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Jurisdiction and Recognition of Insolvency - Related Judgments: A Comparison between the European Insolvency Regulation and the UNCITRAL Model Law

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Acknowledgment

INSOL International is pleased to publish this new technical paper, "Jurisdiction and Recognition of Insolvency-Related Judgments: A Comparison between the European Insolvency Regulation and the UNCITRAL Model Law", authored by José Carles Delgado, of CARLES | CUESTA Abogados y Asesores Financieros SLP, Madrid, Spain.

This paper has been adapted from the work originally submitted by the author as part of INSOL's Global Insolvency Practice Course.

The paper provides an analysis of the background, goals and scope of the EIR and Model Law regulatory frameworks in relation to the jurisdiction, recognition and enforcement of insolvency-related judgments. The paper also critically analyses the extent to which the EIR and the Model Law provide for effective cooperation between jurisdictions, decrease the risk of incongruent rulings and enhance predictability and certainty in a manner which encourages international trade and investment.

At a time when business increasingly transcends borders, and many insolvencies involve a cross-border element dealing with group entities, assets and creditors in multiple jurisdictions – and with a diversity of approaches from courts in different jurisdictions on whether an insolvency-related judgment such as a reorganisation plan is capable of binding creditors on a worldwide basis – this paper provides a timely contribution. Ultimately, greater consistency and harmonisation in the approach to cross-border recognition and enforcement of judgments in an insolvency context – within clear and predictable frameworks such as the EIR and the Model Law – will help to underpin financial stability, economic growth and investment at this important time in the global economy.

INSOL International thanks the author for his dedication, expertise and analysis in completing this paper.

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Jurisdiction and Recognition of Insolvency-Related Judgments: A Comparison between the European Insolvency Regulation and the UNCITRAL Model Law*

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1. Introduction

Nowadays, many corporations belong to international group structures with multiple cross-border implications. Companies tend to have an international presence and it is most common that foreign companies and residents are involved in their commercial and financing relationships, in their ownership structure and / or in their management. Consequently, companies' assets and liabilities are typically spread among many jurisdictions in modern commercial practice.

In the event of insolvency, this structure may lead to a multiplicity of insolvency proceedings around the globe. Thus, rules of private international law on the jurisdiction to open insolvency proceedings become necessary. However, for these proceedings to produce effects worldwide, the jurisdiction, recognition and enforcement of other rulings that have a strong connection to the insolvency proceedings also need to be addressed – for example, judgments concerning the confirmation of a reorganisation plan, avoidance actions or the liability of directors of insolvent companies.

This paper commences by providing an overview of the goals and scope of both the European Insolvency Regulation Recast (EIR Recast)[1] and the United Nations Commission on International Trade Law (UNCITRAL) Model Law on the Recognition and Enforcement of Insolvency-Related Judgments (MLIRJ),[2] as this will allow a better understanding of the differences between both systems. Secondly, the paper analyses the concept of insolvency-related judgments under the EIR Recast and compares it to the definition under the MLIRJ. Thirdly, the paper explains the rules on international jurisdiction for

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[1] Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (Recast), OJ L 141, 5.6.2015, pp 19-72, is available at: http://data.europa.eu/eli/reg/2015/848/2018-07-26.

[2] The UNCITRAL Model Law on the Recognition and Enforcement of Insolvency-Related Judgments was adopted in 2018 and is available with its Guide to Enactment at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/ml_recognition_gte_e.pdf. At the date of this paper, still no country has adopted legislation based on this Model Law. However, in July 2022, the United Kingdom Government launched an open consultation on the implementation of the MLIRJ, as well as the Model Law on Enterprise Group Insolvency.

these judgments under both regimes. Finally, the paper describes the recognition and enforcement mechanisms under both regimes and their respective differences.

2. Scope, application and goals of the EIR Recast and the MLIRJ

European Union regulations and UNCITRAL Model Laws are not comparable in legal nature. They have a different scope and application and they pursue different goals. Therefore, a short introduction on the nature, scope and goals of these legal tools – and, particularly, the EIR Recast and the MLIRJ – is essential to understand both regimes.

2.1 Introduction to the European Union's EIR[3] and EIR Recast

The common tradition and goals of the European Union, such as providing a proper functioning of the internal market, have made it the most conducive regional environment for the development of supranational insolvency rules.[4]

As the free circulation of European Court decisions clearly contributes to the soundness of the operation of the internal market, the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters[5] provided certain rules on international jurisdiction and recognition of rulings on civil and commercial matters. However, it excluded expressly from its scope, in article 1.2, rulings on "bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings".

In 2000, by means of a regulation – the EIR, as the predecessor of the EIR Recast – the European Union aimed to solve that lack of commonality by setting uniform rules on international jurisdiction, recognition and applicable law. The EIR made cooperation and coordination in insolvency proceedings possible and avoided insolvency-related forum shopping within the European Union. It addressed not only the rulings on the opening, course and closure of insolvency proceedings and the approval of compositions but also those "judgments deriving directly from insolvency proceedings, and which are closely linked with them".[6]

The EIR and the EIR Recast are European Union regulations, which are defined under article 288 of the Treaty on the Functioning of the European Union[7] as those legal acts of the European Union that: (i) have general application; (ii) are binding in their entirety; and (iii) are directly applicable in all Member States. Thus, the same text and wording of the EIR Recast is binding in its entirety – with no choice of form and methods – and

[3] Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, [2000] OJ L 160, is available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32000R1346&qid=1650307131068. It was repealed by the EIR Recast.

[4] J J Ezquerra Ubero, El Reglamento comunitario y la Ley Concursal en el nuevo Derecho internacional privado de la insolvencia in Icade. Revista De La Facultad De Derecho 61 (2004), 235. This article is available at: https://revistas.comillas.edu/index.php/revistaicade/article/view/6428.

[5] The 1968 Brussels Convention is the predecessor of the current Brussels I bis Regulation or 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 (recast), [2012] OJ L 351. The latest consolidated version is available at: http://data.europa.eu/eli/reg/2012/1215/2015-02-26.

[6] EIR, art 25.1, para 2.

[7] Consolidated versions of the Treaty on the European Union and the Treaty on the Functioning of the European Union, Official Journal C 326, 26/10/2012 P. 0001 – 0390, available at: http://data.europa.eu/eli/treaty/tfeu_2012/oj.

applicable in all Member States (with the exception of Denmark)[8] without any further internal execution measures, as was also the case for its predecessor, the EIR.

2.2 Introduction to UNCITRAL's MLIRJ

From an international law perspective, the specific and highly developed means of the European Union are not replicable anywhere else in the world.

However, the international community is aware of the benefits of the facilitation of international trade and investment, which is precisely one of the goals of UNCITRAL. As insolvency is a sensitive matter that is usually excluded from international instruments dealing with the jurisdiction and international recognition and enforcement of commercial law rulings,[9] UNCITRAL, aware of the relevance of cooperation in cross-border insolvencies to international trade, developed a Model Law on Cross-Border Insolvency (MLCBI)[10] in 1997.

The MLCBI addresses "additional assistance" (article 7) and "relief" (article 21, which refers to "any appropriate relief") that may be granted upon recognition of foreign insolvency proceedings. But, unlike the EIR, the MLCBI does not expressly refer to insolvency-related judgments or actions which derive directly from the insolvency proceedings and are closely linked with them.

This lack of express reference to insolvency-related judgments has led to a narrow interpretation of the MLCBI in some rulings, which has excluded insolvency-related judgments from the assistance and relief available under the MLCBI. In contrast, courts in other countries, such as the United States, have taken the view that the MLCBI grants sufficient authority for the recognition and enforcement of insolvency-related judgments.[11]

This uncertainly on the possibility of recognising and enforcing judgments given in the course of foreign insolvency proceedings under the MLCBI resulted, in 2014, in a mandate to UNCITRAL's Working Group V on Insolvency Law to develop a new Model Law to provide for the recognition and enforcement of insolvency-related judgments: the MLIRJ.

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[8] EIR Recast, recital 88 (recital 33 of the previous EIR).

[9] Such as the Hague Convention of 1 February 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, available at: https://www.hcch.net/en/instruments/conventions/full-text/?cid=78. Under art 1 (5), the Hague Convention expressly excludes "questions of bankruptcy, compositions or analogous proceedings, including decisions which may result therefrom and which relate to the validity of the acts of the debtor". The Hague Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, available at: https://www.hcch.net/en/instruments/conventions/full-text/?cid=137, also excludes "insolvency, composition, resolution of financial institutions, and analogous matters" under subparagraph (e) of art 2.1. The same exclusion to "insolvency, composition and analogous matters" is made under art 2.2 (e) of the Hague Convention of 30 June 2005 on Choice of Court Agreements, available at: https://www.hcch.net/en/instruments/conventions/full-text/?cid=98.

[10] The UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation is available at: https://www.uncitral.org/pdf/english/texts/insolven/1997-Model-Law-Insol-2013-Guide-Enactment-e.pdf. As of 29 May 2022, 51 States in 55 jurisdictions have adopted legislation based on the MLCBI.

[11] Specific eexamples of these current incongruences in the application of the MLCBI are outlined in para 3.2.1 below.

Currently, Working Group V is expressly addressing asset tracing and recovery tools.[12] These new priorities in UNCITRAL's agenda will enhance the relevance of the MLIRJ in the near future, as those tools (provisional measures, disclosure orders, orders securing access to information and evidence, evidence and preservation orders, freezing orders and injunctions) are insolvency-related judgments. Thus, the effectiveness of asset tracing and recovery measures will ultimately depend on the effective implementation of the MLIRJ.

Unlike European Union regulations, Model Laws are non-binding instruments which only recommend certain uniform provisions that need to be voluntarily adopted by States. Therefore, their implementation will most likely be asymmetric. Some countries may decide to implement only parts the MLIRJ instead of its entirety, so that only those parts would voluntarily become binding on the adopting State. Countries may also decide to modify the wording of the MLIRJ, either slightly or significantly, as has been the case with the MLCBI, causing further asymmetries in their implementation.

3 Concept of insolvency-related judgments

The EIR Recast does not explicitly define this concept, while the MLIRJ provides a definition that implies a broader concept than that of the European regime.

3.1 Decisions on actions directly deriving from insolvency proceedings and closely linked with them under the EIR Recast

Recital 35 and articles 6.1 and 32.1 (subparagraph 2) of the EIR Recast[13] refer to actions that: (i) derive directly from the insolvency proceedings; and (ii) are closely linked with them.

The European Parliament proposed to include a definition of these actions in article 2 of the EIR Recast with the following wording:

[12] See, in this regard, the output of the Sixtieth Session of UNCITRAL's Working Group V (Insolvency Law) held in New York between 18 and 21 April on civil asset tracing and recovery in insolvency proceedings, available at: https://uncitral.un.org/en/working_groups/5/insolvency_law.

[13] Recital 35 of the EIR states: "The courts of the Member State within the territory of which insolvency proceedings have been opened should also have jurisdiction for actions which derive directly from the insolvency proceedings and are closely linked with them. Such actions should include avoidance actions against defendants in other Member States and actions concerning obligations that arise in the course of the 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. Where such an action is related to another action based on general civil and commercial law, the insolvency practitioner should be able to bring both actions in the courts of the defendant's domicile if he considers it more efficient to bring the action in that forum. This could, for example, be the case where the insolvency practitioner wishes to combine an action for director's liability on the basis of insolvency law with an action based on company law or general tort law". Article 6.1 of the EIR Recast provides: "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". And, finally, article 32.1 (subparagraph 2) on the direct recognition and enforceability of these judgments states: "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".

> "Action directed at obtaining a judgment that, by virtue of its substance, cannot be, or could not have been, obtained outside of, or independently from, insolvency proceedings, and that is exclusively admissible where insolvency proceedings are pending".[14]

This definition referred to a matter of substance (over form) when considering the existence of the close link and was not included in the final form of the EIR Recast. However, this proposed definition, and the precedents of the Court of Justice of the European Union (CJEU), shed some light on the meaning of insolvency-related judgments under the EIR Recast (particularly on the relationship and connection between these actions and pending insolvency proceedings).

The EIR Recast excludes from the concept of insolvency-related judgments those that concern the course and closure of insolvency proceedings, the approval of compositions or preservation measures. These are separate and autonomous concepts under article 32.1 (subparagraphs 1 and 3).

3.1.1 The requirement of a previous insolvency proceeding

From the wording of article 6.1 of the EIR Recast, a pre-existing insolvency proceeding in the terms of article 1 of the EIR Recast and annex A is required.

The concept applies to actions that derive not only from main insolvency proceedings but also from secondary insolvency proceedings.[15]

Independent territorial proceedings in Member States where the insolvent debtor has an establishment (and no main insolvency proceeding has been previously opened) would also comply with this requirement.[16]

3.1.2 The close connection to insolvency

Neither the EIR nor the EIR Recast provide a definition of decisions on actions "closely linked" to insolvency. Nevertheless, the EIR Recast[17] includes two specific examples:

(a) avoidance actions (the only example provided in article 6.1 of the EIR Recast, and also referred to in recital 35); and

(b) actions concerning obligations that arise in the course of the insolvency proceedings, such as advance payment for costs of the proceedings (also referred to as an example in recital 35).

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[14] European Parliament legislative resolution of 5 February 2014 on the proposal for a regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1346/2000 on insolvency proceedings (COM(2012)0744 – C7-0413/2012 – 2012/0360(COD)), when referring to art 2 (ga), available at: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52014AP0093&from=ES

[15] Case C-649/13 *Comité d'entrepise de Nortel Networks SA v Rougeau* [2015], ECLI:EU:C:2015:384, para 33. The actions to decide on the allocation of the assets between the main and secondary proceedings relate to the debtor's assets located in the Member State in which the secondary insolvency proceeding is open.

[16] G Ringe, "Chapter I General Provisions: Article 6 – Jurisdiction for Actions which Derive Directly from the Insolvency Proceedings and are Closely Linked with Them" in R Bork and K Van Zieten (eds), *Commentary on the European Insolvency Regulation* (2016, Oxford University Press) 205.

[17] See the exact wording in n 13 above.

Lacking a definition, the criteria included in the case law of the CJEU becomes essential to construe this concept.

The CJEU first referred to the concept of actions that "derive directly" from insolvency proceedings and that are "closely linked" with them in 1979 in its decision on *Gourdain v Nadler*.[18] In this case, a French order had declared that the de facto manager of an insolvent French company (a German resident for which the conditions for a *liquidation des biens* in France had been met) had to bear part of the company's debt. The syndic of the French insolvent company sought to enforce the French order in Germany.

As explained in section 2.1 above, if this order was considered an order on a civil or commercial matter, the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters would apply to the enforcement. On the other hand, if the ruling was considered related to insolvency or winding up, the Convention would not apply to the exequatur.

The CJEU understood that this decision derived directly from the bankruptcy or winding-up and was closely connected to it on the following grounds:[19]

(a) only the syndic of the insolvent company was entitled to make the application for its administrator to make good a deficiency in the assets;

(b) the application was made on behalf of and in the interests of the general body of creditors with a view to partial reimbursement following the *par conditio creditorum* rules;

(c) the application was regulated in a national law on bankruptcy and based on provisions that derogated from the general rules of civil law (rule of "substance");[20]

(d) the application needed to be made before the insolvency court; and

(e) it would benefit the general body of creditors of the French company.

Therefore, as a decision given in the context of bankruptcy (therefore, closely linked to insolvency), it was excluded from the application of the 1968 Brussels Convention.

In 2009, in *SCT Industri v Alpenblume,*[21] the CJEU considered again that the Brussels I Regulation was not applicable.[22] Specifically, the CJEU determined that this exception should apply to a judgment of a Member State (Austria) that declared invalid the sale of shares of a company registered in that Member State (Austria) on the ground that the liquidator of another Member State (Sweden) had no power to sell assets located in

[18] Case 133/78 *Henri Gourdain v Franz Nadler* [1979] European Court Reports 1979-733, ECLI:EU:C:1979:49.
[19] *Idem*, ground 5.
[20] In Case C-295/13 *H. v H. K.* [2014], ECLI:EU:C:2014:2410, para 16, the CJUE introduced a relevant nuance. Even if the provision applied was a general rule of commercial law, the fact that it pursues a goal that is also a goal of insolvency law and that it is given in the context of an insolvency proceeding would suffice.
[21] Case C-111/08 *SCT Industri AB I likvidation v Alpenblume AB* [2009] European Court Reports 2009 I-5655, ECLI:EU:C:2009:419. Despite the date of the ruling, the EIR 2000 was not applicable to the case as the insolvency proceedings remained open in Sweden since 1993, before the EIR 2000 entered into force.
[22] Art. 1.2 (b) of the Brussels I Regulation replicates art. 1.2 of the previous 1968 Brussels Convention (see above, n 5).

Austria. In fact, Austria did not recognise the powers of a Swedish liquidator that derive from Swedish law governing Swedish insolvency proceedings. The link was considered particularly close as the action for restitution of title derived directly from provisions of national law that regulated the exercise of powers of a liquidator under insolvency.[23]

In 2009, in *Seagon v Deko Marty*[24], the CJEU followed the criteria of *Gourdain v Nadler* on a case that concerned an avoidance action brought by the liquidator of a German insolvent company against a Belgian company, considering it derived directly from the insolvency proceeding and was closely connected to it. This case, however, modified the criteria in *Gourdain v Nadler* in that the decision on the avoidance action did not need to be handed by the insolvency court.[25]

In contrast, the following actions are not considered as being "closely connected" under the EIR Recast:

(a) actions related to the performance of the obligations under an agreement signed by the insolvent debtor before the insolvency proceedings declaration;[26]

(b) actions to ensure the application of a reservation of title clause;[27]

(c) actions that derive from an assignment of claims of an insolvent debtor; and [28]

(d) actions to pursue the piercing of the corporate veil, actions regarding liability in groups of companies or claims against directors when they have not complied with general provisions of civil and commercial law.[29]

Therefore, the "close link" is absent when the actions derive from the general provisions of civil law or are not given in the context of insolvency and therefore do not have a "substance" of insolvency law.

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[23] *SCT Industri AB v Alpenblume* (see above, n 21), para 28. In the view of the author, in this case the CJUE should have understood that the action brought did not derogate from the general laws of civil law, as it referred to the general lack of power of attorney to bring an action under civil law.

[24] Case C-339/07 *Christopher Seagon v Deko Marty Belgium NV* [2009] European Court Reports 2009 I-767, ECLI:EU:C:2009:83.

[25] *Idem*, paras 16 (on the criteria), 19 (on the similarity to *Gourdain v* Nadler) and 27 (on the possibility that the decisions on these actions could also be handed by another court, as per art 25.1 of the EIR 2000).

[26] EIR Recast, recital 35; Case C-157/13 *Nickel & Goeldner Spedition GmbH v "Kintra" UAB* [2014], ECLI: EU:C:2014:2145, paras 29 and 43.

[27] Case C-292/08 *German Graphics Graphische Maschinen GmbH v Alice van der Schee* [2009] European Court Reports 2009 I-8421 ECI:EU:C:2009:544. In this case, the mere fact that the liquidator of Dutch insolvent Holland Binding BV was a party to the proceedings did not provide for sufficient connection to the insolvency. The action to ensure the application of a reservation of title: (i) did not even require the opening of an insolvency proceeding; and (ii) was not based on the law of the insolvency proceedings.

[28] Case C-213/10 *F-Tex SIA v Lietuvos-Anglijos UAB "Jadecloud-Vilma"* [2012] ECLI:EU:C:2012:215. In this case, the CJEU did not understand that the *action pauliana* brought by a Latvian assignee against the Lithuanian defendant was closely linked to the German insolvency of the assignor. The criteria that were considered were: (i) the applicant (assignee) was not acting as liquidator; (ii) the action did not concern the liquidator's powers to assign the rights of the insolvent debtor and/or the validity of that assignment; (iii) the exercise of the right acquired by the assignee was subject to rules other than those applicable in the German insolvency proceedings of the assignor; (iv) the assignee was not legally obliged to exercise its right to enforce the acquired claims; (v) the action benefited the assignee only and not the creditors as a whole; (vi) the action did not increase the insolvent's assets; and (vii) the assignee could exercise its right even after closure of the insolvency proceedings.

[29] G Ringe (see above, n 16), 208-209.

To sum up, we may conclude that the criteria that would define an action as closely connected under the EIR Recast are that:

(a) the entitlement to bring the action corresponds to the syndic or court-appointed insolvency practitioner of the insolvent company;

(b) the action is brought on behalf of and in the interests of the general body of creditors with a view to the partial reimbursement following the *par conditio creditorum* rules;

(c) there is a relevant rule of "substance" concerning bankruptcy or insolvency law; and

(d) the action benefits the general body of creditors of the insolvent company.

3.2 Insolvency-related judgments under the UNCITRAL Model Law

The 1997 MLCBI regulates the recognition of foreign insolvency proceedings and the relief that may be granted upon recognition. However, it does not include specific provisions for insolvency-related judgments.[30] Some authors state that there is an implicit assumption that insolvency related-judgments entered in the main proceedings would also be recognised.[31] However, this lack of express reference to insolvency-related judgments under the MLCBI has led to different interpretations and incongruent judgments.

3.2.1 Current incongruences

In *Rubin v Eurofinance SA,*[32] the Supreme Court of the United Kingdom analysed the enforcement of a foreign decision in a United States avoidance proceeding against English residents who did not appear before the United States Court. In its decision, the Supreme Court followed a territorial approach and determined that the MLCBI could not deal with judgments in insolvency matters by implication.

In *Fibria Celulose S/A v Pan Ocean Co. Ltd,*[33] the High Court analysed, among other issues, if it had the jurisdiction to prevent the termination of a contract between a Brazilian party and an insolvent Korean counterparty as "any appropriate relief" upon recognition of the Korean insolvency proceedings in the United Kingdom. The High Court construed the concept of "any appropriate relief" under article 21 of the MLCBI narrowly. It denied the relief requested by the insolvency practitioner of the Korean insolvent company on the ground that it would not be relief available under United Kingdom domestic insolvency law. Indeed, *ipso facto* clauses – which allow for termination of contracts on the grounds of the insolvency opening of the other party to the contract – were at that time valid under English law, which was the law that governed the contract.

[30] I Mevorach, "Overlapping International Instruments for Enforcement of Insolvency Judgments: Undermining or Strengthening Universalism?" (2021) 22 *European Business Organization Law Review* 283-315. This article highlights the obscurity of the MLCBI "on the issue of enforcement of judgments and orders".
[31] B Markell, "Infinite Jest: The Otiose Quest for Completeness in Validating Insolvency Judgments" (2018) 93 *Chicago-Kent Law Review* 751.
[32] *Rubin and another (Respondents) v. Eurofinance SA and others (Appellants)* [2012] UKSC 46.
[33] *Fibria Celulose S/A v Pan Ocean Co. Ltd* [2014] EWHC 2124 (Ch).

In *Re OJSC International Bank of Azerbaijan,*[34] an Azeri restructuring process was recognised in the United Kingdom, together with a moratorium. However, the requested continuation of the moratorium was rejected (which implied in practice that the court sanctioning of the Azeri restructuring plan was not recognised in the United Kingdom) as there were interests of creditors governed by English law. Indeed, the High Court (and the Court of Appeal) stated that the continuation of the moratorium in the United Kingdom would imply varying or discharging English law governed substantive rights by a foreign judgment, which would be contrary to the rule in *Gibbs*[35] that operates in the United Kingdom.

Besides, in the United States, the Court of Appeals for the Fifth Circuit denied the enforcement of non-debtor releases included under a Mexican Court-approved reorganisation plan, as that relief was not generally available under United States law (and the circumstances to grant extraordinary relief under United States law had not been demonstrated).[36] However, the solution reached has been the complete opposite (enforcement of foreign third party releases) in cases such as *In re Avanti Communications Group PLC*. [37]

3.2.2 Introduction of the concept of insolvency-related judgments under the MLIRJ

The legal uncertainty under the MLCBI led to the need to complement it[38] and to the adoption, in 2018, of the MLIRJ.

Article 2 of the MLIRJ defines "insolvency-related judgment" as:

(a) any decision issued by a court or an administrative authority, provided that an administrative decision has the same effect as a court decision;

(b) which arises as a consequence of or is materially associated with an insolvency proceeding, whether or not that insolvency proceeding has closed; and

(c) was issued on or after the commencement of the proceeding (thus, it includes first day orders).

The concept under the MLIRJ has a broad scope. The Guide to Enactment states that it may include any equitable relief[39] and sets out some examples of the judgments in relation to which recognition and other relief may be accorded:[40]

(a) judgments on the disposal of assets of the insolvency estate;

(b) judgments on avoidance actions (such as the one analysed in *Rubin v Eurofinance SA*);

[34] *In re OJSC International Bank of Azerbaijan, Bakhshiyeva v. Sberbank of Russia et al* [2018] EWHC 792 (Ch).
[35] *Antony Gibbs & Sons v La Société Industrielle et Commerciale des Métaux* (1890) LR 25 QBD 399.
[36] *Ad Hoc Group of Vitro Noteholders v. Vitro S.A.B. de CV*, 701 F.3d 1031 (5th Cir. 2012).
[37] E Zucker and R Antonoff, "UNCITRAL's Model Law on Recognition and Enforcement of Insolvency-Related Judgments – A Universalist Approach to Cross-Border Insolvency", in INSOL International Special Report, March 2019, 4.
[38] See Preamble of the MLIRJ, para (f).
[39] *Idem*, Guide to Enactment, s V, para 57.
[40] *Idem*, s V, para 60.

(c) judgments related to directors' liability in connection with actions taken when the debtor was already insolvent or approaching insolvency;

(d) judgments confirming plans of reorganisation (such as the one analysed in *In re Vitro S.A.B. de CV*) or liquidation or approving out-of-court restructuring agreements;

(e) judgments granting the discharge of a debt;

(f) judgments on the examination of a director of the insolvent debtor when the director is located abroad;

(g) judgments determining whether the debtor owes or is owed a sum or other type of performance, to the extent considered by the Enacting State; and

(h) judgments on actions that derive from an assignment of claims of an insolvent debtor.[41]

Excluded from the scope of relief are:

(a) judgments commencing an insolvency proceeding, already covered by the MLCBI, in accordance with article 2(d)(ii) of the MLIRJ; and

(b) decisions on interim measures of protection, under article 2(b) of the MLIRJ.

3.3 Comparison between the concepts under the EIR Recast and the MLIRJ

The concept of insolvency-related judgments is broader under the MLIRJ than under the EIR Recast. First, the MLIRJ includes under the concept decisions not only from courts but also from administrative authorities, while the latter are excluded under the EIR Recast. Second, the MLIRJ includes under the concept other types of rulings that are a separate and autonomous concept under the EIR Recast (judgments confirming plans of reorganisation or liquidation, granting release of debts, or approving out-of-court restructuring agreements). Finally, the underlying understanding of "substance" is also broader under the MLIRJ, as it includes judgments on actions excluded under the EIR Recast (i.e. actions that derive from an assignment of claims).

However, as soft law, the MLIRJ may be enacted differently in different jurisdictions, which could lead to modifications or limitations to the concept as outlined in the original text of the MLIRJ.

4. International jurisdiction for insolvency-related judgments under the EIR Recast and the MLIRJ

The EIR Recast includes a specific rule for international jurisdiction for insolvency-related judgments, while the MLIRJ only implies some rules on jurisdiction when addressing their recognition and enforcement.

[41] *Idem*, para 61.

4.1 The *vis attractiva concursus* on international jurisdiction under the EIR Recast

The European Insolvency Regulation adopted in 2000 (EIR 2000)[42] did not codify any explicit international jurisdiction rules for proceedings on actions "closely connected" to insolvency. However, the CJEU understood that the jurisdiction rule in article 3.1 of the EIR 2000 for the order commencing the insolvency proceeding was also applicable to insolvency-related judgments.

The EIR Recast codifies the principle of *vis attractiva concursus*[43] in article 6.1. This implies that actions deriving from insolvency proceedings and closely linked with them will be attracted to the jurisdiction of the court that has jurisdiction over the insolvency proceedings. In other words, the courts that have jurisdiction to open an insolvency proceeding (those located in the country where the debtor has its COMI in the case of main proceedings or those where the debtor has an establishment in the case of territorial or secondary proceedings) shall also[44] have jurisdiction for insolvency-related judgments, regardless of the residence of the defendant.[45]

However, under article 6.2 of the EIR Recast, when two closely connected actions are brought against a defendant and one of the actions is based on general provisions of civil law, the insolvency receiver may bring both actions, together, before the courts of the country where the defendant is domiciled. If there are several defendants, the actions may be brought before any of the countries where any of the defendants is domiciled. It would be required, however, that those courts have jurisdiction under the Brussels I bis Regulation.

4.2 International jurisdiction under the MLIRJ

Although there is no specific article on international jurisdiction in the MLIRJ, it includes some general rules on international jurisdiction. Notably, recognition and enforcement may be refused under article 14 of the MLIRJ if:

(a) the party against whom the insolvency-related judgment was issued was not notified in a correct manner;

(b) the insolvency-related judgment was obtained by fraud;

(c) the insolvency-related judgment is not consistent with another ruling in the country where recognition is sought in a dispute that involves the same parties;

(d) the insolvency-related judgment is not consistent with another ruling in a third country in a dispute on the same subject matter that involves the same parties, given that the ruling of that third country meets the conditions for recognition and enforcement in the country where recognition is sought;

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[42] Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings (OJ 2000 L 160).
[43] On this concept, see L Carballo Piñeiro, "*Vis Attractiva Concursus* in the European Union: Its Development by the European Court of Justice" in InDret 3/2010,13-15.
[44] As article 6.1 refers to "shall have jurisdiction", it must be understood that this jurisdiction is exclusive. In this sense, Case C-296/17 *Wiemer & Trachte GmbH v Zhan Oved Tadzher* [2018], ECLI:EU:C:2018:902, para 43, is clear.
[45] Case C-328/12 *Ralph Schmid v Lilly Hertel* [2004], ECI:EU:C:2014:6, pars 37-38.

(e) recognition and enforcement of the insolvency-related judgment would interfere with the administration of the debtor's insolvency proceedings;

(f) the insolvency-related judgment materially affects the rights of creditors generally, and the interests of creditors (and other interested persons, including the debtor) were not adequately protected in the proceeding;

(g) the originating court did not have jurisdiction to enter the judgment because:

- the party against whom the insolvency-related judgment was issued did not give explicit consent to the jurisdiction of the originating court or did not submit to the jurisdiction of the originating court;
- the originating court exercised jurisdiction on a basis on which a court in the country where enforcement is sought could have exercised jurisdiction; or
- the originating court did not exercise jurisdiction on a basis that is not incompatible with the law of the country where the enforcement is sought; or

(h) in the case that the originating country has enacted the MLCBI, if the insolvency proceeding in that country is not recognisable under its implementation of the MLCBI, with certain exceptions.

Therefore, implicitly, we can conclude that a country would have an incontestable international jurisdiction for insolvency-related-judgments under the MLIRJ when none of the grounds for refusal under article 14 of the MLRIJ are present (and given that the public policy exception under article 7 of the MLIRJ does not apply).[46]

4.3 Comparison of international jurisdiction under the EIR Recast and the MLIRJ

The European Union has rules on international jurisdiction for insolvency-related judgments that are far more developed than UNCITRAL's regime, providing a higher degree of certainty and predictability.

As the EIR Recast provides a solution on the international jurisdiction of judgments that open the insolvency proceedings, there is greater uniformity and predictability within the European Union on this issue. It thus seems reasonable that Member States also accept the international jurisdiction of these same courts for insolvency-related judgments. On the contrary, under the UNCITRAL regime, countries may enact the MLIRJ without previously enacting the MLCBI.[47] Therefore, it is evident that, under a less solid base of uniformity, the UNCITRAL system cannot provide a solution similar to that of the EIR Recast on international jurisdiction for insolvency-related judgments. However, minimal requirements regarding international jurisdiction may be implied from the MLIRJ as, even when a judgment is considered insolvency-related, its recognition and enforcement may be refused on grounds of lack of international jurisdiction.

[46] Guide to Enactment of the MLIRJ, s II, para 98, specifically states that "The list of grounds is intended to be exhaustive, so that grounds not mentioned would not apply. As noted above, provided the judgment meets the conditions of article 13, recognition is not prohibited under article 7, and the grounds set forth in article 14 do not apply, recognition of the judgment should follow."

[47] MLIRJ, Preamble, s 1(f).

5 Recognition and enforcement under the EIR Recast and the MLIRJ

The EIR Recast differentiates the concepts of automatic recognition and enforcement, while the MLIRJ provides a process for recognition and enforcement that, despite being relatively simple, may lead to a higher number of refusals.

5.1 Automatic recognition and direct enforcement of insolvency-related judgments under the EIR Recast

The EIR Recast refers to recognition and enforcement in article 32.

Regarding recognition, insolvency-related judgments shall be recognised with no further formalities (automatic recognition).

The enforcement will follow the procedure set in articles 39 to 44 and 47 to 57 of the Brussels I bis Regulation. Thus, the EIR Recast has opted for the direct enforcement of insolvency-related judgments (provided they are enforceable in the country of origin).[48]

As per article 41 of the Brussels I bis Regulation, the procedure for the enforcement of insolvency-related judgments shall be governed by the law of the Member State in which enforcement is sought. Furthermore, insolvency-related judgments shall be enforced there under the same conditions as an insolvency-related judgment given in that country.

The application for enforcement must include:

(a) a copy of the insolvency-related judgment that meets the conditions necessary to establish its authenticity;

(b) a certificate by the country of origin that the judgment is enforceable, containing an extract of the judgment. These documents shall be served on the person against whom the enforcement is sought; and

(c) a translation may also be required (as the person against whom the enforcement is sought may request it prior to any enforcement measure being taken, it would always be advisable to file this).

Any application for refusal of the enforcement of an insolvency-related judgment shall be based on the effects of that judgment being manifestly contrary to the enforcing State's public policy. Article 48 of the Brussels I bis Regulation provides that applications for refusal of enforcement shall be decided without delay.

Regarding the effects of the insolvency-related judgments enforced, article 54 of the Brussels I bis Regulation imports the measures from the originating country. However, when those measures are not known in the law of the enforcing country, they shall be adapted to other measures that: (i) have equivalent effects; (ii) pursue similar aims and interests; and (iii) are known in the law of the enforcing country.

[48] On the previous need for *exequatur* under the EIR 2000, see P Oberhammer, "Chapter II Recognition of Insolvency Proceedings: Article 32 – Recognition and Enforceability of Other Judgments" in R Bork and K Van Zieten (eds), *Commentary on the European Insolvency Regulation*, (2016, Oxford University Press) 370.

5.2 Recognition and enforcement of insolvency-related judgments under the MLIRJ

Article 11 of the MLIRJ provides for an expeditious procedure for the recognition and enforcement of insolvency-related judgments.

In the application for recognition and enforcement, the insolvency representative (or the person entitled under the laws of the country in which the insolvency-related judgment has been issued) must submit a set of documents to the competent court or administrative authority of the country in which the enforcement is sought, including:

(a) a certified copy of the insolvency-related judgment and documents related to the effect and enforceability of the insolvency-related judgment in the originating country, including information regarding a pending review or appeal of the insolvency-related judgment, or, in the absence of these documents, any other documents acceptable by the court;

(b) in order to prove that the judgment is "insolvency-related", the Guide to Enactment[49] recommends to also file the decision opening the insolvency proceeding;

(c) as the court may require the translation of the aforementioned documents, it would be advisable to file the translation too;

(d) a request for provisional relief, if it is urgently needed to protect the assets (which may or not be granted); and

(e) notice to any party against whom relief is sought (as they have the right to be heard).

In accordance with article 11 of the MLIRJ, the insolvency-related judgment will be recognised and enforced if: (i) an entitled party makes the application to a competent court of authority; (ii) the insolvency-related judgment complies with the formal requisites (i.e. enforceability and effects in the country of origin); and (iii) the application includes all the documents required.

However, the competent court or authority may refuse recognition and enforcement on a limited number of grounds:

(a) procedural irregularities related to the notice to any party against whom the relief is sought;

(b) fraud when obtaining the insolvency-related judgment;

(c) inconsistency of the insolvency-related judgment with: (i) another ruling in the country where relief is sought in a dispute involving the same parties; or (ii) an enforceable judgment of another country in a dispute involving the same parties on the same subject matter;

(d) interference with the administration of the foreign insolvency proceedings;

[49] MLIRJ Guide to Enactment, s V, para 85.

(e) lack of adequate protection of creditors (or the debtor itself) in the foreign proceeding in which a decision that materially affects the rights of creditors generally (i.e. a ruling confirming a reorganisation or liquidation plan or approving a release of debts or an out-of-court restructuring agreement) was issued; or

(f) inadequate jurisdiction of the court that issued the insolvency-related judgment.

The public policy exception also applies, so that courts or administrative authorities could deny recognition and enforcement if it would be manifestly contrary to the public policy, including the fundamental principles of procedural fairness.

Regarding the effects of insolvency-related judgments, the countries that adopt the MLIRJ will have to choose between: (i) importing the same effects that the foreign-related judgment would have in its country of origin; and (ii) granting it the same effects they would produce under the country in which the judgment is being enforced. If the relief is not available, the enforcing country should provide relief with equivalent effects.

5.3 Comparison between recognition and enforcement under the EIR Recast and the MLIRJ

The European regime for recognition and enforcement is also far more developed than UNCITRAL's system.

Given the confidence within the EU in the propriety of the judgments and the existence of the CJEU, common to Member States, the EIR Recast provides for automatic recognition and a very direct procedure for enforcement (the same procedure under the national laws of countries where insolvency-related judgments are enforced). The grounds for refusal are limited to reasons of public policy and any application for refusal shall be decided without delay, which guarantees that insolvency-related judgments are timely and *de facto* enforced. Finally, the effects of the enforcement will be those of the originating country (unless the measures sought need to be adapted to equivalent measures not existing in the enforcing country).

In contrast, the MLIRJ does not provide for automatic recognition and lists more grounds for refusal, given its context of certain mistrust in the propriety of foreign judgments. Therefore, the allegedly simple procedure could become more uncertain and complicated in practice and the effects of insolvency-related judgments abroad could be delayed or frustrated. Regarding the effects of enforcement, under UNCITRAL's system, it would be possible to substitute the measures contained in the insolvency-related judgment with those that would be produced under national law. This substitution – not foreseen under the EIR Recast – could lead in practice to limited effectiveness of the enforcement.

6. Conclusion

Both the European Union and UNCITRAL have followed a "modified universalism" approach when determining a regime for international jurisdiction, recognition and enforcement of insolvency-related proceedings. The aim is to provide effective cooperation between jurisdictions under both systems, to decrease the risk of incongruent rulings and to add predictability and certainty in the assumption of risks to foster international trade.

Although the suggested regime of UNCITRAL under the MLIRJ is a clear step forward towards harmonisation of the rules on insolvency-related judgments, the European system proves to be more developed, direct and efficient.

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