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Comparative and International Insolvency Law Central Themes and Thoughts

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Framework for financial institutions

In 2000 the Convention on International Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters 1968 ('Brussels Convention') was substituted by the 2002 Brussels Regulation.[1] According to Article 1(2) of this regulation "bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal parties, judicial arrangements, compositions and analogous proceedings", amongst others, are excluded from its scope. These proceedings are covered by Article 1(1) of the Insolvency Regulation. It is important to know that Article 1(2) of the Insolvency Regulation excludes 'financial institutions' from its scope. The applicable directives with regard to Insurance Undertakings, Credit Institutions and (Collective) Investment Undertakings include the 'Insurance undertaking' Directive 2001/17 of 19 March 2001 and the 'Credit institution' Directive 2001/24 of 4 April 2001.[2] Finally, within the context of credit institutions and for the purpose of this lecture, I would like to draw your attention to Directive 94/19/EC on Deposit Guarantee Schemes.

Directive 2001/24 on the reorganisation and winding-up of credit institutions has its EC basis in Article 47 of the EC Treaty: "the harmonious and balanced development of economic activities throughout the Community should be promoted through the elimination of any obstacles to the freedom of establishment and the freedom to provide services within the Community", see recital 2 of Directive 2001/24. In literature the special position of credit institutions has been underlined. Hüpkes finds banks special because they have a specific function in the economy, provide fundamental financial services and have a specific 'liquidity' position.[3]

The specific position of (troubled) financial institutions therefore has its own basis in the EC Treaty, where the angle is 'freedom of providing financial services throughout Europe' and not, as with the Insolvency Regulation, 'mutual trust' between all courts and therefore 'automatic recognition' of judgments that open insolvency proceedings.
The European system of reorganisation or liquidation of banks has three pillars:
(i) 'single entity': the credit institution in the home member state and any branch in another member state form one legal entity;
(ii) 'unity': there is only one competent authority/court, which is the home country authority/court;
(iii) 'universality': the effects of the reorganisation measures or liquidation and its applicable law (i.e. the law of the home member state: lex concursus) shall in principle apply throughout the whole EU and European Economic Area (EEA, which includes Norway and Iceland).

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[1] Council Regulation (EC) no. 44/2001.
[2] For general information see Bob Wessels and Gabriel Moss, General Introduction to the EU Insolvency Law Framework and Principles with regard to Financial Institutions, in: G. Moss and B. Wessels, EU Banking and Insurance insolvency, Oxford University Press, 2006, p. 3-47.
[3] Eva H. G. Hüpkes, The Legal Aspects of Bank Insolvency. A Comparative Analysis of Western Europe, the United States and Canada, Studies in Comparative Corporate and Financial law, Volume 10, The Hague/ London/Boston: Kluwer Law International 2000.

So there are quite a few differences between a company and a bank when it comes to the treatment of insolvency. Banks have their specific position in Directive 2001/24, which has a different base in the EC Treaty. In matters of international jurisdiction the registered seat, not the COMI of the bank, is the deciding factor. Secondary proceedings cannot be opened, because the bank and its foreign branches are seen as a 'single entity'. The Directive does not contain a public policy defence, as is the case in Article 26 of the Insolvency Regulation. The Directive's geographical scope is wider, including member states and EEA states, and its substantial scope is wider as well, also including 'reorganisation measures' that fall outside of the definition of 'collective insolvency proceedings' as meant in Article 1(1) of the Insolvency Regulation.
In matters of applicable law there are differences, too, as Directive 2001/24 contains a wider range of applicable law: a bank or branch is wound up in accordance with 'the laws, regulations and procedures' ('lex domus' – house rules) and this general rule has some specific exclusions for netting and repurchase contracts.

Landsbanki / Icesave

Last year there was a large-scale insolvency matter in the Netherlands relating to Icesave, the Dutch branch of Iceland's Landsbanki. Around 140,000 deposit holders turned to the Dutch deposit guarantee scheme. Near Christmas time the large majority of them were paid up to a maximum of 100,000 euros. What happened in Iceland?
On 7 October 2008, following the continued deterioration of the financial markets, the Financial Supervisory Authority of Iceland (FME) used its powers granted by the Icelandic Parliament with reference to Article 100 of Act. No. 161/2002, as amended, to take control of Landsbanki Islands hf ('Old Landsbanki'). Subsequently, New Landsbanki Bank hf ('New Landsbanki') was created (now 'NBI hf.') and Old Landsbanki's domestic Icelandic deposits, as well as significant Old Landsbanki assets relating to its Icelandic operations were transferred to it. New Landsbanki is wholly owned by the Icelandic government. A 'Resolution Committee' was appointed by the FME to supersede the Board of Directors of Old Landsbanki. The role of the Resolution Committee is to oversee the realisation of assets, maximize their value as much as possible, and retain them within Old Landsbanki until a formal process of payment distribution commences.
New Landsbanki has taken over all of Old Landsbanki's domestic Icelandic deposits, along with significant Old Landsbanki assets that were related to its Icelandic operations, such as loans and other claims. Old Landsbanki retains all liabilities and assets not transferred to New Landsbanki. New Landsbanki will issue a bond to Old Landsbanki, the face value of which will be the net difference between the assets and liabilities transferred into New Landsbanki from Old Landsbanki, to reflect a fair value asset adjustment verified by an independent third party.
The decision of the FME of 9 October 2008 reads[4]:
"The FME appoints recognized appraisers to evaluate the true worth of assets and liabilities allocated to New Landsbanki Íslands hf. according to this decision. Following this valuation, a settlement shall be made, whereby New Landsbanki Íslands hf. shall pay Landsbanki Íslands hf. the difference between the worth of assets and liabilities, with reference to the time frame of the transfer according to par. 5. The conclusion of the appraisers shall be available within 30 days of this decision. New Landsbanki Íslands hf. shall issue a bond to Landsbanki Íslands hf. as payment of the remuneration. The terms of the bond shall be available within 10 days of the announcement of the conclusion of the appraisers. The value of the bond shall be verified by an internationally recognized appraisal company to be appointed by the FME."

[4] On file with author.

Against the background of the turmoil in Iceland, the District Court of Amsterdam had to decide on 13 October 2008 whether Article 3:202 of the Act on Financial Supervision (Wft) is applicable[5]. This provision states the following: "In case the solvability or liquidity of a branch, located in the Netherlands, of a credit institution with its seat in another member state, which does not possess a license, is in such a state that it is to be expected that the credit institution or its branch respectively cannot or can only partly fulfil its obligations, the District court within the area in which the credit institution or the branch is located, may, at the request of DNB, open an emergency scheme ('noodregeling') in the interest of the joint creditors." The Amsterdam court ruled: "Article 3:202 Wft applies to the current situation. The Dutch branch of Landsbanki (currently: Old Landsbanki) is now a branch of what must be assumed to be an unauthorized bank with its seat in another Member State. Furthermore, given the fact that the branch has ceased paying the customers who are requesting payment of their savings deposits, the cash flow of the branch is such as to warrant the conclusion that it will be unable to honour all or part of its obligations with respect to the funds received by it. This Court will, therefore, in the best interests of the combined creditors, declare the emergency regulations applicable. To avoid any misunderstanding, the Court would like to add as follows with regard to the legal consequences of its decision. […] In light of the principle of equality of creditors, there are a few question marks concerning the way in which Landsbanki was split up and the consequences thereof for Icelandic and foreign account holders".[6]

The next judgment in the Icesave/Landsbanki saga was made by the District Court of Reykjavik on 5 December 2008.[7] Both the FME and the Resolution Committee were of the opinion that in order to fulfil the obligations incumbent upon Landsbanki, it was necessary to restructure the bank financially. They applied for a 'moratorium', which they deemed a necessary prerequisite to achieve these goals. The court considered that a moratorium on payments "ensures adequate protection, domestically and abroad, against the demands of creditors while the financial undertaking seeks to reorganise its financial position with regard for the company's interests and that of creditors." The moratorium was granted until 26 February 2009, 14.00 hours, and was understood to apply automatically to all branches operated in other states of the EEA. On 3 March 2009 this period was extended to 26 November 2009.

An abundance of questions

There are many questions to be answered regarding this case. Let me touch on just a few of them. In general one can say that the splitting of Landsbanki, whereby assets were transferred to the New Bank and the creditors continued to be creditors of the Old Bank, is detrimental to the creditors. The procedure leading to the 'moratorium' may also not pass the test of Article 6 of the European Convention of Human Rights (ECHR), because it seems that large groups of (foreign) creditors have not been heard.

Another query is whether the moratorium of 5 December 2008 can be halted by a 'public policy defence' when the Directive does not contain such a defence. Article 10 EC Treaty states: "member states shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks. They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty." By comparison, its equivalent in Article 3

[5] District Court of Amsterdam 13 October 2008, LJN: BF8586; JOR 2008/343.
[6] Note by the editors: the request to nullify the court's judgment was denied, see District Court of Amsterdam 6 August 2009, LJN: BJ4716.
[7] On file with author.

EEA Agreement reads: “The Contracting Parties shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Agreement. They shall abstain from any measure which could jeopardize the attainment of the objectives of this Agreement. Moreover, they shall facilitate cooperation within the framework of this Agreement.”
It seems appropriate to test whether these articles indeed may play a role. Insolvency law in Europe therefore also leads to the study of the complexities of European law itself.

Another query is whether Directive 2001/24 is applicable at all. Is Old Landsbanki a ‘credit institution’? What happened to the banking license? Was it ‘split’, ‘partly continued’ or has a new license been given to a ‘leveraged die-out’?
Furthermore, is the ‘moratorium’ a reorganisation measure in the meaning of Article 2 of Directive 2001/24: “‘reorganisation measures’ shall mean measures which are intended to preserve or restore the financial situation of a credit institution and which could affect third parties’ pre-existing rights, including measures involving the possibility of a suspension of payments, suspension of enforcement measures or reduction of claims.”

Communicate and coordinate actions

I am sure there will be many other legal questions, which may take just as many years to answer. In general, in complex cross-border insolvency cases, a sensible solution cannot be found in ‘conflict’, but in communication and coordination, albeit step by step. In my opinion there is enough legal basis to plea for a solution through cooperation, for instance between both central banks, including the FME, but also between the administrators of the Icesave branch in the Netherlands and the office holders in Landsbanki. Not only Article 10 EC Treaty and its counterpart in Article 3 EEA Treaty point in that direction, several recitals in Directive 2001/24 do so too. For instance, relating to ‘Branches of third countries’, Article 8(3) provides: “The administrative or judicial authorities referred to in paragraph 1 shall endeavour to coordinate their actions.” Article 19(3) adds: “Any liquidators shall likewise endeavour to coordinate their actions.” Later in this Honours Programme we will discuss the topic of ‘protocols’. My suggestion is that a protocol might help here, if it is based at least on the following points of view:
1. Be reluctant to change the legal consequences of the present Dutch insolvency measures if these deviate from the consequences of the lex concursus (Icelandic law) that the Icelandic moratorium – if the Directive is applicable – produces. In this regard, the guiding principle should be to take account of the justified expectations of all parties involved and possibly also of the extent of the disadvantage for these parties when existing (Dutch) consequences are substituted by others, e.g. whether or not a party already has taken new legal steps based on the Dutch consequences;
2. Claims or debts of the Dutch estate, initiated prior to the Icelandic moratorium, should be regarded as claims or debts of the Icelandic moratorium;
3. In principle, the full amount of the estate in the Dutch insolvency case is available for recourse of claims of the moratorium; these claims will obtain the preferences that result from the law applicable to the moratorium;
4. Mutual alignment of the consequences of the legal measures taken in both countries and cooperation between the supervising authorities, appointed administrators and courts in both countries, are of prime importance, based on the following points of departure: (i) that the Iceland moratorium – within the scope of Directive 2001/24 – is the only proceeding, (ii) that the consequences of the Dutch emergency measure will be as limited as possible for all parties concerned, and (iii) that the interests of all creditors are paramount and treated equally.