

European Insolvency Laws: Convergence or Harmonisation?

Paul Omar asks if insolvency law has developed in Europe to the extent that convergence is now a possibility



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WORK ON A COMMON SET OF RULES ALSO EXISTS AND MAY BE SEEN IN THE WAY IN WHICH THE UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY 1997 WAS DEVELOPED



In 1895, writing in a Scottish law journal, the doyen of Dutch private international law, Professor Josephus Jitta, put forward three possibilities for progress in the bankruptcy world. The first was to have a world law, passed by a federal parliament assembled for that purpose, although he considered this to be an unattainable objective. The second was the assimilation of bankruptcy rules through the elaboration of a common set of rules to be adopted by domestic legislators. This appeared to be a more practical outcome, although also seemingly difficult to achieve. Lastly, he put the case for a treaty, by which identical rules would be inserted in the laws of state parties. As to the contents of any such treaty, he posited as the minimum rules on jurisdiction (based on the “centre of the business life” of the debtor), publicity for proceedings, transactional avoidance and equality of creditors.¹ His call for a treaty has been answered in part through the production of the European Insolvency Regulation, itself the successor to a treaty-based model, after a process that endured over 30 years from when the Insolvency Working Party was first set up in the late 1960s. The contents of the EIR differ somewhat from Professor Jitta’s list, although there are recognisable elements in common.

Work on a common set of rules also exists and may be seen in the way in which the UNCITRAL Model Law on Cross-Border Insolvency 1997 was developed. Although not a treaty in form, it is designed to be adopted within the domestic law of jurisdictions wishing to assimilate its provisions. The Model Law, however, just like

the EIR, deals mostly with procedural co-ordination and the effect of recognition and enforcement of judgments. More recent international work in the insolvency law field has progressed in a different way to that Professor Jitta foresaw with, for example, the work by UNCITRAL Working Group V resulting in the production of a Legislative Guide on Insolvency Law in 2004. The recommendations in this guide provide advice intended to be used by domestic authorities and legislators when preparing new insolvency laws and rules or as part of a review process of the adequacy of their existing statutory and regulatory frameworks. In this way, the advice, although not structured as rules per se, sets out a common framework for consideration by those involved in designing and reviewing insolvency systems. This also reflects the trend towards benchmarking and setting out best practice that can be seen in texts such as, *inter alia*, the Principles of European Insolvency Law 2003, the EBRD Core Principles for an Insolvency Law Regime 2004, the INSOL Europe Communication and Cooperation Guidelines 2006 and the EBRD Principles in respect of the Qualification, Appointment, Conduct, Supervision and Regulation of Office-Holders in Insolvency Cases 2007.

What of Professor Jitta’s first, but “unattainable” objective, a world law? It is a rarely remembered fact that the 1970 draft of the European Bankruptcy Convention, predecessor of the EIR, was accompanied by a model law of six articles dealing with substantive insolvency

matters for enactment as part of the domestic laws of the member states. The later 1979 draft truncated this to three articles dealing with rules on property claims by the debtor’s spouse, set-off and reservation of title. By later drafts, substantive law had dropped off the agenda, leaving only the procedurally focused rules seen in the EIR. It was perhaps the fundamental differences in legal culture within the then European Community (now Union) that prompted this choice of formula, pending the sufficient development in commercial law harmonisation to make it feasible for approximation (or convergence) of laws. As Professor Manfred Balz has noted, the differences in Europe are wider than those prevailing in the United States, where, despite a relative homogeneity in legal culture, the creation of a domestic bankruptcy law took a century to develop.² The question might be asked as to whether commercial (and particularly, insolvency) law has now developed in Europe to the extent that convergence of laws is now a possibility? Indeed, would actual harmonisation now be conceivable given the advances in insolvency law and practice?

In support of this possibility, two factors may be considered. The first is the unceasing quest for the optimal insolvency law system, which has stimulated reform activity in the European Union since the 1990s. In certain countries, notably in Central and Eastern Europe, reforms were prompted by the disintegration of the Soviet Bloc, with countries like Czechoslovakia,³ Estonia,⁴ Hungary,⁵ Latvia⁶ and Lithuania⁷ proceeding to reforms in that



period. The 1990s were also propitious for changes in Finland,⁸ Ireland,⁹ Malta,¹⁰ Portugal¹¹ and Sweden.¹² France also faced calls for modifications prompting the passing of a major amendment law.¹³ The turn of the millennium saw projects initiated and completed in the United Kingdom,¹⁴ Spain¹⁵ and again in France.¹⁶ Other countries reassessing their legislation included, *inter alia*, Finland,¹⁷ the Netherlands¹⁸ and Slovakia.¹⁹ Greece also enacted a new law in 2007 based on the French system,²⁰ while in France two sets of amendments were made to its law in 2008 and 2010.²¹ In 2011, Spain comprehensively reviewed its earlier law.²² Further reform proposals in other European Union countries are known, particularly in states that have had to respond to an enduring financial crisis and the more recent spectre of sovereign bankruptcy.

Part of the reform process in these countries will have involved the use of the benchmarking texts noted above as well as advice from the relevant organisations operating in the insolvency sector, although consideration of the scope of reforms in other jurisdictions has undoubtedly also taken place. This insight into, acknowledgment of and, in some cases, direct inspiration from the laws elsewhere has been, it could be suggested, accelerated by the existence of the second factor, the EIR itself. Since its entry into force in 2002, the EIR has generated hundreds of cases, many on the issue of jurisdiction and has seen avoidance techniques (such as

manipulation of the COMI) used to overcome the cumbersome nature of its jurisdictional paradigm, an example being seen in *Re: Collins & Aikman*.²³ Indirectly, these cases have pitted insolvency legal systems against one another as they have revealed the desire by office-holders and creditors alike to be able to choose the system that appears to offer them the best outcomes. This has led to examination of other states seen as “competitors” in a process of “regulatory arbitrage” and emulation of the best features of these models through direct borrowings of institutions, procedures and techniques.

At present, it appears that this comparative insolvency process is destined to remain at domestic level. It is difficult to see member states agreeing to proposals from the European institutions for substantive rapprochement of their internal laws unless there were overwhelming economic benefits for them to do so. This would necessarily be a precondition to persuading the European institutions to undertake the process. Given the length of time it has taken to reach the adoption of the EIR, it might be doubtful to expect solutions to be forthcoming in the short to medium terms. Harmonisation, however, has never gone away as the utopian ideal of law-making. In fact, measures in the related company law field have shown that, where harmonisation has been the aim, it has worked reasonably well, provided it is targeted at discrete areas and not systematically across the field as a

whole. Perhaps that targeting might offer the way to making progress, so that Professor Jitta’s first and radical ideal of a world law may be realised, if only to begin with on a modest basis and at a regional level within the European Union.

FOOTNOTES

1. J. Jitta, *International Bankruptcy Codification (1895) 7 Edinburgh Juridical Review* 305, at 308-310.
2. M. Balz, *The European Union Convention on Insolvency Proceedings (1996) 70 American Bankruptcy Law Journal* 485, at 490.
3. Act no. 328/1991. After the separation of this country into two territories in 1993, Slovakia readopted the same piece of legislation as Act no. 328/1993.
4. Law on Bankruptcy 1992; Commercial Code 1995.
5. Law no 49 of 1991.
6. Law of 3 December 1991.
7. Law on Bankruptcy 1992.
8. Corporate Reorganisation Law 1993:47.
9. Companies Act 1990.
10. Companies Act 1995.
11. Decree Law no. 132/93 of 23 April 1993; Decree Law no. 127/96 of 8 August 1996.
12. Reorganisation of Business Act 1996:764.
13. Law no. 94-475 of 10 June 1994.
14. Insolvency Act 2000; Enterprise Act 2002.
15. Law no. 22/2003 of 9 July 2003.
16. Law no. 2005-845 of 26 July 2005.
17. Bankruptcy Law no. 120/2004.
18. Bankruptcy Act 2004. A later proposal, initiated in 2007, to rewrite the entire bankruptcy law, was abandoned by the Dutch Government in 2010.
19. Act no. 7/2005.
20. Insolvency Code of 2007. Major changes were made to this text in 2011.
21. Ordinance no. 2008-1345 of 18 December 2008; Articles 57-58, Law no. 2010-1249 of 22 October 2010.
22. Law no. 38/2011 of 10 October 2011.
23. *Re: Collins & Aikman Europe SA and others* [2006] EWHC 1343.

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AT PRESENT, IT APPEARS THAT THIS COMPARATIVE INSOLVENCY PROCESS IS DESTINED TO REMAIN AT DOMESTIC LEVEL

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