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New Initiatives on Cross-Border Insolvency in Europe

by
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Introduction

The framework for dealing with the phenomenon of cross-border insolvency acquires a new instrument within the European Union with the adoption on 29 May 2000 of the European Council Regulation on Insolvency Proceedings. It will enter into effect on 31 May 2002.[1]

The Regulation began its life as a proposal for a convention to supplement the treaty framework creating a common legal system within Europe following the foundation of the European Community in 1957. Fundamental principles providing for free movement of goods, services, employees and capital brought in their wake the need for the settlement of disputes and the availability of enforcement measures across the member states of the community so as to remove structural impediments to the free flow of commerce and the creation of the single market. The extension of the treaty framework has in certain cases been effected by further treaties between the member states. In the private international arena, much of the progress seen to date has been achieved as a result of multilateral conventions entered into by the member states, designed to secure the simplification of formalities governing the reciprocal recognition and enforcement of judgments.[2]

As part of the initial drafting work for such a convention, general questions about the nature and extent of any structure elicited the views of members of the working party to the effect that certain fields of law were, by their nature, problematic and difficult to include in any broad-brush framework.[3] The work eventually produced the Brussels Convention 1968 covering broad civil and commercial law. Excluded from the remit of the convention by Article 1 are the areas of personal law rules, administrative law and insolvency law, the last of these because it was felt that a separate insolvency convention seemed to be the only method of achieving harmony in this area of the law. Work on an insolvency convention began in 1963, a draft being produced by 1970, which as designed ended up affecting even insolvencies without a discernible cross-border element and attracted considerable opposition.

Over the years, problems were faced by successive working parties trying to complete a draft acceptable to member states. Some of these difficulties stemmed from a failure to take into account strongly held national views and the importance to certain jurisdictions of maintaining close scrutiny and control over the use of insolvency law as an economic tool. Despite this and a hiatus

[1] Published in the Official Journal L160, 30 June 2000, p.1.
[2] Art. 293 (formerly 220), EC Treaty.
[3] See Muir Hunter, The Draft Bankruptcy Convention of the EEC (1972) 21 ICLQ 682 and The Draft EEC Bankruptcy Convention: A Further Examination (1976) 25 ICLQ 310 for views on an early text.

of many years while work on the convention seemed to fizzle out, a draft was produced which met with substantial agreement in the early 1990s.[4] This draft was approved for signature and seemed set to create a new framework for dealing with what had by then become a noticeable phenomenon: cross-border insolvencies affecting the financial sector. It ran, as the official story would relate,[5] into a British Conservative Government that had withdrawn co-operation from European institutions in the wake of unresolved issues over the BSE crisis. One of the tactics used was to refuse to sign or adhere to instruments, of which the convention was one. As the signatures on the document were incomplete, the instrument failed to negotiate the final obstacle before entering into force.[6]

After many years of speculation over the possibility of the project being revived,[7] the project received a new lease of life through an initiative jointly proposed by Finland and Germany and submitted to the Council of the European Union on 26 May 1999. This initiative has resulted in the production of the Council Regulation on Insolvency Proceedings.[8]

Purpose of the Initiative

The Regulation seeks to introduce rules for dealing with insolvencies with a cross-border element. These rules do not differ greatly from those contained previously in the final draft convention.[9] Some of the reasoning employed to justify the Regulation with view to its adoption appears in the preamble, containing thirty-three separate paragraphs forming a composite of views on insolvency law and its purpose within the framework of community law. In analysing these reasons, there is an opportunity of assessing whether the Regulation has coherence in terms of its fundamental policy objectives and will achieve its intended purpose. There is also an opportunity of examining whether there may be areas of difficulty in its implementation deriving from ambiguities in the stated objectives.

The stated aim of the European Union is to create a single legal area based on the ideals of freedom, security and justice.[10] These ideals have underpinned the process of European economic integration leading to the creation of the Single Market. In order to ensure the proper functioning of the internal market, improvements to the framework for dealing with insolvency

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[4]The final draft was opened for signature in Brussels on 23 November 1995 for a period of six months.

[5]A different and unofficial story relates that Britain's concern at the reluctant inclusion of Gibraltar within the scope of the convention led to the failure to adhere.

[6]See Balz, The European Union Convention on Insolvency Proceedings (1996) 70 ABLJ 485; and Fletcher, The European Union Convention on Insolvency Proceedings: An Overview and Comment, with US Interest in Mind (1997) 23 BJIL 25.

[7]See Rajak, Whither the Euro Bankruptcy Convention? (1998) 6 IL&P 317 (editorial).

[8]Published in the Official Journal C 221, 3 August 1999, p8.

[9]See by this author: An Introduction to the European Insolvency Convention (1995-6) 4 RALQ 245.

[10]Recital no. 1. This is a statement common to the new Title IV of Part III of the EC Treaty (Arts. 61-69) and the Third Pillar on Justice and Home Affairs as amended by the Treaty of Amsterdam.

and the speeding up of insolvency proceedings where there are cross-border implications are necessary. The Regulation is intended to achieve these objectives and is set firmly within the structure for judicial co-operation in civil matters outlined by Article 65 of the EC Treaty.[11] What lies at the heart of the Regulation is the recognition that cross-border activities by what are termed undertakings have a profound effect on the economic basis of the community and are therefore to be regulated by common rules across the Single Market. This approach has formed the foundation for many of the initiatives behind the creation of a legal framework for competition and harmonisation of company law rules.

It is believed that insolvency and its macro-economic function as a systemic regulator affects the success of the internal market and that the proper workings of the internal market are enhanced or impeded by the scale of failures of undertakings. Accordingly, the Regulation puts into legislative form the need for an instrument permitting the efficient co-ordination of measures to be taken regarding an insolvent debtor and assets within the insolvency across Member States.[12] Proper and effective co-ordination of measures taken with respect to any debtor will require the avoidance of incentives for parties in financial difficulty to transfer assets between Member States, in light perhaps of more favourable or protective regimes. Similarly, in a bid to discourage forum shopping, the Regulation states that resorting to judicial proceedings for an insolvent debtor or its creditors should not be allowed to depend on the existence of a more favourable legal position elsewhere than in the most appropriate jurisdiction to hear the claim.[13] Only a measure that co-ordinates proceedings at the supranational level can have the impact necessary to harmonise the objectives of a level playing field by removing unequal domestic barriers to the exercise of rights.[14]

The type of co-ordination sought in the Regulation rests on harmonising provisions governing jurisdiction for opening insolvency proceedings and is limited, by application of the principle of proportionality, to these rules and to rules governing the issue of judgments forming the basis of insolvency proceedings or directly connected to these proceedings. Proportionality, particularly important in the sphere of economic law and the rule by which the imposition of obligations is tested against the purpose of the measure, is stated to underpin the Regulation, particularly how it is to govern the recognition of judgments in insolvency and the law to apply to matters

[11]Recital no. 2. The choice of this structure was not without consequences for the uniform application of the Regulation throughout the European Union, given the opt-out provisions originally secured by Denmark, Ireland and the United Kingdom.
[12]Recital no. 3.
[13]Recital no. 4. See Centros Ltd v Erhvervs- og Selskabsstyrelsen (C-212/97), illustrating the risk inherent in strict interpretation of the availability of European rights at the expense of national consumer and public-protection aims, leading to the possible abuse of incorporation rights in a favourable jurisdiction and the phenomenon of the Delaware effect.
[14]Recital no. 5. There is the question of whether co-ordination without substantive harmonisation of domestic rules can be truly effective. Some cross-border measures, e.g. the West African Model Law, adopted pursuant to the OHADA Convention, and based in part on the Convention, attempt to do both.

connected to insolvency proceedings.[15] The recitals repeat the original exclusion from the Brussels Convention 1968 of insolvency and insolvency-related proceedings as grounds for the adoption of the Regulation.[16] The use of the Regulation form is felt to be necessary in order to accelerate the introduction of rules governing cross-border insolvency proceedings, besides being the most appropriate form to ensure that these provisions are binding and directly applicable in Member States.[17]

Scope of the Regulation

The Regulation is intended to apply widely to a number of types of proceedings, irrespective of whether the debtor has incorporated status and whether the debt arises in the course of trade. This lack of distinction is fundamental to assessing the impact of the Regulation and its reception, given that many jurisdictions are particularly concerned with debts incurred by natural persons, or consumers, and apply special regimes to them. The special treatment accorded this group in the Brussels Convention 1968 seems to be significantly eroded by the lack of differentiation here in the status of the debtor and this is likely to be quite problematic for some jurisdictions.[18] Exceptions are, however, given for insurance undertakings, credit institutions, investment undertakings holding funds or securities for third parties and collective investment undertakings, for whom it is intended that special provision be made and in the case of which it is expected that national supervisory authorities will exercise appropriate powers of intervention, avoiding or controlling the outcome of financial crises.[19]

It is recognised in the Regulation that a variety of insolvency proceedings exist across Member States, not all of which involve action by an appropriate judicial authority. For that reason, the expression 'court' wherever used is intended to have a broad meaning and to apply to any person or body empowered under national law to open insolvency proceedings. Nevertheless, the application of the regulation is stated as conditional on the insolvency complying not only with Regulation provisions, but with the criteria for recognition and validity in the Member State where the proceedings originate. To come within the Regulation, proceedings must be collective in nature and entail the partial or total divestment of the debtor with the appointment of a liquidator.[20]

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[15]Recital no. 6. See Article 5 (formerly 3b), EC Treaty.

[16]Recital no. 7. See Gourdain v Nadler (C-133/78) [1979] 3 CMLR 180 for limits to the exclusion by Article 1, Brussels Convention 1968.

[17]Recital no. 8. The main disadvantage of the directive form and the use of conventions is, of course, the need for legislation to translate the impact of new rules into domestic terms.

[18]See Bogdan, Consumer Interests and the New EU Bankruptcy Convention [1997] 5 Cons LJ 141.

[19]Recital no. 9. There are proposals for Directives on the reorganisation and winding-up of credit institutions and insurance institutions that were agreed on 8 and 25 May 2000 respectively.

[20]Recital no. 10. This is framed so as to avoid the creditor-driven type procedures of receivership coming within the ambit of the Regulation. See, however, Dahan, The European Convention on Insolvency Proceedings and the administrative receiver: a missed opportunity? (1996) 17 Co Law 181.

Despite the intended wide scope, the Regulation acknowledges that widely differing laws apply across Member States in relation to property. In practice, this makes it almost impossible to introduce insolvency proceedings with universal scope covering the totality of a debtor's assets in Member States because of the difficulty in securing homogeneous treatment of assets. Drawing a line between the extreme positions of universality and territoriality, the Regulation recognises that strict application of the law of any Member State where proceedings are opened to these assets would lead to insuperable problems and likely conflicts. The examples cited in support of the framework the Regulation will introduce include security interests in relation to assets and the distinction to be made with regard to select groups of creditors, principally those with preferential rights.

These situations of conflict will be managed by special references to the relevant governing law in the case of particularly significant rights and legal relationships, rights in rem and contracts of employment being cited as examples, and permitting the opening of domestic proceedings with coverage limited to locally-situated assets alongside other principal proceedings with universal scope.[21] The benefits heralded by the Regulation are chiefly to enable creditors to avoid over-centralisation of insolvency proceedings to their detriment by being able to rely on a locally created instrument evidencing rights. Despite the potential for fragmentation, the Regulation states that mandatory rules of co-ordination for all proceedings will guarantee the overall unity of proceedings with respect to any debtor.[22]

Jurisdictional Issues

(a) The Primary Jurisdiction

As a basic rule, insolvency proceedings may be opened in the Member State where the debtor has the centre of his main interests. Insolvency proceedings opened in this jurisdiction are deemed to have universal scope and encompass all the debtor's assets on a worldwide basis, affecting all creditors, wherever they may be located. This definition of a centre of main interests aims at reconciling the civil law test for jurisdiction based on the real seat rule and the common law presumption of incorporation or residence determining jurisdiction and may thus depend on a number of factors. Part of the definition relies on finding that the debtor conducts the administration of his interests in a place on a regular basis and this place is therefore ascertainable by third parties. This place must of course be within the European Union.[23] This default rule in the Regulation leads to the identification of a Member State as having the appropriate competence to open proceedings, although domestic law is then used to determine where internally those proceedings will be

[21]Recital no. 11.
[22]Recital no. 12. See Hanisch, "Universality" versus Secondary Bankruptcy: A European Debate (1993) 2 IIR 151 and Johnson, The European Union Convention on Insolvency Proceedings: A Critique of the Convention's Corporate Rescue Paradigm (1996) 5 IIR 80.
[23]Recitals nos. 13-14. See also s42, Civil Jurisdiction and Judgments Act 1982 for rules determining domicil for companies for the purposes of the Brussels Convention 1968.

heard, thus providing for the situation of Member States, such as France, where the country is divided into separate judicial districts (“ressorts") and allowing for determination of the appropriate court.[24]

The importance of having a primary jurisdiction identified in this way is to allow an appropriate court to begin taking necessary measures for the preservation of assets. The Regulation states that it enables the court having jurisdiction to open main insolvency proceedings to order provisional and protective measures from the time that a request is made to commence proceedings and deems these powers important in order to guarantee the effectiveness of the insolvency proceedings, principally by avoiding the dissipation and fraudulent disposal of assets. The Regulation allows for two options in this context: the first by giving the court ordinarily competent under the basic test the right to order provisional protective measures covering assets situated outside the jurisdiction of that court which will themselves be enforced in accordance with later Regulation provisions, the second by giving an official appointed, often on an ad hoc or temporary basis, prior to the opening of main insolvency proceedings to apply for preservation measures in other jurisdictions where assets are located and proceedings may be contemplated.[25]

(b) The Secondary Jurisdiction

In order to control the proliferation of proceedings, secondary jurisdiction to hear cases is qualified by limiting occasions when independent territorial proceedings may be opened to two specific instances: first, where proceedings are for the benefit of local creditors or creditors of a local establishment and, second, where main proceedings cannot be opened for any reason under the law of the Member State where the debtor has the centre of his main interests. The Regulation states that the reason for placing these restrictions on independent proceedings is in order to limit proceedings to only what is absolutely necessary, but this will also have the advantage of concentrating assets for distribution rather than dissipating these on fees and costs. Once main proceedings are opened, territorial proceedings become secondary.[26] The difficulty with such qualifications, however, is that they may be generously interpreted in order not to deny a creditor legitimate redress or recovery against assets that are conveniently situated. Nevertheless, a localised grab rule is avoided by requiring dividends to be credited if a claim is made in other proceedings.

What is more problematic may be the second qualification, where proceedings can not be opened in a primary jurisdiction, perhaps because of a legal impediment related to the status of the debtor. If in this case assets are insufficient to meet the demand from local creditors, an effective remedy

[24]Recital no. 15. It is doubtful whether this would also provide for the situation of the United Kingdom, where separate legal systems may apply within its borders, without explicit recognition of this fact as is the case in section 16 and Schedule 4 of the Civil Jurisdiction and Judgments Act 1982.
[25]Recital no. 16.
[26]Recital no. 17.

could not be obtained if assets in the principal jurisdiction are not subject to recovery for the benefit of these creditors. A further exception to the limit on the proliferation of proceedings consists of an exception in favour of a liquidator in primary proceedings to request the opening of secondary proceedings for the efficient administration of assets belonging to the estate. This could arise where the debtor's estate is too complex to administer as a unit or where differences in the legal systems concerned may cause difficulties for orders given by the court in main proceedings to have proper effect on the assets where located.[27]

(c) Co-ordination of Proceedings in Parallel

The co-ordination of proceedings occurring in parallel is stated by the Regulation as a must for the efficient realisation of assets and subsequent distribution to creditors. The main pre-condition for achieving proper co-ordination of proceedings relates to the duty on all liquidators to co-operate closely. In particular, this is to be effected through regular contact for the purpose of exchanging any relevant information relating to the conduct and progress of proceedings as well as keeping other liquidators properly apprised of important steps taken as a result of proceedings. The requirement for co-ordination does not exclude the pre-eminence enjoyed by the liquidator acting in the context of primary proceedings. This pre-eminence is ensured by giving the liquidator powers to intervene in secondary proceedings, including applying for the opening of such proceedings, proposing a restructuring plan or composition or applying for suspension of the process by which assets in secondary proceedings are realised.[28]

Recognition Rules

It may be argued that proper recognition rules are more significant than arrangements for the exercise of jurisdiction. The Regulation provides for immediate recognition of judgments relating to the opening, conduct and discharge of insolvency proceedings within the scope of the Regulation and, more importantly, recognition of judgments that are handed down on matters directly connected with such insolvency proceedings. This is particularly cogent given the possible extension of the remit of the court hearing insolvency proceedings to providing for other appropriate relief, one example being civil and criminal penalties for directors of insolvent debtor companies.[29] The objection raised by some commentators relates to the control a jurisdiction in which recognition is sought can exercise over the original

[27]Recitals nos. 18-19. An example could be the situation of real property in jurisdictions that require special authority to evidence a transfer, e.g. an order of court effecting a change on the register or notarisation.

[28]Recital no. 20. This will depend on courts rigidly adhering to Regulation rules allowing, subject to evidence being provided, for automatic recognition of a liquidator's appointment.

[29]For an example of this cross-over of laws ("enchevêtrement"), see Gruber, L'action en comblement de passif et l'Article 1, alinéa 2 de la Convention de Bruxelles du 27 septembre 1968, PA 1995.52.4 and the recent Krombach (C-7/98) case, in which judgment was given by the ECJ on 28 March 2000, on public policy defences in the context of enforcement proceedings seeking to recover civil damages awarded during a criminal trial.

judgment, in effect because the judgment is repatriated and given the same effect as one produced by the court of recognition.

The Regulation establishes a principle of automatic recognition, meaning that the effects attributed by the judgment or order to the proceedings by the law of the Member State in which the proceedings were opened extend to all other Member States. It postulates that recognition of judgments delivered by the courts of the Member States must be based on the principle of mutual trust. This theory has acceptance in the United Kingdom, where it is referred to as the comity principle, although lately courts have also begun to refer to a doctrine of obligation.[30] To that end, grounds for non-recognition are reduced to the minimum necessary, chiefly on grounds of public policy and protection of personal freedom.[31] The mutual trust principle is also the basis on which any dispute between the courts of two Member States is to be resolved where both courts claim competence to open principal proceedings. Pre-eminence is given to the decision of the first court to open proceedings, which is to be recognised in other Member States without those Member States having the power to scrutinise the court's decision.[32]

As an adjunct to the jurisdiction and recognition rules, the Regulation sets out particular rules of uniform application in conflict of laws situations replacing, insofar as these are also of application to the subject matter, equivalent national rules of private international law for the matters covered by it. The intention is to provide that the law of the Member State where proceedings are first opened should apply to the subject matter of the dispute. With the exception of certain limited instances, this lex concursus principle is stated as valid both for principal and secondary proceedings and will determine the effects of insolvency proceedings, whether of a procedural or substantive nature, on the participants and legal relationships they have contracted or acquired. The same principle also governs all the conditions for the opening, conduct and closure of the insolvency proceedings.[33]

The Case for Special Rules

The Regulation recognises, in spite of the principle of automatic recognition of insolvency proceedings to which the law of the opening State normally applies, that there will be cases in which strict adherence to this principle will interfere with the rules under which transactions are carried out in other Member States. There is a sentiment that legitimate expectations by parties arising in some situations and the overriding requirement for certainty of transactions in other Member States will need to be met by providing for some exceptions from the general rule.[34] The exceptions relate to particular rights,

[30]See Cheshire and North's Private International Law (Butterworths, 12th edition) at 346.
[31]The Brussels Convention 1968 rules on refusal of recognition are also stated as being of application.
[32]Recital no. 22. This may differ somewhat from the position in Article 21, Brussels Convention 1968, which gives pre-eminence to the court first seized, but subjects this to the test of whether the jurisdiction is subsequently established.
[33]Recital no. 23.
[34]Recital no. 24.

recognised as being useful in the insolvency context, to particular categories of transactions and to particular classes of participants in insolvency.

Two forms of particular rights recognised as meriting exceptions from the general rule relate to rights in rem and the exercise of rights of set off, both considered as useful guarantees for the granting of credit. A right in rem, its basis, validity and extent, are to be determined by the law where the right in rem is situate and will not be affected by the opening of insolvency proceedings. The proprietor of the right in rem can therefore continue to assert his right to separate settlement of his claim, which may rely on separation of the security on which the right depends from other assets. In order to more effectively deal with rights in rem, the liquidator may request the opening of secondary insolvency proceedings in the jurisdiction concerned if the debtor has an establishment there or deal with the security under preservation orders made in the context of principal insolvency proceedings. Proceeds from sale of the security are affected to settlement with the creditor, whose right in rem it is, before any surplus reverts to the asset fund.[35] As far as set off is concerned, a creditor normally entitled to exercise this type of claim will be permitted to do so, even if it is not available under the law of the jurisdiction where proceedings are opened. The Regulation states that set off acquires as a result the status of a guarantee on which the creditor concerned can rely when the claim eventually arises.[36]

An example of particular protection for transaction frameworks occurs with the exception made in the Regulation for payment systems and financial markets. This exception applies particularly to position-closing agreements and netting agreements that are to be found in such transaction systems. It also applies to the sale of securities and to guarantees provided in the case of such transactions, in particular to those governed by rules on settlement finality in payment and securities settlement systems.[37] These rules are expressed as taking precedence over the general rules in the Regulation as, for such transactions, the law that should be material is that applicable to the payment system or market on which those transactions occur. The insertion of this provision is intended to prevent the possibility of mechanisms for the payment and settlement of transactions provided for in payment and set-off systems or by regulated financial markets in the Member States from being arbitrarily upset in the case of insolvency of a party to that transaction. In the language of the directive concerned, this is to allow for those rights of holders of collateral security to be insulated from the effects of the insolvency of the provider of the security.[38]

As an example of protection of a particular class of participants in insolvency, the case for protection of employees and employment itself may be taken. This is felt to be a priority with special rules in the Regulation and is a logical progression from earlier work within the Community relating to protection of

[35]Recital no. 25.
[36]Recital no. 26.
[37]Directive 98/26/EC of 19 May 1998 settlement finality in payment and securities settlement systems.
[38]Recital no. 27.

employees during take-overs and availability of state guarantee schemes in the event of insolvency of the employer.[39] In order to achieve this protection, the effects of insolvency proceedings on the continuation or termination of employment as well as on the rights and obligations of all parties to such employment must be determined by the law applicable to the agreement. The applicable law will be determined in accordance with general rules on conflict of law. This represents a shift from the Brussels Convention 1968 and Rome Convention 1980 rules based on the habitual place of work rule or, an alternative in the former convention, the place of engagement rule.[40] Any other insolvency related questions, including whether the employees' claims are protected by prior acquired rights and what status these rights have, will be determined by the law of the State where proceedings are opened. It seems that the convenience for employees of having mandatory convention protection which could not be ousted by contractual provisions, is substituted by reliance on contract related rules with pre-eminence ultimately being given to the principal jurisdiction for questions of priority.

The Protection of Creditors

Creditors receive, besides the debtor and employees, explicit mention in the Regulation, confirming their central status to the success of any rescue arrangements. Information is felt to be the key to ensuring their active participation. The existence of the decision opening proceedings with regard to any debtor and its content must be notified in other Member States. This is a mandatory requirement for the principal liquidator to fulfil. For business considerations, it may also, where there is an establishment in the Member State concerned, be the subject of a ruling making notification compulsory. Prior notification is not, however, felt to be a pre-condition for recognition of foreign proceedings.[41] This may not sit easily with the provision on protection of third parties also contained in the Regulation in situations where these parties are unaware of proceedings. This provision deems that persons acting in good faith effecting payment on account of any transaction with the debtor, where this payment should have been made to the liquidator, are taken to have been discharged from any further obligation in this respect.[42] The difficulty for creditors here is that these payments, even if reintegrating the asset base, may by being subject to further claims fall outside those assets which are distributable.

In relation to how creditors may further assert their rights, all creditors, wherever domiciled in the Community, have the right to assert their individual claims in any of the insolvency proceedings that may be pending in relation to

[39]Directive 77/187/EEC of 14 February 1977 (safeguarding of employees' rights in the event of transfers of undertakings) and Directive 80/987/EEC of 20 October 1980 (protection of employees in the event of the insolvency of their employer). See also Everson (C-198/98), in which judgment was given by the ECJ on 19 December 1999, on Art. 3 of the latter Directive, now subject to revision by the Commission, which has issued a communication to this effect (C(2000) 354, not published in the Official Journal).
[40]Recital no. 28. See Art. 5(1), Brussels Convention 1968 and Art. 6, Rome Convention 1980.
[41]Recital no. 29. This may be contrasted with the position in Art. 20, para 2, Brussels Convention 1968 on minimum standards of notice making it a pre-requisite in most cases.
[42]Recital no. 30.

their debtor. This provision will also benefit tax authorities and social insurance institutions, which may extend their reach across national boundaries, and is an important departure from the practice in many jurisdictions with regard to the (non-)recognition of foreign penal and revenue laws.[43] In practice, despite the notice requirements, only diligent creditors will be able to take advantage of these provisions and there well may be a cost-element prohibiting smaller creditors from participating in more than local proceedings. Nevertheless, in order to ensure equal treatment of creditors, there is an attempt to co-ordinate overall distribution of proceeds by requiring creditors to account for dividends received in other proceedings. Under this arrangement, the Regulation states that creditors may only participate in the distribution of total assets in other proceedings if creditors with the same standing have obtained the same proportion of their claims.[44]

Application of the Regulation

The Regulation will apply to those types of domestic insolvency proceedings mentioned in its Annexes. Specific authority is reserved to allow for amendments to these Annexes should domestic law in any member States be altered, thus keeping the co-ordination element active as Member States introduce changes to their domestic systems.[45]

As noted earlier, the Regulation is being introduced under the co-operation provisions in civil procedural matters inserted by the Treaty of Amsterdam in the EC Treaty. In accordance with Articles 1 and 2 of the Protocols attached to this Title, the Regulation is not ordinarily binding on either the United Kingdom or Ireland unless these Member States exercise rights pursuant to Articles 3 and 4 of the Protocols to consent to the application of the Regulation.[46] Both of these countries have in fact opted into the negotiations, a fact reflected in the revised draft of the Regulation.[47]

Similarly, the opt out negotiated by Denmark means that, unless the Council is informed under Article 7 of the Protocols that it no longer wishes to avail itself of the arrangement, the Regulation will not apply to this Member State.[48] Because of the complex nature of the opt-out provisions, it is unclear whether Denmark may in fact opt in and a report states that the Danish Government will in fact enact in domestic law legislation mirroring the terms of the Regulation so as to enable the courts of that country to regulate cross-border insolvencies affecting Danish interests.[49]

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[43]See Government of India v Taylor [1955] AC 491 for the position in the United Kingdom.
[44]Recital no. 21. In the former draft of this recital, the Regulation spoke of a consolidated proportion survey to be established for the Community, which was taken to mean a requirement for courts to ensure they keep a tally of distributions in parallel proceedings.
[45]Recital no. 31.
[46]As noted in the original draft of this recital (formerly no. 30).
[47]Recital no. 32. The UK Parliament Select Committee on European Scrutiny in fact cleared the way for the adoption of the Regulation in its Report of 24 November 1999.
[48]Recital no. 33.
[49]Report by Professor Ian Fletcher at a session of the Clive Schmitthoff Symposium on 1-3 June 2000 in London.

Summary

The Regulation begins with a handicap compared to its predecessor, the European Insolvency Convention, in that the choice of fundamental legal basis in Article 65 of the EC Treaty meant that it would not apply to three of the fifteen Member States. Two, Ireland and the United Kingdom, have in fact chosen to adhere but there remains the question of what measures Denmark will need to enact to become party to the cross-border framework.

From the perspective of the United Kingdom, the question that must be asked is whether there are benefits from inclusion in the Regulation. In connexion with the previous Convention text, commentators have pointed to gaps in the rules, including the absence of support for private law enforcement measures in aid of creditors' rights such as the institution of receivership.[50] Indeed, commentators have alternately wondered whether the structure of the framework, classifying proceedings into main and territorial proceedings, is not either too simplistic or too unrealistically complex. Furthermore, the Regulation is by no means an exhaustive set of rules to govern all the possibilities that may occur within a single insolvency. Scenarios ad infinitum could be set up for imagining how courts and participants would deal with variations in the estates of insolvent debtors.[51]

Ultimately, the application and success of the Regulation will depend on a consensus emerging through decisions of courts applying the Regulation in a consistent manner. Overall, there are benefits of having the Regulation framework to deal with the ever-increasing phenomenon of international insolvencies. In this, it would be of considerable interest for the United Kingdom, with its wealth of experience in the management of international insolvencies, to help shape the law to come by being there at its inception. This would also, given the consideration shown by the United Kingdom to the adoption of the UNCITRAL Model Law on Insolvency,[52] be of benefit in introducing a comprehensive system for dealing with insolvencies across national boundaries affecting commercial arrangements between the United Kingdom and its principal trading partners.

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[50]See Dahan, La Floating Charge: Reconnaissance en France d'une sûreté anglaise (1996) 2 JDI 381.
[51]See by this author: Jurisdiction in the European Insolvency Convention: A Practical Problem [1999] 7 ICCLR 225 for a speculative solution to one such problem posed by Gabriel Moss QC.
[52]Clause 13 of the Insolvency Bill 2000.