INSOL INTERNATIONAL

GLOBAL INSOLVENCY PRACTICE COURSE

Module B

Recognition and enforcement of plans / schemes and other insolvency-related judgments

2024 / San Diego

Agenda

1. Territorialism vs. Universalism – recognition
2. Recognition regimes
3. Recognition in practice
    1. EU
    2. US
    3. UK
    4. Others – Show and tell

Quick recap – Territorialism vs. Universalism

What's the relevance here?

1. ***Territorialism*** – local insolvency laws apply to insolvency proceedings commenced, in each place where the multinational debtor can satisfy the local filing requirements

2. ***Universalism*** – a single primary court administering the insolvency case of a multinational debtor, with the insolvency law of that jurisdiction governing the case and extending to all the debtor's assets, wherever located

→ Universalistic approach may be the 'Valhalla' – or utopia? – of many restructuring professionals

→ (Almost) true universalism only to be found in the EIR (but: territorial/secondary proceedings, exceptions)

Territoriality is and remains point of departure of actual insolvency regimes worldwide

→ The 'bridge': recognition of foreign insolvency proceedings and judgements – including restructuring plans, schemes, WHOAs &c.

☺️ Practice sidenote: all of this only even considers a *single* (entity) multinational debtor, not a (corporate) group…

Sidenote: harmonisation

- The 'territoriality gap' may be mitigated also by 'things just working the same way' across jurisdictions, or the same or similar principles being accepted / applicable
  - Mechanism underlying *synthetic secondary proceedings* (*Collins & Aikman* and *Nortel* cases; article 36 EIR; article 28 MLEGI)
- Harmonisation of insolvency laws? A European project:
  - *Proposal for a European Directive harmonizing certain aspects of insolvency law* – published by the European Commission 7 December 2022 (COM2022/2022/702)
  - Status: first reading in council. Final version December 2024, to come into effect in Member States (after implementation period) in 2026/2027?
  - Intention: harmonizing targeted elements of Member States' insolvency rules, creating common minimum standards across all member states, thereby facilitating cross-border investment (CMU)
  - Only limited number of topic in scope:
    1. Avoidance actions: grounds and effects
    2. Asset tracing: enhance transparency
    3. Pre-packs: general norms
    4. Directors' requirement to file for insolvency
    5. Simplified procedures for insolvent microenterprises
    6. Creditors' committees
    7. Key features of national insolvency regimes, including insolvency triggers, transparency for creditors

Recognition regimes: general overview

- Absent 'true' universalism, foreign insolvency processes and their outcomes may be 'locally' recognised and/or enforced generally through:
  - Adoption of a **modified universalism** approach – recognition of proceedings as a whole
  - Recognition of single judgments
    - under bilateral or multilateral treaties, international frameworks
    - under a county's common Private International Law
  - Common law jurisdictional precedents/comity

  → ***Modified universalism*** – Approach which seeks to find a balance between purely territorial bankruptcy systems, and an entirely universal international bankruptcy system. The Model Law, and Chapter 15 of the Bankruptcy Code for example, present a form of 'modified universalism'

- Whilst such regimes recognition provide a framework for 'recognition' (and cooperation) of restructuring and insolvency procedures, it what that means – and to what extent they enable (automatic) recognition and enforcement of plans, schemes and/or other insolvency judgments

Key frameworks for recognition

- UNCITRAL Model law on Cross-border Insolvency (**MLCBI**) (-implementations)
  - US: chapter 15
  - UK: Cross-Border Insolvency Regulations 2006
  - Singapore adoption of Model Law
  - Canada (CCAA part IV)
  - …Romania (Efwon… ☺)
  - and others: in total 58 States in a total of 61 jurisdictions
- European Insolvency Regulation (**EIR**)
- UNCITRAL Model Law on the Recognition and Enforcement of Insolvency-Related Judgments (**MLIJ**)
- EU Brussels I (bis) / Judgements Regulation (Regulation (EU) No 1215/2012 of the EP and C)
- EU Rome I Regulation (Regulation (EC) No. 593/2008 on the law applicable to contractual obligations)
- Lugano Convention
- Common law/comity and comparable (protocols)
- 'Local' Private International Law
- The Hague Convention (2005 Hague Convention on Choice of Court Agreements)…

MLCBI

UNCITRAL Model law on Cross-border Insolvency (MLCBI)

- UNCITRAL adopted framework in May 1997 (25th aniv)
- Intention is “to assist States to equip their insolvency laws with a modern legal framework to more effectively address cross-border insolvency proceedings concerning debtors experiencing severe financial distress or insolvency. It focuses on authorizing and encouraging cooperation and coordination between jurisdictions, rather than attempting the unification of substantive insolvency law”
- No legal effect until it is implemented by States domestically. Has been adopted in 60 States in a total of 63 jurisdictions
- Key features: recognition of foreign proceedings as main or non-main, based on COMI/establishment
- Automatic or discretionary relief upon or following recognition

EIR

European Insolvency Regulation (EIR)

- Regulation (EU) 2015/848 of the EP and the C (20 May 2015 on insolvency proceedings (recast), original 2001)
- Intention is "that cross-border insolvency proceedings should operate efficiently and effectively… in order to achieve [that] aim In order to achieve the aim it is necessary, and appropriate, that the provisions on jurisdiction, recognition and applicable law in this area should be contained in a Union measure which is binding and directly applicable in Member States"
- Part of the law of all EU countries (except Denmark)
- Key features: automatic recognition and full* effect of listed (Annex A) foreign proceedings as main or territorial/secondary, based on COMI/establishment
- …including giving effect to plans / schemes and other insolvency-related judgments?
    - Yes, "The scope of this Regulation should extend to proceedings which promote the rescue of economically viable but distressed businesses and which give a second chance to entrepreneurs." (Whereas 10)
    - As long as they are on Annex A
    - But how does it work exactly? What does "automatic recognition", full effect mean and how do you get it? Will explore a bit later on

MLIJ

UNCITRAL Model Law on the Recognition and Enforcement of Insolvency-Related Judgments (MLIJ)

- UNCITRAL adopted framework in July 2018
- Intention is to overcome the 'uncertainty concerning the ability of some courts, in the context of recognition proceedings under the MLCBI, to recognise and enforce judgments given in the course of foreign insolvency proceedings … on the basis that neither article 7 nor 21 of the MLCBI explicitly provide the necessary authority'
- No legal effect until it is implemented by States domestically. This is expected to take many years (with no State having yet given domestic effect to the MLIJ)
- UK is consulting further as to how to ensure how to adopt some of this model law

MLEGI

UNCITRAL Model Law on Enterprise Group Insolvency (MLEGI)

- UNCITRAL adopted framework in July 2018
- Model Law on group insolvency / implementations
- UK is proposing to adopt in full

‘Other’ EU regulations, international frameworks

- EU Brussels I (bis) / Judgements Regulation (Regulation (EU) No. 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast))
- Lugano Convention: similar to EU JR
- EU Rome I Regulation (Regulation (EC) No. 593/2008 on the law applicable to contractual obligations)
- 2005 Hague Convention on Choice of Court Agreements

→ all questionable… we will get to that as we carry on!

Common law/comity and comparable (protocols); 'local' Private International Law

- Courts and IPs may enter into 'cross-border protocols' (Jet Airways; Lehman Brothers; Nortel Networks; Bernard Madoff Investment Securities)
- A country's national/local Private International Law usually provides modalities for recognition of foreign judgments. These may or may not apply to insolvency related judgments as well, and/or provide a basis for recognition of schemes, plans, etc.
- Common law – e.g. Gibbs

Recognition in practice...

Recognition ‘in the EU’: a cookbook

- Only in part a unified picture
- Don’t forget it’s not a (federal) country…
- The EU landscape:
  - EIR
  - MLCBI implementations
  - ‘other’ EU regulations and international frameworks
  - ‘Local’ Private International Law
- It actually depends what you want to get recognised, where
- Take the NL WHOA as an example

Schemes and the like under the EIR

- Is your preferred restruc tool on Annex A of the EIR? E.g.: NL *public* WHOA, FR sauvergardes,
  DE öffentliche Restrukturierungssache (note: UK scheme of arrangement never was!)
- No? → Do not pass *Go* and do not collect $200
- If yes, is COMI in an EU Member State(except Denmark…….)?
- No? → Do not pass *Go* and do not collect $200
- If yes, it's easy and all is great! – or is it?
  - Automatic recognition in all EU countries
  - Lex concursus rules, dictates all consequences
  - But pitfalls… e.g.:
    - Articles 8 (!) - 18
    - Territorial/secondary proceedings
    - And how about a group of companies?

Schemes and the like NOT under the EIR

- So, your preferred restruc tool is not on Annex A of the EIR or no COMI in the EU

→ *Note: now it does not matter, whether these are at all proceedings originating in the EU, or not. E.g. non-public WHOA, or UK scheme, or US chapter 11…*

- You will have to get creative and rely on other options
- Where in the EU do you need recognition exactly?
- Did that country implement the MLCBI?
  - Great! Your proceedings may be recognised…
  - …if the debtor entity/ies have COMI or an establishment in the chosen restructuring forum!
  - But what does that get you, exactly, in terms of recognition of a plan or scheme (or other insolvency judgment)?
  - Depends on the local implementation which relief may be available exactly…
  - …most importantly here, whether the local legislator/court considers that article 7 / 21 of the MLCBI provide the necessary authority to recognise – give full force and effect to – schemes, (confirmed) restructuring plans, etc.

Schemes and the like NOT under the EIR (2)

- If the relevant country did not implement the MLCBI or its implementation does not cover ‘full force and effect’ / recognition of other judgments: did it implement the MLRIJ? (Future… none yet)
- Otherwise, rely on:
  - the relevant country’s national/local Private International Law; or
  - perhaps: EU Rome I, or Judgments Regulations, Lugano Convention, Hague Convention…

Seeking recognition in the US

The US landscape:

- Chapter 15: implementation of the MLCBI (2005)
- Chapter 15's stated purpose is "to provide effective mechanisms for dealing with cases of cross-border insolvency" with the objective of, among other things, cooperation between U.S. and non-U.S. courts
- Section 1515 of the Bankruptcy Code (**BC**): representative of a foreign debtor may file a petition in a U.S. bankruptcy court seeking "recognition" of a "foreign proceeding"
- As main or non-main, depending on COMI
- What kind of foreign proceeding? S. 101(23) BC: "[A] collective judicial or administrative proceeding in a foreign country, including an interim proceeding, under a law relating to insolvency or adjustment of debt in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation"
- Limits?
    - *In re Global Cord Blood Corp.*, 2022 WL 17478530 (Bankr. S.D.N.Y. Dec. 5, 2022)

Seeking recognition in the US (2)

- What kind of relief? Model of the MLCBI
  - On filing recognition petition – on request, preliminary relief (11 U.S.C. § 1519), e.g.
    - Staying execution against debtor's assets
    - Certain relief available also on recognition
  - Immediately upon recognition – automatic effects (11 U.S.C. § 1520), e.g.
    - Automatic stay – but US, not worldwide
    - DIP
  - Upon recognition – on request, further relief (11 U.S.C. § 1521), e.g.
    - entrusting the administration or realization of all or part of the debtor's assets within the territorial jurisdiction of the United States to the foreign representative or another person
  - …but the real beauty is in 11 U.S.C. § 1507, as the US Courts are used to § 105!
    - "if recognition is granted, [the Court] may provide additional assistance to a foreign representative under this title or under other laws of the United States", consistent with principles of comity
    - *which consistently, the US Courts have construed to include giving "full force and effect" to foreign plans, schemes, etc.*
  - All relief under section 1519 or 1521 (…) only if the interests of the creditors and other interested entities, including the debtor, are sufficiently protected (11 U.S.C. § 1522)

Seeking recognition in the UK

Puzzle pieces…

Adoption of Model law - CBIR	*~~EUIR~~ …. BREXIT*	*S426. IA1986*
Gibbs	*Common law*	*Outbound (inc. ResPlans)*
Local expert evidence	*Parallel processes*	

The UK – Adoption of the Model Law

- MLCBI wholesale adoption through the Cross-Border Insolvency Regulations 2006 (CBIR)
- Recognition not automatic – application through the court required
- Recognition under the CBIR has the following key elements:
  - the commencement of the foreign proceedings and, where relevant, the appointment of the foreign representative;
  - the foreign representative has standing to make an application to the English court under the clawback provisions under the Insolvency Act 1986;
  - for foreign main proceedings only (ie opened where the debtor has its COMI), recognition results in an automatic stay on certain enforcement actions against the debtor, equivalent to the stay applicable in English liquidation proceedings; and
  - discretionary relief is available however relief is supposed to be procedural and should not involve the application of a rule of foreign law or be used to recognise and enforce a foreign judgment

Re Rubin v Eurofinance [2012] UKSC 46)

The UK – Adoption of the Model Law

Key cases clarifying parameters under CBIR have been:

- Re Agrokor – recognition of foreign main proceedings of a single company that is subject to foreign group insolvency proceedings.
- Re Stanford International – Refusal to recognise a foreign receivership as not a collective proceeding.
- Re Videology – The court was not satisfied that Videology's centre of main interests ('COMI') was in the United States and refused to recognise the Chapter 11 proceedings as a foreign main proceeding but did recognise the proceedings as a foreign non-main proceeding and granted the discretionary relief sought.
- Re Nordic Trustee v OGX Petroleo - the need for full and frank disclosure by foreign debtors on recognition applications as to the effects recognition will have on third parties.
- Re Ronelp Marine – the lifting of the stay in exceptional circumstances to allow litigation to proceed against a debtor in England where to do so would not unduly advance the claimants' interests of those of the creditors as a whole.
- Re Sturgeon Central Asia Balanced Fund – refusal of recognition of the just and equitable winding-up of a solvent foreign debtor.

The UK – The Rule of Gibbs

The Rule of Gibbs

- A 130 year old English court decision provides that a debt governed by English law cannot be discharged or altered by a foreign law (including a foreign insolvency proceeding).
- The rule provides certainty to parties that choose English law that their contracts will not be modified or extinguished by any law other than the one they chose.
- This means that, while an English court may recognise a foreign insolvency process and impose an interim enforcement moratorium while a foreign restructuring plan is negotiated, a final restructuring plan endorsed under the framework of a foreign insolvency process is not effective to extinguish or modify debts of creditors whose contracts with the insolvent debtor are covered by English law.
- Seemingly not disappearing soon – UK not adopting model law on recognition of judgments…

Re. Antony Gibbs Sons v. La Société Industrielle Et Commerciale Des Métaux (1890) 25 QBD 399 (Court of Appeal).

Re. Rubin and another (Respondents) v. Eurofinance SA and others (Appellants), [2012] UKSC 46.

Re. Bakhshiyeva v Sberbank of Russia [2018] EWHC 59 (Ch)

Example – How do CBIR and Gibbs interact

Re OJSC International Bank of Azerbaijan [2018]

- June 2018 International Bank of Azerbaijan obtained a Recognition Order in the U.K. High Court recognising the Azeri restructuring proceedings as foreign main proceedings under the CBIR.
- Wide-ranging moratorium provided, preventing creditors from commencing/continuing action without permission of the Court, binding all creditors irrespective of whether they voted for the plan or not.
- Sberbank and Franklin Templeton held English law-governed debts, and did not participate in the IBA restructuring proceedings.
- Azerbaijani restructuring plan overwhelming voted for and bound dissenting creditors
- Sberbank and FT indicated they were to seek to enforce English law governed debts in the English Court when the moratorium was removed.
- IBA applied for indefinite protection under article 21 of the CBIR 'any appropriate relief' when the Azerbaijani restructuring completed.
- Outcome was the Court (and Court of Appeal) rejected this request as this sought to keep the restructuring plan artificially alive, this was not in the interest of creditors, and this sought to circumnavigate Gibbs.

The UK – Section 426 IA 1986

- S.426 predates the MLCBI and the CBIR
- Provides for officeholders in certain countries to make a request to UK Courts for assistance. Assistance under s426 is wide-ranging and can include 1. An order for an injunction, 2. A declaration recognising the rights of a foreign insolvency representative, 3. The making of an Administration Order. Like the CBIR it cannot be used to enforce foreign judgments.
- S426(5) Insolvency Act 1986 permits the English Court to apply the insolvency law of England or the law of the requesting Court. No reciprocity required.
- Not automatic – court application process required. S426(5) Insolvency Act 1986 permits the English Court to apply the insolvency law of England or the law of the requesting Court.
- "The Courts having jurisdiction in relation to insolvency law in any part of the United Kingdom shall assist the Courts having the corresponding jurisdiction in any other part of the United Kingdom or any **relevant country or territory**". The relevant countries/territories are mainly commonwealth or ex-commonwealth): Anguilla, Australia, the Bahamas, Bermuda, Botswana, Brunei, Canada, Cayman Islands, the Channel Islands (Jersey, Guernsey, Alderney, Sark, and Herm), Falkland Islands, Gibraltar, Hong Kong, Isle of Man, Malaysia, Montserrat, New Zealand, the Republic of Ireland, South Africa, Saint Helena, Turks and Caicos Islands, Tuvalu and the British Virgin Islands.
- ROI included here… The company, Silverpail, went into an Irish examinership in December 2022, following Covid 19-related financial difficulties. On 31 March 2023, the High Court in Ireland confirmed a scheme of arrangement which had been proposed by the Irish Examiner and issued a Letter of Request to the High Court of England & Wales, asking that the company's English and Welsh creditors also be bound by this scheme in accordance with Irish law. In this most recent High Court decision. Possibility to set-aside Gibbs from ROI cases, but not yet tested

Re Silverpail Dairy Ireland Unlimited Company [2023] EWHC 895.
Re England v Smith [2001] Ch 419 – ability to apply law of other relevant jurisdiction in the UK
Re Business City Express Ltd ([1997] 2 BCLC 510)

The UK – BREXIT implications

Pre Brexit = EIR – Automatic recognition – *for those proceedings that were on Annex A!*

Impact of Brexit = Since the UK's departure from the EU, any insolvency proceedings in an EU Member State commencing after 11pm on 31 December 2020 is not recognised in the UK under the EU Regulation. No longer a single, uniform regime for the coordination of restructurings between the UK and EU member states.

Post BREXIT Inbound: (EU to UK) CBIR now the route for EU inbound applications. applications benefit from procedural law and treaties and may lead to different outcomes depending on the jurisdiction. (Exception is ROI)

Post BREXIT Outbound:

More complicated……. Also depends on type of restructuring process ('insolvency' or reorganisation), COMI, Governing law etc

1. Limited EU states have adopted the model law (only Greece, Poland, Slovenia and Romania).
2. UK lawyers have worked extremely hard to interrogate other lanes which can be relied upon for recognition:
    1. Rome 1
    2. Hague convention
    3. PIL
3. English judges wont sanction schemes/plans if there is no reasonable prospect of it having substantial effect (DTEK). Expert witnesses required to conclude recognition likely.
4. Whilst a few helpful expert witness statements in circulation supporting likely recognition routes, this has not been tested much in the courts so still tbc

A tricky area which now requires extensive legal analysis in each case… good for lawyers, maybe not so much the debtors or creditors!

Re Gategroup Guarantee Limited [2021] EWHC 304

The UK – Local expert evidence, parallel processes, Irish Schemes…

Parallel proceedings:

i. **Cimolai – Italian group utilised Italian proceedings in parallel with English ResPlan. English ResPlan required for Gibbs reasons. Italian process recognised under CBIR.**

ii. **Vroon – Dutch WHOA in parallel to English Scheme. Scheme for Gibbs**

iii. **McDermott -** International Group, UK ResPlan + Dutch WHOA and Chapter 15 recognition.

Post BREXIT Outbound:

Local evidence used to satisfy UK court recognition will be granted

Irish Scheme:

s426 entry route…

Seeking recognition – Some final thoughts before show and tell

1. Case by case…
2. Jurisdictional ‘wrinkles’ e.g. Gibbs
3. Adoption of model law – how adopted matters – see next session!
4. To come… MLIJ and MLEGI

3. Inbound and Outbound recognition in practice

Show and tell…