The complex landscape of Nordic Forum Shopping

The Scandinavian legal landscape with regard to cross-border insolvency proceedings has become significantly more complex over the last decade or so, as the authors explain

> REGIONAL UNIFORMITIES ARE BEING SUPERSEDED BY SUPRA-NATIONAL COLLABORATIONS ON A MUCH FARTHER-REACHING SCALE

Denmark, Norway, Sweden, Finland and Iceland are often referred to as 'The Nordics' seeing as they are, in most metrics, quite similar; the languages are mostly similar, the historic throwbacks are nearly identical, and the legal backdrop is largely uniform due to longstanding and widespread coordination efforts between the varying governments.

In 1933 the 'Nordic Bankruptcy Convention' entered into force, providing a legal framework for cross-border recognition and enforcement of bankruptcies between the participating countries (Denmark, Sweden, Norway, Iceland and Finland). The scope of the convention is limited to bankruptcies and compulsory arrangements with creditors, the latter of which no longer exist in all the participating countries.

The regional uniformities are, however, being superseded by supra-national collaborations on a much farther-reaching scale, e.g. the European Union. Denmark, Sweden and Finland are members of the EU, but Norway is only part of the European Economic Community. Furthermore, due to its opt-outs, Denmark is not part of the EU Justice and Home Affairs cooperation and therefore the European Insolvency Regulation ('EIR') does not apply to Denmark (and the request for a parallel agreement has been declined or at least sidelined pending the Brexit negotiations).

The Scandinavian legal landscape with regard to cross-border insolvency proceedings has therefore become significantly more complex over the last decade or so. Denmark and Norway have no automatic

recognition of foreign insolvency proceedings in place, and vice versa (apart from Scandinavian bankruptcies), and there is no automatic stay of enforcement for such foreign proceedings, either.

The recast EIR grants jurisdiction to open (main) insolvency proceedings in the courts of the Member States where the debtor has its center of main interest ('COMI', as explained further below) and confines the other Member States to opening secondary proceedings, provided the debtor has assets there. It also lays out more or less specific guidelines/ requirements for cooperation between the insolvency courts and insolvency practitioners in the various Member States, and it allows for the appointment of an independent coordinator of insolvency proceedings regarding groups of companies.

The Nordic Bankruptcy Convention, on the other hand, does not specifically address the matter of international jurisdiction and, instead, merely states that "*If bankruptcy proceedings are opened against a debtor in one contracting state, they will also encompass the debtor's assets in the other states.*", cf. Article 1 of the Convention. The Convention, therefore, relies entirely on national jurisdiction regulations and widens the scope of those regulations to also encompass the other Nordic countries on the proviso that the business had its 'seat' in the state opening the proceedings (without providing any guidance on how to determine the location of that seat). The Convention therefore relies on a single, regional, type of insolvency proceedings instead of main and secondary proceedings in each contracting state. This regional use of *lex concursus*, however, is limited to insolvency-related matters like the filing and adjudication of claims, waterfall priority, claw back, announcement in each state's official gazette etc. whereas, for instance, rights *in rem* follow *lex rei seitus*.

Danish and Norwegian Insolvency courts will claim jurisdiction if the debtor's habitual place of business is located in Denmark or Norway, respectively.

Norwegian Insolvency law is, however, rapidly moving towards adopting the concept of COMI in determining jurisdictional issues. This process is now formalised by adding a new chapter to the Norwegian Bankruptcy Act, which is expected to enter into force later this year. The new Norwegian legislation also introduces the concept of secondary insolvency proceedings, which will enable the opening of limited bankruptcy proceedings against foreign companies operating in Norway, essentially mirroring the possibility for secondary proceedings under the recast EIR.

Finland and Sweden are bound by the recast EIR and their insolvency courts will have jurisdiction to open main insolvency proceedings if the debtor's COMI is situated in Finland or Sweden, respectively.

Can international recognition be established?

This Danish and Norwegian lack of reliance on the debtor's place of its registered office raises the question of whether the Nordic Bankruptcy Convention can be used as a vehicle to obtain the otherwise lacking international recognition of Danish or Norwegian insolvency proceedings and to obtain an EU-wide stay of enforcement proceedings against the debtor's foreign assets.

The EIR(r) concept of COMI should be an established (although slightly vague) concept by now, being the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties, cf. EIR(r) article 3(1). The EIR(r) provides specific rebuttable presumptions regarding the COMI for legal persons and natural persons, both individuals exercising business activities and private individuals, but according to Recitals 23-34 the aim of the regulation is not to hinder COMI-relocations (i.e. 'Forum Shopping') per se, but only to curtail fraudulent or abusive relocations.

Therefore, the EIR(r) certainly accepts that bankruptcy proceedings can be opened in one member state against a company even though the place of that company's registered office is located in another state.

With Norway moving towards this same concept of COMI, the jurisdictional issue is rapidly becoming a non-issue in relation to Norwegian businesses. Danish jurisdiction regulations, however, rely on the debtor's habitual place of business (or residence in case of non-business natural persons), which at best could be construed to be a quasi COMI-like rule.

Therefore, the requisite alignment between the different Nordic countries' jurisdictional regulations seems possible, which could allow for beneficial COMI-relocations.

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> THERE IS NO COMPLETE OVERLAP BETWEEN THE RECAST EIR AND THE NORDIC BANKRUPTCY CONVENTION

What would the specific purpose of such relocations be, seeing that the Nordic insolvency regimes are already quite similar?

As Danish and Norwegian insolvency practitioners will tell you, there are two very significant shortcomings to Danish and Norwegian cross-border insolvency proceedings which all claim to have universal effect. There are (i) no guarantees of international recognition, and (ii) no automatic stay of enforcement against assets located in other jurisdictions, unless such jurisdictions offer unilateral recognition on their own accord, i.e. Germany, Belgium, Spain and Finland.

If it is possible for a Danish or Norwegian company to "seek safe harbor" under Swedish or Finnish jurisdiction, that would activate the recast EIR, including the automatic EU-wide recognition and stay of enforcement proceedings. The Swedish/Finnish insolvency proceedings would also enjoy automatic recognition throughout the Nordics by virtue of the Nordic Bankruptcy Convention.

It should be noted, however, that there is no complete overlap between the recast EIR and the Nordic Bankruptcy Convention. The recast EIR applies to Swedish and Finnish bankruptcies, reconstructions and schemes of arrangements, whereas the Convention only applies to bankruptcies. Therefore, any Danish or Norwegian company seeking refuge under the recast EIR will be forced to do so through bankruptcy proceedings if they wish to maintain recognition throughout the Nordics.

How would one go about doing this?

Danish and Norwegian companies are not allowed to shift their registered office outside of their respective countries, but seeing that jurisdiction under the recast EIR is based on the COMI of the debtor and not the registered office, the registered office can remain in place.

To effectively shift a company's COMI, its strategic management (as opposed to the day-to-day management) needs to be relocated to Sweden/Finland, which is certainly a lesser task than moving the entire business.

Furthermore, it must be demonstrated to the outside world that the shift of COMI has taken place. As stated by the European Court of Justice (the "CJEU") in the *Eurofoods* (case C-341/04) and the *Interedil* (case C-396/09) cases, the factors surrounding the shift must be both objective and ascertainable by third parties in order to rebut the presumption of the registered office determining jurisdiction.

Therefore, the mere fact that a parent company located in another Member State in fact directs the debtor's actions is insufficient to shift COMI to that Member State, seeing that the respective circumstances are not readily apparent and ascertainable for the outside world. The CJEU has also given an example at the other end of the spectrum: a letterbox company which only does business in another state than the one in which it is registered will have its COMI in that other state. The CJEU does, however, not give much specific guidance as to the broad spectrum of cases between these two extremes.

Conceivably then, if the shift was reflected in the debtors' outgoing communication, e.g. listed in auto signatures, invoices, letters, website etc., the shift should meet the 'ascertainable by third parties' test and therefore be acknowledged by the courts under the recast EIR as being genuine.

This effect of publicly "advertising" one's COMI, even if doing so is unintentional, is demonstrated in an English case (*Thomas & another v Frogmore Real Estate Partners & others* [2017] EWHC 25 (Ch)) where the deciding metric for determining whether the company's respective COMI was in Jersey or in the UK was their publicly known ties with an English agent and an English financer who had funded their English real estate investments. These factors, which were apparent and ascertainable by third parties, led to the company's COMI being considered to be in the UK under the EIR.

As stated above, Norway is implementing a COMI-based jurisdiction mirroring that of the recast EIR, so that the Norwegian companies should not face jurisdictional resistance in this regard.

Under Danish law, the jurisdictional issue is slightly more complex. Danish insolvency courts will claim jurisdiction if the debtor conducts business in Denmark (i.e. the overall management of the debtor takes place in Denmark), or, alternatively (if no business is conducted in Denmark) if the debtor's habitual residence/registered office is located in Denmark. This suggests that even if a Danish company were to shift COMI to another country, Danish courts would still claim jurisdiction by virtue of the Danish registered office (which can't be shifted abroad under Danish company law). That suggestion is certainly correct if the shift is made to an EU country (other than Sweden or Finland) or a non-EU country, due to the fact that the Danish insolvency law does not recognise foreign insolvency proceedings. It should be noted, however, that the Danish case law appears to be non-existent on this matter.

However, if the shift is made to Sweden or Finland and bankruptcy proceedings are opened there, the Nordic Bankruptcy Convention would apply and prevent the Danish courts from opening competing bankruptcy proceedings, because the Convention supersedes the Danish jurisdictional regulation.

So it appears that it is in fact possible to use the Nordic Bankruptcy Convention as a vehicle to "seek safe harbor" under the recast EIR and thereby obtain recognition throughout the EU.

> IT IS IN FACT POSSIBLE TO USE THE NORDIC BANKRUPTCY CONVENTION AS A VEHICLE TO "SEEK SAFE HARBOR" UNDER THE RECAST EIR AND THEREBY OBTAIN RECOGNITION THROUGHOUT THE EU

Who would be the most likely candidates for such a shift?

As alluded to earlier, this form of COMI relocation is 'only' relevant for debtors who could benefit from the application of the recast EIR, i.e. debtors with assets located in other EU countries who would otherwise risk that those assets become subject to singular enforcement proceedings to the benefit of the most vigilant creditor. In this situation, the general body of creditors could conceivable benefit from the COMI relocation due to the safeguards put in place by the recast EIR.

This argument also counters the reservations stated in the recitals of the recast EIR regarding abusive or fraudulent COMI relocations, the desired outcome being to protect the general body of creditors as such and not to unduly target specific creditors or groups of creditors.

It is furthermore limited to debtors located in states which are contracting parties under the Nordic Bankruptcy Convention, as this convention is used as the vehicle to activate the recast EIR.

A practical example is that of the companies in the distressed Norwegian oil sector, where we have seen a significant uptick in bankruptcies in recent years, but any Danish or Norwegian business with assets in other EU jurisdictions could likewise benefit from such a COMI relocation.

As stated above, this legal patchwork is at the crossroads of the EU law, the Nordic Bankruptcy Convention and the national law in each of the Nordic countries and therefore contains many more facets than may be described in this article.

As the Nordic Bankruptcy Convention conveys jurisdiction throughout the Nordics to the opening court, any company considering shifting its COMI to Sweden or Finland should thoroughly analyze and weigh the cons and pros associated with submission to that court's insolvency proceedings and *lex fori concursus*. ■

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