BANKRUPTCY AFTER BREXIT
RECOGNITION OF INSOLVENCY PROCEEDINGS INVOLVING THE UK
INSOL EUROPE'S VIEW

Until the arrival of the European Insolvency Regulation in 2002[1] there were no rules of European law on the recognition of insolvency proceedings opened in one member state of the European Union by the courts of another member state. This was left to national laws. These laws were very different and there were many instances in which it was very difficult to obtain adequate assistance in one member state with respect to insolvency proceedings opened in another member state.

The European Insolvency Regulation[2] brought dramatic changes in the area of intra-european effects of insolvency proceedings. It caters to a system of jurisdiction and of automatic recognition of insolvency proceedings opened in other member states.

Pursuant to Article 3(1) first paragraph, the courts of the member state within the territory of which the centre of the debtor's main interests ("COMI") is situated shall have jurisdiction to open main insolvency proceedings. Such proceedings produce the same effect in any other member state[3] as under the law of the State of the opening of proceedings (Article 20(1) EIR)[4] , the insolvency practitioner appointed by the court of the main proceedings may exercise all powers conferred on it by the law of the State of the opening of proceedings in another member state (Article 21(1) EIR) and the opening judgment is recognized in all other member states without formalities (Articles 19(1) and (20(1) EIR).

In short, the opening judgment has a pan-european effect throughout the union, expanding the powers of the trustee to the whole territory of the union. Moreover pursuant to Article 7 EIR the rules of the insolvency law of the State of the main proceedings apply in respect to those proceedings throughout the union.

An important consequence of this system is that the determination by the court opening the main insolvency proceedings, that the COMI is indeed located in that state and that it therefore has jurisdiction to open the main proceedings, cannot be challenged by in courts of other member states[5]. It can only be challenged through appeal possibilities in the State of opening. If no such appeal has been lodged or if such possibilities have been exhausted the opening judgment is final and therefor so also is the assumption of jurisdiction by the court that rendered the opening judgment. If there is a dispute about the location of the COMI such dispute may depend on interpretation of that criterion under the EIR. The courts that have to decide such questions may and the highest courts in the member states must refer such questions to the European Court of Justice if there is uncertainty about the interpretation of the criterion. This also applies to any other matters of interpretation of the EIR. Thus the European Court of Justice furthers a correct and above all uniform interpretation of

[1] Regulation EC 1347/2000, OJ L160/1.
[2] The original one was replaced in 2017 by a recast European Insolvency Regulation EU 2015/848, OJ L 141/19. References in this paper to provisions of the European Insolvency Regulation are references to the provisions of the recast unless otherwise indicated.
[3] Denmark opted out of the system.
[4] There are several exceptions to this rule and territorially limited proceedings can be opened in another member state where the debtor has an establishment.
[5] Except for violation of public policy, which exception should be applied restrictively. See ECJ 2 May 2006, re Eurofood C-134/04, ECLI:EU:C:2006:281.

the provisions of the EIR, including its jurisdiction provisions and it provides to a certain extent for supervision.

This is not an exceptional situation. For example the Brussels-I recast Regulation 1215/2012[6] on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters contains a similar system. Also under this regulation the assumption of jurisdiction by a court in one member state cannot be challenged in another member state[7] and must be challenged in the higher instances in the State where the judgment was given, which may have to refer questions of interpretation to the European Court of Justice. So also under this regulation it is the European Court of Justice which provides for the ultimate interpretation of the provisions of the regulation.

Nobody knows what Brexit means except that it means Brexit. However it is almost certain that as a consequence of Britain's secession the EIR will no longer apply to the relation between the United Kingdom and the member states. In general, as, from the perspective of the remaining member states, the United Kingdom becomes a third country, European legislative instruments dealing with community matters no longer include the United Kingdom. To give an example: Article 20 paragraph (1) EIR provides that main proceedings opened in a member state[8] 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. Mc Cormack and Anderson are therefore right where they state that the EIR is an inward looking measure which does not purport to provide a framework for the resolution of insolvency issues where proceedings are opened outside the European Union[9]. Thus insolvency proceedings opened in the United Kingdom after the withdrawal will not be recognizable in the member states under the provisions of the EIR.

INSOL Europe is of the opinion that it is desirable that in cases where the COMI of a company or person is located in the United Kingdom, insolvency proceedings which are opened in the United Kingdom are recognized and facilitated within the European Union and vice versa. This is in the interest of international commerce notwithstanding the fact that the United Kingdom may leave the common market. The member states had faith in the way proceedings in the United Kingdom were conducted ("community trust") and there is no reason to believe that the quality of the British legal infrastructure will not remain the same.

In this context INSOL Europe has assumed that business relations, including corporate relations between Member states and the UK will continue to be in the future extremely strong and therefore insolvency matters between both jurisdictions will be as relevant as before.

INSOL Europe observes two very relevant facts to be considered:

1. The EIR is a tool which was designed, applied and developed by all parties, that has a lot of accumulated experience.

[6] OJ 2012, L 351/1
[7] Unless one of the rather specific grounds under Article 18 Brussels I Regulation is present.
[8] That proceedings opened in a member state are the object of this provision follows from the reference therein to Article 3(1) EIR. Article 3(1) EIR endows jurisdiction to open insolvency proceedings on the courts of the *member state* within the territory of which the centre of the debtor's main interests is situated.
[9] Gerard McCormack and Hamish Anderson, 'The Implications of Brexit for the Restructuring and Insolvency Industry in the united Kingdom, in: Insol International, The Implications of Brexit for the Restructuring and Insolvency Industry, a collection of essays, 2017.

2. That the UK may not accept the jurisdiction of the ECJ after Brexit.

There are basically two ways in which EU-wide recognition and assistance can be provided. The two possible EU instruments are:

(i) a bilateral treaty between the United Kingdom and the European Union; and

(ii) a legal instrument enacted by the European Union providing for recognition and facilitation of insolvency proceedings opened in third countries (including the United Kingdom), such as the UNCITRAL Model Law on Cross Border Insolvency

(i) Bilateral treaty

With respect to a possible bilateral treaty, two possibilities have to be distinguished: (a) the ECJ retains its jurisdiction in its present form and its interpretation needs to be sought by and is binding upon the UK courts or (b) the ECJ does not retain such jurisdiction.

The solution under (a) would entail that the bilateral treaty could contain the same provisions as the EIR re-including the United Kingdom. In respect of insolvency proceedings everything would essentially remain the same. This solution would seem uncomplicated and easy to implement. However there are a few issues to be considered:

- The EIR is a living instrument which has to be reviewed from time to time[10]. If the EIR is changed, but the EIR Treaty is not, this will lead to disparity, which is undesirable by itself[11]. It would also mean that the EIR Treaty would contain rules which the member states would consider suboptimal. If disparity is to be avoided, it would mean that the EIR can be changed only if the EIR Treaty would be changed accordingly.

- Furthermore however, the EIR constitutes only a first step in the development of a corpus of European insolvency law. The European Commission has issued on 22 November 2016 a draft directive[12] which attends inter alia to pre-insolvency plans and further harmonization initiatives may be expected. As the harmonization of European insolvency law progresses the role and function of the EIR may change.

Although the issue of further development of the EIR should not be underestimated, INSOL Europe is of the opinion that this should not constitute an insurmountable obstacle to an EIR Treaty with retention of the jurisdiction of the ECJ.

- It is not known at this point whether the United Kingdom will be prepared to accept retention of jurisdiction by the ECJ. Therefore the question arises whether it would be conceivable to have an EIR Treaty with the United Kingdom without quasi supervision by the ECJ.

[10] Article 90.
[11] It should be noted that there are also disparities between the Lugano Treaty and the Brussels I recast Regulation. These disparities however are of another nature and moreover do not concern issues of a more substantive nature such as the immunity of rights in rem and avoidance rules. The Lugano Treaty will be discussed below.
[12] COM (2016)723 final; 2016/0359 COD.

In order to further consider that question it is useful to look at a somewhat equivalent situation.

The Lugano Convention applies to recognition and enforcement of judgments between the EU member states and Iceland, Norway and Switzerland[13]. There is no obligation for any court to refer questions of interpretation of the Lugano Convention to the European Court of Justice, but only a mutual obligation for all the States bound by the Lugano Convention to pay due account to the principles laid down by the courts bound by the Convention and the European Court of Justice[14]. Thus the Lugano Convention might provide an argument that an EIR Treaty would be possible even without quasi supervision by the ECJ but containing merely such "due account" provision.

However a counterargument would be that the EIR is dissimilar to the Lugano Treaty in the sense that the Lugano Treaty, broadly speaking, assumes that the answers to legal questions which arise in proceedings under it will be the same, regardless in which state the court that handles the case is located ("Entscheidungsharmonie"), whereas under the EIR Treaty this is emphatically not the case, as the law of the state where the proceedings are opened determines the applicable rules of insolvency law.

Regulation on recognition of insolvency proceedings from third countries

The next possibility is to have a Regulation on recognition of insolvency proceedings from third countries in the absence of a treaty. The great advantage of such regulation is that it would subject the recognition of third country insolvency proceedings to the same rules throughout the European Union. The UNCITRAL Model Law on Cross-Border Insolvency[15] contains a regime under which foreign main proceedings can be recognized and facilitated regardless in which country the insolvency proceedings have been opened. Thus the Model Law creates a recognition regime in the absence of a supervisory international court. However under Article 17 of that Model Law the decision by the court opening the main proceedings, that the COMI is located in that state, is under review by the court of the receiving state.

Enacting the Model Law would not be a typical Brexit venture. It would rather constitute a new building block in the development of European Insolvency Law. It would lead to treatment of insolvency proceedings from other countries on the same footing.

Common rules in this respect would also meet with the desire of the Commission to strive for more harmonization in the area of insolvency law, especially if that enhances the internal market[16]. Therefore the alternative solution might be that the European Union adopts the UNCITRAL Model Law, as INSOL Europe has already promoted in the past[17]. The United States now has ample experience with this Model Law, which is incorporated in Chapter 15 of the US Bankruptcy Code and other jurisdictions, such as the United Kingdom, have adopted the UNCITRAL Model Law as well. It provides the insolvency practitioner from the foreign jurisdiction with a tool to obtain recognition and assistance by the domestic court. Such assistance can be tailored to the case at hand.

[13] The situation with respect to Denmark is somewhat complicated and will not be discussed here.
[14] Second Protocol to the Lugano Convention, Article 1(1), 2009 L 147/29.
[15] http://www.uncitral.org/pdf/english/texts/insolven/1997-Model-Law-Insol-2013-Guide-Enactment-e.pdf
[16] See preamble nr 7 of the draft directive of 22 November 2016
[17] Revision of the European Insolvency Regulation, Proposals by INSOL Europe (2012), https://www.insol-europe.org/technical-content/european-insolvency-regulation; Chapter VII.

INSOL Europe has offered to the Commission a draft revision of the EIR in 2012 in which it proposed as Chapter VII provisions incorporating the Model Law. INSOL Europe is still of the opinion that incorporating the Model law in a Regulation is desirable irrespective of Brexit, but especially if an EIR Brexit Treaty is not feasible.

UK Schemes of arrangement

Schemes of arrangement are reorganization plans regularly applied in the United Kingdom. The British courts regularly assume jurisdiction to confirm such reorganization plans even if the debtor does not have its COMI in the United Kingdom. The British courts rely on expert advice provided by the parties to the confirmation proceedings that the scheme of arrangement is recognizable in other member states. There is however very little case law on the issue from other member states. The scheme of arrangement is not included in Annex A to the EIR.

The main argument against recognition of a UK scheme under the Brussels I recast Regulation is that the scheme constitutes a composition which is excepted under Article 1(2)(b) of that regulation.

Brexit does not bring any changes to recognition of the UK scheme under the EIR since it is not recognizable under the EIR now. To the extent such scheme is recognizable under the Brussels I recast Regulation, Brexit will entail that such recognition is no longer possible unless the United Kingdom joins the Lugano Treaty or a similar bilateral instrument.

Dated September 20, 2018 by the Brexit Committee of INSOL Europe comprising:

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