The European Insolvency Regulation – events and prospects

BY CHRISTOPH G. PAULUS AND MARC UDINK

After almost three years of its coming into force, the Regulation can be said to have reached solid ground. Not only that it is given the necessary recognition by the insolvency practitioners throughout the former 14 member states, it has also been duly respected by the new 10 member states of the European Union. However, an overview over the court decisions in the last year dealing with this statute amplifies that the main thrust still is in the area of recognition of main or secondary proceedings. This seems to indicate that certain stages within such insolvency proceedings have not yet been reached so that one still has to wait for disputes and subsequent decisions in those areas. An example for these stages would be the details of the co-operation duties in art. 31 seq. or the question of what exactly constitutes the *lex concursus* according to art. 4.

Centre of main interest

As to the aforementioned recognition issues, it has to be emphasised that the English courts do not refrain from playing a kind of risky game by applying art. 3 par. 1 with its famous 'centre of main interest' quite frequently in a rather irregular manner. Instead of scrutinising whether or not the presumption of the second sentence is to be followed or if this presumption is rebutted by given facts, they content themselves with downwriting meaningless formulas such as "and the court being satisfied that the EC Regulation does apply and that these proceedings are main proceedings as defined in art. 3 of the Regulation." Which evidence exactly did lead to the court's satisfaction and who has given it? Was any counter-evidence taken into account?

Questions like these indicate where the risk of such judicial behaviour lies. Not only does it undermine the fundamentals on which the Regulation is built– namely, placing trust in the proper functioning of other jurisdictions and their actors (for this, see already Paulus/Udink, *European Law and Trust*, Eurofenix Spring 2004, p. 8 seq.); they provoke, moreover, more or less understandable counter-reactions; e.g., an unhealthy race to the court house (like in Mönchengladbach/Germany) or a – on first sight futile – appeal to the highest court (as in the Daisytec case in France where the Cour de Cassation will have to decide on venue questions) or – even worse – an initiative to change the Regulation. A careful reading of the decision of the Oberlandesgericht Wien from November 2004 reveals exactly these sentiments, as it elaborates (in over-proportionally great length) that the above cited statement of an English court has to be acknowledged and that it cannot be rejected on the ground of a violation of the public order. It is to be hoped – for the sake of a further prospering of the Regulation – that the English courts learn to comply with the requirements of ordinary application of statutory law – irrespective of the fact that in some circles the idea is seriously discussed that New York and London should have (or get) the exclusive venues for any bigger international insolvency cases.

The influence of the European Court of Justice

It is one of the regrettable deficiencies of the Regulation, in comparison with its predecessor Convention, that it has lost the direct accessibility to the European Court of Justice. Needless to say, in insolvency matters, speed is of utmost importance. On the other hand, clarity on a European-wide level is evidently a great advantage for a uniform application of the Regulation – the best example for that being the aforementioned interpretation of art. 3 par. 1. However, since the Regulation is based on art. 61 and 67, the European Court of Justice can be approached only after all national instances have been passed. Because this is normally quite time consuming, it is to be feared that the European Court will not have too many chances to provide a clear and authoritative understanding.

Under these circumstances, the two cases have already reached the Luxemburg Court are to be welcomed. The issue in the first case is which centre of main interest is decisive for the applicability of art. 3 par. 1 if the debtor moves after the filing of the petition from one member state (Germany) to another one (Spain)? If the court of the first member state opens a main proceeding, it would do so even though at that time the centre of main interest is no longer in this state. However, no petition has been filed n the second member state. In this case, does the first court have the possibility, the right, or even the duty to pass on the case to the courts of the second member state? Or should it reject the petition for lack of jurisdiction under art. 3 par. 1?

The issue of the second case is related to the first one as it also results from some discrepancies between the time of the filing of the petition and the subsequent opening of the proceeding. After the filing in one member state (Ireland) another member state (Italy) opened a proceeding which it claimed to be a main proceeding – arguing ▸▸

that the centre of main interest were in fact there. The Irish courts, however, responded that in their jurisdiction the opening of an insolvency proceeding dates back to the time of the filing; therefore, they argued, a main proceeding had already been opened in Ireland and therefore barred the courts from other member states from opening a main proceeding.

It is strongly to be hoped that the European Court of Justice will use these predictably rare chances of deciding on the Insolvency Regulation and will render judgments which will decide not only about the issues at stake but will also give some more general guidelines for further treatment of these rules.

Cross-border cases

The Regulation is intentionally silent about the type of insolvencies which, in practical terms, are most dominant in cross-border cases – namely, group insolvencies. It is notorious that more often than not the insolvency of one member of a group causes the insolvency of other members, until the entire group is totally infected by this "virus". According to the Explanatory Report of Virgós/Schmit (n. 75), such interrelated insolvencies have to be treated independently, i.e. each insolvency constitutes an individual case.

This quite time-honoured rule appears to be somewhat outdated. It has its full justification in a situation where winding-up is the only option in insolvency law. Generally speaking, the liquidation of the various parts does not gain nor lose if it is done separately, and there is no urgent need for combining such procedures. However, if reorganisation is an option, things turn out differently. To the extent that the group as a whole has an added value compared with the sum of its individual members, such surplus is best preserved by handling the multiple cases in a uniform way – or, even better, to combine them. From an economic point of view, it would be best if these types of – i.e. groups which have an added value due to their mutual connectivity – would be treated as a singly unit – even though, admittedly, a number of unresolved legal problems would result from such an approach (in particular, protection of creditors of each member of the group).

The Regulation, however, builds up unnecessary obstacles for this more modern view, in that it demands in art. 3 par. 3, second sentence that secondary proceedings have to be winding-up proceedings. Nevertheless, the most modern Insolvency Codes, such as the one from Spain from the year 2004, contain rules that deal with group insolvencies. They permit, for example,the filing of the petition for any member of a group at the place of that court which is competent for the filing for the head of this group. These rules, quite certainly, form part of the insolvency law of such member states and constitute as such the *lex concursus* in relevant cases. Thereby, the intentionally neglected law of group insolvencies "creeps" into the Regulation and through that vehicle into the other member states. They, in turn, might be induced to adjust their insolvency laws accordingly, so that in the future the Regulation could lead to a mutual adjustment of the member states' insolvency laws. ■

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