LEGAL ANALYSIS

Localisation of Assets under the European Insolvency Regulation (Recast)

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Abstract

On 26 June 2017, the existing Insolvency Regulation (EIR 2000), in legal force since May 2002, will be repealed on the day of the entry into force of the EU Insolvency Regulation (recast) (EIR 2015). It allows for two or more parallel insolvency proceedings in two or more EU states. Of prime importance is the question where an asset can be located, as was the case in Nortel Network. The mechanism the EIR uses is localisation rules, indicating where a debtor's assets must be deemed to be located. The EIR 2015 contains eight of these rules, including rules for shares, financial instruments, cash held in bank accounts and copyrights. The author presents a short survey of these.

Introduction

On 26 June 2017, the EIR 2000[1], in legal force since May 2002, will be repealed on the day of the entry into force of the EIR 2015.[2] The legislative process was commenced on the basis of EIR 2000 art.46, which obliges the European Commission (EC) to present to the European Parliament, the Council and the Economic and Social Committee "… a report on the application of this Regulation". This report is commonly referred to as the *Heidelberg-Luxembourg-Vienna Report*, which was published in 2013. The title reflects the involved universities—and professors of these institutions—as principle drafters.[3] EIR 2000 art.46 furthermore requires that the report "… shall be accompanied if need be by a proposal for adaptation of this Regulation". The EC's proposal of 12 December 2012[4] is based on said report, on discussions and consultations with a group of experts and an appraisal of the effects on existing EU policy.[5]

The need for renewal was based on the EC's identification of five main shortcomings in the EIR 2000 that the proposal aims to address: (1) the scope of EIR 2000 does not include pre-insolvency proceedings, hybrid proceedings and certain personal insolvency proceedings; (2) the application of the rule of international jurisdiction of a court (that is, the centre of main interest (COMI)) of an insolvent debtor has led to some difficulties and to forum shopping by relocating the COMI; (3) commencing secondary proceedings, which must be winding-up proceedings, has been shown to disturb the efficient administration of the debtor's assets; and (4) as there is no obligation to publicise the opening of insolvency proceedings, creditors need to be aware of insolvency proceedings for having their claims lodged by improving the Member States' registration procedures—and the EIR 2000 does not deal with the insolvency of groups of companies. Many of these needs have been addressed in the new regulation, the EIR 2015, for which I refer to already available literature.[6]

Localisation of assets: general remarks

Where an asset is located is of prime importance in an insolvency case. The mechanism the EIR uses in both the EIR 2000 and the EIR 2015 is localisation rules. A localisation rule is a rule that indicates where a debtor's assets must be deemed to be located so that it is possible

* It should be disclosed that the author has advised the European Committee on the recast of the Insolvency Regulation.

[1] Regulation 1346/2000 on insolvency proceedings [2000] OJ L160/1.

[2] Article 92 of Regulation 2015/848 on insolvency proceedings (recast) [2015] OJ L141/19.

[3] B. Hess, P. Oberhammer and T. Pfeiffer, *European Insolvency Law: The Heidelberg-Luxembourg-Vienna Report*, published in 2013 available at: *http://ec.europa.eu/justice/civil/files/evaluation_insolvency_en.pdf* [Accessed 28 February 2017]. As a commercial edition published by CH Beck, Hart, Nomos, 2014.

[4] Proposal for a Regulation amending Regulation 1346/2000 on Insolvency Proceedings COM(2012) 744 final. See B. Wessels, *International Insolvency Law*, 3rd edn (Alphen aan den Rijn: Kluwer, 2012), Ch.IV.

[5] Staff Working Document Impact Assessment Accompanying the document Revision of Regulation 1346/2000 on insolvency proceedings SWD(2012) 416 final.

[6] See Reinhard Bork and Renato Mangano, *European Cross-border Insolvency Law* (Oxford: Oxford University Press, 2016); Gabriel Moss, Ian F. Fletcher and Stuart Isaacs (eds), *Moss, Fletcher and Isaacs on the EU Regulation on Insolvency Proceedings*, 3rd edn (Oxford: Oxford University Press, 2016); Reinhard Bork and Kristin van Zwieten (eds), *Commentary on the European Insolvency Regulation* (Oxford: Oxford University Press, 2016).

to determine the scope of operation of (cross-border) insolvency proceedings. The main purpose of such rules is to clearly identify the location of assets that will be subject to, and therefore covered by, insolvency proceedings that have been opened in a certain country. Under the EIR 2015, the general principle of universalism is embraced: insolvency proceedings opened in one Member State have universal effects and therefore cover all assets of the debtor regardless of their location within the EU. Although under these circumstances the problem of asset localisation would seem to be less relevant, it is becoming complicated whenever the question arises whether the state or states where assets of the debtor are located recognise the coverage of these assets by foreign insolvency proceedings. As a consequence, different laws may apply and it is therefore of utmost importance to determine which assets are subject to which law. EIR 2015 art.2 contains definitions which have specifically tailored meanings formulated for "… the purposes of this Regulation". It is, however, submitted that EIR 2015 art.2(9) also applies when assets are situated in (non-EU) third states.[7]

The reason that the EIR 2015 deals with localisation follows from the rather compelling (but not very substantiated) wording of Recital 39 to the EIR 2015:

> "This Regulation should provide for rules to determine the location of the debtor's assets, which should apply when determining which assets belong to the main or secondary insolvency proceedings, or to situations involving third parties' rights in rem. In particular, this Regulation should provide that European patents with unitary effect, a Community trade mark or any other similar rights, such as Community plant variety rights or Community designs, should only be included in the main insolvency proceedings."[8]

The EIR 2015 provides for uniform rules regarding the determination of the territorial location of the assets and is therefore decisive in respect of: (1) the question of whether assets belong to the main insolvency proceedings and whether or not rights in rem—on assets located abroad—are affected; or (2) the question of whether these assets belong to the territorial proceedings, as such proceedings can only affect the assets located in the state in which the proceedings are opened. Interestingly, EIR 2015 art.2(9) contains eight categories of assets, whereas EIR 2000 art.2(g) contained just three rules for locating assets (tangible property, property and rights ownership and claims).[9] Short comments will now be provided on the eight categories of assets.

Registered shares

Registered shares in companies (EIR 2015 art.2(9)(i)) other than the intermediate securities referred to in art.2(9)(ii), are located in the Member State within the territory of which the company having issued the shares has its registered office. This location rule is not surprising; shares generally have been located in the Member State where the issuer has their registered office. It is noted that this rule results in a similar approach with what is accepted as a norm under the company law statute, which creates more legal certainty.

Financial instruments

The second category is formed by financial instruments, "… the title to which is evidenced by entries in a register or account maintained by or on behalf of an intermediary (book entry securities)", see EIR 2015 art.2(9)(ii). These are to be treated as situated in the Member State in which the register or account in which entries are made is maintained. An example is the situation that a debtor holds bonds through a clearing house, such as Euroclear. The debtor's interests in these bonds are regarded as "book entry securities". Van Zwieten[10] observes that the chosen language is very similar to that used to define "book entry securities collateral" in Directive 2002/47 on financial collateral arrangements.[11] I support her submission in that this definition (along with the related definition of "financial instruments" in the Directive) will likely be considered relevant to the interpretation of these terms in the EIR 2015.

Cash held in a bank account

The provision regarding the location of cash held in a bank account (art.2(9)(iii)) contains two subcategories for the location of cash in a bank account: (1) for cash held in accounts with a credit institution, the Member State indicated in the account's International Bank Account Number (IBAN); or (2) for cash held in accounts with a credit institution which does not have an IBAN, the location is the Member State in which the credit institution holding the account has its central administration. Where, however, the account (in the meaning of (1) and (2)) is held with a "… branch, agency

[7] See the European Court of Justice, which decided in relation to EIR 2000 art.2(g), see *Comité d'entreprise de Nortel Networks SA v Rogeau* (C-649/13) EU:C:2015:384; [2015] I.L.Pr. 33 at [52]: "It should be added in this connection that, although Article 2(g) of Regulation No 1346/2000 refers expressly only to property, rights and claims situated in a Member State, that provides no ground for inferring that that provision is not applicable if the property, right or claim in question must be regarded as situated in a third State."

[8] The second subparagraph in the cited recital relates to the EIR 2015 art. 15.

[9] Compared to the EIR 2000, the categories of EIR 2015 art.2(9) Points (i)–(iii), (v) and (vi) are new, whilst the others are partly amended. The present EIR 2015 art.2(9)
solves to a large extent present uncertainties and conflicts, see Hess, Oberhammer and Pfeiffer, *European Insolvency Law: The Heidelberg-Luxembourg-Vienna Report* (2013), p.183. Critical regarding EIR 2015 art.2(9) is Björn Laukemann, "Regulatory Copy and Paste: The Allocation of Assets in Cross-border Insolvencies—Methodological Perspectives from the Nortel Decision" (2016) 12(2) J. Priv. Int. L. 379.

[10] Kristin van Zwieten in Bork and Van Zwieten (eds), *Commentary on the European Insolvency Regulation* (2016), 2.30.

[11] Directive 2002/47 on financial collateral arrangements [2002] OJ L168/43.

or other establishment", the cash held in that account will be the Member State in which the branch, agency or other establishment is located.

Property and rights in a public register

The next category is property and rights in a public register (EIR 2015 art.2(9)(iv)). Property and rights, ownership of or entitlement to which is entered in a public register other than those referred to in art.2(9)(i) (registered shares), are located in the Member State under the authority of which the register is kept. The rule is sometimes referred to as the *lex registra*. This provision is applicable, for example, in the case of shipping registers and aircraft registers, and extends to intangible property. Said "Member State under whose authority the register is kept" is not necessarily the State in which the register is physically situated. It could also be a consular register or a centralised international register. The term "public register" includes a register kept by a public authority but the definition stresses a register for public access, an entry in which produces effects vis-à-vis third parties. An obvious problem is registration outside the EU, e.g. main insolvency proceedings in England, a secondary insolvency proceeding in France and a ship physically located in France but registered in Panama for convenience. This situation gives rise to the question of whether the ship falls outside the scope of the secondary proceedings, therefore, in principle, constituting an asset of the main proceedings or, given the fact that local harbour authorities and local creditors will have claims against the debtor, whether the ship falls within the scope of the secondary proceedings.

European patents

European patents (EIR 2015 art.2(9)(v)) are treated as to be located in the Member State for which the European patent is granted. The reference to "European patents" relates to the Convention on the Grant of European Patents (5 October 1973), resulting in a form of patent that does not have unitary effect throughout the EU. For this reason, art.2(9)(v) refers to "the Member State for which the patent is granted".[12]

Copyright and related rights

Copyright and related rights are to be treated as being located in the Member State within the territory of which the owner of such rights has its habitual residence or registered office, see EIR 2015 art.2(9)(vi). Some six years ago, in this Journal, Van der Weide and I made several proposals for the localisation of certain assets.[13] As a recommendation we formulated:

> "Patent rights, trademark rights and copyrights and rights vested in them are located at the place where the patent holder, trademark proprietor or copyright holder has his seat or his domicile."

Save for certain patents, which have their own location rule in art.2(9)(v), our study may further shed light on EIR 2015 art.2(9)(vi) or determine the location of assets not under the scope of EIR 2015 art.2(9). In our recommendation, we included "rights vested" in these intellectual property rights. Rights vested in trademark rights and copyrights are absolute rights vested in trademark rights and copyrights, such as user and security rights (usufruct, pledge). Where trademark rights and copyrights are intangible, they qualify as intellectual property rights in a general sense. This means that, strictly speaking, the localisation of intellectual property rights is fictitious. In the context of insolvency proceedings, however, the location of intellectual property rights can be a relevant issue, for example, in connection with determining the scope of effect of insolvency proceedings that have been opened. It has not been explained what, in art.2(9)(vi), the term "related right" means. Here, it should be noted that various EU Regulations in the field of intellectual property rights provide their own rules in that the law applicable to the intellectual property right in question shall be determined on the basis of the seat or domicile of the proprietor of the intellectual property right.[14]

Tangible property

Tangible property, other than that referred to in art.2(9)(i)–(iv), is regarded to be located in the Member State within the territory of which the property is situated, see EIR 2015 art.2(9)(vii). This generally means: to be located in the place in which it is physically situated. This is the *situs naturalis*, which confirms the *lex rei sitae* rule for furniture, laptops and computers, large equipment, stock etc. What about tangible property in transit, a theme sometimes referred to as *res in transitu*? In the event that main proceedings are opened at a time in which certain tangible goods are in transit, the rules of the state within which main proceedings are opened are decisive to determine the location of these goods for the purposes of the regulation.

Claims against third parties

As to the insolvent debtor's claims against third parties, other than those relating to assets referred to in art.2(9)(iii) (cash in bank accounts), these are treated to be located in the Member State within the territory of which the third

[12] This type of patent should be distinguished from European patents that have unitary effect (as provided for by Regulation 1257/2012 implementing enhanced cooperation in the area of the creation of unitary patent protection [2012] OJ L361/1). This "European patent with unitary effect" is mentioned in EIR 2015 art.15, providing that for the purposes of the Insolvency Regulation this right should always be included in the main insolvency proceedings.

[13] J.A. van der Weide and B. Wessels, "Where to Locate Assets, Subject to Certain Security Rights?" (2011) 26 J.I.B.L.R. 369.

[14] See, for example, art.16(1) of Regulation 40/94 on the Community trademark [1994] OJ L11/1 pursuant to which the seat or domicile of the trademark proprietor determines which law is applicable to the Community trademark. Similarly, art.22 of Regulation 2100/94 on Community plant variety rights [1994] OJ L227/1, and art.27 of Regulation 6/2002 on Community designs [2002] OJ L3/1.

party required to meet the claims has the centre of its main interests, as determined in accordance with art.3(1), see EIR 2015 art.2(9)(viii).

The location of the Member State in which the centre of main interest of the third party—i.e. the debtor of the insolvent debtor—is decisive. Sometimes this point of departure is referred to as *lex debitoris*, *debitor debitoris* or "account debtor". The basis for this location rule is the idea that courts of the specific country are in the best position to impose payment of the claim.[15] For example, a Swedish company (A) has a claim against a German debtor, in the event of A's insolvency the claim will be located where the third party (the German debtor) has its COMI (let's assume: Germany). However, if the German debtor is an establishment of a French company, the claim is likely to be located in France. If the German debtor is a branch of a Dutch bank and A is the holder of a credit account, the claim will be located in the Netherlands, not because the bank will be the obligor and the COMI will be in the Netherlands, but because for an account held by a branch, the location is the Member State in which this branch is located (EIR 2015 art.2(g)(iii)). In practice, the rule is not as clear as it appears as the term "claim" is undefined and the method of determining the COMI is left open. This may give rise to questions relating to: who has the burden of proof, what type of proof is required, whether there is a rebuttable presumption with regard to the registered office and which court has the jurisdiction to decide—the relevant court in the main proceedings, the relevant court in the secondary proceedings or the court where the third party is established.

Conflicts

It might very well be that disagreement arises with regard to the specific location of an asset. This will have its root in the inter-relationship between main and secondary insolvency proceedings. A clash concerning the location of certain assets has been one of the questions decided by the Court of Justice of the EU (CJEU) in the *Nortel* case in 2015.[16] The CJEU reformulates one of the questions to be decided upon as a question of law applicable, more specifically: (1) the allocation of international jurisdiction between the court hearing the main proceedings and the court hearing the secondary proceedings (in this case England and France respectively); and (2) the identification of the law applicable when determining the debtor's assets that fall within the scope of the effects of the secondary proceedings. The key question, says the CJEU, is: must EIR 2000 arts 3(2) and 27 (nearly similar provisions in art.3(2) and 34 EIR 2015) be interpreted as meaning that the courts of the Member State in which secondary insolvency proceedings have been opened (France) have exclusive jurisdiction, or concurrent jurisdiction with the courts of the Member State in which the main insolvency proceedings have been opened (England), to rule on the determination of the debtor's assets falling within the scope of the effects of those secondary proceedings? The CJEU decides that these courts have concurrent jurisdiction. Where the EIR applies, it is therefore possible that the court of the secondary proceedings can rule on the determination of the debtor's assets falling within the scope of the effects of those proceedings. The CJEU approaches the quagmire of the domain of conflict of law with caution. It safely assumes that the effects of secondary insolvency proceedings are restricted to the assets of the debtor which, on the date of the opening of the insolvency proceedings, were situated within the territory of the Member State in which the secondary proceedings were opened. It then refers to Recitals 6 and 23 (now: Recitals 3 and 66 to the EIR 2015), providing that the EIR sets out uniform rules on conflict of laws which replace national rules of private international law and that this replacement is limited, in accordance with the principle of proportionality, to the field of application of the rules laid down by the EIR:

> "… the regulation does not preclude, in principle, all application, in the context of a related action, such as those before the referring court, of the legislation of the Member State of the court before which that action is pending, relating to the private international law of that State, in so far as Regulation 1346/2000 does not contain a uniform rule governing the situation at issue".[17]

The CJEU's conclusion, however, is firm "… in relation to whether, for the purposes of applying Regulation 1346/2000, assets must be regarded as situated within the territory of a Member State on the date of the opening of the insolvency proceedings, [as] that regulation does lay down uniform rules, excluding, to that extent, any recourse to national law".[18]

Regarding EIR 2000 art.2(g) (now with a larger scope in EIR 2015 art.2(9)), the CJEU holds that EIR 2000 art.2(g) provides that the

> "… 'Member State in which assets are situated' is, in the case of tangible property, the Member State within the territory of which the property is situated, in the case of property and rights ownership of or entitlement to which must be entered in a public register, the Member State under the authority of which the register is kept and, finally, in the case of claims, the Member State within the territory of which the third party required to meet them has the centre of his main interests, as determined in Article 3(1) of that regulation".[19]

[15] For an application, see Higher Regional Court Vienna, 9 November 2004 (*Stojevic*), NZI 2005, p.56, in which it was considered that the location of a claim is determined according to the third point laid out in EIR 2000 art.2(g); the predecessor of EIR 2015 art.2(9)(viii).
[16] *Nortel* EU:C:2015:384; [2015] I.L.Pr. 33.
[17] *Nortel* EU:C:2015:384; [2015] I.L.Pr. 33 at [49].
[18] *Nortel* EU:C:2015:384; [2015] I.L.Pr. 33 at [50].
[19] *Nortel* EU:C:2015:384; [2015] I.L.Pr. 33 at [51].

The Court seems to deliberately limit the conflict of law issue to the specific case before the secondary (in this case French) court, cutting all discussions as to where intellectual property rights (also or exclusively) may be located. The CJEU considers that, in order to identify the assets falling within secondary insolvency proceedings, it is sufficient to establish whether, on the date of the opening of the insolvency proceedings, these assets were situated—within the meaning of EIR 2000 art.2(g)—within the territory of the Member State in which those proceedings were opened, and "… it is not relevant in that regard to determine, as the case may be, in what other State those assets were situated at a subsequent stage".[20] Quite remarkably, the CJEU then sets out a marching order for the French court:

> "Consequently, as regards the disputes before it, the referring court will have the task of establishing, [(1)] first, whether the assets at issue, which do not appear capable of being regarded as tangible property, are property or rights ownership of or entitlement to which must be entered in a public register, or [(2)] whether they must be regarded as being claims. Next [(3)], that court will have the task of determining, respectively, whether the Member State under the authority of which the register is kept is the Member State in which the secondary insolvency proceedings have been opened, namely the French Republic, or [(4)] whether, as the case may be, the Member State within the territory of which the third party required to meet the claims has the centre of his main interests is the French Republic. It is only if one of those checks has a positive outcome that the assets at issue will fall within the secondary insolvency proceedings opened in France."[21]

Van Zwieten submits that the finding of concurrent jurisdiction between the court of the main insolvency proceedings and the court of the second insolvency proceeding is likely to lead to a race to file to determine the location of a contested asset because the judgment issued first will be entitled to recognition in the rival Member State.[22] It seems, indeed, that the CJEU has the same sentiment, judging the following consideration:

> "However, as the Advocate General has observed in point 60 of his Opinion, Article 25(1) of Regulation No 1346/2000 [equivalent to EIR 2015 art.32(1); the author] will enable the risk of concurrent judgments to be avoided, by requiring any court before which a related action, such as those before the referring court, has been brought to recognise an earlier judgment delivered by another court with jurisdiction under Article 3(1) or, as the case may be, Article 3(2) of that regulation."*Nortel* EU:C:2015:384; [2015] I.L.Pr. 33 at [45].

The case was decided under the regime of the EIR 2000. At this juncture, however, reference must be made to EIR 2015 art.42 (Cooperation and communication between courts), providing that in order to facilitate the co-ordination of main and secondary insolvency proceedings concerning the same debtor, a court before which a request to open insolvency proceedings is pending, or which has opened such proceedings, "… shall cooperate with any other court" before which a request to open insolvency proceedings is pending, or which has opened such proceedings, to the extent that such co-operation is not incompatible with the rules applicable to each of the proceedings. It is my opinion that, under the new EIR 2015, both courts should seek a way to commonly address a location issue and avoid the situation that another jurisdiction is confronted with a hard-line automatic recognition (of the decision the other court took in isolation).

To conclude, the present list of localisation rules in EIR 2015 art.2(9) is certainly an improvement compared to the former situation under EIR 2000 art.2(g). That serves deal certainty, in the sense of strategic planning of asset location, and provides more certainty where it should come to legal conflicts about asset localisation.

[20] *Nortel* EU:C:2015:384; [2015] I.L.Pr. 33 at [53].
[21] *Nortel* EU:C:2015:384; [2015] I.L.Pr. 33 at [54].
[22] Van Zwieten in Bork and Van Zwieten (eds), *Commentary on the European Insolvency Regulation* (2016), 2.31.