

**Reforming the European Insolvency Regulation  
– a legal and policy perspective**

On 12 June 2013, the Centre for Business Law and Practice at the University of Leeds, together with the Centre for Business and Insolvency Law at Nottingham Law School, hosted a joint conference on the reform of the European Insolvency Regulation (EIR). The conference provided an opportunity for practitioners, policy makers and academics to discuss the most recent proposals for reform.

**Rewriting the Regulation - the broad thrust of the reform agenda**

The morning session was introduced by Professors Joan Loughrey (from the University of Leeds) and David Burdette (from Nottingham Law School, Nottingham Trent University) and chaired by His Honour Judge Behrens.

Professor Michael Veder from Radboud University in Nijmegen opened the proceedings. As a member of the EIR Expert Group, Professor Veder was able to provide the conference members with a lively and comprehensive overview of the proposals for reform. He considered that, overall, the process of reform had been well managed. The use of the EIR in 26 Member States had been evaluated, problems had been identified and solutions proposed. The solutions had been carefully drafted and thought through, although they were not overly ambitious. He cited the approach taken to group insolvencies as an example of a solution that could have been more imaginative and noted that the INSOL proposal for a uniform rescue plan had not been picked up by the EU. He considered that the proposals would provide certainty and predictability but, in view of the lack of ambition in some areas, he hoped that they would not be watered down.

Professor Veder was followed by Dean Beale, Head of International Policy and Insolvency Practitioner Regulation at the UK Insolvency Service. Like Professor Veder, Mr Beale considered that the EU had undertaken a lot of work in reviewing the EIR and had done it very well. From a UK perspective, the EIR had worked reasonably well since its introduction although there were a few areas where some improvement would be beneficial, for example, with regard to the determination of the Centre of Main Interests ("COMI"), the insolvency of groups, certain issues with regard to secondary proceedings (in particular the fact that they were limited to liquidation) and the need for a repository of information about insolvencies across the EU.

He commented specifically on schemes of arrangement and forum shopping. The UK government would not want to include schemes of arrangement as a pre-insolvency procedure falling within the scope of the EIR, despite the prevailing EU view that they should. He also observed that forum shopping should be put into perspective: each year, there were only 200 cases of forum shopping in the UK (in other words, cases being brought in the UK by non-UK nationals/entities claiming a COMI in the UK) 60% of which came from Germany and 15% of which came from Ireland. This was a drop in the ocean, bearing in mind that the total number of bankruptcies per year was in the region of

32,000. It was his view that, in light of these figures, there was no need for additional regulation.

He considered that it would be very useful to have an EU insolvency register, but recognised that there would be technical challenges associated with it. In fact, the UK probably collected most of the relevant information already. With regard to the insolvency of a group of companies, he wondered whether the best solution was to have the same person involved in overseeing all the insolvencies. A particular difficulty of having a group insolvency process rather than an individual insolvency process arose in the context of managing intercompany claims.

### **Improving the process of COMI determination and the co-ordination of main and secondary insolvency proceedings**

Peter Cranston, a Partner at Eversheds, looked at two specific issues identified by the EU in relation to the EIR. The first of these related to COMI and the second related to secondary insolvency proceedings.

He began by outlining the difficulties associated with determining which Member State is competent to open insolvency proceedings. Although there was wide support for granting jurisdiction for opening main proceedings to the Member State where the debtor's COMI is located, there have been problems with the practical application of the concept of COMI. Following up on an earlier point raised by Mr Beale, he also referred to the criticism of the EIR jurisdiction rules that has arisen where they have allowed (or been seen to allow) forum shopping by companies and natural persons through abusive COMI relocation.

Overall, the reforms will not change things dramatically: it will remain the case that establishing COMI will be necessary for main proceedings. COMI is now defined in the revised Article 3(1) as the place where the debtor conducts the administration of his interests on a regular basis and which is ascertainable by third parties. Existing jurisprudence from the EU Court of Justice will have a role in clarifying issues of jurisdiction and procedure. A new Article (3(b)) creates a duty on the court or insolvency practitioner to examine whether the jurisdiction is correct (which, judging by comments from delegates seems to happen in most jurisdictions as a matter of course already) and creditors may challenge the choice.

The second issue discussed by Mr Cranston concerned the problems arising in the context of secondary proceedings. The opening of secondary proceedings means that the liquidator in the main proceedings no longer has control over those assets which are located in the other Member State. This has been seen to be inefficient and can make a going concern sale of the debtor more difficult. A further problem is that secondary proceedings currently have to be winding-up proceedings so that restructuring is not a realistic option.

Things may improve under the new proposals as secondary proceedings no longer have to be winding up proceedings and the requirement to cooperate is extended to include the courts, not just the liquidators. Although he recognised the EU objective of increased harmonisation of substantive laws, Mr Cranston considered that it was still a long way off.

Nora Wouters, a Partner at McKenna Long & Aldridge LLP based in Brussels, provided a non-UK perspective on these two issues.

She identified that, although COMI can work in many cases (possibly in over 90% of cases), there will be some situations where it will not. She considered that there would

be real, practical difficulties in cases where, for example, holding companies were set up as part of a tax structure; or where groups had cash pooling arrangements; or where special purpose vehicles were involved. She therefore questioned whether COMI was still the right criteria.

With regard to the questions on secondary proceedings, she wondered whether they were still necessary. With an increase in the level of harmonisation across the EU in other areas of law (such as contract, companies, employment and securities law) it may be the case that the insolvency treatment in different jurisdictions may also become increasingly harmonised by default.

Ultimately she considered that, in respect of questions such as whether the COMI was still the right criterion and whether the possibility of secondary proceedings is still needed, it was necessary to do the economics.

### **Widening the scope of the Regulation - pre-insolvency procedures and groups of companies**

The afternoon session was chaired by Richard Sheldon QC and began with a presentation from Professor Paul Omar from Nottingham Law School. Professor Omar delivered an entertaining canter through the development of "rescue" as a concept explaining how various nations (the French and the Americans amongst others) had at some time or another claimed to have "invented" it, and that the meaning of the term "rescue" had changed over time. He discussed the proposed changes to Annex A whereby pre-insolvency proceedings would be included within the scope of the EIR. This posed particular difficulties within the UK where the issue arose as to whether the Companies Act 2006 scheme of arrangement should fall within its remit.

Professor Omar was followed by Joe Bannister, a Partner at Hogan Lovells LLP, who presented the practitioner perspective on the difficulties arising with the inclusion of schemes of arrangement within Annex A. Schemes of arrangement are used not just for restructuring insolvent companies outside formal insolvency proceedings, but more generally in the management and restructuring of solvent companies. Annex A also begged the question as to when a pre-insolvency event actually arose: at what point was the line crossed so that a scheme was for the purposes of rescue?

Dr Irit Mevorach, Associate Professor at the University of Nottingham School of Law, rounded up the session by looking at the reforms relating to the insolvency of groups. The proposals require improved coordination and cooperation between the liquidators of the different group companies, between the liquidators and the courts and between the courts themselves, with a focus on achieving the most efficient outcome. They also allowed for an element of centralisation, raising the possibility that a single liquidator could be appointed where a number of insolvent group companies existed in the same Member State.

Professor Gerry McCormack considered the approach to "insolvency related actions" and the relationship between the EIR and the Brussels I on jurisdiction and the enforcement of judgments, noting that although Brussels I had recently been recast it had not solved all issues. There could be overlaps or gaps between the two instruments. Regarding the scope of "insolvency related actions" he considered that this would extend to avoidance actions and actions challenging acts of the liquidator but not actions challenging the

actions of receivers, nor actions such as IA 1986, s 423 relating to transactions defrauding creditors. Misfeasance actions were considered to be more difficult, since recoveries would go to swell the company's assets but the provision would not give rise to a new cause of action.

### **Security of transactions – insolvency and related actions**

Jennifer Marshall, a Partner at Allen & Overy LLP, considered that the EIR reforms had missed a trick. It was helpful that the *lex situs* definition in Article 2 had been amended as there had been difficulties in interpreting the current rules. However, the Article 5 rules had not been changed and this meant that practical problems remained in the context of cross-border restructurings when it came to compromises involving secured debt.

The last presentation of the day was delivered by Caroline Gerkens from the General Secretariat of the Council of the EU. She presented the EU policy perspective on the proposed reforms reiterating the importance of efficient and effective insolvency proceedings in ensuring the smooth functioning of the internal market and its resilience in economic crises. She also stressed the intention that the new rules would ensure a "second chance" for viable businesses and the "honest entrepreneur" in financial difficulties. She traced the steps involved in the process of reviewing the EIR and indicated that it was hoped that the new EIR would pass through all stages of the EU legislative process by 2014.

The proceedings were brought to a close by Professor Gerry McCormack of the University of Leeds who thanked all the speakers for their insights into the proposals. Professor David Burdette thanked Professor McCormack on behalf of the delegates for the hospitality and excellent conference facilities provided by the University of Leeds.

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