

THE CROSS-BORDER INSOLVENCY CONCORDAT AND ITS APPLICATION IN THE US-SWITZERLAND CASE RE AIOC RESOURCES

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I. Introduction

As a direct consequence of globalization over the last decades – i.e. the growing importance of international trade, investments and multinational operations of corporations - countries have been increasingly confronted with multinational defaults of the same debtor. This trend is unlikely to slow in the future while legislation seems – so far - unable to keep pace with. The problem arising from this development lies in the potential conflict among different proceedings opened in several countries. Such multiple proceedings are threatening the widely respected principles of equal treatment and the liquidation of all assets of a debtor to the best satisfaction of all creditors¹. A reliable insolvency law framework that is predictable and equitable, however, is an essential requirement for well functioning cross-border markets. Some of the negative implications of cross-border insolvencies may be precluded or at least reduced by virtue of cooperation between the involved judicial authorities (i.e. administrator, trustee or liquidator). The cornerstones of such coordination can in appropriate situations be outlined in a case-specific cross-border judicial agreement (a so-called protocol).

Part II of this paper briefly touches the traditional approaches in multinational insolvency proceedings (territoriality vs. universality) and its practical implementations in common law (i.e. comity) and civil law jurisdictions (i.e. exequatur). Moreover the models applied in the United States and Switzerland as mixed forms of territoriality and universality (modified universalism) are presented. Part III discusses the scope and objectives of the Cross-Border Insolvency Concordat of the International Bar Association². Part IV focuses on ad hoc Cross-Border Insolvency Cooperation Protocols as a mechanism for efficient administration and claim processing of multiple insolvency proceedings in different jurisdictions. This part emphasizes particularly on its application in the Re AIOC Resources case.

AIOC Resources AG, a Swiss stock corporation, was a trading company in the field of metal commodities (i.e. ferrous, nonferrous, and precious metals) headquartered in Zug and with more than twenty offices worldwide. On April 11, 1996 AIOC Corporate, a Delaware Corporation, became subject

¹ The fundamental goal of equal treatment may moreover be disregarded by the fact that the application of different national laws leads to different outcomes with respect to the priority of the claims, its enforceability (avoidance rules) or satisfaction. Other problems may include "asset running" or the removal of assets in a more favourable jurisdiction by the debtor.

² Committee J, Cross-Border Insolvency Concordat, Sept. 17, 1995 (hereinafter Concordat)

to involuntary Chapter 11 proceedings with the United States Bankruptcy Court for the Southern District of New York³. In August 1996 the district court of Zug, Switzerland opened proceedings against AIOC Resources AG⁴. At that time the company was simultaneously engaged in two concurrent *plenary* (as opposed to main and ancillary) proceedings in two different jurisdictions. This situation created an obvious potential for a conflict of interest between the appointed U.S. Chapter 11 trustee and the Bankruptcy Office for the Canton of Zug. Both proceedings have in the following been administered and coordinated under a Cross-Border Liquidation Protocol, dated as of May 7, 1998. The liquidation plan (announced in summer 2000) provided for 100% distributions on all allowed administrative and priority claims and approximately 19% and 27% of unsecured claims against AIOC Corp. and AIOC Resources AG respectively.

II. Traditional approaches and techniques to multinational insolvency proceedings

Territoriality and universality have been for long the major concepts with respect to the choice of law and choice of jurisdiction (forum) in international insolvency cases.

Territoriality vs. universality

Territoriality provides for the exclusive application of national law to creditors resident in and to assets situated within that respective country and does therefore not recognize any extraterritorial judgement of a foreign court. This approach is widely applied in practice protecting the country's sovereignty. The predictability and the fact that there is no need for new legislation can be presented as some of this approach's few advantages.

However, territoriality leads primarily to a discrimination of the creditors and is therefore not compatible with the *pari passu* principle. This results in a preference of local creditors to the detriment of foreign creditors in the local proceedings because the local authority acts primarily in the best interest of the local creditors. The debtor may transfer assets from one jurisdiction in another in order to favour certain creditors (forum shopping). Furthermore, inequitable distributions may occur due to the different rules applying to avoidance and priority of claims. To put it mildly, territoriality is not an economic approach in dealing with cross-border insolvencies due to the administrative inefficiencies resulting from uncoordinated proceedings.

The concept of universality, on the other hand, promotes a single forum in order to administer all the debtor's assets. This simply means that all aspects are conducted in one proceeding according to one law with global effect and a focus on the going concern value of the failed enterprise. The primary advantage is the equal treatment of creditors - wherever they are located - with respect to the satisfaction of their claims. That is why universality enjoys strong support in literature. The main

³ Chapter 11, case Nos. 96 B 41895, 96 B 41896 (BRL) (Jointly Administered)

drawback is of practical nature. Recognition and enforcement in another jurisdiction is still rather difficult or unlikely to obtain.

Modified or cooperative universalism

Either of the previously described concepts has rarely been applied in its pure form. Many jurisdictions provide in absence of any treaty or legal framework for some discretion with respect to international cooperation. The liquidator in the main proceedings frequently seeks assistance of the jurisdiction where the assets of the debtor are located or where other proceedings, if any, have been opened. By doing this he tries to give the substantive law of the State of the main proceedings extraterritorial effect. This, however, leads to less predictability and reliability compared to a pure universalist approach.

In general, the common law principle of “comity” is that courts of one state or jurisdiction will give effect to laws and judicial decisions of another state or jurisdiction, not as a matter of obligation but out of deference and mutual respect⁵. By applying the comity doctrine U.S. Courts could enable international cooperation through the recognition of extraterritorial decisions given that the interests of its citizens and residents are sufficiently protected. In the context of insolvency, comity favours the equal treatment of creditors in cross-border insolvency cases⁶. Accordingly, the Liquidation Protocol for AIOC Resources states the promotion of international cooperation and respect for comity among the involved authorities as one of its main objectives.

With the amendments to the U.S. Bankruptcy Code Section 304 (11 U.S.C. § 304)⁷ in 1978 - as a reaction to the famous *Herstatt* bankruptcy – the modified universalism approach has been further enhanced by the introduction of ancillary proceedings providing assistance to a representative of a foreign insolvency proceeding and deference of the U.S. proceedings to the main proceedings. Among others, section 304 permits a foreign representative of a foreign proceeding to seek ancillary relief in a U.S. bankruptcy court. However the restrictive application of the underlying criteria in granting such relief has been subject to criticism by academics⁸.

⁴ Case number 1996/180

⁵ *Brown v. Babbitt Ford, Inc.*, 117 ARiz. 192, 571 P.2d 689, 695. The leading U.S. case *Hilton v. Guyot*, 159 U.S. 113 (1985), describes the concept of Comity as follows: “the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its law.” *Cunard Steamship Company Limited v. Salen Reefer Services AB*, 773 F.2d 452, 457 (2nd Cir. 1985) with reference to 159 U.S. 113, 202-203 (1885), “Comity will be granted to the decision or judgement of a foreign court if it is shown that the foreign court is a court of competent jurisdiction, and that the laws and public policy of the forum state and the rights of its residents will not be violated.” With respect to insolvency proceedings the U.S. Court of Appeals for the Second Circuit made in *Cunard Steamship Company Limited v. Salen Reefer Services AB*, 773 F.2d 452, 458 (2nd Cir. 1985) with reference to 159 U.S. 113, 202-203 (1885) the following statement: “The granting of comity to a foreign bankruptcy proceeding enables the assets of a debtor to be dispersed in an equitable, orderly and systematic manner, rather than in a haphazard, erratic or piecemeal fashion.”

⁶ Stefan Breitenstein, *Internationales Insolvenzrecht der Schweiz und der Vereinigten Staaten – Eine rechtsvergleichende Darstellung* (1990), p. 50

⁷ Expected to be replaced by the new Chapter 15 of the US Bankruptcy Code (Ancillary and other cross-border cases) largely based on the UNCITRAL Model Law

⁸ See Jay Lawrence Westbrook, *Choice of Law in Global Insolvencies*, 17 Brook. J. Int'l L. 499, 518 (1991): “The section 304 procedure in the United States reflects two sides of modified universalism. It serves universalism by providing specific procedures for international cooperation and deference to the home-country court ... On the other hand, section 304(c) provides a whole list of excuses for refusing cooperation and enormous discretion to defer or refuse deference is vested in the trial court.” The mentioned excuses can be deviated from the factors - listed in section 304 – that courts have to take into account in determining whether to grant relief: (1) just treatment of all holders of claims against or interests in such estate; (2) protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceeding; (3) prevention of preferential or fraudulent disposition of property in such estate; (4)

Modified universalism also builds the model of Chapter 11 in the Swiss Federal Act on Private International Law (PILA) by granting judicial assistance under certain conditions, while still protecting certain fundamental local rights. A foreign representative may file for recognition of a foreign judgement. According to the PILA, recognition - by means of an exequatur (the civil law equivalent to comity) - is subject to the enforceability of this foreign judgement in the petitioning country, the compatibility with Swiss public policy (“ordre public”) and reciprocity of Swiss orders with respect to their recognition and enforcement⁹. The initiated proceedings will then entirely be conducted by the Swiss authorities and governed by Swiss law.

III. Cross-Border Insolvency Concordat

In Mai 1996 the Committee J of the Section on Business Law of the International Bar Association (IBA) has approved the Cross-Border Insolvency Concordat¹⁰ which represented at that time one of the most remarkable initiatives on coordination and harmonization in international insolvencies as so far no uniform treaty or statute had been adopted by commercial nations. The IBA considered therefore the Concordat as an “interim measure” (and not a substitute) until such treaties and/or statutes are enacted. However, the Concordat is not enforceable and its soft law character leads to different interpretations.

While favouring the theory of universality as preferable solution (as provided in Principle 1) the Concordat is not only an attempt to reconcile the concepts of territoriality and universality (modified universalism) but is also applicable to several co-pending plenary proceedings (as opposed to main and secondary/ancillary proceedings). This is certainly a distinctive and significant feature of the Concordat compared to the modified universality approaches described in Chapter II. In the case of several plenary proceedings the use of a protocol in order to set forth responsibilities and jurisdiction of each country is highly encouraged (see Chapter IV).

The Concordat is a set of ten general principles. It provides rules for cooperation in general and assistance, participation in proceedings, information, choice of law and so on. In the following the most relevant guidelines are briefly presented.

In Principle 1 the Concordat strongly favours the universality approach by suggesting that one single administrative forum shall be responsible for coordinating several proceedings of the same debtor¹¹. However, the commentary correctly acknowledged that this may not always be feasible. Principle 2 applies when there is one main forum and provides that (a) administration and collection of assets should be coordinated by the main forum; (b) after payment of secured claims and privileged claims, as determined by local law, assets in any forum other than in the main forum shall be turned over to the main forum for distribution; (c) common claims are filed in and distributions are made by the main

distribution of proceeds of such estate substantially in accordance with the order prescribed by this title; (5) comity; and (6) if appropriate, the provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns.

⁹ Art. 166 PILA

¹⁰ Black's Law Dictionary defines Concordat as a compact, covenant or convention between two or more independent governments.

forum (...); (d) the main forum may not discriminate against non-local creditors; (e) filing a claim in the main forum does not subject a creditor to jurisdiction for any purpose, except for claims administration subject to the limitation of Principle 8 and except for any offset (under voiding rules or otherwise) up to the amount of the creditor's claim; and (f) a discharge granted by the main forum should be recognized in any forum.

The primary intent of Principle 2 is to ensure equal treatment and fairness among creditors and is, with the exception of 2(b), based on the universality approach. In the case where there is more than one forum, Principle 3 provides in relevant part for the official representatives' and creditors' rights to appear in any fora and to request a court, for a reasonable time, to reconsider the issues covered by its orders¹² as well as for public availability in all fora of information publicly available in one forum. These guidelines have its roots in the modified universalism approach.

Of considerable relevance in a situation where there are multiple, co-pending proceedings with no main forum (as in the *Re AIOC Resources* case) is Principle 4 that deals with choice-of-law rules (procedural) and substantive aspects with respect to claims in such proceedings. The drafters of the Concordat advocate the use of a governance protocol in order to facilitate the coordination between the two or more proceedings and to mitigate the disadvantages of such cases compared to universal proceedings. The drafters believe that the objectives of universality (mainly in respect to the maximization of the estate's value) may also be met by application of a protocol¹³. At first glance it seems surprising that forum shopping is almost encouraged by allowing the creditors to file their claim and appear in any forum. In the drafters' opinion this is remedied by the free choice of each creditor to file in the court which is the most advantageous or convenient for her. However, equal opportunity leads not necessarily to equal treatment. For secured and privileged creditors the choice of forum also decides on the choice of law resulting in a different treatment of the claim¹⁴. While secured and privileged claims are governed by the law of the State where the claim has been filed, all other (common) claims are coordinated world-wide among the plenary fora. The principle provides further that distributions for common claims – irrespective of where they have been filed – should be made on a pro-rata basis while the so-called hotchpot rule¹⁵ applies to claims filed in more than one proceeding.

Principle 8 advocates the application of the same international law principles (choice of law) as in usual commercial transactions (“same transaction in a non-insolvency proceeding”) namely with respect to procedures for fixing and allowing claims (incl. creditor's rights to collateral and set-off) and voiding rules.

¹¹ Principle 1 sets forth that “if an entity or individual with cross-border connection is subject of an insolvency proceeding, a single administrative forum should have primary responsibility for coordinating all insolvency proceedings relating to such entity or individual.”

¹² As time is crucial, particularly in the early stage of the proceedings, courts are inclined to give interim orders, which can become subject to later review once the facts appear in a different light. Such reconsiderations by the courts are commonly referred to as “come-back” procedures.

¹³ Concordat, supra note 2, p.8

¹⁴ Which has been acknowledged by the drafters in the commentary

¹⁵ Principle 4(c) provides in relevant part that “if a claim is filed in more than one plenary forum, distribution must be adjusted so that recovery is not greater than if the claim were filed in only one proceeding.”

IV. Cross-Border Insolvency Cooperation Protocols and its application in Re AIOC Resources

A protocol is an ad-hoc agreement between two or more fora which can basically cover any issues and constitutes a framework which will guide the actions of the parties with respect to the efficient administration of cross-border insolvency proceedings in the absence of formal treaties or conventions. Protocols typically stipulate rules on the application of procedural and substantive law (choice of law), claims reconciliation process, communication, distribution of assets to the creditors and so on. Furthermore protocols facilitate the prior negotiation of issues of potential dispute arising later during the lapse of the proceedings. Also it can avoid unnecessary overlaps in the proceedings. Its use makes particularly sense in concurrent main proceedings where the multiplicity and incompatibility of local insolvency laws becomes inevitably apparent.

The response from practitioners and academics to the development of cross-border insolvency protocols as a means for cooperation has been in general positive. For example, Flaschen and Silverman conclude that¹⁶: “The Protocols implemented to date can serve as useful instrument for reference in crafting future cross-border cooperation agreements. In particular, the International Bar Association Concordat can serve as an important guidepost for consideration or incorporation in future Protocols.”¹⁷

The “Cross-Border Liquidation Protocol for AIOC Resources, AG, et al.” (hereinafter the “Protocol”) is one of the first protocols after the publication of the Concordat. This case represents the situation described in the Concordat’s Principle 4 where there is more than one plenary forum and the two plenary proceedings do not defer to one another but are rather conducted in parallel. As noted earlier, in such cases the use of protocols is highly encouraged.

Mr. Edward G. Moran, the Chapter 11 trustee, and the Bankruptcy Office of the Canton of Zug have entered into an agreement outlining the co-operation between the two parties and their respective powers and authorities. The protocol stipulates that the parties “need to analyze under U.S., Swiss and other applicable law their duties and responsibilities concerning the potential rights of the creditors” and that both parties “work together in good faith to effectuate an orderly and equitable liquidation of the Resources Group”. The first part is in accordance with Principle 8a of the Protocol which states in relevant part that “each forum should decide the value and allowability of claims filed before it using a choice of law analysis based upon principles of international law.” The purpose of this provision is to prevent any unexpected application of the forum’s substantive law to claims and transactions contrary to the creditor’s interest and/or intent.

¹⁶ Evan D. Flaschen, Ronald J. Silverman, *Cross-Border Insolvency Cooperation Protocols*, Texas International Law Journal, 1998

¹⁷ Some years (and obviously some complex insolvency cases) later the same author expresses some reservations regarding the use of protocols: “Protocols have primarily involved Canadian, English and other common law jurisdictions. (...) Whether Protocols will emerge as a common feature of cross-border reorganizations involving mixed common and civil law, or Roman, Dutch law, Arabic law, and so on, remains to be seen. Whereas Protocols typically involve courts in two countries, sometimes three, multinational corporations for the most part operate on a broader international scale. (...) While the negotiation of Protocols between two or three countries is feasible, the negotiation of Protocols involving 10, 50 or 150 countries is unfeasible. Protocols are generally agreements between courts having jurisdiction over the same debtor. Most international business, however, operate locally through subsidiaries. (...) As a result, the local court must act in the best interests of the local subsidiary, not the international corporate group. (...)”; Evan D. Flaschen, Anthony J. Smits, Leo Plank, *Case Study: Foreign Representatives in U.S. Chapter 11 Cases: Filing the Void in the Law of Multinational Insolvencies*, Connecticut Journal of International Law, 2001

In Recital I.D the Protocol explicitly refers to the Concordat acknowledging that both parties have reviewed the principles contained therein and believed “that an agreement upon general administrative matters is essential to the orderly and efficient administration of these cross-border insolvency proceedings”.

The primary goals stated in the Protocol are “to promote international cooperation and respect for comity”, “to facilitate the fair and efficient administration of the proceedings”, “to establish a coordinated claims reconciliation process”, “to establish a coordinated litigation strategy with respect to any matter which cannot be resolve through good faith efforts in the first instance”, “to establish a coordinated strategy to marshal and liquidate any remaining assets”, “to establish a coordinated and fair mechanism for distributing assets to creditors” and “to adopt a framework of general principles to address issues that are likely to arise in connection with the administration of these cross-border insolvency proceedings”.

The Protocol contains some provisions that have their basis in the Concordat¹⁸. The general provisions under paragraph II.C and II.D make reference to Principle 4c¹⁹. Paragraph II.C stipulates in advancement to the latter that claims recognized in one proceeding shall be recognized in both proceedings (subject to approval) without additional filings by any creditor. Paragraph II.D promotes the so-called hotchpot rule by referring to Principle 4c that states in relevant part that „if a claim is filed in more than one plenary forum, distribution must be adjusted so that recovery is not greater than if the claim were filed in only one forum.“ Following the Principle 3a, c and d of the Concordat the rights to appear in any forum granted to all creditors or their representatives²⁰ and to get access to all public documents have been specified in paragraph II.F.

V. Conclusion

The introduction of protocols on the one hand, employed for the first time in the famous Maxwell Communications case²¹, can certainly be considered as a breakthrough approach with respect to the coordination in international insolvency proceedings. On the other hand, the later introduced Concordat - despite its soft law character - proved to be a good and workable compromise between most important elements of both universality and territoriality and a good framework for the drafting of protocols.

Some of the inherent drawbacks of the current state of the cross-border insolvency legislation²² have been successfully addressed in the Re AIOC Resources case. Predictability regarding the applicable law and jurisdiction has been clearly increased. Thanks to the automatic recognition of the claims in all proceedings and the right to appear in each forum, discrimination of foreign creditors has effectively

¹⁸ An overview of the provisions in the Protocol is provided in the table in Appendix I.

¹⁹ Supra note 14

²⁰ Namely the Official Committee of Unsecured Creditors in the Chapter 11 Cases

²¹ 93 F.3d 1036 (2nd Cir. 1996)

been avoided and the value of the debtor's assets could be protected and maximised. The coordination between the two competent authorities and the mutual good faith recognition of the other proceedings have obviously improved the fairness and efficiency of the insolvency administration.

In the meantime also the UNCITRAL Model Law - which took into account the proposals of the Concordat²³ - advocates, in its article 27 the use of agreements concerning the coordination of proceedings as one form of cooperation while article 29 provides that cooperation must be sought in concurrent proceedings.

However, the increasing complexity of insolvency cases, i.e. several concurrent proceedings, poses some important challenges to the cooperation based on bi- or multilateral agreements between the authorities. Thanks to a common understanding in most jurisdictions about the fundamental goal of insolvency proceedings - namely the maximisation of the estate's value²⁴ consistent with the preservation of due process and other fundamental rights - protocols may present despite their limits a workable framework in overcoming the inherent problems of multiple proceedings.

²² As identified by the UNCITRAL Model Law in formulating its objectives in the preamble.

²³ Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency, nr. 18

²⁴ This includes in particular the economic use of resources to administer the proceedings

Appendix I – Overview of provisions in the AIOC Resources Liquidation Protocol

The table below provides an overview of general, claim related (i.e. Resources) and non-claim related provisions of the AIOC Resources Liquidation Protocol. The second column lists the elements which have been agreed between the U.S. Trustee and the Swiss Bankruptcy Office or shall be jointly determined at a later stage respectively. The third column names the responsibilities that are in the sole discretion of either of the two parties to the agreement (sometimes dependent on the consent of the other party as indicated).

	Coordination / joint administration / joint jurisdiction	Sole administration / jurisdiction - both procedural and substantive law - governing the respective case unless considerations of comity otherwise require
Definition of Swiss and non-Swiss entities	Entities listed in appendix (Paragraph II.A and B)	
Approval of claims	Automatic recognition of a claim in either proceedings in the other proceedings without the need for additional filings (Paragraph II.C)	
Appearance in court and information	Right to appear in all proceedings in any fora for official representatives and creditors (Paragraph II.F) Availability of public information (Paragraph II.F)	
Communication between representatives	Written notice where required (Paragraph II.E)	
Currency exchange rate	One pre-defined rate applies (Paragraph II.G)	
Proceeds in favour of AIOC	Funds shall be maintained in an interest bearing account either in Switzerland (for funds from Swiss sources), in the U.S. (for funds from U.S. sources) or determined on a case-by-case basis in all other instances (Paragraph II.H)	
Actions	Public policy reservation (Paragraph II.I) Transactions relating to the disposition of assets (Paragraph III.A)	<i>With consent of the other party:</i> <ul style="list-style-type: none"> ▪ Disposition of shares and interests ▪ Substantive consolidation with any other entity ▪ Actions causing a material adverse impact on any member of the Group <i>Without consent of the other party:</i> <ul style="list-style-type: none"> ▪ All other acts (Paragraph III.B and C)
Distribution	Mechanism for providing distributions and recoveries to creditors (Paragraph III.D) Hotchpot rule applies (Paragraph II.D)	
Claims reconciliation process for non-bank claims (Paragraph III.E 1.)	Joint determination which party shall administer the claim reconciliation process for claims filed in both proceedings	U.S. trustee responsible for claims filed in Chapter 11 proceedings Swiss administrator responsible for claims filed in Swiss proceedings

	Coordination / joint administration / joint jurisdiction	Sole administration / jurisdiction - both procedural and substantive law - governing the respective case unless considerations of comity otherwise require
Claims reconciliation process for bank claims (Paragraph III.E 2.)	Coordination of the administration of all bank claims	U.S. trustee responsible for claims filed in Chapter 11 proceedings only or filed in both proceedings Swiss administrator responsible for claims filed in the Swiss proceedings only
Procedures for fixing and allowing non-bank claims (Paragraph III.E 3. a)		Any party may fix and allow a claim
Procedures for fixing and allowing bank claims (Paragraph III.E 3. b)	For a claim filed in both proceedings the effectiveness of a compromise is subject to the approval of both parties For a claim filed in either proceedings, but not both proceedings, the parties shall employ a claims adjustment process	
Litigation and investigations (non-claim related)	Consultation on a case-by-case basis (Paragraph IV.)	
Non-Swiss subsidiary provisions		U.S. trustee responsible for the winding down of the non-Swiss subsidiaries (Paragraph V.)
Swiss subsidiary provisions		Swiss administrator responsible for the winding down of Swiss subsidiaries with assistance of U.S. if needed (Paragraph VI.)
AIOC Corp. provisions		U.S. trustee responsible for the winding down of AIOC Corporate (Paragraph VII.)
All matters not provided in the Protocol	The parties shall act in a manner to promote the goals of Paragraph I.E , e.g. international cooperation, respect for comity, efficiency and fairness (Paragraph II.J)	