



FUTURE DEVELOPMENTS IN CROSS-BORDER INSOLVENCY LAW

by Christoph G. Paulus

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1) What has been achieved so far

For centuries, jurisdictions followed the so called territoriality principle; *i.e.* they closed their doors to foreign administrators (and creditors as well) and did not allow their law to reach out beyond the borders of their respective jurisdictions.

In the nineties, the UNCITRAL model law on trans-border insolvency was proposed. At present, it has been adopted by ten jurisdictions. A number of other jurisdictions plan to do adopt it in the future, or draft their own cross-border law based on the model. These jurisdictions represent both common law and civil law countries. Thus, it is a proper starting point for any jurisdiction to have its own cross-border insolvency law be identical to or modelled after the UNCITRAL proposal.

2) Deficiencies and ambiguities

However, it does not come as a surprise that developments in this field did not stop with the model law. The more this law and its principles are used in practice, the more it will become obvious that there are deficiencies and ambiguities that need to be addressed.

At this point, it is worth pointing out a phenomenon that proved to be quite influential in the development of cross-border insolvency law, namely, a certain regionalisation. Starting as early as the end of the 19th century, some Latin American countries entered into treaties dealing with cross-border issues. The first was the Montevideo Treaty, which was specified

* World Bank.

some decades later by the second Montevideo Treaty. In between these dates, a number of other Latin American and Caribbean countries developed still another treaty, commonly known as the Bustamante Code.

Other regions followed, admittedly, a considerable time later. Thus, the member states of the European Union developed the European Insolvency Regulation in the late nineties. At about the same time, some 16 states in central Africa formed a group of common law jurisdictions called OHADA and, finally, the members of NAFTA developed the ALI project which brings both common law and civil law jurisdictions under one roof.

These regional undertakings go further than the UNCITRAL model law. This is no surprise as these regions share closer ties among members than they do with the rest of the world. Therefore, the mutual trust in each others' systems is greater. It might, therefore, appear that regionalisation would be a driving force in cross-border insolvency law. However, the achievements of these regional efforts, increasingly, appear to have deficiencies.

3) Consequences

What can be learned from the development of cross-border insolvency law as described so far? The least one can say is that regionalisation is a recognised way of developing cross-border insolvency law, and that some regions seem to have sufficient economic, political and cultural commonalities to set up treaties through which they may proceed on their own path.

Thus, if some countries in Asia (if not all) can find commonalities that justify the development of their own regional cross-border insolvency law, much can be learned from the deficiencies of existing model laws and regional treaties.

Almost paradigmatic is one of the most intricate problems in cross-border insolvency law, namely, the insolvency of groups. It is “solved” as of today by means of the term “centre of main interests” (*cf.* Model Law, EIR, and, to a certain degree, the OHADA legislation). There is, nevertheless, a far-reaching consensus that this solution is far from satisfying, and the European Court of Justice has just (2 May 2006) decided accordingly.

Therefore, what needs to be found is a more precise determination of where a main proceeding is to be opened. One possibility would be to request a determination from group companies themselves at the time when the group is formed through obligatory registration. For those to whom this appears an unwelcome invitation to forum shop, one could look for other

more objective criteria that might determine the place where a group insolvency proceeding should be handled.

A further problem is the splitting of one main proceeding into several secondary proceedings. As a compensation for the loss of efficiency, the present rules provide for co-operation duties. However, what appears to be an attractive solution proves, in practice, to be a stumbling block. The problem of co-operation increases to the degree to which it is possible to open secondary proceedings. As a result of a political compromise, the present rules in the said treaties have quite a low threshold for such opening, namely, an establishment as a combination of an asset plus human means.

Possible solutions that could be tested in a new regional treaty are, for example, to heighten this threshold by increasing the requirements that need to be met in order to open a secondary proceeding, or providing an exclusive right to file a petition to open a secondary proceeding to the debtor and the administrator of the main proceeding, or to require this administrator's consent to a petition of a creditor.

One final example of the said deficiencies is that the highly influential European regulation is designed exclusively for its member states. All third countries outside the territory (as covered by the member states) are excluded and ignored. One might thus say that this legislative piece adheres to a territoriality principle on a higher level. The consequence thereof is that each member state has its own cross-border insolvency law with regard to third countries—the German one, *e.g.* modelled after the rules of the regulation, and the English one modelled after the UNCITRAL model law.

Looking at this example, it would be advisable to avoid a “closed-shop approach” and to provide an opening opportunity for the rest of the world or, at least, interested new members of the regional neighbourhood right from the outset.

4) Outlook

In this way, the regions of the world can add their experience, knowledge and imagination to the further development of cross-border insolvency law. As each region has its own historical, economic and legal background, such multilateral approaches will ensure that the future cross-border law will enjoy general acceptance and application.