

Trunk | Garašić | Silvestri [eds.]

EU International Insolvency Law and Third Countries

Which Way(s) Forward?



Nomos

Alexander Trunk | Jasnica Garašić | Kevin Silvestri [eds.]

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Foreword

The European Insolvency Regulation as it stands today (Regulation (EU) No 2015/848 of 20 May 2015) focuses on cooperation in insolvency matters between different EU Member States. On the other side, insolvencies are a global phenomenon, and insolvency proceedings in EU Member States have to deal also with questions related to non-EU countries, e.g. assets in such countries, non-EU creditors or insolvency proceedings opened outside the borders of the EU.

The present book presents contributions written for a research project ‘EU International Insolvency Law and Third Countries: Which Way(s) Forward?’, which was started in 2021 and was carried through by a group of scholars and legal practitioners from both the EU and outside, in constant contact with UNCITRAL and representatives of the European Commission. The purpose of the project was to develop fresh ideas – on the basis of comparative research – for steps which the EU might undertake in order to regulate cooperation with third countries in insolvency matters, taking into account also (and in particular) the global work of UNCITRAL in this field.

The project was coordinated by Prof. Prof. h. c. Dr. Dr. h. c. Alexander Trunk (Kiel University) and Prof. Dr. Jasnica Garašić (University of Zagreb), with active co-responsibility of Dr. Kevin Silvestri (Kiel University and Trento University).

We received an endorsement by the UNCITRAL Secretariat and financial support by the Fritz Thyssen Foundation (Germany). We wish to express our deep gratitude both to UNCITRAL and to the Fritz Thyssen Foundation for their interest in this project and support. Foremost, of course, our thanks go to the authors contributing to this book, and to the members of our Steering Committee (Prof. Dr. Susan Block-Lieb, Prof. Dr. André Boraïne, Prof. Dr. Christoph Paulus and Prof. Dr. Ignacio Tirado) for their highly inspiring input and academic feedback. We would also like to express our sincere gratitude to the other scientific and student assistants at the Institute of East European Law, in particular to Ms. Ina Rohmann who was the first ‘administrative assistant’ to this project, for their great engagement and help.

Foreword

Due to the policy-oriented focus of this book, the authors were asked to limit academic references to a reasonable minimum in order to free their minds (and time) for the development of fresh ideas. It turned out that nevertheless most contributions also qualify under the usual academic standards, although we wanted to write mainly for legislators. We very much hope that both the European Commission and EU Member States and UNCITRAL find the outcome helpful.

Kiel/Zagreb, 2 February 2026

Alexander Trunk

Jasnica Garašić

Kevin Silvestri

Table of Contents

Greeting from the UNCITRAL Secretariat	13
Databases of consolidated legislation directly referred to in the book	17
General Bibliography	21
Abbreviations	23
Preface	33

Part A. Topical reports

Subpart I. General topics

Eugénie Fabriès-Lecea

Europe's approach to international insolvency law at a time for choosing legal methods	59

Eugénie Fabriès-Lecea

L'Europe de l'insolvabilité internationale à l'heure du choix des méthodes juridiques	75

Elena Moustaira

Which role and meaning for the concepts of 'universality' and territoriality', 'unity' and 'plurality' (of proceedings) in future international insolvency law – especially in the relations between EU and third countries?	91

Rodrigo Rodriguez

UNCITRAL and Swiss insolvency law – an example of conceptual implementation	103

Table of Contents

Susan Block-Lieb and Christoph G. Paulus

Europe and beyond: What can the EIR learn from the UNCITRAL Model Law?	125

Kevin Silvestri

A few remarks on the relationship between the EIR and preventive restructuring frameworks	161

Klaus Pannen and Susanne Riedemann

Recognition is key: how to deal with a bank crisis in the internationally interconnected financial industry	171

Subpart II. Domestic insolvency proceedings

Alexander Trunk

Domestic insolvency proceedings and non-EU countries – general report	191

Renato Mangano

Transaction avoidance law and third countries. The case for a set of European private international law rules	255

Jasnica Garašić

Informing foreign creditors of the opening of insolvency proceedings	293

Subpart III. Recognition

Alexander Trunk and Kevin Silvestri

Recognition of foreign insolvencies – general report	319

Georg Kodek

Recognition of third country insolvencies in the EU	399

Andreas Pickenbrock

Lessons to be learned from ‘Galapagos’	407

Kevin Silvestri

The law governing the effects of foreign insolvency proceedings on lawsuits pending in the home forum	417

Subpart IV. Concurrent proceedings

Alexander Trunk

Concurrent insolvency proceedings – relations between the EU and third countries – general report	445

Nicoleta Mirela Năstasie

Should issues of mutual exchange of information be addressed in future regulation on cross-border insolvency?	479

Luciano Panzani and Robert van Galen

Observations on cross-border group insolvencies	507

Héctor José Miguens

The UNCITRAL 2019 Model Law on (multinational) enterprise groups insolvency with Guide to Enactment. An example of legislative practicality, convenience and pragmatism.	529

Subpart V. Overarching topics

Alexander Trunk

Insolvency-related proceedings in cross-border cases – with specific regard to relations between the EU and third countries	557

Vesna Lazić

Arbitration and insolvency: is there a ‘conflict’ and if so, how should it be resolved?	583

Defne Taşman

Mediation in cross-border insolvencies	609

Table of Contents

Alexander Trunk

Information and communication technologies in cross-border insolvency – A brief look	643

Part B. Regional and national reports

Subpart I. Approaches of regional organisations

Ngaundje Doris Leno

The application of international insolvency law within and outside the OHADA space: issues and challenges	651

Elena Babkina

Regional economic integration in the sphere of cross-border insolvency: foreign experience as a possible model for the Eurasian Economic Union	663

Subpart II. Approaches of individual countries

Héctor José Miguens

Argentina – A commentary of the Argentine Cross-border Insolvency Bill of 2018	673

Flavio Galdino and Rodrigo Saraiva Porto Garcia

Brazil – Cross-border insolvency and the Brazilian experience (so far): comments on the recent adoption of the UNCITRAL Model law on cross-border insolvency	717

Jingxia Shi and Shuaidong Yan

China (PRC) – The recognition of German insolvency proceedings in China and beyond	747

Miodrag Dordevic and Dejan Kostovski

North Macedonia – The (North) Macedonian perspective on insolvency law and cross-border insolvency with particular reference to relations with the European Union	763

Vladimir Yarkov and Ruslan Baldanov

Russia – Analytical note on the prospects for the development of cross-border insolvency in the Russian Federation	783

André Boraine

South Africa – Cross-border insolvency principles in terms of South African Law	793

Kim Young-Seok

South Korea – Korean practice on the recognition of discharge orders rendered in foreign insolvency proceedings Focusing on the Supreme Court of Korea Judgment 2009-Ma-1600 and subsequent lower court practice	843

Daniel Staehelin and Élodie Kleider

Switzerland – Does the Recast Insolvency Regulation violate the ordre public of Switzerland?	875

Gerard McCormack

United Kingdom – UK schemes, plans and international recognition	883

Part C

Reflections of the Editors	897
List of contributors	941
Index	945

Greeting from the UNCITRAL Secretariat

The Secretariat of the United Nations Commission on International Trade Law (UNCITRAL) is pleased to recognize this important scholarly contribution addressing cross-border insolvency relations between the European Union (EU) and non-EU jurisdictions. The book is both timely and relevant, notably in view of the forthcoming review of the European Insolvency Regulation (EIR) Recast scheduled for 2027, as well as the increasing prevalence of insolvency cases involving assets, creditors, and proceedings across EU and non-EU borders, and omni-territorial assets and business activities.

The volume brings together an international group of contributors, whose diverse professional backgrounds and perspectives ensure that the issues are examined from both within and outside the European Union. This breadth of viewpoints significantly enriches the analysis and enhances the relevance of the book for policymakers, judges, practitioners, academics, and international organizations.

The UNCITRAL Secretariat commends the editors for their sustained engagement with this subject matter and project, their careful curation of contributions, and their thoughtful reflections that frame and connect the individual chapters. Their contribution is also evident in the book's clear and helpful structure, which progresses from foundational issues to domestic insolvency proceedings, recognition of foreign proceedings, concurrent proceedings, overarching approaches and regional and national reports.

The Secretariat particularly welcomes the clear explanation from the outset of the foundational concepts underpinning cross-border insolvency, including the respective objectives, scope, and operating logic of the EIR Recast and the UNCITRAL Model Law on Cross-Border Insolvency (ML-CBI), as well as the differences between them. This conceptual grounding provides a valuable point of reference for readers navigating the interaction between these regional and global insolvency frameworks.

Of particular interest and significance to the UNCITRAL Secretariat is the book's discussion of possible avenues for aligning a future framework governing EU-non-EU cross-border insolvency relations with the UNCITRAL framework. The book rightly observes that, while the European Union has developed a highly sophisticated framework governing insolvency within the internal market, the cross-border insolvency relations

of EU member States with non-EU jurisdictions remain largely governed by autonomous and often divergent national laws.

The comparative overview of the legal positions of EU member States on such relations provided in the book is therefore highly relevant. It demonstrates that the differences are not minor and that they contribute to legal uncertainty, inconsistent treatment of foreign proceedings, and increased transaction costs. In this area, UNCITRAL's cross-border insolvency framework offers an immediately available and internationally tested model. It provides a coherent set of concepts and procedures, covering access for foreign representatives, recognition of foreign proceedings, relief, judicial cooperation, and the coordination of concurrent proceedings, developed through extensive negotiation and consensus, in which many EU member States participated, either as UNCITRAL member States or observers. This framework promotes global interoperability, enabling courts and insolvency practitioners in EU member States to engage effectively with their counterparts in jurisdictions that have already adopted UNCITRAL instruments. Such engagement is often essential for maximizing the value of the insolvency estate and achieving other objectives of insolvency law. At the same time, the UNCITRAL framework allows for flexibility to accommodate regional and national particularities. The experience of the four EU member States that have enacted the MLCBI, examined in the book (Greece, Poland, Romania, and Slovenia), offers concrete insights into how the UNCITRAL framework may operate alongside EU insolvency law in practice.

The UNCITRAL Secretariat hopes that this book, while at times adopting a careful and non-prescriptive approach and, in other instances, leaning towards particular national solutions, has succeeded in building a compelling case for the desirability of a harmonized EU approach to cross-border insolvency with non-EU countries that is closely aligned with the UNCITRAL framework. The UNCITRAL Secretariat appreciates the reasons for a cautious approach, in particular to institutional and competence-related questions within the EU. It remains neutral on internal EU choices, including whether any future EU rules would take the form of minimum or exhaustive standards and whether they would be supplemented by opt-in or opt-out mechanisms allowing member States to maintain more liberal national regimes. It likewise remains neutral on related technical decisions, including the appropriate placement of any such rules within the EU legislative structure. Any approach that advances the goals of harmonization

and cooperation in this important area of UNCITRAL's work would be welcome.

At the same time, the UNCITRAL Secretariat would regard it as a missed opportunity not to encourage EU States, explicitly and strongly, to build upon and enact the UNCITRAL cross-border insolvency framework that they themselves helped to formulate and have long recognized as internationally accepted best practice. Doing so would advance principles of fairness and non-discrimination by promoting a level playing field for recognition and relief in insolvency proceedings both within the EU and vis-à-vis non-EU jurisdictions. It would also set a positive example for other regions considering the development of interoperable cross-border insolvency frameworks and support EU States should they wish to be recognized as attractive restructuring hubs, including for preventive restructuring.

This greeting, while acknowledging the scholarly value of the work, does not imply endorsement of specific proposals or conclusions of editors or other contributors expressed in the book. Nevertheless, the UNCITRAL Secretariat welcomes the book's engagement with proposals concerning the treatment of banks and insurance companies within a possible future EU framework governing cross-border insolvency relations with non-EU countries, subject to existing sector-specific EU regimes and appropriate safeguards reflecting the particular characteristics of such entities. It also welcomes the view that reciprocity should not be required for recognition. At the same time, the Secretariat takes a cautious approach to certain proposals, particularly those that would diverge from the UNCITRAL framework or invite differing interpretations of its concepts and provisions. Recently adopted UNCITRAL insolvency texts, as well as ongoing work and forthcoming updates, may help to further clarify these issues.

The book's emphasis on practical considerations, rather than purely academic discourse, is also welcome, as it may help explain approaches reflected in UNCITRAL insolvency texts. While sometimes associated in theory with particular legal traditions, those texts in practice offer pragmatic solutions applicable across legal systems to the complex and urgent issues that frequently arise in cross-border insolvencies. Such issues include the need: to achieve effective coordination of concurrent insolvency and insolvency-related proceedings, both in cases involving a single debtor and enterprise groups; to prevent holdouts by secured creditors or dissenting minorities and to recognize third-party releases and discharges to make restructuring and a fresh start possible and timely; and to grant relief needed for tracing and recovering concealed or dissipated insolvency estate

assets. While the book appropriately highlights the role of the public policy exception, the safeguards for the adequate protection of creditors contained in articles 21(2) and 22 of the MLCBI likewise merit detailed consideration in all these contexts, as they are central to achieving the delicate balance between relief, cooperation, and the protection of local interests.

Further exploration of these practical aspects should be firmly situated in the context of: the growing uptake of a rescue culture worldwide, including for micro and small enterprises; ongoing developments in insolvency law at both UNCITRAL and EU levels; and other relevant developments, such as the establishment of specialized insolvency courts, including in civil law and mixed systems (e.g. Mexico and the United Arab Emirates). Such developments may demonstrate the growing convergence of practice in this area of law across legal systems.

The UNCITRAL Secretariat extends its appreciation to the editors and contributors for elevating the need and urgency of cross-border insolvency reforms across the EU, and highlighting the relevance and utility of UNCITRAL's readily available frameworks in that context. It looks forward to continued engagement with the issues explored in this volume, and hopes for positive outcomes aligned with its views expressed in this message.

UNCITRAL Secretariat

Vienna, 2026

Databases of consolidated legislation directly referred to in the book

Albania	https://qbz.gov.al/
Argentina	https://www.infoleg.gob.ar/
Armenia	http://www.parliament.am/
Australia	https://www.legislation.gov.au/
Austria	https://www.ris.bka.gv.at/default.aspx
Azerbaijan	https://e-qanun.az/
Belarus	https://pravo.by/
Belgium	https://www.ejustice.just.fgov.be/cgi_loi/
Bolivia	http://www.silep.gob.bo/
Brazil	https://www4.planalto.gov.br/legislacao
Bulgaria	https://apis.bg/bg/
Canada	https://laws.justice.gc.ca/eng/
Chile	https://www.bcn.cl/leychile/
China (PRC)	https://flk.npc.gov.cn/index
China (Hong Kong SAR)	https://www.elegislation.gov.hk/
Council of Europe	https://www.coe.int/en/web/conventions/full-list
Croatia	https://www.zakon.hr/
Cyprus	https://www.cylaw.org/
Czechia	https://www.zakonyprolidi.cz/
Denmark	https://www.retsinformation.dk/
Estonia	https://www.riigiteataja.ee/index.html
Eurasian Economic Union	https://docs.eaeunion.org/
European Union	https://eur-lex.europa.eu/homepage.html?lang=en

Finland	https://www.finlex.fi/fi
France	https://www.legifrance.gouv.fr/
Georgia	https://infohub.rs.ge/ka
Germany	https://www.gesetze-im-internet.de/
Greece	https://www.lawspot.gr/
Hungary	https://njt.hu/
India	https://www.indiacode.nic.in/
Ireland (Eire)	https://www.irishstatutebook.ie/
Italy	https://www.normattiva.it/
Japan	https://laws.e-gov.go.jp/
Kazakhstan	https://adilet.zan.kz/kaz
Kyrgyzstan	https://cbd.minjust.gov.kg/ru
Latvia	https://likumi.lv/
Liechtenstein	https://www.gesetze.li/
Lithuania	https://www.infolex.lt/ta/
Luxembourg	https://legilux.public.lu/
Malta	https://legislation.mt/
Mexico	https://mexico.justia.com/
Monaco	https://legimonaco.mc/
Montenegro	https://www.sluzbenilist.me/
Netherlands	https://www.overheid.nl/
North Macedonia	https://ener.gov.mk/Default.aspx
Norway	https://lovdata.no/
OHADA	https://biblio.ohada.org/
Peru	https://diariooficial.elperuano.pe/home
Poland	https://isap.sejm.gov.pl/isap.nsf/home.xsp
Portugal	https://diariodarepublica.pt/dr/home
Romania	https://legislatie.just.ro/
Russia	https://www.consultant.ru

Serbia	https://pravno-informacionisistem.rs
Singapore	https://sso.agc.gov.sg/
Slovakia	https://www.slov-lex.sk/
Slovenia	https://pisrs.si/
South Africa	https://lawlibrary.org.za/
South Korea	https://elaw.klri.re.kr/kor_service/main.do
Spain	https://www.boe.es/
Sweden	https://www.riksdagen.se/
Switzerland	https://www.fedlex.admin.ch/de/
Türkiye	https://www.mevzuat.gov.tr/
Tunisia	http://www.iort.gov.tn/
Ukraine	https://zakon.rada.gov.ua/laws
United Kingdom	https://www.legislation.gov.uk/
United States of America	https://www.law.cornell.edu/ (LII)
Uruguay	https://www.impo.com.uy
Uzbekistan	https://lex.uz/uz/
Zimbabwe	https://zimlil.org/

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Abbreviations

ABI	American Bankruptcy Institute	
ADR	Alternative Dispute Resolution	
AG	Aktiengesellschaft	Public limited liability company (Germany/Austria/Switzerland)
AJP/PJA	Aktuelle Juristische Praxis/Pratique Juridique Actuelle	
ALI	American Law Institute	
Am.Bankr.L.J.	American Bankruptcy Law Journal	
ASEAN	Association of Southeast Asian Nations	
BaFin	Bundesanstalt für Finanzdienstleistungsaufsicht	Federal Banking Supervisory Authority (Germany)
Bankr. L.J.	Bankruptcy Law Journal	
Bankr. S.D.N.Y.	U.S. Bankruptcy Court for the Southern District of New York	
BGBL.	Bundesgesetzblatt	Federal Official Gazette (Germany)
BJE	Bulletin Joly Entreprises en difficulté	
Brook. J. Corp. Fin. & Com.	Brooklyn Journal of Corporate, Financial & Commercial Law	
Brook. J. Int'l L.	Brooklyn Journal of International Law	

Abbreviations

BRRD	Bank Recovery and Resolution Directive	Directive 2014/59/EU
BV	Besloten Vennootschap	Private limited liability company (Netherlands)
CAAJ	Contemporary Asia Arbitration Journal	
Cass.	Corte di Cassazione	
Cass. com.	Cour de cassation, chambre commerciale (France)	
CCII	Codice della crisi d'impresa e dell'insolvenza (Italy)	
CEPEJ	Council of Europe European Commission for the efficiency of justice	
Ch	Chancery	
CILSA	Comparative and International Law Journal of Southern Africa	
CIPC	Companies and Intellectual Property Commission (South Korea)	
CIRE	Código da Insolvência e da Recuperação de Empresas (Portugal)	Code of Law on Insolvency and Restructuring (Portugal)
CJEU	Court of Justice of the European Union	
CNUDCI	see UNCITRAL	
Col.J.Transn.L.	Columbia Journal of Transnational Law	
COMI	Centre of Main Interests	
Cornell L. Rev.	Cornell Law Review	
Cornell L.Rev.	Cornell Law Review	

CPA	Civil Procedure Act (South Korea)
CPL	Civil Procedure Law (PRC)
DIFC	Dubai International Financial Centre
DRBA	Debtor Rehabilitation and Bankruptcy Act (South Korea)
EAEU	Eurasian Economic Union
EBL	Enterprise Bankruptcy Law (PRC)
EBOR	European Business Organization Law Review
ECFR	European Company and Financial Law Review
ECJ	CJEU
ECLI	European Case Law Identifier
EEA	European Economic Area
EIR	European Insolvency Regulation (EU) 2015/848
EU	European Union
EUInsVO	EIR
European Econ. Rev.	European Economic Review
EuZW	Europäische Zeitschrift für Wirtschaftsrecht
EWHC	High Court of Justice (England and Wales)
EWiR	Entscheidungen zum Wirtschaftsrecht (EWiR)
Fall.	Il fallimento e le altre procedure concorsuali
Fordham L. Rev.	Fordham Law Review

Abbreviations

FSB	Financial Stability Board	
Gaz. Pal.	Gazette du Palais	
GDP	Gross Domestic Product	
Giur. it.	Giurisprudenza italiana	
GmbH	Gesellschaft mit beschränkter Haftung	Private limited liability company
Harv.L.Rev.	Harvard Law Review	
Hastings Intern. & Comp.L.Rev.	Hastings International & Comparative Law Review	
HCCH	Hague Conference on Private International Law	
HERO	Herstructurering en Recovery Online	
HNLR	Harvard Negotiation Law Review	
IBA	International Bar Association	
IBR	Institutul Bancar Român	Romanian Banking Institute
ICR	International Corporate Rescue	
III	International Insolvency Institute	
IILR	International Insolvency Law Review	
IJLQ	International & Comparative Law Quarterly	
IMF	International Monetary Fund	
INPPI	Institutul Național pentru Pregătirea Practicienilor în Insolvență	National Institute of Insolvency Practitioners (Romania)
InsO	Insolvenzordnung	Insolvency Act (Germany)

INSOL	International Association of Restructuring, Insolvency & Bankruptcy Professionals	
Insolv.Intellig	Insolvency Intelligence	
Int. Insolv. Rev.	International Insolvency Review	
IO	Insolvenzordnung	Insolvency Act (Austria)
IPRax	Praxis des internationalen Privat- und Verfahrensrechts	
IRRd	Insurance Recovery and Resolution Directive	Directive (EU) 2025/1
J.Priv.Int.L.	Journal Private International Law	
JDI	Journal de droit international	
JIBLR	Journal of International Banking Law and Regulation	
JOUE	see OJEU	
JZ	Juristenzeitung	
KGW	Gesetz über das Kreditwesen	Banking Law Act (Germany)
KTS	Zeitschrift für Insolvenzrecht	
KYIL	Korean Yearbook of International Law	
LC	Ley Concursal	Insolvency and Restructuring Law Act (Spain)
LLC	(private) Limited liability company (US)	
Ltd	(private) Limited liability company (UK, Ireland, Canada)	
Mich.L.Rev.	Michigan Law Review	
Minnesota L. Rev.	Minnesota Law Review	

Abbreviations

MLCBI	UNCITRAL Model Law on Cross-Border Insolvency (1997)	
MLEGI	UNCITRAL Model Law on Enterprise Group Insolvency (2019)	
MLIJ	UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments with Guide to Enactment (2018)	
NV	Naamloze Vennootschap	Public limited liability company (Netherlands)
NZI	Neue Zeitschrift für Insolvenz- und Sanierungsrecht	
öBGBL.	Bundesgesetzblatt für die Republik Österreich	Federal Official Gazette (Austria)
OHADA	Organisation pour l'harmonisation en Afrique de droit des affaires / Organization for the Harmonisation of Business Law in Africa	
OJEU	Official Gazette of the European Union	
OLG	Oberlandesgericht	Appellate Court (Germany)
OIA	OHADA (Uniform) Insolvency Act	Acte uniforme portant organisation des procédures collectives d'apurement du passif
PILA	Private International Law Act (Switzerland)	Bundesgesetz
plc	public limited company (UK, Ireland)	

PRC	People's Republic of China	
RabelsZ	Rabels Zeitschrift für ausländisches und internationales Privatrecht	
RCDIP	Revue critique de droit international privé	
Rev. proc. coll.	Revue des procédures collectives, civiles et commerciales	
RIW	Recht der Internationalen Wirtschaft	
RLDA	Revue Lamy Droit des Affaires	
s.a.r.l.	Société à responsabilité limitée	Private limited liability company (France)
SA	Société Anonyme/Sociedad Anonima	Public limited liability company (France, Belgium, Switzerland, Spain)
SA Merc LJ	South African Mercantile Law Journal	
SAG	Gesetz zur Sanierung und Abwicklung von Instituten und Finanzgruppen	
SE	Societas Europea	Public limited liability company (EU)
Sp. z o.o.:	spółka z ograniczoną odpowiedzialnością	Private limited liability company (Poland)
SpA	Società per azioni	Public limited liability company (Italy)
SRM Regulation	Single Resolution Mechanism Regulation	Regulation (EU) No 806/2014
StaRUG	Gesetz über den Stabilisierungs- und Restrukturierungsrahmen für Unternehmen	
StB	Der Steuerberater	

Abbreviations

TDM	Transnational Dispute Management
TEU	Treaty on the European Union
Tex. Int'l L.J.	Texas International Law Journal
Tex. L. Rev.	Texas Law Review
Tex.Intern.L.J.	Texas International Law Review
TFEU	Treaty on the Functioning of the European Union
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg / Journal of Contemporary Roman-Dutch Law
TSAR	Tydskrif vir die Suid-Afrikaanse Reg / Journal of South African Law
TvA	Tijdschrift voor Arbitrage
TvOB	Tijdschrift voor Vennootschapsrecht, Rechtspersonenrecht en Ondernemingsbestuur
UAE	United Arab Emirates
UK	United Kingdom of Great Britain and Northern Ireland
UKSC	Supreme Court of the United Kingdom
UN	United Nations
UNBR	Uniunea Națională a Barourilor din România
UNCITRAL	United Nations Commission for International Trade Law
US	United States of America
USC	U.S. Code

Vand. J. Trans- nat'l L.	Vanderbilt Journal of Transna- tional Law	
Yale L.J.	Yale Law Journal	
ZFPPIPP	Zakon o finančnem poslovan- ju, postopkih zaradi insolvent- nosti in prisilnem prenehanju	Insolvency Law Act (Slovenia)
ZInsO	Zeitschrift für das gesamte In- solvenz- und Sanierungsrecht	
ZIP	Zeitschrift für Wirtschaft- srecht	
ZPO	Zivilprozessordnung	Code of Civil Proce- dure (Germany)
ZRP	Zeitschrift für Rechtspolitik	

Preface

Alexander Trunk, Jasnica Garašić, Kevin Silvestri

The present book contains contributions on a subject, which is basically not covered by the European Insolvency Regulation (Recast) of 2015, and which is of eminent practical relevance: What should the European Union (or other actors) do in order to improve cross-border insolvency cooperation with non-EU countries?

The European Insolvency Regulation (EIR) mainly deals with inner-EU insolvency cooperation, but most larger and even mid-sized business insolvencies have not only an EU dimension (business and creditors in several EU Member States), but also farther-going international dimensions. EU-based enterprises may have business contacts with U.S., UK or Chinese partners, who may become creditors in the insolvency of the EU-based enterprise. Vice-versa, businesses from the U.S. or other non-EU countries may become insolvent in their home countries and commence there an insolvency proceeding, which will have repercussions in the EU. A particular and also very common constellation are insolvencies of international corporate groups with affiliates all over the world.

In all such situations, cross-border insolvency law, which is in the EU mainly governed by the EIR, has to offer a balanced, well-structured legal framework, under which such cross-border insolvencies can be dealt with efficiently and fairly.

The present book is the result of a common research project initiated by the editors in 2021, in which more than 50 scholars and legal practitioners from 30 countries (EU and non-EU) have participated. The research underlying this book was coordinated by Professor Alexander Trunk (University of Kiel) and Professor Jasnica Garašić (University of Zagreb) together with Dr Kevin Silvestri (post-doc researcher at the University of Kiel and the University of Trento). The work received significant intellectual support by a steering committee, the members of which were Professor André Boraine (University of Pretoria), Professor Susan Block-Lieb (Fordham University), retired Professor Christoph Paulus (Humboldt-Universität zu Berlin) and Professor Ignacio Tirado (Universidad Autónoma of Madrid), Secretary-General of UNIDROIT. We would like to express our deep grat-

itude to the members of the steering committee for their support. The project included several conferences and workshops and received a declaration of support by the UNCITRAL Secretariat. We are particularly grateful to Ms. Samira Musayeva, Secretary of UNCITRAL Working Group V for Insolvency Law as well as to Mr. Miha Žebre (LLM), Legal and Legislative Officer in General Directorate for Justice and Consumers at the European Commission, for their cooperation in this project. It was carried-through in constant contact with both UNCITRAL and staff members of the European Commission. It received significant funding from the Fritz Thyssen Stiftung, for which we are also most grateful.

The project and this book come timely, as the European Insolvency Regulation is due to be reviewed by the European Commission in 2027 and may then have to be revised. One of the major fields where such a revision might be particularly important, is the 'external' dimension of the EIR. Although the primary purpose of the book is to give impulses to the EIR review process of the European Commission, its scientific and practical direction is wider: just as the EIR is only one legal tool in the global structures of cross-border insolvency law, the purpose of the book is also to make a contribution to the further development of cross-border insolvency law on a global scale. The major forum for such work is today UNCITRAL, in which the EU is also represented. Thus, the book is also hoped to contribute to UNCITRAL's ongoing and future work.

Basic concepts

Discussions and legislation on cross-border insolvency law have to deal with three basic constellations, viewed from the perspective of the country where a (basically national) insolvency proceeding is carried-through: 1) domestic insolvency proceedings, 2) cross-border effects of foreign insolvency proceedings, 3) handling of parallel (concurrent) insolvency proceedings in several countries. National insolvency legislation usually deals with all these constellations, though with different intensity. International (or supranational) texts sometimes contain general, overarching provisions for all these constellations. A major example for this approach is the EIR, which nevertheless contains particular provisions for recognition of (foreign) insolvencies and the conduct of parallel proceedings.

For a long time and partly even today, academic discussion of cross-border (or international) insolvency has been centered around so-called ‘principles of cross-border insolvency law’. As the two main principles of cross-border insolvency legal literature usually mentions the ‘principle of universality’ and the, allegedly opposed, ‘principle of territoriality’¹. Whatever the meaning and value of such principles as instruments of academic analysis is, neither of them is realized in legislation and practice in a pure form. The present book takes account of such academic discussions, but bases its analysis and suggestions on more specific, concrete issues and challenges.

Insolvency law is in its basic form the law of insolvency proceedings (before state courts or, possibly, administrative bodies)². It typically includes procedural and material provisions. The term ‘material law’ is used here as referring to legal relations of (mainly) civil and commercial character in opposition to procedural law. Taken together, procedural and material law are termed in this book ‘substantive law’ as opposed to conflict of laws (private international law, applicable law). The editors have tried to unify this terminology across the book, but some authors preferred to keep with terminology common in their countries, which may be slightly different.

Consequently, also cross-border insolvency law contains three types of provisions: provisions on conflict of laws and substantive provisions, which include procedural provisions and provisions of material law. Legislators sometimes choose between dealing with a problem through the use of conflict of laws (leading to a national legal system) or by means of substantive law, including internationally harmonised (uniform) substantive law.

Looking at the use of conflict of laws in the context of insolvency proceedings, one can distinguish, firstly, between the use of conflict of laws in domestic insolvency proceedings and conflict of laws in the context of recognition of foreign insolvency proceedings. In each of these constellations the conflict of laws rules can be universal (referring to laws of whatever country, depending on the connecting factor) or unilateral (referring to the law of only one country, mostly the country of the forum). However, there is also an intermediate category of conflict of laws rules, which refers

1 Cf. Irit Mevorach, *The Future of Cross-Border Insolvency* (2018), pp. 1–12.

2 Atypical cases are pre-insolvency procedures or other court-supported liquidation or reorganisation procedures, which may be based, e.g., on contract law, company law, property law, civil procedure law, mediation or other sectors of law. Whether such procedures are covered (or should be covered) also by rules of cross-border insolvency law, needs to be discussed in each case.

to a limited group of countries, e.g. the of MemberState of a treaty or of the EU. In this book, such conflicts rules are termed ‘plurilateral’ conflicts rules.

The basic conflict of laws rule in cross-border insolvency law is the *lex fori concursus* (insolvency law of the country where an insolvency proceeding is conducted). However, several exceptions to this conflicts rule are made by the EIR and the autonomous laws of various countries. If such rules refer to a different country (e.g. the law applicable to a labour contract), this means that also the insolvency rules of this country apply and that they apply in a way ‘as if’ an insolvency proceeding had been commenced or opened in this country. This may require an analysis, which of several existing insolvency proceedings (and its effects) is most similar (‘comparable’ or ‘equivalent’: so-called ‘substitution’) to the insolvency proceeding which is carried through in the *forum concursus*. For example, if the insolvency proceeding in the *forum concursus* is a liquidation proceeding, the special conflicts rule would refer to the effect of a (local) liquidation proceeding in the respective country, not necessarily to the effects of a reorganization proceeding.

As similar distinction between ‘unilateral’ and ‘universal’ rules can be found as to substantive rules in cross-border insolvency: they may be written to apply both to domestic and foreign insolvency proceedings or to only one of these constellations or specifically for the case of parallel proceedings.

Granting effects to foreign insolvency proceedings is described in the EIR by the term ‘recognition’(of foreign proceedings or judgments)³. The term ‘recognition (of foreign insolvency proceedings)’ is also used in the MLCBI⁴, albeit with a different meaning: it describes a particular variant of judicial assistance to a foreign insolvency proceeding including a significant degree of judicial discretion. In the Civil Law tradition, recognition of foreign judgments (or proceedings) is seen as a legal category different from judicial assistance and largely devoid of judicial discretion. As the term ‘recognition’ is understood differently in the EIR and the MLCBI, it is important to analyse in detail in which aspects the approaches of both texts (EIR and MLCBI) concur and in which they differ. From such comparison, recommendations to the legislator can be derived.

3 Chapter II EIR.

4 Chapter III EIR.

Legal sources

1. Overview: The research focus of this book is primarily on the EIR and its relevance for insolvency relations with third countries, but it includes also other EU law texts as well as international treaties⁵, the UNCITRAL Insolvency Model Law family and autonomous laws. Apart from the EIR, matters of cross-border insolvency law are governed on the EU level by directives for banks and insurances⁶ and some other legislative texts of very specific content. The EU Restructuring Directive of 2019⁷ does not deal specifically with cross-border issues, but certain of its procedures have been included into Annex A of the EIR. The same is true for the new EU Insolvency (III) Directive of 2026.⁸ However, the substantive rules of these directives apply also to insolvency proceedings with an international dimension and have therefore to be taken into account also in this book. The Brussels I a Regulation and other EU regulations on international civil procedure regularly exclude insolvency proceedings from their scope of application, but these exemption clauses sometimes give reason for case-law (CJEU or national courts) on borderline issues of cross-border insolvency and private international law or international civil procedure. In the current process of recasting the Brussels Ia Regulation the relationship with the EIR will have to be taken into count, as well as the question whether the Brussels Ia Regulation should in the future address relations with third countries more systematically than at present⁹

5 E.g. Hague international civil procedure treaties, if they do not exempt insolvency proceedings, or the Council of Europe's Istanbul Convention on Certain International Aspects of Bankruptcy.

6 Banks: Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms (BRRD), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02014L0059-20250117> (accessed 19.03.2025). Insurances: Directive (EU) 2025/1 of the European Parliament and of the Council of 27 November 2024 establishing a framework for the recovery and resolution of insurance and reinsurance undertakings (IRR), <https://eur-lex.europa.eu/eli/dir/2025/1/oj/eng> (accessed 19.03.2025).

7 <https://eur-lex.europa.eu/eli/dir/2019/1023/oj/eng> (accessed 19.03.2025).

8 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32026L0799> (accessed 26.05.2026)..

9 As to this topic, it may be suggested to have a look at Alexander Trunk and Nikitas Hatzimihail (eds.), *EU Civil Procedure Law and Third Countries: Which Way Forward?* (2021), the preceding 'sister publication' to the present study.

The most important text for comparison with the EIR in this book is the UNCITRAL Model Law on Cross-Border Insolvency (MLCBI) of 1997, which has at the present time been adopted by 60 states¹⁰, among them four EU Member States (Greece, Poland, Slovenia, Romania). In addition, UNCITRAL has passed two other model laws relating to cross-border insolvency (on insolvency-related judgments, 2018, and on enterprise group insolvency, 2019) and is working on a new model law on applicable law in insolvency proceedings. Beyond this, UNCITRAL's work on insolvency matters includes further texts (e.g. a Legislative Guide on Insolvency Law with different parts), which are also of interest for this research project.

As the EIR applies only if the debtor's COMI is in the EU, there remains ample room for autonomous rules of EU Member States on cross-border insolvency law, e.g. on recognition of non-EU insolvencies, but also on jurisdiction and conflict of laws in EU-based proceedings concerning the assets of non-EU debtors. The present book includes a comparative look at the respective provisions in the EU Member States, but also at legislation and judicial practice in non-EU countries, which may be of interest to the EU. Cross-border insolvency is not a one way matter, it needs to take into account also the perspective of 'the other side', with which cooperation is intended. For this reason, this book includes also views 'from outside', i.e. from the perspective of non-EU countries and their legislation and practice.

Looking at the autonomous cross-border legislation of EU Member States, some of them have passed special legislation, others have integrated cross-border insolvency in their general insolvency legislation and/or in Private International Law Acts. As a rule, Codes of Civil Procedure or general legislation on private international law legislation apply subsidiarily. It is not possible to go into depth of all such solutions within the limits of this book, but exemplary legal provisions or case-law are taken into account as far as feasible. The editors owe gratitude in this respect to the contribution of the various authors of the book as well as to discussions within the project.

2. Contents: Characterizing the contents of these sources briefly and beginning with the EIR, it can be summarized that the EIR does not exclude relations with non-EU countries from its sphere of application, but its rules on recognition of foreign insolvencies and on cooperation between parallel

10 https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency/status (accessed 19.3.2025).

insolvency proceedings apply only between EU Member States. Also, the specific conflict of laws rules of the EIR¹¹ refer only to the law of other EU Member States. In contrast, EU-based main insolvency proceedings include also property situated in non-EU countries.

The MLCBI is focused on cross-border cooperation between courts and/or insolvency representatives. This includes recognition of foreign insolvency proceedings and cooperation between parallel proceedings, but it basically does not deal with domestic proceedings and also does not contain express rules on conflict of laws. While the MLCBI is based on a judicial assistance approach, which includes a significant degree of judicial discretion, the separate Model Law on Recognition and Enforcement of Insolvency-related Judgments (MLIJ) of 2018 basically follows the classical model of recognition of foreign judgments. The third, presently existing UNCITRAL Model Law relating to insolvency (MLEGI, 2019) deals with insolvency of groups of enterprises and shares some similarities with the corresponding provisions of the EIR, but without their limitation to inner-EU cooperation. The current UNCITRAL work-project on applicable law in insolvency proceedings will the MLCBI's gap with regard to conflict of laws rules and proposes to confirm expressly the basic rule of *lex fori concursus* as the dominant conflict of laws rule in international insolvency law, adding some – but only few – specific conflicts rules, in particular for avoidance, for set-off, for treatment of secured creditors and for foreign pending litigation and arbitration. Exceptions to the *lex fori concursus* are also foreseen for labour contracts and relationships, further for rights and obligations of the participants in a payment, clearing or settlement system, a regulated financial market or another multilateral trading facility as well as for operation of a close-out netting arrangement in relation to securities, commodities, derivatives, forward, options, swaps, securities repurchase and master netting contracts or agreements.¹²

Between the Nordic Member States of the EU and other Nordic countries the Nordic Bankruptcy Treaty of 1934 continues to apply, but it contains only rather rudimentary provisions. The Istanbul Bankruptcy Con-

11 Art.11 – 13, 16, 18 EIR. Without such limitation: Art.9 and 17 EIR. The basic conflicts rule (*lex fori concursus*) refers only to the law of EU Member States, as it is linked with the direct jurisdiction of EU Member States under Art.3 EIR.

12 See Draft Model Law on Applicable Law in Insolvency Proceedings as contained in the Secretariat's Note for the 13–17 April 2026 meeting of Working Group V in New York, accessible at: <https://docs.un.org/en/A/CN.9/WG.V/WP.207>. Details of the text are still under discussion and may be modified before finalisation.

vention of 1990, which was developed under the auspices of the Council of Europe, has not entered into force, but can be useful for an academic comparison in some cases.

Some EU Member States have adopted specific autonomous rules on cross-border insolvency. One group of countries took their primary inspiration from the EIR, applying rules of the EIR also – with different variations – to relations with non-EU countries. This is true for Austria, Belgium, Germany, Portugal and Spain. They also regulate along these lines the recognition of non-EU insolvency proceedings and decisions. A second group of EU Member States have adopted the UNCITRAL MLCBI, albeit often with modifications (Greece, Poland, Romania, Slovenia). Taking a closer look, Croatia, Poland and Slovenia are special cases. Croatia has not adopted the MLCBI, as it had already developed its autonomous international insolvency law in detail back in 1996, prior to the adoption of the MLCBI by UNCITRAL. The basic solutions in Croatian international insolvency law are essentially compatible with the solutions contained in the MLCBI. Croatian international insolvency law contains numerous cross-border rules. This includes: international jurisdiction for the opening of insolvency proceedings, the preconditions and procedures for recognition of a foreign judgment opening insolvency proceedings, rules on applicable law in cross-border insolvency proceedings, and cooperation between insolvency representatives when parallel insolvency proceedings are opened against the same debtor in different countries.. Poland complements the MLCBI with rather detailed rules of its own on cross-border insolvencies, without, however, touching upon conflict of laws. Slovenia has adopted the MLCBI, but complemented it with rules of its own and uses the conflicts of laws rules of the EIR also in relation with non-EU countries. Another group of countries have adopted some specific rules on cross-border insolvency without developing a coherent system resembling the EIR or the MLCBI (Czechia, France, Hungary, Italy, the Netherlands, Slovakia, Sweden). The remaining EU Member States have either not specifically regulated cross-border insolvency law at all or have limited themselves to provisions on jurisdiction or on implementing the EIR (Bulgaria, Cyprus, Denmark¹³, Estonia, Finland, Ireland, Latvia, Lithuania, Luxembourg and Malta). In some countries, foreign insolvencies may be recognized under general rules on recognition of foreign judgments, but this is not guaranteed everywhere and little tested.

13 Denmark is not a Member State of the EIR.

Outside the EU, some countries have adopted legislation following to some degree the model of the EIR (Georgia, North Macedonia, Norway and Serbia). On the other hand, a large number of countries have adopted the MLCBI. Among them are economically important jurisdictions like Australia, Brazil, Canada, Japan, Saudi Arabia, Singapore, South Africa¹⁴, South Korea, the UAE (for the DIFC), the UK and the United States). Also, some associated countries of the EU such as Albania, Kosovo, Montenegro, Serbia and Ukraine have taken this approach. For example, the international insolvency law of North Macedonia is a combination of elements of the MLCBI, the EIR and inspirations taken from other sources, in particular the law of Croatia. The rules of international insolvency law currently in force in Bosnia and Herzegovina are likewise inspired by the provisions of Croatian autonomous international insolvency law. The MLCBI has been adopted both by Common Law jurisdictions and by countries of the Civil Law tradition (e.g. in Latin America: Brazil, Colombia, Chile, Mexico and Panama). In conjunction with the MLCBI, other rules relating to cross-border insolvency may apply, in particular rules on direct jurisdiction. Yet other countries have passed specific, but partial legislation on cross-border insolvency (e.g. India¹⁵, Liechtenstein¹⁶, Russia¹⁷ and Switzerland¹⁸). A final group of countries have not developed any particular rules on cross-border insolvency.

Issues of terminology

The use of terminology is always a challenge in international research groups. This is also true in this book, and while the editors did their best to unify the use of terms, this was not always possible.

14 Introducing a reciprocity requirement into the MLCBI.

15 Sec. 234 and 235 of the Indian Insolvency and Bankruptcy Code (referring, mainly to agreement on the Central Government level).

16 See, in particular, Art.5 Liechtenstein Insolvency Act.

17 See, in particular, Art.I (6) of the Russian Insolvency Act: general clause on recognition of foreign insolvency decrees, referring mainly to reciprocity.

18 Specific provisions on recognition of foreign insolvency decrees, Art.166 – 175 Swiss Private international Law Act).

Some examples can here be given; the terms have for the use in this book in principle the meaning given below:

- ‘insolvency proceedings’: bankruptcy, other insolvency, pre-insolvency, winding-up, consumer insolvency – in principle a broad understanding; a formal insolvency test may not be required; restructuring proceedings may fall outside the concept of insolvency proceedings when they are not ‘collective’ (i.e. including in principle all creditors) or cover only some assets or are not ‘public’ proceedings¹⁹.
- domestic – foreign proceedings/decisions (or judgments): these terms are used from the perspective of the court dealing with a certain (insolvency or other) proceeding; this distinction is made in numerous national laws, but underlies the EIR only implicitly;
- ‘main’ – ‘non-main’ proceedings: under the EIR and the MLCBI this distinction is based on the underlying jurisdictional rule (COMI or COMI-equivalent v. establishment or assets or other limited contact/connection), but includes also the idea that a main proceeding should have a guiding or coordinating function in relation with non-main proceedings;
- forum concursus: the insolvency court in a specific proceeding or the country where this court is located;
- ‘opening’ and ‘commencing’ a proceeding: ‘opening’ is the term used in the EIR, ‘commencing’ is used in the MLCBI; both terms are slightly different, as ‘commencing’ refers to the request of a party, while ‘opening’ refers to a judicial or administrative decision;
- ‘comity’: a classical concept used in Common Law jurisdictions with different content, e.g. granting judicial assistance in procedural matters, recognizing foreign court decisions, applying foreign law on a discretionary basis²⁰;
- applicable law: sometimes used as a synonym for conflict of laws or private international law; can also mean the specific legal system (here in the sense of the legal system of a certain country) to which a conflict of laws rule refers;

19 E.g. the EIR covers only ‘public’ proceedings under the EU Restructuring Directive of 2019.

20 Cf. Sarah Lee, *The Ultimate Guide to Comity Legislation*, Navigating the complexities of comity in bankruptcy law and its legislative aspects (2025), https://www.numberanalytics.com/blog/ultimate-guide-to-comity-legislation#google_vignette (last accessed 17.07.2025).

- conflict of laws rules – substantive (procedural – material) rules: rules determining the applicable law of one or another country in cases with an international element v. rules on the conduct and the legal effects of insolvency proceedings which are not conflicts rules, but may be of a procedural or material character (e.g. stay of proceedings v. power to terminate a contract);
- unilateral – plurilateral – universal (‘all-sided’) conflicts rule: conflict of laws rules which determine only the applicability of the law of one country or of several countries (e.g. EU Member States or Member States of an international treaty) or of whatever country the connection factors lead to;
- *lex fori concursus* (v. *forum concursus*): the law of the state of the court opening and further conducting an insolvency proceeding;
- *vis attractiva concursus*: usually understood in a procedural sense; e.g. can the insolvency court or another court in the country of the insolvency proceeding decide on insolvency-related matters? Sometimes also used as a synonym to the *lex fori concursus* rule or to the principle of universality.
- universal (extraterritorial) – territorial reach/scope of insolvency proceedings: a substantive rule according to which (from the legislator’s perspective) an insolvency proceeding should cover all assets (and acts) of the debtor worldwide or whether it should cover only assets (and acts relating to them) located in one or a limited number of countries, e.g. in the country of the proceeding;
- EU Member State, EIR Member State, non-EU countries/third countries. In the book the term EU Member State is usually meant to refer to EU member countries which are also bound (and entitled) by the EIR, i.e. without Denmark.
- EIR (2015) – EIR 2000: recast version of the EIR v. original version of the EIR. The years are usually omitted, EIR usually refers to the EIR 2015.
- UNCITRAL Insolvency Law family – MLCBI (1997, MLIJ (2018), MLEGI (2019); also, the Legislative Guide on Insolvency Law and related texts including work in progress, e.g. on a Model Law on applicable law in insolvency proceedings.

Structure of the book

The book is divided into three Parts (A. – C.).

Part A. of the book analyses in a systematic structure the major issues of cross-border insolvency law in relations between the EU and third countries. It starts with general topics. These contributions relate to basic concepts of cross-border insolvency laws and regulatory approaches on which approaches the EU might take with regard to cross-border cooperation with non-EU jurisdictions in insolvency matters. This subpart includes also a contribution on specifics of bank insolvencies. The second subpart is structured according to the three major constellations of cross-border insolvency law: domestic insolvency proceedings, recognition of foreign proceedings and parallel proceedings. Each subsection begins with a general report. The starting point of the general reports is the EIR with a particular view to its relevance for relations with non-EU countries. This is contrasted with a look at the UNCITRAL Model Insolvency Law family and also compared with the autonomous cross-border insolvency laws of EU Member States and selected other countries. Some contributions were inserted at the place where their main focus lies, e.g. domestic proceedings, even if they briefly address also other constellations of cross-border insolvency, e.g. recognition of foreign proceedings. Thereafter follow contributions on overarching topics, which do not easily fit into the basic categories of domestic proceedings, foreign proceedings and parallel proceedings, but deserve particular analysis. The focus is here on the impact of insolvency proceedings on other court proceedings, arbitration or mediation. Part B. of the Book is devoted to specific international and national approaches outside the EU. It contains, in particular, one report on the cross-border rules of the OHADA Uniform Insolvency Act and various country reports from the perspective of non-EU countries. These contributions were written with a view to the EIR and include ideas on relations with the EU in insolvency matters from an external perspective. Part C. of the Book contains conclusions and recommendations proposed by the editors of the book being also responsible for the coordination of the research project.

The contributions opening **Part A.**, covering general topics, are united by the observation that the EIR has some notable ‘blind spots’ that would seem to require reform. The most important of these—also the main subject of the book—is the EIR’s limited scope regarding procedures involving third states; a limitation which, as will be discussed below, is actually only

partial. Moreover, the EIR does not give due importance to procedures aimed at restructuring failing firms to prevent them from reaching a state of irreversible insolvency. These two issues are intertwined: the rise of such procedures is not solely a European phenomenon, and indeed, the EU Restructuring Directive (Directive No. 1023/2019) is part of a global trend toward establishing a ‘rescue culture.’ This combination of oversights—a dual limitation (excluding both proceedings initiated in third states and ‘new proceedings’) – makes the EIR an instrument that needs to be rethought in the current context of cross-border insolvency.

The subpart begins with Eugénie Fabriès-Lecea’s contribution (*‘L’Europe de l’insolvabilité internationale à l’heure du choix des méthodes juridiques’*), in which she highlights that the EU’s regulatory impact on cross-border insolvency is affected by several factors: Brexit, the emergence of new procedures, and the competition among different models of cross-border insolvency regulation (namely, the MLCBI). To reinvigorate the EU’s impact in this field of law, the author proposes combining the strengths of existing regulatory methods in a ‘European way’: she emphasizes the value of the method of recognizing legal situations created by foreign laws (as followed by, for example, the UNCITRAL Model Law) and underscores the importance of the public policy exception in reaffirming certain fundamental values of European law. She further highlights the role of the EU’s harmonizing action on Member States’ insolvency laws in stimulating modernization, which can transform the EU into an attractive ‘restructuring hub’ worldwide. Finally, she suggests amendments to the EIR, such as establishing uniform direct jurisdiction rules for cases where the debtor’s COMI is outside the Union, expanding the scope of the conflict rules, and, most importantly, eliminating the inexplicable limitation that restricts exceptions to the application of the *lex fori concursus* solely to the laws of Member States.

This is followed by Elina Moustaira’s contribution (*‘Which role and meaning for the concepts of ‘universality’ and territoriality, ‘unity’ and ‘plurality’ (of proceedings) in future international insolvency law—especially in the relations between the EU and third countries?’*), who, anticipating many of the themes developed later in the book, situates the subject in the age-old conflict between the principles of territoriality and universality. Moustaira observes that the crisis affecting limited universality seems to have become chronic; the principle—which its proponents viewed as a temporary compromise between territoriality and universality—appears to have stabilized and fragmented into several variants (two examples,

Brazil and China, are examined later in the book), some of which are internally undermined by strong territorialist drives. The author therefore sees extending the EIR to proceedings pending in third states (albeit with adaptations, such as indirect jurisdiction control) as an opportunity to revive universalism and thereby reposition the EU as a leader on the path toward the quest for universalism.

Thereafter follows a contribution by a Swiss author, Rodrigo Rodriguez, illustrating how Switzerland, a non-EU country with a strong national approach to insolvency law based on the Civil Law tradition, has recently integrated elements of UNCITRAL insolvency law texts into its provisions on cross-border insolvency law. The author also addresses issues of a possible treaty between Switzerland and the EU on cross-border insolvency matters, thus opening a discussion on instruments which might be chosen by the EU to create fair, efficient and ‘reciprocal’ rules on cross-border insolvencies in relations with third countries.

The proposal to by and large extend the EIR to relations with third countries, as put forward by the authors of several foregoing contributions, is ideally contrasted with the essay by Susan Block-Lieb and Christoph G. Paulus (‘Europe and beyond: What can the EIR learn from the UNCITRAL Model Law?’), in which they consider the hypothesis that the EU should adopt the UNCITRAL Model Law (either by Regulation, or as a chapter within the EIR, or alternatively by directive). They emphasize the ‘family resemblance’ between the two instruments. The authors begin by pointing out the paradox that the EIR was created to affirm the principle of universality among Member States, yet it reaffirms territoriality by excluding the recognition of procedures from third states. They note that this dual attitude was challenged by the Court of Justice’s ruling in *Schmid v. Hertel*, whose reasoning suggests that the provisions of the EIR, unless explicitly stated otherwise, are also applicable to procedures linked to third states. This ruling transformed the EIR into an instrument characterized by an ‘outward universality,’ which, given today’s geo-economic context, should be surpassed in favor of complete openness to third states. The authors see a way to achieve this openness in the MLCBI by borrowing its rules on indirect jurisdiction, the prerequisites and effects of recognition, and the mechanisms for cooperation and communication between bankruptcy courts. They point out that adopting the MLCBI (with supplementary provisions on applicable law where necessary) would add a useful institution to the EIR’s toolkit—the institution of ancillary cases, which shows some resemblance to the EIR’s secondary proceedings.

Closing the first (informal) subpart of the book are two contributions that address additional ‘blind spots’ in the EIR: one concerning ‘new procedures’ (Kevin Silvestri’s essay on the relationship between the EIR and preventive restructuring frameworks) and a contribution relating to banking and insurance businesses (Klaus Pannen and Susanne Riedemann, ‘Recognition is key, or how to deal with a bank crisis in the internationally interconnected financial industry’). These areas are typically overlooked by the main instruments of international insolvency law due to the inherent complexities they present—a state of things hardly justified given that, as the authors rightly point out—‘in a bank crisis, cross-border situations are the norm rather than the exception.’ In relation to bank-related procedures, some EU law provisions actually explicitly govern interactions with third states—for example, Articles 93 and 94 of Directive 2014/59/EU and Article 33 of Regulation (EU) No 806/2014, which Pannen and Riedemann address in detail.

The second subpart of the book is devoted to the regulation of ‘domestic’ insolvency proceedings (whether main or non-main), which are conducted in EU Member States and have cross-border dimensions. This part is introduced by a general report by Alexander Trunk. It starts with a look at the EIR (which does address some issues related to third countries) and then turns to the MLCBI, international treaties and national legislations. It then turns to specific topic such as direct jurisdiction (for insolvency proceedings as such and insolvency-related proceedings), conflict of laws and substantive issues such as the universal or territorial scope of insolvency proceedings. It turns out that direct jurisdiction for insolvency proceedings not covered by the EIR is defined quite differently in the various EU Member States and abroad, often allowing jurisdiction on the basis of location of assets. Also, the treatment of ‘foreign’ creditors shows some differences in national legislations.

Two essays on specific topics follow, both united by the idea that the EIR requires improvements—both to extend some of its provisions to relationship with third states and to benefit domestic procedures that interact solely with other Member States.

Renato Mangano’s contribution (‘Transaction avoidance law and third countries. The case for a set of European private international law rules’) offers a critical review of the regulation of jurisdiction, applicable law, and recognition of measures concerning avoidance actions with foreign defendants – a review made imperative by the increasing frequency of proceedings aimed at the reorganization of companies within groups. The

contribution first questions the legal basis for extending the relevant rules contained in the EIR to non-EU states, focusing on the issue of compliance with the principle of subsidiarity: it is precisely the potential impact of avoidance actions on group reorganizations – which, in cases involving companies with ties to non-EU states, typically have a pan-European dimension – that could justify legislative intervention under Arts. 81 and 114 TFEU. The discussion then turns to identifying the optimal regulatory approach. Firstly, it proposes revisiting the conditions for departing from the *vis attractiva concursus* provided by Art. 6(2) EIR (currently, an avoidance action may be brought in a state other than where the insolvency proceedings are pending only if it is closely linked to another civil or commercial case within another Member State's jurisdiction), in order to make forum choice a 'negotiable token,' particularly in group restructurings. Secondly, regarding applicable law, it is suggested that the exception to the application of the *lex fori concursus* in Article 16 EIR should be removed, as it is based on a misconception (refuted by a comparative analysis of the regulation of avoidance actions) – namely, that such actions must protect the expectations of parties in good faith and the rights vested upon them under the *lex contractus*. Finally, on the recognition of avoidance judgments from third states, it is proposed to incorporate the 2018 UNCITRAL Model Law on the Recognition of Insolvency-Related Judgments into EU law, retaining only the public policy exception as a ground for denying recognition.

Jasnica Garašić's contribution ('Informing foreign creditors of the opening of insolvency proceedings') on the other hand addresses the issue of foreign creditor participation in domestic proceedings develops a number of practical proposals how to create more fairness for foreign (non-EU) creditors in EU-based insolvency proceedings, thus also improving the EU's negotiating position in its relations with third countries.

The third subpart is focused on the recognition of foreign insolvency procedures. It is structured similarly to the previous one and opens with a general report by Alexander Trunk and Kevin Silvestri, which frames the concept of recognition, outlines the existing regulatory regimes from which the EU might draw inspiration, and examines in detail the various components of recognition: the common prerequisites of the different regimes and their role (in particular, identifying 'recognizable procedures,' indirect jurisdiction, and respect for public policy), the procedure itself (contrasting automatic and formal recognition), and the effects of recognition. Even though the EIR and the MLCBI are based on different concepts of 'recognition,' they converge in essential aspects: Both under the EIR and the

MLCBI recognition is non-discretionary ('ex lege'), and this is also true for a core group of the effects of the foreign proceeding. However, under the MLCBI there still exists a significant degree of judicial discretion as to the effects of the foreign proceeding, while the EIR has chosen an ex lege approach based on a conflict of laws analysis. Some national legislations in the EU have aligned their rules on recognition of non-EU insolvencies along the lines of the EIR, while others have in so far adopted the MLCBI, but nevertheless avoided open conflicts with the EIR. As a complementary to the general report, a transcript of Georg Kodek's presentation at the project's second Project conference (Kiel, 26–28 October 2023) is included, in which the topics addressed in the general report are synthesized with notable clarity and insight.

Similar to the theme-specific contributions in the previous subpart, the following essays in this section highlight some of the shortcomings of the recognition rules within the EIR, emphasizing the need for reform from the perspective of extending its reach. A new theme emerges in this section: the contribution of the Court of Justice of the European Union. Its jurisprudence is often quoted by the courts of third states when interpreting rules and institutions borrowed from the EIR or coined in its wake, e.g. as to the concept of COMI and the influence of the *Eurofood* ruling sometimes even in jurisdictions that have adopted the UNCITRAL Model Law. Given that, it is plausible that the development of an EU-Third Countries regime of cross-border insolvency will partly rest upon the Court of Justice.

Andreas Piekenbrock's contribution ('Lessons to be learned from 'Galapagos') examines the case for harmonizing the recognition rules, or at least better integrating the EIR with national regulations, by focusing on the issue of 'conflict of recognition'—that is, when a proceeding initially opened in a third state is followed by one opened against the same debtor in a Member State, and the national law of a different Member State requires recognition of the former, while the EIR mandates recognition of the latter. Such a conflict can arise both in cases of positive jurisdictional conflict and (as in the Galapagos case) when the COMI shifts from one state to another with proceedings being initiated in each. In situations where the conflict involves only two Member States, the positive conflict is resolved (under Art. 19 EIR) through the criterion of prevention (recognition is granted to the proceedings opened first), and in cases of COMI-shift through the lis pendens criterion (as ruled by the Court of Justice in the Galapagos case), but when one of the two proceedings (the one initiated first) involves a third state, no rule resolves the conflict, nor can a solution be sought from

the Court of Justice, since recognition of proceedings initiated in third states is governed by national law. Hence, the task of regulating recognition should be taken up by the Union.

Kevin Silvestri's contribution ('The law governing the effects of foreign insolvency proceedings on lawsuits pending in the home forum') addresses the effects of recognizing foreign proceedings on pending domestic proceedings, particularly those involving claims lodged in the foreign proceedings—a matter that touches on a key aspect of domestic insolvency law, namely, the coordination between ascertainment of claims and pending lawsuit on the same claims. In this context, the correct identification of the law applicable to the effects of a foreign proceeding on a pending lawsuit (and thus the determination of the applicable regime for the recognition of the foreign trial's effects) becomes crucial. The author argues that regardless of whether the EIR or the MLCBI model is chosen for governing the recognition of proceedings initiated in third states, there remains a need to clarify further the meaning and limits of the relevant provisions – Art. 18 EIR and Art. 20(1)(a) MLCBI, respectively). He emphasizes that such clarification might not necessarily require legislative action but could also take the form of an ECJ ruling.

The next subpart of the book is devoted to concurrent (parallel) insolvency procedures. It also opens with a general report by Alexander Trunk. It starts with a comparison of the general approaches of the EIR, the MLCBI, international treaties and national legislations in this respect. Taking apart that the EIR does not address cooperation between parallel EU-based and non-EU proceedings, there are significant commonalities as to the concrete provisions on cooperation and coordination.

Thereafter, more specific issues are discussed, e.g. on the role (and limits) of discretion in this field. The specific contributions then focus on two complementary themes: the need for cooperation and communication between the bodies handling the procedures (as discussed in Nicoleta Mirela Nastasie's essay, 'Should issues of mutual exchange of information be addressed in future regulation on cross-border insolvency?'), and the challenges posed by procedures relating to enterprise groups, addressed in two contributions ('Observations on cross-border group insolvencies' by Luciano Panzani and Robert van Galen; and 'The UNCITRAL 2019 Model Law on (Multinational) Enterprise Groups Insolvency with Guide to Enactment. An Example of Legislative Practicality, Convenience, and Pragmatism' by Héctor José Miguens). The two themes are complementary in that both the duty of communication and cooperation between the various

procedural bodies and the coordination tools specifically designed for enterprise groups (such as the EIR's coordination procedure and the planning procedures of the 2019 UNCITRAL Model Law on the Insolvency of Multinational Groups) aim to restore the economic unity of a single enterprise (or of a group of enterprises) that has been fragmented by the initiation of multiple proceedings. These proceedings often involve different individuals (judges and practitioners) who may not know one another, speak different languages, and come from varying professional and cultural backgrounds, and oftentimes represent conflicting interests. This is a challenging goal, and while the EIR still struggles to achieve it when competing proceedings are opened in different Member States, that challenge becomes even more complex when some proceedings are pending in non-Member States.

Nastasie's contribution highlights that the barriers to effective cooperation and communication among procedural bodies – what can be termed 'decentralized coordination' – are not only of a legislative nature (primarily differences in procedural, insolvency, and judicial rights) but also stem from language differences, structural deficiencies, a lack of familiarity with handling parallel proceedings, insufficient mutual trust among insolvency professionals across jurisdictions, and, not least, the absence of adequate incentives for cooperation when the benefits are less clear than the risks and challenges. The essay makes it clear that, in order to overcome these additional barriers, legislative interventions may not be the most appropriate solution; rather, other measures (such as educational initiatives and the creation of informal judicial networks) are needed, for which the European Commission could take direct charge, rely on private organizations (such as INSOL Europe or INSOL International), or build upon the longstanding work already undertaken by UNCITRAL.

Panzani and van Galen's essay exposes and compares the regulatory approaches of the EIR and the 2019 UNCITRAL Model Law on Group Insolvency, questioning why they have been so unsuccessful despite the frequent—and perhaps prominent—occurrence of group insolvencies in the international arena. The failure of the EIR in this regard (and in particular, the shortcomings of the coordination procedure under Articles 61 ff.) is mainly attributed to the limited powers of the coordinator (who is not a group insolvency practitioner but rather someone tasked with issuing non-binding directives to the practitioners managing individual company proceedings), whose authority is markedly inferior to that of the group representative in the counterpart institution (UNCITRAL's planning procedure). The authors propose supplementing the existing mechanisms in the

EIR with the unified European Rescue Plan, as proposed by INSOL Europe in a 2012 study, which would apply at least to the restructuring of the parent company's debts to achieve the financial recovery of the entire group; and they suggest adopting (first in the world) the Model Law for cases involving groups of non-European scale.

Finally, Miguens' essay focuses on an analysis of the Model Law, reconstructing its development and offering a reasoned interpretation that highlights the innovative character of its three key components—the planning procedure, the group representative, and the group insolvency solution—as well as the mechanisms and effects of its recognition in the states where the various group companies' COMIs are located.

The final subpart deals with overarching issues of cross-border insolvencies focusing on procedural issues. It begins with a contribution by Alexander Trunk on 'Insolvency-related proceedings in cross-border cases', which start with an overview of the respective rules in the EIR, in the UNCITRAL insolvency law family (in particular the MLIJ) and under the autonomous laws. The author strives to structure the relevant issues and defines major legislative issues which the EU should address in this context. One example is the definition of indirect jurisdiction for recognition of insolvency-related judgments rendered in non-EU countries. The author pleads for flexibility in this respect, allowing recognition of such decisions not only on the basis of COMI, but also on other acceptable grounds.

This is followed by two contributions exploring the relationship between cross-border insolvency and the subject area of alternative dispute resolution. Vesna Lazić's contribution ('Arbitration and cross-border insolvency') explores in detail the complex relationship between arbitration and transnational insolvency proceedings and develops concrete proposals for reform. Defne Taşman's contribution examines the rise of ADR methods (with a particular focus on mediation) in insolvency law and restructuring ('Mediation in Cross-Border Insolvencies'), as well as the opportunities offered by a gradual increase in their use—opportunities such as greater efficiency, effectiveness, and confidentiality in managing cross-border insolvency proceedings. Taşman reviews the events surrounding the adoption and reception of the European Directive on Mediation (Directive 2008/52/EC) and discusses the role of mediation in harmonized European insolvency law, mostly apparent in the Commission Recommendation of March 12, 2014, on a new approach to business failure and insolvency (2014/135/EU), and less overtly, but still noticeable, in Directive no. 1023/2019 (in which the mediator's facilitating role is assigned to the

restructuring practitioner during negotiations between the debtor and creditors on the business recovery plan). Taşman thus proposes reforms to the regulatory framework (as well as organizational reforms, particularly regarding the accreditation of mediators/restructuring practitioners) aimed both at encouraging the use of mediation (for instance, by granting insolvency courts the power to mandate mediation during proceedings) and at facilitating its voluntary use by interested parties and practitioners (overall, the harmonization of mechanisms for enforcing mediation agreements, including through the EU's accession to the United Nations Convention on International Settlement Agreements Resulting from Mediation (also known as the Singapore Mediation Convention). Both contributions (Lazić and Taşman) might stimulate some joint project between UNCITRAL's Working Groups V (Insolvency) and II (ADR) for discussions within the ADR and the Insolvency communities on how to find a broadly accepted solution balancing the interests involved in insolvency and ADR.

The subpart concludes with a short essay by Alexander Trunk on the use of information and communication technologies in cross-border insolvency. The EIR contains some rules in this respect, e.g. on the establishment of insolvency registers, and the EU Restructuring Directive 2019 has added further details for EU-based proceedings. The new EU Insolvency Directive has added some further provisions in this direction, and national legislations – inside the EU as well as in other countries – have gone even much farther in this respect, providing e.g. for electronic lodging of claims, electronic creditors' meetings, access to electronic court files etc. Often such rules are very parochial, not very open to international (also non-EU related) dimensions²¹.

It should be noted, that all contributions in this book are interrelated, sometimes visibly, sometimes a second glance. For example, issues of jurisdiction are addressed in the subchapter on domestic proceedings, but also in the subchapters on recognition of foreign proceedings, on concurrent proceedings and on overarching topics.

Although the book tries to address all major issues of cross-border insolvency law in EU-third country relations, it is not – and cannot be – an encyclopedic treatise. Topics, which have remained out of this book, but which would deserve further study, are the links between cross-border in-

21 It should be mentioned that UNCITRAL Working Group IV deals particularly with issues of electronic commerce; perhaps, at some time, Working Groups V and IV might join forces in a project relating to the use of IT in cross-border insolvency.

solvency law and international labour law, international administrative and criminal procedure law, international environmental law or international tax law. However, such topics would go beyond a future EU instrument on cross-border insolvency relations with non-EU countries, which needs to concentrate on more ‘classical’, but still important issues.

Part B. of the book contains contributions dedicated to the cross-border insolvency law of certain non-European states (namely, Argentina, Brazil, China, South Korea, Switzerland, and the United Kingdom) or non-European regional organizations (OHADA, i.e., the Organization for the Harmonization of Business Law in Africa; and EAEU, i.e., the Eurasian Economic Union). The purpose of this discussion is to offer insights into non-European experiences that may directly inspire thoughtful decision-making.

Part B. opens with two contributions on recent activities in international organizations outside the EU with regard to cross-border insolvency law. Ngaundje Doris Leno (‘The Application of International Insolvency Law within and outside the OHADA Space: Issues and Challenges’) and Elena Babkina (‘Regional economic integration in the sphere of cross-border insolvency: foreign experience as a possible model for the Eurasian Economic Union’), each examining cross-border insolvency within the context of a regional organization, the OHADA and the EAEU respectively. In the OHADA context, there is a unique combination of unified commercial insolvency regulation, the EIR (for cross-border insolvencies of only regional significance), and the MLCBI (for recognition of proceedings initiated in third states). In the EAEU, by contrast, there is currently no corresponding regulatory framework, and the author points out that the growing economic integration among EAEU states requires – from her perspective – adopting a regulatory system akin to the EIR, which would complement existing treaties on civil and commercial judicial assistance²².

The following contributions deal with national approaches, including the view of third countries on their relations with the EU in the field of cross-border insolvency law. For easiness of access, these contributions are organized in the book following the alphabetical order of countries. However, in this preface a short characterizing of these contribution in a thematical

22 It may be added that the Commonwealth of Independent States (CIS), the oldest regional organisation in the post-Soviet region, has recently started work on a Model Law on Transnational Insolvency, see https://eccis.org/news/31708/rabochaja_gruppa_mpa_sng_odobrila_proekt_modelnogo_zakona_o_transgranichnoj_nesostojatelnosti?ysclid=mpmt5tx8zo107873666 (accessed 26.05.2026).

order was chosen to make the relation between these contributions more visible. Two essays illustrate the current regime in Civil Law countries that have adopted the MLCBI: Brazil, via Flavio Galdino-Rodrigo Saraiva Porto Garcia's essay ('Cross-border insolvency and the Brazilian experience (so far): comments on the recent adoption of the UNCITRAL Model Law on Cross-Border Insolvency'), and South Korea, via Young-Seok Kim's essay ('Korean practice about the recognition of the discharge order rendered in foreign insolvency proceedings'). The limitations of the Model Law regime are highlighted, along with a certain stickiness of old habits and concepts in the practices of these states—factors that the EU should consider, given the overall complexity of transplanting an entirely new regulatory model, especially one intended to replace or interact with the legal systems of as many as twenty-six states.

In particular, the contribution of Galdino and Garcia observes that the notion of COMI in the MLCBI is less clearly defined than in the EIR, which has led some Brazilian courts, following the adoption of the MLCBI alongside comprehensive reforms to Brazilian insolvency law (Federal Law No. 14112/2020), to continue interpreting COMI in light of the longstanding jurisprudence on the concept of the debtor's principal place of business (*local do principal estabelecimento do devedor*), defining the direct jurisdiction of Brazilian insolvency courts.

Kim's essay focuses on the ambiguity within the MLCBI regarding whether its Article 21(1)(g) can be relied upon to grant recognition to discharge orders issued by foreign courts—a question that, as is well known, has been resolved differently by various enacting states. In South Korea's case, a territorialist attitude of the Supreme Court (inherited from the previous system), which emerged in a case where a discharge order issued by a U.S. court was denied recognition for reasons specific to that case, has been misinterpreted by lower courts, which have reiterated on several occasions that the MLCBI does not permit recognition of such orders.

Concluding this section is Héctor José Miguens' essay 'A commentary of the Argentine cross-border insolvency bill of 2018' which discusses a draft law designed to transpose (with some adaptations) the text of the MLCBI, while also incorporating provisions on regulating the insolvency of cross-border groups.

Four other essays are devoted to countries (China, North Macedonia, Russia, and South Africa) where at present cross-border insolvency regimes inspired by neither the MLCBI nor the EIR are in force, and which, interestingly, share the provision that recognition of foreign procedures

is subject to the requirement of reciprocity. North Macedonia (dealt with in the contribution by Miodrag Dordevic and Dejan Kostovski) is in this group specific as the country has applied for membership in the EU and is undergoing deep reform processes in view of adoption of EU legislation. In this context North Macedonia has created rules on cross-border insolvency, which take some elements both from the MLCBI and from the EIR, but also, in particular, from the law of Croatia. Interestingly, there is now a discussion in North Macedonia to drop the reciprocity requirement in cross-border insolvency law.

Article 5 of the Chinese Enterprise Bankruptcy Act is featured by the essay of Jingxia Shi and Shuaidong Yan ('The Recognition of German Insolvency Proceedings in China and Beyond'). As noted, Article 5 makes recognition subject to a strict set of conditions, including the requirement of reciprocity. The authors examine how Chinese courts have interpreted reciprocity over time: initially as *de facto* reciprocity (i.e., recognition was conditioned on proof that the requesting state had previously recognized Chinese proceedings), and later as *de jure* reciprocity (i.e., contingent on the Chinese proceeding being theoretically recognizable under the law of the requesting state).

Russian cross-border insolvency law is addressed in the contribution of Vladimir Yarkov and Ruslan Baldanov ('Analytical Note on the prospects for the development of cross-border insolvency in the Russian Federation'), which describes the growing tendency of Russian courts to open domestic insolvency proceedings with regard to foreign nationals using, *de facto*, the COMI criterion; and, conversely, the reluctance to recognize foreign proceedings unless reciprocity is ensured. The authors also note that, at present, the adoption of the MLCBI appears to be the only viable solution, given the current significant political obstacles in concluding treaties.

South African law is examined in detail in André Boraine's essay ('Cross-Border Insolvency Principles in Terms of South African Law'), which analyzes the country's 'dual' system—where common law principles (influencing the entire commercial and insolvency law in a system derived from Roman-Dutch law) coexist with one of the earliest versions of the MLCBI. However, the application of the MLCBI in South Africa is limited in relation with a number of states designated by the Minister of Justice on the condition of reciprocity; a requirement that has so far prevented the application of the MLCBI at all.

Finally, the essays by Daniel Staehelin and Élodie Kleider ('Does the Recast Insolvency Regulation violate the *ordre public* of Switzerland?')

and Gerald McCormack ('UK schemes, plans and international recognition') expose the negative impact of the EIR's frequently mentioned 'blind spots.' Staehelin and Kleider first present a *sui generis* model for regulating cross-border insolvencies found in the Swiss Private International Law Act (IPRG), which has been in force since the 1980s and is centered on initiating, upon recognition of foreign proceedings in Switzerland, a 'mini-proceeding' that is territorial in scope and involves only a limited number of creditors. They point out that the expansive reach granted to the EIR by the Schmid v. Hertel ruling (which theoretically extends the universal reach of EU-based proceedings) and the EIR's contrastingly restrictive stance—particularly concerning the participation of non-EU creditors—could be grounds for rejecting EU proceedings in Switzerland on public policy grounds.

McCormack's contribution, by contrast, illustrates—through a discussion of several high-profile cases, particularly the DTEK case—how uncertainties (which predate even Brexit) regarding whether certain reorganization procedures (especially schemes of arrangement) excluded from the EIR could nevertheless be recognized under the Brussels I-bis Regulation or the Rome I Regulation, continue to pose significant obstacles not only to the circulation but also to the practical usability of reorganization schemes for multinational enterprises, given the English courts' reluctance to sanction schemes involving foreign creditors that do not present significant prospects of recognition abroad. There is a particular link between this contribution and the contribution of Kevin Silvestri in Part B of the book, which also addresses – from the EU's perspective – cross-border issues of foreign schemes of arrangement.

Part C. of the book contains conclusions and recommendations by the editors of the book. The conclusions are drawn from the various contributions. Both the conclusions and the recommendations were beforehand discussed in the research group and with the steering committee and comments have been taken into account in the final version of the text. However, there was no voting in the group with regard to conclusions or recommendations.

The conclusions start with the general structure of the EIR and its approach to relations with non-EU countries. The EIR being assessed as deficient in this regard, the conclusions then move on to possible improvements. Different ways of improvement are discussed, mainly the creation of new rules on relations with non-EU countries in the EIR or another EU instrument. The content of such rules could either be based

on the UNCITRAL Insolvency Law family or on the existing EIR rules, in both cases with modifications. The conclusions address also the relations between any new EU rules and the autonomous insolvency law of the EU Member States.

Another general question is the material scope of application of the EIR in relations with non-EU countries, as the present approach of a binding and exhaustive annex²³ collecting all relevant proceedings would not be practicable in relations with non-EU countries.

Thereafter the conclusions turn to central issues of domestic insolvency proceedings (mainly jurisdiction, conflict of laws and substantive law), recognition of foreign insolvency proceedings (structure of recognition, prerequisites, procedure and legal consequences of recognition) and parallel proceedings involving non-EU countries. Issues of conflict of laws and substantive law are discussed for each of these constellations separately, but cross-referring between each other. The distinction between main and non-main proceedings is kept, but the precise design of non-main proceedings should be more flexible. The basic outcome for domestic proceedings is that the existing conflict of laws rules of the EIR should not simply be extended to non-EU relations, but need separate reflection. Overarching issues of the impact of insolvency proceedings on other court proceedings, arbitration and mediation are discussed separately. The same is true for the use of IT in cross-border insolvency law. Banking and insurance insolvencies are touched briefly.

The editors derive from the foregoing conclusion various recommendations. For example, they recommend to pass rules on direct jurisdiction as well as recognition of and cooperation with insolvency proceedings opened in non-EU countries. In some cases, they do not give specific recommendations, but leave the answer open, explaining pros and cons of different options. This is true, mainly, for the question whether the EU should in relations with non-EU countries basically adopt the UNCITRAL Model Laws or whether it should choose an approach closer to the existing rules of the EIR. In both cases, however, modifications are recommended, with opening clauses for autonomous legislation. Separate recommendations are made for the impact of insolvency proceedings on court proceedings and arbitration and for the use of IT and mediation in the cross-border insolvency context.

23 Presently Annex A to the EIR.

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

Eugénie Fabriès-Lecea

Abstract:

In the wake of Brexit, the European Union is paving the way for work towards a future international insolvency law addressing also third countries. While the European Insolvency Regulation (EIR Recast, Regulation (EU) No 2015/848 of 20 May 2015) already governs insolvency situations arising on both sides of the external borders of Europe when the debtor's centre of main interests is located in the territory of a EU Member State, it refers to the law of its Member States whenever this connecting factor is not met. However, such an approach, which maintains national rules of international jurisdiction and conflict of laws, raises the question, in a context reshaped by Brexit, of the relevance and suitability of these solutions to the contemporary objectives of European international insolvency law. The developments in recent years towards the restructuring, rescue, and recovery of debtors, as well as the consideration of specific interests¹, cannot be ignored. Also, in the game of legal sovereignty played by the major economic powers, and in which the European Union intends to participate, the competition between models – Common Law, Civil law, European law—is becoming increasingly evident. Faced with this challenge, the European Union is confronted with a choice of legal methods upon which the future of international insolvency law will depend.

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

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

A. Introduction

Four years after the United Kingdom withdrew from the European Union, the shockwaves of Brexit are being felt also in the field of European insolvency procedures, and their magnitude is already significant. While the UK officially became a third country on January 31, 2020, a transition period was in place until 31 December 2020, during which EU law continued to apply also in relations with the UK². Since that date European international insolvency law³ no longer applies between the EU and the UK.

Thus, Brexit has reactivated previously dormant solutions under general international insolvency law. This is the case when the debtor's centre of main interests is located in the United Kingdom⁴ or whenever an English court is seized of a request to open an insolvency proceeding. Since Brexit, the jurisdiction of English courts is once again governed by English law, and instead of the *lis pendens* mechanism under the Brussels Regulation⁵, the doctrine of *forum non conveniens* will return and anti-suit injunctions will again have to be expected in relations between the UK and the EU. Furthermore, traditional English conflict-of-laws rules have regained their authority, and with them, when English law is applicable, the Scheme of Arrangement procedure, which the transposition of Directive (EU) 2019/1023 on preventive restructuring frameworks⁶, concurrent with Brexit, did not alter. Above all, the *exequatur* procedure reappears under the conditions set by national law and the treaty law to which the United Kingdom is a party. Thus, the entire Anglo-Saxon law world awakens on the doorsteps of Europe.

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

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

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

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

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

While the United Kingdom is not the only EU Member State to escape European international insolvency law – Denmark, for example, has never been subject to the EIR due to an opt-in clause⁷ – the implications of Brexit take a decidedly unprecedented turn here because of the nearly 20 years of application of European international insolvency standards in the UK, and the resulting established practices. Currently, the English system remains heavily influenced by European solutions, but over time, the divergence between the two legal models will widen.

Consequently, the question arises in situations relating to non-European countries as to the relevance of reactivating national solutions and their suitability to the contemporary objectives of European international insolvency law, whose evolution towards debtor recovery, rescue and recovery, as well as the consideration of specific interests, cannot be ignored. Certainly, this discussion extends beyond the sole context of Brexit, as general international insolvency law continues to apply whenever the EIR is not applicable, i.e. when the debtor's centre of main interests is located in a third country⁸. However, while aligning Member State legislation with European solutions is conceivable in such situations⁹, the same cannot be expected from the legislation of third countries, which will continue to use their own standards.

In this melting pot of models, the European Union must find its own path to assert its legal sovereignty, as it is difficult to claim to be a great power if its law is never applied¹⁰. Faced with this challenge, several legal approaches are available, and the future of international insolvency law will depend on the choices made.

B. Recognition of legal situations

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

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

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

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

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

established by a public authority or a foreign judgment¹¹. The question is no longer which law applied when a right was created, but rather how to recognize a right lawfully established abroad, in order to respect the parties' expectations regarding established rights. In this respect, the method of recognition tends to overshadow the conflict of laws approach¹².

While appealing, the method of recognition of legal situations cannot be exercised without a review of international regularity according to criteria set by the host State. While this review is less stringent in the presence of a community of harmonized legal systems and laws, such as mutual recognition within the European Union¹³, its level of rigor increases when the rights conferred were established in a State outside this community. In addition to verifying the existence of a sufficient connection between the situation and the State in question, the absence of fraud in resorting to the foreign authority, and the regularity of the act according to the law of origin or the conflict-of-laws rules of the host State, particular attention will be paid to the absence of any conflict between the legal situation created and the international public policy of the host State. Thus, in the event of significant divergences between legal systems, the public policy exception will play its prohibitive role.

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

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

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

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

of Cassation has established the essential principles of French international insolvency law (principle of equality of creditors¹⁴, principle of filing claims¹⁵, principle of staying individual proceedings¹⁶), it has also clarified that not all aspects of French insolvency law are deemed to be an expression of such essential principles¹⁷. It remains that the content of international public policy, which is in principle freely determined by States, is influenced by European law for those States, which are members of the European Union. Thus, the Court of Justice of the European Union, through its preliminary reference procedure¹⁸, provides guidance as to what constitutes the public policy exception within the European Union. In this regard, it has stated that Member States may refuse to recognize a decision to open an insolvency proceeding if such decision was taken in manifest violation of the fundamental right to be heard of a person concerned by such a proceeding¹⁹. Along the same lines, the French Cour

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- 14 Cass. civ., March 11, 1913, Nebel, DP 1914, 185, note Pic; JDI 1913, 910, note Perroud; RCDIP 1913, 453.- Cass. com., January 19, 1988, BCT Computer, D. 1988, 365, note Rémyery; RCDIP 1990, 527.- Cass. com., May 14, 1996, BCCI, D. 1996, 586, note Vasseur; RCDIP 1996, 475, rapp. Rémyery.
 - 15 Cass. civ., 29 Sept. 2004, RCDIP 2005, 322, note Rémyery; JDI 2005, 378, note Mélin; D. 2005, jurispr. 2159, note Henry.
 - 16 Cass. civ., 5 Feb. 1991, Rev. arb. 1991, 625, note Idot. – Cass. 1st ch. civ., 24 Mar. 1998, JCP G 1998, 1712, note Kerckhove.- Cass. 1st civ., May 6, 2009, Bull. civ. 2009, I, n°86; APC 2009, pers. 182, notes Mastrullo; JCP G 2009, act. 255, obs. Beguin; LEDEN July 2009, 5, obs. Mélin; JCP E 2009, 1814, n°2, obs. Petel; D. 2009, 1422, obs. Delpech; RTD com. 2009, 546, obs. Loquin; JCP E 2009, 1814, n°2, obs. Petel; Rev. proc. coll. 2010, 29, n°9, obs. Staes – Cass. com., Nov. 12, 2020, n° 19-18.849, APC 2021, n°1, comm. 5, Fin-Langer notes.
 - 17 On the conditions for opening, see Cass. com., 18 Jan. 2000, RJDA 2000, no. 233; JDI 2001, 539, note Poillot-Peruzzetto; JCP E 6 Apr. 2000, 611, note Chaput; LPA 2000, no. 7, 12, note Vallens; RCDIP 2000, 442, note Bureau; D. 2000, act. jurispr. 105, note Faddoul; APC 2000, no. 4, note Regnaut-Moutier. – On the duration of the suspect period, see Cass. civ., 20 May 1967, JDI 1967, 629, note Bredin. – Cass. 1st civ., 15 July 1975, Bull. civ. I, no. 236; JDI 1975, 847, note Kahn.- Cass. com., 5 Feb. 2002, JCP G 2002, I, obs. Fabries, no. 7; JCP E 2002, 500; RJDA 6/2002, no. 676; D. 2002, 957, obs. Lienhard; RJ com. Apr. 2002, 162, note Menjucq; Gaz. Pal. 19 and 20 Feb. 2003, 26, note M.-L. Niboyet; JCP E 2003, 955, note Raimon.
 - 18 ECJ, 28.3.2000 -C-7/98, ECLI:EU:C:2000:164- Dieter Krombach v André Bamberski, Gaz. Pal. 2000, 1731, chron. M.-L. Niboyet; RCDIP 2000, 473, note Muir-Watt; RTD civ. 2000, 944, obs. Raynard.- ECJ, 11.5.2000 -C-38/98, ECLI:EU:C:2000:225- Régie nationale des usines Renault SA v Maxicar SpA and Orazio Formento, RCDIP 2000, 497, note Gaudemet-Tallon; JDI 2001, 696, note Huet.
 - 19 ECJ, 2.5.2006 -C-341/04, ECLI:EU:C:2006:281- Eurofood IFSC Ltd., JCP G 2006, II, 10089, note Menjucq; D. 2006, 1286, note Lienhard; D. 2006, 1752, note Dammann;

de cassation has held that the failure to hear employee representatives does not constitute a manifest violation of the fundamental right to be heard of a person concerned by such proceedings²⁰. Furthermore, the new Regulation (EU) No 2015/848 defines the parameters of the public policy exception by stipulating respect for fundamental rights and the principles enshrined in the Charter of Fundamental Rights of the European Union, and in particular the protection of personal data, the right to property, and the right of access to a court²¹. In this respect, the Cour de cassation held that the English rule transferring ownership of jointly owned assets of a debtor in judicial liquidation to the trustee does not produce effects manifestly contrary to the French conception of international public policy²². A little earlier, the Court had censured the lower court judges, citing Article 6 of the ECHR, for having disregarded the right of access to a court by declaring inadmissible the third-party objection of creditors domiciled in another Member State, thereby depriving them of any remedy²³.

Apart from this, without affecting the content of the international public policy exception, the UNCITRAL Model Laws on International Insolvency²⁴, insofar as they govern the recognition of insolvency decisions and procedures, offer a real advantage to insolvency practitioners and national

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

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

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

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

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

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

courts operating in accordance with common principles, which are shared with their foreign counterparts²⁵. This phenomenon of internationalizing the legal framework for recognizing insolvency situations is gaining momentum and could affect the European Union in the near future²⁶. The EIR already refers, for cooperation between insolvency practitioners and between jurisdictions, to international trade practices and the practices set out in the UNCITRAL Model Laws on International Insolvency²⁷. Within this framework, the EU could soon go further by transposing, during the revision of Regulation (EU) 2015/848, the UNCITRAL Model Laws on International Insolvency.

Certainly, such an action would require the establishment, within the European Regulation, of two distinct regimes – mutual recognition and the elimination of the exequatur requirement for intra-European situations, on the one hand, and recognition and simplified enforcement for extra-European situations, on the other²⁸ – but it would allow insolvency practitioners and the courts of Member States and third countries to operate within the framework of their cooperation on a common basis. Above all, it would lead to the emergence of new standards, derived from best practices, capable of providing international insolvency with its own specific regulatory framework, free from any national or regional considerations²⁹.

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

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

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

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

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

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

C. Harmonization of substantive law

While substantial harmonization of insolvency laws among EU Member States was long met with strong national resistance, the path to harmonizing substantive law was first opened by Directive (EC) 80/987/EC on the wage guarantee institution³⁰, then by the introduction in Regulation (EC) No 1346/2000 of the first common rules on informing creditors and on filing of claims, and more recently by the adoption of the Directive (EU) 2019/1023 of 20 June 2019 on the preventive restructuring framework and of the Directive (EU) 2026/799 of 30 March 2026 harmonising certain aspects of insolvency law. The aim is then to move beyond the existence of the foreign element, at least within the European space, to develop a substantive model through the establishment of a European insolvency procedure capable of competing with the most-established international standards.

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

While no one doubts that the development of a European insolvency procedure will contribute to a more harmonious functioning of the European internal market and offer a legal model capable of competing with those of other major economic powers, its promotion in cross-border situations outside Europe is less certain. Indeed, the strength of the European model will never be only the result of deliberate choices made by economic actors¹, giving preference to competing foreign models. In the absence of a common set of values and guarantees shared with third countries, exporting the European model beyond the scope of European integration will prove difficult unless it is accompanied by other major European advances, particularly in the law of security interests and guarantees. In this respect, external situations remain distinct from internal ones and require different regulation.

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

D. Harmonization of conflict of laws

The European Union embarked quite early on the path of harmonizing conflict of laws in matters of international insolvency³¹. However, it was only with the Treaty of Amsterdam and the adoption of Regulation (EC) No 1346/2000³², and subsequently its successor Regulation (EU) No 2015/848³³, that this harmonization became legally binding. While there is now an area in the world where rules of international jurisdiction and conflict of laws in insolvency matters are common to several states, these rules remain limited to insolvency proceedings in which the debtor has the centre of its main interests in Europe³⁴. For other situations, European insolvency law refers to domestic and treaty-based solutions.

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

Furthermore, the extraterritorial effect of European international insolvency law is hampered, in matters of conflict of laws, by the almost exclusive designation in the EIR of the law of a Member State³⁵. While the close link between jurisdictional competence and legislative competence

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

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

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

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

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

in this area explains why, as a general rule in EU law, the law of the Member State where insolvency proceeding has been opened is designated, Regulation (EU) 2015/848 disconnects jurisdiction from the applicable law in certain matters³⁶. This leads the judge to apply another law, although the designation remains in most cases limited to that of a Member State. Such wording is regrettable when a right in question, e.g. a property right in a foreign asset, is located in the territory of a third country including, recently, the United Kingdom³⁷. In such cases, it is likely necessary to consider that, failing to meet the conditions set out in the special conflict-of-laws rule, a return to the principle of the law of the Member State where the proceedings were opened is mandatory³⁸. There is an inconsistency in seeing that the applicable law, and ultimately the protection of the right in question, varies depending on whether the law designated by the special conflict-of-laws rule is that of a Member State or a third country. Another difficulty lies in determining whether the return to the *lex fori concursus* operates in its substantive rules or in its conflict-of-laws rules, potentially leading to the designation of the law of a third country. Besides the fact that nothing justifies restricting the designated law to that of a Member State, this ‘Eurocentric’ approach creates a rupture within European conflict-of-laws law itself, since in other areas of law, applicable law is determined

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

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

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

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

independently of whether it leads to the law of a Member State or that of a third country³⁹.

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

While initially the primary objective of European International Insolvency Law was to ensure the proper functioning of the internal market by requiring that cross-border insolvency procedures operate efficiently and effectively⁴⁰, and attention was therefore focused on the internal aspects of the integrated area⁴¹, the increasingly pressing competition from foreign models and the need to preserve the competitiveness and attractiveness of European enterprises now compels the European Union to address the external aspects of this area. However, given the previously outlined limitations surrounding each of the legal methods available to it, the EU must seek a new path. In this regard, the universalization of its European conflict-of-laws rules appears a reasonable, even desirable, solution, since it will ultimately allow, whenever the jurisdiction of a Member State is designated, the dissemination of European standards on the international stage.

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

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

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

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

related to non-EU countries⁴², with the difficulty of establishing specific jurisdictional criteria for non-EU situations⁴³, or maintaining the application of national law⁴⁴. While this may eventually allow for the alignment of domestic jurisdictional criteria with those of Regulation (EU) No 2015/848, it also carries the risk of affecting the functioning of domestic venue criteria and protective fora⁴⁵. Whichever option is chosen, the new international jurisdiction rules of Member State courts for insolvency situations involving third countries will have to be accompanied by an ‘extra-EU’ *lis pendens* rule, which is currently lacking. In this regard, the optional rule contained in Regulation (EU) No 1215/2012 could be a model⁴⁶, allowing for the conclusion that when insolvency proceedings are pending before a court of a third country at the time a court of a Member State is seized of a claim between the same parties concerning the same subject matter and cause of action, the latter may stay proceedings if it expects the court of the third country to render a decision capable of being recognized and enforced in that Member State, and if it is satisfied that the stay is necessary for the proper administration of justice.

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

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

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

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

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

46 Art. 33 of this Regulation.

will then be endowed with a universal geographical application criterion⁴⁷, similar to the practice of the European Union in other areas of international law⁴⁸. On the other hand, the European Union will have to abandon any exclusive reference to the law of a Member State. Indeed, whenever third countries are involved in the international relationship, the solution to the conflict of laws must be 'universal,' designating both the law of a Member State and the law of a third country. However, while the *renvoi* mechanism is excluded in principle in relations between Member States, its application will have to be reinstated each time the law of a third State is designated, unless the law in question is considered to fall under the principle of party autonomy⁴⁹. Therefore, a proposal could be made to include a provision relating to this mechanism, similar to that adopted in Regulation (EU) No 650/2012 on international successions⁵⁰. Thus, when the application of the law of a third State is prescribed, it will apply in its current provisions, including its rules of private international law, insofar as they refer to the law of a Member State or to the law of another third State applying its own law.

Finally, the second area of action for the European Union will consist of developing European standards whose dissemination will be ensured internationally each time the law of a Member State is designated as applicable. While the question of the degree of substantive harmonization will again arise, the path of harmonizing legislation around a common minimum framework, without sacrificing national particularities, could this time be considered⁵¹. This would also apply to European rules concerning the notification of creditors and the filing of their claims, and those relating to the

47 Fabriès-Lecea, Bruylant 2012.

48 Regulation (EU) No 2019/1111 on international jurisdiction and the effects of decisions in matrimonial matters and matters of parental responsibility; Regulation (EU) No 650/2012 on international succession; Regulation (EC) No 593/2008 on the law applicable to contractual obligations; Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations; Regulation (EC) No 4/2009 on maintenance obligations; Regulation (EC) No 1259/2010 on the law applicable to divorce; Regulation (EU) No 2016/1103 on matrimonial property regimes; Regulation (EU) No 2016/1104 on the property effects of registered partnerships.

49 Therefore, no reference would be applicable to the laws covered by the provisions of the European regulation on employment contracts.

50 Art. 34 of this Regulation.

51 And why not revive the debate, for intra-European situations, on the degree of harmonization of the future European insolvency procedure?

protection of personal data⁵². If these European standards are intended to be developed, the question of their binding nature in situations involving third countries will inevitably be raised, and with it, their capacity to override the application of foreign law⁵³. Here again, everything will depend on political choices.

As transposition of the UNCITRAL Model Laws into European legislation only partially addresses the challenges of international insolvency law, a complementary legal approach must be considered⁵⁴. In this respect, the universalist evolution of the European Union's international insolvency law, and its European standards, appears as a satisfactory response to the linking of national insolvency systems and procedures in relations with third countries⁵⁵. Without being hegemonic, the European Union would gain in legal sovereignty.

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- 52 Only European rules based on the principle of mutual trust, such as automatic recognition, coordination of procedures and cooperation between bodies, could not be exported to relations with third countries.
- 53 Considered here as the law of a third State. The question falls within the line of thought prompted by the *Ingmar* judgment (ECJ, 9.11.2000, -C-381/98, ECLI:EU:C:2000:605- *Ingmar GB Ltd v Eaton Leonard Technologies Inc.*, JDI 2001, 511, note Jacquet, JDI 2001, 511, note Jacquet).
- 54 Pending the development of a universal international insolvency law, which could undoubtedly emerge through the work of UNCITRAL (see 60th session of Working Group V, 18–21 April 2022, New York, A/CN.9/WG.V/WP.179 on the applicable law in insolvency proceedings).
- 55 The path of adopting treaties between the EU and third countries is unsatisfactory, as such an approach proves too piecemeal and uncertain given the issue of ratification. Only the drafting of a text within the framework of the Hague Convention or UNCITRAL could be considered. However, the difficulty remains, for the former, that international insolvency falls outside its purview due to the close link between the issue and jurisdictional competence, and, for the latter, that it lacks binding force and its transposition into national legislation depends solely on the will of the States.

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L'Europe de l'insolvabilité internationale à l'heure du choix des méthodes juridiques

Eugénie Fabriès-Lecea

Résumé:

Au lendemain du Brexit, l'Union européenne ouvre la voie à des travaux pour un futur droit international de l'insolvabilité impliquant des Etats tiers. Si le règlement (UE) n°2015/848 du 20 mai 2015¹ régit déjà les situations d'insolvabilité qui naissent de part et d'autre des frontières extérieures à l'Europe lorsque le centre des intérêts principaux du débiteur se trouve sur le territoire d'un Etat membre, il renvoie à la compétence des Etats membres chaque fois que ce critère de rattachement n'est pas rempli. Or, une telle approche qui maintient actives les règles nationales de compétence internationale et de conflit de lois pose la question, dans un contexte renouvelé par le Brexit, de la pertinence et de l'adéquation de ces solutions aux finalités contemporaines du droit européen de l'insolvabilité internationale dont les évolutions ces dernières années vers le redressement, le sauvetage et le rebond du débiteur, et la prise en compte d'intérêts particuliers², ne peuvent être ignorées.

Aussi, dans le jeu de la souveraineté juridique auquel se livrent les grandes puissances économiques, et auquel l'Union européenne entend participer, la concurrence des modèles- droit anglo-saxon, droit continental, droit européen- se fait criante. Face à l'enjeu, l'Union européenne se trouve confrontée à un choix de méthode juridique dont dépendra l'avenir du droit de l'insolvabilité internationale.

1 JOUE, n°L.141, 5 juin 2015.

2 Il suffit de songer aux règles de conflits de lois spéciales du Règlement « Insolvabilité » et « Insolvabilité bis » qui attestent de la modernité du droit international privé européen en la matière, en protégeant certains intérêts particuliers en les soumettant à l'application d'une loi autre que la *lex fori concursus* (art. 8 à 18, Règl. (UE) n°2015/848).

Mots-clés: Brexit; Union européenne; États tiers; droit contemporain de l'insolvabilité internationale; redressement; ordre public; harmonisation du droit; conflit de lois-space-after 24pt

A. Introduction

4 ans après le retrait du Royaume-Uni de l'Union européenne, les ondes de choc du Brexit sur les procédures d'insolvabilité européenne se font sentir et leur magnitude s'annonce déjà importante. Certes, le Royaume-Uni est officiellement devenu un Etat tiers depuis le 31 janvier 2020 à 23h, mais une période de transition avait été ouverte jusqu'au 31 décembre 2020 pendant laquelle le droit de l'Union européenne continuait de s'appliquer dans ce pays en partance³. Aussi, ce n'est que depuis cette date que le droit européen de l'insolvabilité internationale⁴ n'est plus applicable de ce côté de la Manche.

Ce faisant, le Brexit réactive les solutions du droit international privé commun de la faillite, jusque-là endormies. Il en va ainsi chaque fois que le centre des intérêts principaux du débiteur se trouve au Royaume-Uni⁵ ou que le juge anglais est saisi d'une demande d'ouverture d'une telle procédure. Aussi, passé *l'exit day*, la compétence des juridictions anglaises est à nouveau régie par le droit anglais, et au lieu du mécanisme de litis-

3 Accord sur le retrait du Royaume-Uni de Grande-Bretagne et d'Irlande du Nord de l'Union européenne et de la Communauté européenne de l'énergie atomique, *JOUE* n°L29, 31 janv. 2020. – Déc. (UE) 2020/2252 du 29 déc. 2020.- Sur la question Fabriès-Lecea, RLDA 2020, suppl. avr., 17 (17).

4 Règl. (UE) n°2015/848. – Dir. 2001/24/CE, 4 avril 2001 concernant l'assainissement et la liquidation des établissements de crédit (*JOCE*, n°L125, 5 mai 2001), mod. Dir. 2014/59/UE, « BRRD » 15 mai 2015 (*JOUE*, n°L173, 12 juin 2014), mod. Dir. 2019/879/UE « BRRD 2 » du 20 mai 2019.- Dir. 2001/17/CE, 19 mars 2001 concernant l'assainissement et la liquidation des entreprises d'assurance (*JOCE*, n°L110, 20 avril 2001), mod. Dir. 2009/138/CE du 25 nov. 2009. – Dir. 2008/94/CE, 22 octobre 2008 relative à la protection des travailleurs salariés en cas d'insolvabilité de l'employeur (*JOCE*, n°L283, 28 oct. 2008).

5 Le règlement européen ne s'applique qu'aux procédures dans lesquelles le centre des intérêts principaux du débiteur se trouve sur le territoire d'un Etat membre (cons. 25, Règl. (UE) n°2015/848). Dans les autres situations, il est renvoyé aux solutions nationales du droit international privé de la faillite. Sur ce point, Fabriès-Lecea, Société de législation comparée, coll. « Trans Europe Experts », 2015, 23 (23).

pendance⁶, il faudra compter avec la théorie du *forum non conveniens* et un retour des *anti-suit injunctions* dans les relations de part et d'autre de la Manche. De plus, les règles anglaises de conflit de lois recouvrent leur autorité, et avec elles, lorsque la loi anglaise est désignée, la procédure de *Scheme of Arrangement* que la transposition de la directive (UE) 2019/1023 sur les cadres de restructuration préventive⁷, concomitante au Brexit, n'a pas permis de retoucher. Surtout, la procédure d'exequatur réapparaît selon les conditions posées par le droit national et le droit conventionnel auquel le Royaume-Uni est parti. C'est alors tout le monde anglo-saxon qui se réveille aux portes de l'Europe.

Si le Royaume-Uni n'est pas le seul Etat dans le giron de l'Union européenne à échapper au droit européen de l'insolvabilité internationale, le Danemark n'ayant jamais été soumis au règlement (UE) n°2015/848 en raison d'une clause *d'opt in*⁸, les incidences du Brexit prennent ici un tour résolument inédit en raison de l'application pendant presque 20 ans des normes européennes de l'insolvabilité internationale dans ce pays, et des habitudes qui se sont créées. Pour l'heure, le système anglais demeure par trop imprégné des solutions européennes, mais le temps passant, la prise de distance entre les deux modèles juridiques s'accroîtra.

Dès lors, la question se pose pour les situations extra-européennes de la pertinence d'une réactivation des solutions nationales, et de leur adéquation aux finalités contemporaines du droit européen de l'insolvabilité internationale dont les évolutions vers le redressement, le sauvetage et le rebond du débiteur, et la prise en compte d'intérêts particuliers, ne peuvent être ignorées. Certes, la réflexion dépasse ici le seul cadre du Brexit, la survivance du droit international privé commun de la faillite se rencontrant chaque fois que le règlement (UE) n°2015/848 ne trouve pas à s'appliquer, c'est-à-dire chaque fois que le centre des intérêts principaux du débiteur est localisé dans un Etat tiers⁹. Mais si, pour de telles situations, un alignement des législations des Etats membres sur les solutions européennes est

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

7 Dir. (UE) 2019/1023, 20 juin 2019, JOUE, n°L172, 26 juin 2019. Pour une étude de la directive, Fabriès-Lecea, Revue Europe 2/2022, 5 (5).

8 Cons. 88, Règl. (UE) n°2015/848.

9 Cons. 25, Règl. (UE) n°2015/848. Sur ce point, Fabriès-Lecea, Société de législation comparée, coll. « Trans Europe Experts », 2015, 23 (23).

envisageable¹⁰, il n'en va pas de même pour les législations des Etats tiers qui continueront d'imposer leurs propres standards.

Dans ce melting-pot des modèles, l'Union européenne doit trouver sa voie pour s'imposer dans le jeu de la souveraineté juridique, car il est difficile de prétendre être une grande puissance si son droit n'est jamais appliqué¹¹. Or, face à l'enjeu, plusieurs méthodes juridiques s'offrent à elle, et du choix qui sera fait, dépendra l'avenir du droit international de l'insolvabilité.

B. La reconnaissance des situations juridiques

La méthode de la reconnaissance des situations, conçue au XVIIe siècle par l'école hollandaise, se pose en des termes similaires pour une situation juridique nouvelle consacrée par une autorité publique ou par un jugement étranger¹². Il ne s'agit plus de s'interroger sur le droit applicable lors de la création de ce droit, mais de reconnaître le droit créé régulièrement à l'étranger, au nom du respect des attentes des parties relativement aux droits consacrés. En cela, la méthode de la reconnaissance tend à éclipser le conflit de lois¹³.

Bien que séduisante, la méthode de la reconnaissance des situations juridiques ne peut s'exercer sans un contrôle de régularité internationale selon les critères posés par l'Etat d'accueil. Si ce contrôle est allégé en présence d'une communauté de droits et de systèmes juridiques harmonisés, à l'image de la reconnaissance mutuelle dans l'Union européenne¹⁴, son

10 Cette attitude pourrait être opportune en ce qu'elle unifierait les règles relatives à l'insolvabilité internationale, quel que soit le lieu d'ouverture de la procédure.

11 En ce sens, Abitbol : « On n'est pas une grande puissance quand on applique le droit des autres. On n'est pas une puissance du tout, quand on se soumet aux tribunaux des autres », *BJE* 4/2022, n°BJE200r4, (33).

12 Niboyet recourt à la notion de « conflit d'autorités » (Niboyet, n°1571).

13 En droit français, le contrôle de la loi appliquée a été abrogé pour la reconnaissance des jugements étrangers (Cass. 1^{re} civ., 20 février 2007, *Cornelissen*, n°05-14082, *RCDIP* 2007, 420, note Ancel et Muir Watt; *JDI* 2007, 1195, note F.-X. Train; *D.* 2007, 1115, note d'Avout et Bollée, et chron. 892; *Gaz. Pal.*, 29 avril-3 mai 2007, nos 119-123, sp. cont. jud. int. et europ., 2, note M.-L. Niboyet). Toutefois, la question demeure de distinguer les cas dans lesquels un acte public doit faire intervenir pour sa reconnaissance le contrôle de la loi appliquée, car il ne s'agit pas d'encourager le recours aux autorités étrangères pour échapper aux dispositions contraignantes d'une loi donnée.

14 Depuis le Règl. (UE) n°1215/2012, l'exigence du préalable de l'exequatur est supprimée, et le contrôle de la régularité internationale de la décision rendue en matière

niveau d'exigence est relevé dès lors que les droits conférés l'auront été dans un Etat étranger à cette communauté. Outre la vérification de l'existence d'un lien suffisant entre la situation et l'Etat en cause, l'absence de fraude dans le recours à l'autorité étrangère, ou encore la régularité de l'acte selon la loi d'origine ou selon les règles de conflit de lois de l'Etat d'accueil, ce sera l'absence de contrariété de la situation juridique créée à l'ordre public international de l'Etat d'accueil qui retiendra particulièrement l'attention. Aussi, en cas de divergences sensibles entre les systèmes juridiques, l'exception d'ordre public jouera son rôle prohibitif.

A cet égard, la jurisprudence française illustre l'importance de la réserve nationale de l'ordre public international en matière d'insolvabilité. Si la Cour de cassation a dégagé les principes essentiels du droit français de la faillite internationale (principe d'égalité des créanciers¹⁵, principe de la déclaration des créances¹⁶, principe de l'arrêt des poursuites individuelles¹⁷), elle a également précisé que tous ses aspects n'en relèvent pas¹⁸. Reste que

civile et commerciale ne s'exerce *a posteriori* qu'en cas de contestation, et consiste en la vérification de l'absence de contrariété manifeste avec l'ordre public de l'Etat d'accueil, en la loyauté dans l'assignation, en l'absence de décisions inconciliables, et exceptionnellement en la vérification de la compétence du juge étranger pour les domaines de la compétence exclusive de l'art. 24, des règles en matière d'assurance, de consommation ou de contrat et de contrats passés par les consommateurs ou les travailleurs. En matière de procédure d'insolvabilité, la reconnaissance mutuelle réside dans une reconnaissance de plein droit des décisions, sous réserve de leur conformité à l'ordre public de l'Etat d'accueil (art. 32 et 33, Règl. (UE) n°2015/848).

- 15 Cass. civ., 11 mars 1913, *Nebel*, *DP* 1914, 185, note Pic; *JDI* 1913, 910, note Perroud; *RCDIP* 1913, 453.- Cass. com., 19 janv. 1988, *BCT Computer*, *D.* 1988, 365, note Rémerly; *RCDIP* 1990, 527.- Cass. com., 14 mai 1996, *BCCI*, *D.* 1996, 586, note Vasseur; *RCDIP* 1996, 475, rapp. Rémerly.
- 16 Cass. civ., 29 sept. 2004, *RCDIP* 2005, 322, note Rémerly; *JDI* 2005, 378, note Mélin; *D.* 2005, jurispr. 2159, note Henry.
- 17 Cass. civ., 5 févr. 1991, *Rev. arb.* 1991, 625, note Idot.- Cass. 1re ch. civ., 24 mars 1998, *JCP G* 1998, 1712, note Kerckhove.- Cass. 1re civ., 6 mai 2009, *Bull. civ.* 2009, I, n°86; *APC* 2009, comm. 182, note Mastrullo; *JCP G* 2009, act. 255, obs. Béguin; *LEDEN* juill. 2009, 5, obs. Mélin; *JCP E* 2009, 1814, n°2, obs. Pétel; *D.* 2009, 1422, obs. Delpech; *RTD com.* 2009, 546, obs. Loquin; *JCP E* 2009, 1814, n°2, obs. Pétel; *Rev. proc. coll.* 2010, 29, n°9, obs. Staes – Cass. com., 12 nov. 2020, n° 19-18.849, *APC* 2021, n°1, comm. 5, note Fin-Langer.
- 18 Sur les conditions d'ouverture, Cass. com., 18 janv. 2000, *RJDA* 2000, n°233; *JDI* 2001, 539, note Poillot-Peruzzetto; *JCP E* 6 avr. 2000, 611, note Chaput; *LPA* 2000, n°7, 12, note Vallens; *RCDIP* 2000, 442, note Bureau; *D.* 2000, act. jurispr. 105, note Faddoul; *APC* 2000, n°4, note Regnaut-Moutier.- Sur la durée de la période suspecte, Cass. civ., 20 mai 1967, *JDI* 1967, 629, note Bredin.- Cass. 1re civ., 15 juill. 1975, *Bull. civ.* I, n°236; *JDI* 1975, 847, note Kahn.- Cass. com., 5 févr. 2002, *JCP G* 2002, I, obs. Fabries, n°7;

ce contenu de l'ordre public international librement déterminé par les Etats, subit, pour ceux qui sont engagés dans l'Union européenne, l'influence du droit européen. Ainsi, la Cour de justice fournit, à travers le contrôle de compatibilité¹⁹, les traits saillants de ce que doit être l'exception d'ordre public dans l'Union européenne. A cet égard, elle a déclaré qu'un État membre peut refuser de reconnaître une décision d'ouverture de procédure si elle a été prise en violation manifeste du droit fondamental à être entendue dont dispose une personne concernée par une telle procédure²⁰. Dans la lignée, la Cour de cassation a retenu que l'absence d'audition des représentants du personnel ne constituait pas une violation manifeste du droit fondamental à être entendue dont dispose une personne concernée par cette procédure²¹. Au-delà, le nouveau règlement (UE) n°2015/848 fixe les contours de l'exception d'ordre public en énonçant le respect des droits fondamentaux et des principes consacrés par la Charte des droits fondamentaux de l'Union européenne, et tout particulièrement la protection des données à caractère personnel, le droit de propriété et le droit d'accès au juge²². En ce sens, la Cour de cassation a considéré que la règle anglaise de transfert au syndic de la propriété des biens indivis du débiteur en liquidation judiciaire, ne produit pas des effets manifestement contraires à la conception française de l'ordre public international²³. Un peu plus tôt, la Cour avait censuré les juges du fond, au visa de l'article 6 CEDH, pour avoir méconnu le droit

JCP E 2002, 500; *RJDA* 6/2002, n°676; *D.* 2002, 957, obs. Lienhard; *RJ com.* avr. 2002, 162, note Menjucq; *Gaz. Pal.* 19 et 20 févr. 2003, 26, note M.-L. Niboyet; *JCP E* 2003, 955, note Raimon.

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

20 CJCE, 2.5.2006 -C-341/04, ECLI:EU:C:2006:281- Eurofood IFSC Ltd., *JCP G* 2006, II, 10089, note Menjucq; *D.* 2006, 1286, note Lienhard; *D.* 2006, 1752, note Dammann; *Bull. Joly* 2006, 907, note Fasquelle; *Rev. sociétés* 2006, 360, note Rémy; *JCP E* 2006, I, 2071, note Vallens; *JDI* 2007, 5, note Khairallah; *Europe* 2006, comm. 230, note Idot. – Jault-Seseke et Robine, *RCDIP* 2006, 811 (811).

21 Cass. com., 27 juin 2006, *D.* 2006, act. jurispr. 1816, obs. Lienhard; *D.* 2006, jurispr. 2257, note Vallens; *JCP G* 2006, II, 10147, note Menjucq.

22 Cons 83, Règl. (UE) n°2015/848. Pour une étude de l'art. 33 du Règl. (UE) n°2015/848, Fabriès-Lecea, Société de législation comparée, coll. « Trans Europe Experts », 2015, 219 (219).

23 Cass. com., 16 juill. 2020, n°17-16200, Fabriès-Lecea, *BJE* 5/2020, n°BJE118e0, (53). Dès lors, le motif tiré de la violation de l'article 1er du 1er protocole additionnel à la Convention européenne des droits de l'homme, ne saurait prospérer.

d'accès au juge en déclarant irrecevable la tierce opposition des créanciers domiciliés dans un autre État membre, les privant de la sorte de toute voie de recours²⁴.

Reste que sans influencer sur le contenu de l'exception d'ordre public international, le *package* des Lois-type de la CNUDCI sur l'insolvabilité internationale²⁵, en ce qu'elles encadrent la reconnaissance des décisions et des procédures d'insolvabilité, présentent un réel avantage pour les praticiens de l'insolvabilité et les juridictions nationales qui oeuvrent au regard de principes communs et partagés avec leurs homologues étrangers²⁶. Ce phénomène d'internationalisation du régime juridique de la reconnaissance des situations d'insolvabilité prend aujourd'hui de l'ampleur²⁷, et pourrait toucher dans un avenir proche l'Union européenne. Déjà, le règlement (UE) n°2015/848 renvoie pour la coopération entre les praticiens de l'insolvabilité et entre les juridictions, aux usages du commerce international et aux pratiques énoncées dans les lignes directrices de la CNUDCI²⁸. Dans ce cadre, l'Union européenne pourrait prochainement aller plus loin en transposant, à l'occasion de la révision du règlement (UE) n°2015/848, les Lois-type de la CNUDCI relatives à l'insolvabilité internationale. Certes une telle action imposerait la mise en place, au sein du texte européen, de deux régimes distincts- reconnaissance mutuelle et suppression de l'exequatur pour les situations intra-européennes, d'une part, et reconnaissance et

24 Cass. com., 30 juin 2009, *Eurotunnel*, *Rev. proc. coll.* 2009, n°16, avec les concl. de l'avocat général Bonhomme. – Menjucq, *Rev. proc. coll.* 2009, repère 4.- Cass. com., 15 févr. 2011, n°09-71.436, *Rev. proc. coll.* 2011, n°174, chron. Mastrullo et Menjucq; APC 2011, n°115, obs. Mastrullo; *RCDIP* 2011, 903, note Jude.

25 Loi-type sur l'insolvabilité internationale de 1997 et Guide pour l'incorporation et l'interprétation 2013.- Guide législatif de la CNUDCI sur le droit de l'insolvabilité : Première et deuxième parties 2004, Troisième partie sur le traitement des groupes d'entreprise en cas d'insolvabilité 2010, Quatrième partie sur les obligations des administrateurs d'entreprises dans la période précédant l'insolvabilité, 2e éd. 2019.- Guide pratique de la CNUDCI sur la coopération en matière d'insolvabilité internationale 2009.- Loi-type sur la reconnaissance et l'exécution des jugements liés à l'insolvabilité de 2018.- Loi-type sur l'insolvabilité des groupes d'entreprises de 2019.

26 La Loi-type sur l'insolvabilité internationale de 1997 est applicable dans 50 pays (Etats-Unis, Royaume-Uni, Canada...), dont l'Europe est largement absente (seule la Grèce a transposé ladite Loi).

27 A l'image des travaux de la CNUDCI, et de la révision de l'Acte uniforme OHADA en 2015 qui traite également des procédures d'insolvabilité internationale par-delà les frontières de l'espace OHADA.

28 Cons. 48, Règl. (UE) n°2015/848.

exécution simplifiée pour les situations extra-européennes, d'autre part²⁹-mais, elle permettrait aux praticiens de l'insolvabilité et aux juridictions des Etats membres et des Etats tiers, d'agir dans le cadre de leur coopération sur des bases communes. Surtout l'on assisterait à l'émergence de nouvelles normes, issues des meilleures pratiques, qui seraient à même de donner à la situation d'insolvabilité internationale une réglementation qui lui est propre, délestée de toute considération nationale ou régionale³⁰.

Si la méthode de la reconnaissance des situations juridiques se montre attrayante à maints égards, elle ne peut cependant apporter, à elle seule, une réponse satisfaisante aux enjeux contemporains de l'insolvabilité internationale. Les différents régimes juridiques qui l'entourent (Lois-type de la CNUDCI, Acte uniforme OHADA, principe européen de reconnaissance mutuelle), et la diversité des ordres publics internationaux, encouragent le *forum shopping* et nuisent incontestablement à sa mise en œuvre.

C. L'harmonisation du droit matériel

Si pendant longtemps, le rapprochement substantiel des législations des Etats membres de l'Union européenne en matière d'insolvabilité a connu de fortes réticences nationales, la voie à l'harmonisation du droit matériel s'est d'abord ouverte par la directive (CE) 80/987/CE sur l'institution de garantie des salaires³¹, puis par l'apparition dans le règlement (CE) n°1346/2000 des premières règles communes sur l'information des créanciers et la production des créances, et plus récemment par l'adoption de la directive (UE) 2019/1023 du 20 juin 2019 sur le cadre de restructuration préventive et de la directive (UE) 2026/799 du 30 mars 2026 harmonisant certains aspects du droit de l'insolvabilité. L'objet est alors de dépasser l'existence de l'élément d'extranéité, au moins dans l'espace européen, pour élaborer un modèle substantiel à travers l'instauration d'un droit européen de l'insolvabilité, apte à concurrencer les plus grands standards étrangers.

La question essentielle consiste alors à définir le degré d'harmonisation de ce droit européen : *a minima* à l'image des directives de 2019 et de 2026 qui laissent tellement d'options ouvertes aux Etats membres que le

29 Cela pourrait prendre la forme d'un nouveau chapitre consacré à la reconnaissance et à l'exécution des décisions rendues par les juridictions d'un Etat tiers.

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

31 Mod. Dir. 2002/74/CE, 23 septembre 2002.- Mod. Dir. 2008/94/CE, 22 oct. 2008.

risque d'échappatoire est grand, ou *a maxima* avec la difficulté ici qu'aucun modèle ne s'impose naturellement et qu'il faudra sans doute puiser dans les modèles nationaux existants. Or, tout l'enjeu résidera pour l'Union européenne dans sa capacité à proposer dans un avenir proche un modèle européen émancipé des législations continentales, apte à attirer les acteurs économiques et les prêteurs.

Si nul ne doute plus que l'élaboration d'une procédure européenne d'insolvabilité contribuera à un fonctionnement plus harmonieux du marché intérieur européen, et offrira un modèle juridique apte à concurrencer ceux des grandes puissances économiques, sa promotion dans les situations transfrontières extérieures à l'Europe est en revanche moins évidente. En effet, la vigueur du modèle européen ne sera jamais que le résultat d'une soumission par choix des acteurs économiques, par préférence aux modèles étrangers concurrents. Aussi, en l'absence d'un fond commun de valeurs et de garanties partagé avec les Etats tiers, l'exportation du modèle européen en dehors du périmètre de l'intégration européenne se révèle difficile si elle n'est pas accompagnée d'autres avancées majeures européennes, notamment en droit des sûretés et garanties. En cela, les situations externes demeurent distinctes des situations internes, et appellent une réglementation autre.

D. L'uniformisation du droit des conflits

L'Union européenne s'est lancée assez tôt dans la voie de l'uniformisation du droit des conflits en matière d'insolvabilité internationale³². Pour autant ce n'est qu'à la faveur du Traité d'Amsterdam, et de l'adoption du règlement (CE) n°1346/2000³³, puis de son successeur le règlement (UE) n°2015/848³⁴, que celle-ci a trouvé force contraignante. S'il existe désormais dans le monde un espace où les règles de compétence internationale et les règles de conflit de lois sont communes à plusieurs Etats, celles-ci

32 Convention du Conseil de l'Europe à Istanbul le 5 juin 1990 et de la Convention des Communautés européennes à Bruxelles le 23 novembre 1995.

33 Pour une étude de ce texte, Giorgini, Dalloz 2006, préf. Vidal.- Fabriès-Lecea, Bruylant 2012, préf. Saint-Alary-Houin.- Mélin, Bruylant 2008.- Nabet, Litec 2010, préf. Martin-Serf.

34 Pour une étude de ce texte, Cuniberti, Nabet et Raimon, LGDJ 2017.- Sauton-Laguionie (ss coord.), Société de législation comparée, coll. « Trans Europe Experts », 2015.

demeurent limitées aux seules procédures d'insolvabilité dans lesquelles le débiteur a le centre de ses intérêts principaux en Europe³⁵. Pour les autres situations, le droit européen de l'insolvabilité renvoie aux solutions internes et conventionnelles du droit des conflits.

Or, dans un contexte mondial de concurrence des modèles juridiques, la question du maintien de la compétence des systèmes des Etats membres pour régir les situations d'insolvabilité qui impliquent des Etats tiers, se pose, soit que les solutions nationales sont réactivées vingt ans après, à l'image du Brexit, soit qu'elles n'ont pas évolué alors même que les enjeux contemporains de l'insolvabilité internationale se sont, dans le même temps, renouvelés. Cette approche de l'Union européenne du droit international de l'insolvabilité se révèle aujourd'hui inefficace tant les modèles nationaux entretiennent le spectre du protectionnisme, et laisse entière la question de la conjonction des systèmes nationaux et des procédures dans les relations avec les États tiers.

En outre, l'extra-territorialité du droit européen des conflits bute, en matière de conflits de lois, sur la désignation quasi exclusive de la loi d'un Etat membre³⁶. Certes le lien étroit qu'entretient la compétence juridictionnelle avec la compétence législative en la matière explique que par principe, en droit de l'Union européenne, soit désignée la loi de l'Etat membre du lieu d'ouverture de la procédure d'insolvabilité. Mais, pour un certain nombre de questions, le règlement (UE) n°2015/848 déconnecte la compétence du juge de la compétence de la loi, amenant celui-ci à appliquer une loi autre dont la désignation demeure toutefois limitée à celle d'un Etat membre³⁷. Or, une telle formulation est regrettable dès lors que le droit en cause se trouve localisé sur le territoire d'un Etat tiers, et depuis peu

35 Cons. 25, Règl. (UE) n°2015/848.

36 A l'exception de la règle de conflit énoncée à l'art.17 sur la protection du tiers acquéreur qui soumet la validité de l'acte conclu après l'ouverture de la procédure par lequel le débiteur dispose d'un bien immobilier, d'un navire ou aéronef ou valeurs mobilières soumis à enregistrement, à la loi de l'Etat sur le territoire duquel se trouve ce bien immobilier ou sous l'autorité duquel ce registre est tenu, sans exiger que cette loi doit être celle d'un Etat membre.

37 Il en va ainsi de l'art.11 sur les contrats portant sur un bien immobilier, art.12 sur les systèmes de paiement et marchés financiers, art.13 sur les contrats de travail, art.14 sur les droits soumis à enregistrement, art.16 sur les actes préjudiciables, art.17 sur la protection du tiers acquéreur et art.18 sur les instances ou procédures arbitrales en cours.

au Royaume-Uni³⁸. Sans doute faut-il considérer dans cette hypothèse que faute de remplir les conditions posées par la règle de conflit spéciale, le retour au principe de la compétence de la loi de l'Etat membre d'ouverture s'impose³⁹. Il y a là une incohérence à voir la loi applicable, et *in fine* la protection du droit en cause, varier selon que la loi désignée par la règle de conflit spéciale est celle d'un Etat membre ou d'un Etat tiers. Une autre difficulté réside dans le fait de savoir si le retour à la *lex fori concursus* s'opère dans ses règles matérielles ou dans ses règles de conflits de lois, pouvant conduire cette fois à la désignation de la loi d'un Etat tiers. Outre que rien ne justifie la restriction de la loi désignée à celle d'un Etat membre, cette approche « eurocentrée » crée une rupture au sein même du droit européen des conflits dès lors que dans les autres domaines du droit, la loi désignée applicable l'est aussi bien que ce soit la loi d'un Etat membre ou celle d'un Etat tiers⁴⁰.

E. Pour l'universalisation du droit international de l'insolvabilité de l'Union européenne et des standards européens

Si à ses débuts, le but primordial était d'assurer le bon fonctionnement du marché intérieur en exigeant que les procédures d'insolvabilité transfrontalières fonctionnent de manière efficace et effective⁴¹, et que l'attention se

38 Ainsi, par ex. le sort des contrats portant sur un immeuble situé à Londres appartenant au débiteur soumis à une procédure d'insolvabilité ouverte en Europe, sera déterminé non pas par l'art.11 du Règlement (UE) n°2015/848 qui désigne la loi de l'Etat membre du lieu de situation de l'immeuble, mais par l'art.7 qui pose le principe de la *lex fori concursus*. Or, rien ne justifie que les effets de la procédure d'insolvabilité sur un tel contrat oscille entre la loi du lieu de situation de l'immeuble et la loi du concours, selon que l'immeuble se trouve sur le territoire d'un Etat tiers ou sur celui d'un Etat membre autre que l'Etat d'ouverture de la procédure.

39 En faveur d'une application de la *lex fori concursus* dans ses règles matérielles plus conforme à la construction européenne qui rejette le mécanisme du renvoi lorsque la loi d'un Etat membre est compétente, v. Fabriès-Lecea, Bruylant 2012, préf. Saint-Alary-Houin.- Contra, Mélin, Bruylant 2008.

40 Par ex. Règl. (CE) n°593/2008 sur la loi applicable aux obligations contractuelles.- Règl. (CE) n°864/2007 sur la loi applicable aux obligations non contractuelles.- Règl. (UE) n°1259/2010 sur la loi applicable au divorce. Règl. (UE) n°650/2012 sur les successions internationales.

41 Cons. 2, Règl (CE) n°1346/2000 et Règl (UE) n°2015/848.

concentrait donc sur le volet interne de l'espace intégré⁴², la concurrence de plus en plus pressante des modèles étrangers et les nécessités de compétitivité et d'attractivité des entreprises européennes, obligent aujourd'hui l'Union européenne à appréhender le volet externe de cet espace. Mais, face aux limites précédemment exposées qui entourent chacune des méthodes juridiques qui s'offrent à elle, l'Union européenne doit rechercher une voie nouvelle. En cela, l'universalisation de son droit européen des conflits paraît une solution raisonnable, voire souhaitable, dès lors qu'elle permettra à terme, chaque fois que la loi d'un Etat membre sera désignée, la diffusion sur la scène internationale des standards européens.

Pour ce faire, l'Union européenne devra agir concomitamment sur deux fronts. Le premier consistera à « universaliser » ses règles de conflit, et à corriger, à travers la révision prochaine du règlement (UE) n°2015/848, les imperfections dont elle les a affublées ces dernières années. Ainsi, sur le terrain de la compétence internationale, un choix politique s'imposera qui consistera soit à un nouvel abandon de souveraineté des Etats membres au profit de l'Union européenne⁴³, avec la difficulté ici d'édicter *ou pas* des critères de compétence spécifiques aux situations extra-européennes⁴⁴, soit à un maintien du renvoi aux droits nationaux⁴⁵, avec certes la possibilité à terme d'un alignement des critères internes de compétence juridictionnelle sur ceux du règlement (UE) n°2015/848, mais aussi le risque d'affecter le fonctionnement des critères internes de compétence

42 Certains auteurs, s'appuyant, à l'époque, sur le texte de l'article 65 du TCE selon lequel l'Union européenne ne pouvait légiférer sur le terrain du droit international privé que si cela était « nécessaire » pour le bon fonctionnement du marché intérieur, estimant en effet que seules les situations intracommunautaires auraient pu tomber sous l'emprise des règles supranationales, toute autre situation étant forcément laissée, en vertu du traité, au droit international privé commun des États membres ou aux accords internationaux éventuellement conclus par ceux-ci.

43 L'Union européenne n'a qu'une compétence d'attribution. Pour l'heure, les Etats membres n'ont consenti un abandon de souveraineté au profit de l'Union européenne que pour les procédures d'insolvabilité dans lesquelles le débiteur a le centre de ses intérêts principaux sur le territoire d'un Etat membre.

44 La réflexion devrait porter sur l'opportunité, eu égard aux enjeux contemporains du droit international de l'insolvabilité, d'un régime différencié de la compétence internationale selon que la situation d'insolvabilité met en cause ou pas des Etats tiers.

45 Ces arguments ont été avancés lors de la révision du Règl. (UE) n°1215/2012, et ont conduit à l'abandon du projet de supprimer les conditions d'applicabilité *ratione loci* du texte.

spéciale et des fors protecteurs⁴⁶. Quelle que soit l'option retenue, la nouvelle compétence internationale des juridictions des Etats membres pour les situations impliquant des Etats tiers, devra s'accompagner d'une règle de litispendance « extra-européenne », aujourd'hui inexistante. A cet égard, la règle facultative contenue dans le règlement (UE) n°1215/2012 pourrait être inspirante⁴⁷, et permettre de retenir que lorsqu'une procédure d'insolvabilité est pendante devant une juridiction d'un Etat tiers au moment où une juridiction d'un Etat membre est saisie d'une demande entre les mêmes parties ayant le même objet et la même cause, celle-ci peut surseoir à statuer si elle s'attend à ce que la juridiction de l'Etat tiers rende une décision susceptible d'être reconnue et exécutée dans ledit Etat membre, et si elle est convaincue que le sursis à statuer est nécessaire pour une bonne administration de la justice.

Au-delà, sur le terrain des conflits de lois, deux actions de l'Union européenne seront requises. D'une part, l'Union européenne devra se saisir des situations d'insolvabilité extra-européennes qui aujourd'hui lui échappent, et donc abandonner l'exigence de la localisation du centre des intérêts principaux du débiteur sur le territoire d'un Etat membre, de sorte qu'il suffira que le juge d'un Etat membre se reconnaisse compétent, sur le fondement des règles européennes ou de ses règles internes lorsque les critères européens ne seront pas remplis, pour que les règles européennes de conflit de lois s'appliquent. Le texte européen sera alors doté d'un critère d'application géographique universel⁴⁸, à l'image de ce que pratique l'Union européenne dans les autres domaines du droit international⁴⁹. D'autre part, l'Union européenne devra abandonner toute référence exclusive à la loi

46 Récemment la Cour de cassation a mis fin à la compétence des juridictions françaises sur le fondement du privilège de juridiction de l'art. 14 du Code civil invoqué par le créancier français pour ouvrir un redressement ou une liquidation judiciaire à l'encontre d'un débiteur libanais (Cass. com., 12 juin 2024, n°22-16.626, Fabriès-Lecea, BJE 5/2024, à paraître).

47 Art. 33 dudit Règl.

48 Fabriès-Lecea, Bruylant 2012, préf. Saint-Alary-Houin.

49 Règl. (UE) n°2019/1111 sur la compétence internationale et les effets des décisions en matière matrimoniale et en matière de responsabilité parentale; Règl. (UE) n°650/2012 en matière de succession internationale; Règl. (CE) n°593/2008 sur la loi applicable aux obligations contractuelles; Règl. (CE) n°864/2007 sur la loi applicable aux obligations non contractuelles; Règl. (CE) n°4/2009 en matière d'obligations alimentaires; Règl. (CE) n°1259/2010 sur la loi applicable au divorce; Règl. (UE) n°2016/1103 sur les régimes matrimoniaux; Règl. (UE) n°2016/1104 sur les effets patrimoniaux des partenariats enregistrés.

d'un Etat membre. En effet, dès lors que des Etats tiers sont impliqués dans la relation internationale, la solution au conflit de lois se doit d'avoir un caractère « universel », et désigner aussi bien la loi d'un Etat membre que la loi d'un Etat tiers. Reste que si par principe le mécanisme du renvoi est exclu dans les relations entre Etats membres, sa mise en jeu devra s'imposer à nouveau chaque fois que la loi d'un Etat tiers sera désignée, sauf à considérer que le droit en cause relève de l'autonomie de la volonté⁵⁰. Aussi, la proposition pourra être faite de l'insertion d'une disposition relative à ce mécanisme, à l'image de ce qui a été retenu dans le règlement (UE) n°650/2012 sur les successions internationales⁵¹. Ainsi, lorsque l'application de la loi d'un Etat tiers sera prescrite, celle-ci s'appliquera dans ses dispositions en vigueur, y compris ses règles de droit international privé, pour autant qu'elles renverront à la loi d'un Etat membre ou à la loi d'un autre Etat tiers qui appliquera sa propre loi.

Enfin, le second front d'action de l'Union européenne consistera à élaborer des standards européens dont la diffusion sera assurée sur la scène internationale chaque fois que la loi d'un Etat membre sera désignée applicable. Si là encore la question du degré de l'harmonisation matérielle se posera, la voie d'un rapprochement des législations autour d'un socle minimum commun, sans sacrifier aux particularismes nationaux, pourrait cette fois être envisagée⁵². Il en irait ainsi des règles européennes relatives à l'information des créanciers et à la production de leurs créances, et de celles relatives à la protection des données personnelles⁵³. Si ces standards européens auront vocation à se développer, la question de leur impérativité dans les situations impliquant des Etats tiers ne manquera pas d'être soulevée, et avec elle leur capacité à évincer l'application de la loi étrangère⁵⁴. Là encore tout sera fonction de choix politique.

50 Aussi, aucun renvoi ne serait applicable pour les lois visées par les dispositions du règlement européen sur les contrats de travail.

51 Art. 34 dudit Règl.

52 Et pourquoi pas relancer le débat, pour les situations intra-européennes, sur le degré d'harmonisation de la future procédure d'insolvabilité européenne.

53 Seules les règles européennes fondées sur le principe de la confiance mutuelle, telles la reconnaissance de plein droit, la coordination des procédures et la coopération des organes, ne pourraient s'exporter dans les relations avec les Etats tiers.

54 Envisagée ici comme la loi d'un Etat tiers. La question s'inscrit dans la lignée des réflexions suscitées par l'arrêt *Ingmar* (CJCE, 9.11.2000, -C-381/98, ECLI:EU:C:2000:605- *Ingmar GB Ltd v Eaton Leonard Technologies Inc.*, JDI 2001, 511, note Jacquet, *JDI* 2001, 511, note Jacquet).

Parce que la transposition des Lois-type de la CNUDCI dans la législation européenne ne répond que partiellement aux enjeux du droit international de l'insolvabilité, une méthode juridique complémentaire doit être envisagée⁵⁵. En cela, l'évolution universaliste du droit international de l'insolvabilité de l'Union européenne, et de ses standards européens, apparaît comme une réponse satisfaisante à la jonction des systèmes nationaux et des procédures d'insolvabilité dans les relations avec les États tiers⁵⁶. Sans être hégémonique, l'Union européenne gagnerait en souveraineté juridique.

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55 Dans l'attente d'un droit international de l'insolvabilité universel qui pourrait, sans doute, voir le jour à travers les travaux de la CNUDCI (V. 60e session du groupe de travail V, 18-21 avril 2022, New-York, A/CN.9/WG.V/WP.179 sur la loi applicable dans les procédures d'insolvabilité).

56 La voie de l'adoption de traités entre l'UE et les États tiers n'est pas satisfaisante, une telle orientation se révélant trop parcellaire et incertaine eu égard à la question de la ratification des textes. Seule l'élaboration d'un texte au sein de la convention de La Haye ou de la CNUDCI pourrait être envisagée. Toutefois, la difficulté demeure, pour la première, que l'insolvabilité internationale est étrangère à ses travaux en raison du lien étroit que la question entretient avec la compétence juridictionnelle, et, pour la seconde, qu'elle n'a pas de force contraignante et que sa transposition dans les législations nationales ressort exclusivement de la volonté des États.

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Which role and meaning for the concepts of ‘universality’ and territoriality’, ‘unity’ and ‘plurality’ (of proceedings) in future international insolvency law – especially in the relations between EU and third countries?

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Abstract:

This paper examines the evolving roles of universality, territoriality, unity, and plurality in international insolvency law, with a special focus on the relationship between the EU and third countries.

Keywords: international insolvency; universality; territoriality; modified universalism; cross-border proceedings; EU law; forum shopping.

A. Introductory comments

It is really very interesting that states, all over the world, follow different paths, when it comes to handling international insolvency issues. They did follow different paths in the past, they still follow different paths, even if some of the states have changed paths.

The target is always the applicable law – even when the ‘fight’ is about international jurisdiction of the (national) courts. The fact that in the case of insolvencies with foreign elements, that is, assets and creditors in more than one country, the generally applicable law (even when there are exceptions) is the law of the country, the court of which opens the insolvency proceeding, explains this ‘phenomenon’.

Generally speaking, the different approaches to the choice of the applicable law are determined by the different legal traditions.¹ When the law defined as applicable by the forum’s private international law rules, in all cases, is rarely a foreign law, then it is very difficult, if not impossible, to accept that a foreign law will govern everything concerning an insolvency

1 Moustaira, *International Insolvency Law*, p. 15.

proceeding opened by that foreign country's court – even the assets being found in other countries.

On the other hand, the world is changing extremely quickly and both large and small businesses 'operate globally using nothing but a mobile phone'; especially '[c]ompanies today are no longer confined to work within a single country or geographic region'.²

B. Modified universalism – universal proceduralism – cooperative territorialism

Modified universalism seems to be the dominant approach almost everywhere, nowadays. Not all consider it as the best solution, obviously.

There have been other proposals. One of them is the 'universal proceduralism'³. This universal proceduralism is based on a choice-of-law principle that its proponent calls 'virtual territoriality'⁴.

According to this proposal, 'the goal is to facilitate a bankruptcy case administered at the debtor's center of main interest that is procedurally global, but substantively territorial'.⁵ Universal proceduralism is less concerned with equality of distribution across borders and more concerned with the respect of local priorities.

The supporters of modified universalism disagree with those of universal proceduralism about the importance of respecting local priorities.⁶ The first believe in a regime of 'one case under one law', while the latter believe in a regime of 'one case under many laws'.⁷

It is rather obvious, that modified universalism works best when the insolvency regimes of the interested countries are harmonized, something very difficult to happen. Furthermore, it is almost convincingly argued that by allowing ancillary courts to retain their right to apply their own law and protect their own local creditors, modified universalism is territorialist in its nature and that that is its downfall. Predictability is guaranteed only when pure universalism reigns. This predictability is sacrificed when

2 Sachdev 93 Am.Bankr.L.J.2019, 343 (346).

3 His proponent is Janger, 32 Brook. J.Int.L. 2007, 819.

4 Janger 48 Col.J.Trans.L. 2010, 401 (408).

5 Janger 46 Tex.Intern.L.J. 2011, 441 (442).

6 Westbrook 48 Col.J.Transn.L 2010, 503 (517).

7 Janger 46 Tex.Intern.L.J. 2011, 441 (442).

modified universalism governs because the 'regime or regimes that will ultimately distribute the debtor's assets may depend on the country in which the assets are located at the time of bankruptcy'.⁸

And what about forum shopping? It is considered as one of the main problems (or evils) of pure universalism. Forum shopping is not necessarily an evil strategy, since it is allowed to choose a forum among more 'offered'. But when the forum shopping is abusive, it may reduce the legal certainty of the proceedings, since the applicable law may be changed.⁹

The lack of legal certainty has given the opportunity to the debtors themselves or to the directors of distressed companies to resort to abusive forum shopping, because of the differences between the various insolvency laws. By selecting jurisdiction and consequently the [most favorable to their own interests]¹⁰ applicable law, it is very possible that certain creditors may be harmed by this choice, since the applicable law might not be favorable to them – it might cause them unexpected monetary expenses and liabilities or it might discriminate between domestic and foreign creditors, or it might not guarantee the equal protection of creditors, or the payoff might be altered, etc.¹¹

Because of the above abusive forum shopping danger, another approach has been proposed, that of 'cooperative territorialism'. Under this approach, each country may open and administer its own bankruptcy case, applying each its own law. None of these cases may be considered a main case or an ancillary case.

Nevertheless, while cooperative territorialism might have some advantages – for example, it solves the 'home' country problem and it provides greater predictability to lenders – it seems too optimistic an approach, given the fact that the regime that it promotes *does not require* cooperation.

In favor of forum shopping, it is argued that it has several benefits. One of them is centralized management, but the primary benefit, it is pointed out, is 'the traditional choice of law motivation: namely, the application of congenial substantive law'. Although it is not certain whether that would be the 'traditional' choice of law motivation in all countries' private international law, one is inclined to accept that in insolvency matters this is really it. As it is mentioned, an easy example of this would be the situation

8 LoPucki 84 Cornell L.Rev. 1999, 696 (728).

9 McCormack 63 IJLQ 2014, 815.

10 Szydlo 11 EBOR, 2010, 253.

11 Coburn, *Insolv.Intellig.*, 2012, 8.

of a debtor who would like to reorganize its business, but is in a legal system which is liquidation oriented. That debtor would try to relocate to a jurisdiction which would allow a reorganization and thus he would avoid the liquidation.¹²

C. Has universalism suffered a major setback?¹³

It seems that no absolute answer may be given. Furthermore, legal scholars often ‘translate’ differently the paths that national laws take towards recognizing foreign insolvency proceedings and accepting the universal application of that foreign *lex [fori] concursus*.

For example, modified universalism is translated as a threshold to absolute universalism, an optimism not convincingly expressed. It is argued by US scholars, that:

“[Universalists] deploy modified universalism both as a theory to undergird a transitional system sensitive to the interests of sovereign states and local stakeholders, pending the establishment of a fully universalist system, and as a normatively laden method or principle that, applied correctly, will help bring about a fully universalist system¹⁴”.

That was also what had been said about 20 years ago, by one of the best US insolvency scholars: that modified universalism was the best interim solution in the way to the optimal solution, the ‘true universalism’.¹⁵

One could easily doubt about that... That interim solution tends to become a permanent one. The following chapter rather confirms that.

D. Is modified universalism becoming customary international law?

It has been supported that modified universalism, from a transitory approach could become customary international law.¹⁶ Could it? Should it? It seems doubtful.

12 Pottow 56 Tex.Intern.L.J. 2021, 155 (161).

13 As it is argued by Sokol in 44 Hastings Intern. & Comp.L.Rev. 2021, 39 (41).

14 Walters 93 Am.Bankr.L.J. 2019, 47 (49).

15 Westbrook 98 Mich.L.Rev. 2000, 2276.

16 Mevorach, pp. 80 ff.

It is argued that 'we are witnessing a gradual reunification of private and public international law in both theory and practice'.¹⁷ But, really, are we? It is also pointed out that this is not a question of merger of private international law and public international law but that it is about an 'internationally oriented mission of private international law' which 'should continue to evolve'¹⁸ and learn from public international law,¹⁹ seek guidance from foreign law through the notion of the law of nations (*ius gentium*).²⁰

Still, one wonders whether this would be something new. In continental European countries, at least, private international law was never really nationally oriented, since the traditional choice of law rules were and are neutral and the application of a foreign law was and is almost always guaranteed, when the private international law rules point to that. The exception of public policy is only in specific circumstances activated. On the contrary, in common law countries (with many variations between them, of course), private international law or, as it is mostly called there, conflict of laws/choice of law very often points to *lex fori*, as the applicable law.²¹

But even in European continental countries, before the regulations' entry in force, there were differences, regarding the application of a foreign law in the case of an insolvency the consequences of which were not limited in one country.

For example, several countries wanted their insolvency judgments to have universal effect but refused such effect to foreign insolvency judgments and, consequently, refused to recognize them and apply a foreign law, e.g., by rendering assets located in their territory to the foreign administrator, according to the rules of the foreign *lex fori concursus*. They were universalists and territorialists, regarding the domestic and the foreign insolvencies, respectively.

On the contrary, [very] few countries (Greece was among them) were willing to recognize a foreign insolvency and consequently apply the foreign *lex fori concursus*. Obviously, modified universalism is rather a drawback for these countries: their private international law did have an internationally oriented mission that gradually – and obligatorily, because of the

17 Mevorach, p. 105.

18 Mevorach, p. 105.

19 Michaels 4 J.Priv.Int.L.2008, 121 (137–138).

20 Waldron 119 Harv.L.Rev. 2006, 129 (135–138).

21 About that, see Moustaira, International Insolvency Law.

governing European Regulations and the adoption of a law incorporating the MLCBI – was restricted.

As it is perfectly and sincerely stated, ‘modified universalism is not a unified phenomenon with a single set of characteristics or predicates’. MLCBI system ‘is dominated by the US, the leading producer of Model Law jurisprudence’. Judges in other countries that also have adopted Model Law should not be expected ‘to subscribe to a strong, American version of modified universalism’, would not be willing to accept such an exercise of American soft power.²²

So, no repeated application of the same rules is observed. One could hardly speak about modified universalism as customary international law.

E. Trajectory of national laws – two examples of actuality

Examples of new national laws – in regard to the concepts [and the practice, obviously] of universality and territoriality – show a rather confused attitude. The reason, very probably, is the tremendous increase of insolvencies that have consequences in more countries. Instead of accepting/enforcing the universality principle, national laws (either written or judge-made) often show a reluctance to that. Rather obviously, this is the result of the pressure by the interested persons – debtors, creditors, insolvency practitioners, etc.

I. Brazil

It is extraordinarily interesting, that Brazil had enacted (and repealed) various bankruptcy laws during the last decades of the 19th century, in which laws there were rules about recognition and enforcement of foreign insolvency judgments and that this fact changed during the 20th century.²³

The former Federal Bankruptcy and Reorganization law, of 2005, contained no provision on international insolvencies. International insolvency issues were decided in Brazil on a case-by-case basis, mostly following the principle of territoriality.²⁴ In December 2020, Brazil adopted a modified

22 Walters 93 Am.Bankr.L.J. 2019, 47 (104).

23 Campana Filho, Int.Insolv.Rev. 2022, 1 (2).

24 Moustaira, International Insolvency Law, p. 34.

version of the MLCBI on cross-border insolvency. The law entered into force in January 2021. Two big cases were already tried according to its rules. It is argued that ‘the time is ripe for Brazil to embrace modified universalism and to leave behind its long history of refusals of recognition of foreign proceedings and of the absence of cooperation with courts of other countries’.²⁵ It remains to be seen, whether this new legislation/situation will bring best results in the future.

II. China

Article 5 of the Enterprise Bankruptcy Law 2006 is the first – and only – Chinese provision to address cross-border insolvencies – there are no rules governing international jurisdiction or choice of law.²⁶ It consists of two paragraphs, respectively concerning the universal ambitions of Chinese insolvency proceedings and the modified universalist (or, rather, territorialist) approach to foreign insolvency proceedings in China.²⁷

The first paragraph says that insolvency procedures commenced in accordance with this Law are binding on the debtor’s property located outside the territory of the People’s Republic of China (PRC).

The second paragraph sets out the criteria for recognition of foreign insolvency proceedings. Therefore, for an insolvency proceeding opened outside mainland China to be recognized and enforced, the conditions are that:

1. relevant international treaties between the country concerned and mainland China have been concluded; or
2. reciprocal relations between the country concerned and Mainland China have been established;
3. the insolvency proceeding shall not violate the basic principles of the laws of the PRC;
4. the insolvency proceeding shall not jeopardize the sovereignty and security of the State or public interests;
5. the insolvency proceeding shall not undermine the legitimate rights and interests of creditors within mainland China.²⁸

25 Campana Filho, *Int.Insolv.Rev.* 2022, 1 (15).

26 Moustaira, *International Insolvency Law*, pp. 39–40.

27 Parry/Gao *Int.Insolv.Rev.*, 2018, 5 (10–17).

28 Gong, p. 40.

It is argued that this article 5 ‘reflects the key principles of modified universalism’, but it is not a convincing argument.²⁹ As it is admitted, up until now there have been scarce cases in which Chinese courts have recognized foreign insolvency proceedings and granted assistance to them.

F. And what about the schemes of arrangement?

They are not included as an insolvency proceeding, in the recast EIR's Annex. That means that their recognition and enforcement (or not) will be based (conditioned) on other regulation(s).³⁰ In regard of all the other states of the world, the question of whether a scheme of arrangement will be recognized and enforced will depend on their private international law rules of national origin, except if there are relevant bilateral or multilateral treaties (rather not). Thus, in case of a scheme of arrangement, universality appears as an even more frail principle.

It has been argued that the existence of the scheme proceedings ‘suggests that the universalist benefits of centralized administration may be more easily achieved within Europe than outside the continent’;³¹ this argument is based on the opinion of other scholars, according to which a scheme, while not recognized as insolvency procedure under EIR, it will be recognized and enforced under Brussels I-bis.³² It is true that somehow a scheme will be recognized and enforced within Europe (and this fact leads to a somewhat universalist tendency in regard to ‘insolvency’ proceedings), but it is not certain under which regulation this recognition and enforcement will take place. The following case proves that:

On the 08.06.2021, the English High Court sanctioned the DTEK Energy B.V. and the DTEK Finance PLC schemes of arrangement.³³

The judge did not accept that:

“Prior to 1 January 2021, the general approach was that the EU Courts would recognize a scheme sanctioned in this jurisdiction under EU Regulation 1215/2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (‘the Judgments

29 Zhang EBOR 2022, 735 (737).

30 Rodriguez, *European Insolvency and Restructuring Journal* 2023, 1 (11).

31 Pottow 56 *Tex.Intern.L.J.* 2021, 155 (161).

32 Kokorin/Madaus/Mevorach 56 *Tex.Intern.L.J.* 2021, 109 (126).

33 [2021] EWHC 1551 (Ch).

Regulation’). Certainly, he said, English schemes were generally not approved as effective on that basis”

He proceeded, saying (among other comments) that in two recent judgments addressing the effectiveness of English schemes in the Netherlands, the two Dutch expert evidence brought before him demonstrated: in the first case (*Re Hema UK 1 Ltd.*)³⁴ that the scheme would be effective either under the Judgments Regulation or as a matter of private international law and in the second case (*Re Selecta Finance UK Ltd.*)³⁵ that the scheme would be recognized in the Netherlands under the Judgments Regulation, or under EU Regulation 593/2008 applicable to contractual obligations (‘Rome I’) or under the Lugano Convention. He also mentioned another case (*Re Lecta Paper*),³⁶ in order to show that the same approach has been or will be adopted by Luxembourg, France, Spain and Italy, in which case the various experts based their opinions upon the judgment’s regulation, principles of private international law and Rome I.³⁷

G. EU – third countries: universality

Do the words and their meanings change role? Or is it that people who use them, who refer to the concepts expressed by those words, try to adapt versions of them to what they themselves would like best? Personally, I believe that the latter happens.

Personally, too, I believe that only the absolute universality (together with unity: one insolvency proceeding and one applicable law) would contribute to a fair insolvency procedure, with equal opportunities for all persons concerned – and especially for the creditors. Only one applicable law can achieve that. When more laws ‘ask’ to be applied and they achieve that, often the result is far from what the institution of insolvency had ever put forth as its aim. Modified universality/universalism is not only becoming a permanent solution, instead of an interim one, but it is slowly but steadily corroded by neo-territorialist national attitudes, both in the European Union space and in other parts of the world. For example, voices in favor of an amendment of the conflict of laws rules in the EIR, aiming

34 [2020] EWHC 2558 (Ch).

35 [2020] EWHC 3220 (Ch).

36 [2020] EWHC 382 (Ch).

37 Moustaira, in Arvanitakis (edn), 2021, pp. 195 (202–203).

at enlarging the list of exceptions to the application of the *lex fori concursus*, would contribute to the final reign of territoriality in the insolvency proceedings.

Having in mind all the hurdles in a cross-border insolvency case, the fact that the Recast EIR does not follow the *erga omnes* approach followed by several other EU Private International Law instruments seems a bad choice.³⁸ The result of such a choice is that in each Member State there are two different regimes about cross-border insolvencies: the European one and the national private international law of insolvency. This fact may be cause of many problems, one of the reasons being that ‘the line of division between these two laws is artificial’.³⁹

In *Schmid*⁴⁰, the CJEU held that the (former) EIR applies even when only the debtor’s COMI is in a Member State, while all the other elements of an insolvency are located in third countries. One can imagine the difficulties that are created in such cases.

It is necessary to extend – unilaterally – the scope of application of the EIR, since – as it is eloquently pointed out – ‘the real world does not end at the geographical borders of the EU’.⁴¹ One of the advantages of such an extension would be that the equal treatment of creditors would have a more solid guarantee. Another one would be the more efficient administration of insolvency proceedings.

Thus, I argue that the rules of the EIR should be extended as to be also applied towards third countries. As a consequence, non-EU insolvencies too should be recognized and the foreign *lex fori concursus* (the third country’s insolvency law) should be applied, if the insolvency proceeding was opened at the place of its (non-EU) COMI. The public policy exception could always be used, if deemed absolutely necessary.

On the contrary, non-EU insolvencies should not be recognized in the EU, if COMI is in an EU member state. The opposite would demolish decades of work inside the (European Communities, first, and next) European Union.

38 Nisi, J.Priv.Int.L. 2017, 324 (325).

39 Jault/Robine, Rev.Crit. DIP 2016, 21 (23) (« dès lors que la ligne de partage entre ces deux droits est artificielle »).

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

41 Nisi, J.Priv.Int.L. 2017, 324 (330).

A (legal) practice followed in some countries, in order to overcome the different ranking of claims that different national insolvency laws have, is that of the virtual territoriality: courts treat foreign (from other member states of the EU) creditors 'as if' a secondary insolvency proceeding had been opened in their respective jurisdictions.⁴² Thus, proceedings are simplified through consolidation of local priorities and assets are distributed according to a hypothetical territorial distribution. Could that be a solution in cases where COMI is in the EU, and establishments outside the EU? I am not at all certain. Furthermore, there is no doubt that this is an opposite discrimination of creditors.⁴³

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42 Wessels, *Brooklyn Journal of Corporate, Financial & Commercial Law* 2014, 63 (76).

43 Moustaira, *International Insolvency Law*, p. 136.

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UNCITRAL and Swiss insolvency law – an example of conceptual implementation*

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Abstract:

Starting with a short introduction to UNCITRAL's work in the field of insolvency law, the article discusses recent reforms of Swiss cross-border insolvency law in 2019, which introduced into Swiss legislation on ancillary insolvency proceedings COMI as an additional head of indirect jurisdiction, aligning Swiss law to some degree with both the EIR and the MLCBI. In addition, in particular, rules were passed for recognition of foreign insolvency-related judgments and for cooperation between concurrent proceedings (including enterprise groups). The article also discusses some issues which would need to be solved if the EU and Switzerland (possibly together with other countries) engaged in negotiations about a 'parallel' insolvency treaty, oriented along the lines of the EIR or UNCITRAL model laws.

Keywords: Swiss Private International Law Act (PILA); European Insolvency Regulation (EIR), UNCITRAL Model Laws on Insolvency, UNCITRAL Legislative Guide on Insolvency Law; COMI; recognition of foreign insolvencies; indirect jurisdiction; ancillary proceedings; insolvency-related judgments; cooperation; harmonization

A. Introduction

Most legal instruments of the United Nations Commission on International Trade Law (UNCITRAL) are little known in continental Europe, and perhaps even less so in Switzerland. This is particularly true in the field of insolvency law. While lawyers are likely to be familiar with, for example, the UNCITRAL Convention on the Recognition and Enforcement of Foreign

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Arbitral Awards (New York Convention)¹ or the United Nations Convention on Contracts for the International Sale of Goods (CISG)²³, the same is probably not true of the UNCITRAL Model Laws and Legislative Guides on insolvency law.

This lack of familiarity could, to some extent, still have been justified as long as these instruments had had little influence on Swiss law. Since at least the 2019 revision of Chapter 11 of the Swiss Private International Law Act (PILA),⁴ however, this can no longer be maintained. Not only do UNCITRAL instruments shape developments worldwide and across Europe, but since the 2019 PILA revision, UNCITRAL's instrument have also – admittedly to a modest degree – influenced Swiss law. The radiating effect of UNCITRAL instruments, both direct and indirect (through influencing the legal systems surrounding Switzerland) makes them increasingly relevant – for Swiss law as well. This contribution first presents the relevant UNCITRAL instruments and then highlights the reforms of Swiss law influenced by those instruments.

B. UNCITRAL instruments in insolvency law

I. The UNCITRAL Working Group V

1. UNCITRAL

UNCITRAL was established in 1966 by a resolution of the United Nations General Assembly, with the mandate to promote the harmonisation and unification of international trade law and to remove legal obstacles to

1 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958), SR 0.277.12.

2 See United Nations Commission on International Trade Law, 'International Sale of Goods (CISG) and Related Transactions' <<https://uncitral.un.org/en/texts/salegoods>> (last accessed: 17.4.2026).

3 United Nations Convention on Contracts for the International Sale of Goods (Vienna, 11 April 1980), SR 0.221.211.1. Vienna and New York are the seats of the United Nations Commission on International Trade Law (UNCITRAL), which is headquartered in Vienna and also convenes in New York.

4 Federal Council Message of 24 May 2017 concerning the Amendment of the Federal Act on Private International Law (Chapter 11: Bankruptcy and Composition Agreements).

cross-border trade. It consists of 60 member states –including Switzerland, whose current term runs until 2031.⁵

The core activity of UNCITRAL lies in the drafting of international legal instruments. Various types of instruments are used: binding international conventions,⁶ model laws⁷ and guides and recommendations⁸ for national implementation, as well as procedural rules⁹ that parties may adopt by agreement.

The most significant UNCITRAL instrument is probably the CISG (Vienna 1980), which is currently in force in 97 states – including Switzerland since 1 March 1991.¹⁰ In the area of arbitration law, UNCITRAL has set globally authoritative standards through the UNCITRAL Model Law on International Commercial Arbitration (1985/2006)¹¹ and the UNCITRAL Arbitration Rules (1976, most recently revised in 2021).¹²

For Swiss legal practice, these instruments are of direct relevance: The CISG applies by operation of law to the majority of cross-border contracts for the sale of goods involving Swiss parties, unless expressly excluded. As an international arbitration hub – with institutions such as the Court of Arbitration for Sport (CAS) in Lausanne and the WIPO Arbitration and

5 United Nations Commission on International Trade Law, ‘Member States History’ <https://uncitral.un.org/en/about/faq/mandate_composition/memberhistory> (last accessed: 15.4.2026).

6 United Nations Commission on International Trade Law, The UNCITRAL Guide: Basic Facts about the United Nations Commission on International Trade Law, p. 13 et seq.

7 United Nations Commission on International Trade Law, The UNCITRAL Guide: Basic Facts about the United Nations Commission on International Trade Law, p. 14 et seqq.

8 United Nations Commission on International Trade Law, The UNCITRAL Guide: Basic Facts about the United Nations Commission on International Trade Law, p. 16.

9 United Nations Commission on International Trade Law, The UNCITRAL Guide: Basic Facts about the United Nations Commission on International Trade Law, p. 17.

10 See United Nations Commission on International Trade Law, ‘Status: United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) (CISG)’ <https://uncitral.un.org/en/texts/salegoods/conventions/sale_of_goods/cisg/status> (last accessed: 17.4.2026).

11 See United Nations Commission on International Trade Law, ‘UNCITRAL Model Law on International Commercial Arbitration’ <https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration> (last accessed: 17.4.2026).

12 See United Nations Commission on International Trade Law, ‘UNCITRAL Arbitration Rules’ <<https://uncitral.un.org/en/texts/arbitration/contractualtexts/arbitration>> (last accessed: 17.4.2026).

Mediation Center in Geneva – Switzerland is closely integrated into the arbitration law framework shaped by UNCITRAL.¹³

UNCITRAL is divided into working groups, each of which is active in specific areas of law and responsible for drafting legislative texts: Working Group I (Procurement), Working Group II (International Arbitration and Conciliation), Working Group III (Transport Law), Working Group IV (Electronic Commerce), Working Group V (Insolvency Law) and Working Group VI (Security Interests). The working groups meet once or twice a year, alternating between Vienna and New York. The number and areas of responsibility of the working groups may change over time.¹⁴

2. Insolvency law in particular

Working Group V (Insolvency Law) is one of the most productive legislative bodies within UNCITRAL and has, over the past two decades, addressed a remarkable range of issues in the field of cross-border insolvency law. In 1995, it commenced work on the development of a legal instrument on cross-border insolvency.¹⁵ This work culminated in 1997 with the adoption of the Model Law on Cross-Border Insolvency (MLCBI).¹⁶ The Model Law remains the most important UNCITRAL instrument in the area of insolvency law to date (see section II. below).

Following this instrument, the Working Group was mandated to develop a comprehensive legislative guide on national insolvency law, with flexible implementation approaches – functionally resembling a model insolvency law. The result of several years of work was the (over time multi-part) UNCITRAL Legislative Guide on Insolvency Law ('Legislative Guide').¹⁷ The Legislative Guide (in its original Parts One and Two) is a comprehensive model instrument intended to serve as a template for states in drafting or reforming national insolvency legislation. In Switzerland, the content of

13 United Nations Commission on International Trade Law, *The UNCITRAL Guide: Basic Facts about the United Nations Commission on International Trade Law*, p. 10.

14 See United Nations Commission on International Trade Law, <<https://uncitral.un.org/en>> (last accessed: 17.4.2026).

15 Rodríguez, *Zuständigkeiten im Internationalen Insolvenzrecht*, mn. 243.

16 See United Nations Commission on International Trade Law, 'UNCITRAL Model Law on Cross-Border Insolvency (1997)' <https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency> (last accessed: 17.4.2026).

17 See United Nations Commission on International Trade Law, 'UNCITRAL Legislative Guide on Insolvency Law' <https://uncitral.un.org/en/texts/insolvency/legislative_guides/insolvency_law> (last accessed: 22.4.2026).

the Legislative Guide broadly corresponds to the provisions of the Swiss Debt Enforcement and Bankruptcy Act (DEBA) regarding bankruptcy and composition agreements (as well as avoidance actions in bankruptcy). Part One sets out the fundamental objectives of a modern insolvency law: maximising the value of the insolvency estate, balancing the interests of creditors and debtors, promoting the reorganisation of viable businesses, procedural transparency and efficiency, and market confidence in the legal system (Rec. 1) and sets out the general features an insolvency law should have (Rec 7). The second, more specific, part (Recs. 8 to 198) extensively addresses procedural aspects, covering the conditions for opening proceedings, the standing of the parties, the procedure for lodging and classifying creditor claims, the treatment of security interests and rights of separation, as well as the rules on realisation and distribution. Particular attention is paid to the role of the court and the principle of equal treatment of creditors. The guide also proposes a restructuring procedure as well as instruments for preventing abusive conduct prior to insolvency, such as the avoidance of asset transfers – i.e. a comprehensive (domestic) insolvency law.

The Legislative Guide was first supplemented in 2010 with a Part Three (Treatment of Enterprise Groups in Insolvency).¹⁸ This third part deals with rules (for example, on communication and cooperation between parallel insolvency proceedings opened against companies within the same corporate group) and possible strategies (such as the appointment of a single insolvency administrator for several group companies, ‘insolvency protocols’ on communication and cooperation, etc.) for handling group insolvencies.¹⁹

The Working Group subsequently undertook an update of the Guide to enact the MLCBI, which was completed in 2013. It then entered into several years of negotiations that culminated in 2018 in the adoption of a further Model Law, namely the Model Law on Insolvency-Related Judgments (MLIJ).²⁰ The purpose of this Model Law is to close a regulatory gap with respect to decisions that are closely connected to insolvency proceed-

18 See United Nations Commission on International Trade Law, ‘UNCITRAL Legislative Guide on Insolvency Law, Part Three: Treatment of Enterprise Groups in Insolvency’ <<https://uncitral.un.org/sites/default/files/media-documents/uncitral/en/leg-guide-insol-part3-ebook-e.pdf>> (last accessed: 22.4.2026).

19 Rodriguez, ZZPInt 15/2010, 267 (267–296).

20 See United Nations Commission on International Trade Law, ‘UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments (2018)’

ings (such as avoidance actions) but do not qualify as ‘insolvency decrees’ and therefore are not covered by the recognition under the MLCBI. The EIR addresses such decisions in its Article 32(1), second subparagraph. The MLIJ in turn contains a highly detailed set of rules on the conditions for recognition of such decisions.²¹

As early as 2019, a fourth part was added to the existing three parts of the Legislative Guide. This part addresses the obligations of management bodies in the period approaching insolvency (Part Four: Directors’ obligations in the period approaching insolvency, including in enterprise groups, ‘LG Part 4’).²² The aim of the recommendations contained therein is to establish standards that help prevent misconduct by management in the lead-up to insolvency and above all highlight the need to respond to financial difficulties at an early stage.

In the same year, a further Model Law was adopted, this time on the treatment of group insolvencies (Model Law on Enterprise Group Insolvency – MLEGI).²³ It addresses the handling of insolvency proceedings involving several companies belonging to the same corporate group in different countries and contains various proposals to coordinate such proceedings or to prevent a multiplication of proceedings in a group context – including, for example, the option of transferring jurisdiction for the opening of proceedings to another state in which proceedings relating to other group companies are taking place. It builds in part on the recommendations contained in Part Three of the Legislative Guide, but also goes beyond them.²⁴

In response to the economic consequences of the COVID-19 pandemic, Working Group V adopted in 2021 a further addition to the Legislative Guide containing legislative recommendations on the insolvency of micro,

<<https://uncitral.un.org/en/texts/insolvency/modellaw/mlij>> (last accessed: 22.4.2026).

21 See Veder/Bork, The UNCITRAL Model Laws on Cross-Border Insolvency and on the Recognition and Enforcement of Insolvency-Related Judgments as well as Carles, Jurisdiction and Recognition of Insolvency-Related Judgments, both *passim*.

22 See United Nations Commission on International Trade Law, ‘UNCITRAL Legislative Guide on Insolvency Law, Part Four: Directors’ obligations in the period approaching insolvency’ <https://uncitral.un.org/sites/default/files/media-documents/uncitral/en/19-11273_part_4_ebook.pdf> (last accessed: 22.4.2026).

23 See United Nations Commission on International Trade Law, ‘UNCITRAL Model Law on Enterprise Group Insolvency with Guide to Enactment (2019)’ <<https://uncitral.un.org/en/MLEGI>> (last accessed: 22.4.2026).

24 See Fn 19.

small and medium-sized enterprises (Part Five, Treatment of MSME Insolvencies).²⁵ This new section proposes a simplified insolvency procedure with low thresholds, reduced costs and simplified rules, designed to accommodate the particular situation of such businesses (UNCITRAL Legislative Guide on Insolvency Law for MSMEs, Rec. 1-26).

In 2025, UNCITRAL issued a non-normative, explanatory foundational document on asset tracing in the insolvency context (Key Principles and Background Notes on Asset Tracing in Insolvency).²⁶ These ‘Key Principles’ provide a reasonably comprehensive overview of – primarily common law – existing asset tracing instruments, including instruments of civil procedure.

Since 2025, the Working Group has been engaged in the demanding task of developing a model law on the law applicable in insolvency proceedings. The central question is the scope of application of the *lex fori concursus* in cross-border insolvency proceedings, particularly its exceptions (specific contracts, secured rights, arbitral proceedings). The Working Group has set itself the goal of presenting a draft in the summer of 2026.²⁷

II. The Model Law on Cross-Border Insolvency in particular

As noted, UNCITRAL can produce both binding conventions (such as the New York Arbitration Convention or the CISG) and ‘soft law’ instruments, such as model laws or legislative guides. In the field of insolvency law, UNCITRAL has primarily issued soft law instruments.

25 See United Nations Commission on International Trade Law, ‘UNCITRAL Legislative Guide on Insolvency Law, Part five: Insolvency law for micro- and small enterprises’ <https://uncitral.un.org/sites/default/files/media-documents/uncitral/en/msms_insolvency_ebook.pdf> (last accessed: 2.5.2026); Interestingly, several fundamental concepts of this Model Law are incorporated into the proposed introduction of a debt discharge procedure in Switzerland, such as the basic distinction between simplified composition proceedings involving limited asset liquidation and proceedings without assets and without liquidation. See Section 3.2.4.2 below.

26 See United Nations Commission on International Trade Law, ‘Asset Tracing and Recovery in Insolvency Proceedings: UNCITRAL Toolkit and Background Notes’ <<https://uncitral.un.org/sites/default/files/media-documents/EN/Texts/UNCITRAL/2513250e-uncitralbackgroundnotesatr-ebook-accessible.pdf>> (last accessed: 22.4.2026).

27 See United Nations Commission on International Trade Law, ‘Working Group V: Insolvency Law’ <https://uncitral.un.org/en/working_groups/5/insolvency_law> (last accessed: 2.5.2026).

The UNCITRAL Model Law on Cross-Border Insolvency (MLCBI is the ‘crown jewel’ of Working Group V.²⁸ It has been implemented by over 40 states (with greater or lesser fidelity to the original) – primarily in the common law world.²⁹ The United States has entirely aligned its recognition law in Chapter 15 of the US Bankruptcy Code with the Model Law; legal systems such as those of Australia, Canada, as well as England and Wales are also based on the Model Law.

In the Civil Law world, the influence of the MLCBI has been considerably more modest (although it found partial implementation many countries in Latin America).³⁰ In Europe in particular, the EU instruments (in insolvency law, for example, the EIR,³¹ which also covers the subject matter of the MLCBI) have supplanted the UNCITRAL instruments as models – not least because of the binding character of EU instruments.

The MLCBI has not been without influence on Switzerland (see below). With regard to the other UNCITRAL instruments in the insolvency area, their influence is limited, though it is also difficult to measure, since these texts have frequently served as a source of inspiration for legislative work even without explicit reference – in particular the provisions of the Legislative Guide.

C. UNCITRAL and Swiss insolvency law

I. No influence on the origins of PILA and DEBA

The PILA, and in particular its Chapter 11, dates from the 1980s (adopted on 18 December 1987, in force since 1 January 1989) – predating the MLCBI. Even the (failed) European Convention on Certain International Aspects of

28 See Markus, SZW 1998, 15 (15 et seq.).

29 See United Nations Commission on International Trade Law, ‘Status: UNCITRAL Model Law on Cross-Border Insolvency (1997)’ <https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency/status> (last accessed: 2.5.2026).

30 See the list in the preceding footnote. The implementation in Mexico, for example, includes the criterion of reciprocity, which is not provided for in the Model Law.

31 Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast), OJ L 141/19, 5.6.2015, 19–72.

Bankruptcy of 1990 was unable to influence the PILA in time,³² let alone the subsequent UNCITRAL instruments.

The same applies a fortiori to the Federal Debt Enforcement and Bankruptcy Act (DEBA), which was enacted more than 100 years before the first UNCITRAL Legislative Guide. Even the major revision of the DEBA's restructuring law in 2012 (in force since 1 January 2014)³³ made no reference to the UNCITRAL instruments and excluded international matters. It was only the subsequent 2019 revision that incorporated concepts from UNCITRAL Model Laws and drew certain provisions from the instruments described above.

II. UNCITRAL and the 2019 PILA revision

1. Key features of the revision

On 18 March 2018, Parliament adopted – following relatively brief but at times surprisingly contentious deliberations – the revision of Chapter 11 of the PILA.³⁴ It largely followed the Federal Council's draft and message of 24 May 2017.³⁵ This marked the first comprehensive revision of an entire PILA chapter since it entered into force on 1 January 1989.³⁶

The impetus for the revision was less international developments than a general dissatisfaction with certain elements of the existing Chapter 11.³⁷ A significant portion of scholars and practitioners found the previous framework to be cumbersome, costly, and unnecessarily complex in its practical application.³⁸ In particular, the reciprocity requirement proved

32 The 1983 PILA Message (BBl 1983 I 236, 448) contains only references to older bilateral conventions.

33 Message concerning the Amendment of the Federal Act on Debt Enforcement and Bankruptcy (Restructuring Law) of 8 September 2010 (BBl 2010 6455).

34 Rodriguez, Jusletter, 14 January 2019, mn. 1

35 See Rodriguez, Jusletter, 14 January 2019, mn. 1; Message concerning the Amendment of the Federal Act on Private International Law of 24 May 2017 (BBl 2017 4125), Chapter 11: Bankruptcy and Composition Agreements.

36 See Draft Amendment and Message concerning the Amendment of the Federal Act on Private International Law: Chapter 12: International Arbitration <<https://www.parlament.ch/de/ratsbetrieb/suche-curia-vista/geschaefte?AffairId=20180076>> (last accessed: 20.4.2026).

37 Rodriguez, Jusletter, 14 January 2019, mn. 12.

38 Rodriguez, Jusletter, 14 January 2019, mn. 12; see also Gehri/Kostkiewicz, SZIER 2/2009, 193 passim; Neuron Naef/Naef, AJP/PJA 2008, 1399 passim; Rodriguez,

to be expensive (leading to ‘battles of expert opinions’) or resulted in the non-recognition of foreign bankruptcy decrees due to circumstances (the private international law of the state of origin) that lay outside the sphere of influence of the parties concerned.³⁹

The mandatory opening of ancillary bankruptcy proceedings as an automatic consequence of the recognition decision was also criticised. Since only certain categories of creditors are permitted to participate in these ancillary proceedings (namely creditors secured by pledge and privileged creditors), conducting ancillary proceedings proved redundant in many cases where no qualifying domestic creditors existed (unsecured creditors and creditors with non-privileged claims may participate in domestic proceedings only where a branch establishment of the foreign debtor is concerned).⁴⁰

Further problems arose from the increasing prevalence of the international instruments mentioned above: the fact that both the EIR and the Model Law had established the debtor’s centre of main interests (COMI) as the jurisdictional criterion for the cross-border recognition of corporate insolvencies exerted a certain pressure on the existing jurisdictional principle of the PILA, which effectively relied solely on the registered seat of the company. Increasingly, the question arose as to whether foreign insolvency decisions rendered at the COMI other than the registered seat should be recognised.⁴¹ Under the previous law, this was generally not the case.⁴²

These factors led the Federal Council to publish a preliminary draft on 14 October 2015 and, on 24 May 2017, a draft and explanatory message for the revision of Chapter 11 of the PILA (bankruptcy and composition proceedings).⁴³ On 18 March 2018, Parliament approved the draft with

SZIER/RSDIE 3/2015, 399 et seqq.; Staehelin in Riemer/Kuhn/Vock (eds), *Schweizerisches und internationales Zwangsvollstreckungsrecht: Festschrift für Karl Spühler zum 70. Geburtstag*, 407 et seqq.; Schwander in *Recht und Internationalisierung*, 331 et seqq.; Schnyder in Gottwald (ed), *Aktuelle Entwicklungen des europäischen und internationalen Zivilverfahrensrechts*, 385 et seqq.

39 Rodriguez, Jusletter, 14 January 2019, mn. 13.

40 Rodriguez, Jusletter, 14 January 2019, mn. 14.

41 Rodriguez, Jusletter, 14 January 2019, mn. 15; see also Rodriguez, *Zuständigkeiten im internationalen Insolvenzrecht*, mn. 808 et seqq.; Rodriguez/Meier, *EuZ* 2019, 96 et seqq.

42 Rodriguez, Jusletter, 14 January 2019, mn. 15; the courts of the Canton of Ticino have developed a practice according to which certain COMI decisions may be recognised, see Jaques, *La reconnaissance et les effets en Suisse d'une faillite ouverte à l'étranger*.

43 BBl 2017 4125.

minor modifications. The new provisions have been in force since 1 January 2019.

2. Influence of the MLCBI on PILA

As explained, the work on revising Chapter 11 of the PILA, which entered into force on 1 January 2019, dates back to approximately 2014 – immediately following the entry into force of the revision of the substantive restructuring law. At that time, the MLCBI had already been adopted, and work on the MLII as well as on the MLEGI was already well underway. These instruments were therefore able to exert, directly or indirectly, a certain influence on the Swiss reform project. They did so to a limited yet noteworthy extent.⁴⁴

One of the objectives of the revision proposal for Chapter 11 of the PILA was to respond to these international developments. The explanatory message on the revision of Chapter 11 of the PILA⁴⁵ recalls that, in the case of a model law, ‘the priority is not verbatim adoption, but rather the implementation of the essential ideas. [...] In exactly this spirit, the draft takes on board the core elements of the UNCITRAL Model Law, while refraining from a comprehensive adoption. Integration into the PILA allows for adaptation to Swiss procedural particularities and preserves the character of the PILA as a comprehensive codification. Through this implementation [revision of Chapter 11 of the PILA], Switzerland can join the ranks of states that have implemented the Model Law – and thus the most widely recognised international standard – in their own way.’⁴⁶

Whether this statement can be agreed with, in particular with regard to Switzerland as an ‘implementing state,’ merits closer examination.⁴⁷ In any event, UNCITRAL does not list Switzerland among its implementing states.⁴⁸ The following sections examine the influence of the MLCBI and

44 Specifically, the Message concerning the revision of Chapter 11 of the PILA refers at the outset to the UNCITRAL instruments (BBl 2017 4127).

45 BBl 2017 4134.

46 BBl 2017 4134 (Translation by the Author).

47 See Rodriguez, Joly éditions, *Mélanges en l'honneur de Jean-Luc Vallens*; see also Staehelin in Grolimund/Koller/Loacker/Portmann (eds), *Festschrift für Anton K. Schnyder*, 358 et seq., 371.

48 See United Nations Commission on International Trade Law, ‘Status: UNCITRAL Model Law on Cross-Border Insolvency (1997)’ <https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency/status> (last accessed: 2.5.2026).

other UNCITRAL Model Laws on the PILA, and in some instances also on the DEBA.

a) The revised Article 166 PILA and the arrival of 'COMI'

Article 166 of the old PILA required, for recognition purposes, that the foreign decree to be recognised had been issued at the debtor's domicile or registered seat. The seat was determined – including for a foreign seat – in accordance with Art. 20 et seq. PILA. For legal entities, this led (and still leads, under the still-applicable Art. 21 PILA) to the application of the incorporation principle, which is firmly embedded in Swiss legal understanding, particularly in company law.

With the adoption of the UNCITRAL Model Law – and in Europe through the EIR⁴⁹ – the criterion of the centre of main interests (COMI) has gained increasing prominence worldwide and across Europe (for an explanation of what COMI is, see Art. 16(3) MLCBI⁵⁰ and Art. 3 EIR).

Strict application of the incorporation principle under Art. 166 of the old PILA would, for example, have rendered unrecognisable bankruptcy decrees issued by EU member states and other important Swiss trading partners that were (lawfully under EU law) issued in proceedings opened at the debtor's centre of main interests (COMI), where that differed from the registered seat.⁵¹ In order to avoid such 'limping' legal relationships, the COMI criterion – as provided in the Model Law and the EIR as the principal criterion for main proceedings – was newly added to Art. 166(1) PILA as an alternative basis for indirect jurisdiction (Art. 166(1)(c)(2) PILA).

However, the incorporation principle was not abandoned but merely supplemented, for recognition purposes in international matters, by the COMI: decisions rendered in proceedings opened at a foreign centre of main interests diverging from the place of incorporation are now also recognisable (Art. 166(1)(c)(2) PILA). In doing so, the PILA acknowledges, on the one hand, the legal reality created by the EIR and UNCITRAL instruments, and, on the other, aligns Swiss law with these instruments.

49 Fn 31.

50 '3. In the absence of proof to the contrary, the debtor's registered office, or habitual residence in the case of an individual, is presumed to be the centre of the debtor's main interests.'

51 BBl 2017 4128.

As regards the interpretation of COMI, however, the PILA clearly follows the interpretation of the EIR provision (by the CJEU) rather than the – arguably more open – interpretation of the corresponding Model Law provision.⁵²

At the same time, an important clarification introduced by the revised PILA must be noted: where a company has its registered seat in Switzerland (Art. 21(1) PILA in conjunction with the second half-sentence of Art. 166(1) (c)(2) PILA), recognition of foreign insolvency proceedings opened at the COMI must be refused. This priority of the registered seat over the COMI represents a clear and deliberate departure from the Model Law (and the EIR).

The very targeted introduction of COMI into Swiss law thus does not represent a true paradigm shift in the PILA system, but rather a minimal adjustment to avoid unwanted refusals of recognitions – while also acknowledging the fact that COMI has now become the globally recognised ‘standard’ with respect to indirect jurisdiction.

Together with other, less significant amendments, Chapter 11 of the PILA now shares essential features of the MLCBI, namely the recognition of insolvency decrees issued at the COMI, with essentially the same conditions and legal effects as those provided for by the Model Law. Nonetheless, certain differences remain, such as the priority accorded to the (Swiss) registered seat, or the fact that decisions rendered neither at the registered seat nor at the debtor's domicile are not recognisable at all (not even as ‘non-main proceedings,’ which the Model Law optionally provides for).

b) Coordination of proceedings

The newly added Art. 174b PILA, introduced by the revision of Chapter 11, is primarily inspired by the MLCBI (Art. 25 et seq.).

The explanatory message⁵³ describes the purpose of this provision as follows: ‘Where several bankruptcy proceedings in respect of the same debtor are conducted simultaneously (e.g. parallel branch and ancillary bankruptcy proceedings), or where several companies within a group are affected by bankruptcy proceedings at home and abroad, the bodies involved should be able to coordinate their actions with one another. For example, the

52 BBl 2017 4136.

53 BBl 2017 4142.

exchange of information with foreign authorities should be possible, and arrangements ('insolvency protocols') should be able to be concluded.⁵⁴

The message further recalls that the 'concept of coordination is to be understood broadly and encompasses, in particular, all forms of cooperation covered by Art. 25–27 of the UNCITRAL Model Law, including the examples referred to in Art. 27 (e.g. coordination of simultaneously pending proceedings; coordination of the administration and supervision of the debtor's assets and affairs).' Furthermore, 'the power to coordinate procedural matters directly with a foreign authority [...] also includes the power to communicate directly between the relevant authorities.'⁵⁵

Although Art. 174*b* PILA is shorter and more general in its formulation than Art. 25–27 of the MLCBI, the reference in the message and the enumeration therein of the most important forms of coordination make it clear, in our view, that this provision is intended to incorporate, in substance, the regulatory content of the Model Law. In practice, however, the significance of this provision has remained modest – which also applies to its model, the MLEGI, which has not yet been implemented by a single state.

c) Treatment of ancillary proceedings

A further significant innovation of the PILA revision concerned the possibility of dispensing with ancillary bankruptcy proceedings (Art. 174*a* PILA). This innovation was, however, justified more by practical needs and cost considerations than by a desire to conform to an UNCITRAL instrument. The Model Law itself says very little about the concrete consequences of recognition and leaves it to implementing states to determine how recognition effects are to be achieved (Art. 20 MLCBI).

That said, with the increased flexibility in the legal consequences of recognition and the curtailment of secondary proceedings introduced by the PILA revision, the PILA now moves closer to the more flexible regime of the MLCBI, and in some respects even to the recommendations of the MLEGI. Admittedly, the parallels with the regime of the EIR (with

54 For insolvency protocols, see Rodríguez, ZZPInt 15/2010, 267 et seqq.

55 BBI 2017 4142 (translated by the Author).

its equally optional secondary proceedings) are greater than with the UNCITRAL instruments.⁵⁶

3. Influence of the Model Law on Insolvency-Related Judgments on PILA

Until the Federal Supreme Court's decisions in the *Sabena v. Swissair* case – which even came before the International Court of Justice in The Hague – the issue of insolvency-related actions was largely unknown in Switzerland.⁵⁷ This was the case despite the fact that the EIR, in its original version, had already addressed and regulated this category of decisions in Art. 32(1), second subparagraph, since 2001.⁵⁸

Work on the revision of the PILA and on the development of the Model Law on Group Insolvencies proceeded partly in parallel. The completion of that Model Law in 2019 (with preparatory work dating back to 2017) and the fact that the EIR had always provided a framework for insolvency-related actions led, in the course of the PILA revision, to the desire to also regulate these cases.⁵⁹ A dedicated new article – Article 174c PILA – was created for this purpose.

Although the substantive concerns of Article 174c PILA correspond to those of the MLIJ, the regulatory approach is fundamentally different. The MLIJ addresses all aspects of the recognition of insolvency-related decisions, both procedural and substantive, and comprises 17 articles. Article 174c confines itself to one paragraph, fitting into the regulatory framework of the PILA, in particular Chapter 11. Procedural questions and the conditions for recognition (with the exception of indirect jurisdiction) are left to Art. 25 et seq. PILA. That said, it establishes a new, independent condition for recognition and defines indirect jurisdiction.

A separate condition for recognition is that the insolvency proceedings with which the decision to be recognised is closely linked must have been

56 However, the ancillary proceedings under the PILA are not entirely comparable to secondary proceedings under the EIR, as the former are limited to a restricted group of creditors; see Art. 172 PILA, unlike Art. 45(1) EIR.

57 Decision of the Swiss Federal Supreme Court 140 III 120; Markus, AJP/PJA 3/2017.

58 'Unterabsatz 1 gilt auch für Entscheidungen, die unmittelbar aufgrund des Insolvenzverfahrens ergehen und in engem Zusammenhang damit stehen, auch wenn diese Entscheidungen von einem anderen Gericht erlassen werden.'

59 BBl 2017 4144.

recognised pursuant to Art. 166 PILA. This requirement is derived from Art. 13(b) of the MLIJ.⁶⁰

A significant departure from the MLIJ is contained in Article 174c with regard to indirect jurisdiction. Instead of the highly complex regime of Art. 13 and 14 of the MLIJ,⁶¹ Art. 174c PILA does not, as a general rule, impose any criterion of indirect jurisdiction. It does, however, make one important exception: where insolvency proceedings have been opened in Switzerland, a closely linked foreign decision is not recognisable. This departs from the EIR and the Model Law – but the restriction appears comprehensible in light of the Swiss legal understanding that insolvency-related actions form part of the *vis attractiva concursus* and should therefore be conducted exclusively in Switzerland.⁶²

4. Influence of the Legislative Guides on substantive law

a) Influence on cooperation provisions in PILA and DEBA

The Legislative Guide obviously had no influence on the DEBA of 1898. Even in later revisions, such as the revision of composition law, the legislative materials contain no indication that the Legislative Guide had any influence on statutory amendments.

The sole exception is Part Four of the Legislative Guide (added in 2010) on group insolvencies, which formed the basis of the 2019 Model Law on Enterprise Group Insolvency, specifically with regard to communication and cooperation between parallel insolvency proceedings. The MLCBI had already included provisions on cooperation between parallel proceedings. Part Four of the Legislative Guide elaborated on these. In the context of the 2019 revision, these models led to the creation of Art. 174b PILA and 4a DEBA. Both provisions state that, in proceedings that are substantively connected, the authorities and bodies involved may coordinate their actions with one another and with foreign authorities and bodies.

60 See Commentary (Rodríguez) of Art. 13 in: Veder/Bork, The UNCITRAL Model Laws on Cross-Border Insolvency and on the Recognition and Enforcement of Insolvency-Related Judgment.

61 See Commentary (Rodríguez) of Art. 13 and 14 in: Veder/Bork, The UNCITRAL Model Laws on Cross-Border Insolvency and on the Recognition and Enforcement of Insolvency-Related Judgment.

62 BBl 2017 4144, see also Art. 289 Swiss Debt Enforcement and Insolvency Act.

b) Parallels of Part Five with the new discharge of residual debt procedure

Part Five of the Legislative Guide on MSME Insolvencies is of interest in connection with the new reorganisation procedure for natural persons – the proposed Swiss discharge of residual debt procedure.⁶³ Even though it does not appear to constitute a direct source for the revision work, this instrument may, as part of a general international trend towards debt discharge procedures for natural persons, have reinforced the pressure to introduce such procedures in Switzerland as well – although here too the concrete developments in neighbouring states have probably had a greater influence. Despite the absence of any discernible mutual influence between the projects in their respective drafting phases, the legislative proposal for a revised reorganisation law for natural persons shows striking parallels to the basic structure of Part Five of the Legislative Guide. For example, both instruments propose two alternative procedures: one for a modest but positive composition dividend and one for so-called ‘no-asset’ proceedings.⁶⁴

D. A Pan-European instrument based on UNCITRAL models?

Even if the Swiss provisions have considerably evolved thanks to the last reform to a more generous and effective recognition regime, there is still a considerable gap between them and the level of cooperation and coordination that the EuInsReg provides for member states. The same applies to other European jurisdictions that are economically closely integrated in the EU, such as Norway, Iceland, the UK and Denmark.⁶⁵

A way to close that gap and to have the legal integration match the level of economic integration would be to follow the example of the Brussel I (recast) Regulation and its parallel Lugano Convention (*de facto* extending

63 Message concerning the Amendment of the Federal Act on Debt Enforcement and Bankruptcy (Debt Restructuring Proceedings for Natural Persons) of 15 January 2025, BBl 2025 356; for the current status in Parliament (final vote scheduled for June 2026), see Federal Office of Justice, ‘Sanierungsverfahren für natürliche Personen’ <<https://www.bj.admin.ch/bj/de/home/wirtschaft/gesetzgebung/schuldsanierung.html>> (last accessed: 23.4.2026).

64 The Federal Council’s proposal contains, similarly to Part Five of the Legislative Guide, both a simplified restructuring procedure and a ‘no-asset’ procedure (‘restructuring bankruptcy’), which display striking parallels but also important differences.

65 Denmark is a EU Member State but, due a special status, does not participate in judicial cooperation policies outside the Brussel I/Lugano context.

the Brussel Regulation's scope to the EFTA states). An obvious extension of this strategy would consist in drafting a parallel convention the EuInsReg to which the countries cited above, including Switzerland, could adhere.

This idea is not new. Early attempts at parallel conventions to EU Regulations were made in respect of the EU service and evidence Regulations⁶⁶. Negotiations in this respect were quite advanced but ultimately failed due to disagreement on the 'automatic' takeover of future changes (on which the EU insisted) that were deemed not acceptable for non-members. Later, the EU instruments became more and more integrative and less amenable to become parallel instruments (including registers, eliminating ordre public reservations and partly including applicability to third countries). This development has, to a certain point, also taken place with respect to the EIR (inclusion of insolvency registers, automatic recognition, complex coordination proceedings). In order to 'relaunch' the idea of parallel Conventions (for instance, one parallel to the EIR), the 'parallelism' would need to be limited to core elements of the instrument. When assessing these core elements, UNCITRAL Instruments, especially the MLCBI, will play an essential role, though its provisions might well be complemented with some detail from the EIR, but probably not all of its elements.

This approach would not need to be limited to the insolvency domain but could be embedded in a more general strategy to extend *ratione materiae* the 'Lugano Sphere' to other domains, notably to most domains in the field of international civil jurisdiction and recognition. *Rationae loci* these parallel conventions could encompass the EU (including Denmark) and its 'close non-members', such as Switzerland, Norway, Iceland, the UK or even Canada.

E. Conclusion

The following table summarises the influences of the UNCITRAL instruments on Swiss law described in the preceding chapters:

66 Regulation (EU) 2020/1784 of the European Parliament and of the Council on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), OJ L 405, 2.12.2020, pp. 40–78 and Regulation (EU) 2020/1783 of the European Parliament and of the Council of 25 November 2020 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters (taking of evidence) (recast), OJ L 405, 2.12.2020, pp. 1–39. See, on the (failed) attempts for a parallel convention on these issues in the late 2000's: Rodríguez/Markus, p. 184.

UNCITRAL Instrument	Swiss Law	Content
MLCBI (Art. 16)	PILA Art. 166 I (c) 2	COMI as recognised criterion for indirect jurisdiction
MLCBI (Art. 20), MLEGI	PILA Art. 174a, DEBA Art. 4a, PILA Art. 174b	Waiver of ancillary proceedings
MLIJ	PILA Art. 174c	Recognition of insolvency-related judgments
MLCBI (Art. 25 et seq.), ML on Group Insolvencies	PILA Art. 174b, DEBA 4a	Coordination of parallel proceedings

It would be an exaggeration to claim that the UNCITRAL instruments in the insolvency area have substantially influenced Swiss law. Yet their influence has not been negligible – for constant dripping wears the stone: the radiating effect of, for example, the MLCBI has had an impact on EU instruments and on the legal systems of neighbouring states⁶⁷ – all of these factors in turn have created a pressure for adaption that was (also) a significant contributing factor to the 2019 PILA revision. As shown above, some of the amendments would probably not have found their way into Swiss law without the UNCITRAL Model Laws. Not all of them may have played an equally important role to date: Article 174a PILA plays an eminently important role in practice; for other provisions (such as those on cooperation between different proceedings), their time may yet come – but Switzerland is prepared for potential cases and can claim a legal system that at least keeps pace with international developments.

To go any step further in terms of cooperation, only a treaty-based reciprocal approach within Europe seems viable. UNCITRAL Model Laws, especially the MLCBI could serve as a substantial baseline for a future parallel Convention (following the ‘Lugano-logic’) to the EIR, provided that the concept of ‘parallelism’ moves away from the idea of a full parallelism

67 EU legal sources (in particular the EIR) have likely exerted at least as much pressure for legislative adaptation on Switzerland as the UNCITRAL instruments. The extent to which the UNCITRAL instruments have influenced EU legal sources would merit a separate study. The parallelism in these respective developments suggests that the UNCITRAL instruments triggered important reform impulses within the EU.

with the now highly integrative EU instruments towards a parallelism of core concepts as outlined in the UNCITRAL Instruments.

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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 decision² that was both predictable and surprising. The court’s decision in *Hertel* was predictable in light of an earlier decision by the CJEU³ on a parallel question under the Regulation on the Recognition and Enforcement of Civil and Commercial Judgments⁴; 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

5 See Westbrook 17 Brook 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

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- (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 Regulation¹⁰ 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, MLCBI 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 MLCBI, 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 law¹⁴ 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 jurisdiction¹⁷ – 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 I.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 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, geoeconomic²⁵ – 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 MLCBI, 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 country 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 established 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 order 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 in 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 MLCBI). 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 under-

mine 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 <i>fremdenrecht</i> (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 followed. 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 MLCBI; 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.	

A few remarks on the relationship between the EIR and preventive restructuring frameworks

Kevin Silvestri

Abstract:

Despite recent amendments, many provisions of the EIR still reflect the paradigm of traditional court-based, liquidation-oriented insolvency proceedings. The disruptive emergence of innovative forms of restructuring frameworks, whose characteristics mark a sharp departure from such paradigm, pose increasing challenges to the cross-border insolvency regime envisioned by the EIR. An example of such challenges -the debate on the recognition regime for confidential preventive restructuring frameworks under German Law- is illustrated, and some conclusions are drawn regarding the need for a European framework for the recognition of Third Countries preventive restructuring proceedings.

Keywords: Preventive restructuring – EU Restructuring Directive – recognition – StaRUG – Germany

A. The footprint of traditional insolvency law in the EIR

The two fundamental instruments of contemporary international insolvency law, the EIR and the MLCBI, are approaching their thirtieth anniversaries. The MLCBI was adopted by UNCITRAL in 1997. The EIR, meanwhile, is the direct descendant of the 1995 Brussels Convention on Insolvency Proceedings; although that convention never entered into force, its substantive provisions were seamlessly transfused into the EIR of 2000. In this sense, the core framework of the EIR has already reached its three-decade milestone. Furthermore, the historical trajectory of the EIR stretches back even further: as early as the 1970s, the European Communities had embarked upon the drafting of an ambitious multilateral convention on cross-border insolvency, envisioned as the necessary complement to the

1968 Brussels Convention on jurisdiction and the recognition of judgments in civil and commercial matters¹.

Over the course the last thirty years, the landscape of insolvency law has undergone rapid and radical transformations. The insolvency of consumers and public entities², as well as sovereign debt crises (topics once deemed secondary to corporate insolvency) have steadily gained prominence³. Concurrently, corporate insolvency law itself has been profoundly reshaped. The traditional insolvency proceedings, primarily oriented towards the piecemeal liquidation of the debtor's assets, have gradually been supplemented by novel legal frameworks. These new mechanisms possess distinctive structural characteristics that differentiate them sharply from their traditional counterparts.

First and foremost, the primary objective of these modern instruments is the preservation of the enterprise's going-concern value, its financial rehabilitation, and the safeguarding of employment, know-how, and the broader economic ecosystem (in essence, preserving the social value of the enterprise). To achieve these goals, such instruments place the onus on the autonomy of the debtor and the creditors to negotiate an optimal exit from financial distress. Rather than entrusting the fate of the enterprise to a public official bound by a rigid statutory agenda, these frameworks demand a collaborative effort among the debtor, the creditors, and all relevant stakeholders. They provide a flexible legal arena within which these actors are free to tailor the most appropriate solution to the specific circumstances of the case. Consequently, the regulatory design of these modern tools does not rigidly prescribe the treatment of creditors and contractual partners (both present and past). This is a stark departure from traditional proceedings, which rely on strict, mandatory rules governing pending contracts, the avoidance of transactions detrimental to the general body of creditors, the liability of directors for the *mala gestio* that precipitated the crisis, and the statutory priority of claims. In traditional settings, such rigid rules afford insolvency practitioners virtually no margin of manoeuvre, limiting them to a binary choice of whether to exercise certain statutory powers or not. Conversely, in the new frameworks, the debtor typically retains control over the day-to-day management of the business as a 'debtor-in-possession'.

1 On the history of the EIR, see Fletcher, 339 et seq.; Bork/Mangano, 13 et seq.; Wessels, 19 et seq.

2 Insolvencies of municipalities are a prominent example: on the topic, see Vaccari/Corrêdo/Marique/Quinot (eds), *passim*

3 Chukwu, *passim*

The judiciary, for its part, assumes a significantly reduced role. Indeed, many of these modern processes lack a formal opening phase dedicated to verifying the substantive prerequisites for access (such as the debtor's subjective status and his financial and economic condition), nor do they necessarily culminate in a judicial order declaring the process successfully (...or unsuccessfully) concluded. Instead, the court largely remains in the background, intervening only when the delicate balance of opposing interests between debtor and creditors necessitates judicial oversight (for instance, to impose a stay on individual enforcement actions, to authorize the modification of contractual terms, or to approve transactions that could substantially alter the financial equilibrium of the enterprise).

Despite these profound substantive developments, the normative architecture of the EIR remains heavily imprinted with the characteristics of traditional insolvency proceedings. A superficial reading of the Regulation (particularly its original 2000 text) reveals an instrument essentially designed for that older paradigm. The EIR is replete with rules and legal concepts that are either entirely absent from modern restructuring frameworks or exist in a vastly altered state. Notable examples include the following:

- Article 1 originally stipulated that the EIR applied exclusively to collective insolvency proceedings which entailed the partial or total divestment of the debtor and the appointment of a liquidator.
- Articles 4 et seq. establish conflict-of-laws rules for core aspects of traditional proceedings, such as the effects of the opening of proceedings on current contracts (Article 4(2)(e) and Article 10), the effects on individual enforcement and pending lawsuits (Article 4(2)(f) and Article 15), the rules governing the lodging and verification of claims to be satisfied by the insolvency practitioner (Article 4(2)(g) and (h)), the rules on the distribution of proceeds (Article 4(2)(i)), the treatment of acts detrimental to the general body of creditors (Article 4(2)(m) and Article 13), and the rules on set-off (Article 4(2)(d) and Article 6).
- Article 5 carves out an exception for rights *in rem* held by third parties over assets located in a Member State other than the State of the opening of proceedings, ensuring that such creditors can satisfy their claims exclusively from the proceeds of those assets. This rule is highly characteristic of traditional liquidation proceedings resulting in the piecemeal sale of the business, often designed to reduce procedural costs by 'outsourcing' the liquidation of the affected assets.

- Articles 16 et seq. govern the recognition of judgments handed down throughout the lifespan of the proceedings, from the opening judgment (Article 16) to closure, and any intermediate decisions (Article 25). Furthermore, Articles 21 et seq. establish a minimum common regime for the publication of these decisions, mirroring the classical structure of national insolvency law. As noted, this tripartite categorisation of judicial decisions is a hallmark of traditional insolvency.
- Under the original Article 3(3), secondary proceedings were strictly limited to winding-up proceedings.
- Articles 39 et seq. are dedicated to defining the rights of foreign creditors to be informed of the opening of proceedings, primarily to allow them to lodge their claims for formal verification.

B. Accommodating the EIR to restructuring proceedings

To be fair, it must be acknowledged that the 1995 Brussels Convention and the 2000 EIR were already applicable to a range of insolvency proceedings that lacked some of the hallmarks of the traditional model. These proceedings, despite their peculiarities, could still be classified as ‘traditional’ insofar as they had, in some instances, been part of the legal landscape for decades. A prime example is the Italian concordato preventivo. Featured in the 1942 Bankruptcy Act (*Legge fallimentare*, which had, in turn, inherited it from collateral legislation to the earlier *Codice di commercio* dating back to 1903⁴), this procedure does not entail a total divestment of the debtor, does not employ avoidance actions to recover assets, and lacks a formal phase for the verification of claims⁵. On the other hand, its procedural skeleton strongly resembles a traditional insolvency proceeding: it commences with a judicial decree, progresses through a series of phases requiring constant judicial involvement, and concludes with a court judgment homologating the arrangement. Consequently, the provisions of the EIR could only be applied to it ‘halfway’.

For a long time, such procedures were regarded (rightly or wrongly) as marginal or exceptional. However, due to a confluence of factors that need not be detailed here, they steadily gained prominence and ultimately served as the blueprint for the most innovative modern restructuring frameworks.

4 Provinciali, 980 et seqq.

5 Fabiani, 200 et seqq.

The EIR managed to withstand the disruptive impact of these new frameworks for a certain period, largely thanks to targeted adjustments introduced by the 2015 recast. The definition in Article 1 was broadened to encompass proceedings that do not require the debtor's divestment but merely impose forms of control or supervision over the debtor's management of the enterprise. Furthermore, the scope was extended to proceedings designed to address not only current insolvency but also the mere likelihood or imminence of insolvency. On the other hand, the restriction in Article 3(3), which limited secondary proceedings solely to winding-up proceedings, was abolished.

Most importantly, the structural integrity of the EIR remained intact even in the face of the restructuring frameworks adopted by Member States to transpose the Restructuring Directive (Directive (EU) 2019/1023)⁶. Even more radically than the pre-existing reorganization procedures, these new frameworks have shed the traditional characteristics of insolvency proceedings. One need only consider the *Restrukturierungsrahmen* introduced in Germany by the *StaRUG*⁷. These do not constitute a 'procedure' in the orthodox sense, but rather a modular toolkit that the debtor can combine according to the specific needs of the corporate rescue.

This toolkit includes stabilization measures (*Stabilisierungsmaßnahmen*) aimed at imposing a stay on individual creditor enforcement actions that could disrupt the financial balance of the enterprise. It also offers the debtor the option to place the creditors' approval of the restructuring plan within a judicial setting (*gerichtliche Planabstimmung*), the right to request a court ruling on preliminary legal questions relevant to the plan's approval (*Vorprüfung*), and the possibility (sometimes a necessity) to have the creditor-approved plan homologated by a court (*Planbestätigung*).

Evidently, there is no formal judicial order opening or closing a unitary procedure; there is no appointed insolvency practitioner holding the power to bring avoidance actions; and numerous other traditional elements are absent.

6 Reports on the transposition of the Directive in six EU jurisdictions (plus the UK) are contained in Koster/Boon/Vriesendorp, *passim*; and in the CERIL 2024-1 report on the transposition of the EU Preventive Restructuring Directive: <<https://www.ceril.eu/news/ceril-statement-report-2024-1-on-the-transposition-of-the-eu-preventive-restructuring-directive-2019-1023>>.

7 The implementation of *StaRUG* (short denomination for the *Unternehmensstabilisierungs- und -restrukturierungsgesetz*) has already resulted in very rich literature and commentaries: see e.g. Braun (ed.) and Morgen (ed.)

Despite these profound structural differences, the *Restrukturierungsrahmen* (at least in their ‘public’, ‘non-confidential’ form: see *infra*) have been included in Annex A of the EIR. Thus, the EIR applies to these innovative instruments, even though they are decidedly eccentric when measured against the traditional proceedings for which European cross-border insolvency law was originally conceived.

C. New challenges: preventive confidential and selective restructuring frameworks

Concurrently, the EIR is forced to confront a much more radical challenge, posed by innovative rescue frameworks possessing two specific characteristics that render their inclusion in Annex A highly problematic. These instruments (which are better conceptualized as ‘frameworks’ or ‘pathways’ rather than ‘proceedings’) are inherently non-public. Their execution remains confidential, involving only the debtor and a select group of key creditors (typically banks and strategic suppliers). Strictly speaking, they are also not collective, as the negotiations to forge a rescue plan do not involve the general body of creditors, but only those essential stakeholders whose financial concessions are critical to overcoming the distress.

One notable example to illustrate this phenomenon: the confidential *Restrukturierungsrahmen* under German law. A vigorous academic debate is currently unfolding in Germany regarding whether the effects produced by these frameworks (whether arising from acts executed by the debtor and creditors, from statutory provisions, or from judicial orders in the rare instances where court intervention occurs) can be recognized across Europe, and if so, through which legal instrument.

Regarding the *Restrukturierungsrahmen*, there is a consensus that the EIR only applies as long as such proceedings take form in their public form, while as long as they unfold confidentially, without notice being given to unaffected creditors, the EIR does not apply⁸. The debate therefore focuses on the so-called ‘dovetail’ principle (the mutually exclusive relationship

8 § 84 *StaRUG* provides that the publicity of the proceedings is subject to a request of the debtor only. Thus, unless the debtor requests otherwise, a *Restrukturierungsverfahren* remains confidential (*nicht öffentliches* or *vertrauliches Restrukturierungsverfahren*); similarly, § 44 *Restrukturierungsordnung* (Austria).

between the Brussels regime and the EIR)⁹: does the exclusion of these frameworks from the EIR automatically trigger the application of the Brussels I-bis Regulation, or is the dovetail principle inapplicable here, leaving the matter to national private international law?

Proponents of the first solution, such as Madaus, Skuradszun and Nijmens argue that these frameworks do not qualify as analogous proceedings under Article 1(2)(b) of Brussels I-bis¹⁰. Instead, they fall squarely within the realm of civil and commercial matters, specifically contract or company law¹¹. Furthermore, they contend that the EIR is wholly unsuited for these tools¹². They maintain, that applying the EIR would result in shortcomings due to the poor compatibility of some of its provisions (namely, article 8 EIR on third-parties rights *in rem*) with reorganization purposes¹³, and it would pave the way for abusive secondary restructuring proceedings¹⁴.

Conversely, Bornemann argues that while these frameworks fail to meet the Article 1 EIR requirements of publicity and collectivity, this does not automatically push them into the scope of Brussels I-bis¹⁵. They observe

9 Recital 7 to the EIR reads: 'Bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings and actions related to such proceedings are excluded from the scope of Regulation (EU) No 1215/2012 of the European Parliament and of the Council. Those proceedings should be covered by this Regulation. The interpretation of this Regulation should as much as possible avoid regulatory loopholes between the two instruments. However, the mere fact that a national procedure is not listed in Annex A to this Regulation should not imply that it is covered by Regulation (EU) No 1215/2012'. Contrasting arguments as to the meaning of recital 7 are set forth in the CERIL Report 2022-2 on Cross-Border Effects in European Preventive Restructuring (pages 11 and 12): <https://congressus-ceril.s3.amazonaws.com/files/6bf538e8a3514e9bad224a67e07bf73c.pdf?response-content-disposition=inline%3Bfilename%3D2022-2_CERIL_Report_on_Cross-Border_Effects_in_European_Preventive_Restructuring.pdf&AWSAccessKeyId=AKIAIUTQ23AZYKILZQ&Signature=gxxtWILbGzY8dpyKG5ObWK%2BEzhA%3D&Expires=1780861854>

10 Madaus, < <https://stephanmadaus.de/2020/10/02/auf-in-die-moderne-das-saninsf-og-macht-den-restrukturierungsstandort-deutschland-2021-wettbewerbsfaehig/>>; Skuradszun/Nijmens, 11

11 Skuradszun, ZIP 2019, 1501 (1503).

12 Skuradszun/Nijmens, 11-13

13 Skuradszun/Nijmens, 11-13

14 Skuradszun/Nijmens, 11-13 observe that debtors might opportunistically initiate main restructurings in jurisdictions with more lenient access requirements (namely, regarding the insolvency/distress-test), only to subsequently seek secondary restructurings in jurisdictions where statutory requirements are far stricter by relying on the prohibition of re-examination of the debtor's insolvency of article 34 EIR.

15 Bornemann, in Graf-Schlicker InsO art. 1 EuInsVO, mn. 46.

that the abovementioned ‘dovetail principle’ strictly applies to annex actions related to insolvency, not to the proceedings themselves (a nuance confirmed by the CJEU in certain rulings¹⁶). According to Bornemann, the historical context of the dovetail principle is enlightening: the bankruptcy exclusion in Article 1(2) of the 1968 Brussels Convention anticipated the adoption of a parallel convention whose scope was originally meant to cover all collective debt restructuring proceedings¹⁷. However, Article 1 of the EIR subsequently adopted a narrower definition that expressly requires publicity. This legislative gap is therefore intentional. Abel and Herbst similarly argue that publicity is indispensable to the very functioning of the EIR (as highlighted in Recital 13, and in the rules on insolvency registers and creditor information obligations), as it is essential for the system of preventing parallel proceedings and thwarting putative main proceedings¹⁸. Moreover, these confidential frameworks are undeniably insolvency matters in substance, as evidenced by the fact that their ‘public sisters’ are covered by the EIR¹⁹. Consequently, cross-border recognition can be granted on the basis of national procedural law (in Germany, under the ZPO rather than the InsO, a choice further justified by their modular nature that eschews classic insolvency structures²⁰). Finally, the lack of automatic European recognition is not a systemic failure, but rather a calculated trade-off: it leaves the debtor with a strategic choice between the detriments of publicity (which afford protection to creditors) and the benefits of EU-wide recognition (which require the safeguarding of creditor rights).

D. (Cautious) conclusions

In conclusion, the domain of insolvency law is being enriched by new instruments at an accelerating pace, both within and outside the EU (just consider the English Part A1 moratorium).

16 ECJ 8.11.2012 - case C-461/11, ECLI:EU:C:2012:704 paras 23-27 - *Ulf Kazimierz Radziejewski v Kronofogdemyndigheten i Stockholm* (regarding a debt relief proceeding under Swedish administrative law); ECJ 10.9.2009 - case C-292/08, ECLI:EU:C:2009:544 - *German Graphics Graphische Maschinen GmbH v Alice van der Schee*.

17 Bornemann, in Graf-Schlicker InsO art. 1 EuInsVO, mn. 44.

18 Abel/Herbst, Morgen StaRUG, Anhang zu § 86, mn. 33 and 34.

19 Abel/Herbst, Morgen StaRUG, Anhang zu § 86, mn. 29 and 30.

20 Abel/Herbst, Morgen StaRUG, Anhang zu § 86, mn. 38.

The EU finds itself at a crossroads, compelled to determine what regulatory stance to adopt (not least because the emergence of these novel instruments was, to a significant extent, catalysed by the EU's own legislative initiatives in the insolvency sector). The vibrant and ongoing debate both within the European academic community indicates that generally acceptable legal solutions are still maturing²¹. For the time being, a matter worth exploring is the way Member States are currently handling the recognition of the effects of third Countries' preventive restructuring frameworks under their national regimes. Novel and unprecedented solutions might emerge and be empirically tested in 'national laboratories', before the European Union embarks upon more ambitious interventions, regarding both intra-EU and extra EU restructurings. Interventions that might take the form of an expansion of the reach of the EIR, or of the Brussels I-a Regulation, or of both instruments (with the view of letting each one covering individual facets of these innovative proceedings), or, lastly, the creation of a totally new instrument.

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21 In the past months, the European Commission has established an expert sub-group composed of members representing the Member States and including some scholars based in Switzerland and the UK to discuss the revision of the Brussels Ia Regulation, including the scope of the exclusion of insolvency from its sphere of application: see Cuniberti, on the EAPIL Blog: <<https://eapil.org/2026/05/22/commission-expert-subgroup-on-brussels-i-bis-holds-first-meeting/>>. On the ongoing discussion regarding > [last accessed on 7.6.2026]. Meanwhile, in December 2025 CERIL issued a statement calling the EU to seize the occasion of the upcoming EIR recast to finally clarify whether such frameworks fall under the remit of EIR; see CERIL Statement and Report on Reviewing the EIR 2015: <<https://www.ceril.eu/news/reviewing-the-eir-2015>> [last accessed on 7.6.2026].

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Recognition is key or how to deal with a bank crisis in the internationally interconnected financial industry

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Abstract:

The crisis of banks poses unique challenges for supervision, resolution, and insolvency due to their strong international interconnectedness. This paper discusses the procedural variants for resolving a bank crisis in Germany and Europe, the cooperation and recognition possibilities of these variants, and proposes integrating cooperation and recognition options in bank resolution into general international insolvency law.

Keywords: Bank crisis, resolution, insolvency, international cooperation, financial industry

A. Introduction

The crisis of banks¹ poses special challenges for supervision, resolution and insolvency.

On the one hand, due to their business model, banks are strongly interconnected internationally, both within an economic unit and in relation to other market participants. Thus, the failure of financial institutions entails considerable economic risks. These risks result from the danger of contagion due to the close interconnection of market participants on the interbank market. The effects of a bank crisis are rarely limited to a single state. In a bank crisis, cross-border situations are the norm rather than the exception. Moreover, the dangers to the overall economy in the event of a crisis should not be underestimated due to the sheer number of assets held

1 For purposes of this article, the word 'bank' is used to include all financial institutions that are subject to special insolvency regimes.

by a bank in relation to the domestic product of the host state. For example, bank assets take up an average of 77 % of GDP in global comparison.²

But the enormous importance for the economy as a whole through its financing function also lends its crisis special weight. Due to this importance for the national economy, states have often had their own interests in mind when dealing with a bank's crisis. However, this approach has led to synergy losses, as a better result – i.e. with less negative impact on other market participants – could be achieved with a coordinated approach.

The complexity is further increased in the crisis of an international bank by the different supervisory and resolution variants that exist within the respective jurisdictions and in international comparison.

Despite – or perhaps because of – these enormous challenges in a banking crisis, considerable legislative efforts have been made which, as a result, go well beyond the recognition and cooperation possibilities and obligations in general insolvency proceedings.

Against this background, this paper has a three-part structure:

- I. First of all, an overview of the different procedural variants for the resolution of a bank crisis in Germany and Europe will be presented.
- II. In the second part, the respective cooperation and recognition possibilities of the different process variants will be considered.
- III. In the third part, the above findings will be used to present a reform proposal arguing for the integration of the cooperation and recognition options in the resolution of a bank into general (international) insolvency law.

B. Legislative approaches for bank crisis

In principle, there are two different procedural variants for handling the financial crisis of a bank in Germany: insolvency or liquidation. Since recognition and cooperation are largely determined by the respective legal framework, these frameworks will be presented in a brief overview.

Generally speaking, the legal framework is shaped on the one hand by European law and by national law on the other hand. Various factors must be taken into account when determining the applicable law. The legal

2 See *GlobalEconomy.com*, 'Bank assets to GDP – Country rankings', <https://www.theglobaleconomy.com/rankings/bank_assets_GDP/> (last accessed 31.02.2023).

framework depends in particular on the size or systemic relevance of the affected bank, on the respective domicile and on the scope and possible effects of the crisis of the affected bank. However, the areas of application of the legal frameworks cannot be clearly distinguished in the details.

Simplified, these are the available options:

- A. Supervisory measures pursuant to §§ 46 et seq. of the Financial Industry Act (hereinafter KWG, acronym for *Gesetz über das Kreditwesen*)³, in particular, the so-called silent liquidation during ongoing business operations;
- B. Resolution measures on the basis of the Act on the Recovery and Resolution of Institutions and Financial Groups (hereinafter SAG, acronym for *Gesetz zur Sanierung und Abwicklung von Instituten und Finanzgruppen*);⁴ or
- C. 'Regular' insolvency proceedings on the basis of the Insolvency Act (hereinafter InsO, short form for *Insolvenzordnung*)⁵.

The heading of this section '*crisis*' is therefore not a linguistic inaccuracy insofar as it does not speak of bankruptcy or resolution, since banks in Germany can go through both insolvency proceedings and official resolution measures.

I. Preventive supervisory measures

First of all, the German national banking supervisory authority (*Bundesanstalt für Finanzdienstleistungsaufsicht*, or *BaFin*) has various (preventive) measures at its disposal in the event of a financial threat to the bank.

If milder measures are unsuccessful, BaFin may, in particular if the fulfilment of the credit institution's obligations towards its creditors is at risk, revoke the banking license under the conditions of § 35 (2) no. 4 KWG and order liquidation pursuant to § 38(1), sentence 1 KWG and appoint a liquidator.

Insolvency proceedings and supervisory measures under the KWG do not have an exclusive relationship. For example, BaFin will regularly order

3 As amended on 09.09.1998, BGBl. I p. 2776.

4 Enacted 10.12.2015, BGBl. I p. 2091.

5 Enacted 05.10.1994, BGBl. I p. 2866.

a moratorium pursuant to § 46 of the German Banking Act (KWG) prior to filing an application to open insolvency proceedings in order to protect the insolvency estate from adverse changes.⁶ However, liquidation on the basis of § 38 of the German Banking Act (KWG) does not permit any interference with the rights of creditors and other stakeholders. In fact, this is a liquidation ordered by the BaFin, which follows general commercial law.

II. Resolution

A different rule applies to resolution on the basis of the SAG. Firstly, the historical background of this law is important for understanding the SAG:

In the context of the financial crisis of 2007–08, insolvency law for banks had reached its limits. The dangers of an uncontrolled market exit by individual banks for other financial institutions and the entire financial system have become apparent. The subsequent bail-outs with taxpayer money were often defended with the slogan ‘too complex, too connected, too big to fail’. In fact, this led to a State guarantee for the high-risk corporate management and the ensuing economic collapse.

This unsatisfactory result caused a constant flow of reforms aimed at avoiding bank insolvencies and, if necessary, achieving an alternative resolution involving the economic stakeholders.⁷ The preventive aspect of these reforms in response to the financial crisis concerned mainly the capital requirements of credit institutions, which were successively tightened up until the latest iteration (Basel III).⁸

A core element of the European banking regulations is also the strengthening of depositor protection. Most recently, Directive 2014/59/EU, known as Recovery and Resolution Directive (hereinafter, ‘BRRD’) and Regulation (EU) No 806/2014, known as Single Resolution Mechanism Regulation (hereinafter, ‘SRM Regulation’) were amended in 2019 for this purpose, which was implemented in German law within the framework of the Risk Reduction Act (RiG) at the end of 2020.⁹ Overall, the European legislature

6 Lindemann, in Fischer/Schulte-Mattler, KWG § 46 mn 34.

7 See in particular the so called ‘bail-in’ on the basis of § 91 SAG, BGBl. I 2021 p. 2091.

8 Basel III: A global regulatory framework for more resilient banks and banking systems – revised version June 2011.

9 See Waschbusch/Reinstädter, StB 2022, p. 201–212.

is attempting through the reforms to mitigate the disincentives that result from the ‘too big to fail’-policy. Through capital requirements and resolution planning, European banking crisis legislation has tried to replace this previous predicament, which led to a massive use of public money to rescue ailing credit institutions, with the mantra of ‘*too safe to fail*’.¹⁰ However, banking crises cannot be completely avoided.

This is why a trend towards resolution rather than insolvency has been gaining ground worldwide since the financial crisis of 2007–08.

On behalf of the G20 Heads of State and Government, the Financial Stability Board (FSB) developed the so-called Key Attributes of Effective Resolution Regimes for Financial Institutions (Key Attributes). Based on these key attributes, the BRRD was created at European level on 2 July 2014, which was implemented in Germany in the form of the SAG.¹¹ The main new regulations brought about by the SAG include the participation of shareholders and creditors in the losses of an institution and in the costs of resolution. In addition, the SAG has expanded the obligation to prepare a restructuring plan. Also new are rules on early intervention by supervisory authorities, intra-group financial support and cross-border cooperation between national supervisory and resolution authorities. Compared to other economic sectors, the banking industry is thus characterized by extensive possibilities of administrative coercive measures.¹²

The resolution of a systemically important financial institution (Significant Institute) within the European Union is carried out by the single resolution board (SRM), whose legal basis is the SRM Regulation.¹³ The already existing BaFin handles all other proceedings as the national resolution authority within the meaning of the SAG, § 3(1) SAG.

III. Insolvency

In addition to liquidation, there is also the possibility in Germany of conducting insolvency proceedings for a bank, provided there is no threat of

10 See Huertas, *passim*.

11 Sanierungs- und Abwicklungsgesetz, enacted 10/12/2014, BGBl. I 2091.

12 See §§ 45 et seq. KWG and §§ 89 et seq. SAG.

13 Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010, Journal of the European Union L 225/1.

disadvantages compared to resolution. In the event of the insolvency of a bank, the InsO generally applies. However, the InsO is partially modified by §§ 46b et seq. KWG. On the other hand, the InsO also contains special provisions, for example on the treatment of certain financial products (cf. § 104 InsO).

In particular, the application for the opening of insolvency proceedings against the assets of a bank is regulated differently from general insolvency proceedings by § 46b of the KWG. In other common insolvencies, according to § 13 (1) sentence 2 InsO, creditors and debtors are entitled to file an application for the opening of insolvency proceedings.

This is not applicable to credit institutions. § 46b (1) sentence 4 KWG creates a statutory application monopoly for credit institutions by the BaFin. This sole right of application ensures the priority of the special state supervision to which this sector of the economy is subject. Only in the case of imminent insolvency does an effective insolvency application additionally require the consent of the institution concerned, § 46b (1) sentence 5 KWG, whereas this consent is not required if insolvency or overindebtedness has occurred. Applications to open insolvency proceedings by the debtor or by creditors are therefore inadmissible within the scope of application of § 46b (1) KWG. In addition, § 46c of the KWG, in deviation from the standard insolvency proceedings, sets out special deadlines for contesting insolvency and blocking enforcement pursuant to § 88 and §§ 129 et seq. InsO.

Furthermore, § 104 InsO provides for extensive special rules for banking transactions in the form of fixed transactions, financial services or contractual liquidation netting in deviation from § 103 InsO. In principle, § 103 InsO grants the insolvency administrator a right of choice regarding the fulfilment or termination of contract.¹⁴ If fulfilment of the contract appears to be advantageous for the insolvency estate, fulfilment of the contract will therefore regularly be demanded. In contrast, § 104 InsO orders the termination of contracts by law for goods that have a market or exchange price as well as for financial futures and other financial instruments.¹⁵ The aim of the provision is to avoid uncertainties for the contracting parties

14 BGH, 20.12.1988 – IX ZR 50/88, ZIP 1986, 171; Wegener, in: Uhlenbruck, InsO § 103 mn 2.

15 Andres, in Andres/Leithaus, InsO, § 104 mn. 1; Ringstmeier, in Schmidt, InsO § 104 mn 24.

and incalculable speculation by the insolvency administrator in the event of market fluctuations.¹⁶

The state of uncertainty caused by the insolvency administrator's right of choice under § 103 of the InsO would increase counterparty risk, which would indirectly lead to a threat to financial market stability due to the enormous volume of the potentially affected transactions.¹⁷

Apart from these special rules, however, regular insolvency proceedings are carried out as a basic procedure.

IV. Non-applicable legal frameworks

There are other restructuring and resolution procedures in Germany, but they do not (or no longer) apply to banks.

Until 28.12.2020, credit institutions also had the option of restructuring under the KredReorgG.¹⁸ This law had been created by the German legislator on its own as a reaction to the financial crisis. However, during its period of application, not a single case of usage has become known.

The German Act on the Stabilization and Restructuring of Enterprises (*Unternehmensstabilisierungs- und -restrukturierungsgesetz – StaRUG*) does not apply to companies in the financial sector within the meaning of § 1 (19) of the KWG. The financial sector within the meaning of this provision consists of two sectors. On the one hand, the insurance industry and, on the other, the banking and securities services industry, which is why the credit institutions discussed in this paper are not covered by the personal scope of application of the StaRUG.

The recently published proposal for a directive to harmonize certain aspects of insolvency law¹⁹ also does not apply to credit institutions as defined in Article 4(4)(1) of Regulation (EU) No 575/2013 according to Article 1(2)(b) of the proposal for a directive.

16 Balthasar, in Nerlich/Römermann, InsO § 104 mn. 6, Andres, in Andres/Leithaus, InsO § 104 mn. 1.

17 Knof, in Uhlenbruck, InsO § 104 mn. 5, 7.

18 Gesetz zur Reorganisation von Kreditinstituten – Kreditinstitute-Reorganisationsgesetz, enacted 09.12.2010, BGBl. I 1900, repealed with effect on 29.12.2020.

19 Proposal for a directive of the European Parliament and of the Council harmonising certain aspects of insolvency law, Procedure 2022/0408/COD.

C. Recognition and Cooperation

In accordance with the types of proceedings mentioned above, a distinction must be made between resolution proceedings and insolvency proceedings with regard to recognition and enforcement in international cases. The details are as follows:

I. Resolution proceedings

Within the EU, the recognition of resolution measures is governed by Art. 87–92 BRRD. Art. 87 BRRD lays down general principles for decision-making regarding the resolution measures of individual resolution authorities. Central to this is the consideration of the interests of the other Member States by the respective resolution authority, Art. 87(e)–(h) BRRD. This is particularly important as the measures of the resolution authority under Article 66(1) BRRD also have an effect on assets, shares or liabilities in other Member States, which the German legislator has implemented in § 153(1) SAG.

Further special aspects must be taken into account in the resolution of a banking group. In this case, the respective regulatory authorities establish a joint resolution authority that ensures cooperation and coordination with resolution authorities in third countries, Art. 88(1) BRRD. If, due to equivalent branches or subsidiaries in several Member States, no resolution authority should be solely responsible for group resolution, so-called European resolution colleges can also be created on the basis of Art. 89 BRRD. In Germany, these requirements were laid down in §§ 46e para. 2, 6 KWG. The recognition of resolution measures thus has the effect that particular proceedings in Germany, be they insolvency or resolution proceedings, are inadmissible if a Member State had already opened proceedings against the bank.

The recognition results in support obligations for the measures of the authorities of the home member state, § 46d (5) sentence 1 KWG. This is because the responsibility of the home Member State for enacting the reorganisation measure does not change the fact that the legal power for enforcement in the individual States remains with the respective authorities. The support includes, for example, the provision of information but also compulsory enforcement by way of administrative enforcement.

For resolutions where the SRB replaces the national authority, cooperation is governed by the SRM Regulation. Art. 33 SRM Regulation applies

to the recognition of settlement measures from third countries, unless an international agreement with the third country pursuant to Art. 93 BRRD regulates the aspect concerned. The criteria for recognition are set out in Art. 33 (2), (3) SRM Regulation as follows:

- (2) The Board shall assess and issue a recommendation addressed to the national resolution authorities on the recognition and enforcement of resolution proceedings conducted by third-country resolution authorities in relation to a third- country institution or a third-country parent undertaking that has:
 - (a) one or more Union subsidiaries established in one or more participating Member States; or
 - (b) assets, rights or liabilities located in one or more participating Member States or governed by the law of participating Member States.

The Board shall conduct its assessment, after consulting the national resolution authorities and, where a European resolution college is established pursuant to Article 89 of Directive 2014/59/EU, with the resolution authorities of non-participating Member States.

The assessment shall give due consideration to the interests of each individual participating Member State where a third- country institution or parent undertaking operates, and in particular to the potential impact of the recognition and enforcement of the third-country resolution proceedings on the other parts of the group and the financial stability in those Member States.

- (3) The Board shall recommend to refuse the recognition or enforcement of the resolution proceedings referred to in paragraph 1, if it considers that:
 1. (a) the third-country resolution proceedings would have an adverse effect on financial stability in a participating Member State;
 2. (b) creditors, including in particular depositors located or payable in a participating Member State, would not receive the same treatment as third-country creditors and depositors with similar legal rights under the third-country home resolution proceedings;
 3. (c) recognition or enforcement of the third-country resolution proceedings would have material fiscal implications for the participating Member State; or

4. (d) the effects of such recognition or enforcement would be contrary to the national law of the participating Member State.

Based on Art. 93 BRRD, cooperation agreements were concluded with 17 third-country authorities as of 26 March 2023.²⁰

In addition, the SRB can also ensure a uniform approach of the Member States outside of the original supervisory responsibility, provided that the resolution action of a third state has a link to several member states.²¹ In this case, the SRB also represents the SRM participating member states in principle in dealings with non-participating member states, Art. 32(1) SRM Regulation.

The write-down or conversion of liabilities (bail-in) is of particular importance in the recognition process. If these liabilities are subject to the law of a third country, the liabilities can only be included in the eligible liabilities of the bank if the recognition of a resolution procedure in the third country is secured, see Art. 12(17) SRM Regulation.

Central counterparties (CCP) that are systemically important in more than one jurisdiction (so called SI>1 CCPs) are subject to special rules. Authorities have established crisis management groups (CMGs) for all 13 CCPs that are systemically important in more than one jurisdiction.²² The Plan of the G20 States to implement institution-specific arrangements for information sharing and cross-border cooperation has been fulfilled for the majority of SI>1 CCPs.²³

Other third-country resolution measures can be recognized and enforced by participants in the European Banking Union on the basis of Art. 94 BRRD, which was implemented in Germany in the form of § 169 SAG. However, Art. 95 BRRD clarifies that member states are entitled to refuse to recognize third-country resolution, in particular if there is a threat of negative effects on the financial stability of the member state or if the cred-

20 States of origin are in chronological order: Canada, USA, Brazil, Serbia, Mexico, Albania, Japan, United Kingdom, Switzerland, Bosnia and Herzegovina, South Korea, Montenegro, Australia, Argentina, New Zealand, see Single Resolution Board, 'Cooperation', <<https://www.srb.europa.eu/en/content/cooperation>> (last accessed 31.03.2023).

21 Recital 92, Regulation (EU) No. 806/2014, L 225/17.

22 Financial Stability Board, 2022 Resolution Report, Completing the agenda and sustaining progress, 08.12.2022, p. 1.

23 Financial Stability Board, 2022 Resolution Report, Completing the agenda and sustaining progress, 08.12.2022, p. 1.

itors of the member state are placed in a worse position in the third-country resolution than creditors with a comparable position.

In addition, Art. 94(6) BRRD, which has been implemented in Germany in the form of § 169(7) SAG, clarifies that general insolvency law remains unaffected despite recognition of the foreign resolution proceedings.

II. Insolvency Proceedings

Bank insolvencies within the EU are not covered by the scope of application of the general rules of the EU Insolvency Regulation (EIR²⁴). Banks are expressly excluded from the scope, Art. 1 (2) b) EIR. The recognition of insolvency proceedings over the assets of a bank from a third country is therefore generally governed in Germany by §§ 335 et seq. InsO. Since credit institutions are excluded from the scope of application of the EIR pursuant to Art. 1 (2) EIR, the autonomous insolvency law of §§ 335 et seq. InsO are also applicable even within the geographical area of the European Union.

Therefore, for the cooperation of administrators and courts, in particular Art. 56 et seq. EIR do not apply, even if at least one proceeding concerning the assets of a debtor of the group of companies is conducted in another Member State.²⁵ However, in autonomous German international insolvency law, § 357 of the German Insolvency Code (InsO) regulates cooperation between insolvency administrators in situations outside the scope of application of the European Insolvency Regulation. Thus, insofar as the scope of application of the EU Insolvency Regulation is not opened, § 357 InsO applies as part of the autonomous insolvency law.²⁶

However, § 46e KWG contains a special provision for insolvency proceedings of a credit institution within the European Economic Area (EEA). In contrast to §§ 354 et seq. InsO or §§ 34–52 EIR, the opening of secondary insolvency proceedings is barred, § 46e (2) InsO. According to § 46e (2) KWG, the authorities and courts of the home member state are solely responsible for opening insolvency proceedings regarding the assets

24 Regulation (EU) 2015/848 of the European Parliament and the Council of 20 May 2015 on insolvency proceedings, L 141/19.

25 Spliedt, in Schmidt, InsO §§ 269a et seq. mn. 6.

26 BGH, 03/02/2011 – V ZB 54/10, NZI 2011, 420, 421 pt. 11; Reinhart, in Stürner/Eidenmüller/Schoppmeyer InsO § 335 mn. 5.

of a credit institution. In particular, the foreign proceedings are recognized without regard to the requirements of § 343 (1) InsO, see § 46e (1) sentence 2 KWG. In particular, the jurisdictional competence of the foreign court is not reviewed and the effects of the proceedings are not assessed for its recognisability on the basis of German *ordre public* under § 343 InsO. Accordingly, § 46e (1) sentence 2 KWG states that not only the opening of proceedings, but the organization of the entire proceedings – including the distribution of the insolvency estate – falls under the jurisdiction of the home state.²⁷

In addition, § 340 InsO contains a special provision for banks insofar as they are – as is regularly the case – participants in an organized market. According to this section the settlement of the pending contractual relationships is not governed by the *lex fori concursus*, in deviation from § 335, but by the law to which the respective market is subject, § 340(1) InsO. This makes the applicable insolvency law predictable for market participants. This exception is extended by § 340(2) InsO to the insolvency of a contracting party in repurchase agreements and debt conversion agreements and by § 340(3) InsO to payment and securities settlement systems. For such systems of the interbank market, the general § 335 InsO is superseded by a link to the *lex causae* in order to protect legal certainty for the participants of the system in the insolvency of a system participant. § 340 InsO is intended to minimize the insolvency-related disruption of complex financial systems that could result from the collision of different legal systems.²⁸ § 340 InsO is thus an all-round conflict rule for domestic as well as for foreign insolvency proceedings.²⁹ The choice of the governing contract law by the participants in the system can also determine the law applicable in insolvency by referring to the property law of the other state under § 340 InsO.³⁰

The content of the German provision § 340(3) InsO corresponds to Art. 12 EIR despite the deviations in the wording.³¹ However, Art. 12 EIR does not apply to credit institutions in view of the exclusion in Art. 1(2) EIR. Art. 12 EIR thus has a limited scope of application in practice for

27 Lindemann, in Fischer/Schulte-Mattler, KWG § 46e mn. 14.

28 Fried, in Stürner/Eidenmüller/Schoppmeyer InsO § 340 mn 2.

29 Fried, in Stürner/Eidenmüller/Schoppmeyer InsO § 340 mn 2; Lüer/Knof, in Uhlenbruck, InsO § 340 mn pt 1.

30 Fried, in Stürner/Eidenmüller/Schoppmeyer InsO § 340 mn 2.

31 Lüer/Knof, in Uhlenbruck, InsO § 340 mn 1.

those companies that are not credit institutions or investment firms but are nevertheless members of clearing houses, for example in the context of direct access/sponsored membership models, on the basis of which direct access to clearing houses can be granted to non-regulated companies.³²

III. Recognition of Bank Insolvencies in the U.S.

Due to the close economic relations with the United States of America, the question arises as to what possibilities exist for the recognition of German insolvency proceedings over the assets of a bank in the USA. The United States have taken a different path to resolve bank insolvency by prohibiting these entities to enter bankruptcy proceedings.³³ This does not include the holding companies, which can still file for bankruptcy.³⁴ Banks in America are resolved in a receivership-proceeding under control of the FDIC with almost no judicial review.³⁵ For the recognition of foreign insolvency proceedings, the U.S. has opted for a procedure based on the UNCITRAL Model Law on Cross Border Insolvency with Chapter 15.³⁶

At first glance, this seems contradictory, because the UNCITRAL Model Law on Cross Border Insolvency excludes banks from the scope of application, cf. Art. 1(2) UNCITRAL Model Law. However, this only applies to the extent that banks are subject to special insolvency regimes. Bank insolvencies can also be recognized via Chapter 15. This solution is surprising at first glance, as banks are generally denied access to the Bankruptcy Code, 11 U.S.C. § 109(b). However, this exclusion only applies to banks 'doing business in the United States'.

This provision dates back to the case of *Israel British Bank (London) Ltd. v. Federal Deposit Ins. Corporation*.³⁷ In this case, it had been stated regarding the recognition, 'that the exclusion of banking corporations from US Bankruptcy Act did not apply to foreign banks not doing business in the United States.' This case law was codified in the now repealed 11 U.S.C.

32 Fried, in Stürner/Eidenmüller/Schoppmeyer EUInsVO, Art. 12 mn 5.

33 Hynes Wash. & Lee L. Rev. 2010, 985 (1993).

34 Hynes Wash. & Lee L. Rev. 2010, 985 (1993); a well-known example is *Washington Mutual, Inc.*

35 Hynes Wash. & Lee L. Rev. 2010, 985 (1993).

36 Chapter 15 replaced § 304 U.S.-Bankruptcy Code. An overview of this is provided by Grauke/Fail/Hwangpo, in: Stürner/Eidenmüller/Schoppmeyer InsO vol. 4, Länderbericht USA mn 71 et seq.

37 586 F.2d 509, 512–15 (2d Cir. 1976) denied 429 U.S. 978 (1976).

§ 303(k). Now this follows from the reference in 11 U.S.C. § 1501(c)(1) to 11 U.S.C. § 109(b)(3)(B), which denies foreign banks access to the Bankruptcy Code if they have a branch or agency (as defined in § 1(b) of the International Banking Act of 1978) in the United States.

An example in this respect is the recognition of the resolution of the Irish Bank Resolution Corporation Ltd -successor entity to the Anglo-Irish bank Resolution Corporation (IBRC)- based on the Irish Bank Resolution Corporation Act 2013 as a foreign procedure under Chapter 15 of the U.S. Bankruptcy Act. On December 18, 2013, the Delaware District Court overruled the Creditors' appeal against the recognition and granted recognition of the foreign main proceedings.³⁸

IV. UNCITRAL Model Laws

The UNCITRAL Model Law on Cross-Border Insolvency (1997) proposes to exclude banks from the scope of application of the relevant implementing legislation insofar as they are subject to special procedures, see Art. 1 (2) of the Model Law.³⁹ However, a backward exception is formed regarding recognition.

Remark No. 58 states the following: 'It is not advisable to exclude all cases of insolvency of the entities mentioned in paragraph 2. In particular, the enacting State might wish to treat, for recognition purposes, a foreign insolvency proceeding relating to a bank or an insurance company as an ordinary insolvency proceeding if the insolvency of the branch or of the assets of the foreign entity in the enacting State do not fall under the national regulatory scheme. The enacting State might also wish not to exclude the possibility of recognition of a foreign proceeding involving one of those entities if the law of the State of origin does not make that proceeding subject to special regulation.'

In addition, Remark No. 59 emphasizes that the features of the Model Law concerning cooperation and coordination should be applied, even if access to the procedure should be denied for certain types of debtors.

38 Bankr. Case No. 13–12159-CSS; affirmed: In re: Irish Bank Resolution Corp., District Court for the District of Delaware, Bankr. Case No. 13–12159-CSS (D. Del. Sep. 27, 2019).

39 Art. 1 (2): 'This Law does not apply to a proceeding concerning [...] banks [...], that are subject to a special insolvency regime in this State and that this State wishes to exclude from this Law'.

In other words, the recommendation to exclude banks from the scope of application is directed at the domestic institutions of the respective State and does not make any statement about the recognition of proceedings concerning foreign banks.

The 2018 Model Law on Cross Border Recognition, on the other hand, takes a somewhat different approach with Article 1, paragraph 2, which provides for the possibility of excluding banks from the scope of recognition. The reasons for this provision are cited as 'public policy considerations or where other specifically designated legal regimes are applicable'.⁴⁰

V. Summary on recognition

The assessment shows that there are significant differences in terms of recognition and cooperation.

§§ 153 et seq. SAG or § 46e KWG show that in the European context there is a recognition and extension of effect of resolution and insolvency proceedings that even goes beyond the recognition of general restructuring and liquidation proceedings under the EIR. There is no possibility for credit institutions to conduct particular or secondary proceedings, as the home member state has sole jurisdiction, cf. § 46e (2) KWG. There is EEA-wide insolvency jurisdiction of the home Member State, since the unity that the credit institution and its branches form is to be maintained even in the case of reorganization or liquidation.⁴¹

There are also far-reaching recognition possibilities for third-country matters specifically for credit institutions in the law of the European Union and Germany:

On the one hand, there is the possibility to negotiate agreements with third countries on the recognition of settlements. The legal basis for this practice is Art. 93 BRRD, which was implemented in § 167 et seq. of the SAG. However, even without a corresponding agreement, resolution measures from third countries can be recognized and, if necessary, enforced under the conditions of § 169 SAG.

Insolvency proceedings of third countries, on the other hand, can be recognized in Germany by means of the autonomous international insolvency law of §§ 335–358 InsO.

40 UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments (2018, Guide to Enactment, p. 28.

41 Becker in Reischauer/Kleinhans, KWG § 46e mn 1.

D. Reform proposals regarding recognition

Recent cases again highlight the need for stronger international coordination in bank resolution. The orderly resolution of Credit Suisse demonstrated how rapidly measures such as the write-down of AT1 instruments and the facilitated takeover by another global bank can affect multiple legal systems.⁴² It also revealed reliance on exceptional domestic powers and ad hoc international acceptance to ensure financial and legal stability.

A similar pattern can be observed in the collapse of the Silicon Valley Bank, where the failure of the US parent company triggered coordinated yet different responses in other countries. In particular, the resolution of its UK subsidiary required swift intervention by national authorities, without a unified framework for crossborder recognition.⁴³

Both cases illustrate that the effectiveness of resolution measures depends heavily on prompt cooperation and mutual recognition between authorities, while the current framework remains fragmented and provides limited legal certainty.⁴⁴

Functionally, bank resolution and insolvency pursue closely related objectives, namely the orderly management of failing institutions and the mitigation of systemic risk. Resolution tools, especially bail-in mechanisms, further underline this proximity. At the same time, parallel resolution and insolvency processes within banking groups can create coordination challenges and legal uncertainty.

Against this background, embedding the recognition of resolution outcomes within the existing insolvency recognition framework appears appropriate. Recognition should remain conditional, guided by financial stability, equal treatment of stakeholders, and relevant public interest, with existing European frameworks offering a useful reference point.

Taking into account the above findings, we therefore propose the implementation of resolution procedures in the UNCITRAL Model Law on Recognition and Enforcement. The aim of this proposal is to enable uniform recognition of insolvency and resolution proceedings, provided that

42 See Swiss Financial Market Supervisory Authority (FINMA), 'Resolution of Credit Swiss Group AG', <<https://www.finma.ch/en/news/2023/03/20230319-mm-cs/>> (last accessed 20.05.2026)

43 See Financial Stability Board, 'Key Attributes of Effective Resolution Regimes for Financial Institutions', <<https://www.fsb.org/work-of-the-fsb/financial-institutions/resolution/>> (last accessed 20.05.2026)

44 UNCITRAL Model Law on Cross-Border Insolvency (1997), FSB

the security of the financial stability of the recognizing state is granted as a condition for recognition.

This proposal is based on the following considerations:

The global trend towards the resolution of distressed credit institutions is unstoppable. Bank resolution – and its international recognition and enforcement – is predominantly left to special regimes. The trend towards resolution of banks outside of insolvency proceedings causes challenges, as the traditional rules for the recognition of insolvency proceedings generally do not apply.

General international civil law does not provide any support in this respect either. Decisions on insolvency proceedings are usually excluded from the Hague Convention, as these matters are deemed too specialized.⁴⁵ Furthermore, Article 2, subparagraph 1 (e), of the 2018 Hague draft Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters provides for the additional exclusion of 'resolution of financial institutions'.

The 2018 Model Law on Cross Border Recognition of Insolvency-Related Judgments also provides for the option of excluding banks from the scope of recognition in the form of Article 1, paragraph 2. The motives behind this option are 'public policy considerations or where other specifically designated legal regimes are applicable'.⁴⁶

The approach of excluding the recognition of the 'resolution of financial institutions' from the scope of application may be convincing in the context of the Hague Convention. However, a comparable exemption is not convincing within the framework of the UNCITRAL Model Law. This is because the decision to exclude banks from the scope of application is difficult to understand in view of the strong global networking within this sector as long as there is no adequate alternative recognition option. The Financial Stability Board (FSB) has a clear focus on (globally) systemically important banks. However, even for the 13 globally systemically important banks, it has not yet been possible to reach corresponding agreements.

Moreover, despite the enormous economic importance of these big players, it should not be forgotten that the vast majority of banking crises affect

45 UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments (2018), Guide to Enactment, p. 12.

46 UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments (2018), Guide to Enactment, p. 28.

small and medium-sized banks. These too are usually strongly networked internationally.⁴⁷

Fundamentally, bank resolution is ideally characterized by an economic approach. The institution is to be stabilized or broken up in order to avoid contagion risks for the entire financial market. With the help of the resolution instruments, especially bail-in, an attempt is made to involve the relevant stakeholders in the costs of resolution, as in a hypothetical insolvency, cf. § 97 SAG. In this way, a resolution is not dissimilar to an insolvency. Thus, this article argues for the recognition and, if necessary, enforcement of bank resolution to be included in the regulatory recommendations within the framework of the Model Law on the Recognition and Enforcement of Insolvency-Related Judgements due to the comparable interests involved, to enable recognition in states whose legal systems do not recognize bank resolution.

And in addition, the assessments of the respective supervisory authorities on systemic relevance, capital requirements and possible options for action by the supervisory authorities can differ greatly from the assessments of the national regulators in foreign jurisdictions. It can therefore happen that a resolution procedure is carried out in one country, but an insolvency procedure over a subsidiary or branch is carried out in another country. In order not to face follow-up problems in these cases regarding the recognition and coordination of resolution and restructuring proceedings, the recognition of resolution proceedings should therefore take place within the same legal framework as the recognition of insolvency proceedings.

However, recognition should not be inevitable. It is important that the measures do not jeopardize the financial stability of the recognizing state and that the extraterritorial procedure does not put creditors from the recognizing state at a disadvantage compared to other creditors. The criteria for recognition should in particular consider financial stability, equal treatment of stakeholders and other fiscal interests of the recognizing state. In this respect, Art. 94 BRRD and § 169 SAG could serve as a model. This would shorten the lengthy process of creating a new legal framework for

47 A more recent example is the collapse of Silicon Valley Bank, which radiated to Germany through its branch, although its business was geared towards the American tech scene.

the recognition of resolutions, but rather adapt the existing rules on the recognition of insolvencies.⁴⁸

E. Conclusion

The financial crisis and the subsequent collapses of individual banks up to the present day have highlighted two aspects in particular with regard to the internationally strongly interconnected financial industry. Firstly, the importance of cooperation in the event of cross-border insolvency and, secondly, the importance of ensuring that agreed resolution measures are also implemented.

A particular difficulty arises in the area of banking crises from the fact that they occur infrequently. This means that there is no opportunity to comprehensively test laws and regulations geared to this crisis. In this respect, the insolvencies of individual, smaller institutions, credit institutions are only suitable as a testing ground to a limited extent, since each crisis differs in its causes and effects. A blanket statement about crises, especially those of a bank, is out of the question. The famous introductory sentence from Anna Karenina still applies: 'Happy families are all alike; every unhappy family is unhappy in its own way'.

Without a sufficiently large number, an empirical statement about the decisive factors of the crisis of a credit institution is not possible apart from anecdotal evidence. But recognition that enables resolutions even across national borders is essential. So, there must be an effective system in place to recognize bank resolution as well.

In the international context, the recognition of bank resolution and insolvency proceedings is subject to a conflict between the preservation of synergies and the individual interests of states. On the one hand, the strong international networking of credit institutions requires a coordinated approach to avoid contagion risks. On the other hand, the recognizing states resist far-reaching coordination, since even the crisis of a medium-sized bank regularly leads to considerable economic distortions and the states regularly oppose extensive recognition because of their own monetary and market policy interests. It is therefore important not to limit the recognition of resolution measures to individual agreements between resolution author-

48 The 2022 FSB Resolution Report, p. 17, No 3.4, shows that despite intensive efforts, the finalization of agreements is currently still ongoing.

ities, but to include it in general international insolvency law in line with the above proposal.

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Domestic insolvency proceedings and non-EU countries – general report

Alexander Trunk

Abstract:

The contribution gives a comparative overview over the rules of the EIR, the UNCITRAL Model Laws, some other international treaties and national legislation, in particular of EU Member States, with regard to domestic main and non-main insolvency proceedings. It also develops some recommendations.

Keywords: Domestic insolvency proceedings; MLCBI; EIR; national laws; basic concepts; universality, extraterritorial reach, territoriality, jurisdiction, conflict of laws, substantive law.

The purpose of this general report is to give an overview of rules under the European Insolvency Regulation (Recast) of 2015 in their application to non-EU countries (third countries)¹ from the perspective of insolvency proceedings opened in the EU and to present some ideas how such rules might be further developed in the future. The general report includes also some comparative notes on national approaches, trying to find out whether they provide solutions which might inspire future EU provisions as to relations with non-EU countries.

Although the text of the EU Insolvency Regulation (EIR) does not distinguish between ‘domestic’ and ‘foreign’ insolvency proceedings², this distinction is generally made in insolvency practice. Insolvency proceedings opened in one EU-country are perceived in this country as ‘domestic’,

1 The term ‘EU countries’ refers throughout the whole book to countries bound by the EIR, i.e. excluding Denmark.

2 This differs from the UNCITRAL Model Laws on Insolvency, cf. Preamble (b) of the 1997 Model Law on Cross-Border Insolvency: ‘this State’ = domestic v. ‘foreign’ (proceeding etc.), <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/1997-model-law-insol-2013-guide-enactment-e.pdf> (accessed 16.06.2025).

while insolvency proceedings opened in another EU country or outside the EU are perceived as ‘foreign’. The fact that the EU Insolvency Regulation contains a chapter entitled ‘general provisions’ means that these provisions apply both to domestic and foreign proceedings as well as to situations of parallel proceedings. Some of these provisions are of a general nature³, while others are very specific, even though they are placed under the heading of general provisions⁴.

The EIR contains rules on direct jurisdiction, conflict of laws, recognition of foreign proceedings and on coordination of parallel proceedings including the corporate group context. It also includes a number of substantive (procedural or material) rules applying in different procedural contexts (domestic proceedings, foreign proceedings, parallel proceedings).

This report does not, in principle, deal with recognition of foreign proceedings and concurrent (parallel) proceedings as these topics are the subject of other contributions of the book⁵. However, such issues may be touched upon briefly in some contexts. The report will deal with domestic proceedings in general, including both main (COMI-based) and non-main proceedings.

The report will mainly focus on direct jurisdiction and conflict of laws from the perspective of a domestic insolvency proceeding, but will also address some issues of substantive law treated in the Regulation.

As far as relations with non-EU countries are concerned, the EIR contains numerous rules whose application is limited to inner-EU cases. As to domestic proceedings, many of the conflict of laws rules of the EIR refer only to the law of other EU countries or require certain circumstances (e.g. acts or location of property) to be present within the EU. Also, the substantive rules of the EIR tend to refer only to property situated in other EU Member States⁶ or creditors resident in the EU⁷. In so far as the EIR is not applicable, the cross-border insolvency law of the EU’s Member States is governed by autonomous law or (rarely) international treaties⁸. In this

3 Art.1 EIR (scope) and Art.2 EIR (definitions).

4 See e.Art. 3 – 6 EIR (jurisdiction) and Art.7 – 18 EIR (applicable law and certain substantive provisions).

5 See → Trunk (Concurrent proceedings) and → Trunk/Silvestri (Recognition).

6 See Art.8 EIR (rights in rem), Art.10 EIR (retention of title) and Art.23 EIR (duty to return payments).

7 See Art.1 (11) and (12) EIR, ‘local’ and ‘foreign’ creditors.

8 E.g. the Nordic Bankruptcy Treaty (1933), the French-Monaco Bankruptcy Treaty (1950) and – in so far as the EIR does not apply – the Austrian-German Bankruptcy

respect, some EU countries⁹ have adopted the UNCITRAL Model Law on Cross-Border Insolvency (MCBI) of 1997¹⁰, while others have developed models aligned to the EIR¹¹ or use independent, but rather piecemeal approaches¹²

The report begins with a short overview of the EIR's rules applicable to cross-border cases with a link to non-EU countries. Thereafter follows an overview of national approaches to cross-border insolvency law outside the EIR, focusing on aspects which might be of use for developing future EU rules.

The second part develops the analysis of the the present state of law in more detail.

Throughout the report, national approaches will be referred to if they seem to be of interest for a future unified EU approach. The report will also take into account the model laws of UNCITRAL relating to insolvency for comparative purposes. The basic Model Law of 1997 (MLCBI) and the Model Law on Enterprise Group Insolvency (MLEGI) of 2019 are mainly concerned with the recognition of foreign insolvency proceedings and cooperation of parallel proceedings, which are outside the scope of this report. Recognition of foreign insolvency-related judgments (Model Law of 2018, MLIJ) is treated in a separate contribution in this book. However,

Treaty (1985). The Council of Europe's Istanbul Bankruptcy Convention of 1990 has not entered into force, but will be taken into account in this report at some places for comparison.

- 9 Greece, Poland, Slovenia and Romania, cf. Alexander Trunk, FS Smid (2022), pp.453 – 466.
- 10 MLCBI 1997. The other model laws developed by UNCITRAL in matters of cross-border insolvency (MLIJ and MLEGI) have not yet been adopted by EU Member States.
- 11 See, e.g. sec.217 – 262 Austrian Insolvency Code. Art.116 – 119 Belgian Code of Private International Law and Art.XX-210 – 223 Belgian Code of Business Law, Arts. 392 – 399 Croatian Bankruptcy Act, (with significant particularities), sec. 335 – 358 German Insolvency Code (Insolvenzordnung, InsO), Art. 7, 275 – 287. 294 – 297 Portuguese Insolvency Code, Art.45 – 56 and Art.721- 741 of the Spanish Insolvency Act.
- 12 Cf. Art. 2, 20 and 203 – 205 Dutch Bankruptcy Act, sec. 67 and 70 Hungarian Private International Law Act. Sec. 1793 – 175 Slovakian Bankruptcy and Restructuring Act.

the current UNCITRAL draft Model Law on applicable law in insolvency proceedings¹³ will be addressed in more detail in this report¹⁴.

The third part of this report develops some ideas for discussion on future legislative action.

A. Overview of the present state of the law

I. The EIR in its relation to non-EU countries

As is clear from the wording of Art.19 (1) EIR, the Regulation does not deal with recognition of non-EU insolvencies. It also does not address cooperation between concurrent/parallel insolvency proceedings in the EU and in third countries (cf. Art.34 EIR, which refers to proceedings in EU countries only). However, the distinction between ‘EU’ and ‘non-EU’ contacts can play a role also in domestic insolvency proceedings, both for direct jurisdiction, for conflict of laws and on a substantive level.

As to jurisdiction, the main jurisdictional criterion of COMI (Art.3 (1) EIR) is determined on an analysis of the debtor’s activities and property worldwide, not merely on circumstances located in the EU. On the other hand, the alternative jurisdiction criterion of establishment (Art.3 (2) EIR) is limited to cases of establishment within the EU. If COMI is located outside the EU, the EIR is not applicable.

As to conflict of laws, the basic conflicts rule of the *lex fori concursus* (Art.7 EIR) can lead only to the law of EU Member States, whose direct jurisdiction is established under Art.3 EIR. Also, most special conflicts rules refer only to the law of other EU Member States (Art.11 – 16 EIR), exceptions, however, being Art. 9 EIR (set-off) and Art.17 (EIR (protection of third-party purchasers). This leads to the question whether Art.11 – 16 EIR should be applied *de lege lata* or *ferenda* to relations with non-EU countries.

13 Most recently, see the draft discussed at the session of WG V of UNCITRAL at its session in New York on 13-17 April 2026, <https://docs.un.org/en/A/CN.9/WG.V/WP.207>.

14 The recent UNCITRAL Toolkit and Background Notes on Asset Tracing and Recovery in Insolvency Proceedings (2025), <https://uncitral.un.org/sites/default/files/media-documents/EN/Texts/UNCITRAL/2513250e-uncitralbackgroundnotesatr-ebook-accessible.pdf>, are conceived both for domestic insolvency proceedings and in the context of recognition of foreign proceedings. Due to their very specific content and their function only as a toolkit they will not be addressed in detail in this paper.

As to substantive rules (both of a procedural or material character), the EIR's provisions are often, though not generally, limited to circumstances in the EU. The main examples are Art.8 and 10 EIR (third party rights in rem and reservations of title: assets located in another EU Member State). The term of foreign creditors, which are granted a particular status under Art.53 – 55 EIR, is limited in Art.2 (12) EIR to creditors resident in the EU. As far as the geographical reach of insolvency proceedings is concerned, Art.3 (1) EIR – COMI-based proceedings – does not mention any territorial limitation, and recitals 22 and 23 state as given that such proceedings have 'universal scope'. This expression refers to the 'universality principle' in cross-border insolvency doctrine, under which insolvency proceedings have a global reach, though if this may need (and not always receive) recognition abroad. In contrast, Art. 3 (2) EIR limits the reach of establishment-based insolvency proceedings to assets situated in the respective forum state.

The Court of Justice of the European Union has decided that the EIR is not limited to cases with links between at least two EU Member States and that it applies also to cases linked with a non-EU country¹⁵. Thus, the jurisdictional rules of the EIR can be used also for lawsuits against defendants domiciled outside the EU

The EIR distinguishes between 'main' and 'non-main' insolvency proceedings¹⁶. The distinction is grounded on the underlying head of (international¹⁷) jurisdiction: main proceedings are based on the 'center of main interests' (COMI) of the debtor in a certain EU Member State¹⁸, non-main proceedings can be based, under the EIR, only on an 'establishment' of

15 ECJ, judgment of 16 Jan. 2014, C-328/12 (Schmid./Hertel), <https://lexetius.com/2014,138> (avoidance action against defendant domiciled in Switzerland) and ECJ, judgment of 4 Dec. 2014, C-295/134, H. v N.K. ([Nortel], <https://curia.europa.eu/juris/document/document.jsf?text=&docid=160307&pageIndex=0&doclang=DE&mode=req&dir=&occ=first&part=1> (corporate director's liability claim in action against defendant domiciled in Switzerland). For difficulties in this respect from the Swiss recognition perspective see → Staehelin/Kleider.

16 See Art.3 (1) EIR v. Art.3 (2) and Art.34 et seq. EIR ('secondary' proceedings). The EIR does not expressly use the term 'non-main' proceedings, but see Art.2 (c) UNCITRAL MLCBI.

17 In contrast with territorial jurisdiction (venue), subject-matter jurisdiction and other jurisdictional categories.

18 Art.3 (1) EIR.

the debtor in a EU Member State¹⁹. The distinction between main and non-main proceedings is relevant, under the EIR, for basically two reasons:

Firstly, main proceedings have an intended universal (extraterritorial) reach²⁰, while ‘the effects [of non-main proceedings] shall be restricted to the assets of the debtor situated in the territory of the latter Member State’ (Art.3 (2) sentence 2 EIR). Secondly, the EIR gives main proceedings a function of prevalence or guidance in relation to non-main (secondary) proceedings²¹. This prevalence is, however, limited to the relations between proceedings in the EU. The conflict of laws rules of the EIR (Art.7 – 18 EIR) do not distinguish between main and non-main proceedings.

II. The UNCITRAL Model Laws

The existing UNCITRAL Model Laws on cross-border insolvency deal with ‘domestic’ insolvency proceedings only marginally or in very specific contexts. This is true both for the MLCBI, the Model Law on Recognition of Foreign Insolvency-Related Judgments (MLIJ) and the Model Law on Enterprise Group Insolvency (MLEGI). The current work on a Model Law on conflict of laws in insolvency²² will change this picture and have particular relevance for domestic proceedings. The Model Laws do not distinguish between ‘Model Law countries’ and other countries.

Comparing the MLCBI with the EIR in a general manner, the MLCBI also distinguishes between main and non-main proceedings (Art.2 (b) and 2 (c) MLCBI). Similarly to the EIR, jurisdiction for main proceedings is based on the debtor’s COMI²³, jurisdiction for non-main proceedings on an ‘establishment’ of the debtor²⁴. However, the MLCBI defines juri-

19 Art.3 (2) EIR. National legislation often accepts also other heads of jurisdiction, e.g. situation of property, conduct of business activities etc., sometimes providing for court discretion.

20 This is not expressly stated in the EIR, but follows *e contrario* from the express territorial limitation of non-main proceedings under Art.3 (2) as well as from several provisions of the EIR, excluding assets situated ‘in another Member State’ (than the *forum concursus*) from some provisions. There is no indication in the EIR (and would also contradict the functionality of insolvency law), that EU-based main proceeding had an intended territorial limitation to EU countries.

21 See, e.g. Art.34 sentence 2, 36, 37, 46, 47, 49, 51, 52 EIR.

22 Supra note 13.

23 Art.2 (b) MLCBI.

24 Art.2 (c) in conjunction with Art.2 (f) MLCBI.

sisdiction only for recognition or other assistance purposes (indirect jurisdiction), leaving direct jurisdiction to national legislation (with a small limitation in case of secondary proceedings, see Art.28 MLCBI)²⁵.

The MLIJ applies also to recognition of foreign court decisions in the context of domestic insolvency proceedings, setting common standards for recognition in such cases with some inspiration from the EIR. The same is true for the MLEGI, although there are significant differences from the corresponding rules of the EIR. The planned Model Law on conflict of laws in insolvency is significantly inspired by the EIR, but reduces the number of special conflicts rules deviating from the *lex fori concursus*.

III. International treaties and uniform laws

There exist only few international treaties or – apart from the EIR – binding uniform laws dealing with cross-border dimension of ‘domestic’ insolvency proceedings.

An interesting modern example is the OHADA Uniform Insolvency Act (revised version of 2015), which contains – similar to the EIR – one set of rules applicable to cross-border relations between the member states of OHADA, and another set of rules for relations with non-OHADA countries²⁶. The first part (on inner-OHADA cases) combines elements of the MLCBI with inspiration from the EIR, but without conflict of laws rules. The second part is a largely literal adoption of the MLCBI.

Among relevant international treaties, a relatively recent example is the Council of Europe’s European Convention on Certain Aspects of Bankruptcy of 1990 (Istanbul Convention)²⁷, a forerunner of the EIR. This Convention is not without interest for the present study, as it is designed for a broader range of contracting states than EU members and can be a useful tool of comparison in the discussion, how a future EU instrument might be structured and what rules it should contain. The Istanbul Convention applies only to relations between its member states, it does not address cooperation with third countries (see Art.1 (2) of the Convention). Basically the Istanbul Convention is structured into General Provisions, provisions

25 See Guide to Enactment and Interpretation, point 224.

26 For details see → Leno.

27 <https://www.coe.int/en/web/conventions/-/council-of-europe-european-convention-on-certain-international-aspects-of-bankruptcy-ets-no-136-translations> (accessed 05.03.2025). The Convention has not entered into force.

on certain powers of the insolvency representative ('liquidator'), recognition of foreign proceedings and concurrent proceedings. It also contains a particular substantive chapter on information of creditors and lodgement of claims. The Convention distinguishes, like the EIR and the MLCBI, between main and non-main proceedings (COMI and establishment). It basically applies the COMI test (for recognition purposes only, Art.3 (a) in conjunction with Art.4 (1) of the Convention), but sets also uniform rules on direct jurisdiction for non-main insolvencies, preferring the establishment test, but allowing for other heads of jurisdiction under national law (Art.17 of the Convention). Some of its rules apply, similar to the EIR, both to domestic proceedings and to the recognition perspective, and their content is close to the EIR. However, it does not contain a differentiated system of conflict of laws rules.

The French-Monaco Bankruptcy Treaty of 1950²⁸ also applies only to relations between the Contracting States, leaving cooperation with third countries outside (cf. Art.1 and 3 of the Treaty). Like – in principle – the EIR, it deals both with domestic insolvency proceedings and recognition containing uniform rules on direct jurisdiction, basic conflict of laws provisions (mainly, *lex fori concursus*) and some specific substantive rules. In contrast with the EIR, the French-Monaco Treaty is based on the principle of unity of the insolvency proceeding, excluding the opening of concurrent proceedings.

There are also some older treaties relating to insolvency (Montevideo Treaties of 1889/1940, *Código Bustamante* and others²⁹), but they do not reflect modern legislative tendencies and their practical relevance appears limited.

IV. State of autonomous laws

For discussion on whatever future EU regulation with regard to cross-border insolvency cooperation with third countries it is helpful to gain beforehand an oversight of the approaches both on the side of EU countries as

28 Accessible at <https://legimonaco.mc/tai/convention/1950/09-13-taill000728@1953.01.09/>.

29 E.g. Bankruptcy Treaties between some Swiss cantons and some German states dating from the 19th century. The Austrian-German Bankruptcy Treaty of 1985 has been largely superseded by the EIR and will not be scrutinized here more in detail as it does not contain any significant particularities.

to this topic and on the side of various non-EU countries, partners-to-be in future EU cooperation with them in the insolvency field. At this stage of the report, a brief overview will be given. Thereafter, at B., specific issues will be discussed more in detail, taking account of the present approaches in various national legislations.

1. EU countries

Several EU Member States have adopted detailed provisions on international insolvency law outside the scope of the EIR, addressing also domestic insolvencies: Austria, Belgium, Croatia, Germany, Greece, Poland, Portugal, Romania, Slovenia and Spain. The laws of these countries are of particular interest for the discussion on future EU rules on insolvency relations with non-EU countries.

Some of these countries basically use the EIR as a model for cross-border insolvency law also in relations with non-EU countries (Austria, Belgium, Germany, Portugal and Spain). A few EU Member States have adopted the MLCBI for relations with non-EU countries: Greece, Poland, Romania and Slovenia. Poland combines in its relations with non-EU countries the rules of the MLCBI with some provisions derived from the EIR, addressing also domestic proceedings. Romania also addresses domestic proceedings in this context, but very briefly.

The other EU Member States have either not passed any particular legislation on cross-border insolvency proceedings³⁰ or they have passed only sparse rules³¹, e.g. on direct international jurisdiction³². Even EU Member States without specific legislation often have judicial practice in cross-border insolvency matters including domestic proceedings, which may be grounded on general rules of insolvency law and private international law³³, in some cases even international treaties³⁴.

30 Cyprus, Ireland, Latvia, Lithuania, Luxembourg, Malta.

31 Cf. Czechia, France, Netherlands, Portugal, Sweden.

32 Bulgaria, Estonia, Finland, Hungary, Italy.

33 This includes traditional common law rules and concepts such as, e.g., comity. Examples for this are Cyprus, Ireland and Malta.

34 One example is the Nordic Bankruptcy Treaty of 1933/1977 which continues to apply in relations between Finland or Sweden with Denmark, Iceland and Norway.

2. Non-EU countries (third countries)

Outside the EU, a significant number of countries have adopted the MLCBI³⁵, which, however, basically does not address domestic insolvency proceedings. One can observe here a certain distinction between countries of the Civil Law and Common Law legal families³⁶. In particular Civil Law countries tend to complement the MLCBI with further rules, sometimes inspired by the EIR.

A small group of countries of the Civil Law family have adopted specific rules on cross-border insolvency, which often follow to some degree the EIR, but also develop their own approaches. Examples for this are – in alphabetical order – Georgia³⁷, Liechtenstein³⁸, North Macedonia³⁹, Norway⁴⁰, Serbia⁴¹ and Switzerland⁴². In this context, domestic insolvencies are also addressed⁴³.

Other Civil Law countries have adopted the MLCBI with few changes (e.g. Albania⁴⁴, Brazil, Chile, Japan, Kosovo, Mexico, South Africa, South Korea, UAE for the DIFC, Ukraine), but often in combination with at least

35 E.g. Australia, Brazil, Canada, Chile, Colombia, Japan, Kosovo, Saudi Arabia, Singapore, South Africa, South Korea, the UK, Ukraine, the U.S. India is planning to adopt the Model Law.

36 Countries whose legal system cannot be attributed to one of these two groups, usually have specific approaches, but may nevertheless have adopted the MLCBI, e.g. Saudi Arabia.

37 Insolvency Law of 2020, inspired by the EIR.

38 Autonomous approach, see Art.1 and 5 Liechtenstein Insolvency Code.

39 The North Macedonian provisions are largely based on the Croatian model, which itself follows, with some modifications, the EIR.

40 S. 161–177 Norwegian Insolvency Act 1984 as revised in 2016/2021.

41 Insolvency Law of 2009; combination of the MLCBI with elements of the Croatian model.

42 See Daniel Staehelin, *Die internationale Zuständigkeit der Schweiz im Schuldbetreibungs- und Konkursrecht*, AJP/PPA 1995, pp.259 – 284.

43 An exception is Switzerland, which provides for specific rules on recognition of foreign insolvencies, but does not expressly rule on cross-border dimensions of domestic insolvency proceedings.

44 Having moved to the MLCBI-based approach from a former more EIR-based regulation.

some rules on domestic insolvencies (e.g. Albania⁴⁵, Colombia⁴⁶, Japan⁴⁷, South Korea). Such rules usually deal with (international) jurisdiction, but sometimes also guarantee the equal treatment of foreign creditors, state the global reach of domestic proceedings or lay down the basis conflict of laws rule of *lex fori concursus*.

Common Law countries have a tradition of flexibly dealing with cross-border insolvencies. In so far as they have adopted the MLCBI, this usually blends with Common Law traditions such as comity, which apply also to domestic insolvencies. In particular, the UK and the U.S. have both adopted the MLCBI and have developed on the basis of their general insolvency legislation and Common Law principles detailed and pragmatic rules how to handle cross-border insolvencies. Other Common Law countries, in particular Australia, Canada and Singapore, have adopted the MLCBI with specific adaptations and have also a growing practice of domestic insolvencies with cross-border dimensions. This is also true for Hongkong as a Special Administrative Region of China⁴⁸.

Some countries, irrespective of a Civil Law or Common Law background, apply within the framework of insolvency legislation general rules of private international law or cross-border civil procedure⁴⁹.

B. Specific issues

Turning to specific issues, the following aspects appear to be of principal relevance:

- the sphere of application of the EIR (or any other future legal instrument for cross-border cooperation with non-EU countries) as a general precondition also for the commencement of domestic insolvency proceedings in the EU,

45 The provisions of the new Albanian Insolvency Law of 2016, are based on the UNCITRAL Model Law, however, they touch also upon domestic insolvencies, but only marginally. In contrast, the former Insolvency Law of 2002 followed the German model, also with regard to cross-border insolvencies.

46 Art.2, 6 Colombian Insolvency Act.

47 Art.3 – 5 of the Japanese Bankruptcy Act of 2004. The Japanese law on foreign insolvencies follows the MLCBI.

48 See, e.g., Yung, Kai-hong Patrick, Cross-border Insolvency in Hong Kong: Developments and Updates (2022) *International Insolvency Review*, pp. 297–323.

49 This is sometimes expressly stated in legislation, sometimes accepted implicitly.

- the structural distinction between main and non-main proceedings,
- issues of (direct) jurisdiction,
- issues of conflict of laws,
- issues of substantive law in the context of domestic proceedings, in particular the geographical scope of proceedings and the principle of equality of creditors.

I. Sphere of application of EIR: definition of insolvency proceeding + Annex

The subject-matter sphere of application of a legal instrument on cross-border insolvency is, in principle, a general issue relevant both for domestic proceedings and recognition of foreign proceedings or cooperation between concurrent proceedings. Theoretically, the question can be decided differently for each of such constellations, and this is done so in some countries. For example, in the U.S., the provisions of the Bankruptcy Code on cooperation with foreign countries (Chapter 15 BC) apply also to foreign insurance companies, while banks and insurance companies are generally excluded from the provisions of the Bankruptcy Code on domestic proceedings⁵⁰. The issue will be discussed here with a focus on domestic proceedings.

According to Art.1 (1) Sentence 1 EIR, the Regulation applies to ‘public collective proceedings, including interim proceedings, which are based on laws relating to insolvency and in which, for the purpose of rescue, adjustment of debt, reorganisation or liquidation’ and which are characterized by certain legal effects defined in letters a) – c) of this provision, such as appointment of an insolvency administrator and/or subjecting the activities of the debtor to the supervision of a court⁵¹. Some types of proceedings are explicitly exempted from the Regulation according to Art.1 (2) EIR, mainly banking and insurance insolvencies. Proceedings falling under the Regulation are laid-down in an exhaustive and binding list (Annex A of the EIR).

International dimensions of proceedings, which are not covered by the list, continue to be governed by the autonomous laws of the EU Member States, if the EU has not passed special legislation, which it has done for the

50 Cf. § 109 (b) and (d) BC vs. § 1501 (c) (1) BC.

51 For a discussion of modern developments in this respect see → Bornemann.

banking and insurance sectors⁵². This is true both for domestic proceedings and for recognition of foreign proceedings and coordination of parallel proceedings.

In contrast, some national insolvency laws define their scope of application more broadly, including, for example, also banking and insurance insolvencies. This is true, for example, for Austria, Belgium, Croatia, Czechia, Germany or Poland. Some EU Member States have adopted specific laws for various insolvency proceedings, including insolvency legislation in the context of Commercial Codes or in company laws or for the banking and insurance sectors⁵³. Often, specific legislation has been passed for non-business (consumer) insolvencies⁵⁴. If such proceedings are not included in Annex A of the EIR, their international dimensions are governed by autonomous law. Provisions of autonomous cross-border insolvency law may include several national proceedings, or they may be specific for the various sub-types of proceedings. They may also exclude specific groups of economic actors or sectors (e.g. state-owned enterprises) from insolvency proceedings in general.

Thus the definition of debtors, which are covered by the autonomous (domestic and cross-border) insolvency law in the EU Member States, is rather diverse, but there is general agreement that at least typical commercial entities are covered.

It is less clear to which degree pre-insolvency reorganisation procedures are covered by the existing autonomous cross-border insolvency rules. ‘Public’ restructuring procedures, which were created by the EU’s Restructuring Directive of 2019, have been explicitly included into the EIR’s Annex A. However, this does not yet guarantee that they are also covered by the autonomous cross-border insolvency provisions of EU Member States, if this is not clearly expressed in the respective laws. Only few EU Member States address this issue, e.g. Spain, which has adopted specific provisions for pre-insolvency proceedings referring with some modifications to the general cross-border insolvency rules (Art.753 – 755 Spanish Insolvency Act).

52 Bank Recovery and Resolution Directive II (BRRD II) of 20 May 2019, Insurance Recovery and Resolution Directive (IRRD) of 27 November 2024.

53 See e.g. Art.612 (2) of the Bulgarian Commercial Code, which refers, however, subsidiarily to the Commercial Code.

54 E.g. Chapter XIX of the Belgian Economic Code.

A particular phenomenon are proceedings under company (corporate) law, which are appreciated by many stakeholders due to their flexibility⁵⁵. If such proceedings are used, they may be qualified as parts of company law, which are governed not by rules of cross-border insolvency law, but of international corporate law. Though the law applicable to the corporation (*lex corporacionis*) may coincide with the *lex fori concursus*, the characterization can play a role when exceptions to the *lex fori corporacionis* or the *lex fori concursus* are discussed. Also, recognition of the effects of such proceedings in other countries may depend on whether such proceedings fall – from the perspective of foreign countries – under the concept of cross-border corporate or cross-border insolvency law. Courts have used different approaches when dealing with such issues, and there is no conceptual unity or ‘best practice’ how to handle such situations. In the context of the present project it can be stated that such questions exist and should be taken into account in a future legal instrument of the EU on cross-border insolvency relations with non-EU countries.

The MLCBI solves this issue by a general definition of (foreign) ‘proceeding’, which covers both classical bankruptcy proceedings and other proceedings ‘pursuant to a law relating to insolvency’ (Art.2 (a) MLCBI) and is, arguably, broad enough to cover even restructurings under corporate law. On the other side, the MLCBI leaves it to national legislators to exclude certain types of proceedings, such as in the banking or insurance sector or consumer insolvencies (Art.1 (2) MLCBI). As to domestic proceedings, Art.1 (1) (b) MLCBI foresees that the covered domestic proceedings should be mentioned expressly by the national legislator.

II. The distinction between main and non-main proceedings

Both the EIR and the MLCBI and most national insolvency laws distinguish today between ‘main’ and ‘non-main’ insolvency proceedings⁵⁶. The distinction is based on policy considerations such as the most adequate (and internationally acceptable) forum for an insolvency proceeding with global reach (main proceeding) and policy considerations in favour of non-main proceedings in certain cases (efficiency considerations, protection of local creditors etc.). The distinction between main and non-main proceed-

⁵⁵ See, e.g. → McCormack.

⁵⁶ See, e.g., Art.3 (1) and Art.3 (2) EIR and Art.2 (b) and (c) MLCBI.

ings is usually based on the head of (direct) jurisdiction for domestic proceedings, but it is also relevant for other aspects of the domestic proceeding as well as for recognition of foreign proceedings and cooperation between concurrent proceedings.

The distinction between main and non-main proceedings as such does not appear unfit for relations with non-EU countries, it seems even more justified to allow for non-main proceedings in the EU when the main proceeding is conducted in a non-EU country with different legal standards and practices. It is, however, another question whether jurisdiction for non-main proceedings should be same in cases when the debtor's COMI is situated in the EU or outside, or whether other rules on the relationship between, e.g., main proceedings and non-main proceedings within the EU or in third countries should be identical or – perhaps slightly – differ.

One aspect in this context is the question which proceeding should take the role of 'main proceeding', implying some guiding role with regard to non-main proceedings. This is linked with the question of jurisdiction, but can also be decided as a separate matter. In common law countries, e.g., it is not uncommon to grant jurisdiction upon discretion: Is there a justified interest to commence an insolvency proceeding in a certain country? In this context, the request of parties plays a role but also other considerations such as the experience of judges or the quality and international renown of the insolvency regime of one or the other jurisdiction. In particular, restructurings of larger enterprises, which often include complex corporate structures and take place within corporate groups, are often brought to particularly experienced courts, although considerations of an expected 'favorable outcome' for influential stakeholders may also be present. This may lead to an agreement between insolvency stakeholders (or courts) that the function of 'main proceeding' should not (or cannot efficiently) be carried-out by the court of the debtor's COMI, but by the court in another country.

III. Direct jurisdiction

In contrast with the MLCBI, the EIR unifies also direct jurisdiction in insolvency matters among the EU Member States. One needs to distinguish between jurisdiction to commence and conduct an insolvency proceedings generally (Art.3 EIR) and jurisdiction to decide specific matters or disputes related to the insolvency proceedings (Art.6 EIR).

1. Main insolvency proceedings

Direct jurisdiction for commencing insolvency proceedings is today mostly grounded, even outside the EIR, on the debtor's center of main interests (COMI) in a certain country. However, under national legislation, in particular in non-EU countries, often more traditional but similar concepts such as the debtor's place of incorporation or domicile continue to be used.

The concept of COMI has become generally accepted today, also on the global level by UNCITRAL, as a reasonable head of jurisdiction for main proceedings⁵⁷. While modifications of this term or alternative approaches in the context of direct jurisdiction can be discussed, this would go beyond the specific direction of this book. Issues of indirect jurisdiction will be addressed in the context of recognition.

There has been a large number of cases, both on the national level and before the Court of Justice of the EU (CJEU, formerly ECJ), on the interpretation of the term 'COMI' and its application in various situations⁵⁸. There does not appear to be a reason to define COMI under the EIR differently in cases where the debtor's COMI is located in the EU or outside. It is, however, not excluded that COMI is defined differently in a non-EU country than under the EIR, and this may lead to cases of negative or positive jurisdictional conflicts.

Similar considerations apply when, from the EIR's perspective, the debtor's COMI is situated either in the EU or in a non-EU country (e.g. Switzerland or the UK) and national jurisdictional rules in the third country do not use the COMI concept. As of today, even in some EU Member States national (non-EIR) jurisdictional rules have been not completely aligned with the EIR⁵⁹ and in others countries they may differ significantly

57 For a comparison of the understanding of COMI under the EIR and the MLCBI (from a U.S. perspective) see Wessels/Kokorin, COMI under European and American Insolvency Law, <https://blogs.law.ox.ac.uk/business-law-blog/blog/2019/02/comi-under-european-and-american-insolvency-law> (accessed 17.03.2025).

58 Cf. Bork/Mangano, European Cross-Border Insolvency Law, 2nd ed. (2022), pp.77 – 109.

59 E.g. in Belgium (art.118 §1 nr.1 Belgian CDIP: principal establishment or statutory seat in Belgium), Bulgaria (art. 613 Bulgarian Commercial Code: debtor's seat), Croatia (art.392 Croatian Bankruptcy Act: center of business activity in Croatia, which, in practical terms, is understood as the COMI), Germany (sec.3 German InsO: debtor's domicile, but COMI prevails), Greece (art.4 (1) Greek Insolvency Act: COMI), Italy (sec. 11 (1) 1st alt. Italian Code of Business Crisis and Insolvency: COMI), Netherlands (art.2 (1) Dutch Bankruptcy Act: in principle, debtor's domicile), Poland

from the EIR⁶⁰. This may lead to the result, that in such countries a (self-proclaimed) main proceeding can, for example, be opened at the place of registration of a company, even if the COMI is situated in another country. This creates or increases a risk of possibly conflicting main proceedings within and outside the EU.

It would seem that future EU rules on insolvency relations with non-EU countries should address this issue. Possible approaches might be to approximate national jurisdictional standards without strict limitation to COMI and, in addition, introduce some discretion of courts either not to open an insolvency proceeding in the EU in such situations or to limit it to property located in the EU. Another possibility would be to create a mechanism for agreement between courts or insolvency administrators with the approval of the creditors or the court.

2. Non-main insolvency proceedings

Both under the EIR and (for recognition) under the MLCBI jurisdiction for commencing (opening) a non-main insolvency proceeding is based on the existence of an ‘establishment’ of the debtor (Art.3 (2) EIR, Art.2 (b) and (f) MLCBI). The term ‘establishment’ is defined in Art.7 (10) EIR as ‘any place of operations where a debtor carries out or has carried out in the 3-month period prior to the request to open main insolvency proceedings a non-transitory economic activity with human means and assets’, which differs in detail – in particular as to the relevant point in time or time-period when the establishment needs to exist – from the definition of establishment under Art.2 (f) MLCBI.

The existence of an establishment of the insolvent debtor as a jurisdiction-founding criterion is today accepted in most EU member countries⁶¹.

(sec.382 Polish Insolvency Act: main economic activity in Poland). Slightly more distant Austria (sec. 63 (1) Austrian InsO: business or habitual residence in Austria).

60 Examples are Cyprus, Ireland and Malta, which apply traditional company and bankruptcy law provisions in conjunction with Common Law rules. A particular case is France, where in principle, the debtor’s corporate seat in France is decisive, but other jurisdictional criteria such as existence of an establishment in France, other business activities, location of assets and even the ‘citizenship’ of participants may suffice to open an insolvency proceeding with universal reach, see Dammann/Sénéchal, *Le droit de l’insolvabilité internationale* (2018), pp.677 – 703.

61 However, outside the scope of the EIR, Bulgaria, Estonia, Greece, Lithuania, Portugal and Romania seem not to provide for non-main jurisdiction at all, cf. art. 613 Bulgari-

However, the unitary focus on an establishment for jurisdictional purposes⁶² contrasts with the approaches existing under numerous, if not most autonomous insolvency laws both in the EU and globally. Most states foresee beyond an establishment also other jurisdictional grounds. The most frequent additional ground for non-main jurisdiction is the location of assets of the debtor in the forum state⁶³. Another widely spread approach, in particular in Common Law countries, is a balancing test: Is it economically reasonable and fair to commence an insolvency proceeding in a specific country (even if the debtor's place of registration or COMI may be in another country)?⁶⁴ This lays of course a significant burden as to the capability of evaluating all circumstances on the court which has to decide on its jurisdiction. It should be mentioned that the balancing test is in some countries not limited to 'non-main' insolvencies, but can also be used with regard to 'main' insolvency proceeding⁶⁵.

Taking the EIR in its present form as a starting point, the existence of an establishment of the debtor in the EU would seem to be adequate and acceptable also in cases when the debtor's COMI is located in a non-EU country.

However, the limitation of non-main proceedings to the jurisdictional basis of an establishment may not always be sufficient in cases with COMI outside the EU. The limitation to the establishment as a ground for non-main jurisdiction is based on the assumption that in such cases a main proceeding can be opened at the debtor's COMI in another EU Member State, and that such a proceeding is according to all probability in view of mutual trust and legal guarantees under EU law fair and acceptable to all stakeholders. When the COMI is situated outside the EU, a corresponding

an Commercial Code, sec.4 (2) Estonian Insolvency Act, sec.4 Greek Insolvency Act 2007, Art.10 Lithuanian Enterprise Bankruptcy Act, Art.7 Port. Insolvency Act (with slight modifications), Art.120 Romanian Code of Civil Procedure 2010.

62 Only establishment-based jurisdiction is foreseen, e.g., in sec. 118 §1 No.2 Belgian Code de droit international privé, following closely the EIR. Similar examples are Czechia, Italy and Hungary.

63 E.g. under sec. 63 (2) 2nd. alt. of the Austrian Insolvency Code. The same is true, e.g. for Croatia (Art.393 (2) Croatian Bankruptcy Act), Finland (Ch.7 sec.2 2nd alt. Finnish Bankruptcy Act), France, Germany (sec.354 (1) German InsO), Poland, (sec. 382 (2) 3rd alt. Polish Insolvency Act), art. 174 (1) Slovak Insolvency Act.

64 See, e.g. sec. 122 (1)(g) UK Insolvency Act 1985 ('if ... the court is of the opinion that it is just and equitable that the company should be wound up').

65 Cf. 11 U.S. Code § 305 and 28 U.S. Code § 1334 (c) – power of court to abstain from hearing a bankruptcy proceeding, e.g. based on considerations of comity.

degree of trust and legal guarantees in the COMI country may not always exist or be justified to assume.

If the debtor's COMI is located outside the EU and national rules on non-main jurisdiction remain as divergent as they are today, the continuing disarray of jurisdictional rules in the 27 EU Member States can cause negative effects both for the debtor and the community of creditors, including incentives for forum shopping.

Therefore, in situations when the debtor's COMI is located outside the EU, jurisdiction should – arguably – be defined more broadly to avoid gaps of protection as well as of efficiency. One possibility might be to create two common grounds for jurisdiction in cases when COMI is outside the EU or the EIR is for other reasons not applicable: the existence of an establishment of the debtor or location of assets.

In addition, other tools of insolvency law could be used in such situations, e.g. a priority rule for the first non-main proceeding⁶⁶, or a possibility of transfer of jurisdiction between several non-main proceedings in the EU or cooperation between parallel proceedings.

3. Insolvency-related proceedings

The EIR contains not only jurisdictional rules for the insolvency proceeding itself, meaning thereby primarily the 'opening'⁶⁷ of such a proceeding by court decision⁶⁸, but also for other insolvency-related court proceedings (Art. 6 EIR, cf. also Art.32 EIR)⁶⁹.

Such proceedings raise different questions, not only about jurisdiction. They will be discussed more systematically in another contribution in this book⁷⁰. However, direct jurisdiction for such proceedings will be dealt-with briefly also at this place.

⁶⁶ Cf. e.g. sec. 63 (3) nr.1 Austrian InsO.

⁶⁷ Cf. Art.2 (7) EIR.

⁶⁸ Cf. the wording of Art.3 (1) EIR; but this applies also to some provisional measures, cf. Art.32 (1) subpara.3 EIR (the reference to the Brussels Ia Regulation appears to include implicitly also its provisions on direct jurisdiction, cf. Christoph Thole, in: Münchener Kommentar zur InsO, 4th ed. (2021), Art.32 EIR note 29.

⁶⁹ The notion of court may include administrative authorities, cf. Art.2 (6) EIR.

⁷⁰ → Trunk (Insolvency-related proceedings).

Art.6 (1) EIR establishes, in principle, an exclusive⁷¹ (international) jurisdiction of the forum concursus for insolvency-related court proceedings⁷².

The provision applies to ‘actions deriving directly from insolvency proceedings and closely linked with them’. This term was originally developed by the ECJ in a case on the insolvency exception of the 1968 Brussels Convention⁷³. It includes, for example, proceedings in the insolvency court to impose subsidiary liability on corporate directors⁷⁴, lawsuits before general courts for an avoidance of transactions (detrimental acts) under insolvency law⁷⁵, 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 proceeding⁷⁶. 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, on claims to ‘separate satisfaction’ (German: *Aussonderung*) as to assets technically not falling into the estate, on ‘privileged satisfaction’ by secured creditors, 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 category⁷⁷.

Only in two limited cases exceptions are made under Art.6 (2) EIR: firstly, the courts of the (EU member) state of the defendant’s domicile are also granted jurisdiction, but only when the insolvency representative sues the defendant both on a legal basis under insolvency law and under a legal basis of non-insolvency law, e.g. corporate or general civil law. The second exception relates to specific cases of several defendants.

In relations with non-EU countries, this may lead to a doubling of proceedings and/or conflicting judgments.

71 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).

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

73 Case of 22 Feb. 1979, C 133/78, *Gourdain v. Nadler*, ECLI:EU:C:1979:49.

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

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

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

77 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.

If the debtor's COMI is located in the EU, the courts of the COMI state are, in principle, regarded as exclusively competent for such actions under the EIR, but this is not binding on courts in non-EU countries. Extra-EU courts may nevertheless render a decision in such cases (for or against the insolvency representative). Even if these decisions would probably not be recognized in the EU due to the EIR⁷⁸, this does not solve the problem of possibly conflicting judgments.

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* judgment⁷⁹, 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 apply⁸⁰ – either by the autonomous international insolvency law⁸¹ or autonomous civil procedure law⁸² of the EU Member States.

Some autonomous laws – both of EU and non-EU countries – also provide for an (international) forum concursus for such proceedings⁸³, others tend to apply general rules of jurisdiction under Codes of Civil Procedure⁸⁴ or other legislation. The forum for such disputes under autonomous law is usually not exclusive⁸⁵, but there are also examples of (internationally) exclusive jurisdiction in such cases⁸⁶. In view of the economic relevance

78 Most probably, on the basis of lacking indirect jurisdiction.

79 *Supra* note 74.

80 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.

81 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 passed 'in' the foreign insolvency proceeding).

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

83 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).

84 This is the case, e.g., in Germany. However, if the debtor's COMI is located in the EU, art.6 EIR applies.

85 This probably true under sec.118 § 2 Code de droit international privé of Belgium, and applies also under German law (Code of Civil Procedure).

86 Sec. 63 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).

of such decisions, jurisdictional disorder certainly does not further international cooperation in insolvencies linked with non-EU countries.

In 2018, UNCITRAL passed a special model law dealing with insolvency-related judgments, the Model Law on Recognition and Enforcement of Insolvency-Related Judgments (MLIJ). The MLIJ deals only with recognition of judgments, but it contains provisions on indirect jurisdiction, which give an impression about the current international state of discussions with regard to jurisdiction for such disputes. 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. It can be seen from Art. 14 (g) MLIJ that 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.

IV. Conflict of laws

After jurisdiction, probably the second most discussed legal issue in domestic insolvency proceedings with an international dimension is the topic of applicable law (conflict of laws). The EIR is one of the first international legal instruments, which contains a detailed set of rules on conflict of laws in the insolvency context (Art. 7 – 18 EIR)⁸⁷. It has opened a wide global discussion on conflict of laws in insolvency. This has recently inspired UNCITRAL to start work on a project (now determined to become a Model

87 Predecessors are the German-Austrian Bankruptcy Treaty of 1985 and the Council of Europe’s Istanbul Convention of 1990. Earlier treaties did not contain diversified conflicts rules.

Law) on conflict of laws in insolvency, which can be expected to be completed soon⁸⁸.

The following reflections will focus on conflict of laws in the context of domestic insolvency proceedings, with a particular view to cases linked with non-EU countries. Issues of conflict of laws in the recognition context will be addressed in the general report on recognition of foreign insolvencies in this book.

The conflict of laws provisions of the EIR are characterized by that they apply both to domestic insolvency proceedings and to the effects of (recognized) foreign proceedings (cf. Art. 7 EIR and Art. 20 EIR). As the EU could in this case regulate conflict of laws for both sides – the perspective of the domestic insolvency proceeding and the perspective of recognizing states –, it largely avoids the problem of divergent decisions within the EU. In relations with non-EU countries, this cannot be guaranteed.

Generally speaking, conflict of laws under the EIR is based on the *lex fori concursus* principle, i.e. the law of the country conducting the insolvency proceeding (*forum concursus*) applies to all procedural and material aspects of the proceeding (Art. 7 EIR). This can be described as a particular example of the *lex fori processus* principle, which is generally accepted in international civil procedure. In the insolvency context, however, this principal rule does not only cover issues of procedure, but governs to a significant degree also issues of material law such as avoidance of transactions, validity of contracts, impact of the insolvency proceeding on property rights or on the corporate structure.

Comparing briefly the conflict of laws rules of the EIR with the projected UNCITRAL Model Law on Applicable Law in Insolvency Proceedings, it can be stated that the UNCITRAL text is closely related to the EIR, but contains fewer exceptions to the *lex fori concursus*. Furthermore, it has a global perspective, while the EIR to a significant degree provides for particular conflicts rules in the inner-EU context. In contrast with the EIR, the UNCITRAL project will address conflict of laws mainly for the context of domestic insolvency proceedings, providing for conflict of laws rules in

88 See the various materials of UNCITRAL Working Group V (Insolvency Law) at https://uncitral.un.org/en/working_groups/5/insolvency_law (accessed 26.05.2026). The following remarks on the Draft Model Law on applicable law in insolvency proceedings are based on the Secretariat's Note for the 13–17 April 2026 meeting of Working Group V, accessible at <https://docs.un.org/en/A/CN.9/WG.V/WP.207>. The other UNCITRAL Model Laws on insolvency do not deal with conflict of laws issues in a clearly defined, systematic manner.

the context of recognition only in a very diluted form (Art.10 and 11 of the current draft).

Autonomous cross-border insolvency law in the EU Member States and beyond has until recently been largely uncoded. Within the EU, however, the EIR has led to a wave of codifications in this field. Several EU Member States have adopted the conflict of laws rules of the EIR also for purposes of their autonomous law, sometimes adapting them with a view to relations with non-EU countries. This is true for Austria, Belgium, Germany, Portugal, Slovenia (otherwise and MLCBI State!) and Spain⁸⁹. Not addressed is conflict of laws in the MLCBI-based cross-border insolvency provisions of Greece, Poland and Romania. As the EIR applies to most EU-based insolvencies as well as inner-EU recognition, the autonomous provisions are relevant mainly for recognition of non-EU insolvencies, but they can also apply to the effects of EU-based insolvency proceedings in third countries, in so far as this does not conflict with the EIR.

Outside the EU, conflict of laws in insolvency is rarely codified. Examples are Georgia, North Macedonia, Norway and Serbia, which have taken inspiration from the EIR⁹⁰.

The MLCBI touches upon conflict of laws only in a hidden, sparse manner. Nevertheless, some courts have used conflict of laws considerations also within Model Law-based legislation⁹¹, and such cases also deserve interest in discussions on future further developments of the EIR with regard to non-EU countries.

89 The Netherlands have not adopted express conflict of laws rules for the insolvency context, although they have otherwise passed some provisions on cross-border insolvency law, cf. Art.203 – 205 Dutch Bankruptcy Act.

90 The political background of this appears to be membership in the EEA (case of Norway), the EU accession endeavours of some of these countries (Georgia, Western Balkan countries), but also the continuing contacts between countries in the Balkans region, mainly successor states of Yugoslavia, and the model of cross-border legislation in developed by Croatia. Moldova and Ukraine have, however, not yet taken the EIR as structural model for their cross-border insolvency law.

91 See, e.g. U.S. District Court for the Eastern District of Virginia, Alexandria Division, decision of 07.05.2012, *Jaffe v. Samsung Elecs. Co.* (In re *Qimonda AG*), 470 B.R. 374; or U.S. District Court for the Southern District of New York, decision 08.01.2004, *Europe Movieco Partners Ltd. v. United Pan-Europe Communs. N.V.* (In re *United Pan-Europe Communs N.V.*), 2004 U.S. Dist. LEXIS 223.

1. General rules on conflict of laws applicable?

Firstly, the EIR does not contain any rules which are – at least in civil law countries – regarded as belonging to the general part of conflict of laws, e.g. on the issues of characterization, renvoi or the public policy exception in conflict of laws. It is submitted that such issues can be resolved by interpretation of the EIR, taking inspiration from other EU Regulations dealing with conflict of laws (Rome I Regulation, Rome II Regulation etc.). It does not seem that in this respect EU-related cases should be treated differently from cases linked with non-EU countries.

2. Basic conflicts rule

The basic conflicts rule in cross-border insolvency law, which appears to be accepted almost universally and has also been expressly laid-down in Art.7 EIR, is the *lex fori concursus* (law of the court administering or supervising the insolvency proceeding)⁹². Art.7 EIR is not limited to inner-EU conflicts of laws, but applies also to legal relationships linked with non-EU countries. This is in line with other EU Regulations on conflict of laws, for example the Rome I and Rome II Regulations.

The autonomous cross-border insolvency laws and the UNCITRAL Model Insolvency Law family follow the same basic approach.

3. Special conflicts rules and related provisions

The EIR contains, however, also several specifications or even exceptions to the *lex fori concursus*. These specifications and exceptions are laid-down in Art. 8 – 18 EIR. Some of these provisions contain particular conflicts rules: Art. 9 (set-off), Art.11 (contracts relating to immovables), Art.12 (effects of insolvency proceeding on payment systems and financial markets), Art.13 (employment contracts), Art.14 (effects of insolvency proceedings on rights subject to registration), Art.16 (detrimental acts), Art.17 (protection

92 In the U.S. and other Common Law jurisdictions, in theory a more flexible approach is taken, e.g. a most significant relationship or a governmental interests/comparative impairment test, see <https://www.abi.org/abi-journal/conflict-of-laws-which-state-rules-govern> (accessed 16.06.2025). However, the *lex fori concursus* principle underlies also this approach. Conflict of law is mainly discussed when exceptions from the *lex fori concursus* are at stake.

of third-party purchasers in certain cases) and Art.18 (effects of insolvency proceedings on pending law-suits and arbitral proceedings).

Most of the special conflicts rules laid-down in the EIR are limited to inner-EU conflict of laws, referring only to the law of other EU countries. The underlying policy seems to be that particular protective considerations (e.g. for specific categories creditors or trust in business relations or the governmental interest in immovables), which justify a deviation from the *lex fori concursus*, need to be taken into account within the EU, while the matter can be left open in relations with non-EU countries. This includes an element of privilege for EU-based creditors or business within the EU. In three cases, when (presumably) even EU-based creditors of business may rely on the law of non-EU countries (Art.9 EIR for set-off, Art.12 EIR for payment systems and financial markets and Art.17 for third-party purchasers), the special conflict rules are universal.

Other provisions in this context do not determine the applicable law, but establish particular substantive rules (Art. 8, 10, 15 and 23 EIR). As such, they will be discussed separately below at 5.). However, some autonomous laws contain in these respects special conflicts rules, which will be scrutinized in this section.

In so far as these conflicts rules refer to another law than the *lex fori concursus*, it is generally acknowledged that they refer also to the insolvency law of the designated country. According to general principles of private international law, it needs to be ascertained how courts in the respective country would apply their law in the respective case. This may lead to difficulties in two cases:

Firstly, courts in the other country might deny application of their own insolvency legislation to a foreign insolvency proceeding⁹³. Within the EU, such an approach would hardly be compatible with the legislative purpose of the EIR, but the question can if necessary be clarified by the CJEU. If foreign courts were to take such an approach, the special conflicts rules of the EIR would lead only to foreign 'non-bankruptcy' law and neglect the specifics of the insolvency situation. Within the EU the risk for this may be small, but in relations with non-EU countries it is significant.

Secondly, courts in the other country may (generally or in specific cases) deny recognition to the EU-based insolvency proceeding. Again, within the

93 An interesting express solution to such questions is given (outside the scope of application of the EIR) by Art.175 (1) Slovak. Insolvency Act: Recognition of a foreign insolvency proceeding leads to the effects of a corresponding Slovak proceeding.

EU this is very improbable and can from a conflict of law perspective be neglected, but the same cannot be assumed in third countries. Is it adequate to apply the insolvency law of a foreign (non-EU) country, if the EU-based proceeding is not recognized in that country? This might serve as an argument for different conflict rules in relations between EU countries and in relations with non-EU countries. This would be in line with the present approach of the EIR, which limits most special conflicts rules to inner-EU situations (application of the law of other EU countries).

Those EU Member States which have aligned their autonomous cross-border insolvency law with the EIR, have ‘universalised’ the special conflicts rules contained in the EIR, namely with regard to contracts of employment, contracts relating to immovables, set-off and impact on organized markets.⁹⁴ The other EU Member States have not transposed the EIR’s conflict of laws provisions into autonomous law and have also avoided to develop conflicts rules of their own. The is also true for EU Member States (or non-EU countries) which basically follow the MLCBI⁹⁵.

Those non-EU countries which have chosen to approximate their autonomous cross-border insolvency law with the EIR, have adopted only few of the special conflicts rules of the EIR, mainly the *lex laboris*⁹⁶. In Common Law countries, exceptions to the *lex fori concursus* tend to be made by courts on a discretionary basis (usually including substantive considerations), while civil courts would be reluctant to deviate from the *lex fori concursus* if legislation does not provide for particular conflict rules. This does not exclude settlements between parties under applicable insolvency legislation.

The ongoing UNCITRAL project will, foreseeably, adopt the EIR’s special conflicts rule on employment contracts (Art. 13 EIR) for global use. It also proposes special conflict rules for the impact of insolvency proceedings on ‘payment, clearing and settlement systems, regulated financial markets and other multilateral trading facilities’ as well as on ‘close-out netting’

94 In the EU: Austria, Belgium, Croatia, Germany, Portugal, Slovenia and Spain. Slovenia has also adopted the MLCBI.

95 In the EU: Greece, Poland and Romania (this is in line with of the approach of the MLCBI to avoid clear conflict of laws rules). As to Slovenia see *supra* note 88.

96 Georgia (Art.III – 113 Insolvency Act: contracts relating to immovables, employment contracts, set-off), North Macedonia (Art.323, 324 Insolvency Act: rights in rem, employment contracts) and Serbia (Art.175 (3) Insolvency Act: employment contracts). Norway has not passed conflict of laws rules for Norwegian insolvencies.

outside such systems. The EIR contains similar, but not identical rules on these subjects (Art. 9 – set-off, Art.16 payment systems).

The EIR's particular conflicts rule on contracts relating to immovables (Art.11 EIR), on rights in immovables (Art.14) and on pending lawsuits (Art.18) have by now not been adopted by the UNCITRAL Working Group V. Also, the UNCITRAL text does not adopt the cumulative conflicts rule on the avoidance of detrimental acts (see Art. 16 EIR), but gives much broader application to the *lex fori concursus*, providing only for some limited exceptions in Art. 7 of the current draft.

Further missing in the UNCITRAL text are the EIR's particular provisions on the impact of insolvency proceedings upon third party security rights (Art.8 and 10), European patents and trademarks (Art.15) and protection of third-party purchasers (Art.17). As these provisions have, despite being positioned between conflict of laws provisions, a substantive character, they will be discussed below in the respective part of this report.

Subsequently, the special conflicts rules of the EIR (Art.9, 11, 12 – 14, 16, 18 EIR) will be looked at from the perspective of whether they should be extended to relations with non-EU countries. It is not the purpose of this report to discuss whether the EU should keep, modify or even drop some of these provisions for inner-EU relations⁹⁷.

a) Set-off (Art.9 EIR)

According to Art. 9 EIR, '(t)he opening of insolvency proceedings shall not affect the right of creditors to demand the set-off of their claims against the claims of a debtor, where such a set-off is permitted by the law applicable to the insolvent debtor's claim.' Art. 9 EIR is a conflict of laws provision, as it designates applicable law to certain aspects of creditors' rights of set-off in the insolvency of the debtor. It deviates from the general rules of *lex fori concursus*, at it refers to 'the law applicable to the insolvent debtor's claim. It does not, however, oust the *lex fori concursus* completely, but requires additional scrutiny of the *lex causae* of the insolvent debtor's claim with a view to a substantive result: protection of a creditor's right of set-off, if either the *lex fori* or the *lex causae* of the debtor's claim protect the right of set-off in the insolvency context. Non-insolvency aspects of set-off are

97 Critical from this perspective e.g. Francisco Garcimartin, Is EU Insolvency Law consistent? (2023), <http://dx.doi.org/10.2139/ssrn.4756783> (accessed 17.03.2025).

not covered by this provisions, in the EU context they are determined, as to contractual obligations, by Art.17 Rome I Regulation, which (also⁹⁸) refers to the *lex causae* of the debtor's claim. Thus, Art. 9 EIR is softly linked with Art.17 Rome I Regulation.

This rather complicated conflicts provision stands between two substantive provisions which also establish protective rules for certain creditors, though only as substantive rules (Art.8 and 11 EIR). Art. 9 is also related to the EIR's provision on avoidance of detrimental acts (Art.16 EIR), which, similarly to Art. 9 EIR, also provides for additional (cumulative) application of a further legal system to protect third parties from avoidance claims.

The background of Art. 9 EIR lies in the domestic insolvency law of some EU Member States, e.g. Germany, which regard rights of set-off as a kind of security, which should be protected in insolvency similar to other secured creditors⁹⁹.

The autonomous cross-border insolvency laws of Austria, Belgium, Germany, Portugal and Spain contain provisions mirroring Art.9 EIR¹⁰⁰. If one shares this policy decision, there is no reason not to apply Art. 9 EIR also to claims governed by the *lex causae* of a non-EU country. It should, however, be remarked that Croatia, which otherwise oriented itself in its autonomous cross-border insolvency law along the lines of the EIR, has not adopted this special conflicts rules, but has instead passed a substantive law provision protecting good faith in respect of set-offs executed between the date on which the foreign insolvency proceeding was opened and the date on which the decision recognizing that foreign insolvency proceeding in Croatia was published.¹⁰¹). As of the date on which the decision on the recognition of the foreign insolvency proceeding is published in Croatia, the insolvency-law provisions of the *lex fori concursus* govern the permissibility of set-off. Also, the planned UNCITRAL Model Law on applicable law in insolvency proceedings does not currently provide for a general exception for set-off, but limits it to 'close-out netting arrangements', i.e. cases

98 As to set-off against the insolvent debtor. Set-off by the debtor or the insolvency representative is not covered by Art.17 EIR.

99 Cf. sec. 94 – 96 German Insolvency Code.

100 Sec.223 Austrian Insolvency Code, sec. 338 German Insolvency Code.

101 Art.415 Croatian Bankruptcy Act. This illustrates that Croatia has made here legislative choice between a conflicts rule and a substantive rule.

of contractual netting (set-off in a larger sense) in specific contexts¹⁰². The proposed UNCITRAL provision refers exclusively to ‘the law applicable to that arrangement’, i.e. basically the *lex contractus*, avoiding the complicated combination of applicable laws foreseen by Art. 9 EIR.

b) Effects of insolvency proceedings on contracts relating to immovables
(Art.11 EIR)

According to Art.11 (1) EIR¹⁰³, the ‘effects of insolvency proceedings on a contract conferring the right to acquire or make use of immoveable property [are] governed solely by the law of the Member State within the territory of which the immoveable property is situated’. Art.11 (1) EIR resembles at a first glance the conflicts rule under Art. 4 (c) Rome I Regulation, but is indeed more restrictive as it does not accept – in contrast with the Rome I Regulation – a different choice of law by the contracting parties¹⁰⁴. The legal policy behind Art.11 (1) EIR is to give the *situs* state the determining voice which effect the (from its perspective foreign) insolvency proceeding should have on such contracts.

Art.11 EIR applies only to contractual matters. The impact of an insolvency proceeding on property issues, including immovable property, is governed by the separate provision of Art. 14 EIR.

As a mere conflicts rule Art.11 (1) EIR leaves the content of the applicable substantive law open.

The autonomous cross-border insolvency laws of some EU Member States contain equivalent provisions¹⁰⁵ of universal direction, i.e. they refer also to the law of non-EU countries. Germany takes a step beyond Art. 11 EIR as it includes also contracts relating to (registered) ships and airplanes (sec.336 sentence 2 German InsO). This is not followed by Austrian law (sec. 225 Austrian InsO).

102 See UNCITRAL Working Group V, 65th session, 16–20 Dec. 2024, document A/CN.9/WG.V/WP.198 (Secretariat’s Note. Applicable Law in Insolvency Proceedings, p.33.

103 Art.11 (2) EIR contains a specific jurisdictional rule with elements of applicable law and substantive law. This provision will not be analysed here.

104 But see Art.11 (2), which refers in the context of a jurisdiction rule to the applicable *lex contractus*.

105 See, e.g. sec.119 § 3 nr.1 Belgian Code de DIP, sec. 225 Austrian Insolvency Code, sec. 336 sentence 1 German Insolvency Code.

Sec. 336 of the German Insolvency Code applies outside the scope of the EIR. It shows that the German legislator regards this special conflicts rule as a fair balance of interests in general, not only a motivation of protection of interests within the EU.

Again, the UNCITRAL Working Group on Insolvency takes a different position, not providing for a special conflicts rule on contracts relating to immovables. Thus the UNCITRAL approach is closer to the Rome I Regulation than Art. 11 EIR.

c) Payment systems and financial markets (Art.12 EIR)

The EIR contains in its Art. 12 a further special conflicts rule addressing the effects of insolvency proceedings on a ‘payment or settlement system or to a financial market’. According to this provision, ‘the rights and obligations of the parties to a payment or settlement system or to a financial market shall be governed solely by the law of the Member State applicable to that system or market.’ The background of Art.12 EIR lies in European Financial Markets regulation and serves the purpose of securing the undisturbed functioning of international payment and clearing systems also in the case of the insolvency of participants in such system¹⁰⁶. Participants in such systems are usually financial institutions, which are exempted from the scope of application of the EIR. However, some participants in such system may be covered by the EIR and Art.12 EIR establishes an equivalent rule under the EIR with the rules applying to bank insolvencies. The economic relevance of this rule is due to the systemic importance of such financial systems and markets.

Art.12 is a universal conflicts rule which includes also systems and markets governed by the law of non-EU countries and has a general international background¹⁰⁷.

On the national level, sec. 340 of the German Insolvency Code contains a similar provision, which, however, includes also some other transactions (financial repurchase agreements and novation agreements and netting arrangements). The corresponding sec. 226 Austrian Insolvency Code is limited to regulated financial markets.

106 Cf. Peter Kindler, in: Münchener Kommentar zum BGB, Bd. 13, 8th ed. (2021), EuInsVO Art.12 Rz.1 – 4 with further references.

107 S. z.B. Alexander Bornemann, in: Graf-Schlicker, InsO, 6th ed. (2022), Art.12 EIR notes 1 – 4.

In view of this broader international background it is not surprising that the UNCITRAL Working Group on Insolvency proposes in its planned document on applicable law in insolvency an equivalent, though more precisely worded and somewhat broader rule¹⁰⁸.

d) Effects of insolvency proceedings on employment contracts (Art.13 EIR)

Art.13 EIR provides for a specific conflicts rule as to the effect of insolvency proceedings on contracts of employment. In contrast with Art.11 EIR, this provision refers to the law (of another EU Member State) ‘applicable to the contract of employment’, i.e. to the law applicable under Art.3 in conjunction with Art.8 Rome I Regulation. The main reason behind this provision is the protection of employees and considerations of social policy. Like in the case of Art.13 EIR, application of the applicable labour requires an analysis whether the – recognized – (foreign) insolvency proceeding can be regarded as functionally equivalent to a domestic insolvency proceeding under the laws of the *lex contractus laboris*.

Under autonomous cross-border insolvency law, usually the same rule is foreseen, but is not limited to EU Member States (see, e.g. sec. 227 Austrian InsO, sec. 119 § 3 no.3 Belgian Code of DIP, Art.397 Croatian Bankruptcy Act, sec. 337 German InsO¹⁰⁹, Art. 729 Spanish Insolvency Act).

The effects of insolvency proceedings on labour contracts (employment contracts) are one of the few examples where the planned UNCITRAL document contains an identical, also universal conflicts rule.¹¹⁰

e) Effects on immovables and other registered rights (Art. 14 EIR)

Coming to the effects of insolvency proceedings on property law (rights in rem) Art. 14 EIR contains a special rule on immovables, referring to the ‘*lex registri*’ of such immovables, i.e. indirectly to the *lex rei sitae*. Going

108 See UNCITRAL Working Group V, 65th session, 16–20 Dec. 2024, document A/CN.9/WG.V/WP.198 (Secretariat’s Note, Applicable Law in Insolvency Proceedings, p.29).

109 This provision expressly refers to the Rome I Regulation.

110 See UNCITRAL Working Group V, 65th session, 16–20 Dec. 2024, document A/CN.9/WG.V/WP.198 (Secretariat’s Note, Applicable Law in Insolvency Proceedings, p.27).

beyond immovables in the strict sense, the provision includes also rights in ships or aircraft. The reference in the provision is limited to EU Member States, i.e. effects of EU-based insolvency proceedings on immovables in non-EU countries are determined (from the EIR's perspective) by the *lex fori concursus*. Whether foreign countries accept this view, depends on the cross-border insolvency law of such countries.

The broad wording of the provision would seem to include all effects of the insolvency proceeding, including, e.g. the power of insolvency representatives to administer such property, stay of execution into such property, insolvency-specific rules on selling-off such property, but also possible limitations to the rights of secured creditors to enforce their security into these categories of property.

The autonomous insolvency laws of Austria, Hungary, Slovenia and Spain contain an equivalent universal conflicts rule (sec. 228 Austrian InsO, Art.77 (2) Hungarian PIL Act, Art. 481 (1) Slovenian Insolvency Act, Art. 723 Spanish Insolvency Act), which is not limited to EU countries. In contrast, German autonomous law does not provide for a universal conflicts rule on this subject; however, it contains a similar, but unilateral rule in the context of recognition of foreign (non-EU) insolvencies (sec. 351 German InsO). This provision is more precisely formulated than Art.14 EIR. According to its first subparagraph it protects the legal position of secured creditors (as provided for by the German *lex rei sitae*), while the second subparagraph contains a catch-all clause for the legal position of the insolvent debtor in immovables located in Germany.

The planned UNCITRAL text on applicable law in insolvency does not contain any particular provisions in this respect. Under the MLCBI, the recognizing court could make the adequate decision within its discretion, including – but not requiring – a conflict of laws analysis.

f) Detrimental acts (Art. 16 EIR)¹¹¹

A special conflicts rule is also provided in Art. 16 EIR in conjunction with Art. 7 (2) (m) EIR with regard to the effects of insolvency proceedings on 'legal acts detrimental to the general body of creditors' (detrimental acts). Under Art. 7 (2) (m) EIR, 'the rules relating to the voidness, voidability or unenforceability of [detrimental acts]' are governed by the *lex fori concur-*

111 For details see → Mangano.

sus. The core of the provision concerns the avoidance of transactions done by the debtor in a certain time period before the insolvency, but it would cover also other acts, including acts of creditors.

Art.16 EIR modifies the *lex fori concursus*, adding a cumulative requirement that the *lex fori concursus* 'shall not apply where the person who benefited from an act detrimental to all the creditors provides proof that:

(a) the act is subject to the law of a Member State other than that of the State of the opening of proceedings; and

(b) the law of that Member State does not allow any means of challenging that act in the relevant case.'

This very complicated and much discussed provision combines elements of conflict of laws and substantive law. It is a conflict of laws rule in so far as it adds to the *lex fori concursus* the *lex causae* of detrimental acts (Art.16 (a) EIR), e.g. the *lex contractus* or the *lex rei sitae*. It contains also a component of substantive law in so far as Art.16 EIR requires a particular material content of the *lex causae*. The *lex causae* must 'not allow any means of challenging that act in the relevant case'. 'Any means of challenging' includes also the insolvency law of the *lex causae*.

Thus, it has first to be examined whether a certain act is void, voidable or unenforceable under the *lex fori concursus* (arguably, even under its non-insolvency rules such as contracts law). If this is confirmed, on the second stage the *lex causae* of the respective act (e.g. *lex contractus* for detrimental contracts or *lex rei sitae* for detrimental dispositions of property) has to be examined. The act is only void, voidable or unenforceable if such a result is foreseen by both the *lex fori concursus* and the *lex causae*. It seems evident that this complicated and restrictive rule, under the guise of protecting good-faith third parties, can protect bad-faith parties as well and significantly restricts the possibility to counter detrimental acts.

As Art.16 EIR applies only if the *lex causae* is the law of an EU Member State, the *lex fori concursus* remains solely applicable if the detrimental act is governed by non-EU law – irrespective of other circumstances such as the domicile of participants or the *locus actus*. In the case of, e.g., detrimental contracts, well-informed parties might choose a law under which the contract is fully valid despite the insolvency.

On the other side, if the debtor's act is not governed by the law of an EU Member State, the *lex fori concursus* remains solely applicable, even if, for example, the recipient of an illicit benefit resides in the EU.

Sec. 339 of the German Insolvency Code (like some other autonomous laws¹¹²) contains an equivalent, universal conflicts rule limiting avoidance also when the *lex causae* is the law of a non-EU country. The same is true, though with some counter-exceptions, in Austria (sec. 229 Austrian InsO). However, these provisions apply only outside the scope of application of the EIR, i.e. mainly at recognition of non-EU insolvencies.

In contrast, Croatia does not provide for a special conflict of laws provision on detrimental acts, thus leaving it (outside the scope of application of the EIR) with the general rule of *lex fori concursus*.

g) Protection of third-party purchasers (Art. 17 EIR)

The issue of protection of persons who have acquired from the insolvent debtor after the opening of the insolvency proceeding an immovable or certain other specified goods (registered ships, aircraft and securities), has been regulated in the EIR in a special conflict of laws rule (Art. 17 EIR). Instead of the *lex fori concursus*, the *lex rei sitae* or *lex registri* apply. This is again a provision meant to realize particular protection of certain parties through conflict of laws. In contrast with Art.16 (detrimental acts), the designated law applies even if it protects the third party less than the *lex fori concursus*.

Austria and Germany (as well as some other EU countries) haven taken-over this rule into their autonomous insolvency law. However, they have done it in different ways. Austria has remained close to the EIR and also passed a universal conflict of laws rule in this respect¹¹³. Sec. 349 German InsO, in contrast, is a substantive provision, which has been positioned in the chapter on recognition of foreign insolvencies and applies only to dispositions over German immovables and registered ships and aircraft registered in Germany. Croatia has also chosen the way of a substantive rule in respect of debtor's disposal of the assets undertaken between the date on which the foreign insolvency proceeding was opened and the date on which the decision recognizing that foreign insolvency proceeding in Croatia was published for the recognition context (Art. 413 Croatian Bankruptcy Act). Art. 413 of the Croatian Act applies to all dispositions of the debtor, not

112 In the same sense e.g. sec. 119 § 4 no.1 Belgian Code de DIP, Art. 281 Portuguese Insolvency Act and Art. 730 Spanish Insolvency Code.

113 Same approach e.g. sec. 119 § 4 no.2 Belgian Code de DIP, and Art.725 Spanish Insolvency Act.

only dispositions about immovables. As of the date of publication of the decision recognizing the foreign insolvency proceeding in Croatia, the *lex fori concursus* determines the legal effects of the debtor's disposals of assets forming part of the insolvency estate that the debtor would undertake on that date and after (Art. 411 of the Croatian Bankruptcy Act).

h) Third parties' rights in rem

Art. 17 EIR has to be distinguished from Art. 8 and 10 EIR, which also deal with the effects of insolvency proceedings on rights in rem, but develop for this particular substantive rules. Belgium, Croatia, Portugal and Spain have turned Art. 8 and 10 EIR into conflicts rules for rights in rem (sec. 119 § 2 no. 1 and no. 3 Belgian Code de DIP, Art. 396 Croatian Bankruptcy Act, Art. 280 Portuguese Insolvency Act¹¹⁴, Art. 724 Spanish Insolvency Code). Somewhat differently, sec. 351 (1) German InsO provides for third party rights in rem a unilateral conflicts rule for the recognition context. Indirectly, all of these provisions appear to accept the critique of Art. 8 and 10 EIR as being overprotective.

i) Effect of insolvency proceedings on pending lawsuits or arbitral proceedings (Art. 18 EIR)¹¹⁵

According to Art. 18 EIR the 'effects of insolvency proceedings on a pending lawsuit or pending arbitral proceedings concerning an asset or a right which forms part of a debtor's insolvency estate shall be governed solely by the law of the Member State in which that lawsuit is pending or in which the arbitral tribunal has its seat.'¹¹⁶ Art. 18 EIR is again a conflict of laws provision. Like all conflict of laws provisions of the EIR, it applies both to domestic proceedings and to recognition of foreign (EU-based) insolvency proceedings. In comparison with the EIR 2000, the provision was extended to expressly include also arbitral proceedings.

114 In addition, Art. 280 of the Act provides also for some substantive rules.

115 For details see → Silvestri (court proceedings) and → Lazić (arbitration).

116 For an in-depth analysis of the various aspects of this provision see, e.g. Kindler, in: Münchener Kommentar BGB, Bd. 13, 9th ed. (2025), Art. 18 EIR.

The provision is primarily addressed at courts (or arbitral tribunals)¹¹⁷ in which lawsuits¹¹⁸ (or arbitral proceedings) are pending at the moment when the insolvency proceeding is opened¹¹⁹. This includes courts (and arbitral tribunals) in the state of the forum concursus as well as court proceedings or arbitral proceedings in other EU countries.

Mediation, which has gained ground in insolvency practice in many countries over the last years, is not addressed in Art. 18 EIR¹²⁰.

aa) Court proceedings¹²¹

The typical main impact an insolvency proceeding has on pending court proceedings by or against the insolvent debtor is suspension (or non-suspension) of the court proceeding. Closely related with such a suspension is the question if and how such proceedings can later be resumed. It may also be the case that such proceedings are completely stopped and may not be continued by any of the parties¹²².

If the court proceeding takes place in the same state as the insolvency proceeding, the *lex fori concursus* and the *lex fori processus* of the pending proceeding coincide. If, however, the court proceeding takes place in another EU Member State, Art. 18 EIR refers for the effect of the insolvency proceeding upon the pending proceeding to the *lex fori* of that proceeding. From the perspective of that court the insolvency proceeding is a foreign

117 There are few procedural tools available – at least in the EU – to enforce this provision ‘from outside’ in the insolvency proceeding. Instruments such as contempt of court or other sanctions are not foreseen in most EU countries, in particular when foreign courts (or arbitral tribunals) are concerned. This may however change in the future. Another possibility are ‘indirect sanctions’ such as non-recognition of a judgment neglecting Art. 18 EIR in the forum concursus or otherwise.

118 Cf. Kindler, in: Münchener Kommentar BGB, Bd. 13, 9th ed. (2025), Art.18 EIR Rz.3 – 5: classical lawsuits (probably including special proceedings such as for payment orders), but not proceedings of ‘voluntary jurisdiction’ (questionable); also lawsuits in administrative courts; but not administrative proceedings outside courts.

119 However, it may include also orders of the insolvency court as to such situations.

120 As to this topic see → Taşman. Furthermore e.g. Filip Ionescu, To what extent is mediation an effective mechanism for resolving disputes in cross-border insolvency?, <https://lawyersweek.net/24808/to-what-extent-is-mediation-an-effective-mechanism-for-resolving-disputes-in-cross-border-insolvency.html>.

121 For details see → Silvestri (proceedings).

122 The exact range of rules covered by Art. 18 EIR is much discussed, see, e.g. Kindler, in: Münchener Kommentar BGB, Bd. 13, 9th ed. (2025), Art.18 EIR Rz. 11 (broad understanding).

insolvency, which needs to be recognized in order to have the effect under Art. 18 EIR in conjunction with the *lex fori processus* (including its rules of the effect of insolvency proceedings on pending court proceedings).

Art. 18 EIR applies to all pending court proceedings, irrespective of the domicile of the parties, which may be located in non-EU countries.

The autonomous law of some EU Member States – Austria, Portugal and Spain – contains in this respect a universal conflict of laws provision (sec. 231 Austrian InsO, sec. 285 Portuguese Insolvency Act, Art. 731 Spanish Insolvency Act). Germany passed a corresponding provision only for the impact of foreign insolvency proceedings upon court proceedings in Germany (sec. 352 German InsO)¹²³. With regard to the aspired effects of German (domestic) insolvency proceedings on court proceedings in other countries (outside the scope of application of Art. 18 EIR, i.e. mainly in non-EU countries), the *lex fori concursus* would apply. Of course it depends on the cross-border insolvency law of the respective foreign country whether the German insolvency proceeding is recognized and which effects this has on local (or other) pending court proceedings. Under the MLCBI this would largely be a matter of discretion of the recognizing court.

bb) Arbitral proceedings¹²⁴

Over the years, arbitral tribunals have developed quite different approaches as to the impact of insolvency proceedings on arbitral proceedings. Some arbitral tribunals have denied any effects of insolvency proceedings upon arbitral proceedings, others have merely given the insolvency representative the possibility to enter the proceeding, again others have suspended the arbitral proceeding with different further consequences¹²⁵. It is therefore

123 Poland has, instead, passed a substantive (unilateral) rule on suspension of court proceedings in Poland for the recognition context, after (formal) recognition of a foreign insolvency proceeding, Art. 397 (1) no. 1 Polish Insolvency Act.

124 For details see → Lazić.

125 See Jasna Garašić, Effects of Foreign Insolvency Proceedings on Pending Arbitral Proceedings, in: Sander, Gerald G./Pošćić, Ana/Martinović, Adrijana (ed.), Exploring the Social Dimension of Europe (2021), pp. 177 – 191, Simon Vorbürger, International Arbitration and Cross-Border Insolvency: Comparative Perspectives (2014), Deyan Draguiev, The Effect of Insolvency on Pending International Arbitration: What is and What Should Not Be, Journal of International Arbitration, Volume 32 (2015), pp. 511–542.

not surprising that the recast EIR deals also with the impact of insolvency proceedings on arbitration.

Art.18 EIR addresses only a limited number of issues arising in the interplay of insolvency law and arbitration law. It neither deals with the question of the validity of arbitration clauses after the opening of an insolvency proceeding nor with recognition and enforcement of arbitral awards. As to the conduct of arbitral proceedings during insolvency (e.g. when the arbitral tribunal continues the proceeding), Art. 18 deals only with the topic of ‘effects of insolvency proceedings on a pending arbitral proceeding’. It does not address, for example, the effects of the insolvency proceedings on ‘new’ arbitration proceedings. Also, it is not quite clear how broad the notion of ‘effects of insolvency proceedings on pending arbitral proceedings’ is to be understood: Does it include the ‘standing’ of the insolvency representative? Does it include the whole further conduct of the arbitral proceeding after the opening of the insolvency proceeding?

Basically, the approach of Art. 18 EIR to refer to the *lex arbitri* is certain to be welcomed by the arbitration community. But does this create a convincing balance between the underlying purposes and values of insolvency law and arbitration law? What are the consequences if, for example, an arbitral tribunal were to deny all effects of the insolvency proceeding on the conduct of the arbitral proceeding? Arguably, this might lead to a setting-aside of the arbitral award by the competent state court or to a denial of recognition of the award in the state of the *forum concursus* and perhaps also in other countries.

The planned UNCITRAL Model Law on applicable law in insolvency proceedings does not presently mention this topic, which is at the intersection mainly between UNCITRAL’s Working Groups V (insolvency) and II (dispute settlement).

At present, no EU Member State has, be it within its insolvency or arbitration legislation, passed specific rules on the interplay between insolvency and arbitration law. A recent comparative document in this field is the IBA Toolkit on Insolvency and Arbitration, which was published in 2021 und updated in 2024, and the corresponding work of the Insolvency and Arbitration Sub-Group of the IBA’s Arbitration Committee¹²⁶.

126 Text available at https://www.ibanet.org/LPD/Dispute_Resolution_Section/Arbitration/insolvency-and-arbitration-working-group#toolkit. For a short overview see <https://jsumundi.com/en/document/publication/en-overview-the-iba-toolkit-on-insolvency-and-arbitration>. As to the work of this group see <https://www.ibanet.org/>

j) Escape clause?

At present, the EIR does not contain an escape clause in insolvency conflict of laws matters. In contrast, such escape clauses exist in several other EU regulations dealing with conflict of laws, e.g. Art.4 (3) of the Rome I Regulation on the law applicable to contractual obligations or Art.4 (3) of the Rome II Regulation on the law applicable to non-contractual obligations.

The autonomous cross-border insolvency laws of EU Member States also do not provide for specific escape clauses in this field. However, some countries have passed general escape clauses for conflict of laws, which appear to apply also to conflict of laws in the insolvency context (e.g. sec. 24 Czech Private International Law Act, sec. 10 Hungarian Private International Law Act, cf. also sec. 1 (1) of the Austrian Private International Law Act). A similar function is fulfilled by the flexible approach to conflict of laws taken by many U.S. courts¹²⁷.

4. Particular aspects of non-main proceedings?

Neither the EIR nor the autonomous cross-border insolvency law of the EU Member States contain any particular conflict of laws provisions for non-main proceedings. The limitation of such proceedings to assets of the debtor situated in the forum state of the non-main proceeding (Art. 3 (2) EIR and most autonomous laws) is a criterion of substantive law, not of conflict of laws. Even in a non-main insolvency proceeding the laws of another country (EU Member State or non-EU country) may have to be applied. For example, it may be necessary even in non-main proceedings to determine property in an asset that has been brought from another country into the forum state of the non-main proceeding. There are, however, no indications in the EIR or in autonomous laws that in such cases particular conflicts rules should apply in non-main insolvencies. Another example would be the effect of a non-main insolvency proceeding on pending lawsuits or arbitral proceedings. If such proceedings relate to property covered by the non-main proceeding, there is no reason to exclude proceedings in

LPD/Dispute_Resolution_Section/Arbitration/insolvency-and-arbitration-working-group (all accessed 18.03.2025). As to the role of soft law in cross-border insolvency in general see Mevorach, pp.140 – 143.

127 Cf. <https://www.abi.org/abi-journal/conflict-of-laws-which-state-rules-govern> (accessed 16.06.2025).

foreign countries from the conflict of laws rule of Art. 18 EIR or to develop a different conflicts rule for such cases.

5. Interim summary

Summing-up, the EU Insolvency Regulation has developed a differentiated set of rules on conflict of laws in insolvency, setting standards for this sector of private international law on the international level. While the basic rule of *lex fori concursus* is today generally accepted, the exceptions and specifications are more of a European experiment. A global standard might develop in the current UNCITRAL project on applicable law in insolvency. According to the present version of its draft, there will be significantly fewer exceptions from the *lex fori concursus* than under the EIR. This approach has to be seen in the context of the other UNCITRAL model laws on insolvency, in particular the MLCBI, and might not be fully adequate for the EU, at least not for its inner-EU relations.

When the UNCITRAL text on applicable law in insolvency is completed, it may be an attractive instrument also for the EU, ‘universalising’ its basic conflicts rules in insolvency on a global level. However, there will also be a need to discuss whether and to which degree the existing special conflict of laws provisions in the EIR should be kept for inner-EU situations, or whether they should be dropped or modified to avoid different sets of rules for inner-EU and ‘external’ relations. One possibility would be to limit some of these rules to the recognition context, following the example of the autonomous insolvency law of some EU member countries, at least with regard to non-EU insolvencies.

V. Substantive law

Apart from conflict of laws, the EIR contains numerous rules of a substantive (procedural or material) content for cross-border cases. In the context of domestic insolvency proceedings these are – apart from classical international civil procedure issues such as jurisdiction and recognition – mainly provisions specifying the general geographical reach (scope) of insolvency proceedings, secondly particular provisions containing limits of their territorial reach, thirdly some provisions distinguishing between creditors or other stakeholders according to their geographical location. These three groups of substantive provisions will be addressed below in

some detail. Other provisions of a substantive character will be dealt-with more summarily.

1. Geographical reach of insolvency proceedings in general and non-main proceedings in particular

The EIR does not expressly specify the intended geographical reach of COMI-based (main) proceedings.

a) Main insolvency proceedings

It seems to be unanimously accepted in the EU that COMI-based proceedings apply to all assets of the debtor, whether they are situated within the EU or in non-EU countries, as well as to acts done (or omitted) in other countries than the forum concursus. This is sometimes deduced from general policy considerations, which are seen as underlying the EIR, in particular the ‘universal’ vocation of main proceedings as a globally accepted and reasonable approach in cross-border insolvency law¹²⁸. Other voices prefer an argument *e contrario* from the express territorial limitation of non-main (establishment-based) proceedings under Art.3 (2) EIR.

If the EIR is not applicable, the legal situation may differ under autonomous cross-border insolvency law. In most EU countries main proceedings are expressly or implicitly accorded (intended) universal effect, thereby including also assets in non-EU countries. This is often expressed through the formula that the insolvency proceeding (or the estate) includes property ‘wherever situated’¹²⁹. The same is true for most non-EU countries¹³⁰. However, this issue may be arguable in some jurisdictions, in particular in Common Law countries, where courts may have discretion to decide on this question.

Even if main insolvency proceedings have a universal (global) reach, this does not mean that they can be enforced globally. Some non-EU countries

128 See recitals 22 and 23 of the EIR. At the same time, authors mention that foreign countries can decide themselves whether they recognize the effects of EU insolvency proceedings with regard to assets outside the EU, e.g. by granting recognition under the MLCBI.

129 Cf., e.g., sec. 237 Austrian Insolvency Act (with some limitations), sec. 20 of the Dutch Bankruptcy Act or sec. 174 (2) of the Slovak Insolvency Act.

130 See, e.g. sec.34 of the Japanese Bankruptcy Act or sec. 174a (6) of the Serbian Insolvency Act.

may recognize a EU-based main proceeding and cooperate with it, others may deny such recognition. In such a situation the insolvency court of the main proceeding has – at least in the EU – only limited means to react to such non-recognition. Procedural tools such as contempt of court sanctions or injunctions against participants are rarely available in the courts of EU Member States, and they may be problematic as they tend to cause tensions with other jurisdictions. However, the EIR contains some limited substantive rules, which may be applied (also) in such cases, in particular Art. 23 EIR (duty of creditors to return or impute proceeds received abroad).

b) Non-main insolvency proceeding

According to Art.3 (2) sentence 2 EIR, the effects of proceedings opened on the basis of an ‘establishment’ of the debtor, i.e. non-main proceedings under the Regulation, ‘shall be restricted to the assets of the debtor situated in the territory of the latter Member State.’ This means that in principle only assets situated within the territory of this State are covered by the administrative powers of an insolvency representative, are protected against execution by individual creditors or by other protective rules of domestic insolvency law. On the other side, Art.3 (2) sentence 2 EIR does not provide for a general territorial limitation of the rules governing such insolvency proceedings. For example, the insolvency representative appointed in a non-main proceeding is entitled to sue abroad to recover assets removed from the territory of the State of the territorial proceeding.

Under autonomous law, non-main proceedings are usually regarded as having only territorial reach as to the assets covered by the proceeding. This is explicitly stated in Belgium, Croatia, Germany, Poland, Portugal, Slovenia and Spain (sec. 118 § 1 no.2 in conjunction with sec.117 no.3 Belgian Code de DIP, Art. 393 (4) Croatian Bankruptcy Act, sec. 354 (1) German InsO, Art.380 (4) Polish Bankruptcy Act, sec. 294 (1) Portuguese Insolvency Act, Art. 474 (2) no.1 Slovenian Insolvency Act, Art.49 (2) Spanish Insolvency Act)¹³¹.

However, this approach is not taken everywhere. In France, for example, all insolvency proceedings, including non-main proceedings, have in prin-

131 Same approach: Art.251 sent. 3 and 4 and Art.256 – 27 OHADA Uniform Insolvency Act.

ciple universal reach.¹³² The same seems to be true in the Netherlands according to the wording of sec.20 of the Dutch Bankruptcy Act, and for Slovakia according to Art.174 (2) Slovak Insolvency Act. Outside the EU, e.g. the UK and the U.S. follow a similar approach, granting the insolvency court, however, discretion to limit the geographical reach of the proceeding in a general manner or with regard to certain assets or circumstances¹³³.

An interesting particular approach has been developed by the Austrian legislator, stating in sec. 237 (1) Austrian InsO that the effects of any Austrian insolvency proceeding (i.e. including non-main proceedings) covers also foreign assets, 'except if 1. The debtor's COMI is located in foreign country, 2. In this country a [main] insolvency proceeding has been opened and 3. that proceeding includes also foreign assets.' Thus, sec. 237 (1) Austrian InsO gives also non-main proceedings a universal reach under certain conditions. The legislative purpose appears to be that conflicts with a foreign main proceeding should be avoided, but if no such conflicts can be expected, also non-main proceedings have a global reach and can in fact serve like a main proceeding. In contrast with the U.S. and UK approach (and perhaps France), the Austrian model does not foresee discretionary powers of the insolvency court in this respect.

A differentiating approach has also been adopted by the MLCBI, though mainly for purposes of cooperation between parallel proceedings (see Art. 28 MLCBI). Even if a (secondary) non-main proceeding is meant to cover only property situated in the forum state, this does not exclude that the proceeding is extended to property situated abroad, if this serves the purposes of cooperation between the parallel proceedings.

132 See see Dammann/Sénéchal, *Le droit de l'insolvabilité internationale* (2018), pp.700 – 703.

133 Cf. Note, *Extraterritorial avoidance actions under the U.S. Bankruptcy Code*, 135 *Harv.L.Rev.* (2022), pp.2173 – 2193, <https://harvardlawreview.org/print/vol-135/extraterritorial-avoidance-actions-under-the-u-s-bankruptcy-code/> (accessed 16.06.2025), David P. Stromes, *The Extraterritorial Reach of the Bankruptcy Code's Automatic Stay: Theory vs. Practice*, 33 *Brook. J. Int'l L.* (2007), pp.,277- 307, <https://brooklynworks.brooklaw.edu/bjil/vol33/iss1/6> (accessed 16.06.2025).

2. Geographical reach of specific provisions

a) Art. 8 and 10 EIR

Two provisions of the EIR, which in principle apply both in main and non-main proceedings¹³⁴, contain a geographical limitation to assets located in the State of the forum concursus (Art. 8 and 10 EIR). Art. 8 EIR (third parties' rights in rem) and Art. 10 EIR (retention of title) state that assets located in the territory of a Member State other than the State of the insolvency forum 'are not affected' by the insolvency rules of the State of the insolvency proceeding. Although there has been some discussion whether these provisions could be interpreted as conflict of laws rules¹³⁵, it seems to be generally accepted today that they exclude specifically the application of substantive insolvency rules to assets situated abroad¹³⁶. For example, if the insolvency law of EU Member State 1 provides for rules limiting the right of a seller under a retention of title agreement to withdraw his property from the insolvent estate, these rules do not apply to assets situated in EU Member State 2. This can complicate endeavours for restructuring and at least weakens the negotiating power of insolvency representatives.

Art. 8 and 10 EIR have been justified with the argument that retention of title sellers and owners of in rem security right deserve particular protection notably in cross-border insolvencies. Other voices in literature regard the solution laid-down in these provisions, however, as an overprotection of some economic players¹³⁷. In any case, Art. 8 and 10 do not protect such participants as to assets situated in non-EU countries.

The territorial limitations in Art. 8 and 10 EIR are founded on specific considerations to protect expectations within the EU internal market. If the legislator had intended to create either a general legal regime or open the way to national approaches, this should have been stated expressly. Whether such rules should be extended to relations with non-EU countries is a matter of legal policy and future regulation.

134 However, in non-main proceedings they may have no practical relevance to the geographical limitation of these proceedings to assets located in the State of the establishment.

135 Cf. Bork/Mangano, *European Cross-border Insolvency Law* (2022), p.142 et seq.

136 This has been confirmed by the CJEU in the German Graphics case, ECLI:EU:C:2009:544.

137 Bork/Mangano, *European Cross-border Insolvency Law* (2022), p.146.

Nearly none of the EU Member States extends these provisions to non-EU countries, the only exception being Austria (sec. 222 and 224 Austrian InsO). Most of those EU Member States, which have passed special legislation on this issue, have created a universal conflict of laws rule referring to the *lex rei sitae* (Belgium, Croatia, Portugal and Spain).¹³⁸ Germany takes a slightly different position at this place limiting its conflicts rule to the recognition context and assets situated in Germany (sec. 351 German InsO).

b) Art. 9 EIR

A peculiar position in this context has the provision of Art.9 EIR on rights of set-off in cross-border insolvency. Art.9 EIR states that creditors' rights of set-off are 'not affected' by insolvency, 'where such a set-off is permitted by the law applicable to the insolvent debtor's claim.' On the one hand, the formula 'not affected' corresponds to the wording of Art.8 and 10 EIR which except foreign assets from certain substantive rules of the *lex fori concursus*. In contrast, Art.9 EIR contains a conflict of laws rule, referring to 'the law applicable to the insolvent debtor's claim'. Thus, Art.9 EIR stands between conflict of laws and substantive law, somewhat similarly to Art.16 EIR on detrimental acts. Whether Art.9 EIR reflects a sound policy in the context of cross-border insolvency is disputed, in particular as national laws differ significantly as to set-off in insolvency. Similarly to Art.16 EIR, Art.9 sort of maximises the protection of creditors with regard to set-off. Differently from Art.16 EIR, Art.9 is not limited to debts or claims governed by the law of EU Member States, neither does it foresee a distinction between local or foreign creditor or the (fictional) location of debts. Art.9 EIR applies universally, thus excluding possible critiques of discrimination – however at the disadvantage of the other creditors.

138 Belgium: sec. 119 § 2 no.1 and 3 Code de DIP, Croatia: Art.396 Bankruptcy Act (for 'exemption' and rights in rem, Aus- und Absonderung), Portugal: Art.280 Portuguese Insolvency Act (in addition, Art. 280 provides also for some substantive rules, but without geographic limitation), Spain: Art.723 Spanish Insolvency Act (accompanied by one substantive rule, but no geographical limitation). See also *supra* at subpoint 3, footnotes 107 and 108). This illustrates how member states switch between conflict of laws rules and substantive rules in cross-border insolvency law.

3. Distinction between creditors and other stakeholders or their debts/
claims along lines of location or other ‘closeness’

The history of insolvency law as well as comparative observations show that insolvency laws sometimes distinguish(ed) between ‘local’ and ‘foreign’ stakeholders (debtors, creditors, other persons). The EIR also uses such distinctions (see e.g. the definitions of ‘local’ and ‘foreign’ creditors in Art. 2 (11) and (12) EIR), but gives them within the EIR’s rules relatively small weight.

a) Debtor

Jurisdiction is based on the COMI (Art.3 (1) EIR), a concept based on rather ‘objective’ factors (place of business, property etc.). The debtor’s domicile or habitual residence plays a certain role in the context of COMI, but only as one of many factors. Also, jurisdiction based on an establishment (Art.3 (3) EIR) can be seen as an objective category, available to debtors from all over the globe.

There are no other rules in the EIR, distinguishing between insolvent debtors according to their nationality or domicile, although it is not excluded that national insolvency laws (or insolvency-related laws) might use these concepts in certain contexts¹³⁹. As the case may be, this can lead in the future to disputes about possible discriminations under EU law or constitutional law.

The autonomous laws of Germany and Austria take basically the same position as the EIR, not distinguishing (taking aside jurisdiction, which follows basically the COMI approach) between ‘local’ or ‘foreign’ debtors. The same appears to be true, in principle, for the other EU countries, but exceptional rules cannot be excluded, e.g. on the basis of provisions on reciprocity or retorsion contained in some acts on private international law or cross-border civil procedure¹⁴⁰.

139 For example, autonomous French law gives the citizenship of creditors and debtors a certain role in establishing jurisdiction also in insolvency cases, see Dammann/Sénéchal, *Le droit de l’insolvabilité internationale* (2018), pp.692 – 695.

140 See, e.g. Art.31 Hungarian Private International Law Act, Art. 2.561 Romanian Civil Code.

b) Creditors and other stakeholders¹⁴¹

As to creditors, the situation is somewhat different. In principle, the EIR does not distinguish between ‘domestic’ and ‘foreign’ creditors¹⁴². It also does not distinguish between domestic and foreign ‘claims’, in whichever way they might be defined. For example, any creditors, whether domiciled in other EU Member States or in non-EU countries, may participate in main as well as in non-main proceedings under the Regulation¹⁴³. The same is true for other stakeholders, e.g. shareholders of the debtor, commercial partners of the debtor, even public entities.

However, this basic observation needs to be qualified. Some provisions in the Regulation do distinguish between ‘local’ and ‘foreign’ creditors. In the context of non-main proceedings ‘local’ creditors are accorded some specific (mostly procedural) rights (see Art. 3 (4) EIR for isolated non-main proceedings, Art.36 EIR for undertakings to avoid a secondary proceeding, Art 38 (2) and (3) for secondary proceedings). In a general context ‘foreign’ creditors are sometimes mentioned specifically as having certain procedural rights (see Art.54 and 55 EIR).¹⁴⁴

With this, the definition of ‘foreign’ creditor in Art.2 (12) EIR is limited to creditors domiciled¹⁴⁵ in EU Member States, i.e. it excludes creditors domiciled in non-EU States¹⁴⁶. This might be regarded as discriminatory from a non-EU perspective, but the applicable national insolvency law regularly steps in and grants equal status to all creditors irrespective of their domicile. Also, in so far as provisions of the EIR do not distinguish between local and foreign creditors, it can be argued that non-EU creditors are included therein (see, e.g. Art.45 EIR: ‘any’ creditor). Another aspect of the definition of foreign creditors in Art. 12 (2) EIR is that it expressly includes ‘tax authorities and social security authorities of Member States’. This opens the way for foreign public entities from other EU Member States

141 For details see → Garašić.

142 See, e.g. Art. 46 EIR: ‘any’ creditor may lodge claims in secondary proceedings.

143 Cf. Art.54 EIR.

144 See Art.2 (12) EIR: term ‘foreign creditor’ is limited to creditors domiciled (etc.) in another EU Member State, excluding creditors domiciled in non-EU countries.

145 In detail more open, see Art.2 (12): habitual residence, domicile or registered office. In addition special provision is made for ‘tax authorities and social security authorities of Member States’.

146 Another aspect of this definition is that it expressly includes foreign public entities such as tax authorities and.

to lodge claims (and exercise other creditor rights¹⁴⁷) in all EU-based proceedings, but it excludes – or at least does not include – public authorities from non-EU countries.

‘Local’ creditors, on the other hand, are not defined by domicile, but by the local link of their ‘claim’ (Art. 12 (11) EIR). Claims are local if they ‘arose from or in connection with the operation of an establishment situated in a Member State other than the Member State in which the centre of the debtor’s main interests is located.’ Under this definition, the term ‘local creditors’ is limited to the context of non-main proceedings. There are, strictly speaking, under the EIR no ‘local’ creditors in main proceedings, all rules apply basically to creditors in general.

According to the jurisprudence of the Court of Justice of the EU in civil procedure law, discrimination according to nationality can also exist in an indirect form, e.g. by using domicile or other seemingly neutral criteria¹⁴⁸. Developing this approach further, distinctions based on the ‘location’ of claims or assets or on the law applicable to claims also risk to be regarded as a form of indirect discrimination.

The autonomous insolvency laws of the EU Member States in principle also do not distinguish between ‘local’ or ‘foreign’ creditors or other stakeholders, and this is sometimes even expressly stated in provisions on cross-border insolvencies.¹⁴⁹ However, in certain cases, domestic creditors continue to enjoy some preferential treatment or foreign creditors are treated less favorably under autonomous insolvency laws in the EU even today¹⁵⁰. In exceptional cases, negative treatment of some creditors on the basis of provisions on reciprocity or retorsion contained in some private in-

147 However, as Art.45 EIR does not mention other rights in the proceeding expressly, there is some ambiguity which other rights a foreign public entity may have. Arguably, this is left for autonomous legislation to decide, e.g. whether foreign tax authorities are on an equal footing with domestic authorities as to privileges in satisfaction of their claims. Traditionally, this is denied.

148 Cf. https://curia.europa.eu/jcms/jcms/pl_3287489/en/ (accessed 18.03.2025).

149 See, e.g. sec. 236 Austrian InsO, Art.XX-212 Belgian Economic Code, Art.13 Greek Insolvency Act (and Art.14 of the expressly states that foreign creditors must also be informed about the proceeding), Art. 380 (1) Polish Bankruptcy Act, Art. 339 Polish Restructuring Law, Art. 284 (1) Portuguese Insolvency Act, Art.285 (1) and 286 Romanian Insolvency Act, Art.46 Slovenian Insolvency Act (general provision of Slovenian insolvency law), Art.739 Spanish Insolvency Act.

150 See, e.g. sec. 182a Czech Insolvency Act (security for costs in domestic proceedings may be imposed on non-EU foreign creditors), Art.380 (2) Polish Bankruptcy Act and Art.340 Polish Restructuring Law (foreign creditors have to appoint representative in Poland), Art. 285 (2) and (4) Romanian Insolvency Act (foreign creditors

ternational law acts cannot be excluded. Outside the EU, such practices also exist, e.g. with regard to recognition of foreign (e.g. EU-based) insolvencies. The problems in this respect are, however, sometimes more of a factual than legal nature.

As to foreign public entities, e.g. foreign tax authorities and foreign social security authorities, the legal situation seems at best unclear. Most probably, their participation in domestic insolvency proceedings tends usually to be denied¹⁵¹.

4. Other provisions

There is a considerable number of other substantive provisions in the EIR, which have not yet been mentioned or were only briefly touched in this report.

One example is – in the ‘General Provisions’ of the EIR – Art.15, which states that European patents with unitary effect, Community trade marks and ‘any other similar rights established by Union’ may only be included in EU-based main proceedings. This avoids complicated distribution problems between concurrent proceedings in the EU. Most of the substantive provisions in the EIR deal with procedural issues such as lodging claims, information to be given to participants, cooperation between insolvency representatives or courts in parallel proceedings etc. Issues of parallel proceedings will be addressed in another contribution in this book.

Another, more general provision is Art. 31 EIR. Although it is positioned in the EIR’s chapter on recognition of foreign proceeding, it is also applicable in the context of domestic proceedings. The provision protects good faith payments (or other performance of obligation) made in EU Member States to a debtor who would under insolvency rules not be entitled to receive such payments. Due to this provision, the third party is liberated and does not have to pay again to the insolvency representative. Art. 31 EIR is based on similar provisions in some EU member countries.

German autonomous insolvency law repeats this provision in sec. 350 German InsO, but limits it to payments made in Germany. Sec. 235 Austrian InsO contains a similar provision, but does not limit it to payments in Austria.

‘not ranked lower than ordinary creditors’ i.e. perhaps implicitly denying privileged status). As to such aspects in non-main proceedings see below at e).

151 See, e.g., Art. 380 (3) Polish Bankruptcy Act.

The substantive provision in Art. 23 EIR on return or imputation of proceeds received in other EU Member States has already been mentioned. It has been taken-over with some additions into autonomous cross-border insolvency law in Germany, applying both to receipts in Germany and abroad (sec. 342 German InsO). Austria has not passed a similar provision.

With regard to non-EU countries, uniform technical rules, which have been developed in the EIR, could be useful – in a modified form – also in relations with non-EU countries, but this would require a detailed analysis of each of these provisions. One example are the provisions of the EIR about the use of information technologies in cross-border insolvencies (in particular Art. 24 – 30 and 53 – 55 EIR) and insolvency law is included in the EU's more general e-Codex working program¹⁵². Also, the EU Restructuring and Insolvency Directive of 2019¹⁵³ contains several 'enabling' rules as to the use of information technologies in EU-based insolvency proceedings, expressly 'including in cross-border situations' (Art. 28 of the Directive)¹⁵⁴. The EIR has created innovative rules on the establishment, interconnection and access to insolvency registers between EU Member States (Art. 24 – 30 EIR). Some kind of cooperation in this field would be of use also in relations with non-EU countries. The respective EIR provisions could be a good starting-point for such discussion.

On the national level, information technologies are more and more used in national insolvency proceedings, but cooperation in this respect with non-EU countries is little developed.

A further area of practical importance which would deserve attention also in the context of the EIR from a perspective of (mostly) substantive law, is the use of mediation in cross-border insolvencies. The EIR does not presently contain rules on this subject, and the European Mediation Directive of 2008¹⁵⁵ does not directly address mediation in the insolvency context. However, the mediation is increasingly used in the insolvency context and promises significant efficiencies. In the EU, e.g. Slovenia has

152 See <https://eur-lex.europa.eu/EN/legal-content/summary/e-codex-computerised-system-for-the-cross-border-electronic-exchange-of-data-in-the-area-of-judicial-cooperation-in-civil-and-criminal-matters.html> (accessed 18.03.2025).

153 <https://eur-lex.europa.eu/eli/dir/2019/1023/oj/eng> (accessed on 20.3.2025).

154 According to this provision 'at least the following actions' must be open to the use of IT: filing of claims, submission of restructuring or repayment plans, notifications to creditors, lodging of challenges and appeal.

155 Text available at <https://eur-lex.europa.eu/eli/dir/2008/52/oj/eng> (accessed on 18.03.2025).

passed specific rules on mediation in insolvency¹⁵⁶, and in the United States and many other countries worldwide mediation is frequently used, also in cross-border insolvencies¹⁵⁷.

5. Particular aspects of non-main proceedings

Many of the substantive provisions of the EIR concern non-main proceedings and will now be addressed together in context. Issues of jurisdiction and conflict of laws have already been discussed above and need not be repeated at this place. Recognition of foreign non-main proceedings will be dealt with in the general report on recognition, as will particular aspects of concurrent proceedings, i.e. mainly the relationship between main proceedings and secondary (non-main) proceedings.

a) Opening of non-main proceeding

The opening stage of an insolvency proceeding includes a number of conditions, some of which tend to be modified in the case of non-main proceedings.

aa) Availability

Under the EIR, non-main insolvency proceedings are available for all categories of insolvency proceedings covered by the EIR in general. However, international jurisdiction must exist under Art. 3 (2) EIR (establishment in a EU Member State, with COMI in the EU).

On the national level, non-main proceedings may sometimes not be available for certain groups of debtors, e.g. banks or insurances. Non-main proceedings may also not be available (or may have to be suspended or terminated), if a foreign main proceeding has been opened. This is not the case, however, under the EIR.

¹⁵⁶ See Art. 49 and 50 of the Slovenian Insolvency Act. Example: US, others.

¹⁵⁷ See, e.g., Scott Atkins/Kai Luck, Mediation as a bankruptcy and insolvency game changer, <https://ccla.smu.edu.sg/sgri/blog/2023/11/15/mediation-bankruptcy-and-in-solvency-game-changer> (accessed on 18.03.2025).

bb) Right to apply ('standing') for non-main proceeding

The right to apply for (request the opening of) a non-main proceeding may be clarified or modified in comparison with a regular (main) proceeding. For example, a particular right to apply for a non-main proceeding may be granted to the insolvency practitioner of the main proceeding or other non-main proceedings concerning the same debtor¹⁵⁸. Some creditors may be excluded from applying for a non-main proceeding. For example, only 'local' creditors or 'local secured or privileged' creditors may be entitled to apply for a non-main proceeding. There may also be special rules for a debtor applying for a non-main insolvency. For example, debtor's standing might be specifically granted (or denied) if a main proceeding has already been opened.

The EIR contains in this respect different rules for non-main proceedings which are commenced before a foreign main proceeding (in the following: 'isolated' non-main proceedings) and non-main proceedings, which are requested when a foreign main proceeding is already underway. In the first situation, Art. 3 (4) EIR tries to reduce the opening of non-main proceedings by limiting the right to apply to local creditors (having claims relating to the establishment) and local public authorities. If, however, a main proceeding is not available in the respective case in the COMI state, general (national) rules of the right to request a proceeding continue to apply. The reason behind this is the policy to further the conduct of insolvency proceedings in the COMI state. If, on the other hand, an EU-based main proceeding already exists, the insolvency representative in the main proceeding has a right to request a secondary proceeding of his own, but all other persons with standing to apply for such a proceeding under national law may also do so (Art. 37 (1) EIR).

Taking a look at the autonomous laws in EU Member States, a significant difference exists between countries, which have adopted the MLCBI (Greece, Poland, Romania, Slovenia) and other countries, which have developed their own system, more in line with the EIR, but also with independent characteristics.

Austria does not provide for a particular subchapter on domestic non-main insolvency proceedings, but deals with such proceedings in distribut-

158 The insolvency practitioner of another proceeding (not concerning the same debtor) may be entitled to apply for an insolvency proceeding as part of the recognition of such other proceeding.

ed provisions (jurisdiction in sec. 63 (2) Austrian InsO, geographical scope in sec. 237 Austrian InsO as well as procedural and conflict of laws provisions of a general character). Austria does not provide for specific standing of a foreign insolvency representative to apply for a domestic non-main proceeding, but seems to recognize his standing if foreseen under the foreign *lex fori concursus* (sec. 241 (1) Austrian InsO). In contrast with the EIR, Austria does not provide for particular rules on the right of creditors to apply for an Austrian non-main insolvency proceeding.

Croatia provides for a particular subchapter on domestic non-main secondary insolvency proceedings (Arts. 418 – 423 Croatian Bankruptcy Act), which mainly contains provisions on cooperation between parallel proceedings. Further aspects of non-main proceedings, in particular ‘isolated’ non-main proceedings, are addressed under the heading of ‘non-recognition’ of a foreign proceeding (Art. 424 – 426 Croatian Bankruptcy Act) and at other places in the Act (e.g. jurisdiction in Art. 393 Croatian Bankruptcy Act). In the first case (existence of a foreign recognized proceeding), Croatia limits the standing to apply for a secondary proceeding in Croatia in principle to a small number of domestic public creditors and to the debtor’s employees with a regular place of work in the Republic of Croatia (Art. 418 (1) of the Act). Only in case of ‘particular difficulties’ other creditors may apply for the opening of a secondary proceeding. In case of isolated non-main proceedings (including the case when the foreign proceeding is not recognized) the standing of creditors is not limited (cf. Art. 426 of the Act). On the other hand, the insolvency representative of the recognized foreign (main) proceeding has standing to apply for a secondary proceeding in his own right (Art. 417 of the Act), which corresponds to the solution under the MLCBI. Interestingly, Art. 418 (3) of the Act gives the insolvency court the power ‘not to open’ the secondary proceeding, ‘if it assesses that the opening of such proceedings would be economically inappropriate’. This appears quite similar to the power of abstention under U.S. Bankruptcy Law and the discretionary power of courts under the MLCBI.

The German Insolvency Code provides for a special subchapter on non-main proceedings (sec. 354 – 358 German InsO), but limits itself to a few basic provisions. In particular, it does not provide for a special right of a foreign insolvency representative to apply for a non-main proceeding in Germany, but the foreign representative may act for the debtor under rules of recognition of foreign insolvencies (sec. 343 German InsO). Creditors are granted the right to apply for a non-main proceeding in Germany under regular national rules, if there exists a debtor’s establishment in Germany,

otherwise only when they can show a particular interest in the non-main establishment (sec. 354 (2) German InsO).

EU Member States which have adopted the MLCBI, have extensive detailed rules on (mainly secondary) non-main proceedings (cf. e.g. sec. 405 – 412 Polish Bankruptcy Act). Taking the example of Polish law, only specifically defined ‘local’ creditors have standing to apply for a secondary proceeding (Art. 407 (1) of the Act), which appears to conflict with Art. 13 MLCBI, but is in line with Art. 3 (4) b EIR. On the other hand, the insolvency representative of a recognized foreign main proceeding has standing to apply for a secondary proceeding (sec. 402 Polish Bankruptcy Act, in line with Art. 11 MLCBI). Formerly, Polish law also provided for the possibility to open a secondary proceeding *ex officio* ‘if required by the interests of a resident in the Republic of Poland of creditors from labor relations and creditors, the amount of compensation for causing the disease, inability to work, disability, or death, as well as maintenance creditors (older version of Art. 407 (2) Polish Bankruptcy Act), but this rule was dropped in 2015.

cc) Grounds for opening non-main proceedings (e.g. insolvency, acts of bankruptcy etc.)

Specific attention is sometimes given to the grounds for opening a non-main proceeding. In legal systems which require for the opening of insolvency proceedings the proof of insolvency of the debtor, insolvency may for example be presumed if a main proceeding has already been opened. It may also be specifically stated, for example, whether the comparison of debts and assets or the finding of ‘acts of bankruptcy’ needs a specific approach in non-main proceedings (e.g. including only local assets and local creditors or referring only to acts in the forum state). Another approach can be to give the court a broad power to evaluate whether the opening of a non-main insolvency proceedings is in the best interest of the creditors (or some creditors) and the debtor.

Art. 34 sentence 2 EIR states that ‘Where the main insolvency proceedings required that the debtor be insolvent, the debtor’s insolvency shall not be re-examined in the Member State in which secondary insolvency proceedings may be opened.’ A similar provision is foreseen as a global rule by Art. 31 MLCBI. Neither the Austrian nor the German cross-border insolvency laws contain a similar provision, but it exists in several other

EU Member States, mostly countries which have adopted the MLCBI like Poland and Slovenia¹⁵⁹, but also other countries, e.g. Spain¹⁶⁰. In detail, these rules differ: Some laws provide, like the MLCBI, only for a presumption of insolvency (Poland and Slovenia), others do not require in such cases the insolvency test (Spain).

dd) Role of discretion of the court

A more general question regards the role of discretion of the insolvency court, here in the context of non-main proceedings¹⁶¹. Is the court given a broad discretion to open a non-main proceeding or does the court have other more limited discretionary or evaluative powers in this context?

This question can also arise at a later stage, after the opening of the proceeding.

The EIR does not contain particular provisions in this respect. In contrast, the MLCBI generally gives great weight to discretion of the court in cross-border cooperation, though it does not deal specifically with the role of discretion at commencing a non-main proceeding (cf. Art. 28 MLCBI).

The example of Croatia shows, that discretionary elements may be foreseen also in non-MLCBI countries (e.g. in Art. 418 (3) Croatian Bankruptcy Act). MLCBI-based laws give significantly more discretionary powers to the insolvency court.

b) Legal consequences of (opened) non-main proceeding

In principle, non-main proceedings can be said to have the same legal consequences as main proceedings, with the exception that they are usually given only territorial effect. However, there may be some modifications. In particular, the right of creditors to participate¹⁶² in non-main proceedings is sometimes regulated differently from main proceedings.

159 See sec. 408 Polish Insolvency Act, sec. 477 Slovenian Insolvency Act.

160 See sec. 433 Spanish Insolvency Act: insolvency test not required in such a case).

161 Cf. IMF, *Orderly & Effective Insolvency Procedures – Key Issues* (1999), <https://www.imf.org/external/pubs/ft/orderly/> (at General Features, Common Issues, Exercise of Discretion).

162 This has to be distinguished from the right ('standing') of a creditor or other applicants to apply for an insolvency proceeding, see *supra* at a)bb).

Under the EIR, both in main and non-main proceedings in principle all creditors are entitled to participate in the proceeding¹⁶³, although their legal status in the proceedings may be different (e.g. secured creditors, privileged creditors, ordinary creditors) and some creditors may be completely excluded ('new creditors' of the debtor since the opening of the proceeding¹⁶⁴, foreign tax creditors etc.). Under autonomous laws, the circle of participation-entitled creditors in non-main proceedings may sometimes be limited or there may be various forms of open or hidden discrimination of foreign creditors¹⁶⁵. However, the worldwide trend as expressed in the MLCBI and also in the EIR runs against such discriminations and in the autonomous laws of the EU member countries, privileges for local creditors and formal discrimination of foreign creditors are rather rare exceptions¹⁶⁶.

6. Interim summary

The overview has shown that the geographical reach of main proceedings in all EU Member States under the EIR is universal, with slight reservations under autonomous law. Non-main proceedings are usually given only territorial reach, following the EIR. However, some countries take a different approach, giving non-main proceedings at least in principle or under certain conditions also universal reach. In such systems conflicts with foreign proceedings are avoided through other tools, e.g. limitation of the universal reach of the proceeding by discretion of the court.

The provisions of the EIR on geographic limitations of some substantive provisions (Art.8 and 10 EIR) are not repeated by all but one EU Member State. However, some countries have adopted for these situation special conflict rules. A different approach, which is also to be found in some EU countries, is to pass unilateral substantive rules for the effect of foreign recognized proceedings on assets, acts or proceedings in the recognizing country. Generally speaking, it can be observed that the autonomous insol-

163 Cf. (as to the position of foreign creditors) Kurt H. Nadelmann, Foreign and domestic creditors in bankruptcy proceedings. Remnants of discrimination? https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=9314&context=penn_law_review (accessed 18.03.2025).

164 See CJEU Air Berlin case (ECLI:EU:C:2024:331).

165 See, e.g. Art.50 (1) of the Swiss Civil Execution and Bankruptcy Act ('creditors of the establishment'; such creditors may be domestic or foreign).

166 On example is, arguably, Art. 285 (2) and (4) Romanian Insolvency Act (foreign creditors 'not ranked lower than ordinary creditors').

veny laws in the EU Member States have taken the EIR as an instrument for reflection whether in relations with non-EU countries the EIR can be used as a model or whether different rules seem more adequate, including the MLCBI.

C. Suggestions for future action

I would now like to present some suggestions for future action on the side of the EU as to domestic insolvency proceedings linked with non-EU countries.

I. General structure

It seems to me that the basic structure of the European Insolvency Regulation does not need fundamental changes in view of contacts with non-EU countries.

The approach of the EIR to have common provisions, which apply both to domestic proceedings and to recognition, assembled in Chapter I, may be unusual on an international scale, but it is not unreasonable and has become familiar to legal practitioners and scholars. Also, the distinction between main and non-main proceedings (though with a somewhat peculiar terminology) is reasonable and need not be changed with a view to relations with non-EU countries.

The main general question, which permeates all aspects of EIR and affects, of course, also the domestic proceedings perspective, is whether the Regulation (or some other instrument) should address also relations with non EU countries. My answer is decidedly yes, and I will now discuss this as to subtopics where action seems to me particularly desirable. I will first address jurisdiction, then conflict of laws and, thereafter, substantive issues.

I will try to focus on particular rules or considerations regarding EU-third country relations, but as some of these considerations also have an impact on inner-EU cases, the inner-EU dimension will always have to be taken into account.

II. Scope of application

A general aspect, which relates to all constellations of cross-border insolvency (domestic proceedings, effects of foreign proceedings, parallel proceeding), concerns the subject-matter scope of any future rules on relations with non-EU countries. The approach of the EIR to put-together the covered proceedings in an exhaustive and binding separate annex, is not feasible in relations with an basically unlimited number of foreign countries. It could be useful, however, to create a non-exhaustive annex, which might contain examples of foreign proceedings that should be clearly covered by the future rules.

More generally speaking, the general definition of insolvency proceedings should also cover pre-insolvency or restructuring proceedings of the kind, which is already included in Annex A of the EIR today. The definition should also be kept flexible enough to include other proceedings such as company restructurings if this serves cross-border restructuring with an insolvency dimension. This could be conditioned on an agreement between stakeholders and subject to court approval.

III. Jurisdiction

1. Main proceedings: COMI

The concept of COMI has come to be broadly accepted and used today globally, not the least by the MLCBI, and it is used in legal practice in an overall convincing manner. There is to my view no need to give up COMI as head of direct jurisdiction for EU-based proceedings. Refinements of the definition of COMI may be imaginable, but they are not urgent.

Indirect jurisdiction in the recognition context can be defined differently, if recognition of non-EU insolvencies were to include an indirect jurisdiction test.

2. Non-main proceedings

The basic decision to admit non-main insolvency proceedings (in the sense of proceedings not grounded on COMI or COMI-equivalent jurisdictional rules) in the inner-EU context is also convincing – and even more justified – in relations with non-EU countries.

However, in relations with non-EU countries – when the debtor’s COMI is situated in a non-EU country – jurisdiction for non-main insolvency proceedings in the EU should be enlarged in order to create a possibility for orderly insolvency-based liquidation and reorganisation and even defined cases of pre-insolvent reorganisation.

Broadly acceptable grounds for non-main jurisdiction would seem to be the existence of an establishment in the EU (like under the EIR) and/or location of assets. In addition, jurisdiction on a discretionary basis (with significant contacts with the EU to justify an insolvency proceeding) might be added. This would contribute to making the EU an attractive and internationally accepted forum for corporate restructurings.

IV. Conflict of laws

1. The two basic structural questions on conflict of laws in this context are, firstly, whether there should uniform or separate rules on conflict of laws for domestic insolvency proceedings and for recognition of foreign proceedings (as is the case under the EIR today) and, secondly, whether there should be uniform or separate conflict of laws rules for inner-EU cases and cases linked with third countries.
 - a) The conflict of laws rules of the EIR apply presently both to domestic proceedings (i.e. the perspective of the country of the domestic proceeding) and to foreign proceedings. Whether this parallelity should be given up or at least modified with regard to foreign non-EU insolvencies, will be addressed in the report on recognition in this book.
 - b) At present, the EIR contains some universal conflict of laws rules and some conflicts rules, which are limited only to the law of EU Member States (most of the special conflicts rules in Art.8 – 18 EIR). In another subject area, international company law, different conflict of laws rules apply to companies established in the EU and non-EU companies. This can create frictions, but they may be justified when there are different policy considerations in inner-EU or third country-related constellations

My view is that we should keep the present conflict of laws rules of the EIR¹⁶⁷, in so far as they are either generally convincing or address particular aspects of inner-EU relations (mutual trust etc.).

On the other hand, with regard to relations with non-EU countries, the EU should follow common global approaches as to conflict of law, aligning itself to the present UNCITRAL work project on applicable law in insolvency. This means that the existing special conflicts rules of the EIR, which are limited to the law of other EU Member States, should not be extended to the law of non-EU countries. Only those special conflicts norms, which are accepted also in the UNCITRAL project, should be adopted by the EU in relations with third countries. This mainly relates to effects of the insolvency proceeding on employment contracts and regulated markets.

Whether there should be particular conflicts rules or substantive rules as to the effects of foreign non-EU insolvencies, will be discussed in the report on recognition.

2. The basic conflict of laws rule of *lex fori concursus* is justified and needs no changes.
3. Art.7 – 18 EIR contain both conflict of laws provisions and substantive provisions. The autonomous cross-border insolvency laws of the EU Member States diverge as to whether they apply these rules also to relations with non-EU countries. Practice shows that some EU Member States have transformed substantive provisions established under Art. 8 – 18 EIR into conflict of laws provisions and vice versa. This illustrates that the use of conflict of laws or substantive law is a matter of legislative evaluation and decision.
4. The special conflict of laws provisions, which are presently foreseen in Art.8 – 18 EIR, should remain – if they continue to appear adequate – to be limited to the law of other EU Member States¹⁶⁸. In relations with non-EU countries, conflict of laws in matters covered by Art.8 – 18 EIR should be solved according to the (future) rules developed by UNCITRAL in its project on applicable law in insolvency.
5. In view of the large diversity of case situations in insolvency matters, the EU should consider introducing an escape clause on conflict of laws in

167 I do not take a position here on whether these rules should be modified in the future at possible broader evaluation of the EIR in general. The focus in this book is only on EU-third country relations.

168 The only ‘universal’ conflicts rule in this context is Art.9 EIR on set-off. This general justification of this rule is not discussed here.

insolvency, which could be inspired by, e.g., Art.4 (3) Rome I Regulation or Art.4 (3) Rome II Regulation, but would have to take into account the particular context and purposes of insolvency proceedings including the particularities of concurrent proceedings.

V. Substantive law

1. The EIR contains numerous provisions of a substantive (procedural or material) character. Some of such provisions may be tailored to inner-EU constellations, where EU law creates a common legal and factual ground and there is a higher degree of mutual trust than (typically) in relations with non-EU countries. Other provisions may not require a relation of particular trust, but can be useful and adequate also in relations with non-EU countries. If such provisions are at present limited to inner-EU constellations, they should be opened – as the case may be with some modification – also to relations with non-EU countries. This is done already now by numerous EU Member States under their autonomous cross-border insolvency law.

Adaptations as to substantive law must be scrutinized for each of the classical constellation of cross-border insolvency law: domestic proceedings, recognition of foreign proceedings, parallel proceedings.

2. In so far as procedural rules in domestic proceedings are concerned and as they are limited to participants domiciled or resident in other EU Member States or to insolvency or other proceedings in other EU Member States, they should be – if necessary, with adaptations – extended also to participants or proceedings in non-EU countries. In this respect the EU should as far as possible also coordinate its rules with the UNCITRAL MLCBI.
3. More specifically, the notion of foreign creditors in Art.2 (12) EIR should be extended to include creditors domiciled in non-EU countries. The provisions of the EIR on rights and duties of foreign creditors (e.g. Art.53 – 55 EIR) should be reconsidered with a view to whether creditors domiciled in non-EU countries should be given some special treatment equalizing their specific difficulties in participating in EU-based insolvency proceedings.
4. In so far as material rules are concerned, e.g. the particular territorial limitations foreseen in Art. 8 and 10 EIR or the specific reference to EU

patents and Community trademarks in Art. 15 EIR, they should remain limited to EU Member States and the respective EU-based IP rights.

It may also be considered to develop particular substantive rules for such matters in the context of recognition of foreign non-EU insolvencies. Examples for this exist in the autonomous cross-border insolvency laws of some EU Member States.

5. Non-main proceedings should in cases, in which the debtor's COMI is situated outside the EU, include all assets of the debtor within the EU¹⁶⁹. In addition, a legal base should be created (e.g. granting judicial discretion) to include assets located in non-EU countries into the reach of such proceedings. This would, in particular, make the EU attractive to become a forum for cross-border restructurings, even if the technical COMI of the debtor is not in the EU. Conflicts with other insolvency proceedings can be avoided by special rules, following either the UNCITRAL MLCBI or the examples given by the autonomous cross-border insolvency law of some EU Member States.
6. Some substantive rules of the EIR, which apply in all constellations of cross-border insolvency law (domestic proceedings, recognition of foreign proceeding, parallel proceedings) appear to be particularly topical and relevant and should be addressed in the EIR or other legal instrument, not only with a view to inner-EU cases, but also with a view to relations with non-EU countries:
 - a) The use of information technologies in cross-border insolvencies should be addressed at least in a general manner, but some specific rules would be helpful, e.g. on establishing procedures to open publication tools for relations with third countries on the basis of special agreements.
 - b) The use of mediation in cross-border insolvencies should be addressed and encouraged at least in a general manner.

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169 A similar rule (e.g. extension possibility under certain conditions) might also be helpful in inner-EU cases, but this is beyond the scope of this book.

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Transaction avoidance law and third countries. The case for a set of European private international law rules

Renato Mangano

Abstract:

This paper critically examines the need for a uniform set of European private international law rules governing transaction avoidance in cross-border insolvency, particularly when detrimental transactions involve third countries, and in the light of the contemporary trends of ‘group’ and ‘rescue culture’. The question of the legal basis for EU legislative intervention in the field is first examined. The study dissects the key challenges in determining jurisdiction, selecting the applicable law, and ensuring the recognition and enforcement of judgments rendered in avoidance actions. It argues that the existing EU framework—namely, articles 6(2) and 15 EIR— falls short in addressing cases that cross the EU’s external borders. The paper proposes an opt-out model based on wider possibilities to derogate from *vis attractiva concursus* for jurisdiction, recommends a referral solely to the *lex fori concursus* for applicable law, and advocates for a partial adoption of the 2018 UNCITRAL Model Law on the Recognition and Enforcement of Insolvency-Related Judgments (MLIJ). Additionally, it suggests extending these proposals to cover *actio pauliana*, thereby enhancing creditor protection in multinational insolvency proceedings.

Keywords: European insolvency law; transaction avoidance; cross-border insolvency; private international law; *lex fori concursus*; *vis attractiva concursus*; MLIJ; *actio pauliana*.

A. Introduction

I. Scenarios and questions

Regulation (EU) 2015/848 ('EIR') provides a set of uniform rules on jurisdiction, applicable law, recognition and enforcement concerning 'the voidness, voidability or unenforceability of legal acts detrimental to the general body of creditors' which have a cross-border connection with at least one Member State, with the exception of Denmark, this state not being subjected to the EIR¹. By contrast, there is no parallel European regulation concerning those detrimental acts that have a connection with both a Member State and a third country, *i.e.* either with a non-Member State or with the State of Denmark. Nor has the European Union accessed an international convention that provides such a legal framework. For an explicit choice of policy, the Convention of the Hague Conference on Private International Law of 2 July 2019 on 'The Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters', which was accessed by the European Union on 12th July 2022, 'shall not apply to ...(e) insolvency, composition, resolution of financial institutions, and analogous matters.'²

In the field of detrimental acts with third countries, two scenarios are relevant, namely a) an outbound scenario; and b) an inbound scenario.

- a) The outbound scenario can be exemplified as follows. The Court of Rome opens insolvency proceedings with regard to Company A, which has its COMI (centre of main interests) in Italy. Immediately before the opening of insolvency proceedings, Company A made a payment to its Creditor X, who is domiciled in Abu Dhabi, in order to perform a contract concluded under English law. The insolvency practitioner who has been appointed to the proceedings in Rome has the feeling

1 The territorial scope of EIR of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast), OJEU L 141, 5.6.2015, p. 19–72, is determined by its Art. 3 and Recital 88, respectively. The sentence which is written in inverted commas partially reproduces the contents of Art. 7.2.m. EIR.

2 Council Decision (EU) 2022/1206 of 12 July 2022 concerning the accession of the European Union to the Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, OJEU L 187, 14.7.2022, p. 1–3. The text of the Convention of the Hague Conference on Private International Law of 2 July 2019 on 'The Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters' is available to download at: <https://www.hcch.net/en/instruments/convention/s/full-text/?cid=137> (last accessed: 28.02.2024).

that that payment is detrimental to Company A's creditors and, hence, is voidable. Therefore, the Italian practitioner asks the following questions: 1) What law is relevant in establishing whether that payment is voidable? Is it Italian law (*i.e.* the *lex fori concursus*); the law of the United Arab Emirates (*i.e.* Creditor X's *lex domicilii*); English law (*i.e.* the *lex causae*); or, perhaps, another law or even a combination of two different laws? 2) What court is internationally competent? Is it the court that opened the insolvency proceeding or, at least, an Italian court? Or is this court a court of the Emirates? Or is it a different court again? 3) And, if the competent court is in Italy – which, in principle, appears to be preferable for the whole administration of the proceedings – how is it possible for the insolvency practitioner to have the Italian judgment recognized and enforced in the Emirates, so that an Emirates bailiff can compel Creditor X to give the payment back to the Italian insolvency practitioner?

- b) The inbound scenario can be exemplified as follows. The Court of Abu Dhabi opens insolvency proceedings with regard to Company B, which has its COMI (centre of main interests) in the United Arab Emirates. Immediately before the opening of insolvency proceedings, Company B made a payment to its Creditor Y, who is domiciled in Rome, in order to perform a contract concluded under English law. The Emirates insolvency practitioner who has been appointed to the proceedings has the feeling that this payment is detrimental to Company B's creditors and, hence, is voidable. Therefore, the Emirates practitioner asks the following questions: 1) What law is relevant in establishing whether that payment is voidable? Is it the law of the United Arab Emirates (*i.e.* the *lex fori concursus*); Italian law (*i.e.* Creditor Y's *lex domicilii*); English law (*i.e.* the *lex causae*); or, perhaps, another law or even a combination of two different laws? 2) What court is internationally competent? Is it the court that opened the insolvency proceeding or, at least, a Court in the Emirates? Or is this court an Italian Court? Or is a different court again? 3) And, if the competent court is in the Emirates – which, in principle, appears preferable for the entire administration of insolvency proceedings – how is it possible for the insolvency practitioner to have the Emirates judgment recognized and enforced in Italy, so that an

Italian bailiff can compel Creditor Y to give the payment back to the Emirates insolvency practitioner?³

In point of fact, some Member States have already provided in their national laws the answers to these questions. For example, this is the case of Germany, where the Insolvency Statute also contains private international law prescriptions for cross-border law cases that have a connection with both Germany and a third-country⁴. And the same situation occurs in other Member States, even though these rules very often vary from jurisdiction to jurisdiction⁵.

In the past, this national choice of policy was quite understandable because, at that time, insolvency law aimed primarily at liquidating distressed companies, and – even within multinational groups of companies – avoidance laws were employed in accordance with an entity law approach. However, today the setting has changed dramatically. In fact, in the last few years the European Union has embraced both a rescue culture and a group culture and, very often, the insolvency practitioners appointed to companies belonging to the same multinational group apply avoidance laws as a part of their holistic strategy in order to restructure the group as a whole. For example, insolvency practitioners collaborate in evaluating whether a transaction that has undermined a single company could be regarded as advantageous for the group as a whole and, consequently,

3 Sometimes, this picture might be even more complex. Since almost all regulations on cross-border insolvency law, including EIR, adopt a concept of ‘modified universality’, it is possible for each of the above-mentioned scenarios to have a sub-scenario according to which there are at least two sets of insolvency proceedings, namely, one set of main insolvency proceedings in the country where the debtor has the COMI, and one or more sets of secondary insolvency proceedings in the countries with which the debtor has a connection that is considered as relevant for the opening of secondary proceedings. Varying from jurisdiction to jurisdiction (here, the term ‘jurisdiction’ also includes the European Union) this connection may consist either in a pool of assets or in an establishment. However, this complication in the scenario does not add further complications to the topic at issue. In effect, if the *lex fori concursus principalii* lays down that the payment must be challenged by the practitioner appointed to the main proceedings, this must answer the same questions as in the above-mentioned scenario. By contrast, if the *lex fori concursus secundarii* lays down that the payment must be challenged by the practitioner appointed to the secondary proceedings, this does not face cross-border law questions, because secondary proceedings are territorial only. As a result, this paper will only concentrate on the two scenarios described in the text.

4 § 335 et seqq. *Insolvenzordnung* (InsO).

5 For example, see: as regards Austria, § 217 et seqq. *Insolvenzordnung* (IO); and, as regards Spain, Art. 721 et seqq. *Ley Concursal*.

could be considered worth being preserved from the avoidance effects; and, vice-versa, they collaborate in evaluating how a transaction that is neutral, or even advantageous for a single company, could be considered as disadvantageous for the group as a whole, and how they can make this transaction ineffective – actually, in Europe this is still a moot point⁶. As a result, avoidance law must be as much standardized as possible in order to facilitate comparisons between vulnerable transactions, not only with regard to those acts that fall within the scope of the EIR, but also as regards those acts which have connections with both a Member State and a third state.

This paper will take into account the emergence of both rescue culture and group culture and will focus on the impact that these two game-changers have on designing a better avoidance law system concerning detrimental transactions with third countries. In particular, the paper will highlight that these two game-changers give rise to three questions which, for the sake of simplicity, could be labelled: the ‘If question’; the ‘What question’ and the ‘How question’, respectively. These questions could be formulated as follows:

The ‘If question’ – does Art. 5 TEU prevent the European Union from introducing a set of uniform private international law rules on detrimental transactions with third countries, or – on the contrary – does the same Article suggest that today this action would be better achieved at Union level? And, if this question is given a positive answer,

The ‘What question’ – what set of uniform private international law rules on detrimental transactions with third countries ought to be proposed? And, finally,

The ‘How question’ – how ought the European Union to introduce these rules? Ought this action to be performed through a mere regulation, a directive or a non-binding act of the European Union? Or ought this action

6 In Europe, both at Member State level and at Union level, the legislation on group insolvencies is mainly based on the ‘entity law approach.’ This claims that the insolvency of each company belonging to a group must be treated as if this company were a standing-alone company. However, scholars pinpoint the limits of this approach and suggests that courts and lawmaker should adopt – even though under certain conditions – an ‘enterprise law approach’ that takes into account the fact that all the companies belonging to a group run the same enterprise. For this approach and its caveats see, especially, Mevorach, p. 32 et seqq., and with specific reference to transaction avoidances, p. 286 et seqq. On the latter topic, see also Mevorach ECFR 2011, p. 235 et seqq.

to be performed through a multilateral treaty binding the European Union, on the one hand, and the signatory third countries, on the other?

This paper will also endeavour to answer both the ‘If’ and the ‘What’ questions. However, it will refrain from providing any answer to the ‘How question’, first, because the proposal for a set of uniform private international law rules on detrimental transactions with third countries is part of a more comprehensive project which goes beyond the scope of this article; secondly, because the topic concerning how the European Union ought to introduce these rules is by its very nature more political than academic.⁷

B. The ‘If question’

- I. After Maastricht: The new terms of the dilemma ‘centralization vs decentralization’ and the logic and limits of the principle of subsidiarity; the insufficiency test and the added-value test

Consider, first, the ‘If question.’

It is well-known that the European Union is a supranational organization and that, since the enactment of the Treaty of Maastricht, there has been a presumption according to which – in principle – Member States are competent to regulate issues which fall into the areas of shared competence. This is the case as regards insolvency law. However, it is equally well-known that this presumption is rebuttable, albeit under certain conditions. The new version of Art. 5 TEU (which takes into account both the Treaty of Maastricht and that of Lisbon), on the one hand, lays down that ‘the use of Union competences is governed by the principles of subsidiarity’, and, on the other hand, lays down that ‘under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.’

Scholars unceasingly highlight that the wording of Art. 5 TEU is the outcome of a miserable compromise reached in Maastricht between the German Delegation, which wanted the European Union to intervene whenever

7 On this point, see also the observations by Trunk, in Trunk/Hatzimihail (eds.), p. 37 (45 et seq.).

its intervention was expected to increase efficiency, and the UK Delegation, which intended to restrict European interventions to cases where such interventions were considered as necessary.⁸ As a result, writers maintain that subsidiarity is one of the vaguest concepts of Union law; the Protocols that aim at shedding light on the way it functions are not particularly helpful;⁹ and, last but not least, the Court of Justice of the European Union (CJEU) has intervened only to a minimum extent to clarify whether the European Union may regulate a matter which does not belong to its exclusive competence and, vice-versa, whether the single Member States are competent.¹⁰

In principle, scholars nevertheless converge in recognizing that Art. 5 allows the European Union to take action in the area of shared competence, wherever:

- the objectives of the proposed action cannot be sufficiently achieved by the Member States (insufficiency test); and – the proposed action can be better achieved at Union level (added-value test)¹¹.

II. From the law in the book to the law in action. Regulation (EU) 2015/848 on European cross-border insolvency law

Scholars also agree as regards the functioning of the ‘insufficiency test.’ In particular, they agree that Member States must refrain from regulating topics that produce spillover effects on other Member States.¹² This is because, if a Member State regulated a topic of this kind, this regulation would improperly affect the sovereignty of other Member States.

European legislation provides many examples where the existence of spillover effects is regarded as decisive for the ‘insufficiency test’ to be passed. These include *inter alia* regulations on insolvency law matters which have connections with more than one Member State. Consider, for example, the first sentence of Recital 4 EIR. This reads: ‘The activities of undertakings have more and more cross-border effects and are therefore increasingly being regulated by Union law.’ Even though this recital does

8 Begg et al. 1993, p. 20.

9 Wyatt and Dashwood's *European Union Law*, 6th ed., Oxford/Portland 2011, p. 114 et seqq.

10 Marauhn/Mengeler, in Walzenbach/Alleweldt (eds.), p. 35.

11 Wyatt and Dashwood's *European Union Law*, cit., p. 116 and, more recently, Marauhn/Mengeler, in Walzenbach/Alleweldt (eds.), p. 34.

12 Begg et al., p. 36.

not explicitly refer to the concept of spillovers, it makes it clear that by definition Member States are not in the best position to manage European cross-border cases and that the European Union must intervene here in a centralised way.

Scholars, moreover, agree that the prerequisite for passing the added-value test is met whenever an action aims at protecting the Common Market and other values that are placed at the core of the European Union¹³.

In this respect, the EIR is again illuminating. Consider, for example, its Recitals 3 to 5. These read: '(3) The proper functioning of the internal market requires that cross-border insolvency proceedings should operate efficiently and effectively. This Regulation needs to be adopted in order to achieve that objective, which falls within the scope of judicial cooperation in civil matters within the meaning of Article 81 of the Treaty. (4) The activities of undertakings have more and more cross-border effects and are therefore increasingly being regulated by Union law. The insolvency of such undertakings also affects the proper functioning of the internal market, and there is a need for a Union act requiring coordination of the measures to be taken regarding an insolvent debtor's assets. (5) It is necessary for the proper functioning of the internal market to avoid incentives for parties to transfer assets or judicial proceedings from one Member State to another, seeking to obtain a more favourable legal position to the detriment of the general body of creditors (forum shopping).'

III. From the law in the book to the law in action. Directive (EU) 2019/1043 on preventive restructuring

In 2021, Günter Walzenbach and Ralf Alleweldt published a book titled *Varieties of European Subsidiary – A Multidisciplinary Approach*, where these and other scholars point out that the recent application of the principle of subsidiarity is evolving to a great extent. In particular, in the Introduction Walzenbach and Alleweldt write: 'The question of how powers should be

13 Walzenbach/Alleweldt, in Walzenbach/Alleweldt (eds.), p. 7–8, who state that 'Typically, the critique [against the European Union] has identified a step-by-step depletion of member state competences due to the EU's overarching goal to establish and maintain a common market. Potentially, almost any member state norm or domestic piece of legislation can be interpreted as constituting a barrier to free market forces.'

distributed between the EU and the member states is not, or only to a minimal extent, answered by Article 5 (3) TEU. This question is mainly decided in negotiations between member states on treaty amendments and in legislative deliberations between member states' governments in the Council. It is obviously an eminently political question that depends on regular feedback from local, regional and national actors. Fundamentally, it cannot be answered by applying legal rules alone. Instead, it requires an empirical investigation into the practice application of subsidiarity from the perspective of multiple disciplines.¹⁴

These statements are very provocative and, frankly speaking, we do not know whether they hold true also as regards the field of insolvency law – *Varieties of European Subsidiary* covers many subjects, such as environmental law and migration law but, unfortunately, it does not cover the field of insolvency law. Nevertheless, it is clear that the economic and social context where the concept of subsidiarity is applied in insolvency law has evolved, so that even the existence of a situation of merely domestic insolvency has been regarded as decisive in rebutting the presumption laid down by Art. 5 TEU and justifying an intervention of the European Union aimed at harmonising national insolvency laws.

Consider Recitals 7 and 8 of Directive (EU) 2019/1043. These read: 'Differences between Member States in relation to procedures concerning restructuring, insolvency and discharge of debt translate into additional costs for investors when assessing the risk of debtors getting into financial difficulties in one or more Member States, or of investing in viable businesses in financial difficulties, as well as additional costs of restructuring enterprises that have establishments, creditors or assets in other Member States. This is most notably the case with restructuring international groups of companies. Investors mention uncertainty about insolvency rules or the risk of lengthy or complex insolvency procedures in another Member State as being one of the main reasons for not investing or not entering into a business relationship with a counterpart outside the Member State where they are based.... (8) The differences among Member States in procedures concerning restructuring, insolvency and discharge of debt lead to uneven conditions for access to credit and to uneven recovery rates in the Member States. A higher degree of harmonisation in the field of restructuring, insolvency, discharge of debt and disqualifications is thus indispensable for a well-functioning internal market in general and for a working Capital

14 Walzenbach/Alleweldt, in Walzenbach/Alleweldt (eds.), p. 14.

Markets Union in particular, as well as for the resilience of European economies, including for the preservation and creation of jobs.’

Unlike the EIR, which refers to cross-border insolvency involving more than one Member State, Directive (EU) 2019/1043 deals with the restructuring of cases that usually have a domestic relevance. Nevertheless, Recital 7 of Directive (EU) 2019/1043 points out that, from the proactive perspective of restructuring law, even domestic cases can have a European dimension in terms of the spillover effects of both the issues in question and the future impact of the envisaged regulation. In effect, this recital highlights that distressed companies very often belong to multinational groups. Moreover, Recitals 8 of Directive (EU) 2019/1043 points out that even a situation of merely domestic insolvency may require a centralised intervention of the Union aiming at protecting the Common Market, the Capital Markets Union and other European law values, such as the resilience of Member States’ economies and the preservation and creation of jobs.

IV. Conclusion. Arguably, a proposal for a European regulation on detrimental acts with third countries would easily pass both the insufficiency test and the added-value test

The above observations refer to both the EIR and Directive (EU) 2019/1043. Arguably, these hold true also as regards a proposal for a European regulation on detrimental acts with third countries, which could easily pass both the insufficiency test and the added-value test.

Consider, first, the example we gave as regards outbound actions.

‘The Court of Rome opens insolvency proceedings with regard to Company A, which has its COMI (centre of main interests) in Italy. Immediately before the opening of insolvency proceedings, Company A made a payment to its Creditor X, who is resident in Abu Dhabi, in order to perform a contract concluded under English law.’

In the past, a climate of liquidation culture did not stimulate insolvency practitioners to ask whether Company A belonged to a group of companies and who Creditor X was. Both questions were irrelevant. However, the situation has changed; the European Union has adopted both the rescue culture and the group culture, and this new legal context requires the insolvency practitioner appointed to the proceedings concerning Company A to ask whether Company A belongs to a group of companies and who Creditor X is. In fact, if Company A belongs to a group of companies

and Creditor X is a company which belongs to the same group, the insolvency practitioner who has been appointed to the insolvency proceedings concerning Company A must ensure that the avoidance action should be in line with the strategy of rescuing the whole group or part of it.

As a result, in the past, it made sense that single Member States should enact their own private international law rules concerning detrimental acts with third states. But, today, Art. 5 TEU suggests that this law-making should be done at European level. In fact, if Company A belongs to a group of companies based in Europe – which is very probable in the case of outbound actions – the regulation on transaction avoidances can spill over onto the other companies which are based in Europe and interfere with the Common Market, the Capital Markets Union and other European law values, such as the resilience of Member States' economies and the preservation and creation of jobs.

The same holds true as regards inbound actions, which were exemplified by the following example: 'The Court of Abu Dhabi opens insolvency proceedings with regard to Company B, which has its COMI (centre of main interests) in the United Arab Emirates. Immediately before the opening of insolvency proceedings, Company B made a payment to its Creditor Y, who is resident in Rome, in order to perform a contract concluded under English law.' In fact, if Company B belongs to a group of companies which is based in Europe, the recognition and enforcement of the action brought by the Emirates insolvency practitioner can spill over onto the other companies which are based in Europe and interfere with the Common Market, the Capital Markets Union and other European law relevant values.

To conclude, these observations imply that a proposal for a European regulation on detrimental acts with third countries would easily pass both the insufficiency test and the added-value test and that this proposal would find its legal basis in Arts. 81 and 114 TFEU. Art. 81.1 TFEU lays down: 'The Union shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases. Such cooperation may include the adoption of measures for the approximation of the laws and regulations of the Member States.' Art. 114.1 TFEU *inter alia* lays down: '...The European Parliament and the Council shall ... adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.'

C. The 'What question'

I. The sources of inspiration

Consider, now, the 'What question', which reads as follows: 'what set of uniform private international law rules on detrimental transactions with third countries ought to be proposed?'

Certainly, the EIR provides an important source of inspiration for the lawmakers, since this regulation contains a complete legal framework that allows cross-border detrimental acts to be challenged, albeit this is applicable only within the European Union (with the exception of Denmark). Moreover, during the years when, first, Regulation (EC) 1346/2000, and, subsequently, the EIR were applied, the CJEU produced a wealth of case law which clarifies and supplements the relevant prescriptions¹⁵.

Nevertheless, the exemplar of the EIR must not be overestimated if a legal framework is to be designed concerning detrimental acts with third countries.

First, the EIR and the related case law contain a system of avoidance law that is much more complex than expected, so that the idea of using it as a pattern to develop further regulation would not be a 'copy and paste' task but would imply a choice between different alternatives. The EIR provides both a default model and an opt-in model. Moreover, after the CJEU's judgments in the *F-Tex* and *Feniks* cases, case law on the EIR has envisaged a third model which refers to cases where the avoidance actions are brought, not by the relevant insolvency practitioners, but either by a person who bought the action from the insolvency practitioner or by one of the debtor's creditors¹⁶ – accordingly, these actions will have to be brought under 'Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters' (Brussels Ia). As a result, nowadays the legal framework provides as many as three models that could be summarised as follows.

15 Mangano, in Bork/Mangano, paras 3.98 – 3.100.

16 CJEU 19.4.2012 – case C-213/10, ECLI:EU:C:2012:215- *F-Tex SIA v Lietuvos-Anglijos UAB 'Jadeccloud-Vilma'*; and CJEU 4.10.2018 – case C-337/17, ECLI:EU:C:2018:487- *Feniks Sp. z o.o. v. Azteca Products & Services SL*.

The by-default model

Jurisdiction The State of the Opening (Art. 6(1) EIR) – as an exclusive forum
Applicable Law <i>Lex Fori</i> (Art. 7(2.m) EIR) + <i>Lex Causae</i> as a veto (Art. 16 EIR)
Recognition and Enforcement Automatic (Art. 32(1) EIR)

The opt-in model

Jurisdiction The State where a connected action has been brought (Art. 6(2) EIR) – as an optional forum
Applicable Law <i>Lex Fori</i> (Art. 7(2.m) EIR) + <i>Lex Causae</i> as a veto (Art. 16 EIR)
Recognition and Enforcement Automatic (Art. 32(1) EIR)

The model based on Regulation (EU) 1215/2012 (Brussels Ia)

Jurisdiction The State of the defendant's domicile or, if chosen by the claimant, the State of the performance of the obligation (Art. 4 or Art. 7.1(a) Regulation (EU) 1215/2012)
Applicable Law <i>Lex Fori</i> (Art. 7(2.m) EIR) + <i>Lex Causae</i> as a veto (Art. 16 EIR)
Recognition and Enforcement Automatic (Art. 32(1) EIR)

Secondly, and more importantly, the EIR is a supranational piece of legislation that imposes prescriptions on States that are Members of the European Union and that, as such, have accepted the supremacy of European law over their own national laws. By contrast, if the European Union intends to design a set of uniform private international law rules concerning detrimental acts with third countries, it must be aware that it cannot interfere with the tradition and values of the third countries. Otherwise, there is the risk that, in outbound affairs, the European insolvency practitioners that have

obtained a judgment in a Member State will have difficulty in having this judgment recognized and enforced in a third country where the court or some other competent authority can raise the nasty 'ordre public' exception.

Alternative or complementary to the EIR, other important sources of inspiration are: the 'UNCITRAL Model Law on Cross-Border Insolvency (1997)' (MLCBI) with Guide to Enactment and Interpretation (2013);¹⁷ and the 'UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments with Guide to Enactment (2018)' (MLIJ).¹⁸

MLCBI plays a role of paramount importance in the approximation of insolvency laws around the globe by facilitating the recognition and enforcement of insolvency proceedings abroad. Moreover, some Member States that have enacted their own autonomous private international law rules on cross-border insolvency matters have transposed – entirely or partially – the MLCBI. This, of course, determines a climate of convergence regarding national rules on private international laws. Nevertheless, this exemplar is not a panacea either: first, because the MLCBI refers mainly to the recognition and enforcement of insolvency proceedings, so that there are no rules on jurisdiction and applicable law; secondly, because it is controversial whether the rules on the recognition and enforcement of insolvency proceedings also refer to the recognition and enforcement of avoidance actions.

In this respect, the MLIJ is, certainly, more helpful. In effect, it is true that this Model Law refers to recognition and enforcement only, but it is equally true that it provides an explicit solution for the recognition and enforcement of avoidance actions. Rather, it is questionable whether this solution fits well with the project at issue (→ section 12).

Of course, this variety of sources (of inspiration) will affect what is to be argued in the following sections. As a result, *a priori* no model will be considered as better than any other, and the analysis will focus on the

17 UNCITRAL, UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation <<https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/1997-model-law-insol-2013-guide-enactment-e.pdf>> (last accessed: 28.02.2024).

18 UNCITRAL, UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments with Guide to Enactment, <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/ml_recognition_gte_e.pdf> (last accessed: 28.02.2024).

topics at issue in the following sequence: Jurisdiction, Applicable law, and Recognition and Enforcement.¹⁹

II. Jurisdiction. In favour of an opt-out rule *vis attractiva concursus*

The first issue to deal with concerns jurisdiction.

This question basically consists in deciding whether the insolvency practitioner appointed to the insolvency proceedings who intends to bring an avoidance action ought to apply to a court of the country where insolvency proceedings have been opened, in accordance with a concept of international law *vis attractiva concursus*, or to another court in accordance with the usual rules on competence for civil and commercial judgments. These usually lay down that the action must be brought before the court of the country where the opponent is domiciled.

The first solution has great appeal. First, it was adopted by Art. 6.1 EIR, which lays down: ‘the courts of the Member State within the territory of which insolvency proceedings have been opened in accordance with Article 3 shall have jurisdiction for any action which derives directly from the insolvency proceedings and is closely linked with them, such as avoidance actions’. Secondly, this choice of policy is less costly, because the insolvency practitioner does not need any cooperation with a foreign professional, at least in order to bring the action. Thirdly, the court that has the control of the case can easily have also the control of the proceedings concerning the avoidance action, since these are administered in the same jurisdiction. Moreover, these two latter advantages are even enhanced whenever the domestic law of the country where insolvency proceedings have been opened adopts a concept of national law *vis attractiva concursus*. This happens in many jurisdictions around the globe, for example, in Italy,²⁰ Spain,²¹ and the USA.²² In effect, if this is the case, the combination of the international law *vis attractiva concursus* with the national law *vis attractiva concursus* will allow the insolvency practitioner to bring avoidance actions, not only before a court of the same country where insolvency proceedings have been

19 For a similar approach, Trunk, in K.Pannen/S.Riedemann/M. Zeuner (eds.), p. 453 seqq., especially at p. 465.

20 Art. 32 of *Codice della crisi d'impresa e dell'insolvenza*.

21 Art. 55 of *Ley Concursal*.

22 Art. 157(b), Title 28, of *United States Code*.

opened, but before the very same court that has opened the insolvency proceedings.²³

This choice of policy, too, has some drawbacks. Some scholars highlight that the idea of bringing avoidance actions in the same country where insolvency proceedings have been opened is neither appropriate nor efficient. In particular, one might maintain that the international law *vis attractiva* is not appropriate because it derogates from the usual competence for civil and commercial judgments and, consequently, violates a principle of natural law according to which every citizen has a right to be judged by the court that is pre-established by law – in some countries, this principle is protected at a constitutional level.²⁴ Some scholars, moreover, argue that the international law *vis attractiva* is not efficient either, because, if a cross-border avoidance action is brought in the country where insolvency proceedings have been opened, the insolvency practitioner could face severe problems in having the related judgment recognized and enforced in the country where the opponent is domiciled.²⁵ Finally, some writers observe that the fact that the insolvency practitioner may bring avoidance actions in the same country where insolvency proceedings have been opened does not necessarily imply that this court will be competent to hear an avoidance action – in fact, the international law *vis attractiva* does not necessarily imply a domestic law *vis attractiva*.²⁶

Arguably, as regards Art. 6.1 EIR these criticisms are excessive for a number of reasons. First, the EIR is an instrument of supranational law, which, as such, prevails over national laws, including constitutional ones. Secondly, within the scope of application of the EIR the recognition and enforcement of foreign judgments are particularly easy (even though, after the *Schmidt-Hertel* case, it is possible for the place of recognition and enforcement to fall

23 For a recent and detailed description of the pros of an international law *vis attractiva concursus*, see Ringe, in Bork/van Zwieten (eds.) 2022, paras 6.10 – 6.13. However, at para 6.14 this author also maintains that the *vis attractiva concursus* must be the outcome of a free choice of the insolvency practitioner and not the result of a legal command. As regards the pros of an international law *vis attractiva concursus* see also Grompe, p. 73 et seqq.

24 For a USA-German comparison, see Habscheid, p. 74 seqq. Moreover, for an approach to international jurisdiction that takes into account also constitutional law values, see Pfeiffer, especially at p. 288 et seqq.

25 For example, Ringe, in Bork/van Zwieten (eds.), para 6.61. This author maintains that, despite the wording of Art. 6.1 of EIR, this prescription would provide for a form of optional jurisdiction.

26 For example, Ringe, in Bork/van Zwieten (eds.), para 6.54.

outside the scope of application of the EIR).²⁷ Thirdly, within the European Union some countries also adopt a domestic law *vis attractiva*, so that the court that has opened insolvency proceedings could be also competent to hear the proceedings concerning avoidance actions²⁸. Fourthly, when this is not the case, the fact that the court that has opened insolvency proceedings and the court that is competent to hear the related avoidance action do not coincide does not rule out that the international law *vis attractiva* is equally a facilitation. It is reasonable to expect that cooperation between two courts that employ the same language and the same law will prove to be smoother than cooperation between two courts that employ different languages and different laws. However, these criticisms must be taken seriously if one intends to design a set of European rules on detrimental acts with third countries. In fact, if the European Union interferes with the legal traditions and values of the third countries – especially when these have a constitutional rank – there is a high risk that the courts or corresponding authorities of the third countries will raise against European insolvency practitioners the ‘ordre public’ exception and recognize no judgment that they have obtained in Europe.

In effect, even the EIR does not contain a mandatory rule concerning jurisdiction for related actions, including avoidances. In fact, it is true that Art. 6.1 EIR lays down: ‘The courts of the Member State within the territory of which insolvency proceedings have been opened in accordance with Article 3 shall have jurisdiction for any action which derives directly from the insolvency proceedings and is closely linked with them, such as avoidance actions.’ However, it is equally true that Art. 6.2 of the same Regulation lays down: ‘Where an action referred to in paragraph 1 is related to an action in civil and commercial matters against the same defendant, the insolvency practitioner may bring both actions before the courts of the Member State within the territory of which the defendant is domiciled, or, where the action is brought against several defendants, before the courts of the Member State within the territory of which any of them is domiciled, provided that those courts have jurisdiction pursuant to Regulation (EU) No 1215/2012.’

The idea of introducing the *vis attractiva concursus* by means of an opt-out rule is appealing, not only because this choice of policy gives

27 CJEU 16.1.2014 – case C-328/12, ECLI:EU:C:2014:6, ruling – Ralph Schmid v Lilly Hertel.

28 For example, this is the case of Italy and Spain.

insolvency practitioners some latitude of discretion (and, consequently, a greater chance of having the expected judgment enforced), but also because, especially in group insolvencies, this proposal could allow insolvency practitioners to put the decision whether or not to adopt the *vis attractiva concursus* at the core of the negotiations that are usually carried out with the other insolvency practitioners.²⁹ Suppose that there is a group that consists of Company A, Company B and Company C. Suppose that all three companies are in distress and that one set of insolvency proceedings has been opened for each company and one insolvency practitioner has been appointed for each set of insolvency proceedings. If the insolvency practitioner that has been appointed for Company A intends to challenge a payment that Company A made to Company B, the insolvency practitioner for Company A (the plaintiff) might promise the insolvency practitioner for Company B (the defendant) to give up his or her right to the *vis attractiva* in exchange for an undertaking of the insolvency practitioner for Company B to cooperate in rescuing the group as a whole. This shifting of the forum, from the State of the opening to the State of the defendant's domicile, should be advantageous for the insolvency practitioner for Company B since it reduces the litigation costs that the insolvency practitioner for Company B will have to bear in order to face the threatened challenge.

As was previously said, Art. 6.2 EIR allows the *vis attractiva concursus* to be waived. However, it was also said that under Art. 6.2 EIR the conditions under which an insolvency practitioner can derogate from the rules on international jurisdiction for related actions, including avoidances, are very strict. As a result, in this respect (*i.e.* as regards the conditions for waiving), Art. 6.2 EIR cannot serve as a model.

Of course, this statement does not mean that the insolvency practitioner ought to be able to waive the rules on jurisdiction for related actions without any limits, because an international principle on jurisdiction, which is incorporated in many jurisdictions and also in Recital 15 of Regulation (EU) 2015/2012, reads: 'The rules of jurisdiction should be highly predictable'.³⁰ Nevertheless, the same Recital 15 of Regulation (EU) 2015/2012 adds that 'jurisdiction is generally based on the defendant's domicile', while

29 Ayres/Gertner Yale L.J. 1989, p. 97 ss., where the authors refer to the so-called penalty default rules, which, 'by definition, give at least one party to the contract an incentive to contract around the default.'

30 Lazić/Mankowski, para. 1.187.

Recital 19 of Regulation (EU) 2015/2012 concludes that, if there is an agreement between the relevant parties, it should be respected.

As a result, concerning jurisdiction for avoidance actions the European Union should introduce an opt-out *vis attractiva concursus* that may be waived in favour of the forum of the defendant's domicile and, in case of an agreement between the relevant parties, in favour of the forum that both parties have considered as the most convenient. This hierarchy of criteria might be clearly depicted through the following chart.

Hierarchy of Criteria for Jurisdiction

1 st	The by-default model The State of the opening of insolvency proceedings
2 nd	The opt-in model based upon a choice of the insolvency practitioner The State of the defendant's domicile
3 rd	The opt-in model based upon an agreement between the insolvency practitioner and the opponent The State that is considered, by both the insolvency practitioner and the defendant, as the most convenient

III. Applicable law. The most common solutions outside and inside the European Union

The second issue to deal with concerns applicable law.

It is well-known that, at least outside Europe, the law applicable to transaction avoidances is usually the *lex fori concursus*.³¹ This choice of policy is sensible whenever the legal framework prescribes the *vis attractiva concursus*. If this is the case, *forum* and *ius* coincide perfectly, which – it goes without saying – is most desirable. At any rate, the idea that the law applicable to transaction avoidances should be the *lex fori concursus* seems

31 See Westbrook Tex. Int'l L.J. 2006–2007, p. 903; and again Westbrook Brook. J. Int'l L. 1991, p. 499 et seqq. This author pinpoints the fact that transaction avoidances are closely related to the distribution of the debtor's assets. However, in theory other laws could be applicable. For a list of possible alternatives to the *lex fori concursus*, see again Westbrook, Fordham L. Rev. 1996, p. 2534. For an in-depth analysis of German scholars' thoughts concerning the law applicable to transaction avoidances see Garašić, p. 335 et seqq. of the manuscript.

to be reasonable even when the legal framework does not prescribe the *vis attractiva* and the court that is competent for transaction avoidances is located in the country where the opponent is resident. In the first place, this choice of policy corresponds to the aim of ‘modified universality’, according to which the general rule is that the law applicable to cross-border insolvency matters consists in the *lex fori*, while the other options must be considered as derogations from the general rule that cannot be justified by simply quoting the aspiration of any legal system to have *forum* and *ius* coincide. Secondly, this choice of policy corresponds to the nature of transaction avoidances, which are universally considered as actions that are closely related to the debtor’s insolvency and, especially, as actions that are closely related to the distribution of the debtor’s assets. Thirdly, this choice of policy facilitates the business of the insolvency practitioners who are usually engaged in challenging many acts that the same debtor performed for the benefit of various people or entities that are resident in various countries. To sum up: whenever no *vis attractiva* applies and the insolvency practitioners must apply to various courts in various jurisdictions, it is highly desirable that they should be at least able to apply the same law.

However, it is equally well-known that, within European legal culture, the situation is different since most regulations in Europe incorporate a combination of *lex fori* and *lex causae* that is usually called the ‘veto solution’, according to which the insolvency practitioner who intends to challenge the debtor’s detrimental acts applies the *lex fori concursus*, but the opponent may successfully object to the practitioner that the *lex causae* is different from the *lex fori* and – which is crucial – that the *lex causae* does not consider that act as a detrimental one.

This situation for example occurs under the EIR. On the one hand, Art. 7.2.(m) EIR lays down: ‘The law of the State of the opening of proceedings shall determine the conditions for the opening of those proceedings, their conduct and their closure. In particular, it shall determine the rules relating to the voidness, voidability or unenforceability of legal acts detrimental to the general body of creditors’. On the other hand, Art. 16 EIR lays down: ‘Point (m) of Article 7(2) shall not apply where the person who benefited from an act detrimental to all the creditors provides proof that: (a) the act is subject to the law of a Member State other than that of the State of the opening of proceedings; and (b) the law of that Member State does not allow any means of challenging that act in the relevant case.’ This is the case also in some Member States that regulate cross-border insolvency cases that have a connection with a third State. Consider, for example,

the case of Germany. On the one hand, Section 335 *Insolvenzordnung* (InsO) lays down: ‘Unless otherwise provided, the insolvency proceedings and their effects are subject to the law of the state in which the proceedings have been opened’; and, on the other hand, Section 339 *InsO* lays down: ‘A transaction may be contested if the conditions for contesting insolvency are met under the law of the state in which proceedings were opened, unless the opponent of the contest demonstrates that the law of another state is relevant to the transaction and the transaction is by no means contestable in accordance with this law.’

IV. More on applicable law. The logic of the veto solution

Certainly, the veto solution is inefficient from an insolvency practitioner’s point of view. Cunning debtors tend to exploit the diversity of legal systems and perform their acts under the law of a country which has a lenient regulation on transaction avoidance. As a result, when these debtors are subjected to insolvency proceedings, it is highly probable that the claims of the insolvency practitioners appointed to these proceedings will be successfully opposed by the opponent, which in effect is what happens in the real world.

Nevertheless, the veto solution has great appeal. In effect, as regards Art. 13 of Regulation (EC) 1346/2000, which is the ancestor of Art. 16 EIR, the Virgos-Schmit Report clearly states: ‘The aim of Article 13 is to uphold legitimate expectations of creditors or third parties of the validity of the act in accordance to the normally applicable national law, against interference from a different ‘lex concursus.’³² However, it is questionable what this statement really means and, more specifically, how national insolvency laws protect the ‘legitimate expectations of creditors or third parties’ and, consequently, whether the European Union that adopts the veto solution would be compliant with Art. 5 TEU, where this establishes the principle of proportionality. Art. 5 TUE *inter alia* lays down: ‘The use of Union competences is governed by the principle [...] of proportionality’ and, again, ‘Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.’

32 Virgos-Schmit Report, para 138. Moss/Fletcher/Isaacs in Moss/Isaacs (eds), *The EU Regulation on Insolvency Proceedings*, para 138.

In principle, the passage of the Virgos-Schmit Report is open to two alternative interpretations.

The first interpretation refers to what Ehrenberg – in an old, but still topical, seminal paper – called ‘Rechtssicherheit’ (certainty about the existence of a law, a right or a claim), *i.e.* ‘legal certainty.’ Ehrenberg writes that ‘legal certainty’ refers to that feature of each legal system according to which the existence and contents of a law, a right or a claim cannot be put in doubt.³³ If one adopts this interpretation, the Virgos-Schmit passage could be rewritten as follows: ‘The aim of Article 13 is to ensure legal certainty regarding the validity of the act in accordance with the normally applicable national law, against interference from a different ‘lex concursus’.

This interpretation is, however, implausible for two reasons. First, this reading would mean that, since national laws are certain, private international law would have to introduce conflict rules which do not infringe this national law climate of legal certainty. This is correct, but redundant. Secondly, the need to protect legal certainty in cross-border regulations does not refer to avoidance law only, but is a general stance referring to any field of law³⁴. Therefore, if such an interpretation were embraced, it would be inexplicable why the European Union should provide so special a protection in the field of avoidance law only.

The second interpretation refers to what Ehrenberg called ‘Verkehrssicherheit’ (textually, certainty about the circulation of either a right or a claim), *i.e.* ‘the relevance of a state of good faith in the circulation of either a right or a claim.’ Ehrenberg writes that ‘relevance of a state of good faith in the circulation of either a right or a claim’ refers to that feature of each legal system according to which a person who has achieved a right or a claim intentionally or who has been discharged from a previous duty with consent should not experience the negative consequences of

33 Ehrenberg, p. 273 seqq., especially at p. 274 of the reprinted edition (1968). Actually, at p. 279 of the reprinted edition, Ehrenberg adds that the concept of ‘legal certainty’ can be understood in a narrower sense and that this second meaning refers to that feature of each legal system according to which a person who is entitled to a right or a claim must not experience any change in his or her legal position without his or her consent. However, it is self-explanatory that paragraph 138 of the Virgos-Schmit Report cannot refer to this narrower meaning of ‘legal certainty.’ In fact, avoidance laws do not grant any protection to the consent of creditors or third parties who – on the contrary and because of a designed choice of policy – are obliged to experience a modification in their position without their own consent.

34 Fuller, p. 38–39, who considers the absence of legal certainty, which Fuller exemplifies in 8 types of malfunctions, as a failure in lawmaking.

those adverse circumstances that prevent him or her from enjoying the new position, *unless he or she was previously aware of the existence of those circumstances*. Consequently, if this interpretation is adopted, the Virgos-Schmit passage could be rewritten as follows: ‘The aim of Article 13 is to ensure the relevance of the state of good faith of those creditors or third parties who have relied on the validity of the act in accordance with the normally applicable national law, against interference from a different ‘lex concursus».’

This interpretation is certainly plausible because many avoidance rules contain a reference to the mental state of the creditors or third parties in their position as beneficiaries of the debtor’s transactions. It is, moreover, attractive, since it is based on the assumption that avoidance laws are designed to ensure protection to beneficiaries who are in good faith.

V. More on applicable law. The limits of the veto solution: the veto solution is based on a misunderstanding according to which avoidance laws ensure protection to beneficiaries in good faith

In Europe, the idea that avoidance laws ensure protection for beneficiaries in good faith is very popular and is based on the observation that, for the success of the action, many jurisdictions require that the opponent should be aware either of the debtor’s insolvency or of the existence of a similar circumstance. For example, this observation holds true as regards German law, where Section 130.1 *InsO* lays down: ‘A transaction granting or facilitating for an insolvency creditor a security or satisfaction may be contested ...if it was made during the last three months prior to the request to open insolvency proceedings, if the debtor was illiquid on the date of the transaction, *and if the creditor was aware of the insolvency on this date*’ (emphasis added). The same observation can be made as regards other Member states, such as Austria,³⁵ France³⁶ and Italy.³⁷

However, we cannot be sure that this assumption is entirely correct. In fact, against the assumption that avoidance law would ensure protection for beneficiaries in good faith one can make the following observations.

35 § 31 *Insolvenzordnung* (IO).

36 Art. L632–2 *Code de commerce*.

37 Art. 166 *Codice della crisi d’impresa e dell’insolvenza*.

First, modern avoidance law has its roots in one or more of the remedies that already existed at the time of Roman law and that – among non-specialist in Roman law – are generically unified under the umbrella of *Actio Pauliana* – apparently, at that time the *Actio Pauliana* was only one of the many remedies of this kind.³⁸ In particular, in this respect the Digest of Justinian reports that, when debtors had fraudulently divested themselves of their assets in order to appear unable to pay their creditors, the judge (*praetor*) granted either the liquidator of the debtors' assets (*curator bonorum*), or the debtors' creditors a remedy that aimed at reversing the effect of this divestment and at giving the liquidator or the debtors' creditors the possibility of foreclosing the assets of their debtors.³⁹

Scholars are not sure about the number and contents of these remedies and, in the 19th century, the authors who studied the relevant fragments from an historical point of view were even unsure whether these texts were genuine or had been manipulated. Case by case these scholars regarded with suspicion either those who had compiled the Digest, or those who had handed the Digest down to modern times, or both. More specifically, these scholars thought that some of the relevant fragments might have been changed in order to accommodate the thoughts of Ulpian (who was active between 211 and 222 AD) and Paulus (who was active late 2nd to early 3rd century AD) to the new times, *i.e.* to Justinian's time (who was emperor

38 See what will be said later on, in this section, text and footnotes. After what has been said, it should be clear to the reader that, here, the term *Actio Pauliana* refers to one of the various remedies employed in Roman law, and not to some forms of avoidance actions that are currently in force in many jurisdictions and will be dealt with in section 13. For the sake of clarity, the former is called *Actio Pauliana*, while the latter will be called *actio pauliana*.

39 D. 42.8.1 pr. (where 'pr.' stands for 'principium', *i.e.* beginning). This fragment, in a translation by Scott, no page number, reads: 'The Praetor says: 'I will grant an action to the curator of property, or to anyone else to whom it is necessary to grant one, in a case of this kind, within the year in which he has a right to institute such a proceeding, where any act has been committed for the purpose of fraud with anyone who was not ignorant of said fraud, and I will also maintain this right of action against it.' (Ait praetor: 'Quae fraudationis causa gesta erunt cum eo, qui fraudem non ignoraverit, de his curatori bonorum vel ei, cui de ea re actionem dare oportebit, intra annum, quo experiundi potestas fuerit, actionem dabo. Idque etiam adversus ipsum, qui fraudem fecit, servabo'). The Digest was a compendium of Roman law that was drawn up under the Emperor of the Eastern Roman Empire, Justinian I. Nowadays, the Digest is one of the most important sources of Roman law.

from 527 to 565 BC), or/and to the time of the Middle Ages.⁴⁰ Nevertheless, these historians had no doubts that, despite the difficulty in dating the suspected manipulations, those fragments register a development in the law of avoidance and trace the evolution from the relevance to the non-relevance of the mental state of the beneficiary of the debtor's transaction. In fact, while in D. 42, 8, 1 pr. the judge is reported to grant the remedy under the condition that the beneficiary of the fraudulent transaction was a person who was not ignorant of the debtor's fraud (*qui fraudem non ignoraverit*), in D. 2. 8. 10. pr. the judge is reported to have granted the same remedy even if such an awareness did not exist (*et si scientia non sit*).⁴¹

Secondly, it is well known that these fragments had a huge influence on modern codifications, which case by case incorporated either the principle according to which the bringing of avoidance actions *does* require the beneficiary to be aware of the debtor's insolvency, or the opposite, and stricter, principle according to which the bringing of avoidance actions does not require the beneficiary to be aware of the debtor's insolvency.

Generally speaking, the regulation on the avoidance actions which the cheated creditors may bring outside insolvency proceedings has incorporated the principle according to which the avoidance action *does* require the beneficiary to be aware of the debtor's insolvency. For example, this is the case in Austria⁴², Germany⁴³ and Italy.⁴⁴

By contrast, it appears that, depending on the prescription at issue, insolvency law regulations have incorporated both the principle according to which the bringing of avoidance actions *does* require the beneficiary to

40 Lenel, p. 5 et seqq.; Solazzi, p. 11 et seqq.; and Piano Mortari, p. 5 et seqq. and, with specific reference to the Middle Ages, p. 13 et seqq. and p. 152 et seqq.

41 D. 42. 8. 10. pr. This fragment, in a translation by Scott, no page number, reads: 'The Praetor says: 'Where Lucius Titius, with your privity and to your advantage, has disposed of any property for the purpose of defrauding his creditors, so that an action under my Edict will lie against him for the property in question, when no more than a year has elapsed, as an action with reference to said property can be brought, you must grant restitution, after proper cause has been shown; and even if you were not aware of the fact, I will grant an action in factum.' (Ait praetor: 'Quae Lucius Titius fraudandi causa sciente te in bonis, quibus de ea re agitur, fecit: ea illis, si eo nomine, quo de agitur, actio ei ex edicto meo competere esse oportet, ei, si non plus quam annus est, cum de ea re, qua de agitur, experiundi potestas est, restituas. Interdum causa cognita et si scientia non sit, in factum actionem permittam').

42 § 2 *Anfechtungsordnung*.

43 § 3 *Gesetz über die Anfechtung von Rechtshandlungen eines Schuldners außerhalb des Insolvenzverfahrens* (AnfG).

44 Art. 2091 *Codice civile*.

be aware of the debtor's insolvency, and the principle according to which the avoidance actions do not. For example, this is the case of Germany where, in addition to prescriptions that require the beneficiary's awareness, Section 134 *InsO* lays down: 'A gratuitous benefit granted by a debtor may be contested unless it was made more than four years prior to the request to open insolvency proceedings'. This is also the case in France⁴⁵ and Italy.⁴⁶

Moreover, as regards the above-mentioned jurisdictions (*i.e.* those jurisdictions where some insolvency law prescriptions *do* require the beneficiary to be aware of the debtor's insolvency and other insolvency law prescriptions do not), no one has objected that these legal frameworks prove to be discriminatory. Rather, some years ago a Dutch scholar suggested that the European Union should replace national avoidance laws with a harmonized European Union legal framework that did not contain any reference to the beneficiary's awareness.⁴⁷ This double-track regulation confirms that, at least in modern law, proof of the beneficiary's mental state has nothing to do with the protection of the beneficiary's good faith and does not aim at protecting his or her legitimate expectations.

Thirdly, in Germany some prescriptions contain presumptions – albeit rebuttable – according to which the subjective status of the beneficiary's awareness is inferred from another fact, such as the awareness of the disadvantage to the insolvency creditors or the fact that the opponent has a close relationship with the debtor. Consider, for example, Section 131 *InsO*. This long and complex prescription lays down: '(1) A transaction granting or facilitating for an insolvency creditor a security or satisfaction without that creditor's entitlement to such security or satisfaction, or to the kind or date of such security or satisfaction, may be contested if such transaction was made 1. during the last month prior to the request to open insolvency proceedings or after such request; 2. within the second or third month prior to the request to open insolvency proceedings, and the debtor was illiquid on the date of the transaction; 3. within the second or third month prior to the request to open insolvency proceedings, and the creditor was aware of the disadvantage to the insolvency creditors arising from such transaction on its date. (2) For subsection (1) no. 3 to apply, awareness of circumstances necessarily indicating the disadvantage is considered equivalent to awareness of the disadvantage to the insolvency creditors. *A person with a close*

45 Art. L632-1 *Code de commerce*.

46 Art. 163 *Codice della crisi d'impresa e dell'insolvenza*.

47 De Weijs, *Int. Insol. Rev.* 2011, p. 219 et seqq.

relationship to the debtor on the date of such transaction (section 138) is presumed to have been aware of the disadvantage to the insolvency creditors' (emphasis added).

There is no doubt that this prescription is part of the policy that subordinates the success of avoidance actions to the proof of the beneficiary's mental state. However, if one thought that the proof of the beneficiary's mental state was a device to protect the beneficiary's good faith, this prescription would have to be considered as contradictory. In fact, it alleviates the burden of proof for the insolvency practitioner and, consequently, it proves to be against the interests of the beneficiary.⁴⁸ To sum up, this observation confirms again that, at least in modern law, proof of the beneficiary's mental state has nothing to do with the protection of the beneficiary's good faith and does not aim at protecting his or her legitimate expectations.

Fourthly, it is well known that in 1978 the US Congress enacted a new regulation on insolvency law (*The Bankruptcy Reform Act of 1978*) including a regulation on preferences that no longer contained any reference to the beneficiary's mental state (§ 547 *US Bankruptcy Code*).⁴⁹ As a result, nowadays insolvency practitioners (bankruptcy trustees) can recover payments and other transfers of property made by the debtor on the eve of the filing for the opening of insolvency proceedings by only proving that these acts have produced an advantage for some creditors at the expenses of others. However, the *travaux préparatoires* to the above-mentioned reform clearly demonstrate that this change in the choice of policy has been well received and no one has observed that it would impair the beneficiaries' legitimate expectations. For example, a distinguished scholar that thoroughly reported this moment of history wrote: 'The draftsmen of the Bankruptcy Reform Act of 1978 addressed the difference in treatment of the two kinds

48 In this respect, see also some observations by Terranova, pp. 4–5.

49 Actually, as regards avoidance actions Continental law is different from US law since the US insolvency practitioners have various avoidance powers depending on the nature of the relevant transactions. Nevertheless, Continental laws and US law seem functionally comparable, and this feature indeed justifies a comparison between the Continental law regulations on avoidance actions and the US regulation on preferences. The previous regulation was laid down by s. 60 of the *US Bankruptcy Act of 1898*. Actually, the *Bankruptcy Reform Act of 1978* kept the reference to the beneficiary's mental state when the beneficiary was an insider-creditor. However, a 1984 amendment eliminated even this reference. The *Bankruptcy Reform Act of 1978* completely replaced the former *Bankruptcy Act of 1898* (Nelson Act). In its turn, the *Bankruptcy Act of 1898*, including the regulation on preferences, was amended many times.

of preferential transfers by almost entirely eliminating any requirement that the creditor have reasonable cause to believe the debtor insolvent. ... The Commission proposed a new preference section, which eliminated the requirement that the creditor have reasonable cause to believe the debtor insolvent.' In conclusion he says: 'During congressional hearings on the Commission proposals, no one stated opposition, and for that reason, the proposals received little attention. The National Bankruptcy Conference fully endorsed the proposals.'⁵⁰

VI. More on applicable law. In favour of a referral to the *lex fori concursus* only

We are aware that this topic would deserve an analysis that delved in greater depth than we were able to do through the above observations.⁵¹ Nevertheless, these comments demonstrate with sufficient clarity that the prerequisite that the beneficiary must have been aware of the debtor's insolvency is not a device to ensure protection to beneficiaries in good faith – otherwise, it would be strange and inconsistent that the German lawmaker and other lawmakers across Europe should have provided for this device for some acts only and even that these lawmakers should have provided some 'in malam partem' presumptions (although rebuttable) according to which the status of awareness can be inferred from other facts. Rather, the above observations demonstrate that the prerequisite that the opponent must have been aware of the debtor's insolvency is not a device to ensure protection to beneficiaries in good faith but, on the contrary, an instrument to make it easier for claimants to prove the opponents' fraudulent behaviour and their role of 'accomplices' of the debtor in the commitment of acts that later on would prove detrimental to the debtor's creditors.

This statement is crucial in setting up European law. It demonstrates that national avoidance laws do not ensure protection to beneficiaries in good faith and, consequently, there is no need for the European Union to 'uphold legitimate expectations of creditors or third parties of the validity of the act in accordance to the normally applicable national law, against inter-

50 Countryman, *Vanderbilt Law Review* 1985, p. 713 et seqq., and, more specifically, at pp. 726–727.

51 But, for a more in-depth analysis, see Mangano, 'Against the veto solution', p. 364 et seqq.

ference from a different ‘lex concursus».’ Indeed, it is arguable that such a protection granted by the European Union might even infringe Art. 5 TEU, which *inter alia* lays down: ‘The use of Union competences is governed by the principle [...] of proportionality’ and, again, ‘Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties’ (emphasis added). In fact, it could be argued that such a special protection goes beyond the goal of Art. 81 of the Treaty on the Functioning of the European Union (TFEU), which only lays down that ‘The Union shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases. Such cooperation may include the adoption of measures for the approximation of the laws and regulations of the Member States.’

It is not meant by this that Art. 16 EIR infringes the principle of proportionality. This point would deserve further investigation. However, we do suggest that, if the European Union intends to enact some rules on detrimental acts with third countries, the law that ought to be applicable to these proceedings should be not a combination between the *lex fori concursus* and the *lex causae*, even in the mild form of the veto solution, but the *lex fori concursus* only.⁵²

52 On this point, see also Carballo Piñeiro, p. 32 et seqq., who dealt with the topic at issue in Spain. This scholar maintained that Spanish avoidance law did not ensure protection to beneficiaries in good faith, so that a proposal for Spanish international private law rules on detrimental acts with third countries ought to refrain from adopting the veto solution. The coincidence between our position and the position of Laura Carballo Piñeiro is not fortuitous, but is the outcome of a long-lasting and fruitful academic dialogue. In 2004, I published *La revocatoria fallimentare delle attribuzioni indirette*, Torino 2004, where I maintained that Italian avoidance law and other corresponding foreign laws did not ensure protection to beneficiaries in good faith (p. 75 et seqq.) – this volume was reprinted with the same contents in 2005. In 2005, Carballo Piñeiro published *Acciones de reintegración de la masa y derecho concursal internacional*, where she developed the same argument as regards Spanish law and transposed it to the field of private international law (p. 32 et seqq.); in the present paper, I have further developed the achievements of both. I thank Laura for her contribution to our common idea and I add that any error in the present paper is mine.

VII. Recognition and enforcement. In favour of a partial adoption of the MLIJ

The third and last issue to deal with concerns the recognition and enforcement of the judgments issued within the proceedings regarding avoidance law. This issue also includes the recognition and enforcement of those court orders that impose preventative measures aiming at ensuring that their future judgments will be successfully enforced (provisional reliefs).

Basically, three options are available.

The first option consists in adopting a discretionary system of recognition and enforcement according to which the local court or the corresponding local authority that has been requested for recognition and enforcement has discretion to grant assistance to the foreign insolvency practitioner making the request.

Such a system, which is based on the interpretation that the UK courts made of the MLCBI, is particularly respectful of the country where the avoidance judgments must be enforced.⁵³ However, for this very reason, it does not facilitate the solution of cross-border cases. In fact, from an *ex ante* perspective, it is easy to observe that this system does not create an environment of legal certainty – the insolvency practitioner who intends to bring a cross-border avoidance action cannot have an *ex ante* certainty that the judgment will be recognized and enforced in the relevant jurisdiction. Moreover, evaluated from an *ex post* perspective, this system does not appear to be focussed on maximising the debtor's assets – if the local authorities refuse recognition and enforcement, this refusal is detrimental to the administration of insolvency proceedings.

The second option consists in adopting the MLIJ, which in principle ensures that – if the required conditions are met – the ‘insolvency-related judgment shall be recognized and enforced’ (Art. 13).⁵⁴

53 *Rubin v. Eurofinance SA* [2012] UKSC 46, [2013] 1 AC 236; and *In re OJSC International Bank of Azerbaijan, Bakhshiyeva v. Sberbank of Russia et al* [2018] EWHC 792 (Ch). For this trend, and the relation that it has with the so-called ‘Gibbs-rule’ according to which English Courts refuse to enforce foreign judgments that rule modification of, or even discharge from, obligations contracted under English law, see Mevorach, in EBOR 2021, p. 291.

54 UNCITRAL, UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments with Guide to Enactment <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/ml_recognition_gte_e.pdf> (last accessed: 28.10.2022).

This system is certainly much more desirable than that provided by the MLCBI since, under certain conditions, neither the local court nor the corresponding authority has full discretion in cooperation. Nevertheless, the MLIJ also has its limits, since this lays down that the local courts/authorities may refuse to satisfy the request of the foreign insolvency practitioner by raising not only the usual public policy exception – which here also includes the infringements of ‘fundamental principles of procedural fairness’ – but also an exception grounded on a long and omni-comprehensive list provided by Art. 14 MLIJ. This article lays down: ‘In addition to the ground set forth in article 7, recognition and enforcement of an insolvency-related judgment may be refused if: (a) The party against whom the proceeding giving rise to the judgment was instituted: (i) Was not notified of the institution of that proceeding in sufficient time and in such a manner as to enable a defence to be arranged, unless the party entered an appearance and presented their case without contesting notification in the originating court, provided that the law of the originating State permitted notification to be contested; or (ii) Was notified in this State of the institution of that proceeding in a manner that is incompatible with the rules of this State concerning service of documents; (b) The judgment was obtained by fraud; (c) The judgment is inconsistent with a judgment issued in this State in a dispute involving the same parties; (d) The judgment is inconsistent with an earlier judgment issued in another State in a dispute involving the same parties on the same subject matter, provided the earlier judgment fulfils the conditions necessary for its recognition and enforcement in this State; (e) Recognition and enforcement would interfere with the administration of the debtor’s insolvency proceedings, including by conflicting with a stay or other order that could be recognized or enforced in this State; (f) The judgment: (i) Materially affects the rights of creditors generally, such as determining whether a plan of reorganization or liquidation should be confirmed, a discharge of the debtor or of debts should be granted or a voluntary or out-of-court restructuring agreement should be approved; 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; (g) The originating court did not satisfy one of the following conditions: (i) The court exercised jurisdiction on the basis of the explicit consent of the party against whom the judgment was issued; (ii) The court exercised jurisdiction on the basis of the submission of the party against whom the judgment was issued, namely that that party argued on the merits before the court without objecting to jurisdiction

or to the exercise of jurisdiction within the time frame provided in the law of the originating State, unless it was evident that such an objection to jurisdiction would not have succeeded under that law; (iii) The court exercised jurisdiction on a basis on which a court in this State could have exercised jurisdiction; or (iv) The court exercised jurisdiction on a basis that was not incompatible with the law of this State; [States that have enacted legislation based on the UNCITRAL Model Law on Cross-Border Insolvency might wish to enact subparagraph (h).] (h) The judgment originates from a State whose insolvency proceeding is not or would not be recognizable under [*insert a reference to the law of the enacting State giving effect to the UNCITRAL Model Law on Cross-Border Insolvency*], unless: (i) The insolvency representative of a proceeding that is or could have been recognized under [*insert a reference to the law of the enacting State giving effect to the UNCITRAL Model Law on Cross-Border Insolvency*] participated in the proceeding in the originating State to the extent of engaging in the substantive merits of the cause of action to which that proceeding related; and (ii) The judgment relates solely to assets that were located in the originating State at the time the proceeding in the originating State commenced.’

Lack of space precludes any analysis of this list, which – on the whole – may appear quite understandable within a system of approximation of jurisdictions that does not contain any suggestions regarding applicable law. This is the case of the system set up by the UNCITRAL, since this Commission focussed primarily on the topics of recognition and enforcement.⁵⁵ At any rate, this quotation of the full list laid down by Art. 14 MLIJ makes it sufficiently clear that option b) gives the foreign insolvency practitioners less certainty that it promises.

The third option consists in adopting the MLIJ partially and, more specifically, in suggesting that the local court/authority should be able to refuse recognition and cooperation only by raising against the foreign insolvency practitioner the public policy exception in the expanded terms that have been formulated by Art. 7 MLIJ. This article reads: ‘Nothing in this Law prevents the court from refusing to take an action governed by this Law if the action would be manifestly contrary to the public policy, including the fundamental principles of procedural fairness, of this State.’

Arguably, this option would suit the case well if the European Union intends to set up a legal framework on detrimental acts with third countries.

55 Mevorach EBOR 2021, p. 312–313.

Although this system reduces the guaranties for local courts/authorities, one should bear in mind that the context for which the UNCITRAL issued the MLIJ is partially different from the context for which we are suggesting ‘the third option.’ In fact, while the former is a context for which the UNCITRAL has not yet suggested any choice-of-law rules, the latter is a context for which we have made such suggestions (→ sections 8 to 11).

VIII. A coda. Extending the above proposals to the ‘*actio pauliana*’, provided that this action is brought by an insolvency practitioner, within a set of insolvency proceedings and in the interests of the general body of creditors

It is arguable that the suggestions that we have put forward as regards insolvency avoidances should be extended to the many forms *actio pauliana* that exist around the world – provided that, of course, the *actio pauliana* is brought by an insolvency practitioner, within a set of insolvency proceedings and in the interests of the general body of creditors.⁵⁶ In many jurisdictions, both outside and inside Europe, insolvency practitioners may bring some actions that derive from the *Actio Pauliana*, which is reported in the Digest of Justinian,⁵⁷ and are still known under the label ‘*actio pauliana*’. Under these current laws a creditor or, when insolvency proceedings have been opened, an insolvency practitioner appointed to the already opened insolvency proceedings, may recover those assets that a distressed debtor who/which is not yet technically insolvent has fraudulently transferred to a third party.

At a first glance, the question appears extremely challenging since around the world there are as many *actiones paulianae* as there are jurisdictions that have decided to introduce them into their legal framework. As a result, it might seem that any attempt to answer this question would imply a research study on comparative law of immense scope.

However, if one studies this topic in greater depth, one can realise that this question is easier than expected and, especially, that the rulings of the CJEU play a crucial role in this respect. First, in many cases the CJEU has

56 For example, this choice occurs when the limitation period for the insolvency avoidance has already expired, while the *actio pauliana* is still available.

57 D. 22.1.38.4, which states: ‘...*Pauliana, per quam (actionem) quae in fraude creditorum alienata sunt revocantur*...’.

ruled – even though implicitly – that the concept of actions concerning ‘the voidness, voidability or unenforceability of legal acts detrimental to the general body of creditors’ must be interpreted in functional terms, having regard more to the purpose of the action than to its nature⁵⁸. Secondly, in the *Feniks* case the CJEU considered an *actio pauliana* under Polish law as an action that, in principle, is included in the concept of those actions concerning ‘the voidness, voidability or unenforceability of legal acts detrimental to the general body of creditors’ and which, in that particular case, could not be included in that list since it was brought by a single creditor in his or her own interests and not by an insolvency practitioner in the interests of the general body of creditors⁵⁹.

We are aware that these rulings refer to the topic of *vis attractiva concursus*. Nevertheless, we are convinced that the functional approach adopted by the CJEU provides us with important guidance: the suggestions that we have made in the previous sections as regards avoidance actions may be extended also to the many forms of *actio pauliana* that still exist, provided that these actions are brought by an insolvency practitioner, within a set of insolvency proceedings and in the interests of the general body of creditors.

D. Conclusions – Our proposal in a nutshell

This paper has tried to demonstrate that the European Union ought to enact a set of uniform private international law rules on detrimental acts that have a connection with third countries and that this regulation is not only desirable but also compliant with the interpretation of Art. 5 TEU that was placed at the basis of both the EIR and Directive (EU) 2019/1043. By contrast, this paper has not dealt with the question of whether the European Union should introduce these rules by means of a regulation, a directive or a non-binding act of Union law. This choice was thought to be more political than academic and, in any case, as a question to be decided as regards all the topics covered by the Project.

This paper has, moreover, tried to demonstrate how these rules ought to be drawn up and, as a result, the following suggestions have been made.

58 CJEU 4.12.2019 – case C-493/18, ECLI:EU:C:2019:1046 paras 22–32 - UB v VA, Tiger SCI, WZ, acting as UB's trustee in bankruptcy, Banque patrimoine et immobilier SA.

59 CJEU 4.10.2018 – case C-337/17, ECLI:EU:C:2018:487- Feniks Sp. z o.o. v. Azteca Products & Services SL.

- The rules on jurisdiction should provide for an opt-out rule imposing the *vis attractiva concursus* that may be waived in favour of the forum of the defendant's domicile and, in case of an agreement between the relevant parties, in favour of the forum that both parties consider as the most convenient. This choice of policy allows the insolvency practitioner who intends to bring an avoidance action to evaluate whether or not it is more appropriate to have this action concentrated in the *forum* of the insolvency proceedings. Especially in group insolvencies, this discretionary space could allow insolvency practitioners to put the decision whether or not to adopt the *vis attractiva* at the core of the negotiations that are usually carried out with the other insolvency practitioners.
- The rules on applicable law should provide for a referral to the *lex fori concursus* only, first because the veto solution reduces the chances of success of avoidance actions; secondly, and especially, because in our opinion this choice of policy is based on the misunderstanding that avoidance actions ensure protection to beneficiaries in good faith.
- The rules on recognition and enforcement should partially adopt the MLII. In fact, the paper suggests that a country can refuse the recognition of a foreign judgment simply by raising the public policy exception in the expanded terms that have been formulated by Art. 7 MLII. This article reads: 'Nothing in this Law prevents the court from refusing to take an action governed by this Law if the action would be manifestly contrary to the public policy, including the fundamental principles of procedural fairness, of this State.'
- The proposed rules on detrimental acts with third countries should be extended to the many forms of *actio pauliana* that exist around the world, provided that these actions are brought by an insolvency practitioner, within a set of insolvency proceedings and in the interests of the general body of creditors.

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Informing foreign creditors of the opening of insolvency proceedings

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Abstract:

The paper analyses the rules of the European Insolvency Regulation and the UNCITRAL Model Law on Cross-Border Insolvency relating to the informing of foreign creditors of the opening of insolvency proceedings, and addresses the question of whether the rules of the European Insolvency Regulation should be improved in respect of situations in which insolvency proceedings are opened in the territory of a Member State of the European Union while the foreign creditor, whether a natural or legal person, has its habitual residence, domicile, or registered office in a third country.

Keywords: European Insolvency Regulation, UNCITRAL Model Law on Cross-Border Insolvency, informing foreign creditors of the opening of insolvency proceedings, *lex fori concursus*.

A. Introduction

Every State's national legislation includes provisions governing the notification of creditors of a debtor in respect of whom insolvency proceedings have been opened. These provisions are of great importance, because a creditor's ability to timely lodge (file) their claim in insolvency proceedings, participate in them, and influence through voting the decisions that will be adopted in those proceedings - decisions that will ultimately determine the satisfaction of their claim against the debtor - depends on obtaining timely knowledge of the opening of the insolvency proceedings. Certain categories of creditors, such as secured creditors, in some legal systems are not even required to lodge their claims. However, national insolvency law may nevertheless prescribe specific rules for such creditors that, to some extent, limit their rights or the manner in which those rights may be exercised once insolvency proceedings have been opened. It is therefore

important for them as well to obtain timely knowledge that insolvency proceedings have been opened.

It is customary for national legislators to provide that the decision opening insolvency proceedings be published in the official gazette and/or posted on the court's notice board, and, in modern times, also published on the court's electronic notice board. National legislators may also provide for individual notification of creditors by means of traditional or electronic service of a notice on the opening of insolvency proceedings. However, by its very nature, such notification is limited to those creditors who are known to the court that opened the insolvency proceedings or to the insolvency practitioner appointed in those proceedings, and in that respect such notification is not sufficient. Additionally, the national legislators typically provide for the entry of the decision opening insolvency proceedings into the public register in which the debtor is registered as a business entity carrying out business activities, or into the public registers in which the debtor is recorded as the holder of a particular right (for example, the land register, the ship register, the aircraft register, intellectual property registers, etc.)

As a rule, national legislations prescribe the duty to notify creditors of the opening of insolvency proceedings in a neutral manner, most often without explicit rules on notifying foreign creditors of the debtor.

There is no doubt that foreign creditors of an insolvent debtor must also be notified of the opening of insolvency proceedings, so that they may lodge their claims and participate in the proceedings. If only domestic, and not foreign, creditors were notified of the opening of insolvency proceedings against the debtor, this would violate one of the fundamental principles of insolvency law – the equal treatment of all of the debtor's creditors (*par conditio creditorum*).

It must be borne in mind that foreign creditors are, as a rule, in a significantly less favourable position with respect to their ability to obtain valid and timely knowledge of the opening of insolvency proceedings against the debtor. Foreign creditors will, as a rule, become aware of the opening of insolvency proceedings at a later stage due to their geographical distance; moreover, they typically do not know the language in which the proceed-

ings are conducted and are insufficiently familiar with the substantive and procedural law governing those proceedings.¹

The European Insolvency Regulation (hereinafter: EIR)², as one of the most comprehensively regulated instruments of international insolvency law, contains specific provisions governing the notification of foreign creditors of the opening of insolvency proceedings. The Regulation applies among the Member States of the European Union, with the exception of Denmark.³

The UNCITRAL Model Law on Cross-Border Insolvency (hereinafter: MLCBI)⁴, which sets out the rules on the recognition of foreign insolvency proceedings and encourages States worldwide to align their domestic international insolvency regimes with its framework, likewise devotes specific provisions to the issue of notifying foreign creditors.

The purpose of this article is to present and analyse the aforementioned rules on the notification of foreign creditors contained in these two most relevant and widely recognised international legal instruments governing cross-border insolvency. In this context, particular attention will be devoted to situations in which insolvency proceedings are opened in the territory of a Member State of the European Union, while the foreign creditor, whether a natural or a legal person, has their habitual residence, domicile, or registered office in a State that is not a Member State of the European Union. We will examine whether, in such circumstances, there is a need to enhance or further refine the EIR's rules.

Section II will first present and examine the existing rules on the notification of foreign creditors contained in the EIR, followed by Section III, which will examine the corresponding rules found in the MLCBI. Finally, Section IV will set out the conclusions and recommendations.

1 Similarly, also Brinkmann/Dahl/Kortleben Art. 54 mn. 1; Stürner/Eidenmüller/Schoppmeyer/Reinhart Art. 54 mn. 1.

2 Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2016 on insolvency proceedings (recast), Official Journal of the European Union (hereinafter: OJEU) 2015, L 141, pp. 19-59; last amendment: OJEU 2025, L 2073, pp. 1-15. That Regulation was preceded by the Council Regulation (EC) No. 1346/2000 of 29 May 2000 on insolvency proceedings, Official Journal of the European Communities, 2000, L 160, pp. 1-18.

3 Recital no. 88 EIR.

4 The text of the Model Law on Cross-Border Insolvency is available at: www.uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency (last accessed: 23 Mai 2026).

B. European Insolvency Regulation

The EIR contains not only an explicit provision imposing the duty to notify foreign creditors of the opening of insolvency proceedings (Article 54(1) EIR), but also provisions governing their individual notification, the minimum content of such individual notice, as well as the language in which that notice must be provided (Article 54(2)-(3) EIR). Timely notification of foreign creditors of the opening of insolvency proceedings in a Member State is further facilitated by the provisions requiring the publication of the notice of the decision opening insolvency proceedings in other Member States (Article 28 EIR), as well as by the provisions mandating the entry of information on the insolvency proceedings into the public registers of other Member States (Article 29 EIR). The establishment of national insolvency registers and their interconnection within a unified EU-level system (Articles 24–27 EIR) likewise increases the likelihood that foreign creditors will be informed in a timely manner of the opening of insolvency proceedings against the debtor in any Member State of the European Union, excluding, of course, Denmark, to which the EIR does not apply.

I. An explicit provision imposing the duty to notify known foreign creditors of the opening of insolvency proceedings

Pursuant to Article 54(1) EIR, as soon as insolvency proceedings are opened in a Member State, the court of that State having jurisdiction, or the insolvency practitioner appointed by that court, shall immediately inform the known foreign creditors. This provision is of considerable importance, since every foreign creditor may lodge claims in the insolvency proceedings (Article 53 EIR).

The aforementioned provision is important for yet another reason. Namely, the law applicable to the insolvency proceedings and their legal effects is the law of the Member State within the territory of which such proceedings are opened (the ‘State of the opening of proceedings’), i.e. *lex fori concursus*, unless the EIR provides otherwise (Article 7(1) EIR). In other words, this means that the *lex fori concursus* would, in principle, also govern the issue of notifying foreign creditors of the opening of insolvency proceedings. The difficulty, however, lies in the fact that a considerable number of Member States of the European Union do not contain any specific provisions on the notification of foreign creditors.

In this respect, Article 54(1) EIR fills the gap that often exists in the national laws of the Member States. At the same time, this provision also prevails over national law that may offer weaker protection to foreign creditors with regard to notification of the opening of insolvency proceedings than the level of protection guaranteed by the EIR.⁵ Of course, national law may also provide for a higher level of protection for foreign creditors than that laid down in the aforementioned provision of the EIR.

It follows from Article 54(1) EIR that the duty to notify known foreign creditors lies either with the court⁶ or with the insolvency practitioner⁷. This provision is evidently designed to be flexible, as in some Member States the duty to notify foreign creditors is entrusted to the court, while in others it is assigned to the insolvency practitioner.⁸

It should be noted that the duty to notify known foreign creditors of the opening of domestic insolvency proceedings under Article 54(1) EIR arises not only when domestic main insolvency proceedings are opened (Article 3(1) EIR), but also when so-called non-main domestic insolvency proceedings are opened (Article 3(2) EIR), whether they take the form of independent domestic territorial insolvency proceedings (Article 3(4) EIR) or domestic secondary insolvency proceedings (Article 3(3) EIR).⁹

5 In the same direction also Mankowski/Müller/Schmidt, Art. 54. mn.1; Stürner/Eidenmüller/Schoppmeyer/Reinhart Art. 54 mn. 2.

6 For the purpose of the EIR, the term 'court' in Article 54 means the judicial body or any other competent body of a Member State empowered to open insolvency proceedings, to confirm such opening or to take decisions in the course of such proceedings (Art. 2(6) (ii) EIR).

7 For the purpose of the EIR, the term 'insolvency practitioner' means any person or body whose function, including on an interim basis, is to: (i) verify and admit claims submitted in insolvency proceedings; (ii) represent the collective interest of the creditors; (iii) administer, either in full or in part, assets of which the debtor has been divested; (iv) liquidate the assets referred to in point (iii); or (v) supervise the administration of the debtor's affairs (Art. 2(5) (i)-(v) EIR. The persons and bodies referred to in Art. 2(5) (i)-(v) EIR are listed in Annex B of the EIR (Art. 2(2) EIR).

8 Garašić ZPFRI 2016, 1039 (1046); Bork/van Zwieten/Lenzing Art. 54 mn. 54.07; Nummer-Krautgasser/Garber/Jaufer/Kantner p. 147 (153); Brinkmann/Dahl/Kortleben Art. 54 mn. 6-7; Stürner/Eidenmüller/Schoppmeyer/Reinhart Art. 54 mn. 10-11.

9 Likewise, long ago Virgós/Schmit Report on the Convention on Insolvency Proceedings, mn. 264; Stürner/Eidenmüller/Schoppmeyer/Reinhart Art. 54 mn. 4 and 7. Compare Mankowski/Müller/Schmidt Art. 54 mn. 6, that the duty to inform foreign creditors on the opening of insolvency proceedings especially connects with main and territorial insolvency proceedings. Compare also Brinkamann/Dahl/Kortleben Art. 53 mn. 4 in the conjunction with Art. 54 mn. 4. that this duty in particular connect with main and ancillary insolvency proceedings.

Indeed, in all of these proceedings foreign creditors are entitled to lodge their claims. In the case of parallel proceedings, cooperation and communication between the insolvency practitioners appointed in those proceedings (Article 41(1)-(3) EIR), including the exchange of information concerning foreign creditors, will be of particular importance.

The duty to notify known foreign creditors under Article 54(1) EIR applies to those foreign creditors who are known to the court or to the insolvency practitioner. These are, in the first place, creditors whom the court or the insolvency practitioner can identify from the debtor's financial records, from the debtor's business books more generally, from business documentation, or from the debtor's correspondence with creditors prior to the opening of the insolvency proceedings.¹⁰ However, it should be considered that the duty to notify foreign creditors also extends to those creditors whose existence has become known to the court or the insolvency practitioner on the basis of information orally provided by the insolvency debtor, by members of the governing bodies of a corporate debtor, or by the debtor's employees, who under national insolvency law are required to cooperate with the bodies conducting the insolvency proceedings.

Known foreign creditors must be notified of the opening of the insolvency proceedings immediately. This is most commonly interpreted as meaning without delay¹¹. Namely, there are time limits in national insolvency law within which creditors may lodge their claims in the insolvency proceedings, and these time limits are not the same across all Member States. Notifying creditors without delay is particularly important in those Member States whose national insolvency law does not allow late filing of claims, nor provides any procedural remedy such as reinstatement to the previous procedural position (relief from missed deadlines).¹² Foreign creditors must be able to lodge their claims and participate in the insolvency proceedings on the same footing as the debtor's domestic creditors.

A specific feature of the EIR is that, under the term '*foreign creditor*', it understands only a creditor which has its habitual residence, domicile or registered office in a Member State other than the State of the opening of

10 Mankowski/Müller/Schmidt Art. 54 mn. 12; Bork/van Zwieten/Lenzing Art. 54 mn. 54.06; Nunner-Krautgasser/Garber/Jaufer/ Kantner p. 147 (154); Brinkmann/Dahl/Kortleben Art. 54. mn. 5; Bork/Mangano mn. 6.68.

11 Garašić ZPFRi 2016, 1039 (1046); Bork/van Zwieten/Lenzing Art. 54 mn. 54.11; Mankowski/Müller/Schmidt Art. 54 mn. 13-14; Brinkmann/Dahl/Kortleben Art. 54 mn. 8; Stürner/Eidenmüller/Schoppmeyer/Reinhart Art. 54 mn. 9.

12 In the same direction also Bělohávek, Art. 54 mn. 54.08.

proceedings, including the tax authorities and social security authorities of Member States (Article 2(12) EIR). This means that Article 54 EIR does not apply to a foreign creditor whose habitual residence, domicile or registered office is in a third country, that is, in a country which is not an EU Member State. From Article 7(1) EIR, read in conjunction with Article 54 EIR, it follows that the insolvency law of the Member State in which the insolvency proceedings are opened, as the *lex fori concursus*, will be applicable to the notification of a foreign creditor whose habitual residence, domicile or registered office is in a State that is not an EU Member State.¹³ The problem lies in the fact that the Member States, as already noted, often do not have specific provisions in their national law concerning the notification of foreign creditors, whether those within the European Union or those outside the European Union.

II. Individual notification of known foreign creditors

Known foreign creditors within the meaning of Article 2(12) EIR are to be notified of the opening of the insolvency proceedings by means of individual notice (Article 54(2), first sentence, EIR).

Domestic creditors of the debtor, for whom the law of the Member State of the opening of insolvency proceedings is applicable with regard to notification of the opening of the proceedings (Article 7(1) EIR), are generally not notified individually of the opening of the insolvency proceedings, but rather through publication of that notice in the national official gazette, on the court's electronic notice board, or on the court's physical (traditional) notice board. Nevertheless, it is considered that the individual notification of foreign creditors under the EIR, as opposed to the generally collective notification of the debtor's domestic creditors under national law, does not amount to discrimination contrary to EU law, taking into account the fact that foreign creditors face, as a rule, far greater difficulties in learning in a timely manner that insolvency proceedings have been opened over their debtor's assets in another State.¹⁴

13 Virgós-Schmit Report, para. 271; Garašić, p. 460; Mankowski/Müller/Schmidt Art. 54 mn. 10; Stürner/Eidenmüller/Schoppmeyer/Reinhart Art. 54 mn. 6; Bork/van Zwieten/Lenzing Art. 54 mn. 54.05.

14 Stürner/Eidenmüller/Schoppmeyer/Reinhart Art. 54 mn. 6.; Bork/van Zwieten/Lenzing Art. 54 mn. 54.03. Bork/Mangano, mn. 6.76., mention in this context a

For the individual notice to foreign creditors, the standard notice form is used (Article 54(3), first sentence, EIR). It is available under the heading ‘*Notice of insolvency proceedings*’ on the European e-Justice Portal (Article 54(3), second sentence, EIR). The use of this form is, as a rule, mandatory.¹⁵ Only in insolvency proceedings relating to an individual not exercising a business or professional activity is the use of this standard form not mandatory, provided that creditors are not required to lodge their claims in order for them to be taken into account in the proceedings (Article 54(4) EIR).

In practice, it has been disputed whether, when serving individual notice on a foreign creditor, the EU Regulation on the service in the Member States of judicial and extrajudicial documents in civil and commercial matters (service of documents) must be applied.¹⁶ Recital 64 of the EIR expressly emphasises that the Service Regulation should not be applied, in order to ensure the swift transmission of information to creditors. Indeed, the EIR does not require that service must necessarily be effected by postal means.¹⁷ In fact, the law of the Member State in which the insolvency proceedings are opened, as the *lex fori concursus*, determines the method of sending the notice in question. This means that, if the law of the Member State opening the insolvency proceedings permits, for example, electronic service, the individual notification of creditors may also be effected in that manner.

III. Minimum content of the individual notice

The standard notice form has a prescribed minimum content. The information shall in particular include the time limits, the penalties laid down with

possible ‘phenomenon of reverse discrimination’ against creditors resident in the state of the opening of insolvency proceedings, who might not have the same treatment according to their own national law.

15 Mankowski/Müller/Schmidt Art. 54 mn. 24; Stürner/Eidenmüller/Schoppmeyer/Reinhart Art. 54 mn. 2.

16 Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil and commercial matters (service of documents), and repealing Council Regulation (EC) No 1348/2000, OJEC, 2007, L 324, pp. 79-120; last amendment: OJEU, 2013, L 158, pp. 1-71.

17 Compare Mankowski/Müller/Schmidt Art. 54 mn. 23 and Stürner/Eidenmüller/Schoppmeyer/Reinhart Art. 54 mn. 12. Compare, for German law, Bork/van Zwieten/Lenzing, Art. 54 mn. 54.08.

regard to those time limits, the body or authority empowered to accept the lodgement of claims, and any other measures laid down, as well as an indication whether creditors whose claims are preferential or secured *in rem* need to lodge their claims (Article 54(2), sentences 1–2, EIR).

By prescribing the minimum content that every individual notice of the opening of insolvency proceedings addressed to a foreign creditor in the European Union must contain, it has been ensured that a foreign creditor in the Union genuinely receives the essential information necessary for the exercise of their rights once insolvency proceedings are opened over the assets of their debtor.¹⁸ The national legislator could certainly include in the notice form on the opening of insolvency proceedings additional information that may be useful to the foreign creditor¹⁹, such as the currency in which the claim must be lodged, the treatment of interest, the position of claims belonging to lower ranking classes, the rules on representation, and similar matters. It should be noted that, according to the explicit provision of the EIR, representation by a lawyer or another legal professional is not mandatory for the sole purpose of lodging a claim (Art. 53, second sentence, EIR). With regard to other aspects of representation, the *lex fori concursus* applies.

It should be emphasised that the individual notice shall also include a copy of the standard form for the lodging of claims referred to in Article 55 EIR, or information on where that form is available (Art. 54(2), third sentence, EIR), which is likewise very useful for foreign creditors.

IV. Language of the individual notice

The individual notice shall bear the heading „*Notice of insolvency proceedings*’ in all the official languages of the institutions of the European Union (Art. 54(3), second sentence, EIR).

As a rule, the individual notice shall be transmitted in the official language of the State of the opening of proceedings. However, if there are several official languages in that Member State, it shall be transmitted in the official language or one of the official languages of the place where insolvency proceedings have been opened. In any case, the individual no-

18 Mankowski/Müller/Schmidt Art. 54 mn. 4.

19 Mankowski/Müller/Schmidt Art. 54 mn. 19; Stürner/Eidenmüller/Schoppmeyer/Reinhart Art. 54 mn. 13-14.

tice form may also be transmitted in another language which that State has indicated it can accept (Article 55(5) EIR), if it can be assumed that that language is easier to understand for the foreign creditors (Art. 54(3), sentences 2-3 EIR).²⁰

If the foreign creditor does not understand the official language of the State of the opening of proceedings, they will have to translate the individual notice at their own expense. However, if the *lex fori concursus* allows such costs to be lodged in the insolvency proceedings, the creditor may lodge a claim for these costs in addition to their other claims.²¹

V. Unknown foreign creditors and publication of the notice of the decision opening insolvency proceedings in other Member States

One possible way of informing unknown foreign creditors about the opening of insolvency proceedings is the publication of a notice of the decision opening domestic insolvency proceedings in other Member States.

Namely, the insolvency practitioner or the debtor in possession has not only the authority but also the duty to request that notice of the decision opening insolvency proceedings, and, where appropriate, the decision appointing the insolvency practitioner, be published in any other Member State where an establishment of the debtor is located. Of course, all of this can be done only in accordance with the publication procedures provided for in that Member State (Art. 28(1) EIR). Such publication shall specify, where appropriate, whether an insolvency practitioner has been appointed and whether the insolvency proceedings are main insolvency proceedings opened on the basis of Article 3(1) EIR, or whether they are territorial or secondary insolvency proceedings opened on the basis of Article 3(2) EIR (Art. 28(1), second sentence, EIR).

Moreover, the insolvency practitioner or the debtor in possession has the authority to request that such information be published in any other Member State where the insolvency practitioner or the debtor in possession considers it necessary, in accordance with the publication procedures provided for in that Member State (Art. 28(1) EIR)

Recital 75 emphasises that such publication is not a prior condition for the recognition of foreign proceedings. Recognition of a decision opening

20 Moss/Fletcher/Isaacs, p. 495, mn. 8.738-8.740.

21 Garašić ZPFRi 2016, 1039 (1047).

insolvency proceedings handed down by a court of a Member State which has jurisdiction pursuant to Article 3 EIR shall be granted in all other Member States (except Denmark) from the moment it becomes effective in the State of the opening of proceedings (Art. 19(1) EIR), which means that recognition is automatic and does not require a formal recognition procedure.

The EIR does not mention the possibility of publishing a notice of the decision opening insolvency proceedings in States that are not Member States of the European Union. However, there is no doubt that each Member State could, in its national insolvency law, authorise or even oblige the domestic insolvency practitioner or the debtor in possession to request the publication of domestic insolvency proceedings also in other States that are not Member States of the European Union. Whether the insolvency practitioner or the debtor in possession will be able to exercise that authority or fulfil that duty in those other States will, naturally, depend on whether the national law of the non-EU State concerned also permits it.

The publication of a notice of the decision opening insolvency proceedings in other Member States is important not only as one of the means by which foreign creditors from those other Member States may learn of the opening of the proceedings, but also for existing debtors of the insolvent debtor and the manner in which they must discharge their obligations after the opening of the proceedings²², as well as for those natural and legal persons that intended to enter into a business relationship with the insolvent debtor concerned.²³

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- 22 Where an obligation has been honoured in a Member State for the benefit of a debtor who is subject to insolvency proceedings opened in another Member State, when it should have been honoured for the benefit of the insolvency practitioner in those proceedings, the person honouring the obligation shall be deemed to have discharged it if he was unaware of the opening of the proceedings (Art. 31(1) EIR). Where such an obligation is honoured before the publication provided for in Article 28 EIR has been effected, the person honouring the obligation shall be presumed, in the absence of proof to the contrary, to have been unaware of the opening of insolvency proceedings (Art. 31(2), first sentence, EIR). Where the obligation is honoured after such publication has been effected, the person honouring the obligation shall be presumed, in the absence of proof to the contrary, to have been aware of the opening of proceedings (Art. 31(2), second sentence, EIR).
- 23 After the opening of insolvency proceedings, the right to manage and dispose of the debtor's assets generally passes to the insolvency practitioner. Even where a decision has been made in the opened insolvency proceedings to allow the insolvent debtor to remain in personal management (debtor in possession), the debtor will nevertheless

Let us note that the costs of the publication provided for in Article 28 EIR shall be regarded as costs and expenses incurred in the proceedings (Art. 30 EIR).

VI. Unknown foreign creditors and the entry of a notice of the decision opening insolvency proceedings in public registers of other Member States

One of the additional ways in which foreign creditors who are not known to the court that opened the insolvency proceedings, or to the insolvency practitioner appointed in those proceedings, may learn of the opening of the insolvency proceedings is indirectly through the entry of a notice of the decision opening the proceedings in the public registers of other Member States. The EIR expressly regulates this matter in Article 29(1)-(2) EIR.

Namely, where the law of a Member State in which an establishment of the debtor is located and this establishment has been entered in a public register of that Member State, or the law of a Member State in which immovable property belonging to the debtor is located, requires information on the opening of the insolvency proceedings referred to in Article 28 to be published in the land register, company register or any other public register, the insolvency practitioner or the debtor in possession shall take all necessary measures to ensure such registration (Art. 29(1) EIR). These are the so-called mandatory cases of registration.²⁴

There are also the so-called discretionary cases of registration. Namely, the insolvency practitioner or the debtor in possession may request such registration in any other Member State, provided that the law of the Member State in which the register is kept allows such registration (Art. 29(2) EIR).

The EIR does not mention the possibility of entering (registering) a notice of the decision opening insolvency proceedings in public registers in States that are not Member States of the European Union. There is no doubt, however, that any Member State could, in its national insolvency law, authorise or even oblige the domestic insolvency practitioner or the debtor in possession to request the entry of a notice of the decision opening domestic insolvency proceedings also in public registers in States that are not Member States of the European Union. Whether they will be able to

be subject to certain restrictions on the management and disposal of his assets and will be placed under the supervision of the trustee.

24 See Brinkmann/Szirányi Art. 29 mn. 3-4.

exercise that authorisation or fulfil that obligation in those other States will, naturally, depend on whether the national law of the non-EU State concerned also permits it.

Although such entries (registration) primarily serve to protect the insolvency estate and contribute to legal certainty, it is clear that they may indirectly also have a notification function for unknown foreign creditors regarding the opened insolvency proceedings. In any event, such entries in public registers, whether of Member States of the European Union or of third country, should be made as soon as possible after the opening of the insolvency proceedings.

Let us also note that the costs of the entries (registration) provided for in Article 29 EIR shall be regarded as costs and expenses incurred in the proceedings (Art. 30 EIR)

VII. Unknown foreign creditors – national insolvency registers and their interconnection at the EU level

The possibility for foreign creditors to learn in a timely manner of the opening of insolvency proceedings over the assets of their debtor in one of the Member States of the European Union has been significantly enhanced by the establishment of national insolvency registers in the Member States and their interconnection into a single decentralised system at the EU level.

Namely, the 2015 EIR obliged the Member States to establish on their territory, by no later than 26 June 2018, and thereafter maintain, at least one publicly accessible electronic register in which information relating to insolvency proceedings shall be published (Art. 24(1), first sentence, EIR in conjunction with Art. 92(2)(b) EIR). It is prescribed that such information must be published as soon as possible after the opening of the insolvency proceedings (Art. 24(1), second sentence, EIR). The EIR also lays down which information is mandatory, that is, which information relating to insolvency proceedings must be entered in such national insolvency registers.²⁵ A departure from the publication of mandatory information is permitted only exceptionally in insolvency proceedings concerning individ-

²⁵ According to Article 24(2)(a)-(j) of the EIR, the mandatory information are: a) the date of the opening of insolvency proceedings; b) the court opening insolvency proceedings and the case reference number, if any; (c) the type of insolvency proceedings referred to in Annex A that were opened and, where applicable, any relevant subtype of such proceedings opened in accordance with national law; d) whether

uals who do not exercise an independent business or professional activity, but only under the additional condition that known foreign creditors are informed, in accordance with Article 54 of the EIR, of the court before which and, where applicable, of the time limit within which a challenge to the decision opening insolvency proceedings is to be lodged under Article 5 of the EIR, or of the criteria for calculating that time limit (Art. 24(2)(j) and Art. 24(4)(1) EIR). Where a Member State makes use of that possible derogation from the publication of mandatory information, such insolvency proceedings shall not affect the claims of foreign creditors who have not received the information referred to in Article 24(2)(j) EIR (Art. 24(4)(2) EIR). Member States may include documents or additional information in their national insolvency registers, such as directors' disqualifications related to insolvency (Art 24(3) EIR).

The publication of the opening of insolvency proceedings in the insolvency register of the State of the opening of proceedings is very important for a foreign creditor. The basic rule is that the claims shall be lodged within the period stipulated by the law of the State of the opening of proceedings (Art. 55(6), first sentence, EIR). However, in the case of a foreign creditor, that period shall not be less than 30 days following the publication of the opening of insolvency proceedings in the insolvency register of the State of the opening of proceedings (Art. 55(6), second sentence, EIR). Where a Member State relies on Article 24(4) EIR, that period shall not be less than 30 days following a creditor having been informed pursuant to Article 54 EIR (Art. 55(6), third sentence, EIR). It has to be stressed out, that the publication of information in the registers under the EIR does not have any legal effects other than those set out in national law and in the described Article 55(6) EIR (Art. 24(5) EIR).

jurisdiction for opening proceedings is based on Article 3(1), 3(2) or 3(4); e) if the debtor is a company or a legal person, the debtors name, registration number, registered office or, if different, postal address; f) if the debtor is an individual whether or not exercising an independent business or professional activity, the debtors name, registration number, if any, and postal address or, where the address is protected, the debtor's place and date of birth; g) the name, postal address or e-mail address of the insolvency practitioner, if any, appointed in the proceedings; h) the time limit for lodging claims, if any, or a reference to the criteria for calculating that time limit; i) the date of closing main insolvency proceedings, if any; j) the court before which and, where applicable, the time limit within which a challenge of the decision opening insolvency proceedings is to be lodged in accordance with article 5, or a reference to the criteria for calculating that time limit.

The 2015 EIR also obliged the European Commission to establish a decentralised system for the interconnection of insolvency registers no later than 26 June 2019. The European e-Justice Portal serves as the central public electronic access point to the information contained in the system composed of the national insolvency registers. The system provides a search service in all the official languages of the institutions of the European Union in order to make available the mandatory information, as well as any other documents or information included in the insolvency registers that the Member States choose to make available through the European e-Justice Portal (Art. 25(1), sentences (1)-(3), EIR). It must be emphasized that Member States are obliged to ensure that the mandatory information listed in Article 24(2)(a)–(j) EIR is made available free of charge via the system for the interconnection of insolvency registers (Art. 27(1) EIR). Unfortunately, for the time being, this service is available only in those Member States whose insolvency registers have completed the interface set-up: Austria, Belgium, Croatia, Cyprus, Estonia, Finland, France, Germany, Hungary, Ireland, Latvia, Lithuania, Luxembourg, Malta, The Netherlands, Poland, Romania, Slovakia, Spain and Sweden.²⁶ So, it is still necessary to complete the interconnection with the national insolvency registers of the six remaining Member States.

National insolvency registers and their interconnection through the European e-Justice Portal are important not only for creditors, as they enable them to learn in a timely manner about insolvency proceedings opened in any EU Member State, but also because they help to avoid the unnecessary opening of parallel insolvency proceedings against the same debtor within the EU.²⁷

It must be emphasized that foreign creditors, insolvency practitioners, judges, legal persons, and individuals, even those outside the European Union, may freely search and obtain information from the interconnected insolvency registers of the EU Member States. The search interface itself is available in all official EU languages, but the information retrieved from a national register is, as a rule, displayed in the original language of the Member State to which that register belongs.

26 See https://e-justice.europa.eu/topics/registers-business-insolvency-land/bankruptcy-insolvency-registers-search-insolvent-debtors-eu_en (last accessed: 23 Mai 2026).

27 See Recital no. 76 of the EIR.

VIII. Breach of the duty to inform foreign creditors

The EIR does not contain specific rules for situations in which the duty to inform foreign creditors about the opening of insolvency proceedings is breached. It follows from this that, in accordance with Article 7(1) EIR, the law of the Member State in which the insolvency proceedings have been opened, the *lex fori concursus*, will govern this issue.²⁸

Having in mind the divergent practice of national courts in resolving this issue across different Member States²⁹, it may be desirable to devote greater and more appropriate attention to this issue during the next revision of the EIR.

C. Model Law on Cross-Border Insolvency

The MLCBI also contains an explicit provision on the duty to inform known foreign creditors of the opening (commencement) of insolvency proceedings. Thus, Article 14(1), first sentence, provides that whenever, under the laws of the enacting State relating to insolvency, notification is to be given to creditors in that State, such notification shall also be given to the known creditors who do not have addresses in that State. The *Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency* (hereinafter: *Guide to Enactment*), adopted on 18 July 2013, emphasizes that, as a corollary to the principle of equal treatment established by Article 13 MLCBI, Article 14 requires that foreign creditors should be notified whenever notification is required for creditors in the enacting State.³⁰ It should be noted that Article 14(1), first sentence, of the MLCBI does not specify who exactly has the duty to inform known foreign creditors. This matter has evidently been left to the national law of the enacting State.

When it comes to informing unknown foreign creditors, the MLCBI provides that the court may order that appropriate steps be taken with a view to notifying any creditor whose address is not yet known (Art. 14(1), second sentence).

28 Garašić ZPFRi 2016, 1039 (1048 seq.); Mankowski/Müller/Schmidt Art. 54 mn. 34-35; Brinkmann/Dahl/Kortleben Art. 54 mn. 12.; Bělohávek, Art. 54. mn. 54.37; Stürner/Eidenmüller/Schoppmeyer/Reinhart Art. 54 mn. 20.

29 For a detailed presentation of this practice, see Bork/van Zwieten/Lenzing Art. 54 mn. 54.16-54.20; Bělohávek Art. 54, mn. 54.38-54.40.

30 Guide to Enactment, para. 121, second sentence.

In any case, such notification shall be made to foreign creditors individually, unless the court considers that, in the circumstances, some other form of notification would be more appropriate (Article 14(2), first sentence, MLCBI). Thus, as a rule, foreign creditors will be notified individually, but the court has the discretion to decide otherwise in a particular case. As an example of a situation in which the court may depart from individual notification, the *Guide to Enactment* refers to cases in which individual notice would entail excessive cost or would not seem feasible under the circumstances.³¹ It appears that, in such cases, collective notification by publishing the decision opening the insolvency proceedings - for example in the official gazette or on the court notice board - would suffice.³² To facilitate individual notification, the MLCBI expressly provides that no letters rogatory or other similar formality are required (Art. 14(2), second sentence). Namely, States may, with regard to the form of individual notification, rely on special procedures for serving notices in a foreign jurisdiction, the use of which would typically not provide foreign creditors with timely notice of the insolvency proceedings.³³ However, the requirements of the international treaty or other form of agreement that regulate this matter and to which the enacting State is a party with one or more other States shall prevail (Article 3 MLCBI), i.e. they have to be respected.³⁴

The MLCBI also prescribes the minimum content of the notice of the opening of insolvency proceedings that must be provided to foreign creditors. Such notification shall: a) indicate a reasonable time period for filing claims and specify the place for their filing; b) indicate whether secured creditors need to file their secured claims; and c) contain any other information required to be included in such a notification to creditors pursuant to the law of the enacting State and the orders of the court (Art. 14(3) MLCBI). Namely, the legal position of secured creditors and their participation in insolvency proceedings may be regulated very differently across individual States.³⁵

The MLCBI does not contain a provision on the language in which the individual notification of the opening of insolvency proceedings addressed

31 *Guide to Enactment*, para. 122, third sentence.

32 See Garašić, p. 475.

33 *Guide to Enactment*, para. 123, sentences 1-2.

34 See the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters, <https://www.hcch.net/en/instruments/conventions/full-text/?cid=17> (last accessed: 23 May 2026).

35 See *Guide to Enactment*, para. 126, sentences 1-2.

to a foreign creditor should be written. This matter has evidently been left to the national law of the enacting State.

The MLCBI also does not contain an explicit provision authorizing or obliging the foreign representative (practitioner) to request the publication of a notice of the opening of insolvency proceedings in other States, in order, among other things, to ensure that foreign creditors are informed of the opening of the proceedings in a timely manner. However, reference should be made to Article 21(1)(g) of the MLCBI, which prescribes the following: upon recognition of a foreign proceeding, whether main or non-main, and where necessary to protect the assets of the debtor or the interests of creditors, the court may, at the request of the foreign representative (insolvency practitioner), grant any appropriate relief that may be available to a person or body administering a reorganization or liquidation under the law of the enacting (recognizing) State. Such relief may be granted even earlier, upon an application for recognition of a foreign proceeding (Art. 19(1)(c) of the MLCBI). It would therefore be desirable for a State enacting the MLCBI to expressly provide that the domestic insolvency practitioner has the authority or the duty, especially in the case of foreign establishment, to request the publication of a notice of the opening of domestic insolvency proceedings in other States, and that the foreign insolvency practitioner, upon recognition of the foreign insolvency proceeding - or even earlier, upon the filing of an application for recognition of that proceeding - has the authority to request the publication a notice of the opening of the foreign insolvency proceeding in the State of recognition.

Furthermore, the MLCBI does not contain an explicit provision authorizing or obliging the foreign insolvency practitioner (foreign representative) to request the entry of a notice of the opening of insolvency proceedings in the public registers of other States. However, even in this context, appropriate judicial relief could be requested pursuant to Article 21(1)(g) of the MLCBI upon recognition of the foreign insolvency proceeding, or, alternatively, even before recognition, following the filing of an application for recognition of a foreign proceeding, in accordance with Article 19(1)(c) of the MLCBI. Therefore, with respect to this issue as well, it would be desirable for a State enacting the MLCBI to expressly provide that the domestic insolvency practitioner has the authority to request the entry of a notice of the opening of domestic insolvency proceedings in the public registers of other States, and that the foreign insolvency practitioner, upon recognition of the foreign insolvency proceeding - or even earlier, upon filing of an application for recognition of that proceeding - has the authority

to request that a notice of the opening of the foreign insolvency proceeding be entered in the public registers of the State of recognition.

The MLCBI does not contain any provisions on insolvency registers of States.

The MLCBI does not contain any provisions on the consequences of a breach of the duty to notify foreign creditors of the opening of insolvency proceedings. This matter has evidently been left to the national law of the enacting State. It should be noted that the *UNCITRAL Legislative Guide on Insolvency Law*³⁶, adopted on 25 June 2004, in its Recommendation No. 121, provides in general terms that the insolvency law should specify the consequences of the insolvency representative's failure to perform, or to properly perform, its duties and functions under the law, as well as any related standard of liability imposed. In its Recommendation No. 31, first sentence, *the Legislative Guide* provides that the insolvency law of the State in which insolvency proceedings are commenced (*lex fori concursus*) should apply to all aspects of the commencement, conduct, administration and conclusion of those proceedings and their effects.

D. Conclusions

From the provisions of the EIR and the MLCBI concerning the notification of foreign creditors of the opening of insolvency proceedings over the assets of their debtor, it clearly follows that, in this respect, the EIR contains more extensive and detailed rules than the MLCBI.

However, the problem lies in the fact that, when imposing the obligation of individual notification of foreign creditors of the opening of insolvency proceedings, the EIR understands the term foreign creditor to mean only 'a creditor which has its habitual residence, domicile or registered office in a Member State other than the State of the opening of proceedings' (Article 54(1)-(2) in conjunction with Article 2(12) EIR). The EIR does not prohibit creditors whose habitual residence, domicile or registered office is located in a State that is not a Member State of the European Union from being individually notified of the opening of insolvency proceedings in one of the Member State. It merely leaves that matter to the law of the State of the

36 Text of the UNCITRAL Legislative Guide on Insolvency Law, Parts One and Two is available on: https://uncitral.un.org/sites/default/files/media-documents/uncitral/en/05-80722_ebook.pdf (last accessed: 23 Mai 2026).

opening of insolvency proceedings (*lex fori concursus*), in accordance with Article 7(1) EIR. Yet, this already gives rise to the possibility of unequal treatment between foreign creditors of the debtor who are located within the European Union and those located outside it. An additional difficulty lies in the fact that the national laws of the Member States often do not contain explicit rules on notifying foreign creditors of the opening of insolvency proceedings.

This solution, contained in the recast EIR of 2015 (Articles 54(1)-(2) and 2(12) EIR), had already been included in the EIR of 2000³⁷ (Article 40(1)-(2) EIR), as well as in the Convention on Insolvency Proceedings (Article 40(1)-(2)), from which the EIR in fact originated.³⁸ In the well-known *Virgós-Schmit's Report on the Convention on Insolvency Proceedings* this aforementioned solution is explained by stating 'that the Convention aims to improve the situation of intra-Community creditors situated outside the State in which proceedings are opened' and that 'the Convention does not take into consideration creditors from outside the Community to whom the national law of the State in which the proceedings are opened applies'³⁹. But is it not, in the 21st century, necessary to improve the situation regarding the notification of the opening of insolvency proceedings in relation to all of the debtor's foreign creditors and to take all of them into account, irrespective of where they are situated?

Namely, the classical principle of property law holds that a debtor is liable for their obligations with all of their assets, regardless of where those assets are located, whether in the home country or abroad, and that all creditors have the right to be satisfied from those assets. This principle is accepted in most legal systems, and the principle of universalism in international insolvency law developed, among other things, grounded in that very principle of property law.

Timely knowledge of the opening of insolvency proceedings over the debtor's assets is a prerequisite for a creditor's access to the court conducting those proceedings, as well as for that creditor's participation in the proceedings and the exercise of their rights, including the filing and enforcement of their claims.

37 Council Regulation (EC) No. 1346/2000 of 29 May 2000 on insolvency proceedings, Official Journal of the European Communities, 2000, L 160, pp. 1-18.

38 For further details on the historical origins of the 2000 European Insolvency Regulation, see Garašić, p. 30 seq.

39 Virgós/Schmit, Art. 40 para. 271.

All Member States of the European Union have ratified the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950⁴⁰, drafted within the framework of the Council of Europe, which in its Article 6(1) establishes, among other things, as one of the fundamental procedural rights, ‘the right to a fair trial’. In the interpretation of the European Court of Human Rights, developed through its case-law, this right also encompasses ‘*the equality of arms principle*’, which must be applied to all participants in judicial proceedings in which their civil rights are being determined. There is no doubt that insolvency proceedings involve decisions concerning the property and civil rights of the debtor and their creditors. Therefore, all Member States are obliged, in the insolvency proceedings they open within their territories, to comply with Article 6(1) of that Convention on Human Rights and with the principles encompassed therein. The procedural principles contained in Article 6(1) of the said Convention are also set out in Article 47(2), first sentence, of the Charter of Fundamental Rights of the European Union⁴¹, which forms an integral part of European Union law. It is therefore not surprising that the Court of Justice of the European Union itself, in the *Eurofood IFSC Ltd case*⁴², emphasized the importance of applying these principles in the conduct of insolvency proceedings in the Member States of the European Union.

It follows from the foregoing that, in all insolvency proceedings conducted in the Member States of the European Union, the debtor’s creditors should be treated equally, meaning that they should have the same opportunities to obtain knowledge of the opening of the insolvency proceedings, so that they may exercise their right of access to the court concerned and their right to participate in those proceedings, for the purpose of satisfying their claims. From this perspective, the solution contained in Article 54(1)–(2) of the 2015 EIR, according to which, when read together with Article 2(12) of the EIR, only the known foreign creditors of the debtor who have their habitual residence, domicile, or registered office in one of the Member States other than the State of the opening of proceedings are to be individually and without delay notified of the opening of insolvency

40 Tekst of the Convention for the Protection of Human Rights and Fundamental Freedoms of 4. 11. 1950 is available at <https://www.coe.int/en/web/conventions/full-list?module=treaty-detail&treatynum=005> (last accessed: 23 Mai 2026).

41 Charter of Fundamental Rights of the European Union, OJEC, 18. 12. 2000, C 364, pp. 1-22.

42 CJEU 02.05.2006 - case C-341/04, ECLI:EU:C:2006:281, Eurofood IFSC Ltd, paras. 65-66.

proceedings, infringes the ‘*equality of arms principle*’ and is, in its essence, *discriminatory*.⁴³ Individual notification of known foreign creditors of the opening of insolvency proceedings in a Member State should not depend on whether the foreign creditor comes from another Member State of the European Union or from a third country. An infringement of this procedural principle – the *equality of arms principle* – may result in a creditor learning of the opening of the insolvency proceedings too late, thereby preventing the creditor from lodging and enforcing their claims in those proceedings. This, in turn, leads to an infringement of one of the fundamental substantive principles of insolvency law, namely *par conditio creditorum* – the *equal treatment of creditors*.

Let us note, in passing, that insolvency proceedings may nevertheless be opened under the EIR over the assets of a debtor whose habitual residence, domicile, or registered office is in a State that is not a Member State of the European Union, provided that its centre of main interests is situated within the territory of a Member State (Article 3(1) EIR). Let us also note that, in the case *Ralph Schmid v. Lilly Hertel*⁴⁴, the Court of Justice of the European Union held that Article 3(1) of the EIR must be interpreted as meaning that the courts of the Member State within whose territory insolvency proceedings have been opened have jurisdiction to hear and determine an action to set a transaction aside by virtue of insolvency, even when such an action is brought against a person whose place of residence is not within the territory of a Member State. It is therefore evident that, in these situations, the EIR may also apply to natural and legal persons whose habitual residence, domicile, or registered office is in a State, country that is not a Member State of the European Union.

On the basis of the above, it would be necessary, in the next revision of the EIR, to extend the duty to individually notify known foreign creditors of the opening of insolvency proceedings to known foreign creditors whose habitual residence, domicile, or registered office is in a State that is not a Member State of the European Union, that is, in a third country. The MLCBI, in its Article 14(1)-(2), rightly provides for the duty of individual notification of known foreign creditors in respect of all known foreign creditors, irrespective of the State in which they are situated.

Both the EIR (Art. 54(2)) and the MLCBI (Art. 14(3)) lay down a minimum content for the individual notice to be sent to foreign creditors, while

43 In the same direction, Bělohávek Art. 54 mn. 54.26-54.29.

44 CJEU 16.01.2014 - case C-328/12, ECLI:EU:C:2014:6, *Ralph Schmid v. Lilly Hertel*.

not excluding the possibility that, in accordance with the national law of the State in which the insolvency proceedings have been opened, additional information that may be useful to foreign creditors may be included in the notice.

The MLCBI does not contain provisions on the language in which individual notice is to be sent to foreign creditors, whereas the EIR goes further in this respect and expressly provides that, in addition to the language of the State in which the insolvency proceedings have been opened, such notice may also be sent in another language (Art. 54(3) EIR). This undoubtedly facilitates communication in cross-border insolvency proceedings.

The EIR authorises the insolvency practitioner (as well as the debtor exercising personal management, debtor in possession) to request the publication of the opening of insolvency proceedings in another Member State. Where the debtor has an establishment in that Member State, the practitioner or debtor in possession is even obliged to request such publication (Art. 28(1)-(2)). The MLCBI contains no explicit provision on this point, but a foreign insolvency practitioner could request such assistance in the recognising State, as a form of relief within the meaning of Art. 19(1)(c) or Art. 21(1)(g) MLCBI. Since the publication of the opening of insolvency proceedings in other Member States under Article 28(1)-(2) of the EIR also serves, among other things, to inform foreign creditors that such proceedings have been opened, it may be advisable, in a future revision of the EIR, to extend the insolvency practitioner's authority to request publication abroad to third countries as well, that is, to States that are not Member States of the European Union. This would contribute to the equal treatment of foreign creditors from Member States of the European Union and creditors from third countries with regard to their collective notification of insolvency proceedings opened in one of the Member States of the European Union. Naturally, whether such an authority of an insolvency practitioner from an EU Member State would be recognised in a third country would depend entirely on the international insolvency law of that third country in which the publication is sought. As a rule, in international insolvency law, the State of recognition acknowledges the powers of a foreign insolvency practitioner as determined (conferred) by the *lex fori concursus*. It is therefore important to provide expressly for such an authority on the part of the insolvency practitioner in proceedings opened in an EU Member State, so that this authority may also be recognised abroad. In any event, an EU Member State may expressly provide in its autonomous international insolvency law that its insolvency practitioner is

authorised to request the publication of a notice of the opening of domestic insolvency proceedings also in third countries. Likewise, it may recognise the authority of a foreign insolvency practitioner from a third country to publish in its territory a notice of the opening of insolvency proceedings opened in that third country.

For the same reasons, it would be desirable to extend the authority of the insolvency practitioner (as well as the debtor in possession) under Article 29(1)-(2) EIR to request the registration of a notice of the opening of insolvency proceedings in the public registers of another Member State, so that it also encompasses third countries. In any event, an EU Member State may expressly provide in its autonomous international insolvency law that its insolvency practitioner is authorised to request the registration of a notice of the opening of domestic insolvency proceedings also in the public registers of third countries. Likewise, it may recognise the authority of a foreign insolvency practitioner from a third country to request that a notice of the opening of insolvency proceedings opened in that third country be entered in its domestic public registers. Although the MLCBI does not expressly regulate this issue, a foreign insolvency practitioner could certainly request such assistance in the State of recognition as relief within the meaning of Article 19(1)(c) or Article 21(1)(g) MLCBI.

The introduction of mandatory electronic national insolvency registers in the Member States and their interconnection through the European e-Justice Portal significantly contributes to ensuring that foreign creditors learn in a timely manner that insolvency proceedings have been opened against their debtor in a Member State of the European Union. It is important to emphasise that these registers may be used not only by foreign creditors whose habitual residence, domicile or registered office is located in a Member State, but also by all other foreign creditors from any third country.

Neither the EIR nor the MLCBI expressly regulates how to address a breach of the duty to inform foreign creditors of the opening of insolvency proceedings over the debtor's assets. It must therefore be taken that the law of the State opening the insolvency proceedings, as the *lex fori concursus*, will govern the resolution of that issue. Given the very diverse practice of national courts on this matter, and in view of the exceptional importance for foreign creditors of receiving timely information on the opening of domestic insolvency proceedings, it would nevertheless be desirable, in the next revision of the EIR, to formulate a uniform solution to this issue,

one that would apply to all of the debtor's foreign creditors, irrespective of whether they are creditors from EU Member States or from third countries.

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Recognition of foreign insolvencies – general report

Alexander Trunk and Kevin Silvestri¹

Abstract:

The contribution gives a comparative overview over the rules of the EIR, the UNCITRAL Model Laws, some other international treaties and national legislation, in particular of EU Member States, with regard to recognition of foreign insolvency proceedings. It also develops some recommendations.

Keywords: Recognition; foreign insolvency proceedings; MLCBI; EIR; national laws: basic concepts; discretion; prerequisites of recognition; procedure of recognition: legal effects of recognition.

The most discussed aspect of cross-border insolvency is, probably, the recognition of foreign insolvency proceedings². The term ‘recognition’ of foreign insolvency proceedings is used both by the UNCITRAL Model Law on Cross-Border Insolvency (MLCBI) and by the European Insolvency Regulation (EIR) and denotes the prerequisites and legal consequences of giving effect to foreign insolvency proceedings in a country different from the one whose courts conduct the proceeding (*forum concursus*). It should be noted, however, that ‘recognition’ is not the only term describing the mechanism of giving effect to foreign insolvency proceedings. In addition, the term can be understood differently. In particular, the concept of recognition under the EIR³ differs from the MLCBI⁴.

The purpose of this report is to give an overview of the approaches to recognition of foreign insolvencies currently in use, with a view to possible recommendations on how the European Union should, from the

1 Paragraphs A and D are authored by Alexander Trunk; paragraphs B and C by Kevin Silvestri; paragraph E by both authors.

2 Bork (2023), p. 69 et seq.; Bork (2017), 2.52 et seq.

3 See Art.19 EIR: ‘recognition of foreign insolvency proceedings’ used as basic concept for giving effects to foreign insolvency proceedings.

4 See MLCBI Chapter III: ‘recognition of a foreign proceeding’ as one of several tools of cross-border cooperation in insolvency matters.

perspective of the authors of this book, regulate this topic in relations with non-EU countries (third countries). The report will focus particularly on a comparison of the approaches taken by the MLCBI and the EIR in this respect, but it will also have a look at national approaches, which may differ from both the MLCBI and the EIR. The purpose of this report is not to give a complete comparative account of all such approaches, but rather to focus on aspects which seem to the authors particularly relevant or instructive.

A. General aspects

I. The basic concept of 'recognition'

While both the EIR and the MLCBI use the term 'recognition' (of foreign insolvencies), they do that with different meanings. Under the EIR, recognition relates to foreign 'judgments' (decrees, decisions etc.) rendered in or connected with insolvency proceedings⁵, while the MLCBI speaks, more generally, about recognition of foreign insolvency 'proceedings'⁶. This reflects the different historic and constructive background of cross-border cooperation in insolvency matters in civil law and common law countries⁷. In civil law countries, recognition of foreign insolvencies has traditionally been seen as a specific case of recognition of foreign judgments, while in common law jurisdictions the focus lies on (judicial) assistance granted to foreign courts and their proceedings. Typical examples of the common law approach are the former sec. 304 of the U.S. Bankruptcy Code⁸, which has in the meantime been superseded by Chapter 15 of the Code implementing the MLCBI⁹, and sec. 426 of the British Insolvency Act of 1986¹⁰. Linguistically particularly clear examples of the conceptual judgment-oriented approach in civil law jurisdictions are Art. 121 § 1 of the Belgian Private

5 Cf. Art. 19 (1) EIR referring to the 'opening (decision)' of the insolvency proceeding; more clearly so e.g. Art. 32 EIR.

6 Cf., e.g., Art. 15 (1) and Art. 17 MLCBI.

7 Dalhuisen, p. 3–100: 'For purposes of recognition and execution of foreign adjudications, bankruptcy is often equated with judgments. This is especially true in civil law countries of French tradition where, as a consequence, the exequatur procedure is made available for the domestication of foreign bankruptcy measures'.

8 Boshkoff ICQL, 1987, 744; Schrag/Walker/Blumberg BLI 2004, 159; Rimel BDJ 1992, 459.

9 Chapter 15: Ranney Marinelli ABLJ 2008, 269 et seq.

10 Smart, p. 168 et seq.; Fletcher (2005), p. 139 et seq.

International Law Act and Art.166 of the Swiss Private International Law Act (recognition of foreign bankruptcy decrees). However, even civil law jurisdictions sometimes choose a general form at the beginning, speaking about recognition of ‘foreign insolvency proceedings’, although they thereafter address specifically the recognition of foreign decrees, in particular the decree formally ‘opening’ an insolvency proceeding (cf. sec. 343 and 345, 353 of the German Insolvency Code, InsO).

The very specific definition of the object of recognition under the civil law approach makes it possible to clearly determine the effects of recognition and can work well without considerations of discretion, which play a significant role under the common law approach¹¹. It also allows to see recognition of foreign insolvencies as a particular case of recognition of foreign judgments in general, which contributes to systematic coherence of cross-border judicial cooperation and allows to draw parallels between different areas of international civil procedure and to fill the gaps by way of analogy. On the other hand, the judicial assistance approach used by tradition in common law jurisdictions as to recognition of foreign insolvencies also has parallels in international civil procedure and gives the recognising country broad powers and flexibility for cooperation with foreign insolvencies. This may be very helpful in complicated cases, but at the same time comes with an inherent element of imprevisability.

Within this report, the term ‘recognition’ will be used in the broad sense, including both the judgment-related concept (EIR approach) and the legal assistance approach (MLCBI and common law). In so far as these conceptual distinctions may play a role to better understand specific rules or to develop future rules, they will be taken into account for the analysis. It should not be overlooked that the concept of judicial assistance (or cooperation and coordination) is broader than recognition, as it may apply also in cases when (formal) recognition is not applied for or even denied¹² or when judicial assistance is requested by a domestic court from foreign courts or in cooperation between parallel insolvency proceedings. For convenience, in this report the term ‘recognition’ will be used in principle as relating to ‘foreign insolvencies’, although a more precise look may show that some jurisdictions may have the recognition of judgments in mind, while other use the broader concept of recognition of foreign insolvencies

11 Cf. McCormack (2022), p.230 et seq.

12 Cf. Guide to Enactment and Interpretation of the MLCBI, note 40.

and determine the legal consequences on a conceptually later stage, e.g. when specific decisions on cooperation are requested.

II. Comparative overview

For much of the 20th century, in a significant number of countries recognition of foreign insolvencies was generally denied, referring to an alleged principle of territoriality in international insolvency law¹³. However, even in those times courts sometimes found ways to recognize certain effects of foreign insolvencies, e.g. qualifying them as issues of corporate law¹⁴. Moreover, some countries concluded treaties on mutual recognition of foreign insolvencies (or, more general, on cooperation in cross-border insolvency matters). Notable examples are the Nordic Bankruptcy Convention of 1933, and the Treaties of Montevideo of 1889 and 1940¹⁵. Also, the European Economic Community started in the 1960s to work on a Bankruptcy Convention¹⁶, which eventually led to the (in the end politically stopped) EU Bankruptcy Convention of 1995¹⁷, which itself paved the way to the EU Insolvency Regulation 2000, now recast as EU Insolvency Regulation (EIR) 2015. An important step on this way was also the Council of Europe's Istanbul Convention on Certain Aspects of [Foreign] Bankruptcies of 1990¹⁸. In parallel and co-discussion with the EU, UNCITRAL developed its Model Law on Cross-Border Insolvency (MLCBI) of 1997, which includes important provisions on recognition of foreign insolvencies, and has in recent times been complemented by further, more specific model laws on

13 Cf. Trunk (1998), pp.34 – 45.

14 Smart, p. 168 et seq.; Fletcher (2005), p. 139 et seq.

15 Omar IIR 2002, pp.187 – 189.

16 Fletcher in Lipstein, 124; Fletcher (2005), p. 350 et seq.; Nadelmann, Law and Contemporary Problems 1977, 54 (63); Fletcher (1982), p. 233; Hunter ICLQ 1976, 310; Lew NLJ 1975, 628; Farrar JBL 1977, 320–337.

17 Balz IFLR 1994, 17 et seq.; Balz ABLJ 1996, 485 et seq.; Carbone Dir. comm. int., 1998, 633 et seq.; Fletcher BJIL 1997, 25 et seq.; Guzzi Dir. comm. int. 1997, 901 et seq.; Johnson, IIR 1996, 80 et seq.; Kayser IIR 1998, 95 et seq.; McKenzie ERPL 1996, 181 et seq.; Omar ICCLR 1996, 163 et seq.; Schollmeyer BDJ 1997, 421 et seq.; Zamperetti Giur. comm. 1997, 607 et seq.

18 Fletcher in Ziegel, p. 123; Omar IIR 2003, 155–157; Volken Forum Internationale 1993, 26.; Fletcher International Lawyer 1993, 429 et seq.; Ramackers La Semaine Juridique June 1993, 279–280; Daniele Cahiers de droit Européen 1987, 512 et seq.

cross-border insolvency¹⁹. Both the EIR and the MLCBI have inspired other organisations such as OHADA to draft their own rules on cross-border insolvencies including recognition²⁰.

On the national level, approaches which generally deny recognition of foreign insolvencies seem to have disappeared, two main examples being formerly Japan and South Korea, which have however moved away from the principle of absolute territoriality to an approach of cooperation and recognition based on the MLCBI²¹. However, numerous countries have not passed special legislation on recognition of foreign insolvencies, making it necessary to examine in each case whether, e.g., general rules on recognition of foreign judgments are applied also to foreign insolvencies. This leads to a particularly restrictive approach in countries which recognize foreign judgments only on the basis of international treaties or EU law. However, even in such countries, general rules on judicial assistance might be available also with respect to insolvency proceedings, but the extent of such assistance in civil law countries is much more limited than in common law countries.

Twelve EU member states have passed special legislation on cross-border insolvency law including recognition of foreign insolvencies (Austria, Belgium, Croatia, Czechia²², Germany, Greece, Hungary²³, Poland, Portugal, Romania, Slovakia, Slovenia, Spain). Ten EU countries recognize foreign insolvencies under general rules on recognition of foreign judgments in civ-

19 The 2018 Model Law on Recognition and Enforcement of Insolvency-Related Judgments (MLIJ) and the 2019 Model Law on Enterprise Group Insolvency (MLEGI). As to these model laws and current further projects at UNCITRAL see <https://uncitral.un.org/en/texts/insolvency> (last accessed 05.07.2025).

20 Cf. also soft-law texts adopted by organizations such as the IBA (e.g. the Cross-Border Insolvency Concordat of 1996) or INSOL International, cf. Boon/Wessels.

21 → Kim. Rim, in Ho, 579 et seq.; on Japan, Yamamoto IIR 2002, 67; Abe, in Ho, 321.

22 Some basic rules on cross-border insolvency law are contained in Art.III of the Czech Private International Law Act (2012), which also addresses – very briefly – recognition of foreign insolvencies (Art.116 (5)). In addition, Czechia has passed some complementary rules to the EIR in Art. 426 – 430a of its Insolvency Code. Furthermore, Czechia has passed specific rules on cross-border banking and insurance insolvencies (Art.112 – 116 PIL Act, completing detailed rules on banking and insurance insolvencies in the Insolvency Code).

23 <https://practiceguides.chambers.com/practice-guides/insolvency-2024/hungary> (last accessed 05.07.2025).

il and commercial matters (Bulgaria²⁴, Estonia²⁵, France²⁶, Italy²⁷, Latvia²⁸, Lithuania²⁹, Luxembourg³⁰) or under common law rules (Cyprus³¹, Ireland³², Malta³³). The most restrictive approach (no recognition without a treaty) seems to be followed by Denmark³⁴, Finland³⁵, the Netherlands³⁶ and Sweden³⁷.

Outside the EU, the most broadly used approach – both among common law and civil law jurisdictions – is recognition under the rules of the MLCBI (e.g. important trading partners of the EU like Australia³⁸,

24 <https://ceelegalmatters.com/restructuring-2022/restructuring-bulgaria-2022> (last accessed 05.07.2025).

25 <https://ceelegalmatters.com/restructuring-2022/restructuring-estonia-2022> (last accessed 05.07.2025).

26 Dammann/Sénéchal (2018), pp. 704 – 723.

27 Baccaglini, *passim*; Corno in Cagnasso/Panzani, 934 et seqq.

28 <https://ellex.legal/cross-border-insolvency-latvia/> (last accessed 05.07.2025).

29 <https://www.gov.uk/government/publications/cross-border-insolvencies-recognition-and-enforcement-in-eu-member-states/cross-border-insolvencies-recognition-and-enforcement-in-eu-member-states#lithuania> (last accessed 05.07.2025).

30 <https://www.loyensloeff.com/insights/news--events/news/restructuring--insolvency-qa-cross-border--groups/> (last accessed 05.07.2025).

31 <https://www.erotocritou.com/cl/publications/cross-border-recognition-of-insolvency-proceedings/ppp-301/47/> (last accessed 05.07.2025).

32 <https://www.williamfry.com/knowledge/recognition-of-foreign-insolvency-proceedings/> (last accessed 05.07.2025).

33 <https://www.gov.uk/government/publications/cross-border-insolvencies-recognition-and-enforcement-in-eu-member-states/cross-border-insolvencies-recognition-and-enforcement-in-eu-member-states#malta> (last accessed 05.07.2025).

34 Cf. <https://practiceguides.chambers.com/practice-guides/insolvency-2024/denmark> (last accessed 05.07.2025).

35 Cf. <https://ally-law.com/restructuring-and-insolvency-guide-finland/> (last accessed 05.07.2025).

36 With some exceptions, see <https://www.nortonrosefulbright.com/en/knowledge/publications/cbfa12ac/netherlands-25th-anniversary-of-the-model-law#section2> (last accessed 05.07.2025). The Dutch Bankruptcy Act provides for some rules on cross-border insolvencies (sec. 2, 20, 203 – 205) but does not address recognition of foreign proceedings.

37 <https://practiceguides.chambers.com/practice-guides/insolvency-2024/sweden> (last accessed 05.07.2025).

38 Zander/Pettingill, Recognition of a Foreign Insolvency Process and Enforcement of Insolvency-Related Judgments (Australia), <https://uk.practicallaw.tr.com/w-039-4645> (last accessed 07.07.2025).

Canada³⁹, Brazil⁴⁰, Japan⁴¹, Saudi Arabia, South Korea⁴², Mexico, South Africa⁴³, the UK or the U.S., also e.g. the OHADA member states under the OHADA Uniform Insolvency Act⁴⁴). This is followed by assistance under common law rules (e.g. Hongkong⁴⁵, India⁴⁶, but also several offshore jurisdictions⁴⁷ such as the Bahamas, Bermuda⁴⁸, the Cayman Islands, or Panama) or by recognition under general rules of civil procedure (e.g., most importantly, China⁴⁹). Examples of the ‘civil procedure approach’ in Europe are, with some modifications, the offshore jurisdictions Liechtenstein⁵⁰ and Monaco⁵¹, as well as Russia⁵². Several countries, which have applied for EU membership, have aligned their cross-border insolvency law to some degree with the EIR, including provisions on recognition of foreign

39 Nocilla, Canadian cross-border insolvency law and the triumph of ‘modified universalism’: A retrospective, 33 IIR 2024, pp. 399 – 420.

40 See → Galdino/Garcia.

41 Yamamoto, IIR 2002, p.67 et seq.

42 See → Kim.

43 See → Boraine.

44 See → Leno.

45 Yung, Cross-border Insolvency in Hong Kong: Developments and Updates, (2022) 31 International Insolvency Review pp.297 – 323, see also <https://www.nortonrosefulbright.com/en-hk/knowledge/publications/80831390/cross-border-insolvency-in-hong-kong> (last accessed 05.07.2025).

46 Cf. <https://ibclaw.in/recognition-of-indian-cirp-proceedings-in-a-foreign-court-a-landmark-judgment-and-the-call-for-cross-border-insolvency-laws-in-india-by-abhineet-pange-and-mahima-jayan/#:~:text=The%20Need%20for%20a%20Cross%2D-Border%20Insolvency%20Law,Z%2C%20they%20have%20yet%20to%20be%20im-plemented> (last accessed 05.07.2025).

47 Some of them have adopted the MLCBI, e.g. the British Virgin Islands (BVI), the DIFC (UAE) or Singapore.

48 See <https://law.asia/foreign-liquidator-assistance-common-law-bermuda/#:~:text=There%20are%20no%20statutory%20mechanisms%20for%20the,or%20cross%2Dborder%20co%2Doperation%20in%20insolvency%20or%20restructurings.&text=The%20general%20rule%20is%20that%20the%20court,the%20place%20of%20incorporation%20of%20the%20company.%E2%80%9D> (last accessed 06.07.2025).

49 See → Shi.

50 Art.1 and 5 of the Liechtenstein Insolvency Code.

51 Monaco provides for international jurisdiction as to insolvency proceedings in Art.6 nr.6 of its Private International Law Code, but has not adopted the MLCBI or passed other special rules on recognition of foreign insolvency proceedings. However, in its relations with France, the principle of unity and universality of insolvency proceedings is laid-down in the France-Monaco Bankruptcy Treaty of 1950.

52 See → Yarkov/Baldanov.

insolvencies (Bosnia and Herzegovina⁵³, Georgia⁵⁴, North Macedonia⁵⁵). Albania, Kosovo, Montenegro⁵⁶, Serbia and Ukraine have instead opted for the MLCBI. Norway and Switzerland have developed specific approaches: The Swiss Private International Law Act provides for recognition of foreign insolvencies through a simplified insolvency proceeding (Art. 166 – 175 Swiss Private International Law Act)⁵⁷. Norway has created a set of rules on cross-border insolvency law (Bankruptcy Act, Part IV, sec. 161 – 177), which takes its major inspiration from the EIR, but is less detailed and contains also some specific provisions⁵⁸. As to recognition of foreign insolvencies outside the scope of the Nordic Bankruptcy Convention the Act takes a civil procedure approach adapted to the specifics of insolvency proceedings (Art. 163 – 172 Norwegian Bankruptcy Act).

III. Sphere of application

The subject-matter sphere of application of the rules on recognition of foreign insolvencies differs in the various jurisdictions. Some regimes include both commercial and non-commercial insolvency proceedings as well as proceedings relating to the insolvency of legal and natural persons (consumers and sole traders). Other regimes define the notion of insolvency proceedings very broadly, including, e.g. also corporate or contractual workouts. Yet others apply rules on recognition of foreign insolvencies to some types of insolvency proceedings only, leaving room for either applying them by analogy to other types of proceedings or applying different

53 In Bosnia and Herzegovina, each of the entities (BiH Federation, Brčko District and Republika Srpska) have passed their own Bankruptcy Acts. They all contain provisions on cross-border insolvency law modelled after the Croatian Bankruptcy Act.

54 The Georgian Insolvency Act of 2020 is inspired by the EIR, though in a simplified form, see Chapter 11 of the Act. Art. 116 deals with recognition of foreign insolvencies in a minimal manner, referring basically to general rules on recognition of foreign judgments.

55 The North Macedonian Bankruptcy closely follows the Croatian Bankruptcy Act.

56 With some modifications and adds-on derived from the EIR, see Part IX of the Montenegro Bankruptcy Act.

57 Cf. <https://www.news.admin.ch/de/nsb?id=66833> (last accessed 07.07.2025). See also → Staehelin/Kleider.

58 See Ali/Røsæg, *New Rules on Cross-Border Insolvency in Norway*, 17 *Yearbook of Private International Law* (2015/2016), pp. 385 – 394.

rules, e.g. on recognition of foreign judgments in civil and commercial matters. Also, some countries carve out (cross-border) insolvencies in certain business areas, such as the financial sector, and submit them to special rules. This is the case, for example, under the EIR⁵⁹, and the U.S. Bankruptcy Code⁶⁰. Other countries use general rules on recognition of foreign insolvencies as a basis and apply them subsidiarily to specific branches of the economy such as the financial sector, while taking into account specifics that may characterize such sectors⁶¹.

It is also not uncommon to define the term ‘insolvency proceeding’ differently for purposes of domestic proceedings and (recognition of) foreign proceedings. This may be done in a way that certain foreign proceedings cannot be recognized, although similar domestic proceedings are governed by insolvency law in the respective country and might be recognized as such in foreign countries. Another possibility is to recognize foreign proceedings under insolvency rules, although such proceedings do not exist under domestic rules, or are categorized as ‘non-insolvency’ proceedings in the domestic context. This may apply, e.g., to corporate restructurings or contractual workouts⁶². This does not exclude, of course, that such proceedings may be recognized abroad, whether under insolvency rules, judgment-recognition rules, or conflict of laws rules.

IV. Terms

Some cross-border insolvency legislations include lists of terms with definitions⁶³. Both the EIR and the MLCBI use this approach for their overall sphere of application, i.e. the definitions are not limited to the issue of recognition. On the national level, terms are sometimes defined for recognition purposes only. Such definitions sometimes indirectly serve to delimit

59 Art.1 (2) EIR.

60 § 109 (2)(b) and (3) of the Bankruptcy Code, with some modification as to Chapter 15 of the Code, see § 1501(c)(1) and (3). As to bank insolvencies see also Pannen/Riedemann.

61 This is true, e.g. for Austria (sec. 243 InsO) and Germany (no explicit exclusion of banking and insurance insolvencies from the Insolvency Code; but specific banking and insurance legislation has prevalence).

62 See also → Silvestri (Part A.).

63 Some legislations provide for lists of definition in their general parts, but include therein terms, which are relevant for cross-border cases, e.g. Art.2 of the Bankruptcy Act of Bosnia and Herzegovina (Federation of Bosnia and Herzegovina) of 2021.

the rules on recognition of foreign insolvencies from general rules on recognition of foreign judgments (such as, in the EU, the Brussels Ia/Ibis Regulation) or from general rules on conflict of laws (such as, in the EU, the Rome I or Rome II Regulations). Sometimes definitions include rules of a more general character, e.g. on conditions and procedures for recognition.

V. General structure of the rules on recognition of foreign insolvencies

Before turning to details of the rules on recognition of foreign insolvencies, the basic structures of the existing texts and rules need to be examined as they may inspire future regulation by the EU as to recognition of non-EU insolvencies.

1. EIR and MLCBI

The EIR is structured in four parts: general provisions, recognition of (foreign) insolvency proceedings, secondary proceedings as a special case of parallel proceedings, insolvency proceedings of corporate groups. The MLCBI is structured, mainly, in five parts, whose content differs significantly from the EIR: general provisions, access of foreign representatives and creditors to courts in that State (whether in the context of domestic proceedings or assistance/recognition), recognition of foreign proceedings and relief, cooperation with foreign courts and representatives, concurrent proceedings.

The EIR and the MLCBI share many commonalities:

- the common intent to improve cooperation between different countries in insolvency matters,
- the focus on the debtor's COMI as the main jurisdictional ground for the conduct of insolvency proceedings (main proceeding), accompanied by the existence of an 'establishment' as a subsidiary jurisdictional ground (non-main or 'territorial' proceeding),
- the *lex fori concursus* principle as a basic conflict of laws rule in insolvency proceedings,
- the 'universality' of the effects of a main (COMI-based) proceeding,
- combined with the admissibility of concurrent proceedings,

- ‘recognition’ of foreign insolvency proceedings as a basic concept for defining the effects of an insolvency proceeding outside the forum concursus,
- the differentiation, also in the recognition context, between ‘main’ proceedings (COMI-based and with ‘universal’ effect) and ‘non-main’ proceedings (establishment-based and with territorial effect only).

However, the provisions in the EIR and the MLCBI on recognition of foreign insolvencies⁶⁴ contain also major differences:

The core difference between the two instruments lies in the fact that under the EIR recognition is conceptually tied to recognition of decisions rendered in the course of the insolvency proceedings, while the MLCBI relates the term ‘recognition’ to foreign insolvency proceedings in a general manner and, in addition, treats recognition of foreign insolvency proceedings as only one (though important) element of judicial assistance to a (foreign) insolvency proceeding. The legal position of foreign representatives is dealt with in the MLCBI as a separate category of judicial assistance, while under the EIR the legal position of (foreign) insolvency practitioners is contingent on the recognition of the foreign proceeding, more specifically, of the opening decision, in which the foreign insolvency court has appointed the representative. It may even happen that the decision to commence (‘open’) the foreign proceeding is recognized, but the decision to appoint a particular representative is not (e.g. if a corrupt or otherwise incapable person has been appointed). The MLCBI leaves the relation between ‘recognition’ of a foreign insolvency proceeding and acceptance of certain acts of a foreign representative open, seemingly giving the court the power (and perhaps discretion) to decide this question.

Another difference relates to the use of conflict of laws methods in cross-border insolvencies. The EIR includes a complete and very detailed set of rules on conflict of laws, which apply both in domestic insolvency proceedings and in the recognition context. The MLCBI, on the other hand, deals with conflict of laws issues only in a minimal manner and focusses instead on uniform substantive⁶⁵ rules for recognition and other coordination and cooperation. It needs to be noted, however, that UNCITRAL is currently

64 As to differences between the EIR and MLCBI on other aspects of cross-border insolvency cf. in particular, the general reports on ‘domestic insolvency proceedings’ and ‘concurrent insolvency proceedings’ in this book: →Trunk (Domestic proceedings) and →Trunk (Concurrent proceedings).

65 ‘Material’ or ‘procedural’, see → Preface.

working on a complementary instrument dealing with conflict of laws in insolvency, which will – from today’s perspective – also address conflict of laws in the recognition context⁶⁶ and provide in this respect for a very flexible approach⁶⁷.

A third difference relates to the role of judiciary discretion at recognition. The EIR’s rules on recognition of foreign insolvency proceedings (or decisions), are, in principle non-discretionary: When prerequisites for recognition exist, recognition is granted by law and even the legal effects of recognition are determined by law: conflict of laws and the substantive rules under the applicable law⁶⁸. In contrast, the MLCBI, drawing inspiration from the practice in Common Law countries, refers to a significant degree to judicial discretion⁶⁹, although recognition itself is mandatory⁷⁰. It should also not be neglected, that both models (EIR and MLCBI) use numerous general clauses, which may give some space to freedom of assessment.

A further significant difference between the EIR and the MLCBI concerns procedural aspects of recognition. Under the MLCBI recognition is based on a formal recognition proceeding, while under the EIR recognition is basically ‘automatic’, i.e. it does not require a formal recognition proceeding.

Both the MLCBI and the EIR contain various rules on cooperation and communication as well as certain rights and duties of creditors or insolvency representatives in cross-border insolvency cases⁷¹. These provisions apply also in the context of recognition of foreign proceedings, but they are not limited to this constellation and will therefore not be addressed here in detail.

A more particular aspect of recognition of foreign insolvencies concerns insolvency-related proceedings (or judgments), which are linked with for-

66 Note by the Secretariat on ‘Applicable Law in Insolvency Proceedings’, A/CN.9/WG.V/WP.202, prepared for Working Group V (Insolvency Law), Sixty-sixth session, New York, 12–16 May 2025, p.36 – 38.

67 At present, the following text is proposed: ‘Upon recognition of a foreign proceeding, the court may grant relief by giving effect to the *lex fori concursus* and other laws applied by the foreign court in accordance with chapter II of these legislative provisions.’

68 Such national rules may, however, include elements of judicial discretion, which is not a concept absent in Civil Law countries.

69 See, e.g., Art.19 and 21 MLCBI.

70 See Art.17 MLCBI; this applies also to the core effects of recognition under Art. 20 MLCBI.

71 Chapters II, IV and V MLCBI.

eign insolvencies. The EIR contains rules on (international) jurisdiction for such proceedings (art.6 EIR) as well as on the recognition of decisions rendered in them (art.32 EIR). This topic is dealt with in detail in another contribution to this book⁷².

Overall, the EIR approach gives more legal certainty, while the MLCBI approach is more flexible,

2. Treaties and other uniform law outside the EIR and the MLCBI

Since the beginning of the 19th century, a significant number of treaties have been concluded to deal, either specifically or in a larger framework of international civil procedure, with insolvency (bankruptcy) proceedings. Between EU member states, such treaties (namely, those listed under art. 85) have been superseded by the EIR. Although these treaties still deserve interest from a historical perspective, they will not be analysed in this report.

Two modern texts are, however, interesting for this project: the Council of Europe's Istanbul Convention on Certain International Aspects of Bankruptcy of 1990⁷³ and the OHADA Uniform Insolvency Act of 2015, which creates a uniform insolvency regime for the 17 member states of the Organization for Harmonization of Business Law in Africa⁷⁴. A short glimpse will also be made at uniform cross-border insolvency law in the banking and insurance sectors.

a) Istanbul Convention on Certain International Aspects of Bankruptcy

The Istanbul Convention, which has not entered into force, can be seen as a predecessor both of the EIR and of the MLCBI. It remains an interesting object of comparison for this book as it deviates to a certain degree from the structures both of the EIR and the MLCBI. The Convention consists

⁷² See → Trunk (Concurrent proceedings).

⁷³ Text available at <https://www.coe.int/en/web/conventions/-/council-of-europe-european-convention-on-certain-international-aspects-of-bankruptcy-ets-no-136-translations> (last accessed 07.07.2025).

⁷⁴ Text in English available at <http://www.ohadalegis.com/anglais/telAUGB/1998-Uniform-Act-bankruptcy-proceedings-en.pdf> (last accessed 07.07.2025). An earlier version of the UIA was passed in 1998. For details see → Leno.

of five chapters: General provisions, Exercise of certain powers of the liquidator, Secondary bankruptcies, Information of the creditors and lodgement of their claims, Final provisions. Similarly to the EIR, the Istanbul Convention would apply only between member states of the Convention.⁷⁵ Taking apart the restricted term definition of 'bankruptcy' in this context⁷⁶, the Convention assembles in a rather patchy way provisions on domestic insolvency proceedings, recognition of foreign proceedings and concurrent proceedings. Its focus lies on recognition of foreign proceedings⁷⁷, although this term is not used. Many provisions are formulated a way that they can be applied to domestic proceedings (with a cross-border dimension) as well as to recognition of foreign proceedings and in concurrent proceedings⁷⁸.

Art. 3 and 4 of the Convention determine the main prerequisites for recognition of a foreign decision 'opening' the bankruptcy proceeding: indirect jurisdiction (basically: COMI, subsidiarily establishment), effectiveness (not necessarily finality) of the foreign decision, no violation of public policy). The Convention does not provide for a formal recognition proceeding. It states the basic conflicts rule of *lex fori concursus* (Art. 10 – for the recognition context, Art. 19 – for secondary bankruptcy proceedings) but limits the *lex fori concursus* in the recognition context by 'implementation' rules of the *lex rei sitae* (Art. 10 (2). Another provision protects 'security' (in rem) 'over land or other property established or recognised by the law of the (recognizing) Party' (Art. 14 (2) of the Convention). On the other hand, 'any Party may permit the foreign liquidator to exercise on its territory wider powers than those laid down in this chapter' (Art. 16 of the Convention). Beyond this, the Convention contains numerous more or less specific substantive provisions, which have mostly a procedural⁷⁹, but sometimes also a material character⁸⁰. An unusual provision is Art. 11 (1), according to which 'the liquidator's powers as set out in Article 10, paragraph 1, shall be suspended during a two month period commencing the day after the publication of the notice referred to in Article 9'. The policy

75 Cf. Art. 1 (2) of the Convention.

76 See Art. 1 of the Convention.

77 Cf. Art. 4, 10, 11, 14, 15 of the Convention.

78 See, e.g., Art. 1 (2), 2, 8, 10, 12 et al. of the Convention.

79 See, e.g. Art. 8 – protective measures, Art. 9 – advertisement of liquidator's powers abroad.

80 See, e.g. Art. 5 – partial payment to creditors abroad, Art. 13 discharge by payment or delivery of assets to the 'liquidator', Art. 16 – extension of liquidator's power by recognizing country.

of this provision is questionable as it encourages debtors to move assets to a ‘safe haven’ during this period⁸¹.

b) OHADA Uniform Insolvency Act⁸²

The OHADA Uniform Insolvency Act (UIA) is the first modern large-scale uniform insolvency law not only in Africa, but also globally. It contains a Chapter (Title VII) on cross-border insolvencies.

The UIA applies both to classical bankruptcy proceedings and more flexible restructuring proceedings, but it is limited to commercial insolvencies (art.1 – 2). It also extends to banks and insurance undertakings, in so far as there is no other special regulation (art.1 – 1). Although Title VII covers by its heading international insolvency proceedings in a general manner, the two chapters of this title focus on the recognition of foreign proceedings. Direct jurisdiction is established within the chapter on general provisions of the Act (art. 3 and 3–1), distinguishing between main proceedings (individual debtor’s principal establishment or company’s registered office) and non-main proceedings (national main centre of operations). This is somewhat in contrast with Title VII, where the distinction between main and non-main proceedings is grounded on other heads of jurisdiction: centre of main interest and establishment.

Within Title VII, Chapter 1 deals with inner-OHADA recognition, while Chapter 2 deals with recognition of third-countries insolvencies. Chapter 1 appears to be inspired by the EIR with its judgment-based approach, while Chapter 2 follows, with some modifications, the MLCBI. Although the heading of Chapter 2 refers only to recognition (of foreign proceedings), some provisions also cover – like the MLCBI – particular aspects of domestic and concurrent proceedings. Thus, the UIA merges two models. An EIR-inspired approach seems to have been chosen for intra-OHADA relations as it fits better for countries with close legal and economic relationships. The MLCBI was apparently regarded more suitable for relations with the ‘rest of the world’, perhaps because of its flexibility. Interestingly, art.247 subs.2 UIA applies the judgment-based approach to recognition, which is

81 Under Art. 11 (2), only a limited group of creditors (mainly preferential creditors and public creditors) are allowed to enforce their claims during this period, but even this limitation may in some cases be detrimental to the success of the insolvency proceeding, e.g. in reorganization cases.

82 For details see → Leno.

used in Chapter 1, also to recognition under Chapter 2, thus linking the EIR- and the MLCBI-approaches. In contrast with the EIR, art.247 subs.1 UIA uses the term '*res judicata*' (*autorité de la chose jugée*) to describe the effects of recognition. This illustrates the link between recognition of foreign judgments in general (with focus on the French legal tradition) and recognition of foreign insolvencies. The term '*res judicata*' denotes, in this context, probably only that the foreign decision has the effects given to it under its *lex fori concursus* and is not open to renewed scrutiny by courts in other OHADA countries. Another significant deviation from the EIR consists in that the UIA does not provide for specific conflict of laws rules. Perhaps this was not regarded necessary, as substantive insolvency law is unified by the UIA and third-country relations were left aside as not being frequent enough to deserve particular rules. The Act appears, however, implicitly based on the *lex fori concursus* as the governing law.

c) Banking and insurance sectors⁸³

On the international level, Unidroit has been working for several years on a project relating to bank insolvency (including cross-border aspects), which has recently been completed with a UNIDROIT Legislative Guide on Bank Liquidation' (2025)⁸⁴.

In numerous countries specific rules on insolvencies of businesses operating in certain industries are in place. Typical examples are insolvencies in the financial services sector, in particular for banks and insurances. Such enterprises are sometimes excluded from general insolvency law, sometimes they are included but special rules may prevail⁸⁵. This is also true for cross-border insolvency rules.

In the EU, for example, there are special directives applying to insolvencies of credit institutions and insurance undertakings – the Bank Resolution and Restructuring Directive (BRRD) 2014/59 of 15 May 2014⁸⁶ and

83 See also → Pannen/Riedemann.

84 See <https://www.unidroit.org/work-in-progress/bank-insolvency/>. As to specifics of cross-border bank insolvencies see → Pannen/Riedemann.

85 This is, e.g., the approach of the OHADA Uniform Insolvency Act 2015 (art.1 – 1).

86 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32014L0059> (last accessed 07.07.2025).

for the insurance sector the IRRD directive of 27 November 2024⁸⁷ These directives contain very detailed provisions also on cross-border matters, some of which are identical to the EIR. A typical particularity in these two areas is the existence of governmental supervision authorities, which relates also to insolvency matters and may lead to particular rules on jurisdiction, right to file for bankruptcy, insolvency administration, exclusion of parallel proceedings etc. Insolvencies in these sectors are excluded from the sphere of application of the European Insolvency Regulation (art.1 (2) EIR). The MLCBI in principle does not exclude insolvencies in such sectors but leaves the decision to the implementing legislators (art.1 (2) MLCBI).

Some countries exclude the banking and insurance sectors from the sphere of application of their international (or even domestic) insolvency legislation⁸⁸, but usually they are not excluded, but priority is given to special legislation in these sectors⁸⁹. An interesting example in this respect is the U.S. Bankruptcy Code, which excludes banks and insurances from domestic proceedings under the Code (sec.109 (b)) but includes foreign insurance companies in Chapter 15 of the Code (sec.1501 (c)(i)).

In Austria, the Insolvency Code does not exclude banks and insurances, but its chapter on international insolvency law contains quite detailed specific provisions for these sectors (sec.243 – 251). Similarly, the Czech Private International Law Act contains specific provisions for cross-border bank and insurance insolvencies (Art.112 – 116 PIL Act), complementing the short general provision on international insolvency law (Art.111 PIL Act)⁹⁰. The German Insolvency Code also does not exclude banks and insu-

87 Directive (EU) 2025/1 of 27 November 2024 establishing a framework for the recovery and resolution of insurance and reinsurance undertakings, <https://eur-lex.europa.eu/eli/dir/2025/1/oj/eng> (last accessed 07.07.2025).

88 See e.g. sec. 274 subs.2 of the Romanian Insolvency Act 2014 (as to international insolvency law), the same was true under the former Romanian International Insolvency Law of 2002 (art.2 subs.2).

89 See e.g. sec.2 subs. 4–8 of the Latvian Insolvency Act of 2010, similar Estonia, Lithuania and others.

90 In addition, the Czech Insolvency Act contains detailed provisions on EU-related bank and insurance insolvencies, which address also cross-border situations (sec. 367 – 388c). To compare with, Slovakia has not passed special cross-border rules on banking or insurance insolvencies, but regulates banking and insurance insolvencies (including some cross-border aspects) extensively in Part 6 (sec. 176 – 195a) of its Bankruptcy Act 2004.

rance companies, but special (EU-based) legislation⁹¹ largely supersedes the Code.

3. National legislation

The basic structures of the EIR and the MLCBI can also be found, though with various modifications, in national legislation. Leaving apart those jurisdictions which have more or less literally adopted the MLCBI, one can distinguish legislations which have oriented themselves basically at the EIR but adopted some modifications to deal with non-EU countries, and legislations which have significantly modified the MLCBI or even developed their own original approaches.

The following overview, basically in alphabetical order, will describe in some more detail, though still with a focus on major aspects, the approaches developed by EU and some non-EU countries.

a) EU Member States

The Austrian legislator has tailored its rules of international insolvency law along the lines of the EIR, but chose a somewhat different approach, both in structure and numerous details. The Austrian Insolvency Code begins the Chapter on International Insolvency Law also with general provisions, but they are basically limited to a statement on the priority of the EIR (§ 217). Thereafter, the Code lays down some provisions on the implementation of the EIR, which are followed by provisions on cross-border insolvency not covered by the EIR. Here, the Code starts with provisions on the conflict of laws in insolvency⁹² (§§ 221 – 234), followed by some provisions on domestic (Austrian) insolvency proceedings (§§ 236 – 239) and, thereupon, recognition of foreign proceedings (§§ 240 – 242). The following and final subpart of this Chapter deals with specifics of cross-border insolvencies in the financial sector (§§ 243 – 251). Like under the EIR, recognition of foreign insolvencies in Austria is judgment-based and automatic and includes detailed conflict of laws rules. The Austrian law

91 E.g. sec.46b, d e, 53b – d KWG (Kreditwesengesetz), sec.153 – 171 SAG (Gesetz zur Sanierung und Abwicklung von Instituten und Finanzgruppen).

92 As an exception, § 235 contains a substantive rule on protection of good faith recipients of payments.

provides for recognition of foreign main proceedings only on the basis of COMI. Differently from the EIR, Austrian law does not foresee the recognition of foreign non-main proceedings⁹³. The number of specific substantive provisions for cross-border insolvencies in the Austrian Insolvency Code is very limited and, basically, reflects provisions of the EIR.

Insolvencies in the financial sector are under the Austrian Code in principle covered by the same rules as other insolvencies. However, cross-border insolvencies of institutions covered by the EU Bank Recovery and Resolution Directive 2015/59/EU and corresponding EU legislation in the insurance sector are the subject of special legislation. §§ 243 – 251 of the Austrian Insolvency Code provide for similar provisions on cross-border insolvencies of banks and insurance companies licensed in other Member States of the European Economic Area (§ 243). Several of these provisions apply also to banks and insurances established in other (third) countries provided they have an establishment or branch in Austria (§ 243 subs.2).

Belgian law regulates cross-border insolvencies mainly in two texts: the Code of Private International Law (Chapter 11), and the Code of Economy Law (Book XX, chiefly in Title VII). The basic provisions are contained in the former text, which contains provisions on their sphere of application (art.116), definitions (art.117), international jurisdiction (art.118), conflict of laws (art.119), and recognition of foreign insolvencies (art.121). Belgium extends to non-EU insolvencies the judgment-based approach of the EIR (cf. art.121 § 1). Recognition of foreign insolvencies from non-EU countries, however, seems to require formal recognition (cf. art.121 § 3 of the Code); in addition, the law refers to the provisions in the Code on the exequatur of foreign judgments, which also requires a particular proceeding. Whether recognition or the exequatur have in this case *erga omnes* effects is not evident (cf. art.121 § 1 in conjunction with art.22 and 23 of the Code). The provisions of the Code of Economy Law on cross-border insolvencies merge elements of the EIR and the MLCBI on cooperation with foreign courts and insolvency representatives. Although they do not explicitly create discretionary powers of the court, they refer at several places to the standard of reasonableness, which may come close to discretion (see in particular art.XX.217 and art.XX.219 § 2).

Croatia is one of the pioneers in legislation on cross-border insolvencies since its first legal regulation of this subject-matter in 1996. Chapter XI

93 As far as direct jurisdiction is concerned, § 63 of the Code goes beyond the EIR, including, in particular ‘doing business’ and ‘property’ as grounds for jurisdiction.

of its Bankruptcy Act of 2015, contains rules on international insolvency law (art. 394-427), which apply with respect to states to which the EIR is not applicable. The chapter starts setting international jurisdiction of Croatian courts (art.392 – 393). Thereafter come general provisions (art.394 – 399), followed by detailed provisions on recognition of foreign insolvencies (art.400 – 417 and 424 – 427). A particular subchapter is devoted to the opening of a secondary proceeding in Croatia as a consequence of recognition of a foreign proceeding (art.418 – 423). Croatia follows also in relations with non-EU insolvencies the judgment-based approach (cf. art. 402, 403), referring subsidiarily to general provisions on recognition of foreign judgments (art. 400). Like the EIR, the Croatian law includes in its general provisions detailed rules on conflict of laws, as well as some substantive provisions. Additionally, the subchapters on recognition contain further substantive provisions. In contrast with the EIR Croatia has established a formal recognition proceeding with *erga omnes* effect (art.401 – 408). It has also provided, as an exception to the general rule, for the possibility that the question of recognising a foreign decision opening insolvency proceedings may be determined as a preliminary issue in judicial proceedings (incidental recognition). However, such recognition has only *inter partes* effect (art.409).

The Czech Insolvency Code contains only few summary provisions on cross-border insolvency law, not addressing recognition of foreign insolvencies in a general manner⁹⁴. However, the Czech Private International Law Act of 2012 contains a particular division (Part 6) on cross-border insolvency law. Taking a closer look, it turns out that only one provision in this Part, sec.III of the PIL Act, deals with cross-border insolvency law in general, while sec. 112 – 116 address bank and insurance insolvencies. One subparagraph deals with recognition of ‘foreign decisions in matters of insolvency proceedings’ (sec. III (5) PIL Act). Prerequisites for recognition are indirect jurisdiction of the foreign court (defined by the debtor’s COMI), reciprocity and the non-existence of a Czech territorial proceeding (as to assets in Czechia). In addition, compatibility with Czech public policy is also a prerequisite of recognition (sec. 4 PIL Act). Sec.III PIL Act does not provide for a special proceeding on recognition of foreign insolvencies. It also does not expressly provide for conflict of laws in the recognition

94 Sec. 7b and 182 of the Insolvency Act. Some complementary provisions to the EIR are laid-down in sec. 426 – 430a of the Insolvency Act, but they do not deal with issues of recognition.

context, but sec. 112 (3) states that the conflict of laws provisions of the EIR ‘can be applied’ also in cases outside the scope of the EIR, which seems to open a degree of discretion for Czech courts as to conflict of law in the recognition context surprisingly similar to the MLCBI. Sec. 111 (6) PIL Act expressly extends these rules also to ‘public preventive restructuring proceedings’, along the lines of the EU Restructuring Directive of 2019.

Cyprus, Ireland and Malta can be mentioned here very briefly, as they apply Common Law rules on recognition of (or assistance to) foreign insolvency proceedings⁹⁵.

France has a rich practice of recognition of foreign insolvencies on the basis of general rules on recognition of foreign judgments in civil and commercial matters, although the French legislator has not yet passed any specific legislation on cross-border insolvency law. Like the EIR, French law also regards recognition of foreign insolvencies as a matter of recognition of foreign decisions in insolvency matters, primarily of the ‘opening’ decision of the foreign insolvency proceeding⁹⁶. The prerequisites of recognition are, basically, the existence of a foreign ‘insolvency proceeding’⁹⁷, indirect jurisdiction (today under the flexible standard of ‘characteristic links’/liens caractéristiques)⁹⁸ and compatibility with French public policy⁹⁹. Under French law, the full effects of a foreign insolvency proceeding are recognized only on the basis of an exequatur proceeding in France¹⁰⁰. On the basis of the exequatur, the effect of the foreign proceedings in France are, in principle, determined by the foreign *lex fori concursus*, but exceptions are under discussion¹⁰¹.

The German Insolvency Code resembles the EIR in so far as it also distinguishes between general provisions, recognition of foreign insolvencies, and secondary proceedings (in Germany). It also takes the judgment-based approach with the main focus on recognition of the foreign decree opening

95 For Ireland see, e.g. <https://bhsm.ie/insights-news/the-recognition-by-irish-courts-of-insolvency-proceedings-instituted-in-the-united-kingdom/> (last accessed 07.07.2025).

96 Cf. Dammann/Sénéchal, p. 707 et seq.

97 Often discussed under the category that the foreign proceeding must nr ‘susceptible d’exequatur’, see Dammann/Sénéchal, p. 716 – 717.

98 For details see Dammann/Sénéchal, p. 711 – 712.

99 See Dammann/Sénéchal, p. 714 – 716. Often, the lack of ‘fraude à la loi’ is mentioned as a separate category.

100 Dammann/Sénéchal, p. 704 – 708.

101 Cf. Dammann/Sénéchal, p. 718 – 719.

the insolvency proceeding, adding particular rules on recognition of other insolvency-based or insolvency-related decisions. Like the EIR, the German Insolvency Code contains detailed conflict of laws provisions (which have, like in the EIR, in principle been included in the 'general provisions' on international insolvency law). It also distinguishes between foreign main and non-main proceedings, but in contrast with both the EIR and the MLCBI¹⁰² it accepts also the location of property as a jurisdictional ground for non-main proceedings. In line with the EIR, German law foresees also the recognition of foreign non-main proceedings. In addition, the German Insolvency Code provides for several specific rules of a substantive character, applicable particularly to the recognition context, but there are also some substantive rules in the general provisions of the international insolvency law part of the Code, which apply both to domestic and (recognized) foreign proceedings.

Greece, Poland, Slovenia and Romania have chosen the MLCBI as a basic approach towards recognition of non-EU insolvencies¹⁰³. They provide for a formal recognition proceeding, while restraining the discretionary powers of the court foreseen under the MLCBI. Poland and Romania do not use the conflict of laws rules of the EIR outside the sphere of application of the EIR. Art.397 nr.1 of the Polish Insolvency Act contains only one specific provision on conflict of laws referring to Polish procedural law (*lex fori processus*) as to the effects of a recognized foreign insolvency proceeding upon civil proceedings in Poland. In contrast, the Slovenian Insolvency Act uses the EIR conflict of laws provisions also for autonomous cross-border insolvency law.

Hungary and Italy have not passed detailed legislation on cross-border insolvency law, but apply general rules on recognition of foreign judgments, which also leads, basically, to the prerequisites of the existence of a foreign insolvency proceeding, indirect jurisdiction and public policy, in the case of Hungary adding the requirement of reciprocity (Art. 114 (1) Hungarian PIL Act).

Portugal has codified its autonomous cross-border insolvency along the lines of the EIR, without adoption of the MLCBI, but with its own concep-

102 The MLCBI does not prohibit this ground of jurisdiction but does not include such proceedings into its rules. The EIR, however, excludes property as a basis for jurisdiction if the debtor's COMI is situated in the EU.

103 For a more detailed analysis see Trunk, in Pannen/Riedemann/Zeuner, p. 453 et seq.

tual deliberations. Title XV of the Portuguese Insolvency Code regulates cross-border insolvency law under the heading of ‘Conflict of laws’ (in the large sense). It starts – like the EIR – with General provisions, thereafter, follows chapters on Recognition of foreign insolvency proceedings and on ‘Particular’ insolvency proceedings¹⁰⁴. The General Provisions include mainly conflict of laws provisions closely following the EIR and which apply also to foreign insolvency proceedings. The chapter on recognition begin with prerequisites of recognition: indirect jurisdiction mirroring Portuguese direct jurisdiction (basically: COMI, registered office or domicile; but extended to cases of an ‘equivalent connection’) and compatibility with Portuguese public policy. Thereafter come provisions on protective measures, on publication of the foreign proceeding and some technical issues. A particular recognition proceeding is not required, but Art. 293 of the Code refers to ‘enforcement’ of foreign decisions implying a particular enforcement proceeding.

Slovakia has regulated cross-border insolvencies rather briefly in Part 5 of its Bankruptcy and Restructuring Act, including recognition of foreign proceedings. Foreign decisions in insolvency matters¹⁰⁵ are recognized on the basis of reciprocity (sec. 173 and 175 of the Act). It would seem that indirect jurisdiction and public policy control are further requirements, even though they are specifically mentioned. An interesting provision is sec. 175 (2) of the Act, which grants the recognizing court the seemingly discretionary power (comparable to the MLCBI?) to recognize only ‘some’ effects of the foreign proceeding and to determine that ‘certain effects’ of the foreign proceedings are not recognized. Another similarity with the MLCBI can be seen in sec. 175 (3) of the Act, which state that a court has to ‘revoke’ recognition ex officio if it finds that the prerequisites of recognition are not (or no longer) given. The Act does not mention a formal recognition proceeding, but sec. 175 (3) might imply that such formal recognition can exist.

Spain codified its International Insolvency Law as Book 4 of the Insolvency Code of 2020 (art.721 – 755). Recognition of foreign insolvencies (outside the sphere of application of the EIR) is addressed in art.742 –

104 Secondary proceedings are explicitly treated as a particular case of particular (territorial) proceedings.

105 Recognizable proceedings are defined flexibly: foreign proceedings ‘similar’ to a bankruptcy (or restructuring?) proceeding under Slovak law (Art.175 (1) of the Act).

748, which resemble the provisions of the EIR. In contrast with the EIR, the Spanish Insolvency Code contains separate sets of conflict of laws rules for domestic and foreign insolvencies. However, the conflicts rules in the recognition context are determined by reference to the conflict of laws rules in domestic cases, with a small add-on regarding employment contracts (see art.745 subs.1 and art.745 bis). The Spanish Code contains a reciprocity requirement and an additional comity requirement for recognition of non-EU insolvencies (art.721 subs.2). As to recognition of foreign insolvencies, the Code also contains an interesting definition of foreign restructuring proceedings as proceedings ‘functionally equivalent’ to Spanish proceedings (art.753 subs.2), while insolvency proceedings generally are directly defined in art.742 subs.1 nr.1)¹⁰⁶.

b) Third countries

Outside the EU, Switzerland has well before the EU developed its own approach to cross-border insolvencies. The Swiss Private International Law Act (IPRG) of 1987 contains a chapter on recognition of foreign insolvencies (Chapter 11, art.166 – 177)¹⁰⁷. The basic approach to recognition of foreign insolvencies is judgment-based. Recognition of the foreign decree opening an insolvency proceeding leads, in principle, to a simplified liquidation proceeding in Switzerland under Swiss law (*‘Minikonkurs’*). As this approach turned out to be too restrictive and costly in many cases, the Swiss legislator revised these rules in 2019, allowing (under certain conditions) for recognition without the simplified Swiss ‘mini proceeding’, and renouncing also to the earlier reciprocity requirement for recognition. However, Swiss law still does not provide for a differentiated set of conflict of laws rules for cross-border insolvencies, which would also apply to foreign insolvencies. A brief conflicts rule has, however, been introduced in 2019 in art.174a subs.4 IPRG, which refers to the *lex fori concursus* of the foreign proceeding ‘under the observance of Swiss law’. One element

106 Cf. https://www.garrigues.com/en_GB/new/international-insolvency-three-novelities-introduced-insolvency-law-reform-bill.

107 Cross-border aspects of Swiss insolvencies are – with the limited exception of art. 174 bi IPRG – not regulated in the Private International Law Act, but briefly and rudimentarily addressed in the Swiss Execution and Bankruptcy Act. Further on the topic → Staehelin/Kleider; Spahlinger, p. 220; Dutoit, p. 747 et seq.

of Swiss recognition law is some preference for Swiss-domiciled creditors (art.172 subs.1 b) and subs.2, art.174 and art.174a IPRG).

Norway, a non-EU country, which is however a member of the European Economic Area agreement and in close relations with the EU, has adopted rules on recognition of foreign insolvencies which closely resemble the EIR. North Macedonia, a non-EU country, but EU accession candidate, has adopted rules on cross-border insolvencies, which are mainly inspired by Croatian law and thus indirectly by the EIR. The same is true for Bosnia and Herzegovina, with the particularity that each of its constituent entities (Federation of Bosnia and Herzegovina, Republika Srpska and Brčko District) have passed their own Bankruptcy Acts, which apply both to ‘interlocal’ and to ‘international’ insolvencies.

In recent years numerous countries have aligned their cross-border insolvency law with the MLCBI¹⁰⁸, which has thus grown into a sort of standard for good rules on cross-border insolvency worldwide. In addition, UNCITRAL has continued its work, having added the MLIJ and the MLE-GI, and conducting currently work on an instrument about conflict of laws which will – though probably in a very mitigated form – also apply to the recognition context¹⁰⁹. This does not mean, of course, that the MLCBI is perfect and could not be improved. The comparative overview shows, however, that the MLCBI is not necessarily incompatible with the EIR, but can be combined with it in different ways.

B. Prerequisites of recognition

1. Prerequisites of recognition in general

The term ‘prerequisites of recognition’ refers to a set of elements that, in current cross-border insolvency law regimes, often appear under other labels. Some of these elements define the scope of recognition rules (when specifically tailored for insolvency cases); others serve as grounds for refusing recognition; some define the object of recognition, i.e. determine what must be present for recognition to be possible, while others constitute explicit requirements for recognition. Additionally, certain elements may

108 For example, Australia, Brazil, Canada, Japan, Mexico, Panama, Saudi Arabia, Singapore, South Africa, South Korea, the UAE (for the DIFC), the UK, Ukraine, the U.S. Reports from selected individual countries are contained in Ho (2017), *passim*.

109 See *supra* note 67.

influence the legal effects of recognition or the granting of measures that follow from it.

In systems where recognition is not automatic but requires a judicial decision, the procedural steps involved may themselves be considered a recognition requirement.

Broadly speaking, any factor that determines whether recognition produces legal effects qualifies as a recognition requirement. Such effects include the extension of legal effects under the *lex fori concursus*, the recognition-related effects stipulated by the law of the recognizing state, or effects established independently by cross-border insolvency regulations such as the MLCBI.

Despite variations across legal systems and the inherent flexibility of ‘recognition requirements’ as a category, certain fundamental elements remain consistent and warrant closer analysis.

First, there must be insolvency proceedings pending in the forum *concursum*. The proceedings may be required to meet specific criteria for recognition. These criteria can be structural, i.e., the process must be judicial or administrative, involving the debtor’s divestment, a debtor-in-possession regime, or both. Additionally, a qualified receiver may need to be appointed. Furthermore, they might be procedural prerequisites, i.e., the debtor must meet certain conditions, such as being insolvent, in financial distress, or subject to proceedings for other legally recognized reasons. Finally, further criteria might be debtor-specific: some legal systems impose restrictions on which debtors qualify—for example, the debtor may need to be a trader or may be excluded if operating in certain sectors (e.g., banking and insurance).

Often, recognition is not granted merely because insolvency proceedings exist in a foreign state. Instead, the forum must be determined based on specific criteria of so-called indirect jurisdiction.

Another universal requirement is that recognition must not violate the fundamental values and principles of the recognizing state, commonly referred to in private and procedural international law as ‘public policy’.

Let us examine how these three core requirements—pending insolvency proceedings, jurisdictional criteria, and public policy considerations—are reflected in current legislation, particularly in the EIR and MLCBI. In the next section, we will also discuss the procedural aspect of recognition.

2. A pending foreign insolvency proceeding: proceedings covered by recognition regimes

The existence of foreign insolvency proceedings is explicitly recognized as both an object and a prerequisite for recognition in the MLCBI. Article 17 states that ‘a foreign proceeding shall be recognized if ... [it] is a proceeding within the meaning of subparagraph (a) of article 2’.

In contrast, the EIR defines ‘insolvency proceedings’ as a way of establishing its scope of application. Article 1 states: ‘This Regulation shall apply to public collective proceedings’ followed by a definition of the necessary characteristics for recognition under the Regulation.

Importantly, a foreign procedure that does not meet these definitions is not necessarily excluded from recognition entirely—it may still be recognized under other legal frameworks. However, such recognition would fall outside the specific scope of the EIR or the MLCBI, raising broader questions about the interplay between different legal sources governing recognition. The topic cannot be fully addressed here¹¹⁰; suffice it to mention that in EU law, insolvency proceedings are excluded from the main framework of judicial cooperation in civil and commercial matters, i.e. Brussels Ia Regulation, whose article 1, second paragraph, letter b), provides that the regulation does not apply to ‘bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings’. It is a matter of debate whether this provision excludes only the proceedings to which the EIR applies, or those falling under the insolvency matter at large, regardless of their inclusion into the remit of the EIR. This issue used to be less problematic in the past, when the Regulation 1346/2000 applied to insolvency proceedings of all sorts, with just a few minor exceptions. Since the reception of Directive 2019/2013 in Member States, however, the question whether pre-insolvency proceedings and restructuring frameworks aimed at ailing companies can, at once, fall under the carve-out of article 1 of Brussels Ia Regulation and out of the sphere of application of the EIR has become increasingly relevant. Evidently, this is not only an issue regarding the wording of the Brussels Ia provision, since it involves general questions regarding the very nature of such innovative proceedings and framework,

110 On the complex interactions between different cross-border insolvency regimes in English law: see, McCormack, p. 218 et seq.; Wilson/Perkins, in Moss/Fletcher/Isaacs/Smith/Paulus, mn 5.04 ss.

whose features oftentimes make it hard to fit them into the traditional categories underlying the structures of EU instruments of cross-border civil procedure and insolvency law¹¹¹.

Both the MLCBI and the EIR provide definitions of ‘insolvency proceedings.’ The MLCBI’s definition in Article 2(a) is broad, describing insolvency proceedings as ‘a collective judicial or administrative proceeding in a foreign state, including an interim proceeding, pursuant to a law relating to insolvency, in which the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation.’ This definition closely mirrors that of the 1995 Brussels Convention, which later became Regulation 1346/2000¹¹².

The recast EIR adopted a more detailed definition, adding publicity as a requirement—something the MLCBI does not explicitly mandate (but may be implicit in the ‘collective’ requirement, since the involvement of creditors intuitively requires that they are informed that the proceedings are underway).

Despite their similarities, the two definitions serve different purposes. Under the MLCBI, the definition determines what may be recognized. In contrast, under the EIR, the definition guides Member States in identifying which national procedures qualify for inclusion in Annex A—a list of recognized insolvency procedures¹¹³. In fact, recognition under the EIR is only available to procedures listed in Annex A, regardless of whether they meet the definitional criteria of Article 1(1). Conversely, procedures not listed in Annex A—even if they meet the definition—are excluded from the EIR’s recognition rules and must rely on other legal instruments¹¹⁴.

111 For a general overview of the debate, and for further literature references, see Schmidt IIR 2021, 86.

112 On the MLCBI notion of ‘foreign insolvency proceedings’, Mevorach in Bork/Veder, mn. I.2.02 et seqq.; Silvestri Dir. fall. 2025, 694 (705).

113 Bork/Mangano, mn 2.51; Dammann/Sénéchal, p. 115 et seq.

114 See recital no. 9 to the EIR: ‘This Regulation should apply to insolvency proceedings which meet the conditions set out in it, irrespective of whether the debtor is a natural person or a legal person, a trader or an individual. Those insolvency proceedings are listed exhaustively in Annex A. In respect of the national procedures contained in Annex A, this Regulation should apply without any further examination by the courts of another Member State as to whether the conditions set out in this Regulation are met. National insolvency procedures not listed in Annex A should not be covered by this Regulation’. The recast Regulation, thus, adopts (and expands) the position taken by the ECJ, 22.11.2012 -C-116/11, ECLI:EU:C:2022:783-*Bank Handlowy w Warszawie SA* case, §§ 31–35.

The EIR's 'list approach' works effectively within the EU, where Member States operate within an integrated legal framework. However, it presents challenges when Member States reform their insolvency laws. For example, when implementing Directive 2019/1023, disputes arose over whether certain new procedures should be included in Annex A. Nevertheless, the list approach has a key advantage: it eliminates litigation over whether a specific proceeding falls within the EIR's scope, as recognition is automatically granted to listed procedures. This suits the EIR's automatic recognition model, which seeks to minimize the recognition requirements.

On a global scale, however, the list approach is impractical due to the significant diversity of legal systems and frequent, uncoordinated legislative changes¹¹⁵. The MLCBI instead adopts an open-ended definition, requiring courts to assess whether a foreign procedure meets the criteria of Article 2. In practice, courts often rely on expert testimony on the insolvency law of the foreign state. While this adds costs (mainly financial rather than time-related), it can deter the use of the MLCBI in smaller cases.

The MLCBI's deliberately broad definition has allowed it to adapt over time, accommodating evolving insolvency frameworks. Over the past two decades, insolvency law has shifted focus away from traditional liquidation proceedings, and away from the assumption that judicial proceedings are the primary mechanism for handling financial distress. This trend has led toward the emergence of negotiation-based approaches, where courts play a limited oversight role to safeguard stakeholder interests. As a result, procedures traditionally not classified as insolvency proceedings—such as voluntary winding up of solvent companies or England's Part A1 moratorium—have been recognized under the MLCBI¹¹⁶. Furthermore, in jurisdictions enacting the MLCBI recognition has been at times granted to proceedings whose opening was required by supervisory regulations applicable to that

115 Further guidance on the notion of 'foreign insolvency proceedings' can be found in the Guide to Enactment and Interpretation to the MLCBI (mn 65 et seq.): <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/1997-model-law-insol-2013-guide-enactment-e.pdf>

116 An Australian judgment recognized an English Part A1 moratorium under the MLCBI: see *Re Hydrodec Group Plc* [2021] NSWSC 755, in *jade.io*; foreign voluntary winding up proceedings have been regularly recognized by US courts: e.g., *In re Betcorp Ltd.*, 400 B.R. 266 (Bankr. D. Nev. 2009), in www.casotext.com.

debtor¹¹⁷, or stemming from a deliberation of the shareholders¹¹⁸, merely because under the *lex fori concursus* such proceedings were designed to address *also* situations of insolvency.

The EIR, by contrast, has been more selective. Annex A does not include many modern insolvency mechanisms, despite EU encouragement for their adoption. This is due not only to the list approach but also to four additional factors.

First, the definition in Article 1 EIR is stricter than that of Article 2 MLCBI, particularly by requiring proceedings to be public. This has, for instance, prevented a significant number of restructuring frameworks adopted by Member States in the enactment of Directive 2019/1023. A case in point is the German *Restrukturierungssache*, which, if held confidentially, with no notice of its filing being given on public registers, does not fall under the remit of the EIR¹¹⁹.

Second, proceedings listed in Annex A not only qualify for expedited recognition under the EIR but are also affected by rather restrictive rules on direct jurisdiction. If the debtor's COMI is within the EU, only the Member State where such COMI is to be found will have, in principle, jurisdiction to open a proceeding, while a more limited competence is left for Member States where the debtor has an establishment. No other State may open a proceeding, namely relying on less restrictive criteria (such as the debtor having assets within the territory of the State). Such considerations have led some Member States to exclude some proceedings from Annex A. For instance, the UK retained company voluntary arrangements and schemes of arrangement outside Annex A during the EIR recast, to ensure their accessibility to foreign European companies with limited UK ties¹²⁰.

The third and main factor contributing to the EIR's restrictive stance lies in a key distinction between the EIR and the MLCBI, already mentioned above: the EIR focuses on recognizing judicial decisions within insolvency proceedings, while the MLCBI recognizes the proceedings themselves, or

117 Re Stanford International Bank Ltd [2010] EWCA Civ. 137, where an English court recognised a liquidation pending in Antigua and Barbuda against a company that had not met certain disclosure obligations under the International Business Corporation Act in force in that jurisdiction.

118 In re Betcorp Ltd, 400 B.R. 266 (Bankr. D. Nev. 2009).

119 For further discussion on whether confidential *Restrukturierungssachen* qualify for recognition, see Abel/Herbst in Morgen StaRUG § 86, mn 16 et seq., and literature cited therein.

120 → McCormack.

rather treats the pending of a foreign insolvency proceeding as a precondition for grating relief.

This fundamental difference shapes how recognition operates under each framework and explains their divergent approaches to defining insolvency proceedings.

The EIR requires not only that the procedure to be recognised be among those listed in Annex A, but also that in the same procedure a court must have rendered at least a decision qualifying as a ‘judgment to open the procedure’, as defined in Art. 2, n. 7. The recognition of an opening decision conditions the recognition of all subsequent decisions made by the insolvency court, as it appears from the wording of art. 32: recognizable judgments must have been handed down by the court ‘whose judgment concerning the opening of proceedings is recognised in accordance with Article 19’ (however, ‘judgments deriving directly from the insolvency proceedings and which are closely linked with them’ may exceptionally qualify for recognition under the EIR). Subsequent judgments are those concerning ‘the course and closure of insolvency proceedings, and compositions approved by that [the opening] court’. Finally, judgments ‘relating to preservation measures taken after the request for the opening of insolvency proceedings or in connection with it’ also fall under the EIR’s recognition regime (art. 32, § 1, last sentence). Despite such judgments are made before the formal opening of the proceeding, they usually aim at anticipating some of the effects that will stem from the opening judgment and are given in the expectation that the proceeding will be eventually opened.

Article 32 essentially requires insolvency proceedings to follow the traditional model, whereby proceedings begin with a court order that establishes the necessary conditions and initiates the process. These proceedings are marked by a predefined series of judicial measures and ultimately conclude with a closure order that fully or partially reverses the effects of the opening decision. It is true that the term ‘opening decision,’ as defined by the EIR, is broad in scope, since it encompasses not only the formal decision to commence proceedings but also the appointment of a provisional liquidator - an act that, strictly speaking, would more appropriately fall under the ‘provisional decisions’ mentioned in the final sentence of Article 32(1)¹²¹. Despite its arguably excessive breadth, the concept of an opening decision remains essential to the EIR. Consequently, the regulation is ill-suited

121 Bork/Mangano, mn 5.15 et seq.

to cover procedures where court intervention is merely optional (as in instruments similar to the English Part A1 moratorium) or where the only judicial decision is the closure of proceedings. This occurs, for instance, in certain Italian restructuring agreements (*accordi di ristrutturazione*, which are listed in Annex A but may involve court intervention solely to approve an agreement between the debtor and creditors, with no actual ‘opening decision’ ever being rendered)¹²².

National legislations based on the ‘decision-recognition paradigm’ face the same issue. Italian law, for example, treats foreign insolvency proceedings under general provisions on recognition of civil and commercial judgments. In one instance, a territorial court (*Tribunale* of Perugia) was faced with a request of recognition of the automatic stay stemming from the filing of a Chapter 7 petition; noting that the representative for the U.S. proceedings did not seek the recognition of a court order under article 67 of Law No. 218/1995, the *tribunale* managed to overcome the obstacle by recognising the U.S. court clerk’s certification of filing of the petition under article 68 of the same Law (providing recognition of acts from public officials)¹²³. Such a pathway looks rather serendipitous, and the case in question shows that such legislative obstacles pay little service to a seamless management of cross-border cases.

In summary, the EIR appears to require insolvency proceedings to follow a defined structure. In contrast, the MLCBI simply mandates the existence of insolvency proceedings, however structured —with the proviso that they are collective, either judicial, or administrative, and that they involve judicial oversight, fall under insolvency law, and aim at the debtor’s reorganization or liquidation. Unlike the EIR, the MLCBI remains neutral regarding the sequence of acts and judicial pronouncements shaping the proceedings.

The downside of the MLCBI approach of not addressing recognition of judgments specifically has notoriously emerged in the context of cross-border restructurings, whereby courts of enacting States, seized with requests of recognition of debt discharge orders effecting schemes of arrangements, have shown diverging stances regarding the possibility of using the MLCBI

122 More on the *accordi*, D’Attorre, p. 72–73. However, oftentimes a *commissario giudiziale* (a practitioner listed in Annex B) may be appointed by the court as soon as the debtor files the petition: the court decree appointing the practitioner seems to be falling under the EIR notion of ‘opening judgment’.

123 Trib. Perugia, 1.3.2021, in *Il Fallimento e le altre procedure concorsuali* (Fall.) 2021, 1124 et seq., with comment by Panzani.

for such purposes¹²⁴. These divergences have prompted UNCITRAL to pass the 2018 Model Law on the Recognition of Insolvency Related Judgments to address an issue that the EIR, on the contrary, has dealt with from its inception.

The fourth and last factor lies with the fact that, unlike the MLCBI, the EIR seems to require that proceedings eligible for recognition must be opened upon the showing of a state of financial distress of the debtor (however defined): such a requirement is apparent, *inter alia*, from article 34 EIR, which prohibits the re-examination of the debtor's insolvency by the judge requested of the opening of a secondary proceeding, implying that the debtor's financial state must have been scrutinised by the court opening the main proceeding. This is true also for proceedings which share a common structure with traditional insolvency court proceedings, despite being designed for additional purposes (e.g. for supervision on certain entities, like cooperatives or financial undertakings)¹²⁵.

In conclusion, a few legislations of EU Member States finally deserve a mention. In jurisdictions with regimes specifically designed for recognition of decisions rendered in foreign insolvency proceedings, the requirement under examination aims at telling decisions made in insolvency proceedings (whose recognition is regulated by special rules) from ordinary civil and commercial judgments (whose recognition is regulated by ordinary provisions). It is the case, e.g., of Spain (article 742 LC), Germany (§ 343 InsO) and Portugal (art. 288 CIRE). Statutory definitions of insolvency proceedings, however, are rare: among the three provisions just mentioned, only the Spanish contains an express definition, that is based on that of the MLCBI. Whilst notions of '*ausländischen Insolvenzverfahren*' and '*processo estrangeiro*' are thus left to interpreters. German commentators predominantly employ an open-ended definition highlighting a few pivotal

124 The UK Supreme Court declined recognition of judgments under the Cross-border Insolvency Regulations in *Rubin v. Eurofinance SA* [2012] UKSC 46, § 144, in *supremecourt.uk/cases*. US courts tend to be favourable: e.g., in *re Diebold Nixdorf Dutch Holding B.V.*, Case No. 23–90729, DRJ, Bankr. S.D. Texas, 7/8/2023, recognising a Dutch 'WHO'; in *re Oversight and Control Commission of Avanzit*, SA 385 BR 525, Bankr. S.D.N.Y. 2008, recognising a Spanish *convenio*.

125 A case in point is the Italian *liquidazione coatta amministrativa*, whose structure closely mirrors that of liquidation proceedings for ordinary companies (and it is thus listed in Annex A), but whose opening does not always require the debtor's insolvency.

structural and functional similarities between German and foreign insolvency proceedings¹²⁶.

In jurisdictions where ‘insolvency decisions’ are recognised under the general regime for civil and commercial judgments, the notion of ‘judgment’, instead, is decisive, though structural and functional commonalities between the local and the foreign proceedings may still be relevant to identify the insolvency process as a judicial proceeding from which a ‘judgment’ may emanate¹²⁷.

3. Indirect jurisdiction

Having concluded the analysis of the first constant requirement for the recognition of foreign insolvency proceedings across various regimes, we now turn to the second requirement: that the proceedings seeking recognition must be pending not just in any foreign State, but in a State identified by precise jurisdictional criteria.

This requirement, commonly found in general recognition regimes for civil and commercial judgments across many legal systems, serves together with other criteria, to minimize conflicts of recognition. It prevents situations where the State receiving the recognition request is confronted with multiple insolvency proceedings pending in different states, each claiming exclusive authority over the debtor’s assets and insolvency process. Such conflicts could arise between competing insolvency bodies or in terms of the substantive effects of the proceedings, impacting the debtor’s management powers, creditor rights, and ongoing contracts.

Theoretically, such conflicts may be resolved by other means—such as prioritizing the first proceedings to be opened or the first to seek recognition—the reliance on indirect jurisdiction criteria ensures that recognition is granted based on a substantial connection between the debtor and the forum concursus. Without such criteria, recognition would be determined by arbitrary factors, such as which court processed the opening or recognition more quickly, rather than by substantive legal considerations.

126 Trunk, p. 267 et seq.

127 For Italy, e.g., see Baccaglioni, p. 42 et seqq., who concludes that an opening ‘judgment’ should be understood as a judgment ascertaining the preconditions required by the foreign *lex concursus* for the opening of the insolvency proceedings, much in the same way as an ordinary judgment ascertains rights, liability and obligations of the parties in dispute.

On the other hand, indirect jurisdiction alone does not prove effective in cases where jurisdiction is disputed, and concurrent ‘putative’ proceedings in different States each claim to have been opened in the proper forum (in other words, in cases of positive jurisdictional conflict)¹²⁸.

This is the reason why usually different methods concur, as it is the case of the EIR, whose rules on recognition allow the circulation of effects of proceedings regarding debtors whose COMI is found within the EU, and grant recognition to the first of such proceedings opened in time (so-called ‘prevention criterion’).

Additionally, an indirect jurisdiction test aims at discouraging foreign States from adopting exorbitant direct jurisdiction criteria—those that establish jurisdiction based on a tenuous or even fictitious connection between the debtor and the State. This, in turn, helps preventing forum shopping, which, while not inherently problematic, can lead to abuses detrimental to creditors. Creditors have a legitimate expectation that insolvency proceedings will be handled in a jurisdiction foreseeable to them, governed by laws they can anticipate. This expectation aligns with the principle found in many insolvency regimes that jurisdiction also determines the applicable law (*Gleichlaufsprinzip*).

The jurisdictional test in the recognition context may present itself in significantly different shapes.

Under the MLCBI, as well as under many national regimes¹²⁹, the requirement of indirect jurisdiction leads to a formal judicial review during recognition proceedings. The court in the recognizing state must assess whether the foreign court had appropriate jurisdiction based on established criteria. Furthermore, under the MLCBI the jurisdictional basis influences the effects of recognition: proceedings in the debtor’s ‘COMI’ produce broader effects than those based on the debtor’s ‘establishment’ in a foreign state.

In contrast, the EIR does not require courts of recognition to examine indirect jurisdiction. Instead, courts must accept the jurisdictional assessment made by the opening court. However, the debtor’s COMI within the EU determines whether the automatic and facilitated recognition system of

128 A further problematic case, where COMI is shifted across two States’ boundaries pending the opening of one the ‘putative’ proceedings is examined by → Piekenbrock, who argues that the solution of such cases warrants different criteria than indirect jurisdiction and prevention (i.e., *lis pendens*).

129 Italy: article 64(1)(a) of Law no. 218/1995; Spain: article 742(1)(3) LC; Germany: § 343(1)(1); Portugal: article 288 CIRE.

Articles 19 et seq. of the EIR applies. This system is reserved for debtors with the strongest ties to the EU—those ‘essentially at home’ in the Union. If a debtor’s COMI is outside the EU, recognition depends on national laws, which are often more restrictive than the EIR’s automatic recognition framework.

In the EIR, COMI and establishment thus serve as direct jurisdiction criteria, determining which EU courts may open insolvency proceedings and which insolvency law applies.

The structure of the EIR aims to replicate a national-level insolvency system across the EU: insolvency proceedings are concentrated in a single court, which assesses all legal prerequisites, including insolvency status and the debtor’s qualifications. EU law adds jurisdictional criteria to this assessment, ensuring that courts of other Member States only need to verify that proceedings do not violate public policy. The logic of automatic recognition aligns with this approach by minimizing potential grounds for refusal.

The feasibility of concentrating insolvency proceedings in a single court within the EU is justified by mutual trust among Member States. EU courts are presumed equally competent in applying EU law, and national insolvency procedures are assumed to respect party rights at all stages, including appeals. This trust is absent at the global level, making it necessary for both the opening court and the recognizing court to evaluate jurisdiction independently, often following MLCBI-inspired models. Such a system can accommodate both automatic and formal recognition approaches, as seen in jurisdictions like Germany and the MLCBI framework.

To complete the analysis of the second constant requirement for recognition, it is important to acknowledge that COMI and establishment are not the only possible jurisdictional criteria. In fact, the use of COMI has been increasingly criticized. Despite the longevity of the EIR and the MLCBI, the precise meaning of COMI remains controversial. Additionally, critics argue that rigid reliance on COMI discourages alternative jurisdictional approaches that could better respect party autonomy and efficiency considerations. For instance, a debtor may prefer to initiate proceedings in a jurisdiction with more effective insolvency procedures or better-qualified professionals, or where the legal framework is more robust than in the COMI state. To this end, some authors have suggested that COMI should give way to a rule whereby the debtor is entitled to elect its insolvency forum in advance and obliged to ‘commit’ to its choice in case of insolvency; thus -these commentators argue- the debtor’s commitment ought not be

disregarded altogether when deciding on the recognition of the proceedings initiated in the elective forum¹³⁰.

Nevertheless, despite these criticisms and alternative proposals, COMI retains *de jure condito* its dominant role in cross-border insolvency law.

Finally, it should be noted that indirect jurisdiction criteria do not necessarily have to mirror the direct jurisdiction rules of the recognizing state. That is, a state may apply different standards when defining which foreign proceedings it recognizes versus which domestic proceedings its own courts can open (contrary to the *Spiegelbildprinzip* in German legal doctrine). However, maintaining separate standards for direct and indirect jurisdiction increases the risk of parallel proceedings—where a domestic proceeding coexists with a foreign-recognized one. If such a scenario is adequately regulated, as in the MLCBI, it may not pose significant issues. However, where the goal is to avoid parallel proceedings altogether, aligning direct and indirect jurisdiction rules may be preferable.

4. Public policy

The final constant requirement for recognition is respect for public policy, ensuring that recognition does not conflict with fundamental principles of the recognizing legal system. Public policy considerations may influence both whether recognition is granted and what effects recognition produces.

Under the EIR, violation of public policy is the sole ground for refusing recognition of judgments rendered in foreign insolvency proceedings (Article 33)¹³¹. The MLCBI, by contrast, adopts broader language, stating that ‘nothing in this Law prevents the court from refusing to take an action governed by this Law if the action would be manifestly contrary to the public policy of this State’ (Article 6).

The distinction in wording reflects differences in the roles played by the recognizing courts in each framework. In the EIR, courts outside the opening state play a largely passive role: upon recognition of a foreign insolvency judgment, they acknowledge its effects and adjudicate disputes accordingly, respecting the *lex concursus*. Thus, public policy considera-

130 See Casey/Gurrea-Martínez/Rasmussen, *passim*.

131 Bork/Mangano 5.43 ss.; Thole in Brinkmann EIR art. 33; Undritz in Schmidt EUInsVO art. 33, with extensive reference to German caselaw; Thole in Stürner/Eidenmüller/Schoppmeyer EUInsVO art. 33; Paulus EUInsVO art. 33; Oberhammer/Scholz-Berger in Bork/van Zwielen EIR art. 33, mn.

tions may only lead to non recognition of the foreign judgment. The MLCBI, however, envisions a more active role for the recognizing court, which may assist the foreign court by granting necessary relief measures. This greater involvement justifies the broader wording of Article 6 MLCBI, whereby public policy becomes a key consideration in deciding not only whether, but also how, to grant assistance to the foreign proceeding's representative¹³².

The content of public policy is largely left to the interpretation of courts and to a case-specific assessment¹³³, that adds a layer of discretion to both recognition regimes. A widely accepted view holds that public policy may be either substantive or procedural¹³⁴. Substantive public policy refers to a set of fundamental rights and values (usually set down in constitutions, human rights law conventions, or sources of law ranking higher than ordinary legislation) that might be touched upon by the effects that the opening and the course of the foreign insolvency proceedings bears on the individual rights of persons involved (mainly, the debtor and its creditors¹³⁵), or on wider policies pursued by the recognizing State, on which cases involving larger businesses may have a significant impact (labour or industrial policies; fiscal or monetary policies; national security etc.). Procedural public policy, on the other hand, includes minimum standards of due process, that need to be observed in the foreign insolvency proceedings, such as the right to be heard, timely notice of the commencement of the proceedings, procedural fairness, equal treatment of the parties, judicial impartiality, and availability of appeals.

Infringement of public policy may stem either from significant differences between the insolvency regime of the foreign country and of the recognizing country, or from a wrongful conduct of the proceedings abroad, or a gross mistake in the application of the *lex fori concursus* by the

132 Van Zwieten in Bork/Veder, mn 1.6.01 et seq.

133 A reasoned report on caselaw on the public policy exception within MLCBI can be found in the Digest of Case Law on the UNCITRAL Model Law on Cross-Border Insolvency (p. 20 et seq.): https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/20-06293_uncitral_mlcbi_digest_e.pdf

134 ECJ 2.5.2006 -C-341/04, ECLI:EU:C:2006:281- *Eurofood IFSC Ltd.*; Bork/Mangano, 5.54 – 5.56.

135 For instance, *In re Toft*, 453 B.R. 186, 55 Bankr. Ct. Dec. (LRP) 61 (Bankr. S.D.N.Y. 2011) (CLOUT case 1209), in *casetext.com* (Stati Uniti) dismissed a request for relief aimed at enforcing an e-mail interception order made by a German court, citing 18 U.S. Code § 2511 (the Wiretap Act) and the Fourth Amendment to the U.S. Constitution.

foreign insolvency court. In the latter case, a review of the case under the public policy exception may even cross the line of a *revision au fond*. Each of two prongs of the public policy exceptions listed above (substantive and procedural) may be successfully pleaded independently from the other: thus, a foreign judgment consistent with the recognizing country's procedural public policy may yield results that go contrary to the same country's substantive public policy¹³⁶. Conversely, a judgment that basically upholds the recognizing country's fundamental substantive law values (or even bears the same effects that an equivalent judgment would have had if passed under the local insolvency regime) may be the result of an unfair proceeding, thus denied recognition.

5. Reciprocity

A further prerequisite of recognition that deserves a separate mention is reciprocity. This requirement is obviously absent from multilateral regimes, such as the EIR, from bilateral treaties, and is not found in numerous legislations unilaterally adopted by States. Importantly, it is not included in the MLCBI, although a few enacting States have added a reciprocity clause to their national regimes based on the UNCITRAL instrument¹³⁷. Only a few jurisdictions maintain this tool in place. Notable examples (China, Russia, and South Africa) are explored in other contributions of this book.

The purpose of reciprocity may be twofold. On the level of relations between States, it may work as a tool for encouraging foreign States to espouse a friendly posture in handling the recognition of their insolvency cases by threatening to retaliate by denying recognition to any future proceedings of the requested State. On a different level, reciprocity may be employed to discourage debtors from forum shopping in certain jurisdictions, namely those in which a potential parallel proceeding opened in the recognizing country may not, in turn be recognized, thus jeopardizing the interests of local creditors, and hindering attempts at achieving some workable form of coordination of proceedings.

136 E.g., *In re Metcalfe Mansfield Alternative Investments*, 421 B.R. 685 (Bankr. S.D.N.Y. 2010) in *casetext.com* sanctioned a third-party non-debtor release ordered by a Canadian bankruptcy court under less stringent conditions than those prescribed by U.S. law.

137 South Africa, Mauritius, Mexico, the British Virgin Islands, Romania, Uganda and Zimbabwe: → Boraine; generally, on the MLCBI and reciprocity, Yamauchi IIR 2007, 145.

The scrutiny of the reciprocity requirement may range from a strict, *de facto* reciprocity test, whereby recognition is granted if and only the foreign jurisdiction has ever recognised a proceeding initiated in the requested stay, to a looser, *de jure* reciprocity assessment, whereby it suffices that under the law of the foreign insolvency forum proceedings commenced in the recognising state may be granted recognition under comparable circumstances. As illustrated in another contribution contained in this book¹³⁸, China has shifted from the former standard (developed under article 204 of the 1982 Law on Civil Procedure¹³⁹) to the latter standard over the years.

Furthermore, reciprocity may be positive or negative, that is recognition may be granted if and only the requesting State would be ready to recognise the forum's proceedings (positive reciprocity), or recognition may be denied to the extent the law of the requesting State does not allow recognition of the forum's proceedings (negative reciprocity). The former (stricter) approach is the most common. The latter (somewhat more defensive) approach is followed, for instance, by Zimbabwe and Spain¹⁴⁰.

These two jurisdictions also exemplify two further versions of reciprocity that are worth mentioning: Zimbabwe, that has enacted a modified version of the MLCBI, has opted a 'blacklist' approach, meaning that proceedings pending in State included in a list made by the Minister of Justice will not be given recognition in the African State. Spain, on the other hand, denies recognition to foreign proceedings either 'absent reciprocity' or in case of 'repeat lack of cooperation' by the authorities of the requesting States (*falta sistemática a la cooperación por las autoridades de un Estado extranjero*: art. 721(2) *Ley Concursal*, or LC). Thus, Spanish law envisions a combination of *de facto* and negative reciprocity, leaving in the hands of its judges a significant amount of discretion.

Lastly, reciprocity is a concept contiguous to that of comity, which is in turn a central notion in American international private law and procedure, though often employed also in other common law jurisdictions¹⁴¹. It is well known that, since the Supreme Court handed down the famed judgment in *Hilton v Guyot*¹⁴², American courts have cited comity conspicuously, and in

138 → Shi/Yan.

139 Cuniberti, p. 279 et seqq.

140 On sec. 152(3) and (4) of the Zimbabwean Insolvency Act 7 of 2018, see → Boraine.

141 E.g. South Africa: → Boraine.

142 *Hilton v. Guyot*, 159 U.S. 113 (1895): "Comity, in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to

all areas of (private and even public) international law¹⁴³. In the context of cross-border insolvency, the notion of comity has long prevented virtually any recognition of foreign insolvencies¹⁴⁴, and it has often hindered cooperation with bankruptcy courts abroad even after the enactment of section 304¹⁴⁵. Curiously, judgments made in recent years have instead employed comity as an argument in support of enhanced cooperation¹⁴⁶. Being that notion so closely tied with developments of U.S. law particularly, it warrants no further examination here, although it may still be relevant for a few jurisdictions within the EU with a common law heritage (Cyprus, Malta, Ireland).

C. Procedure for recognition

I. In general

As previously mentioned, existing cross-border insolvency frameworks generally follow two main approaches to the recognition of foreign proceed-

the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws’.

143 Dodge Columbia LR 2015, 2071.

144 Matter of Berthoud 231 Fed. 529 (S.D.N.Y. 1916) dismissed in 238 Fed. 797 (2d Cir. 1916). See Krause/Janovsky/Lebowitz Fordham LR 1996, 2591; Lee BLJ 2001, 624; Becker ABAJ 1976, 1292; Nadelmann NYULR 1977, 7.

145 Rimel BDJ, 1992, 459 et seq. Notably, comity appeared in subsection (c) among the factors U.S. courts had to consider in deciding an application for relief under sec. 304: ‘In determining whether to grant relief under subsection (b) of this section, the court shall be guided by what will best assure an economical and expeditious administration of such estate, consistent with:

- (1) just treatment of all holders of claims against or interests in such estate;
 - (2) protection of claim holders in the United States against prejudice and inconvenience
- in the processing of claims in such foreign proceeding;
- (3) prevention of preferential or fraudulent dispositions of property of such estate;
 - (4) distribution of proceeds of such estate substantially in accordance with the order prescribed by this title;
 - (5) comity; and
 - (6) if appropriate, the provision of an opportunity for a fresh start for the individual that
- such foreign proceeding concerns.

146 Comity is considered at length in *In re Metcalfe Mansfield Alternative Investments*, 421 B.R. 685 (Bankr. S.D.N.Y. 2010) in *courtlistener.com*, paragraphs III.A and III.B particularly.

ings. The first is automatic recognition, where foreign insolvency proceedings take effect in the recognizing jurisdiction without requiring a court decision. The second approach, by contrast, makes recognition contingent on a formal review and decision by an authority in the recognizing state—typically a court—based on the prerequisites outlined above.

A mixed approach is also possible, as seen in Spain. There, recognition of the opening decision requires an *exequatur* (Article 742 LC), while subsequent decisions related to the conduct and closure of the insolvency proceedings are recognized automatically (Article 744 LC).

This section will examine the two primary approaches, each of which presents distinct features and challenges, though some common issues arise in both.

II. Automatic recognition

1. Key issues

The automatic recognition model raises several questions¹⁴⁷. First, from what point in time do foreign insolvency proceedings produce legal effects in the recognizing country? Second, are additional formalities required for certain effects to materialize, such as registering an order in a public register? Third, in the absence of a formal recognition ruling, what mechanisms exist for ex-post review by those who wish to challenge recognition? Lastly, how and when do the effects of recognition come to an end?

2. Timing of effects

There are two main approaches to determining when foreign proceedings produce effects in the recognizing state:

- As soon as the foreign judgment or order becomes effective in the originating jurisdiction.
- Only once the foreign judgment has become final (i.e., after all appeals have been exhausted).

The first approach—followed by the EIR (Article 19), Germany (§ 343 InsO), Portugal (Articles 288 and 293 CIRE), and Belgium (Articles 22(1)

147 On disadvantages of the system of automatic recognition more in detail see Garašić, *Recognition of Foreign Insolvency Proceedings*, pp. 343–344.

and 121(1) DIP)—creates a mirroring mechanism, ensuring that the foreign insolvency order produces identical effects in both jurisdictions. This model requires a high level of trust between legal systems, particularly to protect the rights of local creditors who may seek to challenge the foreign order in its original forum. This is why article 5(2) EIR explicitly mandates Member States to make appeals against opening decisions available to all parties in interests. Without such safeguards in place, objections based on procedural public policy may often arise.

The second approach—adopted, for example, by Italy (Article 64(1)(d), Law No. 218/1995) and Spain (Article 742(1)(2) LC)—introduces a potential gap between the moment when the foreign insolvency order takes effect and when it is recognized in the receiving jurisdiction. To mitigate risks during this interim period, courts in the recognizing state may consider imposing precautionary measures to protect creditors' interests.

3. Additional formalities

In some cases, specific effects of an insolvency proceeding—especially those affecting third parties unaware of the case (e.g., a debtor's debtors or immovable property owners)—depend on registering the decision in a public register. Jurisdictions that apply automatic recognition may still require foreign insolvency decisions to be entered into local registers to ensure they have full legal effect.

For example, under German law (§ 350 InsO), a foreign insolvency decision must be registered for certain effects to apply (e.g., preventing a debtor's debtor unaware of the proceeding from being discharged by paying in the hands of the insolvent debtor), in the same way as domestic decisions (§ 350 InsO). The EIR -Article 31(2)- contains a similar provision, supplemented by Article 28 EIR, which obliges insolvency practitioners to request the publication of judgments in any Member State where the debtor has an establishment (thus, presumably, most of its debtors).

4. Ex-post review of recognition prerequisites

Challenges to recognition can arise either:

- Incidentally, during a lawsuit or proceeding where the recognized foreign decision's effects are contested (e.g., a dispute over the validity of a contract signed by a debtor after their divestment in a foreign proceeding).

- As a stand-alone action, via a declaratory judgment (e.g., Article 67(1), Italian Law 218/1995; Article 744, Spanish Law 29/2015, for judgments other than the opening decision).

A key difference between these methods is *res judicata*: a declaratory judgment has conclusive legal force (thus prevents the parties to it to relitigate recognition), whereas an incidental review may not, depending on whether local procedural law extends the scope of *res judicata* to incidental questions.

5. Termination of recognition

In jurisdictions following the automatic approach, recognition of the foreign closing decision will typically terminate the effects of the insolvency case without requiring a separate court ruling. Since the original opening decision was recognized automatically, there is no need for a local court order to remove its effects. For instance, once the foreign closing decision becomes effective or final, the debtor regains control over their assets in the recognizing state (Article 32(1) EIR).

III. Formal recognition (or ‘non-automatic’ recognition)

A non-automatic recognition system raises different procedural questions:

- Who has standing to apply for recognition?
- Which court has jurisdiction to hear the recognition request?
- Is the recognition proceeding published?
- What evidence is required to prove that the prerequisites for recognition are met?
- What interim measures can be granted to preserve the effects of the foreign proceedings pending recognition?
- What are the effects of recognition? Are they limited to the country where the proceedings is carried-through or are they (should they be) recognized in other countries as well?
- How can the recognition’s effects be modified or revoked in response to later developments abroad?

Some of these questions are briefly addressed below.

1. Standing to apply for recognition

Standing may be either:

- Broadly available to any interested party (e.g., creditors, affected employees, etc.), as under Spanish law (Article 54, Law No. 29/2015).
- Restricted to the foreign insolvency administrator or debtor-in-possession, as in the MLCBI.

A broad approach recognizes that creditors have a legitimate interest in securing recognition, especially to prevent asset dissipation before the foreign proceeding takes effect locally. Similarly, employees or other stakeholders may have an interest in preventing disorganized liquidation. Arguably, public authorities (such as prosecutors or financial regulators) should also have standing to seek recognition, especially when they can instead open local insolvency proceedings.

A restrictive approach to standing could lead affected parties to pursue local proceedings instead, potentially disrupting the orderly administration of the insolvency case as a whole.

2. Jurisdiction for the recognition process

This question is highly dependent on national regimes of judicial organization.

The competent court for recognition may be determined based on:

- Territorial proximity—typically, the court in the jurisdiction where the debtor has an establishment or assets.
- Judicial specialization—courts handling recognition should have expertise in insolvency law, as the process often involves technical concepts like COMI, establishment, and insolvency effects.

Even in jurisdictions that follow automatic recognition, specialized courts may still play a role. For example, they may issue precautionary measures before the foreign proceeding is opened or order the publication of the foreign decision in local registers (§ 348 InsO; Article 291 CIRE).

3. Publicity of the recognition proceeding

The MLCBI does not contain provisions on the publicity of recognition proceedings or the decisions in such proceedings. Slovenia, which has adopted the MLCBI, provides for publication of the decision on recognition (Art.463 of the Slovenian Insolvency Act)¹⁴⁸. In Croatia, both the commencement of such proceedings and the decision are published (Art.405 and Art.407 (3) of the Croatian Bankruptcy Act.)

4. Interim measures pending formal recognition

Securing the effects that will follow the formal recognition of the foreign proceeding may be necessary if the recognition process takes time. This is usually achieved by way of interim measures ordered by the same court before which recognition is sought. Obviously, the content of such measures is determined by the *lex fori*, and may either mirror that of measures that may be available pending the opening of a local proceeding, or be specifically tailored for cross-border cases; the latter approach seems prevalent (see, e.g., art. 748 of the Spanish *Ley Concursal*, or provisions based on art. 19 MLCBI), and is arguably based on the assumption that the impact of such measures will be, most times, different than that of interim measures ordered under the local insolvency law with regard of ‘national’ debtor (which have presumably a more significant degree of contact with the local forum than a debtor made insolvent abroad).

5. Effects of formal recognition in general

Countries which provide for a formal recognition proceeding following the MLCBI determine the effects of such recognition basically by substantive (procedural or material) rules, distinguishing between recognition of foreign main or non-main proceedings¹⁴⁹. Croatia as a country, which also provides for the possibility of formal recognition, but has developed its own rules in this respect (see Art. 400–409 of the Croatian Bankruptcy Act), determines the effects of recognition more generally: the foreign decision

148 In contrast, for example, Poland and Romania do not contain any provisions on publication in this context.

149 Cf. the example of Art.466 – 468 of the Slovenian Insolvency Act (ZFPPIPP).

opening an insolvency proceeding is given, in principle, the same effects as a Croatian decision¹⁵⁰, but this does not appear to modify the general conflict of laws rules¹⁵¹. This is to say, that the foreign decision has, with some exceptions the effects foreseen under the foreign *lex fori concursus*. The reference in Art.407 (1) of the Croatian Bankruptcy Act seems mainly to mean that formal recognition has an *erga omnes* effect.

Nothing specifically is said in this context about the effects of formal recognition in other countries. It may be argued, however, that formal recognition in a separate, published proceeding giving a broad circle of participants the right to start such a proceeding or intervene in it and which gives the decision *erga omnes* effect, is comparable to recognition of a foreign judgment in an action upon the judgment which has been decided by the CJEU in the H Limited case¹⁵² to have EU-wide effect.

6. Termination of effects of recognition

Termination of the effects of recognition, finally, requires the repeal of the exequatur order, that is achieved by way of a specific procedure, often an extremely simplified one. Since this feature is something unusual for cross-border civil procedure generally, when specific provisions for insolvency cases are in place, the revocability of insolvency exequaturs is usually explicitly foreseen: see article 742(5) LC (Spain), and article 17 MLCBI. The latter provision mentions, as grounds for removal of the recognition judgment, both the lack of prerequisites of recognition, and their subsequent ceasing. The two aspects should remain distinct: lack of grounds for recognition are to be pleaded by way of appeal against the exequatur order; while their subsequent ceasing should be ground for a removal of the order. The difference between the appeal and the removal lies in the fact that the former is usually time limited. If the (initial) lack of grounds for recognition could be pleaded with no time limits, the main advantage of the exequatur approach (that is, certainty) would be taken away. Thus, conveniently, the Spanish law distinguishes between the removal (*modificación, revocación*: article 742 LC, limited to subsequent changes or cease of

150 Art.407 (1) Croatian Bankruptcy Act.

151 Cf. Art.407 (2) Croatian Bankruptcy Act in conjunction with Art.395 – 397 Croatian Bankruptcy Act.

152 Judgment of 7 June 2022, J v. H Limited, case C-568/20, ECLI:EU:C:2022:264.

recognition grounds) of the exequatur, and its challenge (*recurso*: article 55 of Law no. 29 of 2015).

D. Effects of recognition of foreign insolvency proceedings

Whatever approach to recognition is taken (MLCBI approach, EIR approach or other), the legal consequences of recognition of foreign insolvency proceedings need to be determined. This will now be addressed in more detail.

I. MLCBI concept – EIR concept – other approaches

Under the MLCBI, the term ‘recognition’ refers to a formal proceeding, granting in case of recognition far-going (though still including elements of judicial discretion) effects to the foreign insolvency proceeding¹⁵³. Recognition in this sense is just one, albeit very important element of giving assistance to (or cooperating with) a foreign insolvency proceeding. Assistance to a foreign insolvency proceeding can, however, also be granted outside formal recognition¹⁵⁴. Formal recognition leads to a broader range and higher intensity of support measures, also at later points in time after the formal recognition has been granted. Some legal consequences may be discretion-based¹⁵⁵, other consequences follow directly from recognition¹⁵⁶. Assistance to a foreign insolvency proceeding outside formal recognition is, basically, obligatory, but its limits are not clearly defined¹⁵⁷ and it includes significant elements of judicial assessment up to discretion¹⁵⁸.

Under the EIR recognition is a general concept describing the prerequisites and legal consequences of giving effect to a foreign insolvency proceeding (Art.19 EIR). The legal consequences of recognition are stated

153 MLCBI Chapter III.

154 MLCBI Chapters II and IV, partly also Chapter V.

155 In particular Art.19, 21 and 22 MLCBI.

156 E.g. Art.20 MLCBI.

157 Art.9 and II MLCBI deal with the right of foreign insolvency representatives to courts in the requested country, Art.25 – 27 MLCBI address in a general manner ‘cooperation’ and ‘information exchange’.

158 Compare Art.9 and II MLCBI (no mention of discretion) with Art.25 (1) [duty of cooperation ‘to the maximum extent possible’] and Art.27 [implementation of cooperation ‘by any appropriate means’].

clearly, at least in theory, in the EIR: Recognition of the foreign decision opening the insolvency proceeding leads to the attribution of legal consequences to this decision in the recognizing State (Art.20 EIR). The legal consequences are determined at first according to the conflict of laws method (*lex fori concursus* and exceptions), which is complemented by various particular substantive rules dealing with particularities of the recognition situation. Recognition of other foreign decisions rendered either ‘in’ the foreign insolvency proceeding, in particular by the foreign insolvency court, or rendered by other courts, even in other countries than the *forum concursus*, in insolvency-related cases (cf. Art. 32 EIR) has similar consequences, which are however more limited corresponding to the subject-matter of such decisions.

Both the EIR and the MLCBI distinguish recognition (automatic or formal) from the conduct of a secondary insolvency proceeding, which is typically more costly, but also potentially more far-going than recognition and is governed by its own *lex fori concursus*. However, a secondary insolvency proceeding can also serve as an instrument for cooperation with foreign insolvency proceedings, in particular a foreign ‘main’ proceeding.

As the foregoing comparative overview has shown, today basically three approaches to recognition of foreign insolvencies exist in the world. A large number of countries, among them four EU member states¹⁵⁹, have adopted the MLCBI¹⁶⁰. These EU member states apply the EIR to inner-EU relations, the MLCBI for relations with non-EU countries.

The most significant deviations from the MLCBI shows the law of Poland. Poland has kept, also with regard to non-EU insolvencies, the general concept of recognition of foreign decisions, with a particular focus – like under the EIR – on the decision ‘opening’ the foreign insolvency proceeding¹⁶¹. However, Poland has integrated the MLCBI into its provisions on cross-border insolvency law, often with modifications. Following the MLCBI, Poland foresees for recognition of foreign insolvencies a formal recognition proceeding (Art. 386 – 396 Polish Bankruptcy Law), leaving open whether ‘automatic’ (incidental) recognition is also possible. Again,

159 Greece, Poland, Romania, Slovenia.

160 See the status information by UNCITRAL, https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency/status (presently 60 states) (last accessed 11.07.2025).

161 See Heading of Part II Title III of the Polish Bankruptcy Law and Art. 392, 394 Polish Bankruptcy Law.

following the MLCBI, the Law contains provisions on cooperation with foreign insolvency courts and insolvency representatives, which do not explicitly require (formal) recognition¹⁶². Following the EIR (and in contrast with the MLCBI), the Polish Bankruptcy Law contains a conflict of laws rule relating to the effects of foreign (recognized) decisions. In contrast with the EIR, however, this provision does not refer to the *lex fori concursus* of the foreign proceeding, but to Polish law (Art. 397 (1) Bankruptcy Law; see also Art. 403 (1) of the Law). This somewhat resembles Art. 170 of the Swiss PIL Act but does not include a separate ‘Minikonkurs’ (with, e.g. a Polish ancillary administrator) as the one foreseen under Swiss law.

Slovenia has also integrated the MLCBI in its provisions on cross-border insolvency law¹⁶³. Following the MLCBI more closely than the Polish legislator, the Slovenian Act does not primarily use the concept of recognition of foreign insolvency ‘decisions’, but of foreign insolvency ‘proceedings’¹⁶⁴. In contrast with Poland, however, the Slovenian Act provides for detailed conflict of laws provisions (Art. 479 – 484 ZFPPIPP) which appear to apply also to foreign insolvencies, in so far as the Act does not provide for other rules, in particular substantive rules based on the MLCBI.

A smaller, but still significant number of countries (mostly members of the European Union) use for cross-border insolvency relations with non-EU countries the approach of the EIR, though also with modifications¹⁶⁵. Austria, Belgium¹⁶⁶, Germany and Portugal follow by and large the EIR model: recognition of foreign insolvency decisions as basic approach, combined with rules on conflict of laws and some substantive provisions. Czechia, Hungary and Slovakia also follow, in principle the EIR approach, but provide only for very few rules on recognition of foreign insolvencies¹⁶⁷.

162 Polish Bankruptcy Law Part II Title V, Art. 413 – 416.

163 Slovenian Insolvency Act (ZFPPIPP) Chapter 8.

164 See heading of Chapter 8.3 ZFPPIPP and e.g. Art. 459 – 463 ZFPPIPP.

165 Supra at A.II

166 In contrast with the EIR, however, Belgium provides – line with the French legal tradition – for a formal ‘*exequatur*’ proceeding as a prerequisite of full recognition, Art. 121 § 1 Belgian PIL Code.

167 Art.III (5) and (3) of the Czech PIL Act (2012) [recognition of foreign decisions in insolvency proceedings], Art. 109, 113 and 114 of the Hungarian PIL Act (2017) [not expressly mentioning conflict of law with regard to foreign insolvencies], Slovakian Bankruptcy and Restructuring Act (2005), Part 5, sec.172 – 175. Sec. 173 and 175 deal with recognition of foreign insolvencies, sec. 173 referring to decisions in insolvency proceedings, sec. 175 to recognition of insolvency ‘proceedings’]. Seems to be based

Croatia and Spain have chosen more independent approaches. Both countries share the EIR approach based on recognition of foreign insolvency ‘decisions’¹⁶⁸. Both countries also address issues of conflict of laws in the recognition context but use different techniques: Croatia provides for ‘general provisions’ including rules on conflict of laws¹⁶⁹, but adds various substantive rules in the recognition context (Art. 412 – 426 Croatian Bankruptcy Act). The Spanish Act separates conflict of laws rules for domestic proceedings (Art. 723 – 725 bis) and for the recognition context. The effects of recognized foreign proceedings are also determined by the *lex fori concursus*, but with fewer exceptions than in domestic insolvencies (Art. 745 and 745 bis of the Spanish Act¹⁷⁰). Both Croatia and Spain provide for formal recognition proceedings¹⁷¹, but admit also incidental recognition (cf. Art. 409 of the Croatian Act¹⁷²). It should also be mentioned that both Croatia and Spain provide for some effects of foreign proceedings (or cooperation with foreign proceedings) without making mention of recognition (cf. Art. 399 Croatian Act, Art. 734 nr.2 and Art. 748 (2) Spanish Act).

A third group of countries have chosen their own approach, usually providing for only few specific rules or applying general rules of recognition of foreign judgments or traditional common law rules of comity¹⁷³. This does not exclude, of course, the existence of rich and recognition-friendly jurisprudence on recognition of foreign insolvencies on the basis of patchy

on *lex fori concursus* rule but grants the court discretion (cf. sec. 175 (2) of the Slovakian Act).

168 See Croatian Bankruptcy Act, Chapter II (International bankruptcy law), Subchapter III, see also Art. 400 – 410, 427 of the Act. For Spain see Art. 742, 744 Spanish Bankruptcy Act [though the heading of the chapter on recognition mentions ‘proceedings’; similar to the EIR].

169 Art. 395 – 397 Croatian Bankruptcy Act. Their applicability also to the recognition context is confirmed in Art. 411 (1) of the Act.

170 They cover mainly only labour relationships (*lex contractus laboris*).

171 Very detailed and differentiated regulation of this issue in Art. 400 – 409 of the Croatian Act. The Spanish provisions are shorter (Art. 742 – 743).

172 Incidental recognition is also mentioned in Art. 744 (2) sentence 2 of the Spanish Act, but the provision might apply only to insolvency-related decisions, not to the opening decision. Both laws distinguish also the insolvency-specific recognition proceeding from enforcement *strictu sensu* (cf. Art. 412 Croatian Act, Art. 746 Spanish Act). However, Spanish law refers subsidiarily to general rules on exequatur also for the recognition proceedings under the Bankruptcy Act (see Art. 741 (1) of the Act).

173 *Supra* at A.II.

legislation¹⁷⁴. A remarkable special case in this group is Switzerland, which has developed its own particular approach to recognition of foreign insolvencies (decisions in insolvency proceedings) – a combination of elements of the EIR and secondary proceedings ('mini-proceeding').

II. Conflict of laws?

Inspired by its regulations on different matters of conflict of laws (Rome I, Rome II and other regulations) as well as on recognition of foreign judgments (in particular the Brussels Ia Regulation), the EU has inserted in the EIR a complete set of conflict of laws rules for cross-border insolvencies¹⁷⁵. A peculiarity of this approach is that it applies both to domestic insolvency proceedings (in the EU) and to recognition of foreign proceedings. However, the EIR deals only with recognition of insolvency proceedings between EU member states, while recognition of non-EU insolvencies is left to the rules of the EU member states. Some of them have chosen to adopt the EIR rules, with some modifications, also in relations with third countries, others have insofar opted for the MLCBI or have for the time being passed only selective or no particular legislation.

The EIR approach is to apply the *lex fori concursus* to insolvency proceedings (domestic or foreign) and their legal consequences. Relating to recognition of foreign proceedings, this corresponds to the general approach as to the effect of foreign judgments under the Brussels Ia Regulation¹⁷⁶. However, the effects of a foreign insolvency proceeding are much broader and develop over the time of a proceeding, which differs significantly from a typical judgment in a civil or commercial dispute. Judgments in cases under the Brussels Ia Regulation deal with specific, limited disputes. In contrast, insolvency proceedings are the basis for a significant number of further procedural steps and numerous legal consequences both of a procedural and material character. They do not only decide on a

174 Examples are France, Italy and many Common Law jurisdictions.

175 Forerunners of this approach were the Council of Europe's Istanbul Convention on Certain International Aspects of Bankruptcy (cf. Art. 10 (1) of the Convention) and other international treaties, e.g. the Austrian-German Bankruptcy Treaty of 1979.

176 ECJ, judgment of 04.02.1988, *Hoffmann v. Krieg*, ECLI:EU:C:1988:61. Note that even under the Brussels Ia Regulation, modifications of this approach are discussed, based on ECJ jurisprudence (judgment in *Gothaer Allgemeine Versicherung v. Samskip* of 15.11.2012, ECLI:EU:C:2012:719).

specific case of the past, but they carry an enduring character with strong business content. The EU has taken this into account, creating a significant number of special conflicts rules deviating from the *lex fori concursus*. Such rules include, mainly, the effects of the insolvency proceeding on employment contracts, the rights of secured creditors (rights in rem), set-off, contracts relating to immovables, the effect of insolvency proceedings on pending litigation or arbitration and the law applicable to the avoidance of transactions¹⁷⁷. In some instances, the EIR provides also particular substantive rules or combines the conflict of laws provisions with substantive rules.

The MLCBI, on the other side, has left the question of conflict of laws in insolvency largely open. Some provisions of the MLCBI contain limited references to conflict of laws¹⁷⁸. The MLCBI is implicitly based on the conflicts rule of *lex fori concursus*, sometimes referring also to the law of the recognizing country. Other possible exceptions to the *lex fori concursus* are not defined. Some courts exercising their discretion under the MLCBI have from time to time chosen to apply or at least consider application of foreign law¹⁷⁹. The lack of conflict of laws rules has, however, been found to be a weakness of the Model Law by many observers, and UNCITRAL has therefore decided to take-up work on a new, additional legal instrument on conflict of laws¹⁸⁰. As the project stands now¹⁸¹, it will formulate a set of conflict of laws rules, based on the *lex fori concursus* principle, but providing for some exceptions: labour contracts and relationships; payment,

177 The application of these particular conflicts rules has led some courts to de facto non-recognition of the effects of foreign insolvency proceedings in the area of the special conflicts rules, arguing that domestic law (e.g. property law or labour law) presupposes the opening of a domestic insolvency proceeding. This argumentation misunderstands the sense of the respective conflicts rules: In so far as they refer to the law of another country than the *lex fori concursus*, that law is to be applied ‘as if’ a (functionally equivalent) insolvency proceeding had been opened in the respective country, see, e.g. Bork/Mangano p.140 note 4.35. This ambivalence should be clarified at a future revision of the EIR, but this is a general issue, not specific for relations with non-EU countries.

178 E.g. Art.5, 7, 11, 13, 20 (2), 21 (1)(g) and (3) EIR.

179 Cf., e.g. U.S. Bankr. Ct. for the District of Virginia, In re Qimonda AG, 462 B.R. 165; Federal Court of Australia — Victoria District Registry, Appleyard v. Crawford Farms Ltd. [2012] FCA 1373, and numerous others.

180 Cf. https://uncitral.un.org/en/working_groups/5/insolvency_law (Applicable law in insolvency proceedings project) (last accessed 17.07.2025).

181 See the UNCITRAL Secretariat’s note on ‘Applicable Law in Insolvency Proceedings’, A/CN.9/WG.V/WP.202, prepared for Working Group V (Insolvency Law), Sixty-sixth session, New York, 12–16 May 2025.

clearing and settlement systems, regulated financial markets and other multilateral trading facilities; close-out netting in certain situations. In contrast with the EIR, there are presently no exceptions from the *lex fori concursus* for transactions relating to immovables and avoidance of transaction, and no special substantive rules on rights in rem¹⁸². Like the EIR and the MLCBI, the future instrument on applicable law in insolvency proceedings will also apply to the recognition context, however with a significant deviation from the EIR. It contains a Chapter III on ‘Recognition of the effects of the *lex fori concursus* and other laws applied by the foreign court’, which includes, at present, the following sole provision:

‘Giving effect to the *lex fori concursus* and other laws applied by the foreign court

Upon recognition of a foreign proceeding, the court may grant relief by giving effect to the *lex fori concursus* and other laws applied by the foreign court in accordance with chapter II of these legislative provisions.’¹⁸³

In its draft commentary, the UNCITRAL Secretariat has given details about the ongoing discussions relating to this provision. Basically, the proposed provision corresponds to existing jurisprudence under the MLCBI, making the rule more explicit. In contrast with the EIR, the proposed rule grants courts judicial discretion with regard to applicable law. It specifies the potentially applicable conflict of laws rules, thus suggesting that the foreseen exceptions to the *lex fori concursus* (for labour contracts etc.) might be applied also in the recognition context. Other exceptions than the ones provided for in the proposed instrument are not mentioned. Also, the provision refers only to laws ‘applied by the foreign court’, which may cause difficulty in understanding whether this refers as such to the conflicts rules of the foreign forum concursus or whether some decision of the foreign court is required. From the EU’s perspective, the proposed formula may appear to be too weak for aspired legal security and previsibility.

Existing national legislations – both within and outside the EU – differ with regard to conflict of laws in the recognition context. Austria¹⁸⁴, Ger-

182 See Secretariat’s note (supra note 181), pp.26 – 34.

183 Secretariat’s note (supra note 181), p.36.

184 Sec. 221 – 234 of the Austrian Insolvency Code (‘general provisions’). Sec. 241 (1) Austrian InsO repeats the *lex fori concursus* principle for the powers of a foreign insolvency representative in Austria, thereafter adding some substantive provisions.

many¹⁸⁵ and Portugal¹⁸⁶ apply, basically, the EIR's conflict of laws rules (with minor modifications) also to recognition of non-EU insolvencies¹⁸⁷. Belgium and Spain take a similar approach (orienting themselves also for relations with non-EU countries along the lines of the EIR) but use a different legislative technique. They regulate conflict of laws separately from recognition¹⁸⁸, but refer in the recognition context to the conflict of laws rules applicable in Belgian or Spanish proceedings¹⁸⁹. The advantage of this approach is that it gives a basis for more specifically tailoring conflicts rules to cases of recognition of non-EU insolvencies. It is worth discussing, whether the conflict of laws rules for inner-EU cases (where all EU countries apply the same conflicts rules and are also harmonizing substantive rules of insolvency) fit also the needs of cooperation with non-EU insolvencies on a global scale.

Croatia's approach lies somewhere between the forementioned models. On the one hand, Croatia's Bankruptcy Act contains (like the EIR and Austria and Germany) 'general provisions', which include the *lex fori concursus*-rule (Art. 395 of the Act) and special conflicts rules for rights in rem and employment contracts (Art. 396 and 397 of the Act). On the other hand, Croatia regulates the effects of recognition of foreign insolvencies in detail, differentiating between various constellations of recognition (recognition leading to a secondary proceeding, other recognition etc.). The most general provision in this context is Art. 411 (1) of the Croatian Act, which

185 Sec. 335 – 340 of the German Insolvency Code ('general provisions'). A specific conflicts rule for the effects of foreign insolvency proceedings upon immovables situated in Germany is laid-down in sec. 351 (1) German InsO.

186 Art. 276 – 286 Portuguese Insolvency Act ('general provisions').

187 It should be noted that Art. 351 of German Insolvency Code establishes for the recognition-context only a unilateral substantive rule (territorial limitation) on rights in rem in Germany (Art. 351 of the Code), while Austria provides for this – more closely to the EIR – universal (bilateral) rules, Art. 222 and 224 of the Austrian Code. Portugal adopts at this place a bilateral conflict of laws rule (Art. 280 Portuguese Insolvency Act).

188 For Belgium: Art. 119 Belgian PIL Code (for insolvency proceedings or other court proceedings in Belgium). For Spain: Art. 723 – 731 and Art. 732 of the Spanish Bankruptcy Act.

189 See Art. 122 § 2 Belgian PIL Code referring to Art. 119 § 2 – 4 of the Code. For Spain: Art. 745 (1) of the Spanish Insolvency Code referring to Art. 723 – 731 of the Code. See also Art. 743 (4) of the Code (repeating the *lex fori concursus* principles for powers of foreign insolvency representative after recognition). Art. 745 bis of the Code provides a special conflicts (and substantive) rule on Spanish labour relations in the recognition context.

refers, similarly to the laws of Belgium and Spain, to the conflict of laws rules applicable in domestic insolvency proceedings.

Slovenia, while having adopted the MLCBI, has also passed detailed rules on conflict of laws, which correspond – by and large – to the EIR and apply also to foreign insolvencies (Art. 479 – 484 ZFPPIPP). The Slovenian example shows that the MLCBI is not in contradiction with the EIR's conflict of laws rules.

Poland offers a completely opposite model, applying to (recognized) foreign insolvencies the effects of Polish insolvency law (Art. 397 (1) Polish Bankruptcy Law; specified for some issues in Art. 403 of the Act). This resembles the Swiss 'Minikonkurs' (Art. 170 Swiss PIL Act) but does not require the appointment of a Polish insolvency representative, though some control by Polish courts exists (see Art. 401 Polish Bankruptcy Act).

III. Substantive law

Both under the EIR and the MLCBI, the effects of recognition of foreign insolvencies are determined to a high degree by specific substantive rules of a procedural or material content (e.g. stay of enforcement proceedings or modification of non-insolvency rules contained in Civil Codes). In the MLCBI the use of substantive rules is the general approach, even though the Model Law includes some more or less hidden rules on conflict of laws¹⁹⁰. In the EIR, the approach is a combination of conflicts and substantive rules. Some of these rules are included in the EIR's special chapter on recognition of foreign proceedings (Chapter II), but others are contained in the general provisions of the EIR (Chapter I) and other chapters. Similarly, the MLCBI deals with legal consequences of recognition not only in Chapter III (on recognition), but also in other chapters.

In this comparative report it is not possible to examine all substantive provisions in detail, but their system will be analysed, and a focus will then be laid on individual provisions or aspects of – to the view of the authors – particular relevance. The focus will lie here on a comparison of the MLCBI and the EIR, not so much on national legislations.

190 See *supra* at note 179.

1. Links between prerequisites and substantive effects of recognition

In principle, both under the EIR and under the MLCBI, the prerequisites and legal consequences of recognition of foreign insolvencies are independent categories, i.e. when the prerequisites of recognition exist and, as the case may be, have been formally recognized as such by a court, the full consequences of recognition step into force. The kind of consequences depends, under EIR, on the specific kind of recognized decision (e.g. the decision opening an insolvency proceeding or more specific follow-up decisions), while under the MLCBI consequences are set out autonomously and in a largely uniform way in articles 20 and 21. On one hand the effects much depend on the type of assistance that is sought upon by the foreign representative filing for recognition, on the other hand the recognizing (or otherwise ‘assisting’ or ‘cooperating’) court retains a considerable margin of discretion in deciding the content of assistance measures granted in individual case.

There are some particular links between (at least certain) prerequisites and substantive consequences of recognition.

Firstly, public policy of the recognizing state – which is foreseen as a requisite (also) of recognition of foreign insolvencies both under the EIR and the MLCBI – may in some cases hinder recognition completely, while in other cases it may only exclude recognition of some effects of the foreign proceedings, e.g. effects against unfairly treated creditors or specific effects which are seriously incompatible with fundamental ideas of justice and policy in the recognizing state. Also, the requirement of reciprocity – in so far as it is applied in international insolvency law¹⁹¹ – may lead to non-recognition of certain substantive effects of foreign insolvencies. A similar phenomenon exists, when some insolvency-based or insolvency-related decisions are not recognized, while the insolvency proceeding generally is recognized.

191 Neither the EIR nor the MLCBI contain a requirement of reciprocity. However, reciprocity is a requirement for recognition also in insolvency cases in several EU member states: Czechia, Hungary, Slovakia, Spain, also in Finland and the Netherlands (treaty-based reciprocity). In contrast, Switzerland has dropped this requirement in 2019 → see Rodríguez. Outside the EU, e.g. South Africa has introduced reciprocity into its MLCBI-based legislation. Russia has adopted *de facto* reciprocity as a ‘liberal’ standard in comparison with treaty-based reciprocity. In Common Law countries, reciprocity has sometimes been required as an element of comity.

Secondly, the MLCBI distinguishes between ‘effects’ (art. 20) and ‘relief’ (art. 21). The former stem automatically from the recognition of proceedings that qualify as ‘main’ (proceedings), i.e. which are pending in the State where the debtor has its COMI. The latter may be granted in any recognition case (i.e., regardless whether the foreign proceedings are pending in the COMI state or in any other state where the debtor has an establishment). Thus, under the MLCBI, the jurisdictional requirement influences the content of the effects of recognition.

A significant difference between ‘effects’ and ‘relief’, and, in turn, between recognition of ‘main’ and ‘non-main’ proceedings, is that in determining the consequences of the recognition of main proceedings the recognizing court enjoys little discretion. In contrast, in case of recognition of non-main proceedings, articles 21, § 1 and 22, § 1 MLCBI assign the court the task to weigh the interests of the parties who will benefit from the assistance (usually, the foreign representative and the foreign creditors) against those of the parties who may be affected from it (mostly, local creditors), and consequently subject relief to any condition it considers appropriate (art. 22, § 2 MLCBI).

2. Links between substantive effects and the recognition procedure

There are also links between the substantive effects of recognition and the recognition procedure. Under the MLCBI, formal recognition under Chapter III leads to a broader range of substantive consequences than other assistance or cooperation, e.g. under Chapter II or IV MLCBI or under art.7 MLCBI in conjunction with ‘other laws’.

The EIR, foreseeing only automatic recognition, seems to be based on the assumption that the effects of recognition are generally accepted in a uniform manner within the EU even without a formal recognition procedure. The EIR does not provide a clear answer when recognition comes up in different contexts. In such cases, recognition may be assessed differently by various courts, as there is no judgment-based *erga omnes* effect of automatic recognition. National legal systems may answer this question differently under the EIR or perhaps the CJEU might find a uniform solution.

National legal systems of EIR countries, which provide for a mixed system of formal and incidental recognition, such as e.g. Croatia, sometimes distinguish between ‘*erga omnes*’ effects of formal recognition and ‘*inter partes*’ effects of incidental recognition (cf. Art. 407 (1) and Art. 409 (1) Croatian Bankruptcy Act).

3. Relationship with rules on concurrent proceedings

Thirdly, there are links between the rules on recognition (which include the legal consequences of recognition) and the rules on concurrent proceedings. Under both the MLCBI and the EIR domestic proceedings (e.g. secondary proceedings) are given priority over recognition of foreign proceedings, which however continue to be recognized even in the presence of a foreign proceeding in so far as there is no conflict between the two (or more) proceedings. This topic is discussed in more detail in the general contribution on concurrent proceedings in this book¹⁹².

4. The issue of territorial or extraterritorial effect of foreign insolvencies (or respective decisions)

One of the basic and extensively discussed aspects of cross-border insolvency law concerns the question whether insolvency proceedings should try to extend (and regulate) all property belonging to the debtor globally or whether they should only relate to property situated in the country of the forum concursus¹⁹³. The discussion is sometimes phrased in so-called principles of international insolvency law such as ‘universality’ and ‘territoriality’ of insolvency law and insolvency proceedings¹⁹⁴.

The EIR – and many national legislations – distinguish between insolvency proceedings which should extend to all debtor’s property wherever situated, while other proceedings are seen as limited to property situated in the state of the forum concursus¹⁹⁵. The MLCBI is more open in this respect. Although it also distinguishes between main (‘COMI-based’) and non-main proceedings, it leaves the intended universal or only territorial effect of non-main proceedings mostly open, providing for territorial auto-limitation only in the specific case of concurrent non-main proceedings¹⁹⁶

192 → Trunk (concurrent proceedings).

193 The expression ‘relate to property’ (worldwide or only in the state of the forum concursus) is usually seen as synonymous for the geographical application of insolvency law in general: worldwide (i.e. also extraterritorial) or only in relation to inland property of the debtor.

194 Cf → Moustaira and → Fabriès-Lecea.

195 Cf. Art. 28 MLCBI, Art. 3 (2) sentence 2 EIR. Examples from national legislations: sec. 237 (1) Austrian InsO, Art. 392 (4) and 393 (4) Croatian Bankruptcy Act, Art. 47 and 49 Spanish Bankruptcy Act.

196 ‘Secondary proceedings’ in the terminology of the EIR.

(Art. 28 MLCBI). While many national legislations follow the EIR model¹⁹⁷, others do not make a clear distinction between ‘universal’ and ‘territorial’ proceedings¹⁹⁸.

This distinction can relate both to the conduct of domestic proceedings and to recognition of foreign proceedings. Both under the MLCBI and under the EIR recognition of foreign insolvencies means that foreign proceedings are given effect in the recognizing country. Such effects may relate to the debtor’s property (e.g. when the foreign representative wishes to take such property into his administration or when creditors try to levy execution into such property) but are not limited to property issues in the strict sense. They may also concern activities of the debtor or other persons, the corporate structure of a debtor, or the existence or size of the claims of creditors.

In the recognition context this may mean that effects of such proceedings are limited to such (local) property¹⁹⁹. This is true for the EIR in inner-EU relations (Art. 20 (2) of the Regulation), although it avoids the term ‘recognition’ in this context. In contrast, Art. 17 (2) (b) MLCBI uses explicitly the term ‘recognition’ of foreign non-main proceedings, but the legal consequences of such recognition are not limited along territorial lines (see Art. 19 and 21 MLCBI). Thus, the MLCBI allows recognition of foreign non-main proceedings even with regard to property located in other countries but grants the recognizing court discretion in this respect. Some national legislations provide only for recognition of foreign main (= universal) proceedings²⁰⁰, while others recognize also non-main proceedings²⁰¹. Recognition of such proceedings is sometimes limited to

197 E.g. sec. 237 (1) nr.1 Austrian InsO, Art. 118 § 1 nr.2 Belgian PIL Act, sec. 354 sentence 1 German InsO (non-main proceeding outside the scope of EIR: also, on the jurisdictional ground of debtor’s assets in Germany), Art. 294 Portuguese Insolvency Code, Art. 49 (2) Spanish Bankruptcy Act.

198 Cf. Art. 34 Japanese Bankruptcy Act (not distinguishing between main and non-main proceedings), Art.3 South Korean Debtor Rehabilitation and Bankruptcy Act. Also, in Common Law jurisdictions, courts tend to exercise discretion whether to include foreign property in non-main proceedings.

199 Cf. Art. 20 (2) EIR, Art. 17 (2) (b) MLCBI uses explicitly the term ‘recognition’ of a foreign non-main proceeding.

200 Examples: sec. 240 (1) nr.2 Austrian InsO; similar, though more flexible, Art.288 (1) a) of the Portuguese Insolvency Code.

201 E.g. Art. 121 § 1 nr.2 Belgian PIL Act, also sec. 343 (1) nr.1 German InsO.

territorial effects (on property located in such country²⁰², but this is not always clearly expressed²⁰³.

This said, it can be stated that there is at present in the EU no general or preponderant approach as to whether recognition of foreign non-main insolvencies is limited to ‘territorial’ effects of such proceeding or may also include ‘universal’ effects.

This is complicated by the fact that the national legislations take different approaches as to which (foreign) proceedings can be considered as main and non-main proceedings. These approaches often differ both from the EIR and the MLCBI. Thus, (direct) ‘universal’ insolvency jurisdiction is often claimed on the basis of the debtor’s domicile, residence or corporate registration, and this would then also apply to the recognition context. Sometimes even flexible criteria such as ‘doing business’ or ‘expediency’ are used, also for the recognition context. Insolvency proceedings in all countries can be modern and efficient (or may lack these qualities), and they can be based on reasonable considerations of the participants why one or the other country (or countries) are chosen as a forum for the insolvency proceeding.

Summing-up, it would appear that the approach of the MLCBI to decide on recognition of foreign non-main insolvency proceedings flexibly, not based on strict territorial consideration, would fit also for the EU in relations with non-EU countries.

5. Other substantive rules

Both the EIR and the MLCBI provide for numerous substantive (procedural or material) rules, which are applicable in the recognition context, and some national legislations add further provisions.

Under the EIR, substantive rules for cross-border insolvencies, including the recognition context, are closely linked with conflict of laws provisions and qualify their application (cf. Art.20 EIR with Art.21, 23, 28 – 31 EIR). Also, some substantive provisions governing the conduct and the effects of an insolvency proceeding with cross-border components are contained in ‘general provisions’ of the EIR (Chapter I) or other chapters of the EIR. In several cases, Chapter I EIR puts substantive provisions excluding certain

202 E.g. Art.121 §1 nr.2 Belgian PIL Act and Art.742 (5) nr.2 Spanish Bankruptcy Court: recognition ‘as territorial proceeding’.

203 Cf. sec. 343 (1) nr.1 German InsO.

property from the territorial reach of the main proceeding between conflict of laws provisions (cf. Art.8 and 10 EIR).

In the MLCBI, substantive rules on recognition of foreign insolvencies are concentrated in Chapter III, but some rules relevant to recognition can also be found in other Chapters of the MLCBI. For example, Art. 20 and 21 MLCBI (on recognition) define which substantive consequences occur (or may be ordered by the court) as effects of recognition. In addition, Chapter II MLCBI (on access of foreign representatives and creditors) also deals with recognition-related situations, granting, for example, foreign representatives the right to access to courts in the requested country (art.9 MLCBI). Similarly, some provisions in Chapter IV (Cooperation with foreign courts and representative) cover recognition-related situations, e.g. Art. 25 MLCBI on cooperation with foreign courts or representatives. In so far as such provisions are tailored to parallel proceedings (e.g. Art.11, 12 MLCBI and Art.26 MLCBI), they will be addressed in the general contribution on this topic in this book.

In the following a short summary of such substantive rules will be given, taking into account also international treaties and national legislation

a) General structures

The EIR contains in its chapter on recognition, in essence, substantive provisions on the powers of foreign insolvency representatives (Art.21 and 22 EIR). The other provisions in this Chapter (establishment of insolvency registers etc.) are not specifically designed for recognition of foreign insolvency but carry an overarching character. In the general Chapter, the EIR contains two substantive provisions, which exclude certain foreign-located property from the territorial reach of the main proceeding (Art.8 and 10 EIR), a provision assigning European patents with unitary effect and Community trademarks only to COMI-based proceedings (Art. 15 EIR) and one provision combining elements of conflict of laws with a certain substantive result (Art. 9 EIR on set-off).

The Istanbul Bankruptcy Convention of 1990 had a somewhat different structure. It did not use the concept of recognition of foreign insolvencies as a basic structural element, but put-together various substantive (and partly conflict of laws) elements of cross-border bankruptcy: most significantly, on the powers of a (mainly foreign) representative (Chapter II of the Convention, Art. 6 – 15), complemented by some provisions in the general

Chapter (in particular Art. 2). Similar to the EIR, it also contained substantive provisions for domestic proceedings and for concurrent proceedings.

The MLCBI has chosen a different structure, although some of its provisions resemble the EIR very much. In its general Chapter, it contains a recognition-related provision, which allows the requested state to ‘provide additional assistance to a foreign representative under other laws of this State’ (Art.7), i.e. the MLCBI serves only as a minimum standard for assistance to foreign proceedings. It then deals separately with the access of foreign representatives to courts in the requested state (Chapter II, Art. 9 – 12)²⁰⁴. The Chapter on recognition of foreign insolvencies (Chapter III) provides for the following substantive effects of recognition: Art.20 (ex lege effects) and Art. 21 (optional relief)²⁰⁵. Art.20 applies to recognition of foreign main insolvencies and provides for the stay of individual actions and execution against the debtor²⁰⁶ as well as for a suspension of the debtor’s power dispose of the assets of the estate²⁰⁷. According to Art. 20 (2) MLCBI the scope of the stay and of the suspension of the power of disposition are determined by the law of the recognizing state. Art. 21 MLCBI (optional relief) applies to (foreign) main and non-main proceedings alike and gives the recognizing court, basically, the discretionary power to grant ‘any ... relief that may be available under the laws of the [recognizing] state’. Thus, the MLCBI lays-down a broad general clause empowering the recognizing court to pass any decision in support of the foreign proceeding, which is available under its legislation. This has been interpreted by some courts as including considerations of conflict of laws (e.g. within the concept of comity) but could also be read as referring only to substantive provisions. Chapter IV MLCBI contains overarching provisions on cooperation with foreign representatives and courts, and Chapter V deals with concurrent proceedings.

204 Chapter II Art.13 – 14 (legal position of foreign creditors) deals primarily with domestic insolvency proceedings.

205 In addition, a provision on interim relief upon application for recognition, Art.19 MLCBI. Furthermore, there are some complementary provisions in Art.22 – 24 MLCBI.

206 Art. 20 (1) (a) and (b) MLCBI.

207 Art. 20 (1) (a) and (b) MLCBI.

Some of these provisions address procedural effects²⁰⁸, others deal with material effects²⁰⁹ or have a mixed character (procedural and/or substantive)²¹⁰.

National legislators have ‘transposed’ these models into their autonomous legislation in quite different manners.

For example, Austria deals with the powers of foreign insolvency representative mainly through conflict of laws provisions (sec. 241 (1) Austrian InsO: foreign *lex fori concursus*) mitigated by a reference to Austrian law as to ‘exercise of their powers’, e.g. the mode of disposal of property and the information of employees (sec. 242 (2) Austrian InsO). In addition, sec. 242 Austrian InsO lays-down a duty of the foreign representative to publish the opening of the foreign proceeding in Austria (if the debtor has an establishment in Austria) and/or to apply for entry of the foreign proceeding in Austrian registers (enterprise register and land register).

Germany regulates the effects of recognition of foreign insolvencies in much more detail. As a supplement to the general *lex fori concursus*-rule (sec. 335 German InsO) it adds substantive provisions on interim measures (sec. 344 InsO), domestic publications of the foreign insolvency proceeding (sec. 345 and 346 InsO), information duties of the foreign representative (sec. 347 InsO), provisions on the jurisdiction of German courts in matters relating to recognition (sec. 348 (1) InsO), establishment of a power (not duty) of cooperation of the German court with the foreign insolvency court in recognition-related matters (sec. 348 (2) InsO). Sec. 349 and 350 InsO provides for substantive (material) rules on good faith protection if the debtor has disposed over immovables located in Germany or if third parties have made payments to the debtor instead of to the foreign representative. Sec. 351 (1) InsO exempts rights in rem²¹¹ in German-located assets from the effects of the foreign insolvency, ‘unilateralizing’ the bilateral provisions of Art. 8 and 10 EIR to the recognition context outside the scope of the

208 E.g. Art. 20 (1) (a) and (b) MLCBI (stay of proceedings and execution).

209 E.g. Art. 20 (1) (c) MLCBI (suspension of power of disposition).

210 E.g. Art. 21 and 22 EIR (powers of foreign representative).

211 More exactly: ‘Aus- und Absonderungsrechte’ according to sec. 47 – 52 German Insolvency Code.

EIR²¹². Sec. 352 InsO stays domestic court (and arbitration) proceedings²¹³, and sec. 352 InsO provides for execution of decisions rendered ‘in’ foreign insolvency proceedings on the basis of a German *exequatur*. A characteristic of the German approach is to provide in several cases for substantive rules applicable in case of recognition of foreign non-EU insolvencies where the EIR establishes – between EU member states – either bilateral conflict of laws provisions or bilateral substantive rules.

Another, particularly differentiated example is the law of Croatia. The Croatian Bankruptcy Act (Chapter 11 on International Insolvency Law) blends the rules on recognition of foreign (non-EU) insolvencies with the rules on concurrent proceedings. Its Title on recognition of foreign insolvencies (Title 5) starts with the case when the foreign proceeding becomes recognized after a domestic Croatian (main or non-main) proceeding has already been opened (Art. 410 of the Act). In this case Art. 410 of the Act refers, with some particularities, to the general provisions on concurrent proceedings (Title 6)²¹⁴. Thereafter, Art. 411 – 416 of the Act deal with ‘simple’ recognition of foreign insolvencies, i.e. without the opening of a concurrent proceeding in Croatia. It has been remembered that recognition of foreign insolvencies in Croatia is based, in principle, on a formal proceeding similar to the MLCBI. A third constellation is the opening of a concurrent insolvency proceeding in Croatia as a consequence of recognition of the foreign main proceeding (Art. 417 of the Act).

Art. 411 of the Act starts with the basic conflicts rule of the (foreign) *lex fori concursus*. Art. 412 contains a substantive rule on restitution of payments (or preferential rights acquired) in execution proceedings in Croatia in the time between the opening of the foreign proceeding and its recognition in Croatia. Art. 413 – 415 deal with different cases of protection of good faith in the recognition context. Art. 413 is a substantive rule on protection of good faith acquisition of assets from the debtor after the opening of the foreign proceeding. Art. 414 provides a rule on good faith protection for third party payments to the debtor instead of to the foreign representative. Art. 415 protects good faith in set-off in certain recognition-

212 Sec. 351 (2) InsO contains a special (unilateral) conflict of laws rule as to the effects of the foreign proceeding on immovables in Germany; this corresponds by and large to the (universal) conflicts rule under Art. 14 var.1 EIR.

213 Substantive provision, in contrast with the (bilateral) conflict of laws provision under Art. 18 EIR.

214 See Art. 410 (2) in conjunction with Art. 419 – 423 of the Act.

related cases. Art.416 grants substantive protection to certain categories of creditors (Croatian tax and social insurance creditors; local employees) and to creditors with rights in rem²¹⁵ in Croatian-located assets, complementing the special conflicts rule of Art. 396 of the Act²¹⁶.

Taken together, the EIR, the MLCBI and national legislations tend to address a core circle of legal issues: the powers (and duties) of foreign insolvency representatives, powers (and duties) of courts in the recognition context, issues of stay of proceedings, and the protection of good faith in civil and commercial relations. Beyond this, issues of interim measures and protection of certain (locally privileged or secured) creditors are frequently addressed.

b) Particular provisions

Some provisions lay the focus on the legal position of certain participants in the insolvency proceedings; others are of a more general or topic-related character. They may have a focus on procedural aspects, on substantive (material) law or cover both aspects.

aa) Rules on powers of insolvency representatives

Several provisions deal with the legal position (rights and duties) of foreign insolvency representatives. Such provisions exist both in the MLCBI and in the EIR as well as in the Istanbul Bankruptcy Convention and in national legislations.

The Istanbul Convention devotes to the legal position of insolvency representatives (termed ‘liquidators’) a particular Chapter (II). The broadest provision is art.10 of the Convention, under which the representative, ‘with-in the powers conferred on him under the law of the [forum concursus], may ‘take or cause to be taken any acts to administer, manage or dispose of the debtor’s assets including removing them from the territory of the Party where they are situated’²¹⁷. However, ‘implementation’ of these measures shall be subject to the law of the Party in whose territory the assets are situated (art.10 II of the Convention). This is qualified by several further

215 More exactly: ‘Aus- und Absonderungsrechte’, similar to German law.

216 Lex loci recognitions: no general exemption from the effects of insolvency.

217 This is a general provision on substantive and procedural aspects.

provisions, e.g. a two-months suspension of the representative's powers after publication of the notice of his appointment in the recognizing country (art.11 of the Convention). However, suspension of effects is not total, as even during the suspension period only some privileged creditors 'may commence or pursue individual legal action against the assets of the debtor' (art.11 II of the Convention). Interestingly from a general perspective, the Convention allows a more liberal approach to be taken by recognizing countries as to recognition than under the Convention (art.15).

In the MLCBI, art.21 I d) grants the recognizing court the power to entrust the 'administration or realization' of all or part of the debtor's assets located in the recognizing State to the foreign representative, or another person designated by the court. Art.21 I MLCBI extends this power, under certain conditions, also to 'the distribution of all or part of the debtor's assets located in [the recognizing] State'. Furthermore, art. 19, lit. b), MLCBI gives the court seized with a request of recognition the possibility to vest the foreign representative with limited administration powers pending the formal recognition process, provided such measure is needed 'to protect and preserve the value of assets that, by their nature or because of other circumstances, are perishable, susceptible to devaluation or otherwise in jeopardy'.

Finally, also art. 21, lit. g) MLCBI may be partly framed as a rule on powers of the insolvency representative, in that it may be relied upon to extend the foreign representative powers that a local representative might enjoy under the laws of the recognizing State should a local insolvency proceeding be opened.

Art.21 and 22 EIR approach this topic somewhat differently than the MLCBI, but in the same spirit. Starting – like the Istanbul Convention – from the conflict of laws rule that the legal position of the foreign representative is determined by his or her *lex fori concursus* (cf. Art.21 (1) EIR), they distinguish between foreign main and foreign non-main proceedings. As to foreign (EU-based) main proceedings they state only limited exceptions to the basic rule of applying the foreign *lex fori concursus*. In particular, a local secondary proceeding remains possible. The powers of representatives of foreign non-main proceedings are specified in Art.21 (2) EIR more restrictedly than the powers of representatives in main proceedings. Art.21 EIR states that non-main representatives may recuperate movable property which has been transferred from the State of the non-main proceeding after its opening or before that under circumstances that justify an action for avoidance of transactions. Generally, foreign representatives must observe

local legislation, e.g. when selling-off property of the debtor (Art.21 (2) EIR). Art.22 EIR adds provisions on proof of the appointment of the foreign representative. Similar provisions are contained in art.15 MLCBI in the framework of the formal recognition proceeding.

bb) Rules on the position of creditors

Secondly, there are some substantive rules in the MLCBI and in national legislations on the position of creditors which may apply also to the recognition context. For example, the (procedural and/or material) treatment of creditors in the foreign insolvency proceeding is one of the considerations which the recognizing court has to take into account for its decision on recognition under Art.17 MLCBI and also for granting specific relief under art.21 MLCBI. Although the MLCBI does not require publication of requests for recognition of foreign insolvency proceedings and also does not specifically mention the right of creditors to participate in such proceedings, national legislators may provide for this, e.g. when they implement the MLCBI²¹⁸. Recognition itself can under the MLCBI be requested only by foreign insolvency representatives, not by the debtor or creditors.

The EIR does not provide for specific provisions of this kind, but the treatment of creditors in the foreign proceeding is one of the elements to be taken into account for a scrutiny of public policy under art.33 EIR.

Under Swiss law, which may be taken here as an example for national legislations outside the MLCBI and EIR models, recognition on the form of mini-proceeding can be applied for both by a foreign representative and by the debtor and by creditors. There are no provisions on participation of other creditors in the proceeding at this stage. However, the decision on formal recognition (opening of the mini-proceeding) is published (Art.169 IPRG). As in the EIR, the fair treatment of creditors in the foreign proceeding is one of the conditions of recognition under Art.166 IPRG in conjunction with Art.27 IPRG and also at further stages of the proceeding (Art.173 sentence 3 IPRG – recognition of foreign distribution scheme; and Art.174a (2) IPRG: decision not to request a mini-proceeding; in both cases with particular reference to fair treatment of creditors with Swiss domicile).

218 Cf. Art. 405 of the Croatian Bankruptcy Act.

cc) Rules on geographical exclusion of property from otherwise universal proceedings

As was already discussed, the EIR limits the effects of foreign non-main proceedings to property situated in the country of the respective forum concursus (Art.19 EIR in conjunction with Art.20 (2) EIR). In contrast, the MLCBI avoids a general statement on this issue.

Beyond this, the EIR contains two provisions excluding certain goods from the regulatory reach of (domestic as well as foreign) insolvency proceedings according to geographical criteria. This applies, firstly, to rights in rem in assets located outside the country of the forum concursus (Art.8 EIR). The legislative reason behind this rule is to protect secured creditors. The provision goes beyond a mere conflict of laws rule and completely protects such creditors from any impact of insolvency proceeding on their security rights. Art.8 EIR applies only to property situated in other EU member states (EIR countries). Similarly, art.10 (1) EIR exempts assets, which belong to a seller of goods under a retention of title agreement and are situated in other EU member states than the forum concursus, from any effects of the (domestic or foreign) insolvency proceeding. Art.10 (1) EIR applies both to proprietary and contractual aspects of retention of title agreements. Under art.10 (2) EIR a similar exemption is foreseen for property sold by the insolvent debtor to third parties under a retention of title agreement. Art.8 and 10 EIR have been criticized in legal literature for being over-protective²¹⁹. On the national level, some legislators have extended these provisions to non-EU insolvencies, but do not foresee a similar limitation for their own domestic insolvency proceedings (e.g. sec. 351 German InsO). Others apply these rules also with regard to non-EU insolvencies in both directions (e.g. sec. 222 Austrian InsO).

dd) Rules on attribution of property

Apart from the rule under the EIR and various national legislations that the effects of non-main proceedings extend only to local property in the State of the forum concursus, some particular provisions attribute certain property objects to one or the other kind of insolvency proceeding with specific reference to the international context. Thus, Art.15 EIR attributes

219 Cf. Bork-Mangano, p.146 (at 4.49).

common EU patents, European Community trademarks and 'similar rights' established under EU law 'only' to the main insolvency proceeding of its owner under the EIR. The rule does not make a statement on the location of such rights, but determines their attribution exclusively for cross-border insolvency purposes.

Somewhat similarly, art.167 sentence 3 of the Swiss Private International Law Act (IPRG) locates claims, with particular reference for cross-border insolvency purposes, at the domicile of the third-party debtor. The consequence of this is that such claims are regarded as making part of the territorially limited (Art.170 IPRG) mini-proceeding under Swiss cross-border insolvency law. The provision leaves, however, open whether this approach to the location of claims applies also to Swiss domestic (main or non-main) insolvencies.

ee) Procedural effects of foreign insolvencies: stay of proceedings

Among the substantive (procedural) effects of foreign insolvencies the MLCBI addresses in Art.20 and 21 the effects of recognition on pending or new actions related to the foreign insolvency proceeding, e.g. a stay of individual court and arbitral proceedings by or against the debtor and the stay of individual execution against the debtor. Additionally, Art.21 (1) (d) MLCBI gives the recognizing court the power to take evidence or order the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities, thus supporting the foreign proceeding.

The standing for a foreign insolvency representative in avoidance actions in the recognizing state is specifically addressed in art.23 MLCBI.

The Istanbul Bankruptcy Convention also mentions among the effects of recognition expressly the stay of 'individual legal action' against the debtor (see Art.11 (2) and (3) of the Convention), without, however, introducing for this effect elements of judicial discretion. A particular provision deals with measures of protection or preservation (Art.8 of the Convention).

The EIR addresses the recognition of procedural effects of foreign insolvencies mainly by using a conflict of laws approach (see Art.20 EIR in conjunction with Art.6 EIR, for pending proceedings see Art.18 EIR). It contains in the recognition-context only two specific procedural effects-focused provisions on the local publication of a foreign proceeding (Art.28) and the entry into registers of the recognizing State (Art.29). Both provi-

sions apply only to states where there is a local ‘establishment’ of the debtor, but they do not exclude further going publications or entries into register.

ff) Material effects of foreign insolvencies

From amongst the consequences of insolvencies upon legal relations under civil or commercial law Art. 20 and 21 MLCBI address in the recognition-context only ‘the right [of the debtor] to dispose of any of his or her assets’, which is ‘suspended’.

The EIR contains some additional rules on material consequences of recognition: Art.23 EIR states that creditors who have received extra-payments by execution or otherwise abroad, have to return these to the foreign proceeding or get those payments imputed in cases of concurrent proceeding. However, despite its position in the Chapter on recognition of foreign insolvencies, this provision applies also in domestic insolvency cases and thus is not recognition-specific. The same is true for Art.31 EIR, which contains a particular substantive provision on protection of good faith payments to an insolvent debtor. The Istanbul Convention contains similar provisions on good faith payments in Art.5 and 13, addressing also payments to a representative.

Some national legislations provide for additional material effects of foreign insolvencies. For example, Art.170 of the Swiss Private International Law Act (IPRG) states that ‘terms under Swiss law’ begin to run only with the publication of the formal decision on recognition of the foreign proceeding. This applies mainly to limitation of actions under applicable substantive (material) law A similar provision relating to avoidance of transactions is contained in art.172 (2) IPRG.

IV. Can recognition be modified or withdrawn?²²⁰

Insolvency proceedings usually take a significant time, even some years. They develop over time, from the request to start a proceeding, the opening of the proceeding and various following acts and decisions up to the closure of the proceeding. The circumstances on the basis of which recognition of a foreign proceeding was granted (or denied) can change or at some time

220 See also *supra* at C.III.6.

information may turn-up which puts the correctness of an earlier decision on recognition in question.

The EIR does not address this issue, but the MLCBI expressly provides for the possibility to amend or even terminate recognition. According to Art.17 (4) MLCBI recognition may be modified or terminated 'if it is shown that the grounds for granting it were fully or partially lacking or have ceased to exist.'²²¹ Basically the same rule is contained in Art.22 (1) and (3) MLCBI as to specific relief granted by the court in the recognition context.

The Croatian Insolvency Act contains provisions on the related issue of appeal against decisions on recognition. The Act refers in so far to the rules on appeal against decrees opening a Croatian insolvency proceeding (sec.408 of the Act).

V. Intertemporal aspects

In the case of formal recognition, but also in the system of automatic recognition, intertemporal issues may arise. Do the effects of recognition date back, e.g. to the time when the foreign recognized decision became effective, or do they become effective only at them moment of recognition? The same question arises if a later moment recognition is modified or cancelled.

Under the automatic recognition approach, the effects of the recognized foreign insolvency decision enter into force as soon as provided by the foreign forum concursus. If transactions were done after the opening of the foreign insolvency proceeding, e.g. between the insolvent debtor and third party, the impact of the insolvency proceeding on them is governed by the *lex fori concursus*, if the recognizing State does not provide for particular rules²²². One such uniform rule, in favour of protection of good faith payments, is contained in Art.31 EIR.

Under a system of formal recognition, intertemporal issues either need to be determined in an abstract manner by the legislator, or they might be left to courts. The MLCBI does not address this issue expressly, but, e.g., the Croatian Bankruptcy Act, contains some good faith protection rules in

221 A similar, but more detailed provision contains e.g. Art. 395 of the Polish Bankruptcy Act.

222 This question arose e.g. in the CJEU case C-186/24 (*Metzler v. Auto1 European Cars BV*), ECLI:EU:C:2025:211.

this respect (Art. 412 – 415 of the Act). Under the MLCBI, this is probably a matter of discretion of the court.

E. Conclusions

I. General aspects

1. The concept of ‘recognition’ of foreign insolvencies is today largely accepted as a basic approach to accepting or granting effect to foreign proceedings. The dogmatic focus, either on foreign proceedings in general or on court decisions in or related to such proceeding, differs between the MLCBI (proceedings-based) and the EIR (judgment-based), but this does not necessarily lead to different outcomes.
2. There may be cases in which a full scrutiny of recognition may not be necessary or feasible. The MLCBI offers some suggestions for differentiation in this respect. This could be integrated into the basic recognition-approach of the EIR.
3. The EIR approach, which is focused on judgments, uses in this respect (subsidiarily) well-known rules on recognition of foreign judgments in civil and commercial matters, adding specifics of cross-border insolvency. The MLCBI is more flexible, being grounded to a significant degree on judicial discretion.
4. Both under the MLCBI and the EIR, recognition of foreign insolvencies is binding and does not depend on judicial discretion. This is also true for some basic consequences of recognition, but most effects of recognition involve under the MLCBI judicial discretion, while they occur *ex lege* under the EIR and the law of most EU member states. Nevertheless, discretionary elements or assessment considerations do exist also under the EIR and under national law and could be further developed to approximate the models of the EIR and the MLCBI.
5. Both the MLCBI and the EIR distinguish also between recognition of foreign ‘main’ and ‘non-main’ proceedings, but these categories may be defined differently. The effects of recognition may also differ to a certain degree between these categories, mainly with regard to which property is regarded as covered by which proceeding.

II. Prerequisites of recognition

The essential prerequisites of recognition are a definition of the proceedings encompassed by the special rules on recognition of foreign insolvencies, indirect jurisdiction, and the public policy clause. Further additions to this list (such as a reciprocity requirement) are most likely unnecessary, since the major instruments of cross-border insolvency law (the EIR and the MLCBI) do not set an excessively high recognition threshold.

The first element in the list (definition of the proceedings) seems the most problematic: in this respect, the approaches of the EIR and the MLCBI differ significantly, since the former instrument is applicable to a closed list of proceedings whose overall structure resembles that of traditional liquidations and reorganisation proceedings, where a court hands down an opening judgment (producing most of the legal effects whose recognition abroad is at stake) and a closing judgment (repealing most of the aforementioned effects), and enjoys a variable degree of oversight upon the development of the case. The latter instrument, on the contrary, contains a considerably more flexible definition, which might fit both traditional liquidation proceedings and reorganisations largely unfolding out of court, and even proceedings whose purpose might not be addressing the debtor's insolvency.

Mandating EU Member States to embrace such a broad definition might prove too ambitious. A more cautious, and recommendable approach, might be to adopt a minimal definition, mirroring that contained in the EIR, and using proceedings listed Annex A as touchstones, leaving it to the responsibility of individual Member States to enlarge the range of proceedings that might be eligible for recognition under national law, arguably with effects limited to the respective national territory.

III. Procedure of recognition

1. An optional particular procedure of recognition (inspired by the MLCBI and examples in some EU Member States) would be welcome in order to create legal security in cases when the general approach of automatic recognition is not deemed efficient enough. There are two major differences between automatic and 'formal' recognition. The first lies in the timing of the effects of recognition. The second is that in either scenario the burden of seizing the court to have the prerequisites of recognition

ascertained will rest upon a different party: the debtor or its representative, in automatic recognition; the creditors, or any person showing a legitimate interest countering recognition in formal recognition. The fundamental choices in this respect are to be made by the European legislator, but Member States should remain empowered to cast detailed rules of procedure.

2. A further fundamental choice deals with the territorial reach of the Member State's judgments granting or denying recognition: in other words, the EU will have to decide whether a recognition judgment will trigger its effects only in the Member State where recognition is sought, or not; and whether a judgment denying recognition should prevent recognition in other Member States. Unlike the choice between automatic and formal recognition, that between 'universal' and 'territorial' recognition involves alternatives that are neutral regarding the respective positions of creditors and debtor: the debtor will certainly benefit from an EU-wide recognition, but so may also a State-limited recognition, insofar as recognition is denied in one or more Member States.
3. A combination of different methods and choices is envisageable, as the Spanish Ley Concursal demonstrates.

IV. Effects of recognition

1. As to the effects of recognition, the EIR, the MLCBI and national legislation are characterised by two main approaches, which depend significantly on the chosen procedure of recognition.

The MLCBI, which as a basic principle requires a formal recognition proceeding, gives the recognizing court considerable discretion as to what legal effects are given to the foreign proceedings. This is consistent with a legal assistance approach to cross-border insolvency. A limited number of these effects are obligatory.

The EIR, but also legislations, which provide under the EIR the possibility of a formal recognition proceedings, start with a conflict of laws approach, but add various particular substantive rules, e.g. on stay of individual actions against the debtor and on protection of good faith payments.

2. EU member countries, which have adopted the MLCBI into their autonomous insolvency law and integrated it into a systematic approach, have been able to combine both approaches.
3. While the EIR uses, also in the recognition-context, a differentiated conflict of laws approach as starting-point, the MLCBI prefers a substantive law approach, even if it does not exclude the use of conflict of laws considerations. However, the MLCBI appears to be compatible also with a more developed conflict of laws approach. In this respect, the current UNCITRAL project on applicable law in insolvency could be used as a basis also for discussion on a future EU regulation on recognition of non-EU insolvencies.
4. While the EIR grants foreign non-main proceedings only territorial effect, the MLCBI and some national legislations take a more flexible, arguably well-founded approach in this regard.
5. The present rules of the EIR on bilateral exemption of rights in certain assets from the territorial reach of main insolvency proceedings (Art. 8 and 10 EIR) do not reflect a general trend under autonomous law, though they might be kept as unilateral rules in the recognition context, if they remain unchanged in relations between EU member states.

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Recognition of third country insolvencies in the EU*

Georg Kodek

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?

* The following text is the slightly revised transcript of a presentation given in the Research Project underlying this book at a conference in Kiel on 23 October 2023.

Another argument may come from a decision by the Court of Justice of the European Union¹ (which was heavily criticized) concerning England and Jordan, in which the Court seems to have 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 Istanbul

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); the 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 judgment? 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 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!

Lessons to be learned from ‘Galapagos’

Andreas Piekenbrock

Abstract:

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

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

A. Introduction

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

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

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

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

This restriction of the recognition and enforcement of judgments given in other Member States works well as far as *individual* proceedings are concerned. If a German court recognises and enforces an English judgment, the interests of other Member States are not affected. In particular, other Member States do not have to recognise the German exequatur-judgment (sec. 723 ZPO⁴) pursuant to Art. 36 of the Brussels I bis Regulation, as long as the principle ‘exequatur sur exequatur ne vaut’ is observed. It is true that this principle, confirmed by the ECJ in the ‘Owens Bank’ Case,⁵ has been put into question in the ‘H Limited’ Case.⁶ Yet, this paper cannot discuss this topic any further.⁷ It will rather deal with the question in how far the

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

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

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

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

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

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

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

B. The ‘Galapagos’ Case

Galapagos S.A. was a holding company registered in Luxembourg without any employees. In June 2019, the COMI was transferred to England. On 22.8.2019, the directors lodged a request to open insolvency proceedings (administration) before the High Court in London (England, UK). On 23.8.2019, the directors were removed at the instigation of a group of creditors holding a share pledge and the COMI was transferred to Düsseldorf (Germany). The lawyers representing Galapagos were instructed to withdraw the request pending in England. Yet, the withdrawal was not effective because a group of creditors had already joined the request. The new director lodged a request to open insolvency proceedings before the Local Court (*Amtsgericht*) in Düsseldorf. The same day, the Local Court appointed a temporary insolvency administrator (*vorläufiger Insolvenzverwalter*). As the German temporary insolvency administrator is listed in the Annex B, the court hereby delivered a judgment opening (main) insolvency proceedings within the meaning of Art. 2(7)(ii) of the Recast EIR. The question whether or not this judgment had to be recognised in the UK pursuant to Art. 19 of the Recast EIR lead to a stay of the proceedings pending in the High Court.⁸ On 6.9.2019, the Court revoked its order and dismissed Galapagos’s request as inadmissible due to the lack of jurisdiction. The same day, two creditors lodged a new request to open insolvency proceedings at the Local Court in Düsseldorf. On 9.9.2019, the Local Court appointed the same person as temporary insolvency administrator, asserting that the COMI had been moved to Düsseldorf.⁹

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

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

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

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

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

11 Amtsgericht Düsseldorf 31.10.2019, 501 IN 150/19.

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

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

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

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

Yet thirdly, considering Art. 67(3)(c) of the UK Withdrawal Agreement¹⁶, the ECJ has come to the conclusion that German Courts were free to open main insolvency proceedings if the High Court had not decided on the pending request before Brexit became effective on 31.12.2020.¹⁷ Actually, the High Court has opened (winding up) insolvency proceedings only on 30.6.2022, considering that the Local Court in Düsseldorf, due to the lack of jurisdiction, had not opened main insolvency proceedings within the meaning of Art. 3(1) of the Recast EIR before 31.12.2020.¹⁸ This point of view is rather surprising as the pending ‘immediate complaint’ against the opening decision of the Local Court in Düsseldorf had no suspensive effect (sec. 570(1) ZPO).

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

C. Lessons to be learned from ‘Galapagos’

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

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

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

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

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

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

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

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

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

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

20 Cf. recital 88 to the Recast EIR.

quest. This is true for Member States such as Greece,²¹ Poland,²² Romania²³ and Slovenia,²⁴ which have implemented the MLCBI²⁵, but also for other Member States providing for *exequatur*-proceedings in insolvency matters such as Belgium²⁶ and Spain.²⁷ If such a request had not been lodged, the national courts might be free to open EU main insolvency proceedings regardless of the opening of such proceedings in the Third Country A. *Fifthly* and finally, Member State B considers the opening of the collective proceedings in A to have taken place after the opening of the EU insolvency proceedings by its own court. We must keep in mind that Art. 2(7) and (8) EIR provide for a definition of the terms ‘judgment opening insolvency proceedings’ and ‘the time of the opening of proceedings’. Member State B may have a narrower understanding of the notion ‘judgment opening insolvency proceedings’ in its autonomous International Insolvency Law. Under one of these circumstances, the Member State C may encounter a ‘conflict of recognition’.

a) Resolving the ‘conflict of recognition’

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

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

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

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

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

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

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

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

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

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

Member States such as Germany²⁹ and Austria³⁰ providing for the automatic recognition of insolvency proceedings opened in Third Countries similar

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

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

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

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

D. Conclusions

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

denomination changed from 'Konkursordnung' to 'Insolvenzordnung' by Art. 1 of the Act of 2010, 68 BGBl. 2010, Part I, N° 29.

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

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The law governing the effects of foreign insolvency proceedings on lawsuits pending in the home forum

Kevin Silvestri

Abstract:

The issue of the legal consequences of the recognition of insolvency proceedings pending abroad is a central feature of cross-border insolvency regimes and will represent an unavoidable question in crafting an EU legal instrument addressing the treatment Third Countries' insolvency proceedings. A specific facet of this question is addressed in this chapter, namely the consequence of the recognition of a foreign insolvency proceeding on lawsuits pending in the recognising jurisdiction, specifically lawsuits where claims against the insolvent are matter of dispute. It is submitted that, as part of the regime of coordination between the procedures for claims' verification within the insolvency proceedings, and these lawsuits, the regulation of the effects of the opening of an insolvency proceedings on pending lawsuits requires a careful delimitation between the remit of the *lex fori concursus*, as defined in article 7 EIR, and that of the *lex fori processus* referred to in article 18 EIR. A refinement of the boundaries between the two *leges* is particularly necessary regardless that the scope of article 18 EIR is broadened as to cover the effects of recognition of insolvency proceedings going on outside the EU, or article 20 MLCBI is enacted, given the wide array of solutions to the coordination problem followed by jurisdictions around the world. It is further submitted that improvements in the current regime may be simply achieved by way of interpretation of the existing EIR text, rather its amendment.

Keywords: recognition, effects, applicable law, pending lawsuits, claims, verification of claim, *lex fori concursus*, *lex fori processus*.

A. Coordinating the verification of claims within insolvency proceedings and lawsuits on the same claims pending elsewhere: facets of the issue and its cross-border layers

All insolvency systems are equipped with procedures for verifying claims lodged in insolvency proceedings. A crucial aspect of the regulation of these systems is the provision for coordinating the verification procedure within the insolvency proceedings and lawsuits with the same objective that were already pending when the insolvency proceedings commenced¹. The aim of these procedural coordination mechanisms is clearly to avoid unnecessary duplication of litigation on the same claims, which could result in the court system wasting its time and resources, and, in the worst cases, in the insolvency court and the court before which the lawsuit is pending issuing inconsistent judgments.

This issue may be resolved by prioritising either the pending lawsuit (requiring the insolvency court to which a dispute on a claim is brought to refrain from adjudicating it until the lawsuit has concluded) or the verification procedure before the insolvency court (in which case, the lawsuit pending elsewhere shall be discontinued, or at least stayed until the insolvency procedure is completed). As we will explore further in this text, jurisdictions around the world are divided². Some give priority to the lawsuit, thus allowing its resumption or simply providing for its continuation despite the filing of the insolvency case; other jurisdictions prioritise the verification procedure, thus requiring the discontinuation of the lawsuit.

Another aspect of the coordination mechanism concerns the binding effect of judgments rendered in these lawsuits. A rule stating that these judgments are not binding upon the insolvency practitioner and cannot be relied upon by the claimant to secure inclusion in the list of claimants entitled to distribution in the insolvency proceedings aligns with the coordina-

1 On this point, see the UNCITRAL Legislative Guide on Insolvency Law, part 2, mn 33, 41 and 42.

2 As acknowledged also by the UNCITRAL Legislative Guide on Insolvency Law, part 2, mn 33: 'Since most insolvency laws include a mechanism to process claims—addressing submission, verification and admission—and to make distributions, proceedings with respect to those claims conducted outside the insolvency case are rendered superfluous. Nevertheless, some insolvency laws provide that, where legal proceedings against the debtor (including both commencement and continuation of those proceedings) are within the scope of the stay, those proceedings can be commenced or continued at the discretion of the court if it is considered necessary to preserve a claim or establish the quantum of a claim' (emphasis added).

tion strategy that prioritises the verification process. When coordination fails and the lawsuit proceeds despite a rule requiring its termination, it is only logical to prevent the litigant from benefitting from bypassing the verification process. Conversely, a rule stipulating that these judgments are *res judicata* against the insolvency practitioner fits within the framework where lawsuits already underway are allowed to run parallel to the verification procedure.

In cross-border cases, the coordination issue comes with an additional twist, particularly when the lawsuits are pending in a different country from the one where the insolvency proceedings are underway. Assuming that the insolvency proceedings opened in the first state are recognised in the second, there comes the question of identifying the law governing these two aspects of coordination mechanism, i.e. whether it is the law of the state in which the lawsuit is pending (the *lex fori processus*), or the law of the state in which the insolvency proceedings were opened (the *lex fori concursus*).

The second aspect (the binding effect, in the procedure of admission of claims, of the judgement that ascertains the existence or non-existence of a claim) touches on the unfolding of a phase of the insolvency procedure, and is therefore, rather intuitively, regulated by the *lex fori concursus*. This is what is provided for in art. 7(h) EIR, which subjects to the *lex fori concursus* the regulation of ‘the lodging, verification and admission of claims’. Similarly, art. 10(2)(g) of Directive 2001/24/EC (on the insolvency of credit institutions), and art. 274(2)(g) of Directive 2009/138/EC (on the insolvency of insurance companies). Furthermore, a provision with a similar content has been included in the draft ‘legislative instrument’ on the law applicable to cross-border insolvency proceedings, currently being prepared by UNCITRAL’s *Working Group V*³. The *lex fori concursus*, among other things, also regulates the recognition of the judgement issued in the *forum processus*, an issue that is logically preliminary to that of its binding effect upon the insolvency practitioner and the general body of creditors.

The first aspect (the fate of the credit process) touches on the question of the effects of the opening of the insolvency procedure on the ongoing law-

3 The *travaux préparatoires* can be read at https://uncitral.un.org/en/working_groups/5/insolvency_law; see the draft approved during the sixty-fifth session of the working group, which includes the rule that ‘Except as provided otherwise in these legislative provisions, the *lex fori concursus* shall govern all aspects of the commencement, conduct, administration and closure of insolvency proceedings and their effects’ (Chapter II, art. A, § 1, *incipit*).

suits, the regulation of which the main systems of international insolvency law all place within the remit of the *lex fori processus*.

Article 18 EIR (formerly Article 15 of Regulation No. 1346 of 2000) states that ‘the effects of insolvency proceedings on a pending lawsuit [...] concerning an asset or a right which forms part of a debtor’s insolvency estate shall be governed solely by the law of the Member State in which that lawsuit is pending [...]’⁴. This provision creates an exception to the extension principle found in Articles 7 and 20 EIR. According to this principle, the commencement of insolvency proceedings in one Member State would ordinarily trigger the same legal effects in other Member States, as governed by the law under which the proceedings are instituted. However, when determining the outcome of a lawsuit pending in a jurisdiction other than the one in which the insolvency proceedings are ongoing, the court hearing that lawsuit will not apply a foreign *lex concursus* (the law governing the debtor’s insolvency). Instead, it will assume that a court within its own jurisdiction has declared the debtor bankrupt and will adjudicate the case as if under domestic law⁵. The reason for mandating the application of the *lex fori processus* instead of the *lex fori concursus* in determining the effects of insolvency on the lawsuit is based on the idea that the expectations of the parties will be better preserved if the consequences of the commencement of an insolvency proceeding abroad are regulated by the law of the local forum, rather than by a foreign, often unforeseen, insolvency law. In this respect, Article 18 EIR shares its rationale with other provisions of the EIR that point to a law other than the *lex concursus*⁶.

4 The parts of the provision omitted here deal in a similar fashion with arbitral proceedings. Analogous provisions are contained in article art. 32 of Directive 2001/24/EC (on insolvency of credit institutions); art. 292 Directive 2009/138/EC (on insolvency of insurance undertakings).

5 For instance, the Court of Appeal of Amsterdam (25 August 2005, cited in Wessels, p. 635) determined the consequences of a French *liquidation judiciaire* on a lawsuit pending in the Netherlands pursuant to articles 27 to 31 of the Dutch Insolvency Act (*Faillissementswet*, or *Fw*), even if no Dutch *faillissement* had been opened in respect of the same debtor.

6 See recital 67 to the EIR: ‘To protect legitimate expectations and the certainty of transactions in Member States other than that in which proceedings are opened, provision should be made for a number of exceptions to the general rule’. On article 18 EIR particularly, see also Virgós/Schmit, mn 142; Wessels, p. 635; Virgós/Garcimartín, 140; Smid, *Deutsches*, p. 82; Dammann in Pannen EuInsVO art. 15, mn 4; Oberle in Hess InsO – EuInsVO art. 18, mn 2; Calvo Caravaca/Carrascosa Gonzáles, p. 142. On top of expectation of the parties, convenience for the court is also mentioned as a rationale, as the application of the local insolvency law would spare the court from the task of

As commentators explain, application of Article 18 EIR follows a two-stages process: firstly, the court before which the lawsuit is pending must identify which proceedings governed by its insolvency law bear most structural and functional similarities with the insolvency proceedings pending abroad, and recognised; secondly, the court must attach to the recognition of the foreign proceedings the same consequences that the opening of the corresponding domestic proceedings would have if they had been opened⁷.

The first stage of the process is particularly tricky, since pairing proceedings instituted under different laws may not be a straightforward task all the times. Consider a German *Insolvenzverfahren* pending against a medium-sized company, a common *GmbH*: the corresponding Spanish proceeding will presumably be a *concurso*: both proceedings have as their prerequisite, as a rule, actual insolvency (i.e., the debtor's current inability to meet its obligations regularly by normal means); they entail, as a rule, the debtor's loss of the power of disposition and administration of its assets (divestment); and they may result either in a covenanted restructuring of the content of creditors' rights (through an *Insolvenzplan* or *convenio*), or in the liquidation of the assets and distribution of the proceeds among all creditors. Likely, the corresponding Italian proceeding will be a *liquidazione giudiziale*⁸. But what if the *Insolvenzverfahren*, as it can well happen, is opened in the event of imminent insolvency (*drohende Zahlungsunfähigkeit*: § 18 *Insolvenzordnung*, or *InsO*)? The Spanish equivalent will still be the *concurso*, which can be based both on *insolvenca actual* or *inminente* (art. 2 of the *Ley concursal*, or *LC*). However, the *liquidazione giudiziale* requires actual insolvency, thus the Italian 'doppelgänger' of the German proceedings will likely be a *concordato preventivo* (with purpose of liquidation: art. 84 of the *Codice della crisi d'impresa e dell'insolvenza*, or *CCII*)⁹.

Moreover, in both the *Insolvenzverfahren* and the *concurso* the debtor, under certain conditions, and appropriately supervised by the court, may retain some powers of administration and disposition of the estate (*Eigenverwaltung* and *intervención de la administración concursal*, respectively: § 270 *InsO* and Art.106 *LC*). This is never the case with *liquidazione giudiziale*, while all other procedures (*concordato preventivo*, *accordi di*

finding out what the foreign *lex concursus* is: thus OLG Köln, 17 October 2007, in ZIP 2007, p. 228 et seqq.

7 Duursma-Kepplinger, in Duursma-Kepplinger, Duursma, Chalupsky, art. 15, mn 18–21.

8 Small-sized companies are eligible for *liquidazione controllata*; certain companies (such as cooperatives) are instead eligible for *liquidazione coatta amministrativa*.

9 Again, there's a variant available to SMEs, i.e. the *concordato minore*.

ristrutturazione, piano di ristrutturazione soggetto ad omologazione) available to medium-to-large enterprises are debtor-in-possession: the Italian counterpart will thus be one of those, depending on the content of the plan.

Finally, the German and Spanish proceedings may yield a restructuring plan, instead of a piecemeal liquidation of the estate: this is also true of the *liquidazione giudiziale*; consequently, while the Spanish counterpart will in any case be a *concurso*, the Italian counterpart, depending on whether the *Insolvenzverfahren* bound to the sanctioning of an *Insolvenzplan* is based on actual or imminent insolvency, or on whether the debtor has been divested, will be a *liquidazione giudiziale* or another one of the above-mentioned procedures, depending on the content of the plan.

Similarly to the EIR, other cross-border insolvency law regimes subject a lawsuit pending in the home forum to the effects of the debtor's access to an insolvency proceeding emanating from the *lex fori processus*.

This holds obviously true for the regimes of cross-border insolvency law that follow the 'assimilation principle', i.e. that generally attach to the recognition of foreign insolvency proceedings the same effects of the opening of domestic proceedings, including those the effects upon pending lawsuits.¹⁰

Moreover, the implementation of the MLCBI yields the same results: Article 20 provides that recognition of foreign main proceedings will result in the stay of proceedings pending against the debtor in that state, and that the scope of this suspension is governed by the same provisions that regulate the effects of local insolvency proceedings on pending proceedings.¹¹

10 Two examples: art. 170(1) of the Swiss Federal Act on Private International Law ('Unless this law provides otherwise, the recognition of a foreign bankruptcy decree entails, for the debtor's property located in Switzerland, the legal consequences of bankruptcy as provided by Swiss law'); as well as art. 4 of the Argentine *Ley de concursos y quiebras* ('La declaración de concurso en el extranjero es causal para la apertura del concurso en el país, a pedido del deudor o del acreedor cuyo crédito debe hacerse efectivo en la Republica Argentina'): evidently, in the latter case the application of the *lex fori* is a consequence of the opening of a domestic proceeding.

11 See for example 11 U.S. Code §1520(a)(1) and Article 20(2) of *Schedule 1* of the UK *Cross-Border Insolvency Regulations 2006*. The former provision reads: 'Upon recognition of a foreign proceeding that is a foreign main proceeding sections 361 and 362 [the automatic stay provisions, *ed.*] apply with respect to the debtor and the property of the debtor that is within the territorial jurisdiction of the United States'; the latter closely mirrors that of the Model Law in providing that the stay of domestic actions has the same scope and effect 'as if the debtor, in the case of an individual, had been adjudged bankrupt under the Insolvency Act 1986 or had his estate seized under the Bankruptcy (Scotland) Act 1985 M2, or, in the case of a debtor other than an individual, had been made the subject of a winding-up order under

Back to Article 18 EIR, it should be noted that it poses delicate coordination problems with the Article 7 EIR, particularly with the provision contained in Paragraph 2(f), which subjects to the *lex fori concursus* 'the effects of the insolvency proceedings on proceedings brought by individual creditors'. Commentators (and the EU Court of Justice) agree that the unfortunate term 'proceedings' (*procédures*, *Rechtsverfolgungsmaßnahmen*, *ações*, *azioni giudiziarie*) contained in this provision includes only enforcement proceedings (more explicit, in this sense, is the Spanish version of the EIR, which speaks of *ejecuciones individuales*), while the 'lawsuits' (*instances*, *Rechtsstreitigkeiten*, *procesos*, *ações judiciais*, *procedimenti giudiziari*) referred to in Art. 18 EIR would include only cognition proceedings, initiated by the debtor before entering insolvency, or against him.¹²

Article 18, as we shall observe below, also raises problems of coordination with other provisions of Article 7, which arise precisely by examining the issues raised by the coexistence of a procedure for the verification of claims in one state, and litigation on the same claims in other states. The thorniest questions arise precisely when the *leges* indicated as applicable by Article 7 (to concurrent verification) and Article 18 (to pending proceedings),

the Insolvency Act 1986,' and that such suspension is subject 'to the same powers of the court and the same prohibitions, limitations, exceptions and conditions as would apply under the law of Great Britain in such a case'. Note that the MLCBI provision does not postulate any 'pairing' of the foreign proceedings to a local one, as the relevant provision of the *lex fori processus* are clearly identified: e.g., regardless of the type of proceedings that are granted recognition in the U.S., lawsuits pending before an American court will always face the consequences set out in §§ 361 and 362.

- 12 Virgós/Schmit, mn 142; Bork/Mangano, p. 170; Virgós/Garcimartín, p. 76–77 and p. 140; Fletcher in Moss/Fletcher/Isaacs, p. 71 (93); Dammann, Sénéchal, p. 556 et seqq.; Garcimartín/ Virgós in Bork/Van Zwieten, EIR art. 18, p. 338; Paulus, EuInsVO art. 18, mn 3; De Cesari/Montella, p. 133–134; Duursma-Kepplinger in Duursma-Kepplinger/Duursma/Chalupsky EInsVO art. 15, mn 27; Undritz in Schmidt EuInsVO art. 18, mn 6; Smid, *Deutsches*, p. 84; Thole in Vallender EuInsVO art. 18, mn 4; Reinhart in Stürner/Eidenmüller/Schoppmeyer IV, EuInsVO 2015 art. 18, mn 4; Dahl/Kortleben in Brinkmann, EuInsVO art. 18, mn 6; Lupoi, in Maffei Alberti EIR art. 18, mn 5; McCormack, p. 163; Wessels, p. 635; Calvo Caravaca/Carrascosa Gonzáles, p. 141–142.

See also AG Bobek, 9.6.2016 – case C-212/15, ECLI:EU:C:2016:427 paras 48 et seqq. – *ENEFI Energiahatékonysági Nyrt v Direcția Generală Regională a Finanțelor Publice Brașov (DGRFP)*; ECJ 9.11.2016 – case C-212/15, ECLI:EU:C:2016:841 paras 31–35 – *ENEFI Energiahatékonysági Nyrt v Direcția Generală Regională a Finanțelor Publice Brașov (DGRFP)*; ECJ 6.6.2018 – case C-250/17, ECLI:EU:C:2018:398 paras 29–32 – *Virgílio Tarragó da Silveira v Massa Insolvente da Espírito Santo Financial Group SA*; on article 32 of Directive 2001/24/EC, see ECJ 24.10.2013 – case C-85/12, ECLI:EU:C:2013:697 paras 51–58 – *LB I hf v Kepler Capital Markets SA e Frédéric Giraux*.

respectively, make divergent basic choices as to how verification and passive litigation should be coordinated.

We will examine these issues by considering two hypothetical cases. Before that, it may be useful to illustrate, with some examples, how such coordination can be articulated in different ways.

B. Two methods for verifying disputed claims in insolvency

Coordination between the process of claim verification and lawsuits regarding individual claims largely depends on the structure of the former, particularly at the stage where objections to the admission of such claims, raised by parties with an interest (such as fellow creditors, the insolvency practitioner, or even the debtor themselves), must be resolved by a judge before any distribution of proceeds or any voting on a composition can take place.

Depending on the extent to which the so-called *vis attractiva concursus* encompasses disputes that might affect the liabilities of the estate, the law may require that such divergences be settled either in a separate venue or incidentally within the insolvency proceedings.

In the first instance, the parties involved in the dispute must either initiate a new lawsuit (possibly before the same court that is hearing the insolvency case) or resume the lawsuit that was pending when the insolvency procedure commenced. We shall refer to this as the 'double track' method.

Alternatively, the parties must submit their disagreement to the same judge presiding over the insolvency case. Claims already brought before another judge may be an exception, in which case the 'double track' method would again be applicable. However, if the law designates the bankruptcy judge as the sole authority to hear any dispute regarding claims lodged within the proceedings, we shall describe this as the 'single track' method.

Each method entails a different approach to dealing with pending lawsuits: the former allows their continuation, while the latter necessitates their discontinuation.

Before delving deeper into this topic, it may be helpful to examine each method more closely through a few examples drawn from jurisdictions both within and outside the EU.

I. Examples of the 'double track' method

§ 179 of the German Insolvency Act (InsO) stipulates that if objections to a claim are raised either by the insolvency practitioner or a fellow creditor, the claimant wishing to be included in the schedule of claims (*Insolvenztabelle*) among creditors entitled to the distribution of the debtor's assets must petition for the ascertainment (*Feststellung*) of her claim. Conversely, if her claim is supported by a judgment or any title permitting the commencement of a forced execution, it is up to the objecting practitioner or creditor to bring an appeal against the judgment or to seek the annulment of the title (*Widerspruch*). In both scenarios, the petition will initiate an ordinary lawsuit, parallel to the insolvency procedure, as clarified by the first line of § 180 InsO. Furthermore, the second line of this provision states that if a controversy regarding that claim was already pending between the debtor and the claimant, the objections to the claim will be addressed within the same lawsuit after its resumption (*Wiederaufnahme*), according to § 86 InsO; thus the lawsuit will be litigated on in the pristine venue, and the judgment rendered therein will bind the insolvency practitioner and all of the creditors (§ 183, first line, InsO)¹³.

A similar approach is followed in Austria, in accordance with §§ 7, 110, and 113 of the *Insolvenzordnung* (or IO)¹⁴: the first provision in the order regulates the interruption of the pending lawsuits and the steps towards their resumption, that can only happen as soon as the hearing for claims' verification (*Prüfungstagsatzung*) has taken place; in the second and fourth provisions mentioned basically mirror § 180 InsO, while § 113 grants *erga omnes* effect to the judgments made in the duly resumed lawsuits.

Article L624–2 of the French Commercial Code (*Code de commerce*) stipulates that the *juge-commissaire*, who is generally tasked with deciding whether a claim should be allowed in the schedule of claims or not, must refrain from doing so when claims for which lawsuits are pending are involved. Instead, the *juge-commissaire* must take note of this circumstance in his decision. Furthermore, Article L622–22 allows the creditor to resume the lawsuit as soon as she has lodged the claim by summoning the insolvency practitioner but prevents the competent court from ordering the debtor

13 Smid, *Forderungen*, p. 193 et seqq.

14 Roth, p. 218 et seqq.; p. 289 et seqq.

to pay (even if the creditor prevails), as the court's sole responsibility will be to ascertain whether the creditor holds such a right¹⁵.

Similarly, Dutch law provides that claims against which objections have been raised will be adjudicated by the insolvency court unless a dispute was already pending at the time of the commencement of the *faillissement* (see Articles 29 and 122, first paragraph of the *Faillissementswet*)¹⁶.

Spanish law differs from French law mainly in one respect: the pending lawsuit will not be stayed upon the opening of a *concurso*. Article 137 of the *Ley concursal* (LC) states that, as a rule, lawsuits to which the debtor is a party that are ongoing at the time of the commencement of the insolvency case shall continue unless the law exceptionally stays them or joins them to the insolvency proceedings. No exception is provided for lawsuits on claims. Finally, Article 262 states that claims being disputed before another court shall be included in the schedule of claims (*lista de acreedores*) contingently, in the same way as conditional claims¹⁷.

Outside Europe, noteworthy examples include articles 84, 127 and 130 of the Mexican *Ley de concursos mercantiles*, that allow the lawsuit to continue and the winning creditor to rely upon the judgment to be included in the claimants' list; the Uruguayan *Ley de proceso concursal*, whose Articles 52 and 103 show clear similarities to Spanish law, and the Japanese Insolvency Act (the *Hasanhō*, Law No. 75 of 2 June 2004), whose Articles 126 and 127 establish a framework similar to the German and Austrian systems.

Small differences aside, the common feature of these laws is that litigation on claims is 'outsourced' to other courts, either completely (as in Germany, Austria and Japan) or in part (as in France, Netherlands, Spain, Mexico and Uruguay), specifically the litigation that was already ongoing at the time of the commencement of the procedure.

The reason for this approach is evidently to keep the bankruptcy court free from 'sideline litigation' as much as possible and allow it to focus on the primary tasks of monitoring the insolvency procedure and managing the insolvent's estate.

It can be observed, however, that this is a general objective of insolvency laws, regardless of whether they follow a 'double' or 'single-track' method in the verification of claims. In jurisdictions following the latter method, the

15 Le Cannu/Robine/Jeantin, p. 456 et seqq.

16 Vriesendorp, p. 296 et seqq.

17 Extensively on the topic, Menéndez Estébanez, p. 412 et seqq.; see also Guerrero Palomares, p. 100 et seqq.

aim is simply to minimise the formalities of the verification process rather than to limit its scope.

II. Examples of the ‘single-track’ method

Among European jurisdictions, Italy and Portugal follow the ‘single track method’, although with considerable exceptions (which will not be addressed here). Interestingly, in neither jurisdiction does this method result from black-letter law; rather, it is the consequence of well-established lines of judicial rulings.

Under Article 151 of the Italian Act on Insolvency and Restructuring (CCII), in force since the summer of 2022, all claims, regardless of their rank (and even if they may be exempted from the prohibition of seeking satisfaction through individual enforcement actions, as is provided for some types of mortgages), must be lodged and ascertained according to the procedure set out in the Act, particularly Articles 200 et seqq. This provision replicates Article 52 of the former *Legge fallimentare* (which had been in force for eighty years from 1942 onwards), a provision that courts consistently construed as prohibiting any litigation related to insolvency claims outside the *fallimento* itself¹⁸. Since such a conclusion is anything but apparent from the letter of the law, an often-cited argument supporting it is that Article 204(2)(c) CCII states that only claims already ascertained by a non-final judgment (that is, a judgment still subject to appeal) shall be contingently listed in the schedule of claims (*stato passivo*)¹⁹. This means the creditor might have her share of proceeds provisionally set aside until the judgment ascertaining her claim becomes final, so that, should the judgment be successfully challenged at the appellate stage, such proceeds can be distributed among the other creditors²⁰. The argument runs as follows: disputes on claims entitled to such provisional enlistment must be settled not by the bankruptcy judge but through the usual litigation process within the frame of the pending lawsuit. *A contrario*, courts maintain that

18 See, for example, Cass. 24.1.2023, no. 2090; Cass. 28.3.2022, no. 9853; among lower courts, e.g., App. Messina 11.2.2022; App. Milano 7.4.2021; Trib. Roma 24.7.2023; Trib. Bergamo 24.5.2023, all available on <bdp.giustizia.it> Find extensive references in Montanari Giur. comm., 2015, 94 (94).

19 Montanari, *passim*.

20 See such principle thoroughly explained and applied in App. Napoli, 11.6.2024, no. 2598.

claims already being litigated in lawsuits that have not reached the judgment stage at the time of the opening of the *fallimento* (now rebranded as *liquidazione giudiziale*) are not entitled to such treatment and, consequently, must be litigated before the bankruptcy court (the *giudice delegato* first, then the *collegio*). Consequently, lawsuits regarding those claims must be discontinued unless a judgment on the merits (whether favourable to the claimant or not²¹) has already been issued. In that case, it will be up to the insolvency administrator (the *curatore*) to file an appeal, and it will be her responsibility to stand as a party should an appeal be filed by the creditor, or in cases where the appellate proceedings have already started at the time the insolvency case commenced.

In Portugal, the *Tribunal Superior de Justiça* has consistently held that as soon as the judgment opening the insolvency proceedings (*sentença de declaração de insolvência*) becomes final, the lawsuits on claims against the insolvent debtor that are pending must be terminated under Article 277(e) of the Portuguese Code of Civil Procedure, on the grounds that their continuation has become superfluous for the creditor, since she will have both the possibility and the obligation to lodge that very claim with the insolvency court and have it ascertained following the procedure set out in Articles 128 et seqq. of the *Código da Insolvência e da Recuperação de Empresas* (or CIRE)²².

Outside Europe, Chilean²³, Bolivian²⁴, and Peruvian²⁵ laws provide that pending lawsuits shall be joined (*acumuladas*) with the insolvency proce-

21 Although the wording of article 204 exclusively refers to ‘claims ascertained by a judgment’ (thus, a judgment favourable to the plaintiff), courts construe the provision broadly: see for instance Cass. civ., 15.32022, no. 8463, in *Fall.*, 2022, pp. 939 et seqq.

22 See Ac. do STJ, 30.4.2024 (case 18490/16.8T8LSB.LI.S1-A); Ac. do STJ, 19.6.2018 (case 18860/16.1T8LSB-A.LI.S2); Ac. do STJ, 22.11.2018 (case 4144/17.1T8LSB.LI.S2); Ac. do STJ, 2.11.2017 (case 11674/16.0T8LSB.S1); Ac. do STJ, 26.9.2017 (case 3499/16.0T8VIS.S1); Ac. do STJ, 8.5.2013 (case 170/08.0TTALM.LI.S1); Ac. do STJ, 15.3.2012 (case 501/10. 2TVLSB.S1); Ac. do STJ, 13.1.2011 (case 2209/06.4TBFUN-LI.S1); Ac. do STJ, 25.3.2010 (case 2532/05.5TTLSB.LI.S1); among trial courts, Ac. do TRL Lisboa, 7.3.2017 (case 11804/16.2T8LSB-A.LI-7); Ac. do TRL Evora, 29.1.2015 (case 692/11.5TBCTX.EI); all judgments can be found at <https://www.dgsi.pt/>. See Epifânio, p. 187 et seqq.; Gonçalves, p. 310 ss.

23 See articles 142 and 143 of Law no. 20720 of 2013 (only arbitration proceedings and lawsuits pending in front of certain special courts are exempted).

24 See article 1591 of the *Código de comercio*.

25 See articles 32 and 33 of the *Ley general del sistema concursal*.

dure²⁶. Lastly, in Argentina, the creditor is given the choice between resuming the lawsuit or seeking a quick ascertainment of her claim within the insolvency procedure²⁷.

The main rationale behind this method, as stated by Italian scholars and Portuguese higher courts, is the need to ensure that the *pari passu* principle is preserved in the determination of the estate's liabilities, which, in turn, determines the amount of the share of proceeds to which each creditor will be entitled²⁸. This calls for the possibility of each creditor 'having her say' about the merits of fellow creditors' claims, as the higher the amount to which a claim is allowed to partake in the distribution, the less all creditors will eventually obtain from such distribution.

It is interesting to note that 'double track' jurisdictions, too, do not ignore the need to give all creditors the chance to actively dispute the substance of all claims lodged. However, they achieve this objective differently, by transforming the pending lawsuit into a multi-party procedure, for example, by mandating that creditors objecting to the allowance of a fellow creditor's claim be joined as parties in the resumed case (see, particularly, §§ 110 and 113 of the Austrian *Insolvenzordnung*, and Article 127 of the Japanese *Hasanhō*). 'Single track' jurisdictions, on the other hand, employ a different procedural technique by establishing a special, multi-party procedure unfolding before the insolvency court.

Once again, the divide between 'double track' and 'single track' jurisdictions does not stem from diverging policies but rather from the choice of different procedural devices.

C. Policy consistencies within the leges concursus...

The key takeaway from this brief comparative overview is that the fate of pending lawsuits on claims is closely intertwined with the structure of the process that leads to the ascertainment of the estate's liabilities. The connec-

26 From a purely domestic perspective, a joinder of the lawsuit to the verification process may sound as a form of 'double track', in that the lawsuit will not be discontinued, but rather transferred to another venue (the insolvency court), where it will continue. Viewed from a cross-border perspective, however, a law requiring a joinder to a foreign insolvency proceeding is tantamount to a provision demanding a termination of the lawsuit, being a formal transfer of the same from one jurisdiction to another clearly unconceivable.

27 See article 21(2)(2) of the *Ley de concursos y quiebras*.

28 Fabiani, p. 334.

tion between these two elements is so strong that it seems impossible to determine the outcome of lawsuits outside the proceedings independently of what occurs within. The consequences of commencing an insolvency case must differ depending on whether a venue to litigate the claims within the proceedings is provided or not.

Yet, as will be shown forthwith, Article 18 EIR, if construed literally, may have the extraordinary effect of severing two sides of the same coin by dictating that, in instances where the insolvency case and the lawsuit on the claim are pending in different jurisdictions, two different *leges concursus* will apply: that of the *forum concursus* will govern how claims are proven and ascertained by the insolvency court; that of the *forum processus* will determine whether the court in that forum will ever be allowed to issue a judgment on the merits of those claims, if seized before the insolvency cases had started.

The outcome of such a *depeçage* may not be dramatic if the two laws in question follow the same method for verifying disputed claims, as the treatment of the pending lawsuit under the insolvency law of its forum will not differ significantly from that it would face under the law of the insolvency forum. For instance, a lawsuit pending in France while the debtor party to it is made insolvent in Germany will be stayed under Article L622-22 and resumed as soon as the *Insolvenztabelle* excluding the creditor is published. Similarly, a lawsuit pending in Portugal while the debtor is adjudged bankrupt in Italy will be terminated in much the same way as if it had been pending in Italy.

In such cases, the combination of two similarly oriented insolvency laws leaves no gaps between the treatment of the lawsuit and the procedure for verifying the claim; or, in the worst scenarios, raises minor issues if such insolvency laws exhibit small differences. Problems, however, arise when the lawsuit's forum and the insolvency forum follow two different methods.

I. ... and their disruption under article 18 EIR.

1. Case A: The bankruptcy court ends up packed with litigants from the 'single track' jurisdiction

Imagine a Portuguese judge sitting in a *tribunal de comarca* learns that a *Rechtbank* in the Netherlands has recently placed a company made defendant in a case currently on her docket under the control of a *curator*. There

are no questions regarding the jurisdiction of the Dutch bankruptcy court, nor does the *juíza* doubt the compatibility of the judgment opening the Dutch proceeding with Portuguese *ordre public*. Applying Article 18 EIR, the Portuguese judge will issue the judgment that Portuguese law would expect if a colleague of hers were to hand down a *sentença de declaração de insolvência*. She will, accordingly, terminate the lawsuit, inviting the parties to ‘move’ their dispute to the Dutch court. That would not pose a practical problem for the Portuguese plaintiff, as she could either lodge her claim using the standard form named in Article 55 EIR or ask her Portuguese lawyer to familiarise themselves with the relevant provisions of the *Faillissementswet*, as the assistance of an *Advocaat* will not be required (Article 53 EIR). This situation will align with her lawyer's expectations since the same would have happened had the defendant been made bankrupt in Portugal. Indeed, if the latter had the sense that things were not going well in the lawsuit, she might see its termination as an opportunity to refine her litigation strategy.

From the perspective of the Dutch court, however, such a turn of events may be less ideal, as it could find itself resolving disputes that, had they been pending in the Netherlands, would have remained in the original venue. If we add to this scenario the fact that the insolvent is a bank that, like many banks, was already facing a wave of litigation both domestically and abroad on the eve of its *Faillissement*, the situation for the *Rechtbank* could become overwhelming. Article 18 EIR (or, in this case, Article 32 of Directive 2001/24/EC) may have achieved its purpose of protecting the expectations of litigants, but it would do little to serve the policy of concentration underlying the Portuguese regime (as there is no insolvency proceeding going on there) and would hinder the Dutch court from achieving the simplification and swiftness that its law seeks by outsourcing sideline litigation²⁹.

2. Case B: Foreign litigants' broken expectations

Consider a reverse scenario: an Italian *tribunale* winds up a company that a French creditor has made defendant before a French *tribunal de commerce*.

29 *Mutatis mutandis*, case A's plot mirrors that of a couple of Italian cases adjudged by Cass., 26.9.2023, no. 2736 (in *Fall.*, 2024, p. 183 et seqq., with comment by De Cesari/Montella), and Cass. 21.6.2023, n. 17777 (in *Fall.*, 2023, p. 1359 et seqq., with comment by De Cesari/Montella) respectively. The latter is commented below in the text.

The creditor in question lodges her claim with the Italian *curatore* and then immediately resumes the French proceedings under Article L622–22 of the *Code de commerce*. Despite being duly summoned, the *curatore* is unlikely to appear before the French judge. This would result in the French court swiftly awarding the creditor a *jugement*, possibly even before the Italian *giudice delegato* has had the opportunity to examine the claim brought before him by the French claimant. The latter might even arrive at the hearing (*udienza di discussione*) with a certified copy of the *arrêt*; however, the Italian judge will likely not grant a provisional listing in the *stato passivo* based on Article 204(2)(c) CCII, as the judgment was rendered after the opening of the *liquidazione giudiziale* in a lawsuit that, under Italian law, should have been terminated and must therefore be treated as ineffective (*inopponibile*) upon the estate. Hence, the creditor will find herself defending her case again in front of the Italian court, replaying the same scenario as before the *tribunal de commerce*. However, as often happens in litigation, the creditor's fortune might take a different turn. In this case, the policy of concentration underpinning Italian insolvency law is achieved thanks to Article 18 EIR—at the expense of the rationale of Article 18 EIR itself and the expectations of the French creditor, who might have reasonably believed she would be able to complete her lawsuit before the *tribunal de commerce* and have the judgment obtained there recognised in Italy.

D. Possible fixes

I. Article 18 EIR as a conflict and (partly) substantive provision. Critique.

To resolve the conflict arising from the application of two divergent insolvency laws, some commentators argue that Article 18 of the EIR should be interpreted to align either the law of the forum processus or the law of the forum concursus with the relevant foreign law. This can be achieved either by interpreting national law considering the *effet utile* of the foreign provisions applicable under the EIR, or by characterizing Article 18 as a (partly) uniform substantive rule of insolvency law that—by virtue of the principle of *primauté communautaire*—takes precedence over conflicting national provisions.

Let us now examine these arguments in detail.

1. Arguments in favour of the alignment of the *lex fori processus* to the purposes of the *lex fori concursus*.

Some commentators argue that the *lex fori processus* should be applied in a way that does not undermine the objectives of the foreign insolvency proceedings. They point out that, in certain cases, insolvency proceedings that are ‘equivalent’ in structure and function to those opened abroad do not produce the same effects as those prescribed by the *lex fori concursus* for foreign insolvency proceedings. While acknowledging that under Article 18 of the EIR the effects of opening insolvency proceedings on a pending trial are determined solely by the *lex fori processus*, these authors nonetheless maintain that the *lex fori concursus* should guide its application.

By way of example, consider the interruption of proceedings (*Unterbrechung, interrupción, interruption, interruzione*). The doctrine in question notes that the reorganization of a failing firm can be structured so that divestment either mirrors that of liquidations or is mitigated to varying degrees. Consequently, if reorganization proceedings in each state result in the debtor’s total divestment, proceedings pending in that state are typically halted to allow the liquidator to replace the debtor as a party. However, this may not occur under the *lex fori processus*, which might prescribe a more limited form of dispossession, allowing the debtor to be a party to lawsuits. Proponents of this view conclude that, in such cases, the *lex fori processus* should be applied with due regard to the requirements of the foreign insolvency proceedings, especially where a strict application could harm the insolvency estate.

Consider a situation in which there is a genuine risk that the debtor—who remains a party to the ongoing proceedings—might collude with a creditor and fail to mount an adequate defense, making it easier for the creditor to obtain a judgment that could then be enforced against the estate during claims’ admission. In such a scenario, the preservation of the debtor’s standing must be balanced by granting the curator the right to intervene (potentially by interpreting the rules on third-party intervention more flexibly). Furthermore, if proceedings are not formally interrupted, the curator should have the option of requesting a deadline extension (potentially more generously than typically allowed under the *lex fori processus*) to carry out any defensive actions the debtor may have—intentionally or otherwise—neglected.

Returning to the issue of coordinating pending passive litigation and verification proceedings, the thesis under consideration (taken to its logical

extreme) might even suggest that courts in states following a ‘single track’ model should not formally conclude proceedings pending before them, as they would if insolvency proceedings had been opened in their own jurisdiction. Instead, they should allow the creditor to resume those proceedings (potentially against the liquidator), whenever the *lex fori concursus* permits such proceedings to continue in parallel with the verification of claims.

The Italian *Corte di Cassazione* adopted this approach in a case where an Italian court was asked to terminate a contract for non-performance and order the return of the price, while, at the same time, the defendant was involved in an *Insolvenzverfahren* before the *Amtsgericht* in Munich³⁰. To support its decision, the Court argued that aligning the *lex fori processus* with the *lex fori concursus* is mandated by the Regulation itself. In Article 7(2)(f), the Regulation subjects the fate of ‘proceedings’ to the law of the opening state but qualifies this by adding ‘except for pending judicial proceedings’. According to the Supreme Court, this qualification is meant to allow pending proceedings to continue in accordance with the *lex fori concursus*, particularly when that law does not provide a procedure within the bankruptcy proceedings to establish claims and leaves that process to be carried out elsewhere. The Court concluded that any alternative interpretation would create a normative loophole, ultimately denying the creditor protection—whether through the concursus court or the litigation court—by preventing either from recognizing his rights due to the constraints imposed by their respective insolvency laws.

2. Theses advocating the adaptation of the *lex fori concursus* to the ongoing trial under the *lex fori processus*

Another interpretation holds that Article 18 EIR implicitly contains a rule not so much aimed at bending the *lex fori processus* to the requirements of the *lex fori concursus*, but rather at aligning the application of the latter with the fact that the *lex fori processus* permits the continuation of pending litigation. This view has emerged notably in discussions about the sensitive issues arising from the intersection of arbitration and insolvency proceedings. Two situations have been highlighted where provisions of the *lex concursus* might conflict with those of the *lex loci arbitri*, which allow for the continuation of pending arbitrations.

30 Cass. 21.6.2023, no. 17777.

The first situation concerns the rules of the *lex concursus* that, by regulating the impact of opening insolvency proceedings on contracts concluded by the solvent debtor, invalidate or render ineffective the arbitration agreement when insolvency proceedings are initiated. For example, this issue arose with Article 142 of the now-repealed Polish insolvency law (*Prawo upadłościowe*) during the notorious Vivendi affair³¹. It has been argued that Article 18 EIR—by referring to a *lex fori processus* that permits arbitration to continue even when one party is admitted into insolvency proceedings—effectively sanctions a perpetuation of arbitration (*perpetuatio arbitratu*). In this view, any *lex concursus* rules that would otherwise deprive arbitrators of their power to decide the merits (*potestas iudicandi*) should be disapplied³². Thus, Article 18 EIR would require arbitrators not to terminate the proceedings under the *lex fori concursus*, and it would obligate the court in the state where the seat of arbitration has been chosen (and which has jurisdiction over challenges to the award) to recognize the existence of arbitral jurisdiction.

The second situation involves the *lex concursus* rules that, following a ‘one-track’ approach, render pending trials procedurally inadmissible and their judgments unenforceable. Although the doctrine discussing these hypotheses focuses on arbitration³³, the reasoning appears applicable to state proceedings as well. According to this perspective, because many *lex loci arbitri* allow arbitrations to continue, Article 18 EIR would require the insolvency court to consider awards (or judgments) rendered in ongoing foreign arbitrations or trials as recognizable and enforceable against the insolvency estate. This would prevent the *lex loci arbitri* from being effectively rendered meaningless³⁴. Proponents argue that if Article 18 EIR merely stipulated that arbitrators and local judges must conduct proceedings in accordance with their own *lex processus*, it would be redundant, simply restating the well-established principle that the law of the forum governs its proceedings (*lex fori regit processum*)³⁵. Instead, they contend that the true

31 Widmann, in Int'l Lis, 2010, 135.

32 Garcimartín/ Virgós in Bork/Van Zwieten, EIR art. 18, pp. 340–341; Baccaglini, in Carratta et al.; Boggio, in Giur. it., 407 (415); Widmann, in Int'l Lis, 135 (135).

33 Baccaglini, p. 152 et seqq.; Boggio, in Giur. it., 407 (413).

34 Baccaglini, p. 156; Boggio, in Giur. it., 407 (413).

35 This principle is so well established in private international law that it remains unexpressed in most private international law legislations. Article 12 of Italian Law No. 218/1995 marks a rare exception to this state of things. See generally Garnett in Basedow et al, p. 1667 (1667); Collins, p. 203, mn 7–002.

significance of Article 18 EIR lies in addressing the different ways European jurisdictions apply the principle of formal concurrence—that is, the right of all creditors to challenge both the existence and ranking of claims³⁶. In this perspective, Article 18 EIR not only guides parties and arbitrators but also directs the insolvency judge. In applying the *lex fori concursus* during the verification of claims (as required by Article 7(2)(g) EIR), the judge must ensure that the continuation of the process provided by the *lex fori processus* is not obstructed.

3. Critical considerations

These proposals have the significant merit of offering practically sensitive solutions to the misalignment between the *lex fori processus* and the *lex fori concursus*. Their value is especially evident in terms of meeting litigants' expectations, particularly in member states where a 'double track' model prevails. However, several observations are warranted.

The first thesis, which argues for adjusting the *lex fori processus* to serve the goals of the foreign insolvency proceedings, recognizes the need for some consistency in the effects generated by insolvency proceedings, even if the governing laws differ. Yet it remains unclear how far such adaptation can go. One must ask whether a judge in a 'single-track' forum may allow the pending trial to continue—contrary to a provision in domestic law—as the Supreme Court has suggested, and whether, conversely, a 'double-track' forum judge should close the pending trial solely because the consolidation of disputes over liabilities (as targeted by the *lex fori concursus*) requires it. If the answer were affirmative, one might be forced to admit that the outcome is governed by the law of the state where the insolvency proceedings were opened, which would contradict Article 18 EIR.

Some uncertainty also arises from the Supreme Court's reliance on the clause in Article 7(2)(f) that exempts 'pending judicial proceedings' from certain effects. This clause appears to link Article 7 with the exceptional provisions of Article 18 EIR—so much so that the legislator intentionally uses the term 'pending judicial proceedings' in both. Moreover, if one were to adopt this interpretation, Article 7(2)(f) would be seen not as a conflict rule but as a rule of substantive competition law, applicable mainly in jurisdictions that follow a 'single-track' method. In jurisdictions with a 'double-track' system, the 'salvation' of pending trials would not justify a

36 Baccaglioni, p. 156 and p. 162.

formal closure by the forum processum judge—raising the same objection applicable to the second thesis.

Regarding the latter thesis, it is worth noting that the disapplication of the *lex fori concursus* rules (which impede the perpetuation of arbitration) can also be achieved by recognizing that the effectiveness of arbitration agreements already in force is governed not by Article 7(2)(e)—which renders the effects on ongoing contracts subject to the *lex fori concursus*—but by the *lex loci arbitri*. The continuation of arbitration under the *lex loci arbitri* implies that the underlying arbitration agreement remains effective³⁷.

Finally, the reconstruction that Article 18 EIR allows a contesting court to deem a foreign judgment rendered in a pending trial binding on the insolvency proceedings—thereby overriding the rule that such judgments are unenforceable—is, among the proposals considered, the one that most clearly outlines an implicit substantive as well as a conflict rule in Article 18 EIR. While the need to harmonize the differing approaches to assessing liabilities in member states is evident, concluding that Article 18 EIR requires the competition court to depart from its national law seems inconsistent with the overall scheme of the Regulation, which aims not to harmonize insolvency rights *per se* but to establish a coordination mechanism that permits the coexistence of different insolvency regimes³⁸. One must ask whether the differences between the *lex fori processus* and the *lex fori concursus* cannot be resolved by other provisions within the Regulation.

II. A case for a narrow interpretation of ‘insolvency effects’ in Article 18 EIR

It is important to note that both Articles 7 and 18 EIR define only partially and somewhat flexibly the scope of the matters governed by the *lex fori concursus* and the *lex fori processus* (or *lex loci arbitri*), respectively. While Article 7(2) provides a (non-exhaustive) list of aspects subject to regulation by the law of the opening state, Article 18 does not clearly specify what is meant by ‘the effects of the insolvency proceedings on pending proceedings.’ Moreover, it is well established that conflict rules in European private international law should be interpreted not according to the national law

37 Thus Müller, in Mankowski/Müller/Schmidt, EuInsVO 2015 art. 18, mn 22.

38 See Recital 22: ‘This Regulation acknowledges the fact that as a result of widely differing substantive laws it is not practical to introduce insolvency proceedings with universal scope throughout the Union’.

of the forum, but by understanding the terms as autonomous concepts of Union law³⁹.

In attempting to define the boundaries of ‘effects of insolvency proceedings on pending trials,’ one must consider that the commencement of insolvency proceedings can affect litigation involving the insolvent in several ways:

- (a) by suspending them, primarily to allow the liquidator to substitute for the insolvent.
- (b) by terminating them altogether, as seen in certain jurisdictions with passive litigation.
- (c) by impacting judgments rendered by the insolvent’s creditors against third parties to safeguard or restore the integrity of the debtor’s assets (for instance, through common law revocatory actions).
- (d) by affecting the enforceability of transactions with procedural effects (such as arbitration agreements, forum extension agreements, agreements reversing the burden of proof, or the appointment of representatives), potentially rendering them unenforceable against the insolvency administrator who takes over the insolvent’s litigation.

While many of these effects can be broadly categorized as impacts ‘on ongoing proceedings,’ several of them are tied to specific choices made by the *lex fori concursus*. For example, the discontinuation of trials (point a) is typically linked to the loss of the insolvent’s ability to dispose of assets and related procedural relationships—a matter addressed by the insolvency administrator’s assumption of control⁴⁰. Similarly, the fate of actions by creditors against third parties (point c) depends on the scope of the insol-

39 Thus Wessels 636; Duursma-Kepplinger in Duursma-Kepplinger/Duursma/Chalupsky EInsVO art. 15, mn 15; Dammann in Pannen EuInsVO art. 15, mn 8. The same applies to the notion of ‘pendency’ of litigation, a definition of which (given, however, for other purposes) could be found in Article 32 of Regulation (EU) 1215/2012, which refers, alternatively, to the date of filing of the writ of summons with the court seized, or the date of service of the writ itself, if prior to filing: thus Garcimartín/Virgós, in Bork/van Zwieten EIR art. 18, mn 18.07.

40 Fabiani, p. 329; on the subject, more extensively, Ghirga in Chiarloni, p. 7 et seqq.; Califano, p. 44 ss.; Baccaglioni, in Fall., 2021, 1123 (1123 et seqq.). On the rationale of § 240 of the German *Zivilprozeßordnung* (ZPO), which provides for the interruption (*Unterbrechung*) of lawsuits regarding assets included in the insolvency estate, Smid, *Handbuch*, p. 157 et seqq.; Muthorst, in Bork, Hölzle, p. 405 et seqq. See also Geimer/Garbe, in Geimer/Schütze EIR art. 18 mn 3.

veny administrator's exclusive or non-exclusive authority to bring such actions on behalf of all creditors, as specified in Article 7(2)(c) EIR.

Thus, it is the role of the *lex fori concursus* to determine the extent to which the administrator is empowered to bring judgments and procedural remedies for the preservation of assets⁴¹. Meanwhile, the *lex fori processus* should regulate only the indirect consequences of these events—for example, whether the debtor's divestiture leads to the discontinuation of pending litigation (and, if so, under what terms and conditions the litigation may resume), or how a trial initiated by a creditor (such as an *actio pauliana*) should be terminated when the insolvency administrator has been granted exclusive rights to initiate actions to protect the estate.

In other words, a clear distinction must be made between the effects of insolvency on the legal status of the parties (i.e., the debtor's dispossession and the consequent rights of the creditors) and the consequences for the

41 The prevailing opinion among German-speaking scholars holds that the *locus standi* (*Prozeßführungsbefugnis*) of the insolvency practitioner is governed by the *lex fori concursus*, both in relation to new lawsuits, as well as to pending ones; as to pending lawsuits, it follows that it is up to the *lex fori concursus* to name the person entitled to resume interrupted lawsuits (i.e., the person endowed with *Wiederaufnahmebefugnis*) complying with forms and time limits set by the *lex fori processus*: Geimer/Garbe, in Geimer/Schütze EuInsVO art. 18, mn 3; Rugullis, p. 51–52; Schuster in Bornemann EuInsVO art. 18, mn 12 et seqq.; Eyber, in ZInsO 2009, 1231 et seqq.; Reinhart in in Stürner/Eidenmüller/Schoppmeyer IV, EuInsVO 2015 art. 18, mn 15; Dahl/Kortleben in Brinkmann, EuInsVO art. 18, mn 11; Thole in Vallender EuInsVO art. 18, mn 11. German authors interpret art. 18 EIR in line with § 352 InsO, which stipulates that upon recognition of a foreign insolvency proceeding in Germany, litigation pending in Germany is interrupted and must be resumed by the person entitled according to the foreign *lex concursus* ('Durch die Eröffnung des ausländischen Insolvenzverfahrens wird ein Rechtsstreit unterbrochen, der zur Zeit der Eröffnung anhängig ist und die Insolvenzmasse betrifft. Die Unterbrechung dauert an, bis der Rechtsstreit von einer Person aufgenommen wird, die nach dem Recht des Staats der Verfahrenseröffnung zur Fortführung des Rechtsstreits berechtigt ist, oder bis das Insolvenzverfahren beendet ist'; emphasis added).

The opinion above is not unanimous, however; a few authors maintain that the lawsuit must be resumed by those having under the *lex fori processus*: thus Wessels, p. 560 (who, however, holds the opinion that the IP's standing is, generally governed by the *lex fori concursus*); Müller, in Mankowski/Müller/Schmidt, EuInsVO 2015 art. 18, mn 18–19; Dammann in Pannen EuInsVO art. 15, mn 12; Undritz in Schmidt EuInsVO art. 18, mn 4; Duursma-Kepplinger, in Duursma-Kepplinger, Duursma, Chalupsky, art. 15, mn 35, reaching this conclusion on Article 21(3) (formerly Article 18(3) in Reg. 1346/2000), according to which 'In exercising its powers, the insolvency practitioner shall comply with the law of the Member State within the territory of which it intends to take action', and thus the local procedural law.

procedural order, which merely reflect the changed legal circumstances. About passive litigation, its fate will depend on how creditors are allowed to have their claims verified—whether through an exclusive insolvency procedure or via another forum. The former would require the litigation to end, while the latter might allow it to continue. This distinction—between the impact on the subject matter of the claim and the procedural consequences of the change in status—appears more appropriately governed by the provisions relating to ‘lodgment, verification, and admission of claims’ (Article 7(2)(h) EIR). Meanwhile, the role of the forum processus judge (or arbitrator) is simply to determine how the litigation should proceed given that the creditor may or may not be able to establish his claim outside the insolvency verification process.

In this way, the coordination problem between the verification of liabilities and the pending trial finds a straightforward solution: both the fate of the pending trial and the enforceability of the substantive judgment rendered therein are governed by the same *lex fori concursus*, whose fundamental choices can be readily implemented. The forum processus judge’s duty, then, is to observe these choices and adjust the conduct of the trial accordingly.

Furthermore, by confining the *lex fori processus* to the regulation of the *ordinatoria litis*—that is, procedural law alone (and not the forum’s conflict law)—the application mechanism of Article 18 EIR can be simplified. Rather than seeking in one’s own legal system a procedure identical to that in the foreign system (a task that can be particularly challenging in systems with numerous procedures and instruments), the judge needs only to consider the effects that the opening of insolvency proceedings produces under the *lex fori concursus* and to characterize those effects in the same manner as the *lex fori processus* determines its procedural consequences. For instance, if the *lex fori concursus* results in the debtor’s dispossession, that event should be classified under the categories used in forum processus law to determine a party’s procedural capacity following a loss of control over the rights in dispute. Examples include the ‘transfer’ of administrative and disposal powers over the active mass as referenced in § 80 InsO or the suspension of such powers as provided in art. 106, § 2, LC. In Italian law, these events can be readily subsumed under the concept of loss of procedural capacity (as defined, e.g., in art. 75 of the Italian code of civil procedure). This reasoning applies regardless of whether the insolvency proceeding tends toward liquidation or reorganization (via an insolvency plan), or whether the insolvency was triggered by actual or imminent

insolvency. It is sufficient that the measure opening the proceedings results in the debtor's dispossession.

Such an interpretation of Article 18 EIR would ultimately narrow its scope, in keeping with the principle of strict interpretation applied to provisions that derogate from the *lex fori concursus*, as repeatedly emphasized by the Court of Justice. Moreover, this reading ties Article 18 back to the well-established principle that the law of the forum governs its proceedings (*lex fori regit processum*), thereby explaining its rationale in restating that principle rather than simply invoking the need to safeguard parties' expectations. On this point, the Regulation is somewhat contradictory: on the one hand, it requires courts to consider the expectations of third parties when identifying the debtor's COMI and the applicable *lex fori concursus*; on the other, it uses those same expectations to justify deviations from the *lex fori concursus* in specific cases.

E. Conclusions

Should the EU pass new legislation to harmonize the recognition of insolvency proceedings initiated in third countries, addressing the consequences of such recognition—in general, and specifically for lawsuits pending within the EU—will be inevitable. Although various approaches could be considered, for brevity we will focus on the two most plausible ones discussed throughout this book. One approach is to extend Article 18 of the EIR to cover the recognition of third-country insolvency proceedings; the other is to enact Article 20(a) of the MLCBI. In both cases, for reasons explained in detail above, it is advisable to carefully delineate the scope of application of the *lex fori processus* by distinguishing between substantive and purely procedural effects.

In the case of Article 18 of the EIR, this can be achieved without altering the provision's text, simply by interpreting the notion and scope of the 'effects of the opening of insolvency proceedings'—a concept that is inherently autonomous EU law and thus primarily falls under the jurisdiction of the EU Court of Justice. Conversely, incorporating Article 20(a) of the MLCBI into EU law will likely require some legislative refinement to link the concept of a 'stay' of actions to the appropriate procedural categories under national law. For example, §352 of the InsO refers to the 'stay' more precisely as an 'Unterbrechung.' Consequently, a directive, rather than a regulation,

might be the more suitable legislative instrument for implementing the MLCBI.

Moreover, additional effects of recognition on pending lawsuits, beyond the 'stay,' will need to be addressed. As other contributors to this book have argued⁴², it may be prudent to await the latest effort from UNCITRAL, that regarding the applicable law in cross-border insolvencies.

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42 →Block-Lieb/Paulus.

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Concurrent insolvency proceedings – relations between the EU and third countries – general report

Alexander Trunk

Abstract:

The contribution gives a comparative overview over the rules of the EIR, the UNCITRAL Model Laws, some other international treaties and national legislation, in particular of EU Member States, with regard to concurrent (parallel) insolvency proceedings. It also develops some recommendations.

Keywords: Concurrent insolvency proceedings; parallel insolvency proceedings; MLCBI; EIR; national laws: basic concepts; discretion; recognition; conflict of laws; substantive law

Cross-border business insolvencies often have a global dimension, which may lead to parallel insolvency proceedings regarding the same debtor in several countries including the EU and third countries.

The European Insolvency Regulation (EIR) contains detailed provisions on the relationship between ‘concurrent’ (or parallel) insolvency proceedings in the EU relating to one debtor. They are put together mainly in Chapter III of the Regulation under the title of ‘Secondary insolvency proceedings’. A slightly shorter version existed already in the first version of the EIR (2000). These rules have to a significant degree inspired the provisions on corporate group insolvencies, which are now laid down in Chapter V of the recast EIR. Corporate group insolvencies will be dealt with in other contributions of this book¹.

The MLCBI, which applies to the relationship between concurrent insolvency proceedings without a regional limitation, addresses concurrent proceedings mainly in Chapter V, but handles certain issues of concurrent proceedings also at other places, e.g. in Chapter II Art.11 and 12 MLCBI and Chapter IV Art.25 to 27 MLCBI.

1 See → Panzani/van Galen and → Miguens (groups).

On the international level, both the Council of Europe (in its Istanbul Convention of 1990) and OHADA have developed rules on concurrent insolvency proceedings.

National legislators have also dealt with concurrent insolvency proceedings, often focussing on the relations between a 'main' proceeding and a 'secondary' proceeding. This reflects, to a certain degree, the rules of the EIR and the MLCBI, but some national legislations address concurrent proceedings in a more general manner.

As the main focus of this publication is on future amendments to EU law in cases related to non-EU countries, Chapter III of the EIR as it stands today will not be analysed in detail in this place. After a short overview of the present state of law, core issues of concurrent proceedings will be discussed on a comparative bases with a view to possible future steps by the EU.

A. State of the law

The present state of the law needs be taken into account as a basis for future reform, in comparison mainly between the EIR and the MLCBI, but also with examples from national legislations.

I. EIR and MLCBI

To begin with, the rules of the EIR and the MLCBI will be looked-at in an overview. The text commences with the EIR as the starting-point for future reform by the EU.

1. EIR

Concurrent (parallel) insolvency proceedings relating to one debtor are dealt with in the EIR mainly in Chapter III, under the heading of 'Secondary insolvency proceedings'. Chapter III EIR contains various provisions regulating the relationship between 'secondary' proceedings (in the EU) and 'main' proceedings (also in the EU). Other constellations of concurrent proceedings, e.g. relations between concurrent non-main proceed-

ings², are left out of this Chapter, but may be covered by other provisions of the EIR.

The EIR – including its Chapter III – applies to a broad range of insolvency proceedings, which are exhaustively enumerated in Annex A of the EIR. In particular, they include also consumer insolvency proceedings and public pre-insolvency restructuring proceedings as foreseen by the EU Restructuring Directive of 2019.

The EIR defines main and non-main insolvency proceedings according to the underlying ground of international jurisdiction. Main proceedings are proceedings opened in the state of the debtor's COMI (Art.3 (1) EIR). Non-main ('territorial' or 'particular') proceedings are proceedings opened in the state of a debtor's 'establishment' (Art.3 (2) EIR)³. Secondary proceedings in the sense of the EIR are non-main proceedings which are conducted concurrently with a foreign main proceeding (Art. 3 (3) and (4) last sentence EIR).

The admissibility and opening of a secondary (non-main) proceeding are regulated in Art.3 (2) and (3) EIR⁴ and, complementarily, in Art.34, 37 – 39 EIR⁵. The conduct of secondary proceedings and their relations with the main proceeding are mainly regulated by Art.35, 36 and 41 – 52 EIR, going very much into details. Complementarily, other, more general rules of the EIR or of applicable national law also apply to concurrent proceeding (cf. Art. 35 EIR).

Chapter III applies only if the (foreign) main proceeding is recognized in the state of the secondary proceeding (see Art.34 EIR)⁶. It has to be noted that the EIR does not foresee a particular recognition proceeding (Art.20 (1) EIR).

Arguably, the three most important general provisions in Chapter III are Art. 41 EIR, stating the duty of the insolvency representatives of the concurrent insolvency proceedings to cooperate with each other, Art.42 EIR which lays-down a corresponding duty (and power) of the insolvency

2 The term 'non-main proceedings' is used following the terminology of Art.2 (c) ML-CBI, leaving open the jurisdictional basis of such proceedings.

3 For the definition of establishment in the sense of the EIR see Art.2 (10) EIR.

4 In Chapter I EIR (general provisions).

5 In Chapter III EIR (secondary proceedings).

6 This would seem to apply also mutually between all concurrent proceedings.

courts and Art. 43 EIR on cooperation between the respective insolvency representatives and courts⁷.

These three basic rules are complemented by numerous specific provisions, e.g. on mutual communication (Art.41 (2) (a) and Art.42 (2) EIR), on conclusion of agreements ('protocols') between insolvency representatives (Ar.41 (1) sentence 2 EIR), on coordinating the conduct of the proceedings (Art.41 (2) (c) EIR), including the preparation of restructuring plans (Art.41 (2) (b) EIR) and Art. 47 EIR). Another provision (Art. 45 (2) EIR) obliges the insolvency representatives of the main and secondary proceeding to lodge claims, which have already been lodged by creditors in their proceeding, also in the concurrent proceedings⁸. Art. 45 (3) EIR grants the insolvency representative of each concurrent proceeding the right to participate in the other proceedings 'on the same basis a creditor'.

2. MLCBI

The MLCBI, in contrast with the EIR, does not purport to develop a general framework of cross-border insolvency law, but it focusses on assistance to foreign insolvency proceedings (including their 'recognition'). In this context, it sets also standards for concurring proceedings (Chapter V, Art. 28 – 32 MLCBI). Similar to the EIR, Chapter V MLCBI has to be read in conjunction with the other chapters of the MLCBI: its general provisions (Chapter I), the provisions on 'Access of foreign representatives and creditors to courts in *the recognizing state*' (Chapter II), on 'Recognition of a foreign proceeding' (Chapter III) and on 'Cooperation with foreign courts and foreign representatives' (Chapter IV).

The MLCBI applies to all insolvency proceedings as defined in its Art.2 (a), but allows adopting states to exclude certain types of proceedings (Art.1 (2) MLCBI). The MLCBI resembles the EIR in that it also distinguishes

7 Both the EIR and the MLCBI (and national legislations) use the terms 'cooperation' and 'coordination' rather interchangeably. The present contribution therefore avoids defining and delimitating these terms in any exact manner. 'Cooperation' focuses on the acts of participants, while 'coordination' has a more objective meaning, but both concepts serve to describe a good working relationship between parallel proceedings.

8 This does not exclude the right of creditors to lodge their claims themselves (Art. 45 (1) EIR) or to object to the lodging of their claims by the insolvency representative in concurrent proceedings (cf. Art. 45 (2) EIR). As to the position of foreign creditors in insolvency proceedings generally (not limited to concurring proceedings), see Chapter V EIR (Art. 53 – 55).

‘main’ and ‘non-main’ (territorial) insolvency proceedings, characterizing them by the underlying ground of jurisdiction (main proceedings: COMI; territorial proceedings: establishment)⁹. it differs from the EIR in that it does not provide for direct jurisdiction¹⁰, does not contain explicit conflict of laws rules and gives considerations of discretion larger space than the EIR does. Going beyond its primary focus on assistance to foreign proceedings, the MLCBI contains also some provisions on the conduct of domestic proceedings in general¹¹, including ‘outgoing’ requests for assistance by domestic courts¹². It is also important that the MLCBI understands itself as a minimal standard for cooperation, explicitly opening the way for more liberal cooperation (Art. 7 MLCBI).

In contrast with the EIR, Chapter V MLCBI is not limited to cooperation between a main and a non-main (secondary) proceeding, but addresses all constellations of parallel proceedings relating to one debtor. Only some provisions of Chapter V deal specifically with the relationship between a main proceeding and a secondary proceeding (Art. 28, 29 (a)(ii) and (b)(ii) and Art.31 MLCBI). Also, recognition of the foreign proceeding is not a general prerequisite for mutual cooperation. For example, Art. 28 MLCBI requires recognition of the foreign (main) proceeding for the effect that a secondary proceeding may only be opened under limited circumstances and that such a proceedings may only have territorial effect. Art. 29 (a)(ii) MLCBI gives a foreign recognized (main) proceeding some larger effect in the concurring proceeding than is given without (or before) such recognition. Finally, Art.30 MLCBI provides different specific rules with regard to recognition of several foreign concurrent proceedings.

Speaking generally, the MLCBI provides for a duty of cooperation between concurrent insolvency proceedings (Art. 25 and 26 MLCBI: between insolvency representatives, between courts and between courts and representatives). This covers the same actors as Art. 41 – 43 EIR and provides also the same basic duty – however without the additional requirement of recognition. The difference as to the necessity of recognition can perhaps be explained. Under the MLCBI recognition is a particular proceeding, which may take some time, while under the EIR recognition is ‘automatic’. Both the approach of the the EIR and of the MLCBI create a possibility for quick

9 See Art. 2 (b) and (c) MLCBI.

10 With a limited exception for assistance purposes, Art.4 MLCBI.

11 E.g. Art.13 and 14 MLCBI on the position of foreign creditors.

12 E.g. Art. 25 – 27 MLCBI. See also the authorization of domestic insolvency representatives to act in a foreign state (Art.5 MLCBI).

cooperation, the EIR through incidental recognition, the MLCBI through cooperation independently from recognition, but with a significant element of discretion on the side of the courts.

Overall, the provisions of the EIR and of the MLCBI on concurrent proceedings resemble each other to a significant degree, but the MLCBI is more open as to the categories of concurrent proceedings covered (main and non-main proceedings) and gives more leeway to the courts.

II. Other international texts

Among the existing or former international texts dealing with cross-border insolvency law, noteworthy provisions on concurrent proceedings are contained in the Council of Europe's Istanbul Convention of 1990 on Certain International Aspects of Bankruptcy (one of the predecessors of the EIR, but which has not entered into force) and in OHADA's Uniform Insolvency Act of 2015.

1. Istanbul Convention 1990

The Istanbul Convention also addresses, similar to the EIR, concurrent proceedings only in the specific constellation of 'main proceeding – secondary proceeding' (Chapter III of the Convention). It is more 'codificatory' in its regulatory approach towards secondary proceedings than the EIR, as it collects most provisions on secondary proceedings in this chapter (including e.g. direct jurisdiction, position of foreign creditors etc.), while they are more distributed in the EIR (and thus applicable generally, not only in secondary proceedings).

2. OHADA's Uniform Insolvency Act 2015¹³

OHADA's Uniform Insolvency Act (OIA) 2015, which has succeeded to the earlier Uniform Bankruptcy Act 1998 creates a uniform insolvency law regime for the Member States of OHADA, including common rules on cross-border insolvency law (mainly in Title VII, Art.247 – 256–31).

Title VII is divided into two chapters: Chapter I deals with recognition of insolvency proceedings within OHADA, Chapter II with recognition

13 For details see → Leno.

of insolvency proceedings conducted in non-OHADA countries. This approach is particularly interesting for the EU under the perspective that it provides for separate rules about inner-organization cross-border cases and cooperation with third countries.

In its general part (Preliminary Title), the OIA provides for direct jurisdiction rules as to insolvency proceedings¹⁴ in OHADA Member States. 'Main' insolvency proceedings can be opened in the state of the debtor's corporate seat, in the case of natural person in the state of the debtor's 'principal establishment' (Art.3 – 1 sentence 1 OIA). Subsidiarily, (territorial) proceedings¹⁵ can also be opened in the state of a debtor's local 'main center of operations' (Art.3 – 1 sentence 2 OIA). In cross-border matters, the OIA does not contain any specific conflict of laws rules, but is implicitly based on the *lex fori concursus* principle.

Title VII OIA focusses exclusively on recognition of foreign insolvencies, including the topic of concurrent proceedings. Recognition under the OIA is dogmatically grounded on the civil procedure concept of *res judicata* of foreign court decisions, in particular the decision opening a foreign insolvency proceeding (cf. Art. 247 OIA).

In the inner-OHADA context (Titel VII OIA Chapter 1), recognition appears to be automatic. Scrutiny of indirect jurisdiction seems to be required¹⁶, but there is no explicit public policy exception. Between concurrent proceedings a general duty of cooperation exists between the courts (Art.253 OIA). Cooperation duties between insolvency representatives are not explicitly laid-down, however, one provision (Art. 252 OIA) states an information duty between the insolvency representatives of a main proceeding and a secondary proceeding.

As to recognition of insolvencies conducted in non-OHADA countries, Titel VII OIA Chapter 2 incorporates quasi-literally the MLCBI. Interestingly, according to Art.247 sentence 2 OIA, non-OHADA insolvencies, which are (formally?) recognized by a court in a OHADA Member State, have thereafter in the OHADA space the effect of an OHADA insolvency as regulated under Chapter 1. Arguably, this does not exclude application of the rules of Chapter 2, in so far as this is compatible with Chapter 1.

14 The OIA applies only to business insolvencies, Art.1 – 1 OIA.

15 Cf. definition 'territorial bankruptcy procedure' in Art.1 – 3 OIA.

16 Cf. Art. 247, 249, 251 OIA.

III. National legislations

The relationship between concurrent insolvency proceedings is also dealt with by national legislators, both EU member countries and third countries. Some countries, also among the EU Member States, have adopted the MLCBI¹⁷, others have passed rules which mirror to a certain degree the rules of the EIR¹⁸ or have developed their own approaches¹⁹.

Characterizing them (in so far as there exists specific legislation) briefly, in alphabetical order, the following may be said²⁰:

Austria: Austria has put-together its provisions on cross-border insolvencies mainly in the 8th Part of its Insolvency Code (IO). It consists of four divisions – general provisions, supplementary provisions to the EIR, proceedings not covered by the EIR and special provision for bank and insurance insolvencies. The supplementary provisions to the EIR do not address relations with non-EU countries. The division on ‘proceedings not covered by the EIR’ contains three chapters: on applicable law, ‘Austrian insolvency proceedings’ and ‘Recognition of foreign insolvency proceedings’. Concurrent proceedings are addressed only in one provision in the chapter on Austrian insolvency proceedings (sec.239 InsO). The provision states, under the heading ‘Coordination’ a general duty of the Austrian insolvency court and the Austrian insolvency representative to inform the foreign insolvency representative about all circumstances relevant for the foreign proceeding (sec.239 (1) IO). Sec.239 (2) sentence 1 IO adds that foreign insolvency representatives must be given the opportunity to make proposals for the sale or other use of the debtor’s property in Austria, and sec.239 (2) sentence 2 IO states the foreign insolvency representative must be given the possibility to make a statement upon an insolvency plan, which is prepared in the Austrian proceedings. The Austrian approach can be described as a minimal regulation on concurrent proceedings.

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

18 In the EU mainly in this direction Austria, Germany, Portugal and Spain.

19 Particularly detailed are the provisions of Belgian law, but also Austria, Croatia and Poland have developed a significant number of particular provisions. A specific approach has also been developed in Switzerland (‘Mini-Konkurs’ as an intermediate form of recognition and concurrent proceeding).

20 The following list contains those EU member countries, which have passed systematically structured sets of rules on cross-border insolvencies. The laws of other EU countries will not be analysed here as this would require an in depth analysis of jurisprudence beyond the limits of this overview.

Belgium: Belgian law regulates cross-border insolvencies, basically, in two laws: in the Belgian Code of Private International Law/Code de droit international privé (Chapter II) and in the Belgian Code of Business Law/Code de droit économique (Chapter XX, mainly Title 7). Formerly, the Code of PIL contained a general provision on concurrent proceedings (Art.120), which laid-down a general duty of Belgian insolvency representatives to cooperate, under the control of the Belgian court, with foreign insolvency representatives and give them information²¹. The provision contained a requirement of reciprocity in the sense that cooperation from the Belgium side was only to granted if the law of the foreign proceedings provided for an equivalent cooperation with the Belgium proceeding. Art.120 was, however, repealed in 2017 in the context of the adoption of the Code of business law, which introduced detailed provisions also with regard to concurrent insolvency proceedings, but only as to business insolvencies.

The Belgian Code of Business Law contains ten provisions which, either specifically or in the context of more general provisions on domestic insolvency proceedings or recognition of foreign proceedings, address concurrent proceedings. One provision deals with the opening of (parallel) insolvency proceedings (Art.XX.211²²), another with one aspect of the coordination of parallel proceedings (Art.XX.221)²³, the others regulate various issues of cooperation between insolvency organs (courts of insolvency representatives)²⁴. The two principal provisions are Art.XX.217 and Art.XX.219. Art.XX.217 establishes the competence of the insolvency judge in a Belgian territorial insolvency proceeding to communicate and otherwise cooperate with the insolvency representative or the insolvency court of a foreign (main or non-main) proceeding, provided that the foreign proceeding is recognized in Belgium. Art.XX.219 establishes the duty of the Belgian insolvency representative to inform the foreign insolvency representative or foreign insolvency court (at their request) about all circumstances relevant for the foreign proceeding and provides for a general duty of cooperation. Art.XX.219 seems to apply to all Belgian insolvency

21 See also Art.118 § 3 Code de dip which allows the opening of a Belgian territorial insolvency proceeding even if a foreign main proceeding is recognized in Belgium. This provision remains in force.

22 See also Art.118 § 3 Code de dip.

23 Scrutiny of insolvency grounds in the domestic proceeding when a foreign proceeding has already been opened before.

24 Art.XX.216 – 219, Art.XX.223.

proceedings, not only to territorial (non-main) proceedings, and it does not explicitly require recognition of the foreign proceedings. However the duty to give information is limited by 'any legal duty of confidentiality or other legal limitations to communications'. For example, one might think of data protection rules. In addition, Art.XX-219 § 3 provides for general exception from the duty to inform or otherwise cooperate 'for serious reasons'. The Belgian approach can be described as a 'maximal' regulation of concurrent proceedings as far as the density and differentiated conditions of the rules are concerned.

Croatia: Croatia has probably the most differentiated, in various aspects most original autonomous regulation on cross-border insolvency in the EU (Croatian Bankruptcy Act, Chapter XI). It starts with rules on direct jurisdiction of Croatian courts to open and otherwise conduct insolvency proceedings and then continues with 'general provisions'. Thereafter follow separate subchapters on prerequisites and proceedings for recognition of foreign proceedings, legal effects of recognition, opening and conduct of secondary insolvency proceedings, issues of non-recognition of foreign proceedings and, finally, on recognition of foreign insolvency plans (insolvency settlements) or other insolvency-related decisions.

The subchapter on general provisions provides for a general duty of cooperation between the insolvency representative of a Croatian insolvency proceeding and insolvency representatives of concurrent proceedings in foreign countries (Art.399 (1) Bankruptcy Act). The duty of cooperation in Art.399 is not explicitly conditioned on recognition of the foreign insolvency proceedings. A specific duty is laid-down for mutual information between insolvency representatives in concurrent proceedings within applicable legal limits (Art.399 (2) Bankruptcy Act).

Issues of concurrent proceedings are addressed in all subchapters of Chapter XI.: in the context of jurisdiction²⁵, general provisions²⁶, prerequisites and proceeding of recognition²⁷, effects of recognition²⁸, secondary

25 Art.393 (5): non-examination of insolvency in the opening stage of a secondary insolvency proceeding.

26 Art. 399, see *supra*.

27 Art. 407 (3): recognition of foreign proceeding may provide for opening of secondary proceeding; effect.

28 Art. 410 (Croatian insolvency proceeding does not hinder recognition of foreign proceeding; binding effect of establishing claims in the proceeding) and Art. 417 (rights

proceedings²⁹, effects of non-recognition³⁰ and recognitions of foreign plans³¹. The Croatian approach can be also described as a 'maximal' regulation of concurrent proceedings, although with a content differing from Belgium.

Germany: The German Insolvency Code (InsO) distinguishes in its Part 12 on cross-border insolvency law between general provisions, recognition of foreign insolvency proceedings and German non-main proceedings. This follows quite closely the EIR, but focuses on the German perspective only. Concurrent proceedings are addressed in all three subchapters but mainly in the subchapter on non-main proceedings (termed 'particular' proceedings), which covers both isolated non-main proceedings and secondary proceedings. The provisions apply to all insolvency proceedings covered by the Code, including, in particular, both business and consumer insolvencies and applying also to bank and insurance insolvencies.

Sec. 341 InsO in the general provisions states that creditors may lodge their claims in all concurrent proceedings, and German insolvency representatives may lodge creditor claims also in foreign proceedings. Sec. 342 InsO addresses proceeds received by creditors in foreign (concurrent) proceedings. Sec. 344 InsO in the subchapter on recognition grants the German insolvency court to pass interim measures as requested by a foreign insolvency representative. Sec. 356 InsO deals specifically with the opening of German secondary insolvency proceedings (adding some aspects to the general rules on German non-main proceedings in sec. 354 and 355 InsO). Sec. 357 InsO (heading: cooperation between insolvency representatives) provides for a general duty of information of the German insolvency representative in the secondary proceeding to 'the foreign representative' (probably only of a foreign main proceeding) and adds some specific procedural rights of foreign insolvency representative in German secondary

of foreign insolvency representative in proceeding for recognition of the foreign proceeding).

- 29 Art. 418 – 423: opening of secondary proceeding in Croatia, avoidance of transactions, order of distribution of assets, proceeds received by creditors in foreign insolvencies, duty of Croatian insolvency representative to lodge claims in foreign insolvencies (see also Art.399 (2) for Croatian main proceeding), additional duty of insolvency representatives to cooperate.
- 30 Art. 426: opening of Croatian insolvency proceeding independently from recognition of foreign proceeding.
- 31 Art. 427 (recognition of foreign insolvency plans etc.): relates also to concurrent proceedings, without expressly mentioning this.

proceedings. Sec. 357 InsO makes no particular mention of cooperation between insolvency courts. The German approach can be characterized as an EIR-related medium-size regulation of concurrent proceedings without a general clause on coordination and cooperation.

Greece: Greece is one of the EU Member States, which have adopted the MLCBI for insolvency relations with non-EU countries. Choosing a stand-alone legislative approach on cross-border insolvency law, Greece has passed a special law (Law nr. 3858/2010 of 28 June 2010), which appears to remain in force unchanged, although the underlying Greek Insolvency Code of 2007 has in 2021 been superseded by a new Insolvency Code (Law nr. 4738/2020). One of the consequences of this legislative reform is that the Law nr. 3858/2010 now also applies to consumer insolvencies, while under the Insolvency Code of 2007 it was limited to business insolvencies. The Law nr. 3858/2010 is a nearly literal translation of the MLCBI with the necessary fill-ins required by the MLCBI. The law follows also the discretion approach of the MLCBI, without giving specifications or other guidance to the courts in this respect.

Poland: Poland has also adopted the MLCBI, but integrated it into a more general regulation on (autonomous) cross-border insolvency law. The main legal sources are the Bankruptcy Law of 2003, which was significantly amended in 2015 and the Restructuring Law of 2015. Both laws include rules on direct jurisdiction, but do not contain autonomous rules on conflict of laws for domestic proceedings. The Bankruptcy Law (Part II) distinguishes general provisions, direct jurisdiction, recognition of foreign insolvencies, secondary insolvency proceedings and cooperation with foreign insolvency proceedings (courts and insolvency representatives). The Restructuring Law (Title III) is a bit shorter, not providing for rules on recognition of foreign proceedings. Adopting the MLCBI, Poland has modified its provisions quite significantly, adding specifications and even deviating from some of the provisions of the MLCBI. Taking the general provisions (Title I) as an example, the Bankruptcy Law also contains a list of definitions (Art. 379)³² and it also provides for prevalence of internation-

32 The definitions by and large coincide with the MLCBI, but contain some important specifications and extensions. E.g. the term insolvency proceedings expressly includes debtor-in-possession cases and pre-insolvency proceedings. Main proceedings are not literally defined by 'COMI', but by the slightly different term of the debtor's

al treaties, adding to this EU law (Art. 378). The scope of the cross-border provisions is not defined specifically, but follows the general scope of application of the Bankruptcy Law (Art. 1), which includes both business and consumer insolvencies. Jurisdiction is regulated in a separate subchapter (Title II), not specifically for recognition or cooperation purposes. The public policy exception is laid down (only) in the recognition context (Art. 392 nr.2), partly also in the Title on secondary proceedings: Art.410a). Authorization of Polish insolvency representatives to act also abroad, e.g. in the context of foreign insolvency proceedings, is not mentioned in the general provisions, but appears to be included in the tasks and duties of Polish insolvency representatives under general rules of the Bankruptcy law³³. No mention is made in the general provisions (Title I) of more liberal autonomous rules on cooperation and of interpretation in the light of the MLCBI.

The Bankruptcy Law is based, like the MLCBI, on the concept of a formal recognition proceeding³⁴. Like the MLCBI, it does not formally exclude incidental recognition³⁵. In contrast with the MLCBI, recognition is under the Polish Bankruptcy Code basically a non-discretionary concept, but discretionary elements are present in powers given to the court during the recognition proceeding (Art. 390), at or even after recognition (Art.393a – 396). Again in contrast with the MLCBI, but also with the EIR, recognition of a foreign insolvency proceeding leads to the legal effects under Polish law (Art. 397), ‘as if’ a Polish insolvency proceeding had been opened. This significantly deviates both from the (bilateral or universal) *lex fori concursus* principle of the EIR and from the discretionary approach which largely characterizes the MLCBI. A similarity can be seen here with the ‘Minikonkurs’ under Swiss law³⁶, but Polish law does not provide in a general manner for a simplified post-recognition insolvency proceeding.

‘main economic activity’. Non-main proceedings are not only establishment-based proceedings, but include also ‘main-like’ proceedings such as at the debtor’s domicile or proceedings based on the location of property.

33 Specific aspects are dealt-with in the context of secondary proceedings (Art.405 – 412) and of cooperation (Art.413 – 417).

34 Cf. also the similar approach of Croatian law, Art.401 – 408 Croatian Bankruptcy Act.

35 This may be grounded, e.g., on general rules of cross-border civil procedure. Art. 381 refers subsidiarily to the Polish Code of Civil Procedure). Contrast this with Art.409 Croatian Bankruptcy Act, which expressly allows incidental recognition.

36 Art.170 Swiss PILA.

However, it mentions at several places the possibility of a secondary insolvency proceeding in Poland after recognition of the foreign proceeding³⁷.

Concurrent proceedings are dealt with in the Polish Bankruptcy Code mainly at two places: in the subchapter on secondary insolvency proceedings (Title IV) and in the subchapter on cooperation (Title V). Title IV (Art. 405 – 412) follows by and large the lines of the EIR, but applies to relations with non-EU proceedings. It does not impose any duties upon the organs of the foreign main insolvency proceedings, but is implicitly based on the concept of cooperation between the Polish non-main proceeding and the foreign main proceeding, however with caveats from the Polish side³⁸. Chapter V of the MLCBI (concurrent proceedings) has not been adopted as such in the Polish Bankruptcy Law, but some of its provisions can be found in the subchapters on recognition and secondary proceedings. However, the Bankruptcy Law contains a general subchapter on cooperation with foreign (insolvency) proceedings (Title V) which follows quite closely Chapter IV of the MLCBI (cooperation with foreign courts and foreign representatives). According to these provisions both Polish insolvency courts and Polish insolvency representatives are empowered and encouraged to cooperate with foreign courts and insolvency representative, including the mutual exchange of information (Art. 416). This includes direct communication by all technical means including e.g. telephone calls or email (Art.413 and Art.414). An original provision is Art. 417, which deals with the case of concurring insolvency proceedings in several foreign countries. Taking some inspiration from Art.30 MLCBI, Art.417 of the Bankruptcy Code grants in such cases the Polish insolvency representative (of a Polish main or non-main proceeding) or Polish courts the power to decide which assets should be attributed to which proceeding.

Portugal: Portugal assembles most of its provisions on concurrent insolvency proceedings in Title XV Chapter 3 ('particular insolvency proceedings') of the Insolvency Code³⁹. Art.294 (1) starts defining the term 'particular insolvency proceeding' by the territorial limitation of its effects. Particular proceedings in this sense are, under Art.294 (1), proceedings opened in

37 Cf. Art.397 (1) last sentence and Art.398 Bankruptcy Code.

38 Cf., e.g., Art.410a recognition of foreign insolvency plan and vote on separate insolvency plan in the Polish non-main proceeding.

39 Chapter 1 contains 'general provisions', Chapter 2 deals with recognition of foreign insolvencies.

Portugal whenever the debtor's registered office, domicile or centre of his main interests is situated outside Portugal. According to Art.294 (2), direct jurisdiction for such insolvency proceedings can be grounded either on an establishment of the debtor in Portugal or on Art.62 lit.c) of the Portuguese Code of Civil Procedure, a flexible rule based on the principle of significant contacts with Portugal. From this follows also that Portuguese insolvency proceedings, which are grounded on the debtor's registered office or domicile⁴⁰ (admissible outside the scope of application of the EIR) are not 'particular' proceedings, but have universal reach. Portugal thus recognizes implicitly the possibility of concurrent main proceedings.

Within Title XV Chapter 3 only one provision, Art. 296, deals expressly with secondary proceedings. According to Art.296 (1) the recognition of a foreign main insolvency proceeding⁴¹ does not prevent the opening of a (secondary) insolvency proceeding in Portugal. Art.296 (2) – (8) regulate various technical issues, such as the right of a foreign insolvency representative to request the opening of a secondary proceeding in Portugal and to participate in the secondary proceeding, dispensability of the proof of insolvency of the debtor for the opening of a secondary proceeding, issues of transfer of pending proceedings to a later recognized foreign main proceeding, some details of insolvency plans etc.

Romania: Romania has adopted the MLCBI quasi-literally⁴², though with some reordering and a few small changes. Basically, only the necessary fill-ins of the MLCBI were added (Title III of the Insolvency Law of 2014). Perhaps most importantly, Romania appears not to provide for non-main insolvency proceedings in Romania outside the scope of the EIR. Art.41 (1) Insolvency Law grants direct jurisdiction for insolvency proceedings only to the courts of the debtor's seat/professional domicile for at least 6 months

40 Cf. Art.7 (1) and (2) Insolvency Code.

41 The term 'main insolvency proceeding' is not expressly defined in the Insolvency Code, but can be understood to cover foreign proceedings opened under rules corresponding to Art.7 of the Code: registered office, domicile, COMI or last domicile of decedent 'or on an equivalent connection' (see Art.288 (1) (a) of the Code).

42 True, the Insolvency Act starts with a general provision (Art.273) on the contents of regulation on cross-border insolvencies (conflict of laws in insolvency, procedural aspects of cross-border insolvencies, mutual assistance in cross-border insolvencies). However, thereafter follow, in principle, only the provisions implementing the MLCBI (Art.273 – 304). It should be mentioned, however, that thereafter follow provisions on cross-border corporate group insolvencies (Art.305 – 311) and cross-border banking and insurance insolvencies (Art.312 – 336).

before the request to open the proceeding. Also, indirect jurisdiction is not mentioned as a ground for non-recognition of foreign insolvencies (see Art. 278). Thus cases of concurrent insolvency proceedings appear to be limited mainly to Romanian main proceedings and foreign non-main proceedings, with some additional space for concurring main proceedings in Romania and abroad and concurring foreign proceedings.

Slovenia: While Slovenia has also adopted the MLCBI, closely following its wording, it has integrated the MLCBI into a general set of rules on cross-border insolvency law. The Slovenian Insolvency Law (ZFPPIPP) – Financial Operations, Insolvency Proceedings and Compulsory Winding-Up Act) regulates cross-border insolvency law its Chapter 8. Chapter 8 distinguishes general provisions (part 8.1.), access of foreign insolvency representatives and creditor to Slovenian courts (part 8.2.), recognition of foreign proceedings (part 8.3.), cooperation with foreign courts and insolvency representatives (part 8.4.), concurrent insolvency proceedings (part 8.5.) and applicable law in domestic insolvency proceedings (part 8.6.). Part 8.7. provides for some special rules complementing the EIR and EU banking and insurance insolvency law. The general provisions in part 8.1. contain, on the one hand, provisions from the MLCBI, on the other hand they lay-down some additional rules, e.g. definitions of location of assets and criteria for the affiliation of persons (e.g. creditors) to one or another country. They do not define the scope of application of these rules differently from the law in general, i.e. they also apply to consumer insolvencies. It is worth noting that the definitions of (foreign) main proceedings and foreign non-main proceedings in the ZFPPIPP follow the MLCBI. Therefore only foreign proceedings conducted on the basis of COMI can be recognized as foreign main proceedings. The same applies to foreign non-main proceedings which are defined by reference to proceedings conducted on the basis of an establishment. From this appears to follow that foreign proceedings conducted, e.g. in the country of their corporate seat (which may not coincide with COMI) cannot be recognized in Slovenia, at least not as foreign main proceedings. Also, rules on cooperation between main and non-main proceedings would not apply to such situations. The ZFPPIPP does not include the provision of the MLCBI opening cooperation for ‘additional assistance under other laws’ (Art.7 MLCBI), although the reference in Art.459 of the Law may perhaps be read in this sense. On the other hand, not all provisions of the MLCBI (and the implementing provisions of the ZFPPIPP) require formal

recognition of the foreign proceeding. This is true, in particular, for the broader rules on access of foreign insolvency representatives to local courts and on cooperation between insolvency courts and insolvency representatives (Parts 8.4. of the Law) including, arguably, some provisions in part 8.5. of the Law (concurrent proceedings). Slovenia also treats recognition of foreign insolvencies as a matter of law, not of discretion, but opens discretionary powers with regard to the determination of concrete effects of recognition. In this respect, Slovenia makes clear references to more general provisions of the ZFPPIPP (cf. e.g. Art.466 (2) of the Law).

Spain: Spain's Bankruptcy Law of 2020 contains detailed provisions on (autonomous) cross-border insolvency law, mainly in its Book 4. Book 4 consists of five titles: general provisions (Title 1), applicable law (Title 2), recognition (Title 3), concurrent proceedings (Title 4) and pre-insolvency restructuring proceedings (Title 5). Spain has not adopted the MLCBI, but some provisions of the Bankruptcy Law coincide with the MLCBI. Concurrent insolvency proceedings are, on the one hand, addressed particularly in Title 4 of the Law, but they have to be read together with other provisions of Book 4 or even other Books of the Law.

The Law distinguishes, in the first hand, between 'universal' and 'territorial' (non-main) insolvency proceedings, depending on their intended effect (or not) on assets of the debtor situated outside Spain (cf. Art. 47 (1) and Art. 49 (2) of the Law). On the second level, the Law distinguishes between 'primary' (or main) proceedings⁴³ and 'secondary' proceedings⁴⁴). Universal proceedings are defined, basically, as proceedings opened at the debtor's COMI (Art.45 in conjunction with Art. 47 of the Law, Art. 742 (2) nr.1 of the Law). However, Spanish law provides also for universal insolvency proceedings on some other other jurisdictional grounds (Art.45 (3) of the Law: debtor's domicile; Art. 46 of the Law: jurisdiction for affiliates in corporate groups). Territorial proceedings in Spain can be grounded (only) on an establishment of the debtor in Spain (Art.49 (1) of the Law), however, in the case of reocgnition of foreign territorial proceeding the standard of indirect jurisdiction is more liberal and accepts also any 'reasonable connection of equivalent character, such a location of assets or an economic activity' (Art. 742 (2) nr.2 of the Law). There remains a regulatory gap as to

43 See Art.47 (1) and Art. 742 (2) nr.1 of the Law.

44 See Art. 735 bis of the Law. Usually, however, this term is avoided, cf. Art. 742 (2) nr.1, Art.749 (3) and Art. 750 (2) of the Law.

recognition of foreign proceedings opened on a jurisdictional basis similar to Art.45 (3) or Art.46 of the Law. They appear to be treated, from the Spanish perspective, as foreign territorial proceedings only.

It is important to note that Spanish law conditions recognition of foreign insolvencies, and in some instances, also cooperation between concurrent proceedings, on reciprocity (Art. 721 (2) case 1 of the Law) or, alternatively, lack of systematic failure to cooperate on the side of the foreign proceeding (Art. 721 (2) case 2 of the Law).

The opening of a parallel insolvency proceeding in Spain, when a foreign proceeding has already been commenced, is dealt with in Art. 733 and 734⁴⁵ and 742 (3)⁴⁶ of the Law. In particular, recognition of a foreign primary insolvency proceeding does not hinder the opening of a concurrent territorial proceeding in Spain (Art.742 (3) of the Law). Art.733 and 734 of the Law stipulate the right of the foreign insolvency representative to request a secondary proceeding in Spain and the dispensability of the insolvency test for the opening of a secondary proceeding.

Coordination of parallel proceedings and cooperation between them are mainly dealt with in Title IV (Art.749 – 752 of the Law), but major aspects are also addressed in Titles II (domestic proceedings) and III (recognition of foreign proceedings). Title IV uses the heading ‘coordination’ (of concurrent proceedings), thereafter addressing both coordination and cooperation. It covers, in principle, all constellations of concurrent proceedings, however, the specific constellation of concurrent main and non-main (secondary) proceeding is addressed at some places in this Title (see, e.g. Art. 749 (3) of the Law). The Law stipulates in Art. 749 (1) a basic duty to cooperate between the insolvency representatives of the concurrent proceedings), provided, however, that the foreign proceeding is (formally) recognized⁴⁷. This includes a requirement of mutual cooperation (Art. 749 (1) sentence 2 of the Law). Art. 749 (2) gives a non-exhaustive list of acts of cooperation, e.g. mutual exchange of information, conclusion of protocols or other coordination of the proceedings. Generally speaking, the Spanish approach can also be characterized as a ‘maximal’ regulation of concurrent proceedings, with significant similarities, but also differences in comparison with the approaches of Belgium, Croatia, Poland and Slovenia.

45 In Title II Chapter I: Territorial proceedings.

46 In Title III: Recognition.

47 Spanish law provides, similar to Croatia, for a formal recognition proceeding, using the traditional instrument of exequatur (Art.742 of the Law). It remains open whether recognition can in some cases also be the object of an incidental decision.

B. General aspects for discussion

Taking the EIR and the MLCBI as a basis for further analysis, it would seem that the following general aspects of concurrent proceedings need to be discussed first:

Firstly, which constellations of concurrent (or parallel) insolvency proceedings should be addressed in future regulation? Secondly, which role should be given to the concept of 'recognition' (of foreign proceedings) in the context of parallel proceedings? Thirdly, should there be any general prerequisites for coordination and cooperation between parallel proceedings and which role should be given to discretion in such cases?

I. Which constellations of concurrent (or parallel) insolvency proceedings should be addressed?

Chapter III EIR provides only for rules on coordination and cooperation between an EU-based main insolvency proceeding and one or several⁴⁸ EU-based secondary or even non-secondary territorial proceedings. This includes also, though rather briefly mentioned, coordination and cooperation between several secondary or other territorial proceedings⁴⁹. Coordination and cooperation between several main proceedings is not addressed as the EIR allows only one such proceeding in the EU (unity principle as to main proceedings).

However, coordination and cooperation between several main (EU-based) proceedings is foreseen in the Regulation in corporate group cases (see, in particular, Art.56 – 60 EIR), the content being similar to the rules in Chapter II⁵⁰.

In contrast, Chapter V MLCBI addresses coordination and cooperation between all categories of insolvency proceedings covered by the Model Law, be they main or non-main proceedings. It even contains a particular provision on coordination and cooperation with several foreign proceedings (Art.30 MLCBI).

48 Cf. Art.41 – 43 EIR.

49 Arguably, this includes coordination and cooperation between several EU-based territorial proceedings (with jurisdiction under Art.3 (2) EIR), when COMI is outside the EU.

50 The particular 'group coordination proceeding' under Art.61 – 77 EIR have no equivalent in Chapter III EIR.

From the perspective of an efficient and fair handling of cross-border insolvency cases it would seem the best solution to define the constellations of coordination and cooperation between parallel proceedings as comprehensively as possible. This does not exclude differentiating according to the concrete context. For example, cooperation may be more liberal between EU-based proceedings or a preponderance in cooperation may be given to one proceeding, e.g. the main proceeding.

II. Which role should in this context be given to the concept of ‘recognition’ of a foreign insolvency proceeding?

Chapter III EIR seems based on the assumption that coordination and cooperation between parallel EU-based insolvency proceedings is condition on that such proceedings are mutually recognized under Art.19 and 20 EIR. Although, theoretically, recognition may have to be denied, e.g. under the public policy clause of Art.33 EIR, this apparently has never occurred until now in judicial practice and is not dealt with in detail in the Regulation.

In contrast, the MLCBI distinguishes in Chapter V between constellations where recognition of the foreign proceeding(s) is formally required⁵¹ and where no mentioning of recognition is made⁵². It must be taken into account that under the MLCBI, recognition is granted in the context of a formal proceeding (Chapter III Art.15 and 17 MLCBI), except if autonomous law provides for a more liberal approach (Art.7 MLCBI). Basically, (formal) recognition or even the commencement of a recognition proceeding gives a stronger position to the recognized foreign proceeding. This is particularly true if the foreign proceeding is a main proceeding in the sense of Art.2 (b) MLCBI, i.e. a proceeding opened at the debtor’s COMI⁵³.

Under the EIR (as well as under EU international civil procedure law in general), the term ‘recognition’ relates to foreign judgments (not to proceedings in general, although in the insolvency context recognition of the foreign judgment opening the insolvency proceedings brings with it the recognition of in principle all effects of the foreign insolvency proceeding) and takes places ‘automatically’, not requiring a formal recognition

51 See, e.g., Art.29 (a) MLCBI, Art.30 (a), (b) and (c).

52 See, e.g., Art.29 MLCBI in general.

53 See, e.g. Art.28 MLCBI.

proceeding⁵⁴. The advantage of this approach is speed and flexibility, but it involves a certain degree of improvisability and incompatibility of decisions on recognition.

In the EU, however, there is also the practice of judicial assistance to foreign proceedings (under EU regulations as well as under, e.g., the Hague Conventions on judicial assistance), which does not require a scrutiny of recognition criteria.

Which approach would seem preferable in future legislative action by the EU with regard to concurrent proceedings opened in non-EU countries?

As the present solution under the EIR with regard to coordination and cooperation between parallel EU-based proceedings does not seem to have led to problems, there is probably no need for changes. As to coordination and cooperation with non-EU insolvency proceedings, the approach should, arguably, be different. Generally speaking, the complete lack of Union rules creates legal uncertainty about cooperation with insolvencies in countries of great economic importance for the EU, such as Switzerland, the UK, the U.S., China and others. One option would be to apply with regard to third countries the provisions of the MLCBI, another would be to extend the provisions of the EIR, perhaps with some modifications, or develop other rules.

Under the insolvency laws of the EU Member States, different approaches are used: for example, Germany and Croatia apply, in essence, the provisions of the EIR by analogy⁵⁵. The Austrian Insolvency Code contains only one short provision on concurrent provisions in non-EU countries, which provides for a general duty of information and other cooperation for insolvency representatives, partly also for courts⁵⁶. Greece, Poland⁵⁷, Romania and Slovenia apply to relations with non-EU countries the provisions of the MLCBI, though with significant differences. A third group of countries have no specific provision in this regard or even no provisions on cross-border insolvency at all⁵⁸.

Applying the rules of the MLCBI would include moving to the principle of formal recognition⁵⁹. This could be modified, e.g. by opening some

54 Art. 20 (1) EIR.

55 See sec. 354–358 German InsO, Art.418 – 423 of the Croatian Bankruptcy Act.

56 Sec. 239 Austrian InsO.

57 With numerous particularities.

58 E.g. the law of the Netherlands.

59 This approach has been chosen by Spain.

space for incidental recognition⁶⁰ or even automatic recognition, either as a common EU standard or by leaving this to national legislation. Another option might be to create a general approach (e.g. not requiring a scrutiny of recognition as a general rule) and varying this for particular issues. This would be in line with the approach taken by the MLCBI, but would include some modifications by the EU.

Arguably, the last approach would seem the most adequate one: A general duty of non-formalized cooperation with foreign proceedings (e.g. between insolvency practitioners of both sides) would avoid unnecessary costs (e.g. for a formal recognition proceeding), while giving the insolvency representatives or other participants the possibility to turn to other insolvency organs or courts for approval of specific actions in cases of doubt. Beyond this, liberating cooperation from a necessity to scrutinize recognition criteria (but keeping public policy as a general security instrument) would be both in line with the MLCBI and the usual approach in cross-border judicial assistance. Cooperation between parallel insolvency proceedings is, principally, only one specific case of cross-border judicial assistance, which even appears to be directly covered by the Hague Conventions on Judicial Assistance.

It may also be reasonable to provide for specific rules for some issues, e.g. when legal clarity seems particularly important. This would seem to apply, for example, to the question of whether a – domestic or foreign – proceeding has universal or territorial effects (cf. Art.28 MLCBI, which links this to formal recognition of a foreign main proceeding). On the other side, coordination (as distinguished from cooperation) transcends the limits of judicial assistance and would therefore seem to require a recognition scrutiny. However, even here, a formal recognition proceeding would not seem to be necessary in all cases. It can be left to the insolvency representatives and other insolvency organs to determine when a formal proceeding of recognition seems necessary for clarity's sake or in order to be safe from liability risks.

The provisional result of the analysis is therefore that the provisions of the MLCBI on concurrent proceedings can well be used by the EU as a starting-point for regulation of coordination and cooperation with non-EU countries, but the provisions of the Model Law should be adapted to the particular legal approaches developed in the EU. This may include, for example, transferring some provisions of the MLCBI, which cover concurrent

60 Such an approach has been developed by Croatia.

proceedings, but are contained in other chapters of the Model Law, into a particular part of future EU law on concurrent proceedings.

III. Should there be general prerequisites for coordination and cooperation between parallel proceedings involving non-EU countries?

Both the MLCBI (in general) and the EIR (for inner-EU cases) provide for a duty of cooperation addressed both to insolvency representatives and courts. Coordination⁶¹ tends to be regulated more specifically, sometimes requiring recognition of the foreign proceeding – which indirectly requires the scrutiny of prerequisites for recognition –, sometimes not mentioning such a requirement. Under the MLCBI (Art.6), and implicitly also under the EIR⁶², public policy limits also the granting of cooperation and coordination between concurrent proceedings. It needs to be remarked that public policy does not necessarily lead to a yes-or-no outcome, it allows also for partial recognition and partial cooperation or coordination.

If a future EU legislative act were to deal with concurrent proceedings (including, but not limited to proceedings in third countries) in a more systematic manner, it would be welcome to give legal definitions of the terms ‘coordination’ and ‘cooperation’ and give the rather inconsequential use of these terms in the EIR a more systematic structure. Another possibility would be to leave the use of the terms unchanged, which would just continue to leave interpretation for courts and academics.

If the purpose were to define (and distinguish) the meaning of these terms, it may be proposed to define cooperation as referring to mutually agreed acts of insolvency organs. On the other side, coordination could be defined as legal rules or acts other than cooperation, which serve the purpose to optimize the conduct of concurrent insolvency proceedings for the participants.

Basically, public policy can be seen (and this could be made explicit in future legislation) as a common limit to both coordination and cooperation. In so far as recognition of a foreign proceeding is (implicitly or explicitly) required, there is no need for a particular definition of requirements for

61 As to the meaning of this term see *supra* note 7.

62 Art.33 EIR (public policy exception); the provision is situated in the Chapter on recognition of foreign proceeding. As cooperation and coordination of concurrent proceedings within the EU seems to implicitly require recognition of the foreign proceeding, Art.33 EIR also applies in the concurrent proceedings context.

recognition in the concurrent proceedings context. In so far as recognition is not required, the public policy clause would seem to suffice as a general requirement, thus following the MLCBI.

IV. Which role should be given to discretion in such cases?

The EIR, in principle, does not explicitly provide for discretion in cross-border insolvency. One exception is Art.36 EIR for the specific case of certain assurances given by the insolvency representative in concurrent proceedings. However, within national insolvency law discretion is foreseen in different contexts. For example, insolvency representatives typically have a large degree of discretion in the exercise of their duties, though this is subject to control by other insolvency organs or risks of liability. On the other hand, the MLCBI provides for discretion (by courts or insolvency representatives) in numerous provisions, e.g. in Art.21 (relief that ‘may’ be granted upon recognition of a foreign proceeding). In Chapter V MLCBI, which deals with concurrent proceedings, the existence of discretion on the side of courts or insolvency representatives is not explicit, but would appear to be included in the references made, e.g. to Art.19 – 21 MLCBI⁶³.

Basically, both the EIR and the MLCBI establish a duty to cooperate with foreign proceedings. Details of cooperation, however, typically include numerous discretionary or evaluation elements under national law. Coordination outside such cooperation is also foreseen on a legally compulsory basis (see, e.g., Art.28 MLCBI, Art.3 (3) EIR)⁶⁴, but may also include discretionary or evaluation elements under applicable national law.

For future legislative action, it would seem that the present approach under the MLCBI or the EIR (for inner-EU cases) which avoids specific mention of discretion, but foresees a legal duty to cooperation and seek coordination if feasible, seems adequate also in cases related to insolvency proceedings in third countries. The details of cooperation (including the denial of cooperation if there are serious reasons to do so in the interest of the creditors or the debtor) can be decided on the level of applicable insolvency law.

63 Cf. Art.29 MLCBI.

64 In so far as the wording of e.g. Art.34 EIR use the term ‘can’, this probably does not open discretion of the court, but only refers to its power (jurisdiction) to render a decision.

V. Particular rules on conflict of laws?

The EIR contains very detailed rules on conflict of laws in insolvency, while the MLCBI is largely silent on this topic. However, UNCITRAL has started work on a particular legal instrument on this subject. Art.35 EIR states expressly that ‘secondary insolvency proceedings’ (non-main proceedings based on an establishment) are governed by the same conflict of laws rules as other insolvency proceedings. The proviso in Art.35 EIR that the Regulation might provide for particular rules for secondary proceedings has by now not yet been used as to conflict of laws in the Regulation.

There is no reason to modify this approach in relations with concurrent proceedings in third countries. One can imagine situations in which e.g. agreements between insolvency representatives of concurrent proceedings include choice of law clauses. Opening conflict of law rules to some degree of party autonomy should, however, not be limited to EU-third country constellations, but should be foreseen – if regarded as practically relevant – in a general manner.

VI. Particular rules on universality/territoriality?

Both the EIR and the MLCBI contain some provisions on the intended extraterritorial (or only territorial) effect of insolvency proceedings. As to non-main proceedings, Art.3 (2) sentence 2 EIR expressly states that ‘the effects’ of such proceedings shall be restricted to the assets of the debtor situated in the territory of the latter Member State’. This territorial auto-restriction is confirmed by the denomination of such proceedings as ‘territorial proceedings’ e.g. in Art.3 (4) EIR. This rule is repeated with particular regard to secondary insolvency proceedings in Art.34 sentence 3 EIR.

In contrast, no such mention is made as to main proceedings, and the general view is that such proceedings have ‘universal effect’, i.e. that they extend also to foreign assets of the debtor, including assets situated in non-EU countries⁶⁵.

The MLCBI approaches this issue in a slightly different way. It does not define the territorial or extraterritorial effect of non-main proceedings

⁶⁵ This is also stated in Recitals 22 and 23 of the EIR.

in a general manner, but it contains a specific provision on the effect of (domestic) concurrent non-main proceedings in Art.28 MLCBI⁶⁶. Art.28 MLCBI states that ‘the effects of that proceeding shall be restricted to the assets of the debtor that are located in this State’. Thus Art.28 MLCBI starts with the principle of territoriality for such proceedings. However, it adds that such proceedings extend also ‘to the extent necessary to implement cooperation and coordination under articles 25, 26 and 27, to other assets of the debtor that, under the law of this State, should be administered in that proceeding.’ This is in line with the generally flexible approach of the MLBCI – based on the corresponding legal traditions in Common Law countries – as to cross-border insolvency.

While it may be justified to keep to this rule in inner-EU constellations, thus giving particular weight to the main proceeding of another EU Member State, a more flexible approach would seem preferable in relations with non-EU countries.

Common Law countries typically do not use the head of jurisdiction (e.g. COMI, domicile, establishment, property) as a decisive criterion for the intended extraterritorial or merely territorial effect of the proceeding. Instead, they tend to focus on balancing interests or determining ‘reasonableness’, granting courts a significant degree of discretion. The consequence can be that a non-main proceeding can be seen to have extraterritorial effects, at least in some respects. This opens the way for insolvency representatives and courts to find flexible solutions to complicated cross-border insolvencies. The EU should take this into account and not exclude its proceedings (i.e. courts, insolvency representatives etc.) from negotiations coming up in such insolvencies. Therefore, as to relations with non-EU countries, Art.28 MLBCI seems to be a more adequate approach than the strictly territorial approach of Art.34 sentence 2 EIR. This would not exclude to keep the strict territoriality principle in Art.3 (2) EIR for reasons of clarity and would give the revised Art.35 sentence 2 EIR an independent role in concurrent proceedings related to non-EU countries. Perhaps even better, Art.35 sentence 2 EIR should be opened in this way also for inner-EU cases, in case a practical need arises.

66 See also Art.29 (c) MLCBI and, implicitly, other provisions. The Chapter on recognition of foreign proceedings (Art.15 et seq. MLCBI) also draws some distinctions between foreign main and non-main proceedings, but does not expressly refer to aspects of territoriality/extraterritoriality.

C. Specific issues for discussion

Both the EIR (for inner-EU proceedings) and the MLCBI contain specific rules on coordination and cooperation of concurrent proceeding for the different stages of the involved proceedings. Some of these rules will now be looked at more closely with a view to the specifics of EU – third country relations.

I. Opening of proceeding

The opening of concurrent proceedings raises mainly questions of general admissibility of the concurrent proceeding, of jurisdiction and of the existence of ‘insolvency’ if this is a formal requirement under the applicable *lex fori concursus*.

1. Admissibility of a concurrent proceeding

Neither the EIR nor the MLCBI exclude the opening of concurrent proceedings completely. However, both the EIR and the MLCBI give the proceeding commenced in the state of the debtor’s center of main interests (COMI) a preponderant role in the coordination of the proceedings.

It seems that a future EU legislation dealing with concurrent proceedings in EU and non-EU countries would have to take the same basic approach. EU law cannot limit the opening of concurrent proceedings in other countries anyway and should not exclude the opening of concurrent proceedings in the EU just because of the existence (or opening) of an insolvency proceeding in a third country. To which degree the opening of an insolvency proceeding in a non-EU country should limit the opening of a concurrent proceeding in the EU or have an impact on the conduct of such proceedings, needs to be discussed in details for the various stages of the proceeding.

2. Jurisdiction

Neither the EIR nor the MLCBI establish particular rules on jurisdiction for concurrent proceedings. The general jurisdictional rule of the EIR on main proceedings is based on the COMI (Art.3 (1) EIR), the general ju-

jurisdictional rule on non-main proceedings is based on an 'establishment' of the debtor (Art.3 (2) EIR). However, if the debtor's COMI is situated outside the EU, the EIR at present does not apply, and applicable national law may foresee other grounds for jurisdiction, e.g. domicile, location of assets or even citizenship.

The MLCBI does not deal with direct jurisdiction for main proceedings, it addresses only indirect jurisdiction for main proceedings in the recognition context, also taking COMI as the relevant connecting factor (Art.2 (b) MLCBI). As to jurisdiction for non-main proceedings, the MLCBI is more liberal than the EIR: It does not limit direct jurisdiction for non-main proceedings⁶⁷, even though its rules on recognition of foreign non-main proceedings and on coordination or cooperation with such proceedings are limited to non-main proceedings opened on the jurisdictional basis of an establishment of the debtor ('foreign non-main proceeding' as defined by Art.2 (c) MLCBI). The provisions of the MLCBI on recognition of foreign proceedings (e.g. Art.15 et seq. MLCBI) are limited to main and non-main proceedings in the sense of Art.2 (b) and (c) MLCBI⁶⁸, although it may be possible to recognize other non-main proceedings (e.g. proceedings on the jurisdictional basis of property situated in the state of the forum concursus) under autonomous national law (Art.7 MLCBI). The rules of the MLCBI on access to court of 'foreign representatives' are less explicit. They might be read as accepting also foreign representatives appointed in 'non-establishment' non-main proceedings (cf. Art.9 – 14 MLCBI). The same would seem to be true for the MLCBI Chapter on cooperation with foreign courts and representatives (Art.25 -27 MLCBI). On the other hand, the Chapter on concurrent proceedings (Art.28 – 32 MLCBI), uses – at different places – both the (broad) term of foreign proceedings and the more specific terms of 'foreign main' and 'foreign non-main' proceeding as defined in Art.2 MLCBI. Taking the wording seriously, the MLCBI would seem not to generally exclude coordination and cooperation with 'non-establishment' non-main proceedings, anyway not under otherwise applicable national law (Art.4 MLCBI).

67 Art.28 MLCBI, which requires for the opening of concurrent non-main proceeding the existence of assets in the forum states, does not seem to be a rule on jurisdiction, but only a rule limiting the jurisdiction extant under other rules (e.g. based on establishment).

68 Cf. Art.17 (1) MLCBI.

From a legal policy perspective with regard to non-EU countries, the approach chosen by the EIR as to direct jurisdiction would seem to fit also cases of concurrent proceedings in EU countries. In particular, it would hardly convince to establish different rules for jurisdiction in dependency of whether COMI is situated in the EU or in a third country as COMI is now globally accepted as an adequate head of jurisdiction for (main) insolvency proceedings. If there is a situation when two or more countries claim to be the main proceeding, the solution of such conflicts must be found on the substantive level, if possible through coordination and cooperation, not on the jurisdictional level⁶⁹.

The evaluation may be different as to non-main proceedings. The limitation of EU-based non-main proceedings to (direct) jurisdiction based on an establishment, serves the purpose to give a significant preference to a COMI-based main proceeding in another EU country. In the case of a main proceeding (COMI-based or possibly other acceptable jurisdiction) outside the EU, the balance of interests may be different as third country proceedings may not be fully compatible with EU standards. In such situations, the autonomous cross-border insolvency law of numerous EU Member States provides for a broader scale of rules on jurisdiction than merely the existence of an establishment. In such cases, the existence of assets of the debtor in the non-main proceeding country should suffice. This head of jurisdiction seems adequate for an insolvency proceeding, which is based in most countries – even today – on a broad concept of levying (general) execution into property. Whether a concurrent proceeding based on assets is indeed requested and can be opened, depends on considerations of convenience and other legal provisions, which can well co-exist with broad jurisdiction.

One could imagine to vary this jurisdiction if the debtor has an establishment in another EU country, giving establishment-based jurisdiction within the EU (or at least an EU proceeding on this jurisdictional basis) priority over a mere ‘asset-based’ proceeding. This would, of course, imply that in such cases the establishment-based EU proceeding would have effect in all EU Member States. In view of the supposed rarity of such cases it will probably not be necessary to regulate this variant expressly.

69 It may be slightly different if the EU accepted in the future the institute of *forum non conveniens*.

3. Determination of insolvency

The definition of ‘insolvency proceeding’, both under the EIR and the MLCBI, presupposes insolvency of the debtor. Technically, insolvency can be understood in different ways⁷⁰, and some countries even allow for insolvency proceedings without a formal test of insolvency.

Both the EIR and the MLCBI take into account these differences, and, in view of the sometimes complicated examinations and costs of a formal test of insolvency, state that recognition of a foreign main proceeding is, for the purpose of opening a domestic non-main insolvency proceeding, (rebuttable) proof that the debtor is insolvent (Art.28 MLCBI). Art.34 EIR contains a similar rule, but requires in addition that the foreign proceeding required a formal test of insolvency. Some national laws dispense completely with the requirement of insolvency in secondary insolvencies.

As the parallelism between Art.28 MLCBI) and Art.34 EIR shows, this rule is not based on specifics of inner-EU cooperation, but serves general purposes of efficient conduct of parallel insolvencies in different countries. Art.34 EIR could therefore be ‘extended’ to non-EU insolvency proceedings, but, arguably, the requirement of a formal test of insolvency in the foreign proceedings does not seem to be necessary. Abuse of insolvency proceedings by solvent debtors can in evident cases be countered by non-recognition or non-cooperation, and abolishing this requirement would significantly facilitate cooperation with insolvencies in Common Law countries, which often do not require a formal insolvency test, but have have other legal instruments to avoid abuse of insolvency law by solvent debtors.

II. Conduct of proceedings

Both the EIR and the MLCBI contain numerous, very detailed provisions on the conduct (including termination) of concurrent proceedings. The EIR concentrates most of these provisions in Chapter III with under the heading ‘Secondary insolvency proceedings’, which is limited to intra-EU relations (Art.34 – 52 EIR). Other, more general provisions of the EIR also apply in the parallel proceedings context, e.g. rules on conflict of laws, on recognition of foreign insolvency judgments, or substantive provisions such

⁷⁰ Typical differences are between balance sheet insolvency and cash-flow insolvency, but the differences include also the concept of ‘acts of bankruptcy’ and growing use of the concept of ‘prospective insolvency’ etc.

as the right of foreign creditors to lodge claims (Art.53 – 55 EIR) or the right of an insolvency representative to exercise his powers in other EU Member States (Art.21 EIR) or the establishment and interconnection of insolvency registers (Art.24 -27 EIR).

The Chapter of the MLCBI on concurrent proceedings (Art.28 – 31) is much shorter than the corresponding Chapter of the EIR, but some of its provisions address the same issues as the EIR: Art.28 MLCBI on the opening of a non-main proceedings corresponds to Art.34 EIR. Art.29 MLCBI (coordination of concurrent proceedings by courts) corresponds, roughly speaking, to Art.42 EIR (cooperation between courts). Art.30 MLCBI, which has no direct parallel in the EIR, deals with coordination of more than one foreign proceedings. Art.31 MLCBI (presumption of insolvency in the opening stage of parallel proceedings) corresponds to Art.34 sentence 2 EIR. Art.33 MLCBI (effects of payments in concurrent proceeding), roughly speaking, corresponds to Art.23 EIR (return or imputation of foreign payments). Some substantive provisions of the EIR, which also apply to secondary proceedings, are regulated in the MLCBI in a Chapter on ‘Access of foreign representatives and creditors to courts ...’, which as such does not exist in the EIR.

Differently from the MLBCI, the Chapter of the EIR on secondary proceedings provides for separate provisions on cooperation between insolvency representatives (Art.41), between courts (Art.42) and between insolvency practitioners and courts (Art.43). The MLBCI addresses basically the same issues, but in differently structured contexts: The powers and duties of courts in concurrent proceedings are specifically addressed in Art.29 MLCBI, but they at this place not limited to cooperation with other courts. Furthermore, Art.29 MLCBI refers on the one hand to a particular Chapter of the MLCBI on general provisions on cooperation between courts and insolvency representatives in cross-border insolvency cases, which is not limited to concurrent proceedings (Art.25 – 27 MLCBI), on the other hand to powers and duties of courts in the Chapter on recognition of foreign proceedings (Art.19 – 21 MLCBI). Both Art.19 – 21 MLCBI and Art.25 – 27 MLCBI are ostensibly influenced by the cross-border insolvency practice (and underlying legislation) in Common Law countries, which makes them somewhat difficult to compare with the EIR.

The basic idea is, however, the same: All insolvency organs, in particular insolvency representatives and insolvency courts, should as far as possible cooperate (and be empowered to do so) with corresponding organs or other institutions abroad with a view to optimize the economic outcome of the

insolvency proceeding for all participants. The EIR develops this concept mainly in the Chapter on secondary proceedings, which is supplemented by a particular, more general Chapter on the rights of foreign creditors. Duties and powers of cooperation with foreign courts outside the parallel proceedings context are not specifically addressed in the EIR, but are left to autonomous law.

There does not seem to be any fundamental incompatibility between the EIR and the MLCBI with regard to cooperation and coordination of concurrent proceedings, though the legislative technique of both texts differs. In particular, the approach of the MLCBI to refer in the Chapter on concurrent proceedings to general provisions on cooperation as well as on recognition, which are based on a significant freedom of discretion and evaluation of court, makes the MLCBI probably difficult to apply in countries where courts are not accustomed and prepared to use such broad powers of discretion.

From the EU's perspective, there might be two basic solutions if concurrent proceedings with participation of non-EU countries were to be addressed: One option would be to use the MLCBI as a model, which would have to be adapted to the structural specifics of the EIR and the experiences of EU countries. The other option would be to use the EIR, in particular its Chapter on parallel proceedings, as a starting point, and integrate it with elements taken from the MLCBI.

Probably, the second approach fits better the legal thinking of the EU, but the second approach may be more effective for international cooperation in insolvency matters on a global scale.

Perhaps it is not even necessary to draw a fundamental line between the two approaches. Not all of the detailed provisions in Chapter III EIR may be necessary for cooperation with third countries. A general duty and power of insolvency courts and insolvency representatives to seek and grant cooperation with foreign courts or insolvency representatives (within the limits of applicable law and on the basis of cooperation on both sides) would seem to be fully compatible with the spirit of the EIR and European insolvency law in general. Such a duty and power could, for example, be included in Chapter I (general provisions) of the EIR, and would be compatible with Chapter IV MLCBI.

Details such as discretion by courts would not necessarily have to be foreseen explicitly in the EIR, although some of the respective provisions of the MLCBI could be 'translated' into wordings common to the EIR.

Also, EU Member States might be granted the right to provide for more cooperation-friendly or, generally speaking, more detailed rules, perhaps even the right to adopt the MLCBI as such if they so prefer and it fits into their legal systems. This might be an attractive option e.g. for EU Member States with a common law background such as Ireland, Cyprus or Malta, or countries which have already adopted the MLCBI for relations with non-EU countries.

D. Theses and suggestions for future action

1. Cross-border insolvencies, in particular in larger business cases, often lead to concurrent (parallel) insolvency proceedings on a global scale. Though many of such parallel proceedings take place in a corporate group context, concurrent proceedings relating to one debtor do exist and need an adequate legal framework. This framework may also be useful for corporate group situations.
2. Jurisdiction for non-main proceedings is not a specific topic for concurrent proceedings, but should be decided for non-main proceedings generally. When the debtor's COMI is located in the EU, the existing rules need no change. When the debtor's COMI is located outside the EU, a widening of jurisdictional grounds should be considered.
3. In case of concurrent proceedings, the EU should amend Art.34 sentence 3 EIR, aligning it with Art.28 MLCBI: possible extension of the effect of the non-main proceeding to foreign assets if this supports coordination and cooperation between the proceedings.
4. The provisions of the EIR on secondary insolvency proceedings (Chapter III EIR), which are presently limited to inner-EU coordination and cooperation, should be used as a starting-point for regulation of relations also with third countries. They should for this purpose, however, be aligned with the MLCBI, which is founded on the same spirit of effective and fair regulation of cross-border insolvencies.
5. Such alignment should include a general duty and power of courts and insolvency representatives to cooperate with foreign courts and insolvency representatives with a view to optimize the results of the insolvency proceedings.
6. Such a duty cannot be unconditional, exceptions should however be limited. Limits under applicable law can be used as a basic rule, but there should be an opening clause for courts. Grave or repeated non-coopera-

- tion by the organs of the other proceeding could also be a reasonable exception. Public policy can serve as another general exception.
7. In concurrent proceedings a limited possibility of choice of applicable insolvency law by insolvency representatives should be introduced in order to facilitate an effective and fair regulation of the insolvency.

Should issues of mutual exchange of information be addressed in future regulation on cross-border insolvency?

Nicoleta Mirela Năstasie

Abstract:

The paper discusses the increasing complexity of cross-border insolvency proceedings and the importance of streamlining information exchange. It argues that non-binding procedural mechanisms can promote similar principles and facilitate cooperation in cross-border cases.

Keywords: Cross-border insolvency, information exchange, procedural mechanisms, international cooperation

A. Introduction

Recognizing that the increasingly complex character of cross-border insolvency proceedings creates difficulties, streamlining the exchange of information, as well as the use of a set of non-binding procedural mechanisms, are likely to promote similar principles for cross-border insolvency, more above the regulatory limitations in various jurisdictions.

B. Legal regime for communication in cross-border insolvency

Analysing the mechanisms proposed by the Recast EIR, we can see that communication and cooperation are key concepts. The Recast EIR contains references to this in Recitals 48, 49 and 50, Articles 41, 42 and 43 and Chapter V, Insolvency proceedings applicable to members of a corporate group. The Recast EIR regulates the duty to cooperate based on general principles arising from EU rules and the case law of the European Court of Justice (CJEU). The amendments made by Articles 42–43 of the Recast EIR on communication and cooperation between courts, between courts and insolvency practitioners are relevant in this respect. Articles 41–44 represent the legal basis in the EU system, where previously there was

uncertainty as to whether the law allows direct judicial communication. In order to facilitate the coordination of insolvency proceedings, Article 42 of the Recast EIR provides that a court before which an application for the opening of insolvency proceedings is pending or which has opened such proceedings must cooperate with any other court before which an application for the opening of insolvency proceedings is pending or which has opened such proceedings, to the extent that such cooperation is not incompatible with the rules applicable to each proceeding. In the Romanian Law No 85/2014 on pre-insolvency and insolvency proceedings (Insolvency Code) lays down the rule that cross-border cooperation may be implemented by any means the court deems appropriate (Article 299(b)).

Cooperation is subject to the requirement that it does not contravene the national rules applicable to the proceedings. Courts are obliged to cooperate and communicate with each other to facilitate the efficient administration of insolvency proceedings to the extent that the conduct of such proceedings so requires. Examples of situations where communication is required may be the appointment of insolvency practitioners, the administration and supervision of the debtors' assets and affairs, the conduct of hearings and the confirmation of protocols.¹ Insolvency practitioners appointed in foreign insolvency proceedings may be heard to the extent appropriate to facilitate the efficient administration of the proceedings, they shall cooperate and communicate with the courts. Practitioners may also ask the courts for information about the insolvency proceedings or for assistance in connection with the insolvency proceedings for which they are appointed, for a stay of any action to recover the debtors' assets.

From the perspective of the MLCBI, communication between courts is possible, *but it should be done carefully and with adequate safeguards to protect the substantive and procedural rights of the parties, with prior notice and in the presence of the parties.*² The subject matter of communication may be formal orders or judgments, notices of general information, questions and submissions, transcripts of court proceedings. Communication may be by telephone, video-link, fax and e-mail.³

1 Article 57 EIR.

2 UNCITRAL Working Group V, Insolvency Law, *Judicial materials on the UNCITRAL Model Law on Cross-Border Insolvency*, A/CN.9/WG.V/WP.97 Thirty-ninth session, Vienna, 6–10 December 2010, p.10, par.160; for details, see Stuart Slatter, David Lovett, *Corporate turnaround, Managing Companies in Distress*, Revises edition, Penguin Books, 1999.

3 Ibidem.

C. Problems and difficulties in cross-border communication

Some existing discrepancies between insolvency regulations in the EU Member States demonstrate the need and efforts to harmonise procedural and even substantive aspects of insolvency laws.

In connection with procedural difficulties, multiple challenges related to the communication process have manifested in practice. Firstly, we note that there are differences between the basic procedural terms used in insolvency, the official languages in national legal systems, which require the translation of procedural documents and acts. We also observed:⁴ lack of knowledge of a foreign language at academic level; lack of appreciation of the possible loss of time and increased costs in organising the communication process, of the risk and consequences of failure of the procedure; (poor) infrastructure of the courts and the technical means available; limited experience in dealing with insolvency cases; lack of a general vision of the impact of insolvency and local procedures in international business, unwillingness to communicate due to lack of mutual trust between participants and other actors involved in the process. Problems at EU level also create the European standards on the protection of personal data. Courts need to be cautious in the process of cooperation and provision of information in order not to overstep these boundaries.⁵ It is not clear whether cross-border insolvency requires a more active judiciary or whether it is sufficient to have well-trained practitioners in insolvency cases and judges only to merely oversee the legality aspects of the various proceedings. From this perspective, soft-law guidelines develop rules for cross-border communication based on the premise of an active judiciary and courts on an equal footing, working together towards a common goal.⁶

When addressing communication issues in cross-border insolvency proceedings, it is necessary to look at them from *different perspectives, including the debtor's point of view*. Restructuring processes and court proceedings can create serious challenges for companies, especially for groups of companies located in multiple jurisdictions, as group members are faced not only with economic and financial problems, but also with declining trust from employees, customers, shareholders, investors, suppliers, communities to which they belong. In this context, communication challenges

4 Wessels, *Insolvency Intelligence*, 2014, p. 100–105.

5 Vallender, p.6.

6 Wessels, *Insolvency Intelligence*, 2014, p. 105.

during restructuring and insolvency proceedings are difficult to avoid. The US experience brings to the fore important lessons. *Four stages of communication during restructuring proceedings* are described as requiring different strategies in the management of a company: when financial difficulties arise, when a petition to open insolvency proceedings is filed, when a reorganisation plan is presented, and when the company's reputation is restored.⁷ At some of these stages, practitioners and specialised courts can influence the course of business and the success of insolvency proceedings through their own way of communicating with practitioners and other courts. In practice, it is recognised that for a company in financial difficulty wishing to initiate preventive restructuring proceedings or to propose a reorganisation plan, it is advisable to give advance notice, particularly to creditors, focusing the communication process on the benefits of continuing business. It is also noted that after the submission of the restructuring plan, to maintain control over the negotiation and approval procedures, the company should reduce the amount of public information on the financial aspects of the plan.⁸ This becomes imperative in the case of a pre-negotiated plan, amicably accepted prior to applying for judicial reorganisation or pre-insolvency proceedings. In this respect, information made public by courts and practitioners or transmitted to foreign courts or proceedings should not undermine the chances of success for the approval of the restructuring plan or the efforts of companies or groups of companies to regain their reputation and rebuild business relations.

Real difficulties may bring technological limitations. A relevant example is the NORTEL case, where the US and Canadian courts had closed-circuit video cameras and high-tech equipment at their disposal for joint cross-border hearings.⁹ Cross-border ad hoc communication and cooperation requires both high quality technical means and, equally, relevant national legislation, training of authorities and specialists to use them.¹⁰

In the area of communication, major problems are also caused by differences in the status of the judge and the organisation of the judicial systems. What defines judicial systems in the European Union is the existence of

7 Jampole, American Bankruptcy Institute Journal 2001, p. 24.

8 Ibidem.

9 Peacock, American Bankruptcy Institute Law Review 2015, p. 559; In re Nortel Networks Inc (Bankr Court, D Delaware), 2015; In re Nortel Networks Corp. Sec. Litig., 238 F. Supp. 2d 613, 617 (S.D.N.Y. 2003).

10 Mevorach, International Insolvency Review 2012, p. 185.

important variations, determined by national regulations, traditions, rules for appointing or designating judges and continuing education, the way judges understand their independence, influence, place, and role in the national and European legal system.¹¹ In this respect, challenges for communication in cross-border insolvency litigation arise in relation to the need for constitutional authorisation and procedural legislation to enable the judiciary to adopt and endorse soft-law mechanisms and guidelines. In civil law systems judges rely mainly on domestic law, which determines the limits of their action and powers. This raises the question of whether international guidelines should be formally approved before following their rules, and what constitutional or procedural regulation is required to do so. The observation about the relationship between national law allowing '*the court (fully) to collect facts or evidence*' and effective communication in international insolvency is still topical.¹²

We also note that the reality of the work of members of the judiciary is not an easy one. Judges are part of a hierarchical professional structure. While in national civil litigation under ordinary law the aim of communication between courts, lawyers and parties is ultimately to persuade the judge to do justice to the relationship between the parties, in cross-border insolvency proceedings things are far from being so simple or transparent. One explanation may be the existence of different goals pursued by entities acting in more than one jurisdiction, their representatives, creditors and interested third parties, in addition to the classic objectives of maximising asset value and increasing profits for creditors.

Not only differences in connection with law and culture are described in the doctrine as impediments to communication, but also the possible reluctance of judges based on the fear that their powers and authority may be diminished in this way.¹³ There are real challenges that judges in different jurisdictions face in resolving international insolvency disputes, caught '*between the temptations of international law and compliance with the domestic law of the country,*' on the one hand, and the reality that the judge '*must apply foreign law, whether or not he or she is familiar with it.*'¹⁴ Accordingly, it is the role of the legislative and political authorities to provide judges with domestic legislative provisions in accordance with

11 Alter, *passim*.

12 Wessels, *Insolvency Intelligence*, 2014, p. 100–105.

13 Mears/McFadden, *ABI Journal* 2012, p. 32, 98–100.

14 *Multilateral Meeting of the Council of Eur. Legal Co-operation with Cent. and E. Eur. Countries*, Bucharest, Rom., Nov. 28–30, 1995, Presentation by Dinu Ianculescu, Dir.

the requirements of international law, as well as information about developments in practice and jurisprudence. Among the difficulties associated with the judicial communication process, the lack of legislatively regulated authorisation in civil law systems, explaining the reluctance of judges to engage in this type of communication, is connected, among other things, to the constraints associated with the process of deliberation 'in secret'.

Cross-border inter-professional communication, between professionals and insolvency practitioners, between insolvency practitioners and courts, raises specific issues. The EIR authorises cooperation and communication between insolvency practitioners, courts, and insolvency practitioners. In the application of these regulations, a problem for the fulfilment of cooperation obligations may be in connection with the subject matter and limits of communication, which both courts and practitioners must consider in insolvency proceedings. From a narrow perspective, the duty to communicate should concern mainly organisational, administrative matters, and less substantive law aspects regarding the relationship between the parties involved in the various insolvency proceedings.¹⁵ In another view, communication involves more than the mere exchange of information, since it is impossible that, whatever the circumstances, the substantive rights of creditors, for example, should not be affected in any way.¹⁶

A difficult issue is the possible conflict of interest between insolvency practitioners appointed in parallel proceedings as an obstacle to communication from the perspective of the relationship between the independence of insolvency practitioners and conflict of interest, as well as that of harmonising ethical requirements for insolvency practitioners. Another aspect relates to the necessity and usefulness of the developing of the notion of conflict of interest in the rules on cooperation in insolvency proceedings. The conflict-of-interest issue is more evident in the case of group companies where group members are in insolvency proceedings in different jurisdictions and the collective interest of creditors of one member may become divergent from the interest of creditors related to other group entities. It is considered in the literature that conflicts of interest in corporate group insolvencies can be reduced by bringing together all subsidiaries

of Int'l ud. Rel. and Eur. Integration, Ministry of Justice, Romania, in *The Judge and international law*, 165 (Council of Eur. Pub. 1998), Abud Adams, Edward and Fincke, Jason, op. cit., p.72 – 73.

15 Moss/Fletcher/Isaacs, p. 500–503.

16 Reumers, Int. Insolv. Rev., 2016, p. 237.

in the same jurisdiction under the control of the same practitioner.¹⁷ The appointment of the same practitioner in the proceedings of several group companies, albeit in the form of a conflict of interest, could more effectively support a reorganisation or judicial liquidation procedure.¹⁸ As far as we are concerned, we appreciate that the answer must be circumscribed in relation to the concrete circumstances of each particular situation.

From the perspective of communication between court and practitioners, the court should not be seen as an abstract, impersonal entity, but rather as a group of judges, unique individuals with personal mental and emotional characteristics and different views on life. There is no standard or ideal model of a judge, but individuals with different levels of knowledge, life experience and professional training. Insolvency practitioners and judges alike who wish to promote the communication process in insolvency proceedings should be aware of this reality.

Recognising characteristics and mechanisms for communication can lead to goal-oriented, persuasion-oriented communication. In cross-border insolvency proceedings it is subsumed under the objective of persuading the foreign court, through strong arguments and transparent information, to respond favourably to the idea of communication and cooperation. Communication must be pragmatic, effective and deliver results in real time, which is essential for insolvency proceedings, whether they concern judicial liquidation, reorganisation, or preventive restructuring.

We should not forget that communication involves two parties, the sender, and the receiver of the message, both of which are equally important and play a fundamental role in the efficiency of the process. In this context, some questions become pertinent. What is the most appropriate formula to approach the judge? Is an impersonal approach always necessary or is another way of communicating possible? Is it always mandatory to use strict, pre-agreed formulas in communication between courts? Is there a need for a set of global standards for the approach of courts in different jurisdictions? What is the most efficient way of communication to ensure that the court receives promptly and correctly the object and purpose of the procedural document or other communication?

From a procedural perspective, identifying appropriate methods to enable the beneficiary, the court, or the insolvency practitioner to formulate

17 van Galen, ERA Forum, p. 241–243.

18 Ibidem.

requests for assistance or helpful explanations quickly and easily can generate an appropriate response and effective communication. In conveying information, greater attention should be paid to the psychological aspects of communication as a complex process for all parties. In this context, the reason and purpose of the request or information must be strongly and clearly explained, to put the judge or the recipient of the communication in a position to understand the legal position of the sender and to provide the answer, to mediate the solution. It can be concluded that a condition for effective communication is the knowledge and understanding of the judge. In insolvency proceedings this idea can be translated by the need to provide the judge with legal and procedural tools to become comfortable in his or her position and increase the chances that the message of a foreign practitioner or court will reach the judge and make international assistance more effective. It can be said, in this sense, that judicial communication is a real form of rhetoric in connection with the various relationships involved in a judicial dispute.¹⁹

There is a favourable trend in European law towards involving the courts in the process of cooperation and coordination of cross-border insolvency proceedings. However, the reality is that stakeholders are generally reluctant to initiate cooperation mechanisms, partly out of a desire to achieve quicker results in domestic proceedings and partly because they fail to fully appreciate the possible favourable outcomes of cooperation. Analysis of existing legislation and international guidelines shows that legislative structures and general principles supporting communication as an important procedural mechanism for cross-border insolvency are promoted at national and international level, but what happens in practice?

D. Practical aspects of communication in cross-border proceedings

I. Management of cross-border insolvency cases

The management of cross-border insolvency cases is one of the important elements for a successful cooperation process. At international level, there has been a trend in recent decades to reduce the freedom of the parties in the proceedings and to give the judicial authority more effective control, a trend which is considered necessary, not least because it is recognised as

¹⁹ Ibidem.

a matter of principle. We believe that the idea of implementing a system in which the management and control of proceedings is the responsibility of the judicial authority (managerial judging) requires judges to accept a managerial approach to their work, both in relation to the purely procedural aspects of civil proceedings and to the complex issues of substantive law arising in this type of cases. This means more rigorous control by the court as the authority that actively directs and manages the proceedings. Romanian legislation has gone in the opposite direction in terms of the management of local insolvency cases, from the total administration and control of the court to a greater freedom for the parties and the insolvency practitioners in this respect.

The obligations regulated in the EIR for national courts to communicate with courts and practitioners in other jurisdictions can be analysed as part of the judicial work of managing cross-border insolvency proceedings. There are clearly major differences in the management of insolvency cases in the Member States, ranging from proceedings where judicial review is carried out continuously by the judge with powers in this regard, to systems where judicial review is exercised at the request of the parties, at fixed intervals, in a structured manner. It is a real challenge for insolvency practitioners or judges to be involved in deciding an international insolvency case, especially when they do not specialise in insolvency but in civil law in general and have not had training in dealing with cases with cross-border implications.

This is why the management concept should be described as a body of general rules in cross-border insolvency for the coordination and harmonisation of parallel proceedings for their real efficiency. Possible tools are information and ongoing consultation between courts, insolvency practitioners and other parties involved in cross-border proceedings. Courts and insolvency practitioners managing the proceedings should establish '*a general timetable for all stages of the proceedings*,' identify the times for resolving various practical issues, organise hearings and '*status conferences*,' identify and implement appropriate tools for the transmission of information.²⁰ Some examples of concrete steps that courts and insolvency practitioners could take in case management would be to determine the issues to

20 *EU Cross-Border Insolvency Court-to-Court Cooperation Principles Final Public Draft*, (extended version); June 2014, B. Wessels, J. Adriaanse, P. Omar, Jean-Pierre van der Rest, Bernard Santen, p. 43–45; Principles 9.3 and 14 ALI / UNIDROIT Principles, principles 6.4 and nr. 6.5 from *Hague Principles for Direct Judicial Communications* (2013); Principles 9.3.3 – 9.3.5 ALI / UNIDROIT Principles; Principle 14 ('*Court Re-*

be addressed and the timetable, specifying the general orientation and dates for different proceedings and briefings, discussing relevant issues related to the international nature of the dispute, determining the most effective methods of communication, etc.

Various questions arise in relation to the issue of judicial management of insolvency proceedings with foreign elements. What is the management of such a case before a national judge? What is the specificity of the management of such cases in the courts of different jurisdictions? What are the procedural conditions and characteristics, considering the provisions of national and relevant civil procedure law?

Harmonisation of national procedural rules in jurisdictions involved in cross-border insolvency can be a powerful tool for active and coordinated management of proceedings, including the communication process. For the European Union area, the general principle is laid down in Article 81(2) TFEU, concerning the possibility for the European Parliament and the Council²¹ to adopt measures '(f) *the elimination of obstacles to the proper functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States;*' for the development of judicial cooperation in cross-border civil matters and situations. The question of whether Article 81(2)(f) TFEU can be a basis for harmonising or approximating Member States' rules on civil procedure, even as regards the management of cross-border insolvency proceedings, is still to be answered.²²

Pending legislative solutions, soft-law mechanisms can mediate the process. We note that the differences between judicial systems are significant, ranging from courts where the application of soft-law communication guidelines would violate national procedural rules, to courts with complete freedom to decide, especially in urgent cases. In some EU jurisdictions, such as Germany, Hungary, Italy, the use of soft law rules is only possible if there are express provisions to this effect in national laws.²³ In the attempt to achieve a minimum harmonisation of procedural rules in cross-border

sponsibility for Direction of the Proceeding'), *ALI-III Global Principles for Cooperation in International Insolvency Cases 2012*, International Insolvency Institute, 2017; for details, see Westbrook, *Am. Bankr. L.J.* 2002, 1.

21 Consolidated version of the Treaty on the Functioning of the European Union 2012/C 326/01, <http://eur-lex.europa.eu/legal-content/RO/TXT/?uri=celex%3A12012E%2FTXT>.

22 van Ree, in Xandra/van Ree (eds.), 39.

23 Ibidem.

insolvency disputes, some issues to be considered are those relating to the procedural obligations of the parties and their representatives, regulated powers and duties for judges and other authorities, the application of the principle of proportionality, the most effective ways of creating a system of procedural rules to play a functional role in supervising language problems arising in practice, etc.

Judicial cooperation based on Articles 25, 26 and 27 of the MLCBI²⁴ is a common practice in the work of judges in common law systems. For a judge in civil law systems, the duty to communicate may be more difficult to put into practice as there are no concrete methods in national law for such cooperation. This raises the question of whether the judge, who is required to communicate under general rules, such as the duty to communicate in European law, is dependent on the existence of an actual practice, or whether a more flexible, creative attitude is permissible. In this respect, there is a real and increasingly positive attitude of courts in the European civil law systems towards a more open approach in cross-border insolvency cases,²⁵ which creates new possibilities for judicial practice, even in the absence of expressly regulated rules and procedural forms in national proceedings.

II. Language used in cross-border insolvency cooperation and communication.

In most European systems the translation of documents and notifications prior to communication is mandatory and the burden of bearing the costs falls primarily on the applicant.

For example, regarding the language used in the process of cooperation, communication and coordination in cross-border insolvency matters, Article 18 of the Romanian Civil Procedure Code, which regulates *the language of proceedings*, states that civil proceedings shall be conducted in Romanian and that applications and pleadings shall be formulated only in Romanian. According to Article 8 of Law No 189/2003 on international legal assistance in civil and commercial matters, unless otherwise provided in international conventions, the request and supporting documents shall be translated

24 *The Model Law on Cross-Border Insolvency*, (UNCITRAL) Resolution No 52/158 from 15 December 1997.

25 *Ibidem*.

into the language of the requested State.²⁶ To this end, requests for international legal assistance shall be transmitted by the Ministry of Justice, the documents attached to the request shall be transmitted by the requesting Romanian authority and at the expense of the interested parties; the proofs of the communication form shall have the title and documents printed in French, English and German by the Ministry of Justice. Under the chapter '*Form of applications*', Article 150 of the Code of Civil Procedure provides that each copy of the application shall be accompanied by copies of the documents; if the documents are drawn up in a foreign language, they shall be submitted in a certified copy, accompanied by a certified translation. In the absence of an authorised translation, translations by persons with knowledge of the language concerned may be used. In conclusion, we note that in Romania the translation of documents and notifications prior to communication is mandatory, and the burden of bearing the costs lies primarily with the applicant. In this general legislative context, we should consider the specifics of insolvency proceedings with cross-border implications.

In international insolvency cases it is necessary to determine the language of communication to identify and resolve divergences, overlaps, gaps, and preliminary problems with legal terms, to assess greater consistency in scope and to ensure uniform use of language terminology. When determining the language of communication in cross-border proceedings, courts should focus on objectives such as reducing costs using available resources, avoiding prejudice to the parties involved, finding practical solutions for efficient and rapid communication. As various European laws require the translation of written documents as evidence, the possibilities for courts to exercise their discretion in this respect are extremely limited. Some legal concepts have no equivalent in another jurisdiction, may have a different meaning or may have different consequences, which would lead to misunderstanding of the legal effects of some of the domain-specific legal terms. In this context, can a European judge to improve the communication process by allowing the use of a language other than the official language, or accepting documents, decisions, judgments, without translation? Given the existing procedural law, the answer seems negative.

26 Năstasie, Phoenix 63/2019, pp. 35–42.

III. Public proceedings. Oral and written submissions in cross-border insolvency proceedings

In the insolvency field, there is a need to strike the right balance between the public and confidential nature of cross-border insolvency proceedings, including hearings and court decisions. To this end, the following should be open to the public, with limited exceptions: hearings and recordings of court hearings; judgments, orders, and their reasoning. In civil law systems, court records are usually available to the parties, with disclosure to the public possible only as an exception, with good justification; in common law systems, by contrast, records of hearings are generally public. It should not be forgotten, however, that in insolvency litigation, particularly in pre-insolvency proceedings, confidentiality is essential, so the specificity of the proceedings should be considered in applying the general principles.

About *oral and written submissions*, a real challenge for foreign creditors, and sometimes for their representatives and insolvency practitioners in cross-border insolvency disputes is the possibility to present oral arguments, to participate in the final hearing before the judges in the proceedings. It remains difficult for creditors and interested third parties to participate in the process of hearing witnesses and experts, particularly where the presence of creditors, for example, involves high costs in relation to the value of their claims.

In the case of witness statements, it is noted that traditional legal systems regulate the oral hearing of witnesses, but in modern jurisprudence a new general direction is developing, aimed at replacing the oral statement of a witness by a written statement. In Romanian law, as in many civil law systems, the hearing of a witness is carried out by the court; the parties have the possibility to ask *additional questions* to a witness or expert under the supervision of a court. Article 321 of the Code of Civil Procedure, which regulates the hearing of witnesses, establishes that this procedure is oral, during the hearing the witness is allowed to formulate the testimony freely, without reading a written answer beforehand; the witness may use notes, with the approval of the judge, but only to specify numbers or names. The testimony shall be drafted by the court clerk, who shall record the witness's statement verbatim and verbatim in accordance with Article 323 of the Code of Civil Procedure. Regarding the above, we propose to recognise the possibility for the court, after consultation with the parties, to require that the initial witness statement be in writing, provided to the parties prior to the hearing. We consider that this alternative may be more efficient and

economical in cross-border insolvency disputes if the parties have the legal right and can attend and question witnesses.

IV. Methods of communication in cross-border insolvency proceedings

Before communicating with another court, the judge should check that this is in accordance with all the procedural rules applicable in his or her state, as the process cannot promote or harm existing domestic rules, procedures, or ethics. The exception could be justified by the existence of emergency situations, where rapid and necessary measures must be taken in insolvency proceedings to save assets, values or to reduce losses. The question is to what extent the judge, or the insolvency authority can interpret the *urgent circumstances* and whether some harmonisation at EU level would be possible in this respect.

Ad hoc means of communication have been used successfully in some of the international insolvency cases of groups of companies. An example of this is the *Cenargo* case, involving courts in the US and UK.²⁷ Although insolvency proceedings were initially promoted in both the UK and the US, following discussions between the appointed judges in the two jurisdictions, the difficulties and conflicting issues were resolved to the extent that the US court, finding that the COMI of the group was in the UK, stayed the proceedings opened under Chapter 11 and accepted the continuation of joint administration proceedings by the English court. The centralisation of proceedings and direct judicial communication have facilitated the restructuring of a significant part of the group entities. In the *Cenargo* case, US and UK judges involved in resolving parallel insolvency disputes used the telephone as a rapid mode of communication, allowing the parties involved to participate directly, listen to the telephone communication, and have access to a transcript of the conversation.²⁸

Regarding cross-border insolvency cases, what methods of notification would be feasible, traditional procedural mechanisms or modern ones such as transmission of information by telephone, e-mail, fax, videoconference? In the near future, would it be possible for cross-border hearings to be organised on a routine basis by technical means of remote communication in an international language with the participation of creditors and other interested parties in different jurisdictions?

27 LoPucki, 189, 191–193, 204–205.

28 *In re Cenargo Intl*, 294 BR 571 (Bankr SDNY 2003).

Analysis of communication methods in cross-border insolvency proceedings, communication within and between national court systems involves the storage and analysis of information that typically accumulates during court proceedings and requires systems that provide long-term security. It is mandatory to ensure secure conditions for the transmission and communication of documents and information between judicial authorities, practitioners, and other parties. Identifying ways to protect the integrity and confidentiality of information, in particular in restructuring and pre-insolvency proceedings, and balancing the need for transparency with the protection of data and information is essential for the competitiveness of companies in the international context. It must be recognised that insolvency proceedings usually involve lengthy and costly written submissions. Communication of documents by physical transmission, for example through post offices, involves risks, including the possibility of loss and alteration of their integrity. In the case of transmission of information by electronic means, there may be some risks related to cybersecurity in the public sector or data transfer²⁹, which require additional measures to protect confidential data that should not be disclosed to the public. Storage of information, retention of documents, regardless of the mode of transmission, may be subject to different standards in various jurisdictions involved in cross-border proceedings.

V. Judicial system. The deliberation process and the role of case law in cross-border insolvency proceedings

In international insolvency cases, dealing with the opening of proceedings, recognition or legal assistance, the judge or authority with competence in the field resolves the various issues arising by means of judgments or orders. These decisions must contain elements generally recognised for judgments and take account of the specific features of the insolvency field. If necessary, an oral judgment or order may be given, but it must be transcribed within a short period of time and made available to the persons concerned in accordance with national procedural rules.

In civil law systems, in the application of European rules on the duty to cooperate, a concern may be how the process of communication between courts is organised so that it does not influence the court's decision and

29 Yuksel/Heindler, *passim*.

does not significantly affect the independence of the judge and the individual's freedom of decision.³⁰ The issue of collective deliberation through judicial dialogue remains an open discussion. While judges in common law systems have greater freedom of decision, it is more difficult for civil law judges to set the limits of dialogue to actively participate in the creation of new models of international cooperation in insolvency matters that can be followed in future cases³¹ while respecting the legal rules of national law.

For example, the Romanian judge is obliged to express his opinion on the various aspects of the case only in the process of secret deliberation. He can be held liable for failure to maintain the secrecy of deliberations or the confidentiality of documents of this nature and other information. In this respect, Article 395 of the Code of Civil Procedure *enshrines the rule of secrecy of deliberations*. Art.10 para. (1) of Law 303/2004 on the Status of Judges and Prosecutors establishes the prohibition of the judge to publicly express his/her opinion on ongoing trials. According to Article 91 of the Law, judges are obliged to respect professional secrecy (para. (1)) and to maintain the secrecy of deliberations and votes in which they have participated, even after they have ceased to hold office (para. (2)). Section 99(j) of the Law regulates a disciplinary violation: the failure to observe the secrecy of deliberations or the confidentiality of such proceedings. Disciplinary misconduct is described as including three distinct situations, non-compliance with the secrecy of deliberations, failure to observe the confidentiality of proceedings of this nature, non-compliance with the secrecy or confidentiality of other information of which the magistrate has become aware in the performance of his duties. As regards the constituent elements of disciplinary misconduct, which must be met cumulatively, they were compared with those of delicts.³² This may require harmonisation between jurisdictions to standardise *'the cross-border resolution of these disputes as a whole'* in accordance with *'their own fundamental principles of jurisprudence'*.³³

In insolvency, some controversies, and differences of interpretation between the European Court of Justice and national courts may express the power of the latter to influence European law. The process of *integrating European Union law into national judicial activity* is not just a passive

30 Vallender, *passim*.

31 Unt, International Insolvency Cooperation, 1077.

32 Gârbuleț, Universul Juridic nr. 1/2016.

33 Unt, International Insolvency Cooperation, 1077.

acceptance of the supremacy of European law, but a creative interpretative activity in which national judges can express their influence in the process of European integration.³⁴

VI. Mechanisms to improve communication in the international context.

Unprecedented changes in the way businesses operate and the internationalisation of business have put increasing pressure on courts and practitioners to address multiple issues that go beyond their own jurisdictions and require creativity in finding practical solutions.³⁵ In this context, although they may create tensions within national systems, the mechanisms proposed by international bodies in the field of cross-border insolvency can be valuable.³⁶

VII. Institutional and organisational mechanisms

To determine the application and effects of the EIR and those of the MLCBI on judicial activity in cross-border insolvency proceedings, a first step is to analyse the various national judicial structures, from courts of first instance to supreme courts.³⁷ Court-to-court dialogue in international insolvency cases is seen as a useful mechanism to fulfil not only the general principles of collective insolvency proceedings, but also to help harmonise ideas in different legal systems and *'enable a process of collective deliberation on common issues'*.³⁸

We agree that effective cooperation between the courts involved in parallel insolvency proceedings can lead to a simplification of the transfer of information to reduce the risk of conflicting solutions. And apart from differences in national insolvency laws and possible conflicting objectives, there remains a serious psychological issue, namely the willingness and trust of judges to cooperate and communicate. To encourage the judiciary towards a communication-friendly attitude, European legislation supporting cooperation should be accompanied by means for developing the spirit

34 Alter, pp. 48–49.

35 Clark, Brook. J. Corp. Fin. & Com. L. 2014, 22–29.

36 Ibidem.

37 Alter, pp. 39–40.

38 Unt, International Insolvency Cooperation 1072 -1087.

of cooperation, including direct meetings between members of the judiciary. It is also a fact that the organisation of specialised courts can have the effect of streamlining cross-border insolvency proceedings, but whether there is a real need for specialised courts in this type of litigation depends on the specificities of the different jurisdictions.

Judges are some of the most important actors for the functioning of any legal system. Mutual trust is the essential bond of judicial cooperation in cross-border insolvency. This requires, however, not only the promotion of the principle of mutual recognition at legislative level, but also the harmonisation of different judicial systems, or of civil law systems with common law systems, bringing them and the insolvency profession up to international standards. I have listed just a few of the topics of heated debate over at least the last ten years.

What mechanisms can be put in place to develop an environment of mutual trust in cross-border insolvency? One option may involve the development of direct international relations and meetings between members of the judiciary, insolvency practitioners, academics, not only for the resolution of a cross-border insolvency case, but also within meetings organised by international institutions and bodies. Despite possible doubts about the effectiveness of procedural mechanisms, the experience of recent years shows that direct inter-judicial and inter-professional communication is likely to enable professionals from different jurisdictions to get to know each other and to realise that common ideals and mutual trust are likely to make the principle of cooperation a reality.

Judicial training programmes on cross-border insolvency cooperation are increasingly common, demonstrating the need for legal security and certainty in this area and the particular importance of the judiciary for restructuring and rescuing cross-border businesses. The prospect of creating a network of insolvency judges organised in an association similar to the National Conference of Insolvency Judges that has existed in the US since 1926³⁹ remains a topical issue. National training of judges should be accompanied by a methodical and organised dialogue with judges specialising in insolvency litigation in a large number of jurisdictions around the world, having the capacity, knowledge and skills to successfully analyse the appropriateness of international principles and guidelines in their actual work. In this way, it is possible not only to assess the effectiveness of soft-law guidelines, but also to determine the practical impediments for

39 Năstasie in *INSOL Europe*, *passim*.

their use depending on the national legal framework, traditions, or different perspectives in the jurisdictions in which judges work. As a member of the professional body of judges, I have found that there is a need for a permanent connection between researchers, academics, judges, and day-to-day practice to identify and develop the most effective mechanisms from those proposed theoretically and to draw on practical judicial experience.

The UNCITRAL-World Bank Group Judicial Capacity-Building Initiative on International Best Practices⁴⁰ is a relevant project for members of the judiciary around the world. The project brings together and enables communication between judges from common law and civil law systems, allowing them to share experience about national legislation, procedural acts, practical difficulties, as a basis for future collaboration. The INSOL International's Judicial Group⁴¹ and INSOL Europe Judicial Wing⁴² which brings together judges, regulators, and judicial officials, provides opportunities to expand international cooperation with judges in common law and civil law systems worldwide through participation in the meetings and direct judicial communication channels. Another example, the Judicial Insolvency Network⁴³ formed in 2016, is a project of the judiciary around the world that is developing a set of standards, guidelines for communication and cooperation between courts in cross-border insolvency matters, proposing concrete mechanisms for judicial communication in insolvency proceedings. The Cross-Border Guidelines⁴⁴ have been implemented by the Supreme Court of Singapore, effective from 1 February 2017, have been adopted by US bankruptcy courts, the Supreme Court of Bermuda, other courts, including the Netherlands, guidelines applicable when courts approve cross-border insolvency protocols. The examples are undoubtedly evidence of the interest in promoting international best practice for cooperation and communication in insolvency.⁴⁵ These initiatives encourage not only judges in common law systems but also the continental European judiciary to become actively involved in the process of judicial cooperation in cross-border insolvency.

40 <https://uncitral.un.org/en/content/uncitral-world-bank-group-judicial-capacity-building-initiative-international-best-practices>

41 <https://www.insol.org/Focus-Groups/Judicial-Group>

42 <https://www.insol-europe.org/judicial-wing>

43 <https://jin-global.org>

44 *Guidelines for Communication and Cooperation Between Courts in Cross-Border Insolvency Matters*, Judicial Insolvency Network Conference.

45 Martin/Fairbairn, *American Bankruptcy Institute Journal* 2017, p. 24–25.

Meetings between judges and practitioners from common law and civil law systems, including presentations of the latest case law, procedural acts of cooperation, communication, and coordination, where the exchange of views with colleagues from different jurisdictions is fostered, can be the basis for future collaboration. In this respect, the flow of information must be efficient for positive effects. Presentations of common law and civil law judicial systems, organisation, appointment, management, case law, etc., focusing less on general descriptions and more on practical aspects of how communication has worked in concrete cases or should be improved through international instruments, direct debates by judges of common themes or problems arising in the resolution of cross-border insolvency proceedings that may be subject to harmonisation, are relevant topics. The confidence of members of the judiciary that everyone's opinion matters will improve the exchange of information, even if only some judges have wider expertise in international litigation and cross-border insolvency. The main idea of such international meetings is to give judges from different Member States and outside the EU the opportunity to get to know each other and try out the experience of real communication.

VIII. Procedural mechanisms

In the continuation of the analysis, we will address the issue of procedural mechanisms to make the communication process more efficient. Some factors to be considered are the existence of significant assets located in more than one jurisdiction, the complex structure of the debtor, different types of insolvency proceedings in the States involved, the availability of time for negotiations, practical issues related to the choice of applicable law and jurisdiction.⁴⁶ In-depth analysis of European and international case law regarding judicial cooperation in cross-border insolvency proceedings can be a step towards more effective communication.

In this respect, the first edition of the Digest of Case Law on MLCBI, 2021, and the Judicial Perspective updated this year promote uniformity in the application of the UNCITRAL Model Laws. As such, they may be helpful to judges from civil law jurisdictions who for various reasons

46 The *UNCITRAL Practice Guide on Cooperation, Communication and Coordination in Cross-Border Insolvency Proceedings* (Part I and Part II 25 June 2004; Part III 1 July 2010; Part IV 18 July 2013), p. 75–78.

might have had limited exposure to complex cross-border insolvency cases. In the absence of domestic cases and guidelines, civil law courts may look for assistance in the practice of foreign courts. The Digest and the Judicial Perspective are important sources of information for their judicial activity. Both publications build on the MLCBI-related case law collected in the Case Law on UNCITRAL Texts (CLOUT) assist judges by making available decisions of courts and arbitral tribunals interpreting UNCITRAL texts. While the Digest systematizes that case law per article of MLCBI, the Judicial Perspective takes a more practical approach.

Practical experience leads us to recognise that, in contrast to the classic rules on international communication in common law civil cases based on certified techniques or authorisations, cross-border insolvency requires modern and rapid methods of communication. In this respect, the MLCBI⁴⁷ proposes communication independently of the requirement of recognition of a foreign proceeding. We also note that *the protocol* is one of the most important mechanisms in international insolvency.⁴⁸ In this respect, the economic and business reality calls for domestic legislation to encourage the use of protocol, courts to approve protocols in cross-border insolvency and an international legal framework for protocols as a common technique in cases involving multiple jurisdictions.⁴⁹ An example of this is the Lehman Brothers protocol, whereby practitioners appointed in parallel proceedings have established effective ways of communicating and resolving other procedural issues.⁵⁰

Various questions about the role of justice in the communication process remain actual. Is it really at the discretion of the judiciary to develop standards for transnational legal relations? What is the real freedom of the judge to decide the method and language of communication? What methods would be most effective in creating an international group of judges dealing with insolvency cases in civil and common law systems, working as a team to harmonise cross-border insolvency while ensuring judicial status and independence? At this stage it is not possible to predict how the new European rules on communication and cooperation in cross-border insolvency will be implemented. Will judges be creative in developing informal ways of connecting courts or will they maintain the problem of communi-

47 Art. 25(1) and 26(1) MLCBI.

48 Bufford, *American Bankruptcy Law Journal*, 2012, p. 731–733.

49 Ibidem.

50 *The Cross-border Insolvency Protocol for The Lehman Brothers Group of Companies*, <http://www.tri-leiden.eu/project/categories/insolvency-protocols-project/>.

cation within the traditional parameters of purely formal proceedings as adopted by different national rules?

E. Proposals for improving cooperation and communication in cross-border insolvency.

The previously described aspects demonstrate demand for concerted actions to promote soft-law mechanisms in an effective way, in the form of practical, simple guidelines translated into several international languages. Translations accessible online to all interested persons, practitioners, judges, company representatives and authorised individuals, mainly of the UNCITRAL Model Laws and Implementation Guidelines, are beneficial.

In practice, bringing the UNCITRAL texts in everyday judicial work is a difficult task, as they are not translated into the languages of different states. This is an area where UNCITRAL and assistance is particularly needed. I believe that the UNCITRAL Model Laws and Implementation Guides should be translated in national languages in different jurisdictions, accessible online for all interested parties, practitioners, judges. As far as the European Union is concerned, it is possible in collaboration with the European Commission to translate at least some of the UNCITRAL texts and make them available to the public in the EU Member States. In this way, they can be promoted more easily through the national authorities and institutions, as, in the case of Romania, the Ministry of Justice, the National Institute of Magistracy, the National Institute for the Training of Insolvency Practitioners (INPPI), The National Union of Romanian Bar Associations (UNBR), the Romanian Banking Institute (IBR).

This process may be, also, a further step for European legislators to consider the possibility of harmonizing UNCITRAL proposals with the EIR on insolvency proceedings, in terms of concrete communication modalities in cross-border insolvency proceedings could be an important step towards efficiency. If a directive would be seen as a more appropriate way of reducing the differences between European jurisdictions, we believe that such a legislative measure would be welcome.

It is necessary to promote, at European level, protocol models, cross-border agreements, adaptable and flexible standard forms, valuable tools for determining the content of protocols in specific cross-border cases, mechanisms that can at least partially reduce procedural differences. A European

model protocol, translated into the languages of the EU Member States, used at least as a tool in the learning experience in civil law jurisdictions, a standardised formula containing the possible elements that can be the subject of negotiation and agreement in parallel insolvency proceedings, would encourage practitioners and judges to make more use of this procedural mechanism and, in time, to turn it into a real customary form in international insolvency law.

In a broader approach to the issue of cross-border communication, the following proposals may be of interest at European level. There is a need to promote international standards for the profession of insolvency judge and to support judges from the civil and common law systems to participate in joint meetings conducted, supervised, mediated by international institutions and bodies such as the WORLD BANK, UNCITRAL and INSOL International, etc., or to create and support an International Judicial Institute of Insolvency, which would allow for educational harmonisation in the field of international insolvency law, facilitate communication and inter-professional cooperation in insolvency proceedings.

There are European regulations on cooperation between main and secondary insolvency proceedings in the case of a single company, and those on coordination of insolvency of groups of companies. However, given the need to streamline and bring the provisions of Regulation (EU) No 848/2015 closer to national specificities and traditions, it would be worth considering revising European and national legislation by including relevant legal provisions on the implementation of international communication methods, the use of protocols in the process of judicial and inter-professional cooperation in cross-border proceedings.

We list by way of example some proposals for new regulations that could be included in national and European legislation:

- regulations allowing the establishment of a common language for communication in the process of cooperation in cross-border proceedings, other than the official language, including by means of a protocol.
- regulation of the possibility of accepting documents, orders, decisions, judgments, without their translation into the official language, except for those parts which are really necessary for the procedure.
- regulating the possibility of direct international judicial communication, at least in urgent cases, by telephone, videoconference call or other electronic method, by laying down rules for communication (possibility for the parties and their representatives to participate in person; need

to record the communication; written transcript of the oral communication filed immediately and available to the parties; arrangements for determining the time and place of communication).

- procedural rules for the organisation and conduct of joint hearings in courts corresponding to parallel insolvency proceedings, concurrent hearings by means of videoconferencing, regulation of concrete procedural conditions for joint cross-border hearings;
- regulation of the procedural conditions for cross-border cooperation in cross-border pre-insolvency proceedings.
- regulation of the possibility for the parties to establish, by means of a cross-border agreement or protocol, other forms of cooperation and coordination than those expressly provided for in national law, if they do not conflict with the European Regulation and national law.

Other regulatory proposals to streamline communication and coordination in cross-border insolvency proceedings concerning groups of companies concern the following procedural aspects:

- the regulation of the elements of the applications, of the conditions, procedures, stages to be followed in the field of cross-border insolvency procedural coordination (the person to be notified and the content of the notification to promote such a mechanism in foreign proceedings, who has the initiative for a coordination proposal, the procedure for implementing coordination and whether a decision of the national court is required to promote such an approach).
- regulations in the cross-border coordination of procedures for the notification, filing and examination of claims, to lay down concrete procedural modalities to facilitate equal and fair treatment of claims of the foreign and local creditors.
- procedural rules for different types of coordination and the applicable legal regime, concrete rules for the joint administration regime, or for the mutual liquidation regime, for example, procedural coordination rules for situations where such solutions would include reorganisation, a sale as a going concern of a part or of the business as a whole, a sale of assets or a combination of liquidation and reorganisation of group members.
- regulation of the cases and conditions in which modification or termination of procedural coordination may be requested and ordered, the limits of judicial review in these situations.

- regulations regarding the costs of coordination of insolvency proceedings, on the possibility of concluding cost-sharing agreements and simplified dispute resolution mechanisms [n this respect.
- regulation of the procedure for appointing a creditor or a committee of creditors from among local creditors to attend meetings of creditors organised at the level of the corporate group, procedural obligations of the parties and their representatives.

Consideration should be given to the need for the procedural rules to be supplemented by practical instructions, rules, guidelines, e.g. on the appropriate forms of communication and cooperation between courts, between courts and practitioners.

F. Conclusions

There is currently no uniform European legal regime applicable to cross-border insolvency from the perspective of procedural law and procedural rules. However, court practice, particularly in jurisdictions with close traditions, has sought to develop communication mechanisms and identify solutions for cooperation or harmonisation of insolvency proceedings including through ad hoc communication mechanisms. It must also be recognised that for most European jurisdictions the process is still timid, under uncertainty in terms of practice and case law.

Reality demands a reduction in the gap between the direct interaction of companies and businesses around the world, whose borders are almost non-existent, and the procedural restrictions still faced by public authorities dealing with cross-border insolvency proceedings. Territoriality is no longer a criterion for determining the characteristics and evolution of jurisdiction towards a practical and functional approach.

A first conclusion we reach, in relation to the previous analysis, is that if cross-border insolvency in the EU is to expand and communicate internationally, flexible, evolving legislative, legal, and high-performance systems must be developed as appropriate. On the other hand, international communication is the essential mechanism for the functioning of all cooperation and coordination procedures proposed by the UNCITRAL Model Laws and Guidelines instruments, which can be used effectively in the EU. The absence of effective communication in international insolvency proceedings may be due to legal and practical reasons. Differences between national insolvency laws and those relating to the status of the judge, the

organisation of judicial systems, court infrastructure, limited experience in dealing with international insolvency cases, procedural difficulties, different official languages used in national legal systems, technological limitations, are, from this perspective, only a few aspects. Efficient institutional and organisational mechanisms used in a coherent and creative way are needed to improve the process of cross-border communication.

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Observations on cross-border group insolvencies¹

Luciano Panzani and Robert Van Galen

Abstract:

This paper observes the treatment of group insolvencies in the European Insolvency Regulation (EIR) and the challenges in achieving efficient solutions for multinational enterprise groups. It discusses the limitations of the EIR in providing powers to insolvency practitioners and the need for a common standard for recognizing foreign proceedings.

Keywords: Cross-border insolvency, group insolvency, European Insolvency Regulation, multinational enterprise groups

A. Main features of the group insolvency treatment in the EIR

The EIR 1346/2000 did not contain any provisions on groups of companies. At the time, many insolvency lawyers thought that this reduced the entire EIR to an irrelevance as most large corporations are divided into units consisting of separate legal entities and there would usually be at least one legal entity for each member state where the corporation is active. Although these insolvency lawyers turned out to be wrong as the EIR was found, in practice, to fulfil a need, the lack of provisions relating to groups was definitely felt and efforts were therefore made to fill the gap. An easy solution would have been to include a provision that, if a court has jurisdiction over one group company, it would also have jurisdiction over the others (similar to 28 U.S.C. § 1408(2)). In a way, that is what the British courts attempted in the early cases by holding that the COMI was located at the groups management centre, but this approach was halted by the Eurofood case², which stressed the importance of the COMI being ascertainable by third parties. A

1 The text of this contribution was licenced by the authors after the conference within the project in October 2024.

2 ECJ 02.05.2006 -case C-341/04, ECLI:EU:C:2006:281- Eurofood IFSC Ltd.

situation in which the insolvency proceedings of one group member created jurisdiction for the insolvency proceedings of the other group companies has never been contemplated: instead, the main proceedings for each group company has to be opened at that companies COMI. Another easy solution would have been to confer powers on the insolvency practitioner of the top company that would enable him to achieve an efficient solution for the entire group. However, corporate structures are sometimes complicated, and control may lie with another group company. The various drafts of the EIR that were circulated prior to its enactment show the Community legislative struggle to reach a politically acceptable solution. Evidently, the member states had difficulty in accepting that courts or insolvency practitioners located in other member states, would be able to take decisions concerning their group companies. When the EIR was finally introduced, in Chapter V thereof insolvency practitioners were given rights to obtain information and give advice with respect to insolvency proceedings of group companies, but no rules were included to regulate which proceeding should take precedence. Similarly, the scope for intervening either directly or through the courts in the insolvency proceedings of group companies was limited. Chapter V also introduced the concept of a group coordinator, who could try to coordinate the negotiation of a restructuring plan. However, the group coordinators powers are also very limited. The whole construct seems to rest on the premise that a restructuring plan should be reached by negotiation between the insolvency practitioners appointed in all the insolvency proceedings and possibly the group coordinator and by subsequent adoption in all these proceedings. Around the time of the adoption of EIR, in 2017, a similar regulation was adopted under German law³ and incorporated as § 269a – 269i of the German *Insolvenzordnung* (*InsO*). The provisions of this regulation apply to local German groups of companies. However, contrary to European law, under §§ 3a-3e of the German *InsO* insolvency proceedings can be opened in a single court with respect to all group companies.⁴ To our knowledge no EIR group coordinators have yet been appointed and the provisions of Chapter V have not been applied in any substantive cases. As far as we could find out, the same applies to the German equivalent provided for by §§ 269a-269i *InsO*, but here at least the instrument of bringing all the group insolvency proceedings in the same court is available. Obviously on a national level,

3 Gesetz zur Erleichterung der Bewältigung von Konzerninsolvenzen.

4 These provisions pre-date the act of 2017.

from a sovereignty perspective such instrument is less problematic than on an international level.

As the provisions of Chapter V of the EIR confer certain rights of coordination and advice on insolvency practitioners with respect to insolvency proceedings of other companies belonging to the same group, the definition of a group is relevant. This can be found in Article 2 (13) and (14) EIR. The concept is linked to Directive 2013/34/EU on the annual financial statements, consolidated financial statements and related reports. Article 2 (13) EIR defines a group of companies as a parent undertaking and all its subsidiary undertakings. Article 2 (14) defines a parent undertaking as an undertaking which controls, either directly or indirectly, one or more subsidiary undertakings. It adds, however, that an undertaking which prepares consolidated financial statements in accordance with Directive 2013/34/EU is deemed to be a parent undertaking. Under that directive shareholdership and control are the key factors taken into account.

Art. 56–60 EIR concern cooperation and communication. These provisions are the complement to Art. 41–43, which provide for cooperation and coordination between insolvency proceedings with respect to the same debtor (main and secondary proceedings). Art. 56 contains an obligation for an insolvency practitioner appointed in proceedings concerning a member of a group to cooperate with any insolvency practitioner appointed in proceedings concerning another member of the same group. An insolvency practitioner's obligation to cooperate as provided for in Art. 56 is subject to limitations which are more restrictive than those applying under the equivalent Art. 41 EIR.

These limitations considerably weaken the obligation to cooperate. In insolvency situations, there are often conflicts of interests between group companies, because they have different sets of creditors. Art. 57 contains a similar provision on cooperation between courts in group proceedings, including the same limitations. Art. 58 provides for cooperation between courts and insolvency practitioners in other group proceedings.

An insolvency practitioner has certain powers in proceedings concerning other group companies. These include the right to be heard in proceedings concerning any other member of the same group and the option for practitioners to request a stay on measures like asset sales across group companies (e.g. one group requesting a stay on another group's asset sale). However, this right is limited. All practitioners are enabled to request stays for the same entity and must be heard. If a group coordination proceeding exists only the group coordinator can request a stay.

Sec. 2 of Chapter V concerns group coordination proceedings. According to Art. 61(1) EIR, group coordination proceedings may be requested before any court having jurisdiction over the insolvency proceedings of a member of the group. The request should be accompanied by a proposal for the person to be appointed as group coordinator. The group coordinator must not be one of the insolvency practitioners appointed in respect of any of the group companies. The group coordination proceedings will thus be opened by the court first seized. The wording of Art. 61 EIR suggests that a request cannot be limited to some of the group members or part of the insolvency proceedings of the group members. A limitation can be created by means of an *opt-out*, as discussed below. Solvent group companies cannot be included in the group coordination proceedings.

After the request for the opening of the group coordination proceedings has been filed, the court considers various criteria. If the court is satisfied that these criteria are met, it notifies the insolvency practitioners involved and gives them an opportunity to be heard.

Subsequently, there is a waiting period of 30 days, during which insolvency practitioners appointed in respect of group companies may object to the person of the proposed group coordinator. An insolvency practitioner may also *opt-out* of the group coordination proceedings altogether (Art. 64 (1) (a) and 65 (1) EIR), in which case the proceedings in which this insolvency practitioner is involved will not be included in the group coordination proceedings. Nevertheless, it is possible that some kind of informal consultation takes place.

Where at least two-thirds of all insolvency practitioners appointed in insolvency proceedings of group companies agree that the court of another member state having jurisdiction is the most appropriate court, that court will have exclusive jurisdiction over the group coordination proceedings. The 30-day waiting period thus gives the insolvency practitioners an opportunity to consider an alternative, both to the jurisdiction and to the group coordinator.

The insolvency practitioners appointed in relation to group members and the group coordinator must cooperate with each other to the extent such cooperation is not incompatible with the rules applicable to the respective proceedings.

The essential tasks of the group coordinator are to make recommendations for the coordinated conduct of the insolvency proceedings and to propose a group coordination plan. A group coordination plan is not a rescue plan in the classic sense of a plan capable of modifying creditors

rights and resolving the insolvency, instead it is more about coordinating the proceedings. Such a plan may contain proposals for measures to re-establish the group's economic performance and financial soundness, settling intra-group disputes and agreements between the insolvency practitioners of the group companies. The insolvency practitioners must consider the recommendations of the group coordinator and the content of the group coordination plan, but are not obliged to follow the recommendations of the plan. However, if the insolvency practitioner does not follow the plan, he must give reasons for this. This is actually tantamount to a comply-or-explain rule.

Under Art. 72 (2) EIR, the group coordinator has various important rights, including the right to participate and be heard, mediate disputes between insolvency practitioners, request information from practitioners to aid coordination and request a stay of proceedings to ensure the plan's implementation.

B. Main features of the UNCITRAL Model Law on Enterprise Group Insolvency

The UNCITRAL Model Law on Enterprise Group Insolvency (MLEG) was adopted by UNCITRAL in 2019. So far it has not been enacted in any state.⁵ Similarly to the EIR the MLEG provides a group proceeding focused on the development of a group insolvency solution for the whole or part of an enterprise group (as explained by recital (c) of the preamble). The EIR is less clear in respect of its purpose, but it follows from recitals 51 and 52 that the efficient administration of insolvency proceedings relating to different companies forming part of a group of companies must be assured. Additionally, the MLEG provides for cross-border recognition and implementation of the group insolvency solution in multiple states. It should be noted that the MLEG differs fundamentally from the EIR in the sense that within the European Union the principle of union trust applies and that no such principle applies under the UNCITRAL instruments. Therefore, under the EIR reliance is placed on the decisions taken in other member states, although in the case of group companies there is a considerable involvement of the local court. Under the MLEG and the UNCITRAL

5 The table of the status of UNCITRAL texts on the UNCITRAL website does not show the MLEGI.

Model Law on Cross-Border Insolvency the foreign representative needs recognition by the court of the enacting state and in many cases a relief decision by the court of the enacting state, in order to achieve any results there. He will therefore be dependent on a substantive review by that court to a considerably larger extent than the insolvency practitioner from an EU members state under the EIR.

Substantively, to a large extent the EIR and the MLEG have the same approach. Art. 9–18 MLEG contain provisions on mutual coordination and cooperation between the courts and between courts and insolvency representatives.⁶ Art. 19–20 provide for the opening of a planning proceeding in the enacting state and Art. 21–26 for the recognition of foreign planning proceedings and the granting of relief to the group coordinator. The planning proceeding is the MLEG equivalent to the EIR group coordination proceeding and the group representative is the equivalent to the EIR group coordinator.

To facilitate the development and implementation of a group insolvency solution, the MLEG provides for enterprise group members to participate in the insolvency proceedings opened in the enacting state (Art. 18). However, such participation is voluntary, and an enterprise group member may commence or terminate participation at any time (Art. 18, par.no. 3).

The planning proceeding is, generally, a ‘main proceeding’ commenced with respect to an enterprise group member.⁷ The MLEG provides that the enterprise group member with respect to which the planning proceeding commences must be one that is likely to be a necessary and integral part of the resolution of the enterprise groups (or a part of the enterprise groups) financial difficulties.

Art. 19 para. 1 MLEG provides that the court may appoint a group representative and thereby open planning proceeding⁸. Contrary to the EIR the MLEG does not contain provisions on the right of the insolvency representatives to have an influence on the appointment of the group

6 These articles also provide for the cooperation with group representatives appointed in a planning proceeding, which is the MLEG equivalent of a group coordination proceeding.

7 The additional text at the end of the definition in subparagraph (g) of the Model Law indicates that a court could, subject to subparagraphs (g) (i) to (iii), recognize as a planning proceeding a proceeding that is separate to the main proceeding, provided that the separate proceeding has been approved by the court with jurisdiction over the main proceeding.

8 Contrary to the structure under the EIR they need not be separate from the main proceedings.

representative or to choose another venue for the planning proceeding, but on the other hand the planning proceeding needs recognition and the granting of relief in the other jurisdictions in order to be effective. Both the EIR and the MLEG provide for the opening of coordination proceedings or planning proceedings, but in the case of the EIR only on voluntary basis. As mentioned above, Art. 64 EIR provides that any insolvency practitioner appointed in respect of any group member may opt out of group coordination proceedings. Under the MLEG, the foreign group representative may seek relief in the enacting state, such as a stay of execution against the assets of the local group company or an examination of witnesses. The court of the enacting state has jurisdiction to grant such relief. Creditors must receive adequate protection (Art. 27) in case of relief. The Legislative Guide clarifies that there must be a balance between relief available under the MLEG and the protection of interests of the persons both natural and legal that may be affected by the relief.

A group insolvency solution may be developed in the planning proceeding (Art. 2 (g) MLEG). Art. 26 establishes that when the group insolvency solution affects an enterprise group member that has the COMI or an establishment in the enacting State, the portion of the solution affecting the enterprise group member which is situated in that State shall have effect once it has received approvals and confirmation required by the law of that State. This means that the approval of all the courts of all the States where procedures referred to enterprise group members, are required.

The *Legislative Guide* clarifies that Art. 26 doesn't provide for a procedure for seeking approval of the group insolvency solution, leaving it to the law of the approving State. Consequently, each State where there is at least one group member will have to take such decision and will apply its own law. Therefore, the general approval of the group solution is likely to need a considerable amount of time and may depend on various conditions.

The result is that the implementation and approval of a planning proceeding is a long trip and a difficult one.

Art. 63 par. 1 b) EIR provides that no creditor of any group member expected to participate in the proceedings is likely to be financially disadvantaged by the inclusion of that member in such proceedings'. This limit may be considered reasonable if read as an expression of the no creditor worse off principle, as compared to the liquidation of the single group member. Under the MLEG there is no such provision, but the creditors of a group company are protected by the duty of the court to look after their interests when deciding on the requested relief.

Art. 72 par. 3 EIR affirms that ‘The plan referred to in point (b) of paragraph 1 shall not include recommendations as to any consolidation of proceedings or insolvency estates’. In this way the plan is in conformity with the European civil law tradition where the consolidation may be only procedural, not substantial, respecting the autonomy of the estate of each group member. The MLEG doesn’t use the expression “substantive consolidation”, but the Legislative Guide notes that in limited circumstances substantive consolidation could be part of the plan.

C. Efficiency of the EIR and of the MLEG

The Conference on European Restructuring and Insolvency Law (*‘Ceril’*) issued a statement and a report on 29 June 2021 (*Ceril* statement 2021–2)⁹ on EU Group Coordination Proceedings. Statement 2021–2 observes that as matter of fact the coordination proceeding provided by the EIR was never used in any significant case of a cross-border insolvency. The *Ceril Statement* observes that there are several good reasons to appreciate the coordination proceeding. A preliminary stay is possible¹⁰, it is likely that domestic courts respect the coordinator as someone impartial and independent, the reorganization can secure additional value of the group, in the opinion of many scholars the coordination is a good compromise between centralization and preserving the autonomy of the individual procedures and those same scholars think that the coordination proceeding may encourage the participants. The *Ceril Statement* also notes that especially in cases concerning multinationals with a pan European presence (air carriers, groups in automotive), the coordination proceeding could provide a good solution. In the list of the positive reasons for the adoption of the coordination proceeding there is also the need for a strategy for a coordinated solution and the fact that the coordination proceeding benefits from the automatic recognition by all the Member States.

9 Both the statement and the annexed report can be downloaded from <https://www.ceril.eu/news/ceril-statement-2021-2-on-eu-group-coordination-proceedings>.

10 Art. 72 par. 2 (e): request a stay for a period of up to 6 months of the proceedings opened in respect of any member of the group, provided that such a stay is necessary in order to ensure the proper implementation of the plan and would be to the benefit of the creditors in the proceedings for which the stay is requested; or request the lifting of any existing stay. Such a request shall be made to the court that opened the proceedings for which a stay is requested.

However, it seems that there have been no cases since the enactment of the Regulation. The Recast of the EIR has been in force since 2017 after five years of the instrument lying bare the conclusion may be inferred that the coordination proceeding does not resolve the exigence for which it was developed.

The *Ceril Report* annexed to the statement provides several explanations for the failure that has so far occurred. It should, however, be noticed that these explanations to some extent are guesses for the reasons, as there are no reliable and consistent sources demonstrating why insolvency practitioners did not invoke the coordination proceeding. Furthermore, it is conceivable that some of the reasons provided by *Ceril* may be overcome in due time when the instrument becomes better known and initial application proves successful. However, we are not optimistic in this respect as insolvency practitioners dealing with large cases already are very much aware of its existence.

Nevertheless, *Ceril* observes that as some countries have a quite small economy, not all courts and insolvency practitioners will understand the concept of coordination. Mostly courts, sometimes even insolvency practitioners, have an inward culture and therefore won't constructively look and assist to go for cross-border solutions. Judges and insolvency practitioners remain reluctant to (simply) cooperate. Moreover, many courts have a somewhat passive attitude, they only use specific instruments they are acquainted with and their know-how of the EIR is low.

It has also been observed that corporate groups often look very different, from highly integrated vertical groups with cash pools to loosely cooperating companies in connected markets. It is difficult to coordinate such complexity. Furthermore, the *Ceril Statement* observes that 'from a legal perspective corporate groups are multiple companies acting (contracting) individually and thus liable to their creditors separately. Therefore, it might appear difficult to align coordination with national professional rules and develop a meaningful plan, as a variety of requirements for commencing insolvency or restructuring proceedings exist'¹¹.

Although this may be true, it is not specific to international cases and equally applies in a domestic setting. Several countries have considered it necessary to introduce legislation concerning groups of companies. In general, group legislation has been inspired by the necessity to reestablish the centralized administration that existed prior to the opening of insolvency

11 Annex to CERIL Statement 2021–2, page 8.

cy proceedings and that was interrupted thereby if separate insolvency proceedings were opened with respect to each group member. This is the reason for a group restructuring proceeding or a group liquidation proceeding almost everywhere. The disruptive effect however is exacerbated in international groups because of the applicability of the insolvency law of the countries where each of the insolvent group companies has its COMI.

The added complexity of achieving an international group solution has not restrained European States like Italy or Spain from developing legislation dealing with international cases. Of course, the situation is more complicated in an international setting, but more difficult doesn't mean impossible if there is a serious reason to find a solution.

As a downside of coordination proceedings, it should be noted that creditors don't have voting rights in respect of the coordination proceeding. Creditors have no right to request the opening of those proceedings nor do they have rights of participation. This flaw may need to be addressed. Understandably, the decision to limit creditors' rights resulted from the desire to reduce the complexity of the proceeding, but creditors rights must be protected and moreover, creditors may be expected to try to avoid the opening of the coordination proceeding if they know that they will not have any possibility to participate.

Art. 73 EIR expressly addresses the issue of which language to use. A voluntary agreement on a common language is preferable. If participants are not able to agree, the coordinator has to communicate with each insolvency practitioner in the language they both agree on, and in the absence of such an agreement, in the official language or one of the official languages of the institutions of the Union, and of the court that opened the proceedings for the respective group member. Although there is a realistic chance that English will be accepted as the common working language, there is no guarantee that a common language for all included group members will be found.

In our opinion the language issue is not really an obstacle to the opening of the coordination proceeding, because English is commonly used, and it's well known between practitioners.

More serious is the argument that insolvency practitioners tend to act in a self-centred way (and fee-hungry) or to play out that they represent the most economically dominant company owning the most part of the assets or a large part of information or the largest part of the employees. If the insolvency practitioner doesn't want to lose control, he will fight against the appointment of a coordinator.

There are more important reasons that explain why insolvency practitioners do not request the opening of coordination proceedings. Two of these reasons are the costs and the time involved with such proceedings. The stay that the coordinator may ask for according to Art. 72 EIR stops for six months any liquidation of assets which is irreconcilable with the coordination project. The insolvency practitioner may prefer to avoid or opt-out of the coordination proceeding in order to reduce the interference of the coordination proceeding with the domestic one. This mechanism is very similar to the controversies we are used to see between the main proceedings insolvency practitioner and the insolvency practitioner who deals with the secondary proceedings.

Costs are also important. Making a preliminary estimate of the costs of the coordination proceeding is difficult. To these costs must be added the indirect costs coming from the delay of the proceeding. For the coordinator there is also the risk that an insolvency practitioner of individual proceedings may leave him exposed delaying or disputing a payment as he may have no interest in supporting the coordination proceeding.

The more serious reason that convinces the insolvency practitioner not to open the coordination proceeding is the lack of power of the coordinator. As we mentioned before, the coordination proceeding has to be opened on a voluntary basis. Moreover, it has been observed that the group coordination proceeding in the EIR is unlikely to be particularly helpful, as it lacks certainty and predictability¹². More importantly, the lack of powers also constitutes an obstacle for the implementation of the proposed coordination plan. The construction and execution of individual restructuring plans for each group company need the cooperation of the majority of participants in the individual proceedings. Otherwise, the group proceeding will not be effective¹³.

The experience in the application of the EIR with respect to single enterprises shows that local creditors sometimes prefer to obtain protection from secondary proceedings. Discussions and fights between local creditors and the insolvency practitioner of the main proceeding are frequent. It also happens that the secondary proceeding is secondary only in name, as the largest part of assets and activities is located in the member state of the secondary proceedings. The EIR provides the main proceeding insolvency practitioner with powers to coordinate the procedures and to obtain protec-

12 Cohen/ Dammann /Sax IILR 2015, 120.

13 Madaus ZRP 2014, 194; Cohen/ Dammann /Sax, IILR 2015, 120.

tion from the local court. He may also offer to local creditors the same treatment which the local law would provide for in secondary proceedings, if they agree not to open such secondary proceedings. According to Art. 36 EIR the insolvency practitioner may give a unilateral undertaking in respect of the assets located in the Member State in which secondary insolvency proceedings could be opened. Such undertaking would mean that he would comply with the distribution and priority rights under national law that creditors would have if secondary insolvency proceedings were opened in that Member State.

The experience with the secondary proceeding where the EIR provides duties of cooperation between the insolvency practitioner of the main and secondary proceedings, shows that there are bugs and conflicts. The root of these conflicts comes from the creditors interests that may differ from each other. Some groups of creditors may be interested in the liquidation instead of restructuring, can expect a more favourable treatment from local law than from the *lex concursus* of the main proceeding, can disapprove of major costs of the main proceeding, and may have many other good reasons to look at the local proceeding as something more practical, closer to them and more efficient.

We will not discuss these issues here in more detail as they fall outside the scope of this contribution.

The system of EIR secondary proceedings is the result of a compromise between universalism and territorialism. If we compare that system with the EIR system of the provisions relating to groups of companies, it appears that the latter system does not give sufficient powers to the coordinator in order to ascertain certainty and efficiency to the coordination plan. It has been argued that as a result of the dynamics of group insolvencies, resistance will especially be acute when gains from cooperation and universalism are less evident. If facilitation of foreign insolvency-related judgments as provided for in the UNCITRAL Model Law for Enforcement of Insolvency Judgments is at stake, courts that are asked to turn over assets to a main proceeding abroad, may yield to the frustration of local creditors in a situation where the longer-term benefits or reorganization, increased international trade, certainty and so forth are less evident and harder to quantify. This can also be perceived as an existing endowment of sovereignty and vested rights¹⁴.

14 Mevorach, *European Business Law Review*, 2022, p. 283–315.

The EIR legislator decided that voluntary coordination was the best way to support the efficiency of the coordination proceeding. However, coordination can be obtained on a voluntary basis also without opening a coordination proceeding. The EIR therefore provides for coordination between proceedings opened on a standalone basis. Art. 56 limits cooperation in the sense that it should not be incompatible with the rules applicable to the proceeding and doesn't entail any conflict of interest. Pursuant to Art. 56 no. 2 agreements may be reached, between the insolvency practitioners of the group companies and one or several of them may be charged with specific tasks to be accomplished if it's allowed by the local law. Insolvency practitioners may also enter into specific agreements and protocols amongst themselves.

So, the question is whether the EIR coordination proceeding doesn't work, or that all needs of coordination are satisfied by the spontaneous coordination permitted by Art. 56 a stay may be asked in any proceeding opened with respect to another member of the group according to Art. 60 and by agreements and protocols that insolvency practitioners may join.

The answer is clear. Spontaneous coordination is possible when there are enough skills and experience in the insolvency practitioners and there is no conflict of interests, except where such conflict of interest may be solved in an easy way. In more difficult situations coordination may be desirable, but the coordination proceedings need teeth and claws to be effective.

If we compare the groups planning proceeding in the MLEG with the EIR coordination proceeding, we can find some differences that may assure more efficiency of the Model Law solution. The concept of a group insolvency solution as expressed by Art. 2 (f) and referred to in many articles of the MLEG is an objective that may be reached only through the approval of the relevant courts. Art. 26 provides that the portion of the group insolvency solution affecting an enterprise group member that has its COMI or an establishment in the enacting state must be approved by the local court to have effect in the state according to the local law. However it is not required that with respect to all these group companies insolvency proceedings are opened in these relevant jurisdictions.¹⁵ Art. 22 and 24 provide provisional relief and relief upon recognition of a foreign planning proceeding in a wide manner. Here again it is not required that with respect to the group company concerned insolvency proceedings have been opened. As mentioned above, pursuant to Art. 36 EIR the insolvency

15 MLEG Guide to Enactment, nr. 43.

practitioner of main proceedings may give a unilateral undertaking in respect of the assets located in the Member State in which secondary insolvency proceedings could be opened. Such undertaking would mean that he would comply with the distribution and priority rights under national law that creditors would have if secondary insolvency proceedings were opened in that Member State. No such provision exists in the EIR with respect to group companies, which would be an entirely different matter, because in the Art. 36 EIR proceedings there are insolvency proceedings in place which encompass the local assets, i.e. the main proceedings, whereas in case of such undertaking with respect to a group company there would not. MLEG however seems to provide for such solution in Art. 30, although the wording of that article is not quite clear.

The function of the group coordination plan is that of a mere reference plan. Art. 72, par. 1, under b, EIR lists non-exhaustively topics which can be dealt with in the group coordination plan, i.e.: 1. measures to be taken in order to re-establish the economic performance and the financial soundness of the group or any part of it; 2. settlement of intra-group disputes as regards intra-group transactions and avoidance actions; and 3. agreements between the insolvency practitioners of the insolvent group members. Apparently, this plan is not a rescue plan, which might deal with such issues as impairment of claims, but a plan that only deals with coordination proper.

Art. 70 (2) subpara. 1 EIR explicitly states that the group coordination plan is not binding upon the insolvency proceedings and that the insolvency practitioner appointed in those proceedings does not have to follow it either in whole or in part. The EIR relies on a 'comply or explain' mechanism. Article 70 (2) subpara. 2 provides that if the insolvency practitioner doesn't follow the coordinator's recommendations or the group coordination plan, he shall give reasons for not doing so to the persons or bodies that he is to report to under his national law, and to the coordinator. If an insolvency practitioner does not follow a sensible group coordination plan without a valid reason, this may have consequences under his national law. It may constitute a violation of his/her duties, creditors or other interested parties may have the right to ask the court for an order to comply with the group coordination plan or it may lead to (civil or even criminal) liability for damages or even the revocation of the insolvency practitioner's appointment.

What has been created was a compromise solution that does not work. There is no interest to ask for the opening of the coordination proceeding. The stakeholders know that it does not provide an efficient solution.

The MLEG is founded on voluntary participation by the receiving state, possibly through the mechanism of the relief provisions. Still, in fact each part of the group solution plan must be approved by local courts and become binding in each State which enacted the MLEG.

Both the EIR and the MLEG contain elaborate provisions on cooperation and coordination. It is questionable whether these provisions are really necessary and whether they solve a problem. In some group insolvency cases protocols are agreed and the insolvency practitioners achieve some level of cooperation. Such cooperation may not require a statutory obligation. Moreover, where such obligation exists, like in the Art. 56–58 EIR, it is questionable whether it really adds anything as the insolvency practitioners or courts may refer to the exceptions. The time required to obtain the plan's approval by a local court may be long and actually too long to save the business. If we multiply this time for all proceedings in various member states necessary to get the plan to be binding in all the states concerned, the result may very well jeopardize the feasibility of the plan.

D. Proposals

How to solve the problem?

The easiest and most obvious way is to amend the EIR. Art. 90 (2) of the Regulation provides that no later than 27.06.2022, the Commission shall present to the European Parliament, the Council and the European Economic and Social Committee a report on the application of the group coordination proceedings. The report shall be accompanied where necessary by a proposal for adaptation of this Regulation.

Until now there is no evidence that the Commission prepared the report or submitted a proposal to deal with the difficulties to apply the coordination proceeding.

It should be noted that there is a lack of coordination between EIR and the EU Directive 1023/2019 on the early restructuring framework. The Directive aims to promote the rescue of the enterprise hit by a crisis or insolvency, but still viable. The EIR in the Art.10 extends the Regulation's scope to proceedings promoting the rescue of economically viable but

distressed businesses. Most of the Regulation however is still very similar to the previous regulation 2000/1346¹⁶.

Regarding the choice between restructuring and liquidation, the EIR should express a general rule of favour for the solution aimed at rescuing the enterprise and protecting the employees, when creditors receive not less than they could get in a liquidation proceeding. And this rule should be applied also in the relationship between the coordination proceeding and the other group company proceedings. Protection of local creditors should be regulated within the terms provided for by Art. 38 EIR for the decision to open a secondary proceeding.

The rules for insolvency proceedings of companies of a corporate group in Art. 56 to 77 EIR assume the opening of parallel main insolvency proceedings for group companies. In contrast, the preventive restructuring approach to a group's financial debt structure would commonly entail a single point of (judicial) entry at the level of the contracting or bond issuing group company. In the case of group companies which are jointly and severally liable for the same debt or group companies which have given guarantees for the repayment of the debt by the main debtor, some insolvency laws allow for intra-group third party release clauses in restructuring plans. Third-party releases entail a total or partial discharge or amendment of claims against third parties, such as co-obligors, guarantors and collateral providers (typically, group members) in the insolvency or restructuring proceeding of the principal debtor. Such clauses entail that the group company is released jointly with the insolvent debtor, without insolvency proceedings having to be opened with respect to this group company. Both Dutch and German law on preliminary restructuring plans which implement Directive 2019/1023/EU provide for such tools, although under the Dutch provision¹⁷ such release is possible only if the court which confirms the plan would also have jurisdiction if the third party-group company would offer a plan itself. In the United Kingdom co-debtor releases were used to enable English schemes of arrangement to be used in cases where the principal debtor was not an English company. Examples

16 CERIL, Report 2022–2 on Cross-Border Effects in European Preventive Restructuring, 7.

17 Article 372 Dutch Bankruptcy Act.

thereof are the *Lecta Paper* judgments¹⁸ and the *Port Finance Investment Ltd.* convening judgment.¹⁹

Lecta Group was the largest manufacturer of specialty and wood-free paper products in southern Europe. The company's ultimate parent was a Luxembourg company, *Lecta SA*. *Lecta SA* had issued notes in the amount of 600 million EUR, which were governed by New York law and subject to the jurisdiction of the New York court. In order to scheme these notes, an English group company, *Lecta Paper UK*, became a co-debtor of the notes. With respect to this company a scheme of arrangement a restructuring plan was adopted. The scheme provided not only that *Lecta Paper UK* was released from its obligations under the notes²⁰, but it provided for the release of *Lecta SA* as well. Under a scheme of arrangement, it is possible to stipulate a release of ancillary claims against guarantors and co-debtors and that is the purpose of this scheme. The question whether there is a sufficient connection with the UK is answered in the affirmative. The *English High Court* agrees with an earlier judgment in which the same technique was applied and in which the court considered:²¹ 'In cases such as the present, however, what is being attempted is to achieve a position where resort can be had to the law of a particular jurisdiction, not in order to evade debts but rather with a view to achieving the best possible outcome for creditors. If in those circumstances it is appropriate to speak of forum shopping at all, it must be on the basis that there can sometimes be good forum shopping.' The *Lecta Paper*²² court furthermore considers: 'I am satisfied that in the present case the structure that has been devised involves good forum shopping, (...), designed to produce the best possible outcome for the creditors as a whole.'

The *Port Finance Investment Ltd* case²³ concerned a leading cruise operator. The scheme concerned notes which were issued by a Turkish group company, and which were governed by New York law and which contained a forum clause favouring the New York courts. An English scheme company was created merely in order to offer the scheme. The court considers in

18 Re *Lecta Paper UK Ltd* [2019] EWHC 3615 (Ch) (19 December 2019) and Re *Lecta Paper UK Ltd* [2020] EWHC 382 (Ch) (28 January 2020).

19 Re *Port Finance Investment Ltd* [2021] EWHC 378 (Ch) (23 February 2021).

20 And junior notes to a lower amount would be issued.

21 Re *Codere Finance (UK) Ltd* [2015] EWHC 3778 (Ch) (17 December 2015) § 18.

22 Re *Lecta Paper UK Ltd* [2019] EWHC 3615 (Ch) (19 December 2019) and Re *Lecta Paper UK Ltd* [2020] EWHC 382 (Ch) (28 January 2020).

23 Re *Port Finance Investment Ltd* [2021] EWHC 378 (Ch) (23 February 2021) § 58.

the convening judgment that ‘It is settled law that a scheme under Part 26 may include a mechanism providing for the release or variation of creditors’ rights against third parties such as guarantors.’²⁴

Other examples of cases in which use was made of a created co-debtor are *Re Codere Finance (UK) Ltd*²⁵, *NN2 Newco Ltd*, *Re Politus BV*²⁶ and *Re Selecta Finance UK Ltd*²⁷.

The *Ceril 2022–2 Report* comments on the use of third-party releases in preliminary restructuring plans. It notes that EIR does not contain any provision to safeguard this approach. Instead, the entity-by-entity principle enshrined in the group insolvency provisions might potentially provide an argument against the compliance of such releases with EIR principles²⁸.

Third party releases in restructuring plans can be forced upon the creditors concerned and may frustrate legitimate expectations of those creditors relying on cross-guarantees and other forms of cross-liability arrangements. Extending the effects of debt reorganization to third parties in the absence of a separate insolvency proceeding may also run contrary to the longstanding views on corporate insolvency and entity shielding²⁹.

An extensive and highly profiled debate in US is taking place about the use of the third-party release orders from the American Bankruptcy Courts that can jeopardize the creditors’ actions against subjects that are not object of the proceedings.

The use and legitimacy of these clauses in an international context may be more controversial than in a national setting. In any case the group reorganization involves more complex problems than those that could be solved by resorting to third-party release clauses. For example, the third-party release affects only part of the claims against the co-debtor (i.e. the claims for which the principal debtor is liable) and if the group company is not a co-debtor, the instrument cannot be used at all, even though the restructuring of the group company may be an essential part of the group solution.

The present instruments do not provide an adequate solution for reorganizations involving groups of companies with activities in multiple jurisdic-

24 *Re Port Finance Investment Ltd* [2021] EWHC 378 (Ch) (23 February 2021) § 58.

25 EWHC 3778 (Ch) (17 December 2015).

26 EWHC 1917 (Ch) (22 July 2019).

27 EWHC 2689 (Ch) (14 October 2020).

28 CERIL, Report 2022–2 on Cross-Border Effects in European Preventive Restructuring, p. 9.

29 Kokorin, European Company and Financial Law Review, 2021.

tions. Presently a reorganization by way of a restructuring plan involving group companies having their COMIs in different jurisdictions, requires that main proceedings are opened in each of those jurisdictions and, more importantly, that the plan is voted on in each of those jurisdictions and is approved by each of the courts. It is understandable that the member states are reluctant to entrust important decisions with respect to their 'own' companies to the courts of other member states. However, without some degree of transfer of these powers an encompassing group-solution cannot be achieved, and unnecessary loss of capital and employment is the result. In fact, some degree of transfer is already present where member states accept that the rights of creditors against co-debtors in other jurisdictions than the jurisdiction of the insolvency proceedings can be impaired.

INSOL Europe, in its 2012 Proposal³⁰, has proposed provisions for a unified European Rescue Plan. One feature of that plan is that it is adopted in the jurisdiction of the parent company of the group. The question which company is the parent company is determined in accordance with the provisions of the Seventh Council Directive 83/349/EEC on consolidated accounts (now Directive 2013/34/EU) and it is the highest European company in the company tree in respect of which insolvency proceedings have been opened. The structure of the plan is similar to the structure of a plan pursuant to the Restructuring Directive 2019/1023/EU or the U.S Chapter 11 bankruptcy plan. That system is useful for the adoption of a plan involving multiple companies, as it involves placement of creditors with diverging interests in separate classes and, in case one or more classes reject the plan, the balancing of the interests of the individual classes against each other. In the context of a single company plan this principle means that preferred creditors will be placed in another class than ordinary creditors or secured creditors and that, where necessary, distinctions can be made between e.g. groups of ordinary creditors, justifying placing them in different classes. If one or more classes rejects the plan the court will have to determine whether the plan is fair nevertheless and the absolute or relative priority rule will constitute an important test in this respect. In the context of a multi-company plan, classification of the creditor in classes can take place in a similar way, albeit that creditors of different companies should be placed in different classes. If one or more classes reject the plan, the determination whether the plan is fair is somewhat more challenging than in the case of a single-company plan, because the absolute or relative priority rule cannot

30 INSOL Europe, *passim*.

be applied with respect to classes of creditors of different companies. However, it is not impossible to make such determination, taking into account the value of the assets of each of the involved companies. After all, also in the case of single-company plans, there is not always a strict application of the absolute priority rule, but there are escape provisions.

The INSOL Europe proposal involves a strict criterion for the determination of the parent company which will define the venue of the group rescue plan and there is mandatory participation by the subsidiaries as decided by the insolvency practitioner of the parent company. If the sovereignty transfer involved in such solution is too severe, other solutions are conceivable. For example, a system similar to the one for the opening of group coordination proceedings may be an alternative, in which the first court seized will open the unified plan proceedings and a majority of the insolvency practitioners involved may decide on another venue. Also, it is conceivable that group companies can opt in or opt out at the onset of the plan proceedings, as determined by their insolvency practitioners or the supervising courts.

E. How to deal with non-EU insolvency proceedings

Amending the EIR will not solve a different problem: the absence in the EU system of the possibility to recognize an insolvency or restructuring proceeding opened abroad as the coordination proceeding for all the groups enterprises located in the EU member states. This problem could be solved by the EU implementing the provisions of the MLEG on recognition of a foreign planning proceeding and relief.

As noted earlier, the MLEG has not yet been adopted anywhere, but this legislative text appears to address the groups restructuring issues adequately, where non-EU proceedings are involved and therefore the principle of union trust does not apply. It would be preferable to combine adoption of the MLEG with adoption of the 1997 UNCITRAL Model Law on Cross-Border Insolvency ('MLCBI').

There has been a serious debate whether adoption of the MLCBI falls within the scope of the powers of the European Union. The question is whether the TFEU provides a sufficiently solid basis for building a regime for recognition of non-EU insolvency proceedings as envisaged by the MLCBI and now also by the MLEG.

The answer given by the 2012 Insol Europe study³¹ is that the EU has these powers on the basis of Articles 3(1)(e), 4(2)(a) and 81 TFEU because the Union created a system for the recognition of EU insolvency proceedings. The Lisbon Treaty recognized in Art. 3(2) TFEU the EU's implied exclusive external competence³². This provides a strong argument that the EU can assume the same powers as regards non-EU insolvency proceedings, pursuant to theory of the implied powers. EU institutions may exercise any power reasonably necessary to the achievement of an objective set forth in the EU Founding Treaties (in this case Art. 81 TFEU) even in the absence of an express power of action provided for in relation to that objective. To incorporate the UNCITRAL Model Law provisions in the EU law, likely as part of the EIR, is essential to improve the functioning of the EU insolvency proceedings. The incorporation is useful to eliminate obstacles to the proper functioning of the insolvency and restructuring proceeding in the EU as far as extraterritorial proceedings can have a fundamental influence within European Union.

It should be added that EU Directive 1023/2019 indicates the need for coordination between the insolvency legislation of the Member States in the context of restructuring of still viable enterprises. It's highly probable that in the future the harmonization will be extended to other issues related to insolvency proceedings.

In recent years some member States recognized the MLCBI (Poland, Greece, Romania and Slovenia). It's highly undesirable that some Member States recognize the powers of a foreign insolvency practitioner on the basis of the MLCBI, whereas other States apply their own international private law, conventions with individual other States or the Lugano convention or other international instruments. There is a growing need for a common standard for the recognition of a foreign proceeding opened outside EU.

31 Insol, p. 109; On the evolution of the principle of Implied External Powers of EU since the ERTA case: Butler/ Wessels, Happy Birthday ERTA! 50 Years of the Implied External Powers Doctrine in Eu Law, in European Law Blog, 31 March 2021 <<https://www.europeanlawblog.eu/pub/happy-birthday-erta-50-years-of-the-implied-external-powers-doctrine-in-eu-law/release/1>>; Chamon, Common Market Law Review, 2018, p. 1101–1141.

32 TFEU art. 3(2): '2. The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope'.

It seems to us that the MLEG does constitute a useful instrument for dealing with group insolvencies, involving group companies which are located outside the EU and that therefore it is recommended that the EU adopts the MLEG for such cases. More importantly still it should also adopt the MLCBI. Alternatively, these model laws could be adopted by the individual member states. It has been noted³³ that the MLEG and the Model Law for Enforcing Insolvency Judgments are connected also. There is an argument that the Model Law for Enforcing Insolvency Judgment is actually superfluous and was only drafted because UK courts gave a very narrow interpretation of the MLCBI. With a somewhat more generous interpretation of the MLCBI, adoption of the rather complex Model Law for Enforcing Insolvency Judgments may not be needed.

The conclusion is that EU should amend the EIR and include rules for the recognition and facilitation of foreign proceedings. Those rules should constitute an adoption of the MLCBI and the MLEG.

Until this day the debate on this issue has not been deemed urgent, but in our view the importance and urgency are growing by the day.

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The UNCITRAL 2019 Model Law on (multinational) enterprise groups insolvency with Guide to Enactment. An example of legislative practicality, convenience and pragmatism.

Héctor José Miguens

Abstract:

The purpose of this paper is to reflect on and make an overall assessment of the recent UNCITRAL *Model Law on Enterprise Groups Insolvency with Guide to Enactment* (2019) (hereinafter MLEG and the *Guide*, respectively).

In this paper the author does not discuss insolvency of corporate groups at the national level (contained in *Chapter II of Part Three* of the 2010 UNCITRAL *Legislative Guide on Insolvency Law*). Instead, it only focusses on the MLEG and its precedents.

Also, the author omits any analysis or reference to the topics left out from the final text of the MLEG that were discussed at the UNCITRAL Working Group V (Insolvency Law) between 2006 and 2019, but he mentions them because they are relevant to know the antecedents of the final text of the adopted MLEG. To consider them in this opportunity is pertinent to this commentary and assessment of the proposed final text by the UNCITRAL.

The method adopted in this paper is the selection and critical analysis of the most relevant legislative proposals by UNCITRAL pertaining to the MLEG.

The sources used in this paper are the UNCITRAL proposals for future rules in connection with the insolvency of enterprise groups; the relevant paragraphs of the *Guide*; the Group V (Insolvency Law) *Working Papers* and, finally, the *Reports* of each session.

The paper ends with an overall critical assessment of the MLEG and a possible solution for the future reform of the Argentine Multinational Corporate Groups in Insolvency regime, *de lege ferenda*.

Keywords: Enterprise Corporate Groups; Corporate Groups in Insolvency; Multinational Corporate; Groups in Insolvency; UNCITRAL *Model Law*; UNCITRAL *Model Law on Enterprise Groups Insolvency with Guide to Enactment* (2019)

A. Introduction: purpose, methodology and sources.

The purpose of this paper is to reflect on and make an overall assessment of the recent UNCITRAL *Model Law on Enterprise Groups Insolvency with Guide to Enactment* (2019) (hereinafter MLEG and the *Guide*, respectively).

I will not discuss insolvency of corporate groups at the national level (contained in *Chapter II of Part Three* of the 2010 UNCITRAL *Legislative Guide on Insolvency Law*). I will only focus on the MLEG and its precedents.

I will also omit any reference to the topics left out from the final text of the MLEG that were discussed at the UNCITRAL Working Group V (Insolvency Law) between 2006 and 2019¹, but they are relevant to know

1 We mention the following documents and items:

Convention on Certain International Insolvency Issues: Report 9/798 of 8 January 2014, paras. 18–19; Report 9/803 of 6 May 2014, para. 39(a); WP 117 of 8 October 2013, paras. 7–16; WP 93/Add. 6 of 19 April 2010, ‘Insolvency law: possible future work. Comments of the International Bar Association concerning proposals for the development of an international convention and/or model law on cross-border insolvency of enterprise groups’ (in respect of a Convention).

Intellectual property issues: Report 9/666 of 2 December 2008, paras. 112–117; Report 9/671 of 25 May 2009, paras. 125–127; Report 9/691 of 28 April 2010, paras. 94–98; Report 9/798 of 8 January 2014, para. 29; Report 9/798 of 8 January 2014, para. 29.

Insolvency of large and complex financial institutions: WP 117 of 8 October 2013, paras. 17–22; Report 9/798 of 8 January 2014, paras. 20–22; WP 93/Add 5 of 16 April 2010. ‘Insolvency law: possible future work. Proposal by the Swiss delegation for the preparation of a study on the feasibility of a resolution tool for cross-border insolvency cases of highly complex financial institutions’; WP 93 of 19 February 2010, ‘Insolvency law: possible future work’, paras. 9–20. In the latter document see also on sovereign debt initiatives at paras. 26–29 and on insolvency of public or state-owned enterprises at paras. 30–33; Report 9/763 of 7 December 2012, paras. 95–96; WP 118 of 9 October 2013, paras. 4–28. A list of documents on the subject can be found in the Annex; WP 109 of 24 September 2012, paras. 1–64. A list of international sources on the subject can be found in the Annex to this document.

Cross-border insolvency protocols: Report 9/618 of 8 January 2007, para. 68.

Jurisdiction of the intervening courts: WP 74/Add. 2 of 4 October 2006, para. 5; WP.122 ‘Comments by the United States of America on document WP 120’ of 27 March 2014, para. 3.

the antecedents of the final text of the adopted MLEG and this commentary and assessment of the proposed text by the UNCITRAL. The method adopted in this paper is the selection and critical analysis of the most relevant legislative proposals by UNCITRAL pertaining to the MLEG.

The sources used in this paper are the UNCITRAL proposals for future rules in connection with the insolvency of enterprise groups; the relevant paragraphs of the *Guide*; the Group V (Insolvency Law) *Working Papers*² and, finally, the *Reports* of each session.³

B. UNCITRAL's work on the law of insolvency of multinational enterprise groups

In December 2019, and after several deliberations,⁴ UNCITRAL adopted the MLEG, with its respective *Guide*, which aims to provide modern legis-

Contract law: WP 76/Add. 1 of 5 March 2007, para. 49; WP 78 of 26 August 2007, para. 4; WP 117 of 8 October 2013, paras. 35–38 (Financial contracts and netting in cases of insolvency); Report 9/803 of 6 May 2014, para. 39(c).

'Synthetic procedures' to facilitate coordination of multiple procedures: WP 120 of 11 February 2014, Section D(1), paras. 47–52; WP 122 of 27 March 2014, para. 3, 'Comments by the United States of America on document WP 120'; WP 124 of 2 October 2014, paras. 27–35.

Conflicts of laws: Report 9/622 of 25 May 2007, para. 92); WP 74/Add. 2 of 4 October 2006, paras. 13–14; WP 76/Add. 2 of 6 March 2007, para. 33.

- 2 Hereinafter the *Working Papers* will be cited by the respective number and date, preceded by the acronym WP, which can be found in chronological order in the UNCITRAL website, Working Group V tab, in English, in https://uncitral.un.org/en/working_groups/5/insolvency_law.
- 3 Hereinafter these *Reports* will be cited by number and date, which can be found in chronological order on the UNCITRAL website, in the Working Group V tab, in English, in https://uncitral.un.org/en/working_groups/5/insolvency_law.
- 4 Discussions on the future MLEG can be found in the following documents, where appropriate WP 92 Add 2 of 11 February 2010; WP 120 of 11 February 2014; WP 122 of 27 March 2014 ('Comments of the United States of America on WP 120'); WP 124 of 2 October 2014; WP 128 of 13 March 2015; WP 131 of 12 May 2015 ('Comments of the Government of France on WP 128'); WP 133 of 28 September 2015 ('Fundamental Principles'); WP 134 of 30 September 2015; WP 137 of 19 February 2016; WP 137 Add. 1 of 19 February 2016; WP 142 of 3 October 2016; WP 142 Add. 1 of 3 October 2016; WP 146 of 2 March 2017; WP 152 of 21 September 2017; WP 158 of 26 February 2018; WP 161 of 18 September 2018; WP 162 of 20 September 2018; WP 165 of 20 March 2019; Report 9/903 of 26 May 2017: Facilitation of cross-border insolvency of multinational enterprise groups (reference to WP 146 and Report numbers 803, 864, 870 and 898); Report 9/864 of 8 January 2016, paras. 13–53 (on 'principles' see this document at

lative proposals on insolvency proceedings related to the insolvency of enterprise (or corporate) groups at the international level.

This text is a specific development of the following regulations on the insolvency of enterprise groups: (1) 1997 *Model Law of Cross-Border Insolvency* (hereinafter, the 1997 MLCBI); (2) 2010 *Part Three of the UNCITRAL Legislative Guide on Insolvency Law* (hereinafter, the 2010 *Guide*); (3) the 2019 *Legislative Guide on Insolvency Law. Part four: Directors' obligations in the period approaching insolvency (including in enterprise groups). First edition (2019), Second edition (2020)*.

The relevant parts of the texts of all these documents apply to the MLEG, by direct reference or by analogy.⁵

The insolvency of so-called corporate groups or enterprise groups,⁶ in the context of more than one national jurisdiction, requires specific rules governing the corporate control relationship, together with a unified economic policy. As discussed in this article, in such a multinational enterprise group, one, some, or all of its members are in insolvency status.

In this sense, the new legal problems relative to the insolvency of corporate groups that have emerged in recent decades caused the need to create appropriate substantial and procedural solutions such as those developed by UNCITRAL, intended to serve as an example for States, and specifically the 2019 MLEG and its *Guide*.

C. The UNCITRAL MLEG. Structure and core provisions

The MLEG has two parts. Part one consists of thirty-two articles distributed in six chapters. Part two consists of the text of the *Guide to Enactment* of

paras. 13–19); Report 9/870 of 6 May 2016, paras. 12–51; Report 9/898 of 21 December 2016, paras. 61–115 (on the planning procedure and Group insolvency solution see this paper paras. 91–95); Report 9/903 of 26 May 2017, paras. 86–138; Report 9/931 of 15 January 2018, paras. 44–95; Report 9/937 of 18 May 2018, paras. 48–104; Report 9/966 of 20 December 2018, paras. 1–III (Draft MLEG and Draft Guide to Enactment); Report 9/972 of 7 June 2019, paras. 13–23 (Draft MLEG in the Annex hereto and Draft Guide to Enactment).

5 On the logical relationships of between the two Model Laws, as well as their complementarity, see the *Guide*, para. 14.

6 The terminology used by UNCITRAL deliberations from 2006 until 2008 was 'corporate groups'. From that year on it used the term 'enterprise groups', which does not alter the substance of the activity of creating a model law. According to the literal wording of the MLEG definitions in art. 2, both concepts are to be understood as synonyms and interpreted as broadly as possible.

the MLEG, which has two hundred and twenty-two paragraphs. There are also two annexes containing the General Assembly Resolutions referring to the regulation.

The *Guide* is not only an instrument that facilitates the incorporation of the regulations to domestic law by potential adopters, but also constitutes an interpretative guideline, as far as it indicates the purposes of the regulation.⁷

Flexibility in the search for solutions and proportionality in the means to achieve them are present throughout. This flexible approach, on the one hand, makes it easier for enacting States to put the regulations into effect and, on the other hand, once passed by the legislatures, to interpret them broadly in accordance with their specific purposes.⁸ Finally, this feature reflects a policy to adjust to the inherent complexity of an insolvent group of multinational enterprises, as we shall discuss below.

D. Purpose and origin of the MLEG

The MLEG makes proposals for future legislation on the following topics, which in turn are the purposes of the regulation, namely:⁹

- (a) to facilitate coordination and cooperation among courts, the ‘Insolvency Representatives’, and the ‘Group representative’, in insolvency proceedings of members of a multinational enterprise group;
- (b) to provide the appropriate tools to achieve a ‘Group insolvency solution’ either for a plurality, or a significant part, or all the members of a multinational enterprise group, through a single insolvency proceeding (referred to as ‘Planning proceeding’) commenced in the place where at least one member of the group has the ‘Centre of Main Interests’ (hereinafter referred to as ‘COMI’);
- (c) to facilitate the voluntary participation of group members in the ‘Planning proceeding’ to coordinate a ‘Group insolvency solution’ and the access to foreign courts of group members and of ‘Group representatives’;

⁷ See *Guide*, para. 8.

⁸ See *Guide*, paras. 76–83, 101, 141 ‘*in fine*’, 184 and 187.

⁹ See MLEG, *Preamble*, and *Guide*, para. 2.

- (d) to provide for the appointment of a 'Group representative' to coordinate the development of such a 'Group insolvency solution' through the aforementioned 'Planning proceeding';
- (e) to negotiate and approve post-commencement finance arrangements and authorize the provision of funds according to them, where necessary for the reorganization of the group;
- (f) to provide for measures to minimize as far as possible the commencement of a 'non-main proceeding' relative to group members participating in the 'planning proceeding';
- (g) to provide examples of relevant measures to facilitate the treatment of creditors' claims against group members and foreign claims in the 'main proceeding';
- (h) to provide examples of some supplementary provisions in respect of arrangements made on the treatment of foreign claims and other eligible measures;
- (i) to facilitate the creation and recognition of a 'Group insolvency solution'.

Potential adopting States may consider incorporating additional mechanisms or institutions such as those discussed in *Part Three, Chapter II* of the 2010 *Legislative Guide*, which are intended to facilitate, mainly, the domestic treatment of the insolvency of enterprise groups.¹⁰

As to the origin of the Model Law, the UNCITRAL Working Group V (Insolvency Law) started discussing the issue of insolvency of corporate groups in December 2006,¹¹ during the 31st session, held in Vienna, as reflected in documents A/CN.9/WG.V/WP 74 and WP 74, Add 1 and WP 74, Add 2 (both dated 4 October 2006) and in the respective subsequent deliberations until 2019.¹²

The standard was adopted by consensus on 15 July 2019, during negotiations at the 52nd session of UNCITRAL, which was held in Vienna from 8 to 19 July 2019, with 60 Member States, 31 Observer States and 34 international organizations in attendance, and adopted by the United Nations General Assembly by Resolution 74/184 of 18 December 2019.¹³

10 See *Guide*, para. 115.

11 See Report 9/618 of 8 January 2007.

12 Pertaining the crucial moments of the discussions see *Guide*, paras. 4–7.

13 See *Guide*, Annex I, p. 99.

E. Relevant topics on the insolvency of enterprise groups discussed by UNCITRAL during the period 2006–2019

I. The complexity of the economic and legal structure of enterprise groups and the pragmatism of UNCITRAL

From the outset of its deliberations and throughout its development, UNCITRAL Working Group V has highlighted the remarkable complexity of the structure of enterprise groups, both in terms of their economic and legal elements. This reality has caused difficulties in defining the legal fundamental concepts of enterprise groups and in regulating them adequately. This has been the case due to factual complexities and conceptual legal problems such as the following, among others:¹⁴

1. dissimilarity in the formulation of the concept of enterprise group or corporate group according to the legal principles and rules of each relevant branch of law (e.g., contract, criminal, tax, corporate, labour, insolvency law, etc.);

14 On the conceptual difficulties of defining and regulating corporate groups and per-
taining other definitions of related concepts, see the following UNCITRAL docu-
ments: Report 9/622 of 25 May 2007, para. 12 and paras. 77–84; Report 9/643 of
16 November 2007, para. 123; Report 9/647 of 14 March 2008, paras. 14–17; Report
9/666 of 2 December 2008, paras. 43–44; Report 9/671 of 25 May 2009, para. 57; WP
74 of 4 October 2006, para. 1 (Glossary), paras. 7–24 (nature of corporate groups)
and paras. 35–38 (definition of corporate group, ownership and control); WP 74
Add. 2 of 4 October 2006, paras. 1–4; WP 76 of 2 March 2007, (Glossary) para. 3
(national or international group of companies); WP 78 of 26 August 2007, paras. 2–11;
WP 80 of 31 December 2007, paras. 1–9; WP 120 of 11 February 2014, paras. 4–9;
WP 122 of 27 March 2014, ‘Comments by the United States of America on WP 120’,
para. 6 and *passim*; WP 124 of 2 October 2014, paras. 4–20 (with various factual
scenarios discussed in the context of group insolvency and the concept of COMI);
WP 124 of 2 October 2014, paras. 27–35 (on the treatment of the so called ‘synthetic
measures’). For other difficult legal issues see the same WP 124, paras. 36–63; WP 128
of 13 March 2015, Annex (Scenarios 1 and 2); Report 9/798 of 8 January 2014, paras.
16–23; Report 9/803 of 6 May 2014, paras. 15–38; Report 9/829 of 26 January 2015,
paras. 33–51 (in the English version); Report 9/835 of 9 June 2015, paras. 23–46; WP
93/Add. 2 of 17 February 2010, ‘Insolvency law: possible future work. Proposal by the
delegation of the United States of America: Background paper on international court
cases involving the insolvency of enterprise groups’, paras. 1–11 and paras. 66–71; WP
93/Add. 1 of 17 February 2010, ‘Insolvency law: possible future work. Proposal by
the delegation of the United States of America: on the preparation of a model law or
model provisions addressing some issues of insolvency law at the international level’.

2. legal independence of their components as opposed to their economic integration;
3. different economic activities conducted by each member of the enterprise group;
4. economic size;
5. some special forms of internal corporate control;
6. the existence of special purposed groups;
7. diverse types of joint ventures;
8. agreements for the temporary acquisition of control of one company by another;
9. the increasing emergence of groups in specific economic activities which were traditionally subject to separate corporations, such as insurance and banking;
10. the cross-liability of the companies belonging to the same corporate group;
11. the liability of controlling or dominant corporation for the debts of subsidiary entities, not only in good economic times but also in situations of insolvency;
12. the conceptual difficulties or ambivalences of the concepts of ownership and control applicable to groups, by a narrow analogy;
13. the recognition of important social, commercial, and legal objectives pursued by corporate groups; and
14. the fact that the circumstances of the insolvency of enterprise groups cases are rarely such that the basic principles of groups are disregarded, rejected, or not applied.¹⁵

An example of this remarkable complexity can be found in the factual scenarios that the UNCITRAL Working Group V has hypothetically considered during the deliberations on the subject.¹⁶

Moreover, considering insolvency institutions for corporate groups at the national level, which are difficult to regulate due to their complexity,¹⁷ it seems unquestionable that their recognition and application at the interna-

15 See Report 9/618 of 8 January 2007, paras. 9–14.

16 See these hypothetical factual scenarios, in WP 124 of 2 October 2014, paras. 4–21, and in WP 128 of 13 March 2015, and Annex (Scenarios 1 and 2).

17 Consider issues such as, for example: substantive consolidation, subordination of claims, joint reorganization, financial contribution order against the parent corporation, liability of the parent corporation for the debts of the insolvent subsidiary and joint liquidation.

tional level would be much more complex than at the national or domestic level.¹⁸

This complexity is relevant and probably has determined a different attitude in terms of what can be called ‘a traditional way of creating law’ on the part of pre-legislators of Private International Insolvency Law such as UNCITRAL (Working Group V), which is based on prudence. Indeed, faced with these difficulties, UNCITRAL has adopted a policy consisting of drafting texts as a non-traditional internationalist would have done. Thus, it has refrained from legislating on subjects such as applicable law, the jurisdiction of the courts, foreign proceedings as such, conflict rules, renvoi, and other typical concepts of private international law. On the contrary, it has drafted rules, practically excluding other topics (or at least predominantly), on the communication, cooperation and coordination of the courts, insolvency representatives and parties involved in international insolvency proceedings of enterprise groups. All this work has been done as broadly and flexibly as a prudent legislator would have done.

This decision, from our point of view, has been a wise example of wisdom, not only because of the difficulties that this traditional creation of rules of private international law could have caused, but also because, at least in cases of insolvency of international corporate groups, of its virtually impossible application or ineffectiveness in practice. This is due to the double economic-legal complexity of the problems to be solved and of their solutions. The legislative product can therefore be described as satisfactory and adequate for the difficulty of the situation and to the flexibility demanded by the substance of the groups of companies in insolvency.

18 See the discussions leading to the *UNCITRAL Legislative Guide on Insolvency Law, Chapter II, Part Three: Treatment of Enterprise Groups in Insolvency 2010*, in the following documents: WP 82 of 1 September 2008, paras. 1–41; WP 82/Add. 1 of 2 September 2008, paras. 1–29; WP 82/Add. 1 of 4 September 2008, paras. 1–44; WP 82/Add. 3 of 5 September 2008, paras. 1–55; WP 82/Add. 4 of 10 September 2008, paras. 1–36 (where appropriate); WP 85 of 6 March 2009, (where appropriate); WP 85/Add. 1 of 13 March 2009, paras. 1–20 (where appropriate); WP 88 of 9 April 2009, ‘Proposal of the United States of America on post-commencement finance’, paras. 1–6 (where appropriate); WP 90 of 31 August 2009, paras. 1–185 (where appropriate); WP 90/Add. 1 of 31 August 2009, paras. 1–47 (where appropriate); WP 90/Add. 2 of 31 August 2009, paras. 1–24 (where appropriate); WP 92 of 10 February 2010, paras. 1–152 (where appropriate); WP 92/Add. 1 of 11 February 2010, paras. 1–54 (where appropriate); WP 92/Add. 2 of 11 February 2010, paras. 1–39 (where appropriate).

II. Proposals on the Centre of Main Interests (COMI) concerning the insolvency of a multinational enterprise group. Another case of a pragmatic solution

Regarding the COMI in the framework of enterprise groups, we can mention another practical and pragmatic solution of UNCITRAL in the articles of the MLEG,¹⁹ after encountering difficulties raised by the question of its conceptual definition, its singular elements, and its regulatory framework.

Indeed, after lengthy discussions on the COMI, specifically in group insolvency cases, the UNCITRAL Working Group V has, in my view, rightly addressed these difficulties through the legislation on communication, cooperation and coordination as noted in the paragraph above immediately preceding the heading.²⁰

19 On the COMI see the following articles of the MLEG: 2.J), 4, 18.1, 18.2., 20.3., 21.3.c), 22.5., 24.4., and 26.1. In the *Guide* see the following paras: 2.b), 5, 44 and 211, and in the respective paras. commenting on the articles of the MLEG mentioned in this footnote.

20 See on the treatment of the COMI, specifically in enterprise group cases, see the following documents: Report 9/618 of 8 January 2007, paras. 50–54.; Report 9/666 of 2 December 2008, paras. 24–32; Report 9/763 of 7 December 2012, paras. 13–65; WP 74/Add. 2 of 4 October 2006, paras. 6–11; WP 76/Add. 2 of 6 March 2007, paras. 2–17; WP 107 of 13 September 2012, *passim*; WP 124 of 2 October 2014, paras. 4–20; WP 120 of 11 February 2014, paras. 11–12; WP 128 of 13 March 2015, paras. 15–18; WP 131 of 12 May 2015 ('Comments by the Government of France on WP 128 of 13 March 2015 entitled 'Facilitation of proceedings related to the cross-border insolvency of multinational enterprise groups') with reference to 'choice of forum'; WP 133 of 28 September 2015, paras. 1–14, with reference to coordination in 'Group insolvency solution' and its fundamental principles applicable to the insolvency of enterprise groups; also on principles applicable to Group insolvency solution and planning proceedings see WP 137/Add. 1 of 19 February 2016; Report 9/766 of 26 April 2013, paras. 13–54, 103 and 105–107; WP 95 of 30 August 2010, paras. 5–50; WP 95/Add. 1 of 30 August 2010, paras. 1–43. See annex to the latter document for a list of court cases; WP 99 of 29 July 2011, paras. 9–64; WP 101 of 4 August 2011, (Proposed definition of 'Centre of main interests' (Articles 2(b) and 16.3 of the UNCITRAL Model Law on Cross-Border Insolvency) submitted by the delegations of Spain, Mexico and the UIA); WP 103 of 28 February 2012 ('Interpretation and application of certain concepts in the UNCITRAL Model Law on Cross-Border Insolvency relating to Centre of Main Interests'); WP 103/Add. 1 of 28 February 2012 (follow-up to WP 103); WP 105 of 28 March 2012 (Proposal of the United States of America, *inter alia*, on the COMI); WP 112 of 11 February 2013 ('Interpretation and application of certain concepts set out in the UNCITRAL Model Law on Cross-Border Insolvency relating to the Centre of Main Interests'), ps. 2–33; WP 114 of 13 February 2013, paras. 1–16 ('The Centre of Main Interests in the context of enterprise groups').

The same happened regarding the treatment of the so-called ‘Coordination Centre’ of a group of companies,²¹ which has no longer been discussed since 2014.

The UNCITRAL Working Group V itself summarized these deliberations and this pragmatic decision — with its usual diplomacy — in WP 120 of 11 February 2014, para. 12,²² the text of which is reproduced below:

*‘12. The application of the COMI concept to the group situation has been the subject of several working papers (A/CN.9/WG.V/WP.74/Add.2 (paras. 5–12); A/CN.9/WG.V/WP.76/Add.2 (paras. 2–17); A/CN.9/WG.V/WP.82/Add.4 (paras. 10–15); A/CN.9/WG.V/WP.85/Add.1 (paras. 3–13); A/CN.9/WG.V/WP.99, paras. 55–64; and A/CN.9/738, paras. 36–37.) and the issue has been discussed by the Working Group on numerous occasions. (The conclusions reached in these discussions are summarized in A/CN.9/WG.V/WP.114). At its thirty-first session, for example, the Working Group concluded (A/CN.9/618, para. 54) that the difficulties of achieving an agreed definition of the COMI of an enterprise group suggested the need to focus, instead, on facilitating the conduct of group cross-border insolvency proceedings by way of coordination and cooperation. At its thirty-fifth session, the Working Group generally agreed (A/CN.9/666, paras. 26–27) that it would be difficult to reach a definition of the COMI of an enterprise group in order to limit commencement of parallel proceedings or to apply the recognition regime of the Model Law to the enterprise group as a whole’.*²³

Thus, this statement is not only relevant regarding the COMI, but also regarding other devices proposed by UNCITRAL relative to enterprise groups in insolvency, as highlighted above in para. 5.1. This solution is realistic and adjusted to the reality of the issues addressed, and therefore it is relevant and prudent.

21 See the adopted policy of suspending its treatment in WP 120 of 11 February 2014, para. 35.

22 See WP 120 of 11 February 2014, p. 5, paras. 11 and 12.

23 All these documents mentioned by UNCITRAL in the transcribed text, regarding the deliberations prior to WP 120 of 11 February 2014 on the COMI are cited in note 20.

III. Three new concepts

The MLEG introduces three new concepts: the ‘planning procedure’, the ‘group representative’, and the ‘group insolvency solution’. The rest of the definitions in the MLEG (for completeness) were already included in previous UNCITRAL texts in the 1997 MLCBI.²⁴

1. Planning procedure

In connection with the planning procedure, the following can be deduced from the relevant paragraphs of the *Guide* and the text of Article 2(g) of the MLEG:²⁵

‘Generally, a main proceeding²⁶ with respect to one group member, a type of ‘insolvency proceeding’,²⁷ essentially hybrid (that is, including reorganization, liquidation or both). Its purpose and aim are to negotiate and develop a ‘Group insolvency solution’, across the different proceedings in different jurisdictions. This is provided that: (a) one or more group members are participating in the main proceeding for the purpose of developing and implementing a ‘Group insolvency solution’; (b) the group member subject to the main proceeding is likely to be a necessary and essential part of that ‘Group insolvency solution’; and (c) a ‘Group representative’ has been appointed.’

The ‘Planning procedure’ is intricately linked to the concept of the COMI,²⁸ it is also treated in two other UNCITRAL documents²⁹ and is regu-

24 See *Guide*, para. 15. Those other terms include the following: ‘insolvency representative’, ‘insolvency proceeding’, ‘main proceedings’, ‘non-main proceedings’, ‘enterprise’, ‘enterprise group’, ‘enterprise group member’, ‘Insolvency representative’ and ‘control’.

25 See *Guide*, paras. 17, 35, 36, 37 and 44–49.

26 The ‘main proceeding’ is defined as a proceeding in the State where the debtor has the COMI according to Article 2 (j) of the 1997 MLCBI and is based on the definition of the ‘foreign main proceeding’ in the same 1997 MLCBI.

27 The ‘Insolvency proceeding’ was defined by the 1997 MLCBI and reproduced in the MLEG, Art. 2, para. (h). See note 25 in this paper.

28 See WP 137 of 19 February 2016, paras. 5–17; WP 133 of 28 September 2015, referring to coordination in the ‘Group insolvency solution’ and its fundamental principles applicable to the insolvency of enterprise groups. Also, on the principles applicable to Group insolvency solution and their relationship to planning proceedings see WP 137/Add. 1 of 19 February 2016, pp. 1–19.

29 The meaning and interpretation of the COMI in general is discussed in detail in the *Guide to Enactment and Interpretation of the 1997 UNCITRAL Model Law on*

lated in the MLEG as a local procedure of the adopting State in Chapter 3 and as a foreign procedure in Chapter 4.

As far as it is aimed at the ‘Group insolvency solution’, in my opinion this process is the most important device created by the MLEG.

2. Group representative

Article 2 (e) of the MLEG defines ‘Group representative’ as a person, even if appointed on a provisional basis, who is authorized to act as a representative of a group of companies in the ‘Planning procedure’.³⁰

Once appointed, the Group representative has the task of seeking to develop a ‘Group insolvency solution’. To this end, he or she may apply for measures under Articles 19 and 20 and is authorized to act in another State as a foreign representative of the ‘Planning proceeding’.³¹

Article 25 regulates the participation of the Group representative in proceedings in the enacting State based on the recognition of a foreign ‘Planning proceeding’, with the possibility of acting in any proceeding in relation to a group member participating in those proceedings.

This is another device that is legislated flexibly with reasonableness, proportionality, fairness and considering all the interests at stake. Likewise, the prohibition of participation and its exceptions are reasonable, as far as the legislator attempts to reduce the complexity inherent in the insolvency of multinational groups of companies and contemplates the exceptions in the rule. In my view, this is a fair and appropriate procedural solution for the problem of group insolvency.

3. Group insolvency solution

Article 2(f) of the MLEG defines the term ‘Group insolvency solution’³² as a proposal or set of proposals developed in the ‘Planning proceeding’ for

Cross-Border Insolvency (2013) in paras. 144–149 and in UNCITRAL Model Law on Cross-Border Insolvency. Judicial Perspective (2011–2013) in paras. 93–135.

30 The *Guide* elaborates on the relationship between this term and the definition of ‘foreign representative’ in the MLCBI of 1997 and the concept of ‘insolvency representative’ in the Legislative *Guide* of 2013. See on this, the *Guide*, para. 41.

31 See *Guide*, para. 116.

32 On this concept see WP 128 of 13 March 2015, paras. 4–7; WP 137 of 19 February 2016, paras. 5–17; WP 137 of 19 February 2016, paras. 5–17; WP 133 of 28 September

the reorganization, sale as a going concern or liquidation of all or some of the assets or operations of one or more enterprise group members. The aim is to protect, preserve, liquidate, or enhance the total combined value of those group members.³³

This adopted policy is coherent and proportionate to the aim of arriving at a single, universal insolvency solution for the whole enterprise group, which is fair and appropriate, considering the unified economic integration of the group and the notable complexity inherent in such an issue. Ultimately, this is the central objective of any international private insolvency law, and what is regulated here is therefore relevant.

In short, the creation of these three new concepts or institutions are, in my opinion, a success of UNCITRAL Working Group V on the issue at hand and deserves to be highlighted here as commendable. This is so because they constitute procedural solutions that are adapted to the specific problems posed by the insolvency of enterprise groups, given their inherent complexity, both from the point of view of procedural law and substantive law. Moreover, they are appropriate because they provide an adequate basis for achieving cooperation and coordination of the proceedings and of the parties and courts involved in the insolvency. Such coordination will ultimately lead to that solution. This is another example of a pragmatic *approach* to the problem.

IV. Specific case law

The harmonious interpretation of the MLEG will be facilitated by the 'CLOUT' information system, under which the Secretariat of UNCITRAL Working Group V publishes extracts of court decisions and arbitral awards.

The purpose of this collection and dissemination of information is to promote knowledge of these legislative texts at the international level and to facilitate their uniform interpretation and application.³⁴ This is another

2015, referring to coordination in 'Group insolvency solution' and its fundamental principles applicable to the insolvency of enterprise groups; also on the principles applicable to Group insolvency solution and their relationship to planning proceedings see WP 137/Add. 1 of 19 February 2016.

33 See MLEG, articles: 2f), 4b), 10f), 13.1, 15b), 15e), 16, 18.1, 18.4, 18.5, 19.1, 19.2, 19.3.a), 20.1, 22.1, 24.1, 24.1.f), 24.2, 26, 32.2.; and in the *Guide*, paras. 42 and 43; also see the *Guide's* commentary of the respective articles referred to in this note.

34 See *Guide*, paras. 67 and 222.

practical tool for legal practitioners regarding the solutions that can be adopted in each case.

In my opinion, all this material will be reasonable provided that an analogy can be made between the rules and the solutions in the precedents and new cases. We are not in favour of a uniform interpretation *per se*, but only to the extent that it conforms to appropriate and proportional standards of justice for each individual case. There is nothing more realistic than a solution adapted to the specific case, far away from any *a priori* generic uniformity in the interpretation of the applicable rules.

V. Specific cooperation and coordination

Regarding cooperation and coordination in the case of insolvency of corporate groups, there is a reciprocal interaction between the relevant parts of the MLCBI 1997 and its corresponding *Legislative Guide* 2010 and the MLEG of 2019; one is general, and the other is specific. Therefore, all similar (partly the same and partly different) rules of Cross-Border Insolvency in general will be applicable by analogy to the specific case of enterprise groups insolvency, *mutatis mutandis*.³⁵

Specific cooperation and coordination are discussed in Chapter 2, Articles 9 to 18 of the MLEG.

This UNCITRAL proposal innovation is relevant because it makes it possible to arrive at consensual solutions between the parties and the courts involved in international insolvency proceedings more quickly and efficiently, compared to a possible legislation on the traditional concepts of private international insolvency law. This policy is, from my point of view, prudent and relevant.

VI. Specific conflicts of interest

In cases where a single or plural ‘insolvency representative’ is appointed to administer several companies of a group (including their complex commercial and financial relationships with their respective creditors), there is a risk of losing his or her neutrality and independence and the typical conflicts of interest related to groups of companies may arise.

35 For details of such reciprocal regulatory interaction see, those mentioned in the *Guide*, paras. 69–72, 76, 84, 86, 90, 93, 95, 96, 97 and 98.

Such conflicts could exist if, for example, the same ‘insolvency representative’ is appointed in situations where there are cross-guarantees, interlocking claims and similar debts within the same group; or post-commencement finance, submission and verification of claims or infringements by one group member against another.³⁶

This list is not exhaustive, as there could be other cases not mentioned in the *Guide*, such as identity of members of the boards of directors of the different members of the group; commingling or confusion of assets and liabilities; cross liabilities of one or even several controlling companies for the debts of one or several subsidiaries; reciprocal claims; abuse of corporate control from the mother or controlling party over their subsidiaries; subordinated claims in the insolvency of another group member, cross-guarantees; accounts that should be consolidated; ‘interlocking boards of directors’; frauds within the group and with third parties.

If usually there are difficulties finding solutions within the jurisdiction of a single country or at the domestic level, *a fortiori* those ones are almost impossible to overcome at the international level. This is another reason UNCITRAL’s policy on cooperation and coordination of international proceedings can be considered very prudent.

The [moral and] legal obligation to disclose the existence of conflicts of interest or their mere possibility is relevant in the context of the group insolvency, as reflected in the recommendations of the 2010 *Legislative Guide*.³⁷

As a safeguard against potential conflicts of interest, the ‘insolvency representative’ could be required to make a specific commitment or be subject to the practice or legal obligation to seek the advice of the court.

In addition, insolvency law and the court may provide for the appointment of one or more additional or replacement ‘insolvency representatives’ to administer the relevant group members in the event of a [potential] conflict of interest. In some jurisdictions those insolvency representatives are called *ad hoc insolvency representative* or *trustee*.

Such conflicts may render Article 17 sole representative of the MLEG inapplicable. Additional appointments could be made based on the specific area of the conflict, limited in time until the conflict is resolved, or the appointments could be more general for the duration of the proceedings.³⁸

36 See these cases mentioned by the *Guide*, in para. 104.

37 See 2013 *Legislative Guide*, recommendations 116, 117, 133 and 252.

38 See *Guide*, para. 104.

These solutions are appropriate responses to the problem posed and preserve the professional independence of the ‘insolvency representative’.

VII. Voluntary and extended participation of all members of the enterprise group

Article 18 of the MLEG is intended to provide an additional instrument for cooperation and coordination. This provision facilitates the participation of any of the group members, wherever they are located, in the main proceedings, as defined under Article 2(j), which were commenced in the enacting State where a group member has the COMI of the whole group. For this reason and given that the development of a ‘Group insolvency solution’ is only one of the possible outcomes of participation, the article is part of Chapter 2 and not Chapter 3 of the MLEG. This needs to be considered for a correct interpretation. This flexibility is tailored to the needs of the enterprise group to arrive at a negotiated and consensual solution for one, several or all the group members, whether or not they are in insolvency. Such a voluntary and free participation is suitable for arriving at a ‘Group insolvency solution’ as flexibly as possible. Moreover, it is in line with the complexity, from an economic and legal point of view, of a multinational enterprise group and is therefore a relevant and prudent policy.

The prohibition on participation in Article 18(2) refers to the non-restriction of the powers of the enacting State with jurisdiction over a group member, to limit such participation and reflects the content of Article 4(a) and (b) of the MLEG.³⁹

The provision aims to highlight the usefulness of the institution and to foster the desirability of a group member to participate in the main proceedings. Such participation may be either because that group member has something to contribute to the solution of the group’s economic and financial difficulties, or because it intends to protect its own interests, which is, moreover, very frequent in practice. This is another manifestation of the practicality and pragmatism in the solutions adopted by the MLEG and, therefore, this regulatory provision is pertinent and correct.

39 See *Guide*, para. 105.

VIII. Specific protection of creditors and other interested persons in connection with enforceable measures

Article 27 — the only provision of Chapter 5 — protects creditors and other interested persons based on the need for a certain balance between the measures that can be granted and the protection of such interests. This rule is based on Article 22 of the 1997 MLCBI.

In addition to the group member that could be affected by the measures, such persons can include other group members participating in the ‘Planning procedure’, creditors of those members and other interested third parties.

Paragraph 1 clarifies that it refers to creditors of those group members participating in the ‘Planning proceeding’. It does not refer to the interests of creditors of the group in general or to creditors of group members not involved in the ‘Planning proceeding’.⁴⁰

This flexible group-specific legislative policy regulates the exercise of the powers provided for in the MLEG, Articles 20, 22, 24, 29 and 31, under conditions to be determined by the court and for the duration of the circumstances taken into account, in accordance with the text being commented and the procedural rules of the enacting State. This is consistent with the right of defence of all interested parties and with the aim of reaching a comprehensive solution of the insolvency of the whole enterprise group.

Furthermore, UNCITRAL’s remarkable pragmatism in this area also overcomes the difficulty of proving the solvency or insolvency of the interested party (controlled or controlling member of the group) to be able to take part in the ‘Planning procedure’. This protects both the insolvent and the solvent entity from an asset protection policy, within the framework of a comprehensive reorganization plan,⁴¹ and avoids the possibility of unfair discrimination on these grounds.

Consistent with the latter, article 27 implicitly empowers the ‘Group representative’ to ask the court to modify or revoke any harmful court measures⁴². The inclusion of ‘other interested persons’ should be emphasized, in our view, by broadly embracing the theory of *stakeholders*. It broadens the subjects protected and potentially affected by the actions of the member of the group in question, extending them beyond the category of mere

40 See *Guide*, para. 189.

41 See Report 9/618 of 8 January 2007, para. 23.

42 See *Guide*, para. 190.

commercial creditors. Consequently, this regulation also includes employees, customers, consumers, suppliers, directors, the State in its different branches, etc.

There is no justification for arbitrarily discriminating against creditors based on criteria such as the place of establishment or nationality of any enterprise group member. Discrimination based on the COMI is also inappropriate, because, in our view, several COMIs may exist, or their location can even change, as a hypothesis. The general policy of the MLEG is that all creditors, regardless of where they are deemed to be located, should be treated equally and, as far as possible, should be treated equally in one State as well as in another.⁴³

Given the systematic placement of the single article of Chapter 5, in our view, this rule is applicable to all concerned proceedings: insolvency, planning, main or parallel, etc.

This practical system is fair and appropriate to the nature of the problems inherent in enterprise groups insolvency and to the interest of third parties. It is therefore relevant and appropriate.

IX. Treatment of foreign claims

Another development applicable to corporate groups is the treatment of foreign claims in Chapter 6, in Articles 28 and 29. In this chapter, the UNCITRAL Working Group V has established some measures to facilitate the coordination of cross-border insolvency proceedings specifically applicable to enterprise groups members. These measures, which are often referred to as summary non-main proceedings, involve treating foreign claims in main proceedings in the same way as they would be treated in foreign non-main proceedings under the applicable law, when such non-main proceedings have been opened.

The term ‘treatment’ refers to the status of the claim (its ranking and payment conditions) and the way it is handled under the applicable law.⁴⁴ Such treatment of foreign claims normally depends on the arrangements made by the ‘Insolvency representative’ appointed in the main proceeding

43 See *Guide*, para. 191. This criterion is logically in accordance with one of the basilar principles of any insolvency law system, in comparative and historical law, which is the *par conditio omnium creditorum*: equal treatment of all the creditors in general.

44 See *Guide*, para. 193.

or elsewhere; when a 'Group representative' has been appointed in the 'Planning proceeding'; or, finally, by both representatives jointly.

This policy is consistent with the objectives of the system, preserves the equal treatment of creditors in different jurisdictions and facilitates the 'Group insolvency solution' which is the goal of any international insolvency process, specifically in cases of enterprise groups.

To ensure the effectiveness of the policy, it should be considered binding and can be enforced against the insolvency estate in the main proceeding.⁴⁵

These measures are also intended to facilitate the coordinated treatment of claims and to minimize the need to initiate a non-main proceeding or to limit the cases where such proceedings might be necessary, as has been the case in practice.⁴⁶

This is consistent with the necessary protection of all the parties involved, cost saving and the shortening of procedures, which, in my opinion, is a relevant and prudent policy.⁴⁷

However, the use of these measures may be limited in practice. For example, when the claims in the State of origin are not of a purely monetary nature; or when it is unrealistic to deal with them in the main proceedings if they would require some form of approval by the courts of the State of origin; or when there are irreconcilable differences between the insolvency law of the State of origin of the claims and the law applicable to the main proceedings.⁴⁸

Such a flexible provision for the numerous conflict hypotheses is an effective example of a proportional solution, in terms of both procedural and substantive law. I think this is another pragmatic policy that should be endorsed.

Article 28 deals with the situation where an 'Insolvency representative' appointed in main proceedings in the enacting State accords certain treatment to foreign claims that might arise in the State in which the group member has an establishment.

The provision also serves the purpose of minimizing the commencement of non-main proceedings in that second State and facilitating the centralized treatment of claims in the insolvency of an enterprise group. Again, the

45 See *Guide*, para. 194.

46 See *Guide*, para. 196.

47 On the effectiveness and economy of this legislative policy see the concrete results that can be achieved in the *Guide*, para. 197.

48 See *Guide*, para. 198.

purpose is to shorten the necessary procedures, reduce the time they may take and save costs. Therefore, this is a prudent and sound policy for future rules of the different potential adopting States.⁴⁹

These measures are intended to apply regardless of the existence of a 'Planning procedure' and would therefore also be applicable when there is no agreement to initiate such a procedure or where the necessary preconditions for such a procedure do not exist.⁵⁰

The effective operation of the rule requires that: (a) there be an undertaking by the 'Insolvency representative' (if applicable, jointly with the 'Group representative'); (b) that the undertaking complies with the formal requirements the court may require; and (c) that the court should approve the treatment to be accorded in the main proceedings (Article 28(1)(a)(b) and (c)). Under these conditions the agreement will be enforceable and binding on the insolvency estate in the main proceedings.⁵¹

Article 29 establishes the power of the State with respect to an undertaking made under Article 28 by an 'Insolvency representative' or a 'Group representative' of another State. In such a case the court of this State may: (a) approve the treatment in the main foreign proceeding of claims that might otherwise arise in a non-main proceeding in this State; and (b) stay or decline to commence a non-main proceeding.

I have emphasized that the non-main proceeding may serve different purposes and that it has advantages and disadvantages. Article 29 allows, but does not require, the court of the enacting State (which is the State in which the claim could have been filed in the absence of the undertaking given under Article 28) to approve the treatment to be accorded in the main (foreign) proceedings and to stay any non-main proceedings already opened or to refuse to open such proceedings. These powers are discretionary, and Article 27 applies.⁵²

Here again we find the necessary flexibility to protect the creditors of an insolvent enterprise group, while respecting the equal international treatment of all creditors without distinction and cost savings, which is also a relevant and appropriate policy.

49 See *Guide*, para. 200.

50 See *Guide*, para. 201.

51 For further details on the operation of Article 28 see the *Guide*, paras. 202–207.

52 For the relevant issues in considering whether the opening of the non-main proceeding is desirable or prudent, see the comments of the *Guide*, paras. 209–210.

F. Banks and insurance companies in international insolvency

I believe that the existence of special insolvency regimes for banks, insurance companies and other similar entities should not prevent the application of the MLEG regime to them. That is my opinion even though they are traditionally excluded from general insolvency regimes in many countries but regulated in special ones. On the contrary, I propose the application of the MLEG rules to such entities. The reasons are as follows:

1. It will be possible that such entities have interests or assets outside the State concerned and therefore it may be prudent to apply the same rules to all of them, by analogy and mainly out of respect for the foreign element by the local State. We understand that the opposite case is also true for this opinion.
2. A group of companies consisting of such entities may be economically and legally truly relevant and therefore the application of the rules proposed by UNCITRAL may be appropriate in the absence of other rules, as is probably the case at the international level.
3. This is especially true in the frequent case where such international banks and insurance companies are part of international enterprise groups, since many corporate groups have their financial lungs within them, as controlled or even controlling members (such as a 'Holding bank corporation' in the terminology of some jurisdictions).
4. It is one thing to exclude banks and insurance companies or other similar legal entities from the general domestic insolvency regime of each State, to legislate them in a special regime, and quite another to deny, exclude or not include the applicability of the rules proposed by the MLEG to such multinational groups including banks and insurance companies. The former does not necessarily imply the latter. Such exclusion may even be detrimental in practice.
5. On the contrary, an exclusion of such entities from the proposed regime as a model law would make it more difficult to reach a definitive solution ('Group insolvency solution') to insolvency cases, or else deprive them of the benefits of such rules, all of which seems inconvenient and inappropriate.

I therefore partially disagree with Recommendations 8 and 9 of the UNCITRAL Legislative Guide, Part Two (2004).

G. Overall critical evaluation

The following is an overall critical assessment of the MLEG.

1. The UNCITRAL Working Group V (Insolvency Law) is aware that very few, if any States, have a comprehensive regime on the treatment of the insolvency of multinational enterprise groups. It therefore includes in this MLEG system specific effective mechanisms to achieve cooperation and coordination in the development of a 'Group insolvency solution'. It also promotes the cross-border recognition and implementation of such a solution in multiple States, in a manner that is appropriate, fair, and reasonable from the point of view of the purposes of any Private Insolvency International Law covering multinational enterprise groups.
2. With the 2019 MLEG, UNCITRAL has effectively implemented and applied the following provisions: (1) *1997 Model Law of Cross-Border Insolvency*; (2) *2010 Chapter two, Part Three of the UNCITRAL Legislative Guide on Insolvency Law*; (3) *2019 Legislative Guide on Insolvency Law. Part four: Directors' obligations in the period approaching insolvency (including in enterprise groups). First edition (2019), Second edition (2020)*. This denotes a coherent policy among all of them and the MLEG in connection with an effective model law of international corporate groups in insolvency as pertinent examples to be followed.
3. The text of the MLEG, in each of its articles, comprehensively covers the need for a Model Law to achieve a fair and efficient administration system for the insolvency proceedings of multinational enterprise groups.
4. These policy objectives are in harmony with the extremely complex economic and legal structure of multinational enterprise groups in insolvency, which is based on the economic integration of numerous legal entities that retain their independent existence within the group and to third parties.
5. The proposed standard achieves that purpose by effectively regulating both the protection of all the individual group members and of the total combined value of the assets and operations of all the enterprise group affected by insolvency. It achieves this, not by means of traditional international legislation, but through the primacy of communication, cooperation, and coordination of the different international processes. Thus, there is proportionality between the *factum* of the

- rule and its consequence, which gives the entire system a harmonious, legitimate, and versatile effect.
6. These rules not only make it clear what treatment that group of companies will certainly receive in insolvency proceedings, but also ensure, to the extent possible, that such treatment facilitates the expeditious and efficient conduct of all the parties in those sets of proceedings. It is desirable that, under these or similar rules, such conduct would take just a few weeks or only some months rather than several years. These texts facilitate an appropriate simplification, speed, and cost savings in the relevant procedures of an enterprise group in insolvency at the international level.
 7. This article is a reflection on the practices on cooperation and coordination that characterize modern and efficient systems of international insolvency administration of corporate groups, both in common law and civil law countries. The remarks here are in line with what has been decided in the cases or comparative legislation of those countries so far.
 8. UNCITRAL Working Group V has respected the differences of the national procedural laws and does not attempt to unify procedural or substantive insolvency law. The law offers useful ways or procedures to provide a modern, fair, and harmonized set of rules. In this way, States have a basic tool to successfully conduct the respective negotiations and decisions of the parties and courts involved to achieve a final solution for the insolvency of the whole international group ('Group insolvency solution') in the fastest and most cost-effective way.
 9. The proposal is a realistic policy, far away from the unattainable fantasies of substantive — universal or unified — legislation taken to its ultimate extremes. The same consideration applies to excessive national territorialism that neglects or denies foreign interests. In our view, the rule lies somewhere in the middle between these two extremes and gives the proposed procedural avenues appropriate flexibility and reliability in their solutions.
 10. Faced with the complex and kaleidoscopic panorama of different national laws that may be applicable to a case of multinational insolvency of corporate groups, this realism also lies in the fact that the proposal advocates a virtually *ad casum* solution. This can be achieved through communication of information, cooperation, and coordination between the different insolvency parties, bodies (officers or parties of the insolvency proceedings, such as trustees in bankruptcy,

corporations, representatives etc.), and courts, on a consensual basis. The proposed procedural routes are suitable for achieving consensus and converge towards this final global agreement.

11. Moreover, we believe that, given the extreme complexity and the large number of possible insolvency processes of a multinational corporate group, it is practically impossible to find satisfactory solutions by the mere and mechanical application of traditional rules of private international insolvency law of each country.⁵³ For this reason, there is practically no other way than to ‘negotiate’ a solution by common agreement between the parties, the officers and the courts involved. This is the criterion followed by the UNCITRAL Working Group V as the *leitmotiv* throughout the articles of the MLEG. As a more practicable solution, it seems to us to be appropriate, prudent, and fair. This intractable complexity is also present in the case of the COMI, as UNCITRAL itself has expressly emphasized in the respective Working Papers cited above.
12. The emphasis on international cooperation between judges, parties and bodies of insolvency or representatives of insolvency, coupled with the clear encouragement of direct communication between them, can achieve the swift action that is important in the matter at hand. This is not only true in general and for groups of companies, but it also makes it possible to find the means to limit or prevent international fraud. This is particularly the case in view of the possible reality of international wire fraud through the fraudulent concealment or transfer of liquid insolvency assets to other jurisdictions, especially in the early stages of the insolvency of the members of an enterprise group.
13. The commented text contributes to the strengthening of legal goods, assets, or values such as predictability and legal certainty, factors that are considered when rating country risk at the international level. In this sense, the model law constitutes a preservation of these characteristics in a particularly sensitive area that is very much considered by foreign investors. The regulation establishes clear, concrete, and non-discriminatory rules for dealing with the relations between creditors and debtors of a multinational enterprise group.

53 See regarding this legislative policy, e.g. Report 9/622 of 25 May 2007, para. 92 on the postponement of the treatment of conflict of laws in our topic and the following documents: WP 74/Add. 2 of 4 October 2006, paras. 13–14 and WP 76/Add. 2 of 6 March 2007, para. 33.

14. An appropriate legislative adoption by potential States would make it possible to quickly and easily — as in substance the work has already been done — update the rules of private international insolvency law in the area of multinational enterprise groups. In this respect, the initiative is timely, as there are numerous cases of countries whose international insolvency rules are obsolete, anachronistic, or inconsistent with the appropriate legislative purposes for such cases or are not in line with the most modern comparative trends. The MLEG is technically sound, consensual, comprehensive, and flexible. Finally, it is not a binding rule for the adopting states, which always retain their legislative powers to regulate the issue from other points of view.
15. ‘Group insolvency solution’ can be described as the goal of international insolvency law in general, and in particular for the insolvency of multinational enterprise groups. It is undoubtedly the ideal situation to be reached after proper communication, cooperation and coordination between courts, insolvency officers, creditors, debtors and other interested third parties. In other words, the aim of any insolvency system is to achieve a fair reorganization of the going concern in its many parts, which benefits all parties involved. If this is true, it is especially true *a fortiori* as a going concern (*Going Concern Value*) relative to international corporate groups.
16. However, the ultimate purpose of the solutions to international insolvency problems must be based on the choice of fair solutions for each specific case, regardless of the lesser or greater success in communication, cooperation and coordination that may have existed. In our opinion, the latter are only instruments or means to reach the justice of the solutions, not a goal. Here I have proposed a true legal-philosophical realism of the concrete case regarding procedural and especially substantive law solutions in this matter, beyond any laboratory or *a priori* hypothetical solution.
17. On the issue of achieving jurisprudential uniformity of cases, I understand that this objective will be reasonable if the analogy between the factual assumptions of the rule and the solutions of the jurisprudence are effectively verified with respect to new court cases. We are not in favour of a uniform interpretation *per se*, but only to the extent that it conforms to adequate and proportional standards of justice for each individual case. There is nothing more realistic than a solution adapted to the specific case, far away from any generic normative (legislative or jurisprudential) uniformity.

18. Regarding Article 24 (f) last paragraph of the MLEG, the following should be noted. In our view, *Ordre Public* may be affected if it becomes impossible for the insolvency representative to assume his functions, due to a conflict of interest. We are referring not only to a case of liquidation insolvency (in which imperative rules policy is more evident), but also to a case of reorganization, by analogy. Therefore, and as the same rule expresses, the court should entrust a person other than the 'group representative' appointed by the court to perform those functions.
19. In conclusion, and for all these reasons, this activity of proposing procedural rules conducted by UNCITRAL Working Group V in the MLEG, due to its methodology and its final product, seems reasonable, timely, fair, and adequate. These procedural rules may make it possible to reach substantive law solutions, the final goal of any system of Private International Insolvency Law, especially for multinational enterprise groups.

H. The proposed solution in the case of Argentina and other Latin American countries

Finally, I understand that it would not be helpful in relations between Argentina and the EU to have a treaty (or other bilateral instrument, e.g. a soft-law instrument) on cooperation in corporate group insolvency matters, on the one hand, because of the internal political difficulties the Government of Argentina should solve, and, on the other hand, because of the difficulties that characterize the negotiation and putting into force of an International Treaty, especially in the case of Latin American Countries nowadays. Therefore, and because of these reasons, I think that it would be preferable to approach the topic adopting the UNCITRAL MLEG by means of an Argentine internal formal law. In this sense, Argentina's legislative initiative through the elaboration and drafting of the 2018 Draft Bill on Cross-Border Insolvency may well prove to be the first step in the direction proposed in this paragraph. Other Latin American countries have already adopted the UNCITRAL Model Law of 1997. The next step in

the Region consists of adopting the UNCITRAL MLEG, *congrua congruis referendo*⁵⁴.

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54 See, in this legislative direction: Miguens, (2018), 74.

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

Alexander Trunk

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 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 addressed 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 context¹. Usually, insolvency-related proceedings are dealt with in general insolvency law. Some EU member states provide for a broadly formulated jurisdictional *vis attractiva concursus* for insolvency-related disputes, which sometimes includes in principle, all insolvency-related disputes arising after² the opening of the insolvency proceeding. Examples are the Austrian Insolvency Code³, the Portuguese Insolvency Code⁴ and the Spanish Bankruptcy Act⁵. Sometimes general formulas such as ‘actions on claims arising under insolvency law and immediately linked with the insolvency proceeding’ are used⁶. Sometimes a distinction 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 plans⁷. Interim measures are often mentioned expressly⁸.

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 effects 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 distinction is underlying Art. 118 § 1 and 2 Belgian Code de PIL and §§ 63 and 63a 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 inadmissibility 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 Portugal⁹ and Spain¹⁰.

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 Code¹¹ 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 will be addressed in the contribution to this book on concurrent proceedings.

I. General aspects: scope and structure of regulation

Insolvency proceedings are, in principle, court-administered proceedings¹², 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 establishes 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 spheres of application of the (former) Brussels Convention of 1968 from the EIR¹³. 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, both 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 exclusive¹⁵ (international) jurisdiction of courts in the (EU-based) forum concursus¹⁶.

The provision applies, apart from the expressly mentioned example of avoidance actions¹⁷, e.g. to proceedings in the insolvency court to impose subsidiary liability on corporate directors¹⁸ 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 proceeding¹⁹. 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 category²⁰.

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* judgment 1979).

15 See CJEU, *Wiemer & Trachte v. Tadzhir* (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 only²² 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* judgment²⁴, 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 apply²⁵ – either by the autonomous international insolvency law²⁶ or autonomous civil procedure law²⁷ 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%91ub-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 passed 'in' the foreign insolvency proceeding).

27 This is the dominant view in Germany, see Lür/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 impression 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 abstractly²⁸, 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 proceedings³⁰, others tend to apply general rules of jurisdiction under Codes of Civil Procedure³¹ or other legislation. The forum for such disputes under autonomous law is usually not exclusive³², but there are also examples of (internationally) exclusive jurisdiction in such cases³³.

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 EU³⁴. 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 probably 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 family 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 decision³⁶. 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 EIR³⁷.

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.

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 prerequisites, 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 exercised 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 differently⁴⁰. 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 fulfilled⁴¹. 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 character⁴².

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 defendant⁴³ 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 recognizing 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 analysis⁴⁴.

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 Code⁴⁶ 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 agreements⁴⁷.

- 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 relates⁴⁸, but only if the insolvency proceeding 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 be 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 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 MLCBI⁴⁹. 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) MLIJ in principle only ‘an insolvency representative [foreign or domestic] or other person entitled under the law of the originating State’ are empowered⁵⁰ 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 would be possible incidentally. Enforcement would require a particular enforcement proceeding, which may be excluded or stayed due to Art.14 MLIJ.

c) Effects 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 MLCBI⁵¹) 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 State⁵². 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 practice⁵³. 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 MLCBI⁵⁴ 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 proceedings 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’ proceedings⁵⁶ 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 adaptations 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 refined 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 be 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 proceeding 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.

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Arbitration and insolvency: is there a ‘conflict’ and if so, how should it be resolved?

Vesna Lazić

Abstract:

The paper addresses the ‘points of interaction’ between arbitration and insolvency proceedings. These two legal institutions are in many ways conflicting, and their cross-border dimension adds to issues that legislators must resolve. The paper firstly summarises potential points of interaction based primarily on the comparative case law. The most important question is whether arbitration agreements concluded before the commencement of insolvency proceeding are binding on an insolvency practitioner, and if so, are there exceptions to it.. Secondly, the focus shifts onto the cross-border implication of such interactions. Thirdly, the paper suggests improvements of the legislation at the EU level and reflects on the current initiatives within the UNCITRAL Working Group addressing the conflict of laws issues in cross-border insolvency proceedings.

Keywords: arbitration; arbitration agreements; actio pauliana; anti-suit injunctions; jurisdiction; characterisation; lex loci arbitri; pending proceedings; vis attractiva concursus

A. Introduction

The interplay between arbitration and insolvency proceedings is often in the literature referred to as a ‘conflict’ between the two fields of law. Although they are procedures of different types, with distinct objectives and underlying purposes, they are not necessarily irreconcilable.¹ Yet the complexity of the intersection is evident, particularly considering that there are usually no express provisions either in insolvency or arbitration law on

1 As the author pointed out in earlier publications, e.g., Lazić (1999), pp. 381 ff.; Lazić, in Kröll/Mistelis/Perales Viscasillas/Rogers (eds.), 337 (337–363); Lazić, in Bamforth/Gandhi (eds.), 125 (125–147).

the effects on previously concluded arbitration agreements or pending proceedings. Besides, there are distinct legal consequences in different types of insolvency – liquidation and reorganisation, which in certain legal systems may reflect on the extent and the nature of intersection between the two fields of law.

Comparative research illustrates that in majority of jurisdictions it is suggested to analogously apply provisions relating to lawsuits.² Indeed, as a matter of principle, there is no reason why arbitration should be treated differently from litigation, considering that they both are legal proceedings for the settlement of the same or similar types of disputes. However, even though generally appropriate, a parallel with litigation does not necessarily accommodate all aspects and specificities of arbitration in the first place. Besides, the allocation of jurisdiction between the courts in case of intervening insolvency proceedings appears problematic, too. The CJEU case law in the last years³ illustrates that there are serious difficulties in delineating the substantive scope of application between the Brussels I-bis and the EIR⁴. Consequently, a future legislative action at the EU level appears indispensable to remedy inconsistencies and shortcomings of the CJEU rulings in that respect.⁵ Inevitably, the difficulties encountered have bearing on certain aspects of the relationship between arbitration and insolvency considering a widely accepted analogy with litigation.

Last, but not least, cross border elements add to the complexity of the interaction: the courts in various jurisdiction, as well as arbitrators, encountered difficulties when facing the question of which effects foreign insolvency proceedings should be given in arbitration and/or court proceedings related to arbitration. Even when the provisions on cross-border insolvency are in place, regrettably there are numerous problematic decisions which

2 See IBA Toolkit on Insolvency and Arbitration <https://www.ibanet.org/LPD/Dispute_Resolution_Section/Arbitration/insolvency-and-arbitration-working-group>.

3 CJEU 6.2.2019 – case C-535/17, ECLI:EU:C:2019:96 – *NK v BNP Paribas Fortis NV*; CJEU, 10.3.2022 – case C-498/20, ECLI:EU:C:2022:173 – *ZK v BMA Braunschweigische Maschinenbaustalt AG*; CJEU 14.11.2024 – case C-394/22, ECLI:EU:C:2024:952 – *Oilchart International NV v O.W. Bunker Netherlands) BV, ING Bank NV*.

⁴ Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, (OJ L 351/I, 20.12.2012) (hereinafter: Brussels I-bis Regulation).

5 For more particulars on this point, see Lazić, in *Revue de Droit Commercial Belge*, 2025, available on conflictoflaws.net <https://conflictolaws.net/News/2025/08/2025-Note-rdc_tbh2025_2p308.pdf>.

increase the confusion and hinder the proper understanding of the complex interface between the two fields of law. Luckily, in the recent years there have been most useful initiatives and research projects in this area of law with the purpose of aiding arbitrators, judges and legal practitioners.⁶

This paper firstly summarises potential points of interaction based primarily on the comparative case law. Thereafter it focuses on cross-border implications. Thereby it gives suggestions for improvements of the legislation at the EU level and reflects on the current initiatives within the UNCITRAL Working Group addressing the conflict of law issues in cross-border insolvency proceedings.

B. Likely points of interaction – arbitration and insolvency taking place in the same jurisdiction

The most important question is whether arbitration agreements concluded before the commencement of insolvency proceeding are binding on an insolvency practitioner, and if so, are there exceptions to it.

I. Majority approach – continuous binding effect of pre-insolvency arbitration agreements

Comparative research illustrates that in the majority of jurisdictions pre-insolvency arbitration agreements are binding upon an insolvency practitioner. Thus, as a matter of principle in a great majority of jurisdictions, the commencement of insolvency proceeding does not render pre-petition arbitration agreements invalid. In some jurisdictions, notably in Canada⁷ and the USA, enforceability of such agreements is in the discretion of the court, i.e., it is decided on a case-by-case basis. In the USA there is no Supreme Court decision, and the approaches are not identical in all Circuits. Yet it

6 See e.g., IBA Toolkit on Insolvency and Arbitration < [https://www.ibanet.org/LPD/Di
spute_Resolution_Section/Arbitration/insolvency-and-arbitration-working-group](https://www.ibanet.org/LPD/Di%20pute%20Resolution%20Section/Arbitration/insolvency-and-arbitration-working-group)>; Madaan/Campbell (eds.), 2022, passim; Bamforth/Kushal (eds), 2023, passim.

7 E.g., *Peace River Hydro Partners v. Petrowest Corp.*, 2022 SCC 41 (Supreme Court of Canada).

seems that the prevailing view is that the bankruptcy court has discretion at least with respect to the so-called 'core' bankruptcy matters'.⁸

Even where the binding nature of pre-petition arbitration agreements is accepted as a matter of principle, the provisions of the insolvency law may entail exceptions and impose limitations to this in comparative law widely accepted notion of continuous effectiveness of arbitration agreements. In this context, relevant may be the provisions on: 1) executory contracts, 2) avoidance powers of the insolvency practitioner in respect of the preferential legal acts of the debtor, 3) nature of claims arising in insolvency proceedings, which may have implications for competence of the courts in insolvency and competence of arbitrators, and 4) provisions on the automatic stay of pending legal proceedings and prevention of initiating individual actions of ordinary non-secured creditors. As already mentioned, an express reference on how these provisions impact on arbitration is very exceptional.⁹

Therefore, it may be questioned whether they are intended to influence arbitration, i.e., do they tend to impact on arbitral proceedings? As a matter of principle, from the point of view of insolvency law in pursuing its objectives and underlying purpose there is no reason to treat arbitration differently than other 'legal proceedings'. The effectiveness of the impact on arbitration is likely to be ensured in purely domestic cases and more generally when arbitration and/or court proceedings related to arbitration are taking place in the country where insolvency proceedings are opened.¹⁰

However, the effectiveness of the consequences of insolvency proceedings in lawsuits, arbitrations and court proceedings related to arbitration will depend as a matter of principle on whether and to what extent the ef-

8 This is not contradicted in the Report for the USA, see IBA Toolkit, Allan L. Gropper, Walsh, Th. W., National Report of the United States of America, <<https://www.ibanet.org/MediaHandler?id=8A157F9D-7590-4CF4-B7F4-EB2CDDF3AA20>>.

9 See e.g., Legislative history relating to Sect. 362 in the USA on extending the automatic stay to arbitration.

10 See e.g., case law in the US maintains the position on the discretion of their courts to stay the proceedings and refer the case to arbitration, also in international arbitration despite generally arbitration friendly framework. Yet an award rendered despite that no referral to arbitration had been granted may be accepted in insolvency proceedings, after all. See, US court decision in *Fotochrome, Inc. V. Copal, Ltd*, 517 F.2d 512 (2d Cir. 1975). In setting aside proceedings a likely ground is violation of due process or of public policy, see French law holding that French Insolvency law is a matter of both domestic and international public policy.

fects of foreign insolvency proceedings are recognised in these jurisdictions, as it will be detailed, *infra* under ‘Cross border insolvency’.

II. Minority approach – invalidity of pre-insolvency arbitration agreements

It is very exceptional that insolvency law invalidates pre-bankruptcy arbitration agreements regardless of whether or not arbitration is already pending.¹¹ Such approach has always been very exceptional and often held inapplicable in cross border situations.¹² Its relevance has been further minimised in the view of deleting such provisions when revising insolvency laws, as it was the case in Poland, Portugal and Spain.

C. Points of interaction – Cross border insolvencies

Whether the consequences of opening insolvency proceeding will be effective in lawsuits abroad, it will depend on the law on cross border insolvency in the country in which such litigations are pending. In general, the extent of recognition of foreign insolvencies will also be relevant for the court proceedings related to arbitration, such as those deciding on the request to refer the dispute to arbitration, for setting aside or for enforcement of an arbitral award. In the latter two it will be decisive whether a violation of the recognised effects of a foreign insolvency proceeding would qualify as a reason for setting aside or refusing the recognition of an arbitral award.¹³

If there is no obligation following from a treaty or national law on cross border insolvency, it is likely that no effects will be given to foreign

11 E.g., former law in Poland, Portugal and Spain.

12 E.g., decision of the Court of Appeal (*Audiencia Provincial*), Barcelona, 29 April 2009, no. 86/2009 (Section 15), available online at: www.aranzadi.es (JUR 2009\472969), holding that this provision did not apply to arbitrations taking place abroad. In the meantime, this provision has been removed when Spanish law on insolvency was revised. The same holds true for the Polish law and Article 142 of the former Polish Bankruptcy and Reorganisation Act (*Prawo upadłościowe i naprawcze*) of 28. 02. 2003, Dz. U. No 60, Pos. 535, repealed by virtue of Article 428(80) of the Act 15. 05. 2015; Dz. U. Pos. 978.

13 See e.g., in the USA *Victrix S.S. Co. V. Salen Dry Cargo A.B.*, 825 F.2d 709 (2d Cir. 1987); *Allstate Insurance Co. V. C.J. Hughes et al.*, (S.D.N.Y. 1994) 174 B.R. 884.

insolvency proceedings.¹⁴ Accordingly, the effectiveness of insolvency law can be ensured only 1) if there are provisions on cross-border insolvency in place, and 2) if they are correctly applied. Examples of judgments that incorrectly applied provisions on cross border insolvency will be addressed in the following section.

Additionally, actions that may be available in certain jurisdictions could further undermine consequences of foreign insolvency proceeding. In particular anti-suit injunctions in support of arbitration are available in common law countries and can be issued to restrain an insolvency practitioner to pursue court proceedings. Thus, UK courts have been granting such injunctions against insolvency practitioners,¹⁵ although in the past they refrained from doing so when insolvency was opened in an EU Member State.¹⁶ This is because the CJEU in *West Tankers*¹⁷ judgment held that such injunctions were incompatible with the relevant EU legislation. Since the UK is no longer bound by the CJEU case law, its courts are no longer restrained in granting anti-suit injunctions regarding actions before the courts in EU Member States.¹⁸ Furthermore, the UK case law illustrates that their courts may issue anti-suit injunctions not only in support of arbitrations in the UK, but also to those taking place abroad.¹⁹

As far as arbitration is concerned, both pending ones and those to be initiated abroad, it is prudent to consider whether a violation of insolvency law may implicate ‘enforceability’ of the award. Recognition of effects foreign insolvency proceedings in the country of the seat may be relevant in the context of an action for setting aside of the award. As to its enforceability, an arbitral award may be filed as proof of claim within insolvency

14 E.g., *Cour d'appel de Paris*, (1re Ch.C.) 12 January 1993 – *Norbert Beyrard* (holding, inter alia, that the order opening bankruptcy proceedings abroad cannot have any effect in the absence of *exequatur* and that, accordingly, the arbitrators were not required to stay the arbitral proceedings).

15 See e.g., *Riverrock Securities Ltd v International Bank of St Petersburg (Joint Stock Company)*, [2020] EWHC 2483 (Comm).

16 See e.g., *Nori Holdings Ltd v Bank Otkritie Financial Corporation*, [2018] EWHC 1343 (Comm).

17 CJEU Judgment of 10 February 2009, Case C-185/07 *Allianz SpA/Generali Assicurazioni Generali SpA v. West Tankers, Inc.*, ECLI:EU:C:2009:69.

18 See e.g., *QBE Europe SA/NV v Generali España de Seguros Y Reaseguros* [2022] EWHC 2062 (Comm) and *Ebury Partners Belgium SA/NV v Technical Touch BV* [2022] EWHC 2927 (Comm).

19 The judgment of the Court of Appeal (Nugee LJ, Snowden LJ and Falk LJ) of 11 October 2023 in *Deutsche Bank AG v RusChemAlliance LLC* [2023] EWCA Civ 1144, <<https://www.bailii.org/ew/cases/EWCA/Civ/2023/1144.html>>. See Grusic, *passim*

proceedings (if still on time) or may be requested in other jurisdictions. In the latter case, a successful enforcement will again depend on the extent of recognition of foreign insolvency and ‘qualification’ of a potential violation as a reason for refusing enforcement. Potential grounds for setting aside and refusing enforcement include violations of due process and the public policy exception.

As a matter of principle, arbitrators are to abide by the rules chosen by the parties and mandatory provisions of *lex arbitri*, if any. The need to take into consideration the provisions of insolvency law may be derived from some requirements of arbitration law, such as due process. Thus, in order to comply with this requirement both parties must have the equal possibility to participate in the proceedings and present their submissions. It presumes that an insolvency practitioner must be given sufficient time to obtain all necessary approvals to participate in pending or to initiate new arbitrations.

Furthermore, arbitrators must validly establish jurisdiction. Provisions of insolvency law may vest jurisdiction over a wide range of related matters with the court opening the insolvency proceedings (*vis attractiva concursus*). As such, they may affect arbitrator’s jurisdiction. At the same time, arbitrators are presumably expected to render an award ‘enforceable in law. Accordingly, in order to comply with the requirements of arbitration law, certain legal consequences deriving out of *lex fori concursus* should be given effects in arbitration.

De lege ferenda, the provisions that entail invalidity of an arbitration agreement due to insolvency as such should not be given effect internationally, i.e., either in court or arbitration proceedings abroad. It is doubtful whether a provision of this kind genuinely serves the purposes and objectives of insolvency law. On the contrary, it may operate against interests of the insolvency estate and its creditors: both an insolvency practitioner and creditors are deprived of the possibility to opt for resolving a dispute by arbitration, even when the advantages of such a choice would be obvious.

I. Difficulties with ‘characterisation’ or ‘qualification’

The interface between arbitral and insolvency is in cross-border situations further complicated by multiple factors. Foremost, there are problems with ‘characterisation’ or ‘qualification’ – both in terms of insolvency law and of arbitration law. Particularly problematic appears the ‘characterisation’ of the consequences/implications of the commencement of insolven-

cy proceedings in terms of arbitration law (e.g., capacity, subject-matter arbitrability, validity of pre-insolvency arbitration agreements), on the one hand, and the application of appropriate provisions of insolvency law on the other. Contradictory conclusions reached by the courts in Switzerland and the UK in the *Syska v Vivendi* case are illustrative.

The Swiss Supreme Court characterised it as a matter of capacity or ‘subjective arbitrability’²⁰. Generally, the expression ‘subjective arbitrability’ may refer to both the capacity to enter into arbitration agreements and the capacity to participate in arbitral proceedings. In the case at hand where arbitral proceedings were underway, it is clear that the issue of the capacity to enter into an arbitration agreement was of no consequence. Rather relevant were the provisions on the capacity to commence or participate in pending arbitral proceedings. Instead of relying on provisions on the role of an insolvency practitioner in pending and future legal proceedings, the Swiss Court erroneously applied the subsequently repealed provision of the Polish Insolvency Act invalidating all pre-insolvency arbitration agreements. Consequently, arbitral proceedings pending in Switzerland were definitely ‘discontinued’ due to intervening insolvency in Poland.

In contrast, the UK courts²¹ held that insolvency proceeding in Poland had no relevance in arbitration taking place in London. Although the decision not to give effects to the provision of Polish law on invalidating pre-insolvency arbitration agreements was correct, the UK courts should have applied the provisions on the automatic stay contained in English insolvency laws as they were required under Article 15 EIR 2000 (current Article 18 EIR). This point will be elaborated in the following section.

Thus, the decisions with opposing results were reached in two jurisdictions, whilst in neither of them the provisions on cross border insolvency were correctly applied. This is a strong argument in favour of expressly providing which consequences of opening foreign insolvencies are to be given effects in the ‘recognising’ state. Thereby the questions of ‘characterisation’ and conflict of law rules in terms of arbitration law would be redundant.

20 *Bundesgericht/Tribunal Fédéral* (T 1/2 4A_428/2008) 31 March 2009.

21 Judgment of Mr Justice Christopher Clarke in High Court of Justice, Queen’s Bench Division, Commercial Court (hereinafter: Commercial Court), *Syska v. Vivendi Universal SA et al* [2008] EWHC 2155 (Comm) (2 October 2008). Court of Appeal (Civil Division) Judgment of 9 July 2009, *Syska v. Vivendi Universal SA et al* [2009] 28 EG 84, [2009] EWCA Civ 677. For an extensive commentary of the present author see Lazić, in Kröll/Mistelis/Perales Viscasillas/Rogers (eds.), 337 (337–363).

II. Nature of action²²

Difficulties may also be encountered when it is to be determined which of action is pursued by an insolvency practitioner. In contrast to often varying views on the aspects of intersection between arbitration and insolvency, no controversies are encountered with respect to ‘avoidance powers’ – in civil law jurisdictions often referred to as ‘insolvency *actio pauliana*’. It is almost undisputed that an insolvency practitioner cannot be bound by arbitration agreements contained in transactions entered by the debtor within certain period before the opening of insolvency proceeding.²³ The reasons for this unanimity in the comparative theory and practice are rather obvious. Most compelling is the fact that these are statutory causes of action: they are established by insolvency laws which also define the conditions under which certain transactions may be invalidated. Since they derive directly from insolvency laws and may be pursued solely within this context they qualify as true insolvency matters. Besides, they are not causes of actions that can belong to the debtor in the first place and accordingly cannot be those which are ‘taken over’ by an insolvency practitioner.

What appears problematic is that not all actions aimed at invalidating the debtor’s pre-petition transactions are pursued in the exercise of ‘avoidance powers’ under insolvency law, even though they may be ‘labelled’ as such. In other words, an insolvency practitioner may establish the claim by relying on the ‘insolvency *actio pauliana*’ provisions, but the true cause of action is an alleged fraudulent act committed by the debtor’s contracting partner. Since this is a true claim arising out of the contract which in the absence of insolvency proceedings can be pursued by the debtor, an insol-

22 This section is partially based on the research in an earlier publication, Lazić/Chauchan, in Madaan/Campbell (eds.), 65 (65–89).

23 E.g., in the USA – *Hays & Co. V. Merrill Lynch...*, 885 F.2d 1149 (3d Cir. 1989 1153 (holding that ‘...the trustee’s section 544(b) claims are not arbitrable under the arbitration clause, because they are not derivative of the debtor and the trustee is accordingly not bound by the Customer Agreement with respect to them’. (in Australia, *New Cap Reinsurance Corporation Limited v A E Grant & Ors, Lloyd’s Syndicate No 991*, [2009] NSWSC 662; in Germany – BGH 17.10.1856, NJW 1956; in the Netherlands – *Rechtbank Utrecht*, 11 August 1993, excerpt in *TvA 1* (1995), p. 37–37; in Singapore – 11 May 2011, *Larsen Oil and Gas Pte Ltd v Petropod Ltd* (in official liquidation in the Cayman Islands and in compulsory liquidation in Singapore), [2011] SGCA 21.

veny practitioner should be bound by an arbitration agreement contained in it.²⁴

It may appear even more difficult to distinguish a true nature of the claim when an insolvency practitioner files multiple actions in one proceeding – those that are ‘inherited’ from the debtor and those pursued in the exercise of the ‘avoidance powers’ under insolvency law. In such cases if the claim is dismissed under the insolvency law, so that transaction does not qualify as an avoidable transaction’, the binding effect of an arbitration clause is to be upheld as a matter of principle.²⁵ Of course, the condition is always that the clause is otherwise valid and that the cause of actions does not have its source in the insolvency law.²⁶

Regrettably, there are judgments that deviate from the practice in their own jurisdiction, as well as from undisputed widely accepted views in comparative theory and practice. The decision brought by the UK Hight Court in *Riverrock*²⁷ is such an example. In litigations in Russia and Cyprus, a bank pursued claims against Riverrock allegedly based on Russian insolvency law, but in fact they were claims to invalidate certain debtor’s contracts because Riverrock had allegedly abused the contractual rights. The latter requested the UK court to issue anti-suit injunction to restrain foreign litigations and to refer the parties to arbitration in London as provided in the arbitration clause. In the first part of the reasoning the Hight Court properly doubted that the causes of action belonged to the administrator regardless of the fact that the claims were based on the Russian insolvency law.²⁸ Such conclusion is not surprising considering that the claims were not pursued by an insolvency practitioner (administrator) in the first place, but by a bank. Most importantly, it may be doubted whether a genuine insolvency proceeding was commenced in Russia.

24 For an appropriate assessment in that respect see, *Nori Holdings Ltd v Bank Otkritie Financial Corporation*, [2018] EWHC 1343. See also, IBA Toolkit on Insolvency and Arbitration, <https://www.ibanet.org/LPD/Dispute_Resolution_Section/Arbitration/insolvency-and-arbitration-working-group>.

25 How such claims are appropriately distinguished, see *Louis Dreyfus Company Suisse S.A. v International Bank of St. Petersburg* [2021] EWHC 1039 (Comm).

26 See, e.g., decision of the USA Bankruptcy Court in *Dunes Hotel Associates v. Hyatt Corp.*, 194 B.R. 967 (Bankr. D.S.Car. 1995), holding that there is no reason to refuse arbitration when all the Bankruptcy Code claims were dismissed, if the arbitration agreement is otherwise enforceable.

27 *Riverrock Securities Ltd v International Bank of St Petersburg (Joint Stock Company)*, [2020] EWHC 2483 (Comm) judgment of 23 September 2020.

28 *Id.*, paras 50–54.

However, the Court then regrettably qualified the causes of actions as genuine insolvency claims based on the avoidance powers which may be exercised solely by an administrator. Curiously enough, the High Court even made a parallel with English law, holding that under English law such avoidance claims would be a matter of insolvency law. But the Court held that it did not render the claim automatically non-arbitrable under English law as *lex arbitri* and as the law governing the arbitration agreement.²⁹ This is the most regrettable conclusion and an erroneous and misleading message to arbitration and insolvency specialists alike. The decision in the result is not incorrect, since the claim was clearly not pursued in the exercise of ‘avoidance action’ under insolvency law. However, the legal argumentation is truly detrimental. Hopefully, this will not be the view followed by the UK courts in a case where a true insolvency proceeding is opened abroad and a proper avoidance action is pursued.

Another example is the decision of the Court of Appeal for British Columbia in *Petrowest*.³⁰ It concerns another rather uncontroversial issue of the relevance of executory contracts for arbitration. These are debtor’s pre-insolvency contracts which have not been fully performed by either party. It is a widely accepted view that the acceptance of the contract by an insolvency practitioner implies the acceptance of an arbitration clause contained therein. If the contract is rejected, the claim becomes a claim of an ordinary non-secured creditor which must be filed in insolvency. If such a claim is contested, there is a verification dispute. There is no uniform approach in comparative law on the arbitrability of verification disputes. As a matter of principle, the view on arbitrability of such disputes seems to prevail, but there may be the need to adjust the conduct of arbitration or a form of an award in some legal systems. In *Petrowest* the Court of Appeal surprisingly confirmed the decision of the first instance court holding an insolvency practitioner unbound by an arbitration clause in an executory contract which he had accepted. Curiously enough in reaching its decision the Court relied on the principle of separability of an arbitration clause. It is unusual indeed to invoke the principle of separability to invalidate an arbitration clause, the principle which serves as means of upholding its

29 *Id.*, paras 74–79.

30 *Petrowest Corporation v Peace River Hydro Partners*, 2020 BCCA 339 (Court of Appeal for British Columbia).

validity in the first place. Luckily, the Canadian Supreme Court³¹ rejected the reasoning on the doctrine of separability, holding that decision was to be made on a case-by-case basis depending on the specific facts at hand. The Court pointed out that a stay may be refused if enforcing an arbitration agreement prevents the orderly and efficient resolution of a dispute. Otherwise, arbitration agreements are enforceable even in the insolvency context. Thus, their enforceability and binding nature are in the discretion of the courts.

In conclusion, even though such exceptional judgments do not present the state of law in a particular jurisdiction or were subsequently overruled by their own courts in the last instance, they certainly further complicate the understanding of the interaction between insolvency and arbitration by both arbitrators and insolvency practitioners. It is hardly conceivable that the reasoning of the *Riverrock* judgment on the allegedly binding nature in connection with ‘insolvency *actio pauliana*’ would have any relevance in future cases when insolvency proceedings are opened in the UK. It is to be hoped that the UK courts also will not follow the legal reasoning in in the *Riverrock* judgment in cases of genuine foreign insolvency proceedings. Given that England is a popular arbitration venue, and in light of the recent ruling of the UK courts accepting jurisdiction to issue anti-suit injunctions even if the seat is not in England, the UK courts are likely to encounter with increasing frequency the challenge of addressing the interplay between insolvency and arbitration. Most importantly, anti-suit injunctions issued by the UK courts in support of arbitration may affect proceedings before the courts of EU Member States brought by an insolvency practitioner.

III. Inconsistency in interpreting the interface between insolvency and arbitration in domestic and cross border situations

The judgment of the UK courts in *Syska v Vivendi* is an example of inconsistent treatment of domestic and foreign insolvency proceedings. It is clear that the automatic stay is ensured when corporate liquidation (winding up) and administration proceeding are opened in England.

31 *Peace River Hydro Partners v. Petrowest Corp.*, 2022 SCC 41 (Supreme Court of Canada).

With respect to corporate liquidation or winding-up by the courts, Section 130(2) of the 1986 English Insolvency Act³² is relevant. Also, in administration ‘no other proceedings and no execution or other legal process may be commenced or continued, and no distress may be levied, against the company and its property except with the leave of the court and subject to such terms as aforesaid.’³³ However, the courts held that no such provision were to be found in English law.

More importantly, already in an earlier judgment,³⁴ the UK court had refused to apply the stay in litigation pending in the UK when insolvency was opened in Germany, despite Article 15 of 2000 EIR (current Art. 18 of the revised EIR). The latter provides for the applicability of *lex fori* to pending lawsuits so that in the case at hand the question was to be answered as a matter of English law. Just as under German law, the relevant provision of Article 130(2) of the 1986 English Insolvency Act provides that pending lawsuits are to be stayed. The Court held, however, that Article 130(2) of the 1986 Insolvency Act was inapplicable to foreign insolvency proceedings in the country of the debtor.³⁵ Such reasoning finds no support

32 Art. 130(2) provides that provides that after a winding-up order has been made no action or proceedings shall be proceeded with or commenced against the company or its property except by the leave of the court and subject to such terms as the court may impose.

33 Art. 10 of the 1986 Insolvency Act. See also Sect. 43(6) of the 2002 Enterprise Act, stating that no legal process (including legal proceedings, execution, distress and diligence) may be instituted or continued against the company or properties of the company except (a) with the consent of the administrator, or (b) with the permission of the Court. 37 Sect. 112 of the Insolvency Act.

34 *Mazur Media Ltd v. Mazur Media GmbH* (2005) 1 Lloyd’s Rep. 41.

35 *Id.*, in paras 67 and 68 the Court reasoned as follows:
(67) Accordingly, section 130(2) can apply in the case of the winding up in England of a foreign company, but I am satisfied that there is no basis for an argument that section 130(2) can apply to a foreign insolvency proceeding.
(68) It is clear from its context that section 130(2) does not apply to foreign insolvency and section 221(1) does not extend it to foreign insolvency proceedings. Nor is there any basis for any argument that it could apply by analogy. Nor do I see any element of discrimination. The effect of Article 4(2)(e) and Article 15 of the Insolvency Regulation is to leave the question whether there should be a stay to the English court in the circumstances in which they apply.

in the text of Article 15, it contradicts the Virgos Schmidt Report³⁶ and deviates from decisions brought in other EU Member States.³⁷

After the judgment in *Mazur Media*, has been issued, in an arbitration taking place in England, the arbitral tribunal continued stayed arbitral proceeding and noted as follows:

‘We have decided that we should accept these submissions made on behalf of the [Claimant] but not without hesitation. The position is paradoxical: if a winding-up order had been made against [Respondent] in England (which could, of course, have been done, notwithstanding that it is not an English company) the effect of Sect. 130(2) would have been to stay the arbitration, assuming it were held to constitute an ‘action or proceedings’ within the meaning of that statutory provision. (...) If the arbitration had been proceeding in Italy the effect of [Respondent’s] *fallimento* would, again, have been to stay the arbitral proceedings ... But because the arbitration is English and the winding-up order Italian there is to be no stay.’³⁸

Thus, both in *Mazur Media* and *Syska*, the UK courts held that the automatic stay was inapplicable in case of foreign insolvency proceedings despite Article 15 EIR 2000 clearly providing otherwise. These judgments illustrate that the effects of foreign insolvency proceedings are not necessarily ensured even when the provisions on the recognition of foreign insolvencies are in place, such as those contained in the EIR. In other words, the purpose of the Insolvency Regulation may be circumvented by different interpretations in various Member States. In addition, it clearly illustrates that the approach taken in the Insolvency Regulation, in particular the dis-

36 Virgos/Schmit, which in paragraph 92(2) relating to the exceptions to the general rule on conflicts of law in Article 4, provides, *inter alia*, as follows: ‘In other cases, it ensures that certain effects of the insolvency proceedings are governed not by the law of the State of the opening ..., but by the law of the State concerned ... In such cases, the effects to be given to the proceedings opened in other Contracting States are the same effects attributed to a domestic proceeding of equivalent nature (liquidation, composition, or reorganization proceedings) by the law of the State concerned ...’ (emphasis added).

37 See e.g., decisions brought by the Austrian Supreme Court of 17 March 2005 – 8 Ob 131/04d, 24 January 2006 – 10 Ob 80/05w and 23 February 2006, 9 Ob 135/04z. The latter held that if a stay is imposed by the *lex fori processus* the proceedings would be stayed even if this does not follow from the *lex concursus*. See also, Moss/Fletcher/Isaacs, 302 para 8.249.

38 ICC arbitration 12421, Final Award in case no. 12421/MS of 2005, excerpt in XXXIII *Yearbook Commercial Arbitration* (2008) 102–117.

inction between pending and non-pending proceedings, seriously affects the uniformity of its application in different Member States.

As it will be explained *infra*, under 'EU – revising the EIR', the Regulation needs to be revised so as to clarify the extent of jurisdiction under Article 6, to alter the current provision of Article 18 and to address in a more precise manner the effects and impact of insolvency proceedings on arbitration.

D. Suggestions for improvements – general remarks

General remarks on the relevance of laws on cross border insolvency and some propositions for improvements as a matter of principle are followed by remarks on the need to revise the EIR and by comments on the initiative within the UNCITRAL Working Group V on applicable law in insolvency proceedings.

The states are generally encouraged to enact laws on recognition of foreign insolvencies. It would enhance cooperation at the international level in improving the efficiency of insolvency proceedings, in preventing individual actions and enforcements of creditors. On a proper application of the EIR one should expect that the courts in EU Member States would decline the enforcement of the award by applying the Insolvency Regulation. However, creditors may attempt to enforce the award on the basis of the 1958 New York Convention in jurisdictions outside the EU. Whether or not they would be successful depends on the law on cross-border insolvency in the country where the enforcement of the award is sought. It is therefore crucial that such legislation is in place based either on an 'international' legal instrument or on a national law.

Indeed, when drafting such legislation, the states may opt for implementing the provision of UNCITRAL Model Law on Cross Border Insolvency (MLCBI). In general, it is more efficient to provide direct solutions whenever possible, rather than using a conflict of law method. Article 20 of UNCITRAL Model Law can be mentioned as an example. Differently from the approach used in Article 18 EIR, it provides for an automatic stay of all legal proceedings against a debtor in insolvency. The stay is meant for

both pending proceedings and those to be initiated and applies to arbitral proceedings, as well.³⁹

In general, the ‘automatic stay’ of legal actions for payment against the insolvency estate – the actions of ordinary, non-secured, non-preferred creditors, is provided in national insolvency laws almost without exception.⁴⁰ Since it appears the least controversial in comparative insolvency laws it is more efficient to provide for a stay directly in an international legal instrument rather than using a conflict of law rule. On the one hand, the latter is essentially irrelevant considering that identical or substantially similar consequences in this respect are provided in majority of national laws. Nevertheless, it may appear inefficient as failing to serve its purpose, either by an incorrect application of foreign insolvency law (in the case if the *lex fori concursus* governs) or an omission to apply corresponding provisions of domestic law if the *lex fori processus* governs. The UK case law presents a clear illustration of inefficiency of the conflicts of law rule provided in the EIR.

However, even though the ‘direct method’ employed in Article 20 ML-CBI is generally preferred approach, MLCBI does not deal with all issues of private international law. For this reason, UNCITRAL put the topic ‘Applicable law in insolvency proceedings’ on its agenda and has been discussing the text within the Working group V on Insolvency. The most recent proposals brought up at the sixty sixth session 12–16 May 2025 will be addressed *infra*, under ‘UNCITRAL Working Group V on applicable law to insolvency proceedings’.

39 Article 20. Reads: ‘Effects of recognition of a foreign main proceeding
Upon recognition of a foreign proceeding that is a foreign main proceeding:
Commencement or continuation of individual actions or individual proceedings concerning the debtor’s assets, rights, obligations or liabilities is stayed
Execution against the debtor’s assets is stayed; and
The right to transfer, encumber or otherwise dispose of any assets of the debtor is suspended.’ On difficulties that may be encountered to enforce the automatic stay, see note 145 of the Guide to Enactment.

40 See both National Reports and the consolidated Report on IBA Toolkit on Insolvency and Arbitration <https://www.ibanet.org/LPD/Dispute_Resolution_Section/Arbitration/insolvency-and-arbitration-working-group>.

I. EU – revising the EIR

Even though such a direct approach may be preferred as a matter of principle, the views may differ on whether it would be acceptable to the EU legislator when revising Article 18 EIR. In other words, it may be questioned whether such a way can be aligned with the conflict of laws approach used in other provisions on the applicable law.

Even if this method is not considered as the preferred way to proceed, the current provision of Article 18 should be revised, nevertheless. The examples in the UK case law illustrate that the present reference to *lex fori* raises doubts on an analogous application in case of foreign insolvency proceedings. In order to ensure the effectiveness of the recognition of insolvency proceedings in all EU Member States, the applicability of *lex fori concursus* should be provided also regarding the impact on pending lawsuits and arbitrations. Thus, it will align the applicability of the same law (*lex fori concursus*) to pending and future legal proceedings. Further it will be the same law governing the role, position and authorities of insolvency practitioners to take over pending legal proceedings and to initiate or defend new ones. Since these provisions are inextricably linked, the current split between *lex fori concursus* and *lex fori* in the EIR is inappropriate. This is also appropriate in terms of ensuring compliance with the due process requirement both in litigation and arbitration, as an insolvency practitioner will have to comply with the provisions of *lex fori concursus* with respect to his or her duties and obligations. Consequently, the exception provided under Article 18 for pending lawsuits and arbitrations should be omitted, so that all legal proceedings would be governed by *lex fori concursus* under Article 7.

The UK case law illustrates difficulties that may be encountered by national courts when they are required to analogously apply the provisions of domestic law on the impact on the pending legal proceedings. The purpose of the Regulation may be undermined, if the *lex fori processus* does not provide for a stay in reorganisation proceedings, whilst the stay is imposed under *lex fori concursus*. Accordingly, the stay would not be granted even though the insolvency proceeding does fall within the scope of Regulation and is properly listed in Annex A.

In essence, the distinction between the *lex fori concursus* and the *lex fori processus* in relation to both pending and prospective legal proceedings makes little, if any, practical difference. This is because the principle that

ordinary, non-secured creditors are precluded from pursuing individual actions is widely accepted across the Member States, at least in the context of liquidation proceedings. The Court of Justice of the European Union (CJEU) has emphasised that this acceptance follows ‘from the principles common to the procedural laws of the Member States’.⁴¹ Accordingly, in practice, a stay is highly likely to be granted under both the *lex concursus* and the *lex fori processus*. Nevertheless, the existence of either a direct rule providing for an automatic stay or a rule expressly mandating the application of the *lex fori concursus* would remove any doubt for the court of the Member State in which litigation or arbitration is pending as to whether a stay should be granted. In other words, such courts would be spared the difficulties faced by the UK courts in assessing whether the provisions of their own national insolvency law apply in cases involving foreign insolvency proceedings.

In addition to Article 18, the rule on jurisdiction in Article 6 needs revising. The current most confusing and inconsistent state of law created by the CJEU jurisprudence urges for legislative action, as the present author explained in her previous publications.⁴² In particular, the CJEU case law inappropriately deals with the interaction between the Brussels Ibis and Insolvency Regulation, i.e., with respect to the extent of the ‘insolvency exception’ under Article 1(2)(b) of the Brussels Ibis Regulation. Perhaps some detrimental consequences of the CJEU rulings could be remedied when revising the Brussels Ibis Regulation, most likely in the Recitals. However, since the main source of the current confusion lies in the interpretation and application of the vague notions referred to in Article 6 of the EIR 2015, revising Article 6 appears indispensable. Although the revision is crucial with respect to litigations and consequently delineating the scope of application between the EIR and Brussels Ibis, it does have bearing on arbitrations, as well. If a certain action is characterised as a matter of insolvency law, so as to be ‘attracted’ by the jurisdiction of a court where insolvency proceeding is opened (*vis attractiva concursus*), it may be a point worth considering in arbitration, too. Namely, it may primarily have relevance regarding the

41 First Chamber in C-294/02 of 17 March 2005 (*Commission of the EC v AMI Semiconductor Belgium BVBA et al.*).

42 On the analysis of the CJEU in that respect see Lazić/Mankowski, p. 41, paras 1.117 – 1.120 and p. 133–134, paras. 2.177 – 2.181. The comment of the most recent CJEU ruling on the interaction between the Brussels Ibis and Insolvency Regulations see, Lazić, in *Revue de Droit Commercial Belge*, 2025, available on conflictoflaws.net (https://conflictoflaws.net/News/2025/08/2025-Note-rdc_tbh2025_2p308.pdf).

subject-matter arbitrability and consequently may have impact on the jurisdiction of arbitrators.⁴³ Even if there is no substantial relevance for the arbitrators' jurisdiction, insolvency law may influence the manner in which an arbitral proceeding is to be conducted or the form in which an arbitral award is to be rendered.⁴⁴

Last but not least, the complex interaction between insolvency and arbitration is not resolved by mere reference to pending arbitrations, as has been discussed in the first parts of this contribution. Indeed, it may be difficult to include all aspects in the normative part of the Insolvency Regulation. Yet it may be appropriate to provide useful guidance in the Recitals so as to address most likely points of interaction and to clarify at least those points with respect to which there are no substantial differences in the laws of the EU Member States. The necessity of such clarifications would be enhanced if the current dichotomy between pending and non-pending legal proceedings would be retained in Article 18. The disadvantages of the applicability of *lex fori processus* will be detailed *infra*, under 'UNCITRAL Working Group V on applicable law to insolvency proceedings.'

II. Cross-border insolvency – possible/future EU legislation on insolvency proceedings in non-EU states

If from the constitutional point of view the EU legislator is entitled to adopt legislation with respect to effects with non-EU countries, a similar line

43 In case of in case of a broad *vis attractiva concursus* and/or an approach based on the discretion of the insolvency court to refer a dispute to arbitration such as in the USA (at least for 'core' matters) and Canada. On the state of law in the USA, see IBA Toolkit on Insolvency and Arbitration, Allan L. Gropper, Walsh, Th. W., National Report of the United States of America, p. 8 <<https://www.ibanet.org/MediaHandler?id=8A157F9D-7590-4CF4-B7F4-EB2CDDF3AA20>>; for Canada, a discretionary power of the court having jurisdiction in insolvency was confirmed by the Canadian Supreme Court *Peace River Hydro Partners v. Petrowest Corp.*, 2022 SCC 41 (Supreme Court of Canada).

44 E.g., *Cour de cassation* (1re Ch. civ.), 8 March 1988, *Rev. Arb.* (1989), p. 473–474 (*Thinnet*); *Cour d'appel de Paris*, 16 February 1989, *Rev. Arb.* (1989), p. 711 (*Almira Films*); *Cour de cassation*, 4 February 1992, *Rev. Arb.* (1992), p. 663 (*SARET*); *Cour de cassation* (Ch. Com.), 2 June 2004, *Soc. Gaussin et autres c/ soc. Alstom Power Turbomachines*, *Rev. Arb.* 2004, no. 3, pp. 593 *et seq.*; *Cour d'appel de Paris*, 27 Febr. 1992, *Rev. Arb.* (1992), p. 590 – *Sohm*; *Cour de cassation*, First Civil Chamber, 6 May 2009, no. 509, available online at <www.courdecassation.fr>.

of reasoning should be followed when dealing with the interface between arbitration and insolvency.

III. UNCITRAL Working Group V on applicable law to insolvency proceedings

UNCITRAL has been discussing a detailed regulatory framework on the applicable law in insolvency, which would cover a wide range of issues. The present contribution will address the ‘Applicable law in insolvency proceedings Note by the Secretariat’ of the Sixty-sixth session held in New York, 12–16 May 2025 – A/CN.9/WG.V/WP.202⁴⁵ and the Report of Working Group V (Insolvency Law) on the work of its sixty-sixth session (New York, 12–16 May 2025) – A/CN.9/1203,⁴⁶ with no reference to earlier drafts.

The draft legislation provides for *lex fori concursus* as the main law governing all aspects of the commencement, conduct, administration and closure of insolvency proceedings and their effects, whereby an extensive non-exclusive list of topics has been proposed. It is to be met by approval that the same law is to govern ‘(d) Protection and preservation of the insolvency estate, including application of a stay of proceedings, and, if a stay of proceedings applies, its scope, duration, modification and termination.’⁴⁷ In the Draft Commentary it clarifies that the stay includes arbitration in a very similar wording as used in the Guide to Enactment of the MLCBI on the note to Article 20.⁴⁸ Besides, there is a reference to arbitration agreements under ‘h) treatment of contracts...’.⁴⁹ However, it appears that the views were divided on whether such an express reference to arbitration agreement should be kept, which was to be further discussed within the Working group.⁵⁰

The current wording under (d) and clarifications that it also applies to arbitration should be maintained. Regrettably, however, it appears that

45 Report on the Sixty-sixth session New York, 12–16 May 2025 A/CN.9/WG.V/WP.202 (hereinafter: Secretariat Note A/CN.9/WG.V/WP.202) <<https://docs.un.org/en/A/CN.9/WG.V/WP.202>>.

46 Report of Working Group V (Insolvency Law) on the work of its sixty-sixth session (New York, 12–16 May 2025) (hereinafter: Working Group Report A/CN.9/1203) <<https://docs.un.org/en/A/CN.9/1203>>.

47 Secretariat Note A/CN.9/WG.V/WP.202, p. 13.

48 *Ibid.*, pp. 16–17.

49 Comments under points 18 and 19 on p. 19.

50 *Ibid.*, footnotes 79 and 80.

proposals were put forward to treat arbitration differently from litigations. The following provision was suggested:

‘Notwithstanding paragraph XX of the legislative provision, the effects of the opening of insolvency proceedings on pending arbitral proceedings shall be governed by the *lex loci arbitri*, provided that such law does not substantially disadvantage when compared with the *lex fori concursus* as regards:

- (i) A temporary stay of the pending arbitral proceedings for a reasonable period of time; and
- (ii) The right of the insolvency practitioner to intervene and to be heard in the pending arbitral proceedings.’

In the view of the present author, providing for a stay expressly as is done in Article 20 MLCBI should be preferred over a conflict of laws rule. Thereby, the consistency amongst UNCITRAL legislative texts would be ensured. If a conflict of laws rule is chosen, it should certainly be *lex fori concursus*.

It is essential to maintain the same ‘treatment’ of litigation and arbitration. First of all, this is the approach accepted in the wide majority of legal systems to provide for the stay of all legal proceedings, including arbitration. Moreover, there are usually no express provisions on the effects of insolvency on arbitration: in majority of legal systems the interface is perceived thought an analogous application of provisions of insolvency law that relate to court proceedings. Accepting a different ‘treatment’ as suggested in the above-mentioned proposal would not be in line with such a majority view.

As a matter of principle, providing for *lex fori processus* for pending litigations and arbitrations as is the case under EIR is an artificial divide between pending and new proceedings. As already mentioned, the stay of individual actions of creditors extends to both, i.e., it prevents both their commencement and continuation. It is not easy to explain the rationale behind applying the provisions on the effects of insolvency law of the country in which no insolvency proceedings are opened. The only explicable reason could be to refer to the provisions of the stay contained in the law of civil procedure, i.e., it is self-explanatory that the courts would apply in that respect their own procedural law. However, this has little connection with giving effects to insolvency proceedings: an acceptance of the effects of foreign insolvency proceedings by no means alters the obligation of the courts to apply their own procedural rules when giving the effects to

foreign insolvency proceedings. In other words, the stay is the effect and when recognising it the court would apply national procedural rules.

However, this line of argumentation does not necessarily apply to arbitration, as arbitrators do not apply procedural rules of the country of the seat other than those relating to arbitration. Indeed, the provisions on arbitration may be contained in a Code of Civil Procedure, but other provisions are unrelated to arbitration and accordingly inapplicable in arbitration, including those on stay and continuation of litigations.

The wording *lex loci arbitri* in the above-mentioned proposal is most unfortunate, indeed. First of all, *lex arbitri* points to the relevant law on arbitration in a particular legal system. As a matter of principle, these provisions seldom if ever mention insolvency. An example can be found in French Law on Arbitration. The provision applicable to domestic arbitration refers to certain provisions of the Code of Civil Procedure which impose a stay in case of the commencement of insolvency proceedings. However, this provision is inapplicable in the context of ‘international’ arbitration. Consequently, a reference to ‘*lex arbitri*’ would result in a legal gap, as provisions on insolvency are usually not found in any arbitration law. In that respect the wording used in EIR is more appropriate as it refers to the ‘law’ of the country in which proceedings are pending since it includes the provisions of insolvency law. As such, it is broader than the wording ‘*lex arbitri*’.

Finally, it may be questioned why the expression ‘*lex loci arbitri*’ is used instead of ‘*lex arbitri*’. Pointing to the ‘seat’ is unnecessary considering that majority of the laws on arbitration follow the so-called ‘territoriality approach’, i.e. provide for its applicability in principle when the seat is in that country, with some notable exceptions, such as the provisions on the enforcement of arbitral awards. It is true that there are examples of arbitration laws that accept two criteria to determine its applicability – seat and the ‘applicable law’ criteria.⁵¹ Considering that they are so exceptional and that there is no relevance of the ‘applicable law’ criterion in this context, there is no need to distinguish it, if this is the rationale behind the use of the wording ‘*lex loci arbitri*’.

51 See e.g., Article 47 of the Tunisian Arbitration Act (‘...the provisions of this law apply only if the place of arbitration is in the territory of Tunisia, or only if either the parties or the arbitral tribunal have chosen these provisions’); see also, Article 1 of the Egyptian Arbitration Act; Chapter 684 of the 2005 Florida Arbitration Law. French New Code of Civil Procedure in Art. 1505 provides for the assistance of the President of the *Tribunal de grande instance* of Paris not only when the seat is in France.

The preference for a 'direct' approach in regulating the interface should be reiterated. Even if it may appear difficult to address this issue in the normative part, it would be desirable if the commentary to the text would provide some clarity at least where there are no substantial differences between legal systems. In addition to the stay of individual actions of creditors, a similar uniformity of approaches can be observed with respect to the avoidance powers of an insolvency practitioner to invalidate certain detrimental transactions entered by the debtor during certain period before opening of insolvency proceedings. Such actions are in civil law jurisdiction often referred to as insolvency *actio pauliana*. Even though the terminology varies amongst different legal systems, as well as the periods of time prescribed, it is held almost without exception that pre-insolvency agreements cannot bind a liquidator or a trustee when pursuing such actions. It would be most useful for the judiciary and legal practitioners to make this transparent in any regulation addressing the interface between arbitration and insolvency proceedings.

As explained *supra*, problems may be encountered when an insolvency practitioner 'combines' in one and the same action the claims based on detrimental actions of the debtor provided under insolvency law with allegations of fraud committed by a debtor's contractual party. Clearly the latter should be distinguished from 'insolvency *actio pauliana*' proper when assessing the binding nature of arbitration agreements. Since these are the claims based on pre-insolvency contractual obligations of the debtor, an arbitration clause contained therein binds an insolvency practitioner. Thus, when such 'combined' claims are submitted in arbitration or are put forward in court proceedings related to arbitration they should be distinguished and separated from insolvency *actio pauliana* proper. Thereby the binding effect is to be maintained with respect to the former and denied as to the latter.

In a similar vein, a direct regulation on the executory contracts may prove useful: firstly, an arbitration agreement when no arbitration is pending cannot be considered as an executory contract, and secondly acceptance of the main contract entails acceptance of the arbitration clause. Rejection of the main contract results in a claim for damages which has to be filed in the insolvency proceeding – if the claim is contested, it results in a verification dispute. The binding nature of arbitration agreements in such disputes should be governed by *lex fori concursus*.

E. Conclusions

Generally complex matters pertaining to the interaction between insolvency and arbitration are even more complicated in cross-border situations. Particular problems may be encountered in connection with characterisation both in terms of insolvency and arbitration law. The conflict of law rules in arbitration are of no assistance if the insolvency proceeding is opened in a country the law of which is not applicable according to the conflict of law rules in the country in which arbitration or court proceedings related to arbitration are taking place, e.g., if the law applicable to 'objective arbitrability' or 'validity of an arbitration agreement' point to a different legal system. In addition, there may be double standards used by the judiciary when facing the intervening insolvency in domestic and in cross-border cases.

It is essential that regulating cross border insolvency becomes part of the legislative framework in many jurisdictions so that the effects of true foreign insolvency proceedings are recognised. This is an important aspect not only within the intersection between arbitration and insolvency, but more generally with the view of enhancing cooperation in cross border insolvencies.

Implementation of the MLCBI may resolve a number of issues, in particular the suspension of individual actions under Article 20. Yet, a more comprehensive legal framework containing a complete set of rules is needed, which would include specific issues and cover various points of interaction between arbitration and insolvency. Moreover, even when there is legislation on cross-border insolvency in place, the recognition of the effects abroad is not necessarily ensured. The decisions of the UK courts illustrate the need to revise EIR. In particular Article 18 is to be omitted so that there will be no division between pending and future legal proceedings. Accordingly, the effects of both should be governed by the *lex fori concursus*.

The best approach would be to employ a 'direct method' without using conflict of law rules, as has been done in Article 20 MLCBI. The fact that there are no substantial divergencies amongst national laws with respect to certain points of interaction (e.g., a non-binding nature of pre-insolvency arbitration agreements concerning avoidance transactions, the principle of preclusion of individual actions of non-secured creditors, as well as similarities in many respects regarding the executory contracts) may facilitate the negotiations and drafting process within the UNCITRAL Working Group

on the applicable law in insolvency. This would be most efficient way to proceed. Should that appear unacceptable considering that the conflict of laws approach is the method generally used, the provisions on both pending legal proceedings and those to be initiated are to be governed by *lex for concursus*. Indeed, the same provision should apply to arbitral proceedings: an express reference to this effect is preferred either in the normative part or in the commentary, just as it has been done in the MLCBI. Any other solution would be inconsistent with the MLCBI and would therefore be likely to undermine adherence to the future UNCITRAL legislation by those States that have implemented the MLCBI.

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Mediation in cross-border insolvencies

Defne Taşman

Abstract:

This chapter argues that mediation should be understood as a restructuring infrastructure tool capable of supporting preventive restructuring, cross-border coordination, and EU external legal influence. It examines the evolving role of mediation within the European Union's (EU) insolvency and restructuring framework, with a particular focus on cross-border disputes. The EU's ongoing efforts to harmonize diverse national insolvency systems have been bolstered by the adoption of the EU Directive on Preventive Restructuring 2019/1023, which aims to facilitate access for debtors in difficulties to restructuring frameworks whilst creating efficient, fair, and equitable outcomes for both creditors and debtors. In parallel, there has been an increasing interest in integrating Alternative Dispute Resolution mechanisms, notably mediation, into insolvency and restructuring practices. Mediation, as an out-of-court method of resolving disputes, is gaining traction due to its cost-effectiveness, efficiency, and privacy, particularly in pre-insolvency stages. Within the field of civil and commercial law, the EU Mediation Directive 2008/52 was adopted to facilitate access to dispute resolution and to promote the amicable settlements by encouraging the use of mediation in cross-border disputes. The Mediation Directive aims to ensure a balanced relationship between mediation and judicial proceedings. More recently, the Singapore Mediation Convention entered into force, which provides a framework for the cross-border enforcement of international settlement agreements reached through mediation. This chapter outlines the benefits of mediation, its legislative development at the EU level and in a global context, and its role in the insolvency landscape. Furthermore, it explores how the EU can employ mediation as a tool for resolving cross-border insolvency disputes, while also extending these practices beyond its borders to strengthen global trade relations. The chapter concludes by underscoring the potential for mediation to foster a more cohesive and resilient global economic framework, promoting cooperation between the EU and Third Countries.

Key words: Insolvency, Restructuring, Cross-Border, Mediation, ADR, Pre-Insolvency, Out-of-Court Settlement, Preventive Restructuring Directive, Singapore Mediation Convention, UNCITRAL Model Law on Cross-Border Insolvency, European Union, Third Countries.

A. Introduction

In the intricate and highly heterogeneous landscape of international commerce, insolvency is a particular challenge, amplified by the cross-border nature of modern business operations. Within the European Union (EU), insolvency law has undergone a considerable evolution, particularly with the European Insolvency Regulation in 2000,¹ and its Recast in 2015,² marked by a persistent effort to coordinate the diverse national systems of the Member States, with the aim to achieve efficient, equitable, and fair outcomes for both creditors and debtors, particularly in cross-border situations.³ More recently, new developments have taken place in the national restructuring frameworks of the EU Member States with the adoption and transposition of the EU Directive on Preventive Restructuring 2019/1023.⁴

One of the pivotal developments in the evolving field of insolvency and restructuring is the increasing appetite for integrating alternative dispute resolution (ADR) mechanisms. These mechanisms include negotiation, conciliation, mediation, and arbitration. This chapter will particularly focus on the growing emphasis on mediation, as an effective tool for resolving insolvency disputes and for the conduct of restructuring negotiations.⁵

The complexities of litigating major cross-border insolvencies in multiple fora can cause delays, inefficiencies, and increased costs, leading to a renewed interest in seeking alternative ways.⁶ Thus, the focus shifts from adjudication of insolvency disputes towards resolution in an out-of-court setting by using ADR mechanisms. Scholars put forward the view that mediation could help avoid the inherent shortcomings of litigation, especially in workout and pre-insolvency stages.⁷ Today, viable businesses in financial

1 Insolvency Regulation 1346/2000

2 Insolvency Regulation Recast 2015/848

3 Ghio, p. 116 et seqq.; Wessels, TvOB 2015, 207 (209).

4 Restructuring Directive 2019/1023.

5 Wessels, Eurofenix 2016, 24 (25).

6 Sussman/Gorskie in Rovine, p. 166.

7 Wessels/Madaus, p. 127.

difficulties need effective national and cross-border preventive restructuring frameworks which would enable them to continue operating. Mediation provides a way of solving legal conflicts without pursuing in-court legal actions, with the help of a third party, namely the mediator, and without (significant) involvement of the judiciary. Mediation is a widely encouraged tool, particularly at the EU level, as it is known to have many benefits, such as its relative cost and time efficiency as well as privacy.⁸

As the EU continues to define, refine, and harmonise its insolvency framework, there also lies a parallel opportunity to further develop and extend these advancements beyond the Union's borders. The integration of robust mediation mechanisms can facilitate smoother cross-border insolvency and restructuring processes, fostering an environment of legal certainty and mutual trust. Enhancing mediation mechanisms, not limited to Member States, but also through collaboration with Third Countries could significantly bolster international trade relations, by providing a more stable and predictable environment for cross-border investments.

This chapter is laid out as follows: Section B explores the benefits of mediation and the significant role it plays in achieving consensual outcomes. Section C explores the development of mediation at the EU level and its influence on national practices, along with an evaluation of the legislative efforts in creating an EU mediation framework. Section D analyses the function of mediation within the EU insolvency and restructuring landscape. This is followed by Section E, which examines how the EU could further integrate mediation as a tool for restructuring and for solving cross-border insolvency disputes to also serve as a model for strengthening legal and economic ties with Third Countries, exploring the benefits and challenges of extending these mediation practices beyond the EU. The chapter concludes by highlighting the potential for a more cohesive and resilient global economic framework, underpinned by cooperation between the EU and its global partners based upon shared objectives and legal standards.

B. Mediation as a tool for amicable resolution

Although mediation does not have a commonly agreed definition, it is generally accepted that it is a relatively inexpensive, time-efficient, as well

8 'European E-Justice, EU Rules on Mediation' (europa 17.11.2021) <https://e-justice.europa.eu/63/EN/eu_rules_on_mediation> (last accessed: 4.8.2024).

as practical instrument aiming to resolve conflicts in an amicable manner with the consent and participation of the stakeholders around a dispute.⁹ At its core, mediation offers a voluntary, confidential, and structured yet flexible process where an impartial, neutral third party, the mediator, facilitates communication and assists the parties to a dispute in negotiating to promote understanding, reconciliation, and to reach a mutually satisfactory agreement.¹⁰ Although it is typically considered that participation in mediation is voluntary, it can also be mandated by law or by courts in some jurisdictions.¹¹

Mediation has numerous advantages over traditional litigation, particularly in the context of insolvency proceedings. It is generally less expensive than court litigation due to lower legal fees and faster resolution times,¹² reducing the time needed to resolve disputes, which is crucial in cases such as restructuring and insolvency where prolonged uncertainty can further damage financial stability of the parties. Mediation emphasizes collaboration and voluntary decision-making, often leading to more durable and amicable solutions. A smooth mediation process relies on cooperation as the parties themselves try to resolve their disputes with the assistance of the mediator, who lacks decision-making power.¹³ The mediator remains neutral and impartial, ensuring a balanced process where all parties are heard and respected. The success of mediation generally depends on the negotiation skills of the parties, enhanced with the support of the mediator, and their good faith.¹⁴ Parties retain control over the outcome, with the mediator guiding the process rather than dictating the terms of the resolution. In other words, the mediator does not impose a decision but helps the parties explore options, brainstorm creative solutions, and negotiate a settlement.¹⁵ The collaborative nature of mediation helps preserve trust and business relationships that might otherwise be irreparably harmed if the conflict is addressed through litigation. Mediation could help the parties to

9 Eidenmüller/Griffiths, 'Mediation in Cross Border Insolvency Procedures, The Practitioner's Resort of Choice in Disputes Concerning Insolvent Undertakings' (insolventmediation) <<https://insolventmediation.nl/media/uploads/file/11-Cross-Border-Mediation.pdf>> (last accessed: 10.8.2024).

10 Art.3 no. a Mediation Directive 2008/52/EC.

11 Stipanowich/Lamare HNLR 2018, 1 (46); Welsh, ABI Law Review 2009, 427 (432).

12 Mocheva/Shah, TDM 2017, 1 (2).

13 Heath, INSOL World Sup. 2021, 6 (9).

14 Jokubauskas, Societal Studies 2017, 244 (248).

15 Hopt/Steffek in Hopt/Steffek, p.12.

separate the people from the problem, focus on the interests, and work out a common solution.¹⁶

The informal and supportive environment of mediation can alleviate the stress and adversarial tension, a symptomatic of court proceedings. Parties also have more flexibility in crafting creative solutions that address their specific needs and interests, rather than being bound by rigid legal procedures and precedents. Mediation can serve as a tool to solve multiple conflicts within one process, potentially offering pragmatic solutions that were not envisaged before, which is often the case after the mediator has discussed with both parties separately in caucuses. Additionally, agreements reached through mediation often enjoy higher compliance rates, as parties are more likely to adhere to solutions that they have actively participated in creating.¹⁷

Procedurally speaking, mediation is arguably more flexible and simpler compared to litigation, as the rules are often decided by the parties themselves or tailored according to their preferences.¹⁸ Moreover, there is the important benefit of confidentiality, as opposed to public court proceedings.¹⁹ Discussions in mediation are confidential, promoting open communication and honest negotiation without fear of repercussions. As the mediation process lays within the autonomy of the parties, it is not bound by a rigid schematic and can vary case-by-case.²⁰ However, generally speaking, it consists of four phases: the parties (1) at the intake phase, agree to mediate and choose their mediator, (2) hold caucuses and plenary meeting during the exploration phase to inform the mediator in order to identify individual interests and common grounds, (3) examine and negotiate different possible solutions with the assistance of the mediator during the negotiation phase, and finally, (4) in the concluding phase, lay down the solution in a settlement agreement and sign.²¹

The practice of mediation has deep and ancient roots, with various forms utilized across different cultures and settings for millennia. Its popularity has fluctuated throughout history, often rising and falling in response to the prevailing social, economic, and political climates. Mediation has

16 For more information, see Fisher/Ury, p. 22 et seqq.

17 World Bank Group International Finance Corporation, 'Mediation Essentials', 2016, 5.

18 Rec. 6 Mediation Directive 2008/52/EC.

19 Rec. 23 Mediation Directive 2008/52/EC.

20 Alexander in Hopt/Steffek, p. 20.

21 van de Griendt/Schutte, p. 8.

gained prominence during periods when parties seek amicable resolutions over adversarial or contentious methods, especially when faced with the prospect of lengthy and costly legal battles or the harsh penalties that might be imposed by the courts. For example, in late medieval and early modern Europe, debtor-merchants often turned to mediation as a way to negotiate with their creditors.²² At that time, failing to repay debts could lead to severe consequences, including imprisonment. Mediation offered a way to settle disputes without resorting to the punitive measures of the legal system, providing more humane and pragmatic solutions that were beneficial to both parties.

Mediation as we recognize it today began to take shape in the mid-20th century, gradually gaining momentum as an alternative to overburdened and costly judicial systems. The United States played a pivotal and pioneer role in this development, while its spread to the EU has been taking some time.²³ Compared to the US, the use of mediation, particularly in the field of restructuring and insolvency, is less common in many EU jurisdictions.²⁴ In literature, the lack of evolution in the mediation framework and the low utilization of mediation, despite its many benefits and a strong policy support, is referred to as the ‘mediation paradox’. The EU has increased its efforts in the past decades to promote mediation and to address this paradox.²⁵

The limited use of mediation in the EU may be attributed to a certain degree of scepticism and a lack of knowledge about the process. Mediation could be perceived as a stalling tactic by the counterparty, or it can be considered as a (mandatory) bureaucratic step prior to litigation, resulting in a waste of time and resources. While courts and national legislators have experimented with mediation – for instance, Dutch courts with pilot programs in insolvency cases²⁶ and the Italian legislator studying the effects

22 de Ruyscher in Beerbühl/Cordes, p. 84.

23 Mocheva/Shah, TDM 2017, 1 (2); Menkel-Meadow in Steffek/Unberath, p. 419 et seqq

24 Wessels Eurofenix 2016, 24 (24); European Commission, ‘Green Paper on alternative dispute resolution in civil and commercial law’, 19.4.2002, COM(2002) 196 final; Section 652 no. a US Alternative Dispute Resolution Act 1998.

25 De Palo, ‘A Ten-Year-Long ‘EU Mediation Paradox’, When an EU Directive Needs to Be More ...Directive’ (European Parliament, 1.11.2018) <[www.europarl.europa.eu/RegData/etudes/BRIE/2018/608847/IPOL_BRI\(2018\)608847_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/608847/IPOL_BRI(2018)608847_EN.pdf)> (last accessed: 8.8.2024).

26 Adriaanse/van Beukering Rosmuller, TvA 2014, 113 (115); Draaijer/van Hees, ‘Pilot Mediation in Faillissementszaken’, Tijdschrift voor Insolventierecht 2013, 244 (246).

of mandatory mediation²⁷ – there is a lack of comprehensive data on the factors contributing to its success or failure. This significantly limits the ability to fully evaluate and understand the potential of mediation.

However, in contrast to the lingering scepticism, mediation offers a dynamic and beneficial alternative to dispute resolution through litigation. Its emphasis on collaboration, confidentiality, and voluntary participation aligns well with the goals of achieving equitable and efficient outcomes. The long legacy and historical evolution of mediation underscores its enduring relevance and adaptability, gradually making it a key component of modern legal systems worldwide. The adoption of mediation within the European Union reflects this global trend, driven by the EU institutions' commitment to improving access to justice and promoting efficient dispute resolution.

C. The EU Mediation Directive

In the evolution of the European Union's mediation framework, the EU Mediation Directive in civil and commercial matters 2008/52/EC (henceforth 'Mediation Directive') was adopted in May 2008. It represents a central pillar to increase awareness regarding ADR mechanisms across Member States. This directive is a legislative instrument that has played a crucial role in promoting mediation as a viable alternative to litigation within the EU.²⁸ The development and employment of mediation have gradually increased in the last two decades. This is partly due to the fact that mediation has become a more regulated area in law as a result of several legislative efforts and improving practices. This was not an easy journey because of a strong opposition due to a fear that regulated mediation processes might 'stifle the experimentation and flexibility which seemed to lie at the heart of these processes, and which make them potentially so attractive'.²⁹

The Mediation Directive's primary objective is to promote the amicable settlement of disputes by encouraging the use of mediation whilst ensuring a balanced relationship between mediation and judicial proceedings.³⁰ This directive applies to cross-border disputes in civil and commercial matters, excluding revenue, customs, or administrative matters, as well as

27 De Palo et al., p. 8.

28 Mediation Directive 2008/52/EC.

29 Wallis in Schonewille/Schonewille, p.10.

30 Art.1 no.1 Mediation Directive.

disputes involving state liability for acts or omissions in the exercise of state authority, namely the *acta iure imperii*.³¹ Hence, the Mediation Directive is intended to facilitate access to mediation procedures in cases where a party located in one Member State has a civil or commercial dispute with a party from another Member State.³²

The scope of the Mediation Directive was initially intended to cover a broader range of topics and more fields of law, but during its development, it was narrowed down to cross-border commercial and civil matters due to a resistance to regulating mediation in certain jurisdictions and apply it over all legal domains.

One of the key drivers behind this directive was the recognition of the aim to improve access to justice by promoting the use of ADR, and the need for a coherent and consistent approach to mediation across the EU with introduction of a predictable legal framework and harmonising mediation practices for cross-border disputes.³³ Prior to its adoption, mediation practices varied widely among Member States, with significant differences in the context, availability, regulation, and quality of mediation services.³⁴ The directive aimed to bridge these gaps by establishing minimum common rules that Member States would adopt into their national legislation, and hence, contribute to the ultimate objective of forming an area of freedom, security, and justice within the EU.³⁵

The Mediation Directive ensures that parties have the option to use mediation as an alternative to judicial proceedings. The Commission emphasizes that mediation should not be viewed as a poorer alternative to merely alleviate the burden on the court system, but rather, where suitable, as one of the available methods for dispute resolution within a modern society.³⁶ To foster mediation as an integral part of the dispute resolution

31 Art. 1 no. 2 Mediation Directive.

32 Art. 2 no. 1 Mediation Directive.

33 European Commission, 'Green Paper on Alternative Dispute Resolution in Civil and Commercial Law', 19.04.2002, COM(2002) 196, 5.

34 European Commission for the Efficiency of Justice Working Group on Mediation, 'The Impact of the CEPEJ Guidelines on Civil, Family Penal and Administrative Mediation', 16.5.2018, CEPEJ (2017), 8.

35 European Commission, 'Proposal for a Directive of the European Parliament and of the Council on Certain Aspects of Mediation in Civil and Commercial Matters', 22.10.2004, COM(2004) 718 final, Explanatory Memorandum, 2.

36 European Commission, 'Proposal for a Directive of the European Parliament and of the Council on Certain Aspects of Mediation in Civil and Commercial Matters', 22.10.2004, COM(2004) 718 final, Explanatory Memorandum, 4.

landscape, Member States are to incentivize its use and, where appropriate, even make it compulsory, provided that the parties are not prevented from exercising their rights of access to the judicial system.³⁷

The directive also highlights the importance of confidentiality in mediation. It mandates that mediators and parties involved in the process must not disclose information arising from the mediation sessions, except under certain circumstances, such as with the consent of the parties or for overriding public policy considerations.³⁸ The mediators are granted an immunity and they cannot be compelled to give evidence in civil and commercial judicial proceedings or arbitration regarding information arising out of, or in connection with, the mediation process. This confidentiality provision aims to foster an environment of trust, enabling parties to communicate openly and negotiate freely without fear of information being used against them in potential subsequent proceedings.

Another important aspect of the directive is its focus on the enforceability of mediated agreements. To enhance the credibility and reliability of mediation, the directive requires Member States to ensure that agreements resulting from mediation can be made enforceable. This may be achieved either by incorporating the agreement into a court judgment or by having it authenticated by a public authority.³⁹ By providing a clear path to enforceability, the directive reinforces the practical utility of mediation as a tool for resolving disputes.

The Mediation Directive also addresses the training and accreditation of mediators. These provisions focus on quality assurance in order to help build confidence in the mediation process and to ensure that parties receive effective, impartial, and competent assistance. Recognizing that the quality of mediation is heavily dependent on the skills and expertise of the mediator, the directive encourages Member States to ensure that mediators adhere to high professional standards as well as to support the development of codes of conduct and effective training programs.⁴⁰

Although it was hoped that the adoption of the EU Mediation Directive would significantly promote and increase the use of mediation across Member States, this goal has not been fully achieved for two main reasons. The first is the lack of practical provisions and guidelines. Whilst the

37 Art. 5 no. 2 Mediation Directive.

38 Art. 7 Mediation Directive.

39 Art. 6 no. 2 Mediation Directive.

40 Art. 4 Mediation Directive.

Mediation Directive aimed to set minimal standards for certain matters, such as confidentiality, it did not attempt to regulate the national mediation practices. Due to lack of guidance on how to put mediation into practice, its use remains relatively sparse, despite the records showing a high rate of settlements when parties resort to mediation.⁴¹ The second is that the directive does not bring a clear and predictable legal framework. The final text watered down the ambitious wording and definitions of the initial drafts and compromised on a minimum set of standards.⁴² The fear of stifling the natural development of mediation in practice and of negatively affecting its flexibility and diversity through implementation of a rigid regulation resulted in a lack of harmonization. The Member States were left with a very large margin of appreciation, allowing a considerable flexibility in how they implement and interpret the legal text based on their own local culture and practice. This somewhat defeats the purpose of having a clear and predictable framework for cross-border disputes.

Studies and evaluations on the impact of the Mediation Directive show that despite the national legislative developments in the mediation landscape, there is a problem in the practical application, due to the absence of a mediation 'culture', insufficient knowledge or awareness particularly dealing with cross-border cases, and absence or inadequacy of quality control mechanisms.⁴³ Therefore, there is unawareness or reluctance in resorting to mediation and courts remain hesitant to refer parties to mediation procedures. As a result, despite an average of 75 % success rate with mediation cases across Europe, this option was brought into play in only 1 % of conflicts.⁴⁴ Besides, the legal frameworks and practice remain divergent within the EU, leaving legal uncertainties unaddressed.⁴⁵ Thus, studies reveal that the Mediation Directive fails to sufficiently increase the use of mediation and close the gap between Member States in the interpretation, application, and regulation of mediation.

41 Schonewille/Lack in Schonewille/Schonewille p. 20.

42 European Commission, 'Proposal for a Directive of the European Parliament and of the Council on Certain Aspects of Mediation in Civil and Commercial Matters', 22.10.2004, COM(2004) 718 final.

43 European Commission, 'Report on the application of Directive 2008/52/EC', 26.8.2016, COM(2016) 542 final, 2.

44 European Parliament, 'Parliamentary question – O-000169/2012', 11.12.2012, verbatim report.

45 De Palo et al., p. 162.

Surprisingly though, in its report on the application of the Mediation Directive, eight years after its adoption, the Commission argued that no revision of the Directive was required.⁴⁶ The Commission did, however, acknowledge that the use of mediation remains weak and that this could be improved by court-application.⁴⁷ Again, while highlighting the untapped potential of mediation, the Commission leaves its development – or the lack thereof – unchanged.

Nonetheless, the directive has served to raise awareness on the usefulness of mediation and spurred further initiatives aimed at understanding of mediation among businesses, legal professionals, and the general public. On the one hand, in some countries, it led to the creation of comprehensive mediation systems, whilst in some others, it triggered the improvement and enlargement of the existing systems.⁴⁸ Overall, it is reported that there have been a very limited number of cross-border mediation cases. Consequently, the directive's impact on the growth of mediation is more significant in jurisdictions where the transposition also applies to domestic cases.

Despite its shortcomings, the Mediation Directive has been crucial in shaping a cohesive and effective mediation framework within the European Union. By promoting mediation, ensuring minimum standards such as confidentiality, guaranteeing enforceability, and emphasizing the quality of mediation services, the directive has laid the groundwork for a future more integrated and cooperative approach to dispute resolution. As mediation continues to gain traction, the directive serves as a groundwork to be built upon to further enhance the role of mediation in both domestic and international contexts. The EU should continue its efforts to evolve the mediation framework, as well as the principles and provisions of the directive for the purposes of enhancing legal coherence and for fostering stronger relations both within and beyond its borders.

46 European Commission, 'Report on the application of Directive 2008/52/EC of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters', 26.8.2016, COM(2016) 542 final, 4.

47 European Commission, 'Report on the application of Directive 2008/52/EC of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters', 26.8.2016, COM(2016) 542 final, 12.

48 European Commission, 'Study for an evaluation and implementation of Directive 2008/52/EC – the 'Mediation Directive'', 16.3.2016, 77.

D. The role of mediation in the current EU insolvency and restructuring framework

Prior to delving into the specific role mediation could play in the field of insolvency and restructuring, it should be stated that insolvency matters fall within the field of civil and commercial law, and thus would be considered within the scope of the Mediation Directive.⁴⁹ However, mediation remains largely underdeveloped in the field of insolvency and restructuring.⁵⁰ The main legislative texts regarding the EU insolvency framework, namely the European Insolvency Regulation and its Recast, have not addressed the use of mediation for such disputes.⁵¹ Neither does the recent Commission Proposal for Harmonizing Certain Aspects of Insolvency Law include any provisions with regard to mediation.⁵²

Nevertheless, in its report on the application of the Mediation Directive, the Commission recognized the potential and benefits of mediation for enhancing the efficiency and fairness of restructuring proceedings and has taken proactive steps to encourage the incorporation of mediation into the national restructuring frameworks.⁵³ The integration of mediation is thus deemed to be beneficial not only in insolvency and liquidation-oriented proceedings, but also in rescue and restructuring proceedings. Traditionally focused on litigation and court-driven processes, leading organizations in the insolvency field increasingly acknowledge the benefits of out-of-court restructuring and the use of mediation for restructuring purposes,⁵⁴ particularly during the negotiation phase, preceding the court approval of a restructuring plan.

49 Vriesendorp et al in Gant, p. 138.

50 European Commission, 'Report on the application of Directive 2008/52/EC of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters', 26.8.2016, COM(2016) 542 final, 5.

51 European Insolvency Regulation Recast 2015/848.

52 European Commission, 'Proposal for a Directive of the European Parliament and of the Council on harmonising certain aspects of insolvency law', 7.12.2022, COM(2022) 702 final.

53 European Commission, 'Report on the application of Directive 2008/52/EC of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters', 26.8.2016, COM(2016) 542 final, 5; B.9 no. a, European Commission, 'Recommendation on a new approach to business failure and insolvency', 12.3.2014.

54 World Bank Group, 'Principles for Effective Insolvency and Creditor/Debtor Regimes', 2021, 20.

Through various initiatives and guidelines, the Commission attempted to integrate the use of mediation, by focusing primarily on the role of mediation in restructuring. For example, the Commission Recommendation on a New Approach to Business Failure and Insolvency encouraged the Member States to incorporate mediation as a key component of their national restructuring frameworks.⁵⁵ This recommendation underscores the importance of early intervention and amicable settlement in preventing the escalation of insolvency cases into full-blown bankruptcy situations. It encourages the appointment of mediators by courts where they consider it necessary in order to assist the debtor and creditors in the successful running of negotiations on a restructuring plan.⁵⁶

A mediator can serve as the facilitator for the development of restructuring plans during pre-insolvency procedures, without the need to formally open court proceedings.⁵⁷ Mediation fosters a collaborative environment where stakeholders can engage in constructive dialogue, which is particularly important in cases where the debtor aims to avoid insolvency by negotiating a business roadmap and restructuring plan with its creditors. Moreover, such dialogue is crucial for the preservation of ongoing business relationships essential for the debtor's future viability. For instance, a mediated agreement might allow a business to continue operations, thereby preserving jobs and maintaining supplier relationships, which can be beneficial for the broader economy.⁵⁸

However, Member States were selective or even dismissive vis-à-vis this recommendation, meaning that many Member States, except from certain minor adjustments to their national legal framework, did not implement or disregarded the initiative completely. Consequently, variations persisted among the approaches adopted by different states, signalling ongoing disparities.⁵⁹

55 Recommendation 8 and 9 no. a, European Commission, 'Recommendation on a New Approach to Business Failure and Insolvency (2014/135/EU)', OJ 2014 L74/65.

56 Boon/Madaus in Adriaanse/van der Rest, p. 242.

57 European Commission, 'Staff working document impact assessment accompanying the document Commission Recommendation on a new approach to business failure and insolvency', 12.3.2014, SWD (2014) 62 final, 33.

58 European Commission, 'Proposal for a Directive of the European Parliament and of the Council on Certain Aspects of Mediation in Civil and Commercial Matters', 22.10.2004, COM(2004) 718 final, Explanatory Memorandum, 6.

59 Eidenmüller/van Zwielen, ECGI 2015; European Commission, 'Inception Impact Assessment, Initiative on Insolvency DG JUST (AI) 2016/JUST/025 Insolvency II', 3.3.2016, 4.

The Commission proposed a restructuring legislation which was adopted in 2019 as the EU Directive on Preventive Restructuring 2019/1023 (henceforth, 'Restructuring Directive') which has a primary objective to provide Member States with a coherent framework that allows businesses in financial difficulties to restructure at an early stage, thereby avoiding insolvency and maximizing value for all stakeholders involved.⁶⁰ Central to this framework is the concept of preventive restructuring, which seeks to address financial distress before it becomes irreversible, thus preserving businesses, jobs, and economic value.

From the earlier drafts of the Restructuring Directive, it was clear that the Commission envisioned mediation to play a crucial role in the preventive restructuring processes.⁶¹ However, prior to its adoption, the draft text of the Restructuring Directive was amended several times leading to the deletion of explicit reference to mediation and its definition⁶², as some Member States were reluctant for the inclusion of training and qualification requirements as well as the appointment of mediators.⁶³

Thus, the adopted Restructuring Directive has not followed with the earlier efforts in introducing mediation within the EU restructuring landscape.⁶⁴ The omission of explicit reference to mediation raises questions as to the completeness of the Restructuring Directive. Nonetheless, there continues to be some room for implementing mediation within the context and purpose of the Restructuring Directive, thanks to the traces of mediation breadcrumbs left in the final text. Instead of actively promoting mediation, it permits Member States to include out of court procedures within the national restructuring framework⁶⁵, and to put in place provisions limiting the court involvement to where it is necessary and proportionate, provided

60 EU Restructuring Directive 2019/1023.

61 Recital 18 European Commission, 'Proposal for a Directive of the European Parliament and of the Council on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU', 22.II.2016, COM(2016) 723 final.

62 Vriesendorp et al in Gant p. 142.

63 For more information, see Presidency of the Council of the European Union, 'Note to the Permanent Representatives Committee on the Proposal for a Directive of the European Parliament and of the Council on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU (8830/18)', 15.5.2018, 5.

64 Vriesendorp et al in Gant, p. 143; EU Restructuring Directive 2019/1023.

65 Recital 4 and Art. 4 no. 5 Restructuring Directive; Fannon/Gant/Finnerty, p. 185.

that the rights of relevant stakeholders are safeguarded⁶⁶. It also introduces a practitioner in the field of restructuring (often abbreviated as 'PIFOR') who, among others, has the task to assist the debtor or the creditors in drafting or negotiating a restructuring plan.⁶⁷ Here, the traces of mediation from the earlier drafts are noticeable as this practitioner seems to be taking over the tasks of the mediator previously promoted by the Commission in its earlier communications and proposals.⁶⁸

The PIFOR assists in designing a restructuring plan that addresses the interests of all parties involved and this process could be interpreted as to include facilitating discussions, identifying common grounds, and helping to overcome obstacles to agreement.⁶⁹ The wording of the process somewhat resembles the definition provided for mediation and the role of the mediator in the draft directive. The origin of this wording was a formulation in the proposal stating that 'the appointment of a restructuring practitioner, whether a mediator supporting the negotiations of a restructuring plan or an insolvency practitioner supervising the actions of the debtor, should not be mandatory in every case, but made on a case-by-case basis depending on the circumstances of the case or on the debtor's specific needs'.⁷⁰ This process, which could thus be interpreted as a mediation procedure, was introduced with the idea that the chances of reaching a consensual restructuring plan is higher and one that can be approved by the relevant authorities and implemented effectively. On the other hand, the very wide scope of the PIFOR roles raises questions as to its coherence and credibility, as it covers a spectrum ranging from tasks reminiscent of mediation and implying voluntariness and confidentiality, to reporting responsibilities to the court, and to potential subsequent functions for the implementation of a restructuring plan.

66 Recital 29 and Art. 4 no. 6 Restructuring Directive.

67 Art. 12 no. 12 and Art. 5 no. 3 Restructuring Directive.

68 European Commission, 'Recommendation on a new approach to business failure and insolvency', 12.3.2014; European Commission, 'Proposal on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU', 22.11.2016, COM(2016) 723 final.

69 Recital 30 and Art. 5 no. 3a Restructuring Directive

70 Recital 18 European Commission, 'Proposal for a Directive of the European Parliament and of the Council on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU', 22.11.2016, COM(2016) 723 final.

One of the key provisions of the directive is the introduction of early warning mechanisms designed to alert debtors to financial difficulties at an early stage.⁷¹ There is no pre-defined list of available tools, however, they should aim to encourage debtors to seek professional advice, to include consideration of mediation as a means to negotiate with creditors and other stakeholders, to help identify and implement restructuring solutions before a business' financial situation further deteriorates.⁷²

The directive includes revolutionary provisions to ensure the adoption of restructuring plans. Once a restructuring plan is negotiated and approved, it can be made binding on all affected parties, including dissenting creditors, provided that certain conditions are met, also known as the cram-down.⁷³ This enforceability is crucial for the credibility and effectiveness of restructuring, as it assures parties that their agreements, which may have been developed through mediation, will be respected and upheld by the legal system. Similarly, restructuring plans would have a higher chance of being agreed upon by voting parties if they had the chance to have inputs and interventions during the drafting of the plan, or if they went through a mediation process first. This is a more sustainable alternative as opposed to the plan being forced by the court.

The overarching aim of the directive is to create a more consistent and predictable environment for restructuring across the EU, making it easier for businesses to navigate financial difficulties and prevent insolvency.⁷⁴ This directive encourages Member States to search for new ways in rescuing businesses and avoiding adjudication.⁷⁵ This is also strengthened by the European Insolvency Regulation Recast, which, compared to the previous regulation, has a broader scope to include public proceedings based on insolvency related laws for the purpose of rescue, adjustment of debt, and restructuring.⁷⁶ However, whilst the Preventive Restructuring Directive represents a significant advancement in the EU's approach to restructuring as it places a strong emphasis on early intervention and the prevention of insolvency by facilitating the restructuring of viable businesses facing financial distress, it can be argued that it misses the opportunity for integrating an explicit mediation provision in the EU legal framework for restructuring

71 Art. 3 Restructuring Directive.

72 McCormack, p. 226.

73 Art. 11 Restructuring Directive.

74 Recitals 1 and 2 Restructuring Directive.

75 Jokubauskas, *Societal Studies* 2017, 244 (247)

76 Art. 1 EIR Recast.

and insolvency, and amalgamating potentially conflicting roles within a single individual. The references to mediation in the directive, though clear and convincing for those familiar with the *travaux préparatoires*, are merely implied and are vulnerable to different interpretations. Thus, the role of mediation in this field remains to be determined by national legislators and this results in, once again, an underdeveloped concept, open to potential divergences between Member States.

E. Further regulatory approaches: strengthening relations between the EU and Third Countries

I. Advantages of integrating mediation into cross-border insolvency and restructuring frameworks

Cross-border insolvencies occur when a debtor has assets or creditors in more than one country. As soon as more than one jurisdiction is involved in insolvency proceedings, cross-border insolvency laws come into effect.⁷⁷ These situations can present complex challenges due to the involvement of multiple jurisdictions, each with its own legal system, rules, and procedures. The intricacies of these cases often lead to conflicts of laws, jurisdictional disputes, and complications in the recognition and enforcement of insolvency proceedings.⁷⁸ Divergent legal standards and practices can lead to inconsistent outcomes, lengthy litigation, and increased costs, ultimately reducing the value of the debtor's estate available for distribution to creditors. Mediation could offer a promising solution for some of these challenges by providing a flexible, collaborative, and efficient tool for cross-border insolvency and restructuring matters. One of the primary benefits of mediation in cross-border insolvencies is its ability to provide a neutral ground for parties from different jurisdictions to come together and negotiate. Unlike litigation, which is adversarial and often conducted within the legal framework of a single jurisdiction, mediation allows for a more inclusive process where all parties can participate on an equal footing. This neutral environment encourages open communication and fosters trust, making it easier to reach consensus.

77 Bork, p. 1; Wessels, p. 1 et seqq.

78 Recital 8 EIR Recast.

The use of mediation could facilitate development of a restructuring plan among the debtor and multiple creditors and could also assist resolution of disputes within cross-border collective insolvency proceedings. The nature of insolvency inherently involves a multitude of competing claims and interests, which can lead to lengthy and costly legal battles if not managed effectively. Mediation can offer a pathway for resolving multiparty disputes, emerging between various stakeholders, including creditors, debtors, shareholders, employees, and other parties with vested interests. Experience shows that mediation can provide a forum where these parties can negotiate directly, aiming to find mutually acceptable solutions that can expedite the resolution process and reduce the overall costs associated with insolvency. Compelling examples highlighting the growing importance of mediation in high-profile cross-border insolvency and restructuring cases are the Lehman Brothers and General Motors cases.⁷⁹ In Lehman Brothers, mediation facilitated the resolution of nearly 95 % of disputes, streamlining the complex process of settling claims among numerous stakeholders in one of the largest bankruptcies in history.⁸⁰ Similarly, in the General Motors case, mediation played a crucial role in addressing post-bankruptcy claims that could have jeopardized the company's restructuring, ensuring a smoother path to recovery.⁸¹ Both cases, involving large multinational companies, underscore the value of mediation in achieving efficient, collaborative resolutions in complex cross-border insolvency situations.⁸²

A noteworthy case further underscores the growing importance of mediation in cross-border insolvency: the InterCement Brasil S.A. case.⁸³ This appears to be one of the first instances in which Chapter 15 provisional relief was granted under the U.S. Bankruptcy Code in connection with

79 Mocheva/Shah, TDM 2017, 1 (9); Dasan/Seow, 'Mediation in international insolvency disputes' (IAA 20.9.2015) <<https://insolventmediation.nl/media/uploads/file/25-Mediation-in-International-Insolvency-Disputes.pdf>> (last accessed: 7.8.2024).

80 In re Lehman Brothers Holdings Inc., Case No. 08-13555 (JMP) (Bankr. S.D.N.Y. September 15, 2011).

81 In re General Motors Corp., Case No. 09-50026 (REG) (Bankr. S.D.N.Y. June 1, 2009).

82 For more examples on mediation in large case insolvencies see Esher, ICR 2015, 349 (249 et seqq.).

83 Watson/Schaden, 'New York court recognises Brazilian mediation in Ch15 first' (GRR, 17.7.2024) <https://globalrestructuringreview.com/article/chapter-15-court-issues-provisional-relief-brazilian-creditor-mediation-process?utm_source=New%2BYork%2Bcourt%2Brecognises%2BBrazilian%2Bmediation%2Bin%2BCh15%2Bfirst&utm_medium=email&utm_campaign=GRR%2BALerts> (last accessed: 3.8.2024).

a court-supervised mediation process initiated in Brazil. A protective injunction proceeding was commenced in Brazil in support of an interim, court-supervised mediation process initiated by InterCement under Brazil's Bankruptcy Law, in furtherance or preparation of either an extrajudicial proceeding or a judicial reorganization.⁸⁴ The São Paulo Bankruptcy and Restructuring Court granted a 60-day injunction barring creditor action, and shortly thereafter the U.S. Bankruptcy Court for the Southern District of New York granted a provisional stay in the Chapter 15 cases. The Brazilian mediation later led to an agreement in principle with certain creditors and was converted into a consensual *recuperação extrajudicial* proceeding. In the subsequent Chapter 15 recognition analysis, the U.S. Bankruptcy Court treated the Brazilian mediation, together with the Brazilian extrajudicial and judicial reorganization proceedings, as part of the restructuring activity supporting Brazil as the debtors' centre of main interests. The case therefore underlines mediation's emerging role as an instrument in cross-border insolvency, potentially opening the door to deeper cross-jurisdictional collaboration in complex insolvency matters and facilitating cooperative resolutions in international restructuring cases.

Mediation can help preserve the value of the debtor's estate by facilitating faster and less adversarial resolutions through a simple, private, and flexible process, which is particularly important for small and medium sized enterprises (SME).⁸⁵ Litigation may be particularly burdensome for such businesses due to the cost, duration, and complexity, as well as its adversarial nature which can lead to reduced productivity, job losses, and long-term economic instability.⁸⁶ In this context mediation can serve as a restructuring support tool within the national framework,⁸⁷ as well as cross-border insolvencies, where the debtor has business operations and relationships with creditors, suppliers, and customers in multiple countries.

Furthermore, mediation can enhance fairness and transparency of insolvency proceedings. By involving all relevant parties in the negotiation process, mediation ensures that each stakeholder has a voice and can contribute to the formulation of a resolution.⁸⁸ In fact, the mediator's facilita-

84 Bacelar, *International Journal of Open Governments* 2022, 221 (224).

85 World Bank Group, 'Principles for Effective Insolvency and Creditor/Debtor Regimes', 2021, 33.

86 Atkins/Grassgreen, *INSOL World Sup.* 2021, 10 (10).

87 Sarra in Omar/Gant, p. 248; Madaus, *Eurofenix* 2017, 14 (15).

88 Recital 17 European Commission, 'Recommendation on a New Approach to Business Failure and Insolvency (2014/135/EU)', OJ 2014 L74/65.

tive role can discourage creditor holdouts which could arise due to a lack of trust, suspicion of information asymmetry, or fear of unequal treatment in case of involvement of different types of creditors. Mediation's inclusive and problem-solving approach could lead to more equitable outcomes, better compliance, and reduce the likelihood of disputes arising from perceptions of bias or unfair treatment. At the same time, the parties to a mediation enjoy privacy. This is particularly important for saving face, the business reputation and relations, but also for keeping commercial confidentiality.

The flexibility of mediation is another advantage. Mediation allows parties to craft bespoke solutions to the specific circumstances of the insolvency case. This is particularly important in cross-border insolvencies, where rigid legal frameworks may not adequately address the complexities involved. Through mediation, parties can explore a wide range of options, including debt restructuring, asset sales, and payment plans, to arrive at a solution that maximizes the value of the debtor's estate and meets the needs of all stakeholders.

In addition, mediation can significantly expedite the resolution of cross-border insolvency cases which is coupled with the need for reducing (court) cases and ensuring stability in the market. Traditional court proceedings in multiple jurisdictions can be protracted and cumbersome, often leading to delays that exacerbate the financial distress of the debtor. Mediation, by contrast, offers a more streamlined and efficient process. Mediators skilled in handling cross-border disputes can facilitate swift negotiations, helping parties to identify common interests and develop practical solutions that can be implemented more quickly than court judgments.

The overall simplification of national restructuring and insolvency frameworks has been a trend in the national and EU legislative efforts in the past decade. The practical application of mediation-like tools in insolvency law is supported by various national initiatives or legal reforms within Member States, such as Belgium, France, and Italy, which have implemented specific provisions to integrate mediation into their restructuring frameworks, offering structured out of court processes as part of the proceedings. These legislative reforms highlight a growing recognition of mediation as a vital component in restructuring and insolvency frameworks. In Belgium, Book XX of the Code of Economic Law encourages a mediation process as a pre-emptive measure to avert insolvency, allowing companies to restructure their debts out of court with the assistance of

a restructuring practitioner, *herstructureringsdeskundige*.⁸⁹ France has similarly integrated mediation-like processes into its insolvency proceedings through the *mandat ad hoc* and *conciliation*, which provide a structured environment for debtors and creditors to negotiate settlements provided that certain conditions are met.⁹⁰ Italy's Crisis and Insolvency Code also reflects this trend by offering businesses access to the *composizione negoziata della crisi*, where the negotiations over a restructuring plan are facilitated by an impartial expert, with the goal of preserving the business and safeguarding jobs.⁹¹ These national frameworks illustrate how mediation can be effectively woven into the legal fabric, providing flexible, efficient solutions that address the specific challenges of (cross-border) insolvencies.

In conclusion, the integration of mediation into cross-border insolvency and restructuring frameworks offers significant potential to address the complex challenges that arise when dealing with multinational cases. As seen in the Lehman Brothers and General Motors cases, mediation can play a pivotal role in facilitating efficient, collaborative resolutions across jurisdictions. In the EU, many national frameworks illustrate how reforms have already embraced or begun to incorporate mediation, setting the stage for broader adoption across the Union. As these practices continue to evolve, mediation could become an essential tool in ensuring fair, transparent, and expedient outcomes in cross-border insolvencies, ultimately benefiting all stakeholders involved.

II. Challenges in integrating mediation into cross-border insolvency and restructuring frameworks

There are several key issues to be addressed regarding cross-border insolvency and restructuring mediation, to include (1) the lack of a clear and predictable EU mediation framework, (2) little to no guidance on the practical application of mediation, (3) inconsistent enforcement mechanisms

89 See Art. I.23,7°/01 and XX.29/2 Belgian Code of Economic Law; For an overview of the Belgian restructuring framework see Taşman/Vanmeenen, HERO 2023.

90 See Art. L611-1 – L611-17 French Commercial Code (*prévention, mandat ad hoc, conciliation*); For an overview of the French restructuring framework see Ghio in Boon/Koster/Vriesendorp, p. 48.

91 See Art.12 and 21 Italian Insolvency Code by Law No. 155 of 19 October 2017 (*composizione negoziata della crisi*); See also Speranzin/Marotta, *Revista General de Insolvencias & Reestructuraciones* 2022, 207.

across the EU, and (4) the ambiguity surrounding the role of mediation in EU (cross-border) insolvency and restructuring.

A significant hurdle to integrating mediation into the insolvency and restructuring framework is the varying degree of acceptance and familiarity with mediation across different Member States. While some countries have relatively well-established mediation cultures, others are still in the early stages of adopting this approach. This lack of uniformity, combined with limited experience in handling cross-border cases and insufficient awareness of mediation processes and quality control mechanisms for mediators are some of the impediments for the application and effectiveness of mediation in cross-border insolvency cases.⁹² Ensuring the enforceability of mediated agreements stands out as a key challenge. Differences in enforcement mechanisms across jurisdictions can undermine the effectiveness of mediation, as the enforceability of settlement agreements often hinges on the parties' willingness to comply. The EU framework could enhance the credibility and reliability of mediation as a tool for resolving cross-border insolvency disputes by standardizing the process, which would help ensuring that agreements reached through mediation are legally binding and enforceable across all Member States.

Another challenge is the ambiguity surrounding the role of mediation and the need for mediators with expertise in cross-border insolvencies. These cases often involve intricate financial structures and complex legal issues that require not only specialized knowledge but also an understanding of language and cultural differences. The success of mediation in insolvency heavily depends on the mediator's expertise, which extends beyond general training and negotiation skills to include a deep understanding of insolvency law and financial matters. Identifying mediators with the appropriate qualifications and experience is therefore crucial for the effectiveness of the mediation process.⁹³ To address this, the EU should encourage Member States to develop robust training and accreditation programs for mediators, ensuring they are well-prepared to manage the unique challenges of cross-border insolvency mediation. Furthermore, the EU legislator needs to address the broad range of tasks and functions assigned to the practitioner

92 European Commission, 'Report on the application of Directive 2008/52/EC of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters', 26.8.2016, COM(2016) 542 final, 4.

93 Heath, *INSOL World Sup.* 2021, 6 (8).

in the field of restructuring, and resolve any potential conflicts between them throughout the restructuring process.

Although challenges remain, such as the varying levels of acceptance across Member States and the need for specialized mediators, these are outweighed by the substantial benefits of mediation. The EU should continue to strengthen its legal framework to support mediation in cross-border insolvencies, as it is poised to play an increasingly vital role in managing the challenges of global business operations and financial distress. Mediation remains a highly effective tool for addressing the complexities of cross-border insolvencies. Its ability to provide a neutral, efficient, and flexible process for dispute resolution makes it particularly well-suited to the multi-jurisdictional nature of these cases. While the Restructuring Directive missed the opportunity to fully develop an EU mediation framework in the restructuring and insolvency domain, the continued evolution of national restructuring frameworks presents an opportunity to integrate mediation more deeply into EU insolvency law. As Member States implement the directive and refine their approaches, the role of mediation is likely to become increasingly important in enhancing the prospects of successful restructuring and contributing to broader economic stability.

III. Overcoming challenges and addressing EU relations with Third Countries

The European Institute of Peace puts mediation at the forefront of global diplomatic and policy context and advocates for EU leadership should also apply to the EU influence across wider international matters, which would include insolvency and restructuring, stating that the EU ‘is a powerful global actor pursuing multiple objectives on the world stage, [deploying] its capabilities, whether political, security, economic or regulatory, more strategically to shape reality’ and regarding the role of the EU in mediation, the institute argues that a review of the EU’s mediation concept would provide an opportunity to generate debate and to define the parameters of the future of EU mediation frameworks as it would necessitate long-term commitment which, ‘given its global reach and longstanding presence in most countries in the world, the EU is well placed to provide’.⁹⁴

94 Keating, ‘Time to step up EU mediation?’ (European Institute of Peace, 1.6.2020) <www.eip.org/publication/time-to-step-up-eu-mediation/> (last accessed: 3.8.2024).

As discussed in the previous sections, the EU has made some progress in integrating mediation within its insolvency and restructuring frameworks, yet there remains considerable potential to further enhance this integration. By advancing mediation practices, the EU can not only improve its internal insolvency processes but also strengthen its relations with Third Countries. This section explores how the EU legislator can further push the integration of mediation in the restructuring and insolvency domain, and the benefits this would bring both within the EU and on the global stage.

To fully realize the potential of mediation in insolvency and restructuring, the EU legislator can focus on refining and harmonizing the existing legislative frameworks. The Mediation Directive and the Restructuring Directive have established a foundation, but additional steps are necessary to enhance their effectiveness. A comprehensive framework dedicated specifically to mediation in insolvency and restructuring, and the key actors for its effective practice, could be introduced, which could mandate that mediation services be available and set clear standards for their application.

It could be proposed that the EU should develop a legislative instrument requiring courts and insolvency practitioners to consider mediation as a preliminary step before proceeding into formal insolvency actions. This could be implemented through legislation motivating the courts to encourage mediation, and compulsory information sessions about mediation ensuring that all parties involved are aware of and consider mediation as a viable option. Uniform mediation standards should also be established to ensure that mediators in insolvency cases are adequately trained and accredited, with their functions clearly identified and delineated with respect to mediation's fundamental principles of voluntariness and confidentiality, thereby assuring functional clarity and maintaining high levels of expertise and professionalism.

In the context of cross-border insolvencies, also beyond the EU, mediation plays a crucial and increasingly indispensable role where the challenges of coordinating among creditors across multiple jurisdictions with differing insolvency regimes. The involvement of a mediator can be pivotal in facilitating parallel insolvency proceedings by helping parties navigate frameworks or protocols for cooperation and coordination across borders. In addition to aiding parties, mediators can also assist courts by narrowing and resolving substantive disputes that arise during these complex processes. Court appointment of the mediator can be critical not only within the EU, but also beyond. The United Nations Commission on

International Trade Law (henceforth 'UNCITRAL') Model Law on Cross-Border Insolvency (henceforth 'Model Law') stipulates that there should be cooperation and direct communication between the courts of different nations.⁹⁵ The appointment of a mediator in cross-border insolvency cases aligns closely with the cooperative mechanisms envisioned by Article 27(a) of the UNCITRAL Model Law as this provision explicitly allows for 'the appointment of a person or body to act at the direction of the court', thereby providing a legal foundation for courts to integrate mediation into the insolvency process.⁹⁶ Such an appointment not only fulfils the courts' obligations under the UNCITRAL Model Law, which mandates maximum cooperation with foreign courts and representatives, but also enhances the overall efficiency and effectiveness of cross-border insolvency proceedings.⁹⁷ Interpreting mediation as being part of the framework of the UNCITRAL Model Law would significantly bolster its flexibility and operational capacity as a modern, harmonized, and equitable insolvency support system. As courts recognize the benefits of mediation, such as cost and time savings, improved cooperation, and higher success rates in resolving complex cross-border disputes, we can expect a growing trend for its use. Hence, introducing new court procedural rules in local jurisdictions empowering courts with the authority to refer parties to mandatory mediation at any stage of the insolvency process would formalize and enhance the role of mediation in these proceedings. However, the existence of such rules specifically tailored to insolvency cases remains limited on a global scale. Expanding these procedural frameworks would be a significant step toward more consistent and effective management of cross-border insolvencies, ensuring that mediation becomes a standard practice rather than an exception in the international insolvency landscape. Moreover, the EU legislator could encourage establishment of cross-border mediation bodies comprising of mediators with separate divisions, including those who are experts in cross-border insolvency and restructuring. From an international perspective, and over time, such mediation bodies pioneered by EU can evolve to contribute to cross-border cooperation and/or inspire the setup

95 UNCITRAL, 'Model Law on Cross-Border Insolvency', 30 May 1997, GA/RES/52/158, arts. 25–26.

96 UNCITRAL, 'Model Law on Cross-Border Insolvency', 30 May 1997, GA/RES/52/158, art. 27.

97 UNCITRAL, 'Model Law on Cross-Border Insolvency', 30 May 1997, GA/RES/52/158, art. 25.

of more international mediation bodies complemented with cross-border insolvency divisions.

International mediation agreements often come without enforceability clauses, as to increase transactional costs as well as unpredictability.⁹⁸ Ensuring that mediated agreements are recognized and enforceable across Member States – and beyond – would necessitate development of clear EU-wide definitions, guidelines and procedures for the mutual recognition of mediation outcomes. The enforceability of mediated agreements should be rationalized, thereby enhancing the practical utility of mediation outcomes. Inspiration could be drawn from the United Nations Convention on International Settlement Agreements Resulting from Mediation (henceforth Singapore Mediation Convention), which came into force in September 2020.⁹⁹ It aims to facilitate the enforcement of international mediated settlement agreements across borders, offering a streamlined process that reduces the need for litigation in different jurisdictions.¹⁰⁰ This convention applies primarily to commercial disputes and provides the signatory countries with mechanisms to recognize and enforce mediated settlement agreements according to their procedural rules, unless, for example, in situations where the agreement is contrary to public policy or if the mediation process was flawed.

In the realm of cross-border mediation, the Singapore Mediation Convention plays a crucial role by providing legal certainty and assuring parties that their mediated settlement agreements will be recognized and enforceable in signatory states. This assurance encourages parties to opt for mediation in cross-border disputes, as it offers a reliable enforcement mechanism. The streamlined process of enforcement significantly reduces the time and costs associated with cross-border dispute resolution, making mediation a more attractive option. As such, this convention provides incentives to use of international mediation in cross-border insolvencies.

Adopting a mediation framework inspired by the Singapore Mediation Convention could align the EU's mediation practices not only within the internal market but also with those of third countries, facilitating smoother cross-border transactions and dispute resolutions. This alignment would strengthen international cooperation, as the EU would be able to establish

98 Lo, CAAJ 2014, 119 (129).

99 UN Convention on International Settlement Agreements Resulting from Mediation 2019.

100 Singapore Mediation Convention, Preamble, 3.

stronger legal and commercial ties with Third Countries by providing a reliable mechanism for resolving cross-border disputes.

As a key global standards setter, the use of EU definitions and practices could inspire Third Countries and vice-versa, leading to further international harmonization. The importance of establishing a cohesive and reliable legal framework for cross-border disputes cannot be overstated, as 'in an ever-increasing globalised world, disputes (...) do not stop at the outer boundaries of the European Union'.¹⁰¹ Offering such a stable and predictable legal environment would also enhance the attractiveness of the EU as a destination for trade and investment, ensuring that cross-border disputes can be resolved efficiently and amicably. The adoption of such principles would boost confidence among international investors and creditors, knowing that their mediated agreements will be respected and enforceable across borders. This would enhance legal certainty and predictability for businesses operating internationally and additionally, lead to a more robust and effective system for managing cross-border disputes within the EU, contributing to the overall stability and growth of the European economy.

Promoting the use of mediation through the sharing and continuous updating of know-how, including adherence to the European Code of Conduct for Mediators, could prove useful, as such initiatives can help align practices and advance the goals of globalization by reducing cross-border transaction costs associated with legal uncertainty, which stems, *inter alia*, from the need to gather information on applicable yet differing mediation laws, which may discourage the use of mediation in cross-border disputes.¹⁰² This alignment would facilitate cross-border mediation with Third Countries by promoting consistency and interoperability in mediation practices. In his key-note speech to the Singapore Global Restructuring Initiative Conference 2024, Judge Hon. Draï, very notably stated that 'over the last 25 years, mediation in all the foregoing forms has become commonplace in the realm of financial distress in the US, except for mediation in out-of-court, pre-bankruptcy workouts. Interestingly, during the last decade European states (...) incorporated mediation in their law in just that pre-insolvency proceeding context', to imply that, from the perspective of incorporating mediation in insolvency law, pre-insolvency stage, some EU

101 Hopt/Steffek in Hopt/Steffek, p. 8.

102 Alexander in Hopt/Steffek, p. 138.

Member States are before the USA.¹⁰³ This statement is maybe outside of general expectations and perceptions, but it certainly merits consideration and deeper analyses, which are beyond the scope of this contribution.

In addition to legislative measures, promoting awareness and education about mediation is vital. Educational campaigns across the EU could be launched to inform businesses, legal professionals, and the public on the benefits of mediation and associated processes. These campaigns could include workshops, seminars, and online resources to broaden the understanding and acceptance of mediation. Incorporating mediation training into the curricula of law and business schools would ensure that future professionals are well-versed in mediation practices. Such educational initiatives would help embed mediation into professional practice and foster a culture that values ADR methods. Additionally, providing EU support for the establishment and operation of mediation centres, particularly in regions where mediation is less developed, could further advance the integration of mediation. These centres could serve as hubs for mediation-related training, resources, and services.

Furthermore, technological solutions, such as secure online platforms for virtual mediation sessions, electronic knowledge and data repositories, and AI-assisted mediation tools could further support cross-border mediation. These platforms, in addition to enabling parties from different countries to participate in mediation without the need for physical travel, would make the process more efficient and accessible, at least by breaking the language barriers. Recent studies argue that (AI-assisted) e-mediation is a practical and cost-effective way to address out-of-court conflict resolution, fostering more intensive use of mediation across the Globe.¹⁰⁴

If the EU further develops its legislative framework and practical implementation tools, it could position itself as an important participant in a broader international dialogue on mediation in insolvency, sharing its experience while also learning from third-country practices and global standards. EU experience may serve as a source of inspiration for national reforms, while education, training, and technical assistance could create opportunities for mutual learning between the EU and third countries. Rather than promoting a fixed model, such cooperation could support the

103 Drain, 'Beyond the Court: Mediation in Restructuring and Insolvency Cases' (SMU, 4.8.2024) <<https://ccla.smu.edu.sg/sgri/blog/2024/08/04/beyond-court-mediation-restructuring-and-insolvency-cases>> (last accessed: 8.8.2024).

104 Giacalone/Giacalone *Diritto del Commercio Internazionale* 2022, 343 (358).

gradual convergence of definitions, methods, and principles, while remaining attentive to local legal cultures and institutional needs.

In conclusion, advancing mediation integration within the EU insolvency and restructuring framework is a strategic move that could enhance both domestic and international dispute resolution processes. By refining legislative frameworks and enhancing practical application, promoting education, strengthening cross-border mechanisms, and engaging with Third Countries, the benefits of mediation can be more fully harnessed. These efforts will not only improve the efficiency and effectiveness of insolvency and restructuring proceedings within the EU but also bolster relations with Third Countries, fostering a more stable, reciprocal, and cooperative global economic environment.

F. Conclusion

The integration of mediation into the EU insolvency and restructuring framework represents a critical evolution in managing financial distress and disputes. Mediation, with its inherent flexibility, confidentiality, and collaborative nature, offers a valuable approach to resolving insolvency issues, which have traditionally relied on more adversarial and rigid legal processes. Integrating mediation could enhance insolvency resolution both within the EU and in its interactions with Third Countries.

Mediation has emerged as a valuable alternative to traditional litigation in insolvency cases. Its benefits, ranging from cost-efficiency and speed to the preservation of business relationships, make it an appealing choice for resolving disputes. Historically, mediation has grown from a less formal practice into a recognized and widely accepted method of dispute resolution. This evolution underscores its potential to address complex insolvency cases effectively, especially when parties face significant financial and operational challenges.

The EU has made attempts in embedding mediation within its insolvency and restructuring framework through legislative initiatives. The Mediation Directive established fundamental standards for cross-border mediation, with the aim of facilitating more consistent and effective dispute resolution across Member States. The Restructuring Directive clearly leaves room for integrating mediation into preventive restructuring efforts. Nonetheless, this remains short of enhancing the use of mediation in practice due to lack of a clear and predictable EU mediation framework. The

current laws provide limited guidance on the practical application of mediation, along with consistent enforcement mechanisms across the EU, and are marked by ambiguity surrounding the roles of mediation and mediator in EU cross-border insolvency and restructuring.

Mediation promises a significant capacity to address the complexities of multiple jurisdictions in cross-border insolvencies. These cases involve multiple legal systems and conflicting interests, which can lead to protracted and costly disputes. Mediation provides a neutral platform where stakeholders from different countries can collaboratively negotiate solutions. This approach not only accelerates the resolution process but also reduces the costs and disruptions associated with multi-jurisdictional litigation. The ability of mediation to foster cooperation and mutual understanding is particularly valuable in these situations, enabling tailored solutions that address the unique needs of all parties involved.

To further enhance the integration of mediation within the EU insolvency and restructuring framework, several measures can be considered from refining legislative frameworks, promoting education, to strengthening cross-border mechanisms. In parallel, cooperation with international organizations and Third Countries could contribute to the development of shared standards and mutual learning in mediation. These efforts will not only improve the efficiency and effectiveness of insolvency and restructuring processes within the EU, but also support more reciprocal relations with Third Countries, contributing to a more stable and cooperative global economic environment.

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Information and communication technologies in cross-border insolvency – A brief look

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Abstract:

The contribution takes a short look at the developing legal framework for the use of IT in cross-border insolvency, mainly from the perspective of the EIR and other EU law.

Keywords: Information technology law; cross-border insolvency, recent trends and developments.

The use of information and communication technologies (ICT or IT) is present today in all spheres of society, including the judiciary. This is also true for insolvency proceedings. IT can significantly enhance the efficiency of proceedings, but entails also various risks such as instability or unreliability of the technical systems, incompatibility of different systems or issues of confidentiality and data protection. This applies also to proceedings with a cross-border dimension. The following contribution takes a very quick look at this extremely dynamic area of IT law in relation with cross-border insolvency.

A. Legal sources

National legislators started to regulate the use of IT in the judiciary, including insolvency proceedings, already some decennies ago, but the legislative process is still ongoing and on the international scale practice is rather divergent¹. Starting from first legislative steps in the field of electronic com-

1 For a comparative overview see Aurelio Gurrea-Martínez, *The Digitalization of Insolvency Proceedings*, *International Insolvency Review* 2025, pp.475 – 491, available at <https://onlinelibrary.wiley.com/doi/10.1002/iir.70003> and Gobile, Awoyemi, Ogunwale, *Cross-Border Insolvencies in the Digital Age: Challenges and Opportunities*

merce, the EU has in recent years developed a strategy on ‘Digitalisation of justice in the European Union’², which has led to a number of legislative acts (such as the e-Codex Regulation of 30.03.2022³) and is still evolving. An important recent act is the Regulation 2023/2844 of 13.12.2023 on the digitalisation of judicial cooperation and access to justice in cross-border civil, commercial and criminal matters, which unifies some technical aspects of the use of IT in cross-border judicial cooperation within the EU and applies also to cross-border insolvency law⁴.

Beyond this, both the EIR and the EU Restructuring Directive 2019 contain specific provisions on the use of IT in insolvency proceedings, and the new EU Insolvency Directive 2026/799 of 30 March 2026⁵ adds some further rules. Also, artificial intelligence is playing an ever growing role in the judicial sphere as well and undergoes its own particular regulation⁶.

UNCITRAL started early in the field of electronic commerce⁷, but has not developed more detailed rules in direction of digitalisation of justice, with some exceptions as to arbitration and mediation⁸. UNCITRAL’s texts on cross-border insolvency law do not specifically address the use of IT, but the use of IT is implicitly included in the general rule on efficient cross-border cooperation. The same is basically true for Unidroit, although digitalisation of civil procedure is mentioned as a particular topic in the ELI/Unidroit Model European Rules of Civil Procedure⁹.

for International Bankruptcy Law, *Int. J of Multidisciplinary Research and Growth Evaluation* 2024, 1393–1400, DOI: 10.54660/IJMRGE.2024.5.4.1393 – 1400.

2 Cf. the European Commission’s Communication on digitalisation of justice in the EU of 02.12.2020, <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=COM:2020:710:FIN>.

3 <https://eur-lex.europa.eu/eli/reg/2022/850/oj/eng>.

4 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52022PC0702>.

5 <http://data.europa.eu/eli/dir/2026/799/oj>.

6 Cf. the EU Artificial Intelligence Act of 2024, <https://artificialintelligenceact.eu/>.

7 See <https://uncitral.un.org/en/texts/ecommerce>.

8 See, e.g. Art.7 Model Law on International Commercial Arbitration (as revised in 2006), and the current work of Working Group II (Dispute Settlement) on an instrument on recognition and enforcement of electronic arbitral awards, s. https://uncitral.un.org/en/working_groups/2/arbitration-.

9 See, e.g., Rule 18 (4) of the Model Rules and Comment 7 on Art.18, see also the points made in the Preamble to the Model Rules, subsection VIII (including remarks on artificial intelligence), <https://www.europeanlawinstitute.eu/projects-instruments/instruments/eli-unidroit-model-european-rules-of-civil-procedure/>.

B. Issues

Bringing the provisions of EU law on the use of IT in insolvency proceedings (including cross-border cases and cooperation) into a system, one can distinguish general and specific rules, with specific rules corresponding to the major topics/stages of insolvency proceedings.

Generally, the rule of conducting insolvency proceedings in an efficient manner, includes also the use of IT. This is specified in Art. 28 of the EU Restructuring Directive 2019 as to electronic communications between the participants of insolvency proceedings and the insolvency organs including the insolvency court. Art. 3 and 4 of the IT in Judicial Cooperation Regulation 2023 add to this the requirement (with some exceptions) of using a 'secure, efficient and reliable decentralised IT system', including the 'European electronic access point shall be established on the European e-Justice Portal'.

Other general rules relating (directly or indirectly) to insolvencies provide for the establishment and the interconnection of insolvency registers in the EU member states (Art. 24 – 27 EIR) as well as for publication (including entry into public registers) of insolvencies in (EU member) countries outside the forum concursus (Art. 28, 29 EIR). Going beyond concrete insolvency proceedings, Art. 3 (3) of the EU Restructuring Directive 2019 provides for online access to early warning tools. As a general information tool, Art. 51 of the EU Insolvency Directive 2026 foresees Member States' 'fact sheets' of core elements of national insolvency laws as a tool for transparency, which are to be made available on the European e-Justice Portal.

More specifically, lodging of claims by foreign creditors through electronic communications is foreseen by Art. 53 EIR, but this right is granted only under applicable national law, and the notion of foreign creditor under the EIR does not include creditors domiciled outside the EU. Art. 28 of the EU Restructuring Directive 2019 now explicitly guarantees the right to electronic filing of claims on the EU level, without distinction according to the domicile of creditors¹⁰. However, details of filing are still governed by applicable national law, in so far as the European Commission does not pass secondary normative acts.

The use of videoconferencing or other distance communication tools by (among others: insolvency) courts is foreseen by Art. 5 of the IT in

¹⁰ Art. 28 is not limited to lodging of claims, but applies also to notification of creditors, submission of plans, filing challenges and appeals.

Judicial Cooperation Regulation 2023, but depends on the availability of such means on the national level. Similarly, Art. 47 (3) of the EU Insolvency Directive 2026 states that ‘Member States shall provide that the members of creditors’ committees are allowed to participate and vote either in person or via electronic means’.

The issue of asset tracing in or for the conduct insolvency proceedings is addressed in Art.14 -20 of the EU Insolvency Directive 2026, which distinguishes between asset tracing through access to bank information (available for designated courts or administrative authorities of EU Member States, be it in cooperation with insolvency practitioners), and access to beneficial ownership registers and national asset registers (available for insolvency representatives of EU Member States). Asset tracing at the request of courts or administrative authorities or insolvency representatives of third countries is not foreseen. In addition, Art.50 – 54 of the draft EU Insolvency Directive foresaw the introduction of electronic auctions as a uniform standard in the EU, though only for insolvency microenterprises, and the respective Title VI. of the Commission’s proposal was dropped in the legislative process¹¹.

Generally speaking, EU law is currently in a process of step-by-step widening and specifying the legal framework for the use of IT in insolvency proceedings, including cross-border cooperation. This is done in an interplay with general provisions of IT law and (cross-border) civil procedure.

C. Summary and recommendations

In the present very dynamic development of EU legislation on the use of IT in insolvency proceedings it is difficult to determine specific provisions on this topic relating to non-EU countries. It would seem preferable to include some general rule into the EIR opening the way to the use of IT in cross-border cooperation also in relations with non-EU countries ‘as far as feasible’ and conditioned on some kind of agreement, be it on the level of the European Commission or Member States. This would also align with the (more general) formula of cooperation under the MLCBI.

11 Cf. https://www.europarl.europa.eu/doceo/document/A-10-2025-0126_EN.html.

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The application of international insolvency law within and outside the OHADA space: issues and challenges

Ngaundje Doris Leno

Abstract:

Currently, there is no international law to govern cross-border insolvency on a global basis. Instead, the international landscape is characterised by patchwork of national and regional insolvency laws to accommodate cross-border insolvencies. These differences can lead to difficulties in dealing effectively with insolvencies that have a cross-border dimension. As a matter of fact, the development of the international insolvency provisions within the Organisation for the Harmonisation of Business Law in Africa (OHADA)'s Insolvency Act (OIA) provides clarification of the law to be applied in respect of cross-border insolvency within and outside the OHADA space. This paper seeks to tackle four important aspects: OHADA's international insolvency rules; its application and shortcomings. The paper ends with a proposal for reform of OHADA's current international insolvency law and the development of a cross-border insolvency regulation within the European Union. For a region where the practice of insolvency is relatively low, an article of this kind would contribute to the development of the practice of insolvency in the OHADA region. Theoretically, it would add to the existing body of knowledge and serves as a guide for future research in Cameroon in particular and the OHADA region in general.

Keywords: OHADA, Insolvency Act (OIA), UNCITRAL, EIR, cross-border insolvency (CBI), intra-OHADA cases; third-country relations, recognition, settlement, enforcement

A. Introduction

The global culture of business has culminated in the enactment of international business laws by States and organisations. As a matter of fact, the Organization for the Harmonisation of Business Law in Africa (OHADA)

has enacted several commercial laws;¹ one of which is the Uniform Act organising Collective proceedings for the Wiping off of Debts otherwise known as the 'OHADA Insolvency Act-OIA'.² The OIA contains both national and international insolvency provisions. The international insolvency provisions regulate the financial distress of a debtor who has assets in more than one Member States of OHADA. Generally, when this happens, it leaves one to wonder about the applicable law. Undoubtedly, differing substantive laws will lead to some problems. First and foremost, it will lead to the opening of diverse insolvency proceedings as it will not be practical to introduce insolvency proceedings with universal scope. Also, it will be costly and very difficult for insolvency representative to administer the insolvent estate.

In my considered opinion, until the laws on insolvency are harmonised or uniformed, there will be problems in the administration of insolvent estates and in the distribution of bankrupt debtor assets; an indication that a uniform approach in relation to cross-border insolvency would be beneficial. A uniform law would bring transparency and clarity to the area of recovery of debts and reduce the transaction costs for the financial sector when deciding whether to carry on business in more than one jurisdiction.³ The OHADA legislators saw the need and possible benefits in adopting a uniform insolvency approach. Today, the Member States of OHADA enjoy a uniform insolvency law with international insolvency provisions. The objective of this article is not to provide a detailed exposition of OIA, but rather to discuss the rules of OHADA's international insolvency law, its application and shortcomings. To attain these objectives, the article employs the doctrinal and exploratory research designs. The relevance of

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- 1 Art 2 of the OHADA treaty refers to the different uniform acts adopted the council of ministers. They include regulations relating to company law, the definition and classification of traders, recovery procedures measures of enforcement, liquidation and administration proceedings and arbitration, labour law, accounting law and carriage and sales of goods.
 - 2 The New Uniform Act Organizing Collective Proceedings for Wiping off Debts dated 10 September 2015 (otherwise called the 'OHADA Insolvency Act'). Underlying this is the aim to speed up and strengthen the efficiency of insolvency proceedings, facilitating the safeguard of viable companies and the substantial payment of creditors, and thereby leveraging access to better financing for businesses; Art. 1, OHADA Insolvency Act.
 - 3 McCormack et al., Study on a new approach to business failure and insolvency Comparative legal analysis of the Member States' relevant provisions and practices (European Commission, January 2016) <https://ec.europa.eu/info/sites/default/files/insolvency_study_2016_final_en.pdf> (last accessed 18.05.2022).

this article cannot be overemphasized. The article would contribute to the development of the practice of insolvency within the OHADA region. Theoretically, it would add to the existing body of knowledge and serve as a guide for future research in Cameroon in particular and the OHADA region in general

B. OHADA international insolvency law

Today, the Member States of OHADA enjoy a uniform insolvency law with international insolvency provisions. The provisions are part and parcel of the OIA and are copiously modelled on the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Cross-Border Insolvency (MLCBI)⁴ and the European Union Regulation on Insolvency Proceedings ('EIR').⁵ This gives the provisions an international flavour, which in turn promotes wide acceptance of OIA. Considering that OHADA is at the forefront in the development of uniform insolvency law, we can say with certainty that the law provides practical lessons for states or regional bodies in the development of uniform insolvency laws.⁶

The international insolvency provisions address effectively cross-border insolvency (CBI) within and outside the OHADA space. One of the features of the law is that it provides for collective debt collection mechanisms through which an insolvent debtor's assets are pooled together for the benefit of all the creditors.⁷ The opening of these proceedings stays all individual lawsuits by creditors against the assets of the debtors as well as the accruing of legal and contractual rights.⁸ As a matter of fact, once insolvency is initiated, all the creditors are grouped together and represented by a trustee whose responsibility is to ensure that the interests of the creditors are protected. Another significant feature of the proceedings is the principle of *creditorium* parity or the *pari passu prorata parte* principle which aims to provide justice to creditors with the concept of proportional justice, which

4 UNCITRAL, 'Model Law on Cross-Border Insolvency', 30 May 1997, GA/RES/52/158.

5 The EC Regulation on Insolvency Proceedings ('EIR') was adopted by the Council of the European Union on 29 May 2000 and came into force on 31 May 2002.

6 Leno, 'Development of a Uniform Insolvency Law in SADC: Lessons from OHADA', pp 259–282.

7 See INSOL Europe, 'Insolvency Proceedings; A Double-Edged Debt Collection Tool' <www.insol-europe.org/documents> (last accessed 18.05.2022).

8 Arts 74–77 OIA.

emphasises on fairly and evenly distribution of debtor's assets to creditors in a more just manner in accordance with the proportion referred to in articles 166 and 167 of the OIA.⁹Against this backdrop, this section presents the application of the law within and outside the OHADA space with the aim of highlighting its shortcomings.

I. Cross-border insolvency within the OHADA region

Within OHADA, cross-border insolvency (CBI) refers to a situation where an insolvent debtor has assets across the region. A glaring example is that of an insolvent debtor in Cameroon who has assets in Senegal, Mali and Gabon. It poses no problem resolving insolvency between these countries because they are governed by a uniform law on CBI. The advantage of the uniform law is that it provides clarity of the applicable law, competent court and certainty of participation and treatment of creditors. When CBI sets in, the law requires the directors to take some form of action, and this generally involves filing for insolvency before the competent court¹⁰ which is territorially limited to the place where the debtor has its registered office (corporate body) or principal place of business (individual).¹¹ It follows from the Cameroonian law on judicial organisation that the competent court would depend on the amount of the disputed claim.

In the light of the law on judicial organisation,¹² the court of first instance has jurisdiction over matters where the amount of damages claimed does not exceed 10 million CFA francs while the high court has jurisdiction over matters where the amount of damages claimed exceeds 10 million.¹³In Senegal, the commercial courts are competent to adjudicate on insolvency issues, an indication that there is no specialised bankruptcy court in the OHADA region. The time in which this must be done is within 30 days of

9 Winanto/Sulistiyono/Muryanto, ICGLOW 2019, p. 288, < https://www.researchgate.net/publication/337753592_Analysis_of_Equality_on_Creditor_Standing_Principle_on_The_Process_of_Arrangement_and_Settlement_of_Bankruptcy_Asset_in_Indonesia > (last accessed 18.09.2022).

10 Art. 25 of the OIA demands that the director files in a statement of insolvency supported with relevant documents such as certificate of incorporation and others as indicated in arts 26 of OIA.

11 Ibid, Art. 3 (1).

12 Law No. 2006/015 of 29th December 2006 as amended and supplemented by Law No. 2011/027 of 14th December 2011.

13 Ibid, Sections 15 (1) (b) and 18 (1) (a).

insolvency, failing which, the directors incur criminal penalties¹⁴ according to the penal codes of the Member States. For instance, in Cameroon, the directors shall be punished with imprisonment for from 1 (one) month to 2 (two) years.¹⁵

In the event of CBI, two types of proceedings may be opened: main bankruptcy proceedings (MBP) and secondary bankruptcy proceedings (SBP), the difference of which lies in the fact that the MBP is universal in nature while SBP is territorial in nature. According to the law, the MBP shall be opened in the Member State within the territory of which the centre of the debtor's main interests is situated. The centre of the insolvent's main interests is situated in the Member State where the debtor has its registered office (case of a legal entity) and principal place of business (case of a self-employed individual).¹⁶ When the MBP is opened, it has an international scope in that it encompasses all assets of the debtor¹⁷ and creditors wherever located in the region. In order to ensure equal treatment of creditors, a creditor who has, in the course of bankruptcy proceedings, obtains through any means total or partial satisfaction of his/her claim, is required to return what has been obtained to the trustee of the opening proceedings.¹⁸

On the other hand of the continuum, the trustee, that is, the administrator or liquidator may exercise all the powers conferred on him/her by the law throughout the Member States, provided no other proceedings has been opened in the other Member States.¹⁹ Although the appointment and powers of trustees are automatically given under the law, it is likely that, from a practical point of view, it will be necessary for him/her to work with the Member States in which he intends to exercise his powers; as the Member States are in control and supervision of trustees in the performance of their duties.²⁰

14 Ibid.

15 Section 332 (1) c of Law No. 2 0 1 6/ 00 7 12 July 2016 relating to the Penal Code of Cameroon.

16 Art. 3 (1) OIA provides that 'the court territorially competent to adjudicate all procedures covered by this Uniform act shall be within the jurisdiction of which: – the individual debtor has its principal establishment on the national territory; or – The debtor company's registered office is located in the national territory'.

17 Art. 251 OIA.

18 Art. 250.

19 Ibid, Arts. 249 and 251.

20 Ibid, Art. 4–6. Supervision include investigation, verification, auditing of accounts and documents held by the trustee.

The general principle of the law is that any judgement opening the MBP, settling issues arising from the proceedings and closing down of the proceedings handed down by a court of a member state is *res judicata* on the territory of the other Member States from the time that it becomes effective in the state where proceedings are opened.²¹ In fact, it is to be recognised by all the Member States. Though binding, the judgment is not enforceable in all the Member States because the Member States of OHADA are not parties to a treaty on the enforcement of CBI judgments.²² As such, enforcement is in accordance with the national laws of Member States. In Cameroon for instance, enforcement is in accordance with the 2007 law.²³ Under the law, a party who seeks for enforcement of foreign court judgment in civil and commercial cases must provide a copy of the decision, original copy of proof of service of the decision and a certificate of non-appeal. The lack of a uniform act on Enforcement of CBI judgements can lead to difficulties in dealing effectively with enforcement that have a cross-border dimension.

In addition to the main bankruptcy proceedings (MBP), the law provides debtors and creditors with an opportunity to submit a bankruptcy petition also in the other Member State where the debtor has an establishment and assets. This type of proceedings is called the secondary bankruptcy proceedings (SBP) and it has to be noted that the effect of the secondary proceedings is restricted only to the assets of the debtor situated in the territory where the debtor has an establishment.²⁴ It should be mentioned that when is carried out in parallel to the main insolvency proceedings, that is, concurrently or simultaneously, the trustees of both proceedings are bound to cooperate in the exchange of information relating to the filing and verification of claims as well as the distributions of proceeds realised from the sale of assets.²⁵

Both main and secondary proceedings take place based on the principle of mutual coordination and should not favour some creditors to the detriment of others. While creditors are at liberty to file in their claims in any

21 Ibid, Art. 247.

22 Some member states have ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Award of 1958.

23 Law No.2007/001 of 19 April 2007 relating to the Enforcement of Foreign Court Judgments.

24 Ibid, Art. 251.

25 Art. 252.

of the proceedings,²⁶ each creditor should only be entitled to participate in the distribution of the total assets in other proceedings if creditors, who are in the same position, receive the same proportionate share of their claims.²⁷ This goes to ensure equality between creditors and hence predictability. The complementary nature of these proceedings is also reflected in the fact that if there are funds remaining after settlement of liabilities in the secondary proceeding, they are subsequently transferred to the main proceeding. In a nutshell, whether main or secondary, the international insolvency provisions will automatically apply throughout the rest of the OHADA region.

II. Cross-border insolvency outside the OHADA space

Here we are looking at the case of an insolvent with assets outside the OHADA space. A case in point is that of an insolvent say in Cameroon who has assets in Nigeria and South Africa. Considering that these countries are not parties to a treaty relating to a uniform insolvency law, it is obvious that the insolvent would be subject to diverse insolvency proceedings opened in accordance with the laws of these countries respectively. While it would be costly for the insolvent, it will also be time consuming for him for her. Assuming the trustee in the local proceedings opened in Cameroon is seeking for recognition of the local proceedings from South Africa or Nigeria, he or she would have to do so in accordance with the laws of the foreign countries. On the other hand of the continuum, if a representative from South Africa or Nigeria is seeking for recognition of the foreign bankruptcy proceedings (FBP) opened in respect of assets in Cameroon, he would do so in accordance with the OIA. The OIA allows for recognition of FBP and cooperation between courts and insolvency representatives.

Article 256 (16) of the OIA lays down the conditions for the recognition of FBP. On the strength of article 256 (16), a FBP will be recognised if it is a foreign proceeding; if the representative requesting for recognition is a foreign representative and if an application is submitted to the competent court of the member state to which the request for recognition is presented. The application is accompanied by a certified copy of the decision to open the FBP and appointing the foreign representative; certificate of the foreign

²⁶ Ibid, Art. 253.

²⁷ Ibid, Art. 255.

jurisdiction to open FBP and appointing the foreign representative; statement of all proceedings known to the foreign representative and translated version of the documents in any of the official language (s) of the state to whom the application is presented.²⁸ In Cameroon for instance, the application will be accompanied by documents translated in English and French, both of which are the official languages as prescribed in article 1 (3) of the Constitution of the Republic of Cameroon.²⁹

A point to note further is that the request for recognition does not subject the foreign representative, the affairs and assets of the debtor within its jurisdiction to the jurisdiction of the local court (territorial approach).³⁰ Pending recognition, the local court may take at the request of the FR provisional measures for the preservation of the debtor assets and protection of creditors' interests.³¹ In taking the provisional measures, the court may freeze the assets of the debtor and entrust the administration of perishable goods in the hands of the foreign representative or trustee appointed by the competent local court.³² It is not clear for how long these measures would last before recognition (limitation period).

Once a FBP is recognised, the foreign representative acquires the power to request for the opening of local bankruptcy proceedings in the member state of OHADA in which the assets of the insolvent are located.³³ He may equally participate in the local proceedings.³⁴ As for the creditors, those domiciled in the foreign state have the same rights as those in the local proceedings in respect of filing of claims.³⁵ This does not affect the priority rank of claims referred to in articles 166 and 167 of the OIA.³⁶ Notice to local creditors are served on foreign creditors individually stating the time

28 Art. 256–14.

29 Law No. 96–06 of 18 January 1996 to amend the constitution of 2 June 1972. Per Art 1 (3) of the Cameroon's constitution, the official languages of the republic of Cameroon shall be English and French, both languages having the same status. The state shall guarantee the promotion of bilingualism throughout the country. It shall endeavour to protect and promote national languages.

30 Arts. 256–8 and 256–9.

31 Ibid, Art. 258–18–20.

32 Ibid, Art. 256–18.

33 Art. 256–10.

34 Art. 256–11.

35 Ibid, Art. 256–12.

36 Ibid.

limit to file for claims³⁷ which is 90 days for foreign creditors and 60 days for local creditors.³⁸

When both foreign and local proceedings are conducted simultaneously or concurrently in respect of the same debtor, the courts and competent authorities of the foreign state and local court are bound to cooperate.³⁹ This is to ensure greater legal security in trade and investment; maximise debtor's assets, protection of all creditors, interested parties and debtors; and to facilitate restructuring in order to preserve investment and employment.⁴⁰ Employment is one area of the law whose regulation is in the hands of Member States. Though article 107 of OIA does not guarantee the continuity of employment contracts during insolvency; the labour laws of the Member States guarantee the automatic pursuits of contracts of employment.⁴¹

C. Limitations of the law and policy consideration

In the application of OHADA's international insolvency provisions, there are a number of challenges one may face in resolving CBI. The first challenge relates to the uncertainty created by articles 96, 166 and 167 of OIA. This leads to difficulty in the treatment of workers claims. According to article 96, the super priority claims of workers are paid within a period of ten (10) days following the decision to open the proceedings and upon a mere decision of the receiver.⁴² This conflict with articles 166 and 167 of OIA, under which workers claims occupy the third and fourth positions.⁴³ There is also varied jurisdictional issue, that is, no specialised court for the settlement of insolvency disputes despite article 3 (1) of OIA.

The real challenge is that of implementation of the law. Implementation of laws is an important part of law enforcement. Without enforcement, laws would become meaningless. Law enforcement involves the willingness of the general society and those who live daily with the law to enforce the

37 Ibid, Art. 256–13.

38 Ibid, Art. 78 talks of 90 days for creditors abroad and 30 days for local creditors.

39 Ibid, Art. 256.

40 Ibid.

41 Art. 42 (1) (2) of Law No. 92/007 of 14 August 1992 relating to the labour Code.

42 Ibid, Art. 96.

43 Workers claims occupy the third position under article 166 and fourth position under articles 167.

law in order to maintain social order and to establish justice. Regrettably, implementation of OHADA's international insolvency law remains an issue of concern in the Member States. In fact, CBI is not a common practice among the corporate fraternity in the region. This is largely due to lack of awareness and understanding of the law. Following a survey conducted in Cameroon early this year, we found out that the business community is unfamiliar with the law and its possible benefits. This can lead to poor interpretation and application of the law as the case in Teks Global.⁴⁴ While creditors are disgruntled for non-payment of their claims, the lawyers representing the parties are not well grounded on the law leading to poor interpretation and application of the law. This creates uncertainty for all parties involved and reduces the assets of the estate and, hence, creditors chances of recovering outstanding debts.⁴⁵

This lack of awareness also concerns judges and lawyers many of whom flaunted their total ignorance on their basis that the law is new and have not been trained. To some, they specialise in criminal law and have nothing to do with insolvency. The problem could also be attributed to the lack of a course on insolvency in most of the universities. Apart from Soa and Dschang, there is no course on insolvency in the sole English-speaking University in the country, that is, University of Buea. For some, the law is complex and difficult to understand because of the technical terms used. In respect of these difficulties, we posit that sensitisation and trainings should be affected through seminars and conferences with the aim of building capacities.⁴⁶

Like the MLCBI, OHADA's international insolvency law does not deal with the enforcement of CBI judgements. While significant efforts have been made to enforce other types of judgements such as foreign arbitral awards,⁴⁷ none has been made to enforce CBI judgements. The differences in jurisdiction and enforcement make proceedings lengthy, costly, inefficient and prolonged for investors. By reason of these problems, we posit

44 Nadesh, 'Teks Global Investors disgruntled over non-payment of dividends, CEO blames IP payment system'(Cameroon News Agency, 26.12.2021) <https://cameroonnewsagency.com/teks-global-investors-disgruntled-over-non-payment-of-dividends-ceo-blames-it-payment-system/> (last accessed 28.12.2022).

45 Leno, in Kashyap (ed), p.183.

46 Leno, 2022, p. 56–57.

47 See the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York 1958.

that the contracting states of OHADA should adopt a convention on the enforcement of CBI judgements in order to maintain uniformity in the application of the law, and hence predictability and confidence on the part of investors.

D. Lessons for the European Union

Considering that OHADA is at the forefront in the development of uniform insolvency law, we can say with certainty that the law provides practical lessons for states and regional bodies such as the European Union (EU) in the development of uniform insolvency laws.⁴⁸ Like OHADA, it is necessary for the legislators of the EU to develop a CBI law to resolve diverse and multiple bankruptcy proceeding in the union. In so doing, the Member States of the EU must be willing and prepared to cede part of their sovereignty to the EU. In other words, the Member States should be committed in developing a uniform international insolvency law that is applicable across the union. Like OHADA, the law should be drafted in the light of the MLCBI taking into account the following rules. The first rule relates to the principle of universalism of the main proceedings, which once open, covers all assets and creditors of the debtor wherever located in the region.

The second rule is that of the principle of territorialism which accords to Member States the opportunity to apply the law with respect to assets within their jurisdictions. Additionally, the law makes use of the principle of *creditorium* parity or the *pari passu prorata parte* which aims to provide justice to creditors with the concept of proportional justice, which emphasises on fairly and evenly distribution of debtor's assets to creditors in a more just manner in accordance with the proportion referred to in articles 166 and 167 of the OIA.⁴⁹

48 Leno, *Journal of African Law* 2013, p 259 (259).

49 Winanto/Sulistiyono/ Muryanto, *ICGLOW* 2019, p. 288, < https://www.researchgate.net/publication/337753592_Analysis_of_Equality_on_Creditor_Standing_Principle_on_The_Process_of_Arrangement_and_Settlement_of_Bankruptcy_Asset_in_Indonesia> (last accessed 18.09. September 2022).

E. Conclusion

The globalised nature of business has pushed the OHADA legislators into adopting an international insolvency law to accommodate cross-border insolvency disputes arising from the region. The laws allow for recognition and cooperation between courts and insolvency representatives, a feature which has spurred wide acceptance of the law. Considering the importance of the law, the author calls on the EU to adopt a uniform law similar to OHADA's taking into the rules of universalism, territorialism and equality of creditors. Despite these developments, OHADA still faces a number of challenges. The first relates to the lack of implementation of the law by the business community. This is largely due to lack of awareness and understanding of the law, which according to the author leads to poor interpretation and application of the law as was the case in Teksglobal. The second challenge relates to the fact that Member States have not adopted a law on the enforcement of CBI judgement. This makes the proceedings costly and inefficient. In respect of these challenges, the author positions herself for the adoption of a law on enforcement and awareness creation of the law within the region. In a nutshell, OHADA should be applauded for taking the bold step hoping to develop its practice following trainings and sensitisation on the law.

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Regional economic integration in the sphere of cross-border insolvency: foreign experience as a possible model for the Eurasian Economic Union

Elena Babkina

Abstract.

The article reveals the shortcomings of the lack of harmonization and unification of the legal regulation of insolvency in international organizations of regional economic integration, analyses the models of regulation of cross-border insolvency developed by world practice. Based on the analysis of existing examples of legal regulation, a conclusion is made about the urgent need for legal regulation of cross-border insolvency in the law of the Eurasian Economic Union and the harmonization of the national bankruptcy law of the EAEU member states. The article proposes a regulatory model of such regulation within the EAEU, taking into account the level of integration, prospects of the development of the Union law and the geopolitical situation.

Key words: harmonization and unification, Eurasian Economic Union, international organization for regional economic integration, EAEU law, cross-border insolvency.

A. Introduction

Legal regulation of cross-border insolvency historically reflects the vectors of development of a legal system and its maturity. If earlier the purpose of the insolvency proceedings was punishment (sometimes in the form of criminal liability of the debtor), then later the restorative function of law began to play a special role in the form of satisfaction of creditors' claims. Three often-mentioned historical concepts of cross-border insolvency have different goals. Thus, the English approach is aimed at developing entrepreneurial activity, the German one is described as a pro-credit model, the French system is aimed at maintaining the financial stability of the

debtor and, as a result, jobs. Currently, the main task of the insolvency proceedings is the rehabilitation focus – the restoration of the debtor's solvency.

However, the presence of a foreign element in relations according to various criteria (the domicile of the debtor, the nationality of creditors, location of debtor's assets on the territory of several states, parallel insolvency proceedings) requires the interaction of national legal systems, their harmonization and unification. This also applies to the framework of international organizations of regional economic integration, primarily due to the fact that the main purpose of creating an international organization for regional economic integration is the functioning of the internal market, including the freedom of movement of goods, services, capital and labour. As a result, the lack of regulation and different approaches to the legal regulation of cross-border insolvency creates an additional barrier to the functioning of the domestic market¹.

The lack of a uniform approach to the regulation of insolvency in such organizations' Member States hinders the pace of economic integration. Of course, the higher the level of integration, the higher the possibility of a single proceedings and automatic recognition of foreign insolvency proceedings.

Researchers note that the degree of approximation of the legislation of states on cross-border insolvency depends on several factors: 1) the degree of similarity and/or differences between the national insolvency law of the Member States, 2) mutual trust between states, 3) the degree and level of integration between states².

The purpose of this contribution is to identify existing models of legal regulation of cross-border insolvency in various international organizations of regional economic integration and to design an optimal regulatory model for the Eurasian Economic Union (EAEU)³.

B. Practical examples: EU and OHADA

International practice has developed several models of supranational legal regulation of cross-border insolvency.

1 Mokhova, p. 15.

2 Mokhova, p. 3.

3 As to the EAEU see <https://www.eaeunion.org/?lang=en> (accessed 22.12.2025).

I. EU

In the European Union, jurisdiction in insolvency cases is unified – the COMI criterion (centre of main interests of the debtor) is applied, which means the location where the debtor administers its business on a permanent basis and which is ascertainable by creditors (art. 3(1), 5(1) of the European Insolvency Regulation of 2015 (hereinafter referred to as EIR), which has replaced Regulation No. 1346/2000), the applicable law is the law of the state in which the insolvency proceedings are opened (art. 7 EIR). According to this model, the main insolvency proceeding has an extraterritorial effect in relation to all assets and creditors of the debtor (art. 19(1) EIR), while the secondary insolvency proceeding can only be initiated in the state of the principal place of business (establishment) of the debtor and has an effect only in relation to the assets of the debtor located in the territory of the State of the place of opening of proceedings (art. 3(2), 34 EIR).

Thus, the European model does not provide for unified insolvency proceedings and does not require a high degree of harmonization of the national laws of the Member States. However, it is impossible not to note the process of progressive evolution of the legal regulation of insolvency within the framework of this integration association. On 20 June 2019, the EU Directive 2019/1023 on restructuring and insolvency⁴ was adopted with the purpose to preserve viable companies, increase legal certainty for foreign investors, increase the value of recovered assets and repaid loans, and increase the number of self-employed by providing a second chance to individual entrepreneurs. At present, the European Union continues to work on harmonization and removal of barriers to the freedom of movement of capital in the internal market, freedom of establishment and attraction of foreign investments, affecting such key aspects of insolvency law as the recovery of assets from liquidated estate, the effectiveness of procedures, predictable and fair distribution of debtor's assets from the property of debtor among creditors⁵. In particular, on 7 December 2022,

4 Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 [Electronic resource].

5 Insolvency proceedings. EU activities in the area of cross-border insolvency cases [Electronic resource]. – Mode of access: <https://commission.europa.eu/strategy-and-p>

a draft Directive of the European Parliament and of the Council on the harmonization of certain aspects of bankruptcy law (COM (2022) 702 final)⁶ (hereinafter referred to as the EU Directive draft) was published.

II. OHADA

A somewhat different model of cross-border insolvency, which was developed within the framework of the Organization for the Harmonization of Business Law in Africa (OHADA), is of interest as well. Here, on 10 September 2015, the revised Uniform Act on Collective Proceedings for Wiping off Debts (originally adopted on 10 April 1998) was adopted (hereinafter referred to as the Uniform Act). The purpose of the Uniform Act is to preserve the economic activity of the debtor and the level of employment, support viable companies and establish a clear ranking of claims of creditors. It should be emphasized that Uniform Acts as a source of OHADA law are a kind of analogue of EU Regulations and are characterized by direct applicability in all 17 OHADA Member States and by priority over domestic law.

The OHADA Uniform Act regulates in detail the procedure for insolvency of individuals, officials of commercial organisations and legal entities. It also includes provisions on cross-border insolvency. The procedure for recognition and enforcement of judgments concerning the opening, conduct and closure of insolvency proceedings, as well as judgments which are directly derived from insolvency proceedings or are closely linked with them, depends on the place where such a judgement was delivered. If the place where the judgments was delivered is an OHADA Member State, then the judgments shall be recognized as *res judicata*. If the insolvency proceedings is opened in a third state, then the legal regulation is based on the UNCITRAL MLCBI and provides for the provision of judicial assistance, unless that would be manifestly contrary to that state's public policy. The

olicy/policies/justice-and-fundamental-rights/civil-justice/civil-and-commercial-law/insolvency-proceedings_en. – Date of access: 25.06.2023.

- 6 Proposal for a Directive of the European Parliament and of the Council harmonising certain aspects of insolvency law [Electronic resource]. As of early 2026, the proposed Directive has advanced significantly: on 19 November 2025, the European Parliament and Council reached a political agreement on the final compromise text, covering five core areas: avoidance actions, asset tracing, pre-pack proceedings, directors' duty to file, and transparency measures. Formal adoption and publication in the Official Journal are pending.

purpose of the regulation is to ensure cooperation between the courts and authorized bodies of the OHADA Member States and foreign states, ensure legal security in trade and investment, ensure a fair and efficient process in order to protect both all creditors and other interested parties, including the debtor, protect all the debtor's assets and optimisation of their value, to facilitate the restructuring of troubled companies in order to preserve their investments, employees and jobs. Thus, a foreign representative has the right to apply for the opening of insolvency proceedings in accordance with the Uniform Act, provided that there are conditions for opening such proceedings; creditors domiciled in a foreign country have the same scope of rights as creditors within the territory of member states, notices given under the Uniform Act to creditors within the territory of member states must also be sent to known creditors from foreign countries. In order to protect the rights of foreign creditors, the Uniform Act specifies the requirements for notification of foreign creditors.

With regard to the recognition of foreign insolvency proceedings, the Uniform Act establishes a list of documents that must be accompanied by an application, as well as a presumption of the reliability of the facts and documents referred to by a foreign representative.

C. Eurasian Economic Union

As for the Eurasian Economic Union (EAEU), established by the Treaty on the EAEU of 29 May 2014, despite the declared goal of the Union – to create conditions for the sustainable development of the economies of the member states in art. 4 of the Treaty on the EAEU – there is no legal regulation of cross-border insolvency, both internal and cross-border, including the soft law level, advisory acts within this regional integrational economic organization.

It should be noted that none of the EAEU Member States has adopted the UNCITRAL Model Law on Cross-Border Insolvency of 1997, which has been implemented by over 60 states worldwide, including the United States, the United Kingdom, and most EU Member States. This further limits the interaction of EAEU insolvency proceedings with third-country jurisdictions.

As the reasons for the lack of integrational law-making interest in the area of cross-border insolvency, researchers name the low level of mutual

investment and assets of small and medium-sized businesses – most of the investments are made by large companies with a high share of state participation in the capital; lack of relocation of companies to countries with a more favourable tax burden; barriers placed in some Member States regarding the admission of foreign companies to the domestic market⁷; lack of practice of recognition and enforcement of foreign insolvency proceedings⁸.

However, today there is no doubt that the above-mentioned circumstances have changed significantly. The events of recent years, economic sanctions against legal entities and individuals of the Russian Federation and the Republic of Belarus, firstly, increased the trade and economic ties of the Member States, and secondly, brought the Republic of Armenia and the Republic of Kazakhstan to the first and second places in the list of relocation states or business domiciliation⁹.

7 In particular, in the Republic of Belarus there is a ban on the establishment of branches of legal entities by foreign entities, while the legal capacity of a representative office of a legal entity is substantially limited. Art. 51–1 of the Civil Code of the Republic of Belarus provides for foreign commercial organizations the possibility of establishment only of representative offices. It should be emphasized that this circumstance was recognized as a barrier by the decision of the Board of the Eurasian Economic Commission dated March 3, 2020 No. 31 'On the fulfilment by the Republic of Belarus of obligations within the framework of the functioning of the internal market of the Eurasian Economic Union'. The issue of the progress of ongoing work to remove the barrier was discussed at consultations on September 23, 2021, December 20, 2021, August 12, 2022, and December 1, 2022. During these meetings, representatives of the Republic of Belarus declared their readiness to make amendments to the national legislation, however, despite the Order of the Eurasian Intergovernmental Council adopted on October 21, 2022 'On the progress of work to remove barriers by the member states of the Eurasian Economic Union within the framework of the functioning of the internal market of the Eurasian Economic union', which ordered that the Member States have to remove all barriers within the framework of the functioning of the internal market of the Eurasian Economic Union, included on the date of entry into force of this order in the register of barriers posted on the official website of the Eurasian Economic Union, the situation today remains the same. – See: Кейсы. Об отсутствии возможности открытия юридическими лицами государств – членов Евразийского экономического союза своих филиалов на территории Республики Беларусь ('Cases. On the Absence of the Possibility for Legal Entities of Member States of the Eurasian Economic Union to Open Branches in the Territory of the Republic of Belarus') [Electronic resource]. – Mode of access: <https://barriers.eaeunion.org/ru-ru/Pages/cases.aspx#InplviewHashb35c0261-874c-4ff9-8b66-f95871466dce>. – Date of access: 30.05.2023.

8 Mokhova, p. 4.

9 Bukach, p. 11–12.

Moreover, the development of the EAEU as an international organization of regional economic integration¹⁰ urgently requires the convergence of the legal regulation of insolvency relations, taking into account the Decision of the Supreme Eurasian Economic Council, adopted on 11 December 2020 No. 12 «On Strategic Directions for the Development of Eurasian Economic Integration until 2025»¹¹.

The legal basis for EAEU regulation in this area could be derived from the Treaty on the EAEU: art. 4 (goals of the Union, including stable development and formation of a single market), as well as art. 62–63 (coordinated macroeconomic policy and macroeconomic sustainability indicators), art. 65–67 (trade in services, establishment and investment). However, the competence of the Eurasian Economic Commission does not currently extend to insolvency law, which remains within the exclusive national competence of the Member States.

It is important to note the fundamental differences in the legal regulation of insolvency in the EAEU's Member States. Thus, in the Republic of Belarus there is no regulation of out-of-court insolvency, as well as the institution of insolvency of an individual as of the time of writing, while the laws of the Russian Federation, the Kyrgyz Republic and the Republic of Kazakhstan contain detailed regulations of these relations¹². Also, there is no uniformity of the substantive rules of insolvency law in the Member States, for example, the ranking of creditors' claims, the legal regime for contesting transactions, subsidiary liability, etc.

Attention should also be paid to the absence of special legal regulation of cross-border insolvency in the domestic law of the EAEU Member States. The regulation is of a general nature and does not take into account the peculiarities of the presence of a foreign element in insolvency relations. Thus, general norms of private international law (international treaties

10 Babkina in Shadursky et al., 130 (130–132).

11 Order of the Council of the Eurasian Economic Commission of April 5, 2021 № 4 (ed. from 22.05.2023) 'On the plan of measures to implement the Strategic directions of development of Eurasian economic integration up to 2025'. [Electronic resource] // ConsultantPlus. Belarus / LLC 'YurSpectr'. – Minsk, 2023; Decision of the Supreme Eurasian Economic Council of December 11, 2020 № 12 'On the Strategic directions of development of the Eurasian economic integration until 2025' [Electronic resource], ConsultantPlus [Electronic resource], ConsultantPlus. Belarus / YurSpectr LLC. – Minsk, 2023.

12 Law of the Republic of Kazakhstan of December 30, 2022 № 178-VII 'On restoration of solvency and bankruptcy of citizens of the Republic of Kazakhstan' [Electronic resource]. Information system Paragraph, 2023.

on legal assistance), as well as the norms of business and civil law, are applicable to such relations.

D. Conclusions

Due to the presence of such significant differences in national law and the absence of any regulation in the EAEU law, we see the best approach in unifying the jurisdictional criteria for cross-border insolvency and applicable law, as well as the introducing a system of mutual recognition of judgments concerning the opening, conduct and closure of insolvency proceeding in the EAEU Member States in accordance with the recognition regimes established within the framework of the Commonwealth of Independent States by the Kiev Agreement of the CIS countries on the procedure for resolving disputes related to the economic activities, adopted on 20 March 1992, the Minsk Convention on legal assistance and legal relations in civil, family and criminal cases, adopted on 22 January 1993, the Chisinau convention on legal assistance and legal relations in civil, family and criminal matters, adopted on 7 October 2002.

It is advisable to choose the law of the Member State of the opening of proceedings as the applicable (*lex concursus*) as the uniform rules on conflict of laws which replace more general national rules of private international law. This conflict of laws rule should apply both to the main insolvency proceedings and to local (territorial) proceedings. The *lex concursus* should determine all effects of the insolvency proceedings, both procedural and substantive, on the persons and legal relations concerned. It governs all the conditions for the opening, conduct and closure of the insolvency proceedings.

A new EAEU international treaty on legal assistance and legal relations in civil, family and criminal cases should be developed, which should also address issues of cross-border insolvency. It should set out as a rule of jurisdiction the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties. With regard to the recognition of judgments concerning the opening, conduct and closure of insolvency proceedings in the EAEU Member States, the following rules should apply: the Member States, on the condition provided for by the relevant EAEU international treaty, at the request of the interested party, mutually recognise and execute the judgments of the competent courts of the Member States that have entered into force. The

list of grounds for refusing to recognize and enforce the judgment must be exhaustive.

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A commentary of the Argentine Cross-border Insolvency Bill of 2018

Héctor José Miguens

Abstract:

Whether it is a question of systemic crises in some countries or regions of countries that have no experience in the solution of corporate crises or insolvencies of multinational companies, or whether it is a question of countries that have reasonable and modern legislation, insolvency law has been put to the test in the last thirty years, requiring the response of the lawmaker to renew the regulations in the face of their age, obsolete nature, and inability to face the modern challenges that the practice of multinational businesses poses to private international insolvency law.

The Treaties of Montevideo of 1889 and 1940 were at that time a great advance around cross-border insolvency, but they are extremely limited to respond to the current needs, and furthermore, they only apply to a small number of South American countries. Cases of cross-border insolvency usually present many complex issues that Argentine law currently in force does not resolve in an adequate manner.

In 2002 a commission appointed by the Argentine Ministry of Justice and Human Rights issued a Cross Border Insolvency Bill. In August 2018, another Argentine Draft Bill on Cross-Border Insolvency Law was submitted by a commission appointed by the same agency, which follows the criteria and principles of the 2002 Draft bill with some differences, subtractions, and additions.

The Argentine Bill of 2018, echoes the problems covered by cross-border insolvency, in four cases in which the debtor has assets in more than one country; or those matters in which some of the claims against the debtor are not enforceable in the country where the insolvency proceedings have been opened; or those which in respect of the same debtor or a group of related companies are configured by the existence of insolvency proceedings opened in different national jurisdictions.

The Draft includes numerous institutions that govern, organize, and distribute justice or equitable solutions to the main problems posed by

modern private international insolvency law, starting with the law of the most advanced countries in the field, through the international organizations devoted to proposing rules by the different countries in various forums, such as UNCITRAL Cross-Border Insolvency Model Law of 1997 (among others) and the World Bank and, finally, by the national or international federations of professionals dedicated to insolvency, such as the American Bankruptcy Institute, INSOL International, INSOL Europe and the International Institute of Insolvency. This confers certainty, reliability in the methodology adopted and independence with respect to the solutions adopted and proposed.

In addition, the rules proposed, since they have been negotiated with an open mind, by means of a sufficient consensus and a high level of participation of the legal experts specialized in the matter and a clear sense of pragmatism, are free from any type of arbitrariness, and, on the other hand, they contemplate adequate levels of freedom to adopt (or not) the solutions. And within the viable options, those adopted by this 2018 Argentine Preliminary Draft are respectful of the nature of the regulated institutions, with coherence, order and adjusted to the prudence they demand.

For all these reasons explained in each commentary of the Draft provisions and in general, in the opinion of the author, this lawmaking activity, for its methodology and for its final product, is worthy of praise, reasonable, timely, fair, and relevant.

Keywords: Cross-Border Insolvency Law; UNCITRAL Cross-Border Insolvency Model Law of 1997; Argentine Insolvency Law; Argentine Cross-Border Insolvency Law; Argentine Cross-Border Insolvency Bill of 2018

A. Introduction: purpose of this paper

Whether it is a question of systemic crises in some countries or regions of countries that have no experience in the solution of corporate crises or insolvencies of multinational companies, or whether it is a question of countries that have reasonable and modern legislation, insolvency law has been put to the test in the last thirty years, requiring the response of the lawmaker to renew the regulations in the face of their age, obsolete nature, and inability to face the modern challenges that the practice of multinational businesses poses to private international insolvency law.

Commercial and investment relations have become increasingly international, interrelated, and electronic, which will lead to an increase in the

solutions that the lawmaker will have to consider and implement prudently to face these recent problems, especially in the field of reorganization and liquidation of multinational companies.

The legal vision on current bankruptcy problems has evolved from the traditional problems and solutions of private international law of the second half of the 19th century and the beginning of the 20th century—such as the distribution of local bankruptcy assets and the treatment of foreign claims—to the emergence of new international insolvency problems.

The Treaties of Montevideo of 1889 and 1940 were at that time a great advance around cross-border insolvency, but they are extremely limited to respond to the current needs, and furthermore, they only apply to a small number of South American countries. Cases of cross-border insolvency usually present many complex issues that Argentine law currently in force does not resolve in an adequate manner.

In 2002 a commission appointed by the Argentine Ministry of Justice and Human Rights issued a Cross Border Insolvency Bill. In August 2018, another Argentine Draft bill on Cross-Border Insolvency Law was submitted by a commission appointed by the same agency, which follows the criteria and principles of the 2002 Draft bill with some differences, subtractions, and additions.

The Argentine Bill of 2018, echoes the problems covered by cross-border insolvency, in four cases in which the debtor has assets in more than one country; or those matters in which some of the claims against the debtor are not enforceable in the country where the insolvency proceedings have been opened; or those which in respect of the same debtor or a group of related companies are configured by the existence of insolvency proceedings opened in different national jurisdictions.

The Draft includes numerous institutions that govern, organize, and distribute justice or equitable solutions to the main problems posed by modern private international insolvency law, starting with the law of the most advanced countries in the field, through the international organizations devoted to proposing rules by the different countries in various forums, such as UNCITRAL and the World Bank and, finally, by the national or international federations of professionals dedicated to insolvency, such as the American Bankruptcy Institute, INSOL International, INSOL Europe and the International Institute of Insolvency. This confers certainty, reliability in the methodology adopted and independence with respect to the solutions adopted and proposed.

In addition, the rules proposed, since they have been negotiated with an open mind, by means of a sufficient consensus and a high level of participation of the legal experts specialized in the matter and a clear sense of pragmatism, are free from any type of arbitrariness, and, on the other hand, they contemplate adequate levels of freedom to adopt (or not) the solutions. And within the viable options, those adopted by this 2018 Argentine Preliminary Draft are respectful of the nature of the regulated institutions, with coherence, order and adjusted to the prudence they demand.

For all these reasons explained in the article, in the opinion of the author, this lawmaking activity, for its methodology and for its final product, is worthy of praise, reasonable, timely, fair, and relevant.

B. Historical context of the new national and international insolvency rules

Since the early years of the 20th century, the literature on private international insolvency law issues in the different countries of Europe and the Americas has increased dramatically, both in terms of monographic works on international insolvency in general, as well as in monographs on specific topics of international insolvency. Particularly in the last three decades, the internationalization of business, economic, and financial activity led to greater conflict between creditors and debtors in multinational forums, especially in cases of groups of companies operating in various countries. This is not only between the disputing parties but also between courts of different countries regarding bankruptcy assets or liabilities of the same debtor operating in them, which raises issues of competition, jurisdiction, and applicable law. As there is frequently no superior authority to settle such competition disputes, domestic or international rules on coordination, cooperation, and communication between the involved courts have been implemented, such as the European Union Regulation on Insolvency Proceedings ('Regulation') of 2000, the European Union Regulation of 2015 or the UNCITRAL Model Law on Cross-Border Insolvency ('Model Law') of 1997 (the latter will be referred to by the acronym MLCBI).

It has been emphasized that only predictable insolvency legal regimes, applied in a consistent manner by an independent, impartial, and efficient judiciary, encourage creditors to negotiate with debtors to avoid the closure or winding up of a company in hardship, rather than withdrawing the flow of credit and launching into individual execution of assets at the first sign of financial or economic hardship. In addition, healthy insolvency laws,

if well enforced, promote the efficient redistribution of assets from failed businesses to other ventures with better prospects, both in the case of corporate reorganization and winding up.

Thus, modern, and healthy systems of insolvency and legal regulation of the relations between creditors and debtors constitute one of the foundations of investment, credit, and lasting economic development, contribute to the stability of the financial system of a country, and provide a safety valve at the time of business failures, preserving value, jobs, and social protection.

After the Asian crises of 1997 and 1998, the issue of national insolvency law was installed in numerous meetings and agendas of multilateral organizations and groups of countries such as the G-7 and G-22. In April 1998, the G-22 Working Group on International Financial Crises drafted a report identifying the objectives and key features of any insolvency regime, which was the origin of two major subsequent initiatives: the World Bank's Principles and Guidelines for Effective Insolvency and Credit Rights Systems (2001) and UNCITRAL's Legislative Guide on Insolvency Law (2004). The common foundation of these two initiatives has been systematized by legal scholars in the sense of recognizing that, although national treatments may differ, effective insolvency systems should aim at the following objectives, namely:

- integration with the remaining commercial legislation of the country.
- maximization of the value of the assets of the company in operation by providing a comprehensive system of reorganization, both in terms of economic and legal aspects.
- establishment of a balance between liquidation and reorganization.
- provision for equal treatment of various categories of creditors, including local and foreign creditors.
- provision for the timely, efficient, and impartial resolution of insolvencies.
- avoidance of the premature dismemberment of the debtor's assets by individual creditors seeking quick judgments.
- provision of a transparent bankruptcy procedure that contemplates incentives to gather and disclose necessary information for the parties.
- recognition of the pre-existing rights of creditors and respect for the priority of claims through a predictable and established bankruptcy process; and

- putting in place a framework for transnational insolvencies, with recognition of foreign proceedings.

These new perspectives and orientations in comparative insolvency law have been reflected not only in the domestic substantive and procedural law of some countries, but also in the field of Private International Insolvency Law.

C. The Argentine 2018 Draft on cross-border insolvency

I. General aspects

In 2002 a commission appointed by the Ministry of Justice and Human Rights issued a Cross Border Insolvency Bill in Argentina. In August 2018, another Argentine Draft Bill on cross-border insolvency was submitted by a commission appointed by the Ministry of Justice and Human Rights, which follows the criteria and principles of the 2002 Draft bill with some differences, subtractions, and additions.

In the *Exposé des Motifs* to the Argentine Bill of 2018, the Commission of Experts in Insolvency Law has highlighted some of the relevant facts and elements that characterize it. They can be summarized as follows:

1. It echoes the problems covered by cross-border insolvency, in cases when the debtor has assets in more than one country; when those matters in which some of the claims against the debtor are not enforceable in the country where the insolvency proceedings have been opened; when the same debtor or a group of related companies are configured by the existence of insolvency proceedings opened in different national jurisdictions.
2. Cases of cross-border insolvency usually present many complex issues that Argentine law currently in force does not resolve in an adequate manner.
3. The Treaties of Montevideo of 1889 and 1940 were at that time a great advance in cross-border insolvency, but they are extremely limited to respond to the current needs, and furthermore they only apply to a small number of South American countries.
4. The rules of domestic law contained in Articles 2(2), 3(5) and 4 of Argentine Bankruptcy Law No. 24522 are insufficient to respond to most of the modern and critical cross-border insolvency problems,

and do not encourage international cooperation and coordination to achieve adequate and fair legal solutions. In cross-border cases, these rules do not facilitate the rehabilitation of companies in financial difficulties or insolvency, do not ensure the protection of the debtor's assets against their dispersion, and do not allow the optimization of the value of such assets. Nor do they impede quickly and effectively certain operations by insolvent debtors aimed at transferring or hiding assets in foreign jurisdictions, a problem that may be aggravated, in its frequency and magnitude, by the ease with which irregular or fraudulent operations may be conducted due to a currently interconnected world. To effectively address such situations, international judicial cooperation is essential and must be supported by a legal framework that facilitates direct communication and the prompt adoption of appropriate measures to preserve and recover assets fraudulently transferred to foreign jurisdictions.

5. The project duly submitted in 2018 by the Committee of Experts in Bankruptcy Law appointed by the Ministry of Justice and Human Rights of the Nation, has adapted to the local needs and the particularities of Argentine Insolvency law the text of the Model Law on Cross-Border Insolvency prepared by the United Nations Commission on International Trade Law (UNCITRAL) and approved by the United Nations General Assembly by resolution 52/158 of December 15, 1997. The draft incorporates the necessary amendments to the uniform text to adapt it to Argentine law but maintains the guidelines of such text to achieve the international harmonization and certainty to which this regime aspires.
6. Among its main objectives, the Project mentions:
 - to encourage international cooperation in the field of multinational insolvencies,
 - to enhance legal certainty,
 - to protect the interests of all subjects affected by international insolvencies,
 - to protect the debtor's assets seeking the optimization of their value, and
 - to facilitate the reorganization of companies in financial difficulties to protect the invested capital and preserve employment.
7. With respect to the legal definitions, the project defines the main terms used, as is usual in international legal instruments. To the definitions proposed by the Model Law, others have been added to specify the

- meaning and scope in the Argentine context of certain terms used in the project.
8. With respect to the general provisions in the Preliminary Draft there are critical issues to be considered when applying this legal regime for which the following general provisions are established:
 - a) If there is a conflict between this regime and the international treaties or agreements that are binding in the Republic, the latter shall prevail.
 - b) The jurisdiction to recognize foreign proceedings and in matters of cross-border cooperation shall be determined in accordance with the rules of Argentine bankruptcy law.
 - c) The trustee or representative of the Argentine bankruptcy proceeding shall be empowered to act in another State in accordance with Argentine law or with foreign law if the former is compatible with the latter.
 - d) The Argentine court may refuse to adopt a measure contemplated in this regime when it is contrary to Argentine public order.
 - e) Additional international assistance may be provided based on other rules, but such assistance shall be subject to certain requirements aimed at:
 - protecting the equal treatment of local and foreign creditors.
 - avoiding harm to local creditors in their claims in the foreign bankruptcy.
 - preventing fraud; and
 - respecting the priority of the claims in the distribution of the bankruptcy in accordance with the order established by Argentine law.
 - f) The interpretation of the rules of the project will consider:
 - international origin,
 - the need to promote uniformity and coordination of its application, and
 - the observance of good faith.
 9. With respect to the specific provisions, the preliminary Draft includes among its objectives the following:
 - a) the right to direct access of the representative of the foreign insolvency proceedings to the courts of the Republic.
 - b) According to the Argentine legislative tradition and the doctrine and jurisprudence prevailing in Argentina, a foreigner is defined as a creditor whose claim is payable exclusively outside the territory

of the Republic. Foreign creditors are recognized as being equal to local creditors in requesting the opening of the insolvency proceeding in the Republic or in participating in it.

- c) The Draft establishes that the privileges will be governed by the law of the forum, so that in the local insolvency proceeding the existence and degree of a priority will be governed by Argentine law.
- d) The recognition of the foreign bankruptcy judgment must be made without any formalities such as diplomatic letters rogatory or letters of request, and the recognition must be made in a prompt manner to enable the award of the provisional measures that may be necessary to preserve the debtor's assets or activity.

The foreign insolvency proceeding will be recognized as a 'principal' proceeding if it takes place where the debtor has the centre of its main interests, or as a 'non-principal' proceeding if it takes place where the debtor has an establishment. But Article 16 of the Draft indicates that the registered office of the debtor legal entity, or the domicile or habitual residence if he or she is a natural person, will be presumed to be the centre of its main interests, following a typical Argentine legal qualification criterion.

Likewise, the Bill provides that the company incorporated abroad that has its seat in the Republic or its main purpose is intended to be fulfilled there, shall be deemed to be a company incorporated in the Republic, to determine the centre of its main interests.

- e) The Draft considers the possibility of ordering provisional measures to ensure evidence, protect the debtor's assets from the action of creditors, or preserve them by avoiding the performance of acts of disposition of the debtor himself.
- f) The Draft establishes the principle/duty of cooperation of the local judge and the local organs of the Argentine insolvency proceeding with the court and the representatives of the foreign insolvency proceeding, as far as possible.
- g) Cooperation may be achieved by any appropriate means, including the possibility of appointing a person or body to act in the direction of the court. In all cases, direct communication shall respect the guarantees of due process and shall not give rise to waivers of the parties' rights or of the court's powers or authority.
- h) There are provisions for coordinating proceedings in cases of multiple bankruptcy proceedings, whether one of them is considered as

- a prior 'principal' foreign proceeding and another as a subsequent 'non-principal' local proceeding, or all of them as simultaneous proceedings (one abroad and one local), with rules if the principal proceeding is the local one.
- i) Two other rules that were already established in the Argentine bankruptcy law are enshrined. The first one establishes that the recognition of a foreign main proceeding is grounds for opening a bankruptcy proceeding in the Republic under Argentine law. The second reproduces the payment rule for parallel proceedings, which seeks to equalize the dividends finally received by the creditors when one or several of them collect their claims abroad and in the local bankruptcy proceeding as well.
 - j) There are important cases of cross-border insolvency that do not necessarily involve the same debtor but multinational groups of companies. The Project contemplates these cases by establishing that its rules on international cooperation, communication and coordination will also apply, to the extent that they are compatible, in the cases of multinational corporate groups.
10. With respect to the amendments to the Argentine Bankruptcy Law No. 24522, it is proposed to replace articles 2, 3, and 4 of the Law by texts like the current ones, but with some modifications in the wording and several innovations aimed at ensuring their compliance with the 2014 new Argentine Civil and Commercial Code and the new legal regime for cross-border insolvency.

II. Analysis of the regulations

The 2018 Draft consists of forty articles distributed in six chapters. The following is an analysis of the project, with a specific critical evaluation of each article.

III. Chapter I. General provisions

Article 1 regulates the scope of application of the law on Argentine Private International Insolvency Law (PIIL) issues, establishing that it will be applicable to four insolvency cases with multinational elements, defined as:

- those in which a foreign court or foreign representative requests assistance in the Republic in connection with a foreign proceeding; or
- assistance is requested in a foreign State in connection with a proceeding being conducted under Argentine bankruptcy law; or,
- a foreign proceeding and a proceeding in the Republic are being conducted simultaneously in respect of the same debtor under Argentine bankruptcy law; or, finally,
- creditors or other interested persons from abroad, who have an interest in applying for the opening of a proceeding or in participating in a proceeding being conducted under Argentine bankruptcy law.

As we have seen, these assumptions express a more modern and respectful conception of new hypotheses of multinational cases than the current Argentine bankruptcy law.

This rule expressly excludes its application in cases of reorganization or collective proceedings of financial entities, insurance companies, and other subjects excluded from the Argentine bankruptcy regime by special laws in the domestic sphere, to the extent that such exclusions are legally in force. This rule seems to be historically due to the double fact that, at a domestic level, in the Argentine regime some entities are traditionally excluded from the preventive bankruptcy or reorganization proceedings, being otherwise under a special regime of liquidation under the authority of an administrative agency and/or before a court of law (in most of the cases with the declaration of bankruptcy by a judge), such as in the case of banks, insurance companies, trusts and others, by special laws or in the Argentine bankruptcy law itself. The second reason for the exclusion is that the UNCITRAL MLCBI excludes such entities, which are usually excluded from administrative or judicial bankruptcy proceedings, in many jurisdictions around the globe.

However, we believe that nothing prevents the application of cross-border insolvency law to such entities, and, on the contrary, it is not only convenient but necessary that they be included in that law, considering the advantages and benefits of the system. In practice, there will undoubtedly be banks, insurance companies, trusts, and other entities with special bankruptcy regimes, which will have assets or claims enforceable in other jurisdictions and, therefore, we believe that this regulation we are commenting on can be perfectly applied to them. Therefore, I think *de lege ferenda* that it is necessary to eliminate in a future modification of this regime this exclusion clause and to write an inclusive one, due to

analogy reasons. Although other insolvency laws do not usually regulate the reorganization of banks and insurance companies, they do regulate their liquidation in the respective insolvency laws. Under such conditions, we think that the system of the rule we are commenting on should be applied to such local and foreign entities, based on this circumstance, the spirit of the rule pertaining to the legal equality of local and foreign subjects and the analogy of the case.

Article 2 defines, for the purposes of the law, some concepts. These definitions are useful to unify terminology in the field and to avoid semantic conflicts that may result in a significant loss of time and a useless waste of jurisdiction.

The terms of the definitions are broad and all-encompassing of all situations, as will be seen below. Thus, for example, the concept of 'foreign proceeding' includes both reorganization and liquidation proceedings, judicial, or administrative proceedings and provisional proceedings.

With respect to the 'foreign proceeding', it is defined as a collective/universal proceeding, whether judicial or administrative, including that of a provisional or preventive nature, that is followed in a foreign State under a law relating to insolvency and by virtue of which the assets and business of the debtor are subject to the control or supervision of the foreign court, for the purposes of its reorganization or liquidation.

'Foreign principal proceeding' is defined as the one followed in the State where the debtor has the centre of its main interests, except for legal entities incorporated or registered in the Republic and companies subject to Argentine law under Article 16(3). According to the purpose of this article, we will use 'principal proceeding' and 'main proceeding' as synonyms.

'Non-principal foreign proceeding' means a foreign proceeding, other than a principal foreign proceeding, which is followed in a State where the debtor has an establishment within the scope of the rule.

'Foreign representative' means the person or body, including the one appointed on an interim basis, which has been empowered in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or business or to act as a representative of the foreign proceeding, if it proves its legal representation under Argentine law.

'Foreign court' means the judicial or other authority that has jurisdiction for the purposes of control or supervision of a foreign proceeding.

'Establishment' means any place of operations where the debtor conducts in a non-transitory manner an economic activity with human means and goods or services.

‘Foreign creditor’ means the holder of a claim payable exclusively outside the territory of the Republic.

‘Local creditor’ is understood as the holder of: (a) a credit payable exclusively in the Republic; (b) a credit with more than one alternative place of payment, at the creditor’s option, provided that one of the places of payment is in the territory of the Republic; (c) a credit that may be paid in the Republic. As we can see, this is an all-encompassing criterion.

‘Republic’ means the Argentine Republic.

‘Argentine bankruptcy legislation’ means any legal rule in force in the Republic, or the one that replaces it in the future, applicable to reorganization proceedings, liquidation in bankruptcy proceedings, or any collective reorganization or liquidation procedure that had insolvency as a premise.

‘Bankruptcy proceeding’ means any collective reorganization or liquidation proceeding that had insolvency as a necessary premise.

‘Court’ means the judicial authority with competent jurisdiction under Argentine law for the purposes of control or supervision of a bankruptcy proceeding.

‘Argentine territorial jurisdiction’. Any property registered in an Argentine registry, any tangible property of a debtor located within the Argentine territory, any intangible property registered or subject to deposit in an Argentine registry under the applicable Argentine law. That is, the legislator includes any property subject to execution or seizure that may be properly seized or attached abroad by an action filed in an Argentine court. This concept was added in 2018 with a broad definition.

‘Cross-border insolvency agreement’ means an agreement entered for the purpose of facilitating coordination of cross-border insolvency proceedings and cooperation between the courts, between the courts and the insolvency representatives, and between the insolvency representatives with the authorization of the courts involved and, if applicable, other interested parties. This concept was added in 2018. It is important because it constitutes the final cause of the system established by this law: the coordination of cross-border insolvency proceedings. It is to be expected that it will obtain fair solutions from the substantial law point of view in the framework of international insolvency.

‘Priority’ or ‘privilege’ shall mean the quality resulting from insolvency law permitting that a claim be paid with preference or priority over another. This is a definition added in 2018 that follows the tradition of the *lex fori* in matters of privileges.

For the purposes of this law, 'group of companies' shall mean two or more companies linked to each other by some form of control contemplated in the corporate legislation; the group of companies shall be considered multinational when two or more participants are in different States. This concept was added to the previous Draft and is designed in sufficiently broad terms to cover all types of corporate groups or 'companies'.

The term 'company' means any entity, regardless of its legal form, which conducts an economic activity and to which, because of the case, the bankruptcy or insolvency legislation applies. This one is another concept in a broad sense added to the previous Bill of 2002.

The term 'attorney representation' shall mean the technical legal advice which, by virtue of the rule of law, the parties must have to act in a judicial proceeding in the Republic. This concept has been added.

'Ordinary course of business' shall mean the operations conducted in accordance with the way the debtor's business is usually conducted, and with the ordinary management practices of its respective activity. This concept was added in 2018.

Article 3 establishes the solution to the possible conflict between this law and the obligation of the country under a treaty or other form of agreement to which the Republic is a party with one or more States, and it is resolved that the provisions of that treaty or agreement shall prevail.

Article 3(2) of the previous 2002 Draft disappeared, which required reciprocity as a requirement for the application of the rule. The elimination of the rule is consistent with the principles of international cooperation and recognition of the foreign phenomenon inherent in every country's private international law. Therefore, it is undoubtedly worthy of praise and auspicious in the 2018 project, which improves the previous one to a great extent. This is the first legal text that does not contain such a requirement and therefore means remarkable progress in international law matters.

Article 4 provides that the functions referred to in this law, relating to the recognition of foreign proceedings and in matters of cooperation with foreign courts, shall be performed by the court having jurisdiction under Argentine bankruptcy law. It also provides that if there is already a bankruptcy proceeding opened in the Republic, the competent court shall be the one before which such proceeding is carried out. This is consistent with the jurisdictional principles in bankruptcy law matters in Argentina.

Article 5 authorizes the trustee or representative of the body in charge of administering the reorganization or liquidation of an Argentine bankruptcy proceeding to act before a foreign State in accordance with the Argentine

bankruptcy law to the extent permitted by the applicable foreign law, or in the absence thereof, in the manner authorized by the latter law, if it is compatible with Argentine law. This wording further improves the previous text of the same article of the 2002 Argentine Bill.

Article 6 regulates any conflicts between public order and this law, with the pre-eminence of the former, establishing that nothing in this law shall prevent the court from refusing to adopt a measure regulated therein, if that measure is contrary to Argentine public order. The judge must interpret public order in the light of the principles of Argentine private international law, under penalty of incurring self-contradiction, according to the regime established by this Bill.

Article 7 provides additional assistance under some other rule. It provides that, subject to the limitations set forth in this law, if the foreign proceeding has been recognized, the Argentine courts or authorities with competent jurisdiction have broad powers to provide the foreign representative with additional assistance under Argentine law, if this will ensure the following:

- (a) equality of treatment of local and foreign creditors' rights over the debtor's assets,
- (b) due protection of the interests of local creditors against prejudice or inconvenience with respect to their claims in the foreign proceeding,
- (c) prevention of preferential or fraudulent dispositions in relation to assets owned by the debtor; and
- (d) distribution of the product of the liquidation of the debtor's assets substantially in accordance with the order prescribed by Argentine law.

The first three paragraphs are consistent with the principles of private international law, but the last one may be subject to conflict and in our view is at least ambiguous with respect to the principles. This situation requires further research in the future. In any way it should respect the equality of foreign and local creditors as a desirable rule of interpretation of the law.

Article 8 establishes a principle of interpretation of the law, according to which its interpretation must consider its international origin and the need to promote uniformity in its application and the observance of good faith. These three criteria are timely and relevant, since they are respectful of the nature of the international standards proposed by UNCITRAL for all countries by consensus.

IV. Chapter II. Access of foreign representatives and creditors to Argentine courts

Article 9 regulates the right of direct access of any foreign representative, according to which such representative shall be entitled to appear directly before an Argentine court of competent jurisdiction, to request the recognition of the foreign procedure, or to act before the Argentine court in connection with rights or claims over the debtor's assets, with the representation of an attorney qualified to practice before the court of competent jurisdiction in the Republic.

This eliminates any other procedure as necessary for such an appearance, which is remarkable and worthy of praise for what it means in terms of simplification and cost-saving. However, it must be considered that the intervening court will have to control the veracity and legality of the documents provided by the intervening parties to adequately preserve the legal certainty of the proceedings, so that it is not a cause or reason for promoting procedural fraud. The rule is like the previous one of the 2002 Argentine Bill.

Article 10 establishes the limits of the jurisdiction of the Argentine court according to which the mere fact of the filing of a request, under this law, before an Argentine court by a foreign representative does not imply the submission of the foreign representative or the debtor's assets and business abroad to the jurisdiction of the courts of the Republic for any effect other than the request.

This limitation is consistent with the applicable principles of international substantive and procedural law, respects the equal treatment of local and foreign creditors, and avoids any possible local or foreign prejudice, and is therefore commendable.

Article 11 establishes the power of any foreign representative to request the opening of a proceeding under Argentine bankruptcy law if, otherwise, the conditions for the opening of such proceeding are met. This is consistent with the entire system of the Draft, the equality of local and foreign creditors and respect for the local procedural rules applicable to the case.

Article 12 establishes the power of the representative of a foreign proceeding, as from the recognition of a foreign proceeding, to participate and enforce the rights it represents in any bankruptcy proceeding opened with respect to the debtor under Argentine law. This equality of treatment is commendable and fair and a fundamental objective of the law, in contrast with the traditional regime that establishes the pre-eminence of treatment

of local creditors with respect to foreign creditors, both in the procedural order and in the order of substantive rights. This standard is therefore to be commended.

Article 13 regulates the access of foreign creditors to a proceeding followed under Argentine bankruptcy law. Section 1 provides that, except for the provisions of Section 2 of this article, foreign creditors shall enjoy the same rights as local creditors with respect to the opening of a proceeding in the Republic and the participation in such proceeding in accordance with the Argentine bankruptcy law and the provisions of this law.

Article 13(2) provides that the existence of privileges and their order of priority shall be governed by the Argentine bankruptcy law and that the provisions of paragraph 1 of this Article shall not affect the existence or the order of priority of the claims in a bankruptcy proceeding opened in the Republic. It also provides that the claims of foreign creditors shall not be assigned a lower priority than unsecured claims, except if the claim verified in the Republic, equivalent to the foreign one in question, was subordinated to the unsecured claims under the Argentine bankruptcy legislation or had a lower priority than the latter under the applicable foreign legislation. This rule is like the previous one but with more detailed wording. Thus, the procedural and substantial equality of treatment of local and foreign creditors is fully ensured, placing them all at an equal rank, which is adequate to justice criteria, to the purposes of international law and to the most modern trends. Therefore, it is worthy of praise.

Article 14 regulates the notification of creditors abroad. This rule is consistent with the bankruptcy principles for notices and another consistent example of how the equality of local and foreign creditors is protected.

Paragraph 1 establishes equal treatment of local creditors and creditors abroad through mandatory notification of the bankruptcy proceedings opened in the Republic, both in the country and abroad. The court is empowered to order the appropriate measures of notification of any creditor whose address is not yet known.

Paragraph 2 establishes the obligation to give notice to each foreign creditor separately, unless the court considers that some other form of notice is more appropriate to the circumstances of the case. No rogatory letters or any other similar formality is required.

Paragraph 3 provides guidelines for the notification of commencement of the proceedings on foreign creditors, establishing requirements such as:

- a) indicating a reasonable period for the filing of the claims, with the pertaining documentation and evidence, and indicating the place where such filing is to be made;
- b) indicating whether creditors with secured claims need to file such claims; and
- c) containing any other information required for such notice under the laws of the Republic and the orders of the court.

This rule facilitates the notification of creditors, especially foreign creditors in their own domicile, thus preserving legal certainty. It is reasonable because the debtor generally knows those domiciles or knows the cities where the creditor's establishments are located, it preserves the equality of treatment between local and foreign creditors, it is not economically burdensome because it can be done by electronic means; we must consider that, most likely, all communication between the creditors and the debtor until the bankruptcy filing has been done like that. Furthermore, it is commendable because it allows another form of notification according to the circumstances of the case. And, finally, it eliminates all kinds of formalities, whose demand or necessity can be avoided by means of modern electronic notification systems with full legal procedural effects, which nowadays have a reasonable degree of certainty. The requirements for the notification of the opening of the insolvency proceedings to foreign creditors are also part of these characteristics and are in harmony with the substantial internal rules on this matter, which are usually regulated by the insolvency proceedings provisions (procedural law).

V. Chapter III. Recognition of a foreign proceeding and measures that may be awarded

Article 15 regulates the application for recognition of a foreign proceeding in six paragraphs, extending its 2002 version.

Paragraph 1 recognizes the power of the foreign representative to apply to the court in recognition of the foreign procedure in which he or she has been appointed.

Paragraph 2 establishes the necessary documents that must accompany the request for recognition:

- (a) A copy duly certified or legalized in accordance with the requirements of Argentine law for documents issued abroad; evidence of the decision

to open the foreign proceeding, of the final nature of such decision; of the jurisdiction of the court; and of the appointment of the foreign representative; or

- (b) a certificate issued by the foreign court, in turn certified or legalized in accordance with the requirements of Argentine law for documents issued abroad, evidencing the declaration commencing the foreign proceeding, if such decision is final, the jurisdiction of the court and the appointment of the foreign representative. This rule is more specific than the previous one of 2002, which is healthy.

Paragraph 3 establishes that all requests for recognition must be accompanied by a statement duly indicating, if applicable, the list of verified creditors, detailing the amount of each of the claims and the percentages that have been received, together with the information on the foreign proceedings opened with respect to the debtor of which the foreign representative is proceeding. This rule is like the previous one, which preserves legal certainty and the completeness of the information.

Paragraph 4 provides that the court shall require that any document submitted in support of an application for recognition be translated into the official language of the Republic (Spanish). This rule reinforces the previous one, according to which it was a power, not a duty, of the court. Therefore, it improves legal certainty.

The new fifth paragraph provides that the request must indicate whether the debtor has been legally notified in the foreign proceeding and indicate the debtor's domicile for notification of the request for recognition, in a period established by the court.

Paragraph 6 provides that the application for recognition of a foreign proceeding must:

- (a) be entered in the appropriate registry of bankruptcy proceedings;
- (b) notify the debtor and any interested person at their domicile for a period and in such manner as the court may specify.

This rule, on the one hand, is flexible with respect to the formalities that must be met by the request for recognition by the local court and, on the other hand, preserves the legal predictability and certainty of the existence of the foreign proceeding and the appointment of the petitioning official. On the other hand, in addition to this documentation, the possibility—which may or may not be provided for by law—of using modern means of communication by telephone and Internet, with respect to the verification

of these points to be accredited by the local court, and with respect to the communication itself between the courts and the representatives of the foreign proceeding and between them. The 2018 rule is more detailed than the previous one.

Article 16 establishes presumptions regarding the recognition of the foreign proceeding in three paragraphs, in accordance with the new wording of Article 15 of the new 2018 Draft law in commentary.

Paragraph 1 states that if the decision or certificate referred to in Article 15(2) indicates that if the foreign proceeding is a proceeding within the meaning of Article 2(a) and if the foreign representative is a person or body within the meaning of Article 2(d), the court shall follow the indications on the certificate or decision.

Paragraph 2 provides that the court shall have the authority to presume that the documents submitted to it in support of the application for recognition are authentic, if they are certified or legalized in accordance with the preceding article.

The rules are flexible. In any case, and since the foreign bankruptcy documents are usually certified by a judicial officer and legalized according to the regime of the Hague Convention ('Apostille'), it may be preferable to place an 'and' instead of an 'or' in the text, to provide legal certainty. It is a procedure that does not take many days to achieve, as well as the translation into Spanish of all the foreign documentation or at least of the substantial parts of the documentation. We think that even in the case that the members of the court or the interested parties or the bankruptcy organs know the source language of such foreign documentation the certification, legalization, and translation would be necessary because they are official documentation.

Paragraph 3 provides that, in the absence of evidence to the contrary, the registered office of the debtor legal entity, or the domicile or habitual residence if it is a natural person, shall be presumed to be the centre of the debtor's main interests. Likewise, the company incorporated abroad that has its headquarters in the Republic or its main purpose is intended to be fulfilled there, shall be considered as a company incorporated in the Republic.

These presumptions are reasonable and are based on the documentary reality of the ordinary business of the company in bankruptcy and of the current possibilities offered by the telephone and internet means of communication. The *factum* of the third paragraph will usually have been determined by the foreign judge at the time of declaring the opening of the

bankruptcy proceeding and will usually have been declared by the debtor at the time of requesting such opening abroad. Hence, the reasonability of the legal consequence pointed out. Furthermore, it is consistent with the developments that have taken place within UNCITRAL with respect to the Centre of Main Interest ('COMI') in recent years.

Article 17 regulates the recognizing a foreign proceeding.

Paragraph 1 provides for the recognition of the foreign proceeding, unless *Ordre Public* is compromised (as provided by Article 6), when these four requirements are met:

- (a) the foreign proceeding is a proceeding within the meaning of Article 2(a) (definition of 'foreign proceeding');
- (b) the foreign representative applying for recognition is a person or body within the meaning of Article 2(d) (definition of 'foreign representative');
- (c) the application meets the requirements of Article 15 (application for recognition of a foreign proceeding);
- (d) the application has been submitted to the court with jurisdiction in accordance with Article 4.

Paragraph 2 provides that the foreign proceeding shall be recognized considering its individual characteristics, namely:

- (a) as a foreign main proceeding, if it is being conducted in the State where the debtor has the centre of his or her main interests, under Article 2(b) and Article 16; in case of doubt, it is established that the Argentine court shall decide on the matter, preventing any procedural abuse; or,
- (b) as a foreign non-principal proceeding, if the debtor has an establishment in the territory of the State of the foreign court within the meaning of Article 2(f) (definition of '*establishment*').

Paragraph 3 provides that the decision regarding the recognition of a foreign proceeding shall be rendered as soon as possible.

Paragraph 4 provides that the provisions of Articles 15, 16, 17, and 18 shall not prevent the modification or revocation of the recognition if it is proved that the reasons for which it was granted are partially or totally absent, or if those reasons have ceased to exist.

The rule is prudent when dealing with documentation from abroad, with its limitations that may lead to error in the local court.

Paragraph 5 provides that the resolution of a foreign proceeding must be published for five days in the manner provided in the Argentine bankrupt-

cy law, making it known that such resolution does not affect the right of local creditors to request the commencement of a bankruptcy proceeding in the Republic or to file their claims in the foreign proceeding, if applicable.

The rule resolves the case of double verification, if it is appropriate according to applicable law, in a broad and reasonable manner. The effects of a 'payment' in respect of the creditor satisfied, both in the foreign country and in the Argentine Republic, and in any case, the principles of unjust enrichment are applicable here.

This regulation establishes precise, reasonable, and adequate requirements for the request to recognize the foreign proceeding, in a prompt manner, and, on the other hand, effectively provides for the case of the inexistence of the reasons that motivated the previous recognition, or their subsequent disappearance, which preserves legal certainty and the reasonable limits of *res judicata* in this case. However, the court must be diligent in evaluating the evidence accompanied by the petitioner to avoid any possible procedural fraud, as we have already pointed out above.

Article 18 regulates the information after the request for recognition of the foreign procedure. In this regard, it provides that from the time the application for recognition of a foreign proceeding is filed, the foreign representative must inform the court without delay of the following:

- a) Any notable change in the status of the recognized foreign proceeding or in the appointment of the foreign representative and any other foreign proceeding that is being followed with respect to the same debtor and of which the foreign representative is aware.
- b) Any other foreign proceeding followed with respect to the same debtor and of which the foreign representative is aware.

This rule provides transparency, publicity, and visibility to the foreign proceeding and legal certainty to local bankruptcy proceedings and is in accordance with the principles of professional ethics of bankruptcy officials. It should be added that, with the electronic means currently available with respect to the information of many international bankruptcy proceedings, these circumstances may be quickly known by the court, especially by websites of the bankruptcy proceedings abroad or websites of the foreign representative and even of the insolvent debtor. Nevertheless, the rule is consistent with the law and is prudent.

Article 19 regulates the measures that may be awarded from the request for recognition of a foreign proceeding until the resolution of the request.

In this sense, in paragraph 1 the rule provides that from the filing of an application for recognition until the resolution of such an application, the court may award provisional measures, at the request of the foreign representative and when the measures are necessary and urgent to protect the assets of the debtor or the interests of the creditors. The list of the provisional measures that may be awarded is not exhaustive or restrictive and, among other orders, the law mentions the following:

- paralyzing any enforcement measure against the debtor's assets,
- entrusting the foreign representative, or any other person appointed by the court, with the administration or liquidation of all or part of the debtor's assets located in Argentine territory, to protect and preserve the value of those assets which, due to their nature or to other concurrent circumstances, are perishable, subject to devaluation, or threatened by any other cause,
- applying any of the measures provided for in Article 21(1)(c), (d), and (g), on measures that may be awarded upon recognition of a foreign proceeding,
- notifying the interested or affected parties, if applicable, according to Argentine law.

Paragraph 2 provides for the expiration of the provisional measures awarded when a decision is rendered on the application for recognition, unless they are extended as provided in Article 21(1)(f), on measures granted upon recognition of the foreign proceeding.

Paragraph 3 provides for the possibility of the rejection of any measure by the court under this article when that measure affects the ordinary course of a foreign principal proceeding.

This rule allows for the adequate and prompt protection of bankruptcy assets since the measures are not subject to the prior decision recognizing the foreign proceeding, provided that the measures are necessary and urgent and that the measures will expire at the time of the decision on the application for recognition. This solution and the safeguards are fair, reasonable, and flexible. At the same time, the rule is respectful of the foreign principal proceeding by providing for the rejection of measures that may affect it.

Article 20 regulates the effects of the recognition of a foreign principal proceeding.

Section 1 provides for such effects:

- (a) the stay of the commencement or continuation of all individual actions or proceedings that are being conducted with respect to the debtor's assets, rights, obligations, or liabilities in the Argentine territorial jurisdiction. This does not prevent a party from commencing or resuming a proceeding in another jurisdiction;
- (b) the stay of all enforcement actions against the debtor's assets in the Argentine territorial jurisdiction; and
- (c) the suspension of any right to transfer or encumber the debtor's assets, as well as to otherwise dispose of such assets, unless the acts of disposition do not affect registrable assets and/or are carried out in the ordinary course of business of the debtor.

Paragraph 2 provides that the scope, modification, and extinction of the effects of the stay and suspension referred to in paragraph 1 of this article, and the procedure to be attributed to the administration and/or liquidation and distribution of the assets upon recognition, if there is no Argentine proceeding, shall be adjusted and subject to the provisions of Argentine law and jurisdiction for such cases.

Paragraph 3 provides that paragraph 1(a) of this article shall not affect the right to commence individual actions or proceedings to the extent necessary to preserve a claim against the debtor.

Paragraph 4 provides that paragraph 1 of this article shall not affect the right to request the commencement of a proceeding under Argentine bankruptcy law or to submit claims in any such proceedings.

These institutions are typical of the effects of an opening of the bankruptcy proceeding, which, in the case of multinational bankruptcies, is operated at the time of the recognition of the foreign proceeding. This provision is in line with several foreign bankruptcy laws. On the other hand, the effects are counterbalanced by protecting local creditors by allowing the commencement of the necessary individual actions or proceedings and by allowing the right to request the initiation of a bankruptcy proceeding under Argentine bankruptcy law or to file claims in such proceeding. This preserves, also, the equality of treatment of local and foreign creditors already mentioned above. The rule is consistent with the law and prudent in its solutions, and wide in coverage. In addition, it foresees the different circumstances through which the Argentine process may go through in view of the consequences of the foreign process, leaving open the needs of each proceeding without limiting them too much.

Article 21 establishes the regime of the measures that can be awarded as from the recognition of a foreign proceeding.

In this respect, paragraph 1 provides that upon recognition of a foreign proceeding, whether principal or non-principal, the court may award any appropriate measure mentioned below, including but not limited to the following, if it is necessary to protect the assets of the debtor or the interests of the creditors, at the request of the foreign representative:

- (a) to paralyze the initiation or continuation of individual actions or proceedings relating to the assets, rights, obligations, or liabilities of the debtor, to the extent that they have not been paralyzed pursuant to Article 20 (1)(a);
- (b) to stay any enforcement action against the property of the debtor to the extent that it has not been stayed under Article 20(1)(b);
- (c) to suspend the exercise of the right to transfer or encumber the debtor's assets, or to otherwise dispose of those assets, to the extent that that right has not been suspended under article 20;
- (d) to provide for the examination of witnesses, the presentation of evidence or the provision of information regarding the debtor's assets, business, rights, obligations, or liabilities;
- (e) to entrust the foreign representative, or any other person appointed by the court, with the administration or liquidation of all or part of the debtor's assets which are in the territory of the Republic;
- (f) to extend any protective measures awarded under Article 19(1) on measures available upon application for recognition of a foreign proceeding; and
- (g) to grant any other measure that, under Argentine law, is appropriate for the administration, reorganization, or liquidation of the debtor's assets.

Article 21(2) regulates another effect of the recognition of a foreign proceeding, whether principal or non-principal, in the sense that the court, in the case of an absence of an Argentine proceeding already opened, shall determine the procedure to be attributed to the administration and/or liquidation and distribution of all or part of the assets, which shall be adjusted and subject to the provisions of Argentine law for such cases.

Likewise, Article 21(2) provides that, at the request of the foreign representative, the foreign representative or any other person appointed by the court to that effect, if it is deemed appropriate, may be entrusted with the administration and/or liquidation and distribution of all or part of the debtor's assets located in the territory of the Republic, provided that the

court ensures that the rights of the local creditors are sufficiently protected, and that the Argentine bankruptcy law is observed and/or the necessary measures are taken to that end.

Article 21(3) provides a guideline for the grounds for the court's decision on measures that may be granted, in the sense that when awarding any measures under this article to the representative of a foreign non-principal proceeding, the court must ensure that:

- the measures relate to assets that, under Argentine law, must be administered within the framework of the foreign non-principal proceeding or
- they relate to information required in that foreign non-principal proceeding and
- they do not interfere with other insolvency proceedings, with the principal proceeding.

The lawmaker went further in 2018 to include the case of 'liquidation' of assets. One author suggested that addition in 2018 on the Spanish edition of a book on the Private International Insolvency Law in Argentina, commenting the 2002 Argentine Bill on Cross-Border Insolvency¹.

This rule protects the debtor's assets and creditors, both local and foreign, of an equal rank, in a reasonable and proportionate manner. The non-restrictive nature of the measures that may be granted provides flexibility and adaptation to the circumstances of the case. This article is perfectly in harmony and consistency with the award of provisional measures under Article 19. The protection of local creditors is also expressly assured as a prerequisite for the court's decision. The rule in paragraph 3 is an adequate manifestation of the parallelism of the forms and powers that govern the proceedings of a foreign non-principal proceeding, in keeping with a local non-principal proceeding. The concept and purpose of the local or foreign non-principal proceeding could be further developed in the future.

Article 22(1) regulates the protection of creditors and other interested people in that, in awarding or denying a measure under Article 19 or 21 or in modifying or terminating such measures under paragraph 3 of this article, the court shall ensure that the interests of creditors and other interested persons, including the debtor, are adequately protected.

Article 22(2) provides that the court may make any relief awarded under articles 19 or 21 subject to certain conditions as it deems appropriate.

1 Miguens, 2018, 89.

The lawmaker has considered the special need for coordination between local and foreign proceedings, especially the principal ones.

Finally, Article 22(3) provides that, at the request of the foreign representative or of any person affected by any measure granted under articles 19 or 21, or *ex officio*, the court may modify or terminate the awarded measure.

This rule provides the court with flexible guidelines to protect both the debtor and the creditors, both local and foreign, respecting the equality between them and ensuring the prudence of the decisions by expressly and reasonably providing for the requirements to award or waive them, at the request of a party or *ex officio*. This protects all parties involved, the court does not waive its leading role in the local bankruptcy with multinational significance and ensures equal treatment of local and foreign creditors. We all agree with the measures explained above.

Article 23 regulates the regime of actions to challenge acts detrimental to creditors, according to which paragraph 1 provides that upon recognition of a foreign proceeding, the foreign representative shall be entitled to file bankruptcy actions or other non-bankruptcy actions (called usually *ius commune* in countries of the European Continental Law such Argentina) to revoke, to make ineffective, or to declare ineffective acts detrimental to creditors. Finally, it is provided that if there is an Argentine bankruptcy proceeding in progress, such actions must be adjusted to the status, manner, and procedure of any such proceeding.

Article 23(2) provides that when the foreign proceeding is a non-principal one, the court must ensure that the action affects assets that, under Argentine domestic law, must be administered in the context of the foreign non-principal proceeding.

The rule broadly protects creditors with respect to the detrimental acts of the debtor since the recognition of the foreign proceeding. With respect to paragraph 2, the nature and purpose of this parallelism of forms and powers between the local and foreign non-principal proceedings is consistent with legal standards but may be further discussed in the future.

The term ‘administered’ should be interpreted in a broad sense, including administration, liquidation, and distribution, according to our opinion.

Article 24 regulates the standing of a foreign representative in a proceeding in Argentina, providing that from the time a foreign proceeding is recognized, the foreign representative may intervene, under the conditions established under Argentine domestic law, in any proceeding to which the debtor is a party.

This rule preserves the equal treatment of local and foreign trustees in bankruptcy or bankruptcy officials or representatives and is therefore consistent with the spirit and letter of this project, one of whose purposes is to achieve such equal treatment between the parties involved in local and foreign proceedings, which is worthy of praise.

VI. Chapter IV. Cooperation with foreign courts and representatives

Article 25 regulates cooperation and direct communication between an Argentine court and foreign courts or representatives.

Article 25 (Paragraph 1) provides that regarding the provisions of Article 1 on the scope of application of the regime, the court must cooperate to the extent possible with the foreign courts or foreign representatives, either directly or through the relevant bodies of the bankruptcy proceeding, or by authorized persons, according to the *lex fori*.

Article 25 (Paragraph 2) empowers the court to communicate directly with foreign courts or representatives or to seek information or direct assistance from them.

This rule enshrines the legal possibility of greater communication among courts themselves and among courts and representatives (and of course among representatives themselves, as provided for in Article 26), following the modern trends proclaimed by UNCITRAL and the other institutions mentioned in the introduction of this work, which we consider to be pertinent and fair. This structure is so because it:

- a) allows a more fluid communication on the issues related to the insolvency proceedings of the same debtor in multiple countries;
- b) increases the amount of information available to all parties involved;
- c) increases the possibilities of defence in court, and, finally,
- d) allows for the coordination of decisions by the courts, especially about the reorganization of the multinational company in operation, or the liquidation and distribution of assets in each country. In the case of communication, the legal regime of the legal effects of telephone and internet communication technologies must be observed. Nowadays all the online acts of the court can be properly and legally recorded.

Article 26 regulates the cooperation and direct communication between the relevant body of the Argentine bankruptcy proceeding and foreign courts or representatives.

Article 26(1) provides that in matters within the scope of the rule being commented (Article 1 of the Draft), the trustee or representative of the body in charge of administering the reorganization or liquidation of an Argentine bankruptcy proceeding must cooperate—in the exercise of its functions and under the supervision of the court—with foreign courts and representatives.

Article 26 (2) provides that the relevant officer of the Argentine bankruptcy proceeding ('Trustee in Bankruptcy') shall be empowered, in the exercise of its functions and under the supervision of the court, to communicate directly with foreign courts or representatives, under the *lex fori*.

The purpose of this rule is to enable, facilitate, and encourage cooperation and direct communication between the officers and courts involved in the various bankruptcy proceedings opened in different countries, in a prompt, accurate, and effective manner. The terms of cooperation and communication (which in turn aim at the coordination of the different insolvency proceedings) are sufficiently broad, flexible, and pragmatic. Thus, the results that may be obtained from this communication activity are as adequate as possible to the applicable regulations (at least to the general principles and the main institutions of the insolvency law of each State whose law is applicable) and to the circumstances of each case. The provision follows the trends of UNCITRAL, and other institutions mentioned above.

It should be noted that the success of these tasks will depend on:

- the efficiency and preparation of the jurisdictional structures of each country,
- the willingness of the parties involved to cooperate,
- the time available and
- the language used, which may well be business and legal English.

We believe that this rule is a good attempt to modernize the jurisdictional structures, to speed up the procedures of reorganization or liquidation of bankruptcies, to promote more expeditious, effective, practical, and equitable solutions for all parties involved. And for these reasons we think it is worthy of praise.

Article 27 establishes in detail the different forms of cooperation which can be carried out by all appropriate means.

Among other means, the article provides a list of means of cooperation, such as:

- (a) the appointment of a person or body to act under the direction of the court;
- (b) communication of information by any means the court deems appropriate;
- (c) coordination of the administration and supervision of the debtor's assets and business;
- (d) approval or implementation by the courts of agreements concerning the coordination of proceedings;
- (e) coordination of simultaneous proceedings regarding the same debtor;
- (f) coordination of proceedings where claims are to be submitted in more than one proceeding and requiring the insolvency representatives to exchange lists of creditors, the claims admitted, their privileges or priorities and even the payments made. If necessary or appropriate, efforts should be made to harmonize the time periods and procedures for the submission of claims.
- (g) coordination of the treatment granted or to be granted to the claims, ensuring the recognition in other States of the claims verified and admitted in the Argentine proceeding and for the recognition in the local proceeding of the claims verified in foreign proceedings; establishing the priority of the claims and other measures necessary for such purpose.

Article 27(2) provides that the court may communicate directly with foreign courts or representatives to obtain information or request direct assistance from them, as long as due process guarantees are respected. In particular, the rule provides that communications shall be subject to the following requirements:

- (a) The time, place, and manner of communication must be determined in advance between the court and the foreign courts or between the court and the foreign representatives;
- (b) all proposed communications must be notified sufficiently in advance of the parties interested in the corresponding insolvency proceeding;
- (c) the court, when deemed appropriate, may authorize the personal participation of the trustee or representative of the body in charge of administering the reorganization or liquidation of the Argentine

bankruptcy proceeding, as well as of another interested party, in the communication;

- (d) the court shall determine whether the communication may be recorded by any technical means, in which case any such recording shall become part of the court file; and
- (e) all communications observe the mandatory rules of the countries between which the communication is made, as well as with the rights of the interested parties, regarding the confidentiality of the information, if applicable.

Article 27(3) provides that communications involving the court and foreign courts shall not give rise to:

- (a) any waiver by the court of any power or responsibility on its part or of its jurisdiction;
- (b) a decision on the merits of any matter before the court;
- (c) a waiver by any party of any of that party's substantive or procedural rights;
- (d) modification or invalidation of resolutions already issued by the court.

Article 27(4) provides that the court may hold hearings in coordination with a foreign court provided that the substantive and procedural rights of the parties to the bankruptcy proceeding and the jurisdiction of the court are safeguarded. To hold these hearings, prior agreement must be reached on the rules for:

- the development of the hearing,
- the requirements for notification,
- the method of communication,
- the conditions that must govern the right to appear and be heard,
- the form of presentation of documents and the limitation of the jurisdiction of each court to the parties that appear before it.

This rule provides a non-exhaustive and non-restrictive list of the possible forms of communication and cooperation for the coordination between the different proceedings that enable the courts and the insolvency agencies to implement these activities. This approach may be useful not only to legally enable these forms of cooperation but also as models to be adopted by the courts or by the insolvency agencies. For the rest, we refer to the comments on the previous article. The court clerk may take minutes of the hearings

for inclusion in the paper or electronic case file or proceed to legalize the recordings of the acts of the court.

We believe it is important to include among the possible subjects of communication not only the debtor who has been subject to a preventive reorganization proceeding but also the debtor's former representatives or directors, since they are the ones who knew or should have known about the debtor's business before the commencement of the local or foreign bankruptcy proceedings.

VII. Chapter V. Parallel proceedings

This chapter establishes the regime of parallel proceedings in the different countries where the debtor has assets or obligations.

Article 28 regulates the commencement of a proceeding under Argentine bankruptcy law after the recognition of a foreign principal proceeding.

In this respect, the article establishes that from the recognition of a foreign main proceeding, a proceeding may only be initiated under Argentine bankruptcy law when the debtor has assets in the Argentine territorial jurisdiction or when it has a branch or establishment in the country, in this case even if it has no assets at all. The effects of this proceeding shall be limited to the debtor's assets located in the Argentine territorial jurisdiction and, to the extent required for the implementation of the cooperation and coordination provided in Articles 25, 26, and 27, to other assets of the debtor located abroad which, under Argentine domestic law, must be administered in this proceeding.

We understand, as we have expressed above when commenting on Article 21(3) of the Draft, that when the rule says 'administered' the meaning should be interpreted broadly and therefore including both the administration of the assets and their disposal, liquidation, and distribution, in the case of a liquidation proceeding or disposal in any form in a bankruptcy or reorganization proceeding.

Article 29 regulates the coordination of a proceeding followed under Argentine bankruptcy law and a foreign proceeding.

In this respect, as a general guideline, the law provides that when a foreign proceeding and a proceeding under Argentine bankruptcy law are being conducted simultaneously with respect to the same debtor, the court shall endeavour to collaborate and coordinate its actions with those of the

other proceeding, pursuant to the provisions of Articles 25, 26, and 27, as set forth below:

The terms of the cooperation are the following, according to the different paragraphs of the regulation, namely:

- (a) When the procedure followed in the Republic is in progress at the time of filing the application for recognition of the foreign procedure:
 - (i) Any measure awarded under Article 19 or 21 must be compatible with the proceeding commenced in the Republic; and
 - (ii) If the foreign proceeding is recognized in the Republic as a foreign principal proceeding, Article 20 shall not be applicable.
- (b) When the proceeding brought in the Republic commences after the recognition, or once the application for recognition of the foreign procedure has been filed:
 - (i) Any measure that was in force under Articles 19 or 21 shall be re-examined by the court and modified or revoked if it is incompatible with the Argentine proceeding;
 - (ii) If the foreign proceeding has been recognized as a foreign principal proceeding, the stay or suspension referred to in Article 20(1) shall be modified or revoked under Article 20(2) if it is inconsistent with the proceeding commenced in the Republic.
- (c) When awarding, extending, or modifying a measure awarded to a representative of a foreign non-principal proceeding, the court shall ensure that such measure affects any assets which, under Argentine domestic law, must be administered in the foreign non-principal proceeding or concerns information required for such proceeding.

This rule is consistent with the system of measures that may be awarded and consequently respects the equal treatment of local and foreign creditors, not only procedurally but also substantively. It also observes the applicability of the Argentine bankruptcy law with respect to any assets located in the country, by application of the *lex fori*. In accordance with our opinion above, we interpret ‘administered’ in a broad sense regarding the assets.

Article 30 provides for the coordination of several foreign proceedings, according to which, as a rule of general scope, it is established that in the cases contemplated as within the scope of the project (Article 1), when more than one foreign proceeding is followed with respect to the same debtor, the court shall seek cooperation and coordination in accordance

with the provisions of Articles 25, 26, and 27, and the following rules shall apply:

- (a) Any relief awarded under Articles 19 or 21 to a representative of a non-principal foreign proceeding, after recognition of a foreign principal proceeding, shall be consistent with the latter.
- (b) If a foreign principal proceeding is recognized, after recognition or after an application for recognition of a foreign non-principal proceeding has been filed, any measure that was in effect under Articles 19 and 21 shall be reviewed by the court and modified or revoked if it is inconsistent with the foreign principal proceeding.

If, after recognition of a foreign non-principal proceeding, another foreign non-principal proceeding is recognized, the court shall grant, modify, or terminate any appropriate measure to facilitate the coordination of the proceedings.

These rules respect the parallelism of the forms and powers of the local and foreign principal and non-principal insolvency proceedings, which is fair and equitable. They also assure equality of local and foreign creditors.

Article 31 establishes that the recognition of a foreign main proceeding is grounds for the opening of a bankruptcy proceeding under Argentine bankruptcy law.

We consider this rule as a rebuttable presumption, to the extent that, unless otherwise proved, the recognition of a foreign principal proceeding shall constitute valid evidence that the debtor is insolvent for the purposes of the commencement of a collective proceeding under Argentine bankruptcy law. We understand that this presumption is rebuttable because we do not consider an automatic extension of bankruptcy as desirable in our country, given how serious it is from an institutional point of view to declare an individual and his or her estate as insolvent when that is not the economic reality, according to the concept of state of cessation of payments as ground for the opening of a bankruptcy proceeding in Argentine law.

This rule coincides with the current Article 4 of the Argentine bankruptcy law, but it is not irrebuttable evidence like that one, which in our opinion is fairer and more appropriate, both because the insolvency can be limited to one country or several but not necessarily and automatically to all possible countries and, on the other hand, a presumption of insolvency, as far as it is exceptional or of institutional relevance, must be adequately limited to the forums in which it actually exists, after verification of the requirements of universality and permanence that any bankruptcy proceed-

ing (at least the Argentine one) demands in order for its commencement to be appropriate.

Article 32 establishes the rule of payment in parallel proceedings.

In this respect, the rule provides that, notwithstanding the rights of the holders of privileged or secured claims, a creditor that has received a partial collection with respect to its claim in a proceeding followed in a foreign State pursuant to a rule concerning insolvency may not receive a new dividend for that same claim in an insolvency proceeding followed under the Argentine bankruptcy legislation with respect to that same debtor, as long as the dividend received by the other creditors of the same category is proportionally lower than the collection already received by that creditor.

This rule proportionally equates local and foreign creditors, is consistent with the project system and with the principles of Private International Insolvency Law and with the legal effects of a 'payment' of the same obligation and, finally, with the rules of unjust enrichment.

VIII. Chapter VI. Multinational groups of companies

Chapter VI is innovative regarding the previous Argentine Project of 2002 and regulates multinational groups of companies.

Article 33 regulates in general international cooperation, communication, and coordination in cases of insolvency of multinational groups of companies to the extent that they are compatible with the Draft system.

Article 34 provides for cooperation between courts in the context of multinational groups of companies. In this respect, the rule provides the following as powers of the court when dealing with an insolvency affecting a multinational group of companies, under Argentine domestic law:

- (a) To provide for cooperation with the courts dealing with insolvency proceedings involving members of a multinational group of companies commenced in different States.
- (b) To authorize cooperation between the courts and the foreign representatives and the trustee or representative of the body in charge of administering the reorganization or liquidation of the debtor of an Argentine bankruptcy proceeding.
- (c) To facilitate and promote the use of various forms of cooperation to coordinate insolvency proceedings involving different members of an enterprise group located in different States and to determine the conditions and safeguards to be applied in such forms of cooperation

to protect the rights of the interested parties and the authority and independence of the courts.

The rule is a consistent derivation of the principles of communication, cooperation, and coordination (and fair solutions) of any international modern insolvency proceeding regulations this time applied to corporate groups. The authorization and powers of the court are timely and appropriate because few things cause such uncertainty as a multinational group in insolvency.

Article 35 provides for cooperation between the Argentine court and foreign courts or representatives.

It establishes the duty of the Argentine court to cooperate with foreign courts or foreign representatives, to the extent of its ability, either directly or through the trustee or representative of the body in charge of administering the reorganization or liquidation of an Argentine bankruptcy proceeding. The purpose of the cooperation is to coordinate the local proceedings, and the insolvency proceedings commenced in other States with respect to a company belonging to the same group of companies. The forms of cooperation established above will be applicable to a multinational group of companies.

We assume that coordination entails a set of fair solutions in cases of multinational insolvency proceedings that have been or are not bankrupt, since the final cause of any legal system is a fair solution to the situation of each individual case. The commentary to the previous article is applicable here.

Article 36 establishes direct communication between the court and the foreign court or representative.

It provides for the possibility of direct communication between the court and foreign courts or representatives in cases of multinational groups of companies for the purpose of:

- (a) seeking information or direct assistance from them with respect to the local proceeding and proceedings in other States concerning members of the enterprise group; or
- (b) coordinating hearings.

All of this is in accordance with the provisions on communications and coordination of hearings of this law.

The article attempts to introduce order and agreement into the complex scenario of a multinational group of companies that are totally or partially insolvent. It is therefore worthy of praise.

Article 37 provides for the possibility of cooperation and communication between the Trustee of an Argentine bankruptcy proceeding of a multinational group with foreign representatives or foreign courts, under the supervision and authorization of the court and in accordance with Argentine law. They may consist of:

- (a) exchanging or disclosing information about the participants of a multinational group of companies, ensuring the confidentiality thereof;
- (b) entering into cross-border insolvency agreements to facilitate the coordination of the insolvency proceedings of the parties of the multinational group;
- (c) coordinating the administration and supervision of the assets and businesses of the members of the multinational group that are subject to insolvency proceedings.

By means of what is mentioned in paragraph (b), above all, the court and the insolvency officers have the tools to arrive at fair solutions in cases of groups of companies, which do not necessarily have to be delayed in time, counted by years or months. In this respect, the experience of General Motors Corporation is an example of a supersonic bankruptcy entire solution that could be imitated by other countries.

Article 38 provides for the replacement of Articles 2, 3, and 4 of Law No. 24522 with the texts formulated therein, namely:

Art. 2. Subjects covered. Human beings, private legal entities, and companies to which the National, Provincial or Municipal State is a party, can be declared bankrupt, regardless of the percentage of their participation.

These are the entities included:

- (1) The estate of the deceased, as long as it is kept separated from the estate of the successors.
- (2) Debtors domiciled abroad in respect of assets existing in the country or when they have a branch or establishment in the country, even if they have no assets.

Public legal entities, insurance companies, financial institutions, persons regulated by Law No. 24241, as well as other subjects that may be excluded from the application of the Argentine bankruptcy legislation by special laws

within the scope of domestic law, may not be declared bankrupt. Therefore, they are excluded from the application of this regulation in comment.

In our view, the special insolvency regimes of the entities mentioned in the proposed Article 2, last paragraph, should not prevent the possible application to them of the cross-border insolvency regime designed here in liquidation (not reorganization) cases. This is based not only on the analogy with the other subjects to which this regime applies, but also because such foreign entities may exist in the Republic, or which have interests or assets in the Republic. Therefore, we propose a modification of the text to authorize this application of the regime in a future amendment of this preliminary Draft.

Art. 3. Competent Court in bankruptcy proceedings.

The court of competent jurisdiction in bankruptcy matters shall intervene in the insolvency proceedings, in accordance with the following rules:

- (1) In the case of individuals, the court of the place of the administration of their business; in the absence of this, the court of the place of domicile.
- (2) If the debtor has several administrations, the court of the place of the administration of the main establishment has competent jurisdiction; if this quality cannot be determined, the judge who first acted in the case shall have competent jurisdiction.
- (3) In case of insolvency of private juridical persons (legal entities) and the companies in which the National, Provincial or Municipal State is a party—with the exclusions foreseen in article 2—the court of the domicile has competent jurisdiction.
- (4) In the case of entities not incorporated in accordance with legal figures, the court of the place of the domicile has competent jurisdiction; otherwise, the judge of the place of the establishment or main exploitation shall have competent jurisdiction.
- (5) In the case of debtors domiciled abroad, the court of the place of the administration in the Republic shall have competent jurisdiction; in the absence of the latter, the court of the place of the establishment, exploitation, or main activity. If according to Argentine law the jurisdiction cannot be established, the court of the place where the assets are located shall have competent jurisdiction. In the event of multiple properties located in different areas of territorial jurisdiction of the Republic, the court which first acted in the case shall have competent jurisdiction.

This last solution may be inappropriate, unfair, or untimely, depending on the insolvent group, so another less mechanical solution shall be preferred to the one established by the last part of the provision in that case. This will have to be analysed on a case-by-case basis by the court, following the principles of jurisprudence.

Art. 4. Insolvencies Declared Abroad.

The future new article 4 states that the declaration of an insolvency proceeding abroad is grounds for the opening of the insolvency proceeding in the country, at the request of the debtor or the creditor whose claim must be made payable in the Republic. The court must check that the foreign judgment meets the procedural requirements of the Law on Cross-Border Insolvency for its recognition.

Without prejudice to the provisions of international treaties, the insolvency proceeding declared abroad that has not been subject to a recognition process in accordance with the provisions of the Cross-border Insolvency Law cannot be invoked against creditors whose claims must be paid in the Republic, to dispute their rights over the assets existing in the Argentine territorial jurisdiction, or to annul the acts that they have entered with the insolvency party.

Multiple bankruptcy proceedings. When a bankruptcy proceeding is opened in the Republic, the creditors belonging to a foreign bankruptcy proceeding that has not been subject to recognition in accordance with the provisions of the Law on Cross-Border Insolvency, when requesting the verification of their claims in the local proceeding, must report their belonging to the foreign bankruptcy proceeding and, if applicable, prove the amount for which they have the obligation of the debtor been verified in such proceeding and the payments they receive or have received from their claim, since in any case they will be subject to the rule of parity in dividends.

Parity in dividends. Any collection of unsecured claims after the opening of the local bankruptcy proceeding made abroad will be charged to the dividend corresponding to their beneficiaries due to common claims.

Foreign creditors. When a bankruptcy proceeding has been opened in the Republic, the creditors whose claims are payable abroad and who do not belong to a foreign bankruptcy proceeding may be verified and collected in parity with the local creditors.

Article 39 establishes that the law becomes effective after its publication in the Official Gazette. Article 40 is of a procedural nature.

With respect to the commentary to Article 38, since it is a different issue from the one in chapter number VI, on multinational groups of companies, and, taking into account that it is a rule applicable to all multinational insolvencies equally (whether or not they are groups of companies or corporations) we understand that the insertion of a new chapter in the text of the Bill, which would be 'Chapter VII', on the replacement of rules of the Argentine insolvency law in force, with a new title, would have been justified.

Undoubtedly, only the commentary to article 38 of the law would deserve a whole monograph like the ones that can be quoted in our Argentine doctrine. Let us just say here that the replacement of the international rules of the current Argentine bankruptcy law is consistent with the entire system of this Cross-Border Insolvency Law, to which we must add what will be expressed below.

IX. General and critical assessment of the Argentine Draft 2018 in totum

According to the characteristics of the Preliminary Project previously analysed, and to make a global and critical evaluation of it, the following considerations can be made.

Following the analysis of some articles of the Preliminary Project, a specific critical assessment of them has been made above, to which we refer the reader. Here, I will make an evaluation of the preliminary project in general.

1. The Draft includes numerous institutions that govern, organize, and distribute justice or equitable solutions to the main problems posed by modern private international insolvency law, starting with the law of the most advanced countries in the field, through the international organizations devoted to proposing rules by the different countries in various forums, such as UNCITRAL and the World Bank and, finally, by the national or international federations of professionals dedicated to insolvency, such as the American Bankruptcy Institute, INSOL International, INSOL Europe and the International Institute of Insolvency. This confers certainty, reliability in the methodology adopted and independence with respect to the solutions that can be adopted and proposed *de lege ferenda*.
2. In addition, the rules proposed, inasmuch as they have been negotiated with an open mind, by means of a sufficient consensus and a high level

of participation of legal experts specialized in the matter of insolvency and a clear sense of pragmatism, are free from any type of arbitrariness, because on the one hand they are respectful of due justice and of the bankruptcy and corporate institutions of the different legal systems already in force and, on the other hand, they contemplate adequate levels of freedom to adopt (or not) the solutions.

3. And within the practical options, those adopted by this Preliminary Draft are respectful of the nature of the regulated institutions, with coherence, order and adjusted to the prudence they demand.
4. For all these reasons, this law-making activity, for its methodology and for its final product, is worthy of praise, reasonable, timely, fair, and relevant to the problems raised that must be solved at present with respect to international bankruptcies.
5. The concepts, the situations described, and the solutions addressed are conceived with great amplitude in the formulas used by the legal text, which have flexibility in the interpretation relative to the addressees of the regulation, which is worthy of praise.
6. This rule regulates in detail and with precision the concepts, requirements, elements, safeguards, and equitable solutions, to achieve adequate communication, cooperation, and, as a final goal, the coordination of the final substantial solutions among the different bankruptcy proceedings of the same debtor in different countries, which is also worthy of praise. However, the ultimate purpose of the solutions to international bankruptcy problems must be based on the choice of fair substantial solutions, beyond the least or most successful coordination that has existed. In our view, the latter is merely an instrument or means for the justice of substantial solutions, not a goal.
7. In this sense, the project follows the most modern trends in comparative law of those countries that are leading reforms in bankruptcy law, in Europe and North America, adopting them with equanimity and proposing them in their right measure.
8. This modernized vision of the recent problems that have arisen in the last three decades is fully reflected in this project.
9. In the first Spanish edition of a monograph in 2018 we had suggested including rules on the insolvency of groups of companies, on the reorganization of companies and on the liability of company directors (on all these subjects, in multinational cases), including the controlling parties, to the fairest possible extent, which could be done in a new Draft that could be conceived. The 2018 Draft added a reasonable set of

rules in Chapter VI on Multinational Groups. Now there may be a lack of rules on reorganization of companies in insolvency and on liability of directors. These rules are already projected in part three (of the year 2010) and part four (of the year 2013) of the UNCITRAL Model Law on Cross-Border Insolvency. So, the path for future work on the issue is clear.

10. The same can be said of other institutions regulated by the European Regulation of 2015, which can inspire new provisions. This requires further study in the future by the authors.
11. Regarding the entities excluded in this Draft, this rule seems to be historically due to the double fact that, at a domestic level, in the Argentine regime some entities are traditionally excluded from the preventive bankruptcy or reorganization proceedings, being otherwise under a special regime of liquidation under the authority of an administrative agency and/or before a court of law. In most of the cases they include a formal declaration of bankruptcy by a court, such as in the case of banks, insurance companies, trusts, and others, by special laws or in the Argentine bankruptcy law itself. The second reason for the exclusion is that the UNCITRAL Model Law of Cross-Border Insolvency of 1997 excludes such entities, which are usually excluded from administrative or judicial bankruptcy proceedings, in many jurisdictions around the globe.

However, we believe that nothing prevents the application of regulations like the one in this commentary to such entities and, on the contrary, it is not only convenient but necessary that they be included in that law, considering the advantages and benefits. In practice, in the future there will undoubtedly be local and foreign insolvency proceedings of banks, insurance companies, trusts, and other entities with special bankruptcy regimes, which will most probably have assets or claims enforceable in other jurisdictions. Therefore, we believe that this regulation we are commenting on can be perfectly applied to them. The lawmaker could have acted here with slight inadvertence that those international problems should be solved. Therefore, a future modification of this regime requires eliminating this exclusion clause; instead, it is required to write an inclusive one. Moreover, in the worst case, otherwise, it is proper to apply this regulation by analogy *de lege lata*, once in force, to these local or foreign entities.

12. Notwithstanding the above, we thought that one of the last obstacles to be removed to achieve fuller respect for the foreign and multinational

phenomenon is the requirement of reciprocity, provided for in Article 3 of the 2002 Argentine Draft. But in the Project of 2018 this requirement disappeared, fortunately. We thought and still think that the rule of art. 3(2) of the Project of 2002 on the requirement of reciprocity for the authorization of the application of the proposed rules is subject to criticism because it certainly limits the recommended equal treatment of local and foreign creditors; also, it notably reduces the applicability of the rule we are commenting on, and, finally, it results in many aspects retrograde, inconvenient, and unnecessary. The latter is not only due to the foregoing, but also because it is inconsistent with basic objectives or principles of private international law, such as respect for foreigners and the consequent equality of treatment among domestic and foreign subjects and obligations. Countries that have adopted the UNCITRAL Model Law, such as, for example, the United States, in Chapter 15 of the U.S. Code, have eliminated this requirement from their multinational insolvency law, and this may well be the first step in that direction for other jurisdictions. We are of the opinion that in future Drafts this rule should be eliminated to ensure the full operation of the institutions of a just Private International Insolvency Law. This is one of the great steps that the 2018 Draft has taken and for which it deserves to be worthy of praise.

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Cross-border insolvency and the Brazilian experience (so far): comments on the recent adoption of the UNCITRAL Model law on cross-border insolvency

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Abstract:

This article examines Brazil's recent adoption of the UNCITRAL Model Law on Cross-Border Insolvency, which displaced the territorial model that had long governed Brazilian insolvency proceedings in favour of modified universalism. Drawing on the body of case law developed before the reform – including the OGX, Oi, OAS, Schahin, and Constellation reorganisation proceedings – it shows how Brazilian courts had already begun asserting jurisdiction over foreign entities within domestically-managed corporate groups through an expansive reading of Article 3 of the Brazilian Bankruptcy Law. The article then analyses the first applications of the new framework in the LATAM Airlines and Prosafe cases, arguing that the principal interpretative difficulty for Brazilian judges, insolvency practitioners, prosecutors and lawyers lies in resisting the temptation to equate the domestic notion of principal place of business with the autonomous, internationally-rooted concept of centre of main interests. Finally, it proposes the adoption of a protocol or a soft-law instrument, to govern judicial cooperation between Brazilian and European Union courts, and identifies Brazil's broader stance on non-main proceedings – anchored on the mere presence of assets in Brazil – as a potentially valuable feature of the new regime.

Keywords: cross-border insolvency; competent venue; Brazilian experience; UNCITRAL Model Law on Cross-Border Insolvency; cooperation and coordination between Brazil and the European Union.

A. Introduction

Cross-border insolvency (or transnational insolvency) is an expression used to encompass insolvency, bankruptcy, and rescue proceedings involv-

ing more than one jurisdiction, when the debtor (or group of debtors), its creditors, or its assets have links with the legal framework from two or more countries. A necessary premise for the success of a cross-border insolvency case is the existence of legal instruments (or case law) that allow cooperation and coordination between different jurisdictions.

At its inception, the Brazilian Bankruptcy Law (Federal Law No. 11,101/2005) did not have any provisions to address cross-border issues. Its main innovation over previous legislation was the introduction of rescue proceedings (judicial and extrajudicial reorganisation), mostly inspired by Chapter 11 of the United States Bankruptcy Code (U.S.C., Title 11), intended to guarantee the continuity and preservation of viable companies undergoing a financial or economic crisis, safeguarding jobs, and the redistribution of wealth.

The only provision remotely related to cross-border insolvency cases in the original version of the Brazilian Bankruptcy Law was the final part of Article 3, which recognised the jurisdiction of Brazilian courts for the filing of judicial or extrajudicial reorganisation 'of the branch of a company that has its head office outside Brazil'. Furthermore, Article 12 of the Introductory Statute to the Rules of Brazilian Law (Federal Decree-Law No. 4,657/1942, as amended) adopted a territorial model, stating that 'the Brazilian judicial authority is competent when the defendant is domiciled in Brazil or when the obligation has to be fulfilled here' and that 'it is up to the Brazilian judicial authority to hear about the actions related to property located in Brazil'.

As is well known, territorialism is a theoretical model that determines the exclusive jurisdiction of the country where the debtor's assets are located, with the consequent application of local rules.¹ According to this model, a debtor would need to file insolvency proceedings in each of the countries where its assets, branches, and affiliated companies are located, with the submission of such proceedings to the local legal systems.²

On the other hand, the theoretical model of universalism affirms that the country in which the debtor has its 'home' has jurisdiction over the debtor's insolvency proceeding at the global level, extending its effects to the legal systems of other countries.³ Thus, the legislation of the place of

1 See LoPucki, p. 701. See also McCormack, p. 172. See also Toledo/Satiro/Satiro/Campana Filho, p. 123–124.

2 See Campana Filho, p. 88.

3 See Perin Júnior, p. 104. See also Toledo/Satiro/Satiro/Campana Filho, p. 123–124.

filing would be applicable on a global scale, affecting the debtor's assets, branches, and affiliated companies, regardless of the country in which they are located.⁴

Each model has its shortcomings, which has led to different proposals with more balanced solutions for transnational insolvency, such as 'modified universalism', 'cooperative territorialism', or 'coordinated universalism', among others. The UNCITRAL Model Law on Cross-Border Insolvency ('MLCBI') adopted the modified universalism model, which prescribes a global approach in which a country leads the insolvency proceeding, where the debtor's centre of main interests ('COMI') is located, which is recognised and made effective in all countries in which the debtor has establishments.⁵ Therefore, cooperation and communication between jurisdictions are essential in this system.⁶

Through the reform recently enacted by Federal Law No. 14,112/2020, made effective on 23.01.2021, the Brazilian Bankruptcy Law adopted the MLCBI in Articles 167-A through 167-Y, with its mechanisms for international cooperation, coordination and communication, expressly allowing recognition of main insolvency proceedings at the debtor's centre of main interests and non-main proceedings where the debtor has foreign affiliates with an establishment, or even assets, as Brazil adopted a broader view toward recognition of non-main proceedings. This places Brazil in a better position to cooperate in cross-border cases involving companies based in the European Union, the United States, and many other countries around the world.

The recent change meant the adoption of a modified universalism model instead of the territorialism model that had ruled for decades in Brazil. There is no doubt that this change in legislation was necessary for Brazil to modernise its bankruptcy and rescue regimes, but it also meant that Brazilian courts, insolvency practitioners, and attorneys had to fundamentally change the way they viewed cross-border cases and learn how to cooperate, coordinate, and communicate with foreign jurisdictions.

With this in mind, the first part of this paper shows what Brazilian courts are used to in terms of finding the competent venues in bankruptcy and rescue cases involving corporate groups with foreign entities. The second

4 See Campana Filho, p. 86.

5 See Mevorach, p. 227.

6 These are true principles of transnational insolvency, without which it would be impossible to conduct multiple proceedings efficiently. See Bork, p. 44–72. See also Fletcher, p. 482–483.

part, in turn, discusses the adoption (rather, transplant) of the MLCBI by Brazilian legislation, considering the little experience that Brazilian courts have had since the enactment of the recent reform, only to conclude that insolvency professionals and Brazilian judges will need to become acquainted (especially through the sharing of experiences) in the seemingly foreign language that is cross-border insolvency. The third part suggests the adoption of a protocol or a soft-law instrument to further cooperation and coordination in cross-border insolvency cases involving companies or corporate groups with ties to Brazil and the European Union.

B. What Brazilian courts are used to: the definition of the competent venue according to the Brazilian Bankruptcy Law

In the Brazilian Bankruptcy Law, Article 3 states that the debtor's principal place of business (or 'principal establishment', according to the literal translation) defines the competent venue to process a bankruptcy or a reorganisation proceeding.

Historically, the notion of domicile as the place of a merchant's principal place of business in Brazilian law has clear roots in French legal tradition, particularly the Napoleonic Code of 1804, which defined domicile not merely in commercial or credit terms but as the locus of a person's central social and legal relations – an idea traceable to French law as early as the seventeenth century and echoed elsewhere in Europe, such as in Italian law's concept of *sede principale*. Against this background, it was natural for the Brazilian Commercial Code of the imperial period to treat the merchant's domicile as a reference to the principal place of business, a conception that later evolved into the explicit replacement of 'domicile' with 'principal establishment' in rules governing jurisdiction for insolvency proceedings. This shift responded to the practical reality that a single merchant might carry on multiple economic activities in different locations, requiring the law to select one point of reference for the application of insolvency regimes. The legislative choice of the principal place of business proved effective, especially as Brazilian law came to recognise the possibility of multiple domiciles or establishments for procedural and other purposes, while reserving the principal one as decisive for insolvency matters.⁷

⁷ See Galdino, p. 186–187.

The imperial conception of jurisdiction based on the debtor's principal place of business was not only preserved but reaffirmed throughout the republican period, as successive reforms of Brazilian bankruptcy law consistently maintained – and in practice strengthened – this criterion, from Federal Decree No. 917 of 1890 through the legislation of 1902, 1903, 1908, 1929, 1942, and its long consolidation in Federal Decree-Law No. 7,661 of 1945, which remained in force for sixty years, until its replacement by Article 3 of Federal Law No. 11,101 of 2005 (the Brazilian Bankruptcy Law), which once again entrusted jurisdiction for insolvency and rescue proceedings to the court of the debtor's principal place of business. The remarkable continuity of this rule, repeatedly scrutinized and reaffirmed by legislators, courts, and legal scholarship in light of the economic importance of insolvency law, suggests that it represents either a particularly sound solution or, at least, the most effective one yet devised.⁸

The rule in Article 3 of the Brazilian Bankruptcy Law aims to identify territorial competence within Brazil's jurisdiction, although it might be akin to the notion of the centre of main interests in cross-border insolvency. The principal place of business is often interpreted by case law as the place of management and control or the place of business and operations,⁹ whereas the company's registered office by itself, though taken into consideration, may be discarded as a relevant standard in this regard, if other factors are present.

Article 3 does not expressly define the criteria that must be adopted to ascertain the debtor's principal place of business, which makes it more appropriate to characterise the debtor's main establishment from a 'measurement of the externalization of concrete acts, constituting, therefore, a matter of fact, to be appreciated in light of the specific case by the judge, when accepting their competence'.¹⁰ At the end of the day, verification of the principal place of business depends on a case-by-case analysis,¹¹ as '[t]here is no formula to determine it. In each case, it is up to the judiciary to identify which establishment has predominance over the business structure'.¹²

8 See Galdino, p. 187–189.

9 See Galdino, p. 194.

10 See Campinho, p. 34.

11 See Galdino, p. 193.

12 See Mamede, p. 25. See also Fazzio Junior, p. 56.

Therefore, the standard of the principal place of business is flexible and must be ascertained based on the factual circumstances of each case.¹³ Thus, in order to determine the principal place of business of a company or a corporate group, the debtor, before filing for reorganisation, and the Brazilian courts, when ruling on such filing, should consider and weigh the importance of the following non-exclusive and non-cumulative factors: (i) the concentration of the debtor's, or debtor group's, greatest volume of business, and its most important establishment from an economic point of view (e.g., the source of most of its revenue), its economic centre;¹⁴ (ii) the decision-making centre, the place from which the most important strategic, financial and administrative decisions and orders emanate;¹⁵

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- 13 The Brazilian Superior Court of Justice (in line with an approach previously prevailing at the Brazilian Supreme Court) has traditionally understood the court of the principal place of business to correspond to the company's decision-making centre in insolvency proceedings; however, over the past decade, some precedents have shown a shift toward identifying jurisdiction by reference to the economic centre, sometimes displacing the decision-making centre and at other times combining both criteria. As a result, after a period in which the decision-making centre clearly predominated as the defining element of the principal place of business, current case law reflects a coexistence of decisions that adhere to that criterion and others that favour the economic centre. See Galdino, p. 203.
- 14 See Brazilian Supreme Court 18.02.1977 – Conflict of Jurisdiction No. 6.025/SP, Justice Antonio Neder, Full Court (affirming that the principal place of business 'is not the one to which the company's bylaws confer the title of principal, but rather the one that concretely constitutes the living body, the vital centre of the debtor's main commercial activities – the seat or nucleus of the business in its throbbing material existence'). See also Brazilian Superior Court of Justice 22.02.2017 – Internal Appeal in the Conflict of Jurisdiction No. 147.714/SP, Justice Luis Felipe Salomão, 2nd Section (stating that 'pursuant to article 3 of Law No. 11,101/2005, the competent forum for the processing of judicial reorganisation and the declaration of bankruptcy is the one where the main establishment of the company is located, thus considered the place with the greatest volume of business, that is, the most important place of the business activity from an economic point of view'). See also Brazilian Superior Court of Justice 20.10.2020 – Internal Appeal in the Motion for Clarification in Conflict of Jurisdiction No. 172.719/RS, Justice Raul Araújo, 2nd Section. See also Brazilian Superior Court of Justice 26.09.2018 – Internal Appeal in the Conflict of Jurisdiction No. 157.969/RS, Justice Ricardo Villas Bôas Cueva, 2nd Section.
- 15 See Brazilian Supreme Court 22.11.1944 – Conflict of Jurisdiction No. 1.529/SP, Justice Orozimbo Nonato, Full Court (affirming that 'what characterizes the principal establishment is not the volume of business nor the importance of commercial activity; rather, with or without those elements, it is the establishment that centralizes administration (...) from which the direction of commercial life radiates'). See also São Paulo Court of Appeals 09.12.2013 – Interlocutory Appeal No. 0015219–05.2013.8.26.0000, Judge Tasso Duarte de Melo, 2nd Reserved Chamber of Corpo-

(iii) the location where most business and industrial activities are carried out;¹⁶ (iv) the location of the debtor's, or the debtor group's, management (e.g., the place from which the directors and managers run the business activity);¹⁷ (v) the place where the majority of employees and creditors is located, or where the debtor's books and accounting are found;¹⁸ (vi) the location of most assets and production facilities owned by the debtor, or the debtor group;¹⁹ (vii) the place where the debtor, or the debtor group, enters into most contracts with governmental entities;²⁰ (viii) the place where the objectives of the Brazilian Bankruptcy Law will be fulfilled with greater

rate Law. See also Paraná Court of Appeals 12.02.2014 – Interlocutory Appeal No. 1050315–2, Judge Renato Lopes de Paiva, 17th Civil Chamber.

- 16 See São Paulo Court of Appeals 14.09.2016. – Interlocutory Appeal No. 2132999–24.2016.8.26.0000, Judge Alexandre Marcondes, 2nd Reserved Chamber of Corporate Law. See also Rio Grande do Sul Court of Appeals 26.04.2017 – Interlocutory Appeal No. 70071561328, Judge Léo Romi Pilau Júnior, 5th Civil Chamber. See also Paraná Court of Appeals 23.03.2016 – Interlocutory Appeal No. 1359265–9, Judge Lauri Caetano da Silva, 17th Civil Chamber. And in light of the previous Bankruptcy Law (Federal Decree-Law No. 7,661/1945), see Barreto Filho, p. 145.
- 17 See São Paulo Court of Appeals 04.12.2012 – Interlocutory Appeal No. 0190084–41.2012.8.26.0000, Judge Ricardo Negrão, 2nd Reserved Chamber of Corporate Law (affirming that the '[d]emonstration that the place of board deliberations, management and other administrative, executive and legislative activities take place in Ribeirão Pires. In addition, the largest productive body that make up the objective and corporate aspects of the company is located in that city'). See also Rio de Janeiro Court of Appeals 12.03.2014 – Interlocutory Appeal No. 0064637–04.2013.8.19.0000, Judge Gilberto Guarino, 14th Civil Chamber.
- 18 See Rio de Janeiro Court of Appeals 12.12.2018 – Interlocutory Appeal No. 0051631–51.2018.8.19.0000, Judge Luiz Fernando de Andrade Pinto, 25th Civil Chamber. See also Paraná Court of Appeals 03.05.2017 – Conflict of Jurisdiction No. 1605387–5, Judge Marcelo Gobbo Dalla Dea, 18th Civil Chamber. See also Rio Grande do Sul Court of Appeals 14.07.2016 – Interlocutory Appeal No. 70067378414, Judge Rinez da Trindade, 6th Civil Chamber. See also São Paulo Court of Appeals 26.06.2012 – Interlocutory Appeal No. 0281187–66.2011.8.26.0000, Judge Pereira Calças, 1st Reserved Chamber of Corporate Law. See also Coelho, p. 54–55.
- 19 See Rio de Janeiro Court of Appeals 25.06.2019 – Interlocutory Appeal No. 0022766–81.2019.8.19.0000, Judge Geórgia de Carvalho Lima, 12th Civil Chamber. See also Goiás Court of Appeals 05.11.2014 – Conflict of Jurisdiction No. 149608–61.2014.8.09.0000, Judge Gerson Santana Cintra, 1st Civil Section. See also Toledo/Abrão/Toledo, p. 13–14.
- 20 See Rio Grande do Sul Court of Appeals 26.06.2014 – Interlocutory Appeal No. 70060247848, Judge Jorge Luiz Lopes do Canto, 5th Civil Chamber.

chances of success;²¹ and/or (ix) the statutory or contractual headquarters of the debtor.²²

All these factors must be evaluated by the debtor before filing for judicial or extrajudicial reorganisation, or for voluntary bankruptcy, as well as by the court when considering such a request, in an attempt to confirm whether the principal place of business is actually located under its jurisdiction. However, some of these factors are more relevant (and therefore have a greater weight in the ruling of the court that recognises its competence) and others less.

On the one hand, the statutory or contractual headquarters, for example, is considered the least important factor in determining the principal place of business because of the ease of manipulation by the debtor. On the other hand, substantive factors, such as where the company or corporate group concentrates its largest volume of business (e.g., the origin of most of its revenue, where most of its contracts are executed), or the place from which the business is run by management, are considered as important factors in determining where the debtor's rescue or bankruptcy proceeding must be carried out. Substantive factors cannot be easily manipulated by the debtor, as they point to the place where it pursues its business activities, produces/sells goods, and/or provides services.

When analysing the principal place of business for a company or a corporate group with operations spread across several districts, or even states, the decision-making centre may be considered a more relevant factor. When the economic activities (e.g., industrial complex, distribution centre) are located in one district or state, and the administrative office in another, the location of activities may be considered more significant.²³ At first glance, it seems that the factors related to economic turnover are the most relevant, but in a situation in which there is more than one establishment or business entity of equal relevance to the company, the location of the other factors may be important to ascertain which is the principal place of business.

21 See Minas Gerais Court of Appeals 19.06.2012 – Interlocutory Appeal No. 1.0707.11.009662 – 5/001, Judge Oliveira Firmo, 7th Civil Chamber.

22 See Brazilian Superior Court of Justice 09.11.2016 – Conflict of Jurisdiction No. 146.579/MG, Justice Paulo de Tarso Sanseverino, 2nd Section. See also Rio Grande do Sul Court of Appeals 28.03.2018 – Conflict of Jurisdiction No. 70075788356, Judge Jorge Luiz Lopes do Canto, 5th Civil Chamber.

23 See Saunders, *Minnesota L. Rev.* May 2006, 1475.

In addition, it is important to keep in mind whether the choice of the principal place of business may cause any type of damage to creditors, employees, and other stakeholders. Consider the example of a rescue proceeding filed in a district deep in the interior of the Amazon rainforest, accessible only by boat and with an unstable Internet connection, with most creditors located in different districts spread out across the largest state in Brazil. In this case, if the decision-making centre is in a district that allows greater inclusion and participation of the actors in the reorganisation process, this criterion should have more weight when deciding where to file the rescue proceeding.

If, after evaluating all the factors, the judge finds that more than one location could meet the standard of the principal place of business, ‘the court of the place of the establishment where the judicial reorganisation action was filed must be considered competent’,²⁴ in order to avoid any harm to the debtor resulting from delays caused by the change of venues. Similarly, in cases in which another establishment could be only marginally more relevant, the proceeding should remain where it is, in order to protect the effectiveness of the rescue process and avoid damages to the debtor, its creditors, and other stakeholders.

As stated by the former President of the Brazilian Supreme Court, Justice Luiz Fux, the ‘judge has the duty to examine the immediate and systemic consequences that their ruling will produce in reality, because, by exercising their decision-making power in the concrete cases they are faced with, judges allocate scarce resources’.²⁵ The analysis, it must be reiterated, should be carried out in each case, with regard to its specificities and peculiarities.

The same logic has been applied by Brazilian courts to plaintiffs that file for judicial reorganisation as a corporate group, with companies headquartered in Brazil and abroad. If the multinational conglomerate (seen as a whole, and not the entities individually, according to Brazilian practice) has its principal place of business in Brazil, the court will find itself competent to process the rescue proceeding. Should, then, Brazilian courts hold jurisdiction to process rescue proceedings that involve foreign entities? A body of case law has been formed in Brazil to answer precisely this question.

24 See Ayoub/Cavalli, p. 92.

25 See Brazilian Supreme Court 12.03.2019 – AgRg Pet No. 8.002, Justice Luiz Fux, 1st Chamber.

I. The Brazilian experience with cross-border cases before the recent reform to the Brazilian Bankruptcy Law

The leading case in transnational insolvency matters is the OGX Group's reorganisation proceeding, specifically regarding the recognition of Brazilian jurisdiction over foreign entities. Two Brazilian companies (OGX Petróleo e Gás Participações S/A and OGX Petróleo e Gás S/A) and two foreign companies (OGX International GmbH and OGX Austria GmbH, both with seats in Austria) filed a petition for reorganisation in Brazil. The companies were members of the same corporate group, with interconnected operations in the oil and gas sector.

In summary, the OGX Group was organised as follows: OGX Petróleo e Gás Participações S/A was the holding and non-operating company, parent of OGX Petróleo e Gás S/A with 99.99 % ownership of its capital structure. In addition, it also directly and fully exercised control over OGX International GmbH and OGX Austria GmbH. The group's administrative offices and business activities were located in Brazil. Meanwhile, the foreign companies were used to attract financing and investments overseas, in order to fund the operation in Brazilian oil fields.

At first, the Brazilian judge did not grant the joint processing of the reorganisation proceeding, grounded on the argument that the Brazilian court did not have jurisdiction over foreign companies.

The OGX Group appealed from this order on the following basis: (i) the absence of a legal provision does not imply a prohibition on the joint processing of the judicial reorganisation of transnational corporate groups; (ii) the court of the location of the corporate group's principal place of business holds jurisdiction to process the rescue proceeding for the entire corporate group; and (iii) the joint processing of the OGX Group's reorganisation does not imply a violation of Austrian sovereignty or legislation, as the country's laws allow the adoption of the unified proceeding in Brazil.

The Rio de Janeiro Court of Appeals accepted OGX Group's arguments for recognising the common corporate structure between Brazilian and Austrian companies and affirmed that the foreign companies were only vehicles for obtaining financing abroad – resources that would be directed to the Brazilian operation. The Rio de Janeiro Court of Appeals, according to Judge Gilberto Guarino's winning opinion, also adopted the following arguments to grant the processing of the judicial reorganisation of the OGX Group: (i) the foreign entities were subsidiaries of the Brazilian

companies; (ii) all plaintiffs were part of the same corporate group, with its principal place of business and centre of operations located in Brazil, when considered as a whole, and not individually; (iii) without bankruptcy protection for the foreign companies, the group's restructuring efforts could be defeated, due to the possibility of foreign orders seizing the group's assets and the difficulty of carrying out operations at the international level; and (iv) Austrian legislation recognises the effects of the foreign reorganisation proceeding.²⁶

Therefore, the Rio de Janeiro Court of Appeals granted the appeal to revoke the lower court judge's order that rejected the application for rescue made by the Austrian companies and determined the joint processing of the judicial reorganisation of the OGX Group companies.

Similar business structures were observed in the judicial reorganisation of the OAS Group, with business activities in construction and real estate development,²⁷ and the Sete Brasil Group, a service provider in the oil and gas industry.²⁸ In both the OAS Group and the Sete Brasil Group rescue proceedings, Brazilian courts have recognised their jurisdiction over foreign subsidiaries because they were used in a financing structure around a corporate group that had its main establishment and centre of operations in Brazil.

In another relevant case, one of the entities in the Schahin Group was an English subsidiary that owned a drilling vessel located in Brazil, which was leased to Petrobras. It was the group's only asset that rendered any proceeds to the ailing corporate group situated in Brazil. Once again, the Brazilian court recognised its jurisdiction, due to the close relationship between the companies, the location of the asset, and the sheer necessity for the lease agreement to continue to inject funds towards the payment of creditors and guarantee the survival of the business.²⁹

26 See Rio de Janeiro Court of Appeals 19.02.2014 – Interlocutory Appeal No. 0064658–77.2013.8.19.0000, Judge Gilberto Guarino, 14th Civil Chamber.

27 See São Paulo Court of Appeals 31.08.2015 – Interlocutory Appeal No. 2084295–14.2015.8.26.0000, Judge Carlos Alberto Garbi, 2nd Reserved Chamber of Corporate Law.

28 See Rio de Janeiro Court of Appeals 07.02.2017 – Interlocutory Appeal No. 0034171–22.2016.8.19.0000, Judge Carlos Eduardo Moreira da Silva, 22nd Civil Chamber.

29 See São Paulo Court of Appeals 13.03.2017 – Interlocutory Appeal No. 2106998–36.2015.8.26.0000, Judge Caio Marcelo Mendes de Oliveira, 2nd Reserved Chamber of Corporate Law.

As the cases kept coming, the Brazilian courts continued to find themselves holding jurisdiction to process the rescue proceedings of foreign entities, in an interpretation of Article 3 of the Brazilian Bankruptcy Law. One of the most important cross-border insolvency cases in Brazil is the well-known judicial reorganisation of the telecommunications giant Oi Group. The petition for reorganisation was filed in a Rio de Janeiro court, which included two Dutch companies and foreign entities used to secure investments directed toward the conglomerate's activities in Brazil. Similar to the other cases mentioned earlier, the Brazilian court recognised its jurisdiction over the foreign companies and admitted them to the reorganisation proceeding, based on the grounds that, like in the OGX Group case, they were financing vehicles used to obtain investments overseas and remit them to the Brazilian operations.³⁰ The Rio de Janeiro court also mentioned provisions from the MLCBI as the basis for the decision, although it had not yet been adopted by Brazil.

At the same time, a suspension of payments was filed before a Dutch court in order to halt any actions or executions by foreign creditors – for the most part, bondholders. The proceeding in the Netherlands took a turn for the worse, and the Dutch companies were declared bankrupt. Notwithstanding, the Brazilian court did not acknowledge this decision and reaffirmed its jurisdiction over the Dutch companies. The discussion was submitted to the United States Bankruptcy Court for the Southern District of New York under Chapter 15, with the purpose of recognising the Dutch bankruptcy as the foreign main proceeding for the Dutch companies. The New York court found that the Dutch companies' 'nerve centre and headquarters [we]re clearly located in Brazil', and that it 'ha[d] no operations or business independent of the Oi Group and [wa]s operated within the Oi Group as part of a single, integrated economic unit'. The New York court also affirmed that the 'Oi Group, in turn, [wa]s headquartered and managed from the principal executive office of Oi in Rio de Janeiro, Brazil', and with 'every aspect of the Oi Group's operations, finances, cor-

30 See Rio de Janeiro Court of Appeals 31.03.2017 – Interlocutory Appeal No. 0051668–49.2016.8.19.0000, Judge Cezar Augusto Rodrigues Costa, 8th Civil Chamber.

porate management, employee management and payroll, and short- and long-term strategic planning directed from Brazil'.³¹⁻³²

The New York court's conclusion, however, was based on an individual analysis of each of the companies' centres of main interests, and since the foreign entities served only as special purpose vehicles to attract investment to the corporate group's main activities in Brazil, the foreign main proceeding was found to be the one under Brazilian jurisdiction.

Another relevant case was the rescue proceeding for the Constellation Group, the owner of drilling rigs, and a service provider in the oil and gas industry. Similar to the Schahin Group, the Rio de Janeiro Court of Appeals found that foreign entities that had assets (e.g., drill ships and rigs) located in Brazil (even if indirectly owned) should also be subject to the Brazilian judicial reorganisation proceeding.³³ This time, the Brazilian court made an individual assessment of each company's principal place of business, instead of looking only at the big picture of the entire group.

Despite explicit legal provisions regulating the subject, Brazilian case law has construed Article 3 of the Brazilian Bankruptcy Law to allow foreign companies to seek judicial reorganisation or extrajudicial reorganisation in Brazil when, despite their formal incorporation abroad, their principal place of business is effectively located in the country. In the aforementioned leading cases, Brazilian courts have asserted jurisdiction over foreign subsidiaries that functioned as financing or asset-holding vehicles within cor-

31 See United States Bankruptcy Court for the Southern District of New York 12.04.2017 – *In re Oi Brasil Holdings Coöperatief U.A.* (Bankr. S.D.N.Y. 2017).

32 Over the past several months, the Oi Group sought to shift the U.S. aspect of its cross-border restructuring away from the Chapter 15 recognition of its Brazilian judicial reorganization toward a full Chapter 11 bankruptcy case in the United States. In July 2025, the company filed a motion before the New York court requesting termination of the Chapter 15 proceeding that has recognised and given effect to its Brazilian judicial reorganisation, arguing that ending such proceeding would clear the way for a standalone Chapter 11 filing to address substantial liabilities that cannot be restructured under Brazilian law (in a possible attempt to restructure amounts provided as a DIP loan in Brazil) and to provide broader creditor protections and liquidity options. However, in early October 2025 the New York court denied Oi's request to terminate the Chapter 15 recognition and dismiss the Chapter 15 case, leaving that proceeding in place and complicating any direct move into Chapter 11.

33 See Rio de Janeiro Court of Appeals 26.03.2019 – Interlocutory Appeal No. 0070417–46.2018.8.19.0000, Judge Eduardo Gusmão Alves de Brito Neto, 16th Civil Chamber. See also Rio de Janeiro Court of Appeals 04.06.2019 – Motion for Clarification No. 0070417–46.2018.8.19.0000, Judge Eduardo Gusmão Alves de Brito Neto, 16th Civil Chamber.

porate groups whose strategic management, operational centre, and economic activities were concentrated in Brazil, or whose key assets were located there. Whether through a group-wide analysis or, in more recent decisions, an individual assessment of each entity's centre of main interests, the courts have consistently emphasised substance over form, allowing foreign entities to be included in Brazilian rescue proceedings so long as their principal place of business – or equivalent decision-making and operational nexus – was found to be in Brazil.³⁴

However, even with the growing number of cases with cross-border ties, most Brazilian courts may not be familiar with the legal framework brought about by the recent adoption of the MLCBI.

C. Brazil's adoption of the UNCITRAL Model law on cross-Border insolvency

In some of the aforementioned cases, such as Oi Group's rescue proceeding, the debtors filed a Chapter 15 proceeding before the United States courts to recognise the Brazilian proceeding as a foreign main proceeding. This put a few Brazilian judges in a position to cooperate, coordinate, and communicate with foreign courts, despite the absence of a legal framework for cross-border insolvency matters. These judges were also exposed to foreign experience and the use of Chapter 15 to recognise foreign main and non-main proceedings. However, these were only a handful of judges that held positions in specialised bankruptcy and corporate law courts in Rio de Janeiro and São Paulo, two of the most economically important cities in Brazil; the majority of judges throughout Brazil, however, may not be specialised in bankruptcy and restructuring matters and, pursuant to the internal rules of court organisation within each state, most judges may

34 In an expert opinion issued in the context of the InterCement Group restructuring proceeding in Brazil, which included Dutch and Spanish entities, Francisco Satiro offers a divergent view, according to which Brazil's adoption of the MLCBI signals to the international community that it will exercise jurisdiction over domestic debtors and assets located within its territory, while respecting the jurisdiction of other countries over foreign debtors and assets situated abroad, and that cross-border insolvencies will be addressed through recognition of foreign proceedings and streamlined international cooperation. Satiro argues that this logic is reflected in Article 3 of the Brazilian Bankruptcy Law, which deliberately refrains from asserting jurisdiction over foreign companies headquartered outside Brazil, out of respect for foreign sovereignty, limiting Brazilian jurisdiction to entrepreneurs and business entities constituted under Brazilian law and to branches of foreign companies operating in Brazil.

be called to process bankruptcy, judicial, and extrajudicial reorganisation proceedings.

Although there is an ongoing movement to create district and regional courts that are specialised in corporate law (including bankruptcy and rescue proceedings), as well as specialised chambers in the State Courts of Appeals, Brazil may be some time away from having judges who are familiar with cross-border insolvency matters in each of its 26 states and the Federal District. This is not the only problem that a continental country like Brazil has; it is also important for insolvency practitioners, public prosecutors (which have a supervisory role in bankruptcy and rescue proceedings), and attorneys across the country to understand the fundamental notions of cross-border insolvency in order to be able to deal with cases that might arise in the future.

An important step in putting legal professionals on the same page was the adoption of the MLCBI by Articles 167-A through 167-Y of the Brazilian Bankruptcy Law. Even though a body of case law may persuade judges to adopt a certain understanding, they are not bound by precedent (except in certain specific situations), since Brazil is not a common law jurisdiction but a civil law country. This means that judges and legal professionals are used to examining the legislation first, which makes it indispensable for any important changes to a certain legal regime (such as corporate bankruptcy and rescue) to be made through the enactment of laws to ensure its widespread and uniform application.

Even then, laws may be misunderstood by legal professionals, especially when such laws may be considered foreign transplants.³⁵ This is because certain notions and concepts may not be entirely laid out by the law and would require further interpretation. As aptly explained by Joseph A. Schumpeter, '[t]here are no doubt concepts that bear no relation to any particular epoch or social world, such as want or choice or economic good. (...) But there are still others which by virtue of their nature cannot stand transplantation and always carry the flavour of a particular institutional framework'.³⁶

35 According to Katharina Pistor, Daniel Berkowitz and Jean-François Richard: 'The fact that formal legal orders have put the key elements of the legal order in writing tends to disguise the fact that the effectiveness of these rules also rests on knowledge and understanding of these rules and their underlying values by social actors' (Pistor/Berkowitz/Richard, *European Econ. Rev.* 2003 (1999), 165).

36 Schumpeter, p. 169.

Often times, ‘not even world best-practice solutions will work if the society will resist them or ignore them. That is why an understanding of local social norms, culture, and religion is so important’.³⁷ The MLCBI certainly provides best-practice solutions when it comes to regulating cross-border insolvency, but ‘for the law to be effective, it must be meaningful in the context in which it is applied so citizens have an incentive to use the law and to demand institutions that work to enforce and develop the law’. Furthermore, ‘judges, lawyers, politicians, and other legal intermediaries that are responsible for developing the law must be able to increase the quality of law in a way that is responsive to demand for legality’.³⁸

Consider the notion of COMI as an example. The MLCBI states that ‘[i]n the absence of proof to the contrary, the debtor’s registered office, or habitual residence in the case of an individual, is presumed to be the centre of the debtor’s main interests’. Unlike the MLCBI, Regulation (EU) 2015/848 (the European Insolvency Regulation Recast – ‘EIR Recast’), provides a clear(er) definition of centre of main interests in its Article 3, item 1, according to which ‘[t]he centre of main interests shall be the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties’. Although the verification of COMI requires a fact-specific analysis, a general guideline provided by the law may be useful for its interpretation and application by the courts.

Brazil transplanted the notion of COMI from the MLCBI, without bringing forth a clear definition as to what it would be (mirroring the MLCBI), as can be seen in Article 167-I, item III, of the Brazilian Bankruptcy Law. ‘The absence of a statutory definition for a term that is not self-defining signifies that the text is open-ended, and invites development by courts, depending on facts presented, without prescription or limitation.’³⁹ Just as the definition of a debtor’s principal place of business pursuant to Article 3 of the Brazilian Bankruptcy Law is heavily influenced by the body of case law, so is the definition of COMI.

Since the concept of COMI is open to interpretation, where would Brazilian insolvency professionals look for help to give it substantial meaning? Well, one might think that Article 3 of the Brazilian Bankruptcy Law, with the definition of principal place of business, as consolidated under

37 Dam, p. 224.

38 Pistor/Berkowitz/Richard, *European Econ. Rev.* 2003 (1999), 165.

39 United States Court of Appeals for the 2nd Circuit 16.04.2013 – *Morning Mist Holdings Ltd. v. Kryz* (In re *Fairfield Sentry Ltd.*), 714 F.3d 127 (2d Cir. 2013).

years of case law, may be a good place to start. However, the notions of principal place of business and COMI are not to be confused, as they have quite different functions, the first being used domestically to define the competent venue to process a bankruptcy or rescue proceeding, while the second is used in order to ascertain which would be the foreign main proceeding in the context of cross-border insolvency.⁴⁰

Because of its specific function, COMI should be interpreted considering its international origin, as suggested by Article 8 of the MLCBI, which states that '[i]n the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith'. When adopting the MLCBI, however, Brazil changed the meaning of this rule of interpretation: Paragraph 1 of Article 167-A of the Brazilian Bankruptcy Law provides that '[i]n interpreting the provisions of this Chapter [of Cross-Border Insolvency], regard is to be had to its objective of international cooperation, the need for uniformity in its application and the observance of good faith'.⁴¹

Instead of looking to the international experience and international cases in which the concept of COMI gained substance and was applied by foreign courts, it is possible that Brazilian insolvency professionals and courts (particularly those that are not specialised) will simply refer to the existing body of case law regarding the definition of principal place of business, as provided by Article 3 of the Brazilian Bankruptcy Law.⁴² Some rulings may be correct (or perhaps fortunate) in ascertaining the COMI of a corporate

40 The Guide to Enactment and Interpretation of the MLCBI, the related texts published by UNCITRAL throughout the years, and the cases listed in the CLOUT database would be great sources of information for the interpretation of COMI, but most Brazilian judges may not be familiarised with these resources and/or may not be fluent in English to be able to utilise them.

41 There are scholars that argue that the provision inserted in the Brazilian Bankruptcy Law has the same meaning as the provision in the MLCBI, despite the different wording. See Scalzilli/Spinelli/Tellechea, p. 296.

42 When interpreting cross-border insolvency rules, it is not possible to utilise case law and scholarship pertaining to local matters as inspiration, but rather international case law and sources. See Hannan, p. 88.

group of an international nature,⁴³ while other rulings may not.⁴⁴ These decisions may cause substantial damage before they are reviewed and struck down by higher courts.

In three recent cases, creditors have also raised the argument that, because of the adoption of the MLCBI, foreign companies cannot restructure before Brazilian courts and under the Brazilian Bankruptcy Law but would be required to file for rescue proceedings in the countries in which they are registered. This line of reasoning confuses (i) the capacity of the Brazilian court to find that it holds jurisdiction to process the rescue and bankruptcy proceedings of foreign entities, as in the OGX, the Oi and the Constellation cases previously mentioned, with (ii) the assessment of COMI for the recognition of foreign main and non-main proceedings.⁴⁵ This was an argument used in the Americanas, the Cervejaria Petrópolis and the InterCement cases.⁴⁶

This is just an example of a topic that may be inadequately interpreted by Brazilian insolvency professionals and courts, setting them apart from

43 In the Gutmen Investment Corp case, the Civil Court of Ibaity, in the State of Paraná, found that the foreign entity's COMI was located in its formal headquarters in the British Virgin Islands, and subsequently recognised the foreign liquidation as a foreign main proceeding – there was no evidence to rebut the presumption of the debtor's COMI and suggest otherwise. See Paraná State Court 04.11.2022 – Proceeding No. 0004672–25.2021.8.16.0089, Judge Nara Meranca Bueno Pereira Pinto, Civil Court of Ibaity.

44 In the Mercon Coffee case, filed before the 3rd Civil Court of the City of Varginha, in the State of Minas Gerais, the court granted recognition of the foreign main proceeding ongoing in the Southern District of New York, based on the newly adopted provisions of the Brazilian Bankruptcy Law. However, both the motion from the filing entity and the lower court order assessed the COMI based on the notion of principal place of business found in Article 3 of the Brazilian Bankruptcy Law. See Minas Gerais State Court – Proceeding No. 5017501–52.2023.8.13.0707, Judge Pedro Parcekian, 3rd Civil Court of the City of Varginha.

45 This confusion may also be observed in papers on the subject. See Hatanaka/Martins/Brunner/Gaspar, p. 230–231.

46 In the Americanas, the Cervejaria Petrópolis and the InterCement cases, the lower court judges have dismissed such arguments, but there is yet no ruling from the Courts of Appeals on the matter. For the Americanas case, see Rio de Janeiro State Court – Proceeding No. 0803087–20.2023.8.19.0001, Judge Paulo Assed Estefan, 4th Corporate Law Court of the City of Rio de Janeiro. For the Cervejaria Petrópolis case, see Rio de Janeiro State Court – Proceeding No. 0835616–92.2023.8.19.0001, Judge Elisabete Franco Longobardi, 5th Corporate Law Court of the City of Rio de Janeiro. For the InterCement case, see São Paulo State Court – Proceeding No. 1192002–34.2024.8.26.0100, Judge Jomar Juarez Amorim, 1st Court for Bankruptcy and Judicial Reorganisation.

their international peers.⁴⁷ Notwithstanding, as Katharina Pistor, Daniel Berkowitz, and Jean-François Richard have explained, ‘for law to be effective, a demand for law must exist so that the law on the books will actually be used in practice and legal intermediaries responsible for developing the law are responsive to this demand’ – which may precisely be the case of Brazil’s adoption of the MLCBI, considering the need for a legal framework to address cross-border insolvency.⁴⁸ The authors go on to elucidate that ‘[i]f the transplant adapted the law to local conditions, or had a population that was already familiar with basic legal principles of the transplanted law, then we would expect that the law would be used’.⁴⁹

47 In the Jason Hector Blain case, filed before the 1st Civil Court of the City of Balneário Camboriú, in the State of Santa Catarina, in which a foreign representative sought to reach assets owned directly and indirectly by a defendant in a civil insolvency case in Scotland, the Public Prosecutor’s Office argued that the motion for recognition of the foreign main proceeding should not be granted, because there was no previous recognition of the efficacy of a foreign order by the Brazilian Superior Court of Justice. The lower court judge sided with the Public Prosecutor’s Office and dismissed the request for recognition, based on the absence of such a ruling by the Brazilian Superior Court of Justice, and further found that the provisions of the Brazilian Bankruptcy Law for cross-border cases would not apply to civil insolvency cases involving natural persons. See Santa Catarina State Court 15.09.2023 – Proceeding No. 5014643–14.2023.8.24.0005, Judge Claudio Barbosa Fontes Filho, 1st Civil Court of the City of Balneário Camboriú. The lower court order was subject to appeal and an injunction was granted by the Santa Catarina Court of Appeals to seize assets owned by Jason Hector Blain, finding that there was no need for an order by the Brazilian Superior Court of Justice, as this was the case of recognition of a foreign main proceeding based on the newly adopted provisions for cross-border insolvency in the Brazilian Bankruptcy Law. See Santa Catarina Court of Appeals 19.12.2023 – Appeal No. 5076905–15.2023.8.24.0000, Judge Osmar Mohr, 6th Chamber of Commercial Law.

48 Though the MLCBI is not a transplant from another jurisdiction, its adoption into law in Brazil may feel like it is, due to its international nature.

49 Katharina Pistor, Daniel Berkowitz and Jean-François Richard continue to develop their reasoning: ‘Because the law would be used, a strong public demand for institutions to enforce this law would follow. And, legal intermediaries that are responsible for developing and enforcing this imported law would be able to develop the law so as to match demand, because the strong demand for law would provide resources for legal change. Where these conditions are present we would expect the legal order to function just as effectively as in an origin country where the law was developed internally. However, if the law was not adapted to local conditions, or if it was imposed via colonization and the population within the transplant was not familiar with the law, then we would expect that initial demand for using these laws to be weak. Legal intermediaries would have a more difficult time developing the law to match the demand. Countries that receive the law in this fashion are thus subject

In Brazil, there are several legal professionals and judges that are specialised in bankruptcy and restructuring, many others with a keen interest in cross-border insolvency matters, and quite a few specialised courts. This familiarity with the concepts brought about by the MLCBI may be of extreme importance in the interpretation of the law, especially considering its international origin.

Nevertheless, there may be a learning curve for legal professionals while they grasp for meaning in the new provisions transplanted from the MLCBI – time, and the outstanding ability of insolvency professionals and judges in Brazil will certainly help in flattening this curve, but it will likely still be there.

The exchange of experiences at conferences and seminars, both in Brazil and abroad, may also play an important role. Events hosted by UNCITRAL, by universities and by associations such as INSOL, III, TMA, ABI, among others, in Europe and around the world, may be very useful in disseminating the knowledge foreign insolvency professionals and courts have developed on cross-border insolvency matters.

That being said, there are two instances in which the newly adopted cross-border rules have come to play and which will be addressed in more detail in this paper: the LATAM Airlines case and the Prosafe case, each with lessons to be learned by Brazilian insolvency professionals.

I. The LATAM Airlines case: a misunderstanding of how the recognition of foreign insolvency proceedings should work

On 26.05.2020, LATAM Airlines Group S.A., owner of Brazil's and Latin America's largest airline company, filed for Chapter 11 protection before the United States Bankruptcy Court for the Southern District of New York. There was no filing for judicial reorganisation in Brazil regarding the Brazilian entity, with the rescue proceeding being carried out before the U.S. bankruptcy court.⁵⁰

to the 'transplant effect': their legal order would function less effectively than either origins or transplants that either adapted the law to local conditions and/or had a population that was familiar with the transplanted law' (Pistor/Berkowitz/Richard, *European Econ. Rev.* 2003 (1999), 165).

50 Azul and GOL, two other Brazilian airlines, also chose to file for Chapter 11 bankruptcy protection in the United States. This may be in part because the United States jurisdiction makes it significantly easier to secure debtor-in-possession ('DIP')

In the meantime, Federal Law No. 14,112/2020 was enacted, and the Brazilian Bankruptcy Law was reformed, including the adoption of the MLCBI. LATAM Airlines did not petition for recognition of the Chapter 11 as a foreign main proceeding before the Brazilian courts and continued to pursue its restructuring strictly overseas.

Shortly thereafter, the Public Prosecutor's Office for the state of São Paulo received a notice for the submission of proofs of claim for pre-petition credits before the U.S. bankruptcy court. With the noble aim of protecting vulnerable creditors situated in Brazil, on 22.03.2021, the Public Prosecutor's Office filed a petition before the São Paulo court to initiate a proceeding, supposedly based on the newly added cross-border rules, to foster cooperation between the Brazilian and the U.S. courts, as well as ensure that Brazilian creditors would be treated in the same way as foreign creditors, pursuant to Article 167-G of the Brazilian Bankruptcy Law (which corresponds to Article 13 of the MLCBI). The Public Prosecutor's Office argued that (i) there would be losses to Brazilian creditors, who had not been given proper notice to participate in LATAM Airlines' Chapter 11 proceeding; (ii) such losses derived from the absence of proper notice (a) by means of a letter rogatory, according to Article 105, item I, subitem i, of the Brazilian Federal Constitution, or (b) through a cross-border insolvency proceeding, with recognition of the foreign proceeding as main or non-main, in accordance with Articles 167-A through 167-Y of the Brazilian Bankruptcy Law.

As can be observed, this was neither a petition for recognition of a foreign proceeding (be it main or non-main), nor the filing of a local proceeding, since the Public Prosecutor's Office would not have standing for either of them. It was something new altogether, loosely based on the recently added cross-border rules.

financing and to restructure or reject aircraft leases, which are central to airline balance sheets. In Azul's case, the airline secured approximately US\$ 1.6 billion in DIP financing under U.S. law, and the Chapter 11 framework gave Azul the authority to assume, reject, or renegotiate aircraft and engine leases in a structured, court-supervised setting, helping reduce lease costs and optimize its fleet mix, something that is far less straightforward in Brazil's judicial reorganisation system. Similarly, GOL's Chapter 11 process enabled it to obtain DIP financing of around US\$ 1 billion and negotiate concessions with lessors and other creditors, smoothing the restructuring of its aircraft lease portfolio to support a more stable post-emergence capital structure. This combination of accessible new money financing and flexible lease restructuring under U.S. bankruptcy law were key drivers for Brazilian carriers opting for Chapter 11 protection, instead of using the Brazilian rescue framework.

On 30.03.2021, the São Paulo court dismissed the petition on the grounds that (i) there was no request for cooperation by a foreign authority or a foreign representative; (ii) there was no filing for recognition of a foreign main or non-main proceeding regarding LATAM Airlines Group; (iii) without recognition of a foreign proceeding, whether main or non-main, Brazilian creditors would not be affected by the outcome of the Chapter 11 restructuring process and were no worse off than if no rescue proceeding had been filed at all; and (iv) the Public Prosecutor's Office does not have standing for a request of such kind.⁵¹

The Public Prosecutor's Office appealed this ruling, claiming that they did not intend to petition for the recognition of a foreign proceeding but rather to initiate a channel of communication between the U.S. bankruptcy court and the Brazilian court. The São Paulo Court of Appeals confirmed the lower court ruling and mentioned, in *obiter dictum*, that the proceeding before the São Paulo court could be seen as 'a camouflaged and unwarranted intervention on a foreign court, to which it was conferred power of imperium by the exercise of sovereignty by another nation state'.⁵²

The outcome, correctly interpreted the recently added cross-border rules and recognised that 'the mere existence of Brazilian creditors, or activity carried out by the debtor in Brazil, does not impose the recognition of a foreign proceeding – main or non-main – in our country; it is a strategy to be defined by the actors of the foreign proceeding'.⁵³ The noble efforts of the Public Prosecutor's Office on behalf of vulnerable creditors located in Brazil should be noted, but the legal framework for cooperation provided by the MLCBI is there to create uniformity (to the highest extent possible) in the way it is employed worldwide, with little room for the creation of a novel proceeding, without legal provisions or grounds to support it.

II. The Prosafe case: the first successful experience

On 10.06.2021, the foreign representative for Prosafe SE, a service provider in the oil and gas industry, petitioned the Rio de Janeiro court for recogni-

51 São Paulo State Court 30.03.2021 – Proceeding No. 1028368–61.2021.8.26.0100, Judge Marcelo Barbosa Sacramone, 2nd Court for Bankruptcy and Judicial Reorganisation.

52 São Paulo Court of Appeals 31.08.2021 – Appeal No. 1028368–61.2021.8.26.0100, Judge Fortes Barbosa, 1st Reserved Chamber of Corporate Law.

53 Satiro/Becue/Teixeira, <https://bit.ly/3CSnbVl>. See also Satiro/Becue, *Revista dos Tribunais* 2021, 337.

tion of the company's foreign insolvency proceeding, based on the newly enacted Article 167-H of the Brazilian Bankruptcy Law. The foreign case is an application for the granting of moratorium protection submitted by Prosafe SE to the High Court of Singapore, based on the Insolvency, Restructuring, and Dissolution Act 2018 of the Republic of Singapore.

The foreign representative argued that Brazil had jurisdiction because three vessels (indirectly) owned by Prosafe SE were located near the coast of Rio de Janeiro, two of which had contracts with Petrobras, which were operated by a Brazilian entity, Prosafe Serviços Marítimos Ltda. For this reason, the recognition of the foreign proceeding in Brazil was necessary to extend the protection measures to such vessels and ensure the continuation of the group's activities in Brazil.

Furthermore, based on Article 167-L of the Brazilian Bankruptcy Law, the foreign representative requested interim relief, 'to determine the suspension of the course of any enforcement proceedings or any other measures individually taken by creditors regarding the debtor's assets'. And pursuant to Article 167-M of the Brazilian Bankruptcy Law, the foreign representative petitioned for the recognition of Prosafe SE's moratorium protection before the Singapore court as a foreign main proceeding.

On 05.07.2021, the Brazilian judge found Prosafe SE's centre of main interests to be in Singapore and recognised the moratorium protection as a foreign main proceeding, thereby granting the relief requested. According to the Rio de Janeiro court's reasoning, 'the plaintiff, although headquartered in Norway, is the parent company of a group of other companies (at least five), dedicated to the commercial exploitation of vessels, all of them headquartered in Singapore', which included 'Prosafe Rigs Pte. Ltd., sole shareholder of the Brazilian company Prosafe Serviços Marítimos Ltda'. Based on these facts, the Brazilian court found that the plaintiff's (as well as the entire corporate group's) COMI was in Singapore, 'the place where it executed most of its contracts and where it is recognised by its creditors'.⁵⁴

The Brazilian court seems to have applied the same notions used for ascertaining a debtor's principal place of business, as used to define the competent venue within Brazil's jurisdiction, instead of assessing where the debtor's COMI, as defined by international case law and scholarship,

54 Rio de Janeiro State Court 05.07.2021 – Proceeding No. 0129945–03.2021.8.19.0001, Judge Diogo Barros Boechat, 3rd Corporate Law Court of the City of Rio de Janeiro.

actually was – a situation that later occurred in the Mercon Coffee case⁵⁵ and is likely to occur in other cases in the future. The ruling also made an assessment of the entire group's COMI, rather than an individual assessment, the former of which is not authorised by the MLCBI or the Brazilian Bankruptcy Law.⁵⁶ The decision briefly (and generally) mentioned international case law regarding the possibility of recognising moratorium protection or schemes of arrangement as foreign main proceedings, but nothing regarding the concept of COMI.

On 28.09.2021, the foreign representative petitioned for recognition of the Singapore High Court's decision that extended the effects of the moratorium protection until 31.01.2022. The Brazilian court granted the extension under the terms of the foreign ruling. On 19.11.2021, the foreign representative informed that the Singapore High Court had ratified Prosafe SE's scheme of arrangement on 18.10.2021 and requested the recognition of the scheme of arrangement by the Brazilian court so that it would be effective in Brazil. The foreign decision was recognised by a Brazilian ruling rendered on 14.12.2021,⁵⁷ without any appeals or further discussion.

D. Cooperation and coordination in cross-border insolvency cases between courts in Brazil and the European Union

Shortly after the Brazilian Bankruptcy Law was amended to include provisions on cross-border insolvency, the Brazilian National Council of Justice (*Conselho Nacional de Justiça*, or 'CNJ'), through Resolution No. 394/2021,⁵⁸ adopted the Judicial Insolvency Network's Guidelines (the JIN Guidelines), to allow for the direct cooperation and communication between Brazilian courts and foreign courts, by way of insolvency protocols – which are allowed by item IV of Article 167-Q of the Brazilian Bankruptcy Law.

Since the Brazilian National Council of Justice may issue recommendations and resolutions that are applicable to all Brazilian courts (including

55 See Minas Gerais State Court – Proceeding No. 5017501–52.2023.8.13.0707, Judge Pedro Parcekian, 3rd Civil Court of the City of Varginha.

56 See also Satiro/Becue, *Revista dos Tribunais* 2021, 337.

57 Rio de Janeiro State Court 14.12.2021 – Proceeding No. 0129945–03.2021.8.19.0001, Judge Luiz Alberto Carvalho Alves, 3rd Corporate Law Court of the City of Rio de Janeiro.

58 See Brazilian National Council of Justice, Resolution No. 394/2021, <https://bit.ly/41Vqojf>.

bankruptcy and restructuring courts), there was no need to undergo a legislative process, allowing a speedier adoption of the JIN Guidelines.

Although both the Brazilian Bankruptcy Law and EIR Recast allow courts to enter into insolvency protocols, a similar protocol to the JIN Guidelines, or even a soft-law instrument, may be useful for relations between Brazil and the European Union, with general recommendations to regulate insolvency protocols governing the cooperation and communication between Brazilian and European Union courts in cross-border insolvency proceedings involving companies with ties to Brazil and member-states of the European Union.

A protocol or soft-law instrument could be adopted rather quickly, as was the case of the adoption of the JIN Guidelines by the Brazilian National Council of Justice, and would not have to go through all the legal and political hurdles of a formal treaty.

Such a protocol or soft-law instrument could provide directives on (i) the coordination and administration of concurrent insolvency proceedings, with the possibility of joint hearings and joint orders; (ii) direct communication and cooperation between Brazilian courts and European Union courts; (iii) the sharing of information between courts without cumbersome formalities; (iv) the limits and scope of any insolvency protocol or agreement between courts; (v) guidelines for or the suggestion of a standard insolvency protocol for courts to use, with courts making adaptations and adjustments whenever needed, among other matters.

In addition to the adoption of a protocol or soft-law document, the exchange of experiences at conferences and seminars, both in Brazil and the European Union, may play a very important role in the dissemination of knowledge between Brazilian and European Union insolvency professionals and courts, with special regard to the expertise developed by the European Union on cross-border insolvency matters.

On the other hand, insolvency proceedings before European Union courts may benefit from a specificity of the Brazilian regulation on cross-border insolvency: Brazil recognises proceedings as non-main proceedings on the mere basis that a debtor's assets are present in such jurisdiction.

This slight deviation from the EIR Recast and the MLCBI may be due to Brazil's historic adoption of territorialism, but it may prove useful in cross-border proceedings in which the debtor has assets in Brazil, but not a COMI or an establishment.

The opening of a non-main proceeding in Brazil for the protection and disposal of assets, to the benefit of a foreign main proceeding and foreign

creditors, may ultimately facilitate the protection and sale of such assets and the transfer of funds to the foreign main proceeding. The alternative through a letter rogatory to recognise the effectiveness of a foreign order could be considered drawn-out in time and limited in its scope, when compared to a cooperative and coordinated non-main insolvency proceeding. In a bankruptcy or rescue proceeding that may have more than one order regarding the same matter, each order would need to be internalised through a letter rogatory to become effective in Brazil, while in a non-main proceeding coordination and communication between courts, with the recognition of the effectiveness of foreign orders, would be much simpler and faster.

Moreover, having a local judge overseeing the sale and cooperating with a foreign judge may aid in expediting the sale process, since a local judge may issue orders that are effective in Brazil with the aim of overcoming bureaucratic, registry and regulatory issues, just to name a few areas from which problems may arise.

However, since the Brazilian Bankruptcy Law was only recently amended to regulate cross-border insolvency proceedings, this has not yet been extensively tested in practice. As previously mentioned in this paper, there have been only a handful of cases in Brazil that used, or at least tried to use, the new provisions concerning cross-border insolvency. Notwithstanding, the legal framework exists and may be applied, if necessary.

E. Conclusions

The adoption of the UNCITRAL Model Law on Cross-Border Insolvency has been regarded as one of the great advancements of the recent reform of the Brazilian Bankruptcy Law – and it could not be seen as anything but, as this puts Brazil in a similar cross-border ecosystem as the European Union, the United States, and many other countries. However, simply putting rules in writing may not be enough: there is an indispensable need for legal professionals to specialise and continue to improve their knowledge to correctly interpret the new provisions introduced by the reform, with special consideration for its international origin.

Several legal professionals and scholars in Brazil specialise in bankruptcy and restructuring, some of which have an interest for cross-border insolvency matters, and there are a few specialised courts, especially in state

capitals. This familiarity with the notions brought about by the MLCBI may lead to a better understanding of the provisions introduced by the reform.⁵⁹

However, there are specific mechanics and open-ended concepts in the MLCBI that need to be mastered by Brazilian judges, insolvency practitioners, public prosecutors, and attorneys. The day-to-day practice, such as the LATAM Airlines and the Prosafe cases, as well as the exchange of experiences with professionals in conferences (both local and international), will play a significant role in advancing the application and interpretation of the MLCBI by Brazilian courts and legal professionals.

Another important undertaking may be the drafting and adoption of a protocol or a soft-law instrument by the European Union and Brazil, to regulate the cooperation and coordination in cross-border insolvency proceedings, which could prove to be very useful for business relations between Brazil and the European Union.

Furthermore, any endeavour to strengthen affairs between Brazil and the European Union, to further the exchange of knowledge and experience, and to promote the cooperation and coordination in insolvency proceedings should be seen as a step in the right direction and should be encouraged by scholars and specialised professionals.

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59 According to Katharina Pistor, Daniel Berkowitz and Jean-François Richard, '[t]he fact that formal legal orders have put the key elements of the legal order in writing tends to disguise the fact that the effectiveness of these rules also rests on knowledge and understanding of these rules and their underlying values by social actors. While most members of society will not, and in fact need not, be familiar with the specifics of individual rules and regulations, they are familiar with the basic concepts of the legal order. Moreover, they can rely on legal professionals as intermediaries, who have a better knowledge of the formal legal order. But even for professionals to apply a special rule, they must not only grasp the wording of that rule, but also the concept behind it, the value judgments on which it rests, and its position within the overall legal order. Even a seemingly clear law – do not steal! – raises a host of interpretative problems when applied to real world cases' (Pistor/Berkowitz/Richard, *European Econ. Rev.* 2003 (1999), 165).

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The recognition of German insolvency proceedings in China and beyond

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Abstract:

Despite its position as the world's second-largest economy, China's development in bankruptcy legislation and judicial practice, especially in the realm of cross-border issues, remains rudimentary. To date, there have been very few cases where PRC courts have recognized and assisted foreign insolvency proceedings. This essay discusses two such cases in which the PRC courts recognized German insolvency proceedings, showcasing the gradual evolution of PRC judicial practice in this area. Notably, the criteria for granting recognition and assistance have shifted from a reliance on strict treaty relationships or *de facto* reciprocity to a more flexible approach based on *de jure* reciprocity. This shift exhibits China's increasingly open stance toward cross-border insolvency recognition and assistance. However, significant challenges remain for China to fully engage in effective cross-border insolvency cooperation with foreign jurisdictions, including Germany and, more broadly, EU member states. Over time, adopting the UNCITRAL Model Law serves as the optimal strategy for enhancing cross-border insolvency cooperation between the PRC and other jurisdictions. This approach also holds significance for the EU as it navigates cross-border insolvency issues with third countries, including China.

Keywords: cross border insolvency in China; recognition; *de jure* reciprocity; Sino-German insolvency cooperation; *In re Sascha Rudolf Seehaus*; *In re Dr. Andreas Ringstmeier*

A. Introduction

As China's engagement with economic globalization deepens, the country has seen an increase in high-profile cross-border insolvency cases over the

recent years.¹ Despite the critical importance of an insolvency legal system in nurturing a market economy, the development of China's bankruptcy law and related judicial practice, particularly its cross-border aspects, are still in the early stages.² This stands in sharp contrast to China's position as the world's second-largest economy. Within the current legislative framework, the 2006 Enterprise Bankruptcy Law ('EBL') addresses cross-border insolvency issues only in a single provision, Article 5, which contains two paragraphs. The first paragraph deals with the extraterritorial effect of outbound proceedings, providing that an insolvency proceeding commenced by a PRC court encompasses all the debtor's assets, irrespective of their locations. This asserts the universality effect of PRC insolvency proceedings, although the realization of this effect heavily relies on the recognition and assistance of foreign courts where the debtor's overseas assets are located. Inspired by Japan's bankruptcy law reforms in the late 1990s,³ this assertion facilitates the bankruptcy administrator duly appointed in a PRC proceeding to seek such recognition and assistance from the courts in foreign jurisdictions.

The second paragraph of Article 5 concerns the territorial effect of inbound proceeding, *i.e.*, whether and how an insolvency proceeding commenced in a foreign jurisdiction could be recognized and assisted by a PRC court. Pursuant to this paragraph, a PRC court may recognize a foreign insolvency proceeding, subject to: (1) the rendering jurisdiction has an international treaty/agreement with the PRC or there exists reciprocity between the rendering jurisdiction and PRC; (2) recognition would not violate the basic principles of PRC law; (3) recognition would not jeopardize the State sovereignty, security or public interest; and (4) recognition would not undermine the interests of PRC creditors. The conditions set in this paragraph mirror the provisions in the 1991 Civil Procedure Law of the

1 See *e.g.*, Shi, Hong Kong Lawyer 2023.

2 In 1986, a first bankruptcy law in the Mainland China was promulgated but only applied to state-owned enterprises on a trial basis, reflecting a need in a transitional period of China from planned economy to market economy. This law did not contain any provision on cross-border insolvency. With respect to the limited judicial practice in this area, see *e.g.*, Guo/Su, Int'l Ins. Rev. 2023, 41 (44–45) ('The judges apply a rigid 'international agreement/treaty + reciprocity' test, following CPLs'). With regard to the judicial practice prior to the adoption of the EBL, see Shi, Int'l Ins. Rev. 2001, 38 (38–39).

3 See *e.g.*, Bhala, p. 60–63.

PRC ('the 1991 CPL'), without distinguishing between collective insolvency proceedings and individual civil and commercial proceedings.⁴

Article 5 of the EBL is emblematic of its historical context, which does not adequately cater to the nuances of cross-border insolvency today. Its origins can be traced back to the influence of the 1991 CPL, especially its Articles 267 and 268 that govern the recognition and enforcement of foreign civil and commercial court judgments. This influence stems from the erstwhile prevailing view that bankruptcy law was a subset of civil procedure law,⁵ suggesting that the criteria for recognizing and assisting foreign insolvency proceedings should align with those for recognizing and enforcing foreign civil and commercial court judgments. Despite the existence of the 1997 UNCITRAL MLCBI and the EIR as potential benchmarks during the EBL's drafting phase, the conditions for integrating these best practices into the EBL appeared immature. Consequently, the EBL's limited engagement with cross-border insolvency, confined to a singular article, hampers its capacity to address the complex realities of cross-border insolvency effectively.

The requirement of treaty relations or reciprocity often serves as a significant barrier for PRC courts in recognizing and assisting foreign insolvency proceedings. The question of whether reciprocity should be a prerequisite for such recognition and assistance in cross-border insolvency was subject to debate.⁶ The outcome is that UNCITRAL MLCBI and the EIR do not mandate reciprocity as a condition for cross-border insolvency cooperation. However, Article 5 of the EBL, reflecting Articles 267 and 268 of the 1991 CPL, does require it. This requirement introduces a fundamental challenge: determining who should initiate for the establishment of reciprocity. Furthermore, when reciprocity is deemed necessary, the question then emerges on how to interpret reciprocity in a way that aids the recognition and support of foreign insolvency proceedings.

Since the enactment of the 2006 EBL, approximately ten insolvency proceedings initiated within the PRC have been recognized by foreign jurisdictions. This includes six cases in Hong Kong, three in the United States, and one in Singapore. On the inbound front, PRC courts have

4 For more analysis on Article 5 of the EBL, see Shi, Norton J. of Bankr. L. and Practice, 2007, 645 (645).

5 This understanding does not merely exist in China. See e.g., Mooney, Washington and Lee L. Rev. 2004, 931 (937–940).

6 See e.g., Yamauchi, Int'l Ins. Rev. 2007, 145 (145–179).

extended recognition and assistance to six foreign insolvency proceedings: two from Hong Kong,⁷ two from Germany,⁸ one from Singapore,⁹ and one from Japan.¹⁰ Following this introduction of PRC legislation and judicial practice on cross-border insolvency, this essay discusses two cases where PRC courts have recognized German insolvency proceedings, highlighting a shift from strict adherence to treaty relations or *de facto* reciprocity towards *de jure* reciprocity. This shift signifies a more open and flexible stance on cross-border insolvency cooperation taken by the PRC courts.

B. In re Sascha Rudolf Seehaus [In re Sascha]

I. Case summary and Court's decision

On July 30, 2012, Sascha Rudolf Seehaus, as a bankruptcy administrator appointed in a Germany insolvency proceeding, submitted an application to the Wuhan Intermediate People's Court ('Wuhan Court') for the recognition of a decision made by the District Court of Montabaur, Germany, on December 1, 2009, under file number '14 IN 335/09'. This decision included several key points: (1) Sascha Seehaus was appointed as the bankruptcy administrator for the debtor company, SP Management GmbH; (2) the debtor was barred from managing or disposing of any assets, both current and those acquired in the future, which were to be handed over to the administrator; (3) the administrator was granted with the power to enforce this decision; (4) creditors were instructed to file their debt of proof in writing to the administrator by January 10, 2010, and to promptly notify the administrator of any claims against movable properties or debt interests to mitigate risk; (5) any person owing money to the debtor was directed to cease payments to the debtor and instead pay to the administrator.¹¹

7 (2021) Yue 03 Ren Gang Po No. 1 [(2021) 粤 03 认港破 1 号] (date of decision: December 15, 2021); (2022) Hu 03 Ren Gang Po No. 1 [(2022) 沪 03 认港破 1 号] (date of decision: March 30, 2023).

8 (2012) E Wuhan Zhong Min Shang Wai Chu Zi No. 00016 [(2012) 鄂武汉中民商外初字第 00016 号] (date of decision: November 26, 2013); (2022) Jing 01 Po Shen No. 786 [(2022) 京 01 破申 786 号] (date of decision: January 16, 2023).

9 (2020) Min 72 Min Chu No. 334 [(2020) 闽 72 民初 334 号] (date of decision: August 18, 2021).

10 (2021) Hu 03 Xie Wai Ren No. 1 [(2021) 沪 03 协外认 1 号] (date of decision: September 26, 2023).

11 (2012) E Wuhan Zhong Min Shang Wai Chu Zi No. 00016, *supra* note 8.

The Wuhan Court found that the decision from the Montabaur Court in Germany came into effect on December 1, 2009. Pursuant to Article 154(1)(k) and Article 282 of the CPL of the PRC (2012 Amendment),¹² recognizing this decision did not contravene the fundamental principles of PRC law, nor did it jeopardize the state sovereignty, security, or public interests of the PRC. Furthermore, it is noted that the Kammergericht Berlin had previously issued a judgment on May 18, 2006,¹³ recognizing a civil decision made by a PRC court, thereby establishing a precedent for reciprocity between the PRC and Germany.¹⁴ Consequently, the Wuhan Court recognized the Montabaur court decision in this case.

II. Comment on the Sascha case

In re Sascha marks the first case of the PRC recognizing a German insolvency proceeding. Regrettably, the ruling issued by the Wuhan Court is extremely brief, spanning just over a single page, and leaves considerable ambiguity. This brevity and lack of reasoning suggest the Wuhan court's relative inexperience in addressing matters concerning the recognition of foreign insolvency proceedings.

First, in the *In re Sascha* case, the request made to the Wuhan Court by the German bankruptcy administrator was ostensibly straightforward, *i.e.*, to secure recognition of a German insolvency proceeding in the PRC. Despite the EBL being in force for several years by that time, the Wuhan Court based its decision on the CPL (2012 Amendment), conspicuously ignoring

12 'After examining an application or request for recognition and enforcement of an effective judgment or ruling of a foreign court in accordance with an international treaty concluded or acceded to by the People's Republic of China or under the principle of reciprocity, a people's court shall issue a ruling to recognize the legal force of the judgment or ruling and issue an order for enforcement as needed to enforce the judgment or ruling according to the relevant provisions of this Law if the people's court deems that the judgment or ruling does not violate the basic principles of the laws of the People's Republic of China and the sovereignty, security and public interest of the People's Republic of China. If the judgment or ruling violates the basic principles of the laws of the People's Republic of China or the sovereignty, security or public interest of the People's Republic of China, the people's court shall not grant recognition and enforcement.' Article 282, Civil Procedure Law of the People's Republic of China (2012).

13 See, Aktenzeichen 20 Sch 13/04 (date of decision: May 18, 2006).

14 (2012) E Wuhan Zhong Min Shang Wai Chu Zi No. 00016, *supra* note 8.

the EBL altogether, including Article 5, which would have been directly pertinent to the case. This unusual decision appears to originate from the enduring perception of bankruptcy law as a subset of civil procedure law. In fact, the judges handling the case, while specialized in foreign-related civil and commercial disputes, demonstrated a notable deficiency in bankruptcy law expertise. Their ruling effectively conflated the recognition of foreign insolvency proceedings with the recognition and enforcement of foreign civil and commercial court judgments – a conflation that deviates from widely accepted international norms. For instance, international conventions on the recognition and enforcement of foreign court judgments, such as the latest Hague Convention, typically exclude bankruptcy and similar collective proceedings from their scope of application.¹⁵

Second, Article 282 of the CPL, as amended in 2012, likewise, requires a treaty or a reciprocity relationship for the recognition and enforcement of foreign judgments. Given the absence of a formal treaty between the PRC and Germany concerning cross-border insolvency, the principle of reciprocity should theoretically underpin the recognition of German insolvency proceedings. In this particular case, the Wuhan Court resorted to a *de facto* reciprocity test, which necessitates proven cooperative actions from the jurisdiction seeking assistance,¹⁶ a method that potentially leads to a deadlock in judicial cooperation.¹⁷ Interestingly, in this case, the judges' limited familiarity with bankruptcy law inadvertently facilitated a simpler establishment of a reciprocity relationship between the PRC and Germany. Instead of referencing an insolvency proceeding or order, the Wuhan Court cited an case where a German court had recognized a civil judgment

15 '1. This Convention shall not apply to the following matters –...(e) insolvency, composition, resolution of financial institutions, and analogous matters;...' Article 2 (exclusions from scope), the Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (HCCH 2019 Judgments Convention).

16 See, UNCITRAL, *Report of the Working Group on Insolvency Law on the Work of the Eighteenth Session*, A/CN.9/419, 1 December 1995, para. 44; Westbrook, *Am. Bankr. L. J.* 1991, 457 (468).

17 Shi, *Cross-Border Insolvency in China: The Status Quo, Trend, and Suggestions*, in *The Third Seminar of the International Commercial Expert Committee of the Supreme People's Court and Reappointment Ceremony of the First Group of Expert Members*, 25 August 2022, <https://cicc.court.gov.cn/html/1/219/199/203/2309.html> (last visited February 25, 2024); Huang, p. 72.

issued by a PRC court in Jiangsu Province, thereby leveraging a broader interpretation of reciprocity requirement.¹⁸

Third, the succinct ruling by the Wuhan Court left crucial details ambiguous, failing to clarify whether any specific relief was extended to the bankruptcy administrator. Typically, the recognition and assistance of a foreign insolvency proceeding encompass recognizing the foreign administrator's status and enabling them to execute their responsibilities, which include managing and liquidating the bankruptcy estate. The absence of such details creates uncertainty regarding the extent of relief, if any, the Wuhan Court provided to the administrator to facilitate the execution of his duties within the PRC.

C. In re Dr. Andreas Ringstmeier [In re DAR]

I. Case summary

In this case, recognition concerned the German insolvency proceeding on *LION GmbH*, a German construction and engineering company, which was officially registered with the Industry and Commerce office of the Landgericht Aachen under the registration number HRB6267. On October 7, 2010, facing financial difficulties and unable to meet its debt obligations, LION GmbH applied for bankruptcy at the Landgericht Aachen. Subsequently, on January 1, 2011, the court issued an insolvency ruling under file number 91IE5/10 (*Aachen Court Ruling*), appointing Mr. DAR as the bankruptcy administrator for LION GmbH. The debtor company owned a piece of real estate in the Dongcheng District of Beijing, acquired on August 11, 1997. As the appointed administrator, Mr. DAR executed a real estate sale agreement with European LION (Singapore) Limited (*LION Singapore*) on December 19, 2016, for a sale price of EUR 50,000. LION Singapore completed the payment and took possession of the property, utilizing it thereafter. This real estate was the sole property of LION GmbH located within China, and no other parties had asserted claims over this property.¹⁹

Mr. DAR, acting as the bankruptcy administrator for LION GmbH, sought to manage the property transfer processes in the PRC and submitted

18 (2004) Xin Min Er Chu Zi No. 154 [(2004) 新民二初字第 154 号] (date of decision: September 2, 2004).

19 (2022) Jing 01 Po Shen No. 786, *supra* note 8.

an application to the Beijing No. 1 Intermediate People's Court/Beijing Bankruptcy Tribunal ('Beijing Court'). In the application, Mr. DAR sought the court's assistance for several actions: (1) to recognize the legal validity of the insolvency proceeding initiated by the Landgericht Aachen on January 1, 2011, under file number 91IE5/10; (2) to recognize him, DAR, as the appointed bankruptcy administrator of LION GmbH; and (3) to permit him to carry out his duties within the PRC, which include: (i) taking possession of LION GmbH's property, seals, accounting records, documents, and other relevant materials; (ii) determining the necessary daily and other essential expenses for LION GmbH; and (iii) overseeing and liquidating LION GmbH's assets.²⁰

II. The Beijing Court's decision

Upon affirming its jurisdiction over the matter, the Beijing Court proceeded to address multiple questions pertaining to the recognition of the insolvency ruling issued by the Landgericht Aachen, the role of DAR as the appointed administrator for LION GmbH, and the fulfilment of duties and functions by Mr. DAR in his capacity as the designated administrator.

1. Recognition of the Aachen Court ruling and Mr. DAR as the administrator

The Beijing Court's decision was anchored in several findings. First, pursuant to Article 5(2) of the EBL, in the absence of a specific treaty on cross-border insolvency between the PRC and Germany, the recognition of German insolvency proceedings should hinge on the principle of reciprocity. To this end, the Beijing Court took note that Section 343 of the German Bankruptcy Code facilitates the recognition of insolvency proceedings from foreign jurisdictions, implicitly including those initiated by PRC courts. Given the lack of any record of Germany refusing to recognize a PRC insolvency proceeding, reciprocity between the two nations is thus presumed to be in place. Second, the Beijing Court realized that, according to the decision from the Aachen Court, the insolvency proceeding was launched at the centre of main interests (COMI) of the debtor company,

²⁰ *Ibid.*

LION GmbH, thereby granting the Landgericht Aachen the appropriate jurisdiction to commence insolvency proceeding against the debtor. Third, the German Bankruptcy Code characterizes its proceedings as collective, not disadvantaging foreign creditors,²¹ including those from the PRC. Moreover, LION GmbH was not involved in any litigation or arbitration proceeding within the PRC, and apart from LION Singapore's role in contracting with the German bankruptcy administrator, no other claimants had become active in the PRC with regard to the debtor's assets in the PRC. Also, no challenges were presented to the Beijing Court within the designated timeframe for such submissions.²² Based on these determinations, the Beijing Court granted recognition to the Aachen Court's Ruling and Mr. DAR as the duly appointed administrator in the German proceeding.

2. The scope of the administrator's duties and functions

The Beijing Court determined that the power and duties of a foreign administrator should be allowed both in the initiating (requesting) jurisdiction and the responding (receiving) jurisdiction. Specifically, the power and duties of the bankruptcy administrator are outlined in Article 25(1) of the EBL²³ and Section 80 of the German Bankruptcy Code.²⁴ Furthermore, the

21 Section 1 of the German Insolvency Code reads: *Insolvency proceedings serve the collective satisfaction of a debtor's creditors by means of liquidation of the debtor's assets and distribution of the proceeds or by reaching an arrangement in an insolvency plan, in particular in order to maintain the enterprise. Honest debtors are given the opportunity to achieve discharge of residual debt.*

22 On November 21, 2022, the Beijing Court published a notice on National Enterprise Bankruptcy Ruling Information Disclosure Platform, no objections were filed within the specified period allowed. (2022) Jing 01 Po Shen No. 786, *supra* note 8.

23 Article 25 (1) of the EBL reads: *An administrator shall perform the following duties: (1) taking over the property, seals, account books, documents and other data of the debtor; (2) investigating into the financial position of the debtor and preparing a report on such position; (3) deciding on matters of internal management of the debtor; (4) deciding on the day-to-day expenses and other necessary expenditures of the debtor; (5) deciding, before the first creditors' meeting is held, to continue or suspend the debtor's business; (6) managing and disposing of the debtor's property; (7) participating in legal actions, arbitrations or any other legal procedure on behalf of the debtor; (8) proposing to hold creditors' meetings; and (9) performing other duties that the people's court deems that he should.*

24 Section 80(1) of the German Bankruptcy Code reads: *Upon insolvency proceedings being opened, the debtor's right to manage and transfer the insolvency estate is vested in the insolvency administrator.*

power and duties of Mr. DAR, as the administrator, were recognized as necessary to manage the LION GmbH's assets within the PRC.

In the present case, Mr. DAR requested the Beijing Court's permission for several specific duties: (1) taking control of LION GmbH's assets, company seals, accounting records, documents, and other relevant information; (2) evaluating the LION GmbH's daily and other essential expenditures; (3) managing and liquidating the assets of LION GmbH. These tasks were crucial for the effective administration of LION GmbH's assets in the PRC and lay within the legal duties of a bankruptcy administrator, as outlined in both the German Bankruptcy Code and the EBL. Consequently, in accordance with Article 5(2) of the EBL and Article 157(1)(k) of the CPL of the PRC, as amended in 2021, the Beijing Court authorized Mr. DAR with the powers necessary to fulfil his duties in the PRC.

3. A breakthrough from *de facto* to *de jure* reciprocity

In *Re DAR*, guided by the Supreme People's Court (SPC), the Beijing Court, for the first time, applied the test of *de jure* reciprocity in recognizing the German insolvency proceeding and the administrator appointed therein.²⁵ This decision is part of a broader effort to adapt the principle of reciprocity flexibly, aiming to facilitate the recognition and assistance of foreign court judgments within the PRC. This approach underscores a significant shift towards a more open and cooperative stance in international legal engagements by the PRC courts.

In recent years, with the rising need for cross-border judicial collaboration, China has evolved its approach to reciprocity requirement in recognizing and enforcing foreign court judgments, transitioning from a strict *de facto* reciprocity to a more flexible *de jure* reciprocity, also known as negative or presumed reciprocity.²⁶ This change addresses the fundamental challenge inherent in reciprocity – the dilemma of who should initiate reciprocal actions first. The PRC courts are now encouraged to offer judicial assistance to foreign counterparts first, aiming to establish reciprocal

25 See, Chang/Liu, *Journal of Law Application* 2023, 126 (126).

26 Negative reciprocity involves a rebuttable presumption that reciprocity was available in the jurisdiction whose proceeding was being recognized. UNCITRAL, *supra note* 16.

relationships proactively and thereby broaden the spectrum of international judicial cooperation.²⁷

The Nanning Statement from the Second China-ASEAN Chief Justices' Forum, specifically in Article 7, clarifies this approach for countries without formal treaties on recognizing and enforcing foreign civil and commercial judgments. It suggests that a reciprocal relationship may be presumed to exist if there is no history of the foreign country's courts ever rejecting the recognition and enforcement of PRC civil and commercial judgments based on reciprocity, or providing recognition and enforcement of PRC judgments is permissible under its domestic laws.

Furthermore, the SPC offers guidance on assessing reciprocity, indicating that when PRC courts review applications for the recognition and enforcement of foreign court judgments, a reciprocal relationship is deemed established if the legal framework of the foreign jurisdiction accommodates the recognition and enforcement of PRC court judgments.²⁸ This methodology, coined as *de jure* reciprocity, aids in establishing reciprocity for the purpose of easing the requirements of recognizing and enforcing civil and commercial court judgements from foreign jurisdictions. The PRC courts are tasked with evaluating the existence of such a reciprocal relationship on a case-by-case basis. The SPC does take note of speciality and uniqueness of insolvency cases in applying these guidelines. Despite this, the support for *de jure* and presumed reciprocity indicates the spirit of active engagement of judicial cooperation. More specifically, the SPC indeed advises that PRC courts should seek innovative approaches to applying the reciprocity principle in cross-border insolvency cases, aiming to enhance collaboration between PRC courts and foreign administrators, thereby promoting the robust and orderly progress of international investments.²⁹ As such, when assessing reciprocal relationships, there is an imperative to relax the strict requirements of reciprocity to improve international judicial cooperation on cross-border insolvency issues.

27 SPC, *The Opinions on Providing Judicial Support for the 'Belt and Road' Initiative*, Fa Fa (2015) No. 9, [法发 2015 年第 9 号], para. 6.

28 SPC, *Conference Summary of the National Court's Symposium on Foreign-Related Commercial and Maritime Trials 2021* (2021 SPC Meeting Minutes on Foreign-Related Trials) [2021 年全国法院涉外商事海事审判工作座谈会会议纪要], 31 December 2021, para. 44.

29 SPC, *Notice on Issuing the Minutes of the National Court Work Conference on Bankruptcy Trials*, Fa (2018) No. 53 [法(2018)第 5 号, 最高人民法院印发全国法院破产审判工作会议纪要的通知], 4 March 2018, para. 49.

Within this context, the Beijing Court posited that, absent an international treaty between China and Germany on cross-border insolvency, the decision to recognize and assist with the German insolvency proceedings hinges on the presence of reciprocity. Traditionally, China assesses reciprocity by examining if *de facto* reciprocity exists between China and requesting jurisdiction. However, in a notable departure from the Wuhan Court's stance in *Re Sascha* (2012), the Beijing Court articulated a differing view in the present case. It highlighted that the Wuhan Court's establishment of reciprocity was based on the Kammergericht Berlin's recognition of a civil judgment (2004) Xin Min Er Chu Zi No. 154 rendered by the Wuxi High-tech Industrial Development Zone People's Court in Jiangsu Province (the Wuxi Court) on May 18, 2006.³⁰ However, this judgment was not related to insolvency, leading the Beijing Court to question the existence of *de facto* reciprocity in the realm of cross-border insolvency between the two nations. Consequently, the Beijing Court shifted its focus to the investigation of *de jure* reciprocity between China and Germany, underlining a critical reconsideration of how reciprocity is determined in the context of cross-border insolvency.³¹

The Beijing Court maintains that establishing *de jure* reciprocity encompasses two aspects: firstly, scrutinizing the German Bankruptcy Code alongside relevant laws or regulations to ascertain if PRC insolvency proceedings can be recognized in Germany, including the conditions for such recognition; secondly, evaluating if there has been any case where Germany has declined to recognize a PRC insolvency proceeding. For this purpose, the Beijing Court engaged the services of the Foreign Law Research Center at East China University of Political Science and Law (*the ascertaining center*), a body designated by the SPC for the ascertainment of foreign laws, to examine the pertinent sections of the German Bankruptcy Code and related legal provisions. The report from the ascertaining center, submitted to the Beijing Court, outlined that foreign insolvency proceedings could be recognized under German law unless the rendering court lacks jurisdiction, or if recognizing the foreign insolvency proceeding would starkly contravene the core principles of German law, particularly those safeguarding civil rights. This indicates that, in general, German courts are inclined to recognize foreign insolvency proceedings and grant relief to foreign admin-

30 (2012) E Wuhan Zhong Min Shang Wai Chu Zi No. 00016, *supra* note 8.

31 (2022) Jing 01 Po Shen No. 786, *supra* note 8.

istrators. Consequently, it was concluded that PRC insolvency proceedings may be recognized by German courts, with the criteria for such recognition not being substantially stricter than those applied by China in recognizing foreign insolvency proceedings. Moreover, there has been no recorded case of German courts refusing to recognize a PRC insolvency proceeding. Based on these considerations, the Beijing Court determined the presence of reciprocity between China and Germany.³²

Although the transition from *de facto* to *de jure* reciprocity in *Re DAR* is lauded as a key advancement in the recognition of foreign insolvency proceedings by PRC courts, it nonetheless highlights the challenges that remain in enhancing cross-border insolvency cooperation. From the perspective of established international norms, dating back to the 1990s, neither the UNCITRAL MLCBI nor the EIR mandate reciprocity as a condition for cross-border insolvency cooperation.³³ The elimination of the reciprocity requirement aligns with the practical necessities emerging from the recognition and support of cross-border insolvency cases, playing a crucial role in fostering such cooperation. In contrast, the reciprocity requirement often leads to considerable coordination costs and not necessarily fulfils the intended goals.³⁴ As demonstrated in *Re DAR*, while the Beijing Court's shift to *de jure* reciprocity simplifies the criteria for recognizing and assisting the German insolvency proceeding, it necessitates a thorough examination of the German Bankruptcy Code and related practices. This requirement could increase the time and costs involved, especially if the method used by PRC courts to ascertain foreign law may not be universally recognized. Consequently, this approach might cause delay in the process of recogniz-

32 *Ibid.*

33 In the *travaux préparatoires* of MLCBI, first, the Commission took into account the complexity of the term reciprocity, which could be understood in sharply differing ways. Including references to a reciprocity factor would contribute to uncertainty, due to differing understandings and legislative concepts of the notion and due to difficulties in determining the extent to which reciprocity was actually available. Accordingly, national laws often contemplated different notions of reciprocity so that no single solution could be easily provided, even in the form of a convention. Secondly, the requirement of reciprocity may derogate from the purpose of the MLCBI, especially from efforts to maintain the project within parameters of a modest but feasible scope. Inclusion of such a factor would be inconsistent with the basic aim of the project to foster greater international cooperation and would send an inappropriate signal not in accordance with that aim. It was further suggested that a successful model law that was widely accepted could accomplish the goal of reciprocity without the inclusion of such provision. UNCITRAL, *supra* note 16, at 11.

34 Westbrook, Am. Bankr. L. J. 1991, 467.

ing and aiding foreign insolvency proceedings and lead to unsatisfactory outcomes, particularly when swift action is required to avert adverse effects in cross-border insolvency scenarios.

D. Concluding remarks: cooperation between the EU and China on cross-border insolvency

While the cases discussed in this short essay illustrate China's gradual willingness to engage in judicial cooperation, they also underscore that such efforts are insufficient for a global economic powerhouse like China to address cross-border insolvency cases effectively. Given the current unsatisfactory status quo, it is crucial for China to both enhance its legal framework and promote judicial practice. Specifically, considering the substantial economic interconnection between the EU and China, fostering cross-border insolvency cooperation between the two sides is not only practical but necessary. It would be prudent for both the EU and China to embrace the UNCITRAL MLCBI, which could serve as a standardized benchmark and foundational platform for judicial cooperation in this field. Adopting the MLCBI could streamline and improve the process of cross-border insolvency proceedings, benefiting both sides and contributing to a more stable and predictable market environment.

The Member States of the EU, except Denmark, have engaged in cross-border insolvency cooperation through the EIR for over twenty years. Despite its accomplishments within the EU, there remains an absence of a structured legal system for engaging with non-EU countries, including China, on cross-border insolvency cooperation. Coordinated efforts between the EU and the third countries become crucial when insolvency proceedings in a non-EU country have implications across multiple EU Member States. Legally and practically, there should be minimal obstacles for EU Member States to recognize and assist third countries based on the principles outlined in the UNCITRAL MLCBI. The key to expanding cross-border insolvency cooperation beyond the EU lies in the Member States' readiness to collaborate, reflecting a commitment to extending the scope of their insolvency cooperation to include third countries.

On the side of China, Article 5 EBL primarily outlines principles rather than offering operational guidelines on cross-border insolvency cooperation. This approach does not align with the widely accepted international

practices in the field, leading to various challenges in practice. Recognizing the need to keep pace with economic advancements and market demands, China is currently revising the EBL. The UNCITRAL MLCBI serves as a crucial reference point for China to modernize its legislation on cross-border insolvency, as well as establishing a stronger basis for judicial cooperation with foreign jurisdictions. Adopting the MLCBI can significantly alleviate the complexities surrounding the reciprocity issue,³⁵ and therefore provide a structured yet adaptable framework for PRC courts to recognize foreign insolvency proceedings. By integrating the MLCBI into the revised EBL, particularly through a dedicated chapter on cross-border insolvency akin to Chapter 15 of the U.S. Bankruptcy Code, China not only could enhance its legal infrastructure but also lay a solid groundwork for engaging in cross-border insolvency cooperation with the EU.

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35 Mevorach, p. 159.

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The (North) Macedonian perspective on insolvency law and cross-border insolvency with particular reference to relations with the European Union

Miodrag Dordevic and Dejan Kostovski

Abstract:

This paper examines the initiatives and challenges faced by North Macedonia in its journey towards European Union integration, with a focus on the reform of its insolvency legislation. It analyses the impact of the EuropeAid project on strengthening the administrative capacities for bankruptcy and liquidation proceedings, and the alignment of Macedonian laws with EU directives and regulations. The paper also discusses the obstacles in the accession process, including bilateral disputes and the need for continuous reforms to enhance the efficiency and transparency of the insolvency system.

Keywords: North Macedonia, European Union, insolvency law, bankruptcy, liquidation, reforms, accession process, EuropeAid project, harmonization, cross-border insolvency.

In 2016 and 2017 I (M.D.) was working at the EuropeAid funded project ‘**Strengthening the administrative capacities for implementation of the legal framework for bankruptcy and liquidation of companies**’ (the Project) in North Macedonia. My role was **Key Expert 2 (Senior Insolvency Expert)**. As an expert I was to contribute to creating a knowledge base through transfer of best practices and policies in conducting efficient bankruptcy proceedings on the side of both bankruptcy organs, debtors and creditors, in terms of use of the bankruptcy proceedings in an efficient way to accomplish the goals of collective settlement of creditor’s claims and fast liquidation of debtor’s assets or restructuring the respective business.

Namely, the Project should contribute to sufficient understanding and awareness of the need for timely commencement of the relevant proceedings. The Project should achieve a greater understanding of the role and

positive effects of early filing for bankruptcy, as well as of the possibilities on the side of creditors as to the use of the debtor's assets in such a way so to achieve higher recovery rate or restructure the bankrupt businesses. Generally, the Project was to contribute towards the strengthening of the country's ability to serve as a business destination and market where insolvent companies are quickly exiting the market, thus preventing any negative impact on the overall business and competition. With regard to my expert activities related to this project I feel sort of obliged to help (assist) the country in its way forward – towards international insolvency community, in particular European Union.

A. Accession of North Macedonia to the European Union

North Macedonia (at that time officially termed Former Yugoslav Republic of Macedonia) began its formal process of rapprochement with the European Union in 2000, by initiating negotiations about *the EU's Stabilization and Association Process*, and it became the first non-EU country in the Balkans to sign a Stabilization and Association Agreement (SAA), on 9 April 2001 in Luxembourg¹. The agreement was ratified by the Macedonian parliament on 12 April 2001 and came into force on 1 April 2004².

On 22 March 2004, Macedonia submitted its application for EU membership. On 6 September 2004, the Macedonian government adopted a *National Strategy for European integration*, supported by the country's parliament through its Commission for European Issues. The government subsequently began the procedure of answering the questionnaire of the European Commission regarding its performance in preparation for membership in accordance with *the Copenhagen criteria*, a process that was finished by 31 January 2005. The European Council officially granted the country candidate status on 17 December 2005, after a review and a positive recommendation of the candidacy by the European Commission.

After the naming dispute with Greece was solved in 2019³, accession negotiations were expected to start within the same year, but in June 2019 the EU General Affairs Council decided to postpone the decision to October,

1 See <https://eur-lex.europa.eu/EN/legal-content/summary/stabilisation-and-association-agreement-with-north-macedonia.html> (accessed 12.12.2025).

2 Text of the agreement at [https://eur-lex.europa.eu/eli/agree_international/2004/239\(2\)/oj/eng](https://eur-lex.europa.eu/eli/agree_international/2004/239(2)/oj/eng) (accessed 12.12.2025).

3 See https://en.wikipedia.org/wiki/Macedonia_naming_dispute (accessed 21.12.2025).

due to objections from a number of countries including the Netherlands and France. France vetoed the decision again in October. On 25 March 2020 the Council of the European Union decided to open accession negotiations, which was endorsed by the European Council the following day. However, on 17 November 2020 Bulgaria blocked the official start of accession talks with the country. North Macedonia is now expected to offer further guarantees to Bulgaria that it will keep on a 2017 friendship treaty with Sofia, which deals with historical issues. Pending bilateral issues between Bulgaria and Macedonia need to be resolved as a matter of priority. Namely, the delays in the official launch of accession negotiations are having a negative impact on the credibility of the EU.

Based on the progress achieved and the conditions having been met, the European Council endorsed the Council's decision to open accession negotiations with Macedonia in March 2020. Overall, the country has continued to maintain a steady and determined pace in advancing EU reforms, focusing on the fundamentals. The authorities in Macedonia continued to demonstrate publicly their commitment to advance on their EU path. After the European Council approved of the Negotiating Framework, in accordance with the revised enlargement methodology, on 19 July 2022 the EU started the opening phase of the accession negotiations with North Macedonia. The Commission started the screening process.

B. The bankruptcy law of North Macedonia

The main source of (North) Macedonian bankruptcy law is currently still the Law on Bankruptcy (Bankruptcy Law, in the following: BL) of 2006, which was most recently revised in 2025⁴. It includes also provisions on cross-border insolvency comprised in Part II (art.319 – 354 BL). Another, more recent, source of insolvency law in North Macedonia is the Law on Out-of-Court Settlement of 2014 (Out-of-Court Restructuring Law)⁵. A new codification of Macedonian bankruptcy law by a Law on Insolvency (Insolvency Law) is currently pending⁶.

Macedonian bankruptcy law governs the settlement of creditors' claims against insolvent debtors. Bankruptcy proceedings may be initiated over the

4 See <https://dejure.mk/zakon/zakon-za-stechaj> (accessed 21.12.2025).

5 Official Gazette of the Republic of Macedonia No. 12/2014.

6 The Draft Insolvency Law (in Macedonian and Albanian) is available at <https://www.economy.gov.mk/mk-MK/regulativa/zakoni/zakoni-met> (accessed 21.12.2025).

property of a debtor, be it a legal entity, an individual, a deceased person, joint property of spouses, or a business. However, bankruptcy proceedings may not be implemented over a public legal entity or property owned by the Republic of Macedonia.

C. The EuropeAid project in North Macedonia with reference to bankruptcy law

In the context of Macedonia's application to EU membership, the EU has supported several projects aiming to improve the general business environment in the country. This included reforms of bankruptcy law, e.g. with a view towards faster winding up of companies through bankruptcy proceedings and voluntary liquidation. The overall purpose is to strengthen the institutional capacity for the implementation of the laws on bankruptcy and voluntary liquidation in order to identify and overcome the administrative bottlenecks and weaknesses arising from the implementation. The Project was initiated due to shortcomings in the extant system of „market exit“, in particular due to the imbalance between the stakeholders fundamental for successful implementation of bankruptcy (i.e. government, judiciary, creditors and debtors).

Despite significant recent progress in the legislation, some remaining gaps had to be addressed. There was also a need to strengthen the bankruptcy organs as well as debtors and creditors with regard to their knowledge, capacity and general understanding of the bankruptcy and other market exit proceedings.

The Ministry of Economy had invested in strengthening the role of bankruptcy trustees (hereinafter: also, administrators). Although progress had been shown after the past reforms (shorter duration of bankruptcy proceedings, less malpractices, better disciplinary system), timely initiation of bankruptcy proceedings and the exercise of rights of the creditors and debtors were still considered a serious problem. A need had been indicated for strengthening the Ministry of Economy staff responsible for tracking, monitoring and analysing the implementation of the law on bankruptcy.

Given that the implementation of bankruptcy law and the length of the proceedings are essential in the insolvency process, the lack of specialization of judges in bankruptcy proceedings and the lack of knowledge was still seriously affecting its outcomes. The awareness of the importance for

a timely initiation of bankruptcy proceedings also needed to be raised between the creditors and debtors.

The Project implementation was comprised of three components (activities). Component I was focused on strengthening the capacity of the Legal Department (Unit for Bankruptcy) in the Ministry of Economy and other beneficiaries. Component II was focused on revised and improved functionalities and Legal provisions in the current Bankruptcy system. Component III was focused on revised and improved functionalities and legal provisions in the current liquidation procedure.

National bankruptcy systems depend on a range of structural, institutional, social, and human foundations to make a modern market economy work. There are as many combinations of variables, though regional similarities have created common customs and legal traditions. The Recommendations under the Project have been designed to be sufficiently flexible to apply as a benchmark to a country system and to embody several fundamentally important propositions. First, *effective systems must respond to national needs and problems*. Second, *transparency, accountability, and predictability are fundamental*. Third, *legal and institutional mechanisms must align incentives across a broad spectrum of market-based systems – commercial, corporate, financial and social*. One of the recommendations was to establish a framework for cross-border insolvencies, with recognition of foreign proceedings.

C. Excerpts from the final report of the EuropeAid Project in Macedonia (November 2017)

III.4. FINAL RECOMMENDATIONS

III.4.1. RECOMMENDATION on EUROPEAN INSOLVENCY REGULATION (recast)

Harmonization of Macedonian bankruptcy legislation with the European Insolvency Regulation (recast)

Introduction

The European Commission put forward a proposal in 2012 updating the 2000 Regulation to improve the application some of its provisions, so as to enhance the effective administration of cross-border insolvency proceedings. This proposal was adopted by the European Parliament and the Council of the European Union on 20 May 2015 and enters into force on

26 June 2017. The new rules aim at facilitating debt recovery in cross-border insolvency proceedings. They will make it easier for businesses to restructure and for creditors to get their money back, by ensuring that collective procedures for cross-border debt recovery are effective and efficient. The Regulation focuses on resolving the conflicts of jurisdiction and laws in cross-border insolvency proceedings. It also ensures the recognition of insolvency-related judgments across the EU.

Key features of the new rules:

- **Wider scope:** The new rules apply to a wider range of national restructuring proceedings. Certain modern and efficient types of national restructuring proceedings were not covered by the old set of rules, meaning that they could not be used in cross-border cases. It will now be possible to use the modern national restructuring proceedings to rescue businesses or recover money from debtors in other EU countries.
- **Increased legal certainty and safeguards against bankruptcy tourism:** If a debtor relocates shortly before filing for insolvency, the court will have to carefully look into all circumstances of the case to see that the relocation is genuine and not to take advantage of more lenient bankruptcy rules. The court will have to check that the debtor is not acting as a 'bankruptcy tourist'.
- **Increased chances to rescue companies:** The new rules avoid 'secondary proceedings' (proceedings opened by courts in an EU country other than the one where the company's registered office is based). This will make it easier to restructure companies in a cross-border context. The rules at the same time also provide for safeguards guaranteeing the interests of local creditors.
- **Group insolvency proceedings:** The new rules introduce framework for group insolvency proceedings. This will increase the efficiency of insolvency proceedings involving different members of a group of companies. In turn, this will increase the chances of rescuing the group as a whole.
- **Linking insolvency registers:** By the summer of 2019 there will be an EU-wide interconnection of electronic national insolvency registers. This will make it easier to obtain information on insolvency proceedings in other EU countries.

Explanation

As a candidate for accession to the European Union, Macedonia should accelerate its efforts to progress towards the EU in all areas of legislation,

including insolvency legislation. The Regulation was adopted in order to enhance the effective administration of cross-border insolvency proceedings. Since the activities of undertakings have more and more cross-border effects and since the increase of cross-border insolvency proceedings is also expected in Macedonia, the implementation of (at least certain) provisions of the Regulation would be beneficial. It is especially noteworthy that the scope of the Regulation extends to proceedings which promote the rescue of economically viable but distressed businesses and which give a second chance to entrepreneurs.

III.4.2. RECOMMENDATION on PREVENTIVE RESTRUCTURING DIRECTIVE (PROPOSAL)

Implementation of Preventive Restructuring Directive upon its adoption

Introduction

In 2014, the European Commission has issued a Recommendation on restructuring and second chance. When the Commission reviewed the implementation of the Recommendation by Member States, it became clear that rules still diverge and remain inefficient in some countries. Reviews of the implementation of the 2014 Recommendation on restructuring and second chance showed that, despite reforms in the area of insolvency, rules still diverge and remain inefficient in some countries. In several Member States, it is not possible to restructure a business before it is insolvent. As regards the second chance, important discrepancies have remained as to the duration of the discharge period. Such differences in Member States' legal frameworks lead to legal uncertainty, additional costs for investors in assessing their risks, less developed capital markets and persisting barriers to the efficient restructuring of viable companies in the EU, including cross-border enterprise groups. In this context, the 2015 Capital Markets Union Action Plan announced a legislative initiative on business insolvency, including early restructuring and second chance. This initiative is intended to address the most important barriers to the free flow of capital and build on national regimes that work well.

This initiative is a key deliverable under the Capital Markets Union Action Plan and the Single Market Strategy. It will contribute to removing important barriers to the development of capital markets in the EU by providing legal certainty to cross-border investors and companies operating across the EU. The new rules will help attract investors, create and preserve jobs, as well as help economies absorb economic shocks. Currently, too

many viable companies in financial difficulties are steered towards liquidation rather than early restructuring and too few entrepreneurs get a second chance.

The proposal is also good news for financial stability since efficient restructuring procedures will prevent businesses from defaulting on their loans to the banks and will help addressing the issue of high levels of non-performing loans in parts of the EU banking sector. This in turn will allow banks to lend more to consumers and businesses.

The proposed Directive focuses on three key elements:

- Common principles on the **use of early restructuring frameworks**, which will help companies continue their activity and preserve jobs.
- Rules to allow **entrepreneurs to benefit from a second chance**, as they will be fully discharged of their debt after a maximum period of 3 years. Currently, half of Europeans say they would not start a business because of fear of failure.
- Targeted measures for Member States to **increase the efficiency of insolvency**, restructuring and discharge procedures. This will reduce the excessive length and costs of procedures in many Member States, which results in legal uncertainty for creditors and investors and low recovery rates of unpaid debts.

The new rules will observe the following key principle to ensure insolvency and restructuring frameworks are consistent and efficient throughout the EU:

- Companies in financial difficulties, especially SMEs, will have access to early warning tools to detect a deteriorating business situation and ensure restructuring at an early stage.
- Flexible preventive restructuring frameworks will simplify lengthy, complex and costly court proceedings. Where necessary, national courts must be involved to safeguard the interests of stakeholders.
- The debtor will benefit from a time-limited "breathing space" of a maximum of four months from enforcement action in order to facilitate negotiations and successful restructuring.
- Dissenting minority creditors and shareholders will not be able to block restructuring plans but their legitimate interests will be safeguarded.
- New financing will be specifically protected increasing the chances of a successful restructuring.

- Throughout the preventive restructuring procedures, workers will enjoy full labour law protection in accordance with the existing EU legislation.
- Training, specialization of practitioners and courts, and the use of technology (e.g. online filing of claims, notifications to creditors) will improve the efficiency and length of insolvency, restructuring and second chance procedures.

Well-functioning insolvency and restructuring systems are of key importance for economic growth and job creation support. This initiative will increase the opportunities for companies in financial difficulties to restructure early on so as to prevent bankruptcy and avoid laying-off staff. It will ensure that entrepreneurs get a second chance at doing business after a bankruptcy. It will also lead to more effective and efficient insolvency procedures throughout the EU.

Explanation

As a candidate for accession to the European Union, Macedonia should accelerate its efforts to progress towards the EU in all areas of legislation, including insolvency legislation.

III.4.3. RECOMMENDATION on the NAME of the LAW COVERING INSOLVENCY PROCEEDINGS

Changing the name of the relevant law from Bankruptcy Law to Insolvency
Law

Introduction

Bankruptcy is the last stage of insolvency. When it is clear that no other remedy is possible, an insolvent business may apply for bankruptcy. Insolvency is only a financial or accounting term, while bankruptcy is a legal term. In some countries bankruptcy applies to individuals, while insolvency applies to business. A business or a company do not file for bankruptcy, they rather face liquidation. If a business has become insolvent, it is not necessarily bankrupt. Bankruptcy is a legal process to provide relief to a person whose business has become insolvent. Bankruptcy is a legal declaration of one's inability to pay off debts. When one files for bankruptcy, there are, in general, two main forms of bankruptcy – reorganization and liquidation bankruptcy. What Bankruptcy and Liquidation share in common is the concept of 'Insolvency'. This means that it takes a person or a company becoming 'Insolvent' to trigger a Bankruptcy or Liquidation.

Explanation

While analysing the existing insolvency legislation in the Republic of Macedonia, it has been pointed out that the existing name of the main law on the subject matter – »Bankruptcy Law« – is inappropriate as it is too narrow. While the Law itself covers different types of proceedings that an insolvent company can face, this is not reflected in the name of the Law, thus creating unnecessary confusion. The more appropriate name of the Law would be »Insolvency Law«.

III.4.4. RECOMMENDATION on INTERNATIONAL LANGUAGE

Introduction of English as an additional language to the official language (for cooperation of domestic courts and domestic administrators with foreign courts and foreign administrators)

Introduction

Business is becoming increasingly international and, consequently, cross-border insolvency proceedings are becoming increasingly common. Therefore, it is important to provide effective mechanisms for dealing with cases of cross-border insolvency and to promote cooperation between the courts and other competent authorities of the States involved in such cases. In the EU, the Regulation 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast) requires cooperation. The use of a common language makes cooperation faster and more efficient.

Explanation

As the number of cross-border insolvency proceedings in the Republic of Macedonia is expected to gradually increase, and considering the fact that the Republic of Macedonia is a candidate country to the European Union. Joining the European Union *Acquis Communautaire*, including the Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast), will become part of the national (insolvency) legislation, it is advised that English is introduced as an additional language to the official language for international cooperation.

Example of good practice – the Republic of Slovenia

Article 473.a of Financial Operations, Insolvency Proceedings and Compulsory Dissolution Act states: 'In the cooperation of domestic court and

domestic administrator with foreign courts and foreign administrators, the national court or the national administrator may use the language which is officially used in the national court or English.’

D. The Bankruptcy Law of 2006 – Provisions on cross-border insolvency

Part 11 of the Bankruptcy Law (art.319 – 354 BL) contains detailed provisions on cross-border insolvency. They are a combination of elements of the UNCITRAL Model Law on Cross-Border Insolvency (MLCBI), the European Insolvency Regulation (EIR) and inspirations taken from other sources, in particular the law of Croatia.

Chapter 1 (art. 319 BL) defines the scope of application of these provisions, basically following Art.1 MLCBI, but adding rules on domestic proceedings with an international dimension. Chapter 2 (art. 320 – 326 BL) deals with jurisdiction of Macedonian courts in international cases and contains also rules on conflicts of law and on cooperation between bankruptcy trustees of concurrent proceedings. This Chapter basically follows the EIR, though in a shortened form. Chapter 3 (art. 327 – 336 BL) contains the basic provisions on recognition of foreign insolvency proceedings, and Chapter 4 (art. 337 – 350 BL) adds more specific provisions on the consequences of recognition. Chapter 5 (art. 351 – 353 BL) adds provisions on the consequences of non-recognition, and Chapter 6 (art. 354 BL) addresses recognition of foreign settlements, bankruptcy plans or other similar decisions.

I. Domestic proceedings (art.320 – 326 BL)

According to art. 320 para.1 BL) Macedonian court are exclusively competent to open bankruptcy proceedings with universal effect (see art.320 para. 4 BL: main proceedings) if the debtor’s headquarters is situated in Macedonia. Proceedings with territorial effect (special bankruptcy proceedings) can also be opened in Macedonia on the basis of a local business unit or local assets of the debtor (art. 321 para. 1 and 2 BL), with some limiting conditions laid down in the law.

Art. 322 BL lays down the *lex fori concursus* as basic conflict of laws rule in bankruptcy, but provides for possible exceptions under this law. As such exceptions, art.323 BL refers to the law of the location of foreign assets with

respect to right of exemption and rights in rem, and art. 324 BL refers to the *lex contractus laboris* for effects of bankruptcy on employment contracts, by and large following the approach of the EIR.

II. Recognition of foreign insolvency proceedings

1. Chapter 3 (art. 327–336 BL) deals with the recognition of a foreign court decision for opening (i.e. commencement) of a bankruptcy procedure, not distinguishing between recognition of EU insolvencies and non-EU insolvencies.

A foreign decision for opening of a bankruptcy procedure shall be recognized (art. 330 para.1 BL) if:

1. the decision has been reached by a competent court or other body which, according to the Macedonian Law, is authorized for cases with international elements;
2. the decision is enforceable according to the respective national legislation of the State where it is adopted, even if it is not a final decision;
3. the recognition of the decision is not contrary to the public policy of the Republic of Macedonia; and if
4. reciprocity exists.

Courts shall refuse the proposal for recognition of a foreign decision (art. 330 para.2 BL), if upon a complaint from the debtor or other participant in the proceeding, it is found that:

- the decision for opening of the proceeding was not delivered to the debtor in accordance with the law of the State where the decision has been adopted and if
- the debtor's basic rights to participate in the bankruptcy procedure have been violated.

In its decision for recognition of the foreign decision on opening of the bankruptcy procedure the court shall state the legal effects of the recognized foreign decision (art. 334 para.2 BL). If the legal effect of the decision for recognition of the foreign decision for opening of the bankruptcy procedure is to commence a bankruptcy procedure in the Republic of Macedonia, the decision for recognition shall have the same legal effect as a decision for opening of a bankruptcy procedure under Macedonian law (art. 334 para.3 BL).

If no special decision for recognition of a foreign decision on opening of a bankruptcy procedure has been rendered, each court may decide upon the recognition of that decision as a preliminary issue in the proceeding, but this decision shall have effect only in that proceeding (Art. 336 para. 1 BL).

2. Chapter 4 (art. 337–350 BL) deals with the validity of a recognized foreign decision for opening a bankruptcy procedure. A foreign decision for opening of a bankruptcy procedure which meets the requirements for recognition pursuant to article 330 BL shall be recognized even though, prior to the submission of the proposal for recognition, a bankruptcy procedure has been opened against the debtor in the Republic of Macedonia in respect of a branch office or the assets of a foreign debtor in the Republic of Macedonia (art. 337 para. 1 BL).

The validity of the recognized foreign decision opening of a bankruptcy procedure shall be determined according to the law of the State where the proceeding has been opened unless it is not in compliance with the basic principles of the bankruptcy law in the Republic of Macedonia and unless otherwise stipulated in this Law (art. 338 para. 1 BL).

In the proposal for recognition of a foreign decision opening a bankruptcy procedure, the foreign bankruptcy trustee or creditors may, as a direct legal consequence of recognition, require the opening of a bankruptcy procedure in the Republic of Macedonia (art. 344 para. 1 BL). The creditors and the foreign bankruptcy trustee (i.e. administrator) may contest registered claims in that proceeding (art. 345 para. 1 BL). The foreign bankruptcy trustee shall also have the right to contest legal acts of the bankruptcy debtor in the bankruptcy procedure in the Republic of Macedonia (art. 346 para. 2 BL).

The bankruptcy trustee of the special bankruptcy procedure in the Republic of Macedonia shall be obliged to enable the bankruptcy trustee of the foreign main bankruptcy procedure to state the manner of turning into cash the assets of the bankruptcy debtor who is included in the domestic special bankruptcy procedure (art. 350 para. 1 BL).

3. Chapter 5 (art. 351 – 353 BL) deals with the non-recognition of a foreign decision opening a bankruptcy procedure. If the court rejects the proposal for recognition of a foreign decision for opening a bankruptcy procedure, upon the proposal of the creditors or the bankruptcy debtor, the court shall open a bankruptcy procedure in the Republic of Macedonia if this is necessary for an equal settlement of all the debtor's creditors (art.

351 para. 1 BL). The foreign bankruptcy debtor, the foreign bankruptcy trustee and the creditors have the right to appeal against a decision that rejects the proposal for recognition of the foreign decision for opening a bankruptcy procedure (art. 352 para. 1 BL). Each creditor as well as the bankruptcy debtor is authorized to request the opening of a bankruptcy procedure in the Republic of Macedonia apart from the fact that a main bankruptcy procedure is opened in a foreign state, if the terms 'because of which the proposal for accepting the foreign decision for opening a foreign proceeding could be rejected' are met (art. 353 para. 1 BL) – if that is what the principle of equal settling of the debtors' creditors requires (art. 353 para. 2 BL).

E. Draft of new North Macedonian insolvency law

In 2022, the Ministry of Economy drafted in cooperation with the International Finance Corporation (IFC, World Bank Group) a new Insolvency Law⁷. According to the Ministry of Economy, the purpose of the adoption of this Insolvency Law was to establish a solid and efficient insolvency system, by improving the insolvency regulatory framework and especially to encourage companies with difficulties to try to negotiate temporary debt relief and to negotiate the terms of out-of-court debt settlement through an appropriate insolvency mechanism. The draft law envisages harmonization with the EU Restructuring Directive of 2019⁸. It also includes provisions on cross-border insolvency (Part 14, art. 436 – 471 draft Insolvency Law), These provisions follow closely the Bankruptcy Law 2006, but they nevertheless contain some significant changes. For example, reciprocity would no longer be a prerequisite for recognition of foreign insolvencies. At present, the draft is still pending in the legislative process.

7 See Djuro M. Djuric, North Macedonia the first EU candidate country to adopt the EU Directive, https://www.insol-europe.org/download/documents/2628&ved=2ahUKEwjLhNTips-RAXsBNsEHbQHMCUQFnoECBs-QAQ&usg=AOvVaw3S4E0sScm7U2_FovrMu-K. The text of the draft is accessible at <https://www.economy.gov.mk/mk-MK/regulativa/zakoni/zakoni-met> (both accessed 21.12.2025).

8 Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on debt relief and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt etc.

F. The North Macedonian way forward

A credible EU perspective remains the strongest incentive for Macedonia to conduct comprehensive political and socio-economic reforms. Despite the challenges introduced on the accession path, it is crucial that Macedonia does not stagnate and continues to advance the national EU reform agenda. A clear way forward on EU integration is key to keep Macedonia's future as part of the European Union.

Strong institutions and regulations are crucial to an effective insolvency system, both domestically and in cross-border relations. The institutional framework has three main elements: the institutions responsible for insolvency proceedings, the operational system through which cases and decisions are processed, and the requirements needed to preserve the integrity of those institutions. In Macedonia it still seems that the way forward should be planned taking into account the (summarized) final recommendations from the Final Report of the EuropeAid project (November 2017). Amendments of legislation concerning insolvency proceedings should be adopted in the regular legislative procedure.

A reliable and predictable regulatory environment for businesses should be ensured by reducing the use of the urgency procedure for legislation, ensuring proper consultation of the stakeholders and reinforcing the independence of commercial courts. Urgent (fast track) legislative procedures are intended for specific purposes and should be used in a very limited number of occasions, when unpredictable and exceptional circumstances require an immediate reaction by the legislator.

Laws adopted in such procedures have many disadvantages. They are usually nomotechnically extremely problematic. Time constraints in urgent procedures force the drafters of legislative proposals to disregard the rules of good legislative technics. Ideas and proposals on new solutions that appear during the procedure cannot be given much thought and discussion. The proposal as a whole can be unclear, unconcise and does not fit well in the overall legal system. The explanation of the proposed norms is insufficient. Consequently, laws adopted in urgent procedures are usually of lower quality both in contents and in legislative technique. The regular legislative procedure, on the other hand, is intended to clarify, resolve and harmonize the issues at stake. It offers a chance for expert discussion and evaluation, sufficient time to form clear and technically appropriate text and to critically judge the proposal.

It is difficult to find a well-founded reason why amendments of insolvency and liquidation legislation should be adopted in an expedited or urgent procedure. Such haste cannot be justified by the interests of security or defence of the state, the elimination of the consequences of natural disasters or avoiding consequences for the functioning of the state, which are the usual reasons for urgent legislative procedures. Therefore, it is strongly recommended that the amendments of legislation concerning insolvency proceedings and liquidation proceedings should be adopted in a regular legislative procedure. In this context, we would like to express some recommendations:

I. Recommendations on strengthening the institutional capacity of the Legal Department (Unit for Bankruptcy) in the Ministry of Economy and other beneficiaries:

- (1) Formation of the Insolvency Sector (within the Ministry of Economy), followed by a formation of the Insolvency Supervision Agency (within the Ministry of Economy).
- (2) Regular and continuous training of the staff of the Sector/Agency.
- (3) Establishment of a new management system for bankruptcy and reorganization proceedings within the Ministry of Economy (or within the Central Register or within the Supreme Court).
- (4) Interconnection of different registers and databases with the ability of automatic and prompt updating of data.
- (5) Websites for publications in Bankruptcy should be managed by special agency.
- (6) Publishing of the data in the Register with effect on the day of the publishing (without publishing in the Official Gazette or other newspapers).
- (7) Access to the data based on the name of the subject or its identification number.
- (8) Access to the data should be free of charge.
- (9) Establishment of an Early Warning System, featuring tools available to debtors to be able to detect a deteriorating business development.
- (10) Only four specialized first instance courts should be competent to decide in insolvency cases (Bitola, Gostivar, Shtip and Skopje).
- (11) Establishment of special insolvency departments within these four courts.

- (12) Only one second instance (appeals) court should be competent to decide in insolvency cases (exclusive jurisdiction of the Appellate Court in Skopje).
- (13) Establishment of a special insolvency department or a chamber within the competent appeals court.
- (14) Specialization of bankruptcy judges, assigned to special insolvency departments or chambers, including through tailored training events.
- (15) Organization of an annual conference/seminar on the topic of insolvency and liquidation law in order to provide the judges with appropriate knowledge and inform them of recent developments in this field of law.
- (16) Upgrade the system of the electronic selection of administrators, taking into account that more extensive knowledge and experience is required in certain types of insolvency proceedings.
- (17) Establish separate systems of the selection of administrators according to the type of proceedings (bankruptcy, reorganization, voluntary liquidation, and entrepreneur).
- (18) Determine more criteria for ranking of the administrators based on considerations particular to each type of proceedings.
- (19) Mandatory continued training for administrators in order to improve overall quality of administering the insolvency proceedings.
- (20) Assuring the impartiality of the administrator, including through mandatory disclosure of the financial situation of the administrator before the appointment in particular insolvency case.
- (21) Formation of the Implementation Monitoring Group with the Ministry of Justice, in addition to the Consultative Body set up within the Ministry of Economy.
- (22) An Association of Creditors should be established.
- (23) Inclusion of a member of the Association of Creditors into the Implementation Monitoring Group.

II. Recommendations on reviewing the functionalities and legal provisions in the current bankruptcy system:

- (1) Harmonization of Macedonian bankruptcy legislation with the European Insolvency Regulation (recast).
- (2) Implementation of Preventive Restructuring Directive upon its adoption.

- (3) Changing the name of the relevant law from Bankruptcy Law to Insolvency Law.
- (4) Transposition of the majority of the provisions on the exam for candidates for administrators from Bankruptcy Law to a specific rulebook.
- (5) Reconsider the form of the exam: only a written test or also an oral exam.
- (6) Introduction of English as an additional language to the official language (for cooperation of domestic courts and domestic administrators with foreign courts and foreign administrators).
- (7) Inclusion of mediation in the bankruptcy (and reorganization) proceedings by determining the types of claims suitable for mediation, the nature of mediation and deadlines for reaching the agreement.
- (8) Proceedings should be diversified, covering different types of debt distress. They should offer an insolvent debtor or debtor facing imminent insolvency appropriate options according to its particular situation by establishing clear distinguishing criteria and functional classification.
- (9) Both bankruptcy (with reorganization) and liquidation proceedings should be addressed.
- (10) Different types of reorganization suitable for different debtors considering their particular features.
- (11) Inclusion of specific provisions on environmental protection in the new Insolvency Law (for example, on the liability for potential damage, cost of pollution management, secondary liability of State for the damage caused, etc).
- (12) The Law on the Out-of-Court Settlement should be abolished.
- (13) The (appropriate) content of the Law should be transposed into the (new) Insolvency Law (into the Chapter on the reorganization plan submitted by the debtor).
- (14) Development of the system of personal bankruptcy also for a consumer in the (near) future.

III. Recommendations on reviewing the functionalities and legal provisions in the current liquidation procedure:

- (1) Clear distinction between different types of liquidation.
- (2) Clear distinction between liquidation as a consequence of the bankruptcy proceedings and compulsory liquidation.
- (3) Detailed regulation of liquidation proceedings, with special emphasis on the reasons for the commencement of the proceedings, the subjects entitled to propose the commencement of the proceedings, rights and duties of the parties to the proceedings, notifications, legal remedies, payment of outstanding claims and distribution of assets.
- (4) Clear distinction between liquidation proceedings and deletion without liquidation (dissolution).
- (5) Detailed regulation of dissolution proceedings, with special emphasis on the reasons for the commencement of the proceedings, the subjects entitled to propose the commencement of the proceedings, rights and duties of the parties to the proceedings, notifications and legal remedies.
- (6) Regulate the status and mandate of liquidators.

IV. Recommendations common to bankruptcy and liquidation:

- (1) Introduction and implementation of the case management system ('Triage')
- (2) Preparing the contents aspect of the 'Triage' project.
- (3) Adopting appropriate legal basis for the implementation of the 'Triage' project.
- (4) Establishment of a working group and commencement of the 'Triage' project.
- (5) Ensuring adequate staffing, in particular of the non-judicial personnel.
- (6) Judicial advisers and/or judicial assistants should have more competencies in insolvency proceedings (which will disburden the judges and ensure more efficient court proceedings).
- (7) Provide legal basis for such new competencies of judicial advisers / assistants.
- (8) Provide a system of legal remedies against the decisions of judicial advisers/assistants.

- (9) A plan of bankruptcy proceedings should be laid down by the court on the proposal of the insolvency administrator and in cooperation with other relevant stakeholders.
- (10) Adoption of business-financial standards for valuation of the assets (in bankruptcy proceedings).
- (11) Inclusion of a provision in the new Insolvency Law providing for a legal basis for the establishment of a Warranty Fund.
- (12) Adoption of a special law on a Warranty Fund.
- (13) Establishment of a Warranty Fund.
- (14) Amendments of legislation concerning insolvency proceedings and liquidation proceedings should be adopted in the regular legislative procedure.

Analytical note on the prospects for the development of cross-border insolvency in the Russian Federation

Vladimir Yarkov and Ruslan Baldanov

Abstract:

This paper analyses the existing regulation of cross-border insolvency in the Russian Federation and the prospects for its development. It discusses the jurisdiction of Russian courts in insolvency cases involving foreign entities, and the need for legislative changes to align with international standards.

Keywords: Russia, cross-border insolvency, jurisdiction, UNCITRAL Model Law, insolvency law, legislative development

A. Existing regulation of cross-border insolvency in the Russian Federation

I. Resolution of questions as to whether Russian courts have jurisdiction to hear insolvency cases involving foreign individuals and legal entities

The Bankruptcy Law of the Russian Federation (BL)¹ applies to persons who may be recognized as insolvent under the Russian Civil Code (*art. 1 para. 2 BL*). Separately, the law mentions the possibility of participation of foreign persons as creditors (*art. 1 para. 5 BL*). However, the law does not contain normative regulations of the procedure for the realization/transfer of property of a foreign insolvent debtor.

In this regard, judicial practice plays a major role in the application of Russian insolvency law, which is far ahead of positive regulation. Historically, Russian jurisprudence has developed two polar approaches regarding the existence of competence of Russian courts to hear bankruptcy cases against foreign debtors. The former approach consisted in denying the existence of such a competence, indicating that proceedings in such cases

1 Text available e.g. at https://www.consultant.ru/document/cons_doc_LAW_39331/ (access 22.12.2025).

could not be opened under Russian law. The more recent approach, on the contrary, points to the existence of competence, referring to instruments of soft law, in particular the UNCITRAL Model Law on Cross-border Insolvency (MLCBI) of 1997.

According to the first approach, if a foreign company applies for bankruptcy, the proceedings are subject to termination. This is what happened, for example, in the following cases:

- Judgment of the arbitrazh² court of the Krasnodarsky region of 02.02.2015, case No. A32–43709/2014 (short description).
- Judgment of the arbitrazh court of the Moscow district of 15.11.2017, case No. A40–15873/2017 (By ruling of the Supreme Court of the Russian Federation of 12.03.2018 the case was rejected for judicial review).
- Judgment of the arbitrazh court of the Central district of 22.11.2021, Case No. A83–2124/2021 (By ruling of the Supreme Court of the Russian Federation of 18.02.2022 the case was rejected for judicial review)

The second approach, on the contrary, concludes that Russian arbitrazh courts have jurisdiction to hear a foreign person's bankruptcy case. Judicial practice bases the existence of competence on the UNCITRAL Model Law on Cross-Border Insolvency.

This approach has become dominant due to recent developments in Russian court practice. In the framework of the bankruptcy case of West-Walk Projects Ltd.³, a company based in Cyprus, the Supreme Court of the Russian Federation actually created norms of law and filled the legal vacuum.

Obviously, this judgment does not contain a complete and systemic regulation, but it draws a system of coordinates, a kind of foundation of legal regulation of cross-border insolvency. The judgment bases the regulation of cross-border insolvency on the theory of modernized universalism: the opening of main proceedings with parallel commencement of non-main (secondary) proceedings. The competence of the court opening the main

2 Following the Soviet tradition, Arbitrazh courts in Russia are state courts dealing with commercial disputes.

3 Judgment of the Supreme Court of the Russian Federation of 08.02.2024, case No. A40–248405/2022, accessible (in Russian) e.g. at <https://legalacts.ru/sud/opredelenie-sudebnoi-kolle-gii-po-ekonomicheskim-sporam-verkhovnogo-suda-rossiiskoi-federatsii-ot-08022024-n-305-es23-15177-po-delu-n-a40-2484052022/?ysclid=mjgw296gpe730658670> (22.12.2025).

proceeding is determined by the presence or absence of a close connection with Russia, such as:

- the debtor conducts permanent economic activities in Russia,
- commercial activities are focused on persons who are located in Russia,
- the centre of main interests of the beneficiaries is located in Russia,
- the management body of the foreign entity is located in Russia,
- the beneficiaries of the company have Russian citizenship or residency or are involved in corporate relations with Russian legal entities,
- the beneficiaries have been brought to subsidiary liability by a Russian court,
- the assets of a foreign debtor are located in Russia,
- a significant part of creditors are Russian legal entities and individuals,
- Russia was the place of fulfilment of most of the contracts,
- The main evidence is located in Russia, etc.

In this case, the court distinguishes between the actual performance of economic activity in the jurisdiction where the person was registered and formal registration, adhering to the real seat doctrine. For the purposes of determining jurisdiction, however, the court uses the centre of main interests (COMI) interpretation of this doctrine. COMI venue may be evidenced by the following circumstances:

- the location of the debtor's principal property. We assume this means the debtor's commercial asset, or the asset that is of the greatest value,
- the location of the majority of the debtor's creditors,
- the location of the debtor's productive resources. As in the case of paragraph 1, it would appear that this refers to the main productive resources that form the basis of the debtor's economic activity.
- the location of the debtor's business activities,
- the place where most of the debtor's profits – the debtor's main income – are derived,
- the place where the debtor is reorganized,
- the place where the debtor's main obligations arise and are fulfilled.
- location of the debtor's beneficiaries and the centre of their main interests, etc.

The approach described above resembles the approach of the MLCBI as interpreted in Anglo-Saxon law and less resembles the model of cross-border insolvency regulation that exists in the European Union. It should be

noted that the judgment does not indicate the existence of the contested presumption of COMI at the debtor's place of registration, thus unleashing the courts to localize COMI and verify the existence of their own competence. It follows from the above material that the rules created by the Supreme Court encourage courts to comprehensively analyse the factual circumstances in order to objectively determine COMI. A similar approach exists in Anglo-Saxon jurisdictions, whose courts often disregard the presumption, stating that its role is to minimize time costs for those cases where everything is obvious⁴. It appears that the rules of law created by the Supreme Court are an accumulation of global experience of cross-border insolvency regulation. In our view, the factors set out above for determining COMI and confirming competence should be interpreted systematically and not in isolation from each other.

A first group of judgments in Russia justify the existence of competence through the doctrine of centre of main interests (Art.16 (3) MLCBI). For example, by a ruling of 30.06.2016 in the case No. A81–6187/2015 the arbitrazh court of the Yamalo-Nenets Autonomous District introduced a restructuring procedure in respect of a citizen of Ukraine. Thanks to the above-mentioned judgment, a positive practice of initiating insolvency proceedings against foreign citizens has emerged in the Russian Federation. For example, bankruptcy cases were initiated against a citizen of India⁵; a citizen of Georgia⁶; a citizen of Serbia⁷ and a citizen of Germany⁸. It should be noted that this group includes insolvency cases involving only natural persons. At the time of the above-mentioned court decisions, the courts were averse to the idea of insolvency proceedings against foreign legal entities.

A second group within this approach justifies the existence of competence to commence 'non-main proceedings' through the doctrine of 'establishment' (Art.17(2)(b) MLCBI). Thus, the Supreme Court of the Russian

4 East-West Logistics LLP v Melars Group Ltd. *England and Wales Court of Appeal Civ 1419 of 28.07.2020*; *Bear Stearns High-Grade Structured Credit*. 389 B.R. 325 (S.D.N.Y. 2008).

5 Judgment of the Moscow arbitrazh court of 29.06.2020, case No. A40–252126/2019.

6 Judgement of the arbitrazh court of St. Petersburg and Leningrad Region of 29.12.2020, case №A56–79182/2020.

7 Judgment of the arbitrazh court of the Republic of Bashkortostan of 03.08.2020, case №A07–28969/2019.

8 Judgment of the arbitrazh court of Krasnodar region of 02.03.2020, case №A33–27910/2019.

Federation actually recognized the possibility of opening ‘non-main proceedings’ in respect of LLC ‘Vitmet’⁹.

The case of Pandora Consulting LC should be separately mentioned. Here, the judgment of the arbitrazh court of the Chelyabinsk Region of 22.04.2022 opened an insolvency proceeding against a foreign corporate debtor (established in the offshore jurisdiction Nevis)¹⁰. The court reasoned that denying the creditor the mechanisms provided for by the Russian Bankruptcy Law would limit the creditor's right to effective judicial protection by a Russian court.

The case on the bankruptcy of the Hungarian company PROinvest Kft is also of particular interest in today's court practice.¹¹ The arbitrazh court of the North-Western District concluded that the Hungarian company was just registered in Hungary, but actually carried out its activities in Russia, as the company had a number of permanent and temporary representative offices in different constituent entities of the Russian Federation, and also had settlement accounts. At the time of preparation of this article, the court of first instance had not yet ruled on the opening of proceedings against the debtor. The above bankruptcy case is of particular interest, because there is a Treaty on Legal Assistance between Russia and Hungary of 15.07.1958¹², under the terms of which decisions on non-property disputes are automatically recognized. The treaty obviously did not provide for the regulation of cross-border insolvencies, since this phenomenon did not exist as such in centrally planned economies. Meanwhile, Russian doctrine suggests that such treaties can be applied to bankruptcy cases. In addition, Hungarian recognition of the Russian bankruptcy procedure would raise a significant issue for cross-border insolvency regulation in the European Union. Currently, the EU Member States, when recognizing a bankruptcy opened in a third country, apply their national law. However, this approach leads towards territorialism, as the debtor's assets may be scattered across all jurisdictions in the European Union.

9 Judgment of the Supreme Court of the Russian Federation of 08.10.2020, case No. A83–6324/2018.

10 Arbitrazh court of the Chelyabinsk Region, case No. A76–31539/2021 of 22.04.2022.

11 Judgment of the arbitrazh court of the North-Western District of 19.02.2024, case No. A13–13917/2023.

12 Text available (in Russian) at https://www.mid.ru/ru/foreign_policy/international_contracts/international_contracts/2_contract/53103/ accessed 22.12.2025).

II. Matters concerning the recognition by Russian courts of judgments of foreign courts recognizing Russian citizens as insolvent

It is obvious that not only migration of foreign citizens to the Russian Federation is possible, but also vice versa. This raises the question of the possibility of recognizing judicial acts of foreign courts on the recognition of Russian citizens as insolvent.

The analysis of judicial practice shows that Russian courts do recognize foreign judicial acts on the recognition of Russian citizens as insolvent. Thus, for example, a Russian arbitrazh court recognized the decision of a German court to recognize a Russian citizen as insolvent. Similarly, a Russian general court recognized a German court's decision to open an insolvency proceeding against a German citizen¹³. In both cases, the recognition of judicial acts of German courts was based on the principle of reciprocity. In the absence of reciprocity, the court refuses to recognize a judicial act of a foreign court recognizing a Russian citizen as insolvent¹⁴. Thus, Russian courts recognize foreign insolvency judgments only on the basis of the principle of reciprocity, since the Russian Federation is not a party to a treaty on insolvency matters. If there is no reciprocity with the country where the insolvency judgment was handed down, the Russian courts deny recognition.

In concluding this paragraph on the current regulation of cross-border insolvency, it should be noted that, although a step forward, the goal (full and systemic regulation of cross-border insolvency) is still a long way off. The Supreme Court's judgment in the *WestWalk Projects Ltd.* case does not regulate issues of recognition of foreign procedures, enforcement of judicial acts related to or arising from the bankruptcy case, and there is no regulation of coordination and cooperation between insolvency administrators approved in different jurisdictions. In this respect, the Russian legal system is yet to develop a consistent regulation of cross-border insolvency.

Besides the classical issues that have already been settled by the Member States of the European Union, the Russian legal system, as well as all others, will have to clarify the ways of determining jurisdiction for entities

13 Judgment of the arbitrazh court of the City of St. Petersburg and the Leningrad Region of 28.05.2008, case No. A56–22667/2007.

14 Judgment of the arbitrazh court of the Sverdlovsk Region of 14.07.2019, case No. A60–29115/2019.

engaged in the sphere of electronic commerce¹⁵. Rapidly evolving, this field has developed independent structures for corporate decision-making based on decentralization as a key principle. For example, the Multi-Signature Wallet is widely used, which works only with the consensus of all key holders¹⁶. Its use allows cash to be managed only with the consent of all key holders, and it is not physically necessary for all key holders to be in the same place. Equally, this technology is used for corporate decision making. Consequently, the main criterion for determining the COMI – the place of decision-making – loses its value and effectiveness. Another example is Compound, which is managed on the basis of anonymity and decentralization (*decentralized autonomous organization – DAO*)¹⁷. This example is particularly interesting not only from the point of view of corporate law, but also from the point of view of civil procedure, as a group of plaintiffs is currently gathering to sue Compound¹⁸. It is obvious that in case of non-compliance with the decision the company will face bankruptcy. However, which court will recognize its jurisdiction to commence proceedings remains unclear, as the company's COMI is not explicitly expressed.

B. Possible ways of development of regulation of cross-border insolvency institution

Taking into account the above-mentioned judicial practice, the regulation of the institute of cross-border insolvency is a topical problem. In this regard, we see the following possible ways of solving the problem.

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- 15 A similar problem was scrutinized by the court in *East-West Logistics LLP v Melars Group Ltd.* England and Wales Court of Appeal Civ 1419 of 28.07.2020. The debtor had almost no physical traces of activity to the extent that would clearly link it to any jurisdiction. At the same time, the debtor had traces of commercial activity in Switzerland, England, Estonia, and was registered in Malta and the British Virgin Islands.
 - 16 Investopedia, Multi-Signature Wallets <<https://www.investopedia.com/multi-signature-wallets-definition-5271193>> (last accessed 14.07.2024).
 - 17 Compound, Governance <<https://docs.compound.finance/governance/>> (last accessed 14.07.2024).
 - 18 The Rosen Law Firm, Compound DAO <<https://rosenlegal.com/case/compound-dao/>> (last accessed 14.07.2024).

I. Conclusion of a Treaty between the European Union and the Russian Federation

The best option for regulating cross-border insolvency would be to conclude an international treaty. A treaty with an experienced cross-border insolvency regulator such as the European Union (EU) would be particularly fruitful. However, it seems unlikely that such an international treaty would be concluded due to the number of complicating political aspects. In this connection we have to state that it is impossible to regulate cross-border insolvency by means of an international agreement with the European Union (as well as with individual member states).

II. Implementation of the UNCITRAL Model Law on Cross-Border Insolvency into the national law of the Russian Federation

Turning the view to instruments of soft law, the UNCITRAL MLCBI uses jurisdiction criteria that are clear and understandable to the Russian legal order. This follows from the courts' references to the rules of the MLCBI (despite the fact that the Russian Federation has not adopted or implemented the provisions of the MLCBI in any form). It should be noted that in 2011 the Ministry of Economic Development of the Russian Federation prepared a draft Federal Law 'On Cross-Border Insolvency (Bankruptcy)'¹⁹. This draft was actually based on the rules of the MLCBI.

Thus, one of the preferred options for regulating cross-border insolvency is to implement the UNCITRAL Model Law. The result would be a new law regulating cross-border insolvency.

We believe that individual (point) changes in the procedural legislation of the Russian Federation (Arbitrazh [Commercial] Procedure Code and Civil Procedure Code) are not able to give an exhausting solution of the problem of cross-border insolvency. The reason lies both in the specifics of the subject of regulation and in the different legal techniques used in both of the two Codes and in the insolvency legislation.

Finally, the adoption of a separate chapter within the Bankruptcy Law also seems less adequate. The general provisions of the Bankruptcy Law do not include the regulation of legal relations between a foreign debtor

19 Available in Russian language at ConsultantPlus (limited accessibility) < <https://www.consultant.ru/cons/cgi/online.cgi?req=doc&base=PRJ&n=152192#3NOnBRUuIxzvEaw2> > (last accessed 14.07.2024).

and creditors (except for the treatment of foreign creditors). Consequently, in case of implementation of the UNCITRAL Model Law into the current Bankruptcy Law, it would be necessary to amend the general provisions of the Bankruptcy Law as well, taking into account the legal relations between creditors and a foreign debtor in the subject of regulation. In addition, it should be taken into account that the regime of cross-border bankruptcy differs from the legal regime of national bankruptcy.

III. Conclusion of an agreement between the Member States of the Eurasian Economic Union (EAEU)

The relevance of cross-border insolvency regulation depends on the intensity of trade turnover between specific countries. With the growth of civil turnover and mutual trade, the role of such an organization as the EAEU is increasing. Consequently, it would be possible to conclude a multilateral treaty between the EAEU Member States.

IV. Final conclusions.

Summing-up, the most preferable option to solve the problem of cross-border bankruptcy regulation would from our perspective be the implementation of the 1997 UNCITRAL Model Law into the national legislation of the Russian Federation. This conclusion is based both on the references of Russian courts to the Model Law and on the actual recognition of the possibility of opening ‘non-main proceedings’ in the case of LLC ‘Vitmet’²⁰, as well as in the case of WestWalk Projects Ltd.²¹. This approach would make it possible to propose universal solutions regarding the regulation of cross-border insolvency in the Russian Federation, which will apply to any states and unions of states, regardless of the political aspects of relations with them.

We believe that in such a case, the principle of reciprocity should be abandoned and a system of direct recognition of foreign insolvency judicial

20 Judgement of the Supreme Court of the Russian Federation of 08.10.2020, case No. A83–6324/2018.

21 Judgement of the Supreme Court of the Russian Federation of 08.02.2024, case No. A40–248405/2022.

acts should be adopted, subject to certain conditions (including the possibility of applying the public policy exception) and legal procedures.

A reasonable structure of a Russian law on cross-border insolvency would appear to be as follows:

- 1) General provisions,
- 2) Determination of the competent court,
- 3) Access of foreign creditors to courts in the Russian Federation,
- 4) Recognition of judicial acts issued in foreign insolvency proceedings,
- 5) Coordination and cooperation of proceedings,
- 6) Parallel proceedings.

Cross-border insolvency principles in terms of South African Law

André Boraine

Abstract:

Given South Africa's relatively large volume of international trade across the globe in general, and with many European Union member states in particular, a clear and predictable cross-border insolvency structure remains essential. South Africa is not a party to any cross-border insolvency treaty or convention, and its cross-border insolvency framework is primarily shaped by common law principles drawing from private international law and based on precedent. In this regard, comity, convenience, and equity play an essential role in shaping this area of our law. The High Courts have discretionary powers to recognize foreign estate representatives but will protect local creditors, too. Although the Cross-Border Insolvency Act of 2000, based on the MLCBI, has been enacted, it will only apply to countries designated by the Minister of Justice. In the context of the Cross-Border Insolvency Act, the Minister's discretion is restricted by the notion of reciprocity, which is a significant determinant for electing designated States. Since its inception more than 20 years ago, no State has been designated yet. Nevertheless, the Act, once activated, will introduce a dual system. In this respect, foreign estate representatives hailing from designated States will enjoy the benefits of its framework, whilst those from non-designated States will remain governed by the discretionary and thus less predictable common law approach. Given its largely procedural focus, the Cross-Border Insolvency Act also leaves some substantive matters unaddressed, necessitating reliance on common law principles to deal with the same. Legislative updates are needed to align with modern insolvency practices, including incorporating recent UNCITRAL Model Laws on insolvency-related judgments and group insolvencies. The activation of the Act – preferably by scrapping the designation/reciprocity clause and further reforms aiming to harmonize South Africa's cross-border insolvency

law with international standards while addressing unique local considerations, remains a matter of high importance in this area of our law.

Keywords: South Africa, Common Law, recognition, discretion, debtor's property, MLCBI, reciprocity

A. General

The purpose of this chapter is to explain the principles governing the South African cross-border insolvency dispensation.¹ With this discussion as a backdrop, pertinent issues in the current dispensation are noted. The aim is to alert other jurisdictions which may be contemplating the reform or revision of their cross-border insolvency rules to problem areas in the South African dispensation. It may also be stated that although there is not a high number of cross-border insolvency matters emanating from South Africa currently, a clear and predictable set of rules remains imperative given the large volumes of international trade between South Africa and its various trading partners in Europe² the Americas and the East for instance, and its position in Africa.

Because there are differences between local insolvency regimes and related legal principles – e.g., the law of securities and the entrenched principle of territoriality in cross-border insolvency – there is no uniform universal approach towards cross-border insolvency matters. In their approaches to this topic, States have traditionally tended to lean towards territoriality although modern needs may require a more universalist approach. Where assistance in cross-border insolvency is granted, the systems may be classified as modified universality or as cooperative or modified territoriality³

1 For general discussions of this topic, see Kunst/Boraine/Burdette, Chap.17; Bertelsmann et al, Chap. 30.

2 For an overview of South African trade with EU Member States, see for instance <<https://www.southafricanmi.com/eusa.html>>.

3 Civil law countries are said be more inclined to take a territorial approach to jurisdiction and that common law countries are more supportive of universalism – See LoPucki, Cornell Law Review 1990, 2216 et seqq; Omar International Company and Commercial Law Review 2002, 416 et seqq; IIR 2002, 173 et seqq; Westbrook St Louis University Law Journal 1995, 753 et seqq; Texas Law Review 2018, 1473 et seqq. Due to the lack of global consensus, the reality is that States rather follow hybrid approaches that may have shades of both, hence terms like ‘modified universalism’ and ‘modified’ or ‘co-operative territorialism’ have emerged. Regarding a practical explanation of

In an earlier constitutional dispensation in South Africa, the Foreign Trustees and Foreign Liquidators Recognition Act of 1907 – a statutory enactment that applied in the former Cape Colony – provided that the then Supreme Court could recognise the appointment of a foreign representative. Although this Act no longer forms part of South African law some of its principles have survived on the basis of precedent⁴

Currently, South African common law based on principles of international private law and precedent, must be considered and applied in this area of South African law. Based on comity, convenience, and equity, a South African High Court is entitled to recognise the appointment of a foreign representative.⁵ The principles of private international law (conflict of laws) are important, especially regarding the treatment of property situated in South Africa and where the insolvency case has an international element.⁶

South Africa enacted the MLCBI as the Cross-Border Insolvency Act 42 of 2000 on 8 December 2000. Although the Act came into force on 28 November 2003,⁷ it is, for all practical purposes, not yet in operation. This may be ascribed to the designation and reciprocity clause in the local version, which limits the application of the Act to states to be designated by

modified universality see *Singularis Holdings v Price Waterhouse Coopers* [2014] UKPC 26: '... a recognised principle of the common law. It is founded on public interest in the ability of foreign courts exercising insolvency jurisdiction in the place of the company's incorporation to conduct an orderly winding up of its affairs on a world-wide basis, notwithstanding the territorial limits of their jurisdiction. The basis of that public interest is not only comity, but a recognition that in a world of local businesses it is in the interest of every country that companies with transnational assets and operations should be capable of being wound up in an orderly fashion under the law of the place of their incorporation and on the basis that will be recognised and effective internationally'.

4 *Ex parte Steyn* 1979 (2) SA 309 (O).

5 *Ex parte BZ Stegmann* 1902 TS 40; *Re Estate Morris* 1907 TS 657; *Ex Parte Steyn* 1979 (2) SA 309 (O); *Ward v Smit & Others: In re Gurr v Zambia Airways Corporation Ltd* 1998 (3) SA 175 (SCA). On comity and convenience as factors to be considered by the Court rather than strict requirements, see also *Ex parte Palmer NO: In re Hahn* 1993 (30 SA 359 (C) at 362J and 363H; and on convenience and equity see *Ward v Smit: In re Gurr v Zambia Airways Corp Ltd* 1998 3 SA 175 (SCA) at 179F and *Deutsche Bank AG v Moser and Another* 1999 (4) SA 216 (C) 219H-I and. See also Smith/Boraine ABI LR, 2002, 135 (177–187).

6 Bertelsmann *et al*, p. 731. Regarding the application of choice of law principles in general, see Fletcher, p. 3 *et seqq*.

7 By virtue of Proclamation No R 73 of 2003 as published in GG 25768 of 27 November 2003.

the Minister of Justice. The Act will thus only apply to designated countries and no state has yet been so designated.⁸

The introduction of a designation system based on reciprocity in the Cross-Border Insolvency Act, means that South African law will have a dual approach to the recognition of foreign insolvency orders – representatives from designated countries will fall under the procedure prescribed by the Cross-Border Insolvency Act once it is in operation; whilst representatives from non-designated countries will have to follow the general-law route based on common law and precedent.

When a South African estate representative, either a trustee or liquidator, wishes to trace assets belonging to a South African insolvent in a foreign country, the laws of that country will determine if and how he or she must apply for recognition in that jurisdiction (an outward-bound request), or whether a concurrent proceeding may be opened in the foreign jurisdiction.

In summary, the current dispensation allows foreign representatives from any foreign jurisdiction to approach a South African High Court with an inward-bound request to apply for assistance in the form of a recognition order authorising him or her to trace property and deal with it. The ultimate aim is to realise the property and to use the proceeds for the benefit of the foreign creditors but subject to the rights of local creditors.⁹ The discretion of the court hearing a recognition application plays an important role and is said to be absolute. This makes the outcome of a request for assistance less predictable.

B. The framework of South African insolvency law

I. General

To explain the cross-border insolvency dispensation of a particular jurisdiction it is useful to have some background on the operation of its legal system and its local insolvency framework. The South African legal system stems from Roman-Dutch law, generally referred to as the South African common law. English law did, however, influence the law, most notably

8 See in general with regard to the Cross-Border Insolvency Act, Smith/Boraine ABI L Rev 2002, 138.

9 Smith SA Merc LJ 2002, 24.

in areas of mercantile law and more specifically, the law of insolvency and company law. In general, the common-law principles apply, save in those instances where they have been replaced by legislation. The English precedent system also found its way into South African law. Although South African law is not codified, legislation, the common law in so far as legislation has not abolished or altered a particular rule, and precedents set by the High Courts are the primary sources of South African law.¹⁰ The Constitution of the Republic of South Africa, 1996 – the supreme law of the land – contains a bill of rights against which the courts may test the constitutionality of legislation.¹¹

When turning to the law of insolvency, it is interesting to note that the Insolvency Ordinance of Amsterdam of 1777 is cited as the foundation of South African insolvency law.¹² The first local insolvency legislation was, however, introduced in 1829 in the former Cape Colony and was based on English bankruptcy law.¹³ Ordinance 6 of 1843 (Cape), which abolished the concept of *cessio bonorum*,¹⁴ replaced the 1829 Ordinance and formed the statutory basis for Insolvency Ordinances of the former pre-union republics of South Africa – i.e., the Transvaal, Orange Free State, and Natal. In 1916, after the establishment of the former Union of South Africa in 1910, the Insolvency Act of 1916 was adopted as the first uniform insolvency law for the whole of the then Union. Currently, the law relating, in the main, to insolvent individuals, is governed by the Insolvency Act 24 of 1936¹⁵ which Act came into force on 1 July 1936.

Although largely regulated by the Insolvency Act of 1936 which addresses the sequestration of individuals and related matters, South African insolvency law is fragmented in that it is not contained in one single piece of legislation. Regarding corporate bankruptcy, the former Companies Act 61 of 1973¹⁶ and the Close Corporations Act 69 of 1984 contain sections that dealt with the winding-up (or liquidation) of companies and close corpo-

10 Kleyn/ Viljoen, p. 50.

11 Idem, p. 56. The South African Constitution, 1996.

12 See also *Fey NO and Whiteford NO v Serfontein* 1993 (2) SA 605 (A).

13 Wessels, p. 670. This Ordinance retained some of the Dutch practices, like *cessio bonorum* i.e. a surrendering by the debtor of his estate to his creditors.

14 Ibid.

15 Hereinafter the 'Insolvency Act of 1936'. See in general Kunst/ Boraine/ Burdette and Bertelsmann *et al* regarding comprehensive discussions of mainly the Insolvency Act of 1936.

16 Hereinafter the 1973 Companies Act, or the Companies Act of 1973.

rations, respectively. These provisions were, however, not comprehensive and, as regards insolvent companies or close corporations, certain sections of these Acts applied certain provisions in the Insolvency Act of 1936 and South African common-law provisions to the liquidation or winding-up of insolvent companies or close corporations. The 1973 Companies Act, bar its Chapter XIV, was replaced by the Companies Act 71 of 2008¹⁷ as from 1 May 2011. The 2008 Act brought about certain amendments regarding the winding-up and liquidation of companies and close corporations. The cross-references and interpretational difficulties of all the applicable insolvency rules governing insolvent companies can at times be confusing.¹⁸ Suffice to say that the 2008 Companies Act does not provide comprehensively for the winding-up or liquidation of insolvent companies and that it set a process in motion to phase out close corporations as a business form. A new business rescue procedure was introduced by the 2008 Companies Act to replace judicial management under the 1973 Companies Act as a formal rescue procedure.

There are also special provisions applicable to the winding-up of other legal entities such as banks, insurance companies, cooperatives and municipalities in various other pieces of legislation.¹⁹ In the latter instances, there are generally specific sections in the respective Acts that deal with the winding-up or administration of such institutions whilst they are debt-stressed. In addition to these statutory enactments, precedents and common-law principles also apply in the absence of specific statutory provisions. The Insolvency Act of 1936, however, remains the principal source of South African insolvency law while the other legislation merely makes certain provisions of the Insolvency Act applicable.

The review of our insolvency law with a view to addressing issues in the system and also ultimately enacting a single unified piece of insolvency legislation to cover personal, corporate, and cross-border insolvency has been on-going for several years. In 1987 the South African Law Commission embarked on an investigation of the law of insolvency in its entirety. A Project

17 Hereinafter the 2008 Companies Act, or the Companies Act of 2008.

18 See in general Boraine/ VanWyk De Jure 2013, 644 (683); and see *AJVH Holdings (Pty) Ltd and Others v Steinhoff International Holdings NV and Others* (7978/2020; WCC; 5 October 2021 regarding specific interpretational problems relating to the winding-up of external companies.

19 See S. 68 of the Banks Act 94 of 1990; Ss. 42-43 of the Long-Term Insurance Act 52 of 1998; Ch. IX of the Co-Operatives Act 14 of 2005 (as amended) and Part 3 of Ch. 13 of the Local Government: Municipal Finance Management Act 56 van 2003.

Committee was appointed to conduct and direct the review as 'Project 63'. A series of working papers dealing with selected topics for discussion, followed by reports, culminated in the Draft Insolvency Bill of 1996.²⁰ The Report and Draft Bill replaced the first draft which the South African Law Reform Commission published in 2000. In 2003 the Cabinet approved the idea of a single unified Insolvency Act that would apply to various types of debtor – both natural person debtors (individuals) and corporate and other entities. Still, apart from more recent working documents from the Department of Justice and Constitutional Development, a formal Reform Insolvency Bill is yet to be published.

For purposes of cross-border insolvency law, the new legislation will aim to include cross-border insolvency rules as a separate chapter rather than it remaining a loose-standing piece of legislation as is currently the case. It is hoped that the designation and reciprocity clause will also be removed in the new legislation.

II. Functionaries in an insolvent estate

The High Courts of South Africa have jurisdiction to grant insolvency orders, i.e., sequestration orders with regard to debtors as defined in the Insolvency Act,²¹ and winding-up or liquidation orders in relation to companies and close corporations.²²

20 The 1996 Draft Insolvency Bill and Explanatory Memorandum were published for comment by the South African Law Commission as the 'Review of the Law of Insolvency: Draft Insolvency Bill and Explanatory Memorandum' Working Paper 66 Project 63 (1996), hereinafter the 'Draft Insolvency Bill' and 'Explanatory Memorandum' respectively. See further Boraine/van der Linde TSAR 1998 (Part 1), 621 et seqq; TSAR 1999 (Part 2), 38 et seqq.

21 The definition of 'debtor' in connection with the sequestration of the debtor's estate, includes a (natural) person, i.e. an individual, and also a partnership or the estate of a person or partnership which is a debtor in the usual sense of the word, but excludes a body corporate or a company or other association of persons which may be placed in liquidation under the law relating to Companies.

22 Although not a fully fledged specialised insolvency court, a Dedicated Insolvency Court was initiated in the Gauteng Local Division of the High Court in Johannesburg as a pilot project in terms of Practice Directive DJP/390/2024/lt dated 10 March 2025, and expanded to Pretoria as from January 2026. It should, however, also be noted that, in the case of companies unable to pay their debts, winding-up may be initiated by means of a special resolution of shareholders in terms of s 352 of the Companies Act 61 of 1973.

It is important to note that the administration of the insolvent estates of individuals, as well as other debtors such as companies, takes place under the supervision of the Master of the High Court.²³

Although the Master of the High Court has several statutory duties – including the supervision of insolvent and deceased estates – this office cannot be seen as an insolvency regulator in the true sense of the term.²⁴

In the case of sequestration of the estate of a debtor as defined in the Insolvency Act of 1936, a trustee is appointed (or in the case of a company or close corporation a liquidator) to take charge of the administration of the respective estates.

Local estate representatives, trustees, or liquidators are, in principle, elected at the first meeting of creditors by those creditors who have proved their claims. However, the ultimate responsibility of appointing such an elected trustee or liquidator rests with the Master. In practice, creditors nominate persons who generally accept appointment as trustees or liquidators, to be appointed as trustees or liquidators even before the first meeting of creditors has been held (this is the so-called ‘requisition’ practice). The Master has an unfettered discretionary statutory power to appoint such a nominee as a provisional trustee or liquidator to take *interim* control of the insolvent estate.²⁵

Although trustees and liquidators need no special licence to act as such under South African law, the Master of the High Court issues directives regarding appointment requirements. The Master keeps lists of persons who are eligible for appointment. They usually hail from trust companies or firms of accountants or attorneys. As the local estate representative, an appointed trustee or liquidator must provide security to the Master for the proper execution of his or her duties.

In corporate insolvency, the Companies and Intellectual Property Commission (CIPC) also has certain statutory duties relating to winding-up and business-rescue proceedings. Apart from prescribing qualifications for business-rescue practitioners, section 138 of the 2008 Act also prescribes a licensing system for business-rescue practitioners issued by the CIPC.

23 The Master of the High Court is a public official whose functions include the supervision of the administration of insolvent estates by appointing trustees or liquidators, giving them directions as to certain aspects of the administration of insolvent estates and confirming the formal estate accounts.

24 Calitz/Boraine TSAR, 728 (744 et seq).

25 Van Rensburg De Rebus 1988 70 et seq; Calitz/Burdette TSAR 2006, 721, (733–751); Loubser SA Merc LJ 2007, 123 (124–139).

C. Inward and outward requests for recognition

I. Rules pertaining to property

The South African system allows for inward and outward-bound requests for recognition and assistance by foreign and local estate representatives, respectively. Such requests or applications from elsewhere must be directed to a division of the South African High Court. One of the reasons for seeking such assistance is to trace the property of the insolvent debtor located in a different jurisdiction with a view to administering it for the benefit of the estate creditors. A South African court will consider the purpose of the recognition but it is not essential that the foreign insolvent has property located in South Africa as the need to conduct an insolvency examination may also provide the basis required.²⁶

The meaning of 'property' in the Insolvency Act²⁷ is relevant to this discussion and can be misunderstood upon a first reading. In terms of the definition it includes all types of property, wherever situated in South Africa. This means that a sequestration order granted by a specific South African High Court applies to property wherever situated in South Africa.²⁸ It does not limit property to assets situated in South Africa. As regards property in a foreign jurisdiction, the common-law rules of private international law apply.²⁹ These rules, which entitle an estate representative to deal with property situated in a foreign jurisdiction, will, according to local law, apply in the case of property situated outside the borders of South Africa

26 See *Moolman v Builders & Developers (Pty) Ltd (in provisional liquidation): Jooste intervening* 1990 (1) SA 954 (A); and see *Lehane NO v Lagoon Beach Hotel (Pty) Ltd* 2015 (4) SA 72 (WCC) at para 56 as approved on appeal in *Lagoon Beach Hotel (Pty) Ltd v Lehane NO and Others* 2016 (3) SA 145 (SCA) at para 51.

27 See the definition of 'property' in S. 2 of the Insolvency Act of 1936. Bertelsmann *et al* at p. 733 indicates that this definition intends to ensure that a sequestration order issued by a specific division of the High Court will extend to all such property of the debtor wherever situated in South Africa.

28 This definition defines property that may form part of the insolvent estate in wide terms and makes it clear that all property in South Africa will be included when any South African High Court division issues a local sequestration order – even where such property is situated outside the boundaries of a specific division of such court – see *Sackstein NO v Proudfoot SA (Pty) Ltd* 2003 (4) SA 348 (SCA), and *cf Viljoen v Venter* NO 1981 (2) SA 152 (W) at 154F. It has no bearing on property located outside South Africa.

29 This principle has been confirmed in precedents over the years in judgements such as *Trustee of Howse, Sons & Co v Trustees of Howse, Sons & Co and Others* 1884 3 (SC) 14; *Ex parte Stegmann* 1902 TS 40; and *Re Estate Morris* 1907 TS 657 666. See further

(outward-bound situation) where a local representative applies to a foreign jurisdiction for recognition, as well as in the case of a request by a foreign representative to be recognised in South Africa (inward-bound situation).

Whether the property in the foreign jurisdiction is movable or immovable and whether the debtor is an individual or a company may have a bearing on the legal status of the property under South African private international law.³⁰ This is because there is a rule applicable to the property of individual debtors subject to formal insolvency which provides that their movable property wherever situated vests in the estate representative if the insolvency order was issued in the jurisdiction where the debtor is domiciled.³¹ However, in the case of immovable property the rule dictates that the *lex loci rei sitae* will apply.³² In theory, these rules imply that

Samsudin v Berrange NO 2005 (3) SA 529 (N); *Viljoen v Venter* NO 1981 (2) SA 152 (W) and *Ex parte Palmer* NO: *In re Hahn* 1993 (3) SA 359 (C).

- 30 The legal position is succinctly summarised in *Ex parte BZ Stegmann* 1902 TS 40 at 47–48, where Innes, JP stated: ‘Regarding, then, a decree of insolvency, not as an ordinary judgment, but as an order *sui generis*, we find two rules of private international law clearly applicable. The one is that an order of insolvency duly made at the domicile of a debtor places in the hands of his trustees for administration all the movable property of the insolvent wherever situated. This rule is recognised by almost every civilised nation... and it is often justified or explained as being an instance of the effect of the maxim, *mobilia personam sequuntur*. But it seems, to say the least of it, doubtful whether the ex-territorial [this should be extra-territorial, but I do not have access to the case report] recognition of a bankruptcy order, as affecting movables, sprang simply from an application of the above maxim. A thorough investigation of the history of the practice would probably show that the fiction which the maxim embodies originated, among other causes, from a desire to justify the placing of foreign movables under the jurisdiction of the judge of an insolvent’s domicile which comity and convenience demanded. The second of the rules referred to is that immovable property is governed by the *lex rei sitae*, and that an order of sequestration made by the judge of an insolvent’s domicile does not vest in his trustee the right to administer any immovable property located outside the jurisdiction. Such property can only be dealt with by invoking, in some form or other, the authority of the Courts of the territory where it is situated. This rule is approved by the tribunals of the great majority of countries; more particularly, it has the sanction of the laws both of England and of Holland.’ See also Smith 2002 SA Merc LJ 2002, 19–31; and Franco SA Merc LJ 2003, 27 (28–38).
- 31 See *Scheer v Wagner N.O. & Others* (Case No. 1109/2024) [2026] ZASCA 32 at para 23, relying on *Ex parte Palmer* NO: *In re Hahn* 1993 (3) SA 359 (C).
- 32 *Mavromati v Union Exploration Import (Pty) Ltd* 1947 (4) SA 192 (A); *Hymore Agencies Durban(Pty)Ltd v Gin Nih Weaving Factory* 1959 (1) SA 180 (D). See also Smith/Ailola 1999 SA Merc LJ 1999, 192 (193–195); Smith SA Merc LJ 2002 17 (29–31); Olivier/Boraine CILSA, 2005, 373 (379–380); Smith/Boraine 2002 ABI LR 2002, 135 (181).

all the movable property of such an individual will automatically vest in his or her insolvent estate wherever situated, whilst a foreign jurisdiction must first grant assistance in the form of a recognition order concerning immovable property situated outside the jurisdiction where the insolvency order commenced.

There is also a difference in the application of this rule in South African insolvency law as in terms of section 20 of the Insolvency Act, the property of the debtor vests in the trustee in the case of the sequestration of the estate of an individual, whilst company property remains vested in an insolvent company but the liquidator obtains control over it.³³ Strictly speaking, it would then not be essential for the estate representative to obtain recognition in a foreign jurisdiction to administer movable property as mentioned in the first instance but located in the foreign jurisdiction, but recognition will be required for immovable property. In the case of an insolvent company, it is however imperative for the estate representative to at least obtain recognition to deal with either movable or immovable property within South Africa.³⁴

The theoretical position is thus that other than the position with movable property where such recognition is deemed a mere formality, recognition in the case of immovable property is essential. Despite these theoretical differences in approach regarding the type of property, the type of debtor, etcetera, recognition will in practice be required in all the instances described.³⁵ In considering requests for recognition and assistance South African courts have an absolute discretion in granting or declining assistance.³⁶ If the representative fails to secure this recognition the property remains vested in the insolvent.³⁷

33 S. 361 of the Companies Act of 1973.

34 See 1998 (3) SA 175 (SCA) for an explicit ruling in this regard. See also 1993 (3) SA 359 (C) at 362J and 363H; See also () 2016 (3) SA 145 (SCA) at para 26–27; and Smith PELJ, 2016, 12–19.

35 1993 3 SA 359 (C) at 362F, as referred to with approval in (Case No. 1109/2024) [2026] ZASCA 32 at paras 20–23

36 See 1902 TS 40 at 52: ‘But on the other hand, the same court, acting from motives of comity or convenience, is equally justified in allowing the order of the judge of the domicile to operate within its jurisdiction, and in assisting the execution or enforcement of such order. The matter is entirely one for its own discretion.’ See also 1993 (3) SA 359 (C) at para 27, as endorsed in See (Case No. 1109/2024) [2026] ZASCA 32 at para 22 See further Smith/Boraine ABI LR 2002, 135 (178–189); and Smith 2002 SA Merc LJ 2002, 17 (24–32).

It is thus submitted that recognition is nevertheless required in both instances and that a declaratory order is also, in practice, required in the case of movable property.³⁸

After recognition has been granted, the foreign representative may, in principle, deal with local assets and related matters such as interrogations. A South African High Court may impose conditions on the foreign representative to safeguard the rights and interests of local creditors.³⁹ If recognition is refused by a South African court or if no application is made, a (foreign) creditor may, in principle, apply for the sequestration or winding-up of the estate in this jurisdiction – subject to local legal requirements being met in this regard.

In an inward-bound situation where the appointment of a foreign estate representative seeks to be recognised by a South African court, he or she may administer the local property as authorised by the local court order. To this end, the South African court may also set conditions to protect the rights and interests of local creditors⁴⁰ as South Africa favours a more territorial approach – once termed a ‘modified territorial’ approach.⁴¹ Such terms and conditions, amongst others, may prescribe how notice must be given to interested parties by, for example, publishing a notice in local newspapers and in the *Government Gazette*.⁴²

Where the South African court refuses to grant recognition of the appointment of the foreign representative to deal with property located in South Africa, the only alternative is to apply for a local insolvency order and open a local concurrent insolvency process. However, to do so the person

37 *Mavromati v Union Exploration Import (Pty) Ltd* 1947 (4) SA 192 (A); *Hymore Agencies Durban(Pty)Ltd v Gin Nih Weaving Factory* 1959 (1) SA 180 (D).

38 *Ex parte Palmer NO: In re Hahn* 1993 3 SA 359 (C) at 362F. See also *Scheer v Wagner N.O. & Others* (Case No. 1109/2024) [2026] ZASCA 32 at paras 20 -23 where the Supreme Court of Appeal referred to the principles set out in the Palmer case with approval.

39 See *Ex Parte Steyn* 1979 (2) SA 309 at 312 F.

40 Ibid. See also *Scheer v Wagner N.O. & Others* (Case No. 1109/2024) [2026] ZASCA 32 at para 23.

41 See Smith SA Merc LJ 2002, 34 who uses the term ‘modified territoriality’ for the South African position. Cf the judgment in *Lehane NO v Lagoon Beach Hotel (Pty) Ltd* 2015 (4) SA 72 (WCC), at paras 46–47, approved on appeal in *Lagoon Beach Hotel (Pty) Ltd v Lehane NO and Others* 2016 (3) SA 145 (SCA), being fairly recent precedents that still followed a more territorial approach in principle by not accepting the automatic worldwide stay following an American bankruptcy order as envisaged by s 362 of the US Bankruptcy Code of 1978.

42 Ibid.

who attempts to open the procedure must meet all the local requirements prescribed by South African insolvency legislation.⁴³

II. The South African procedural rules to deal with cross-border insolvency matters

The High Courts of South Africa have jurisdiction to deal with requests from foreign estate representatives for recognition under local law. Such a request is made by application by the foreign representative to a local division of the High Court in accordance with local rules governing the jurisdiction of the divisions of the High Courts.⁴⁴ As mentioned, this relief is based on comity, convenience, and equity.⁴⁵

Recognition applications to a local High Court generally involve foreign insolvency orders – akin to South African sequestration or liquidation orders – which can be viewed as orders initiating collective debt-collecting procedures.

Although there are not many reported cases on the acknowledgement of foreign pre-insolvency orders, it appears that in the absence of statutory provisions, South African courts may be reluctant to assist in such instances. In *Cooperativa Muratori Cementisti v Companies and Intellectual Property Commission*⁴⁶ the Supreme Court of Appeal intimated that cross-border recognition may only be available to foreign liquidators or the like, but not to some other types of representatives such as Judicial Commissioners executing a statutory (bankruptcy) composition or scheme

43 For an explanation of these requirements, see Kunst/ Borraine/ Burdette, Chs 2 and 3 regarding the process of sequestration, and Nagel et al, paras. 35.86 – 35.104.

44 Since there are a number of divisions of the High Courts in South Africa, the local rules pertaining to jurisdiction to determine which particular division to approach must be followed. In such a cross-border matter it may be the court where the property of the foreign debtor is located. See in general on the jurisdiction of the High Courts of South Africa, Theophilopoulos/Van Heerden/Borraine/Rowan, Ch. 5.

45 See *Scheer v Wagner N.O. & Others* (Case No. 1109/2024) [2026] ZASCA 32 at para 21, relying on *Ex parte Palmer NO: In re Hahn* 1993 (3) SA 359 (C); and *Lagoon Beach Hotel (Pty) Ltd v Lehane NO and Others* [2015] ZASCA 210; [2016] 1 All SA 660 (SCA); 2016 (3) SA 143 (SCA). On the notion of comity see also the American judgment in *Hilton v Guyot* 1895 159 US 113 163–164, and see Smith/Borraine ABI LR 2002, 135 (177–187).

46 [2020] JOL 49000 (SCA) at paras 32–33. See in general Borraine Brics Law Journal 2020, 85; and Smith/Borraine, CILSA 2002, 1.

of arrangement sanctioned by a foreign court in terms of foreign company or bankruptcy laws.

1. Inward-bound applications for recognition

a. General procedural considerations

As indicated, the foreign representative of a foreign insolvent debtor subject to an insolvency order issued by a foreign jurisdiction may only administer the property of the debtor in South Africa if his or her appointment has been recognised by a local High Court. From a practical point of view, it does not really matter whether the debtor is an individual or a company, or whether the insolvency order was issued in the jurisdiction where the debtor is domiciled. The reason is that the foreign representative will, in general, have to be recognised before being allowed to administer the movable and immovable property of the foreign debtor located in South Africa. This principle applies even where the movable property in fact vests in the foreign representative in terms of the applicable rules of private international law as explained above.⁴⁷

In the absence of statutory measures applying to such applications, it is accepted that South African courts derive their powers to entertain the applications for recognition from considerations of comity, convenience, and equity.⁴⁸ The South African courts have a discretion to grant recognition or not, and the court hearing the matter may also set conditions for granting recognition. The courts will, in principle, attempt to protect the interests of local creditors. The recognition order authorises the foreign representative to administer property located in the court's jurisdiction, but it may also provide additional tools for the foreign representative by enabling him or her to make use of certain insolvency-law mechanisms to preserve and trace property, and to obtain information concerning property and trans-

47 Ibid.

48 See *Ex parte Stegmann* 1902 TS; *Re Estate Morris* 1907 TS 657; *Chaplin v Gregory (or Wyld)* 1950 (3) SA 555 (C); *Ex parte Steyn* 1979 (2) SA 309 (O); *Ex parte Palmer NO: In re Hahn* 1993 (3) SA 359 (C); *Ex parte LaMonica v In re Eastwind Development SA (Baltic Reefers Management Ltd intervening)* [2010] JOL 24783 (WCC); and see *Scheer v Wagner N.O. & Others* (Case No. 1109/2024) [2026] ZASCA 32.

domiciled and where the insolvency order was issued.⁵⁵ Since there are various divisions of the High Court in South Africa, the foreign representative must, in principle, approach the division of this court where the property of the foreign debtor is located or where the debtor resides or is located.⁵⁶ The South African court has an absolute discretion to grant the recognition order. The courts also allow some flexibility in that recognition could be granted under exceptional circumstances and by reason of convenience, to a foreign representative appointed by a court within whose jurisdiction the insolvent is not domiciled.⁵⁷ It is to be noted that the modern terminology of main and non-main (or secondary) proceedings is not yet used in local judgments. Some support has been expressed for a single-forum approach based on the place of domicile of the debtor.⁵⁸ The term ‘ancillary’ has also been used when a foreign representative sought some assistance from a South African court to prevent the dissipation of property located in South Africa.⁵⁹

In general, and as pointed out, where the rights and interests of third parties, e.g., local creditors, may be affected by the application they must be notified of the application.⁶⁰ The court will, in practice, first issue a rule *nisi* before the order becomes final to allow interested parties who may be affected to be heard on the application.⁶¹

The application is based on the fact that the foreign representative has been appointed on the strength of a foreign insolvency procedure. In this regard, the foreign representative will have to prove this to the court and also indicate the aim of the relief he or she is seeking in South Africa.

The essence of the court order is to recognise the appointment of a foreign representative elsewhere. The court order is also the authority that

55 See *Lehane NO v Lagoon Beach Hotel (Pty) Ltd* 2015 (4) SA 72 (WCC) at paras 55–57, approved on appeal in *Lagoon Beach Hotel (Pty) Ltd v Lehane NO and Others* 2016 (3) SA 145 (SCA) at para 27.

56 See in general Smith/Boraine 2002 ABI L Rev 2002, 35 (180–181).

57 *Lagoon Beach Hotel (Pty) Ltd v Lehane NO and Others* 2016 (3) SA 145 (SCA) at para 56 for a reference to *Re Estate Morris* 1907 TS 657 at 666 for a *dictum* that recognition could be granted to a foreign representative appointed by a Court within whose jurisdiction the insolvent debtor was not domiciled when exceptional circumstances and exceptional considerations of convenience were present.

58 *Ward v Smit and Others: In re Gurr v Zambia Airways Corporation Ltd* 1998 (3) SA 175 (SCA) at 179 G-I.

59 *Lehane NO v Lagoon Beach Hotel (Pty) Ltd* 2015 (4) SA 72 (WCC) at para 45.

60 See further Kunst/ Boraine/ Burdette, para 17.3.2.1 in this regard.

61 Ibid.

allows the foreign representative to act within the borders of South Africa, but only to the extent which the order allows. It should be noted that unlike the appointment of a local estate representative by the Master of the High Court, the Master does not issue a formal letter of appointment to a foreign representative once recognition has been granted but the court order is endorsed indicating that security has been furnished as required by the Master.

b. Discretion of the court to recognise foreign appointments

The granting of recognition to a foreign estate representative to allow him or her to trace and administer South African-based property is said to be a discretionary matter for the court hearing the application. Although the discretion of the court is wide and said to be absolute, recognition will, in principle, be granted where the interests of comity, convenience, and equity require the court to assist.⁶² The court may thus apply a balance of convenience test in deciding whether to grant the recognition order or not.⁶³

In general, it is the appointment of a foreign estate representative in the foreign jurisdiction that is to be recognised by a South African court rather than the recognition of the foreign insolvency order.⁶⁴ In this context, it must be noted that foreign insolvency orders are not treated on exactly the same footing as the enforcement of foreign judgments since a foreign

62 For examples, see *Ward v Smit and Others: In re Gurr v Zambia Airways Corporation Ltd* 1998 (3) SA 175 (SCA); *Ex parte LaMonica v In re Eastwind Development SA (Baltic Reefers Management Ltd intervening)* [2010] JOL 24783 (WCC) at para 12. See also *Scheer v Wagner N.O. & Others* (Case No. 1109/2024) [2026] ZASCA 32 at para 22 referring to *Ex Parte Palmer NO: In re Hahn* 1993 (3) SA 359 (C); and also *Lagoon Beach Hotel v Lehane* [2015] ZASCA 210; [2016] 1 All SA 660 (SCA); 2016 (3) SA 143 (SCA) para 27.

63 As stated in *Ex parte BZ Stegmann* 1902 TS 40 at 44: 'But on the other hand, the same court, acting from motives of comity or convenience, is equally justified in allowing the order of the judge of the domicile to operate within its jurisdiction, and in assisting the execution or enforcement of such order. The matter is entirely one for its own discretion.' See also *Lehane NO v Lagoon Beach Hotel (Pty) Ltd* 2015 (4) SA 72 (WCC) at paras 80–86, approved on appeal in *Lagoon Beach Hotel (Pty) Ltd v Lehane NO and Others* 2016 (3) SA 145 (SCA) at para 32 and for a useful discussion on this aspect, see O'Brien, p. 16.

64 In terms of the Cross-Border Insolvency Act, the foreign proceeding will be recognised, see S. 15(1).

insolvency order does not merely settle a dispute between litigants but may affect the rights of third parties who were not parties before the foreign court.⁶⁵ It should further be noted that foreign insolvency proceedings may also be based on extra-judicial procedures in terms of which an insolvency process is initiated and not necessarily on a court order as such.⁶⁶

Although in dealing with the insolvency of individuals South African law distinguishes between where the foreign representative intends to deal with locally-situated movable as opposed to immovable property, in reality he or she must in all instances first be recognised⁶⁷ before he or she will be permitted to administer the property of a foreign debtor located in South Africa.⁶⁸

c. Effect of recognition

As we have seen, a recognition order does not equate with a local sequestration or liquidation order. However, to the extent that the foreign estate representative is permitted to administer property situated in South Africa, the effect of the two is somewhat similar.⁶⁹

It remains important to note that the foreign estate representative derives his or her powers and duties from the provisions of the court order which also determine the effect of actions performed under the order.⁷⁰

The ultimate aim is to trace the property of the foreign debtor located in South Africa with the view of using that property to pay the creditors

65 See *Ex parte B Z Stegmann* 1902 TS 40 at 44.

66 See *Ex parte Gettliffe and Another: In re Dominium Reefs Ltd* 1965 (4) SA 75 (T) and *Re African Farms Ltd* 1906 TS 373 at 381–382.

67 See *Liquidator Rhodesian Plastics (Pvt) Ltd v Elvinco Plastic Products (Pty) Ltd* 1989 (1) SA 858 (C) at 869C–D, as approved by the Appellate Division of the High Court in *Moolman v Builders & Developers (Pty) Ltd (in provisional liquidation): Jooste intervening* 1990 (1) SA 954 (A) at 959H–I.

68 O'Brien, p.14, argues that recognition is also required in case of movable property even though the foreign insolvency order was issued by the jurisdiction of domicile of the debtor. Further on this point see at *Ex parte Palmer NO: In re Hahn* 1993 (3) SA 359 (C) 362E–F.

69 *Ex parte Steyn* 1979 (2) SA 309 (O). See also *Herman NO v Tebb* 1929 CPD 65 at 76 and *Chaplin NO v Gregory* 1950 (3) SA 555 (C) 562A–B. Recognition will thus not initiate a moratorium, hence both local and foreign debtors will still in principle be allowed to enforce their claims, but cf *Re African Farms Ltd* 1906 TS 373, and further see *Hassan and Another v De Villiers Berrange NO* [2006] JOL 17346 (SCA), 2012 6 SA 329 (SCA); an Smith/Boraine ABI L Rev 2002, 185.

70 See the content of such an order set out in para 3.2.1.5.

in the foreign jurisdiction. In this situation, however, a conflict of interests may arise where the foreign debtor also has creditors in South Africa who are not part of the foreign insolvency process. The local procedure of recognition will thus generally include some protective measures for South African-based creditors.

It is submitted that the recognition order will not allow the foreign representative to rely on the South African voidable transactions under the South African Insolvency Act of 1936 in that the relevant statutory provisions require formal commencement of local sequestration or liquidation as a pre-requisite.

The court order may, however, apart from also allowing the foreign representative to administer the locally-situated property, also allow him or her to conduct an insolvency interrogation or examination regarding transactions of the foreign debtor in this jurisdiction or to allow other legal mechanisms used to trace property in South Africa.⁷¹

Once the property has been gathered, it should be realised with the view of settling the debts of local creditors in accordance with the insolvency appropriation or distribution rules as authorised by the court order. Local creditors should be allowed an opportunity to give input at special meetings and should also have an opportunity to prove their claims. The position of local creditors versus that of foreign creditors regarding the appropriation of the proceeds of the property is not always that clear but will be further discussed below. As indicated earlier, South African courts will not allow claims to enforce fines for foreign offences or tax claims due and owing by the foreign debtor due to public policy considerations.⁷²

d. The protection of interests of local creditors

In a recognition order the South African courts will protect the interests of local creditors by ensuring that they are aware of the process that will enable the foreign estate representative to deal with South African-based

71 *Ex parte LaMonica v In re Eastwind Development SA (Baltic Reefers Management Ltd intervening)* [2010] JOL 24783 (WCC).

72 *Priestly v Clegg* 1985 (3) SA 955 (T).

property and to provide them with the opportunity to oppose the application.⁷³

To protect the local creditors further, the recognition order may state that no property may be transferred from this jurisdiction before the administration costs of the process and debts of local creditors have been paid. In such an instance, the Master of the High Court will be tasked to certify payment before any property of the foreign debtor may be transferred from South Africa.⁷⁴

Foreign creditors will have to prove their claims, and the foreign estate representative will not be entitled to claim collectively on their behalf.⁷⁵ Their status as creditors will be determined by South African law; in other words, preferences or priorities and security rights will be established by South African law.⁷⁶

In a recent judgment, namely *Scheer v Wagner N.O. & Others*,⁷⁷ the Supreme Court of Appeal had to consider the interplay between section 116 of the Insolvency Act of 1936 and the common-law principles governing the recognition of a foreign estate representative, as well as the implications of such recognition in the context of cross-border insolvency. The matter concerned concurrent insolvency proceedings arising from the sequestration of the insolvent's estate in Austria in 2017. As the insolvent also owned property in South Africa, his local estate was subsequently sequestered in South Africa in 2018. Wagner, the Austrian estate representative, obtained recognition from the South African High Court,⁷⁸ and sought the transfer of surplus funds from the South African insolvent estate to Austria after the claims of local creditors and the costs of administration had been satisfied.⁷⁹

73 See *Moolman v Builders & Developers (Pty) Ltd* 1990 (1) SA 954 (A); *Ex parte Steyn* 1979 (2) SA 309 (O). The first-mentioned case dealt with a foreign company liquidated elsewhere, whilst the latter case dealt with the sequestration of an individual.

74 See in this regard *Re Greatrex & Son Ltd* 1907 TS 538 at 540; *In re Melliar, Smith and Co, Ex parte Hooper* 1922 CPD 116 at 121; *Ex parte Gettliffe and Another: In re Dominium Reefs Ltd* 1965 (4) SA 75 (T) 77H-78F; and *Ex parte Steyn* 1979 (2) SA 309 (O) 311H-312D; and *Moolman v Builders & Developers (Pty) Ltd*, 1990 (1) SA 954 (A), at 957F-958D.

75 Bertelsmann et al, p. 742–743.

76 *Ex parte Steyn* 1979 (2) SA 309 (O) at 312 B-D.

77 (Case No. 1109/2024) [2026] ZASCA 32.

78 *Wagner NO v Gijbers NO* 2024 (6) SA 296 (WCC).

79 *Scheer v Wagner N.O. & Others* (Case No. 1109/2024) [2026] ZASCA 32, para 35.

The insolvent's claim to the surplus in the South African estate was dismissed on appeal, and Wagner's entitlement to the surplus was confirmed. The Court accordingly held that section 116 of the Insolvency Act, which provides for surplus funds to be paid into the Guardians' Fund administered by the Master of the High Court until the insolvent individual has been rehabilitated, does not apply where a recognised foreign estate exists and remains deficient in satisfying the claims of foreign creditors, provided that the expenses of the South African estate have been met and the claims of local creditors have been paid.⁸⁰

The judgment thus confirms that section 116 coexists with, and does not displace, the common-law principles of international comity. Relying on earlier precedent, the Court affirmed that a recognised foreign trustee or estate representative may recover surplus assets situated in South Africa for distribution among foreign creditors, once the claims of South African creditors and the local costs of administration have been satisfied.⁸¹ This judgment is regarded as confirming South Africa's alignment with international insolvency principles and promoting fairness and cooperation in the distribution of assets across jurisdictions.⁸²

e. The contents of a recognition order

In general terms, and with reference to relevant provisions in local insolvency legislation, a recognition court order should cover the following matters relevant to the specific application:

- the recognition of the appointment of the foreign representative as such;
- the duration of the order;
- the general powers of the foreign representative;
- compliance with the requirements for the opening of a bank account to deal with local funds;
- the security to be afforded by the foreign representative to the satisfaction of the Master of the High Court;
- the service of the order on relevant parties;

80 Ibid, para 35 for a finding by the Court that section 116 does not override the common law principles in this regard.

81 Ibid, paras 20-23, 31,35 and 38.

82 See Cremen at <https://www.coxyeats.co.za/LegalUpdates/View/20251/Cox-Yeats-Secures-Landmark-SCA-Judgment-on-Cross-Border-Insolvency>

- supervision by the Master and practical arrangements regarding the administration of the order and the submission of estate accounts to the Master;
- the court order being subject to amendment by the court; and
- special conditions regarding:
 - meetings of creditors;
 - proof, admission, and rejection of claims;
 - plans for distribution;
 - prohibition of the transfer of property from South Africa without the written permission of the Master of the High Court;
 - treatment of local creditors and their claims; and
 - the rights and specific powers of the foreign representative.

The powers bestowed on the foreign estate representative on recognition in relation to the tracing of assets and the holding of examinations, for example, are drawn from local insolvency legislation regulating the sequestration of the estates of individuals and the liquidation of companies.⁸³ These powers required by the foreign representative to administer the property in South Africa are set out in the court order. The court order granted in *Ex parte Steyn*⁸⁴ is a good example of an order granted for the recognition of a foreign sequestration order relating to the insolvent estate of an individual debtor. The order in *Moolman v Builders & Developers (Pty) Ltd (In Provisional Liquidation): Jooste Intervening*,⁸⁵ serves as a good example regarding recognition of a foreign representative in case of a company in liquidation.

III. Outward-bound request

In the case of a South African insolvency order, the local estate representative appointed by the Master of the High Court may need to administer the property of a local debtor situated in a foreign jurisdiction. The local

83 This approach to expand the powers of a foreign representative by incorporating specific provisions of insolvency legislation as initiated in *Re African Farms Ltd* 1906 TS 373 was not followed in the judgment of the Privy Council in *Singularis Holdings Ltd v PricewaterhouseCoopers (Bermuda)* [2014] UKPC 36 (10 November 2014), [2015] 2 WLR 971 at paras 78–83 where the Privy Council refused to follow a similar approach. See also Smith Obiter, 2016, 167 (168–186).

84 1979 (2) SA 309 (O).

85 957F–958D read with 962A–C.

estate representative will then have to follow the cross-border rules of the foreign jurisdiction to acquire the authority to deal with the property of the debtor in that jurisdiction. In this regard strict compliance with the laws and procedures of the foreign jurisdiction is required.

The relevant rules of the foreign jurisdiction may require a letter of request or a process-in-aid from a South African court, in which case the local representative must approach a local court to request such assistance.⁸⁶ It is submitted that when required, the local representative must establish reasonable grounds to justify the institution of the proceedings in the foreign jurisdiction.⁸⁷

South Africa is currently not party to any cross-border insolvency treaty and it is doubtful if it will initiate such a treaty given the disinterest shown to activate the Cross-Border Insolvency Act of 2000, being the locally adopted version of the MLCBI. In this regard it is interesting to note that South Africa is designated as a 'relevant country' for purposes of recognition under section 426 of the Insolvency Act 1986 (England),⁸⁸ and is eligible to use the English Cross-Border Insolvency Regulation of 2006, being their version of the MLCBI. Even these facts have, for instance not prompted the South African Government to designate England for purposes of the Cross-Border Insolvency Act – even though England is a significant trading partner as well. Consequently, when a South African estate representative wishes to follow up on the property of a local debtor subject to a local insolvency order in the UK, he or she may rely on the section 426 procedure for recognition of the South African procedure which is, in effect, tantamount to recognition. Such representatives may

86 See *Ex parte BZ Stegmann* 1902 TS 40, at 50–53; *Insolvent Estate James, James & Co* (1907) 28 NLR 123 at 124; and *Gardener v Walters: In re Ex Parte Walters* [2002] 3 All SA 702 (C) where the Court granted the request to allow a local representative to enable the local representative the opportunity to investigate the disappearance of large sums of monies of an insolvent company.

87 In the judgment in *Gardener v Walters: In re Ex Parte Walters* [2002] 3 All SA 702 (C) at 810 the court stated that, '[i]f a liquidator is *bona fide* of the view that proceedings should be taken in another country, it should be his decision, and his alone.' In this regard the court did not follow the approach in *Ex parte Wessels and Venter NNO: In re Pyke-Nott's Insolvent Estate* 1996 (2) SA 677 (O) that the applicant had to establish some *prima facie* case to convince the court that the granting of the letter of request was necessary for the representative to exercise his or her functions as liquidator in the foreign jurisdiction.

88 See s 426 of the English Insolvency Act of 1986. See further Mallach De Rebus 1994, 771; Polonsky SALJ 1996, 109; and Smith/Ailola SA Merc LJ, 1999 193 (95).

also rely on the 2006 Insolvency Regulation, the English iteration of the MLCBI.

D. The opening of concurrent local insolvency proceedings and related matters

The principle that a foreign representative must at least be recognised as such before attempting to deal with property situated in South Africa, and that the granting of such recognition remains a discretionary matter for the local court to be exercised on the basis of comity, convenience, and equity is entrenched.⁸⁹ It is interesting to note that South African courts will be prevented from denying a local sequestration order based on a consideration of convenience in case of a foreign debtor coming from a designated state as envisaged in the Cross-Border Insolvency Act – which, for all practical purposes, is not yet in operation.⁹⁰

Should the application for recognition fail, the opening of a local insolvency order in relation to the South African-based property (estate) of the foreign debtor, either through sequestration or liquidation depending on the type of debtor, could be considered. Save where a special resolution by shareholders to place a company in voluntary liquidation has been taken,⁹¹ application must be made to a South African court under South African law to initiate all such insolvency orders. The person who brings the application, be it a foreign or a local creditor or representative, must have the required *locus standi* to do so.⁹² It must be noted that a foreign

89 For examples, see *Re Estate Morris* 1907 TS 657; *Ex parte BZ Stegmann* 1902 TS 40 at 52; *Moolman v Builders & Developers (Pty) Ltd (in provisional liquidation): Jooste intervening* 1990 (1) SA 954 (A); *Ex parte Palmer NO: In re Hahn* 1993 (3) SA 359 (C); and *Ward v Smit & Others: In re Gurr v Zambia Airways Corporation Ltd* 1998 (3) SA 175 (SCA) at 179D-G; *Ex parte LaMonica v In re Eastwind Development SA (Baltic Reefers Management Ltd intervening)* [2010] JOL 24783 (WCC) at para 12.

90 See S.149(2) of the Insolvency Act of 1936. It is submitted that the Cross-Border Insolvency Act should be integrated as a chapter in the envisaged new, unified insolvency legislation, in order to counter this type of fragmentation that is so prevalent in South African insolvency regulation.

91 See S. 352 of the Companies Act of 1973.

92 See *Morley v Pederson* 1933 TPD 304; *Goode, Durrant & Murray (SA) Ltd and Another v Lawrence* 1961 4 SA 329 (W); *Deutsche Bank AG v Moser and Another* 1999 (4) SA 216 (C); and *cf Hassan and Another v De Villiers Berrange NO* [2006] JOL 17346 (SCA), 2012 (6) SA 329 (SCA).

representative will not have *locus standi* to apply for a local insolvency order based solely on his or her appointment.

When local insolvency proceedings have been opened where a foreign insolvency order is also in place, there will be concurrent insolvency proceedings running against the same debtor, and the Master of the High Court will appoint a South African estate representative to administer the South African-based property. In such an instance, one would expect the foreign and local estate representatives to cooperate. But practical difficulties may arise in the absence of statutory principles to govern the concurrent proceedings. A protocol between the estate representatives may be useful, but it is unclear to what extent a local court will sanction this as the insolvency legislation makes no provision for such a protocol and it is also uncertain to what extent a local court will sanction such a process between the estate representatives.⁹³ In view of the judgment in *Scheer v Wagner N.O. & Others*,⁹⁴ it is also now clear that a foreign estate representative may apply for recognition to participate in a local insolvency proceeding, *in casu*, to claim surplus funds on behalf of the foreign creditors.

It should further be noted that the South African court hearing a full-blown South African insolvency application, be it for sequestration or liquidation, has a discretion to grant or deny the insolvency order. If abuse of process is suspected⁹⁵ the court will refuse to assist. Depending on the context, alternative and less drastic measures than formal insolvency to deal with the debtor's debt may be considered. In general, the notion of convenience may also persuade a local court that the insolvency would more appropriately be addressed in a foreign jurisdiction.

Recently there have been interesting South African judgments addressing the treatment of foreign companies permitted to run local branches termed 'external companies'. Although not being incorporated in South Africa, these external companies must register a business address in the country⁹⁶ and may participate in the South African economy as if they are local

93 In confirming a local (secondary, concurrent) liquidation order against an external company operating in South Africa, whilst the foreign company was already in liquidation in its jurisdiction of origin, the Supreme Court of Appeal in *Ward v Smit and Others: In re Gurr v Zambia Airways Corporation Ltd* 1998 (3) SA 175 (SCA) at 179 G-I, maintained the local order as issued by the Court *a quo* but remarked by way of an *obiter dictum* that the benefits of a single *concursum creditorum* was obvious.

94 (Case No. 1109/2024) [2026] ZASCA 32 as discussed above.

95 See further Kunst/Boraine/Burdette, Ch.2 para 2.1.5.

96 S 23 of the Companies Act of 2008.

companies. Although registration of an external company in South Africa does not establish a separate legal *persona*, in these instances the affairs of such a company may be wound-up in South Africa as an independent entity even if the foreign entity is not wound-up in the jurisdiction of incorporation or where its centre or main interest is situated. Withdrawal or suspension of the liquidation in the country of incorporation, for whatever reason, also does not affect the South African liquidation process as such.⁹⁷ Accordingly, in relation to the winding-up of an external company, there may be concurrent liquidation processes relating to the same company – one in the country of the company's incorporation regarding the foreign company incorporated elsewhere; and the external branch in South Africa where the company holds its registered address as an external company.⁹⁸ Even where it is not possible to liquidate a foreign company doing business in South Africa other than through its local branch, and, for instance, where jurisdiction for a local court cannot be established, a sequestration order in terms of the Insolvency Act of 1936 may be considered as the company may under such circumstances qualify as a 'debtor' as defined in section 2 of the Insolvency Act of 1936.⁹⁹

E. Recognition of foreign statutory discharge procedures

At times the question arises to what extent South African law will acknowledge a discharge of debt following a foreign rehabilitation or scheme of arrangement or compromise.

In the case of individuals, it is accepted that such a foreign rehabilitation will extinguish debts incurred or payable in the country where the rehabilitation has been granted and to the extent allowed by that system.¹⁰⁰

As discussed above, various established principles confirmed by precedent over many years are entrenched regarding assistance by South African courts rendered in the case of foreign insolvency orders relating to the

97 See the judgments in *Ward v Smit and Others: In re Gurr v Zambia Airways Corporation Ltd* 1998 (3) SA 175 (SCA) at 183H-J, and *Sackstein NO v Proudfoot SA (Pty) Ltd* 2003 (4) SA 348 (SCA).

98 *Ibid.*

99 *Lawclaims (Pty) Ltd v Rea Shipping Co SA: Schiffcommerz Aussenhandelbetrieb Der VVB Schiffbau intervening* 1979 (4) SA 745 (N) at 750.

100 *Cf Cape of Good Hope Bank (In Liquidation) v Mellé* 10 SC (1893) 280; *Dyer v Carlis* 4 Official Reports (1897) 67.

liquidation of the property of insolvent company debtors. Lately, questions have emerged concerning the acknowledgement by South African courts of statutory schemes of arrangements or compromises sanctioned in foreign jurisdictions to the extent that such foreign company debtors have both South African-located property and a presence in South Africa.¹⁰¹ This is an extremely important issue in cross-border matters as the foreign procedure is generally aimed at rescuing the corporate debtor and it is accepted that some level of discharge of debt is generally required to rescue a financially-ailing company. In the absence of a statutory regime providing rules for such an eventuality, it appears difficult to do this in South African law. It is doubtful whether a foreign scheme of arrangement or compromise entered into by the foreign company debtor in its home jurisdiction will in fact be acknowledged by South African law.¹⁰² Apart from procedural difficulties that may arise in the absence of legislation, the notorious ‘Gibbs rule’ may also come into play.¹⁰³

Following a recent judgment of the Supreme Court of Appeal,¹⁰⁴ it is now also clear that external branches of foreign companies doing business in South Africa which experience financial distress are not eligible for the relief provided by the South African business rescue procedure in Chapter 6 of the 2008 Companies Act.

It is submitted that the cross-border insolvency-related position regarding external companies in South Africa is currently unsatisfactory and warrants further consideration. The fact that the Cross-Border Insolvency Act of 2000 is not yet operational (see above) is a contributory factor in this regard. This aspect is, however, problematic in many jurisdictions.

F. The Cross-Border Insolvency Act 42 of 2000

I. General background

As mentioned, the MLCBI was enacted in South African law as the Cross-Border Insolvency Act 42 of 2000. The Cross-Border Insolvency Act came

101 See in general *Cooperativa Muratori Cementisti v Companies and Intellectual Property Commission* [2020] JOL 49000 (SCA), and see further Smith/ Boraine CILSA 2002, 1 et seqq.

102 Smith/ Boraine CILSA 2002, 1 (23–29).

103 Ibid, 1 (37–39).

104

into force on 28 November 2003. However, this Act does not yet apply in practical terms, as the South African version of the MLCBI was adjusted not only to fit the local legal system, but also to subject the operation of the statute to designated jurisdictions and the principle of reciprocity. Section 2(2) thus clearly states that the Act applies only to states designated by the Minister of Justice and Constitutional Development. It is trite that no country has yet been designated, even though the Act was signed into law in 2003.¹⁰⁵ As some states may be designated in future and others not, South Africa is heading for a dual system in that the common-law principles will apply to non-designated states and the Cross-Border Insolvency Act to the designated states.¹⁰⁶ It is submitted that a dual system is not desirable and detracts from the idea of having clear rules in place. It is nevertheless hoped that when new insolvency legislation is enacted it will include cross-border rules and that the legislature will see fit to abandon the designation/reciprocity clause.

This notwithstanding, the Cross-Border Insolvency Act – which is largely aligned with the MLCBI's aims, *inter alia*, to provide effective mechanisms for dealing with cases of cross-border insolvency, to regulate the jurisdiction of the South African High Courts in this regard, and to provide for related matters. The Act is intended to strengthen cooperation between South African and foreign courts in the administration of insolvent estates; to protect creditors and other interested persons, including the insolvent; to facilitate the rescue of financially troubled businesses; and to protect investments and preserve employment.¹⁰⁷ The UNICTRAL Model Law follows an approach of modified universalism and in this regard the South African version should adopt a similar approach.¹⁰⁸ These are all noble aims which sit well with international thought and local imperatives.

Structurally, the Act resembles the Model Law save for the use of certain terminology unique to South African insolvency law. Section 1 is the definitions section, and it holds the key to the application of several important matters, such as the type of debtors and the type of insolvency or insolvency-related matters which fall within the Act.

For the purposes of this contribution, the Cross-Border Insolvency Act will not be discussed in its entirety but certain focal points which may be

105 See Kunst/ Boraine/ Burdette, para 17.1 et seqq; and Bertelsmann *et al*, para 30.1 et seqq.

106 See in general Smith/Boraine ABI LR 2002, 138 et seqq.

107 See the Preamble to the Act.

108 See Olivier/Boraine CILSA, 2005 387.

important to law reform and to other states busy revising their cross-border insolvency rules are considered. Some comparisons between the current South African set of rules and the Act are also highlighted.

II. The aims and structure of the Cross-Border Insolvency Act

The Act consists of 34 sections divided into six chapters. Chapter 1, sections 1–8, cover the interpretation of the Act and fundamental principles. Chapter 2 sections 9–14 address access to South African courts by foreign representatives and foreign creditors. The recognition of foreign proceedings and relief are found in Chapter 3, sections 15–24; while Chapter 4, sections 25–27, govern cooperation with foreign courts and foreign representatives. Chapter 5, sections 28–32 address concurrent proceedings; and Chapter 6, sections 33 and 34 are general provisions including the ‘hotchpotch rule aimed at a fair distribution of the proceeds of the property to both the local and foreign creditors’.

In line with the text of the MLCBI the Act applies:¹⁰⁹

- (a) where a foreign court or representative seeks South African assistance in a foreign proceeding; or, conversely
- (b) where such assistance is requested in a foreign court in proceedings under the laws of the Republic relating to insolvency (a ‘local proceeding’);
- (c) where a foreign and a local insolvency proceeding run concurrently in respect of the same debtor; or
- (d) where creditors or other interested (foreign) persons apply to commence or to participate in a local insolvency proceeding.

The Act grants representatives and creditors from designated foreign jurisdictions certain advantages, including:

- (a) direct and speedy access by foreign representatives to courts in the Republic¹¹⁰ and recognition of foreign representatives or creditors.

¹⁰⁹ Cross-Border Insolvency Act, S. 2(1).

¹¹⁰ Ibid, Ss. 9, and 11, 12, 13(1) and 24.

- (b) clarity with regard to the ranking of the claims of foreign creditors (by stating that their ranking will not be lower than the claims of local non-preferent creditors).¹¹¹
- (c) similar notification as local creditors for foreign creditors.¹¹²
- (d) *locus standi* for a foreign representative upon recognition of foreign proceedings, to institute proceedings to set aside dispositions of the debtor's property in the Republic.¹¹³

III. Important terminology and application of the Cross-Border Act

The Act contains definitions of certain core terms. Some are similar to those in the MLCBI,¹¹⁴ while others link the Act to South African concepts, procedures, etc.¹¹⁵ The definition section is important in that it also provides a set of terminology not currently entrenched in South African cross-border legal terminology – although local commentators sometimes use certain of these terms to explain current aspects of the common-law dispensation. It is submitted that the establishment of uniform terminology is important as it can also be used on a global scale to develop this area of international insolvency law.

The term 'foreign state' defines 'state' as a state designated by the Minister¹¹⁶ in terms of the provisions of section 2(2) of the Act. This definition, of course, ties in with the reciprocity clause as discussed elsewhere.

Given that the type of foreign proceedings to which the enacted version will apply is central to all cross-border dispensations, the Act defines 'foreign proceedings' to mean collective judicial or administrative proceedings in a foreign state, including interim proceedings, pursuant to a law relating to insolvency, in which the assets and affairs of the debtor are subject to

111 Ibid, S. 13(2).

112 Ibid, S. 14(1).

113 Idem, S. 23(1).

114 These S.1 definitions are: 'establishment'; 'foreign court'; 'foreign main proceedings'; 'foreign non-main proceedings'; 'foreign proceedings'; and 'foreign representative'. For some comparisons between terms stemming from the MLCBI and other instruments like the recast EIR, and the definitions in the Cross-Border Insolvency Act, see Chitimira obiter 2018, 173 (174 et seqq).

115 See the following definitions in S.1 of the Cross-Border Insolvency Act: 'court'; 'curator of an institution'; 'foreign State'; 'Minister'; 'receiver'; and 'Republic'.

116 As defined in S.1 of the Act as being the member of the South African Cabinet in charge of the administration of justice.

control or supervision by a foreign court for purposes of reorganisation or liquidation. The intention is that the foreign proceeding should be governed by foreign insolvency law under which a debtor's assets and affairs are controlled or supervised by a foreign court for re-organisation or winding-up. This provision is wide and it may be read to cover any type of insolvency proceedings and any type of debtor – individuals and even banks and insurance companies. In this respect the Act envisages a wider application than the MLCBI. It is also clear that it may also relate to reorganisation, i.e. business rescue. It is submitted that the inclusion of entities like banks and insurance companies should be revisited.

Foreign proceedings will be 'foreign main proceedings' where the proceedings take place in the State where the debtor has the centre of his, her or its main interests, i.e. the *COMI*. This term was not known to South African law prior to the enactment of this Act, although concepts such as domicile, the registered office of a company, or main place of business were all relevant for purposes of jurisdiction and various other aspects concerning debtors.

Similarly, the term 'foreign non-main proceedings' defined as proceedings other than foreign main proceedings, emanating from a state where the debtor has an establishment, is also a novel term in South African cross-border insolvency law.

A 'foreign representative' is defined in section 1(h) as a person or body authorised in foreign proceedings to administer the reorganisation or winding-up of the debtor's assets or affairs, or to act as a representative of the foreign proceedings. Although the Act contains no definition of a 'local representative' – save in relation to a 'curator'¹¹⁷ and a 'receiver'¹¹⁸ – reference is made in section 4 of the Act to such a representative as including a 'trustee', 'liquidator', and 'judicial manager', each of whom, it is submitted, will bear their ordinary meanings within the context of the Insolvency Act and the former 1973 Companies Act.¹¹⁹ To the extent that the Cross-Border

117 'Curator' is defined in S.1 of the Act as a person appointed as such in terms of the provisions of S. 6 of the Financial Institutions (Investment of Funds) Act 39 of 1984, S. 69 of the Banks Act 94 of 1990, or S. 81 of the Mutual Banks Act 124 of 1993.

118 'Receiver' is defined in S.1 of the Act as a person appointed by the court to administer a compromise or arrangement under S. 311 of the Companies Act of 1973. It must be noted that this section is no longer in force since the 1973 Act has been repealed, bar Ch. XIV.

119 'Trustee' is defined in S.2 of the Insolvency Act 24 of 1936, and 'liquidator' and 'judicial manager' are defined in S. 1 of the repealed Companies Act of 1973. It must

Insolvency Act refers to terminology and procedures in the 1973 Companies Act, it must be noted that this Act, except for provisions relating to liquidation in chapter 14 of this Act, has been repealed and replaced by the 2008 Companies Act. It is clear that this must be rectified since procedures such as judicial management and the section 311 compromise and scheme of arrangement have been replaced by the business rescue and statutory compromise provided for in Chapter 6 of the 2008 Companies Act.

The definition of 'court' in section 1 read with section 4 of the Act, makes it clear that it means South African High Courts referred to in section 166(c) of the Constitution of the Republic of South Africa, 1996. The relevant 'foreign court' is a judicial or other authority competent to control or supervise foreign proceedings.

It is notable that the definition section does not define 'property' for purposes of this Act. The inclusion of such a definition may be useful in view of the current common-law rules.¹²⁰

The intention in interpreting the Act is clear in that section 8 states that the Act must be interpreted with due regard to its international origin¹²¹ and to 'the need to promote uniformity in its application and the observance of good faith'. In order not to limit the assistance to be granted to foreign representatives, section 7 provides that the Act is not to be interpreted so as to preclude a court or an insolvency representative from providing additional assistance to a foreign representative under any other South African law.¹²²

The Act applies to both inward-bound requests involving cross-border matters and cases where local representatives wish to seek help elsewhere.¹²³

however be noted that only Ch. 14 of the 1974 Companies Act still applies but the rest of this Act has been repealed. It is clear that the Cross-Border Insolvency Act needs an update in this respect.

120 See Smith/Boraine 2002 ABI LR 2002, 135 (175); Chitimira Obiter 2018, 173 (194).

121 The reference in S. 8 to the 'international origin' of the Act is a reference to the MLCBI.

122 This rule is in fact reinforced by s 233 of the Constitution, 1996 which provides that all legislation must be interpreted to accord with international law rather than to conflict with it.

123 As to the latter, in the judgment of *Wessels and Venter NNO, Ex parte: In re Pyke-Nott's Insolvent Estate* 1996 (2) SA 677 (O) the local representatives intended to recover assets in the United Kingdom. The Court, however, rejected the request as no *prima facie* case, nor a reasonable prospect of succeeding in this quest could be established. Cf. *Gardener v Walters: In re Ex parte Walters* [2002] 3 All SA 702 (C) at 810, where the Court followed a different approach and stated: '[i]f a liquidator

In addition to the so-called 'inward-bound' and 'outward-bound' requests to which the Act applies, it also regulates concurrent proceedings,¹²⁴ proceedings a foreign creditor or another interested person from a foreign State initiates here, or a local proceeding in which such a creditor or person wishes to intervene in the Republic.¹²⁵

By virtue of the requirement of reciprocity in relation to the designation of foreign states to which it will apply, the Act is more limited in its application than the MLCBI.

Section 3 of the Act provides that if a provision of the Act conflicts with an obligation of the Republic arising out of a treaty or other agreement to which it is a party with another state and which has been enacted into law by virtue of section 231(4) of the Constitution, the provisions of the treaty or agreement will take precedence.¹²⁶ South Africa is not currently party to any such insolvency treaty although it has been suggested that such a treaty between South Africa and its neighbouring countries should be considered.

Section 6 of the Cross-Border Insolvency Act provides that a court may refuse to take any action envisaged by the Act which manifestly infringes the Republic's public policy. It must be noted that this public policy-provision allows the courts some discretion to refuse assistance as provided for in the Act. It is, however, submitted that its application will only become clear once the Act is applied.

IV. Reciprocity and designation

In terms of section 2(2)(a), the Act applies only in relation to states designated by the Minister of Justice and Constitutional Development by notice in the *Government Gazette*.¹²⁷ The Minister may designate a state only if he or she is satisfied that the recognition accorded by the law of that state

is *bona fide* of the view that proceedings should be taken in another country, it should be his decision, and his alone'. The Cross-Border Insolvency Act is also less restrictive in this regard and will be more aligned with the approach in the *Gardener* case. See also Smith/Ailola SA Merc LJ 1999 192 at 194.

124 See Ch. 5 of the Cross-Border Insolvency Act.

125 S. 13(1) of the Act.

126 At present, South Africa is not a party to any such a treaty or convention.

127 Mohan IIR 2012, 200 (209) states the South African version 'appears to be the most restrictive'. See also Smith/Boraine 2002 ABI LR 2002, 135 (186–205); Franco SA Merc LJ, 2003, 27 (33–43); Olivier/Boraine CILSA 2005, 373 (379–388).

justifies the application of the Act to foreign proceedings in that state.¹²⁸ The Minister may also, again by notice in the *Gazette*, withdraw any such designation.¹²⁹ All such notices must also be approved by Parliament before their publication. A withdrawal by the Minister of any such notice does not affect any pending legal proceedings which will continue as if the notice had not been withdrawn.¹³⁰

Consequently, although the Act has been promulgated and came into force on 28 November 2003, its provisions will not take effect until such time as the Minister has designated states to which it is to apply in terms of section 2(2).¹³¹

The requirement of the designation of states to which the Act will apply stems from the principle of reciprocity on which this section in the Act is based. Thus, if foreign states wish to avail themselves of the benefits accorded them by this Act, they will, in turn, have to extend the same benefits under their systems to South African representatives and creditors. The effect of the system of designation is that a dual system will operate in terms of which the law and rules applicable at the date of commencement of the Act will govern cross-border insolvency matters between South Africa and non-designated states, while the Cross-Border Insolvency Act will apply in relation to cases involving designated states.¹³²

It is submitted that this provision in the Cross-Border Act does not reflect the spirit of the MLCBI and can be seen as a significant impediment to its usefulness as a more flexible and predictable cross-border insolvency dispensation. It is further submitted that the public policy exception provided by both the Act and the Model Law could address any inappropriate requests that a local court may receive within the context of assistance with cross-border insolvency. This ill-conceived provision will hopefully be discarded in time.

128 S. 2(2)(b) of the Cross-Border Insolvency Act. See also Yamauchi IIR 2007, 145 (169).

129 Ibid, S. 2(2)(c).

130 Ibid, S. 2(5) (inserted by S. 30 of the Judicial Matters Second Amendment Act 55 of 2003 with effect from 31 March 2005).

131 In *Ex parte van Straten* (22678/14) [2014] WCC (19 December 2014) a local High Court granted recognition to a foreign estate representative from Namibia whilst the application relied on the provisions of the Cross-Border Insolvency Act. It is submitted that this judgment was granted in error and should in fact have been set aside since no State has been designated yet – see Boraine THRHR 2020, 622 et seqq.

132 Smith/Boraine ABI L Rev 2002, 138 (191).

When considering states that have already enacted the MLCBI, only a few – of which South Africa is one – have opted for some kind of reciprocity clause. Other states that have included reciprocity dispensations, albeit in different formats, in their locally-enacted Model Law versions are Mauritius, Mexico, the British Virgin Islands, Romania, and Uganda.¹³³

It is interesting that Zimbabwe, a state neighbouring on South Africa, adopted a negative type of reciprocity in that their Minister of Justice may designate to which states their version of the Model Law will not apply.¹³⁴ It is submitted that this approach is more acceptable where the enacting state insists on a reciprocity clause of some sort.

It is also interesting that the Draft Cross-Border Insolvency Bill which preceded the Act, did not contain this clause and its scope of application mirrored that of the Model Law.¹³⁵ A commentator has indicated that the reciprocity clause followed concerns raised by some local Societies of Advocates who argued that states who would benefit from the Cross-Border Insolvency Act might not reciprocate.¹³⁶ The idea of the clause was thus to compel other states to reciprocate.

Another concern raised was that foreign creditors would share in the distribution of the proceeds of local property. Reciprocity was viewed as a way of ensuring equal treatment by the foreign jurisdiction in an outward-bound case.¹³⁷

The final concern raised was that the granting of a recognition order could be abused in that a foreign creditor could attempt to enforce a judgment in South Africa that would otherwise not be enforceable – ‘like a foreign tax claim or a punitive claim’.¹³⁸

Interestingly, the South African Law Reform Commission held the view that notions of either ‘comity’ or ‘reciprocity’ would create uncertainty and possibly defeat the objectives of the Act. The Commission’s view was that the courts should deal with the concerns raised by the Society of Advocates if and when they arise in practice relying on the strength of the discretion permitted by the legislation.

133 Dos Santos Ch. 4. para 4.1.

134 See Ss. 152(3) and (4) of the Zimbabwean Insolvency Act 7 of 2018.

135 See the South African Law Reform Commission Report (1999) *Consolidated Legislation Pertaining to International Judicial Co-operation in Civil Matters*: Project 121, 23 – Annexure at 23–41.

136 Dos Santos Ch. 3. para 2.3.2.

137 Ibid.

138 Ibid.

Dos Santos¹³⁹ refutes the argument of the Society of Advocates. She argues that:

- (a) First, the public policy consideration could be evoked in relevant instances which could serve as a sufficient basis for a refusal to recognise proceedings.
- (b) Second, the Society has confused the recognition and enforcement of foreign judgments with solely recognising an insolvency proceeding.
 - i. In this regard, she notes that the principles of the recognition of foreign judgments cannot be applied directly to insolvency judgments, as ‘a foreign bankruptcy order does not merely settle a dispute between litigants but also affects the rights of third parties who were not parties before the foreign court’.¹⁴⁰
 - ii. She also points out that the Model Law ‘was promoted as having a procedural effect as opposed to a substantive effect that might have included automatic recognition and enforcement or effects’.¹⁴¹

There are, however, also arguments in favour of reciprocity, notably that reciprocity may compel states which have not enacted the MLCBI to do so.¹⁴² Another argument in favour of the concept is that the interrelation between private and public international law should be considered in recognising foreign judgments. Where states do not reciprocate, for example, a deadlock could arise were local estate representatives to refuse to cooperate with foreign representatives from non-reciprocating states. Yamauchi¹⁴³ notes that the inclusion of reciprocity could result in a ‘stalemate’ where neither party will recognise the other and advises states which have enacted reciprocity to repeal it.

Whilst South Africa currently has a positive form of reciprocity, it is interesting to note that its neighbouring state, Zimbabwe, enacted a new unified Insolvency Act in 2018 which includes the Model Law as a Chapter to their new Insolvency Act. As pointed out above, in principle this Act applies to all states, but the Zimbabwean Minister of Justice may exclude specific states from this benefit.¹⁴⁴

139 Ibid.

140 Ibid, and with reference to Kunst/ Boraine/Burdette para 17.3.2.3.

141 Dos Santos para 2.3.2 referring to Mevorach (2018) 102, where she cites *Bank of Western Australia v Henderson* (2011) FMCA 840.

142 Dos Santos, Ch. 3 para 2.3.2.

143 IIR 2007, 145 (179).

144 Ss. 152(3)-(4) of the Zimbabwean Insolvency Act 7 of 2018.

A sobering thought regarding the notion of reciprocity comes from Associate Judge Randall who states: ‘The Model Law enshrines reciprocity subject to its provisions.’¹⁴⁵

V. Recognition of foreign proceedings, representatives, and foreign creditors and some effects

1. Recognition and relief

The Act provides that a foreign representative may apply to a South African High Court for recognition of *the foreign proceedings* in which he or she has been appointed. When compared to the current common-law positions, the Act makes it clear that it is the foreign proceeding rather than the appointment of the foreign representative that must be recognised.

Such an application must be accompanied by relevant documentary evidence including a statement of all foreign proceedings that he or she is aware relate to the debtor.¹⁴⁶ The court may presume that documents accompanying the application are authentic and that the debtor’s registered office or habitual residence is the centre of its, his, or her main interests.¹⁴⁷ The important point here is that, unlike the common-law position, the court hearing the matter will have no discretion to deny the request if the foreign representative comes from a state designated under the Act and if recognition does not militate against local public policy, provided that he or she produces the proof of appointment etcetera as prescribed.

Once recognition has been granted, the foreign representative may take part in a local proceeding.¹⁴⁸ He or she may also intervene in any proceeding to which the debtor is a party.¹⁴⁹ Upon recognition of a foreign proceeding, the foreign representative acquires *locus standi* to initiate legal action to set aside any disposition that is available to a South African trustee or liquidator.¹⁵⁰

145 *Legend International Holdings Inc (as debtor in possession of the assets of Legend International Holdings Inc) v Legend International Holdings Inc* (2016) VSC 308 para 53.

146 Cross-Border Insolvency Act, S. 15.

147 *Ibid.*, S. 16(2) and (3).

148 *Ibid.*, S. 11 and 12.

149 *Ibid.*, S. 24.

150 *Ibid.*, S. 23.

Likewise, foreign creditors may participate in local insolvency proceedings,¹⁵¹ they enjoy a measure of equality with local creditors in that their claims may not be subordinated to claims of local creditors,¹⁵² and they must be informed of local proceedings.¹⁵³

2. Interim (provisional) discretionary relief

On application by the foreign representative, the court may also grant urgent provisional relief pending the outcome of the recognition application to protect the debtor's assets or the creditor's interests. This relief would include a stay of execution; the entrusting of the administration or realisation of assets to the representative or another designated person; suspension of the debtor's right to dispose of his or her assets; the examination of witnesses and the taking of evidence; or any other additional relief available under South African law.¹⁵⁴

3. Effects of the recognition of a foreign main proceeding

The recognition of a foreign proceeding as a foreign main proceeding has the following effects: it stays local individual proceedings as to the debtor's affairs and also execution against his or her assets; the debtor's right to dispose of assets is stayed; and the right of the debtor to transfer, encumber, or otherwise dispose of assets is suspended.¹⁵⁵

In terms of section 20(2) the stay is subject to sections 20, 23 and 75 of the Insolvency Act of 1936 and sections 341 and 359 of the Companies Act of 1973. The stay, however, does not affect the rights of creditors to: begin individual actions or proceedings for preserving a claim against the debtor; to request the opening of a local insolvency proceeding; or to file claims in that proceeding despite the stay.¹⁵⁶

Section 21 also authorises the court that grants the recognition order to: stay proceedings and execution; suspend the debtor's right of disposition; allow the examination of witnesses and the collection of evidence; and en-

151 Ibid, S. 13.

152 Ibid, S. 13(3).

153 Ibid, S. 14.

154 Ibid, S. 19(1) read with S. 21(1)(c), (d) and (g).

155 Ibid, S. 20(1), and see S. 21.

156 Ibid, S. 20(3)-(4).

trust the administration or realisation of assets to the foreign representative or a designated person. The court may even permit the distribution of the debtor's local assets if it is convinced that local creditors are protected. It may also set conditions when granting relief in terms of section 19 or 21, and alter or amend the relief granted, either at the request of an interested person or on its own initiative but is obliged to protect creditors and others, including the debtor.¹⁵⁷

The foreign representative will have standing to initiate any legal action to set aside a disposition that is available to local representatives in terms of the insolvency laws of South Africa. In the case of the *non-main proceedings*, the court must be satisfied that the legal action relates to assets which under local law should be administered in the foreign non-main proceedings. It is submitted that this provision may pose some practical difficulties in that it does not indicate the commencement date of insolvency which is required to calculate certain prescribed periods as provided for in the South African dispensation.¹⁵⁸

VI. Cooperation between local and foreign courts

Chapter 4 of the Act compels local courts to 'cooperate to the maximum extent possible with foreign courts or foreign representatives, either directly or through a trustee, liquidator, judicial manager, curator, or receiver'.¹⁵⁹ Courts may communicate and seek information or help directly from foreign courts or representatives. Under the supervision of the High Court, local representative are expected to act in a similar fashion, and section 26 grants them the same right of direct communication with foreign courts and representatives.¹⁶⁰

It is submitted that the proper implementation of cooperation envisaged may call for the introduction of specific rules of court. However, these principles will lead to a more flexible approach and enable local courts to deal with collaboration more effectively.

157 Ibid, S. 22.

158 See Ss. 26 and 29 of the Insolvency Act relating to dispositions without value and voidable preferences for instance.

159 Cross-Border Insolvency Act, S. 25(1).

160 Ibid, S. 27 for various forms of cooperation.

VII. Concurrent proceedings

The Cross-Border Insolvency Act also covers concurrent proceedings by enabling the launch of a local insolvency proceeding once a South African court has recognised a foreign proceeding. The effects of the local proceeding will then be limited as prescribed and directions as to the administration of the concurrent proceedings provided.¹⁶¹ The foreign representative will also have *locus standi* to bring a local proceeding.

Provision is made for any relief already granted in foreign non-main proceedings to conform to a foreign main proceeding that is subsequently recognised.¹⁶² Once the foreign main proceeding has been recognised by the High Court, the debtor is rebuttably presumed to be insolvent for the purposes of institution of a local proceeding.¹⁶³

The use of protocols to assist the local and foreign representatives in administering the estate assets to the benefit of all the creditors may, for example, also become a feature of our local practice in this regard.

Section 32 is an attempt to prevent the double payment of the same claim in case of concurrent proceedings.

VIII. Outward-bound requests

Section 5 of the Act authorises an insolvency representative, such as a trustee or liquidator, to act in a foreign state in respect of South African insolvency proceedings insofar as the laws of the foreign state permit. It appears, in light of this section, that the local estate representative will not require a formal letter of request issued by a South African court, but the foreign state may, of course, set certain requirements in this regard.

G. New cross-border instruments

The MLCBI has celebrated its 25th anniversary since its adoption in 1997. To date, it has been enacted in the national legal systems of 48 states. In general, this Model Law provides a procedural basis on which to deal

161 Ibid, Ss. 25–30.

162 Ibid, Ss. 30(a)–(c).

163 Ibid, S. 31.

with recognition in cross-border insolvency and certain related assistance procedures.

It has nonetheless emerged clearly that there are certain gaps in the MLCBI.¹⁶⁴ In order to address some of these, UNCITRAL has released two further model laws: the Model Law on Recognition and Enforcement of Insolvency-Related Judgments of 2018¹⁶⁵ and the Model Law on Enterprise Group Insolvency of 2019.¹⁶⁶ Both these model laws are intended to build on the MLCBI by addressing certain aspects not initially covered.

The Model Law on Recognition and Enforcement of Insolvency-Related Judgments of 2018 aims to assist states in equipping their laws with a framework of provisions for recognising and enforcing insolvency-related judgments that will facilitate the conduct of cross-border insolvency proceedings.¹⁶⁷

The Model Law on Enterprise Group Insolvency¹⁶⁸ was designed to expand on extant UNCITRAL insolvency texts to equip states with modern legislation addressing the domestic and cross-border insolvency of multiple debtors that are members of the same enterprise group, thus strengthening existing platforms.

These three Model Laws have complementary characteristics: they use similar terminology and definitions and rely on similar frameworks to achieve their goals.¹⁶⁹ Although it is envisaged that the three Model Laws could be enacted separately, the logical route would be to combine them as a single cross-border platform. To this end, UNCITRAL has also released an illustrative text in the Consolidated Text of the MLCBI, the MLIJ and the MLEG of 2021.¹⁷⁰

164 See Mevorach *European Business Organization Law Review* 2021, 283 (315).

165 See at <https://uncitral.un.org/en/texts/insolvency/modellaw/mlij>

166 See at <https://uncitral.un.org/en/MLEGI>

167 It became clear that there is a need for this, for instance in the UK a distinction is drawn between the recognition of foreign insolvency proceedings and enforcement of insolvency related judgments. The judgment in *Rubin v Eurofinance* [2012] UKSC 46, [2013] 1 AC 236, serves as an example where a UK Court maintained its territorial approach by denying assistance in relation to a foreign insolvency related judgment.

168 See at <https://uncitral.un.org/en/MLEGI>

169 See MLCBI Guide paras. 1–4; MLIJ Guide paras. 1, 35–41; and MLEG Guide paras. 1–3 and 14.

170 Consolidated Text of the of the MLCBI, the MLIJ and the MLEG <<https://uncitral.un.org/en/consolidated-text-uncitral-model-laws-cross-border-insolvency-recognition-and-enforcement>>.

H. Summary and conclusion

South African cross-border insolvency law is currently based on principles of common law and on precedents set by our courts. In this regard, the principles of private international law play a significant role – especially in relation to the status of property.¹⁷¹ A local High Court may consider an inward-bound application to be recognised in South Africa by a duly appointed foreign estate representative to allow him or her to trace assets of a foreign insolvent debtor in this jurisdiction. The ultimate aim of this recognition is to realise the assets and use the proceeds for distribution amongst the foreign creditors, or for a related object such as conducting an insolvency examination.¹⁷²

The definition of the term ‘property’ in section 2 of the Act does not include property in a foreign jurisdiction, but in terms of common-law principles of international private law, movable property of a local insolvent situated in a foreign country will vest in the local insolvent estate if the estate is sequestrated by the court where the insolvent is domiciled.¹⁷³ If a debtor’s estate includes immovable property over which a foreign representative wishes to secure control and which is situated in a foreign country, the foreign representative cannot secure control unless and until his or her appointment as a representative has been recognised by relevant foreign court in terms of the relevant principles of the foreign jurisdiction. If the foreign representative fails to secure recognition, the immovable property remains vested in the insolvent. Contrary to the situation with movable property – where such recognition is regarded as a mere formality – the recognition in the case of immovable property is essential and the courts have an absolute discretion to deny or grant such an application. In *Ward v Smit: In re Gurr v Zambia Airways Corp Ltd*¹⁷⁴ the court nevertheless stated that the local representative must apply for recognition where he or she has to deal with either immovable property or movable property situated in a foreign country and this is the practical situation.

An application for recognition will be considered on the basis of comity and the local courts will apply convenience and equity when exercising

171 See para 3.1 above.

172 Ibid and see para 3.2.1 above.

173 See para 3.1 above.

174 1998 (3) SA 175 (SCA).

their discretion to recognise the foreign estate representative.¹⁷⁵ The court's discretion is said to be absolute which makes the process somewhat unpredictable in practice.¹⁷⁶ In this sense a territorial approach is followed. However as South African law does allow for some assistance to foreign estate representatives, the country's approach can be regarded as a modified form of territoriality. In view of the recent judgment of the Supreme Court of Appeal in *Scheer v Wagner N.O. & Others*,¹⁷⁷ it is nevertheless clear that the local courts are alive to the application of cross-border insolvency principles aimed at assisting foreign estate representatives, while still protecting the interests of local creditors.

Because there is no applicable legislation in this regard to deal with the recognition and its consequences, or with related or ancillary relief such as (interim) stays of execution, the tracing and preservation of property that may at present also be considered,¹⁷⁸ the current dispensation is somewhat unpredictable and unsatisfactory from a contemporary perspective.

Important features of the South African dispensation are that the foreign estate representative derives his or her powers from the court order. In this regard, the local courts may impose conditions for recognition – especially with a view to protecting the interests of local creditors by, for example, by requiring the foreign representative to provide security to the Master of the High Court for: the proper execution of his or her duties in terms of the recognition order and informing the local creditors of the proceeding and allowing them to prove claims with a view to obtaining payment from the locally-situated property of the foreign insolvent debtor.

Should the request for recognition fail, the representative will have to consider opening a concurrent insolvency proceeding in terms of South African insolvency law.¹⁷⁹ The foreign estate representative will not have *locus standi* to apply for a local insolvency order based solely on his or her appointment as such, and will have to meet all the local statutory requirements for such orders.

On 8 December 2000, South Africa enacted an adapted version of the UNCITRAL Model Insolvency Law as the Cross-Border Insolvency Act 42 of 2000. This Act came into force on 28 November 2003 but will take

175 See para 3.2.1.1 above.

176 See para 3.2.1.2 above.

177 (Case No. 1109/2024) [2026] ZASCA 32 as discussed - see para C II,1 above.

178 See para 3.2.1.1.

179 See para 4 above.

practical effect only once the Minister of Justice has designated states to which the Act applies under section 2 of the Act.¹⁸⁰ On formal designation of relevant countries, the Act will regulate this area of the law with regard to the designated countries. In contrast, non-designated countries will still be governed by the current rules described above.

Once states have been designated in terms of this Act, representatives and creditors from designated countries will enjoy improved assistance and protection under the Act than representatives and creditors from non-designated states. By introducing the notion of designation into the local version of the UNCITRAL Model Insolvency Law, a dual system has been created – one for designated countries and another for non-designated states. This is a factor to be considered by foreign states when they design cross-border insolvency rules to accommodate states such as South Africa as the Minister concerned is required to exercise a discretion based on reciprocity in designating states for purposes of the Act. The common law will nonetheless continue to play a role where the 2000 Cross-Border Act does not address a particular aspect that might arise.

It would, however, be a step forward if the envisaged new insolvency legislation were to scrap the designation and reciprocity clause. Furthermore, it would be more conducive to the development of this area of the law if the cross-border insolvency rules were to be included to form part of new unified insolvency legislation.

Once the Cross-Border Insolvency Act has been ‘activated’ this branch of South African law will be much clearer. For a start, there will be a clear field of application and a set of terminology that has gained some foothold in various other jurisdictions – especially where the MLCBI has been enacted and applied. To name but a few important terms would be the centre of main interest (COMI) and main and secondary proceedings. It must, however, be noted that some of the terms defined in the Cross-Border Insolvency Act are already dated due to new company legislation. Definitions referring to repealed concepts such as ‘judicial management’ and the former section 311 compromise and schemes of arrangement should be corrected. In this regard, it is submitted that the legislature should also ensure that all the types of insolvency – and perhaps pre-insolvency procedures envisaged to be covered by the Act – are properly provided for in an amended version.

180 See paras 6.1 and 6.4 above.

When compared to the current position, foreign estate representatives will have *locus standi* to apply for recognition, and the South African courts will no longer have so wide a discretion to deny such relief provided that to do so does not militate against local public policy considerations. To the extent that the Cross-Border Insolvency Act may not deal with certain matters – e.g. the definition of property – the common-law principles will continue to apply.

It is notable that the Cross-Border Insolvency Act will apply to both individuals and corporate debtors, including banks and insurance companies. It is submitted that the legislature should rethink this carefully, especially as the insolvency of banks and insurance companies are highly specialised areas that are not addressed in the MLCBI.¹⁸¹ The current approach of covering both personal and corporate insolvency is, however, supported in general terms.

Under the Cross-Border Insolvency Act both foreign estate representatives and foreign creditors will obtain certain rights to be informed of and participate in local proceedings. The Act is also clear that foreign creditors must be treated on an equal footing with local creditors.¹⁸² This approach to strengthening equality amongst creditors on a cross-border basis is aligned with modern thinking and should be pursued in further developments in this regard.

The type of relief flowing from a recognition order is set out in the Act, and the local court may also provide some discretionary relief. The Act further provides for interim measures pending the outcome of the recognition order. All these measures will be a significant improvement on the current system. It may be asked whether the courts have sufficient discretion to deal with the many cross-border issues that may arise. It is submitted that the discretionary provisions in the Act aimed at assisting foreign representatives, creditors, and courts, read with the fact that the Act must be interpreted and applied with its international origin in mind, provides South African courts with fairly wide powers to develop areas of this law once the Act becomes operational. As mentioned, it must be remembered that the current common-law principles will remain relevant as they will still apply unless they have been replaced by the Act and in instances where the Act does not make provision for a particular matter.

181 See para 6.3 above.

182 See para 6.5.1 above.

However, since the MLCBI and the Cross-Border Insolvency Act are, in the main, geared to provide procedural assistance rather than dealing with substantive insolvency principles, aspects concerning rights of security against the locally-situated property of the insolvent debtor and the treatment of unexecuted contracts are not dealt with in this Act. In such instances, the South African common law will continue to apply.

In the case of voidable dispositions, section 23 activates the use of the provision in the Insolvency Act that deals with such transactions. Still, it is submitted that the section should be amended to make it clear what will be deemed to be the date of formal insolvency (sequestration or liquidation) since this is a crucial element in establishing a cause of action for such claims. A recognition order for a foreign proceeding also does not cause a full *concursum creditorum* to set in as in the case of a concurrent local insolvency proceeding – this remains an important element of the claim.

The procedures for opening and administering concurrent proceedings have been firmly entrenched in the Act and the South African court will have to provide assistance where these principles apply. Of course, even under the current laws, a foreign debtor may be subject to a local insolvency proceeding where the local court may have jurisdiction, and the person bringing the application has the prescribed *locus standi* and meets the statutory requirements. The Cross-Border Insolvency Act extends the use of the latter local procedures to foreign representatives and creditors.¹⁸³ It is also clear that the courts will be obliged to cooperate and assist foreign representatives.

The notion of equal treatment of foreign creditors and greater clarity on the rules regarding the appropriation of the proceeds of the property located in South Africa between local and the foreign creditors are important improvements.¹⁸⁴

The South African legislature will have to reconsider the field of application of the Cross-Border Insolvency Act since, in its current form, it will apply to individuals, companies, and banks and insurance companies.

In its current version, the Act also refers to some former rescue procedures, such as judicial management and the section 311 compromise/scheme of arrangement in the 1973 Companies Act which, save for its Chapter 14, has been replaced by the Companies Act of 2008. The 2008 Companies Act has its own business rescue and compromise procedures

183 See para 6.5 above.

184 See para 6.5.1 above.

that have replaced those of the 1973 Act. In view of recent judgments on the treatment of foreign companies in South Africa in relation to rescue, including the recognition of foreign pre-insolvency procedures like schemes of arrangement with a view to assisting financially stressed foreign companies with a presence in South Africa, should be reconsidered.

As mentioned, UNCITRAL introduced new Model Laws to deal with foreign insolvency-related judgments and the treatment of groups of companies in a cross-border insolvency context.¹⁸⁵ These legislative model laws should be seriously considered with a view to incorporating and integrating them in new cross-border insolvency legislation to provide for the recognition of insolvency-related judgments and groups of companies as they serve to fill gaps in the current MLCBI.

In conclusion, it will be a vast improvement if the Cross-Border Insolvency Act can be implemented by either designating at least all our main trading partners. However, as things stand the Minister is restricted by the reciprocity provision – a better option would, therefore, be to scrap this provision. Furthermore, as discussed, there are other sections in the Act which are in need of amendment. But, for the time being, foreign states that wish to open their jurisdictions to local representatives need to operate under the current legal position in South Africa as broadly captured in this chapter. For the foreseeable future, and save for regional dispensations such as the EU and OHADA, it is clear that the enactment of a clear procedural framework subject to regular improvement is the way forward. The harmonisation of local insolvency and related laws will be a lengthy process in this evolutionary journey in which a largely procedural dispensation sets the tone for global reform.

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Korean practice on the recognition of discharge orders rendered in foreign insolvency proceedings

Focusing on the Supreme Court of Korea Judgment 2009-Ma-1600 and subsequent lower court practice

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Abstract:

UNCITRAL adopted the Model Law on Cross-Border Insolvency (MLCBI) in 1997, thereby establishing the contemporary framework for cross-border insolvency practice, but the MLCBI does not define a clear position on what ‘a foreign proceeding’ mean and how far relief can cover, which caused conflicts of practice over the scope of the MLCBI. The US court have interpreted the scope very widely whereas the UK courts have taken a narrow stance in applying the MLCBI based on traditional doctrines such as the Gibbs Rule and Dicey Rule. In response to these conflicts, UNCITRAL resolved this problem by newly adopting the Model Law on Recognition and Enforcement of Insolvency-Related Judgments (MLIJ) in 2018, establishing a smooth procedure for the recognition and enforcement of insolvency-related judgments constituting components of foreign proceedings rather than the proceeding itself.

Meanwhile, UNCITRAL identified the Supreme Court of Korea Judgment 2009-Ma-1600 Judgment, together with the *Rubin* case, as reflecting a position inconsistent with the principle of universalism and the objectives of cross-border insolvency. The bigger problem is that lower courts in the Republic of Korea appear to have misunderstood the meaning of the Supreme Court Judgment one more step further. Although the 2009-Ma-1600 Judgment is open to criticism, it is possible to accept and understand the conclusion, considering the necessity to protect the expectation of the debtor who trusted the Territorialism under the former Law, which was in effect when the foreign proceeding was in progress.

However, the lower courts appear to have interpreted the Supreme Court’s judgment as endorsing a generally passive stance toward the recognition of discharge orders rendered in foreign proceedings, thereby con-

tributing to a trend that runs counter to the principle of universalism. This represents an apparent return to territorialism and indicates the need for doctrinal and legislative reconsideration.

Ultimately, the most fundamental solution would be the adoption of the MLIJ and the corresponding revision of the Korean Insolvency Law, namely the Debtor Rehabilitation and Bankruptcy Act (DRBA), in order to address uncertainties that have persisted under the MLCBI framework. Looking forward, the MLIJ should be implemented in harmony with the MLCBI, and continued research on international instruments, including European Insolvency Regulation (EIR), will remain essential to achieving that objective.

Keywords: Cross-Border Insolvency, MLCBI, MLIJ, Insolvency-Related Judgments, Recognition and Enforcement of foreign judgments, Gibbs Rule, Dicey Rule, Rubin Case, European Insolvency Regulation

A. Introduction

I. Conflicts of practice over the MLCBI

Nearly twenty-five years have passed since UNCITRAL adopted the Model Law on Cross-Border Insolvency (hereinafter ‘MLCBI’). During this period, major jurisdictions have incorporated the MLCBI into their domestic legal systems and established cross-border insolvency frameworks designed to recognize and support foreign insolvency proceedings (hereinafter ‘foreign proceedings’). However, UNCITRAL did not take a clear position regarding what constitutes a ‘foreign proceeding’ for purposes of recognition, and how far the relief under the MLCBI may cover. As a result, divergent practices have emerged among major jurisdictions concerning the scope of application of the MLCBI.

US courts have interpreted the MLCBI broadly, adopting an approach under which relief may encompass the recognition and enforcement of plan confirmation orders or discharge orders rendered in foreign proceedings. On the other hand, UK courts have interpreted the scope of the MLCBI narrowly, maintaining that relief under the MLCBI is confined principally to procedural assistance and does not extend to the recognition and enforcement of substantive insolvency-related judgments. Consequently, significant difference has emerged between the practice of Chapter 15 of the

United States Bankruptcy Code and that under the United Kingdom's 2006 Cross-Border Insolvency Regulations.

The UK's comparatively restrictive position is grounded in the long-established principles such as the Gibbs Rule¹ and Dicey Rule,² both of which were reaffirmed by the Supreme Court of the UK in *Rubin* case.³ Under this framework, the obligations governed by UK law may generally be adjusted or discharged only through UK insolvency proceedings, and insolvency representatives are often compelled to commence avoidance actions before UK courts when the opposing party resides within the UK, due to concerns regarding the enforceability of foreign avoidance judgments. Such an approach has been criticized as inconsistent with the principle of universalism which underlies modern cross-border insolvency law.

II. Establishment of the MLIJ to resolve these conflicts

In response to these conflicts, UNCITRAL adopted the Model Law on Recognition and Enforcement of Insolvency-Related Judgments (hereinafter 'MLIJ') in 2018. The MLIJ was developed with reference to the structural framework of the EU Insolvency Regulation (hereinafter 'EIR'),

1 The Gibbs Rule is a legal principle according to which the adjustment of debts (including their reduction or discharge) established in foreign insolvency proceedings is not effective in respect of debts governed by English law in the United Kingdom. For a discussion of the Gibbs Rule from a Korean perspective, see Kim, *Korea Private International Law Journal* 28(1) (2022), 81, at 105.

2 The Dicey Rules are systematically organized body of common law rules formulated by the renowned English jurist A. V. Dicey. The rule relevant to this article is Rule 43 (formerly Rule 36). Rule 43 provides that a foreign judgment *in personam* may be recognized and enforced in the United Kingdom where the judgment debtor (i) was present in the foreign country at the time the proceedings were instituted; (ii) was a claimant or counterclaimed in the foreign proceedings; (iii) submitted to the jurisdiction of the foreign court by voluntarily appearing in the proceedings; or (iv) agreed, prior to the commencement of the proceedings, to submit to the jurisdiction of that court in respect of the subject matter of the proceedings. For further details, see Collins / Harris (eds.), *Dicey, Morris and Collins on the Conflict of Laws*, para. 14R-054. For a Korean perspective on the Dicey Rules, see Kim, *Korea Private International Law Journal* 28(1) (2022), 81, at 132.

3 The Supreme Court of the UK, 24. 10. 2012 – [2012] UKSC 46 – *Rubin and another (Respondents) v Eurofinance SA and others (Appellants)*.

which recognizes and enforces individual judgments arising from insolvency proceedings, rather than the proceedings itself.⁴

More specifically, the MLIJ defines the concept of ‘Insolvency-Related Judgments’ (hereinafter ‘IRJs’) (Art. 2(d)),⁵ and gives effect to the IRJs rendered by foreign courts in the enacting State where: (1) it is enforceable in the originating State, and (2) it is not against the public policy of enacting State (Art. 7, 13,) unless it does fall under the refusal reasons stipulated in the MLIJ (Art. 14).

In other words, the MLIJ seeks to facilitate the smooth recognition and enforcement of foreign IRJs by limiting the grounds upon which an enacting State may refuse recognition or enforcement. Notably, the MLIJ does not impose stringent policy-based requirements such as reciprocity, which commonly applies to the recognition and enforcement of foreign civil or commercial judgments.⁶ Consequently, an enacting State is not required to assess whether the originating State has historically adopted a favourable approach toward the recognition and enforcement of judgments rendered by the enacting State.

4 Unlike the MLCBI, the EIR classifies judgments rendered in insolvency proceedings into several categories and prescribes different requirements for their recognition and enforcement. For further details, see Bork / van Zwieten / Oberhammer, Art. 32 mn. 32.01 et seq. For a Korean perspective on the EIR, see Kim, *Korea Private International Law Journal* 21(2) (2015), 285, at 324. For a detailed account of the drafting and discussion process of the MLIJ, see Han, *Seoul National University Business, Finance and Law* (BFL) 81 (2017), 90, at 94.

5 The UNCITRAL *Guide to Enactment of the UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments* (2018), para. 60 et seq., identifies six types of the IRJs; however, this categorization is not exhaustive. In other words, judgments not falling within the six identified categories may also qualify as the IRJs. The determination of the criteria for identifying whether a judgment constitutes an IRJ is expected to become one of the central issues in future cross-border insolvency practice.

6 Traditionally, reciprocity has been regarded as one of the most challenging requirements for the recognition and enforcement of foreign judgments. Korean courts occasionally faced situations where they were unable to recognize and enforce foreign judgments due to the absence of clear evidence that the foreign jurisdiction would accord reciprocal treatment to Korean judgments, even where recognition and enforcement appeared desirable. In this regard, it is particularly encouraging that Korea has recently established a reciprocal relationship with China in the field of civil and commercial judgments.

III. Scope of discussion

The Republic of Korea (hereinafter 'Korea'), which adopted the MLCBI through the Chapter V (Cross-Border Insolvency) of the Debtor Rehabilitation and Bankruptcy Act (hereinafter 'DRBA'), has likewise encountered these conflicts of practice. During the drafting process the MLIJ, UNCITRAL identified the Supreme Court of Korea's Judgment 2009-Ma-1600 (hereinafter 'Supreme Court Judgment'), together with *Rubin*, as an example of jurisprudence that limited the practical scope of the MLCBI and contributed to divergences in cross-border insolvency practice.

A more significant concern, however, lies in the manner in which lower Korean courts have interpreted the Supreme Court Judgment. Although the Supreme Court Judgment has been subject to substantial criticism, its conclusion may nevertheless be understood in light of the exceptional circumstances surrounding the case and the need to protect the legitimate expectations of creditor who had relied upon the territorial approach embodied in the legal framework then in force. However, lower courts seem to have interpreted the judgment as endorsing a generally cautious or passive approach toward the recognition of discharge orders rendered in foreign insolvency proceedings, thereby contributing to a renewed inclination toward territorialism.

Accordingly, the most fundamental solution would be to address uncertainties that have persisted under the MLCBI framework through the adoption of the MLIJ and drawing upon the practice developed under the EIR, upon which the MLIJ was substantially modelled.⁷ However, as it remains uncertain when revisions to the DRBA may occur, this article focuses on an examination of the Supreme Court Judgment and subsequent lower court rulings.

⁷ Commonwealth jurisdictions such as Australia and Singapore have in recent years expressed criticism of the Gibbs Rule, suggesting a greater openness to the adoption of the MLIJ then previously anticipated. Judicial decisions reflecting such criticism include *In re Bulong Nickel Proprietary Ltd* [2002] WASC 126, 42 ACSR 52 (Supreme Court of Western Australia, 17 May 2002), and *Pacific Andes Resources Development Ltd* [2016] SGHC 210 (Singapore High Court, 27 September 2016).

B. Review of the Supreme Court judgment (2009-Ma-1600)

The Supreme Court Judgment has already been extensively discussed in many Korean articles⁸ under the names of ‘Todd OH case’ or ‘Kohap case.’ The central issue concerned whether or not a discharge order rendered by a U.S. Bankruptcy Court has taken effect in Korea. In this case, a discharge order, the nature of which is a judgment affecting creditors generally and collectively, was subject of recognition.⁹ In this respect, this case differs from *Rubin*, where the judgment sought to be recognized and enforced was an avoidance judgment rendered in an adversary proceeding.

I. Factual background

1. Procedural history

The procedural history of this case may be divided into four stages.

1) Stage One

Individual debtor Todd OH applied for a Chapter 11 proceeding before the U.S. Bankruptcy Court for the Central District of California. A plan confirmation order and a discharge order were rendered in the Chapter 11 proceeding, following which the Chapter 11 proceeding was closed.

2) Stage Two

Todd OH subsequently applied for the recognition of the Chapter 11 proceeding before the Seoul Bankruptcy Court.¹⁰ However, the application was dismissed (2006-KukSeung-1) on the ground that the Chapter 11 proceeding had already been closed and was no longer pending at the time the application for recognition was filed

8 Lim, *Seoul National University Business, Finance and Law* (BFL) 38 (2009), 95, at 110; Suk, in: Publishing Committee for Commemorating Prof. Yang Chang-Soo's 70th Birthday (eds.), *Civil Law of Self-Determinism and Justice*, 2021, 555, at 555.

9 Discharge orders or plan confirmation orders generally affect the interests of creditors and stakeholders collectively, distinguishing them from judgments rendered in adversary proceedings, which affect only the rights and obligations of the opposing parties. For further discussion, see Suk, *International Transactions and Law* 33 (2021), 1, at 6.

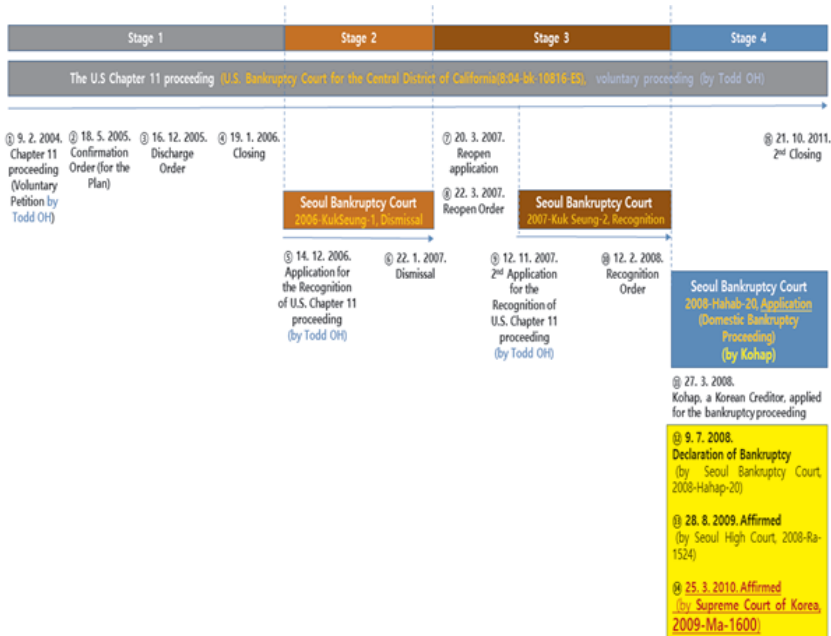
10 Todd OH applied for the recognition of a U.S. Chapter 11 proceeding under the Chapter V of the DRBA (implementing the MLCBI). From the perspective of the EIR framework, this application may be understood as corresponding to a request for recognition of the opening judgment commencing Chapter 11 proceedings.

3) Stage Three

Todd Oh thereafter applied to reopen the Chapter 11 proceeding and obtained a reopening order from the U.S. Bankruptcy Court for the Central District of California. Following the reopening, he again sought recognition of the Chapter 11 proceeding before the Seoul Bankruptcy Court and successfully obtained a recognition order (2007-KukSeung-2).

4) Stage Four

Notwithstanding the recognition of the U.S. Chapter 11 proceeding in Korea, a separate bankruptcy petition (2008-HaHab-20) was subsequently filed in Korea by Kohap, a Korean creditor that had not participated in the U.S. Chapter 11 proceeding. The factual background of the case is summarized in Table below.



The progress of Supreme Court judgment (2009-Ma-1600)

As shown in the Table above, the Supreme Court Judgment arose at Stage Four, and the central issue was whether Kohap, a creditor that had not participated in the Chapter 11 proceeding, could nonetheless exercise its

rights as a creditor in Korea, where the ‘foreign proceeding’ had been recognized in Korea and a discharge order had been rendered in the foreign proceeding. If the discharge order were regarded as effective in Korea, the Korean bankruptcy petition would necessarily have to be dismissed, since Kohap would no longer retain creditor status not only in the U.S. but also in Korea.¹¹

2. Order at issue: discharge order, not confirmation order

Since the debtor, Todd OH, was an individual, discharge from debt could arise only through a discharge order pursuant to Sec. 1141(d)(5) of the U.S. Bankruptcy Code, not a plan confirmation order.¹² This differs from the Chapter 11 proceeding involving non-individual debtors, such as corporations or limited liability companies, where discharge generally takes effect upon confirmation of the reorganization plan

This structure bears some resemblance to Korea’s General Rehabilitation proceedings (DRBA Chapter II) applicable to individual debtors,¹³ under which discharge does not take effect immediately upon confirmation of the rehabilitation order but only after all claims have been repaid in accordance with the plan. Although the DRBA does not prescribe a detailed statutory mechanism governing this issue, Korean practice addresses the matter by specifying in the plan that discharge shall become effective upon completion of the required repayments. By contrast, the U.S. Bankruptcy

11 Art. 294(1) of the DRBA provides that ‘a creditor or debtor may file a petition for bankruptcy proceedings.’ This provision allows creditors to initiate bankruptcy proceedings against a debtor where the debtor does not voluntarily commence such proceedings. For details regarding Korean practice, see Lee, Art. 294–304, in: Kwon, Soon-Il (ed.), *Debtor Rehabilitation and Bankruptcy Act III* (2021), 764, at 783.

12 In principle, debt adjustment becomes effective upon confirmation of a reorganization plan under the Sec. 1141(a) of the U.S. Bankruptcy Code. By contrast, individual debtors are discharged from their debts only upon the issuance of a separate discharge order by the bankruptcy court.

13 General Rehabilitation proceedings (DRBA Chapter II, similar to U.S. Chapter 11) for individuals are distinct from the Individual Rehabilitation proceedings (DRBA Chapter IV, similar to U.S. Chapter 13). Under Korea law, individuals with secured debt not exceeding KRW 1.5 billion (approximately USD1million) and unsecured debt not exceeding KRW 1 billion (approximately USD 670,000) may choose between these two rehabilitation regimes. By contrast, individuals whose debts exceed those thresholds are limited to General Rehabilitation proceeding. For further discussion of the differences between the two procedures, see Seoul Bankruptcy Court Working Group *Individual Insolvency Practice*, 439 et seq.

Code resolves this issue through legislation. Accordingly, Todd OH, as an individual Chapter 11 debtor, obtained discharge only through the discharge order rendered on December 16, 2005 [see Annex],¹⁴ rather than through the plan confirmation order itself.

Nevertheless, the Supreme Court Judgment (2009-Ma-1600) appears to have proceeded on the premise that discharge became effective directly upon confirmation of the plan and therefore framed the issue principally in terms of the recognition of the 'plan confirmation order' rather than the discharge order. However, in this article, both orders are examined together, given that each constitutes a judicial determination producing general and collective effects upon creditors.

II. Principal holdings of the Supreme Court judgment

As shown in Table above, the court of first instance (Seoul Bankruptcy Court 2008-HaHab-20) held that Kohap retained a claim against Todd OH in Korea and accordingly granted Kohap's petition for domestic bankruptcy proceedings against Todd OH, thereby creating parallel proceedings alongside the Chapter 11 proceedings. Todd OH's appeal against the judgment was dismissed by the appellate court (Seoul High Court 2008-Ra-1524), which affirmed the judgment of the first instance court. The Supreme Court of Korea likewise adopted the same position in the Supreme Court Judgment (2009-Ma-1600).

The Supreme Court of Korea concluded that, at least under the circumstances of this case, the discharge order rendered in the Chapter 11 proceeding produced legal effects only with creditors within the U.S. and therefore

14 U.S. Bankruptcy Court for the Central District of California, *In re Todd OH, aka Won Kyung Oh*, Case No. SA 04-10816 (RA), ECF Doc. No. 181 (16 December 2015). It should be noted, however, that a discharge order under the U.S. Bankruptcy Code does not have affect non-dischargeable debts prescribed in Sec. 523 of the U.S. Bankruptcy Code, which constitutes one of the most significant differences from Korean practice. This is because the DRBA provisions concerning non-dischargeable debts, such as the Art. 566 in Individual Bankruptcy proceeding (=US Chapter 7 proceeding) and the Art. 625 in Individual Rehabilitation proceeding (=US Chapter 13 proceeding) do not apply to General Rehabilitation proceeding (=US Chapter 11 proceeding) for individuals.

did not extinguish Kohap's claim in Korea. The principal holdings of the Supreme Court Judgment may be summarized as follows:¹⁵

Supreme Court of Korea Judgment 2009-Ma-1600 (25 March 2009)

- [3] The relief contemplated under the DRBA is intended to enable foreign representatives to secure assets located in Korea for purposes of distribution and repayment in foreign insolvency proceedings and to formulate or implement restructuring or liquidation plans. Such relief includes:

- 1) stays of actions concerning the debtor's business and assets located in Korea; and
- 2) prohibitions or stays of compulsory execution, security exercises, and preservation measures.

Because such relief constitutes **procedural support**, it does **not** extend to substantively altering or extinguishing debts, including by granting effect in Korea to discharge orders or plan confirmation orders rendered in foreign proceedings.

- [4] Discharge orders or plan confirmation orders (hereinafter 'the Orders') rendered by foreign courts concern the existence and scope of claims under substantive law. Accordingly, the debt-adjustment effects by such Orders amount to substantive modification of obligations between debtors and creditors rather than merely procedural relief. Recognition of the Orders is therefore more appropriately resolved as an issue arising between the debtor and creditors on an individual basis. Even where such Orders are rendered in foreign proceedings, granting their effects in Korea is not materially different from recognizing foreign civil or commercial judgments pursuant to Art. 217 of the Korean Civil Procedure Act (hereinafter 'CPA'). Consequently, recognition of the Orders rendered by foreign courts should be governed **not by relief provisions under the DRBA**, but rather by **the Art. 217 of the CPA**.¹⁶

15 There is no official English translation of the Supreme Court Judgment. The translation reproduced below has therefore been prepared by the author and includes limited modifications to the original wording where necessary for clarity and readability.

16 In principle, a foreign judgment is effective only within the jurisdiction in which it is rendered, and whether such judgment will be recognized or enforced domestically depends on the law of the recognizing and enforcing State. In this regard, Art. 217(1) of the CPA sets forth four requirements for the recognition of foreign judgments: (1) jurisdiction; (2) proper service (excluding service by public notice or comparable

- [5] Recognition of the Orders rendered by foreign courts requires that the effects of such recognition not violate public policy of Korea (CPA, Art. 217(1)(3)¹⁷). Specifically, the public policy requirement may not be satisfied where:
- (a) the Orders were rendered through proceedings that failed to adequately protect Korean creditors' rights to participate in foreign proceedings;
 - (b) the substantive content of the Orders is inconsistent with fundamental principles of Korea; or
 - (c) the concrete consequences of recognition would infringe upon the rights or legitimate interests of Korean creditors.
- [6] In the present case, recognition of the discharge order rendered by the U.S. Bankruptcy Court would violate the legitimate expectations of Korean creditors who relied upon the territorial approach embodied in the former Company Reorganization Act¹⁸(Repealed by the Art. 2 of the Annex to the DRBA), which remained applicable in Korea during the pendency of the U.S. Chapter 11 proceeding. Specifically, recognition of the discharge order would undermine Kohap's expectation of obtaining repayment through the compulsory execution against domestic assets or through domestic bankruptcy proceedings grounded in the territorial principle. Accordingly, the concrete consequences of recognizing the discharge order would be contrary to public policy, and accordingly the discharge order rendered by the U.S. Bankruptcy Court could not be recognized due to failure to satisfy Art. 217(1)(3) of the CPA

In other words, the Supreme Court of Korea reasoned that the recognition and enforcement of judgments producing substantive changes in or extinguishment of debts and liabilities cannot be addressed through relief

forms of service); (3) public policy; and (4) reciprocity. For further discussion, see Kim, *Seoul Law Journal* 63(3) (2022), 241, at 247.

- 17 The relevant provision was originally designated as Art. 217(3). However, the author indicates it as 217(1)(3) for ease of reference because the article has become 217(1)(3) following the amendment to the CPA by Act No. 12587 of 20 May 2014.
- 18 The former insolvency legislation, namely the Company Reorganization Act, was based on the principle of territorialism and provided that (1) insolvency proceedings commenced in Korea were effective only with respect to the debtor's assets located in Korea, and (2) foreign insolvency proceedings had no effect on debtor's assets located in Korea. By contrast, the DRBA, which is based on the principle of universalism, departed from this traditionally restrictive approach, although it does not operate retroactively. For further discussion, see Kim, Master's thesis (2012), 3 et seq.

under the DRBA, because such relief is confined to procedural assistance. Accordingly, whether foreign discharge orders or plan confirmation orders should be recognized in Korea must be determined by reference to the requirements governing the recognition and enforcement of foreign civil and commercial judgments under the Art. 217 of the CPA, with particular emphasis on the public policy requirement. From this perspective, the Court considered it necessary to protect the legitimate expectations of Kohap, a Korean domestic creditor, which had relied upon the territorial approach embodied in the former Company Reorganization Act.

This line of reasoning bears significant resemblance to that adopted by the *Rubin* Judgment of the Supreme Court of the United Kingdom, which was decided approximately two years after the Supreme Court Judgment (2009-Ma-1600). Nevertheless certain aspects of the Supreme Court Judgment remain difficult to accept, on some issues, particularly when viewed in light of the attitude of the MLIJ adopted in 2018. The following sections therefore examine these issues in sequence.

III. Review

1. Whether relief under the DRBA is limited to procedural matters

The Supreme Court Judgment held that relief under the DRBA is confined to procedural matters. However, this position can no longer be maintained without reconsideration, particularly in light of the approach reflected in the MLIJ. Art. X of the MLIJ¹⁹ expressly permits enacting States to provide that ‘relief under the MLCBI includes the recognition and enforcement of a judgment,’ Thereby endorsing a broader understanding of the scope of relief available under the MLCBI. Admittedly, this reflects UNCITRAL’s

19 The MLIJ proposes two alternative legislative approaches: (1) adoption of the Model Law in its entirety, including its provisions defining IRJs and setting forth grounds for refusing recognition and enforcement; and (2) adoption of a single provision, namely Article X, which provides as follows (underlining and emphasis added by the author): **Article X** (Recognition of an insolvency-related judgment under [insert a cross-reference to the legislation of this State enacting article 21 of the UNCITRAL Model Law on Cross-Border Insolvency Notwithstanding any prior interpretation to the contrary, the relief available under [insert a cross-reference to the legislation of this State enacting article 21 of the UNCITRAL Model Law on Cross-Border Insolvency] includes recognition and enforcement of a judgment’

subsequent interpretation of the MLCBI rather than the express intent of Korean lawmakers in enacting Chapter V of the DRBA.

Nevertheless, several considerations support a broader interpretation of relief under the DRBA.

First, the DRBA Chapter V was enacted with the objective of establishing a standardized and internationally harmonized framework for the efficient administration of cross-border insolvency proceedings, consistent with the underlying purposes of the MLCBI.

Second, the MLIJ was adopted in response to conflicts of practice that emerged under the MLCBI, including concerns exemplified by the Supreme Court Judgment discussed above. Therefore, acceptance of the broader interpretive approach reflected in the MLIJ may contribute to strengthening mutual confidence and predictability in relations with foreign creditors and other interested parties.

Third, most importantly, the experience of the U.S. Bankruptcy Court²⁰ demonstrates that a broader understanding of relief under Chapter 15 (MLCBI) has frequently facilitated efficient restructuring and enhanced protection of stakeholders' interests. Such an approach enables debtors to concentrate on rehabilitation or restructuring efforts without unnecessary fragmentation and therefore supports the effective administration of cross-border insolvency proceedings.

From this perspective, recognition and enforcement of at least 'judgments rendered in foreign insolvency proceedings', not necessarily judgments arising from all forms of foreign litigation, may appropriately fall within the scope of relief under the DRBA, particularly under the Art. 636①(5) of the DRBA, a catch-all clause.²¹

20 The US Bankruptcy Court have recognized foreign plan confirmation orders from the United Kingdom (*Avanti, Lehman Brothers International Europe*), Canada (*US Steel Canada, Metcalfe, Sino-Forest*), France (*CGG*), Brazil (*Rede Energia, OI Brazil Energia*), Croatia (*Agrokor*) through relief under Chapter 15 of the U.S. Bankruptcy Code. For further discussion of these cases, see Kim, (2022), 26 et seq.

21 Art. 636(1)(5) of the DRBA, reproduced below, corresponds to Art. 21(a) of the MLCBI (underlining and emphasis added by the author).

Article 636 (Relief for foreign proceedings) (1) The court may issue relief falling under any of the following subparagraphs in order to protect the foreign debtor's business and properties or the creditors' profits at the time that it recognizes the foreign proceeding or after the recognition on its own motion:

1. The stay of a lawsuit involving the debtor's business and properties and any administrative proceedings.

Nevertheless adoption of this broader approach under Korean law would require reconsideration of Supreme Court precedent. In particular, the Supreme Court of Korea would need to revisit the Judgment2009-Ma-1600, through an en banc proceeding pursuant to the Art. 7①(3) of the Court Organization Act.²² Such a process may prove procedurally burdensome and could result in delays, as an appropriate case capable of presenting the issue would first need to arise and proceed through the appellate court before reaching the Supreme Court of Korea.

2 . Whether a discharge order constitutes a judgment rendered in an adversarial proceeding

The Supreme Court Judgment treated a discharge order as a judgment resolving disputes concerning debts and liabilities between a debtor and individual creditor and therefore reasoned that recognition of such order should be addressed on an individual basis between opposing parties. However, this characterization appears difficult to reconcile with Art. 14(f) (i) of the MLIJ and the UNCITRAL Guide to Enactment of the MLIJ, both of which states that plan confirmation orders or discharge orders are not merely judgments resolving bilateral disputes between individual parties but are judicial determinations that directly and collectively affect the interests of creditors in general.²³

If the DRBA were to be interpreted in accordance with this broader approach, a debtor who has obtained a foreign discharge order would not be required to repeatedly invoke and prove, in each individual action,

2. The prohibition or stay of the compulsory execution with respect to the debtor's business and properties, the auction for exercise of security rights, and the provisional seizure or preliminary injunction, etc.

3. Prohibition of the debtor's payment or of the disposal of the debtor's properties.

4. The appointment of Cross-Border Insolvency Administrator.

5. **Other dispositions** necessary to preserve the debtor's business and properties and to protect the profits of creditors.

22 Art. 7(1)(3) of the Court Organization Act provides that a case shall be deliberated and decided by more than two-thirds of all Supreme Court Justices '[w]here it is deemed necessary to depart from the Supreme Court of Korea's prior interpretation of the Constitution, statutes, orders, or rules.'

23 Suk, in: Publishing Committee for Commemorating Prof. Yang Chang-Soo's 70th Birthday (eds.), *Civil Law of Self-Determinism and Justice* (2021), 555, at 569, likewise argues that the Supreme Court judgment misunderstood the nature of the plan confirmation order.

satisfaction of the requirements for recognition and enforcement under Art. 217 of the CPA. Rather, it would be sufficient first to obtain recognition of foreign proceeding and subsequently seek relief granting domestic effect to the discharge order. Once such relief is granted by the Seoul Bankruptcy Court,²⁴ the resulting order could then be submitted as evidence in subsequent individual civil proceedings.

Establishment of such a practice would offer several advantages. (1) First of all, it would reduce the risk of inconsistent civil judgments concerning the same recognition requirements, which might otherwise vary depending upon the allegations and evidence presented in individual litigation. (2) Secondly, it would allow civil courts to concentrate upon substantive questions, such as whether particular claims are dischargeable, rather than revisiting the threshold issue of recognition of the discharge order itself. Such an allocation of functions would likely prove more efficient and institutionally desirable not only for the courts but also for debtors and other interested parties.

3. Whether it is appropriate to refuse recognition of a duly-established discharge order based upon Its 'specific result'

The Supreme Court Judgment acknowledged that the discharge order had been 'duly established' in the U.S. Chapter 11 proceeding, but nevertheless concluded that recognition of the order would produce a 'specific result' contrary to public policy. To be specific, the Court emphasized that the former Company Reorganization Act, which embodied a territorial approach, remained in force during the pendency of the U.S. proceeding and that Kohap, relying upon that territorial framework, had not participated in the U.S. Chapter 11 proceeding. Accordingly, the Court considered it necessary to protect Kohap's expectations notwithstanding the subsequent enactment of the DRBA and its adoption of a more universal approach.²⁵

Nevertheless, several considerations cast doubt upon the persuasiveness of this conclusion. First, the U.S. Bankruptcy Court afforded Kohap a suf-

24 Pursuant to Art. 630 of the DRBA, the Seoul Bankruptcy Court has exclusive jurisdiction over cross-border insolvency matters, including the recognition of foreign proceedings and the granting of relief in relation to such proceedings.

25 Oh, *Supreme Court of Korea Judgment Explanation* 83 (2010), 604, at 650.

ficient opportunity to participate in the Chapter 11 proceeding through appropriate notification procedures pursuant to the U.S. Bankruptcy Code.²⁶

Second, despite having notice of the pending proceeding, Kohap deliberately chose not to participate, apparently preferring to pursue recovery through execution against the debtor's domestic assets or through domestic insolvency proceeding.

Third, while the Supreme Court Judgment effectively protected Kohap's reliance upon territorialism, it did so at the potential expense of equal treatment among creditors, including both foreign creditors and domestic creditors who participated in or accepted the effects of the discharge order.

Fourth, the Supreme Court Judgment arguably affords disproportionate protection to Kohap alone and risks complicating the legal relationships among stakeholders who did not challenge the discharge order, by reopening issues that had already been resolved through the foreign proceedings.

In short, refusal to recognize a duly established discharge order on the basis of its 'specific result' should arguably require more exceptional circumstances, particularly where the discharge order was established in accordance with procedural fairness and due process under the foreign law. Such refusal may be justified where it is necessary to preserve equitable treatment among creditors or to prevent manifest unfairness. It remains open to question, however, whether the present case rises to that level.²⁷ Kohap's reliance upon territorialism particularly where it voluntarily elected not to participate in the Chapter 11 proceeding with the purpose of pursuing domestically advantageous remedies 'legal at the time, but unjusti-

- 26 According to the Service List, Kohap was included with its domestic address and appears to have been duly served and notified in the U.S. proceedings. Other domestic creditors were likewise included in the list, excerpts of which are captured below:

Chun-Yong, Choi Byoung Green Town 511-1605 Do-Nong-Dong 2-1, Nam-Yang-Ju-Si Gyung-Gi-Do, Korea, 00 00000	Kohap Inc. Han-Wha Bldg., 11 th Floor #1 Jang-Gyo-Dang, Jung-Gu Seoul, Korea	Korean Government Nam-Dae-Mun Se-Mu-Se (Se-Won-Guan-Ri) Jeo-Dong 1 GA, Jung-Gu Seoul, Korea,
Lee & Ko (Kwang-Jang) Posco Center West Bldg. 16th Floor 892, Dae-Chi-4-Dong, Gang-Nam-Gu Seoul, Korea, 00 00000	My Oy Kwon Esq TAE JI BLDG 2 ND FL 1706 9 Seo Cho Dong Seo Cho Gu SEOUL KOREA, 00 00000	Yong Bin Yim ECS & Partners Attn: Eun Change Yong 15F Union Steel Building 890, Daechi-dong, Kangnam-leu Seoul, Korea

- 27 Korean courts have refused recognition or enforcement of foreign civil and commercial judgments awarding excessive punitive damages or otherwise violating fundamental domestic principles on the basis of Art. 217(1)(3) of the CPA (public policy). For further discussion, see Suk, *International Civil Procedure: Private International Law (Procedures)* (2012), 373 et seq.

fied,²⁸ does not necessarily appear more deserving of protection than the broader objectives of insolvency proceedings, including collective administration and equitable treatment of creditors.

Art. 14(f) of the MLIJ reflects a similar understanding by identifying, as a ground for refusal, circumstances in which ‘the interests of creditors and other interested persons were not adequately protected in the proceeding in which the judgment was issued.’ It is evident that discharge orders or plan confirmation orders fall within the category of judgments materially affecting the rights of creditors generally. In other words, where creditors were not afforded a fair chance to participate in foreign proceedings, refusal to recognize discharge or confirmation orders may be justified. However, once creditors have been given adequate notice and a fair opportunity to participate, refusal of recognition should ordinarily remain exceptional. Likewise, where Art. X of the MLIJ is adopted, courts should exercise caution in refusing relief granting domestic effect to such orders under the Art. 7 of the MLIJ (public policy).

C. Lower court practice

I. Lower courts’ expansive reading of the Supreme Court judgment (2009-Ma-1600)

The Supreme Court Judgment conveyed the view that discharge orders or plan confirmation orders rendered in foreign proceedings should be treated like civil or commercial foreign judgments, and the orders may be denied where such orders seriously prejudice domestic creditors or undermine legitimate expectations deserving protection. In subsequent practice, however, lower courts appear to have developed a tendency toward restrictive recognition of foreign discharge and confirmations orders. A recurring pattern may be observed where creditor [A] files a lawsuit against [B] seeking for performance of a loan or commercial claims, and [B] raises as a defence the existence of a discharge order or plan confirmation order in foreign insolvency proceedings. In many such cases, lower courts have declined to recognize the foreign orders absent particular compelling circumstances.

This trend suggests that the Supreme Court of Korea Judgment have been interpreted more broadly than originally intended, particularly

28 Kohap sought to obtain preferential satisfaction through individual compulsory execution against Todd OH’s domestic assets.

through expansive reliance upon public policy considerations. As discussed above, however, the Supreme Court Judgment arose under highly exceptional circumstances involving a domestic creditor that had relied upon the territorial framework preserved under the former Company Reorganization Act. Accordingly, the Supreme Court Judgment should not necessarily be understood as reflecting a generally restrictive or passive approach toward the recognition and enforcement of foreign discharge or confirmation orders. Rather, it may be more appropriately viewed as a case-specific determination grounded in unusual transitional circumstances.

II. Lower courts judgments showing a restrictive approach toward recognition of discharge orders

1. Seoul Central District Court 2018-Na-11861

In this case, the plaintiff (hereinafter '[P]'), having sold goods without receiving payment from the defendant (hereinafter '[D]'), sought recovery of the purchase price from D, an individual debtor. D defended that he had previously obtained a discharge order from the U.S. Bankruptcy Court for the Central District of California.²⁹ However, the court of first instance (Seoul Central District Court 2017-GaDan-19119) determined that P had not received adequate notice of the U.S. proceeding, emphasizing that P had not been included in the list of creditors. On this basis, the court concluded that recognition of the discharge order in Korea would be contrary to public policy. Additionally, the court reasoned that P's claim had not been discharged in any event, because the discharge order itself expressly provided that 'some debts which the debtors did not properly list is not discharged,' and P's claim had not been included among the listed claims.

On appeal, the Seoul Central District Court (2018-Na-11861) affirmed the first instance court's judgment rejecting D's defence, and the judgment became final without further challenge. The conclusion reached by the courts is understandable to the extent that P was not sufficiently afforded a meaningful opportunity to participate in the U.S. proceeding. In other words the concern related not merely to the recognition of the discharge order itself but to the procedural integrity underlying the issuance of that order.

29 It is unclear from the judgment alone whether the proceeding was commenced under Chapter 7 or Chapter 13 of the U.S. Bankruptcy Code.

Nevertheless, further examination of Sec. 523(a)(3)(A) of the U.S. Bankruptcy Code would have been desirable. That provision states that ‘debts neither listed nor scheduled’ may nevertheless be discharged where the relevant creditor had notice or actual knowledge of the insolvency case in sufficient time to protect its interests.³⁰ Accordingly, if P in fact possessed notice or actual knowledge of D’s U.S. proceeding within an appropriate period, P could arguably be regarded as a creditor who voluntarily elected not to participate despite having been afforded a sufficient opportunity to do so—an approach analogous to Kohap’s position in the Supreme Court Judgment. Under such circumstances, P’s claim might properly be regarded as discharged under U.S. Bankruptcy Code, and recognition of that discharge would not necessarily offend public policy because no legitimate reliance interest comparable to that in the Supreme Court Judgment would be present. Of course, this conclusion is on the premise that the legal effects of discharge order are governed by the U.S. Bankruptcy Code as the *lex fori concursus* of the foreign insolvency proceeding. Such an approach finds meaningful support in Supreme Court of Korea 2012-Da-104526, 104533 Judgment, which recognized that ‘*lex fori concursus* governs matters relating to the typical legal effects of insolvency proceedings’

2. Suwon High Court 2021-Na-18913

In this case, P sought repayment of a loan against D, an individual debtor who had obtained a discharge order in a Chapter 7 proceeding before the U.S. Bankruptcy Court for the District of Connecticut. The court of first instance (Suwon District Court 2020-GaHap-22127) acknowledged that D had listed ‘the debt owed to P’ in the schedule of creditors and that P had received notice of the discharge order issued by the U.S. Bankruptcy Court. Nevertheless, the court concluded that the requirements of Art. 217(1)(2) of the CPA had not been satisfied and therefore rejected D’s defence based on the discharge order.

The court reasoned as follows. First, the notice served upon P related only to the final stage of Chapter 7 proceeding. Second, there was insufficient evidence demonstrating that P had received notice of the proceedings from the initial stages. Third, P’s children, who were listed as co-recipients of the

30 Chapter 7 proceedings may raise a number of practical and legal issues, including situations involving no-asset debtors. For further discussion, see Schuenemann (2017), at 1.

relevant notice, appeared to have resided at a different address during the pendency of the Chapter 7 proceeding. On these grounds, the court concluded that it could not be sufficiently established that documents concerning the discharge order had been served upon P within a time adequate to enable a proper defence. On appeal, the Suwon High Court (2021-Na-18913) upheld the first instance judgment, and the judgment became final without further.

However, several aspects of the case merit closer examination. First, because P had already been included in the schedule and service list of the Chapter 7 proceeding, it may reasonably be presumed that relevant documents had been served upon P from the initial stages of the proceeding. Second, even assuming otherwise, P retained an opportunity to object to or challenge the discharge order after receiving notice of the discharge order itself, but elected not to do so³¹ Third, and perhaps most significantly, P resided in the U.S. rather than Korea at the time the relevant notice was received and therefore faced no practical or geographical impediment to participate in the Chapter 7 proceeding. Fourth, service upon P, a U.S. resident, conducted by the U.S. Bankruptcy Court in accordance with the U.S. Bankruptcy Code should generally be regarded as procedurally legitimate under general rule of private international law.³² From this perspective, it may be argued that the relevant documents were served with sufficient notice and within adequate time to enable the preparation of a defence.³³

III. Lower courts adopting a more forward-looking approach

1. Incheon District Court 2016-Na-13185

In this case, P, an assignee who had acquired a loan claim against D (an individual debtor) from A (the original creditor and assignor) sought repayment from D, who had been discharged from Japanese bankruptcy

31 The notice above also specified the deadline for creditors to object to the discharge, during which period creditors could challenge the discharge by commencing 'adversary proceedings' against the debtor.

32 The validity of service is to be determined in accordance with the law of State in which the judgment was rendered. For further discussion, see Suk, *International Civil Procedure: Private International Law (Procedures)* (2012), 353.

33 The address does not appear to have been incorrectly recorded, as P acknowledged having received notice of the discharge order itself.

proceeding. Notably, the court of first instance (Incheon District Court 2015-GaSo-105752,) concluded that the discharge order rendered by the Japanese bankruptcy court satisfied all requirements under Art. 217(1) of the CPA and therefore dismissed P's claim on the basis of recognition of the foreign discharge order. The court reasoned that recognition of discharge order precluded the assertion of the discharged claim through individual litigation outside the bankruptcy proceeding. To date, this appears to be the only identified lower-court judgment recognizing the effect of a foreign discharge order in Korea.³⁴

More specifically, the court found that A, the assignor, had been included in the schedule of creditors in the Japanese bankruptcy proceeding, and had participated in the proceeding after receiving relevant notices prior to assignment of the claim to P. The court further determined that no circumstances existed that would render recognition contrary to public policy.

Accordingly, the court dismissed P's claim, and the judgment was affirmed on appeal by the appellate court (Incheon District Court 2016-Na-13185,) becoming final without further challenge. This case is particularly noteworthy because it accords with the objectives of the cross-border insolvency system and represents a departure from the relatively restrictive atmosphere that emerged among lower courts following the Supreme Court Judgment (2009-Ma-1600). It is possible that the courts adopted a comparatively receptive approach in part because the foreign proceeding originated in Japan, a jurisdiction geographically proximate to Korea and possessing a legal system sharing certain structural similarities with Korean insolvency law. While such considerations remain speculative, they may nevertheless help explain the courts' comparatively accommodating stance.

2. Seoul Central District Court 2016-GaHap-2074 (a position comparable to Art. X of the MLIJ)

In this case, P, an assignee who had acquired a damage claim against D (an individual debtor) from A (the original creditor, assignor), filed a lawsuit against D. D, however, had been discharged in the proceeding of the U.S.

34 Following the Supreme Court Judgment, this case applied the CPA and nevertheless recognized a discharge order rendered in Japanese bankruptcy proceedings. The decision may therefore be viewed as having reached, in practical terms, a result functionally consistent with the approach contemplated by the MLIJ.

Bankruptcy Court for the Central District of California.³⁵ Although the court of instance court (Seoul Central District Court 2016-GaHap-2074) ultimately rejected D's defence like many other lower courts above, its reasoning is particularly noteworthy.

Unlike the Supreme Court Judgment (2009-Ma-1600), which treated recognition of discharge orders as a matter to be processed through the recognition and enforcement framework applicable to foreign civil or commercial judgment's recognition or enforcement procedure, the court (Seoul Central District Court 2016-GaHap-2074) reasoned that domestic effect should instead be granted through relief under Chapter V of the DRBA, namely Korea's implementation of the MLCBI. The court rejected D's defence on the ground that:

- (1) the foreign proceeding itself had not been recognized in Korea; and (2) no relief had been granted recognizing or giving effect to the foreign discharge order. The relevant portion of the judgment states as follows:

A discharge order rendered in foreign proceedings does not automatically produce legal effects in Korea where neither recognition of the foreign proceeding nor relief supporting the discharge order has been granted pursuant to the Art. 631, 632, 636 of the DRBA. Accordingly, debtors discharged in foreign proceedings continue to retain authority to manage and dispose of their assets in Korea, and creditors likewise retain the ability to pursue individual execution absent such recognition and relief.

In the present case, for the discharge order rendered by the U.S. Bankruptcy Court for the Central District of California to produce legal effects in Korea, recognition of foreign proceedings and relief granting effect to the discharge order under the DRBA were both required. Because no such decisions had been rendered, D's defence cannot be accepted.

This reasoning is broadly consistent with the practice of the U.S. Bankruptcy Courts, that address recognition and enforcement of discharge orders through relief under the U.S. Bankruptcy Code as well as with the policy orientation reflected in Art. X of the MLIJ. Although the precise intention of the court cannot be known with certainty, the decision may be understood as reflecting deliberate departure from the framework established in

35 It is unclear from the judgment alone whether the proceeding was commenced under Chapter 7 or Chapter 13 of the U.S. Bankruptcy Code.

Supreme Court Judgment (2009-Ma-1600). Such an interpretation is plausible given the approach of the Judgment did not fully accommodate the objectives of existing cross-border insolvency system. Notably, no appeal was filed against the judgment.

3. Seoul Central District Court 2018-GaDan-5167140

This case is noteworthy because, it raises interesting issues relating to the operation of the cross-border insolvency system, although it does not concern a discharge order directly. P, an insurer, entered into a performance guarantee insurance contract with D, a German corporation. Following the occurrence of an insured event, P paid the insurance proceeds to the insured party (Korean Railroad Corporation). Pursuant to a contractual indemnity clause allowing recovery against D following payment to the insured, P subsequently sought reimbursement from D. However, D, argued that the lawsuit should be stayed because preliminary insolvency proceedings had been commenced against D before the Munich Bankruptcy Court (Germany) and a stay of compulsory execution had been ordered in connection with those proceedings.

The first-instance court (Seoul Central District Court 2018-GaDan-5167140) did not describe the German insolvency proceedings in detail, making it difficult to determine precisely which provisions of the German Insolvency Act (*Insolvenzordnung*) governed the relevant decisions. Presumably, the Munich Bankruptcy Court may have appointed a provisional insolvency administrator (*vorläufiger Maßnahmen*) pursuant to the Sec. 21(2)(1) of the German Insolvency Act.³⁶

Against this background, the court rejected D's argument and upheld P's claim, reasoning that:

'Even if insolvency proceedings for D have commenced in Germany, litigation against D does not automatically become stayed in Korea, unless a Korean court recognizes the foreign proceedings and grants relief staying the litigation in support of those proceedings.' No appeal was filed against the judgment.

The court's reasoning reflects an accurate understanding of the recognition-and-relief structure governing foreign insolvency proceedings under

36 For a Korean translation of the German Insolvency Act and related commentary, see Kim (2019), 32 et seq.

the MLCBI framework implemented through the DRBA. Of particular importance, the MLIJ excludes from the definition of IRJs judgments producing merely temporary or provisional effects, and instead leaves such matters to be governed by the existing MLCBI regime.

Accordingly, the first-instance court's conclusion would remain persuasive even if the MLIJ were formally adopted and incorporated into the DRBA. In other words, the appointment of a provisional administrator by the German court would not fall within the scope of the MLIJ. Rather, the foreign representative would still be required to seek: (1) recognition of the German insolvency proceedings; and (2) relief staying litigation against D under the Art. 635(1) or 636(1)(1) of the DRBA. This case therefore provides a useful illustration that the cross-border insolvency framework established by the MLCBI will continue to retain practical significance even in a legal system that adopts the MLIJ.

IV. Review – the need to avoid a return to territorialism

Regardless of the precise meaning of Supreme Court Judgment (2009-Ma-1600,) lower courts in Korea appear to have understood the Judgment as reflecting a generally restrictive approach toward the recognition and enforcement of discharge and plan confirmation orders. Although the reasoning varies across individual cases, the overall tendency of lower court practice (with only limited exceptions) has not favoured granting effect to discharge orders rendered in foreign insolvency proceedings. Such an approach may be regarded as comparatively restrictive and insufficiently aligned with contemporary international developments seeking to move beyond territorialism in cross-border insolvency.

Certainly, refusal to recognize foreign discharge orders may be justified where domestic creditors were not afforded adequate notice of foreign proceedings prior to issuance of the discharge order. In such circumstances, the concern lies not merely in the substantive effect of the discharge order itself but in defects affecting the procedure through which the order was established. This rationale accords with the Art. 14(f) of the MLIJ, which permits refusal where the interests of creditors and other interested persons were not adequately protected in the proceedings in which the judgment was rendered.

By contrast, it is necessary to be cautious in refusing the recognition or enforcement of foreign discharge orders on the basis of 'specific result.'

Excessively broad reliance upon public policy risk destabilizing the legal status of stakeholders who participated in foreign proceedings and may ultimately undermine equitable treatment among creditors.

Furthermore, assessment of the procedure through which a discharge order was established should not depend exclusively upon whether domestic creditors subjectively possessed actual knowledge of the foreign proceedings. Rather, substantial weight should also be given to whether the proceedings were conducted in accordance with the procedural requirements of the foreign law governing those proceedings.

This concern may be illustrated through Korean rehabilitation practice itself. During the rehabilitation proceedings of Hanjin Shipping Company under Chapter II of the DRBA,³⁷ the trustee utilized ‘public notice’³⁸ in lieu of individualized service or notification because accurate addresses of all foreign creditors could not be identified. Suppose certain foreign creditors were later to argue that a plan confirmation order involving debt adjustment should not be recognized merely because they had not become fully aware of the progress of the Korean Rehabilitation proceeding. If such arguments were accepted without any limitation in the name of public policy, Hanjin Shipping Company might continue to bear liabilities toward particular foreign creditors in certain jurisdictions, thereby leaving open the possibility of individual enforcement against the debtor’s assets abroad despite the confirmation order.³⁹

Such a result would pose a serious threat to the effectiveness of a restructuring plan designed to restore the debtor’s business operations and financial stability, enabling the debtor to resume commercial activity free from the risk of fragmented enforcement actions across multiple jurisdictions.⁴⁰

37 As noted above, General Rehabilitation Proceeding under the DRBA are broadly comparable to Chapter 11 proceedings under the U.S. Bankruptcy Code.

38 Where the DRBA requires both service and public notice, service may not be substituted by public notice, although service may otherwise be dispensed with at the court’s discretion. Nevertheless, in cases involving a large number of foreign creditors and stakeholders, broader use of public notice may be necessary. For further discussion of Korean rules on service and public notice, see Sim, Art. 8–33, in: Kwon, Soon-Il (ed.), *Debtor Rehabilitation and Bankruptcy Act I* (2021), 200, at 208.

39 For further discussion of the Hanjin Shipping case, see Kim, *Korean Yearbook of International Law* (KYIL) 4 (2016), 101, at 111.

40 Ships and aircraft, although legally treated in certain respects as immovable property, remain highly mobile and are frequently located outside the State in which insolvency proceedings are commenced. Shipping companies and airlines are therefore particularly likely to encounter such issues. For further discussion, see Kim, *Supreme Court*

Therefore, excessive emphasis upon creditors' actual awareness of foreign proceedings risks undermining the very objectives of the insolvency law. Accordingly, whether foreign proceedings were conducted in accordance with the procedural law governing those proceedings should itself constitute an important consideration in evaluating alleged violations of public policy.

D. Conclusion

I. Significance of Supreme Court judgment (2009-Ma-1600)

As demonstrated by the Supreme Court Judgment (2009-Ma-1600,) Cross-Border Insolvency practice of Korea possesses a sophisticated doctrinal foundation that merits greater attention within comparative and international insolvency scholarship.⁴¹

Admittedly, the Judgment may be open to criticism in its characterization of discharge orders and plan conformation orders. The Orders produce collective effects upon creditors generally rather than merely resolving bilateral disputes. Nevertheless, the Judgment retains considerable significance because it was among the earliest judicial decisions worldwide to engage directly with the nature of relief under the MLCBI and its relationship to the recognition and enforcement framework governing foreign judgments.⁴² Compared with the United Kingdom Supreme Court's decision in *Rubin*, the Judgment has attracted relatively limited international attention, due in part to differences in economic influence and in part to linguistic barriers affecting access to Korean jurisprudence.

Law Journal of Korea 8 (2018), 23, at 33. Similar issues may arise in group insolvency situations where one affiliate possesses such assets. For a Korean perspective on the EIR's treatment of group insolvency, see Kim, *Seoul National University Business, Finance and Law* (BFL) 81 (2017), 128, at 128. UNCITRAL likewise adopted the *Model Law on Enterprise Group Insolvency* in 2019.

41 The Seoul Bankruptcy Court has successfully cooperated with numerous foreign courts in cross-border insolvency matters. For further discussion, see Kim, *Korean Yearbook of International Law* (KYIL) 5 (2017), 189, at 198.

42 The Supreme Court Judgment was rendered two years and seven months prior to the *Rubin* judgment.

II. The need to improve lower-court practice of lower concerning foreign discharge orders

Whatever criticisms may be directed toward Supreme Court Judgment, the subsequent development of lower-court practice appears to warrant reconsideration. The Supreme Court of Korea did not necessarily intend to establish a generally restrictive framework for recognition and enforcement of foreign discharge orders. Yet, in practice, lower courts have often approached with excessive caution, sometimes refusing recognition where foreign proceedings had been conducted in accordance with applicable foreign law but domestic creditors lacked actual knowledge of the proceedings.

Such an approach is difficult to reconcile with both the objectives of cross-border insolvency law grounded in universalism and the private international law principle of, *lex fori concursus*.

Moreover, this restrictive tendency appears difficult to harmonize with another important judgment of the Supreme Court of Korea (2017-Da-257746 En banc),⁴³ which broadly interpreted the meaning of ‘service’ under the Art. 217(1), respecting international comity and cooperation between countries in the judicial process. Above all, an excessively restrictive approach toward recognition of foreign discharge orders may ultimately undermine the effectiveness of discharge orders rendered in Korean Bankruptcy Court. As exemplified in the case of Hanjin Shipping Company, lower courts practice might provide excuses for foreign creditors to hinder the effective and efficient restructuring of domestic debtors.

III. The need to introduce the MLIJ

Finally, Korea should give serious consideration to adopting the MLIJ and improving practices that have remained uncertain under the existing DRBA framework implementing the MLCBI.⁴⁴ Although not directly addressed

43 This judgment held that a particular form of substituted service, namely, service effected upon a person maintaining a close personal relationship with the recipient, constitutes valid service satisfying Art. 217(1)(2) of the CPA. The judgment reflects a shift in the Supreme Court of Korea’s approach from a traditionally restrictive position toward a more recognition-friendly stance aimed at facilitating the recognition and enforcement of foreign judgments. For further discussion, see Kim, *Seoul Law Journal* 63(3) (2022), 241, at 262.

44 For further discussion, see Kim (2022), 265.

in this article, the MLIJ has attracted increasing scholarly and practical attention, particularly in the U.S., where a growing body of literature has advocated its adoption⁴⁵ Likewise, commentators in Commonwealth jurisdictions, such as Australia and Singapore, have recently questioned the continued appropriateness of the Gibbs Rule established in the U.K.,⁴⁶ and some scholars have argued that the U.K. itself, whose jurisprudence helped precipitate the creation of the MLIJ, should take the lead in adopting the instrument.⁴⁷ Given the likelihood that additional jurisdictions will adopt the MLIJ in the coming years, early incorporation of the MLIJ into the DRBA would place Korea in a favourable position to contribute meaningfully to the future development of cross-border insolvency practice and policy.

Adoption of the MLIJ would not necessarily create conflict with other international instruments that Korea may join in the future, including the Convention on Choice of Court Agreements (2005) and the Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (2019). Both conventions generally exclude insolvency matters from their scope of application,⁴⁸ thereby preserving an independent regulatory space for the Model Law governing IRJs. Nevertheless, further examination of the relationship between these instruments remains necessary. The Hague Conventions generally adopt an approach excluding only judgments ‘directly related’⁴⁹ to insolvency, while the precise meaning and scope of that formulation remain subject to continuing debate.

In this respect, the jurisprudence of the Court of Justice of the European Union concerning the EIR, particularly its interpretation of the phrase

45 For a leading contribution reflecting the U.S. approach, see Pottow, *Michigan Journal of International Law* 40(3) (2019), 479, at 479.

46 For recent criticism of the Gibbs Rule, see Ho, para. 4-093. Particularly noteworthy is the proposal to use COMI (Centre of Main Interests) as the connecting factor for determining the law governing debt adjustment, while preserving the contractual foundation underlying the Gibbs Rule. For further discussion, see Sachdev, *American Bankruptcy Law Journal* 93 (2019), 343, at 373. For a broader discussion of COMI from a Korean perspective, see Kim, Master’s thesis (2012), 127 et seq.

47 Churchill Jr., *Brooklyn Journal of International Law* 46(1) (2020), 215, at 215.

48 Kim (2022), 176.

49 Regarding the 2005 Convention on Choice of Court Agreements, see Hartley / Dogauchi, para. 56. Regarding the 2019 Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, see Garcimartín / Saumier, para. 49.

judgments deriving directly from the insolvency proceedings and which are closely linked with them,⁵⁰ may provide valuable guidance.⁵¹

In contemporary commercial society, it is increasingly common for both corporations or individuals to hold assets abroad, engage in cross-border business activities, and establish legal relationships with foreign creditors. Cross-border insolvency is therefore no longer an exceptional issue but one that modern legal systems must routinely anticipate and address. What debtors ultimately want to achieve through insolvency proceedings is the debt adjustment through plan confirmation orders or discharge orders. Those objectives can be fully realized only where foreign proceedings and the IRJs are recognized and enforced in a coherent and predictable manner across jurisdictions. Accordingly, greater attention should now be directed toward the harmonious operation of the MLCBI and the timely adoption of the MLIJ.

50 Art. 32(1), second paragraph, of the EIR.

51 For example, avoidance actions are regarded as actions deriving directly from insolvency proceedings and closely linked to them pursuant to Recital 35 of the EIR. However, the CJEU held that avoidance actions brought by a third party who had acquired the claim from the insolvency representative do not fall within this category because they are pursued not for the benefit of creditors generally but solely for the benefit of the assignee (*F-Tex SIA v Lietuvos-Anglijos UAB 'Jadecloud-Vilma'*, Case C-213/10, ECLI:EU:C:2012:215, para. 49, judgment of 19 April 2012). For additional CJEU decisions concerning this issue, see Bork / van Zwieten / Oberhammer, Art. 32 mn. 32.14 et seq. For a Korean perspective on these CJEU decisions, see Kim, Doctoral thesis (2022), 195 et seq.

Annex

Case 8:04-bk-10816-ES Doc 181 Filed 12/16/05 Entered 12/16/05 17:59:06 Desc
b1811 Page 1 of 1

**United States Bankruptcy Court
Central District Of California**

411 West Fourth Street, Suite 2030 Santa Ana, CA 92701-4593

DISCHARGE OF DEBTOR

DEBTOR(S) INFORMATION:

Todd Oh

SSN: xxx-xx-6273

EIN: N/A

aka WON KYUNG OH, aka WON K OH, aka
WON K. OH, aka KYUNG OH WON, aka WON
KYUNG, ...

47 Oak View Drive

Aliso Viejo, CA 92656

BANKRUPTCY NO. 8:04-bk-10816-RA

CHAPTER 11

A petition commencing a case under Title 11, United States Code, was filed by or against the debtor named above on February 9, 2004 and no complaint objecting to the discharge of the debtor was filed within the time fixed by the Court (or that a complaint objecting to discharge of the debtor was filed and, after due notice and hearing, was not sustained). Therefore,

IT IS ORDERED THAT:

- 1) The debtor has no personal liability for debts discharged under 11 U.S.C. Section 727 (or) 1141 (or) 1228 (or) 1328, except those debts determined by order of a court with competent jurisdiction not to be discharged pursuant to 11 U.S.C. Section 523;
- 2) Any judgment heretofore or hereafter obtained in any court other than this court is null and void as a determination of the personal liability of the debtor with respect to any debts discharged under 11 U.S.C. Section 727 (or) 1141 (or) 1228 (or) 1328, except those debts determined by order of a court with competent jurisdiction not to be discharged; and
- 3) All creditors whose debts are discharged by this order and all creditors whose judgments are declared null and void by this order are enjoined from instituting or continuing any action or employing any process or engaging in any act to collect such debts as personal liabilities of the debtor.

*The Discharge Order rendered by the US Bankruptcy Court in relation to the
Supreme Court of Korea Judgment(2009-Ma-1600)*

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Does the Recast Insolvency Regulation violate the ordre public of Switzerland?

Daniel Staehelin and Élodie Kleider

Abstract:

Switzerland is located in the middle of Europe but remains a third state to the European Union. An insolvency proceeding opened in a European Member State and involving goods and/or creditors located in Switzerland is therefore a proceeding involving assets and/or liabilities associated to a third State. As a consequence, European administrators need to comply with Swiss law to obtain recognition of the bankruptcy decree and cooperation of the Swiss authorities (A.). The Recast Insolvency Regulation contains rules designed for European matters, for goods and creditors located within the European Union. Using these rules to involve goods located in Switzerland, while reserving Chapter IV to creditors domiciled in Member States, may induce a discrimination of the creditors domiciled in Switzerland. Such an unequal treatment may be considered as a violation of the formal and of the substantive *ordre public* of Switzerland (B.).

Key words: Switzerland. Ancillary bankruptcy proceeding. Universality. Schmid. Nortel. Foreign creditor. Recognition. Unequal treatment of creditors. Public policy. Lodging of claim

A. *The Federal Act on private international law of December 18th, 1987, Chapter 11. Bankruptcy and composition, revised on March 16th, 2018*

Switzerland is neither a member of the European Union, nor of the European Economic Area. Concerning private international law matters, Switzerland is part of the Lugano Convention, which is not applicable on insolvency matters (Art.1 para. 2 lit. b Lugano Convention), but there is no such parallel convention for such matters. As a consequence, the recognition of foreign bankruptcy decrees by Swiss courts relies on Chapter

11 of the Federal Act on Private International Law (PILA) from 18.12.1987¹. These rules have been revised on 16.03.2018 with effect from 01.01.2019.

Chapter 11 is based on the principle of territoriality with legal assistance. Key is the recognition of the foreign bankruptcy decree by a Swiss court, which is mandatory. No preliminary recognition is possible. Recognition will be granted, if the requirements of article 166 PILA are fulfilled: the decision is enforceable in the State where it has been issued, recognition will not induce any violation of the Swiss formal or substantive *ordre public*, and indirect competence is verified. Indeed, only decisions issued in the debtor's State of domicile, or in the State of the centre of the debtor's main interests, provided the debtor was not domiciled in Switzerland when the foreign proceedings were opened, may be recognized.

Recognition, in principle, induces the opening of an auxiliary bankruptcy proceeding with a civil servant as administrator, and governed by Swiss law. Foreign administrators have no powers on Swiss territory in the frame of an auxiliary bankruptcy proceeding. The auxiliary estate of this proceeding serves for claims secured by assets located in Switzerland, privileged claims of creditors domiciled in Switzerland, and for claims arising from liabilities of the debtor's branch in Switzerland. Any surplus shall be remitted to the foreign bankruptcy estate if the foreign schedule of claims is recognized by the Swiss court, which will check in particular if the creditors domiciled in Switzerland have been included fairly in the foreign schedule of claims. In case of non-recognition, the surplus is distributed among those creditors.

The revision of Chapter 11 of 16.03.2018 gave to the court the possibility to renunciate to the opening of an auxiliary proceeding in Switzerland. There are however two conditions to such a renunciation. Firstly, no privileged or secured claims have been filed. Secondly, the other creditors domiciled in Switzerland are treated appropriately in the foreign proceeding. If the court renounces to the auxiliary bankruptcy proceeding, the foreign administrator may dispose over the assets of the debtor located in Switzerland, but only like a private person acting according to Swiss private law². The performance of sovereign acts, the use of coercive measures or the right to settle disputes are forbidden.

1 Chapter 11 PILA is applicable to all insolvency matters, except in cases where The Federal Law on Banks and Savings Banks of November 8th, 1934, is applicable, and in cases where conventional rules are applicable.

2 Kleider/Staehelin, AJP/PJA 2021, 361 (361f.).

B. Universality of the main insolvency proceedings of Regulation 2015/848, in matters concerning Switzerland

An insolvency proceeding relying on the principle of universalism shall encompass all the assets of the debtor and all of his creditors, no matter where they are located. According to recital 23 of the Recast EIR, main insolvency proceedings have a universal scope³. Worldwide universality will however remain a goal, if recognition is not granted abroad by the foreign authorities. Within the European Union, recognition relies on Chapter II of the Recast EIR. Universality could therefore be limited to European Member States for practical reasons, where the European judicial area allows judgments to cross borders more easily. All of this aside, both assets and liabilities concerned by the European rules must have an identical scope, either European or worldwide, but identical. If only the assets located in Switzerland benefit from the European rules, but not the creditors domiciled there, practitioners may have troubles obtaining recognition in Switzerland.

I. Universality, concerning assets located in Switzerland

The universal scope of the main insolvency proceedings shall encompass ‘all the debtor’s assets’, except for assets involved in secondary insolvency proceedings (recital 23 EIR). Does it mean that assets located in third countries are included?

The *Virgós/Schmit* Report seemed to encourage this interpretation⁴. The problem is, neither Regulation 1346/2000 nor its recast Regulation contain provisions clearly dealing with third States matters. Consequently, when the Court of Justice of the European Union got asked in such cases about Regulation 1346/2000, it gave a shaky answer. Decision *Schmid v Hertel* let believe that the Insolvency Regulation was applicable to third States matters. However, only provisions that did not expressly prescribe a cross-border element involving at least two Member States were concerned⁵. The

3 Concerning Regulation 1346/2000, recital 12.

4 Virgós /Schmit, p. 15, para. 19 and p. 51, para. 73.

5 ECJ, 16.01.2014 – case C-328/12, ECLI:EU:C:2014:6 para. 20–29 – R. Schmid v L. Hertel.

Nortel decision then gave a very confusing solution⁶. One may believe, based on this decision, that assets located in third States belonged to the main insolvency proceeding⁷. The *Nortel* case is particularly intriguing, as it concerned Art. 2 (g) EIR, a provision clearly restricted to European matters. By doing this, the Court crossed the line drawn in the *Schmid* decision and used a *contra legem* interpretation⁸. The method is questionable, and it seems like national courts do not follow this path. The German Supreme Court indeed applied its ordinary private international law, and not the Insolvency Regulation, to assets located in Switzerland, in a decision rendered after the *Nortel* decision⁹.

Even though it is doubtful, some authors believe the *Schmid*- and the *Nortel* decisions to be relevant to interpret the Recast Insolvency Regulation¹⁰. If this were true, and with the abovementioned interpretation of the *Nortel* decision, Regulation 2015/848 would be applicable to third states matters.

Involving theoretically the assets located in third States in the main insolvency proceeding is one thing, reaching them for real is another one. In order to do this, local law needs to be complied with. Decisions of the Court of Justice of the European Union have no mandatory effects in third States. Concerning Switzerland, Chapter 11 of the PILA will be applied. The Lugano Convention will be of no help, as ‘bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings’ are expressly kept outside its scope (Art. 1 para. 2 lit. b Lugano Convention). Of course, Art. 19 Recast EIR is only applicable within the European territory, and the Lugano Convention cannot simply replace the Brussels Regulation in matters concerning Switzerland, in order to obtain the recognition and enforceability of judgments concerning the proceeding, like its course and closure (Art. 32 (1) Recast EIR).

6 ECJ, 11.06.2015 – case C-649/13, ECLI:EU:C:2015:384 para. 53–54 – Comité d’entreprise de *Nortel Networks SA v Cosme Rogeau*.

7 Bork/van Zwieten/Dammann, Art. 47 mn. 47.20; Menjucq, Rev. proc. coll. juillet 2015, comm. 91; Mankowski/Müller/Schmidt/Schmidt, EuInsVO 2017 Art. 2 mn. 26.

8 Henry, Rev. Sociétés 2015, 549 (549f.); Henry, BJE 1^{er} juillet 2015, 209 (209f.).

9 Bundesgerichtshof, 20.07.2017 – IX ZB 63/16.

10 For a list of arguments justifying that Regulation 2015/848 is restricted to European matters: Kleider, para. 81–86; Kleider, Rev. proc. coll. janvier 2020, étude 6.

II. Universality, concerning liabilities claimed by creditors domiciled in Switzerland

According to the Insolvency Recast Regulation, ‘foreign creditors’ are only European creditors, as Art. 2 (g) defines them as creditors having their habitual residence, domicile or registered office in another Member State than the State of the opening of the proceeding. Therefore, creditors with their habitual residence, domicile, or registered office in Switzerland cannot benefit from the rules contained in Chapter IV.

Foreign creditors always suffer from a certain unequal treatment, due to geographic distance and language barriers. Chapter IV shall re-establish more equality, but only for creditors domiciled in the European Union. Creditors domiciled in third States are subject to the national rules of each Member State. One may call this an unequal treatment, even a real discrimination¹¹. The problem doesn’t come from the application of two different sets of rules, one for the European liabilities claimed in the proceeding, and another one for the non-European liabilities. This is not unusual. The problem comes from the interpretation given by the Court of Justice. Universality is a coin with two sides, necessarily of same size, that are assets and liabilities. Since the *Nortel* decision, assets located in Switzerland may be encompassed in the main proceeding, but creditors not. This means, that one side has become universal worldwide, while the other one remained territorial, within the borders of the Union.

From a European point of view, the situation is fully acceptable, because the principle of non-discrimination is made for European matters. For practitioners, the third State’s point of view will however be a lot more important, because their goal is to recover the assets lying there. And some third countries control if creditors have received an equal treatment, in order to accept to cooperate. This is the case of Switzerland. Discriminations of creditors based on the location of their residence or based on their nationality are incompatible with the Swiss public policy¹², and will be sanctioned by a denial of recognition of the foreign schedule of debts, according to Art. 173 PILA. The 2018 recast of Chapter 11 of the PILA did not change this logic: the conduct of an ancillary bankruptcy proceeding remains the rule and, if the court decides to waive the procedure on ancillary bankruptcy, it will nonetheless verify if the foreign proceeding takes

11 About this, Kleider, para. 308–319.

12 Swiss Federal Supreme Court, 06.10.1999, 126 III 101, para. 3. b.

adequately account of the claims of the creditors domiciled in Switzerland who rose other claims than those referred to in Art. 172(1) PILA.

The Swiss judges will decide if recognizing the foreign decision is incompatible with the Swiss public policy, but only manifest incompatibilities will be considered. Creditors are treated unequally, based on the location of their residence in Europe or in Switzerland. This will hurt the Swiss *ordre public*¹³. The question is then to see, if there is a manifest incompatibility. In practice, recognition shall be allowed if the creditors domiciled in Switzerland benefited from certain rights, taking their difficulties as foreign creditors in the proceeding into account. Creditors located in Switzerland must be informed of the opening of an insolvency proceeding, and mistakes occurring during the lodging of the claims must be rectifiable¹⁴.

Looking at Chapter IV of the Recast Insolvency Regulation, foreign creditors benefit from one major advantage: they may lodge their claims in the official language of the institutions of the Union of their choice, using a standard claims form. This makes a real difference with national laws, that often require the lodging of the claim to be done in the local official language. Swiss law requires this too, but from all foreign creditors. Such an unequal treatment, based on the location of the residence of the creditor in the Europe Union or in Switzerland, will hurt the Swiss public policy. It may not be enough to be manifestly incompatible with the Swiss public policy and induce a denial of recognition.

It will be up to the Swiss judges to analyse in each case if creditors domiciled in Switzerland have in fact been treated fairly enough compared to creditors domiciled in Europe, or if the unequal treatment of creditors shall be sanctioned.

If the Recast Insolvency Regulation were to be applicable to third states matters, the use of the standard forms could easily be generalized. In the Swiss case, access to the standard claims' forms and particularly to those in German, French and Italian would be of great use. Concerning countries using another official language than the ones from the Union, the standard form in English would already be an advantage.

13 Kleider, 343.

14 Staehelin, p. 167; Braconi, p. 110–111, Fn. 250, 257, 258; Kleider, para. 348–350.

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UK schemes, plans and international recognition

Gerard McCormack

Abstract:

This paper examines the international recognition of UK schemes of arrangement and restructuring plans under the Companies Act 2006, particularly in the post-Brexit environment. It explores the statutory framework and practical application of UK court jurisdiction in sanctioning these restructuring mechanisms, emphasizing the 'sufficient connection' test that enables foreign companies to access UK proceedings despite not having their centre of main interests in the UK. The analysis highlights how schemes of arrangement, once limited by the Insolvency Regulation's scope, now operate as a flexible and stigma-free alternative to formal insolvency, and it evaluates the potential for cross-border recognition under instruments such as the UNCITRAL Model Law, Rome I Regulation, and the Lugano Convention. The paper further considers the challenges posed by jurisdictional differences and the impact on creditor rights in a global restructuring landscape.

Keywords: UK schemes of arrangement; restructuring plans; Companies Act 2006; international recognition; post-Brexit; cross-border insolvency; sufficient connection test; UNCITRAL Model Law; Rome I Regulation; Lugano Convention.

A. Introduction

This paper addresses briefly schemes of arrangement and restructuring plans under the UK Companies Act and their international recognition in the post-Brexit world. Section 221 Companies Act 2006 gives the English courts jurisdiction to wind up companies not registered under the Companies Act. But one should distinguish between the existence of the statutory jurisdiction and the actual exercise of that jurisdiction in a particular case. The courts have jurisdiction to sanction a scheme of arrangement under Part 26 Companies Act 2006 in relation to a foreign registered

company. That theoretical jurisdiction is co-existence with the power to wind up a foreign registered company under s 221. There are now, however, well-developed principles that control and confine the exercise of that jurisdiction including the company having a 'sufficient connection' with the UK and that sanctioning the scheme will provide benefits to stakeholders in the company and achieve appropriate recognition overseas.

The same general principles have been held to apply also to the new 'super scheme' or restructuring plan procedure under Part 26A of the Companies Act 2006.

B. Schemes of arrangement

While once considered a somewhat clumsy mechanism,¹ schemes of arrangement allow certain corporate problems such as excessive levels of debt to be addressed without necessarily tending to all the corporate ills. Schemes of arrangement contributed to the UK becoming the restructuring capital of Europe with a number financially stretched foreign companies using the UK procedure to restructure their debts.²

The fact that schemes of arrangement were not listed in Annex A means that they were not entitled to the benefits of automatic EU-wide recognition under the Insolvency Regulation, but this was offset against the fact that the ability of the English courts to sanction schemes was not hampered by the jurisdictional conditions of the Regulation. In particular, there was no need to establish that the 'centre of main interests' (COMI) of the company was in the UK. It may be however, that an order of a court sanctioning ('approving') a scheme of arrangement is regarded as a court judgement for the purpose of the Jurisdiction and Judgments (Brussels I) Regulation and is entitled to Europe-wide recognition on that basis. The courts could sanction a scheme if a foreign company was deemed to have a 'sufficient connection' with the UK, even though its COMI may not have been in the

1 Schemes were described in the Joint DTI/Treasury Review of Company Rescue and Business Reconstructions Mechanisms (London, TSO, 2000) at para 43 and the 1982 Cork Committee Report on Insolvency Law and Practice (1982, Cmnd 8558) Ch 7 as slow and cumbersome.

2 See *Re Seat Pagine Gialle SpA* [2012] EWHC 3686 (Ch); *Primacom Holdings GmbH v Credit Agricole* [2011] EWHC 3746 (Ch); *Re Rodenstock GmbH* [2011] EWHC 1104 (Ch), [2011] Bus LR 1245 and see generally Ho JIBLR 434; J Payne, 14 *European Business Organization Law Review*, 563.

UK. The 'sufficient connection' test was established in cases like *Re Drax Holdings Ltd*³ and in *Re Rodenstock GmbH*,⁴ where a sufficient connection was deemed to exist by virtue of the fact that the company's credit facilities contained English choice of law and jurisdiction clauses and also by reason of expert evidence that the relevant foreign courts would recognise the scheme.

Schemes of arrangement enable a company to enter into a compromise or arrangement with any class of creditors, or members with some element of 'give and take' on both sides. In this way, the capital structure of an ailing company may be rearranged. Schemes of arrangement can also be approved in cases where there is no insolvency (e.g. mergers).

The company makes a proposal to rearrange its affairs and makes a proposal to the court to convene meetings of classes of creditors or members whose rights are proposed to be rearranged. The court will designate the appropriate classes and order class meetings to be convened. The class meetings are held and the relevant class consent is deemed to have been given if approval is forthcoming from a majority in number and 75 % of members or creditors or creditors within the relevant class. The scheme proposal becomes binding on the dissenting minority within the class whose rights are said to be 'cramped down' if it is approved by the court at a final sanction hearing.

The existing UK scheme of arrangement has been highly praised and, indeed, spoken of as a model for the 'early stage' restructuring procedures envisaged by the EU's recent Restructuring Directive – Directive 2019/1023.⁵ It was suggested that a procedure modelled on the UK scheme would make restructuring 'procedures less cumbersome, less costly and speedier than they are currently in some Member States'.⁶ Certainly, the procedure does not have any bankruptcy or insolvency stigma since it is a procedure based on company law rather than insolvency law.

The UK scheme can be used as a powerful instrument for debt restructuring, the court said in *Re Van Gansewinkel Groep BV*.⁷

3 *Re Drax Holdings* [2004] 1 WLR 1049.

4 *Re Rodenstock GmbH* [2011] EWHC 1104 (Ch), [2011] Bus LR 1245; See also *Primacom Holdings GmbH v Credit Agricole* [2011] EWHC 3746 (Ch); *Re Seat Pagine Gialle SpA* [2012] EWHC 3686 (Ch); *Re Magyar Telecom BV* [2013] EWHC 3800 (Ch), [2015] 1 BCLC 418; *Re Dtek Finance BV* [2015] EWHC 1164 (Ch).

5 On the Directive see McCormack, *passim*.

6 See SWD (2014) 61, p. 38.

7 *Re Van Gansewinkel Groep BV* [2015] EWHC 2151 (Ch).

The use of schemes of arrangement in this way has been prompted by an understandable desire to save the companies in question from formal insolvency proceedings which would be destructive of value for creditors and lead to substantial loss of jobs. The inherent flexibility of a scheme of arrangement has proved particularly valuable in such cases where the existing financing agreements do not contain provisions permitting voluntary modification of their terms by an achievable majority of creditors, or in cases of pan-European groups of companies where co-ordination of rescue procedures or formal insolvency proceedings across more than one country would prove impossible or very difficult to achieve without substantial difficulty, delay and expense.

The scheme involves 'debtor-in-possession'. The company management can prepare a restructuring plan and submit it to creditors, though obviously in practice there is likely to be a high degree of interaction and consultation with creditors in formulating the detailed terms of the plan and making sure that it is likely to meet with creditor approval.

At the final, sanction, stage, the scheme coming before the court for approval. The court must be satisfied that the scheme proposed is a reasonable one such that a reasonable member of the class concerned and acting in respect of its own interests could have voted for it.⁸

The scheme, however, lacks the facility of cross-class creditor cram-down. While dissenting creditors within a class may be 'crammed-down', there is no scope for dissenting classes of creditors in their entirety to be 'crammed-down'. This fact makes the composition of creditor classes very important and leads to more complicated strategies.

It has been held however, that it is only necessary to get the consent of those with an economic interest in the proposed restructuring. Schemes might therefore be used to 'squeeze out' creditors who are 'out of the money' as in *Re MyTravel plc*⁹ and *Re IMO Carwash*.¹⁰ In broad essence, company assets are transferred to a 'newco', together with some liabilities of creditors who are 'in the money', but 'out of the money' creditors are left stranded with claims against the 'oldco' which no longer has any assets. Such schemes are generally referred to as 'prepack' or 'business transfer' schemes. It may be however, that even more complicated mechanisms are

8 See *Anglo-Continental Supply Co Ltd* [1922] 2 Ch 723, 736.

9 See *Re My Travel Group plc* 2004 EWHC 2741 (Ch); *Re Tea Corp Ltd* 1904 1 Ch 12. For a general discussion, see Seah, *International Insolvency Review* 2011, 91 (161).

10 This case is also referred to as *Re Bluebrook* [2009] EWHC 2114 (Ch).

needed if the junior creditors have bargained for rights of a proprietary nature in a contractually agreed 'security package'.

Business transfer schemes may be complex and they also give rise to questions of fairness and procedural propriety.¹¹ The courts consider the question of valuation at the sanction stage but there may be difficult questions about where in the debt structure the value 'breaks', how one assesses value and what is the relevant comparator.

C. Restructuring plans

Since Brexit, the UK is no longer an EU Member State and was not obliged to implement the EU Restructuring Directive. Nevertheless, in line with the Restructuring Directive and also in line with the US Chapter 11¹², the Corporate Insolvency and Governance Act 2020 made certain changes to restructuring law and practice in the UK.¹³ In particular, the Act introduced a new Part 26A in the UK Companies Act with provision for restructuring plans that add additional features to the previously existing schemes of arrangement procedure.¹⁴ The 2020 Act makes provision for cross class cram down so long as certain conditions are satisfied.

Under a restructuring plan, a company is enabled to bind dissenting classes of creditors or shareholders, provided at least one class approves the plan by at least 75 % by value of those voting. A scheme of arrangement under Part 26 however, has to be approved by each class. Moreover, a

11 See generally Crystal/Mokal, *International Corporate Rescue* 2006, 63 (123); Segal, *Insolvency Intelligence* 2007, 49.

12 For a general discussion of the issues see Payne, *Law Quarterly Review* 2014, 282.

13 For a comprehensive analysis see INSOL Special Report by McCormack, *Permanent changes to the UK's corporate restructuring and insolvency laws in the wake of Covid-19* (London, INSOL International, October 2020).

14 UK Insolvency Service, *A Review of the Corporate Insolvency Framework*, p. 23, mn.9.9 states: The cram-down of a rescue plan onto 'out of the money' creditors is currently possible in the UK only through a costly mix of using a scheme of arrangement and an administration. The Government believes that developing a more sophisticated restructuring process with the ability to 'cram-down' may facilitate more restructurings, and the subsequent survival of the corporate entity as a going concern. <https://www.google.com/url?sa=t&source=web&rct=j&opi=89978449&url=https://assets.publishing.service.gov.uk/media/5a816394ed915d74e33fdef9/A_Review_of_the_Corporate_Insolvency_Framework.pdf&ved=2ahUKewizna2ijaWKAxUPR_EDHX-CHNgQFnoECBIQAQ&usg=AOvVaw0Uzi3wzI2uU8muQai6YbMo> (last accessed 02.07.2024).

scheme, unlike a restructuring plan, contains a ‘numerosity’ i.e. a majority in number of persons within each relevant class, requirement.

Like with a scheme, there are, typically, two hearings in relation to a restructuring plan. At the convening hearing, the court principally considers whether the proposed classes have been properly constituted and meetings of those classes ought to be convened to vote. There is a second (sanctioning) hearing where the court hears the result of the votes and has to decide whether to give its sanction.

In a plan, any creditor or member whose rights are affected by the plan must be permitted to participate in the process, but those who have no genuine economic interest in the company may be excluded. Affected members and creditors must be given sufficient information to be able to vote. A restructuring plan (or scheme) sanctioned by the court is binding on all creditors / shareholders of the relevant classes and the company. Valuation issues are likely to be particularly important at the sanction stage (and possibly even at the initial convening stage), including consideration of what is the likely alternative if confirmation is refused,¹⁵ and whether those with a genuine economic interest have been excluded from participation in the process.

The court has to be satisfied that the proposal was a reasonable one such that a reasonable member of the class concerned and acting in respect of its own interests could have voted for it. While the court was not a rubber stamp¹⁶, it need not be satisfied that the proposal is the only fair one. Thus, the court must be satisfied that, not only the statutory provisions have been observed, the relevant class must have been fairly represented by those who attended the meeting and that the statutory majority were acting bona fide and not coercing the minority in order to promote interests adverse to those of the class they purport to represent.

D. Schemes and international recognition and effectiveness

Re DTEK Energy BV [2021] EWHC 1551 (Ch) illustrates how schemes may still prove effective for international companies in post Brexit world. The same should apply for restructuring plans but with one added twist.

15 Possibly an alternative plan or a sale of the business rather than a liquidation/administration.

16 See in this connection *Re All Scheme Ltd* [2021] EWHC 1401 (Ch).

This restructuring concerned the restructuring of bank and bondholder (note holder) liabilities involving a group of companies. The financing arm of the group was incorporated in the UK but the parent company was located in the Netherlands whereas the main operating companies were located in the Ukraine where the companies supplied a large part of the energy market. It also appeared that the group had some operations in Cyprus. The group's operations had been adversely affected by the ongoing tension between Ukraine and Russia as well as other matters. The group proposed a restructuring of its loan obligations which essentially involved an amendment and extension of these obligations. These liabilities were governed by a mixture of English and New York law and some were subject to a Singapore arbitration clause. There was large scale creditor 'buy in' to the restructuring proposals but a Swiss-incorporated lender objected. This lender was part of the well-known Russian conglomerate, Gazprom.

Separate inter-connected schemes of arrangements were proposed for the bank creditors and the bondholder creditors. Separate class meeting was ordered to be held and then held with unanimous creditor approval of the proposals by those attending and voting. The dissentient creditor, Gazprombank, who held up to 10 % of the outstanding liabilities failed to attend the meeting but nevertheless, objected to confirmation of the schemes at the court sanction hearing.

The court considered that the scheme was 'fair' and rejected the Gazprombank objection. It embodied a compromise or arrangement that might reasonably be entered into by an intelligent and honest class member addressing the issues for decision having regard to its ordinary class interests. Gazprombank was not in a significantly stronger position as regards repayment of its loan than any other scheme creditor. The scheme did not operate unfairly by compelling it to compromise recovery rights which were materially better those of other scheme creditors,

Gazprombank also argued that the English Court could not be satisfied as to the international effectiveness of the scheme post-Brexit, such that any grant of sanction would be an act in vain. But the court said that there was undisputed evidence that the restructuring would be recognised in the US pursuant to Chapter 15 of the US Bankruptcy Code which implemented the UNCITRAL Model Law on Cross Border Insolvency Law in the US. The Model Law had also been implemented within the EU in Greece, Poland, Romania and Slovenia and also in Singapore

According to established principles governing the approval of schemes:

1. The Court must be satisfied that the scheme will achieve its purpose and will not make an order which has no substantial effect.
2. It must be satisfied that the scheme achieves a substantial purpose in the key jurisdictions in which the scheme company has liabilities or assets.
3. It does not need certainty as to the position under foreign law, but does require credible evidence it will not be acting in vain.
4. Credible evidence must show that there is a reasonable prospect that the scheme will be recognised and given effect.

The court stated that there was always uncertainty as to how schemes operate within the framework of Regulation 1215/2012 (the 'Judgments Regulation'). When considering whether the Judgments Regulation presented a jurisdictional bar to the Court exercising jurisdiction over EU domiciled scheme members or creditors, it was assumed to apply but when considering international effectiveness, the English Court would look for expert evidence which demonstrated alternative bases. The court said that 'English Courts have ... never regarded the Judgments Regulation alone as a sufficient ground upon which to assess international effectiveness: and the fact that it is no longer available has not transformed the landscape' [para 31]. Such alternative bases included the Rome I Regulation (EU Regulation 593/2008 on the law applicable to contractual obligations)¹⁷ and autonomous private international law rules in different States.

After hearing evidence from foreign law experts on whether the scheme would be recognised in Cyprus under Rome I, the court was satisfied that there was a reasonable prospect that the scheme would be substantially effective in Cyprus. It did not agree with Gazprombank's argument that Rome I covers only purely consensual variations or extinguishing of contractual rights.

On recognition in the Netherlands, the English court held that it could not decide between rival expert reports on foreign law matters. It focussed instead on the question of whether there was a reasonable prospect of the scheme having substantial effect in the Netherlands, both as regards the consenting creditors and as against Gazprombank.

17 The Regulation was 'onshored' in the The Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc.) (EU Exit) Regulations 2019 SI 2019/834.

E. Restructuring plans and their (non) recognition under the Judgments Regulation and the Lugano Convention

Since Brexit the Judgments Regulation does not provide a basis for recognising the effects of a UK scheme of arrangement in the EU 27. Moreover, schemes were not listed by the UK in Annex A to the Insolvency Regulation and were therefore outside that Regulation.

The Lugano Convention may provide a basis for recognising UK schemes, though not it seems for UK restructuring plans. The Lugano Convention forms the basis of the EU's private international law relationship with Norway, Iceland and Switzerland and is based on the original version of the Judgments Regulation.

The Lugano Convention also applied to the UK by virtue of the UK being treated as an EU member State for the purposes of international agreements entered into by the EU. This arrangement ended at the end of the Brexit implementation period. On 8 April 2020 the UK applied to accede to the Lugano Convention as an independent contracting party.¹⁸ That application is however subject to the agreement of the contracting parties to the Lugano Convention, including the EU, and that agreement has not yet been forthcoming. It should be noted that the Lugano Convention does not have the CJEU as the apex of judicial authority.¹⁹

While the Judgments Regulation applies generally to civil and commercial matters, there are certain exceptions stated however, in Article 1 (2) such that it does not apply to 'bankruptcy, proceedings relating to the winding up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings'.

While there are some indications that, in respect of certain insolvency-related matters, there may be overlaps and concurrent jurisdiction between the Judgments Regulation and the Insolvency Regulation, more recently the CJEU in affirmed that there should be no gaps and overlaps. In Case C-641/16 *Tunkers France v Expert France*²⁰ it held that actions excluded from the application of the Judgments Regulation insofar as they come

18 See UK Government, 'Support for the UK's intent to accede to the Lugano Convention 2007' <<https://www.gov.uk/government/news/support-for-the-uks-intent-to-accede-to-the-lugano-convention-2007>> (last accessed on 02.07.2024).

19 See Swiss Confederation, 'Lugano Convention 2007' <<https://www.bj.admin.ch/bj/en/home/wirtschaft/privatrecht/lugue-2007.html>> (last accessed 02.07.2024).

20 ECJ 09.11.2017 – case C-641/16, ECLI:EU:C:2017:847; and see also ECJ 20.12.2017 – case C-649/16, ECLI:EU:C:2017:986, para. 24 – *Valach v Waldvierter Sparkasse*

under ‘bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings’ fall within the scope of the Insolvency Regulation. Correspondingly, actions that fall outside the scope of the Insolvency Regulation fall within the scope of the Judgments Regulation.²¹

This dovetailing principle cannot be accepted in its entirety however, particularly when one considers the possible relevance of the Lugano Convention where there is an equivalent Article 1(2)(b) provision. In *Re Gategroup Guarantee Ltd*,²² Zacaroli J addressed the possible relevance of this provision.

The case related to whether the jurisdiction of the UK court to sanction a restructuring plan had been affected by the Convention. The restructuring plan was submitted under Part 26A UK Companies Act and proposed the restructuring of bonds that by reason of Article 23(1) of the Convention were subject to an exclusive jurisdiction clause in favour of the Swiss Courts.

As of 1 January 2021 the UK is no longer a party to the Lugano Convention but the claim form was issued before that date. The company argued that the Lugano Convention had no application to a claim under Part 26A because it is not a ‘civil and commercial matter’ as it fell within the bankruptcy exception in Article 1(2)(b). But for the bankruptcy exclusion, the proceedings would be a civil or commercial matter.

Zacaroli J noted that it was up to an EU Member State to choose to submit its domestic insolvency proceedings for inclusion within Annex A of the Insolvency Regulation. Therefore, he suggested that the question whether proceedings, which on the face of it were insolvency proceedings, were excluded from Brussels I could not be answered solely on the basis that they were, or were not, listed in Annex A. In any event, certain countries that were parties to the Lugano Convention, such as Switzerland, were not also a party to the Insolvency Regulation. Proceedings in such a country could not be included in Annex A, and therefore the bankruptcy exclusion in the

Bank AG;; ECJ 14.11.2018 – case C-296/17, ECLI:EU:C:2018:902 para. 29 – Wiemer & Trachte GmbH v Tadzher.

21 See also ECJ 18.09.2019 – case C-47/18, ECLI:EU:C:2019:754 – Skarb v Riehl where the European Court affirmed that the respective scopes of the two regulations are clearly defined and that an action which derives directly from insolvency proceedings and is closely connected with them falls outside the scope of the Jurisdiction and Judgments Regulation but rather within the scope of the Insolvency Regulation.

22 *Re Gategroup Guarantee Ltd* [2021] EWHC 304 (Ch).

Lugano Convention could not be interpreted as limited to proceedings that were listed in Annex A.²³

The question had to be approached from first principles. One should identify the particular features of insolvency proceedings which mean that they require special treatment and enquire whether the Part 26A restructuring plan procedure contained the same features. The principal ‘peculiarity’ of insolvency proceedings which meant that special rules relating to jurisdiction and recognition were required is that they were a collective process, driven by the need to solve the problem that the debtor’s assets are insufficient to satisfy the claims of all of its creditors, thus raising at least the possibility of competition among the debtor’s creditors and stakeholders.²⁴

A principle of ‘modified universalism’ was said to underpin the Insolvency Regulation. Under the English common law, a principle of modified universalism has also been enunciated under which insolvency proceedings opened in a debtor’s ‘home’ jurisdiction should be recognised and given effect in other countries throughout the world.²⁵

On the other hand, the judge in *Re Gategroup Guarantee Ltd* said that the approach to jurisdiction and recognition in the Lugano Convention was incompatible with principles of modified universalism. The relevant provisions provided a basis or bases for assuming jurisdiction against a person by reference either to that person’s place of domicile or the nature of the claim made against that particular person. There were special rules where the claim was in contract, or tort, or related to insurance or consumer contracts, or employment.²⁶ The judge said: ‘In my judgment, proceedings designed to enable a company in financial difficulties to reach a composition or arrangement ... with its creditors involves the same peculiar feature as a straightforward bankruptcy or winding-up. The need for the composition or arrangement arises from the company’s inability to satisfy the claims of all its creditors. There is inherently competition between the company’s creditors, requiring a collective solution that is fair to all. In any event, rules which allocate jurisdiction by reference to the domicile of each creditor, or the legal nature of each creditor’s claim, or by reference to bi-lateral contractual provisions with different creditors, are as inapposite

23 Ibid., paras. 76,81.

24 Ibid., para. 91.

25 See generally McCormack, *Oxford Journal of Legal Studies* 2012, 325; McCormack, *Law Quarterly Review* 2012, 140.

26 Ibid., para. 93–96.

and impractical in the context of Part 26A proceedings, which are premised on the financial difficulties of the company, as they are for traditional insolvency proceedings.²⁷

Therefore, he concluded that proceedings under Part 26A could have been listed under Annex A Insolvency Regulation were the UK still an EU Member State.²⁸

F. Conclusion

While the courts will not act in vain, schemes and restructuring plans are still likely to be approved by UK courts in a post-Brexit world if expert evidence is presented to the court that the scheme/plan is likely to achieve substantial effect in relevant jurisdictions.

- The UNCITRAL Model Law on Cross Border Insolvency which has been implemented in a minority of EU States may provide a basis for recognition in some cases. The US, for instance, which has also implemented the Model Law has recognised UK (and Irish) schemes on this basis.
- Schemes or plans which involve the replacement or modification of contractual obligations may also be recognised pursuant to the 'Rome I' Regulation. Article 1(2)(f) excludes from the scope of the Regulation 'questions governed by the law of companies and other bodies, corporate or unincorporated'. Insofar as it concerns matters of EU law, the proper interpretation of the Regulation ultimately falls to be considered by the CJEU.
- Since schemes/plans are likely to involve largely financial creditors and the modification of contractual debt obligations on generally a contractual basis, it is primarily up to any dissentient creditor to challenge the debt modification. Financial and related considerations are likely to militate against the prospect of such challenge in a number of cases.
- Schemes/plans are likely to achieve practical effect in many EU and other countries on the basis of their domestic private international law rules which have not been harmonised by any EU or other instrument.
- Court judgments or orders confirming (sanctioning) a scheme may be entitled to EU wide recognition under the Lugano Convention though it

²⁷ Ibid., para, 100.

²⁸ Ibid., paras, 83,133, 137.

is doubtful whether the UK will ultimately be accepted as a member of the Lugano Convention.

- It is likely however that restructuring plans will be regarded as excluded by virtue of Article 1(2)(b) from the scope of the Lugano Convention as ‘bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings’.

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Reflections of the Editors

Abstract:

This part collects reflections of the editors of the book as to the major outcomes of the study. It covers all topics addressed in the book (general aspects, domestic proceedings, recognition of foreign proceedings, concurrent proceedings, overarching issues) and also takes into account the contributions of the (non-EU) authors of the book on regional or national experiences and suggestions. The reflections refrain from direct recommendations, but they certainly show some preferences or suggestions which could be used as as basis for recommendations.

Keywords: summary; EIR, UNCITRAL texts, treaties; national laws; domestic insolvency proceedings; recognition, concurrent proceedings; overarching issues; jurisdiction; conflict of laws, substantive law.

Based on the individual contributions contained in this book the editors are hereby presenting some reflections. They are grounded on the work in this project over about three years, including two project conferences, several workshops and discussions among the editors and with the steering committee. The reflections express only the views of the editors. They do not necessarily come to specific recommendations, sometimes they limit themselves to specify options which the EU legislator might exercise, explaining pros and and cons of such options and possible further consequences. When the editors felt that certain proposals might cause discussions, they also endeavoured to take possible objections into account and give them a voice within the reflectionss.

Certain elements of the conclusions are derived from recommendations formulated in individual contributions, but in some cases the editors have developed conclusions from individual papers on their own understanding of the papers or propose conclusions independently from individual papers.

Although the reflections and conclusions are mainly directed to the European Commission, they are also conceived as an analytical toolbox for UNCITRAL, giving an input into UNCITRAL's highly appreciated

work in the field of cross-border insolvency. Should the EU follow the recommendations formulated in these reflections, this would lead to a significant approximation between the European Insolvency Regulation (EIR) and UNCITRAL's model laws¹ dealing with issues of cross-border insolvency. At the same time, UNCITRAL might take account of some of these reflections in its future work on cross-border insolvency regulation on a global scale.

The reflections will follow the same structure as the book in general: general issues, domestic insolvency proceedings, recognition of foreign insolvency proceedings, concurrent proceedings, overarching issues. This basically coincides with the structure of the EIR and the UNCITRAL model laws on cross-border insolvency, with the distinction between 'domestic' and 'foreign' proceedings being expressed more clearly than under the EIR and the UNCITRAL model laws. This does not lead to any basic incompatibility between these reflections and the EIR and the UNCITRAL model laws. Although there may be some overlaps between the issues addressed in different sections of the reflections, the editors have tried to limit them as far as possible.

The editors look forward to a critical analysis and evaluation of these reflections, including conclusions and recommendations.

A. General issues

The reflections distinguish between 'general' and 'overarching' issues. General issues are matters to be decided in advance of specific rules governing cross-border insolvency proceedings. By overarching issues we understand certain matters which typically arise both in domestic proceedings, in recognition and in concurrent (parallel) proceedings and which deserve, from the editors' view, an overall analysis looking at the topic in a consolidated manner both under the perspective of domestic proceedings and of recognition and in concurrent proceedings. Some overarching issues are separately addressed in Section E. of these reflections.

1 This includes also other texts developed by UNCITRAL.

I. Should third-country relations be addressed systematically and in more detail in future EU legislation?

Insolvency cases, in particular business insolvencies, have today very often and yet growingly, relations with non-EU countries (e.g. creditors from such countries, property situated in such countries etc.). This includes, mainly in large-scale cases, concurrent insolvency proceedings in the EU and in non-EU countries. Only some EU Member States have a well-developed autonomous international insolvency law, which is applied in relation to third countries. Some of these Member States apply the rules of the EIR, though with some exceptions, even in relation to third countries. The rules of other Member States in this regard are not sufficiently clear or they do not have such rules at all. Generally speaking, there are significant differences between the Member States in terms of autonomous international insolvency law.

Therefore, the editors and, from their perception, all members of the research project underlying this publication, share the view that the EU should pass some basic common rules or at least recommendations on cross-border insolvency cooperation² with non-EU countries, with the view of promoting, and if necessary guiding the development of this area of the law of its Member States.

II. Which instrument(s) should be used?

It is an open and disputed question whether the EU has the legislative competence, perhaps even an exclusive competence, to regulate matters of cross-border insolvency law relating to non-EU countries. The editors refrain from taking a position on this issue, as this is more an institutional and political question than an issue of the concrete contents of such rules or recommendations. If the EU does have the legislative competence on this matter, it can in principle use all of its legal instrumentarium, in particular regulations, directives, international treaties (with non-EU countries), but it

2 This term is understood here broadly, including all matters of cross-border insolvency law relating to non-EU countries.

might also restrain itself to drafting only soft law such as recommendations, guidance documents etc.³

Having discussed this issue among themselves, the editors would like to point to the major options the EU has in this context.

One position would be to add a new Chapter on relations with non-EU countries to the EIR at the occasion of its next revision⁴. The advantage of this would be to have a uniform solution for all EU members rather soon, which would not hinder a reasonable degree of flexibility, e.g. by giving space for legislative action by Member States on defined issues. Another approach would be to pass a directive on this matter, which would complement the EIR and give even more flexibility to Member States. A third option would be to limit EU action to soft law, e.g. a recommendation to Member States to adopt UNCITRAL Model Laws dealing with cross-border insolvency or other recommendations. Also, treaties might be, in addition, a feasible approach in relations with some countries such as Denmark, Switzerland, EEA countries or the UK, taking inspiration from the examples of the Lugano Convention⁵ or the EU-Denmark Agreement of 2005 on the extension of the Brussels I (Ia) Regulation.

Due to the importance of international insolvency law for the economy and the proper functioning of the international market, the editors believe that the EU should, even if it would not pass a legislative act on this matter, at least prepare recommendations on minimum standards that the autonomous international insolvency law of each Member State should certainly include. It would be desirable that these minimum standards reflect the most important elements of best practices.

III. The basic regulatory approach

1. EIR or UNCITRAL model laws as starting point?

In determining the content of a future instrument on cross border insolvency, the EU might choose one of two possible starting points: the one is

3 Cf. Serhii Lashyn, *Soft Law's Increasing Clout*, <https://verfassungsblog.de/soft-law-cl-out/> (accessed 20.08.2025).

4 This approach is proposed by → Block-Lieb/Paulus.

5 See the CJEU's opinion 01/03 of 7 February 2006 in the Lugano Convention case, ECLI:EU:C:2006:81. Views on this issue differ.

extending the rules of the EIR to non-EU countries, and the other adopting one or several of UNCITRAL's model laws on cross-border insolvency⁶. Each approach would require adaptations to take into account specifics of relations with non-EU countries.

The editors favour an approach taking the EIR as a basis, but regulating relations with non-EU countries as far as possible in line with the UNCITRAL model laws. UNCITRAL model laws allow the enacting States to modify or leave out some of their provisions when incorporating the text of the model laws into their systems. However, in order to achieve a satisfactory degree of harmonization and certainty, UNCITRAL recommends that States make as few changes as possible. In any case, a State has a possibility to deviate from certain provisions of the model laws that are not acceptable to it and not in accordance with specific characteristics of its legal systems, legal traditions and needs. The implementation of such an approach will need to be determined when addressing specific rules.

Furthermore, if the content of a future EU instrument were to follow closely that of the UNCITRAL's model laws, differences in terminology and structure between such rules and the rest of the EIR would have to be bridged. Furthermore, some issues which are not dealt with in the UNCITRAL texts, such as direct jurisdiction and (for the time being) conflict of laws, would either have to remain unregulated or would require new, specific regulation in the revised EIR, be it in a new Chapter on relations with non-EU countries or in other Chapters of the EIR.

2. Minimum standards or best practices?

In comparison with the present state of laws, even a common minimum standard of cooperation between EU-based insolvency proceedings and third countries would be a significant progress. This could be done, e.g. by a general clause on cooperation with non-EU insolvency proceedings. However, the editors would recommend a more ambitious approach, incorporating pieces of best practices. This would create more legal security and define the framework for cooperation more concretely. Such a goal could be achieved either by employing the solutions of the EIR or the UNCITRAL model laws on cross-border insolvency as bases of references.

6 The second approach is favoured by → Block-Lieb/Paulus.

3. Sphere of application

A first important general question of any future EU legislation with regard to cross-border insolvency cooperation with non-EU countries concerns the sphere of application of any such new rules.

The editors suggest that the sphere of application should in principle coincide with the EIR in general, i.e. that it should include both business and consumer insolvencies, liquidation-oriented proceedings as well as restructuring proceedings, proceedings in which an insolvency practitioner is appointed as well as debtor-in-possession proceedings and they should include also preliminary proceedings to such proceedings.

However, the approach of the EIR to lay-down such proceedings in a binding and exhaustive annex to the EIR cannot work in relation to the incalculable number of insolvency proceedings worldwide. In order to create a degree of foreseeability, the editors propose to add a non-exhaustive and non-binding (but having presumptive effect) list of proceedings in some countries, which can be expected to be in regular insolvency-related contacts with the EU, e.g. Switzerland, the UK and the U.S. Another possible approach would be to offer an open-ended, broad definition of insolvency proceedings, akin to that of ‘foreign proceeding’ contained in Article 2 MLCBI, or that contained in Article 1(1) EIR, excluding the reference to Annex A. Both approaches could also be combined, e.g. by giving a broad definition, which could be specified by examples and/or by reference to Annex A of the EIR ‘and equivalent proceedings in other countries’.

The editors further suggest to apply such new rules also to banking and insurance insolvencies, in so far as specific EU rules applicable to these sectors do not apply⁷. In doing so, the specific characteristic of insolvency proceedings in which the debtor is a bank or insurance company should be taken into account. According to the UNCITRAL model laws such entities may be excluded from the application of these model laws. In regulation of cross-border aspects of bank liquidation, Recommendation 93–105 contained in the UNIDROIT Legislative Guide on Bank Liquidation of 2025⁸ may be very useful to national lawmakers.

Within the EU, there is currently a discussion whether certain restructuring frameworks, which are not included in Annex A of the EIR (namely,

7 This is basically the approach proposed by → Pannen/Riedemann.

8 See <https://unidroit.org/instruments/legislative-guide-on-bank-liquidation> (accessed 26.11.2025).

those which lack the requisite of publicity, thus falling outside the scope of Article 1 EIR), should in the future be covered by the EIR or by other EU legislation⁹. While EU-based public restructuring proceedings, which were established under the EU Restructuring Directive of 2019, have been formally included in Annex A of the EIR, other proceedings with similar purposes, which may exist in the EU, are not included. This also applies to similar proceedings in non-EU countries, such as British schemes of arrangements¹⁰. The editors propose to wait for the further development of this discussion in the EU. To the degree to which such proceedings are included in Annex A of the EIR, equivalent proceedings in non-EU countries would also be covered by future EU rules on relations with third countries.

In some cases, such proceedings may be covered by other rules, e.g. of international company law, international contract law or rules on recognition of foreign judgments in civil and commercial matters¹¹. For example, if the Brussels Ia Regulation were revised to include provisions covering such proceedings (e.g. company restructurings or non-public contractual restructurings), this might be seen as an argument not to cover such proceedings by insolvency rules. On the other hand, the possibility of an overlap of insolvency rules and general rules of judgment recognition might also be acceptable in favour of favor recognitionis. This would be in line with the MLCBI. However, it would seem premature to create specific rules for such cases in the present context.

If more clarity on this issue is wished, EU Member States might be expressly granted the right to cooperate with such foreign proceedings under autonomous rules [see *infra* point 5].

4. Relation with national legislation (e.g. opt-out/opt-in)

A further important aspect of any new provisions on cross-border insolvency relations with non-EU countries is the relationship between such provisions and the autonomous legislation of EU Member States.

The new provisions could be designed as exclusive or it might be provided that EU Member States retain the right to autonomous regulation if

9 As to this discussion see → Silvestri (in Part A.).

10 The cross-border dimension of the British schemes is extensively explored by → McCormack.

11 → McCormack.

this leads to more liberal cooperation with foreign proceedings than the uniform EU rules. This approach has been chosen by Art.7 MLCBI.

A further argument for this could be that some national legislations may represent a 'higher standard' of cross-border insolvency law than future EU uniform rules and that these rules are well-established in practice. The validity of such an argument depends, of course, on the content of future EU rules. If they were designed as 'minimum standards of cooperation with non-EU countries, additional and more cooperative national legislation might be even welcome. If, on the other side, the future EU rules were closely tailored after the EIR, the need for having additional autonomous rules may decrease.

Technically, the relations between common EU provisions on cross-border insolvency relations with non-EU countries and autonomous cross-border legislation of EU Member States could be regulated in different manners: by a general clause such as under Art.7 MLCBI, by more specific opt-in or opt-out clauses (e.g. Member State might permitted to opt-out of the common rules under certain conditions) or just by leaving the question open.

5. Relation with other subject areas and EU texts

Insolvency law interacts with other areas of the law in many ways. For example, cross-border insolvency law supplements or may be supplemented by more general rules of international civil procedure (including judicial assistance) or conflict of laws. The same is true for legal areas such as contract law, property law, company law, commercial law, IT law, ADR etc. This includes questions of the relation between cross-border insolvency legislation and legislation applicable to other legal areas. A much discussed example for this is the relation between the EIR and the Brussels Ia Regulation, which are understood by the CJEU to be complementary and not overlapping. This topic will also come-up in insolvency cases related to non-EU countries, e.g. when an avoidance judgment is rendered in a non-EU country and is claimed to be recognized in an EU-based insolvency proceeding. Should such recognition be governed by cross-border insolvency rules or by general rules on recognition of foreign judgments?

The editors would recommend to leave this topic in principle open (as it also currently is under the EIR generally), although particular constellations, such as recognition of foreign insolvency-related judgments, might be addressed by specific rules.

6. Role of ‘principles of international insolvency law’

Academic discussion on cross-border insolvency law has long centered around so-called principles of international insolvency law¹². Usually, two supposedly opposite pairs of such principles are mentioned: the principle of universality versus the principle of territoriality (of insolvency proceedings) and the principle of unity versus the principle of plurality (of insolvency proceedings). Though such principles have a value for academic discussion, they leave much room for interpretation and have rarely been used in pure form in legislative and judicial practice. In this context, new terms have been developed such as ‘modified universalism’, etc.

The EIR does not refer in its provisions or in the preamble to these principles, though some of its provisions can be seen as a concrete form of using them (e.g. the ‘universal scope’ of COMI-based insolvency proceedings, the ‘territorial scope’ of non-COMI proceedings, the possible ‘plurality’ of ‘main insolvency proceedings’ and ‘secondary insolvency proceedings’ within the EU).

The editors do not regard it as necessary to define or use such principles in a general manner in the context of any future EU legislation or recommendations on cross-border insolvency relations with non-EU countries. However, the said principles and their legislative purposes can – also in the context of relations with non-EU countries – be useful for the development of concrete provisions on cross-border insolvencies.

7. Universal/territorial scope

A basic distinction is made both in the EIR and in UNCITRAL’s MLCBI between ‘universal’ and ‘territorial’ insolvency proceedings (see, e.g. EIR Recital 23 and Art. 3 (2) 2 EIR). The distinction is made according to whether insolvency proceedings should cover only debtor’s property¹³ situated in the State of the proceeding (*forum concursus*) or also property situated abroad. The distinction plays a role both from the perspective of domestic proceedings and from the perspective of recognition of foreign

¹² They are summarized in the contribution of → Elina Moustaira.

¹³ This can be seen as a *pars pro toto* formula meaning that the effects of the COMI-based proceeding are generally universal/extraterritorial, e.g. prohibitions under the applicable insolvency law extend also to acts done in foreign States, the insolvency practitioner may also act abroad, etc.

proceedings and in the context of concurrent proceedings. However, in all these constellations the legal treatment of issues of universality or territoriality of insolvency proceedings needs a specific analysis¹⁴.

The terms ‘universality’ and ‘territoriality’ in cross-border insolvency are not free from ambiguity. Although they are defined both in the EIR and in the MLCBI by reference to the location of assets belonging to the debtor¹⁵, this does not mean that a ‘territorial’ insolvency proceeding has no extraterritorial (universal) effect at all. For example, even in a territorial insolvency proceeding acts of the debtor committed abroad are covered by the avoidance rules of the territorial proceeding if they relate to ‘domestic’ assets. Going further, even acts may be covered which do not relate to assets, e.g. sham recognition of certain creditor claim by the insolvent debtor. Although such questions are of theoretical interest, they have not led to significant practical difficulties and therefore do not require specific legislative solution.

Under the EIR, COMI-based proceedings are given universal reach, while non-COMI proceedings are defined as territorial. In contrast, UNCITRAL adopts a neutral stance to this regard. While the MLCBI accepts the distinction between (COMI-based) main proceedings and other (non-main) proceedings, it is basically – with some exceptions¹⁶ – silent as to whether such proceedings have universal or only territorial reach, but instead accepts that some legal systems extend the reach of the non-main proceedings opened under their laws to assets abroad.

The editors propose to adopt a basically flexible position as to the universal or territorial scope of insolvency proceedings in relations with non-EU countries. The current rules of the EIR could insofar be used as a starting-point also in relations with non-EU countries. Thus, EU-based COMI proceedings should cover also property abroad¹⁷, and EU-based non-COMI proceedings should in principle have only territorial reach.

However, in relations with non-EU countries some additional flexibility may be useful.

For example, in cases where COMI is outside the EU, a non-COMI proceeding opened in the EU on a jurisdictional ground such as the registered seat (see below, II.2.a) might be given universal reach under certain cir-

¹⁴ This will be addressed in more detail *infra* in the specific procedural contexts.

¹⁵ Art.3 (2) sentence 2 EIR, Art.28 MLCBI.

¹⁶ See, in particular, Art.28 (1) MLCBI for concurrent non-main [EIR terminology: secondary] proceedings.

¹⁷ This is true already under the present version of the EIR, cf. EIR Recital 23.

cumstances, e.g. if in the COMI-State no insolvency proceeding is opened or if it is not given extraterritorial effects under its own *lex concursus*.

A similar approach might be chosen for the recognition of foreign insolvencies opened on a jurisdictional ground such as the registered seat which is basically similar to COMI, even if technically COMI is situated in a third country. Details of this need however to be addressed in specific contexts and may sometimes require negotiation between the participants with court approval.

8. Location of assets

An issue which comes up mainly in the context of determining the borderlines of a 'territorial' insolvency proceeding, but can play a role also in other contexts (e.g. jurisdiction, conflict of laws, concurrent proceedings) is the location of assets. For example, in order to delimitate the insolvency estates in various insolvency proceedings simultaneously conducted against the same debtor, it is necessary to provide rules on how to localise objects, things, rights so as to make it easier to determine by which proceeding they are (or should be) covered. Most of the rules on localization of debtor's assets, that are contained in Article 2(9)(i-viii) EIR, could be followed also in autonomous international insolvency law, including any modification that the EU might consider as to the criteria for localizing intangible assets that are presently not listed in Article 2 (such as cryptocurrencies and non-fungible tokens). The MLCBI does not contain such rules.

9. Distinction between main and non-main (insolvency) proceedings with subgroups

Following the approaches both of the EIR and of the UNCITRAL model laws on cross-border insolvency, the editors propose to keep also in relations with non-EU countries the distinction between main and non-main (insolvency) proceedings.

However, the editors propose to give some flexibility to these terms in relations with non-EU countries. In inner-EU relations, it can be well justified that the debtor's COMI is the decisive jurisdictional factor, determining whether a proceeding is a main proceeding, having universal scope and some guiding function also for concurrent proceedings. In relations with non-EU countries, some additional flexibility would be useful. For exam-

ple, there may be a foreign insolvency proceeding opened at the debtor's place of registration, which is recognized in numerous countries including the debtor's COMI country. It would seem overly dogmatic to recognize such a proceeding in the EU only as a non-main proceeding with territorial effect. Therefore, the notion of 'main proceeding' should (in particular in cases when the debtor's COMI is located outside EU) be given a degree of flexibility. For example, courts of concurrent proceedings or the insolvency practitioners with court approval might agree on which court should take the role of 'main proceeding' and what effects this entails. As this topic will mainly arise in cases of concurrent proceedings, this issue might be addressed only in this context.

1. Role of discretion

The EIR contains today only clear-cut, non-discretionary rules on jurisdiction, conflict of laws, recognition, concurrent proceedings and various issues of substantive law. However, its provisions include judicial assessment at different places, e.g. in the determination of COMI. In addition, discretionary elements may come in through subsidiarily applicable autonomous law. Also, insolvency practitioners typically have a broad range of discretion in the exercise of their powers.

In contrast, the MLCBI, following the Common Law tradition, grants the insolvency courts discretion at several places, including – arguably – the determination of applicable law¹⁸.

The editors propose that, in relations with non-EU insolvencies, the EU Member States should have the opportunity to decide independently how much discretion they will give their courts when dealing with cross-border insolvency proceedings. The rules on court discretion may resemble the rules of the MLCBI on this issue. Nevertheless, it should be kept in mind that overly broad court discretion may undermine legal predictability and legal certainty. Therefore the court discretion should be specified in concrete rules, e.g. prerequisites of exercise of discretion, content of possible decisions of cooperation. This is especially true when

18 Cf. Art. 21, 22 and 25, 26 MLCBI. Under these rules, the court 'may' (i.e. is not obliged, but has the power to) render a decision on a balancing basis, i.e. grant or deny 'appropriate' relief. In civil law countries, courts only rarely have the power to render decisions on a discretionary basis, the focus is more on clear-cut procedural rules (e.g. on recognition of foreign decisions and legal effects given to such decisions under applicable law using purely legal standards). Exercising discretion in cross-border insolvency cases may sometime be difficult for courts in some countries and can lead to unreasonable results.

the Member State regulating its autonomous insolvency law belongs to the group of Civil Law systems.

*B. Domestic proceedings*¹⁹

I. The category of domestic (insolvency) proceedings

Like the book as a whole, these conclusions use the term of ‘domestic (insolvency) proceedings’ as a category of our analysis. The term is grounded on the existence of national states as organizers of insolvency proceedings, which will then – as the case may be – have to be coordinated or cooperate with ‘foreign (insolvency) proceedings. The category of domestic proceedings, and their distinction from foreign proceedings, underlies also the various national insolvency laws. The EIR, in its endeavour to create common rules for EU-based domestic proceedings and recognition of proceedings opened in other EU countries, does not formally use the category of domestic proceeding, but collects provisions on domestic and foreign proceedings in its general Chapter I. For the purposes of this book, and for the conclusions, this peculiarity of the EIR is of no relevance.

It is a matter of legislative technicality whether some of the proposed rules on insolvency proceedings in relations with non-EU countries should be included in Chapter I of the EIR or in a separate new Chapter of the EIR, if the EU were to adopt such an approach in recognizing of the legal effects of insolvency proceedings opened in third countries. For example, if the EU were to create some specific jurisdictional rules for cases in which the debtor’s COMI is located outside the EU, these rules could be implanted in Art.3 EIR or, alternatively, in a separate new Chapter of the EIR.

19 For more on this topic in general see → Trunk (Domestic proceedings).

II. Jurisdiction

1. Main proceedings: COMI or more open?

As the concept of COMI has today come to be accepted globally as a reasonable jurisdictional standard for main²⁰ (and universal) insolvency proceedings²¹, the EIR should keep to this standard also in cases when the debtor's COMI is located outside the EU.

However, even if this standard is used, there may be cases of positive or negative conflicts of jurisdiction.

For example, when both an EU Member State and a third country regard themselves as the place of the debtor's COMI, a positive conflict may arise.

A negative conflict, on the other hand, might arise if (as it is still the case of many legal systems worldwide) diverging criteria are adopted as exclusive direct jurisdictional bases. For example, State A might base its direct international jurisdiction solely on the registered seat of a company, while State B only adopts COMI as jurisdictional criterion. In a case where a company has its registered seat in State B, but its COMI in State A, neither A nor B would be entitled, under their respective laws, to open an insolvency proceeding.

Conflicts of jurisdiction can be tackled in different ways (see *infra*, at c).

The issue whether insolvency proceedings should be given extraterritorial effects or not is addressed above (I.8).

2. Non-main proceedings

Outside the sphere of application the EIR, there is today a significant divergence between the EU Member States as to the jurisdictional grounds for non-main (non-COMI) insolvency proceedings²².

20 Strictly speaking, the term 'main' proceeding as opposed to 'non-main' proceedings implies the existence of concurrent proceedings. It is, however, common to use this term also for isolated 'main' proceedings.

21 Even in jurisdictions where legislation do not explicitly set out COMI as a jurisdictional basis, caselaw related to COMI is often treated as a reference: see e.g. Russia, as illustrated by → Yarkov/Baldanov.

22 When such proceedings are conducted concurrently with a 'main' proceeding, there are termed by the EIR 'secondary' proceedings. However, non-main proceedings can be opened also as isolated proceedings, without any concurrent proceedings.

The editors recommend insofar to accept as a jurisdictional ground when the debtor's COMI is located outside the EU, the existence of an establishment in the EU (such as under Art.3 (2) EIR) and/or the location of assets, so that different functions, such as supportive, protective and auxiliary function, which non-main proceedings may have, can be realised.²³ If direct international jurisdiction for opening a domestic non-main insolvency proceeding is based solely on the existence of assets of a foreign insolvent debtor, and not on the presence of an establishment in the territory of the Member States, additional conditions could be envisaged for opening such a non-main insolvency proceeding in the Member State, for example, that a creditor, who requests the opening of such proceedings, would not be able to realize its claim in the foreign main insolvency proceeding which has been opened in the third country.

In addition, jurisdiction on the basis of significant contacts of the debtor with the EU should be added. This would contribute to making the EU an attractive forum for corporate restructurings.

3. Specific issue: Positive and negative conflicts of jurisdiction

The EU should address the issue of positive and negative conflicts of jurisdiction in a practical manner, with the purpose of avoiding them, or finding another solution by substantive rules. The EIR does not presently address conflicts of jurisdiction between two main proceedings, as it supposes that there is only one COMI and the first EU proceedings based on COMI is recognized in all other EIR Member States. On the other hand, the rules of the EIR on coordination and cooperation between the main proceeding and secondary proceedings allow for such parallel proceedings, but give the main proceeding a coordinating function.

In relations with non-EU countries this system cannot work properly as EU-based main insolvency proceedings are not necessarily recognized worldwide and there may be proceedings in non-EU countries, which regard themselves as main proceedings (and are perhaps even recognized as such in other countries), although their jurisdiction is not based on

23 In the autonomous International Insolvency Law, the possibility of opening non-main insolvency proceedings based solely on the existence of assets of a foreign debtor in the domestic territory is provided, for example, in Section 354(1) and Section 356(1), first sentence, of the German Insolvency Code (*Insolvenzordnung*), as well as in Article 393(2) of the Croatian Bankruptcy Act.

COMI as defined under the EIR. In such cases there may be a positive conflict between a EU-based main proceeding and a third country proceeding, which also claims to be the main proceeding. One option would be to try to solve the conflict by rules of jurisdiction and recognition. Another would be to apply the general rule on coordination and cooperation between parallel proceedings also to such situations.

Generally speaking, as positive conflicts will mainly become practical in cases of concurrent proceedings, they should be addressed in that context.

To avoid negative conflicts, granting some flexibility (in cases when COMI is outside the EU) would seem to be a reasonable approach. This should include a cautious enlargement of the basis of jurisdiction for main proceedings beyond COMI (if COMI is not in the EU)²⁴ and should be complemented with the general rule on coordination and cooperation with foreign proceedings. Negative conflicts involving non-main insolvency proceedings will practically not arise if the grounds for non-main jurisdiction are enlarged in the way proposed supra at 2..

III. Conflict of laws²⁵

1. Overarching rules or separate rules for domestic and foreign proceedings?

The EIR regulates conflict of laws in its Chapter I as an overarching issue, applying both to domestic proceedings and to recognition of foreign proceedings. This fits inner-EU relations where all EU Member States have to apply the same conflicts rules. In relations with non-EU countries, however, this approach would not work as courts in non-EU countries apply their own conflicts rules, and it would not be adequate to apply to such foreign proceedings all the very specific EIR's conflict of laws rules. Therefore, in these reflections and the book in general, conflict of laws is dealt with separately in the context of domestic proceedings and recognition of foreign

24 See supra at 1..

25 Issues of conflict of laws arise in all constellations of cross-border insolvency law and will there also be addressed in Part V.I. of these reflections as an overarching matter. Specifics of conflict of laws in the domestic proceeding context will, however, be discussed here.

proceedings. This is also the approach of the planned new UNCITRAL Model Law on applicable law in insolvency proceedings.

2. Basic conflicts rule: *lex fori concursus*

The basic conflicts rule in cross-border insolvency law (Art. 7 (1) EIR) – applicability of the *lex fori concursus* – is worldwide accepted as adequate and needs no change in relations with non-EU countries. This is also true for the enumeration (characterization) of issues falling under this conflicts rule (Art. 7 (2) EIR).

The UNCITRAL Legislative Guide on Insolvency Law also establishes the applicability of the *lex fori concursus* as the basic rule in cases of cross-border insolvency proceedings (Recommendation No. 31).

The general applicability of the law of the state opening the insolvency proceedings is also the starting point of the draft Model Law on Applicable Law in Insolvency Proceedings being prepared by UNCITRAL's Working Group V on Insolvency Law (Article 6).²⁶

3. Special conflict rules (including mixed conflicts-substantive rules)

The EIR contains a number of specific conflicts rules dealing with third parties' rights in rem, set-off, reservation of title, contracts relating to immoveable property, payment systems and financial markets, contracts of employment, rights subject to registration, European patents with unitary effect and Community trade marks, detrimental acts, protection of third-party purchasers and the effects of insolvency proceedings on pending lawsuits or arbitral proceedings (cf. Art. 8 – 18 EIR). They usually refer only to the law of EU Member States²⁷, though two provisions (Art. 9 EIR on set-off and Art. 18 on third-party purchasers) do not contain this limitation being grounded on general considerations of good-faith protection.

The UNCITRAL Legislative Guide on Insolvency Law also contains certain exceptions to the application of the *lex fori concursus*. They relate

26 See UNCITRAL Draft Model Law on Applicable Law in Insolvency Proceedings as prepared by the Secretariat for the WG V session of 13-17 April 2026, <https://docs.un.org/en/A/CN.9/WG.V/WP.207> (accessed 27.05.2026).

27 See Art. 11 – 14, 16 and 18 EIR. The underlying idea is mainly to protect inner-EU protection policies (employment contracts the EU real estate market and EU-based payment systems and financial markets).

to numerous aspects such as the effects of insolvency proceedings on the rights and obligations of the participants in a payment or settlement system or in a regulated financial market (Recommendation No. 32) as well as on rejection, continuation and modification of labour contracts (Recommendation No. 33).

A somewhat larger number of derogations from the application of the *lex fori concursus* – though fewer than under the EIR – are set forth in the UNCITRAL draft Model Law on Applicable Law in Insolvency Proceedings. They cover, namely, avoidance actions (Article 6(g) in conjunction with Article 7(1)); set-off (Art.6(i) in conjunction with Article 7(2)); rights in rem (Article 6(j) in conjunction with Article 7(3)); litigation and arbitration (Article 6 in conjunction with Article 7 (3)²⁸); labour contracts and relationships (Article 9(1)); rights and obligations of participants in a payment, clearing or settlement systems, and in regulated financial market or multilateral trading facilities (Article 9(2)); the operation of close-out netting arrangements in relation to certain financial operations (Article 9(3)). On the other side, these derogations are ‘universal’ in the sense that they do not contain a limitation to the *lex fori concursus* or to particular foreign countries.

As to relations with non-EU countries, one option might be to ‘universalise’ the special conflicts rules, e.g. apply them also to the law of non-EU countries²⁹. Another option would be to leave them as they are. This would give greater weight to the *lex fori concursus* and leave the defense of certain protective policies to the respective non-EU countries, e.g. the *forum rei sitae* or to non-EU fora for employment disputes. A third option might be to align future EU conflicts rules on insolvency matters with the forthcoming UNCITRAL Model Law on Applicable Law in Insolvency Proceedings, possibly retaining some conflicts rules with a limitation to the law of EU Member States where a particular strong interest to provide for ‘local’ (inner-EU) protection is seen.

It is not the purpose of this book and its conclusions to discuss whether these rules seem adequate for inner-EU relations.

Some of the EIR’s special conflict of laws provisions, e.g. Art.16 EIR on detrimental acts, combine statements on the applicable law with substantive components (e.g. limiting the rules to objects situated in the EU or exclud-

28 Probably to be shifted to the Chapter on Recognition.

29 This is proposed by → Fabriès-Lecea.

ing any effect of insolvency law on certain objects)³⁰. Art.8 EIR (third parties' rights in rem), Art. 10 (retention of title) and Art.15 (European patents with unitary effect and Community trade marks) do not even contain any explicit conflicts rule. In particular, they do not provide for special conflict of laws rules deviating from the *lex fori concursus* but limit themselves to a particular substantive solution. However, non-insolvency aspects in these cases (e.g. the existence of a certain right in rem) are implicitly governed by applicable non-insolvency conflicts rules.

In so far as these rules apply only to objects located in the EU (limiting the specific conflicts rules to such objects), they should in any case not be extended in relation with non-EU countries to objects located outside the EU. The specific territorial limitations contained in some provisions of Art.8 – 18 EIR are grounded on particular policies of protection in the EU context. In relations with non-EU countries the general conflicts rule of *lex fori concursus* is preferable, provided that insolvency administrators or other participants may agree that another law should apply, if the *lex concursus* allows such carve-outs

For the sake of legal predictability and legal certainty, autonomous international insolvency law should contain an explicit (combined conflicts and substantive) rule on whether foreign creditors with public claims (foreign tax and social security claims) may file such claims in domestic insolvency proceedings, and if so, in which order of priority they will be satisfied (payment rank).

Generally, the editors recommend to harmonize the specific conflicts rules of the EIR with the (future) conflict of laws rules, which are currently developed by UNCITRAL in its Draft Model Law on Applicable Law in Insolvency Proceedings

In view of the large diversity of case situations in insolvency matters, the EU should introduce an escape clause on conflict of laws in insolvency similar to Art.4 (3) Rome I Regulation or Art.4 (3) Rome II Regulation, allowing the judge to apply exceptionally the law of the State to which the case is significantly more closely connected instead of the *lex fori concursus* or any other law indicated as applicable. Escape clauses of this kind are not uncommon in private international law in general. They are particularly helpful where the general conflicts rules are very broad and simple, such as the *lex rei sitae*, the *lex loci delicti* or – in the insolvency context – the *lex fori concursus*. The same may be said, more specifically, for the

30 As to Art.16 EIR see → Mangano.

rule on the law applicable to the avoidance of transactions, where the large variety of situations of avoidance has led the drafters of the EIR to a complicated cumulative rule (Art.16 EIR) which has been criticized by numerous authors and will foreseeably not be adopted by UNCITRAL in its future instrument on conflict of laws in insolvency proceedings. The existence of such an escape clause would align the conflict of laws rules of the EIR with other EU legislation on conflicts of laws. It would not shake legal security as the largely missing practice on the escape clause in the Rome I and Rome II Regulations shows. However, it would fulfil a helpful security function towards very broad general conflicts rules.

Following the general approach of EU conflict of laws regulation, a renvoi should not be admitted.

C. Recognition of foreign insolvency proceedings³¹

I. The category of recognition of foreign insolvency proceedings

Both the EIR and the MLCBI use the category of ‘recognition of foreign insolvency proceedings’, but they define the concept of recognition differently. The EIR focuses on recognition of foreign court decisions (indirectly also recognition of the foreign proceeding), while the MLCBI relates recognition to foreign ‘proceedings’ in general. The EIR approach is primarily rules-based (conflict of laws rules, substantive rules etc.), while the MLCBI gives more room to judicial discretion. However, both the EIR and the MLCBI share the same purpose: developing adequate rules for cross-border insolvency including international cooperation in this field. Despite the different dogmatic bases for recognition in the EIR and the MLCBI, the results are (or can be) quite similar.

The fact that some EU Member States have adopted the MLCBI for relations with non-EU countries shows that both approaches can be combined, though certain adaptations may be recommendable³².

For reasons of internal consistency, the editors propose that the EU should also for recognition of non-EU insolvencies use the dogmatic approach established under the present EIR, but modify it taking into account

31 For more on this topic in general see → Trunk/Silvestri (Recognition).

32 A notable combination of the two approaches is contained in the OHADA Uniform Insolvency Act illustrated by → Leno.

particularities of relations with non-EU countries. In this context, inspiration should also be taken from the MLCBI and the other UNCITRAL texts on cross-border insolvency law.³³

II. Prerequisites

Both the EIR and the MLCBI list the following prerequisites for recognition of foreign insolvencies³⁴: a) the object of recognition must be a foreign insolvency-type court decision (EIR³⁵) or a foreign insolvency proceeding (MLCBI³⁶); b) the foreign court must have (indirect) jurisdiction³⁷; c) recognition must not contradict public policy³⁸.

1. General remark

The editors are of the view that these criteria also fit for future EU rules on recognition of non-EU insolvencies.

- a) Linking recognition for foreign court decisions gives a clear determination of the object of recognition. This approach has proved its functionality in the EU and also fits for relations with non-EU countries. It does not exclude necessary flexibility.
- b) Indirect jurisdiction (jurisdiction for recognition purposes) can be defined either by referring to rules of direct jurisdiction per analogiam ('mirror principle'), or by setting forth an autonomous criterion. The editors would recommend a combined approach: the mirror principle

33 In addition to UNCITRAL Model Law on Cross-Border Insolvency see: UNCITRAL Legislative Guide on Insolvency Law, Part 1 and 2 (2004), Part 3 (2010), Part 4 (2013, 2019) and Part 5 (2021); UNCITRAL Model Law on Enterprise Group Insolvency (2019); UNCITRAL Model law on Recognition and Enforcement of Insolvency-Related Judgments (2018). All of the aforementioned texts are available on the UNCITRAL website: <https://uncitral.un.org/en/texts/insolvency> (accessed 15.10.2025).

34 For more details → Trunk/Silvestri.

35 Art.19, 20, 32 EIR.

36 Art.15 (1), 17 (1) (a) MLCBI.

37 Art.19 (1) EIR, Art.17 (2) MLCBI. However, according to the jurisprudence of the CJEU indirect jurisdiction is not scrutinized in the recognition stage in relations between EU Member States.

38 Art. 33 EIR and Art.6 MLCBI.

as a basis (i.e. COMI and/or additional criteria such as establishment, assets, or any significant contact with the foreign forum concursus³⁹). In addition, recognition of foreign main proceedings should also be made possible in cases of '[COMI or] equivalent contacts' with the foreign forum concursus⁴⁰. This would typically include foreign proceedings opened on the basis e.g. of the debtor's place of registration, seat or domicile, but would still give the recognizing court a power of assessment about 'equivalence with COMI' in the particular case. This would be particularly relevant in a situation where the law of a non-EU country, whose court has opened the main insolvency proceeding based on the registered seat of the debtor, does not formally contain COMI as a criterion for opening the main insolvency proceeding, although in substance the COMI is actually in the particular case located in that country. It should be borne in mind that only the state with the closest connection to the insolvent debtor should have international jurisdiction to open the main insolvency proceeding.

- c) Public policy is a well-established criterion (exception) in cross-border insolvency law, in line with general international civil procedure and private international law (Art. 33 EIR, Art. 6 MLCBI).

2. Further considerations

The editors also discussed whether it should be recommended to add another prerequisite for recognition addressing concurrent insolvency proceedings. As there are detailed special rules both in the EIR and the MLCBI dealing with concurrent proceedings⁴¹, it may be argued that there is no need to address this issue explicitly among the prerequisites of recognition⁴². On the other hand, it may be argued that the approach taken by the EIR's provisions on secondary proceedings (concurrent main and non-main proceedings) cannot be taken for granted in relations with non-EU countries and there is a need for clarification at least for the situation of two proceedings which claim to be main (universal) proceedings. If one follows this idea, an obstacle to recognizing a foreign decision to open main

39 See *supra* at B.II.1 and 2..

40 As to the challenges foreign courts may face even when they use the COMI concept see → Galdino/Garcia.

41 Art.34 – 52 EIR, Art.28 – 32 MLCBI.

42 Art.34 EIR explicitly states that (recognition of) a foreign main proceeding does not hinder the opening of a local non-main (secondary) proceeding.

insolvency proceedings from State A might be the fact that the court of State B, where recognition is sought, has already opened a main insolvency proceeding against the same debtor, or has previously recognized a decision to open a main insolvency proceeding against the same debtor issued in a third state, State C.

To clarify this, the EU legislator might explicitly regulate the situation where the main insolvency proceedings are first opened in a non-EU country, and subsequently main insolvency proceedings against the same debtor are opened in an EU Member State. Namely, if an EU Member State has already recognized a foreign decision to open main insolvency proceedings from a non-EU country, and subsequently main insolvency proceedings against the same debtor are opened in another EU Member State, a problem may arise, given that Member States are obliged to automatically recognize decisions opening insolvency proceedings issued in other Member States (Art. 19 (1) EIR), without being authorized to review the international jurisdiction of the court of the Member State that opened the insolvency proceedings (see Article 5 (1) EIR).⁴³

It should also be mentioned that the EIR, in addition, explicitly demands as a prerequisite for recognition that the foreign judgment opening an insolvency proceeding is effective in the State of the opening of proceedings (Art. 19 (1) EIR). The MLCBI does not contain such an explicit requirement. By its very nature, the recognition of a foreign decision in another state may only occur if the decision also has legal effects in the state where it was issued. It may be left to the discretion of EU Member States whether to explicitly refer to the effectiveness of a foreign decision opening insolvency proceedings as a prerequisite for recognition under their autonomous international insolvency law. In any case, in order to protect insolvent assets, it would not be desirable to require the finality (*Rechtskraft, res iudicata*) of a foreign decision opening insolvency proceeding. There is no necessity for adding a requirement of reciprocity, which would only run counter to the purpose of supporting an efficient and fair solution to the insolvency situation⁴⁴. Namely, establishing the existence of reciprocity is not easy; it can require a lot of time and incur additional costs, as the court of

43 See CJEU, judgment of 24.3.2022, case C-723/20, ECLI:EU:C:2022:209 – Galapagos BidCo. Sàrl. See also the contribution by → Piekenbrock.

44 This conclusion can also be drawn from the contribution of → Boraine on the cross-border insolvency law of South Africa.

the recognizing state usually has to engage an expert witness⁴⁵. Moreover, the requirement of reciprocity does not support the principle of equal treatment of all creditors in insolvency proceedings. An increasing number of countries allow the recognition of foreign insolvency proceedings, and openness to cooperation in cases of cross-border insolvency is a much more appropriate legislative solution than formally imposing restrictions through the requirement of reciprocity when recognizing foreign insolvency proceedings.

III. Procedure for recognition

The EIR does not, at present, provide for a particular proceeding for recognition of foreign insolvencies, but is based on the principle of ‘automatic recognition’ (cf. Art. 19 and 20 EIR). In contrast, the MLCBI requires for ‘full’ recognition the successful carrying-through of a particular proceeding (‘proceeding for recognition’).

The principle (or system) of automatic recognition of a foreign decision opening insolvency proceedings may be acceptable between countries whose insolvency law regimes do not differ significantly.⁴⁶ However, at the present time, we cannot say that there is harmonization of insolvency law at the global level. Having this in mind as well as the fact that the dominant choice-of-law rule concerning international insolvency is application of the *lex fori concursus*, when regulating autonomous international insolvency law, it seems desirable that the legal effects of a foreign decision opening insolvency proceedings be examined from the standpoint of contrariety to the public policy of the state of recognition. It is also desirable to examine whether the court that opened insolvency proceedings has international jurisdiction, as this has a direct impact on the applicable law, and is thus tied to legal predictability and the legal certainty of an insolvent debtor’s creditors. A drawback of the formal recognition system for foreign decisions opening insolvency proceedings is that it potentially allows for abuse by the debtor during the period between the opening of insolvency proceedings in one state and the recognition of that decision in another state. However, this drawback can be mitigated by the possibility for the court

45 As shown by the Chinese practice with Article 5 of the Chinese Enterprise Bankruptcy Law illustrated by → Shi/Yan.

46 Thus → Kodek.

of the recognizing state—where assets belonging to the foreign debtor are located—to impose interim measures for the protection of those assets in the period between the filing of an application for recognition and recognition itself, as well as by the potential retroactive effects of recognition concerning the debtor's dispositions during the period between opening of foreign insolvency proceedings and its recognition by the domestic court. A careful creation of provisions regulating formal recognition proceedings is required.

The rules on the formal recognition of foreign decisions opening insolvency proceedings contained in the UNCITRAL Model Law on Cross-Border Insolvency⁴⁷ may serve as a starting point. However, especially in the case of countries belonging to the civil law system, it is desirable that this procedure be further clarified. For example, not only a foreign representative, but also creditors as well as the insolvent debtor should be authorized to file an application for recognition. An application for recognition should be published, in order to inform creditors about the existence of a formal recognition proceeding. Rules should explicitly determine which courts have subject-matter jurisdiction over recognition proceedings. Designated courts should be those which are otherwise competent for domestic insolvency proceedings, and are familiar with the subject. It should be prescribed in advance who is authorised to participate in a recognition proceeding. In principle, this should include all those whose rights are affected by a decision on (non-)recognition. It is sufficient for the participants in the proceedings to be given an opportunity to declare in writing their position regarding recognition. Courts should also be empowered to hear persons who have declared themselves in writing as being against recognition. However, the time limit for a written declaration should be a short one. The authority of the court to grant a relief upon application for recognition of a foreign proceeding in order to protect the insolvency estate (see Art. 19 and 22 MLCBI) and a relief upon its recognition (see Art. 21 and 22 MLCBI) could be regulated in more details, to ensure legal predictability and certainty. It should be clear what are the legal consequences of recognition, which can be different, depending on whether, as a result of recognition, secondary insolvency proceedings have been opened in the recognizing state or not. A court decision on recognition or non-recognition of a foreign decision opening insolvency proceedings

47 Art. 15–24 MLCBI.

must have an effect *erga omnes*⁴⁸. At the same time, it should contain an enforceability clause against the insolvent debtor. The recognition of a foreign decision opening insolvency proceedings should not automatically entail opening of a domestic secondary insolvency proceeding. Such a solution is impractical in cases where there are insufficient assets to carry out such proceedings in the state of recognition, or where there are no creditors to be protected by opening such proceedings. Therefore, the opening of domestic secondary insolvency proceedings should depend on the specific circumstances of the case. However, if in a particular case it is necessary to open secondary insolvency proceedings, the request for their opening should be made within the recognition procedure of the foreign decision opening the main insolvency proceedings. The recognizing court should then decide on this matter within the same decision by which it recognizes the foreign decision opening the main insolvency proceeding. Namely, if the rules foresee that secondary insolvency proceedings against the same debtor in the recognizing state may be opened at any time after recognition of the main insolvency proceedings (see Art. 28 MLCBI), a 'change of statutes' (change of applicable law) would occur with respect to the debtor's assets contained in the insolvency estate in the state of recognition, since, instead of the previous *foreign lex fori concursus*, the *domestic lex fori concursus* would now be valid for these assets after the opening of secondary proceedings. The legal possibility of the opening of secondary insolvency proceedings at any time after the recognition of foreign decision opening main insolvency proceedings raises many issues that have so far not been addressed by either the EIR or the MLCBI, nor by national legislators whose legal systems contain such possibility. The decision on recognition or non-recognition of a foreign decision opening an insolvency proceeding should be published. A legal remedy against decisions on recognition or non-recognition should be also prescribed, but it should not have an effect of suspension. The issue of bearing the costs of formal recognition proceedings should also be expressly regulated. In any case the rules regulating formal recognition proceeding should ensure that the procedure can be conducted expeditiously, avoiding undue delays that serve no legitimate purposes.

48 As to the question whether such formal recognition should be given intra-EU (cross-EU) effect see *infra* at IV.2.c).

Some EU Member States, e.g. Croatia⁴⁹, have developed in their autonomous International Insolvency Law a combined model: a) as a rule formal recognition proceeding with publicity and with *erga omnes* effects and b) possibility of incidental recognition of a foreign decision opening insolvency proceedings with *intra partes* effects, and that in some exceptional cases where such recognition is more suitable in light of procedural economy. This would, for example, be the case where main insolvency proceedings are opened in State A, while in the recognizing State B only a lawsuit before a civil court or an arbitral proceeding is pending in which the insolvent debtor is a party. Among other things, this raises the question of whether the opening of insolvency proceedings leads to the stay of the law suit or arbitral proceeding in State B, and who is authorized to continue that lawsuit i.e. arbitral proceeding and in whose name. If there are no other creditors nor other objects, things or rights belonging to a foreign insolvent debtor, apart from those which are subject to such lawsuit or arbitral proceedings in State B, conducting a formal recognition procedure In such a situation it may be too costly and inappropriate to require a formal and separate recognition proceeding. Therefore, the court conducting the lawsuit as well as the arbitral tribunal should be authorized to decide on the recognition of the foreign decision to open insolvency proceedings incidentally, with legal effect limited to the specific law suit or arbitral proceeding in question. Both in the case of formal recognition proceedings and in the case of incidental recognition of a foreign decision opening insolvency proceedings, the recognizing court or arbitral tribunal have to establish whether the prerequisites for recognition are fulfilled. Incidental recognition of foreign decision opening insolvency proceedings only means that the court or arbitral tribunal decides on the question of recognition of such a decision only as preliminary issue and with *intra partes* effects. The editors would recommend such a combined approach for future common EU rules on relations with non-EU countries.

IV. Legal consequences of recognition

The EIR endeavours to determine the legal consequences of recognition of foreign insolvency decisions mainly through a set of conflicts rules (Art. 20

49 A similar approach has been chosen, outside the EU, by North Macedonia, see → Dordevic-Kostovski.

in conjunction with Art.7 – 18 EIR), which are complemented by some substantive rules (e.g. Art. 8, 10, 15 EIR; Art. 21, 22, 28, 29 EIR⁵⁰). In contrast, the MLCBI determines the effects of recognition primarily through a set of substantive rules and gives the recognizing court considerable discretion as to what legal effects are given to the foreign proceedings.

Following the example of some EU Member States, which have adopted the MLCBI, but adapted it to the general structures of their less discretion-oriented Civil Law system, the editors would recommend to use the EIR approach also for recognition of non-EU insolvencies, but integrate provisions of the MLCBI into this approach. This could include granting the recognizing court some judicial discretion as to the effects of recognition.

1. Aspects of conflict of laws⁵¹

At present, the EIR contains among its general provisions insolvency-specific conflict of laws rules, which are applicable also to recognition of foreign proceedings. Most of these conflicts rules designate – implicitly or explicitly – only the law of EU Member States⁵², but some conflicts rules are of a ‘universal’ character, i.e. they can also lead to the law of third countries. This is true, for example, for Art.9 EIR (set-off) and Art.17 EIR (protection of good faith purchasers: *lex rei sitae* or *lex registri*). If the EU decides to pass rules on recognition of non-EU insolvency proceedings, different options as to conflict of laws are available:

- a) The EU could simply extend the existing conflicts of law rules of the EIR to the recognition of non-EU insolvencies. This would lead to the application of the law of non-EU countries, e.g. in particular the *lex fori concursus* of the non-EU proceeding, but even to the law of other non-EU countries under a ‘generalising’ (universal) wording of Art.8 – 18 EIR. For example, recognition of an UK insolvency proceeding might entail application of the labour law of a further country, e.g. Chinese or U.S. labour law.

50 Some provisions in Chapter II of the EIR have an overarching character, e.g. Art. 23 and 31 EIR, Art. 24 – 27 EIR, to a certain degree also Art. 28 and 29 EIR.

51 Issues of conflict of laws arise in all constellations of cross-border insolvency law and will there also be addressed in Part V.1. of these reflections as an overarching matter. Specifics of conflict of laws in the recognition context will, however, be discussed here.

52 See Art.7 EIR and Art.8, 10–16, 18 EIR.

- b) The EU could in principle extend the existing conflicts of law rules of the EIR to the recognition of non-EU insolvencies, but handle conflict of laws in situations covered by the specific conflicts rules of Art.8 – 18 EIR in a differentiated manner. For example, some of these specific conflicts rules may be excluded in the recognition context or they might remain to be applicable only to the law of EU Member States.
- c) A third option would be to align conflict of laws in the recognition context with the incoming UNCITRAL instrument on conflicts of laws in insolvency proceedings, which basically gives the recognizing court discretion as to the use of conflict of laws rules.

The editors propose to use for recognition of foreign non-EU insolvencies in principle the conflict of laws approach of the existing EIR as this contributes to legal security and previsibility of the effects of recognition and is also, due to the foreign *lex fori concursus*, a solid basis for cooperation with the foreign insolvency proceeding. However, the editors would not propose to simply and fully extend the EIR's conflicts rules to recognized non-EU proceedings, but to choose a more differentiated approach.

The editors would recommend one of the following two options, but encourage further discussion:

One option would be to keep the existing specific conflicts rules of Art.8 – 18 EIR as they are, i.e. continue to limit their application to the law of EU Member States. This would protect particular legislative interests of EU Member States (e.g. as to labour law or the immovables sector), and at the same time avoid an overcomplication of conflict of laws scrutiny at recognition of non-EU insolvencies. Another option would be to limit the number of specific conflicts rules provided for in Art.8 – 18 EIR in aligning them with the specific conflicts rules foreseen in the incoming UNCITRAL instrument on conflict of laws in insolvency proceedings.

Specific consideration is worth to be given in this context to the effects of an insolvency proceeding on pending lawsuits⁵³ or arbitral proceedings⁵⁴ (see Art.18 EIR). The topic arises mainly in the recognition context, impact of a foreign insolvency proceeding on a pending domestic lawsuit i.e. on an arbitral proceeding.). The question arises whether the solution from Article 18 of the EIR should also be applied in the case of insolvency proceedings opened in a third country, or whether it would be better to provide for the solution contained in Article 20 of the MLCBI, thus, for the

53 For details see → Silvestri.

54 For details see → Lazić.

automatic suspension (stay) of domestic pending lawsuits or ongoing arbitration proceedings in which the debtor is a party, as a legal consequence of recognition such an insolvency proceeding opened in that third country.

A substantive rule of suspension of individual actions as proposed by Lazic for arbitration⁵⁵ would have the advantage of setting out a clear rule on the effects of insolvency for arbitration, an aspect which most legislations of the Member States, as well as arbitral regulation neglect regulating.

The editors are of the view that the *lex fori concursus* should be the applicable law for the following issues: capacity to be a party in pending arbitral proceedings, the procedural capacity of the insolvent debtor in pending arbitral proceedings, effects on the power of attorney issued by the insolvent debtor before the opening of insolvency proceeding for its representation in pending arbitral proceeding, as well as for the authority/entitlement to initiate the continuation of the stayed/suspended arbitral proceedings.

In the interest of legal certainty and predictability, it should be expressly determined which law governs the effect of the opening and recognition of foreign insolvency proceeding on an arbitration agreement.

2. Aspects of substantive law

Apart from provisions on conflict of laws, the EIR provides also for some substantive rules applying also⁵⁶ (or even only⁵⁷) to the effects of recognition of a foreign insolvency proceeding. Several of these provisions contain an element of territorial limitation (location of certain assets in another EU Member State), which raises the general issue of universality and territoriality in the recognition context.

a) General aspects of universality and territoriality in the recognition context

Depending on the type of indirect jurisdiction, recognition of foreign insolvencies can relate to foreign main proceedings (based on COMI or equivalent jurisdiction)⁵⁸ as well as to foreign non-main proceedings.

55 See →Lazić.

56 In particular Art.8, 10, 15 and 16 EIR, but also Art.23 and 28–31 EIR.

57 In particular Art.21 and 22 EIR.

58 See supra C.II.1.

In most cases, recognition of main insolvency proceedings will be sought. Here, from the universality/territoriality perspective general rules on recognition apply. In particular, the foreign insolvency practitioner can, in principle, take assets located in the recognizing country under his or her administration (consequence of the recognized universality of the foreign main proceeding). There may be specifics in cases of non-recognition or partial non-recognition of the foreign proceeding, or where a domestic secondary proceeding has been opened before or after the recognition of the foreign main proceeding, but this is less an issue of recognition than of concurrent proceedings and will be addressed there⁵⁹

In cases of recognition of foreign non-main proceedings, the question may arise whether a foreign non-main proceeding may be given universal (extraterritorial) effect, e.g. in the sense that such a non-main proceeding also encompasses the debtor's assets located abroad if the foreign *lex fori concursus* so provides. The editors recommend to deny this in principle, because the State/country where such a non-main proceeding has been opened does not typically have a broad intensive connection with the debtor. Granting such extraterritorial recognition to non-main insolvency proceedings could destroy legal predictability and legal certainty i.e. expectations of the creditors. If a non-main proceeding with universal effect can be opened solely on the basis of debtor's assets located in the state of opening, regardless e.g. of the existence of an establishment or the debtor's center of main interests, then it is impossible to predict in advance in which countries insolvency proceedings may be initiated against the debtor and the law of which country will be applicable to the legal consequences of the opening of insolvency proceedings. It could be devastating especially for employees and other creditors with small claim, who generally will not have sufficient financial resources to effectively participate in foreign insolvency proceedings. Such participation may require covering travel expenses to attend hearings abroad, hiring legal counsel due to unfamiliarity with the foreign language and legal system, and costs necessary for potential contesting other creditors' claims—all of which impose significant burdens. In most legal systems, there is a rule that creditors bear the costs of their participation in insolvency proceedings, and such costs may have to be reimbursed from the insolvent estate only if the estate is sufficiently large to cover them. In the vast majority of cases, however, the insolvency estate is not even sufficient to satisfy the principal claims of creditors, let alone

59 See *infra* Part D.

their costs of participating in the proceedings. Moreover, the recognition of a universal effect of non-main insolvency proceedings could also lead to the majority of cross-border insolvency proceedings, regardless of the debtor's COMI, being conducted in the future only in the most developed countries of the world—those that have most advanced their insolvency law.

It might also be explicitly foreseen that Member States have the right to recognize foreign non-main proceedings with universal effect on a discretionary basis, similar to Art. 21 MLCBI.

b) Specific substantive rules

The EIR provides for several substantive rules, some of them intertwined with conflict of laws provisions, which apply (specifically or also) to the recognition context. It should be remarked that some EU Member States provide for specific conflict of laws rules in such cases, instead of using a substantive law solution. Noteworthy examples are Art.8 EIR (third parties' rights in rem are 'not affected' by the insolvency proceeding if their collateral is situated 'in another [EU] Member State'). A similar provision is, which includes also a conflict of laws element, is Art.16 EIR on 'detrimental acts' (meaning mainly avoidance of transactions).

As to recognition of non-EU insolvencies, there are again different options.

One possibility is to extend these provisions also to non-EU countries. Another possibility is to keep these rules in so far as collateral is located in EU Member States or the law of some EU Member State applies to the respective acts. This would mean to let these provisions unchanged, not adapting them to specifics of non-EU insolvency proceedings. Also, solutions between these two poles can be imagined, such as a distinction between some of these provisions or a modification of their content.

One may also raise the question whether the current solution contained in Article 8 of the EIR—which fully exempts those creditors whose collateral is located in another Member State, and not in the State where the insolvency proceedings are opened, from the legal consequences of the opening of foreign insolvency proceedings—is consistent with the principle of equal treatment of all secured creditors of the same debtor, namely those creditors who have secured their claims with a right in rem. Likewise, one may raise the question of whether the solution contained in Article 8 of the EIR is consistent with the modern development of insolvency law,

which places emphasis on the restructuring of the debtor rather than the liquidation of his assets. Indeed, without the inclusion of secured creditors in the restructuring plan, including creditors whose collateral is situated in another State, and not solely those creditors whose collateral is situated in the State of the opening of insolvency proceeding, restructuring will generally not be feasible.

There might also be some new substantive provisions addressing particular needs of protection in the case of non-EU insolvency proceedings. For example, it would be possible to provide special protection for the satisfaction of employee claims where the employees have their regular place of work in the recognizing state. This could be done, e.g., in the form of a right for those claims to be settled before the foreign main insolvency proceeding's administrator is permitted to dispose of the debtor's assets located in the recognizing state. A similar protection could be provided for domestic or other EU-based creditors with public claims (domestic tax and social security claims).

c) Intra-EU (cross-EU) consequences of recognition?

An issue which was raised in one of Project conferences and which the editors also discussed, is whether the recognition of court decisions from third countries opening an insolvency proceeding (or passed in the course of the proceedings, or stemming from side-litigation) granted by one or few Member States should be given effects, in some way, in the legal system of other Member States.

Two basic paths might be chosen as starting points.

One approach would be to confine the effects of recognition within the recognizing country only. This approach obliges the debtors, creditors and practitioners from third countries seeking recognition in other Member States as well to seek recognition separately in each Member State where they wish the third country proceeding to take effect.

The other approach would be granting immediate and automatic EU-wide effect to the recognition made in one Member State, leaving non-recognising States the possibility of refusing the recognised proceedings to take effect within their country on specific grounds (e.g. public policy).

The latter approach could present sizeable practical advantages in cases when the debtor has connections with several EU Member States (e.g. assets or creditors in more than one Member State), as it would streamline

the process of recognition of third countries proceedings by channeling recognition through a single 'entry point' (the recognising Member State).

Also, intermediate options can be conceived. For example, such cross-EU recognition of third country insolvencies might be limited to formal recognition proceedings (as foreseen under the MLCBI), and/or Member States might retain a tighter control upon the recognition of third country proceedings in such cases, while still streamlining the process. For example, the ascertainment of certain prerequisites of recognition made by the court of one Member State might relieve courts of other Member States from scrutinising the same prerequisite (e.g. indirect jurisdiction) if they are requested to recognise a proceeding which has already undergone recognition scrutiny in another EU Member State. Such a mechanism would mirror the way in which, under the EIR, insolvency ascertained by the court opening the main proceeding in the COMI Member State shall not be re-examined by the court requested to open a secondary proceeding (art. 34 EIR).

However, having discussed this issue, the editors refrain from specific suggestions at the present time as the topic would require broader discussion.

*D. Concurrent proceedings*⁶⁰

Parallel (concurrent) proceedings occur in two major variants: concurrent proceedings in several countries with regard to one debtor or concurrents proceedings with regard to several debtors who are part of a group of companies (or enterprise group).

Concurrent proceedings with regard to one creditor are a well-established topic of cross-border insolvency law, which is governed by detailed rules both in the EIR (Chapter III: EU-internal relations only) and in the MLCBI (Chapter V: global relations). Concurrent proceedings with regard to corporate groups are also governed by special rules in the recast EIR (Chapter V) and in UNCITRAL's MLEGI. However, practice as to these provisions is scarce, and the MLEGI has not yet been adopted by any country⁶¹.

The editors would recommend to include some rules on concurrent proceedings in future EU provisions on cooperation with non-EU countries,

60 For more on this topic in general see → Trunk (concurrent proceedings).

61 Further on this topic in → Panzani/Van Galen and → Miguens (MLEGI).

but limit them mainly to concurrent proceedings concerning one debtor⁶². With regard to concurrent proceedings relating to corporate groups, a short provision on ‘cooperation as far as possible’ would seem to be sufficient at the present time, but nevertheless helpful.

I. Admissibility of concurrent proceedings

The first question as to concurrent proceedings is whether (and under which conditions) concurrent proceedings should be admitted. The EIR admits concurrent proceedings only in the constellation main proceeding (COMI-based) – non-main proceeding (establishment-based).

In relations with non-EU countries, the EU has only limited possibilities to regulate concurrent proceedings, as such regulation can, at least directly, only cover EU proceedings. However, the MLCBI shows that a more global approach is also possible.

The editors propose that the EU should address in provisions on cooperation with non-EU countries all cases of concurrent proceedings including, e.g. concurrent (self-proclaimed) ‘main proceedings’ (such possibility cannot be excluded) and concurrent ‘non-main proceedings’. The editors recommend to allow the opening of a concurrent proceeding in the EU, when the debtor’s COMI is located outside the EU, on the basis of regular jurisdictional rules. Coordination and cooperation as general principle

The editors recommend to adopt for relations with non-EU countries the provisions of the MLCBI on cooperation between the insolvency practitioners and courts (MLCBI Chapter V) as literally as possible in order to demonstrate the goodwill on the side of the EU to follow the basic cooperative approach of the MLCBI in relations with third countries. This does not mean that a Member State, in relation to third countries, could not lay down additional rules on cooperation, which would further enhance and clarify cooperation with foreign courts and foreign insolvency practitioners. In this context, reference may be made to Articles 7, 25, 26 and 27 of the MLCBI.

62 → Fabriès-Lecea proposes to introduce rules on *lis pendens* inspired by the Brussels Ia Regulation.

II. Prerequisites, contents, limits?

Namely, it would serve legal clarity to define the prerequisites and contents of such cooperation somewhat more precisely than in the MLCBI or even the EIR⁶³.

For example, in concurrent proceedings a limited possibility of choice of applicable insolvency law by insolvency representatives should be introduced in order to facilitate an effective and fair regulation of the insolvency.

A duty of cooperation cannot be unconditional, exceptions should however be limited. Limits under applicable law can be used as a basic rule, but there should be an opening clause for courts.

Grave or repeated non-cooperation by the organs of the other proceeding should also be foreseen as an exception. Public policy can serve as another general exception.

E. Overarching issues

Numerous topics of cross-border insolvency law can arise both in domestic insolvency proceedings and in the recognition context as well as in concurrent proceedings (e.g. conflict of laws issues, position of creditors, insolvency-related publications, data protection). The EIR deals with some of them in its general Chapter I, but it also contains some additional, more specific rules on the same topic or other overarching topics at other places, e.g. in Chapter IV (information for creditors and lodgement of their claims).

Although the book and the reflections basically follow the overall structure of domestic proceedings, recognition of foreign proceedings, concurrent proceedings – some topics turned-out so closely related with each other across the different procedural constellations that the editors decided to deal with them in a general, overarching manner.

The following conclusions take this up and address some issues specifically, bringing together their relevance both in domestic proceedings and in the recognition and the parallel proceedings context.

63 For issues of information exchange in this context see → Năstasie.

I. Conflict of laws

The EIR deals with conflict of laws (mostly) in Chapter I, i.e. the EIR's conflict rules apply both in (or from the perspective of) a domestic insolvency proceeding and to effects of foreign insolvency proceedings. The planned UNCITRAL instrument on conflict of laws in insolvency takes (as the project stands today) a somewhat different approach: its conflicts of laws rules apply in principle only in domestic insolvency proceedings. In the context of recognition of foreign insolvencies, conflict of laws rules apply only in a very mitigated manner, including, in particular, discretion on the side of the recognizing court⁶⁴.

The autonomous insolvency laws of EU Member States differ significantly in this regard: some take, in principle the 'bilateral' approach of the EIR, others provide for (at least partly) different conflicts rules for domestic insolvency proceedings and recognized foreign proceedings.

The editors propose, for the purposes of future EU provisions on cross-border insolvency relations with non-EU countries to keep in principle to the 'bilateral' approach of the EIR⁶⁵, but add a mitigating (discretionary) clause for the effects of foreign (non-EU) insolvencies. This would align such EU rules with the already mentioned draft UNCITRAL Model Law on Applicable Law in Insolvency Proceedings and avoid contradictions between the effects given to the foreign insolvency proceedings by its own rules and the effects accorded to it by the recognizing court.

II. Universal or territorial scope – discretionary elements?

The issue of the (claimed or accorded) universal or territorial scope of insolvency proceedings or certain of its rule comes-up both in domestic proceedings and in recognition of foreign proceedings as well as in concurrent proceedings⁶⁶.

The editors propose to handle this issue in specific contexts, in particular separately for domestic proceedings and recognition. Each country should

64 Cf. e.g. the different options of Art.13, 14 and 15 in the presently discussed at UNCITRAL in the draft instrument on applicable law in insolvency proceedings.

65 In contrast → Fabriès-Lecea proposes to 'universalize' the EIR's conflict of laws rules. She also proposed to admit renvoi when the conflicts rules lead to a non-EU country.

66 As to doubts about the claimed universality of EU insolvency proceedings from a Swiss perspective see → Stähelin-Kleider.

decide which of its proceedings should have universal or territorial scope, if it is not based on COMI, and what this means concretely. The EU should grant foreign non-main proceedings only territorial effect, but might give Member States the right to recognize also universal effects of non-main proceedings, e.g. on a discretionary basis, such as foreseen by the MLCBI.

This may lead to differentiated solutions. For example, the EU might decide to exempt third parties rights in objects located in the EU from any effects of non-EU insolvencies (as is true presently under Art.8 EIR for inner-EU cases), but may apply general rules of insolvency law to such objects located outside the EU. Such an approach is not uncommon in autonomous laws. It may, however, be regarded as discriminatory from an external perspective. The editors would generally recommend to avoid such substantive carve-outs according the location of object and apply instead a conflict of laws approach.

III. Foreign creditors

In modern cross-border insolvency law, foreign creditors usually get equal treatment with domestic creditor. The EIR, however, deviates partly from this principle, as it defines as foreign creditors only creditors resident or domiciled in the EU (Art. 2 (12 EIR)).

The editors recommend including also creditors resident or domiciled outside the EU into this definition. The right to lodge claims in insolvency proceedings against the debtor, as provided for in Article 53 of the EIR, should in fact cover all foreign creditors, regardless of whether they have their habitual residence, domicile, or registered office in a Member State or in some third country. Without the duty of the court or the insolvency practitioner to notify all creditors of the opening of insolvency proceedings, creditors may not be able to exercise their right to participate in the insolvency proceedings⁶⁷.

Therefore, the more appropriate solution is contained in Article 14 of the MLCBI, which requires that notice of the opening of insolvency proceedings be given not only to creditors in the State where the proceedings are

67 Unequal, inconsistent treatment between EU-based and non-EU based creditors may lead to non recognition of EU proceedings in third countries on public policy grounds, as shown by → Staehelin/Kleider.

opened, but also to known creditors who do not have an address in that State.⁶⁸

It is another question whether certain creditors are granted (or not) a privileged status in the insolvency proceeding, e.g. as secured creditors, employees, tax creditors or other creditors with public claims. The editors would recommend leaving this to applicable insolvency law provided that the basic EU freedoms or the European Charter of Fundamental Rights are not violated.

IV. Particular subject areas

Apart from the foregoing general issues, there are some more particular matters coming up in all procedural constellations of cross-border insolvency and that need to be addressed here briefly as such in the conclusions.

1. Insolvency-related court proceedings⁶⁹

One such aspect are insolvency-related court proceedings. They raise issues of direct jurisdiction, conflict of laws and recognition of judgments both from the perspective of domestic insolvency proceedings and of recognition of foreign insolvency proceedings, including concurrent proceedings. The EIR deals with this issue rather systematically (though not completely). UNCITRAL has developed a separate Model Law on the specific (yet crucial) aspect of recognition of foreign insolvency-related judgments (MLIJ).

The editors propose to take the EIR's provisions as a starting-point also for relations with non-EU countries and align them with the MLIJ.

This should include a differentiation between 'core' insolvency decisions or sub-proceedings⁷⁰, 'closely insolvency-related' proceedings and 'distantly (or loosely) insolvency-related' proceedings (cf. Art. 6 and 32 EIR), possibly complemented by a legislative definition of each category, which could help sorting out the rules applicable to one or the other category of proceedings in individual cases.

68 For more details see → Garašić.

69 For more details see → Trunk (Insolvency-related disputes).

70 As to specifics of recognition of foreign discharges ('core' insolvency decision) from a third-country perspective (Korea) see → Kim.

Distantly insolvency-related proceedings⁷¹ need no particular regulation, they may remain to be covered by general rules of international civil procedure. Core insolvency sub-proceedings and decisions as well as loosely insolvency-related proceedings should be covered by cross-border insolvency rules (as they already are under the EIR for inner-EU constellations).

There should be a concurrent, but not exclusive international jurisdiction for closely insolvency related Gaproceedings in the *forum concursus*⁷². Other grounds of jurisdiction may be determined by general international civil procedure law, including the Brussels Ia Regulation. Issues of conflict of laws of the EIR arise in the ordinary conduct of insolvency proceedings, but they may also arise in insolvency-related disputes, e.g. in avoidance lawsuits. The specifics of insolvency-related disputes do not appear to require particular conflicts rules for such procedural contexts, but can be handled in a general manner.

Recognition of third country judgments in such proceedings – be it in the framework of the domestic insolvency proceeding or in other procedural contexts – should be designed along the lines of the MLIJ⁷³. It should be expressed clearly that recognition of a third country judgment relating to a third country insolvency proceeding requires that the decision opening the foreign insolvency proceeding is recognized in the EU⁷⁴. In contrast with Art.32 EIR, however, indirect jurisdiction should not be limited to the *forum concursus*, but should include other fora foreseen under the Brussels Ia Regulation, in particular the defendant's domicile.

2. Alternative dispute resolution (arbitration and mediation) in cross-border insolvency law

Practitioners increasingly resort to mediation and arbitration to handle insolvency-related disputes due to their numerous advantages (cost-efficiency, flexibility etc.), and legislators (including the EU) in recent times have included elements of mediation into restructuring frameworks. Yet, the

71 In the sense of Art.32 (2) EIR.

72 See → Mangano, proposing additional fora for avoidance actions next to the *forum concursus*.

73 For more details → Trunk (on insolvency-related proceedings). See also → Mangano for judgments rendered in third-countries avoidance actions in conjunction either with domestic or with foreign insolvency proceedings.

74 This is presupposed also in Art.32 EIR.

present state of cross-border insolvency legislation in this regard is still incomplete⁷⁵. Neither the EIR nor the model laws of UNCITRAL ever mention mediation, and only address arbitration under a very specific aspect (namely, that of the law governing the effects of recognition upon pending proceedings). Both instruments still neglect highly significant issues, such as the law governing arbitrability and the effects of insolvency upon arbitration agreements, as well as the recognition of arbitral awards made in insolvency related disputes.

Nonetheless, developments in this respect are underway, particularly within UNCITRAL Working Group V on the issue of applicable law.

The editors share the view that it would be premature to address the relationship between ADR and third-countries insolvencies in much detail⁷⁶. The EU should instead follow the aforementioned developments attentively and consider addressing the topic more systematically, also for inner-EU constellations, in the upcoming evaluation of the EIR in general. However, a general encouragement to use ADR in the context of cross-border insolvencies might be helpful. Generally speaking, it would seem advisable to set out consistent rules on arbitration and/or mediation, regardless of their inner- or outer-EU dimension. There does not appear to exist a compelling reason to differentiate between cases in which the insolvency proceeding and the ADR procedure are ‘rooted’ within the EU, or in which one or the other is connected to a third country.

3. Information technologies in cross-border insolvency law

Modern information and communication technologies (ICT) are today of common use both in domestic and cross-border insolvencies. However, developments continue to be extremely rapid and depend to a large degree on developments of technology and the accompanying general legal framework.

For the purposes of cross-border insolvency law this means that specific rules on the use of ICT in cross-border insolvencies are difficult to design at the present time. Taking the existing provisions of the EIR and other EU insolvency legislation as well as EU international civil procedure legislation as a starting point, the EU should foresee in a future instrument

75 → Lazic (on arbitration); → Tasman (on mediation).

76 For a proposal on introducing a substantive rule on suspending arbitral proceedings in case of insolvency → Lazic.

on relations with non-EU insolvencies the possibility of cooperating also with non-EU countries on a non-discriminatory and proactive basis. This should include the authorization of the European Commission to pass secondary legislation to this effect.

F. Summary

Summing-up, there is a serious need for the EU to develop common and consistent rules on cross-border insolvency law in cases linked with non-EU countries⁷⁷. This would seem particularly urgent for relations with close economic partners of the EU such as Switzerland, the UK and the U.S., but the need for an adequate legal framework is not limited to these countries. Insolvencies in China, Türkiye, India, Canada, Brasil or offshore jurisdictions play a growing role also for the EU. By creating a balanced and good quality legal basis for such situations, the EU can improve its role in the cross-border insolvency world and influence also discussions within UNCITRAL with a view to further improving the global legislative framework.

The editors propose to create a set of binding rules – if there is EU competence for such legislation – addressing relations with non-EU countries in cross-border insolvency matters. If such rules were to be passed, the editors would favor the solution to add to the EIR a new Chapter on relations with non-EU countries, which should be aligned as far as possible with all UNCITRAL model laws in this field. However, as the UNCITRAL model law family is itself under continuous development, the EIR can also give some further input into UNCITRAL's work and there is also room for specific new approaches developed by the EU. In addition, room should be left for EU Member States to specify EU common rules in certain aspects or to be more cooperation-friendly under autonomous rules than the common standards may require. Even if the EU were not to pass a legislative act on this matter, it should at least prepare recommendations on minimum standards that the autonomous international insolvency law of each Member State in relation with non-EU countries should certainly include.

77 The contributions in this book by authors from non-EU countries have also shown the interest of such countries in legislative developments on the side of the EU and UNCITRAL as possible models for their own legislation or treaty practice, see e.g. → Babkina and Galdino/Garcia.

Whatever common rules may be passed, they should not exclude developing cooperation-friendly practice further on the basis of recommendations or other soft law instruments, taking into account also UNCITRAL's continuous work.

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Index

The numbers denote the pages on which the terms occur.

- Actio pauliana 255, 278ff, 287ff, 439, 583, 591f, 594, 605
- admission of claims - see verification of claims
- ADR 52f, 609ff, 615ff, 614 fn 24, 636f, 639, 904, 936f
- ancillary bankruptcy proceeding 46, 92f, 103, 112, 116f, 121, 131f, 141f, 148f, 156, 297 fn 9, 368, 397, 414, 808, 835, 875, 879
- applicable law 35f, 38ff, 42f, 46ff, 68f, 72 fn 54, 91ff, 99f, 140ff, 172f, 192 fn 3, 194, 212f, 216, 218ff, 231, 251, 255f, 267ff, 273, 275ff, 286, 289f, 353, 371ff, 394, 397, 408 fn 3, 417, 442, 452, 460f, 476ff, 498, 537, 547, 597ff, 601ff, 604, 607, 652, 654, 667, 670, 676, 694, 908f, 913ff, 920ff, 932f, 937
- arbitral proceeding 109, 154, 216, 226ff, 230f, 388, 559, 586f, 590, 596ff, 601ff, 607, 913, 923, 925f, 937 fn 76
- Argentina 17, 53, 180 fn 20, 422 fn 10, 429, 555f, 673, 678ff, 686, 698f, 715
- Australia 17, 41, 110, 180 fn 20, 200 fn 35, 201, 324, 343 fn 108, 347 fn 116, 371 fn 179, 591 fn 23, 828 fn 141, 847 fn 7, 870
- Austria 17, 27f, 40, 166 fn 8, 192 fn 8, 193 fn 11, 198 fn 29, 199, 203, 207 fn 59, 208 fn 63, 209 fn 66, 211 fn 81, 83, 86, 212 fn 87, 214, 217 fn 94, 219ff, 223, 225, 228, 230, 232 fn 129, 234, 236f, 239 fn 149, 240f, 243f, 245f, 258 fn 5, 277, 279, 307, 323, 327 fn 61, 335ff, 368, 370 fn 175, 372, 373 fn 187, 377 fn 195, 378 fn 197, 200, 382, 387, 403, 410 fn 15, 414f, 425f, 429, 452, 465, 559, 564, 566 fn 26, 568 fn 29-30, 576, 596 fn 37, 726f, 812, 941
- avoidance law 47, 154, 254ff, 258f, 266, 276ff, 280, 282ff, 290f, 936
- bank crisis 47, 171ff
- bank insolvencies 44, 174, 181ff, 221, 327 fn 60, 334 fn 84
- Belgium 17, 44, 134, 199, 203, 206 fn 59, 211 fn 83, 214, 217 fn 94, 219, 226, 233, 236 fn 138, 307, 337, 360f, 368, 373f, 413, 453ff, 462, 568 fn 30, 32, 588 fn 18, 600 fn 41, 628f
- Brazil 17, 41, 46, 54f, 96f, 101, 180 fn 20, 200f, 325, 343 fn 108, 626 fn 83f, 638, 640, 717-745, 855 fn 20
- Brexit 45, 57, 59ff, 67, 73, 75ff, 84, 90, 139 fn 24f, 407, 411, 883, 887ff, 890f, 894
- Brussels Ia (Ibis) Regulation 37, 57, 67 fn 31, 98, 126 fn 4, 134, 161f, 164, 167ff, 209 fn 68, 210f, 266f, 290, 317, 328, 345f, 370, 404, 408, 410, 414, 563, 566, 570, 572, 584, 600, 607, 878, 884, 892, 900, 903f, 931 fn 62, 936
- Bulgaria 17, 40, 199fn 32, 203 fn 53, 206 fn 59, 207 fn 61, 324, 765
- Canada 17, 41, 65 fn 25, 81 fn 26, 110, 120, 180 fn 20, 200 fn 35, 201, 325, 343 fn 108, 585, 594 fn 31, 601 fn 43, 607, 855 fn 20, 938
- China
 - PRC 17, 46, 54f, 56, 97, 101ff, 201, 325, 357f, 465, 747-762, 846 fn 6, 938
 - Hongkong SAR 201, 325
- COMI 24, 38, 42, 45, 49f, 52, 55f, 100f, 103, 112, 114f, 121, 135, 137ff, 141f, 146, 156, 158, 192, 194f, 196f, 205ff, 208ff, 232, 234, 237, 242f, 249f, 253f, 256f, 258 fn 3, 264, 265, 328f, 332, 327, 340 fn 102, 341, 348, 353ff, 358, 363, 376f, 380, 405, 407, 409f, 441, 447, 449, 456 fn 32, 459 fn 41, 460f, 463 fn 49, 464, 470ff, 477, 492, 507f, 513, 516, 525, 533, 535 fn 14, 538ff, 545, 547, 553, 564, 566, 568ff, 665, 693, 719, 732ff, 739f, 741, 754, 785f, 789, 823, 836, 870 fn 46, 873, 884f, 895, 905-912, 917f, 926, 928, 930f, 934
- comity 42, 101, 199 fn 33, 201, 208 fn 65, 342, 358f, 369, 375 fn 191, 381, 395f, 793, 795, 802 fn 30, 803 fn 36, 805f, 809, 813, 816, 827, 834, 869, 895
- commencement of proceeding 128, 141f, 146, 158, 201, 308, 311, 356, 418 fn 2-3, 420, 426, 438, 464, 534, 537 fn 18, 539, 548, 583, 585, 589, 598 fn 39, 602ff, 689, 694, 696, 704, 706f, 763, 774, 781, 784, 811, 826, 831, 845 fn 2
- common Law 41f, 56, 59, 95, 109f, 199 fn 33, 201, 205, 207 fn 60, 208, 215 fn 92,

- 217, 232, 320ff, 324f, 330, 339, 358f, 369f, 375 fn 191, 378 fn 198, 404, 438, 470, 474f, 477, 488, 491, 494, 496ff 552, 560, 731, 793ff, 813, 833, 836f, 845 fn 2, 893, 895, 908
- concurrent insolvency proceedings – 13f, 53, 159, 192 fn 5, 198, 202, 205, 240, 242, 252, 328f, 331 fn 72, 332f, 377, 381, 383, 445ff, 448ff, 451ff, 454ff, 458, 461-469, 478, 773, 821, 825, 832, 838, 897f, 906ff, 910, 912, 918, 927, 930ff, 935
- conflict of laws 35f, 38ff, 42ff, 47, 49, 58f, 62, 67, 70f, 95, 99f, 191f, 194, 196ff, 201f, 212-218, 223-226, 228, 230f, 235f, 242, 244, 248, 250f, 327-330, 334, 336-343, 365, 367-374, 379-383, 385, 387f, 393f, 399, 408, 445, 449, 451f, 459 fn 41, 469, 474, 553 fn 53, 576, 583, 599, 603, 607, 670, 773, 795, 845 fn 2, 897, 901, 904, 907f, 912, 914ff, 924ff, 932ff, 935f
- conflict of recognition (positive – negative) 49, 407, 413ff
- contemporary international insolvency law 161, 866
- corporate groups in insolvency (see also enterprise groups) 29, 102, 152, 158, 205, 290, 328, 461, 515, 529, 530, 532, 534-537, 547, 550-556, 682, 686, 708, 717-720, 726, 930f
- Court of Justice of the European Union 24, 26, 49f, 63, 117, 126, 195, 206, 239, 260, 313f, 400, 404, 406, 410f, 423, 440f, 479, 494f, 563, 568, 590 fn 21, 600, 870, 877ff
- Galapagos case 49f, 60 fn 5, 77 fn 6, 407-415, 919 fn 43
- Hertel case 46, 57, 100 fn 40, 126, 132-138, 148f, 153, 195 fn 15, 210 fn 75, 270f, 314, 565 fn 17, 877
- J v H Limited case 400 fn 1, 408 fn 6
- Nortel case 210 fn 71, 482, 565 fn 15, 875, 877-880
- creditors
 - foreign creditors 48, 57, 93, 164, 195, 201, 238f, 247, 252, 293-317, 376, 381 fn 204, 448 fn 8, 449 fn 11, 456, 475f, 645, 658f, 667, 677, 680f, 687-690, 696, 699, 706f, 711, 715, 728, 754, 791f, 796, 811-813, 817, 821f, 827, 829f, 834, 837f, 858, 867, 869, 871, 879f, 915, 934
 - information – see informing creditors
 - public claims creditors 915, 929, 935
 - ranking 101, 301, 436, 547, 666, 669, 822
 - secured creditors – see secured privileged creditors
- Croatia 17, 40f, 55, 152, 193 fn 11, 199, 200 fn 39 and 41, 203, 206 fn 59, 208 fn 63, 214 fn 90, 217 fn 94, 219, 222, 225f, 233, 235, 236 fn 138, 244, 246, 307, 323, 326 fn 53 and 55, 337f, 343, 364ff, 369, 373f, 376, 377 fn 195, 383f, 386 fn 218, 390, 452 fn 19, 454f, 457 fn 34-35, 462, 465, 466 fn 60, 559, 576, 773, 885 fn 20, 911 fn 23, 923
- Czechia 17, 40, 199 fn 31, 203, 208 fn 62, 323, 338f, 368, 375 fn 191
- debtor's property (see insolvency estate) 97, 377f, 422 fn 10, 452, 755 fn 23, 794, 822, 905
- Dicey Rule 843-845
- discretion 36, 39, 42, 49f, 143, 147, 151, 153, 157, 196 fn 19, 205, 207, 217, 223, 228, 232, 234, 244, 246f, 249, 272, 284f, 289, 304, 309, 319, 321, 329f, 337, 339ff, 356, 358, 366, 368 fn 167, 371f, 375f, 378, 381, 388, 391, 393, 402, 418 fn 2, 445, 449f, 456f, 461, 463, 468, 470, 476, 490, 499, 560, 571f, 575, 585ff, 593, 601 fn 43, 793f, 796, 800, 803, 806, 808f, 816f, 825, 827, 829f, 834ff, 837, 867 fn 38, 908, 916, 919, 924f, 933f
- effects
 - of opening of insolvency proceeding 433
 - of recognition of foreign insolvencies 46, 48, 147f, 158, 319, 330 fn 70, 344, 353, 360, 362, 364ff, 373-376, 380ff, 388-394, 417, 442, 454, 461, 572, 575, 598 fn 39, 920f, 924f, 929, 936
- EIR (Recast) - see Recast EIR
- enterprise (or corporate) groups 15, 21, 50, 103, 107f, 132, 137, 504, 507, 512, 528, 529-556, 769
- Estonia 17, 40, 199 fn 32, 207 fn 61, 307, 324, 335 fn 89, 789 fn 15
- EU Restructuring Directive 2019 37, 42 fn 19, 53, 161, 339, 447, 622 fn 60 and 64, 644f, 776, 887, 903
- EU Insolvency Directive 2026 644-646
- Eurasian Economic Union (EAEU) 17, 54, 663f, 667, 668 fn 7, 669f, 791
- European insolvency law 52, 67, 255, 476
- executory contracts 210, 557, 565, 573, 578, 586, 593, 605f
- exequatur 60, 62 fn 13, 65, 77, 137, 320 fn 7, 337, 339, 360, 365f, 368 fn 166, 369 fn 172, 383, 399f, 403, 406, 407f, 413, 415, 462 fn 47, 588 fn 14
- financial industry → see bank insolvencies and insurance insolvencies

- financial markets 68 fn 36, 215ff, 221, 372, 913
- forum shopping 65, 82, 91, 93, 209, 262, 353, 357, 523
- France 18, 40, 99, 199 fn 31, 207 fn 60, 208 fn 63, 233f, 277, 280, 307, 324, 325 fn 51, 339, 370 fn 174, 426, 430, 531 fn 4, 538 fn 20, 604 fn 51, 628f, 765, 855 fn 20, 891
- Georgia 18, 41, 200, 214, 217 fn 96, 326, 723 fn 19, 786
- Germany 5, 18, 40, 133, 139 fn 26, 153 fn 40, 161, 165f, 168, 171f, 175, 177f, 180f, 185, 188 fn 47, 199, 203, 206 fn 59, 208 fn 63, 211 fn 82 and 84, 214, 217 fn 94, 219f, 223, 225, 228, 233, 236f, 240f, 244, 260, 275, 279f, 307, 323, 327 fn 61, 339, 351, 353 fn 129, 354, 360, 368, 373, 378 fn 197, 382, 383 fn 212, 354, 403, 409–412, 414f, 426, 430, 439 fn 41, 452 fn 18, 455f, 465, 488, 559, 566 fn 27, 568 fn 31, 591 fn 23, 595, 747, 750f, 752, 754, 758f, 786, 865
- Gibbs Rule 404, 819, 843f, 845, 847 fn 7, 869, 870 fn 46
- Greece, 14, 18, 38, 40, 95, 152, 193 fn 9, 199, 206 fn 59, 207 fn 61, 214, 217 fn 95, 243, 323, 340, 367 fn 159, 413, 452 fn 17, 456, 465, 527, 576 fn 54, 764, 889
- group insolvency → see enterprise groups
- Hungary 18, 40, 199 fn 32, 208 fn 62, 223, 307, 323, 340, 368, 375 fn 191, 488, 787
- interim measures 362, 364, 382, 384, 455, 559ff, 576, 837, 921
- legal harmonization and unification 13, 53f, 59, 66f, 71, 95, 103f, 125, 132, 331, 527, 618, 635, 663f, 665f, 679, 767, 776, 779, 901, 920
- India 18, 41, 200 fn 35, 325, 786, 938
- information exchange 366 fn 157, 479, 932 fn 63
- – informing creditors, 48, 66, 293–317, 835
- information technology 643–646
- insolvency test 42, 246, 462, 474
- insolvency estate 14, 15f, 107, 174, 176, 182, 226, 420, 433, 438 fn 40, 514, 548, 549, 589, 598, 755 fn 24, 907, 921f, 927f
- insolvency representative 39, 138, 146ff, 148f, 198, 210ff, 219 fn 98, 228f, 233, 235, 240, 243f, 286, 311, 337, 366 fn 157, 368, 372 fn 184, 373 fn 189, 374, 380, 384ff, 388, 447f, 449, 451f, 454ff, 457f, 460ff, 465ff, 468f, 470, 475ff, 512, 537, 540, 543ff, 547f, 549, 555, 565ff, 570, 575, 579, 646, 652, 657, 662, 685, 702, 820, 832, 845, 871 fn 51, 932
- insolvency register – 53, 120, 125, 168, 241, 296, 305ff, 311, 316, 380, 475, 645, 768
- insolvency-related judgments – 38f, 48, 52, 107 fn 20, 108 fn 21, 117, 129, 132, 135, 140, 144, 185 fn 40, 187, 193, 196, 255, 402, 404, 558, 560f, 563, 569, 571f, 573f, 576 fn 53, 579ff, 767, 793, 833, 839, 844ff, 904, 917 fn 33, 935
- insurance insolvencies 460
- international cooperation 171, 476, 479, 494, 497, 553, 568, 634, 679, 682, 686, 707, 730 fn 34, 733, 759 fn 33, 916
- international organizations
 - CIS – 54 fn 22, 670, 847 fn 7, 870
 - Council of Europe 17, 24, 37 fn 5, 40, 67 fn 31, 193 fn 8, 197, 212 fn 87, 313, 370 fn 175, 400, 446, 450
 - EAEU 17, 25, 54, 663f, 667, 668 fn 7, 669ff, 791
 - OHADA – see OHADA
- intertemporal law – 390f
- judicial assistance 36, 39, 42, 54, 321, 323, 329, 456f, 571, 666, 904
- jurisdiction
 - direct jurisdiction
 - insolvency proceedings 39 fn 11, 41, 45, 47, 55, 58, 192, 194, 197f, 205f, 249, 333, 337, 348, 353f, 355, 449f, 454, 456, 459, 472f, 562, 564, 567, 910, 917
 - insolvency-related proceedings 47, 205, 209, 211f, 558f, 561f, 564, 567ff, 571f, 573, 579f, 901, 935
 - indirect jurisdiction (in recognition or other cooperation)
 - insolvency proceedings 46, 48, 103, 114f, 117f, 121, 131, 198, 206, 211f, 249, 332, 338f, 340f, 344, 352f, 355, 392, 460f, 472, 564, 567, 917, 926, 930
 - insolvency-related proceedings 52, 212, 401, 451, 567, 571f, 574, 580, 934
- Korea (Republic of) 19, 41, 54, 55, 200, 201, 323, 325, 343 fn 108, 378 fn 198, 843 ff, 935 fn 70
- Latvia 18, 40, 199 fn 30, 307, 324, 335 fn 89
- labour claims 245, 659, 893
- labour contracts 36, 39, 128–215, 217, 222, 251, 342, 369 fn 170, 317f, 373, 659, 771, 774, 913f, 924
- legal assistance – see judicial assistance
- legal reform 16, 44, 49, 52f, 55f, 104, 113, 119, 121 fn 67, 174f, 186, 281, 347, 446, 555, 628f, 636, 661, 673ff, 719ff, 726, 730ff, 742f, 748, 763ff, 794, 799, 821, 839

- *lex fori concursus* 36, 39, 43, 45, 48, 59 fn 1, 68, 85, 95, 100, 109, 127f, 143f, 182, 194, 197f, 201, 204, 213, 215ff, 223ff, 228, 231, 236, 244, 251, 255, 257f, 273, 282f, 289, 296, 299ff, 308, 311ff, 315f, 328, 332, 334, 339, 342, 344, 348, 356, 365, 367, 368ff, 382f, 385, 390, 402, 419f, 423, 433ff, 451, 457, 471, 558, 566, 589, 598ff, 603ff, 773, 861, 913ff, 922, 925ff
- *lex fori processus* 213, 227f, 340, 414, 419ff, 433ff, 596 fn 37, 598ff
- Lithuania 18, 40, 207 fn 61, 307, 324
- lodging of claims (filing of claims) 50, 53, 63, 66, 71, 137, 163f, 198, 210, 238 fn 142, 239ff, 293ff, 298, 299ff, 306, 309, 312, 332, 418ff, 502, 561, 565, 645, 656, 658, 688, 771, 879f, 932f,
- Lugano Convention 99, 119, 120, 121, 211, 415 fn 31, 527, 566, 875, 878, 883, 891 ff, 900
- Luxembourg 18, 40, 99, 199 fn 30, 307, 324, 409, 410, 523, 764
- main proceeding 42, 58, 141f, 147, 168, 192, 195f, 198, 202, 204f, 206f, 235, 238f, 240, 249, 258 fn 3, 328, 333, 337, 340, 364, 376f, 380f, 383, 385, 414, 447, 449f, 455, 456 fn 32, 458ff, 463f, 466, 469ff, 477, 508, 512, 517f, 520, 525, 534, 540, 545, 547ff, 657, 661, 682, 684 ff, 693, 695, 704 ff, 706, 734f, 737ff, 773, 784, 822f, 830ff, 906ff, 910ff, 926ff, 931ff
- material/substantive law (as opposed to procedural law) 35, 213, 113, 117, 295, 314, 332, 356f, 389, 481, 487, 542, 548, 552, 554, 558, 576, 670, 678, 688, 705, 793, 875
- mediation 35 fn 2, 44, 52f, 58, 137, 227, 241f, 609ff, 780, 936f
- Mexico 18, 41, 110 fn 30, 180 fn 20, 200, 325, 343 fn 108, 357 fn 137, 426, 827
- *Minikonkurs* (Swiss law) 342, 368, 374, 457
- MLCBI – see UNCITRAL
- MLIJ – see UNCITRAL
- modified universalism/universality 92ff, 127, 138, 258 fn 3, 274, 719, 794, 820, 893, 905
- Monaco 18, 192 fn 8, 198, 325
- Montenegro 41, 152, 180 fn 20, 326
- North Macedonia 18, 41, 55, 56, 200, 214, 217, 326, 343, 763 ff, 923 fn 49
- non-EU countries – see third countries (Third Countries/States)
- non-main proceeding 42, 58, 115, 128, 141f, 142 fn 28, 144, 147f, 192, 195f, 198, 202, 204f, 207ff, 230f, 232ff, 238f, 242ff, 249f, 253, 328, 333, 337, 340, 351, 364, 376ff, 381, 385, 387, 394, 447, 449f, 453 fn 21, 455, 456 fn 32, 458, 460, 463, 469 ff, 471, 517, 534, 540, 547ff, 657, 719, 734f, 738ff, 786, 791, 822ff, 832f, 906ff, 910ff, 926ff, 931ff
- non-principal proceeding - see non-main proceeding
- OHADA 44, 54, 65, 81 fn 27, 82, 197, 233 fn 131, 323, 325, 331, 333 ff, 401, 405, 446, 450 ff, 651 ff, 666 ff, 839, 916 fn 32
- ordre public - see public policy exception
- opening of proceeding 163f, 294, 296, 302ff, 309, 329, 338f, 349f, 360ff, 367, 369 fn 172, 342, 349, 375, 392, 401, 403f, 409ff, 428, 431, 451, 464, 557, 559, 562, 569f, 576, 775, 848, 919ff, 936
- out-of-court settlement 53, 179, 185, 454, 520, 584, 612ff, 659, 773, 776, 780
- *pari passu* principle/*par condicio* (omnium) creditorum 294, 314, 429, 547 fn 43, 653, 661
- parallel insolvency proceedings 34, 36, 38f, 40, 44, 50f, 103, 115, 118, 121, 128f, 168, 186, 191ff, 194, 203, 208f, 234, 240, 244, 249, 252f, 298, 307, 321, 328, 335, 355, 357, 380, 445f, 448 fn 7, 449, 453, 462-469, 474-477, 484, 487, 499, 501f, 522, 539, 547, 558, 565 fn 15, 571, 632, 656, 664, 682, 698f, 704-707, 784, 792, 851, 898, 911f, 930ff
- particular (territorial) proceeding 178, 458
- payment systems 68 fn 36, 215f, 218, 221f, 913 fn 27
- pending contracts - see executory contracts
- pending lawsuits 50, 148, 163, 218, 226, 417ff, 595, 599, 913, 925f
- preventive restructuring 15, 47, 60, 66, 152, 161ff, 262, 339, 482, 485, 522, 610, 622, 624, 637, 665 fn 4, 769ff
- principal (insolvency) proceedings - see main proceedings
- Poland 14, 18, 38, 40, 152, 193 fn 9, 199, 203, 206 fn 59, 208 fn 63, 214, 217 fn 95, 228 fn 123, 233, 239 fn 149 and 150, 240 fn 151, 243, 245, 246, 288, 307, 323, 340, 364 fn 148, 367, 368, 374, 390 fn 221, 413, 435, 452, 456 ff, 462, 465, 527, 559, 560, 576, 587, 590, 889
- Portugal 18, 40, 193 fn 11, 199, 207, 217, 219, 225 fn 112, 226, 228, 233, 236, 239 fn 149, 323, 340 ff, 351, 353 fn 129, 360, 368, 373, 378 fn 197, 427, 428 ff, 452 fn, 458 ff, 559 ff, 576, 587

- pre-insolvency proceeding 42, 64 fn 24, 152, 203, 249, 345, 447, 456, 461, 480, 482, 493, 502, 609f, 621, 635, 836, 839
- Principles of international insolvency law
 - see limited universality, territoriality, universality
- private international law
- procedural mechanisms 479, 486, 492, 498
- public policy exception
 - in general, 16, 45, 79ff, 100, 466ff, 478, 555, 586, 634, 666, 792, 807, 811, 825, 918, 932
 - in conflict of laws 95, 215
 - in recognition 48, 62ff, 120, 128, 145 fn 36, 146, 155, 182, 185, 187, 268, 271, 285f, 289, 332, 338ff, 344, 354ff, 361, 375, 386, 392, 405, 414, 451, 457, 454, 570, 573f, 578, 580, 693
- ranking/priority of claims 101, 162, 436, 518, 520, 658, 666, 677, 689, 702, 915
- secured/privileged creditors 109, 112, 210, 219, 223, 239 fn 147, 240 fn 150, 243, 247, 293, 301, 309, 371, 384f, 387, 525, 565, 659, 681, 685, 689f, 702, 707, 876, 928, 935
- unsecured/ordinary/junior creditors 240 fn 150, 247, 525, 586, 593, 598, 600, 606, 689, 711, 850 fn 13, 887
- Recast EIR 127, 129, 137, 149, 153, 157, 229, 312, 346, 408ff, 446, 479ff, 822, 877f, 930
- reciprocity 15, 41 fn 14 and 17, 56, 110 fn 30, 111, 237, 239, 338, 340ff, 357ff, 375, 392, 405, 453, 462, 580, 686, 715, 748ff, 751ff, 754, 756ff, 761, 774, 776, 788, 791, 795f, 799, 820, 822, 825ff, 836, 839, 846, 853 fn 16, 918f
- recognition
 - recognition of foreign insolvencies 171ff, 319ff, 399ff, 407ff, 417ff, 747ff
 - recognition of foreign insolvency-related judgments 557ff, 843ff, 883ff
- relative and absolute priority rule 525f
- restructuring plans 175, 422, 482, 508, 517, 522ff, 620ff, 626, 629, 710, 883ff, 929
- rights in rem 128, 163, 167, 192, 195, 217 fn 96, 223, 226f, 235, 236 fn 138, 371ff, 382, 384, 387, 774, 913ff, 928
- Romania 14, 18, 38, 40, 152, 193 fn 9, 199, 207 fn 61, 214, 217, 237 fn 140, 239 fn 150, 243, 247, 307, 323, 335 fn 88, 340, 357 fn 137, 364 fn 148, 367 fn 159, 413, 452 fn 17, 459, 465, 480, 484 fn 14, 487, 489, 490 ff, 494, 500, 527, 576, 827, 889
- Rome I and II Regulations 57, 99, 215, 219, 220, 221, 222, 230, 252, 256, 328, 370, 408 fn 3, 890, 894, 915, 916
- Russia 18, 325, 357, 375 fn 191, 592, 668, 669, 783 ff, 889, 910 fn 21
- Rubin Case 147, 284, 351 fn 124, 833 fn 167, 845, 847, 848, 854, 868
- scope of application
 - UNCITRAL texts 184f, 187, 327, 563, 578, 844
 - EIR 38, 58, 100, 169 fn 21, 181f, 202, 211, 221, 249, 327, 335, 345ff, 408, 556, 584, 600, 902
 - Treaties 187, 752, 870
 - national legislation 181f, 211, 225, 228, 327, 337, 460, 682f, 773, 827, 844
- secondary (insolvency) proceeding 101, 116f, 128ff, 131, 144f, 149, 158, 164f, 167, 185, 196f, 234, 238, 242ff, 258 fn 3, 297, 302, 328, 332, 338f, 341 fn 104, 351, 367, 370, 373, 377, 385, 403, 445ff, 454ff, 469, 474ff, 509, 517f, 520, 522, 655ff, 665, 784, 808, 817, 836, 877, 905f, 910f, 918, 921f, 930
- Serbia 18, 41, 152, 180 fn 20, 200, 214, 217 fn 96, 326, 786
- set-off 39, 163, 194, 210, 215f, 217 fn 96, 218ff, 236, 251 fn 168, 371, 380, 383, 557, 565, 578, 913f, 924
- settlement 39, 53, 179, 182, 185, 217, 221, 229, 372, 454, 520, 584, 612ff, 657, 659, 763, 773, 775f, 780, 787, 914
- Singapore Mediation Convention 53, 609, 634 ff
- Sino-German insolvency cooperation 747 ff
- Slovakia 19, 40, 193 fn 12, 208 fn 63, 216 fn 93, 232 fn 129, 234, 307, 323, 335 fn 90, 341, 368, 375 fn 191
- Slovenia 14, 19, 38, 40, 152, 193 fn 9, 199, 214, 217, 223, 233, 239 fn 149, 241, 242 fn 156, 244, 246, 323, 340, 364, 367 fn 159, 368, 374, 413, 452 fn 17, 460 ff, 462, 465, 527, 576 fn 54, 772 ff, 889
- social security claims 238, 240, 299, 915, 929
- South Africa 19, 41, 55, 56, 126, 200, 325, 343 fn 108, 357, 358 fn 141, 375 fn 191, 657, 919 fn 44
- Spain 19, 40, 99, 193 fn 11, 199, 203, 211 fn 86, 214, 217 fn 94, 219, 222f, 225 fn 112 and 113, 226, 228, 233, 236, 239 fn 149, 246, 258, 269, 271, 283 fn 52, 307, 323, 341f, 351, 353, 358, 360, 361ff, 369, 373f, 375 fn 191, 377 fn 195, 379 fn 202, 393,

- 413, 426, 452 fn 18, 461f, 465 fn 59, 516, 538, 559f, 564, 568 fn 29 and 33, 576, 587
- stay
 - of individual proceedings 227f, 385, 393, 402, 409, 418, 422, 425f, 430, 433, 438442f, 480, 492, 575, 586, 588, 590, 594ff, 606, 653, 696, 705, 804 fn 41, 830, 835, 852, 855 fn 21, 865f, 923, 926
 - of insolvency proceedings (in group insolvency coordination) 509, 511ff, 549
- sphere of application - see scope of application
- substantive law (as opposed to conflict of laws) 35ff, 47, 58, 66, 68, 71, 93, 192, 194f, 198, 202, 216, 219f, 224ff, 230ff, 235f, 240ff, 247f, 251ff, 329f, 332, 334, 337f, 340, 352, 367ff, 372ff, 386, 388, 390, 432, 436f, 440f, 474f, 652, 669, 838, 911, 913, 915, 924, 926
- sufficient connection test 62, 523, 884f
- Switzerland 19, 41, 46, 54, 56, 57, 103ff, 169 fn 21, 180 fn 20, 195 fn 15, 198 fn 29, 247 fn 165, 321, 326, 342f, 368, 370, 374, 375 fn 191, 386, 288, 290, 422 fn 10, 452 fn 19, 457, 465, 560f, 568 fn 29, 590, 875 ff, 891, 829, 900, 902, 938, 933
- tax claims 137, 807, 811, 827,
- territorial (insolvency) proceedings 128f, 131, 145, 148, 233, 338, 379 fn 202, 449, 461ff, 469, 527, 906
- territoriality/territorialism 35, 45f, 91ff, 125, 132f, 322f, 377, 469f, 503, 518, 552, 604, 661f, 718f, 741, 787, 794, 835, 843f, 847, 853 fn 18, 858, 866, 876, 905f, 926f
- transaction avoidance 255ff
- Treaties (on bankruptcy/insolvency or insolvency-related) 197ff
 - Hague Conventions 37 fn 5, 72 fn 55, 187, 198 fn 29, 211 fn 80, 256, 309 fn 34, 465, 466, 566 fn 25, 692, 752, 870
 - Istanbul Convention (Council of Europe) 37 fn 5, 39, 67 fn 31, 83 fn 32, 193 fn 8, 197, 212 fn 87, 322, 331 ff, 370, 380, 384, 385, 388, 389, 400, 401, 446, 450
 - Montevideo Treaties 198, 322, 673, 675, 678
 - Nordic Bankruptcy Treaty 39, 192 fn 8, 199 fn 34, 322, 326, 560
 - Other treaties 175, 192 fn 8, 212 fn 87, 325 fn 51, 331, 787, 370 fn
- Ukraine 19, 41, 200, 214 fn 90, 326, 343 fn 108, 889
- UK schemes of arrangement 57, 98, 348, 350, 522, 740, 819, 836, 839, 883ff, 903
- UNCITRAL
 - Model Laws (general) 39, 193 fn 10, 196f, 322f, 343, 833
 - Model Law on Cross-Border Insolvency (MLCBI) 109f, 113ff, 125ff, 308ff, 328ff, 366ff, 400f, 717ff, 819ff, 844ff, 900f
 - Model Law on Recognition and Enforcement of Foreign Insolvency-Related Judgments (MLIJ) 39, 107, 117, 268, 284ff, 289, 558, 563f, 567, 569, 571ff, 845ff, 854ff, 859, 863, 869ff, 935f
 - Model Law on Enterprise Groups Insolvency (MLEGI) 39, 108, 193, 196f, 323 fn 19, 511ff, 519ff, 526ff, 529ff, 833, 930
 - Draft Model Law on the Law Applicable in Insolvency Proceedings 39, 194, 213 fn 88, 343, 602ff, 913f
 - Other UNCITRAL texts relating to insolvency (Legislative Guides etc.) 43, 64 fn 24, 106ff, 118ff, 143, 311, 418 fn 1 and 2, 513f, 534, 541 fn 30, 543f, 550f, 677, 913, 917 fn 33, 537 fn 18
- (un)equal treatment of creditors 100, 107, 186, 188, 201, 294, 308ff, 548, 628, 655, 677, 680, 688f, 699f, 701, 715, 838, 858, 875, 879f, 920, 928, 934
- United Kingdom (UK) (including references to its constituent countries England, Wales, Scotland, Northern Island) 19, 33, 41, 57, 60f, 69, 76f, 99, 110, 119, 120, 129, 133 fn 11, 147, 169 fn 21, 201, 208 fn 64, 234, 257, 264f, 284 fn 53, 320, 325, 345 fn 110, 347f, 350f, 400, 409ff, 411f, 422 fn 11, 492, 507, 522f, 528, 571, 588, 590ff, 598ff, 663, 735 fn 47, 789 fn 15, 796f, 802 fn 30, 815, 833 fn 167, 843ff, 845 fn 1 and 2, 855 fn 20, 868, 870, 883ff, 884, 903
- United States of America (U.S.) 19, 110, 144, 157, 183f, 200f, 206 fn 57, 208 fn 65, 214f, 320, 234, 244, 281, 320, 327, 335, 343 fn 108, 347 fn 116, 350f, 356 fn 135, 357 fn 136, 358f, 371 fn 179, 422 fn 11, 482, 492, 496f, 524, 526f, 560 fn 11, 574, 585ff, 591f, 601 fn 43, 614 fn 24, 715, 737, 761, 804 fn 41, 843f, 848ff, 855 fn 20, 887, 889, 902, 924
- universality
 - as claim for extraterritoriality 137ff, 141, 153, 328, 469f, 748, 877ff, 906, 926ff, 933 fn 66

- as principle of international insolvency law (also, universalism): 35, 43, 45f, 91ff, 99, 125, 127f, 138f, 325 fn 51, 312, 377, 518, 661f, 717ff, 784, 794 fn 3, 820, 843f, 845, 853 fn 18, 869, 877, 893, 905
- verification of claims 163f, 210, 417ff, 424ff, 544, 565, 593, 605, 656, 711, 814
- virtual secondary proceedings 129f
- vis attractiva concursus 43, 48, 118, 269ff, 288f, 424, 589, 600f