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Short Paper

Describe and analyse the system of jurisdiction and recognition of insolvency related judgments (articles 6 and 32 of the EU Insolvency Regulation) and compare it to the UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments

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Introduction

1. This short paper examines, in turn, the systems contained in: (i) the European Insolvency Regulation (recast) (EU 2015/848) (***RR***); and (ii) the UNCITRAL Model Law on Recognition and Enforcement of Insolvency Related Judgments (***MLIRJ***), insofar as they relate to the system of jurisdiction and recognition of judgments relating to insolvency.

EU Insolvency Regulation: Articles 6 and 32

Background: Article 3(1) of the original European Insolvency Regulation

2. Article 6 of the RR, titled *Jurisdiction for actions deriving directly from insolvency proceedings and closely linked with them,* is a new provision in the sense that it did not appear in the original European Insolvency Regulation (EU 1346/2000) (***OR***).

3. Article 3(1) of the OR provided that: "*The courts of the Member State within the territory of which the centre of a debtor's main interests is situated shall have jurisdiction to open insolvency proceedings.*" In other words, whilst the OR addressed the issue of which courts would have jurisdiction to open insolvency proceedings, it left open the issue of which courts would have jurisdiction for actions *deriving from, or linked to*, insolvency proceedings (rather than simply the jurisdiction to *open* insolvency proceedings). Those types of actions were not specifically addressed.

4. The issue came before the European Court of Justice (***ECJ***) in *Christoper Seagon v Deko Marty Belgium NV*[1] within the context of an avoidance action to set aside a transaction prior to the onset of insolvency. In that case, a German court had held that it did not have jurisdiction to hear the avoidance action on the basis that the defendant had its registered office in Belgium (and that EU Regulation 44/2001 (***Brussels Regulation***) applied instead).

5. The ECJ ruled in that case that Article 3(1) must be interpreted as meaning that the courts of the Member State within the territory of which insolvency proceedings have been opened *also* have jurisdiction to decide an action to set a transaction aside by virtue of insolvency, that is brought against a person whose registered office is in another Member State. In arriving at its conclusion, the ECJ specifically noted the purposive nature of the OR and that its finding appeared to be consistent with the objective of improving the effectiveness and efficiency of insolvency proceedings having cross-border effects.

Article 6 of the RR

6. The first point to note is that Article 6(1) is parasitic on Article 3. Jurisdiction for actions deriving directly from insolvency proceedings or closely linked with them under Article 6(1), can (only) be conferred on the courts of the Member State where the insolvency proceedings have been opened in accordance with Article 3[2]. In that way, Article 6 – entirely logically - 'follows' Article 3.

[1] Case C-399/07
[2] Article 6(1)

7. The drafting of Article 6(1) is such that jurisdiction is conferred for actions that: (i) *first*, derive directly from the insolvency proceedings; and (ii) secondly, are closely linked to those insolvency proceedings[3]. Accordingly, there are two criteria that must be met.

8. Article 6(1) itself provides only one non-exhaustive example of an action for which jurisdiction is conferred (possibly offered in the light of the ECJ's decision in *Seagon*): avoidance actions. Further interpretative assistance, in terms of which actions may or may not be covered, is found at Recital 35 of the RR, which provides as follows:

   "... Such actions should include avoidance actions against defendants in other Member States and actions concerning obligations that arise in the course of insolvency proceedings, such as advance payment for costs of the proceedings. In contrast, actions for the performance of the obligations under a contract concluded by the debtor prior to the opening of proceedings do not derive directly from the proceedings..."

9. McPherson & Keay, in *Law of Company Liquidation*[4] state that a decision of a French court in *Gourdain & Nadler*[5] appears to constitute authority for the general proposition that proceedings are insolvency related if they arose from provisions that are distinctive to insolvency law or from adjustment to general legal norms that are brought about by insolvency law.

10. Article 6(2) extends jurisdiction such that insolvency related actions under Article 6(1) may be heard, *together with* a civil or commercial action, in the courts of the Member State where the defendant is domiciled (or where there are several defendants, where one of them is domiciled) in circumstances where: (i) the insolvency related action is *"related to"* the civil/commercial matter, against the same defendant; and (ii) the courts of the defendant's domicile have jurisdiction to hear the civil/commercial matter under EU Regulation 1215/2012 (***Brussels Recast Regulation***). This also applies to actions brought by the debtor in possession (where local law allows debtors in possession to bring insolvency related actions)[6].

11. Lastly, guidance is provided in Article 6(2) as to what is meant by the expression *"related to"*: actions are deemed, as a fait accompli, to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of IRJeconcilable judgments resulting from separate proceedings. In this respect, it seems that the burden is on the liquidator to demonstrate expediency and that there is a risk of IRJeconcilable judgments arising if two sets of proceedings, in two different member states, are brought.

Article 32

12. Article 32 (titled *Recognition and enforceability of other judgments)* concerns recognition and enforcement, rather than jurisdiction. Article 32 is parasitic on Article 19: where a court whose judgment concerning the opening of proceedings has been recognised in accordance with Article

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[3] Seen thus, Article 6 is entirely consistent with the ECJ's judgment in *Seagon*.
[4] 4th Edition at [18-063]
[5] (133/78) [1979] E.C.R. 733; subsequently applied in *Fondazione Enasarco v Lehman Brothers Finance SA* [2014] EWHC 43 (Ch)
[6] Article 6(2)

19, any further judgments from that court concerning *"the course and closure"* of insolvency proceedings, and compositions approved by that court, are to be recognised with no further formalities. Such judgments are to be enforced in accordance with the relevant provisions of the Brussels Recast Regulation.

13. Importantly, within the context of Article 6 specifically, the first proviso of Article 32(1) provides that the recognition and enforcement effects described above (i.e. recognition without further formality) *also* apply to judgments deriving directly from the insolvency proceedings and which are closely linked to them; even if those judgments were handed down by another court.

14. Ian Fletcher, in *The Law of Insolvency*[7], notes that one of the consequences of these provisions is that a judgment that is handed down in an action deriving from and closely linked to insolvency proceedings, is automatically capable of recognition and enforcement throughout Member States even where the judgment has been given in default of appearance (provided certain criteria as to service of the documents on the defendant have been met).

UNCITRAL Model Law on Recognition and Enforcement of Insolvency Related Judgments 2018

Introduction

15. The MLIRJ was adopted on 2 July 2018, in part to address uncertainty with respect to the interpretation of Articles 7 and 21 of the UNCITRAL Model Law on Cross-Border Insolvency (***MLCBI***) that had arisen as a result of certain judicial decisions[8] in member states as to their effect[9]. Those decisions (notably *Rubin*) had arguably signalled a bucking of the trend towards modified universalist principles and had cause *"distress"* to *"many of us on the west side of the Atlantic"*[10].

16. As is set out expressly at paragraph 1 of its preamble, the MLIRJ is designed to provide a simple, straightforward and harmonised procedure for the recognition and enforcement of insolvency

[7] 5th Edition at [31-094]

[8] Most notably, the decision of the UK Supreme Court in *Rubin & Anor v Eurofinance SA* [2012] UKSC, in which the Court concluded (at [24]) and [133-144] that the MLCBI did not expressly or implicitly deal with the enforcement of judgments in insolvency proceedings: *"[143]: It would be surprising if the Model Law was intended to deal with judgments in insolvency matters by implication. Articles 21, 25 and 27 are concerned with procedural matters. No doubt they should be given a purposive interpretation and should be widely construed in the light of the objects of the Model Law, but there is nothing to suggest that they apply to the recognition and enforcement of foreign judgments against third parties."* The Supreme Court went on to hold, at [144], that any reliance on US decisions (including *In re Matcalfe & Mansfield Alternative Investments* 421 BR 685 (Bankr SDNY 2010)) purporting to suggest otherwise, was misplaced: *"In my judgment the Model Law is not designed to provide for the reciprocal enforcement of judgments."*

[9] In fact, the Guide to Enactment for the MLICRR specifically refers in section B (paragraph 2) to the risk that decisions such as *Rubin* might have been regarded as persuasive authority in those states with legislation based on MLCBI Article 8 (which provides that regard is to be had, when interpreting the MLCBI, to its international origin and to the need to promote uniformity in its application).

[10] *Ian Fletcher and the Internationalist Principle* 2015 3 NIBLeJ30 (Jay Lawrence Westbrook) (found at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3064868) (accessed 15 January 2022)

related judgments[11]. The MLIRJ is designed to complement, rather than restrict or limit the application of, the MLCBI.

Framework

17. A helpful overview of the MLIRJ is set out in Section 3 of INSOL's special report dated March 2019, prepared by Evan J Zucker and Rick Antonoff of Blank Rome LLP[12].

18. The MLIRJ applies to the recognition and enforcement of an insolvency-related judgment (***IRJ***) issued in a State that is different to the State in which recognition and enforcement is sought. Recognition and enforcement are generally dealt with as a single concept, notwithstanding any distinctions and/or different treatment of the processes as a matter of local law[13].

19. There are only four definitions contained in the MLIRJ[14], including notably the definition of 'insolvency related judgment,' which means a judgment that: (i) arises *"as a consequence of or is materially associated with"* an insolvency proceeding, whether or not that insolvency proceeding has closed; and (ii) was issued on or after the commencement of that insolvency proceeding. The definition explicitly excludes judgments commencing insolvency proceedings.

20. In this respect the MLIRJ uses a different definition to the RR (see paragraphs 7-9 above and the references to *'derived from and closely linked to'*). However, in practice it remains to be seen whether that is a distinction in terminology, without a difference in substance. The text of the MLIRJ does not itself provide examples of what constitutes an IRJ. That being said, a helpful non-exhaustive list of examples is contained in the *Guide to Enactment* at paragraph 60.

21. The procedure for seeking recognition and enforcement of an IRJ is set out in Article 11. It is not automatic, but it is designed to be straightforward: what is required is: (i) a certified copy of the IRJ; and (ii) any documents necessary to establish that the IRJ has effect and is enforceable in the originating State. Alternatively, if that evidence is unavailable, any other evidence that is acceptable to the Court will suffice. Translations may be required; the Court has the right to presume that documents submitted are authentic; any party against whom recognition and assistance is sought has the right to be heard. [15]

22. Article 13 then provides that the IRJ *shall* be recognised and enforced provided certain criteria are met[16]. There are limited (exhaustive[17]) grounds for refusal contained in Article 14. Broadly

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11 https://uncitral.un.org/en/texts/insolvency/modellaw/mlij; https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/ml_recognition_gte_e.pdf , accessed 17 January 2022

12 https://www.blankrome.com/sites/default/files/2019-03/uncitralmodellaw-antonoffzucker2019.pdf, accessed 16 January 2022

13 *Guide to enactment* at [25]. See further [78-79].

14 Article 2. The other definitions are "insolvency proceeding", "insolvency representative" and "judgment".

15 Article 11(2)

16 In brief, if: (i) the IRJ is enforceable in the originating State; (ii) the applicant is an insolvency representative, as such term is defined; (iii) the evidential requirements are met; and (iv) the application is brought in the relevant forum (i.e. a court, as such term is defined in Article 4).

(depending on which draft of Article 15 is adopted), the IRJ shall have the same effect in the State in which it is recognised as it has in the originating state or would have had if it had been issued in the State in which it is recognised and enforced.

Points of Comparison

23. Insofar as they concern insolvency related judgments, both the RR and the MLIRJ attempt to remedy ambiguities and/or inconsistencies arising from earlier legislation. Articles 6 and 32 of the RR essentially codify the ECJ's decision in *Christoper Seagon v Deko Marty Belgium NV* (which decision arose from ambiguity as to the meaning of the OR), and the MLIRJ has as its origins a number of conflicting decisions as to the scope of the MLCBI.

24. The RR is directly applicable (i.e. has automatic legal effect, prevailing over domestic legislation) in all EU Member States aside from Denmark. By contrast, the MLIRJ (like the MLCBI) is a 'soft law' instrument that may be unilaterally implemented, with or without amendments, into the national legislation of any State worldwide. It is perhaps obvious to state that, absent implementation, the MLIRJ is (like the MLCBI) not legally binding.

25. The definitions used in the RR and the MLIRJ for insolvency related judgments are slightly different. It is not clear whether any substantive distinction arises in practice, but in terms of language, the following points may be made:

    a. although *"deriving directly from"* may be said to be broadly synonymous with *"arising as a consequence of or materially associated with"*, the latter definition would, as a matter of construction, arguably include IRJs arising *indirectly* as a consequence of an insolvency proceeding, such that the latter definition is arguably therefore broader;

    b. under the RR, there is an additional (second) criteria that the action must be closely linked to the insolvency proceedings; under the MLIRJ, the definition is stated in the alternative (i.e. *"arising as a consequence of"* <u>or</u> *"materially associated with"*).

    c. unlike the RR, the MLIRJ *Guide to Enactment* provides a helpful (non-exhaustive) list of examples as to what constitutes an IRJ.

26. Under the terms of the RR, IRJs are automatically recognised with no further formalities (Article 32(1), first proviso). Under the terms of the MLIRJ, recognition and enforcement are not automatic. There is a procedure to be followed under Article 11 (although the procedure is designed to be straightforward).

27. Under the terms of the RR (Article 33), recognition or enforcement may be refused where their effects would be manifestly contrary to public policy. The MLIRJ also contains a public policy

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[17] See also *Guide to Enactment* at [98], which makes the additional point that the language contained in Article 14 (*"may be refused"*) is such that even if one of the provisions of Article 14 is applicable, the Court is not obliged to refuse recognition and enforcement.

exception (at Article 7), but there are also additional grounds of refusal contained in Article 14, equivalents to which do not exist in the RR.

28. Another distinction arises from the extended international jurisdiction, to hear actions deriving directly from insolvency proceedings and closely linked to them, that is conferred by Article 6(2) of the RR on the courts of other Member States where there is a related civil and commercial matter afoot against the same defendant in respect of which action the Brussels Recast Regulation applies.

29. There is no equivalent provision to Article 6(2) of the RR contained in the MLIRJ. That being the case the question of whether an *"insolvency related judgment"* would, in order to be recognised and enforced under the MLIRJ, need to be handed down by the same Court in which insolvency proceedings were opened, does not appear to have been expressly addressed[18].

Conclusion

30. Articles 6 and 32 (insofar as they concern insolvency related judgments) and the MLIRJ may both fairly be categorised as (modified) universalist regimes whereby not only the insolvency proceedings themselves, but also judgments deriving from those proceedings, are administered by one judicial authority and then recognised and enforced overseas automatically (in the case of the RR) or by reference to a straightforward procedure (in the case of the MLIRJ). The universalism is 'modified' in the sense that recognition and enforcement under the RR and MLIRJ is subject to public policy exceptions and, in the case of MLIRJ, additional grounds of refusal (as set out in Article 14).

31. The RR is directly applicable in all EU Member States aside from Denmark. By contrast, the MLIRJ is a soft law instrument that, as far as the author is aware, has not at the time of writing been adopted in any jurisdiction[19]. It remains to be seen whether that will change, and in particular whether the MLIRJ will be adopted in those jurisdictions in which the so-called rule in Gibbs remains good law[20].

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[18] Although arguably the definitions contained in the language of the MLIRJ are sufficiently broad so as to include insolvency related judgments issued by a different court to that in which the insolvency proceedings were opened.

[19] The UNCITRAL webpage makes no mention of jurisdictions where the MLIRJ may have been adopted https://uncitral.un.org/en/texts/insolvency/modellaw/mlij, (accessed 18 January 2022)

[20] Following *Antony Gibbs & Sons v Societe Industriells et Commerciale des Metaux*. The Gibbs rules stands for authority that, in England, the law of the debt governs how it may be extinguished (such that a foreign law scheme or restructuring will not extinguish English law governed debt). A discussion of the Gibbs rule is beyond the scope of this short paper but is suffices to note that one commentator has remarked that if the UK fails to adopt the MLIRJ, it may harm its universalist credentials. (*McPherson & Keay, Law of Company Liquidation 4th Ed* at [18-116].

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Author Statement

DECLARATION OF HONOUR

I declare that the paper, titled *"Describe and analyse the system of jurisdiction and recognition of insolvency related judgments (arts 6 and 32 of the EU Insolvency Regulation) and compare it to the UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgment"* is my own work, that it has been prepared independently and that all references to, or quotations from, the work of others are fully and correctly cited.

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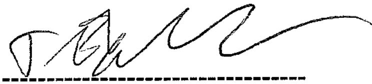

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