A New Insolvency Regulation at Last

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After a debate lasted several years, a new version of the Insolvency Regulation was eventually approved few months ago. Its new title (Insolvency Regulation Recast), however, reveals that the final result is much more 'minimal' than its original ambitions, and that this minimal approach was probably intentional. The political and economic relevance of the conflict of law criterions for insolvency proceedings is quite evident in an integrated internal market. In this regard, an impact assessment of the first reform proposals, drafted by the European Commission in 2012, acknowledged that about one-fourth of all European firms that became insolvent in 2011 were involved in cross-border activities. In all these cases, the crucial questions arise as to the substantive law applicable to the insolvency procedure and to any related issue, and as to which venue should be competent to hear and govern the procedure. As is well-known, the answer of the Insolvency Regulation was that the Member State in which a debtor's centre of main interests (COMI) should be competent to hear and govern the 'main' insolvency proceeding, which shall also have universal effects. The COMI criterion and the principle of 'universality', however, suffer numerous carve-outs and limitations, the most important of which is the possibility to open secondary proceedings limited to local assets in states where an insolvent debtor has just an 'establishment'. The need of reforming the regulation was supported by an intense debate that stretched over the last year. The official starting point was probably the first INSOL report of 2010, which acknowledged that Member States' insolvency regimes diverged from each other and that such differences, together with the vagueness of the COMI criterion, had produced a quite uncertain legal environment and has increased the possibility of forum shopping. The conclusion of INSOL was straightforward: the new regulation should abandon the old mere private international law logic and should partially harmonize insolvency rules and procedures at EU level. The spectre of 'harmonisation of insolvency law' was thereafter haunting Europe, and the European Parliament upheld the INSOL proposal and also recommended a partial harmonization of insolvency rules. Coherently, the impact assessment held that a partial harmonization of selected topics of insolvency law is a superior solution, but – quite surprisingly – it dismissed this solution alleging that it would be 'too intrusive to the national legislations and insolvency systems'. As a consequence, the final version of the reform does not change the original private international approach: despite innovative rules on the common registers, the lodging of claims and insolvency of groups of companies, the core of insolvency regime remain in the hands of national Member States. This reflects a precise political choice. EU institutions do not believe to be the right normative bodies for implementing uniform rules that would impact severely upon the interests of a wide range of stakeholders and political constituencies. This approach mirrors the high political relevance of insolvency regimes. Nevertheless, the regulation is not entirely neutral and the recast has not repealed the most controversial rules that advantage strong creditors, such as the rules on avoidance actions and on 'rights in rem' guarantees. As a term of comparison, it is worth giving a glimpse to the other side of the Atlantic Ocean. In the US, insolvency regime is entirely federal and is heard by federal courts, while company law rules are almost exclusively governed at States' level. In the EU, by contrast, despite the reform of the insolvency regulation, Member States are still competent to govern both areas. Choice of law criterions for company law and insolvency law however diverge. Regarding the former, in its endless war against the real seat theory, the incorporation theory has nowadays won significant battles, at least for intra-EU relationship, thanks to the support of the CJEU. Regarding insolvency law connecting factors, by contrast, the recast has made the precise choice to keep the COMI as criterion for main proceedings. Although the COMI criterion does not exactly coincide with the 'real seat theory', it refers to the presence of physical elements and of the central administration of a company

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in a certain territory, in a way that is recognizable by third parties. We could conclude arguing that, while shareholders can freely choose national company law at the moment of incorporation, the power of regulating the insolvency regime is still in the hand of state that is actually most connected to the business. For the time being, this is to be praised as a reasonable solution.