



REGULATION OF CROSS-BORDER RESTRUCTURING IN INTERNATIONAL AND EU LAW

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ABSTRACT

This article reviews the notion of restructuring within the insolvency procedure from the international and EU law perspective. The author outlines and analyses the main regulations adopted by UNCITRAL and EU in frames of cross-border insolvency, which aim at recognition of judgments and restructuring plans.

International regulation of cross-border restructuring includes a complex network of national laws, international conventions and court decisions that regulate the restructuring of companies in different jurisdictions.

One important framework for cross-border restructuring is the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Cross-Border Insolvency, which has been adopted by several countries around the world, including the United States and the United Kingdom. The Model Law provides a framework for the recognition and enforcement of foreign insolvency proceedings and for cooperation and communication between courts and administrators in different jurisdictions.

In addition to the UNCITRAL Model Law, there are several other international conventions and protocols governing cross-border restructuring, including the European Union Regulation on Insolvency Proceedings and the Hague Convention on the Law Applicable to Certain Rights in Respect of Securities held with an Intermediary. The purpose of these conventions and protocols is to provide a framework for cooperation and collaboration between different jurisdictions and to ensure that creditors' rights are protected in cross-border restructurings.

It is also worth noting that the UNCITRAL Model Law on Cross-Border Insolvency has been widely adopted around the world as the basis for cross-border insolvency cases. The Model Law provides a set of rules for the recognition and enforcement of foreign insolvency proceedings and for cooperation and communication between courts and administrators in different jurisdictions.

Under the Model Law, foreign representatives may apply to the courts of the jurisdiction in which the debtor has assets or operations for recognition of the foreign proceeding. Once recognition is granted, the foreign representative may exercise certain powers, such as initiating legal proceedings or recovering assets, in the jurisdiction where recognition was



granted. The Model Law also provides for cooperation and coordination between courts and administrators in different jurisdictions to facilitate the efficient administration of cross-border insolvency proceedings.

In addition to the Model Law on Cross-Border Insolvency, UNCITRAL has also developed the Model Law on Recognition and Enforcement of Cross-Border Insolvency Judgments (the "Model Law on Recognition"). The Model Law on Recognition provides a framework for the recognition and enforcement of foreign judgements relating to cross-border insolvency proceedings.

The Model Law on Recognition sets out the conditions under which a foreign judgement relating to cross-border insolvency proceedings may be recognised and enforced in the country where recognition is sought. These conditions include notice and stakeholder participation requirements, as well as quality and fairness standards for foreign proceedings.

By providing a framework for recognition and enforcement of cross-border insolvency judgements, the Model Law on Recognition helps to ensure that judgements made in one country can be enforced in other countries, promoting efficiency and consistency in cross-border insolvency proceedings.

Moreover, the enactment of the Model Law on Recognition is undoubtedly a step in the right direction. It has the potential to make cross-border insolvency more predictable, complete and efficient, to maximise asset value and to further other objectives of international insolvency law. It does so by providing a framework for the recognition and enforcement of insolvency judgements - judgements arising out of or materially related to insolvency proceedings, whether or not the insolvency proceedings are closed. The Guide to Enactment of the Model Law on Recognition provides a non-exhaustive list of judgements to which the Model Law on Recognition applies, such as:

- Decision relating to the formation and disposition of assets in the insolvency estate (property-related decisions);
- Decision on cancellation of transactions (decisions on cancellation of preferences and undervaluation);
- Decision on insolvency-related director liability (decisions on director liability);
- Decision to confirm or amend a reorganisation or liquidation plan or to approve a voluntary or out-of-court restructuring agreement (restructuring approval decisions);
- Decision to release a debtor or debt (judicial release judgements).¹

As we can see, the Model Law on Recognition includes recognition of restructuring agreements/plans. However, the recognition and enforceability of these plans may still be questionable.

Because, at the moment, the Model Law on Recognition has not gained popularity and global recognition. Whereas, under the current provisions of the Model Law on Cross-Border Insolvency, a debtor's center of main interest ("COMI") is required when recognising a

¹ UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments with Guide to Enactment, para IV(B), pg. 22. (Access - https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/ml_recognition_gte_e.pdf)



restructuring. As it is provided for in article 17 of the Model Law on Cross-Border Insolvency.² In the case of restructuring, this COMI test may also be an obstacle, as the place of management of the debtor may not be specific in determining COMI, for example, it may be remote management where the board members do not meet in one place or management has been transferred to an outside company as a trustee, as was found in *Thomas & Anor v Frogmore Real Estate Partners*.³

In this regard, it may be concluded that these issues have not yet been resolved at the international level to achieve a universal approach. In this case, the UNCITRAL Working Group 5 is expected to address these issues and provide more flexibility and choice to the parties in organising a restructuring plan.

Now, it is worth considering restructuring issues in the European Union. First of all, it is worth noting that US and UK restructuring legislation has had a significant impact on the systems of other countries.⁴

Thus, it was only in 2014 that the European Commission issued a Recommendation on a new approach to corporate insolvency and bankruptcy.⁵ But still, as Professor S. Madaus writes, this non-binding EU Recommendation encouraged Member States to implement effective reorganisation procedures based on the proposed common characteristics.⁶

But given that these recommendations have been implemented differently by Member States, this 2014 Recommendation was not considered a success. Still, two years later in 2016, the EU proposed for adoption a Restructuring Directive: Directive 2016/723, of the European Parliament and of the Council on preventive restructuring mechanisms, second chances and measures to improve the effectiveness of restructuring, insolvency and exit procedures (the "Directive").⁷

What emerges from this Directive is an intention to engage Member States in changing their national laws to reflect the encouragement of restructuring. And, as A. They argues, the Directive was drafted under the influence of US law and aims at a so-called rescue culture.⁸ Consequently, it can be concluded that the purpose of such preventive restructuring procedures is to enable companies to restructure at an early stage and thus avoid insolvency.

The Directive aims to establish a harmonised legal framework for preventive restructuring procedures in the European Union in order to facilitate the rescue of financially distressed undertakings while protecting the interests of creditors and other stakeholders.

Under the Directive, each EU Member State must establish a framework for preventive restructuring procedures that allows for the negotiation and approval of restructuring plans

² Article 17(2) lit. a) of UNCITRAL Model Law on Cross-Border Insolvency (Access - https://s3.amazonaws.com/abi-globalinsolvency/Chapter15/uncitral_model_law_on_cross-border_insolvency_with_guide_to_enactment.pdf)

³ *Thomas & Anor v. Frogmore Real Estate Partners GP1 Ltd & Ors* [2017] EWHC 25 (Ch)

⁴ Pulgar Ezquerro J (2016) Corporate restructuring: the European recommendation and the Spanish model. In: Parry R, Omar PJ (eds) Reimagining rescue. INSOL Europe, Nottingham, p. 119

⁵ Commission Recommendation of 12 March 2014 on a new approach to business failure and insolvency, 2014/135/EU (OJ 2014, L74/65)

⁶ Madaus S. (2014) The EU recommendation on business rescue – only another statement or a cause for legislative action across Europe? *Insolv Intell* 27. P.81

⁷ Eidenmüller H (2017); Contracting for a European insolvency regime. *Eur Bus Org Law Rev* 18. 273

⁸ They A. (2016) - Crossroads in EU harmonization on restructuring and insolvency: towards a market-based system or one where "The Senior takes it all?". In: Parry R, Omar PJ (eds) Reimagining rescue. INSOL Europe, Nottingham, p. 139



outside the formal insolvency procedure. This framework should be available to all types of businesses, regardless of their organisational form or size, and should be designed to facilitate the rescue of viable businesses.

The Directive also sets minimum standards for the content and approval of restructuring plans, including requirements for approval by a qualified majority of creditors and the provision of adequate information to all interested parties. In addition, the Directive requires EU Member States to provide for cross-class cram-downs, which allow a restructuring plan to be approved even if not all classes of creditors have approved it, subject to certain conditions.

Another key aspect of the Directive is its focus on simplifying debt relief for self-employed individuals and other natural persons. The Directive requires EU Member States to establish debt cancellation procedures for these individuals in order to provide a second chance to those facing financial difficulties.

In the meantime, a dilemma arises under the Directive. That is, whether to consider restructuring as part of insolvency proceedings or to make it a separate proceeding. Some experts, such as the aforementioned H. Eidenmüller, believes that, in implementing the Directive, countries should consider that restructuring should also, as a general rule, be considered as insolvency proceedings.⁹ In this respect, the above Directive provides for this approach.

However, there are also lawyers who oppose the inclusion of restructuring procedures within the general framework of insolvency proceedings. They believe that insolvency procedures should be functionally different from restructuring procedures, that insolvency principles as liquidation principles can only be applied in classical insolvency procedures, while restructuring or reorganisation procedures follow their own principles, which should be derived from general civil law and in particular from contract law.¹⁰

If we look at this position, we can see that the author's idea comes from the fact that in restructuring the parties should proceed more from the autonomy of the parties. Thereby having more choice and more flexible conditions in which the debtor and creditors, relying on the law governing their legal relationship could undergo restructuring, rather than relying on the debtor's COMI.

In addition to the Directive, the European Union has adopted other measures to support cross-border restructuring. One of the most significant of these measures is the European Insolvency Regulation ("EIR"), which establishes a common set of rules for determining jurisdiction and applicable law in cross-border insolvency proceedings.¹¹

The EIR applies to all insolvency proceedings against debtors with assets or operations in more than one EU member state. The Regulation, like the Model Law on Insolvency, provides a mechanism for determining the debtor's COMI, which is used to determine jurisdiction to commence insolvency proceedings. In addition, the EIR provides for automatic

⁹ Eidenmüller H (2016) Was ist ein Insolvenzverfahren? Zeitschrift für Wirtschaft Recht. P. 150

¹⁰ Madaus S. (2017) Restrukturierung mit Insolvenzprinzipien und Insolvenzverfahren mit Restrukturierungsziel? Eine Betrachtung der Grundannahmen des Insolvenz- und Restrukturierungsrechts. In: Paulus CG, Wimmer-Amend A (eds) Festschrift für Dr. Klaus Wimmer. Nomos, Baden-Baden, p. 446.

¹¹ Regulation (eu) 2015/848 of the European Parliament and of the Council of 20 may 2015 "On insolvency proceedings" (Access - <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32015R0848>)



recognition of insolvency proceedings opened in one EU Member State in other Member States, as well as coordination of such proceedings to ensure their efficient administration.¹²

But as we see, the EIR also establishes a requirement in the debtor's COMI. This unsatisfactory conclusion is confirmed when the widespread existence of parallel proceedings in cross-border insolvency law is added to the analysis. It is generally accepted that parallel insolvency proceedings may be commenced in several jurisdictions with respect to the same debtor, provided that the relevant jurisdictional rule permits it, which is usually the case when assets or even the enterprise itself are located there. The universal effect of any debt modification, discussed above, is difficult to reconcile with this system. Even under a regime that prioritises main proceedings over foreign non-main or secondary proceedings, any territorial procedure is able to avoid any effects of foreign (main) proceedings by applying its own local *lex fori concursus*. A secondary proceeding protects the local assets of the (same) debtor from the effects of the foreign *lex fori concursus* and reserves their value for distribution under local law. This defence does not operate against the effect of any - primary or non-main - proceeding on the debt. On the contrary, the basic ability of any parallel proceeding to devise a debt modification plan for the same set of debts of the same debtor to the same set of creditors escapes the system and thus any defence requires special debt modification rules.

Based on the above, we can note that in such procedures, cross-border restructuring becomes unrealistically complicated. In such a system, it is necessary to specifically provide for any priority of the main proceeding, for example, to limit the effects of debt modification in secondary proceedings, or at least to call for co-operation and co-ordination to achieve a result in the common interest, as proposed in Articles 41 and 47 of the EIR.¹³ However, none of these limitations will be able to exclude the substantive consequences of debt modification under the law applicable to the debt (*lex causae*) described in the mechanism above. In conclusion, the established system of core and non-core proceedings may work well for asset-centred procedures, but does not provide a viable solution for debt restructuring mechanisms.

Finally, it is worth noting that the EU has also established a number of financial instruments to support the restructuring of financially distressed companies, including the European Fund for Strategic Investments (EFSI) and the European Investment Bank (EIB). These instruments provide financing and other support to companies undergoing restructuring to facilitate their recovery and ensure their continued viability.

Overall, the EU's approach to cross-border restructuring is characterised by a strong emphasis on cooperation and coordination both between EU Member States and between the various stakeholders involved in the restructuring process. By establishing a harmonised legal framework and other support measures, the EU aims to facilitate the rescue of viable enterprises and contribute to the stability of the European economy as a whole.

¹² Ibid.

¹³ Ibid.



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