INSOL Europe/LexisPSL Joint Project on 'How EU Member States recognise insolvency/restructuring proceedings commenced in third country states'—Hungary

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Restructuring & Insolvency analysis: This article looks at how Hungary would recognise insolvency or restructuring proceedings commenced in a third country state. In particular, it considers whether the English Part 26 scheme or Part 26A restructuring plan would be recognised in Hungary. Written by Hungarian Country Co-ordinator for INSOL Europe, Zoltan Fabok at DLA Piper.

Q1. Has your country adopted the UNCITRAL Model law on Insolvency? If not, does it intend to do so in the near future?

Hungary has not adopted UNCITRAL Model Law on Insolvency. However, the new Statute on Private International Law (section 108(4) of Act No XXVIII of 2017 (PIL Statute)) leaves open the possibility that additional conditions and special rules of procedure may be established by law regarding the recognition of legal effects related to the main insolvency proceedings conducted abroad. In the academic literature the idea emerged that UNCITRAL Model Law may be adopted in the future on the basis of that authorisation of the PIL Statute. However, we have no information about any decision or even intention of the policymakers in this regard.

Q2. What are your country's private international law provisions for the recognition of insolvency proceedings commenced in countries outside of the EU Member States (ie Third Party States like the UK)?

Since no multilateral, regional or bilateral treaties, which Hungary is a party to, seems to address recognition of foreign insolvency judgments, the party seeking recognition needs to rely on the provisions of the PIL Statute.

General provisions

Section 109 of PIL Statute:

> (1) A judgment adopted by a foreign court shall be recognised if:
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> a) jurisdiction of the foreign court is considered legitimate under this Act;
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> b) the judgment is construed as definitive by the law of the State in which it was adopted, or equivalent; and
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> c) neither of the grounds for denial defined under subsection (4) apply.
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> (2) Unless otherwise provided for in this Act, jurisdiction of the acting foreign court shall be construed legitimate under paragraph a) of subsection (1), if the underlying grounds of jurisdiction would justify the jurisdiction of a Hungarian court in accordance with this Act.
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> (3) As regards the recognition of judgments relating to the personal status of persons and in family law matters, in determining whether jurisdiction of the acting foreign court should be construed legitimate any other citizenship of the Hungarian citizen shall also be taken into account.
>
> (4) A foreign judgment shall not be recognised if:
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> a) doing so would be contrary to Hungarian public policy;
>
> b) the party against whom the decision was made did not attend the proceeding either in person or by proxy because the subpoena, statement of claim, or other document on the basis of which the proceeding was initiated was not served at his place of residence or habitual residence properly or in a timely fashion in order to allow adequate time to prepare his defense;

c) proceedings involving the same cause of action and between the same parties are brought in Hungarian courts before the opening of foreign proceedings;

d) a Hungarian court has already adopted a definitive substantive decision in an action involving the same cause of action and between the same parties; or

e) the court of a foreign state, other than the State of the court that has already adopted a judgment in an action involving the same cause of action and between the same parties, has adopted a definitive substantive decision that is found in compliance with the requirements for recognition in Hungary.

Section 110

A settlement which has been approved by a foreign court or other authority may be recognised and enforced in Hungary under the conditions applicable to judgments.

Special provisions regarding recognition of judgment delivered in insolvency proceedings

Section 114:

- additionally, the recognition of judgments in insolvency proceedings is subject to reciprocity between Hungary and the State of the court which delivered that judgment
- recognition of main insolvency proceedings conducted abroad shall not preclude the opening of secondary insolvency proceedings before a Hungarian court
- in Hungary a foreign judgment opening main insolvency proceedings shall impart legal effects provided for in the law of the State of the opening of proceedings only if no secondary insolvency proceedings are opened in Hungary
- additional conditions and special rules of procedure may be established by law regarding the recognition of legal effects related to the main insolvency proceedings conducted abroad

Given that for the time being, no reciprocity in respect of insolvency proceedings is in place between Hungary and other countries, the recognition of foreign insolvency judgments delivered in a third country is rather uncertain. We are not aware of any relevant case law.

Q3. Would your country recognise an English scheme of arrangement (under Part 26 of the Companies Act 2006) or an English restructuring plan (under Part 26A of the Companies Act 2006) now post Brexit and on what basis? (eg Lugano Convention, Hague Convention, Rome I or other private international law rules)

Scheme of arrangement

In the pre-Brexit period (including the transition period that ended on 31 December 2020) recast Brussels I Regulation (RBR) could, at least in theory, be a legal basis of recognition and enforcement of an English scheme of arrangement (scheme) in Hungary. English case law (eg *Magyar Telecom BV, Re* [2013] EWHC 3800 (Ch); *Gategroup Guarantee Ltd, Re* [2021] EWHC 304 (Ch)) seem to suggest that schemes fall within the scope of the RBR meaning that English schemes should be recognised and enforced In Hungary. This may be correct but as far as we are aware, the question has remained untested by Hungarian courts so far.

In the post-Brexit period, the RBR does not apply to the UK anymore so it may not be a legal basis for recognition and enforcement of schemes in Hungary.

In the post-Brexit period, the 2007 Lugano Convention could logically come into play but its application for recognition of schemes is just as untested by Hungarian courts as it is in the context of the RBR. Furthermore, the UK has not yet managed to access to the 2007 Lugano Convention in its own right after it ceased to be a member state of the EU.

Both the UK and Hungary are contracting parties to the 2005 Hague Convention on Choice of Court Agreements. However, the application of the 2005 Hague Convention for recognition of schemes is questionable. First, because the jurisdiction of English courts is not necessarily based on the exclusive choice of courts agreement of the parties which is a precondition to the application of the 2005 Hague Convention. Second, because the 2005 Hague Convention embraces an insolvency exception excluding ‘insolvency, composition

and analogous matters' from its scope (Article 2(2)(e) of the 2005 Hague Convention), it cannot be excluded that schemes fall within that exception. There is no case law in Hungary available.

Rome I Regulation (having universal application) does not address recognition of foreign judgements. Having said that, if all creditors support the scheme, Hungarian courts may conclude that the scheme is binding on the parties based on the law they have chosen. By contrast, in the event the scheme binds dissenting creditors then no such indirect route appears to be feasible.

If an English scheme under no international treaties or EU law is recognised in Hungary, the applicability of the PIL Statute should be examined. A scheme which falls within the category of commercial (ie non-insolvency) matters means that a sanctioned scheme, in order to be recognised on the basis of the Hungarian PIL Statute, requires that the scheme meets the general requirements of recognition (see section 109 of the PIL Statute above) and, beyond that, reciprocity between Hungary and the UK would be required (section 113 of the PIL Statute). However, no reciprocity exists between the two countries.

The requirement of reciprocity may be disregarded if:

- the jurisdiction of Hungarian courts are excluded or
- the jurisdiction of the foreign court which delivered the judgment was based on an agreement that followed Hungarian law

As for the first sub-condition (excluded jurisdiction) the sanctioning of a scheme does not appear to be included in section 89 of the PIL Statute listing exhaustively the types of cases where the jurisdiction of the Hungarian court is excluded. As for the second sub-condition, the jurisdiction of the UK court is not necessarily based on the agreement of the parties. Therefore, the recognition of schemes under the PIL Statute appears to be rather questionable.

A scheme which falls within the category of insolvency matters means that a sanctioned scheme, in order to be recognised on the basis of the Hungarian PIL Statute, requires that the scheme meets the general requirements of recognition (see section 109 of the PIL Statute above) and, beyond that, reciprocity between Hungary and the UK would be required (section 114 of the PIL Statute). However, no reciprocity exists between the two countries so the recognition of the scheme on this legal basis is rather uncertain.

Restructuring plan

The English High Court recently concluded in *Gategroup Guarantee Ltd, Re* [2021] EWHC 304 (Ch) that Part 26A restructuring plans, unlike Part 26 schemes, fall within the insolvency exclusion under the 2007 Lugano Convention meaning that that convention does not apply. Consequently, it seems to be likely that the 2007 Lugano Convention cannot be the legal basis of the recognition of the restructuring plan in Hungary. The UK has not yet managed to access to the 2007 Lugano Convention in its own right after it ceased to be a member state of the EU.

The application of the 2005 Hague Convention for recognition of schemes is more than questionable. First, a restructuring plan probably falls within the scope of the insolvency exception (cf *Gategroup Guarantee Ltd, Re* [2021] EWHC 304 (Ch) and Article 2(2)(f) of the 2005 Hague Convention). Second, the jurisdiction of English courts is not necessarily based on the exclusive choice of courts agreement of the parties which is a precondition to the application of the 2005 Hague Convention.

As for Rome I Regulation see what we discussed under the title 'Scheme of arrangement' above.

As for the applicability of PIL Statute see what we discussed under the title 'Scheme of arrangement' above.

INSOL Europe/LexisNexis table of 'How EU Member States recognise insolvency/restructuring proceedings commenced in third country states'

A table produced by INSOL Europe in partnership with Lexis Nexis (also incorporating information from Lexology Getting The Deal Through) is available here: INSOL Europe/LexisÆPSL Joint Project on 'How EU Member States recognise insolvency and restructuring proceedings of a third country': consolidated table.

We look at how EU Member States would recognise insolvency or restructuring proceedings commenced in a third country, such as the UK (post-Brexit), the US, Japan, Australia or Canada. As always, you should contact local lawyers in the relevant jurisdiction to check the current measures in force.