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Towards a Eurocentric Model Law

by the International Insolvency Institute

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"Towards a Eurocentric Model Law"

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What is already fitting in our respective countries in the current applicable EU Regulations and would it help 'Towards a Eurocentric Model Law'

- Examples: same state or differences?
- Specific jurisdictions?
- Effective public information with insolvency registers?
- European form for declarations of claims?
- IP's role and training?

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AMERICAN BANKRUPTCY INSTITUTE
14TH INTERNATIONAL INSOLVENCY & RESTRUCTURING SYMPOSIUM
"Towards a Eurocentric Model Law"
Prof. Avv. Antonio Tullio, Moderator

- What are the main differences between the UNCITRAL Model Law and the EU Regulation?
- Some remarks about the adoption of the UNCITRAL Model Law by the EU in relation to insolvency proceedings opened outside the EU (e.g. in the UK).
- What should be adapted and/or changed in our respective countries in the current and/or future EU Regulations to help "Towards a Eurocentric Model Law"

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European Update

By Ilya Kokorin and Bob Wessels

COMIs Under Chapter 15 and EIR Recast: Brothers, but Not Twins

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Editor's Note: *The authors co-wrote ABI's* European Union Regulation on Insolvency Proceedings: An Introductory Analysis (Fourth Edition)*, available for pre-order at store.abi.org (make sure to log in with your ABI credentials in order to receive member pricing).*

Center of main interest (COMI) is a concept that is central to the operation of chapter 15 of the U.S. Bankruptcy Code,[1] as well as the European Insolvency Regulation (the "EIR Recast").[2] Both legal instruments share similar background and, in principle, adhere to the same approach of modified universalism, linking main insolvency proceedings to the debtor's COMI.

However, despite the common roots, practice has revealed significant differences in COMI interpretation, leading to divergent and sometimes conflicting results regarding its localization. In this article, the authors argue that uniformity in application of COMI presumptions across jurisdictions is crucial for ensuring the efficient handling of cross-border insolvencies. Inharmonious approaches to COMI frustrate attempts to restructure international corporate groups, inhibit maximization of asset value, and run contrary to the creditors' and debtors' expectations.

The article briefly outlines the history of the COMI concept and the rationale behind it, then proceeds with the review of the European stance on COMI by analyzing the EIR Recast and its predecessor, the EIR 2000,[3] as well as its application on the ground in the most recent case law. This is followed by a comparison with the approach currently adopted under chapter 15, with special focus on the registered-office presumption.[4]

The Origins and Rationale of COMI

The first fine attempt to introduce harmonized rules in handling cross-border insolvencies in Europe was the 1980 Draft Convention on Bankruptcy, Winding-Up, Arrangements, Compositions and Similar Proceedings (the "1980 Convention"). It took a strong pro-universality (one-debtor, one-insolvency proceeding) stance and proposed a term debtor's "center of administration." According to its Article 3, this should be the "place where the debtor usually administers his main interests." For companies, a registered-office presumption was suggested.

The 1980 Convention was never adopted, but the idea of having a connecting jurisdictional link in international insolvency cases migrated to the 1990 Istanbul Convention on Certain Aspects of Bankruptcy, drafted under the auspices of the Council of Europe and for the first time using the COMI term.[5] It then reappeared in the 1995 European Convention on Insolvency Proceedings (the "1995 Convention"), the major document that has strongly influenced both the UNCITRAL Model Law on Cross-Border Insolvency of 1997 (the "Model Law") and the EIR 2000 (now recast). The *Guide to Enactment of the Model Law* (1997) explains that the use of COMI as the determinant that a foreign proceeding is a "main" proceeding corresponds to the formulation in the 1995 Convention, thus building on the emerging harmonization regarding the notion of a "main" proceeding.[6] The 1995 Convention with its provisions on COMI was thus recognized as the main influence on both the EIR 2000 and Model Law.[7] With the enactment of the latter in the U.S. in 2005,[8] the common foundation for the U.S. and European international insolvency instruments was laid down.

The rationale behind COMI is convincingly explained by the Virgós/Schmit Report,[9] which provides an authoritative interpretation of the 1995 Convention. According to this report, insolvency is a foreseeable risk, so it is therefore important that a debtor's current/potential creditors can calculate or assess their rights and exposure in case of insolvency. The EIR Recast links COMI to international jurisdiction where main insolvency proceedings, having a universal effect, can be opened,

1 11 U.S. Code chapter 15. This chapter addresses recognition of foreign insolvencies in the U.S. and the relief available upon such recognition.
2 Regulation (EU) 2015/848 of May 20, 2015, on insolvency proceedings (recast). This regulation contains rules on international jurisdiction, applicable law, recognition of insolvency (and related) judgments, cross-border cooperation between insolvency practitioners/courts from different European Union (EU) Member States and insolvency proceedings of members of a group of companies.
3 Council regulation (EC) No. 1346/2000 of May 29, 2000, on insolvency proceedings.
4 Other major differences between U.S. and European approaches, including the time frame for COMI determination and its substantive characteristics, are outside the scope of this article.
5 The Council of Europe is a much wider organization than the EU, and currently has 47 member states, including Russia and Turkey.
6 *Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency*, ¶ 31 (1997).
7 I. Tirado, "An Evolution of COMI in the European Insolvency Regulation: From 'Insolvenzimperialismus' to the Recast," J. Sarra and B. Romaine (eds.), *Annual Review of Insolvency Law* (2015), pp. 691-722.
8 This was done through the adoption of chapter 15 by the enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, which replaced § 304 of the Bankruptcy Code.
9 Report on the Convention of Insolvency Proceedings, Brussels, May 3, 1996.

as well as to the law applicable to such proceedings and their effects (*lex concursus*).

Being more reserved in scope and ambition, the Model Law, and hence chapter 15, determine COMI and the character of a foreign proceeding (either main or non-main) for the purpose of recognition and available relief. For example, recognition of a foreign proceeding as a "foreign *main* proceeding" automatically leads to a stay of enforcement against the debtor's assets located in the U.S. (§ 1520(a)). No less importantly, failure by a foreign insolvency practitioner to demonstrate the presence of COMI (or an establishment) in the originating state might lead to outright refusal of recognition in the U.S.[10]

COMI Under EIR Recast

The concept of COMI is at the epicenter of the EU's regulatory insolvency framework, which applies only if COMI is located within the EU (recital 25).[11] Article 3 of the EIR Recast states that COMI shall be the place where the debtor conducts the administration of its interests on a regular basis. In the case of a company, the place of the registered office shall be presumed to be its COMI.

In one of the first cases interpreting COMI, *Eurofood IFSC Ltd*.,[12] the Court of Justice of the EU (CJEU) stressed its autonomous "supranational" meaning. The CJEU noted that COMI must be identified by "reference to criteria that are both objective and ascertainable by third parties," hence allowing them to calculate the respective risks of dealing with the debtor. The simple presumption in favor of the "registered office" jurisdiction can be rebutted *only* if objective and ascertainable factors indicate that COMI is somewhere else.[13] This is the case of a "letterbox" company not carrying out any business activity in the territory of its registered office. The value attributed to the registered-office presumption indicates its relative strength. In the 2011 case of *Interedil Srl*,[14] the CJEU further reinforced the presumption by making it impossible to rebut if the debtor's central administration and registered office are situated in the same country.

Article 4(1) of the EIR Recast mandates the court seized of a request to open insolvency proceedings of its own motion to examine whether it has jurisdiction (*i.e.*, whether COMI (or establishment) is located within its territory). In so doing, it might require the debtor to submit additional evidence to support its assertions (recital 32). It is not clear, though, to what extent such a court needs to investigate the facts surrounding an insolvency filing, particularly when the registered office is located in the jurisdiction of the court seized — in order words, how active the judge should be in discovering whether the registered-office presumption can be rebutted, or in looking for evidence to rebut it. Due to the inherent ambiguity of COMI and its fact-sensitivity, as well as the divergent (national) procedural traditions (including the role of courts and the allocation of the burden of proof), cross-border insolvency cases in practice lead to protracted litigation and fierce battles over COMI localization.

Recent years have seen an increase in the insolvencies of European airline companies, among them Italy's national carrier Alitalia, British charter airline Monarch and Germany's second-largest carrier, Air Berlin. Another example from early 2018 comes from Austria and concerns the insolvency of NIKI, a subsidiary of Air Berlin registered in Austria. However, finding its COMI proved to be challenging.

At first instance, the District Court of Charlottenburg in Germany accepted that since NIKI's business was operationally controlled and integrated with Air Berlin (Germany), which had practically been NIKI's only customer and sales generator, COMI was in Germany.[15] The appellate court in Berlin disagreed, finding NIKI's COMI to be in Austria.[16] It noted that in deciding to rebut the registered-office presumption, high demands must be made in order to ensure legal certainty.

In light of the drastic effects that COMI determination leads to, the refutation of this presumption must be subject to a stringent standard. In the present case, there were strong arguments in favor of both Germany and Austria.[17] Since it was not a "black and white" situation, the appellate court was not persuaded that the registered-office presumption was rebutted. Courts in other EU states tend to follow this approach.[18]

COMI Under Chapter 15

As previously noted, chapter 15 and the EIR Recast originate from the same background, namely the 1995 Convention. Chapter 15 does not define COMI, but it contains a rebuttable presumption that the debtor's registered office is presumed to be the center of the debtor's main interests (§ 1516(c)). However, this has not led to the uniform application of the COMI standard under the EIR Recast and chapter 15.

European courts have set a rather high bar for the rebuttal of the presumption and require the applicant to provide sufficient evidence that COMI is somewhere else. Instead, the U.S. courts treat the presumption as merely indicative for "speed and convenience in instances in which the COMI is obvious and undisputed."[19] Some marginal evidence against the registered-office presumption suffices to shift the burden of proof to a representative seeking recognition of a foreign insolvency proceeding in the U.S.[20] In sum, U.S. courts consider that "the Model Law and Chapter 15 give limited weight to the presumption of jurisdiction of incorporation as the COMI."[21]

10 *Bear Stearns High-Grade Structured Credit Strategies Master Fund Ltd.*, 374 B.R. 122 (Bankr. S.D.N.Y. 2007), *aff'd*, 389 B.R. 325 (Bankr. S.D.N.Y. 2008); *Creative Finance Ltd. (In Liquidation)*, 543 B.R. 498 (Bankr. S.D.N.Y. 2016).

11 In a case where the debtor had its COMI in Switzerland (not an EU member state), the Dutch Court of Appeal's *Hertogenbosch*, Nov. 26, 2016, ECLI:NL:GHSHE:2015:4867, rightfully decided that it had no international jurisdiction.

12 *Eurofood IFSC Ltd.*, Case C-341/04, ECLI:EU:C:2006:281, May 2, 2006.

13 *Ibid.* at ¶ 34.

14 *Interedil Srl v. Fallimento Interedil Srl*, Case C-396/09, ECLI:EU:C:2011:671, Oct. 20, 2011.

15 *AG Berlin-Charlottenburg*, 36n IN 6433/17, Dec. 13, 2017.

16 *LG Berlin*, 84 T 2/18, Jan. 8, 2018. In principle, the judgment is incorrect to the extent that a court cannot decide on the international insolvency jurisdiction in another member state.

17 The debtor maintained an office in Vienna and had an Austrian operating license. In addition, approximately 80 percent of the employment contracts concluded by NIKI were subject to Austrian labor law.

18 *See, e.g., Gerechtshof's Hertogenbosch*, ECLI:NL:GHSHE:2014:1311, April 10, 2014. In its decision, the Dutch court concluded that it is up to the creditor or debtor who consider that COMI is not at the place of the registered office to provide evidence the court can rely on to deviate from the presumption.

19 *Creative Fin. Ltd. (In Liquidation)*, 543 B.R. 514-15 (Bankr. S.D.N.Y. 2016).

20 *Tri-Cont'l Exch.*, 349 B.R. 627, 635 (Bankr. E.D. Cal. 2006).

21 *Bear Stearns*, 374 B.R. 128.

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The differences in approaches adopted in Europe and the U.S. are stark and materialized in the recent case related to the insolvency of Oi Brasil, Brazil's largest fixed-line telecoms operator. In 2016, the U.S. Bankruptcy Court for the Southern District of New York, in line with the previous decision of the competent Brazilian court, determined that the COMI of four companies comprising the Oi Group was in Brazil.

The Brazilian proceedings were recognized as foreign main insolvency proceedings under chapter 15.[22] One of the four entities in the Oi Group is a Dutch company, Oi Coop, which played the role of a financial vehicle (SPV), attracting investments on the European markets. Despite Oi Coop's registered office being in The Netherlands, the U.S. court found its COMI to be at the location of the corporate nerve center[23] (*i.e.*, Brazil). In the meantime, that same Dutch company was subject to a Dutch bankruptcy liquidation proceeding. With no real analysis of the COMI issue, the Dutch Supreme Court almost automatically tied the question regarding applicable law and insolvency jurisdiction to the fact that Oi Coop was a legal person, incorporated or established on the basis of Dutch corporate law.[24]

Thus, a company effectively ended up having two COMIs: (1) as part of the group of companies undergoing restructuring in Brazil; and (2) as a separate entity falling under distinct insolvency proceedings in The Netherlands. Despite both courts applying the "registered-office presumption" in determining Oi Coop's COMI, it turned out to be in different places. The follow-up attempts by the Dutch representative of Oi Coop to terminate the previous U.S. recognition order and instead establish the Dutch proceeding as a foreign main proceeding failed.[25]

22 Order Granting Recognition of Foreign Main Proceeding and Certain Related Relief, July 22, 2016, *In re OI S.A.*, No. 16-11791 [ECF No. 38] (Bankr. S.D.N.Y. 2016).
23 With respect to COMI of an SPV, the court relied on the precedent *In re OAS S.A.*, 533 B.R. 83 (Bankr. S.D.N.Y. 2015).
24 Decision of the Dutch Supreme Court, ECLI:NL:HR:2017:1280, July 7, 2017.
25 Memorandum Decision and Order Denying Motion for Reconsideration, Bankr. S.D.N.Y. March 14, 2018.

Way Forward

From this short analysis of the approaches to COMI under the EIR Recast and chapter 15, it is evident that consensus is largely missing. The similarly worded registered-office presumption, contained in § 1516(c) of chapter 15 and Article 3 of the EIR Recast, is treated differently and given more weight in Europe. It is true that consideration must be given to the divergent nature of the two legal instruments. However, this does not justify the outcome for cross-border insolvency cases, particularly when such an outcome lacks efficiency and predictability. As shown in the example of Oi Brasil, distinct COMI regimes place members of the same group of companies under separate autonomous or "unconnected" insolvency proceedings, ultimately inhibiting a group-wide solution, be it restructuring, sale of business as a going concern or streamlined liquidation.

COMI is not a judicial concept set in stone; rather, it develops in light of the changing market conditions and evolving business practices and structures. Predictability and legal certainty of the effects and costs related to a debtor's insolvency should be reinvented as the goal that the concept of COMI was originally created to serve. Maximization of the asset pool and promotion of the rescue of viable-but-distressed businesses require comprehensive solutions.

This can entail harmonization of COMI standards and improved cross-border cooperation and coordination in international insolvencies. The former is encouraged by the UNCITRAL Guide to Enactment and Interpretation of the Model Law,[26] and the latter is being discussed by UNCITRAL Working Group V, which is currently considering draft legislative provisions for cross-border insolvencies of enterprise groups. abi

26 *The UNCITRAL Guide to Enactment and Interpretation of the Model Law*, ¶ 82 (2013).

European Update

By Adam Gallagher and Natasha Chan

Recast EU Insolvency Regulation: A Welcome Development

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Authors' Note: *Member states of the European Union (EU) all have their own unique bankruptcy laws, steeped in their respective legislative and jurisprudential history. More than a decade ago, the EU concluded that an overarching framework on bankruptcy proceedings was needed. The aim was not substantively to harmonize bankruptcy laws across member states, but instead to focus on avoiding a multiplicity of proceedings over the same debtor. This was to be achieved via Council Regulation (EC) No. 1346/2000 (the EIR), which has significantly changed the restructuring and bankruptcy world within the EU, allowing debtors to "forum-shop" and find the "right" jurisdiction to implement a restructuring. As the* ABI Journal *has previously noted,[1] the EIR has become the centerpiece of cross-border insolvency law in Europe. In particular, the U.K. has seen significant growth in the number of restructurings of foreign companies being implemented as its corporate reorganization laws continue to be perceived as the most flexible to implement a successful restructuring. The EIR has now been reformed.*

The EIR applies where a debtor, which may be a corporate or an individual, has assets or creditors in more than one member state of the EU. The EIR establishes a framework for cross-border bankruptcy proceedings in the EU for determining what court has jurisdiction to open proceedings and what member state's laws would apply to those proceedings. The EIR also introduces rules to ensure that bankruptcy proceedings and their effect are recognized throughout the EU.

Background to the Reforms

On June 5, 2015, the final text of Regulation (EU) 2015/848[2] of the European Parliament and of the Council on insolvency proceedings (recast) (hereinafter, the "Recast Regulation") was published in the *Official Journal of the European Union*. The Recast Regulation amends and supersedes the EIR, which came into force in 2002. The Recast Regulation launched on June 25, 2015, but most of its provisions will only apply in two years (*i.e.*, starting June 26, 2017). The Recast Regulation was the culmination of a review process that began a number of years earlier and involved empirical studies, as well as consultation with relevant stakeholders, including the public, experts and member states, to identify issues with the operation of the EIR in practice. The EU Commission published a report on Dec. 12, 2012, noting that although the EIR was generally operating well, it had five main shortcomings:

1. The EIR did not cover national pre-insolvency rescue proceedings, which were growing increasingly important in member states;
2. There were difficulties in determining what member state had the jurisdiction to open insolvency proceedings;
3. There were shortcomings in relation to secondary proceedings, including the requirement that they be winding-up proceedings, which did not promote the debtor's rescue;
4. The EIR did not provide for mandatory publication of insolvency proceedings opened in member states despite a recognition that this would facilitate the functioning of cross-border insolvency proceedings; and
5. The EIR did not specifically deal with the insolvency of a multi-national group of companies.

Accordingly, the EU Commission found that there was a need to amend the EIR to improve the efficiency of the European framework for resolving cross-border bankruptcy proceedings, as discussed herein. Although the majority of the provisions of the Recast Regulation will only become effective on June 26, 2017, it is expected that courts may find its provisions instructive and, where there is current ambiguity, may seek to interpret current bankruptcy law provisions in light of the Recast Regulation. Meanwhile, the EIR will continue to govern bankruptcy proceedings that are opened in the EU before this date.

Broadening the Scope

One of the biggest changes introduced by the Recast Regulation is the broadening of its scope in Article 1(1). The EIR had previously only applied (and, until 2017, will continue to do so) to collective insolvency proceedings entailing the partial or

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1 See Dr. H. Philipp Esser, "Reform of the EU Regulation: New Framework for Insolvent Company Groups: Part I," XXXIV *ABI Journal* 3, 38-39, 77-78, March 2015; Dr. H. Philipp Esser, "Reform of the EU Regulation: New Framework for Insolvent Company Groups: Part II," XXXIV *ABI Journal* 4, 46-47, 120-21, April 2015 (both articles are available at abi.org/abi-journal).

2 The Recast Regulation is available in English at eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32015R0848&from=EN.

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total divestment of a debtor and the appointment of a liquidator (which is defined to mean an "insolvency officeholder"). The scope is now broadened to include pre-insolvency proceedings, interim proceedings, and proceedings that are for the adjustment of debt and/or for the purpose of rescue. This means that the Recast Regulation encompasses a broader range of proceedings, including interim proceedings based on laws relating to insolvency and that are for the purpose of rescue, adjustment of debt, reorganization or liquidation where

1. a debtor is totally or partially divested of its assets and an insolvency practitioner is appointed;
2. the assets and affairs of a debtor are subject to control or supervision by a court; or
3. a temporary stay of individual enforcement proceedings is granted by a court or operation of law in order to allow for negotiations between the debtor and its creditors, provided that the proceedings in which the stay is granted include suitable measures to protect the general body of creditors, and where no agreement is reached, are preliminary to one of the proceedings referred to above.

However, the Recast Regulation does make it clear that proceedings that are based on general company law not designed exclusively for bankruptcy situations (such as the English scheme of arrangement) should not be considered to be based on laws relating to insolvency and therefore fall outside the scope of the Recast Regulation. The broadening of the scope of the Recast Regulation is a welcome development given the recent introduction in many member states of pre-insolvency rescue processes and proceedings that focus on debt adjustment rather than formal insolvency appointments, such as new sauveguarde proceedings in France[3] and homologation in Spain.[4]

According to the EU Commission, approximately 19 new national procedures will benefit from the broadened scope of the Recast Regulation and the EU-wide recognition of the effects of insolvency proceedings that it affords. These are listed in Annex A of the Recast Regulation, which contains an exhaustive list of proceedings to which the Recast Regulation applies.

COMI

A key concept in the EIR, which is retained in the Recast Regulation, is that of the center of main interests (COMI). The EIR only applies to a debtor that has its COMI in a member state of the EU. Furthermore, a debtor's main insolvency proceedings in the EU are to be commenced in the courts of the member state where the debtor has its COMI. This is designed to ensure that the jurisdiction within which a debtor has a genuine connection (as opposed to a jurisdiction that was chosen by its incorporators) will handle its main insolvency proceedings. A large body of case law has developed to help define and aid the understanding of the COMI concept.

COMI was only referred to in the recitals of the EIR. However, the Recast Regulation now provides, within the operative provisions, that a debtor's COMI is the place where the debtor conducts the administration of its interests on a regular basis and is ascertainable by third parties (as shown in Article 3(1)). There is also now an expanded definition of COMI that sets out for companies, individuals exercising an independent business or professional activity, and other individuals not falling into the former categories where COMI is to be presumed.

> **[T]here is cautious optimism that the changes are positive developments on the framework already in place and have paved the way for the improved ... cross-border insolvency proceedings in the EU.**

Under the EIR, there is a rebuttable presumption in the case of a corporate or legal person that its COMI is the place of its registered office. The Recast Regulation now clarifies the circumstances under which this rebuttable presumption no longer applies; essentially, where there has been a move in the registered office of the corporate to another member state within the three-month period prior to the request for the opening of insolvency proceedings. Where there are doubts regarding the court's jurisdiction, the onus will then be on the corporation to provide the court with evidence of where its COMI is located. Particular regard will also be given to creditors and their views as to where a debtor conducts its business, including if the debtor has informed its creditors of its COMI shift in any way. It is hoped that this change will help prevent fraudulent or perceived abusive forum-shopping, which could prejudice creditors, but it continues to allow legitimate and transparent COMI shifts.

The original and controversial proposal to test a corporation's COMI by its historic COMI of three months before or even longer was not adopted in the final text of the Recast Regulation. The Recast Regulation simply states that a company changing its registered office to another member state within the preceding three months will not be able to rely on the rebuttable presumption that its COMI is where its registered office is located.

Secondary Proceedings

Secondary proceedings are proceedings that may be opened in any other member state where the debtor has an establishment, then run parallel with the main insolvency proceedings. The Recast Regulation introduces a new definition of "establishment" that encompasses the place of operations where a debtor carries out or has carried out a "non-

3 Adam Gallagher and Aude Rousseau, "French Insolvency Proceedings: La Révolution a Commencé," XXXIII *ABI Journal* 11, 20-21, 64-65, November 2014, *available at* abi.org/abi-journal.

4 Adam Gallagher, Jesús López Bragado and Jorge Puyol, "Strengthening Pre-Insolvency Tools: A U-Turn in Spain's Restructuring Legislation," XXXIII *ABI Journal* 9, 36-37, 60-61, September 2014, *available at* abi.org/abi-journal.

transitory economic activity with human means and assets" in the three-month period prior to the request to open main insolvency proceedings. The look-back period is a change from the current EIR, but it is a welcome change.

The restriction in the EIR that secondary proceedings had to be winding-up proceedings has been lifted under the Recast Regulation. The scope of secondary proceedings has now been broadened to include rescue proceedings, meaning that there is virtually no difference between the types of proceedings that may constitute main or secondary proceedings. Importantly, it also means that the opening of secondary proceedings will less likely frustrate the rescue of the debtor where this is viable, and it eliminates the corresponding threat that secondary proceedings will complicate the main proceedings.

Synthetic Secondary Proceedings

Under the Recast Regulation, the insolvency officeholder in the main proceedings will be able to offer (with appropriate creditor approval) a unilateral undertaking to protect local creditors in other member states by treating them in the manner that they would be treated in the jurisdiction where secondary proceedings would be opened with respect to the ranking of creditors' claims and the distribution of proceeds. Known as "synthetic secondary proceedings," the aim is to avoid the need for secondary proceedings, thereby avoiding the additional costs that such a process could bring. To a certain degree, this approach (at least in principle, whilst not in detail) codifies the approach taken by English administrators and courts in insolvency proceedings such as *Collins & Aikman* and *MG Rover* — although the Recast Regulation has added new requirements that did not previously exist in the English examples.

Group Coordination Proceedings

The Recast Regulation introduces a new concept called "group coordination proceedings" in recognition of the fact that there is a need to introduce a framework that deals with the insolvencies of members of a group of companies through an entity-by-entity approach. This is achieved by providing for improved cooperation between insolvency practitioners and the courts involved in the proceedings of members of a group of companies to allow for a coordinated restructuring of the group. The concept of group insolvencies was previously examined by *ABI Journal* Associate Editor **Dr. H. Philipp Esser** (Schultze & Braun; Achern, Germany),[5] and the concept is novel. Whether it will be successful (particularly in light of the additional cost that the process would entail) remains to be seen.

Registers

Under the Recast Regulation, there is now a provision for the establishment of national insolvency registers in which information concerning bankruptcy proceedings will be published. It will probably come as a surprise to U.S. practitioners that there is no such central register within the EU and that even on an individual member state level, such registers do not necessarily exist.

For example, in England, there is currently a cumbersome process (including the telephoning of the court) to find out whether a company is in an insolvency process; the results are not conclusive, and the service cannot be accessed electronically or remotely from the court. From this perspective, the introduction of a central EU-wide database containing information from the national insolvency registers that are interconnected through the European e-Justice Portal, to be searchable in all official languages of the EU, is a very welcome change.

The mandatory information to be available on each national register will include the date of the opening of the proceedings, the court and case reference number, and details of the company entering into proceedings, as well as those of its insolvency officeholder. Member states may include any further documents or additional information in the registers if desired.

The linking up of national insolvency registers will help facilitate the flow of information with respect to insolvency proceedings. Courts will be able to determine whether proceedings relating to the same debtor have already been opened in another member state and whether it has the jurisdiction to open main proceedings, while creditors will be able to ascertain whether any proceedings have been opened with respect to the debtor and the powers of the relevant insolvency officeholder.

Conclusion

The initial concerns that the Recast Regulation would be detrimental to European restructurings have been largely debunked. The amendments and changes that have been introduced often codify the practices of courts and therefore promote greater certainty. Other provisions should, as a whole, improve the efficiency of cross-border European insolvencies. With regards to the new group coordination proceedings, only time will tell whether this will add a useful tool in the European restructuring toolbox, or whether this will be an academic concept that will be less used in practice.

As the provisions of the Recast Regulation do not become effective until mid-2017, it is unknown what impact the changes that it introduces will have on the restructuring landscape in Europe. It will be interesting to see whether the national and the European courts will have regard to the provisions of the Recast Regulation prior to its formal application date. At the moment, however, there is cautious optimism that the changes are positive developments on the framework already in place and have paved the way for the improved efficiency and effectiveness of cross-border insolvency proceedings in the EU. abi

5 *See* Esser, n.1.

The International Scene

By Ian G. Williams and Prof. Adrian J. Walters

The Model Law: Is It Time for the U.K. to Change Tack?

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It has never been an easy matter for judges. The judiciary, an independent branch of government, dealing with, applying or even just considering law from another country evokes strong emotions. U.S. Supreme Court Justice Stephen G. Breyer's latest book, *The Court and the World: American Law and the New Global Realities* (Deckle Edge 2015), is expected to ignite the politically sensitive topic of the role that foreign law should play in American judicial decisions.

Justice Breyer firmly believes that taking cognizance of what goes on elsewhere is very important. "The world we're operating in is one in which by and large everyone believes [that] you have to know something about what is going on abroad."[1] This is clearly a very enlightened view, but it is not one that is widely shared in the U.S. However, it rests on the dual premise that global problems require global coordination and that effective judicial cooperation depends on increasing judicial engagement with foreign law. The engagement that Justice Breyer envisions is, of course, fundamental to the resolution of cross-border insolvencies. It will need to deepen further if the internationalist vision associated with universalism — which, where practicable, favors a global "one court, one law" approach to cross-border insolvencies and restructurings — is to gain momentum.

It has been the better part of 10 years now since the U.K. adopted the United Nations Commission on International Trade (UNCITRAL) Model Law on Cross-Border Insolvency (the "Model Law") by the Cross-Border Insolvency Regulations 2006 (CBIR).[2] Its impact in the U.K. has not lived up to the expectations of some and is probably best described as underwhelming.

Outside of the British Commonwealth, few appreciate that CBIR is not a single statutory gateway to judicial assistance in cross-border insolvency matters. It was added to a pre-existing menu of options available to foreign representatives in need of judicial assistance in the U.K. Having options is often a good thing, but a single workable point of entry such as chapter 15[3] might arguably be better. In addition, the complexity of the U.K.'s menu approach might actually be part of its problem.

CBIR coexists with the EU Regulation on Insolvency Proceedings (EUReg)[4] (which prevails over CBIR when there is conflict),[5] section 426 of the Insolvency Act 1986, and historic forms of assistance available under the common law. These various regimes are discrete, yet they sometimes overlap. They effectively divide the world up in ways that reflect the rise of the U.K. as an imperial power in previous centuries, and its more recent evolution to the status of a participating member state of the European Union (EU).

> **[T]he Model Law appears to be a bad fit for the U.K. By enacting it, the U.K. has signaled its willingness to cooperate unilaterally, but cooperation in practice under CBIR has been patchy.**

EUReg only applies where the debtor has its center of main interests (COMI) in the EU. Section 426 applies to a number of specially designated nations from outside the EU, largely consisting of former British Commonwealth countries.[6] The common law of judicial cooperation in cross-border insolvency also continues to be available to foreign representatives from non-EU countries. Moreover the three non-EU gateways are not entirely exclusive. A foreign representative from a country that has "favored nation" status under section 426 (*e.g.*, a Canadian liquidator) will have access to all three non-EU gateways. However, foreign representatives from so-called "third" countries outside the "section 426 club" depend on CBIR and the common law.

1 *See* Adam Liptak, "Justice Breyer Sees Value in a Global View of Law," *New York Times*, Sept. 12, 2015, *available at* www.nytimes.com/2015/09/13/us/politics/justice-breyer-sees-value-in-a-global-view-of-law.html?_r=0 (last visited Dec. 4, 2015).

2 The Cross-Border Insolvency Regulations 2006 (SI 2006/1030). Strictly, CBIR only apply in Scotland, England and Wales. Identical legislation is in effect for Northern Ireland.

3 11 U.S.C. § 1509(b) (foreign representative granted recognition under chapter 15 has direct access to U.S. legal system). *See also* H.R. Rep. No. 109-31 (2005), p. 110.

4 Council Regulation (EC) No. 1346/2000, which has been revised with effect from June 26, 2017, by Regulation (EU) 2015/848 on insolvency proceedings (recast). EUReg applies to all EU countries apart from Denmark.

5 Article 3 of the U.K.'s version of the Model Law states that EUReg prevails in the event of a conflict between EUReg and domestic U.K. law. This simply memorializes the position under EU law that, by virtue of the U.K.'s obligations under the EU's founding treaties, pre-empts inconsistent domestic laws in any event.

6 These countries include Anguilla, Australia, The Bahamas, Bermuda, Botswana, Brunei, Canada, Cayman Islands, Falkland Islands, Gibraltar, Hong Kong, Republic of Ireland, Malaysia, Montserrat, New Zealand, South Africa, St. Helena, Turks and Caicos Islands, Tuvalu and the British Virgin Islands. The Channel Islands and the Isle of Man are also eligible for assistance.

What has become increasingly clear with the efflux-ion of time is that foreign representatives from third countries for whom CBIR is critically important can be at a significant disadvantage. Included among these third countries is the U.S.

CBIR offers foreign representatives in proceedings emanating from the country where the debtor has its COMI with a straightforward route to recognition of those proceedings in a much more streamlined way than is available under the common law. Recognition of foreign main proceedings also carries with it an automatic stay on proceedings in the U.K.[7] However, issues appear to arise where the foreign representative requires more expansive assistance involving, for example, exporting the effects of local insolvency law into the U.K.[8] This could also be a problem that is prevalent in the U.S. as well.[9]

It is well known that attempts under CBIR to domesticate a default judgment from a U.S. avoidance action[10] and to use the insolvency law of the COMI jurisdiction to modify English law-governed rights have failed.[11] There is also a very good chance that the U.K. courts would be unlikely to automatically extend the effects of a foreign reorganization plan into the U.K. without parallel proceedings being instituted.[12]

By contrast, EUReg and section 426 embody a commitment to reciprocal dealing that demands a large measure of deference to foreign insolvency law meaning that the things that CBIR seems not to deliver to foreign representatives relying solely on it could very well be available to foreign representatives who have access to U.K. courts under EUReg and section 426. There is a two-tier system that cannot be desirable if the goal is to promote judicial cooperation in cross-border insolvencies.

While the concept of modified universalism[13] is generally supported by the British judiciary,[14] it does come with the need or requirement to defer to the insolvency law of the home country, and this is where things seem to come undone. Both EUReg and section 426 are underpinned by treaty-driven bonds of mutual trust or historic ties going back centuries. CBIR lacks these features, so it is less potent. This is of material importance to countries that must solely rely on it and it is submitted that this is unsatisfactory.

Part of the problem might be the ease with which foreign representatives from any country can gain access to the U.K. if they satisfy the minimum recognition criteria. Judges in the U.K. (and perhaps also in the U.S.) may worry that if they take a generous view of the scope of their discretionary powers in cases coming from countries with high-quality legal systems, they might be pre-committing themselves to providing comparable assistance to countries whose legal systems are of lower quality. Perhaps the public policy ground for denial of recognition in Article 6 of the Model Law could be used as a filter. However, U.K. judges who are used to statutory regimes underpinned by international treaty (EUReg) or executive branch accreditation of favored nations (section 426) may not be comfortable exercising an ill-defined standard to approve or discredit a foreign legal system.

Currently, the Model Law appears to be a bad fit for the U.K. By enacting it, the U.K. has signaled its willingness to cooperate unilaterally, but cooperation in practice under CBIR has been patchy. Urgent consideration should be given to developing a more unified approach to the granting of assistance under the current tripartite regime for non-EU countries. However, to align the assistance available under section 426 (which includes the possibility of assistance under the requesting country's own insolvency law) with the assistance available under CBIR may require the U.K. to move toward a country-accreditation model for CBIR akin to the section 426 designated-country model. Otherwise, the risk is that U.K. judges will continue to give preference to softer forms of cooperation that involve U.K. parallel proceedings and the application of U.K. law and that are not so progressive in advancing the cause of modified universalism. abi

7 Though the automatic stay under Article 20 of the U.K.'s version of the Model Law is coextensive with the stay in a U.K. winding-up proceeding, it does not operate to stay enforcement of secured claims.
8 *See* A. Walters, "Giving Effect to Foreign Restructuring Plans in Anglo-U.S. Private International Law," (2015) 3 *NIBLeJ* 375.
9 "The Model Law Is Dead. Long Live the Model Law!," *Recovery*, Spring 2014, 30-32.
10 *Rubin v. Eurofinance SA* [2013] 1 A.C. 236 Supreme Court.
11 *Fibria Celulose S/A v. Pan Ocean Co. Ltd.* [2014] EWHC 2124.
12 *Ibid.* at 5.
13 The concept of avoiding duplication of cost of multiple insolvency proceedings in cases of multinational debtors with countries assisting the home country's insolvency proceeding.
14 *Singularis Holdings Ltd. v. PricewaterhouseCoopers* [2014] UKPC 36.