

The convergence and harmonisation of insolvency laws

Christoph Paulus discusses the impact of harmonisation on a European and wider global scale



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There are only few nationals who can better understand what it means to have a converged and harmonised insolvency law than a German. Since it is not even 150 years ago that the territory which nowadays forms Germany was a coloured carpet of many independent jurisdictions which all had different laws – ranging from the *ius commune* (a mixture of ancient Roman and Germanic law) over French law and Prussian law to manifold local laws. Thus, if a merchant from Hamburg, for example, had establishments in Heidelberg, Berlin, and Munich, and he went bankrupt, the consequence was that this one person's estate was split up according to the respective assets' location and was subjected to probably four different proceedings with four different insolvency laws. Today, the same incident would lead to one insolvency proceeding with the application of one insolvency law. No need to emphasise that this is an example for an unambiguous progress in historical development – at least to the degree that an insolvency proceeding's efficiency is based on the maximisation of the estate.

As convincing as this national example might be, the mere efficiency of certain legislative models would probably not suffice to achieve the degree of convergence that we have nowadays on an almost global level. What has to come with this insight is the political will to converge and to harmonise. And surprisingly, such combination of comprehension and political will

occurred twice within a few years during the last decade or so – firstly on a global level, and secondly on the European level.

Towards global consensus

As to the global level, it took the shock of the collapse of the Tiger States and the subsequent decline of the economic-financial situation of Japan, Russia and Brazil which brought us (not unlike the present credit crisis) extremely close to a worldwide disaster in the late 1990s to teach the politicians the before seldom recognised but nevertheless eminently important stabilising function of an effective insolvency law for any national economy. The then G7 states learned this lesson and it came, thus, as a logical consequence that their newly founded Financial Stability Forum established a Compendium of Standards comprising of twelve economic and legal areas which need constant surveillance due to their fundamental significance for the financial stability – one of them being insolvency law. This movement was the single most important trigger for the Bretton Wood Institutions' (International Monetary Fund and the World Bank) engagement in the field of law.

Their compendiums about the necessary contents of any modern and efficient insolvency law had – and still has – an enormous unifying impact on the world's different jurisdictions. Not only that they serve quite often as an imposed guideline for the modernisation of outdated laws due to these institution's powerful conditionality – they have beyond

that an educative effect for many further legislative efforts to reform the existing laws. Moreover, the similar guideline promulgated by UNCITRAL has convinced many legislative decision-makers that there is something like a global consensus about best practices in this subject. It is this united power which makes it understandable that, for instance, nowadays almost any jurisdiction has in its insolvency laws something like a reorganisation proceeding (rather than a composition proceeding) – a feature that has been until a few decades ago an almost exclusive peculiarity of the US law and which, for a long time, was never been thought of as being transferable to other jurisdictions. It is hard to think of a more striking example of harmonisation of world laws.

European equality

And yet, practice taught us that there is an even more striking example – namely the legislative development within the European Community. Even though the political will reaches far before the abovementioned East Asia crisis, it is likely to be more than just accidentally that the European Regulation took its final shape and its entering into force also around the 1990s. It appears as if only then the time had become ripe for moving closer together and to begin an era which later legal historians probably will describe as the development of a modernised insolvency law.

Needless to repeat here the historical development of the Regulation's application which went right from the beginning into the opposite direction of the



political and legislative intent to keep the various insolvency laws untouched; the famous statement of the Regulation's fourth Recital to prevent forum shopping is actually a political confession for the equivalence of the member states' insolvency laws. It is futile to speculate about the foreseeability of this assumption's faultiness; at any rate, the European law stimulated the insolvency lawyer's imagination and creativity in a degree which, in fact, could not have been foreseen.

Forum shopping

It was not until the entering into force of the Regulation that quite many experts and stakeholders became aware of the possibility of a forum shopping also in the area of insolvencies (for many on the continent it was quite unknown that there were bankruptcy havens such as the Bermudas, Cayman Islands, etc.). The consequence was that one started to window shop and to consider which shop might be best suited for one's own interests. The vivid discussion of

the so called migration cases of Deutsche Nickelwerke, Brochier, and Schefenacker demonstrated impressively that the shops had been put under one roof – forming now a big warehouse where checking and shopping gets more and more convenient.

Whereas scholarly scrutiny still recognises innumerable differences and discrepancies (cf. the highly recommendable book edited by McBryde/Flessner/Kortmann, *Principles of European Insolvency Law*, 2003), in practical terms convergences and harmonisations are increasingly underway. A topic like group insolvency law, ignored for decades despite its practical urgency, is all of the sudden on the agenda of many of the member states' legislators. Similarly, the need to introduce a kind of pre-insolvency proceeding – since the competitor shop has it – has caused those very legislators to act who before had not the slightest incentive to change anything. It is, thus, justified to interpret the present development as a movement towards harmonisation which, however, is likely to be for a long time still far from uniformity – since, to stay with the picture, one better does not offer exactly the same as the competitor in the shop next door.

Internationalisation

One last promoter for the European harmonisation deserves to be mentioned at good last – being, actually, probably the most important one: namely the growing personal internationalisation. Formerly purely national conferences are now visited by foreign colleagues; the expert from member state A is invited to speak at a colloquium in member state B; practitioners act in a foreign jurisdiction – thereby learning to respect the local peculiarities – or they advise even a foreign legislator! All this is very new in the field of insolvency law and adds a fascinating feature to an already fascinating subject.

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