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Some Thoughts on International Insolvency Law Evolution as a Tool for a Sustainable Economic Growth

Introduction

In the recent past insolvency law and specifically cross-border insolvency law has attracted an increasing interest all around the globe; but still, when an average person thinks about insolvency law, this person generally takes into consideration mainly insolvency's aggressive function. This article tries to emphasize how this attempt is not anymore correct, and it examines how international insolvency law is changing and it compares some new aspects of modern insolvency law in Europe. These new characteristics briefly analyzed in this article, may be applied to demonstrate that insolvency law, in its restructuring acceptation

Beside Insolvency's aggressive function it is due to be noticed a restructuring function which is increasingly acquiring a relevant importance in the international insolvency framework. This article aims to highlight some important issues that might be considered when planning and conducting an evaluation on international insolvency law devoted to consider insolvency law as a tool for a sustainable economic growth.

Insolvency concept modification

Often we consider insolvency law as permanent in the time and we are inclined to think that insolvency main characteristics can not be subject to modification.

Insolvency concept is quite another thing than steady; it has considerably changed some of its main functions; to better explain the foremost mentioned the following assumption makes the aforementioned statements clearer. Reading Dickens' David Copperfield we might learn how *in the England of the 17th century was not uncommon for an insolvent debtor to face the risk of period of time in the royal prisons. In the ancient Rome debtors sort was even worse1: according to the Law of the Twelve Tables, creditors, under certain conditions, had the possibility to kill the debtor2; alike nowadays insolvency law is changing. insolvency law always follows times evolution and tries to adapt itself to the ever challenging demands of the times; so that if word financial systems changes, insolvency changes as well.*

1 In the archaic Rome, as explained in the The Law of the Twelve Tables, the insolvent debtor was laid at the complete mercy of the creditor; he, the creditor, had the possibility to literally put in chain the debtor and could also fulfill his credit with the debtor's body breaking.

2 The Law of the Twelve Tables (Lex Duodecim Tabularum) TABLE III (Debt): *Tertiis nundinis partis secanto. Si plus minusve secuerunt, se fraude esto*. — On the third market day, (creditors) may cut pieces. If they take more than they are due, they do so with impunity.

Some decades ago commerce was not as much globalized as nowadays; today a proliferation of multinational corporates with hundreds of highly specialized subsidiaries all over the world is leading to a "world legal harmonization".

The modern financial system is characterized by markets interconnection, intended as a diminution or elimination of state-enforced restrictions on cross border exchanges. In such increasingly integrated global system many enterprises carry out economic activities in more than one State. Many companies go beyond classical categories; they can not simply be defined as national, they have diffused interests all over the world; some of them have a per year revenue even higher than some Countries. The activities of such international companies arise effects which trespass national borders and reach a multinational extent.

The global financial crisis we are still facing can be a good example; it began in July 2007 when a loss of confidence by investors in the United States caused an impressive domino effect all around the world, determining an impressive increase in cross-border insolvencies cases.

Similarly markets interconnection is by no means pronounced within European Union where a single market based on free circulation of capitals, people and services is active.

A widely known example of such interconnection is the car producers crisis; Since 2008 car sales had drastically decreased. European leaders discussed the possibility for a common rescue package to be agreed by all the EU member states.

As we see from this case, insolvencies situations always often occur; nevertheless they are drastically changing. They are not not like in the past, they have not just a national extent. A single company crisis may have effects in all countries where the company had financial interests.

Is insolvency an evil to fight?

But is insolvency an evil to fight? Or insolvency is something naturally linked to businesses? In other words shall we consider insolvency as a business virus or as a market antibody?

Insolvency in fact is a natural element present in every healthy economic system. People accept risks in order to make a profit, if too many of these risks come true, people (as companies) may become unable to pay all their debts as they fall due.

In such instances it may occur to file for insolvency. There are many kinds of insolvency procedures, but all of them have a common nature: they are all collective proceeding, aiming to prevent chaos and inequity resulting from individual credit seeking, and as well aiming to enable rehabilitation of the debtor, when it is possible.

As explained before, it may happen to have assets situated in many different States; in such situation, when an insolvency procedure occurs, cross border issues start to arise equally.

Sole States are generally unable to assure an equal treatment within creditors and credits located in different Countries. This necessary degree of collectivity then depends on the willingness of those other States to enforce a common legal background. Nevertheless this common legal background is still lacking in many states. The produced results have been vast inefficiencies; effects that an insolvency procedure should prevent.

The current financial crisis and high-profile insolvencies of well-known companies have refocused attention on the suitability of contemporary insolvency regimes. “The Too Big to Fail policy” which consists on the idea that in modern economic environment the largest and most interconnected businesses are "too big to let fail". This concept has also been more broadly applied to refer to such situations when governments carry on *ad hoc* policies for bailing out national preeminent corporations. All this raise important issues on moral hazard in business operations.

The most important EU company (banks field excepted) referred to as too big to fail was Opel. Some critics saw that bailout as wrong and counterproductive; Some scholars think big companies also should be left to fail if their management was not effective. Opel was unlikely to survive without help from government. The proponents for an Opel state bail-out argued that the company was too relevant to be let fail.

EU insolvency framework

European Union has a common legal framework devoted to coordinate insolvency cross-border procedures. In the past decades, many member States of the European Union have introduced important new legislation in the field of insolvency law. The European insolvency law tries to capture the common elements that national insolvency laws share and then make up the essence of insolvency proceedings in Europe. It is a first, and, so far, unique attempt, to tackle an area of law which is of great importance.

The EU insolvency law looks toward a future of more integration. Undoubtedly, the EU insolvency law will be of positive use in efforts to modernize national insolvency laws by serving as a "European framework". It could lead to a higher conformity of new national legislation with the essence of European insolvency law.

The coming into force of Regulation No. 1346/2000 on 31 May 2002 marked the end of a prolonged legislative vacuum marked by the absence of a coordinated international regulation regarding insolvency proceedings. The Regulation, rather then attempting to harmonize substantive laws, aims at improving the efficiency and effectiveness of insolvency

proceedings having cross-border dimensions by removing formalities. Its purpose was to establish common rules on cross-border insolvency proceedings, based on principles of mutual recognition and co-operation. It sought to achieve this target by harmonizing the insolvency jurisdiction of the EU Member States courts, by restoring creditors equality and introducing uniform rules concerning conflicts of laws in insolvency cases. Moreover the EU regulation aims to disincentive companies from forum shopping, and in the same way it set new solution concerning assets management and processing of creditor claims in multi-jurisdictional cases.

At first States have been unwilling to accept a competences handover to the European Union, It took almost 40 years to arrive to the emanation of the regulation No. 1346/2000.

Even if in almost all Countries the insolvency concept is meant as an executive procedure on the failed assets, nevertheless there was disagreement on insolvencies procedures functions and effects.

Insolvency law has indeed a very strong ideological and political content; Countries approach on insolvency law may tell us a lot about the economic vision and values that in a specified period are ascendant.

Analyzing the insolvency law evolution, the changes occurred, allows us to better understand States economic guidelines.

Insolvency law history may be very interesting, and may disclose many not well known aspects; for example, the undergone treatment by the bankrupt entrepreneur, reveals to which level a market is open to new investments. To better explain such concept we can refer to a sinusoid figure, as briefly traced before, every historical moment appertains to a point in the history of the treatment to which the failed entrepreneur is subject.

Bankrupt's destiny is crucial to understand the development grade of a Country financial system.

Let's take as an example a comparison between the entrepreneur figure and the skipper figure. both have leading responsibility, both have to lead the ship or the company to a safe harbor. Although market waters as the sea waters which the ship and the company have to go across may be not always calm and quite. A financial crisis as a sea storm may espouse the company/ship to huge perils and threats. It may occur the entrepreneur must brave a breathing market space or even worse bad patch.

Companies intrinsic value

At first it is necessary to understand if a company oversteps just a momentary lack of liquidity, or if the company is in a state of economic *decoction*.

The economic decoction (lat.: status decoctionis economicae) comes true when a company can not stay anymore in the market due to such structural chronic diseases which make impossible company continuation in the market.

After performed such first economic evaluation it has to be done a second distinction, between the entrepreneur which has acted fraudulently and the abiding Entrepreneur who has acted dutifully to the market law.

The abiding entrepreneur deserves the possibility of a new fresh start, this is the purpose of modern insolvency law and in particular it is the main purpose of modern international insolvency law:

To find a middle path between creditors rights (winding up operations), and company rescuing; especially when the company has assets and liabilities in many different Countries. When a company under an insolvency procedure has assets and liabilities in many different Countries the Insolvency Office Holder figure obtains an outstanding importance. The Insolvency Holder Office has the important assigned task to ride over difficulties and bring the company to a safe harbor, task even more complicated when the company in distress has relevant cross-border activities.

Company have an intrinsic value[3] which has to be intended as the combination of:

- the company's true economic potential;
- valued assets.;
- often such intrinsic value is not easily appreciable, but it has still a fundamental importance.

Values like:

- people jobs;
- fiscal flow coming from the company;
- position in the international market;
- assets and work done.

All these are not simple words or simple economic quantities, these words represents something that goes beyond the simple economic understanding and becomes something worthwhile to be saved.

Conclusion

As a conclusion, bearing in mind all of the above, it is to be noticed how Insolvency Law is changing; it is becoming a very important tool for saving companies crossing a period

3 *Smith A.* Wealth of Nations. Book 1. Chapter V: "The real price of every thing, what every thing really costs to the man who wants to acquire it, is the toil and trouble of acquiring it. What every thing is really worth to the man who has acquired it, and who wants to dispose of it or exchange it for something else, is the toil and trouble which it can save to himself, and which it can impose upon other people".

of crisis. Indubitably insolvencies procedures still keep their main aggressive function devoted to creditors compensation; although, compensation does not exclude the fact that insolvency law may pursue other targets like helping companies to survive.

We can compare insolvency law to the Dante's Virgil function in the "Divine Comedy". As Virgil assisted Dante in his journey across "inferno"; in the same way insolvency law may furnish good tools for rescuing a company facing troubled times. As Dante last words after his journey in the inferno are "we emerged to gaze upon the stars again", so every entrepreneur who leads a company in distress, just wants to bring the company back "in bonis".

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