Judicial cooperation within the EC Insolvency Regulation

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Introduction

The success of cross-border insolvencies within the European Community depends primarily on how effectively harmonisation between the different proceedings is conducted and on how thoroughly cooperation between the respective liquidators and courts can be achieved. Prior to the Insolvency Regulation taking force, the European Community lacked a legal framework for the coordination of cross-border insolvencies. Within its territorial and temporal scope the Insolvency Regulation replaces all previous bi- and multilateral agreements between member states. As an act of secondary EC law the Insolvency Regulation is binding in its entirety and directly applicable in all member states.

According to the Insolvency Regulation concurrent proceedings are possible only in the form of main and secondary insolvency proceedings. Given their legal background main and secondary insolvency proceedings inevitably host a certain conflict potential, as the opening of the secondary proceeding causes partial dissolution of the debtor's *total* assets to the detriment of the assets of the main insolvency proceeding. The opening of secondary insolvency proceedings leads to an apportionment of the insolvent debtor's total assets. Consequently only the apportioned assets may be dealt with and decided upon by the respective liquidator and court.

Although in cases of cross-border insolvency proceedings cooperation between liquidators is of utmost importance. Yet - in order to harmonize the decision making process - special circumstances might also call for an enhanced coordination and cooperation between insolvency courts.

Legal foundations for a common duty to cooperate

Art. 31 of the Insolvency Regulation provides for an obligation for cooperation and information exchange between liquidators. The Community Legislator introduced this provision in order to overcome possible contradictions, which may result from the fact, that the liquidator of the secondary proceeding enjoys a legal position independent from the one of the liquidator of the main insolvency proceeding. It is established as a substantive provision and is directly applicable in all member states.

Lack of an expressive legal foundation

The Insolvency Regulation lacks a provision similar to Art. 31 as far as the insolvency courts are concerned. Neither the legislative proceedings, nor other documents give a hint on whether the Community Legislator deliberately decided to exclude such a provision, or whether this omission is due to an editorial slip. Since the majority of national insolvency statutes vest the crucial tasks regarding the insolvency proceeding with the liquidator, it is quite probable that the Community legislator did not find it necessary to include provisions on cooperation and information between insolvency courts. Additionally, recital 20 of the Insolvency Regulation exclusively addresses the liquidators, stating that their mutual cooperation is a crucial basis for the effective realisation of the total assets.

Interpretation of Art. 31 of the Insolvency Regulation

Art. 31 of the Insolvency Regulation might be interpreted in such a way, that insolvency courts are not only free to cooperate, but legally obliged to do so. However, the wording of Art. 31 of the Insolvency Regulation unequivocally only speaks of the *liquidators´* duties to cooperate and communicate information. As an autonomous interpretation is required, one has to ask how the Community legislator had reasonably filled the gap (described) with respect to ensuring the success of European Insolvency Law. Still – even if submitting to this functional point of view – Art. 31 of the Insolvency Regulation cannot be interpreted as extending the scope of obliged cooperation and coordination to the insolvency courts. Art. 2b) of the Insolvency Regulation clearly defines (the) "liquidator" as a “*person or body whose function is to administer or liquidate assets of which the debtor has been divested or to supervise the administration of his affairs*”. Those persons and bodies are exhaustively listed in Annex C. As opposed to the Austrian Courts, *German Courts*

are not included in the listing. Furthermore, according to Art. 45 of the Insolvency Regulation, an involvement of the Council is required in order to amend the annexes. Taken together with the explicit reference to the Austrian Courts and the (clear) tenor of Art. 31 of the Insolvency Regulation one can hardly speak of a deliberate omission on behalf of the Community legislator. Therefore conditions for an analogy are not met. Consequently, a duty to cooperate between insolvency courts may not be deduced by analogy to Art. 31 of the Insolvency Regulation.

Duty to cooperate due to general principles (of Community Law)

Even if *de lege lata* an explicit provision regarding a duty to cooperate between insolvency courts is not given, such a duty might be deduced from the unwritten, general principles of Community Law. According to Art. 10 of the EC-Treaty member states are obliged to foster Community goals and to refrain from actions likely to have a detriment effect on the achievement of these aims. This implies the Community Law Principle of mutual trust – also referred to in recital 22 of the Insolvency Regulation. Having regard to that principle many authors assume that at least in cases of parallel opening decisions insolvency courts are under the (unwritten) obligation to provide mutual information and coordination. This, however, may not be compared to a possible *duty* of cooperation once the opening decision has been taken. Under the latter circumstances the question is no longer, whether or not to recognize another Court decision, but about significantly influencing a court decision on *the merits*. Under those circumstances considerations regarding the application of the mutual trust principle cannot be invoked without significantly touching upon the individual judge's independence and freedom of decision. Limitations to the principle of mutual trust would be unduly extended in the direction of an office support obligation. Therefore (unwritten) general principles of Community Law do not call for a duty to cooperate between insolvency courts.

Judicial cooperation under the Model Law

Contrary to the Community Legislator the UN General Assembly in December 1997 adopted a model law dealing - inter alia - with judicial cooperation in cross-border insolvency proceedings and aiming at improved access to courts for foreign liquidators. It serves as a blueprint for countries, which aim at harmonizing and internationalizing their insolvency laws. As such the model law is not binding and [– in order to be enforceable –] requires transformation into national law. The practical relevance of the model law is confirmed by the fact that it has been adopted by a number of states, among them the United States and Great Britain. Just as the European Insolvency Regulation the UNICITRAL Model Law aims at recognition of foreign insolvency proceedings. Unlike the European Insolvency Regulation, however, insolvency courts and judges are explicitly addressed and more thoroughly involved in the proceedings. Accordingly Art. 25 of the UNCITRAL Model Law states: „*The court shall cooperate to the maximum extent possible with foreign courts*“. This shall provide for direct cooperation without the necessity of involving diplomatic channels. The model law, however, does not provide for detailed proposals on how cooperation should be conducted and achieved. Art. 27 of the UNCITRAL Model law solely speaks of “*Communication of information by any means considered appropriate by the court*“. It also explicitly gives a wide margin for the incorporation of more specific examples by the adopting state.

Advantages and disadvantages of cooperation

When considering the cooperation between courts in case of cross-border insolvencies one should first ask, whether or not the advantages outweigh the disadvantages. The answer to that question determines whether or not the Community Legislator should be encouraged to create a provision similar to Art. 31 of the Insolvency Regulation for insolvency courts. I implicitly presuppose that insolvency courts within the European Community have similar tasks and competences, all of them sharing at least a certain, even if not substantive influence on major procedural decisions.

Advantages of cooperation

Cooperation between insolvency courts may contribute to improved and simplified gathering and usage of information, because courts can seek information from the concurring proceedings and introduce to the proceeding as “familiar to court” without necessity of further inquiries. Cooperation minimizes the risk of conflicting decisions in concurring proceedings. It may be required if liquidators – when dealing with a cross-border insolvency – conclude “protocols” in order to coordinate the insolvency proceeding at hand.

Disadvantages of cooperation

There are, however, also disadvantages and some practical and legal difficulties.

I first need to mention problems relating to language and mutual understanding. Due to the (otherwise) significant increase of procedural costs translators may not be of sufficient help in solving this problem. Obstacles to efficient cooperation between insolvency courts also result from the plurality of (substantive) insolvency laws (within the European Community) and – closely related to that – from the large variety of procedural concepts underlying insolvency. To begin with, the various insolvency laws to be found in the European Community have differing, sometimes conflicting goals. Additionally, there are legal difficulties - such as national standards on data protection. They pose a limit to cooperation and the related exchange of information between insolvency courts.

Readiness and willingness for cooperation

Quite apart from the scope of independence – both legally and in fact - that a judge enjoys when dealing with cross border insolvencies, it is the individual judge’s willingness to cooperate and coordinate, which decides, if cooperation between the respective courts is fostered and proceedings harmonized. The CoCo guidelines may offer substantive support.

Although the CoCo-guidelines are primarily addressed to the insolvency liquidators they also contain a number of provisions dealing with member state courts

(guidelines 1.1.; 4.3.; 10.2.; 16, 17.2. and 18). Guideline 16 contains the central provision regarding cooperation of courts.

A direct personal meeting of judges dealing with insolvency proceedings from the various member states of the European Community can contribute more to the spirit of cooperation than rules, which are more or less devoid of content. That, however, does not mean that the Community Legislator should not at least *consider* the adoption of a legal basis for judicial cooperation – either via the creation of a similar standard as the UNICITRAL Model Law offers, or by implementing the rules of the CoCo-guidelines.