The European Insolvency Regulation: Milestones and celebrations

Paul Omar gives a brief history of the introduction and impact of the Original EIR and the EIR Recast

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In 2025, two significant anniversaries will occur: the Silver Jubilee of the European Insolvency Regulation ("Original EIR")[1] and the tenth anniversary of the advent of its replacement, the European Insolvency Regulation (Recast) ("EIR Recast"),[2] both adopted in the month of May. Both texts came into force within the European Union ("EU") roughly two years after their promulgation, giving time to appreciate how they might be used in practice.

Over the quarter of a century that the two texts have been in force, significant changes have also occurred to the shape of insolvency proceedings, the way cross-border instances are coordinated and the frameworks that now permit bridging between domestic systems to allow for global solutions to be reached in the case of indigent debtors (usually, but not exclusively, corporate). To these changes, the texts have tried to respond.

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The advent of the Original EIR

It is difficult at this remove to imagine just how revolutionary the Original EIR was, not that it was "original" in any sense, having been preceded by the Council of Europe's Istanbul Convention 1990, the EU's own European Bankruptcy Convention 1995 and UNCITRAL's Model Law on Cross-Border Insolvency 1997, all of which owed their genesis to the work first initiated by the EU (then European Community) in the 1960s.[3] While these texts assumed different forms (two being treaties and one a Model Law), necessitating some differences in their structure, and each knew a different fate, only the Model Law surviving to the present day, the Original EIR that saw light in 2000 could boast an excellent pedigree. Moreover, it was not wholly different from its predecessors in what it sought to do: create proper jurisdictional bases, dictate the applicable law (and any exceptions), simplify the process of recognition and enforcement and connect insolvency proceedings by imposing rules on communication and cooperation.

But, compared to what had gone before, the Original EIR was revolutionary because, for the first time, a framework was made available that was clear, predictable and (mostly) modern. The use of the directly applicable regulation format helped considerably in creating common rules across member states.[4] Gone was the need to ascertain the arcana of rules of private international law, especially the many bars to recognition and enforcement constituted by public policy exceptions, to engage with thorny rules and procedures towards gaining the assistance of a host court in respect of foreign judgments and orders as well as, and this particularly true of the incremental approach of the common law, to rely on judicial discretion to develop new rules for novel situations and occasions. Two major exceptions, however, remained: for entities and procedures outside the scope of the Original EIR[5] and in the relationship of member states to other (non-EU) countries, recourse to traditional rules would continue to be needed.[6]

This does not mean, however, that the Original EIR was wholly suited to its time. Since the 1960s, when the basic railbed of the text was first laid down, ways of carrying out business globally had changed. Waning was the traditional head office and branch (or representative agency) model, being superseded, for perfectly logical liability limitation reasons, the parent-subsidiary model (often grouped in a pyramid structure for ease of control/ownership).[7] The paradigm of the text, however, cleaved closer to the older model, making administration of groups of connected entities problematic.

As the European Court of Justice reminded us in *Eurofood*,[8] company law doctrines required consideration of each ostensibly separate legal entity separately, albeit the presumption of insolvency at a registered office was rebuttable and insolvency could occur wherever the centre of main interests ("COMI") was found. Moreover, the way the constellation of proceedings was structured and its insistence on a hierarchy between procedures (as well as a limitation on the availability of rescue in secondary proceedings) made restructuring/rescue difficult to achieve,[9] even for entities that adopted the traditional head office and branch structure, never mind for companies adopting the group model. These were only some of the problems that the Original EIR came with; there were others: definitional issues, the precise ambit and scope of jurisdiction,

articulation between the *lex fori concursus* and carve-outs etc.

That said, the Original EIR began to experience success. The case-law interpreting its provisions is testimony to its unresolved issues (*certes*), but also its prevalence in use. There also emerged the desire to palliate some of the difficulties in the text with solutions emanating from practice-based innovations. Group structures were organised through "manipulating" COMI, bringing subsidiaries under the roof of their ultimate parent for a global outcome to be facilitated, *Re Collins & Aikman*[10] and *Re MG Rover*[11] being just two examples of this process.[12]

The limitation to liquidation in secondary proceedings was palliated by creating "virtual secondaries" through avoiding the opening of such proceedings,[13] but creating a structure on paper within amalgamated proceedings that mimicked the effects. This was a step that necessarily required the cooperation of stakeholders, which was boosted by insolvency office-holders being able to give undertakings that local law and, in particular, local priorities, would be respected.[14] Such developments (not the only ones) went far towards palliating some of the more obvious issues of a text rooted in the 1960s and are reminiscent of the oft-observed difference between the law on the books and the law as practised.

Moving on to the EIR Recast

Article 46 of the Original EIR mandated review of its operation by 2012, which was eventually done. The result was the EIR Recast. There are good things that may be said about it, not least that it builds upon the trajectory set up by the Original EIR, thus smoothing the path towards integration into practice. But it also goes further in not only addressing groups of companies in a dedicated Chapter V, but also putting virtual secondaries and undertakings on a statutory basis in its Article 36.

To underpin these imports from practice, the EIR Recast also provides (in Article 38) that stakeholder requests for such proceedings to be opened are to be notified to the insolvency office-holder in main proceedings to facilitate a right to object and pre-empt their opening. It also abandons, for secondary proceedings that are opened, the restriction to liquidation previously mandated by Article 3(3) of the Original EIR, thus facilitating the possibility of a global outcome. With coordination in mind, the text also beefs up the cooperation and communication provisions, extending them to courts (both "horizontally" with other courts and "vertically" with practitioners, on whom this duty had already been imposed by Article 31 of the Original EIR).

Nonetheless, the EIR Recast is not without its criticisms, in particular the inclusion of a group coordination procedure, also in Chapter V, that appears to be redundant. It is seemingly unused in practice, perhaps by reason of the likely costs involved and its imposition of an extra (inefficient) layer in the group insolvency dynamic. The otherwise laudable reflection of modern technology, particularly the interconnection of registers enabling searches across the EU, mandated by Article 25 of the EIR Recast and supported by processes contained in its Articles 87 and 89, has experienced considerable delays that are, at time of writing, not completely resolved.

Also praiseworthy (albeit inelegantly drafted) is the attempt in the provisions governing scope (Articles 1 and 2) to craft definitions that would include the more modern types of insolvency proceedings, going beyond the classic binary divide of office-holder-led rescue and liquidation to embrace debtor-in-possession and pre-insolvency proceedings. Nonetheless, these definitions risk being overtaken by events, particularly by the crafting of new procedures in the Preventive Restructuring Directive ("PRD")[15] and the intention to provide pre-pack frameworks via the latest suggestions in the proposed EU Harmonisation Directive.[16] Which of these procedures will come to fall within the EIR Recast, given the desire to avoid any gap in the dovetailing between it and the Brussels I Regulation,[17] will need determining in due course.

Conclusion

In the final analysis, as the anniversaries approach, it cannot be denied that both texts have led to the emergence of a more or less stable framework for jurisdiction, recognition and enforcement of insolvency instances within the EU. Granted, there have been teething troubles at their introduction and copious case-law resulting from the need to explain the intricacies of their workings, but by and large the texts have worked. Although lacunae have needed to be filled, it has been possible to bring onboard practice solutions as part of the EIR Recast adoption process.

The time for the next review of the framework, mandated by its Article 90 and scheduled for 2027, rapidly approaches. Very soon, thought will need to be given to what other changes currently seen in practice could be usefully taken on board. Definitions may need to alter, especially in light of the procedures adopted in the PRD transposition process and that may come to be adopted through the latest proposals.[18] As yet, though, there has been little call for a fundamental revision of the approach embodied in the texts, which seem to work and to offer enough certainty and predictability as frameworks for the coordination of cross-border insolvencies and restructurings. Even if such calls were to come, these would not be difficult or impossible tasks to realise, especially given the assistance of experts and commentators drawn from practice, academia and the judiciary to which the European Commission has access. ■

Footnotes:

1 Regulation (EC) No. 1346/2000 of 29 May 2000.

2 Regulation (EU) No. 2015/848 of 20 May 2015.

3 See, by this author, "European Insolvency Law Reform: Taking it to the Next Level?" (2024) *Eurofenix* (Spring) 32.

4 But also created other problems due to the lengthy process for amending the Annexes to reflect changes in the domestic laws and procedures of member states.

5 For an example of non-EIR-based recognition, see *Schmitt v Deichmann and others* [2011] EWHC 294 (Ch).

6 For a list of treaties and conventions between member states superseded by the texts, where applicable, see Article 44, Original EIR; Article 85, EIR Recast.

7 For a catalogue of types of models available, see Irit Mevorach, *Insolvency within Multinational Enterprise Groups* (OUP, 2006).

8 *Eurofood IFSC Limited* (Case C-341/04) ECLI:EU:C:2006:281.

9 Of course, such concepts as restructuring/rescue were little developed in the period of the text's origins, albeit they were more widespread at the time of its adoption.

10 *Re Collins & Aikman Europe SA* [2006] EWHC 1343 (Ch).

11 *Re MG Rover España and others* [2006] EWHC 4326 (Ch).

12 In one memorable case, the tables were turned to "locate" the parent at the subsidary's premises, although allowing secondary proceedings to be opened in respect of the parent: *Burgo Group SPA v Illochroma SA* (Case C-327/13) ECLI:EU:C:2014:2158.

13 Unless absolutely necessary, e.g., to utilise a local procedure that was more beneficial for (some) stakeholders, such as redundancy procedures for employees.

14 Such undertakings were sanctioned by the court in *Re Collins & Aikman* (above note 10).

15 Directive (EU) No. 2019/1023 of 20 June 2019.

16 See: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52022PC0702

17 Regulation (EU) No. 1215/2012 of 12 December 2012.

18 Above note 16.

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