Jelenko Lehki - 202021IFU-362 - GIPC SHORT PAPER – February 15 2022

**COMPARISON OF SYSTEM OF JURISDICTION AND RECOGNITION OF INSOLVENCY RELATED JUDGMENTS IN EU INSOLVENCY REGULATION) AND UNCITRAL MODEL LAW ON RECOGNITION AND ENFORCEMENT OF INSOLVENCY-RELATED JUDGMENTS**

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**Introduction**

Insolvency related judgments include those that arise from/after insolvency proceedings are opened and include avoidance actions, recovery of assets, actions undertaken in protecting the estate or pursuing claims, all up to and including judgements on discharge of (remaining) debt. The topic of this short paper is analysis of systems in two legal texts, Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings[[1]](#footnote-1) (in furthrer text: EIR Recast) and UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments (2018)[[2]](#footnote-2) (in further text: MLIJ) and how they approach the issue of jurisdiction and recognition of insolvency related judgements. In following pages the summary indicating nature of these legal texts will be addressed, their origin, general approach and basic provisions regulating the stated topic, following with the conclusion resulting from analysis.

**Nature and origins of legal texts**

EIR Recast was put in force in 2015 and as it is with all EU Regulations, it’s provisions became immediately enforceable in all member states legal systems. As a regulation, it doesn’t need to be transposed/incorporated in national legal text and it serves as supranational law text that is to be enforced “as is”. It is an “iteration 2” of European Insolvency Regulation which is the outcome of decades long attempts in standardizing insolvency legislation in all EU countries. It aims to provide transparent, predictable and efficient system in which all stakeholders in insolvency proceedings will be able to enforce their rights in case of cross border insolvency cases. It’s approach on recognition of insolvency related judgement is the same as with recognition of court decisions/judgements on opening of insolvency procedure, and they are to be recognized automatically (with some basic exceptions).

When it comes to enforcement, it somewhat differs and bring in the assistance of another legal text which is Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (further in text: Brussels I Recast). It points to another strictly formal legal text who by it’s provisions norms the topic in a same formal way. The similar wording of legal provision are there and they immediately take effect in legal systems of each state by power of supranational legal text.

MLIJ on the other hand can be labeled as a “soft law” originating from work of United Nations Commission On International Trade Law (UNCITRAL), it’s Working Group V and comes as additional “tool” in international insolvency addressing in more detail specific topic in whole context of international insolvency which is already regulated in some countries by UNCITRAL Model Law on Cross-Border Insolvency (1997) (further in text: MLCBI)[[3]](#footnote-3). As any Model Law it is intended to be incorporated and operate as an integral part of the existing law of the State implementing it. In due course of time and application of MLCBI it became obvious that it “concentrates” on proceedings rather than judgements and some court decisions, e.g. *Rubin and another (Respondents) v Eurofinance SA and others (Appellants) [2012] UKSC 46* [[4]](#footnote-4) brought to attention that additional text, model law i.e. MLIJ would be necessary to standardize the outcomes in matters of recognition of insolvency related judgements by being “addition” to already implemented MLCBI.

**Relevant provisions of stated texts on jurisdiction and recognition**

1. EIR Recast

EIR Recast considers insolvency related judgements as ones that “derives directly from the insolvency proceedings and is closely linked with them, even if they are handed down by another court”.

EIR Recast addresses jurisdiction and states in it’s Article 6:

*1. The courts of the Member State within the territory of which insolvency proceedings have been opened in accordance with Article 3 shall have jurisdiction for any action which derives directly from the insolvency proceedings and is closely linked with them, such as avoidance actions.*

*2. Where an action referred to in paragraph 1 is related to an action in civil and commercial matters against the same defendant, the insolvency practitioner may bring both actions before the courts of the Member State within the territory of which the defendant is domiciled, or, where the action is brought against several defendants, before the courts of the Member State within the territory of which any of them is domiciled, provided that those courts have jurisdiction pursuant to Regulation (EU) No 1215/2012.*

*The first subparagraph shall apply to the debtor in possession, provided that national law allows the debtor in possession to bring actions on behalf of the insolvency estate.*

*3. For the purpose of paragraph 2, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.*

In regards to recognition, Article 32 states:

*1. Judgments handed down by a court whose judgment concerning the opening of proceedings is recognized in accordance with Article 19 and which concern the course and closure of insolvency proceedings, and compositions approved by that court, shall also be recognized with no further formalities. Such judgments shall be enforced in accordance with Articles 39 to 44 and 47 to 57 of Regulation (EU) No 1215/2012.*

*The first subparagraph shall also apply to judgments deriving directly from the insolvency proceedings and which are closely linked with them, even if they were handed down by another court.*

*The first subparagraph shall also apply to judgments relating to preservation measures taken after the request for the opening of insolvency proceedings or in connection with it.*

*2. The recognition and enforcement of judgments other than those referred to in paragraph 1 of this Article shall be governed by Regulation (EU) No 1215/2012 provided that that Regulation is applicable.*

1. MLIJ

MLIJ defines insolvency-related judgment as a judgment that “arises as a consequence of or is materially associated with an insolvency proceeding, whether or not that proceeding has closed, and was issued on or after the commencement of the insolvency proceeding, while does not include a judgment commencing an insolvency proceeding”.[[5]](#footnote-5)

Being a model law itself, MLIJ leaves “blank text” in order for states implementing it to provide for their addition to it’s provisions where needed/necessary in order to be in line with their law system. With exception of any possible already signed applicable international treaty MLIJ resides on it’s basic principle of promoting “comity and cooperation between jurisdictions regarding insolvency related judgments”[[6]](#footnote-6)

In regards to jurisdiction of court in state where recognition is requested, it states:

Article 4. Competent court or authority

The functions referred to in this Law relating to recognition and enforcement of an insolvency-related judgment shall be performed by *[specify the court, courts, authority or authorities competent to perform those functions in the enacting State]* and by any other court before which the issue of recognition is raised as a defense or as an incidental question.

On the topic of who is authorized to act it states:

Article 5.

*Authorization to act in another State in respect of an insolvency-related judgment issued in this State A [insert the title of the person or body administering a reorganization or liquidation under the law of the enacting State] is authorized to act in another State with respect to an insolvency-related judgment issued in this State, as permitted by the applicable foreign law*

In the matter of jurisdiction, MLIJ has a very wide scope, opting for an approach where the matter of jurisdiction should not pose an obstacle to recognition (other than in case it is exclusive in state where recognition is requested). Rather than delivering rules on “who has” jurisdiction, it’s provisions on that topic are proscribed as “reasons for refusal” of recognition and enforcement.

**Analysis and comparison**

As we can see from the provisions, the procedure of recognition of insolvency related judgements as per EIR Recast is intended to be the same as for decisions on opening the proceedings. If there is doubt it points to Bruxelles I Recast.

EIR, Article 3 states

*“The courts of the Member State within the territory of which the centre of the debtor's main interests is situated shall have jurisdiction to open insolvency proceedings (‘main insolvency proceedings’). The centre of main interests shall be the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties*.”

In respect to that, as the provisions related to jurisdiction of court delivering insolvency related judgement are in line with jurisdiction related to opening of procedure are presumed to be already “settled” in advance so there should not be (at least in matters of *intra* EU proceedings) any question whether or not the court that delivered the judgement considered its jurisdiction before going further into process. The same goes for provisional and protective measures.

Recognition and enforcement of insolvency related judgements for purposes of MLIJ is not connected to matters of main proceedings/COMI as per MLCBI terminology. This approach is in line with it’s intention of being “flexible” and providing for a “solution” that is not limiting. Since every scenario in international insolvency cases cannot be foreseen, and there is no way possible judgements/decisions laid down by different state bodies can be listed, this approach seems best suited for achieving the goals stated in it’s Preamble.

As is with almost all legal text that cover any matter on international level, matter of public policy comes immediately into discussion as a ground for refusal of recognition. So is with these two texts. In both of them, in case that foreign judgement/decision is contradictory to the public policy of the state in which recognition is requested it is stated a one of grounds for refusal of recognition.

Other grounds for refusal are presented below in short in a form of table described in general, not stated verbatim. Since provisions of EIR Recast state that judgements are to be recognized automatically (with public policy exception), provisions of Bruxelles I Recast are put in relation to MLIJ.

Grounds for refusal of recognition

|  |  |
| --- | --- |
| Bruxelles I Recast (Article 45) | MLIJ (article 14) |
| Insufficient notification of party against whom the judgement was issued (to enable arrangement of defense) | Insufficient notification of party against whom the judgement was issued (to enable arrangement of defense) |
| The court of originating state exercises jurisdiction upon explicit consent or no objection of party against whom judgment was issued | The court of originating state exercises jurisdiction upon explicit consent or no objection of party against whom judgment was issued |
| The court in state where recognition is requested should have had exclusive jurisdiction | The court in state where recognition is requested should have had exclusive jurisdiction |
| Judgement incompatible with other judgements between same parties  | Judgement incompatible with other judgements between same parties |
|  | The interests of creditors and other interested persons, including the debtor, were not adequately protected in the proceeding in which the judgment was issued |
|  | Recognition would interfere with administration of debtors estate, rights and interests of creditors |
|  | Judgement obtained by fraud |

We can see the similarities that are expected if we take into account the aim/s of these legal texts. It is evident that many reasons fall into the category of procedural and jurisdictional matters which is expected especially since both legal texts consider all judgements taken to recognition to be “materially” valid in the first place and do not go into reviewing the essence of them. Having that in mind, court in the state where recognition is requested in will primarily concentrate on checking whether or not it has exclusive jurisdiction and in case that “negative condition” is met, they will follow up with “performing test” to see if the basic procedural elements were performed in order to enable opposing party to take effective participation in process in which judgement was delivered.

On the matters of possible postponing od recognition and enforcement, EIR Recast/Bruxelles I Recast deals with that “in advance”, mandating that a “certificate” provided in annex I be appended to the judgement certifying it is valid for enforcement. MLIJ on the other hand has provisions that enable recognition and enforcement to be rejected or postponed in case judgement is under review in originating state.

Bruxelles I Recast doesn’t take into account possible collision with interests of the creditors and other stakeholders in insolvency case due to it’s wider scope, and leaves possible objections in relation to that not addressed.

MLIJ doesn’t explicitly differentiate recognition and enforcement as two procedures, although it provides for cases where “only” recognition is sought. Also, it has special provisions that enable recognizing “a part of” judgement which is in Article 16 referred to as “severability”.

**Conclusion**

Both legal text cover the “matter” that comes after insolvency proceeding have already been opened/has begun. Coming from different law systems both law text aim to achieve similar of same results, the both are there to provide more certainty when it comes to recognition and enforcement of insolvency related judgements in international / cross border insolvency cases. We can see the similarity in intent, but also the difference in way the provisions are delivered. The difference in wording derives from the basic differences between common law and civil law from which these two different legal texts originated and effects of that are noticeable. Similarity can be seen in that both are closely linked, and need to/can be used in connection to additional legal texts (EIR Recast to Bruxselles I Recast) and MLIJ in connection with MLCBI.

Differences are of course obvious, Model Law (as the name states) is “designed” to be incorporated in national law of the state and provide additional legislative code for specified situations. EIR Recast on the other hand is to be put in force in EU Member states and serve primarily development and unification of insolvency proceedings in EU countries. Basic difference is in the EIR Recast’s principle of “automatic” recognition (for the judgements laid down in member states) and its provisions will be the same in every member state. Automatic recognition of insolvency related judgements is “the norm” and in case there is any doubt, Bruxelles I Recast will come to aid. MLIJ is on the other hand made available to supplement MLCBI as it has become apparent through time that MLCBI has its shortcomings in a matter of recognition of “other” judgements that are not ones dealing with just opening of the procedure although it was a great step towards unification of international insolvency law. As a “model law”, it is meant to be incorporated in national legislation with already provided “blank space” for national legal system to adapt it to its own norms (together with/after adoption of MLCBI). This “feature” will inevitably result in differences, minor or bigger in national legislation of States that incorporate it.

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