

## ON GLOBALISATION OF REGULATION

*Bob Wessels\**

During the financial crisis, a global debate has been initiated on whether or not the system of financial regulation should be regulated on a global level or just on a national level, with a few provisions on international cooperation. In this opinion, professor Wessels argues that the methods of regulation are varied enough to address regulation both on a global and national scale. By way of illustrations of the regulation of international insolvencies and based on allocation of clear responsibility and authority to regulating bodies, it is possible to provide an efficient and effective answer for what, at the core, is a global problem, related to international financial markets.

“Don’t globalise financial regulation.” Under this title in *The Economist* of 14-20 March 2009 a debate has been started by guest author Dani Rodrik, a Harvard University professor in economics. Rodrik signals a clarion call for “a global system of financial regulation”, from Angela Merkel to Ben Bernanke (United States Federal Reserve) and from Gordon Brown to Jean-Claude Trichet (European Central Bank). Rodrik is rather against the idea: The logic for such a system of global financial regulation, he argues, is flawed. He submits that strengthening national or sometimes regional systems is far better, “superimposed by a thin veneer of international cooperation”. A more universal approach is therefore replaced by a reconstructed theory of territorialism. What are his main objections? These are three in number. First, a global strategy presumes that leading countries surrender significant sovereignty to international agencies. Rodrik doubts, for instance, that the USA would be willing to do so. Second, if it is at all possible to create global rules, they run the risk of being inadequate. He refers to the Basel solvency process to underline this. His most prominent objection is that a ‘one-size-fits-all’ solution is not tailored enough to the predilections of individual states, depending on their own preferences, desires, levels of developments and the availability of “skilled regulators to implement it”. His conclusion: “In short, global financial regulation is neither feasible, nor prudent, nor desirable”.<sup>1</sup>

It is undoubtedly true that national states have the exclusive power for putting into force legislation, with a court system to – eventually – sanction it. But are these states themselves best positioned to come with solutions for problems to which they also have contributed by ‘allowing’ the financial systems to fail? Not only banks and bankers, but also governments and governors should wonder whether their role is to be continued in its present form. Also lawmakers and regulators should learn from the past. Rodrik’s last

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<sup>1</sup> *The Economist*, 14-20 March 2009, p. 72.

argument seems fair, but experience in other global territories, such as trade – as Rodrik acknowledges – demonstrates that solutions have been drafted, which leave room for national states to maintain their unique social or cultural preferences. The greater good of a solid global system in certain aspects however is inconsistent with maintaining the full force of national social or economic policies. The economic and political differences between domestic and international approaches lie in “one of the most obvious facts of the world: markets want to be cosmopolitan, states do not.”<sup>2</sup> Here, the answer more probably lies in looking for (a combination of) the best methods of regulation on the basis of geography, the nature of regulation itself (hard law, best practices, guidelines), the function of certain rules in relation to the goals or the expectations they aim to address and the character of the rules, for instance procedural rules, rules to facilitate communication and coordination or more substantial rules. Regulation is much more varied and richer in its methods than Rodrik seems to suggest. Whilst Rodrik’s territorialism will undoubtedly preserve unique domestic policies and choices, it certainly is not uniquely suited to provide an efficient and effective answer for what, at the core, is an extra-territorial, global problem, related to international financial markets.

Sometimes there is no (global) regulatory system, but one may effectively be created by its main actors. In February 2009 a “Proposed Cross-border Insolvency Protocol for the Lehman Brothers Group of Companies” (Lehman Protocol) was published, which has the form of a non-binding agreement between sixteen insolvency office holders (administrators, liquidators etc.), which have been appointed by courts in over seventy insolvency proceedings in some forty countries over the world. The Lehman Protocol aims to facilitate the coordination of the progress of these proceedings, the rights of official representatives and creditors to appear in (foreign) courts or creditors meetings, communication on and access to data and information for these official representatives, et cetera. In international literature it is strongly debated whether national courts will be bound by such ‘protocols’.<sup>3</sup> In the Protocol of the largest bankruptcy ever (Lehman Brothers), an instrument of soft law is used, namely the ‘Guidelines Applicable to Court-to-Court Communication in Cross-Border Cases’. These “shall be incorporated by reference and form part of this Protocol in whatever form they are formally adopted by each Tribunal, in whole or in part and with or without modifications (if any). Where there is any discrepancy between the Protocol and the Guidelines, this Protocol shall prevail.” These Guidelines (seventeen in all) in general codify experiences and practices resulting from some fifteen cross-border insolvency cases in which courts in different jurisdictions have mutually aligned their approaches, their communication, their supervision and their completion of cross-border insolvency cases (whether based on a protocol or not). The

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<sup>2</sup> Martin Wolf, *Why Globalisation Works*, Yale University Press 2004, at p. 213.

<sup>3</sup> See for instance Mario Hortig, *Kooperation von Insolvenzverwaltern*, Baden-Baden: Nomos 2008.

Guidelines are a product of the American Law Institute, established in 1923 by judges, legal practitioners and academics, “to promote the clarification and simplification of the law and to secure the better administration of justice”. Here in Europe, ALI is known mainly for its role in the realisation of so-called ‘Restatements’, which are comprehensive descriptions and explanations of certain major topics of law, such as the Restatements on the Law of Agency, Conflict of Laws or Contracts.

The Lehman Protocol also refers to the European Communication & Cooperation Guidelines for Cross-border Insolvency. These Guidelines were drafted in autumn 2007 by Professor Miguel Virgós (Madrid) and I to facilitate communication and cooperation by liquidators, appointed in several insolvency proceedings which only involve one debtor, as foreseen in the EU Insolvency Regulation. An illustration such as a “protocol” is a striking demonstration of the globalisation of commercial activity in the present era.<sup>4</sup> They too have raised international awareness of the need to address the issues associated with insolvency in a cross-border context. Until now in this area of regulation states have only recently become less passive. Now many have started to provide regulation for international businesses experiencing financial difficulties which have cross-border effects. Only in the last five years have countries such as Australia, Germany, Japan, Spain, Mexico, UK and USA introduced or amended their international insolvency rules. Other important nations for the Dutch economy, such as France and Italy, but also the Netherlands itself, possess old-fashioned and ineffective rules. In this area states are lax, resorting to claiming that insolvency matters should be decided exclusively by a mechanism they have a patent for: their national judiciary. Increasingly states are enacting a variety of provisions related to cross-border coordination by administrators and only in some instances by courts. Given the essential role courts play the presence of new rules of the international insolvency should be supported by more robust rules for the cross-border judicial coordination of cross-border cases. Here, the need is felt for a convention with realistic and practical solutions to facilitate and promote the international harmonisation of some of the judicial and procedural aspects of international insolvency law, including a solid base for judicial cooperation in cross-border insolvency cases. I think such a convention – given the indispensable role of courts in insolvency cases – is desirable and feasible. My tentative view is that its contents should be limited in that it formulates fundamental rules and principles and allows the use of protocols, in which case specific details according to a certain format can be arranged.

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<sup>4</sup> In my inaugural lecture “Judicial Cooperation in Cross-border Insolvency Cases”, delivered in June 2008, on the occasion of the acceptance of my chair in International insolvency law, I further elaborate on the issue. For the text of my lecture and the draft Lehman Protocol, please visit my weblog at [www.bobwessels.nl](http://www.bobwessels.nl).

The body of financial regulation should be guided by international accepted principles and guidelines. International regulation and national implementation should reflect a balance between what is necessary in the light of the past events, while still leaving room for fair national demands and policies. With a large number of international bodies claiming their role in drafting and amending rules, it will be of utmost importance to set aside competing activities. Clear responsibilities and authority should be assigned to deal with global regulation in the varied way expressed above. In cross-border insolvency cases, the convention I suggest should be developed by the Hague Conference on Private International Law. The convention should act as an aid for judges to navigate in uncharted waters, and it should ensure that all stakeholders in an international restructuring or insolvency have the information they need to make informed decisions and it should also adopt procedural safeguards to ensure the integrity of all judgments given.

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