How EU Member States recognise insolvency and restructuring proceedings of a third country

Kathy Stones provides an update on the joint project between LexisPSL and INSOL Europe

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> *Gone were the days when IPs could confidently expect any insolvency proceedings listed in Annex A of the EIR Recast and with their COMI in England to be recognised across all EU Member States automatically*

Following the aftermath of Brexit, I began thinking about how the world looked for English insolvency practitioners (IPs) without the comfort of our well-loved European Insolvency Regulation (recast) 848/2015 (the EIR Recast).

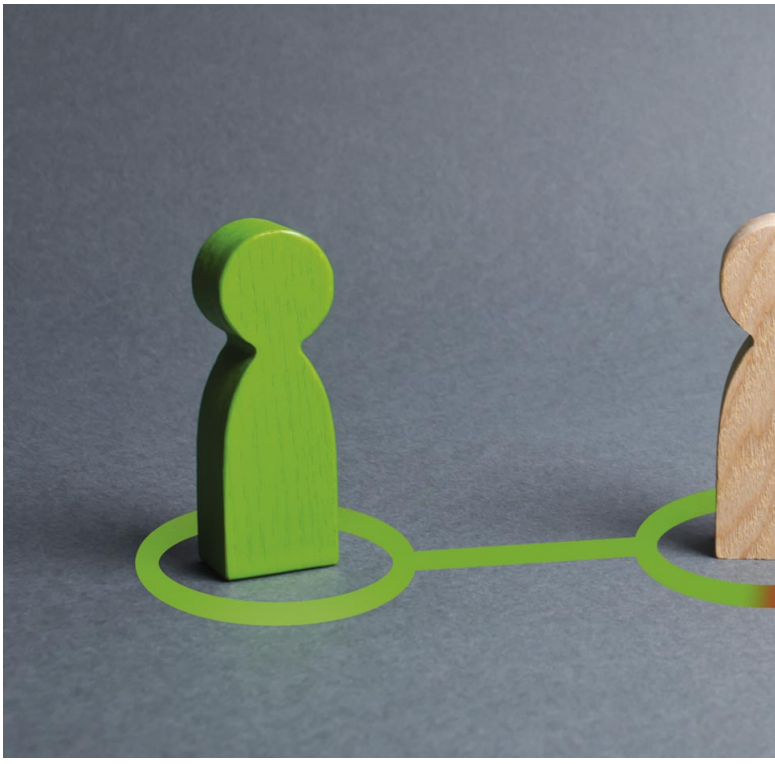
Gone were the days when IPs could confidently expect any insolvency proceedings listed in Annex A of the EIR Recast and with their COMI in England to be recognised across all EU Member States automatically, without question. Instead, we were faced by a confusing patchwork of different local regimes, now that England was effectively treated as a third country. England was effectively in a similar position to the US, Australia, Japan or Canada, when seeking to have its insolvency proceedings recognised in EU Member States.

This was the driver for the Joint Project between LexisPSL and INSOL Europe to map out local processes in each Member State. I have been fortunate to work with Chris Laughton (Mercer & Hole), Myriam Mailly (INSOL Europe Technical Officer), Neeta Chenani (LexisPSL), INSOL Europe's Country Coordinators[1] in each Member State and other local experts to complete this valuable research.

Research areas

The starting point for our work was to ask whether each Member State had adopted (or was considering adopting) the UNCITRAL Model Law on cross border insolvency. Although not as comprehensive as the EIR Recast, it does provide some assistance for recognition following an application to the local court. However, its use is significantly hampered as, besides the UK, only a handful of Member States have enacted it (Greece, Poland, Romania, Slovenia) and none of the others questioned thought future adoption was likely.

At the start of the joint project in February 2021, the question whether the UK could join the Lugano Convention 2007 in its own right was still very much open, so we asked Country Coordinators whether that would apply and assist recognition. However, despite initial support from the other convention countries, such as Norway, Iceland and Switzerland, the EU firmly rejected this avenue. Fortunately,



we had also asked the question what other provisions (e.g. the Hague Convention, Rome I or other private international law rules (PIL)) would assist recognition of insolvency/restructuring proceedings commenced in a third country.

Our final question was to apply these principles to specific facts and we asked whether the Country Coordinators thought that the English (i) scheme of arrangement or (ii) restructuring plan would be recognised in their country.

Key themes

As the results came back, some key themes started to emerge.

Some countries had a form of the *exéquatur* procedure, which required the applicant to apply to court (e.g. France, Lithuania and Spain). Although the exact requirements vary from country to country, general bars to recognition under *exéquatur* or PIL include: being contrary to public policy, the foreign decision being obtained by fraud (e.g. abuse of legal rules or fraudulent forum shopping) or absence of a sufficient connection between the application and the court seized.

Other countries have provisions within their own PIL for companies in third countries, which look at where the company's centre of main interests (COMI) is, even though the EIR Recast does not apply (e.g. Germany, Spain, Austria, Portugal).

On the specific question of whether an English scheme of arrangement or restructuring plan would be recognised, most countries had not yet tested this in caselaw, so pointed back to their general principles on recognition. Roughly 40% of the Country Coordinators thought that their Member States would probably grant recognition, though many said the position was unclear, with some drawing a distinction, following *gategroup Guarantee Limited* [2021] EWHC 304 (Ch), between the restructuring plan (which may be more readily classed by Member States under their PIL as an insolvency procedure) and the scheme of arrangement. Obviously, each case depends on its own facts and local advice should always be sought before commencing proceedings.

Research table, articles and next steps

We have produced a table summarising the results from all EU Member States with links through to the more in-depth articles from the Country Coordinators, which is available on LexisPSL[2] and the INSOL Europe website.[3]

I will be joining Chris Laughton, who is chairing a panel of speakers from the UK, the Netherlands, Germany and Ireland at the INSOL Europe 2022 Dublin Congress, to discuss '*Cross-border schemes and plans: how they work in different jurisdictions*' and also some of the joint project's findings on recognition. ■

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Footnotes:

1 See: www.insol-europe.org/country-coordinators

2 See: www.lexisnexis.com/uk/lexispsl/restructuringandinsolvency/document/393783/624B-GCH3-GXFD-808W-00000-00/INSOL_Europe_Lexis_PSL_Joint_Project_on__How_EU_Member_States_recognise_insolvency_and_restructuring_proceedings_of_a_third_country___consolidated_table

3 See: www.insol-europe.org/technical-content/recognition-in-third-states