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

04/10/2021

Restructuring & Insolvency analysis: This article looks at how Malta 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 Malta.

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

Malta has not adopted the UNCITRAL Model Law on Insolvency and, at present, there are no indications that Malta will adopt the Model Law in the foreseeable future. The recognition and enforcement of cross-border insolvency cases is primarily regulated, from the Maltese position, under the framework of Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May, 2015 on Insolvency Proceedings (Recast), and for cases falling outside the scope and ambit of the aforesaid Regulation, on its domestic rules on the recognition and enforcement of judgements delivered outside Malta, primarily provided for under the Code of Organisation and Civil Procedure (Chapter 12 of the Laws of Malta).

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)?

Where recognition is not possible under the relevant applicable EU legislation, recognition of insolvency proceedings commenced outside Malta may be recognised in Malta in terms of Maltese private international rules or, limitedly in the case of the UK, in terms of a specific piece of Maltese legislation which may experience a resurgence in application as a result of Brexit.

The domestic rules are provided for under the Code of Organisation and Civil Procedure which establish the conditions under which any judgement delivered by a competent court outside Malta and constituting a final, definitive judgement (res judicata) (including any judgement opening insolvency proceedings which may or may not involve the appointment of an insolvency practitioner) may be enforced by the competent courts in Malta in the same manner as judgements delivered by a Maltese court.

In order for enforcement in Malta to be possible, an application (rikors) requesting a declaration of enforcement must be instituted before the competent court in Malta.

Recognition and enforcement is not automatic. While a Maltese court considering enforceability would not be required or requested to re-examine the merits of the judgement, a declaration of enforceability would not be possible if in the opinion of the inquiring court:

- if the judgement sought to be enforced may be set aside on any of the grounds contemplated for under the Code of Organisation and Civil Procedure for a new trial
- in the case of a judgement by default, if the parties were not contumacious according to foreign law
- if the judgement contains any disposition contrary to public policy or to the internal public law of Malta

Maltese public policy rules are not exhaustively listed anywhere under Maltese legislation and what amounts to a public policy issue is determined by the Maltese courts on a case-by-case basis. In view of the implications behind it, however, local Courts have developed the concept of public policy in a restrictive manner. However, given that the Maltese legal system does not adopt the principle of binding precedents, the position currently obtaining on matters of public policy may be determined differently by Maltese Courts in the future.

Also, specifically, in relation to judgements delivered by a superior court of the United Kingdom, recognition and enforcement may possibly be sought under the terms of the British Judgements (Reciprocal Enforcement) Act (Chapter 52 of the Laws of Malta). This legislation (which was superseded by over riding EU legal instruments) applies a specific definition of the term 'judgement' where it is defined as:

> 'any judgment or order given or made by a court in any civil or commercial proceedings, whether before or after the passing of this Act, whereby any sum of money is made payable'

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

Admittedly, the position remains unclear and to the best of our knowledge remains unaddressed by the Maltese courts. At this moment, there is no legal framework to ensure recognition of an English scheme of arrangement (under CA 2006, Pt 26) or an English restructuring plan (under CA 2006, Pt 26A).

Post-Brexit, it could be argued that English schemes of arrangements could be regarded as a contractual matter to be recognized on the basis of the Rome I Regulation (Regulation (EC) 593/2008 which continues to apply. Application of recognition on the basis of Rome I would inevitably be subject to the possible disapplication of English law (as the governing law) and the application of over riding mandatory principles of Maltese law where required in terms of the Rome I framework.

The 2005 Hague Convention on Choice of Court Agreements could also possibly serve as a basis for recognition. This route is not itself without doubt given that insolvency, composition and other analogous matters fall outside the scope of the Convention (Article 2(2)(e) of the Convention).

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/LexisPSL 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.