Setting the Scene:
The EC Regulation on Insolvency Proceedings

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Which Insolvency Law Applies in Europe and Which Court has Jurisdiction?

The European Union (EU) consists of twenty-seven Member States.[1] Each has their own legal system with different insolvency and restructuring laws, reflecting different underlying policies and traditions. Where a debtor is centred in Europe the provisions of the EC Regulation on Insolvency Proceedings (EIR) determine which Member State's insolvency laws applies and which Member State's courts has jurisdiction to decide on the issues arising in the insolvency proceedings. The EIR is mandatory and applies throughout the EU (except Denmark). Its aim is to ensure that insolvency proceedings, including cross-border aspects, operate efficiently and effectively within Europe, but it does not harmonise the substantive insolvency laws of the Member States. Insolvency judgments of the courts in Member States and the powers of the appointed office holders are, however, automatically recognised in other Member States. Further provisions are intended to promote cooperation between insolvency office holders where more than one set of insolvency proceedings have been opened for a particular debtor.

Scope of the EIR

The EIR applies to the specified types of collective insolvency proceedings which are listed separately for each Member State within its Annex A.[2] Insolvency proceedings concerning insurance undertakings and credit institutions are excluded from the scope of the EIR as different EU Directives apply to these regimes.

Establishing Jurisdiction

The key concept of the EIR is the location of the debtor's *'centre of main interests'* (COMI) as it is the courts of this Member State which have jurisdiction to open *'main proceedings'*. Main proceedings are deemed to be of universal scope (except where ancillary proceedings are started), and main proceedings extend to all of the debtor's assets and creditors, wherever they are located. If the debtor does not have a COMI within the EC, the EIR does not apply.

COMI is not a defined term, but recitals to the EIR require that it should correspond with the place where the debtor *'conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties'.* The EIR includes a presumption, in the absence of proof to the contrary, that the COMI will be the place of a corporate debtor's registered office. Unfortunately, the EIR does not include provisions for dealing with group companies on a consolidated basis, but rather the COMI of each separate entity has to be separately assessed. In the early days following the introduction of the EIR, particularly as insolvency professionals considered strategies for dealing with cross-border groups, there were uncertainties as to the correct approach in identifying COMI.

Following rulings of the European Court of Justice and further consideration of the case law by the English Court of Appeal (and its equivalents elsewhere in Europe) this issue has become broadly settled. Accordingly, whilst the fact that a parent company has control of its subsidiary will not itself

[1] Belgium, Denmark (which has exercised an opt out and is not a party to the EIR), Germany, Greece, Spain, France, Ireland, Italy, Luxembourg, the Netherlands, Austria, Portugal, Finland, Sweden, United Kingdom, Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, Slovenia, Romania and Bulgaria. The United Kingdom comprises England & Wales, Scotland and Northern Ireland. The Channel Islands and Isle of Man are not members of the EU and hence not subject to the EIR. However, Gibraltar is part of the United Kingdom for the purposes of the EIR by virtue of A299(4) of the Treaty of Rome, which established the then European Economic Community.

[2] For the United Kingdom, the corporate proceedings falling within the framework of the EIR are compulsory winding up, creditors' voluntary liquidation, administration and voluntary arrangements. For France the applicable procedures are 'sauvegarde' 'redressement judiciaire' and 'liquidation judiciaire'. The German proceedings which are covered are 'Das Konkursverfahren' 'Das gerichtliche Vergleichsverfahren', 'Das Gesamtvollstreckungsverfahren' and 'Das Insolvenzverfahren'.

be sufficient to rebut the registered office presumption as to COMI, the presumption can be rebutted if the head office functions of the subsidiary entity are located in a different Member State (for example, the state in which its parent is located), as long as the location of its head office is readily ascertainable by third parties. With the potential to encourage a race to the courts to open proceedings, the recitals require that Member States defer to the determination as to COMI made by the courts of the place where proceedings are first opened. Any appeal as to COMI must be made through the appeal courts of that jurisdiction, with a final appeal to the European Court of Justice.

Migrating COMI

The EIR requires that main proceedings are opened in the place where an entity has its COMI at the point in time that the relevant insolvency proceedings are initiated. There is, however, no requirement that an entity's COMI is fixed, indeed any such restriction has the potential to run counter to the basic freedom of movement principles upon which the European Union is based.[3] In some cases there may be strategic advantages in migrating the COMI of an entity to another Member State prior to opening insolvency proceedings where, for example, the second Member State has more accessible, flexible or predictable restructuring procedures. An example of a strategic COMI migration, which was approved by the English courts, arose in the restructuring of the Wind Hellas Telecoms group. In that case a Luxembourg-based and registered group holding company migrated its COMI to England three months before English administration proceedings were opened.

Whilst identifying COMI requires a case by case analysis of the particular facts (on an entity by entity basis) it is instructive to note the factors which the English judge in Wind Hellas considered relevant when he evaluated and upheld the debtor's assertion that its COMI had been migrated to England.[4] These comprised the following:

a) the debtor's head office and principal address had been moved to London;

b) the debtor's creditors had been notified of its change of head office;

c) there was a press release announcing that the debtor's activities were shifting to England;

d) the debtor had opened a bank account in London;

e) the debtor had registered as an overseas company under the Companies Act in England; and

f) all negotiations between the debtor and its creditors took place in London.

It should also be noted that a COMI-shift of an operational company, as opposed to a holding company, is much less likely to be feasible.

Opening Secondary and Territorial Proceedings

The EIR permits ancillary proceedings to be opened in a Member State other than that in which a debtor's COMI is located if the debtor has an *'establishment'* in another Member State. An establishment is defined as "*any place of operations where the debtor carries out a non-transitory economic activity with human means and goods.*" Effectively this is a branch concept. Where the

[3] The European Court of Justice has nevertheless upheld the right of Member States to legislate to the effect that a company cannot migrate its COMI to another Member State if it wishes to retain its registered office in the first Member State - *Cartesio Okato es Szolgaltato [2009] Ch 354* so that the strategic migration of COMI may not be readily feasible in some jurisdictions.

[4] Reported as: In the Matter of: Hellas Telecommunications (Luxembourg) II SCA [2009] EWHC 3199 (Ch).

ancillary proceedings are the first proceedings to be opened, they are known as territorial proceedings. Where the proceedings are opened after the main proceedings, which is more usual, they are termed secondary proceedings. In either case, the scope of any ancillary proceedings is limited to the assets located in the relevant Member State territory. Unless the ancillary proceedings are territorial proceedings they cannot take the form of rescue proceedings, but must be one of the forms of winding up proceedings included within Annex B to the EIR. The opening of secondary proceedings will then, in practice, prevent or disrupt attempts to achieve a restructuring of an entity as a whole.

Applicable Law Under the EIR

Subject to a number of significant exceptions carved out from the EIR, including in particular, the law applying to secured assets located in another Member State, the law of the courts which open main proceedings is the applicable insolvency law for all matters, both procedural and substantive. Where secured assets are located outside the jurisdiction in which insolvency proceedings have been opened, the applicable law is the insolvency law of the jurisdiction in which those assets are sited.