European Insolvency Law Harmonisation: The idea that has dared to speak its name

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In words published in this journal just over three years ago, this author was of the view that: "It is difficult to see member states agreeing to proposals from the European institutions for substantive rapprochement of their internal [insolvency] laws unless there were overwhelming economic benefits for them to do so."[1]

Though not a prediction *per se*, these cautious words have nonetheless turned out to be quite far from the direction in which views on harmonisation have now apparently travelled.

The first salvo was in fact fired long before the above thoughts were published. The INSOL Europe Report of 2010, written with view to the eventual review of the European Insolvency Regulation ("EIR") and presented to the European Parliament Committee on Legal Affairs, advocated consideration of substantive harmonisation in a number of areas, including the opening criteria for proceedings, stays of creditor action, procedural management rules, ranking and priority rules, the filing and verification of claims, responsibility for the rescue plan, scope and extent of the debtor's estate, avoidance actions, contract termination or continuation, director's liability, post-commencement financing availability and insolvency practice qualifications.[2]

While many of these areas were procedurally focused, as befitted a review of the way in which the EIR could better function, the report seemed to suggest that the time had come to consider ways in which insolvency law across Europe could go beyond mere convergence and reach the stage at which harmonisation becomes feasible.

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Echoes of the 2010 Report in fact found their way into the European Parliament's reply in 2011,[3] which acknowledged the difficulty of creating a "*body of substantive insolvency law at EU level*", but postulated the desirability of "*worthwhile*" harmonisation in a number of discrete areas, chiefly to avoid the adverse consequences of disparities in national laws that might favour forum-shopping.

The areas included the opening criteria for proceedings, the filing of claims, avoidance actions, insolvency practice qualifications and common aspects for restructuring plans.[4]

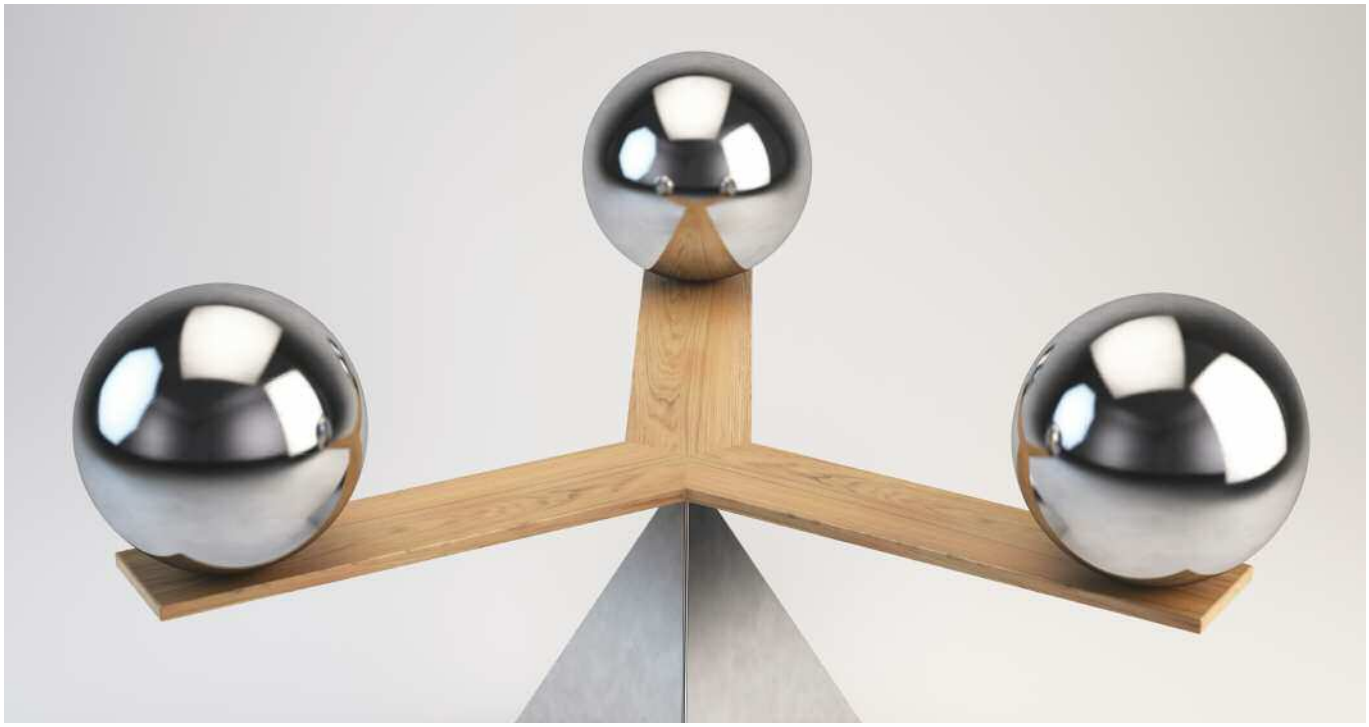
Again, although quite modest, this report can be taken to represent a change of thinking on the part of the European institutions, which, apart from a brief dalliance with harmonisation in the first drafts of what was to become the European Bankruptcy Convention 1995 (and direct model for the EIR), had always shied away in practice from anything beyond promoting the idea of eventual convergence in good practice.

Eliminating legal uncertainty

The energies of the European Commission were directed from 2012 onwards to the reform of the EIR itself. However, even here, attention was given to whether it was desirable to proceed to what was described as an "*approximation of laws*" in discrete areas, some of which replicated items on earlier lists. The context though was not the ideal of harmonisation or the avoidance of disparity, but the need to eliminate legal uncertainty and an "*unfriendly business environment*", deemed to constitute obstacles to cross-border investment.[5]

In fact, rejecting some of the rationale of earlier proposals, the communication suggested that the type or focus of legal systems *per se* did not determine entrepreneurial success or possibility of rescue, rather the availability of specific tools that favour early warning of distress and promote the efficiency of procedures. In language reminiscent of a study in 2003,[6] the European Commission advocated concentration on improving "second chances" by introducing fast-track procedures for honest debtors, aligning and shortening discharge periods and, for small and medium enterprises ("SMEs") in particular, improving prevention, access to out-of-court settlements and debt-recovery generally.[7]

The focus on SMEs and entrepreneurship readily explains how the European Commission moved from incidental consideration of desirable steps to take in modernising domestic laws towards promoting its own vision of what European insolvency should look like. In 2014, it published a text that targeted reforms to deal with four particular concerns: the availability of a framework to facilitate preventive restructuring, assisting restructuring



negotiations through enabling the appointment of a mediator and for stays to be available, ensuring the success of restructuring plans through certain minimum content and clarifying creditor and court involvement in the adoption process as well as providing protection for new financing arrangements.

To these priorities the European Commission tacked on the issue of appropriate discharge periods for entrepreneurs, settling on three years as a new norm.[8] Although the recommendation was primarily addressed to the member states with action expected by March 2015, the European Commission reserved the option, subject to a further study,[9] to propose "additional measures to consolidate and strengthen the approach… in the recommendation", suggesting it might consider an enactment in some form to impose a common framework across the member states. In light of the fact that only a few member states responded,[10] it is perhaps of no surprise that the European Commission has now chosen to act.

Experts' group

In this connection, the European Commission has recently formed an Experts' Group on Restructuring and Insolvency. The role of the experts in the group, which began its work in January 2016, will be, over the course of a three-year period, to assist the Directorate-General Justice and Consumers in the formulation of minimum standards for a new and harmonised restructuring and insolvency law for the European Union.

The proposed law is intended in part to address the terms set out in the 2014 Recommendation. As such, the remit of the Experts' Group not only covers the development of common principles and rules in the area of preventive restructuring procedures that were the subject of the 2014 Recommendation, but also common principles and rules in relation to formal insolvency procedures, the promotion of second chances for honest debtors (natural persons), the qualification of insolvency practitioners, the duties and liabilities of directors in insolvency as well as measures seeking to reduce costs for SMEs in restructuring and insolvency procedures as well as facilitating their access to such procedures. In addition, the Experts' Group will be tasked with ensuring that any common principles and rules that are proposed are consonant with the Recast EIR.[11]

Re-energising harmonisation

It is interesting that the work on directors' duties echoes work carried out by UNCITRAL Working Group V, which resulted in the addition of a Part Four to its Legislative Guide in 2013 dealing with directors' obligations in the "twilight zone" and which UNCITRAL also hopes to extend to the position of directors of enterprise groups. It also reflects an earlier European preoccupation with the same issue appearing in a report aimed at re-energising the company law harmonisation programme.[12] In fact, this concern was again picked up in the Recast EIR which required a report to be submitted on the cross-border issues connected with directors' liability and

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disqualification.[13] In respect of common rules for insolvency procedures, it is also noteworthy that the Recast EIR also mentions the need for a review of employment-related preferences.[14] It seems that at the very least these topics will form part of the new programme, although it may be difficult to predict the precise direction of all the initiatives that may be taken as part of this.

The journey so far

All this seems a far cry from the early days of the insolvency initiative, despite the long-standing interest, dating to the late 1960s, in a Community convention to regulate cross-border jurisdiction, recognition and enforcement in insolvency. For many years, insolvency has been seen merely as ancillary to some other area of interest, for example social policy (employment rights) or company law. "Core insolvency" never really extended beyond the private international and procedural aspects of jurisdiction and coordination.[15]

For the debate to have changed, in a significant way, to considering a methodology, whether "approximation", "convergence" or "harmonisation", and to what fields, procedural and/or substantive, this should extend, is a token of how far down the road the European Union has travelled. As a result of the journey so far, it is clear that the debate has moved on and that "harmonisation" is no longer the idea that dares not speak its name in polite society! ■

Footnotes:

1 In "European Insolvency Laws: Convergence or Harmonisation?" (2012 Spring) *Eurofenix* 20, at 21.
2 See INSOL Europe, *Harmonisation of Insolvency Law at EU Level* (April 2010).
3 See K-H. Lehne (Rapporteur), *Report with Recommendations to the Commission on Insolvency Proceedings in the context of EU Company Law* (Document A7-0355/2011) (17 October 2011).
4 Ibid., at 8-11.
5 See *Communication from the Commission etc. on a New European Approach to Business Failure and Insolvency* (Document COM(2012) 742 Final) (12 December 2012), at 5.
6 Best Project on Restructuring, Bankruptcy and a Fresh Start, *Final Report of the Experts' Group* (September 2003).
7 Above note 5, at 5-6 and 8.
8 *Recommendation on a New European Approach to Business Failure and Insolvency* (Document COM(2014) 1500 Final) (12 March 2014), at 6-10. See also the INSOL Europe Study (12 May 2014) assessing to what extent the member states were already compliant with the norms being promoted.
9 This study, carried out by the University of Leeds, produced an interim report in November 2015.
10 Call for Expressions of Interest in the Experts' Group (September 2015), at paragraph 2.
11 Ibid., at paragraph 3.
12 *Report of the High Level Group of Company Law Experts on a Modern Regulatory Framework for Company Law in Europe* (De Winter Report) (2002).
13 Article 90(3), Recast EIR. See also Article 90(4) which lays the ground for a study on abusive forum-shopping.
14 Ibid., Recital 22.
15 See, by this author, "The Emergence of a New European Order in Insolvency" [2004] 8 ICCLR 262.