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ARTICLE

Bringing Non-EU Insolvencies to Germany: Really so Different from the UNCITRAL Model Law on Cross-Border Insolvency?

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Synopsis

After almost any type of Brexit, English restructuring and insolvency proceedings are likely to fall outside the scope of the European Insolvency Regulation (EIR). In addition, non-EU restructuring hubs like Singapore market their jurisdictions prominently in the EU market while even the US legislator is considering the addition of a scheme-like process to the US Bankruptcy Code. The recognition of such third country proceedings within the EU and in particular in Germany will not follow the mechanisms of the EIR but fall within the scope of the respective national framework of international insolvency law. While a handful of EU member states have oriented their legislation to the consistent requirements of the UNCITRAL Model Law on Cross-Border Insolvency, Germany did not follow this path and instead created autonomous rules for recognition and cooperation. The following article will compare the respective recognition requirements and mechanisms and ultimately show that the German rules are clearly more recognition-friendly and overall do not fall short of the standard set by the Model Law. Non-EU main restructuring and insolvency proceedings including their plans – in particular US Chapter 11 plans – are routinely recognised in Germany without any need for court involvement. The recognition of schemes would depend on the way the rules governing them are structured.

Background

Insolvency proceedings outside Germany take on a 'German flavour' as soon as it is discovered that the debtor has assets or even establishments in Germany. The question arises as to the access of the foreign proceedings, their representatives and possible outcomes like a plan or scheme for these German assets. Does the foreign insolvency administrator have access to the debtor's German accounts? Can he or she register the opening of proceedings in a German land register? Does he or she dispose of domestic assets or is a domestic non-main insolvency proceeding required or advisable? If necessary, can he or she initiate one? Does the debtor's debt relief in a foreign insolvency or restructuring plan also have effect on German creditors?

The answers to these questions can be found in the EIR provided that the main insolvency proceedings are commenced in an EU member state (except Denmark). Here, access and (almost) automatic recognition are readily available. If, however, the foreign insolvency proceedings are not taking place in an EU member state, the application of the EIR's provisions are not clear at all. The CJEU held that they cannot apply with respect to a third state's proceedings insofar as they explicitly require insolvency proceedings in an EU member state.[1] This means that essential provisions of the EIR are not applicable with regard to third state's insolvency proceedings. The answers to the questions raised above are to be determined by the national (insolvency) law of the member state in whose territory procedural effects are to occur. Hence, there is a practical need for corresponding rules of international insolvency law, which unfortunately are currently either absent or at least underdeveloped in many EU member states.[2] The significance of such regulations is likely to increase considerably if there happens to be a no-deal (hard) Brexit causing popular English insolvency and restructuring proceedings to be excluded from the scope of application of the EIR.

The widespread lack of local rules on the treatment of foreign insolvency proceedings prompts local courts to recourse to the principles of international civil procedure law for the recognition of foreign civil proceedings. These rules are not tailored to the needs of insolvency proceedings, which require rapid recognition of often only provisional measures as well as a foreseeable recognition of the outcomes achieved in proceedings. Specific rules for cross-border insolvencies

Notes

1 CJEU, 16.1.2014, C-328/12, ECLI:EU:C:2014:6, at 22-29 – *Schmid*.

2 See N. Nisi, 'The recast of the Insolvency Regulation: a third country perspective', (2017) 13:2 *Journal of Private International Law* 324.

are required. Lawmakers around the world interested in adopting such rules would commonly refer to the UNCITRAL Model Law on Cross-Border Insolvency[3] which was adopted in 1997 and has facilitated national legislation in this area since. At present, 46 countries, including the United States, the United Kingdom, Poland and Romania, have drafted their international insolvency law rules according to this model.[4]

Germany is missing from this list. It had already created its rules on international insolvency law (today in secs. 335 to 358 of the German Insolvency Code – InsO) when discussing the new legislation on the Insolvency Code in the 1980s and early 1990s[5] aligning their content to the requirements of a European Insolvency Convention which was intended at that time. It was the trust that such a Convention would be concluded immediately that led the German lawmaker to initially renounce separate rules on international insolvency law in the original InsO in 1994.[6] It was only after the Convention was dropped and the EIR came into force that the need for separate rules on third state's insolvencies became so clear again that the originally envisaged regulations were enacted in almost unchanged fashion as new secs. 335 to 358 InsO on 20 March 2003. Although the Model Law was present by then, the German rules were in fact older and did not intend to implement the Model Law. Hence, the question arises whether the German rules comply with the standards set by the Model Law. We will show that the German rules provide a solid ground for foreign representatives in German courts.

UNCITRAL Model Law on Cross-Border Insolvency

The Model Law intends to create national regulations which, due to their comparable content, provide a harmonised legal framework at international level for the coordinated handling of cross-border insolvencies. To this end, it focuses on the main issues to be regulated in insolvency proceedings with cross-border implications, without making any attempt to harmonise substantive national insolvency law. The Model Law intends to establish rules in the national law of the host state ensuring that representatives of foreign proceedings have access to local courts, that foreign insolvency proceedings and their respresentatives are recognised, and that on this basis effects of the foreign proceedings are either created or recognised in the host jurisdiction. For this purpose, the courts in both the home and host jurisdiction will generally have to communicate and cooperate in some form, for which legal basis must also be created.

If judicial insolvency proceedings have commenced in a foreign state under the law of that state in respect of the assets of a debtor there and an insolvency administrator has been appointed as representative of the estate, these proceedings only have effects in the territory of the state in which the proceedings are conducted in principle, since the claim to validity of domestic law covers only the domestic territory (territoriality principle). If relevant assets of the debtor are (possibly) located abroad, which might often be the case in view of today's global trade, the insolvency administrator may access them only if he is recognised with his administrative powers abroad according to local law in the host state. Such recognition would also allow to determine and realise assets located abroad and to distribute the proceeds. The procedure opened in one state would therefore also have an effect abroad and thus globally (principle of universality). The Model Law aims to achieve this universality by recognising foreign insolvency proceedings as such and generating their effects under domestic law ('relief' and 'assistance'). Alternatively, it is also possible to conduct a territorial insolvency proceeding in accordance with domestic insolvency law limited to the domestic assets of a foreign debtor (non-main proceedings).

1. Access, Art. 9 ML

In any case, the foreign administrator must be allowed to appear and be heard at the domestic courts for the purpose of recognition or the initiation of domestic particular proceedings (Art. 9 ML), without this threatening him or her with personal disadvantages (Art. 10 ML). He or she should also be able to initiate particular procedures (Art. 11 ML) and participate in them (Art. 12 ML). In order to grant such rights to a foreign person claiming to be a foreign administrator, the domestic court must be satisfied that they are actually confronted with a person who has been effectively appointed as a foreign representative under the law of a foreign insolvency proceeding within the meaning of Art. 2(a) ML. Therefore it is essential that the underlying foreign insolvency proceedings are recognised as such.[7]

Notes

3 Hereafter: 'Model Law' or 'ML'.
4 https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency/status (last accessed on 16.9.2019).
5 See secs. 379 et seq. in the first governmental draft of the InsO in BT-Drucks. 12/2443, at 68 et seq. and 233 et seq.
6 Report of the Legal Committee on the governmental draft of the InsO in BT-Drucks. 12/7303, at 117.
7 UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective, 2012, at 36-37. See also UNCITRAL Model Law on Cross-Border Insolvency Part II: Guide to Enactment and Interpretation, 2014, at 25.

2. Recognition of foreign insolvency proceedings, Arts. 15 to 18 ML

The recognition of a foreign proceeding is thus heart and soul of the provisions in the Model Law. Such recognition requires a simplified, formal recognition procedure in accordance with Arts. 15 to 17 ML at the competent court under national law in accordance with Art. 4 ML. With an application for recognition, the foreign administrator can also apply for provisional security measures pursuant to Art. 19 ML and the court seised shall have the discretion to issue such measures as they see fit.

a) Recognition procedure and conditions

The recognition procedure is only initiated at the request of the foreign administrator (Art. 15 ML) and must be accompanied by a certified copy of the foreign opening decision with the appointment of the foreign administrator, ideally translated into the language of the target proceeding.

The conditions for recognition are regulated in Art. 17(1) ML. If these are fulfilled, the recognition shall take place without further judicial discretion, subject to the public policy objection in Art. 6 ML.[8] In order to be recognised, the foreign procedure must be considered a foreign insolvency proceeding within the meaning of Art. 2(a) ML. It is defined as (1) a collective judicial or administrative proceeding in a foreign state, including an interim proceeding, (2) pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, (3) for the purpose of reorganisation or liquidation. Since the insolvency of a debtor typically gives rise to proceedings which, in view of the common pool problem arising from the insolvency, restrict the rights of all creditors, the legal basis of the foreign proceedings often also has collective effect as a result of the insolvency. Proceedings that only serve individual groups of creditors are not covered.[9] The necessary confiscation of assets does not then have to lead to the appointment of an administrator, meaning that the debtor may be considered a 'foreign representative' when remaining in possession of the estate as long as this administration is subject to the supervision of the insolvency court. Finally, the proceeding must serve to liquidate or reorganise the debtor's assets. Interim proceedings will then also fall within the scope of the Model Law.[10]

If these and some formal conditions are met, recognition may only be refused on the basis of a public policy objection under Art. 6 ML which is to be interpreted narrowly and, in the interests of promoting international cooperation, only applies in cases where recognition would be manifestly incompatible with the principles of domestic law.[11]

b) Recognition decision – main or non-main

While the matter of international jurisdiction of the foreign court is not examined as a condition for recognition under the Model Law, the scope and effects of relief available based on the recognition depend on whether the foreign proceeding is recognised as a foreign main or non-main proceeding. Consequently, the host court must examine the facts regarding international jurisdiction. The rules on jurisdiction in the Model Law are deliberately based on the concept of COMI developed for the EIR without providing a definition comparable to the one in the recast EIR.[12] The interpretation and development of the COMI concept is left to the national law and local courts, who shall observe and quote relevant decisions in jurisdictions applying a COMI test (such as decisions of the CJEU or US courts) in the interest of the consistency without being bound by them. Particularly in cases of forum shopping at the expense of all the parties involved, the courts are expressly permitted to apply any sanctioning rules available in national law.[13]

If the host court finds that the foreign insolvency proceeding takes place in the state of the debtor's COMI, it recognises the proceeding as a foreign main proceeding. Such a recognition shows some effects immediately and automatically, in particular a stay of individual actions and executions against the estate and the suspension of the debtor's right to dispose of these assets.[14] The foreign representative may also initiate avoidance actions (Art. 23(1) ML) and intervene in any proceedings in which the debtor is a party (Art. 24 ML). The duration and scope of these automatic effects are, however, determined by the law of the host state.

Notes

8 UNCITRAL Model Law on Cross-Border Insolvency – Part II: Guide to Enactment and Interpretation, 2014, at 29.
9 UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective, 2012, at 70.
10 UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective, 2012, at 35. See also UNCITRAL Model Law on Cross-Border Insolvency Part II: Guide to Enactment and Interpretation, 2014, at 179.
11 UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective, 2012, at 49-50. See also UNCITRAL Model Law on Cross-Border Insolvency Part II: Guide to Enactment and Interpretation, 2014, at 30, 101-104.
12 See UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective, 2012, at 76. See also UNCITRAL Model Law on Cross-Border Insolvency Part II: Guide to Enactment and Interpretation, 2014, at 81.
13 UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective, 2012, at 108-109.
14 UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective, 2012, at 130-131. See also UNCITRAL Model Law on Cross-Border Insolvency Part II: Guide to Enactment and Interpretation, 2014, at 180.

Also any further relief is only available under Art. 21 ML (see below).

If the host court finds the debtor's COMI outside the territory of the foreign insolvency proceeding, it may still grant recognition as a non-main proceeding if the debtor has at least an establishment pursuant to Art. 2(f) ML in the host state. Although recognition as a non-main proceeding does not produce any of the effects of Art. 20 ML, it allows host courts to grant relief available under Art. 21 ML. If there is no establishment in the host state, but only individual assets, the foreign proceeding cannot show any effects in the host jurisdiction and thus cannot be recognised.[15] Access to these assets must be sought under local law, often by initiating available local insolvency proceedings affecting only these assets.

3. Relief under Art. 21 ML

The recognition of foreign insolvency proceedings as main or non-main proceeding entitles the host court to support the foreign administrator upon his request by taking certain measures pursuant to Art. 21 ML. This may include measures to obtain information on the debtor's domestic assets (asset tracing) through the hearing of witnesses or other information, to authorise the foreign administrator or a domestic person to realise the domestic assets, to extend any provisional security measures pursuant to Art. 19 ML and to take any other support measures (additional relief) which are available under local law either as special rights for foreign administrators in the local international insolvency law rules, or as rights domestic administrators transferable to foreign ones. For example, the court may, at the request of the administrator, endow the administrator with rights similar to those of a domestic administrator; it may, on behalf of the administrator, request and, where appropriate, hear local directors, employees or business partners of the debtor for information on the debtor's assets. The host court has discretion whether and how to grant relief and, according to Art. 22(1) ML, must be satisfied that the interests of the (primarily domestic) creditors and other interested persons, including the debtor, are adequately protected.[16] As a result, it is in the hands of the host court to decide how 'universal' the domestic effects of foreign (main) insolvency proceedings are to be.

In the case of a request from an administrator of a foreign non-main proceeding, the court must also note, pursuant to Art. 21(3) ML, that such proceeding's effects are in principle limited to the territory of the state of the proceedings and the assets situated there. Relief regarding local assets is therefore hardly ever available.[17] Only measures concerning assets in the state of proceedings, such as the access to relevant information to that effect, would be accessible.

Additional relief under national law includes in particular the recognition and enforcement of judgements in foreign insolvency proceedings, insofar as this is requested by the foreign administrator and is possible under national law.[18] In particular the recognition of court-approved insolvency and restructuring plans is available and enforces plan provisions concerning assets or creditors in the host state. It is precisely here that the protection of the creditors concerned demanded by Art. 22 ML becomes relevant. While the Model Law does not offer any further details, the new 2018 UNCITRAL Model Law on Recognition and Enforcement of Insolvency-related Judgements (MLJ)[19] now contains some further criteria. In particular, an assumption in favour of the recognition of a plan that was established there which builds on the prior recognition of the foreign proceeding as a foreign main proceeding (Art. 13 MLJ). This assumption is accompanied by a considerable catalogue of grounds for the refusal of recognition (Arts. 10 and 14 MLJ). It remains to be seen to what extent the new Model Law on Judgements, which is understood as a supplement to the Model Law,[20] influences legislation in the implementing states and leads to a new interest in other legal systems in adopting the Model Laws.

The German rules on cross-border insolvency

The relevant German rules for the treatment of foreign insolvency proceedings and their administrators in Germany can be found in secs. 335 to 358 InsO. A first look at the basic structure of these rules already indicates that they clearly differ from the structure of the Model Law as they are indeed influenced by the regulatory ideas and mechanisms of the EIR instead.

Notes

15 UNCITRAL Model Law on Cross-Border Insolvency Part II: Guide to Enactment and Interpretation, 2014, at 85, 156.

16 UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective, 2012, at 141. See also UNCITRAL Model Law on Cross-Border Insolvency Part II: Guide to Enactment and Interpretation, 2014, at 191.

17 UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective, 2012, at 142-143.

18 It remains to be seen to what extent common law allows for the recognition of insolvency-related judgements; see UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective, 2012, at 145 et seq. and subsequently the English Supreme Court in *Rubin and another v Eurofinance SA and Ors* 2012 UKSC 46. The latter decision effectively led to the amendment of the Model Law by the UNCITRAL Model Law on Recognition and Enforcement of Insolvency-related Judgements (MLJ) in 2018.

19 https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/ml_recognition_gte_e.pdf (last accessed on 16.9.2019).

20 UNCITRAL Model Law on Recognition and Enforcement of Insolvency-related Judgements Part II: Guide to Enactment, 2019, at 35 et seq.

Secs. 335 to 340 InsO begin with conflict-of-laws provisions which, similar to Arts. 7 to 18 EIR, determine which substantive law is to be applied to certain insolvency law matters. Secs. 341 and 342 InsO then contain substantive provisions on the filing of claims and entitlement to quotas, which by their very nature can only apply to domestic proceedings. Such regulations are alien to the Model Law.

Rules on the recognition and support of foreign proceedings and administrators are found in secs. 343 to 358 InsO. The regulatory system is again similar to the EIR, since the law distinguishes between the recognition of the opening decision on the one hand (sec. 343 para. 1 InsO) and the recognition and enforcement of resulting effects on the other (secs. 343 para. 2, 353 InsO) before regulating the availability of a German non-main proceeding (secs. 354 to 358 InsO).

1. Recognition of the opening decision, sec. 343 para. 1 InsO

Sec. 343 para. 1 sentence 1 InsO establishes the principle of full automatic and statutory recognition for the opening of foreign insolvency proceedings in Germany, meaning that such a recognition does not require any court proceeding or constitutive decision before a German court. Instead, recognition is provided automatically by law which means that in a case with no dispute about the recognition of a foreign non-EU insolvency proceeding, including the resulting plan or discharge, its effects in Germany, e.g. a stay or a debt write-off, would be respected by stakeholders autonomously based on the statutory recognition in sec. 343 InsO. Only if a stakeholder objects to the enforcement of these effects in Germany, would the court seised with the relevant dispute hear arguments on the matter of recognition as a precondition of the requested decision. For instance, if a debt write-off under a US Chapter 11 plan would include a German tax claim, the enforcement of the tax claim would depend on the recognition of plan effects and the German tax court hearing the case would hear and decide the matter.

The court seised with a recognition dispute would need to be satisfied that the foreign proceeding producing the litigated decision is a foreign 'insolvency proceeding'. The court would also hear arguments relating to the two exceptions to a recognition of such proceedings provided in sec. 343 para. 1 sentence 2 InsO: (1) that the foreign court does not have international jurisdiction according to German law rules (jurisdiction or COMI objection), and (2) that the specific effect of the foreign proceeding to be recognised is incompatible with fundamental principles of German law (public policy objection).

German international insolvency law is recognition-friendly. It requires neither reciprocity (as German international civil procedure law does in sec. 328 para. 1 no. 5 of the Code for Civil Procedure – ZPO) nor a formal recognition decision. Instead, the determination of recognition is only a preliminary question in the context of the dispute over the consequences of recognition.

a) Opening of a foreign 'insolvency proceeding'

Sec. 343 para. 1 sentence 1 InsO requires the foreign proceeding to be classified as 'insolvency proceedings'. German law lacks a legal definition of such proceedings along the lines of Art. 2(a) ML. According to the explanatory memorandum and the relevant German case law of the Federal Civil Court (*Bundesgerichtshof* – BGH), any proceedings which pursue the same objectives as insolvency proceedings under the German Insolvency Code are to be regarded as insolvency proceedings.[21] It is the function and effect of foreign proceedings that matter, not their specifics in certain aspects, for example with regard to the (lack of) grounds for opening proceedings.[22] It therefore does no harm if the foreign proceeding can also be opened without testing any grounds for opening proceedings[23] or if the decision to open proceedings does not necessarily have to be made by a court.[24] Instead insolvency proceedings are characterised as *collective* proceedings responding to the debtor's insufficiency of assets and intended to deal with this under the pari passu principle.[25] Such foreign collective proceedings may also be entirely geared to the restructuring of the debtor.[26]

The resulting interpretation of the term 'foreign insolvency proceedings' with its focus on the collective nature seems perfectly in line with the definition of 'foreign proceedings' in Art. 2(a) ML. Relevant deviations should hardly occur in practice. In fact, German courts held that US Chapter 11 proceedings,[27] Russian bankruptcy proceedings,[28] Norwegian concordat

Notes

21 Cf. the recitals to these rules in BT-Drucks. 15/16, at 21.
22 BGH, 13.10.2009 – X ZR 79/06, NZI 2009, 859, 861 at 15; BAG, 27.2.2007 – 3 AZR 618/06, NZI 2008, 122.
23 BGH, 13.10.2009 – X ZR 79/06, NZI 2009, 859, 861 at 15.
24 Cf. the recitals to these rules in BT-Drucks. 15/16, at 21.
25 OLG Hamburg, 1.3.2018 – 6 U 242/15, BeckRS 2018, 8679 at 30; OLG Munich, 22.12.2010 – 20 U 3526/10, ZInsO 2011, 866, 868.
26 Cf. the recitals to these rules in BT-Drucks. 12/2443, at 236.
27 BGH, 13.10.2009 – X ZR 79/06, NZI 2009, 859, 860 at 9 et seq.; BAG, 27.2.2007 – 3 AZR 618/06, NZI 2008, 122.
28 OLG Hamburg, 1.3.2018 – 6 U 242/15, BeckRS 2018, 8679 at 30 et seq.

proceedings,[29] Danish insolvency proceedings,[30] Swiss insolvency proceedings[31] and Brazilian restructuring proceedings[32] are 'foreign insolvency proceedings' which usually resulted in their recognition. In addition, para. 2 of sec. 343 InsO also guarantees that interim proceedings are also covered by the system of automatic recognition. Lacking a strict concept of collectivity and the need for a common pool problem, an English Scheme of Arrangement was not held to be a recognisable 'foreign insolvency proceeding'.[33] It remains to be seen whether law reform in the UK will create a type of scheme that would require a new assessment.

b) Jurisdiction or COMI objection

Foreign proceedings that are qualified as 'foreign insolvency proceedings' under sec. 343 para. 1 sentence 1 InsO are principally recognised in Germany. There are only two grounds for objection: lack of international jurisdiction and public policy.

Sec. 343 para. 1 sentence 2 no. 1 InsO excludes recognition of foreign insolvency proceedings if, according to German law, the opening court does not have international jurisdiction to open proceedings. The German court must examine this objection *ex officio* by applying relevant German rules on international jurisdiction to the case. Interestingly, German insolvency law does not provide any specific provision on international jurisdiction. This gap is commonly filled by the application of existing provision on local jurisdiction in sec. 3 InsO. Interestingly again, the structure of this provision resembles the structure of the original Art. 3 EIR. It contains a presumption for the registered office of a debtor company or the domicile of an individual debtor in its first sentence which is trumped by assessing the COMI of the debtor's business under sentence 2. As in the original EIR, the interpretation of the concept of the centre of the independent economic activity of the debtor is not further defined in German law. It was developed independently of Art. 3 EIR and is to be interpreted autonomously of the jurisprudence of the CJEU on Art. 3 EIR. In fact, German courts tend to find the COMI at the centre of the debtor's economic activity which again is allocated where the debtor makes business decisions ascertainable to third parties.[34] This approach essentially mirrors the common approach to the COMI concept followed by both EU and US courts. In case of a group enterprise, German courts tend to follow the US path and allow – in contrast to a strict entity-based approach of the CJEU[35] – for a sort of nerve centre[36] test by finding the COMI with the COMI of the holding company in case of a 'centralised administration' of both businesses.[37] It remains to be seen, however, whether this line will actually be upheld once the *Bundesgerichtshof* will decide the COMI of a group enterprise for the first time.

Using COMI as the relevant criterion for determining international jurisdiction, the German rules are very much in line with the substantial standards of the Model Law, especially since the Model Law also leaves the interpretation of the COMI concept to national law.

Technically, however, the matter of international jurisdiction does not just determine the scope of relief available after the recognition of a foreign proceeding as it does in the Model Law. In Germany, the lack of international jurisdiction hinders recognition altogether. As a consequence, no effect of the foreign proceeding or measure of its representative are recognised in Germany. German courts have no discretion in this respect. As a result, German international insolvency law only recognises foreign *main* proceedings. Foreign non-main proceedings cannot extend their effects to Germany even if they were opened abroad as main insolvency proceedings. The underlying legislative decision is motivated by the wish to prevent foreign jurisdictions from establishing or exercising broad jurisdictional rules beyond the established lines of COMI by signalling that proceedings commenced based on these rules would show no effect in Germany. Accordingly, especially German debtors would find little relief in such proceedings. Schemes made available to foreign debtors in Singapore or a post-Brexit UK under a broad local jurisdiction rule are not attractive to German enterprises with a COMI in Germany.

The non-recognition of foreign non-main proceedings could be considered a significant difference to the standards of the Model Law. However, if one considers that the recognition of foreign proceedings as non-main under the Model Law neither produces the recognition effects of Art. 20 ML nor permits support measures concerning assets located outside the state of

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29 BGH, 14.11.1996 – IX ZR 339/95, BGHZ 134, 79 = NJW 1997, 524.
30 OLG Frankfurt am Main, 24.1.2005 – 20 W 527/04, NJOZ 2005, 2532, 2534.
31 BGH, 27.5.1993 – IX ZR 254/92, BGHZ 122, 373 = NJW 1993, 2312.
32 LAG Hesse, 4.8.2011 – 5 Sa 1550/10, BeckRS 2012, 69432.
33 BGH, 15.2.2012 – IV ZR 194/09, NJW 2012, 2113, 2114 at 22-24.
34 OLG Brandenburg, 19.6.2002 – 1 AR 27/02, ZIP 2002, 1590; AG Cologne, 1.2.2008 – 73 IN 682/07, NZI 2008, 254, 256; AG Hannover, 24.9.2018 – 903 IN 540/18, ZIP 2018, 2285, 2286.
35 CJEU, 2.5.2006, C-341/04, Slg. 2006, I-3813 at 35-37 – *Eurofood*. See also CJEU, 15.12.2011, C-191/10, EU:C:2011:838 at 28 – *Rastelli*.
36 See *in re OAS S.A.*, 533 B.R. 83, 100-103 (Bankr. S.D.N.Y. 2013); *in re Oi Brasil Holdings Coöperatif U.A.*, 578 B.R. 169, 195 (Bankr. S.D.N.Y. 2017).
37 OLG Brandenburg, 19.6.2002 – 1 AR 27/02, ZIP 2002, 1590; AG Cologne, 1.2.2008 – 73 IN 682/07, NZI 2008, 254, 255.

proceeding (cf. Arts. 21(3), 23(2) ML), the differences fade away. They further disappear when the duties to cooperate are taken into account. In case of a foreign main insolvency proceeding and several secondary insolvency proceedings, including a German one, the duty to cooperate under sec. 357 para. 1 InsO also extends to the relationship between the secondary insolvency administrators.

c) Public policy objection

The second and final ground for non-recognition is the public policy objection in No. 2 of sec. 343 para. 1 sentence 2 InsO. It provides that the recognition must not lead to a result that is manifestly incompatible with major principles of German law, in particular where it is incompatible with basic constitutional rights. A similar objection is provided in Art. 6 ML. Effectively, the public policy objection is the only objection available in Germany against the recognition of a foreign main insolvency proceeding and also its restructuring plan or statutory discharge (see below). Its interpretation is key to the way in which German courts handle foreign procedural effects.

The objection actually provides grounds for non-recognition in cases where constitutional procedural rights of affected parties, in particular the right to be heard, were neglected or infringed in the foreign proceedings. On the other hand, constitutional protections of substantive creditors' or shareholders' rights are unlikely to have any relevance, since these protections do not hinder infringements by German insolvency law. Hence it is held that effects of foreign proceedings that are familiar to those of German proceedings, especially a discharge or a plan, cannot be held incompatible with major principles of German law.[38]

2. Recognition effects

a) Effects of the commencement of foreign proceedings

Where the German court recognises the opening of foreign (main) insolvency proceedings in accordance with sec. 343 para. 1 InsO, the court decision to commence foreign insolvency proceedings produces the same effects in Germany as in the opening state (theory of extension of effect). *Lex fori concursus* applies under sec. 335 InsO. The appointment of an administrator is recognised, as is a stay resulting from the opening of a foreign proceeding. The competence to administer local assets is transferred to the foreign administrator unless local secondary proceedings are opened. The local administrator is then obliged to cooperate with the foreign administrator pursuant to sec. 357 para. 1 InsO. The foreign main insolvency administrator may also participate in the creditors' meetings pursuant to sec. 357 para. 2 InsO and submit his own insolvency plan pursuant to sec. 357 para. 3 InsO. Surpluses in the secondary insolvency proceedings are to be distributed to the foreign main insolvency proceedings in accordance with sec. 358 InsO. In addition, secs. 345 to 352 InsO provide for rules that enable notices and register entries in Germany, regulating the effects of the recognition in case of debtor's dispositions towards bona fide third parties or pending litigation involving the debtor. All these effects occur automatically, without the need for a German court to grant any respective relief.

Overall, the effects of the recognition of the commencement of foreign proceedings meet the standards of Arts. 20 and 21 ML. The possibility of domestic secondary insolvency proceedings on domestic assets with purely territorial effect is expressly provided for in Art. 28 ML. The cooperation obligations anchored in Art. 29 ML can be found in sec. 357 InsO. In this respect, the German regulations fully comply with the standards of the Model Law.

b) Effects of other decisions in the recognised foreign proceedings

The recognition of the opening of the foreign proceedings gives effect to the immediate legal consequences of the opening decision under the *lex fori concursus* in Germany (sec. 343 para. 1 InsO). Other decisions of the foreign court, in particular decisions on interim measures before the opening decision or decisions in the further course of proceedings such as to confirm a restructuring plan or issue a discharge, are automatically recognised pursuant to sec. 343 para. 2 InsO. It should be stressed that there is no need to request an additional recognition or relief. Instead, the recognition of these ancillary decisions follows automatically from the recognition of the opening of proceedings. Where the implementation of a plan requires acts of enforcement in Germany, sec. 353 InsO makes German enforcement law available (cf. sec. 722 ZPO).

This recognition-friendly regime means that even decisions substantially affecting the rights of local creditors or shareholders are automatically recognised in Germany based on the need to recognise the opening of the foreign procedure under sec. 343 para. 1 InsO.[39] As a result, German law does not enable a separate review of a plan or discharge along the lines of Art. 22 ML for the protection of local creditors. Indeed, *lex fori*

Notes

38 See BGH, 18.9.2001 – IX ZB 51/00, NJW 2002, 960, 961.

39 Cf. the recitals to these rules in BT-Drucks. 15/16, at 24.

concursus trumps the creditors' *lex causae* without any additional protection under local rules or a minimum quota for local German creditors.[40] As long as excessive plan provisions or the way plan procedures were handled towards foreign stakeholders do not trigger the public policy objection (see above), recognition is automatic. And even if the effects of a confirmed plan or the infringement of basic procedural rights justify the rejection of a plan based on that objection, the prior decision to commence proceedings may still be recognised and enable other effects of the foreign proceeding to extend to Germany.[41]

Sec. 343 para. 2 InsO does not, however, extend to insolvency-related decisions of the foreign court. In this respect, recognition remains subject to the rules of German civil procedural law in sec. 328 ZPO where requirements of reciprocity certainly do not reflect the recognition-friendly requirements of the new MLJ.

Commentary

German international insolvency law follows the principle of universality. While it did not originate as an implementation of the relevant UNCITRAL Model Law, it follows the same ideas and principles. Furthermore, the national mechanisms do not fall short of the standards set by the Model Law in all key aspects. In particular, the German provisions regarding foreign main insolvency proceedings are proving to be much more recognition-friendly as they extend the effects of foreign decisions automatically without the need for a formal recognition decision by a German court. There is no room for discretion and no need for a request for relief. Instead, the opening of foreign insolvency proceedings that are main insolvency proceedings in the eyes of German courts always results in the statutory and automatic recognition of the effects of the proceedings, including any stay and any plan unless a public policy objection is justified. In this respect, German law offers more than the Model Law requires. Foreign non-EU restructurings in particular can rely on these mechanisms when involving assets or stakeholders in Germany.

Notes

40 See BGH, 14.11.1996 – IX ZR 339/95, BGHZ 134, 79 = NJW 1997, 524.
41 See BGH, 13.10.2009 – X ZR 79/06, NZI 2009, 859, 862 at 24.

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