Comment

Professor Paulus on Advocate General Jacobs' Opinion in the Eurofood case

The keenly awaited preliminary ruling on the Parmalat subsidiary Eurofood which has pitted the Italian and Irish courts against each other was handed down on 27 September. The European Court of Justice (ECJ) is expected to publish its final ruling on Eurofood around the end of the year.

Here one of Germany's most senior insolvency academics, Professor Christoph Paulus of Berlin's Humboldt University, explains why he disagrees with two aspects of Advocate General Jacobs' Opinion; the question of whether the European Insolvency Regulation can be used for group insolvencies; and how proceedings can be 'opened' under the Regulation.

Professor Christoph Paulus, Humboldt University

The following critique is best read in conjunction with the full Eurofood opinion which you can see at www.globalturnaround.com/resources

Comment One: Group Insolvencies

Advocate General Jacobs has delivered an Opinion in the Eurofood case which was awaited by numerous commentators all over Europe with high expectations ranging from hope to fear, depending on the individual attitudes towards the modernising impact of the Regulation.

As a matter of fact, the gist of the Eurofood case lies in the question of whether or not the European Regulation can be used for developing a kind of group insolvency law or not.

The answer is a clear 'no' when one looks at the historical considerations presented by the Virgós-Schmit Report and at the wording of the Regulation, above all the second sentence of Article 3(3) with its inflexible requirement that secondary proceedings must be liquidation proceedings and Article 31 (duty to co-operate and communicate information), with its applicability exclusively between main and secondary proceedings (instead of additionally between various main proceedings). To that extent, one could say in respect of the Regulation, something which is true for many other codifications, "It is more a fruit than a seed of legal thinking".

By contrast, the answer is a clear 'yes' when one takes into account the date of the Regulation and its explanatory report. It was written in the early nineties. For millennia previously, such a time-span of about a decade or so between then and today would have been irrelevant; but starting in the late nineties, insolvency law has reached such a level of global topicality that there has been constant development ever since.

UNCITRAL

This is amply demonstrated by the legislative guidelines presented by the IMF (1999) the World Bank (2001) and UNCITRAL (2005). The hottest topic in this context is the evolution of a group insolvency law which reflects and regulates, in an adequate manner, the world-wide predominant situation in trans-border insolvency cases.

If one is willing to follow the modernising approach, Mr. Jacobs' deliberations about the ascertainability of a debtor's centre of main interests in his answer to question four lose weight.

The ascertainability which is mentioned both in the Virgós-Schmit Report and in Recital 13 (but not in the Regulation itself!) might be necessary or at least helpful for individual persons or legal entities, far less so for economic groups, however. For them, the question which is much more important, particularly from the creditors' standpoint, is how to maximise the value of the insolvent group, be it through rescuing it or selling the group as a whole.

Therefore, ascertainability should be replaced in this context by the 'head office functions' approach as mentioned by Mr. Jacobs in paragraph 111, since that is usually the place from where such attempts of rescuing of selling can be started most efficiently.

Comment Two: Opening

A further comment needs to be made on Mr. Jacobs' answer to question one. Generally speaking, its consequence is that, where a 'provisional liquidator' is listed as a 'liquidator' in Annex C, a court's decision to commence preliminary proceedings is to be seen as the commencement of full insolvency proceedings such as are referred to in Article 16 (obligation to recognise prior opening of main proceedings).

This appears to be a misunderstanding of the preliminary period during which a court is bound to investigate whether or not the allegedly insolvent debtor is in fact insolvent.

After all, during this period it is not yet clear whether or not a proceeding will in fact be opened; the preconditions for opening are not yet proven. The fact that, nevertheless, more or less drastic restrictions are imposed on the allegedly insolvent debtor in many cases is due to the long-standing experience of insolvency practice that these persons tend to hide assets during this period. And they do so even if the investigation finally reveals that there is no insolvency.

Moreover, Mr. Jacobs mentions Article 38 extensively and neglects Article 25(1) subparagraph 3 almost entirely, except at paragraph 74. The latter norm, however, would make no sense if Mr. Jacobs were right in his answer to question 1. If ordering preliminary measures were already the 'opening' of an insolvency proceeding, there would be no need to make explicit provision in Article 25 for the recognition of preservation measures. Being part of the full proceeding, preservation measures would necessarily be covered by Article 16.

Secondary proceedings

But it is not only this consequence which amplifies the untenability of Mr. Jacobs' understanding. If a proceeding were to be considered to have been opened at a time when it is not yet clear whether or not the debtor is in fact insolvent, the irregularity could increase dramatically, since in that case the preliminary administrator would have the right according to Article 29 to have secondary proceedings opened in other Member States.

Pursuant to the first sentence of Article 27, these secondary proceedings are opened without investigation into the debtor's insolvency, the rationale of this omission being that the insolvency basis for opening a proceeding has already been demonstrated in the main proceeding.

Following Mr. Jacobs' understanding would lead into one or more 'insolvency proceedings' without any check as to whether these proceedings are justified or not.

Finally, because it would constitute more confusion than provide clarity if one had to distinguish between the varying intensities of different preservation measures, for instance if cumulative restrictive measures are imposed on the alleged debtor, the most reasonable answer to question one is the negative one.

For the same reason, for clarity's sake, the same holds true in cases where an insolvency law gives a court's commencement decision retroactive effect, since this is a technical provision which might be important for the calculation of, for example, certain time periods or the like but which cannot change the sequence of events as they take place. And it is the order in which events take place which can most reasonably be relied on in cases where priority is the decisive issue.

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Eurofood

The opinion handed down by an Advocate General of the European Union over a dispute between the Irish and Italian courts concerning a subsidiary of the bankrupt Parmalat group may make it more difficult to carry out group-wide restructurings in Europe.

The opinion delivered by Advocate General Jacobs on 27 September concerning the insolvency of Eurofood IFSC Ltd appears to favour the Irish courts in their claim that the subsidiary had its Centre of Main Interest (COMI) under the European Insolvency Regulation (EIR) in Ireland, and therefore should be wound up in Ireland.

The Italian administrator of Parmalat, Enrico Bondi, had put the same subsidiary into liquidation in the Parma Court, claiming it had jurisdiction rather than Ireland, prompting a crisis in the working of the EIR.

Last Summer the Irish referred the Eurofood dispute to the EU's highest court, the European Court of Justice (ECJ), in the form of four questions to be answered. The ECJ is due to deliver its final verdict around the end of the year.

In cases like this an Advocate General gives a preliminary opinion, which the ECJ may or may not follow. But so far it has done in about three quarters of cases, and the Irish lobby was delighted at Advocate General Jacobs's decisive opinion that main insolvency proceedings had been opened in Ireland and should take precedence everywhere in the EU.

The Eurofood case is important because it may affect the way the European Regulation is used in big restructurings. English practitioners have used the EIR in MG Rover for instance to base the insolvencies of seven subsidiaries around Europe in the UK, provoking anger and opposition in those countries, particularly Germany.

More recently Kroll have based the administration of subsidiaries of US car parts maker Collins & Aikman in ten different European countries in London.

Advocate General Jacobs stresses that the EIR was never designed for group insolvencies and that the COMI of each individual subsidiary has to be decided on its own merits. If the ECJ follows his lead in opposing 'group COMIs' then the English vision of European-wide restructurings using the EIR may be in jeopardy.

Principles of corporate insolvency law

By Professor Roy Goode
Published by Sweet & Maxwell
www.sweetandmaxwell.co.uk
Price: UK£145.00-216.00 euro

This fully updated third edition of Professor Goode's standard text on English insolvency law includes recent developments in the European Insolvency Regulation and the UNCITRAL Model Law on Cross-Border Insolvency, the latter which is set to be introduced by the UK next April.

Professor Goode's original edition was the first textbook to set down the conceptual framework of English corporate insolvency law and the title is regularly cited in court. In his preface the Professor notes that in the eight years since the second edition "there has been a period of intensive legislative activity." The Insolvency Act 2000 was swiftly followed by the Enterprise Act 2002, which largely abolished new administrative receiverships, replacing them with administration.

The Professor takes a swipe at the legislators for leaving the rules in such a complicated state: "It no longer suffices to be a lawyer; it is necessary to become a physical geographer in order to find one's way around provisions which are randomly dispersed among the body of the Act, the bizarrely numbered Schedules...with seemingly no logic to the distribution nor any conception that it might be useful if all the provisions dealing with the same subject were brought together in clearly stated requirements."

UK-based practitioners who seek to proclaim London as 'The Delaware of Europe' might take note, although they would probably retort that at least the UK system is still more workable than Germany's. And on the international front, there is a new chapter on the European Insolvency Regulation, which deals with the applicable law, jurisdiction, recognition and enforcement in relation to intra-community insolvencies and raises complex issues as to determination of the applicable law and its relationship to 'lex concursus'.

Professor Goode writes in a clear and easily read style, and refers to a lot of the current debates around the world on what insolvency law is for and how it should be practiced, particularly debates in the US. Since English law is playing such a big part in the rapidly evolving capital markets around the world, this book should be useful to anyone interested in the evolution of insolvency in a global marketplace.

To be published in March 2006

EU banking and insurance insolvency

Edited by Gabriel Moss QC and Professor Bob Wessels
Published by Oxford University Press
Price: UK£135.00

This new practitioner work provides analysis of the EU Directives 2001/17 and 2001/24 on the reorganisation and winding-up of insurance undertakings and credit institutions. It covers the impact both directives have upon the role and the tasks of the supervisory authorities in the EU insurance and banking market, including their branches in other EU countries. It also looks at the information to be provided to these authorities, the effects of the measures they can take, the law applicable to reorganisation measures and winding-up proceedings of these institutions.

The 352-page book contains an article-by-article commentary on both directives, as well as 28 separate surveys written by local specialists which describe how the directives will be implemented in their respective countries.