STUDY NOTES

A Framework for International Insolvency

2019

Global Insolvency Practice Programme 2019

MODULE A

Session 1: André Boraine

A Framework for International Insolvency

HOW TO USE THE STUDY NOTES

This is a word (or two) of welcome and information regarding the module dealing with the framework for and concepts and instruments of international insolvency law to be presented as Session One of Module A. It will be appreciated if candidates will go through these Study Notes and the compulsory prescribed materials before this session.

The purpose of the Study Notes is to provide the candidates with an overview over the more important sources and also a framework regarding the scope of the work to be covered during the session. The Study Notes therefore includes a summary of the **required prescribed materials that you should read as well as some of the additional materials** against the backdrop of the insolvency law framework.

Candidates are urged to read the **required** prescribed materials in advance and then to work through the Study Notes as well, in order to prepare themselves for this session. (Use the Summary in power point hand-out format to test your knowledge of the basic concepts after working through the Study Notes and compulsory prescribed materials.)

In this session we will try to establish what international insolvency law is all about, and to assess the available sources. The development of international insolvency law will be discussed from the point of view of the development of both cross-border insolvency rules as well as the setting of standards for the development of domestic insolvency systems.

In order to do so we will first look at the essential features of an insolvency law system, the sources of international insolvency law and some problem areas to be considered when working with cross-border matters.

It must be pointed out that the lecturer of this session does not present all the contents of this guide as his own since it is largely structured around a summary of the prescribed texts and a number of other selected sources in order to make these more accessible for the purposes of the session.

If you have any questions meanwhile please contact me at andre.boraine@up.ac.za

OUTCOMES:

SECTION A: GENERAL BACKGROUND

After completion of this section you must know the basics of the following aspects:

- The framework and essential features of insolvency law.
- Some comparative aspects.
- Classification of insolvency systems.
- Different classes of creditors.
- Core terminology.

SECION B: THE SOURCES AND NATURE OF INTERNATIONAL INSOLVENCY

After completion of this section you must know the basics of the following aspects:

- What international insolvency law is.
- The sources and nature of international insolvency law.
- Basic principles and approaches to cross-border insolvency cases.
- Various models and instruments available and in those in the process of being developed in the area of cross-border insolvency law.
- Problematic areas in cross-border insolvency law.

SECTION C: THE HARMONIZATION OF NATIONAL INSOLVENCY LAW AND ITS USE IN INTERNATIONAL INSOLVENCY LAW

After completion of this section you must know the basics of the following aspects:

- Principles to harmonise national insolvency laws.
- Difficult areas for harmonisation, such as:
  - Voidable dispositions;
  - Labour contracts;
  - Priorities;
  - Securities, and
  - Principles relating to the qualifications of estate representatives.

SECTION D: PRINCIPLES RELATING TO THE QUALIFICATIONS OF ESTATE REPRESENTATIVES

ANNEXURES:

SUMMARY OF Wessels and Boon: CROSS-BORDER INSOLVENCY LAW: INSTRUMENTS AND COMMENTARY

A. SOURCE MATERIALS: SEE ANNUXRES A TO E AT THE END OF THESE STUDY NOTES.

A. REQUIRED READING

- **Boraine, A.,** Insol Fellowship Study Notes (compiled by A Boraine), with Summary in hand out slide format for preparation purposes.
- **Omar, Paul.,** "The Landscape of International Insolvency Law" [Updated version] of Omar, Paul J., "The Landscape of International Insolvency. Law", in: 11 *International Insolvency Review* 2002, **173ff**.]
- **Omar, Paul.,** "Diffusion of the Principle in *Cambridge Gas*: A Sad and Singular Deflation" 2015 (2015) 3 NIBLeJ 31 at https://www4.ntu.ac.uk/nls/document_uploads/194364.pdf
- **Wood, Philip R**., *Principles of International Insolvency* (2007) pp. 1 -30 (General Introduction).

B. ADDITIONAL READING

- **Bewick, Samantha., et al.,** *Ethical Principles for Insolvency Professionals*, (2019) Insol Int
- **Fletcher, Ian F.,** *Theory and Principle in Cross-Border Insolvency, in: Ian F. Fletcher, Insolvency in Private International Law: National and International Approaches* (2005) **pp. 3-17 ("***Insolvency in Private International Law"*.)
- **Fletcher, Ian .F.,** *The Law of Insolvency*, London, Sweet and Maxwell, 5th ed, 2017 Ch 1 (Fletcher *"The Law of Insolvency*".)
- **Garrido, J.M.,** The Role of Personal Insolvency in Economic Development in the World Bank Legal Review (2014) Vol 5 pp 111 – 127.
- **Hatzimihail, NE,** "The Many Lives – and Faces – of the Lex Mercatoria : History as Genealogy in International Business Law" (2008) 71 *Law and Contemporary Problems* at 169.
- **Levinthal, L.,** "The early history of bankruptcy law" 1919 *University of Pennsylvania Law Review* 223.
- **Mevorach, Irit.,** *The Future of Cross-border Insolvency: Overcoming Biases and Closing Gaps* 2018, Oxford University Press, Oxford
- **Wessels, B.,** *International Insolvency Law* (2015)
- **Wessels, Bob and Boon, Gert Jan.,** *Sources of International Insolvency Law*.[Chapter 1 "Introduction to International Instruments: Commentary" from: Wessels, B and Boon, GJ., Cross-Border Insolvency Law. International Instruments and Commentary, 2nd ed Kluwer Law International, (2015), **pp. 1 – 134**.]
- **Westbrook, J.,** "Locating the eye of the financial storm" (2007) *Brook. J Int'l L* vol 32:3.
- **Westbrook, J., "**Ian Fletcher and the Internationalist Principle" 2015 (3) *NIBLeJ* at 30.

SECTION A: GENERAL BACKGROUND

After completion of this study unit you must know the basics of the following aspects:

- The framework and essential features of insolvency law.
- Core terminology.
- Some comparative aspects.
- Classification of insolvency systems.
- Different classes of creditors.

	1. FRAMEWORK OF ESSENTIAL FEATURES OF AN INSOLVENCY SYSTEM	
	A. ESSENCE OF INSOLVENCY/ BANKRUPTCY • Collective(individual) nature/ procedure • Meaning insolvency? • Liquidation of assets v. rescue	
	B. POLICY CONSIDERATIONS • Pro creditor • Pro debtor	
	C. SOURCES • Insolvency legislation (single Act or various pieces of legislation) • General law	
CONSUMER BANKRUPTCY INDIVIDUALS	**D. COMMON CHARACTERISTICS**	**CORPORATE BANKRUPTCY**
	E. GATEWAYS AND COMMENCEMENT **(How to open an insolvency proceeding?)** • Court? • Other? • Who can apply? (locus standi) NB: Importance of commencement of formal insolvency, i.e. bankruptcy	

	F. EFFECTS	
	F.1. AUTOMATIC STAY (Moratorium on individual collecting and execution procedures)	
	F.2. ESTATE/ ASSETS	
F.3.a. Rights, duties, liabilities and limitations of debtor as an individual	**F.3. PERSONAL CONSEQUENCES AND LIABILITY**	F.3.b. Rights, duties, liabilities and limitations of directors and officers
	F.4. EXECUTORY CONTRACTS • General powers of estate representative • -Exceptions, i.e. labour contracts?	
	F.5. SET-OFF AND NETTING (PRE-AND POST COMMENCEMENT)	
	F.6. AVOIDABLE DISPOSITIONS	
	G. ADMINISTRATION • Regulator (Structure) • Court involvement (special court/ other body?) • Estate representative (qualifications etc.?) • Proof of claims • Meetings of interested parties • Creditors	

	• Tracing of assets • Examinations • Realisation of the assets	
	H. DISTRIBUTION • Classes of creditors • Types of claims – Secured – Priorities – Concurrent	
	I. COST OF ADMINISTRATION	
	J. REHABILITATION	
J.a. DISCHARGE		**J.b. CORPORATE/BUSINESS RESCUE**
• Process • Time periods		• Initiate - formal • Moratorium • Debtor in Possession / Rescue Practitioner(?) • Post commencement finance • Discharge • Creditors' committees(?)
-Formal (statutory) repayment plans -Hybrids	**K. ALTERNATIVES** **Creditors' workouts: consensual**	• Formal/ prescribed rescue procedures • Non-formal: work outs • Pre-packs?
	L. CROSS-BORDER DISPENSATIONS	
Some systems: no collective procedures for individuals	**M. SPECIAL RULES**	Like: -Banks, financial institutions; -Groups of companies/ corporations; -State Owned Enterprises; -Non-profit associations; -Municipalities; -Sovereign debt.

1.1 BACKGROUND TO FRAMEWORK

There are a number of ways to classify the legal systems or families of the world but in general legal families across the globe will in many jurisdictions either have an English law, or what can broadly be termed a Civil law orientated foundation. When analysing the insolvency laws of various jurisdictions, such foundations will also show up in the variety of insolvency laws. But certain aspects of insolvency law will be affected by local legal culture, basic rights and the way in which a system deals with related matters like the security rights provided for or the approach to labour issues for instance. Terminology will also differ although one may find that the same principle may be designed by way of different terminology used. Approaches towards socio-economic issues will also be reflected in aspects of the country specific laws. It is therefore rather difficult to select a single legal system or rather insolvency or bankruptcy law systems to sue as point of departure for the purposes of a course of this nature. **Since it is so difficult to work with a particular system in order to explain many of the basic concepts in insolvency law, the UNCITRAL *Legislative Guide on Insolvency Law*, 2004 will largely form the basis to deal with the various aspects of or elements of a developed and efficient insolvency law system. Candidates are therefore also encouraged to read through this document in conjunction with Chapter 1 of this Study guide. (The Legislative Guide, can be used by member states of the United Nation when they need to reform their existing laws. See A. The Organisation and Scope of the *Legislative Guide*.)**

In Part 1 of the *Legislative Guide* that deals with the design of an insolvency law, the key objectives and structure of an effective and efficient insolvency law are explained as follows: "When a debtor is unable to pay its debts and other liabilities as they become due, most legal systems provide a legal mechanism to address the collective satisfaction of the outstanding claims from assets (whether tangible or intangible) of the debtor. A range of interests needs to be accommodated by that legal mechanism: those of the parties affected by the proceedings including the debtor, the owners and management of the debtor, the creditors who may be secured to varying degrees (including tax agencies and other government creditors), employees, guarantors of debt and suppliers of goods and services, as well as the legal, commercial and social institutions and practices that are relevant to the design of the insolvency law and required for its operation. Generally, the mechanism must strike a balance not only between the different interests of these stakeholders, but also between these interests and the relevant social, political and other policy considerations that have an impact on the economic and legal goals of insolvency proceedings. To the extent that it is excluded from the scope of such legal mechanisms, a debtor and its creditors will not be subject to the discipline of the mechanism, nor will they enjoy the protections provided by the mechanism.

Most legal systems contain rules on various types of proceeding (which are referred to in this *Legislative Guide* by the generic term "insolvency proceedings") that can be initiated to resolve a debtor's financial difficulties. While addressing that resolution as a common goal, these proceedings take a number of different forms for which uniform terminology is not always used and may include both what might be described as "formal" and "informal" elements. Formal insolvency proceedings are those commenced under the insolvency law

and governed by that law. They generally include both liquidation and reorganization proceedings. Informal insolvency processes are not regulated by the insolvency law and will generally involve voluntary negotiations between the debtor and some or all of its creditors. Often these types of negotiations have been developed through the banking and commercial sectors and typically provide for some form of restructuring of the insolvent debtor. While not regulated by an insolvency law, these voluntary negotiations nevertheless depend for their effectiveness upon the existence of an insolvency law, which can provide indirect incentives or persuasive force to achieve reorganization."

1.2 LEGEND TO FRAMEWORK

A. ESSENTIALS OF INSOLVENCY/ BANKRUPTCY

When considering A. in the above Framework, it raises questions as to the meaning of insolvency (or bankruptcy) and other matters. Firstly it must be noted that some systems use the term insolvency and others bankruptcy. Although these terms carry the same meaning in many systems, there is an explanation that insolvency sometimes means the state of financial affairs of a debtor whilst bankruptcy refers to the formal state of being put into formal bankruptcy but these terms are used as synonyms in many systems. Insolvency itself may refer to the situation where the liabilities of the debtor exceeds his or her assets, i.e. balance sheet insolvency, or where the debtor cannot repay the debt as it falls due by reason of a cash flow problem, i.e. commercial insolvency.

Wood lists the following possible **essential features** of insolvency or bankruptcy law that are said to be universal principles - but he then discredits them to some extent as well:

- Actions by individual creditors against the bankrupt are frozen- thus individual pursuit is stayed, also referred to as the automatic stay signifying a moratorium against individual debt enforcement. This is the only truly universal feature according to this author.
- The assets are pooled which become available to pay creditors – replacing the piecemeal seizure of assets by individual creditors. This feature is eroded as a universal principle in that different jurisdictions provide different exceptions (the exempt-property applies only to individuals).
- Creditors are paid *pari passu i.e.* pro rata out of the assets according to their claims. Wood term this a piece of ideology "which is nowhere honoured" since priority creditors and secured creditors form exceptions to this. (In practical terms few pro rated unsecured creditors will receive any payment form an insolvent estate.)

Sealy and Hooley distinguish as follows between objectives of insolvency for individuals and corporations:

- Individuals: to protect debtor from harassment by creditors; to enable him to make fresh start – especially in less blameworthy cases; to reduce indebtedness by making contribution from present and future income while at the same time considering his personal circumstances.

- Corporations – where possible to preserve the business, or viable parts thereof – not necessarily the company; where personal liability has been abused, to impose personal liability on responsible persons.

- Principles that apply to both situations are: to ensure *pari passu* distribution, thus on equal footing, except in so far as creditors has priority; ensure that secured creditors deal fairly towards debtor and other creditors; to investigate reasons for failure; to reclaim voidable disposition – where insolvent dealt improperly with assets.

Although some topics overlap in case of insolvency dealing with individuals (consumer insolvency or bankruptcy) and corporate bankruptcy there are also pertinent differences, for instance it is only in relation to individuals that the notion of exempt or excluded assets will apply. This means that some systems allow the insolvent individual to keep some of the assets required to maintain him or herself and his or her dependents.

B. POLICY CONSIDERATIONS

Although there are many policy considerations at play when analysing or reforming a particular insolvency system, a broad and very generalised approach to follow is firstly to ask if a particular system is more pro-creditor orientated, i.e. following a more conservative approach towards the granting of a discharge of debt to debtors or being more pro-debtor, i.e. jurisdictions that follow a rather liberal approach towards discharge, also referred to as rehabilitation or fresh start.

C. SOURCES

When analysing the insolvency laws of a particular jurisdiction, it is extremely important to find the main sources of the particular system. In modern days these rules will usually be found in legislation or codes. It must be noted that some systems like the US has a single bankruptcy act, the Bankruptcy Code of 1978 that applies throughout the US since it is federal legislation. In other systems like South Africa a multiplicity of legislation exist and these must be studied in conjunction with each other in order to understand the system in full – suffice to say that the Insolvency Act 1936 that deals mainly with the insolvency of individuals is the point of departure but provisions in the company's legislation must also be considered when dealing with corporate insolvency in this system. Over and above insolvency legislation, it is a fact that many legal principles forming part of the so-called general law, in other words non-bankruptcy law, will also have an effect in insolvency, for instance the rules that regulate the vesting of securities is not usually to be found in insolvency legislation but it will become a question in insolvency if a security right has been vested and is therefore acknowledged as such in formal insolvency.

D. COMMON CHARACTERISTICS (CONSUMER BANKRUPTCY v. CORPORATE BANKRUPTCY)

In order to analyse the various rules in a particular system it is necessary to distinguish between these two main areas of insolvency law, i.e. consumer and corporate bankruptcy or insolvency. Some principles may be largely the same and may apply in both instances but there are also some pertinent differences due to the very nature of the type of debtors, i.e. human v non-human. It has already been mentioned that only individuals or consumers may have some assets being exempt or excluded from their insolvent estates. It is also only individuals that will survive the bankruptcy when their assets are realised in order to pay their debts, whilst the existence of corporations or companies come to a final end on conclusion of the liquidation of their assets.

E. GATEWAYS AND COMMENCEMENT

All insolvency systems make provision for a procedure whereby formal insolvency or bankruptcy commences. This procedure may be by way of a court order and in this regard it must be noted that some systems have specialised bankruptcy courts, like the US, whilst in other systems the general courts will also decide on such matters. It is also possible that the bankruptcy proceeding may be opened by way of a more informal process, in other words where the process can be opened by way of an administrative process outside the ambit of the courts. In case of corporations some systems allow for the opening of the procedure by way of a members' resolution. It will also be extremely important to consider who may apply for the opening of the procedure, i.e. who has *locus standi* to do so. It is furthermore crucial to determine the moment of commencement of the procedure for a number of reasons, usually the status of creditors, i.e. secured or unsecured will be determined with reference to their positions at this moment, and some calculations like time-periods that may become relevant within the ambit of avoidable dispositions will also be determined with reference to commencement.

F. EFFECTS

After commencement, a number of consequences or effects will follow. Some deals with the legal position or status of the insolvent and his or her assets (estate assets), pre-commencement transactions, whilst others deal more with the administration of the estate.

F.1. AUTOMATIC STAY

It is a rather general feature of the setting into motion of a bankruptcy procedure that individual actions are stayed as mentioned in A. above. The reason for this is that insolvency or bankruptcy signifies a collective procedure that must in principle be binding

on all the creditors. In order to allow a single creditor to continue with his or her individual debt enforcement mechanism would render the collective proceeding senseless.

F.2. ESTATE/ ASSETS

One of the important aspects to be considered at the commencement of insolvency or bankruptcy is what assets are deemed to be estate assets. This aspect is of particular importance in case of consumers/ individuals since, and as stated before, many systems allow for certain assets to be excluded from the estate.

Although this notion of exempt or excluded assets does not really come into play in case of corporate liquidations, it may nevertheless be important to work out which assets are in fact assets of the insolvent entity in order to trace and collect same for the purposes of realisation and distribution.

F.3. RIGHTS, DUTIES, LIABILITIES AND LIMITATIONS

F.3.a. Rights, duties, liabilities and limitations of debtor as an individual

Formal insolvency or bankruptcy of an individual may affect them in a number of ways. Some systems limit their contractual capacity in relation to new credit by requiring the consent of their estate representative, in some instances they are not allowed to take up certain positions like being a member of parliament, or to serve as a directors of companies or being appointed as estate representatives of an insolvent estate.

F.3.b. Rights, duties, liabilities and limitations of directors and officers

The liquidation of a company may give rise to certain personal consequences for its (former) directors and officers. Personal liability against creditors of the insolvent company of such persons in case of reckless or fraudulent trading is one of the aspects that must be thoroughly considered in case of corporate bankruptcy. The estate for such liability may be more lenient or stringent depending on the laws of a particular jurisdiction.

F.4. EXECUTORY CONTRACTS

Although rights and obligation of parties are in principle acknowledged and respected by insolvency law, insolvency systems usually allow the estate representative to deal with contracts entered into by the insolvent with another party prior to commencement of an insolvency proceeding in a number of ways, like for instance to decide if he or she will abide by the contract or not, in which case the solvent party will have certain remedies against the estate. There may also be special legal rules that set out the position of the solvent party in a particular case and in relation to a specific type of contract, for instance a lease. Due to local culture and conditions, the treatment of, especially, contracts of employment differs depending on the relevant approach to socio-economic matters and the

political dispensation of a country. In some systems contracts of employment may terminate or be suspended at commencement of a liquidation, and such contracts may even be transferred to a new owner/ employer where the business is transferred to a new owner. (Note this example of the contract of employment refers to the contractual terms, the way in which such employees will be remunerated for wages etc in arrears is also a major topic in many systems and are also treated in a number of ways.)

F.5. SET-OFF AND NETTING

With regard to set-off a distinction must be drawn between pre- and post-commencement set-off that may have happened in relation to claims of and against the insolvent and another party. In this regard it is to be noted that some systems will provide specific remedies whereby- pre-commencement set-off may be ignored under certain conditions whilst in case of post-commencement set-off where some systems allow it under certain conditions and others not.

In relation to transaction on the financial markets, some systems also have special rules whereby netting-or set-off that happens in relation to such transaction may be honoured even when one of the parties is insolvent, since the risk exists that the non-honouring of such transactions may in certain circumstances may jeopardise the economic stability put the economy of a country under risk.

F.6. AVOIDABLE DISPOSITIONS

The Insolvency Guide stats that since insolvency law establishes a collective debt collecting device, it is essential to discourage individual creditors to continue with individual debt enforcement measures as from commencement. But policy considerations dictates that some transactions that transpired prior to commencement may and should under certain circumstances also become subject to investigation and if certain requirements are met, they may be set aside and benefits received by the beneficiary of a transaction will be called upon to return such benefit to the insolvent estate. Transactions that are typically made avoidable in insolvency are those to prevent fraud(e.g. transactions designed to hide assets for the later benefit of the debtor or to benefit the officers, owners or directors of the debtor); to uphold the general enforcement of creditors' rights; to ensure equitable treatment of all creditors by preventing favouritism when the debtor makes preferential dispositions preferring some creditors at the expense of others; to prevent a sudden loss of value from the business entity just before the supervision of the insolvency proceedings imposed; and, in some jurisdictions , to create a framework for encouraging out-of court settlement—creditors will know that last-minute transactions or seizures of assets can be set aside and therefore will be more likely to work with debtors to arrive at workable settlements without court intervention.

Avoidable dispositions can be classified as either fraudulent conveyances or preferences. A fraudulent conveyance entails a disposition of property by the insolvent, usually in the

form of a donation or undervalue transaction, that therefore causes or increases the insolvent's insolvency, while a preference is marked by the settlement of a pre-existing debt to a creditor or by affording such a creditor real security, thereby improving his position in insolvency. The *actio Pauliana* forms the basis of fraudulent conveyance law in civil law systems, whilst the Act of Elizabeth of 1570 is the basis of this remedy in English law.

G. ADMINISTRATION

The administration of an insolvent estate is the main part of the post-commencement proceedings and a broad number of aspects fall under this very general term.

Many systems provide for a type of regulator or at least an official administrative office that has certain prescribed functions like supervision of the administration process of an insolvent estate and sometimes extensive regulatory functions in relation to the appointment etc of insolvency practitioner. Supervision may therefore take place by way some official body – some kind of regulator, or in some systems by the courts.

The majority of systems provide for the office of an insolvent estate representative or administrator and they are termed differently depending on the particular jurisdiction like liquidator, trustee, receiver, curator or syndic. It may be mentioned that the appointment procedure, prescribed qualifications and regulation of estate administrators differ significantly from system to system. Some systems prefer qualified accountants, others attorneys, and some have no formal prescribed qualifications.

The fact of bankruptcy must be advertised, in other words made known to the creditors so that they know the status of the debtor. Provision will usually be made for creditors' meetings and the filing of claims.

An insolvent estate administrator must be appointed in accordance with the prescribed rules of the relevant jurisdiction and provision must be made for the administration by such person, including the power to investigate, verify claims, realise assets, and distribute the proceeds of the assets in accordance with the distribution prescribed rules by way of dividends. An important task of the administrator is to trace assets of the estate and to bring same to the estate so that they can be available for distribution amongst the creditors.

Creditors will thus participate, usually by way of the creditors' meetings, or where allowed by forming creditor committees.

H. DISTRIBUTION

The distribution rules, or payment rules of creditors in insolvency will differ from system-to-system but systems usually draw a distinction between those creditors who rely on a

type of real security that is acknowledged by a particular system, and creditors who have not established such a right of security at the time of commencement and who will thus in principle be treated as unsecured creditors.

Since there are a number of important differences between the types of real securities, the procedure to effect such rights and their consequences, this remains one of the difficult areas to deal with on a cross-border level. In English jurisdictions the notion of a floating charge is for instance acknowledged whilst this form of security does not from part of civil law jurisdictions in general.

Many instruments are based on the principle that pre-required rights acquired in terms of the general law of a particular jurisdictions, like securities, must be acknowledged during bankruptcy. UNCITRAL has also finalised a Model Law on Security interests. (See **www.uncitral.org/uncitral/en/commission/working_groups**)

Many systems also provide for prescribed statutory priorities or preferences whereby some creditors like the tax authority or employees in relation to claims for wages in arrears will enjoy a statutory priority in
relation to their claims that must first be paid from the proceeds of those assets not subject to a security and surplus income derived from secured assets. Some systems for instance grant employees a super-preference that will enjoy priority over other priority creditors, or in some jurisdictions even above secured creditors.

Usually where there is such provision for priorities, the unsecured creditors who enjoy no priority will be considered for payment from funds remaining at that stage of the distribution. These are the creditors who may get a dividend or may receive no payment at all.

Some claims are even further down in the ladder of payments for instance where a system allows for the subordination of certain claims that will rank even after the unsecured creditors who enjoy no priority.

I. COST OF ADMINISTRATION

The cost of administering an insolvent estate must usually be paid out of the proceeds of the assets after they have been realised. Sometimes there will be a shortfall and some systems then oblige those creditors who have proved claims against the estate to pay the shortfall in accordance with their claims, in other words to make contribution towards settling such shortfall. Where litigation is required, for instance to reclaim estate assets, creditors will sometimes finance such litigation and will then usually enjoy some benefit when the litigation is successful. In some jurisdictions there may be a special dispensation hereby a very small estate or one with no assets be finalised by the official regulator of that jurisdiction.

J. REHABILITATION

The term rehabilitation usually refers to the state where a debtor, after entering an insolvency proceeding, will receive a discharge of unpaid debts, and will then be allowed a fresh start. The notion and pre-conditions of such a fresh start may differ from jurisdiction to jurisdiction and a system could also be termed pro debtor, or pro creditor based on the relative ease or difficulty in providing such a statutory discharge.

J.a. Discharge of individuals

Rehabilitation in the case of liquidation of assets an individual (see J.a.) will thus afford the insolvent a discharge and he or she will be allowed to continue without the pre commencement debt burden, while in case of a company, such liquidation will usually bring an end to the existence of that entity.

J.b. Corporate/ business rescue

Rehabilitation or rescue of corporations (business rescue, see J.b.) has become a main area of reform in many systems over the last couple of years and wherever possible is the preferred way to deal with financially distressed entities rather than to liquidate same. The underlying reasons are that the preservation of a business holds advantages for society in the form of job preservation and thus the ultimate growth of the economy. Such rescue attempt can either be informal and based on a creditor work-out where the parties try to reach an agreement on how to deal with the debt of the particular entity. If an agreement that may allow for an extension of the payment periods of debt, discharge of (some of the) debt and even debt-for equity swops is reached. The rescue plan may be pre-packed in other words work out in advance and may then be either adopted by way of agreement or following a formal prescribed compromise and/ or rearrangement procedure.

In case of a statutory prescribed rescue procedure, there will usually be a process to commence rescue, provisions for a stay of pre-commencement procedures, arrangements regarding directors, i.e debtor in possession (will they remain in office) or where they will be replaced by the rescue practitioner; the appointment of a rescue practitioner where applicable, input and participation by role players like creditors and employees – sometimes by allowing for creditor and employee committees etc. In order to make a rescue viable, it will usually be necessary to bring in new or fresh capital, to discharge at least some of the debts and sometimes to close down some of the units of the business that will inevitably bring about some job losses. Usually there will also be provision for the recue to be converted to a liquidation when it becomes clear that the rescue attempt will not succeed. The essence of rescue is to preserve at least the business or parts of it of the failing debtor.

K. ALTERNATIVES TO LIQUIDATION OF ASSETS

It has already been mentioned above, that debtors may approach their creditors and try to reach an agreement that will allow for a new arrangement in relation to the existing debts. Such agreements may provide for an extension of the repayment periods (rescheduling of debts) and or discharge of some of the debts. Usually when such an agreement is reached, it will take the form of a compromise or composition and will usually lead to a contractual novation of the former debt. In J.b. rescue as an alternative to liquidation of entities like corporations have also been discussed.

It should also be mentioned that some systems also make provision for formal repayment plans as alternatives to insolvency/ liquidation of assets for individuals. Such repayment plans may in some prescribed instances follow a majority vote of acceptance by the creditors or may be enforced on the creditors by way of a court order. Not all systems allow for a discharge in these instances.

L. CROSS-BORDER DISPENSATIONS

A variety of modes to deal with assets of insolvent estates that are situated in foreign jurisdictions, i.e. jurisdictions where the insolvency proceeding has not been opened in the first place, exist. Some systems have statutory provisions in place in some there is no statutory dispensation but the courts can be approached on an ad hoc basis in order to issue an order that may allow for a foreign insolvent estate representative to deal with assets in that jurisdiction. There are also countries that deal with this aspect by way of treaties entered into amongst themselves.

As will be discussed, a number of internal initiatives are in place with the view of establishing a more uniform approach towards cross-border insolvency cases. One such an attempt is *the UNCITRAL Model Law on Cross-Border Insolvency* of 1997. This Model Law is an example of a soft law option and member states of the UN are encouraged to adopt it to improve cross-border cooperation etc in cross-border insolvency cases. [Note: The Model Law will be referred to elsewhere in these notes and discussed more fully in a separate lecture. Article 2 of the Model Law contains definitions and these are helpful in developing a common international terminology regarding aspects of cross-border insolvency. The following definitions are provided:

(a) "Foreign proceeding" means a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation;
(b) "Foreign main proceeding" means a foreign proceeding taking place in the State where the debtor has the centre of its main interests ("COMI");
(c) "Foreign non-main proceeding" means a foreign proceeding, other than a foreign main proceeding, taking place in a State where the debtor has an establishment within the

meaning of subparagraph (f) of this article *(Own note: this may be referred to as a secondary proceeding)*;
(d) "Foreign representative" means a person or body, including one appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding;
(e) "Foreign court" means a judicial or other authority competent to control or supervise a foreign proceeding;
(f) "Establishment" means any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services.

M. SPECIAL RULES

In some systems it is not possible to subject an individual to a collective insolvency procedure and others allow for insolvency procedures only in cases where such an individual is a trader.

Insolvency of groups of companies and the insolvency of financial institutions like banks and insurance companies also poses special difficulties.

Despite the reality of enterprise groups, legislation usually treats corporations or companies as single entities. Insolvency laws in particular respect the separate legal status of each enterprise group member and a separate application for commencement of insolvency proceedings is thus usually required to be made with respect to each of those members. In some instances some laws make provision for limited exceptions that may allow a single application to be extended to other group members where, for example, all interested parties consent to the inclusion of more than one group member; the insolvency of one group member has the potential to affect other group members; the parties to the application are closely economically integrated, such as by intermingling of assets or a specified degree of control or ownership; or consideration of the group as a single entity. In some instances judges have also developed the law to be more in line with modern business realities. (See further Uncitral Legislative Guide on Insolvency Law "Part three: Treatment of enterprise groups in insolvency at http://www.uncitral.org/pdf/english/texts/insolven/pre-leg-guide-part-three.pdf.)

Financial distress of banks and other financial institutions like insurance companies may give rise to a domino effect in that such institutions are usually linked by means of inter-se transactions and the insolvency of one can cause the collapse of a number of such institutions in a particular country - and even beyond its boundaries. This poses a significant risk for local economies and even the global economy. Due to this systemic-risk factor, many jurisdictions allow for special insolvency dispensations for such entities and they are therefore also usually strictly regulated.

2 CORE TERMINOLOGY

SOURCE: EXTRACT GLOSSARY OF TERMS FROM UNCITRAL INSOLVENCY GUIDE OF 2004 ["UIG"] – see Annexure E.4. below.

Notes on terminology
Although the following terms are intended to provide an orientation to the reader of the ***Uncitral Legislative Insolvency Guide*** **["UIG"]**, they can be used in general as well. They must also be read in conjunction with the framework and its explanation above.

Many terms such as "secured creditor", "security interest", "liquidation" and "reorganization" may have fundamentally different meanings in different jurisdictions. An explanation of the use of the term in the Guide may assist in ensuring that the concepts discussed are clear and widely understood. (It is submitted that these terms may form the basis to establish a "common language" for the development of international insolvency.)

Terms and definitions
12. The following paragraphs explain the meaning and use of certain expressions that appear frequently in the Legislative Guide 2004:

(**a) "Administrative claim or expense":** claims that include costs and expenses of the proceedings, such as remuneration of the insolvency representative and any professionals employed by the insolvency representative, expenses for the continued operation of the debtor, debts arising from the exercise of the insolvency representative's functions and powers, costs arising from continuing contractual and legal obligations and costs of proceedings;
(b) "Assets of the debtor": property, rights and interests of the debtor, including rights and interests in property, whether or not in the possession of the debtor, tangible or intangible, movable or immovable, including the debtor's interests in encumbered assets or in third party-owned assets;
(c) "Avoidance provisions": provisions of the insolvency law that permit transactions for the transfer of assets or the undertaking of obligations prior to insolvency proceedings to be cancelled or otherwise rendered ineffective and any assets transferred, or their value, to be recovered in the collective interest of creditors;
(d) "Burdensome assets": assets that may have no value or an insignificant value to the insolvency estate or that are burdened in such a way that retention would require expenditure that would exceed the proceeds of realization of the asset or give rise to an onerous obligation or a liability to pay money;
(e) "Cash proceeds": proceeds of the sale of encumbered assets to the extent that the proceeds are subject to a security interest;
(f) "Centre of main interests": the place where the debtor conducts the administration of its interests on a regular basis and that is therefore ascertainable by third parties;
(g) "Claim": a right to payment from the estate of the debtor, whether arising from a debt, a contract or other type of legal obligation, whether liquidated or unliquidated, matured or unmatured, disputed or undisputed, secured or unsecured, fixed or contingent.

Note: Some jurisdictions recognize the ability or right, where permitted by applicable law, to recover assets from the debtor as a claim;

(h) "Commencement of proceedings": the effective date of insolvency proceedings whether established by statute or a judicial decision;

(i) "Court": a judicial or other authority competent to control or supervise insolvency proceedings;

(j) "Creditor": a natural or legal person that has a claim against the debtor that arose on or before the commencement of the insolvency proceedings;

(k) "Creditor committee": representative body of creditors appointed in accordance with the insolvency law, having consultative and other powers as specified in the insolvency law;

(l) "Debtor in possession": a debtor in reorganization proceedings, which retains full control over the business, with the consequence that the court does not appoint an insolvency representative;

(m) "Discharge": the release of a debtor from claims that were, or could have been, addressed in the insolvency proceedings;

(n) "Disposal": every means of transferring or parting with an asset or an interest in an asset, whether in whole or in part;

(o) "Encumbered asset": an asset in respect of which a creditor has a security interest;

(p) "Equity holder": the holder of issued stock or a similar interest that represents an ownership claim to a proportion of the capital of a corporation or other enterprise;

(q) "Establishment": any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services;3

(r) "Financial contract": any spot, forward, future, option or swap transaction involving interest rates, commodities, currencies, equities, bonds, indices or any other financial instrument, any repurchase or securities lending transaction, and any other transaction similar to any transaction referred to above entered into in financial markets and any combination of the transactions mentioned above;4

(s) "Insolvency": when a debtor is generally unable to pay its debts as they mature or when its liabilities exceed the value of its assets (Added note: this definition denotes commercial insolvency or cash flow insolvency and balance sheet insolvency respect. The terms bankruptcy is also sometimes used but it usually refers to the formal state of being in bankruptcy);

(**t) "Insolvency estate":** assets of the debtor that are subject to the insolvency proceedings;

(u) "Insolvency proceedings": collective proceedings, subject to court supervision, either for reorganization or liquidation;

(v) "Insolvency representative": a person or body, including one appointed on an interim basis, authorized in insolvency proceedings to administer the reorganization or the liquidation of the insolvency estate;

(w) "Liquidation": proceedings to sell and dispose of assets for distribution to creditors in accordance with the insolvency law;

(x) "Lex fori concursus": the law of the State in which the insolvency proceedings are commenced;

(**y) "Lex rei situs":** the law of the State in which the asset is situated;

(z) "Netting": the setting-off of monetary or non-monetary obligations under financial contracts;

(aa) "Netting agreement": a form of financial contract between two or more parties that provides for one or more of the following:
(i) The net settlement of payments due in the same currency on the same date whether by novation or otherwise;
(ii) Upon the insolvency or other default by a party, the termination of all outstanding transactions at their replacement or fair market values, conversion of such sums into a single currency and netting into a single payment by one party to the other; or
(iii) The set-off of amounts calculated as set forth in subparagraph
(ii) of this definition under two or more netting agreements;
(bb) "Ordinary course of business": transactions consistent with both:
(i) the operation of the debtor's business prior to insolvency proceedings; and
(ii) ordinary business terms;
(cc) "Pari passu": the principle according to which similarly situated creditors are treated and satisfied proportionately to their claim out of the assets of the estate available for distribution to creditors of their rank;
(dd) "Party in interest": any party whose rights, obligations or interests are affected by insolvency proceedings or particular matters in the insolvency proceedings, including the debtor, the insolvency representative, a creditor, an equity holder, a creditor committee, a government authority or any other person so affected. It is not intended that persons with remote or diffuse interests affected by the insolvency proceedings would be considered to be a party in interest;
(ee) "Post-commencement claim": a claim arising after commencement of insolvency proceedings;
(ff) "Preference": a transaction which results in a creditor obtaining an advantage or irregular payment;
(gg) "Priority": the right of a claim to rank ahead of another claim where that right arises by operation of law;
(hh) "Priority claim": a claim that will be paid before payment of general unsecured creditors;
(ii) "Protection of value": measures directed at maintaining the economic value of encumbered assets and third party owned assets during the insolvency proceedings (in some jurisdictions referred to as "adequate protection").
Protection may be provided by way of cash payments, provision of security interests over alternative or additional assets or by other means as determined by a court to provide the necessary protection;
(jj) "Related person": as to a debtor that is a legal entity, a related person would include: (i) a person who is or has been in a position of control of the debtor; and (ii) a parent, subsidiary, partner or affiliate of the debtor. As to a debtor that is a natural person, a related person would include persons who are related to the debtor by consanguinity or affinity;
(kk) "Reorganization": the process by which the financial well-being and viability of a debtor's business can be restored and the business continue to operate, using various means possibly including debt forgiveness, debt rescheduling, debt-equity conversions and sale of the business (or parts of it) as a going concern;
(ll) "Reorganization plan": a plan by which the financial well-being and viability of the debtor's business can be restored;

(mm) "Sale as a going concern": the sale or transfer of a business in whole or substantial part, as opposed to the sale of separate assets of the business;
(nn) "Secured claim": a claim assisted by a security interest taken as a guarantee for a debt enforceable in case of the debtor's default;
(oo) "Secured creditor": a creditor holding a secured claim;
(pp) "Security interest": a right in an asset to secure payment or other performance of one or more obligations;
(qq) "Set-off": where a claim for a sum of money owed to a person is applied in satisfaction or reduction against a claim by the other party for a sum of money owed by that first person;
(rr) "Stay of proceedings": a measure that prevents the commencement, or suspends the continuation, of judicial, administrative or other individual actions concerning the debtor's assets, rights, obligations or liabilities, including actions to make security interests effective against third parties or to enforce a security interest; and prevents execution against the assets of the insolvency estate, the termination of a contract with the debtor, and the transfer, encumbrance or other disposition of any assets or rights of the insolvency estate;
(ss) "Suspect period": the period of time by reference to which certain transactions may be subject to avoidance. The period is generally calculated retroactively from the date of the application for commencement of insolvency proceedings or from the date of commencement;
(tt) "Unsecured creditor": a creditor without a security interest;
(uu) "Voluntary restructuring negotiations": negotiations that are not regulated by the insolvency law and generally will involve negotiations between the debtor and some or all of its creditors aiming at a consensual modification of the claims of participating creditors.

3 HISTORICAL DEVELOPMENT AND SOME COMPARATIVE ASPECTS

3.1 Historical background to (and some comparative aspects of) international insolvency law

There are various points of view regarding the notion of international insolvency law. The point of departure is that there is not a single set of insolvency rules that applies globally. [1] In fact, all States with a developed legal system do have some kind of bankruptcy / insolvency system - also referred to as a collective debt collecting procedure - but there are differences in approach and policy as well as substantive and procedural rules. Apart from different approaches in insolvency law, essential areas of the general law also differ. Amidst these differences, scholars, legislatures international organisations – such as the United Nations Commission for International Trade Law (UNCITRAL) and the World Bank – and courts are continuously trying to devise solutions for dealing with insolvency issues on a transnational basis.

[1] B Wessels, *International Insolvency Law*, Kluwer, 2015, p 1.

Consequently, the point of departure on this course is that there is no single set of insolvency rules that apply on a global basis. [2] It is important to have a basic knowledge of the historical roots and essential characteristics of insolvency law in order to understand the various initiatives in trying to establish a more effective and uniform approach to cross-border insolvency law dispensation; this in spite of the differences in legal systems, insolvency dispensations and approaches.

3.1.1 Historical roots of insolvency law

For the purpose of this course, the development of insolvency or bankruptcy in civil law and English law will be taken as a point of departure, since many national or domestic legal systems are still based on one or the other.

The roots of civil law can be traced to Roman law and Table 3 of the Twelve Tables dealt with the execution of judgments. In this sense, debt execution developed from the debtor pledging his own body for the repayment of the loan and he could be imprisoned, sentenced to death or sold as a slave in order to secure repayment of the debt.[3]

In the context of insolvency as such, Fletcher[4] states that the roots of bankruptcy law (as a collective debt colleting procedure) are to be found in the following procedures of the Roman law, namely: *cessio bonorum* (assignment of property); *distractio bonorum* (forced liquidation of assets); *remission* and *dilation* (compositions with creditors). These procedures developed from individual debt collecting procedures, which in turn gave rise to the development of collective debt collecting mechanisms (insolvency law) when the debtor was found to be insolvent.

Insolvency law in Europe further developed as a result of the *Lex Mercatoria*, being the customs and usages that developed between merchants on the continent and thus influenced the laws of the countries that had a more Roman or Germanic law character (loosely termed “civil law”).

Many European countries introduced some form of bankruptcy legislation between the 13th and 17th century. The word “bankruptcy” is said to stem from the Italian *banca rotta*, which means to “break the bench”. This referred to the situation where a merchant who operated his business in the medieval market place could not pay his debt and his creditors closed his business by breaking his bench or counter.[5] A central theme of the development of debt collection and insolvency law was the gradual move from execution against the person towards a dispensation of execution against the assets of the debtor.[6]

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2 P R Wood, *Principles of International Insolvency* (Sweet and Maxwell Ltd, 2007) pp 1 - 30.
3 J C Calitz, “Historical overview of state regulation of South African Insolvency Law” 2010 *Fundamina*, p 5.
4 I F Fletcher, *The Law of Insolvency*, London, Sweet and Maxwell, 5th ed, 2017 Ch 1, p 6; and see generally L E Levinthal, “The Early History of Bankruptcy Law”, 1918 *Uni of Pennsylvania Law Review and American Law Register*, p 223.
5 PR, Wood, *supra*, pp 11 – 12.
6 LE, Levinthal, *supra* , p 232.

At one stage only merchants (traders), as opposed to ordinary wage-earning individuals, could be declared bankrupt and hard sentences were imposed on debtors by incarcerating those who could not pay.[7]

It is evident, then, that bankruptcy started off as a collective debt-collecting mechanism that favoured creditors (pro-creditor). The development of the concept of a discharge of debts (sometimes referred to as "fresh start" or "rehabilitation") and the abolishment of imprisonment for debt, only arrived at a much later stage,[8] providing insolvency law with a far more "humane" face.

In English law, the word "bankrupt" first appeared in the early part of the 16th century. Initially, English law did not provide for imprisonment for debt but this option was introduced by the end of the thirteenth century by the Statute of Marlbridge of 1267. Imprisonment for the non-payment of debt was as a principle only abolished in 1869 by the Debtors Act.[9]

This first English Bankruptcy Act of 1542 provided for a form of compulsory sequestration, to be applied to a dishonest and absconding debtor. This statute viewed debtors as *quasi*-criminals (also called "offenders").[10] The 1542 Act also provided for the appointment of a body of commissioners who, on a creditor's application, could proceed against a trading debtor who fled from the country, who barricaded himself in his house, or who neglected to pay his debts or otherwise defrauded his debtors. The fundamental principle of this Act was that in the case of a fraudulent debtor, there should be a compulsory administration and distribution on the basis of equality amongst all the creditors. It therefore contained the two fundamental principles on which modern insolvency laws are based: collective participation by creditors and a *pari passu* distribution among them of the available assets.

As was the case on the continent, the development of insolvency under English law also first provided for individual debt-collecting procedures prior to the development of a collective (bankruptcy) procedure. The 1570 Act introduced during the reign of Queen Elizabeth I followed and was known as the Act of Elizabeth. This is said to be the first law designed specifically as a true bankruptcy statute, rather than as a fraud-prevention law.[11] This Act provided additional acts of bankruptcy but did not contain a discharge provision, something that was only introduced in the early part of the 18th century. The 1570 Act also transferred jurisdiction of the supervision of the estate from the previously mentioned commissioners, introduced in terms of the Bankruptcy Act of 1542, to the Lord Chancellor. A bankruptcy proceeding could be opened by a creditor following an "act of bankruptcy" by the debtor. Creditors could thus petition the Lord Chancellor to convene a bankruptcy meeting, who could then also appoint bankruptcy commissioners to supervise the process. The commissioners would then typically examine the debtor's transactions and property and the debtor was obligated to transfer his or her property to the commissioners. They could also summon persons to appear for questioning and they could even commit people to prison.

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7 IF, Fletcher, *supra*, p 9.
8 *Ibid*.
9 LE, Levinthal, *supra*, p 3; Calitz, *supra*, p 13.
10 JC, Calitz, *supra*, p 13 and other writers referred to.
11 *Ibid*.

The Statute of Ann of 1705 was an important piece of legislation since it introduced the notion of a statutory discharge.[12] The discharge was not an automatic entitlement and the commissioners had to confirm that the debtor had "conformed" and had co-operated during the proceedings. Most of the principles introduced by these acts have remained part of modern bankruptcy. During the next few decades, a formal system having been introduced by legislation, which quickly fell under the control of courts of equity.

Further legislative reforms followed and a new office, namely the office of the Official Receiver, was introduced in 1883 with the responsibility of administrating the debtor's estate before the commencement of the bankruptcy procedure or of the friendly agreement with creditors.[13]

The late 19th century is marked by a return in "officialism" by the appointment of Joseph Chamberlain as president of the Board of Trade in 1881.[14] Chamberlain set out three principles essential to a good bankruptcy law, namely:[15]

- the assets of the debtor in each insolvency case belonged to the creditors and therefore they should have the fullest control subject to the least possible interference;
- the second principle held that "the trustee should be subject to official supervision and control as regards his pecuniary administration … and his accounts should in every case be audited by authority"; and
- thirdly, he called for an independent examination of the debtor's conduct and circumstances leading to his insolvency.

The law of 1883 is viewed by certain writers as the foundation of the present system of English bankruptcy law, with the aim of the Act being a fair procedure with adequate supervision and means to discourage dishonesty. The machinery for dealing with bankruptcy matters created by the Act of 1883 essentially remains in force in present-day insolvency law.

The 1883 Act remained the basic approach of English insolvency law for most of the 20th century, until the period when a comprehensive review of English bankruptcy law took place under the auspices of the Cork Committee in 1977, leading to the famous Cork Report that ultimately led to the promulgation of the Insolvency Act of 1986.[16]

3.1.2 Different systems of insolvency law (or insolvency law "families")

There are a number of ways to classify the legal systems or families of the world but in general legal families across the globe will in many jurisdictions either have an English law, or what can broadly be termed, a Civil law orientated foundation.[17] When analysing the insolvency laws of various jurisdictions, such foundations will

12 *Idem*, p 9.
13 *Idem*, p 12.
14 *Idem*, p 13.
15 *Idem*, pp 17 to 18.
16 *Idem*, pp 15-18.
17 PR, Wood, *supra*, p 55.

also show up in the variety of insolvency laws. But certain aspects of insolvency law will be affected by local legal culture, basic rights and the way in which a system deals with related matters such as the security rights provided for or the approach to labour issues, for instance. Terminology will also differ although one may find that the same principle may be designed by way of different terminology used.[18]

3.1.2.1 Anglo-American (common law) systems

English insolvency law[19]

The main piece of legislation regulating English insolvency law, is the Insolvency Act 1986. As indicated above, the famous Cork Report lead to the introduction of this Act and it applies to England and Wales.[20]

The Insolvency Act 1986 is an example of unified insolvency legislation in that it deals with consumer (personal) and corporate bankruptcy in one and the same Act but the Act basically duplicates many of the provisions as these apply to individuals and companies respectively.

It is to be noted that the Insolvency Act 2000 and the Enterprise Act 2002, amended aspects of the 1986 Insolvency Act. The Debt Relief Order for individuals was introduced in 2009 and further amendments allowing for an online application for bankruptcy relief was introduced in 2016.

As part of its cross-border rules, England and Wales also adopted the UNCITRAL Model Law on Cross-Border Insolvency in 2006. Section 426 of the Insolvency Act 1986 still applies to "relevant" countries as listed and common law principles still apply as well. Currently the UK is a member State of the EU and as such the EU Insolvency Regulation also applies to cross-border insolvency matters between EU member States *inter se*.

American insolvency law[21]

The USA is a federation and as a rule a distinction must be drawn between federal and state law. It is important to recognise that the Bankruptcy Code is federal legislation, thus applying to all US states. Following the work of the Review Commission of 1973, American bankruptcy law was revised and gave rise to the Bankruptcy Code of 1978. The Code provides for the following procedures:

- liquidation – chapter 7;
- municipalities – chapter 9;
- Reorganisation (rescue) – chapter 11;
- Family farmer – chapter 12;
- Rescheduling of debt (repayment plan) – chapter 13.

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18 *Ibid*.
19 IF, Fletcher, *supra*, chap 1.
20 *Ibid*.
21 See JT Ferriell and EJ Janger, *Understanding Bankruptcy*, 3rd ed, LexisNexis, 2012.

The work of the Review Commission of the 1990's lead to the reforms of 2005 in the form of the Bankruptcy Abuse Prevention and Consumer Protection Act 2005 (BABCPA).

Although the US system is seen as a prime example of a pro-debtor system due to its rather liberal approach to rehabilitation or fresh start, also referred to as a discharge, the Code was amended following the work of the Review Commission of the 1990's.

The reforms to the 1978 Code effected by the Reforms of 2005 in the BABCPA introduced "means testing" as a basis to determine which individual debtors may file for chapter 7 (straight bankruptcy / liquidation) or chapter 13 relief (repayment plan, linked with a discharge). Chapter 15 of the Code contains the adoption of the 1997 UNCITRAL Model Law on Cross-Border Insolvency that has replaced the former section 304 of the Code to deal with international insolvency.

The American system is viewed as trendsetting regarding its rather liberal fresh start approach (discharge of debt) and the chapter 11 reorganisation mechanism. For example, in 2019 it introduced Sub-Chapter V to Chapter 11 to address small business debtor reorganisation.[22]

Australian insolvency law[23]

Australian law is also based on English common law but still has a number of Acts dealing with aspects of insolvency – thus not a single unified Bankruptcy or Insolvency Act although the system has seen some reform as a result of the Harmer Report. Australia has also adopted the UNCITRAL Model Law on Cross-Border Insolvency.

In essence, the Corporations Act 2001 regulates corporate insolvency and the Bankruptcy Act 1966 the insolvency of individuals or natural persons.

4.1.2.2 Continental European (civil law) systems

Dutch insolvency law[24]

The Dutch insolvency law is an example of a civil law system. In earlier times, various ordinances such as the ordinance of Amsterdam of 1772 applied in parts of the Netherlands. At present the *Faillisementswet* of 1897 provides for *failliet* or *surcheance van betaling* (moratorium) but the work of the *Commissie van Onderzoek* (Research Commission) gave rise to *Schuldsaneringswet* that allows for a fresh start in Dutch bankruptcy law. The *Faillissementswet* provides for bankruptcy of individuals and businesses.

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22 H.R.3311 — 116th Congress (2019-2020), Small Business Reorganization Act of 2019

23 See M, Murray and J, Harris, *Keay's Insolvency: Personal and Corporate Law and Practice* 10th ed, Lawbook Co, 2018.

24 See https://gettingthedealthrough.com/area/35/jurisdiction/17/restructuring-insolvency-2019-netherlands/. As to the current Bill and Explanatory memorandum on a prosed 'scheme of arrangement' see www.resor.nl for an unofficial translation of the text.

Before the introduction of *schuldsanering*, Dutch law was typical of many West-European countries in being very much pro-creditor - no discharge was allowed unless creditors agreed. However, new developments in the area of consumer credit compelled them to introduce the concept of a "fresh start" in view of over-indebtedness.

The Netherlands is currently in the process of reforming its insolvency laws and a Bill with Explanatory memorandum is currently considered with the view of introducing a 'scheme of arrangement.'.

French insolvency law[25]

The *Ordonnance de Commerce* of 1673 is an important piece of legislation in the history of French commercial and insolvency law, since its Chapter XI formed the foundation of later French insolvency law in the commercial codes of 1807 and 1838. (This in turn formed the basis of Napoleonic insolvency codes in a number of jurisdictions.)

The 1807 code is said to have been harsh towards debtors, since it allowed for the arrest and detention of debtors. A French law of 1889 introduced the concept of judicial liquidation and in 1935 the severe treatment of bankrupts and managers of failed business was revised, apparently by way of ancillary bankruptcy proceedings against the owners of such insolvent businesses and penalties and disqualifications for directors. A new dispensation followed in 1955 and a complete revision in 1967, which introduced a reorganisation procedure with a moratorium followed by a court approved plan. These developments led to the 1985 Act that is broadly still in force.

German insolvency law[26]

Germany reformed its bankruptcy laws during the 1990s and the *Insolvenzordnung* (InsO), which came into operation on 1 January 1999, is the current bankruptcy code that applies in Germany. The InsO is also an example of unified insolvency legislation.

Spanish insolvency law[27]

In Spain insolvency is regulated by a single procedure that can be utilised by individuals and corporations (Spanish Insolvency Act 2003). This Act has been amended several times over the past 15 years.[28]

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25 See https://iclg.com/practice-areas/corporate-recovery-and-insolvency-laws-and-regulations/france.
26 https://iclg.com/practice-areas/corporate-recovery-and-insolvency-laws-and-regulations/germany
27 https://iclg.com/practice-areas/corporate-recovery-and-insolvency-laws-and-regulations/spain
28 http://restructuring.bakermckenzie.com/wp-content/uploads/sites/23/2017/01/Global-Restructuring-Insolvency-Guide-New-Logo-Spain.pdf

4.1.2.3 Emerging market and developing country systems

General

To a large extent the insolvency laws of emerging market and developing countries are based on the main existing insolvency law systems such as those found in England or civil law countries; this is so due to the fact that most of these countries were colonies and inherited their laws from the former colonial masters.

Africa[29]

African countries still largely follow the laws of the respective former colonial powers. In this regard countries such as Nigeria, Kenya, Botswana and Zambia, and countries in the Eastern part of Africa such as Tanzania, have an English law tradition, whilst Angola and Mozambique have a civil law tradition based on Portuguese law. The Francophone countries of West Africa are steeped in civil law, in particular French law. Some countries, such as South Africa and Namibia, have mixed legal systems since both the Roman-Dutch law (civil law) and English law influenced their respective legal systems.

The pattern concerning insolvency law is that many of the older imported laws form the basis of current legislation; however, a number of African jurisdictions have started introducing new, more modern legislation.

India[30]

The insolvency laws of India are rooted in English law and used to reflect the older English model that provided for different legislation for companies and personal bankruptcy respectively. Following various attempts at law reform over the years, a new Insolvency and Bankruptcy Code was adopted in 2016.

Russia[31] **and China**[32]

Developments in Russia have seen a development of insolvency law since 1992 that started with the Law on Bankruptcy of 1992 and which contained a general reorganisation provision. Further developments finally gave rise to the adoption of the 2002 Bankruptcy Law. The law is marked by stringent qualifications for insolvency administrators and their ethical conduct, although creditors enjoy a rather high degree of control.

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29 http://www.lexafrica.com/wp-content/uploads/2016/09/LEX-Africa-Guide-to-insolvency-in-Africa.pdf

30 https://iclg.com/practice-areas/corporate-recovery-and-insolvency-laws-and-regulations/india Also see S, Batra, Corporate Insolvency and Practice, EBC, 2017; CAG, Sekar, Handbook for the Insolvency and Bankruptcy Code, Wolters Kluwer, 2018.

31 See https://gettingthedealthrough.com/area/35/jurisdiction/26/restructuring-insolvency-2019-russia/.

32 See https://uk.practicallaw.thomsonreuters.com/7-502-0018?transitionType=Default&contextData=(sc.Default)&firstPage=true&comp=pluk; http://www.chasecambria.com/site/journal/article.php?id=149.

In China, the insolvency law developments after 1979 finally gave rise to a rather extensive bankruptcy law in 2006. However, this legislation applies to business entities but not to individuals.

Latin America[33]

South American countries are largely civil law countries. It is said that the law of South America is one of the most unified systems in the world. All the South American countries have also recently signed up to the Union of South American Nations agreement, which aims to establish a system of supra-national law along the lines of the European Union.[34] A number of South American jurisdictions are reviewing their insolvency laws.

East Asia[35]

The aftermath of the 1998 financial crisis in East Asia affected especially Indonesia and Thailand. As far as insolvency law is concerned, this gave rise to some insolvency law reforms and Thailand in particular overhauled its bankruptcy laws.

Singapore is also now becoming a major role-player in the region and it is in process to implement its new Insolvency, Restructuring and Dissolution Bill (called the Omnibus Bill). The Bill was passed by parliament on 1 October 2018 and is expected to come into force in 2019. Once enacted, it will consolidate Singapore's corporate and personal insolvency and restructuring laws into a unified Act.

SECTION B: THE SOURCES AND NATURE OF INTERNATIONAL INSOLVENCY

After completion of this study unit you must have a sound knowledge of:

- What international insolvency law is.
- The sources and nature of international insolvency law.
- Basic principles and approaches to cross-border insolvency cases.
- Various models and instruments available and in the process of being developed in the area of cross-border insolvency law.
- Problematic areas in cross-border insolvency law.

4 WHAT IS CROSS-BORDER INSOLVENCY OR INTERNATIONAL INSOLVENCY?

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33 PR, Wood, *supra*, p 124 *et seq*; http://www.arabruleoflaw.org/bankruptcyreform/wp-content/uploads/2014/02/IR_1999_WB_Reforming-Insolvency-Systems-in-Latin-America.pdf.

34 https://www.unasursg.org/en

35 R, Tomasic, Insolvency in East Asia, Aldershot: Ashgate, 2006. On Singapore, see https://www.herbertsmithfreehills.com/latest-thinking/singapore-unveils-new-omnibus-insolvency-restructuring-and-dissolution-bill.

There are various points of view regarding the notion of international insolvency law. The point of departure is that there is not a single set of insolvency rules that apply globally. In fact all states with a developed legal system do have some kind of bankruptcy/ insolvency system - also referred to as a collective debt collecting procedure but there are differences in approaches, policies as well as substantive and procedural rules.

Some rights are derived from the general law, like the laws that regulate the establishment of real rights of security in favour of creditors and such legal principles also give rise to different legal positions of creditors once bankruptcy sets in.

Due to globalisation, trade and the movement of assets across borders, creditors may be compelled to deal with the estate(s) of their debtor in a number of jurisdictions in an attempt to reclaim their debts. Such a scenario will inevitably give rise to cross-border legal and in many instances cross-border or transnational insolvency law issues.

Wessels *International Insolvency Law* (at p 1) defines international insolvency law as that part of the law that

'is commonly described in international literature as a body of rules concerning certain insolvency proceedings or measures, which cannot be fully enforced, because the applicable law cannot be executed immediately and exclusively without consideration be given to the international aspect of a given case.'

The author however concedes that this definition is limited since it is connected with the existence of a national legal framework of insolvency law. He also refers to various other definitions provided by other commentators, like that of Fletcher **("***Insolvency in Private International Law"*) at p 15 where he proposes that:

'international insolvency' or 'cross-border insolvency' should be considered as a situation '…in which an insolvency occurs in circumstances which in some way transcend the confines of a single legal system, so that the a single set of domestic insolvency law provisions cannot be immediately and exclusively applied without regard to the issues raised by the foreign elements of the case.'

5 NOTES REGARDING CROSS- BORDER INSOLVENCY

[Unpublished note by H Friman, with some updates; and see as optional reading **Wessels** *International Insolvency Law* (2012) pp 1 -97]

5.1 Introduction

There was no coincidence that the founding fathers of the United States of America, already more than 200 years ago, declared in the Constitution that insolvency law is a federal question. A common market with a free flow of goods, services, capital and persons (labour) requires an overreaching, standardised regulation of insolvency matters. Recognition of insolvency proceedings in one state (whether federal or national in nature)

where the debtor holds assets when the proceedings are commenced in another state of the common market cannot depend solely on the good will of the first state. The European Union – where a common market between nation states exists – has also realised this.

And irrespective of the existence of a formalised common market, today's communications and interaction between individuals, businesses and states have given rise to transnational or cross-border cases of insolvency. Investments and establishment of branches and subsidiaries in foreign countries are common and the capital markets have, in general, been deregulated and exchange control relaxed or even scrapped. In the current economy, national borders are increasingly irrelevant. It has even been claimed that, nowadays, the majority of significant corporate collapses involve more than one jurisdiction and, thus, that international insolvencies are the norm, not the exception.[36]

The development has highlighted that most domestic legal systems are ill-equipped for dealing with insolvencies with implication across national borders. In general, a state's enforcement of its jurisdiction ends with its national borders. What is on the other side is – without the cooperation of another state – beyond reach for the national authorities. The problems are obvious in relation to the present-days mobility, the great speed with which assets can be transferred from one place to another and the complexity of many business transactions.

Without coordination and cooperation, there will always be a risk of multiple insolvency proceedings against the same debtor. If these are competing or even incompatible in nature (winding-up/liquidation v. rescue/reconstruction), they may lead to unnecessary capital losses for the creditors. Attempts to resolve economic problems under a rescue or reconstruction scheme may be prevented. The law that will ultimately govern various questions such as security rights and priority to payments in an insolvency situation may not be possible to predict. Such a situation may also further a race for assets in which "only the fittest survive". Weaker creditors will be the major losers. This would run counter a basic principle in insolvency proceedings worldwide, the principle of equality of creditors (*par conditio creditorum*). Risk of (successful) fraud and forum shopping are other drawbacks of anarchy in respect of cross-border insolvency proceedings.

These shortcomings have, of course, been observed by governments, inter-governmental organisations (e.g. United Nations Commission for Trade Law (UNCITRAL), the European Union (EU), the Council of Europe (COE), the North American Free Trade Association (NAFTA), the World Bank and the International Monetary Fund (IMF)) and others – not the least organisations for insolvency practitioners such as INSOL and the International Bar Association (IBA), Section J – and various initiatives have been taken. The most significant of these initiatives will be presented in the following.

5.2 Cross-Border Insolvency Cases

Cross-border cases may occur for many different reasons, *inter alia*, that the debtor has:

(a) economic affairs with a foreign counter-party;
(b) interests in property located in more than one country;
(c) foreign creditors;

[36] "Editorial: International Insolvency", *Company Lawyer* 21/3 (2000) 69.

(d) contractual obligations that may fall under foreign jurisdiction and be governed by foreign law; or
(e) obligations that have been incurred outside the debtor's home country or that are to be performed abroad.

The implication of this may be that "insolvency proceedings" can be commenced in more than one country (jurisdiction). And once opened, every proceeding will give rise to cross-border matters, not the least how to coordinate, if possible, multiple proceedings against the same debtor. The fact that the debtor's affairs are in some way connected with more than one jurisdiction brings the matters into the sphere of "private international law".

A "cross-border insolvency case" may, in its simplest form, involve an insolvency proceeding in one state and creditors in another country. But the case can be much more complex and involve subsidiaries, assets, operations and creditors in numerous countries, as well as multiple "insolvency proceedings" (i.e. proceedings in different countries at the same time).

Moreover, the problems in addressing "cross-border insolvency cases" start already in finding a common language. "Insolvency" – i.e. the reason for commencing proceedings – is normally quite clearly defined in a domestic context. Traditionally, "insolvency" means a situation where the combined total of the outstanding liabilities exceeds the measurable value of all the debtor's assets and a there is normally required some degree of durability of this state of negative net worth. However, also more short-term inability to service debts, e.g. a liquidity crisis, is sometimes also considered sufficient for commencement of "insolvency proceedings". Hence, in an international level it is very difficult to define "insolvency".[37] Indeed so difficult that international conventions and other instruments do not even try to provide a proper definition and instead go straight to defining "insolvency proceedings" (with or without exhaustive lists of proceedings that are to be covered).

"Insolvency proceedings" are somewhat easier to define, although there is a bit of a confusion regarding terminology. "Insolvency proceedings" are often qualified as "collective proceedings" in order to distinguish them from individual creditors' enforcement actions against the debtor. They traditionally include various forms of proceedings with the aim to wind-up the debtor's economic affairs (winding-up, liquidation, sequestration, bankruptcy etc.). Today, however, also other proceedings with the aim to rescue troubled businesses by other means than liquidation (reconstruction, reorganisation, rehabilitation, judicial management etc.) are also included. A common element is the appointment, by a court or the creditors, of someone to administer the debtor's affairs, commonly called "liquidator" in spite of the fact that many different terms are used even within one and the same legal system for different proceedings. In order to fit for different jurisdictions, the definitions must be rather open-ended.

The EU Regulation on Insolvency Proceedings, for example, used to apply to "collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator" and additionally, the various proceedings in each EU Member State were listed in an Annex.[38] The Recast Regulation(Regulation(EU) No 2015/848 of 2015 became operative as from 26 June 2017) is however broader in its scope

[37] See in more detail, IF. Fletcher, *Insolvency in Private International Law – National and International Approaches*, Oxford: Clarendon Press, 2005, pp. 3-6.
[38] *Idem* Article 2.c and Annex B.

since it also includes hybrid and pre-insolvency proceedings. Also the various "liquidators" are listed in an Annex.[39]

Another example is the UNCITRAL Model Law on Cross-Border Insolvency, which offers the following for "foreign [insolvency] proceeding": "a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation".

A further complication is that although "insolvency law" is often considered and treated as a discrete area of law, "insolvency proceedings" also have close ties with many different fields of substantive private law (property law, securities and other rights, labour law, etc.). Hence, only looking to the purely procedural aspects of "insolvency law" would not be sufficient in order to properly address the problems of cross-border insolvency cases.

In an attempt to bring the "cross-border" aspects and the "insolvency" aspects together, one may ask three very pertinent questions:[40]

(1) In which jurisdictions may insolvency proceedings be opened?
(2) What country's law should be applied in respect of different aspects of the case?
(3) What international effects will be accorded to proceedings conducted at a particular forum (including issues of enforcement)?

5.3 Answers? Universality versus Territoriality

The problems and questions have been listed above, but what are the answers? The point of departure is anarchy. Generally, independent and sovereign states govern the legislation and these states must be involved in amending in.[41] Both national and international laws on insolvency traditionally show a lack of structures, formal or informal, to deal with cross-border insolvency cases. Returning to the three questions, insolvency proceedings could possibly be opened concurrently in more than one jurisdiction, each jurisdiction would apply its own laws (including its choice-of-law rules), and no or very limited extraterritorial effects would be granted to foreign proceedings. This is a reflection of the difficulties that one encounters in trying to find cooperation and coordination between different jurisdictions.

One problem is that the standards of insolvency laws in many countries are relatively low. The laws can by outdated (maybe a remnant of a colonial past) or otherwise framed in way that does not suffice for modern day trade and investments. A number of initiatives have been taken in order to create an international discussion and proved recommendations for assessment and good minimum standards. Such projects include The World Bank's *Principles and Guidelines for Effective Insolvency and Creditor Rights Systems*, the United Nations Trade Law Commission's (UNCITRAL) present work on an *Insolvency Guide* and a project by the European Commission called *Bankruptcy and fresh start: stigma on failure and legal consequences of bankruptcy*. A higher general standard

[39] *Idem* Annex C.
[40] See IF, Fletcher, *The Law of Insolvency*, at 5.
[41] However, in some places, most notably in the European Union, nation states have decided to transfer some of these powers to a supranational body.

of national insolvency laws would, of course, go a long way but it does not really answer the questions of cooperation and coordination of multiple insolvency proceedings.

Another difficulty, once discussions on cross-border insolvency issues have started, is to reconcile various national approaches to insolvency. A basic dividing line is the general view as to the interests that insolvency proceedings shall meet. A common distinction is between pro-creditor and pro-debtor systems.[42] However, other systems may stress other interests, for example labour rights (e.g. France). Reluctance may also stem from other public policy reasons, such as an unwillingness to recognise foreign public claims (taxes, social security, etc.) or, simply, an interest to protect "local creditors". With other words, there is a competition between various jurisdictions for the debtor's assets. Additionally, insolvency proceedings are extra complex in the sense that they relate not only to procedural law but also – to a high degree – to significant areas of substantive law (both private and public law). In general, states are more willing to export than to import insolvency proceedings.

In seeking solutions, there is in theory a conflict between two principles: universality and territoriality.[43] The principles are diametrical opposite. Both principles are supported by very legitimate and reasonable arguments and underlying interests and both have their proponents. However, international observers and commentators generally favour the principle of universality – in spite of problems and shortcomings – although some critical voices are also heard. Nevertheless, national governments cannot disregard national interest (and constituencies) that may be easier to identify and defend under the principle of territoriality.

Universality means, somewhat simplified, that there should only be one insolvency proceeding covering all of the debtor's assets and debts worldwide. Hence, once the proceedings are opened, no other insolvency proceedings ought to be possible and also not any other forms of execution in the debtor's assets. Ideally, only one forum should have jurisdiction.[44] The chosen jurisdiction could be where the centre of the debtor's interests is located. There could also be other approaches, however, for example a worldwide insolvency law (but not a single forum), which could also include contractual elements.[45] Anyway, all the debtor's assets should be included in the proceedings and the "liquidator" should have opportunities to control and obtain all the assets. All creditors worldwide should have opportunities to participate in the proceedings with their claims and be treated in an equal manner.

Universality is considered (by the proponents) to best satisfy the interests of recovering assets and, thus, to pay the debts or, even more so, to pave the way for successful business rescue proceedings. Lower administrative costs are also often argued. The principle relates well with globalisation and bigger enterprises that operates on

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[42] For a comprehensive survey, see PR, Wood, *Maps of World Financial Law*, Allen & Overy Global Law Maps: World Financial Law, 3rd ed., 1997.

[43] For a more elaborate presentation, where also the principles of "unity" and "plurality" are added, see IF, Fletcher, *"The Law of Insolvency"*), at 10-12. For further discussion on the terminology, see Jay L, Westbrook, "The Lessons of Maxwell Communications", *Fordham Law Review* 64 (1996) 2531, 2533.

[44] For proponents of this approach, see Jay L, Westbrook, "A Global Solution to Multinational Default", *Michigan Law Review* 98 (June 2000) 2276-2328; AT, Guzman, "International Bankruptcy: In Defence of Universalism", *Michigan Law Review* (June 2000) 2177-2215; L, Perkins, "A Defence of Pure Universalism in Cross-Border Corporate Insolvencies", *New York University Journal of International Law and Politics* 32/3 (Spring 2000) 787-828;

[45] See e.g., RK, Rasmussen, "A New Approach to Transnational Insolvencies", *Michigan Journal of International Law* 19/1 (Fall 1998) 1-36.

international markets. It does, however, require a very high level of trust in foreign legal systems and foreign proceedings, since the single insolvency proceeding would have extraterritorial effects. In order to be effective, a universality approach would also have to address difficult issues such as choice-of-law rules and priority systems.[46]

Opponents, however, points out, *inter alia*, the problem of establishing the "home country" of the debtor where insolvency proceedings exclusively may be opened. Drawbacks are that domestic markets will be confused and that home country standards may be indeterminate (in particular when the debtor is a corporate group) and vulnerable to strategic manipulation.[47]

Territoriality, on the other hand, is partly a response to the principle of universality and means that insolvency proceedings may be commenced in every state where the debtor holds assets. But they should be territorially limited and restricted to property within the state where the proceedings are opened. Thus, there could be multiple proceedings concurrently against the same debtor. The proceedings could also be restricted in respect of which creditors may file their claims and the "liquidator" should have a mandate which, in principle, is confined by the national borders. In line with this principle, national interests should be protected before any assets are transferred abroad.

Territoriality addresses local interests and local creditors who act on a domestic market, where only an evaluation of local assets is often made before credit is given. Such creditors may also have great practical and economic problems to participate in proceedings abroad (even if they are equal *de jure*, they may *de facto* have disadvantages). Without the benefit of local proceedings, it could be that only the strongest creditors would have a chance to get paid. A major drawback, however, is that where territoriality applies the debtor may be declared insolvent in one country (where the debts are) but not in another (where the assets are), i.e. insolvent in one place but highly insolvent in another. And the creditors would be bereaved of the chances to payment for their claims. That is not to say, however, that cross-border problems are limited to major international businesses; such problems may occur also in small cases. Proponents of territoriality do appreciate the problems but they believe that the answer is not universality but a cooperative form of territoriality.[48]

It is sometimes said that civil law jurisdictions are more inclined to take a territorial approach to jurisdiction and that common law jurisdiction are more closely associated with universalism.[49] In practice, however, national jurisdictions do not adopt either approach in its pure form. Territoriality is found to be too costly and an essentially universal approach – pure universality requires multilateral efforts – is often universality politically difficult. Pragmatic approaches have been suggested in the literature, for example an

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[46] See e.g. Jay L. Westbrook, "Choice of Avoidance Law in Global Insolvencies", *Brooklyn Journal of International Law* 17/3 (1991) 499-538; Jay L, Westbrook & DT, Trautman, "Conflict of Laws Issues in International Insolvencies", in: JS, Ziegler (ed.), *Current Development in International and Comparative Corporate Insolvency Law*, Oxford: Clarendon Press, 1994 (655-669); Jay L, Westbrook, "Universal Priorities", *Texas International Law Journal* 33 (Winter 1998) 27-45.

[47] For one of the most prominent critics of universalism, see LM, LoPucki, "Cooperation in International Insolvency: A Post-Universalist Approach", *Cornell Law Review* 84 (March 1999) 696-762.

[48] *Ibid.*

[49] See e.g. PJ, Omar, "A Panorama of International Insolvency Law: Part 1", *International Company and Commercial Law Review (ICCLR)* 13/10 (2002) 366-376. In this article as well as in its second part, *ICCLR* 13/11 (2002) 416-422, the author also compares the procedures for dealing with cross-border insolvencies in Australia, Belgium, France, New Zealand and Switzerland. See also P, Torremans, *Cross Border Insolvencies in EU, English and Belgian Law*, The Hague/London/New York: Kluwer Law International, 2002.

"internationalist principle" based on the common law-concept of comity[50] or non-territory oriented approach based on a choice-of-law rules.[51] Also the international efforts made to remedy the lack of cooperation and coordination seek to modify and to find compromises based on elements of both principles. There is often room for both primary (universal) and secondary (territorial) proceedings (sometimes called "procedural universalism" to be compared with "substantive universalism" which endorses a single insolvency law irrespective of the debtor's location).

5.4 Various Approaches to Solve the Problem

A number of specific matters need to be addressed in order to confront the problems of cross-border insolvency cases. Professor Jay L. Westbrook, a strong proponent of universalism, has identified nine key issues in such cases: (1) standing for the foreign "liquidator", (2) moratorium on creditor actions, (3) creditor participation, (4) executory contracts, (5) coordinated claims procedures, (6) priorities and preferences, (7) avoiding powers, (8) discharges, and (9) conflict-of-law issues.[52]

In an attempt to bring the "cross-border" aspects and the "insolvency" aspects together, Fletcher asks three very pertinent questions:[53]

1) In which jurisdictions may insolvency proceedings be opened?
2) What country's law should be applied in respect of different aspects of the case?
3) What international effects will be accorded to proceedings conducted at a particular forum (including issues of enforcement)?

In answering the three questions posed by Fletcher, insolvency proceedings could possibly be opened concurrently in more than one jurisdiction, each jurisdiction would apply its own laws (including its choice-of-law rules), and no or very limited extraterritorial effects would be granted to foreign proceedings. This is a reflection of the difficulties that one may encounter in trying to bring about co-operation and co-ordination between different jurisdictions.

But from a practical point of view it still remains a first step when seeking assistance in an insolvency matter in a foreign jurisdictions to seek the applicable source to apply in the matter at hand. In the absence of domestic rules relating to cross-border insolvency, or where such rules exist but are inadequate, answers will be sought in the principles of private or international law (conflicts of law rules) or even public international law. It must however be noted that there is not always a uniform approach between States in applying such rules.

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[50] See IF, Fletcher, *"The Law of Insolvency"* , at 10-16. On international comity, see also SL, Bufford *et al*, *International Insolvency*, Federal Judicial Center, Washington, 2001, at 36-42 (with reference to U.S. insolvency law).

[51] See H, Buxbaum, "Rethinking International Insolvency: The Neglected Role of Choice-of-Law Rules and Theory", *Stanford Journal of International Law* 36/1 (Winter 2000) 23-71.

[52] See JL, Westbrook, "Developments in Transnational Bankruptcy", *St. Louis University Law Journal* 39 (1995) 745, at 753-757.

[53] See IF, Fletcher **("***Insolvency in Private International Law"*) pp 3 to 5.

In common law countries, the common law may also assist to provide a basis for courts to deal with cross-border insolvency matters, or even to develop such principles. It however seems that the Courts applying or developing common law principles in this regard are not always consistent. For instance the Privy Council in the Cambridge Gas Transport Corporation v Official Committee of Unsecured Creditors of Navigator Holdings [2006] UKPC 26; [2006] 3 WLR 689 followed a more flexible approach in developing common law application in this sphere of the law, but in *Singularis Holdings Ltd v PricewaterhouseCoopers (Bermuda)* [2014] UKPC 36 (10 November 2014), [2015] 2 WLR 971 it followed a more restrictive approach.[54]

The most difficult but also the most effective solution to the problems would be a certain degree of harmonisation of insolvency laws. The call for global legal rules in general increases with the development of globalisation. To what extent this is a feasible and likely prospect is debateable.[55] The experience of various initiatives up to date does not support the feasibility of a more widespread harmonisation and observers today largely accepts that realistic achievements in most cases will be more modest than harmonisation of national insolvency laws. It has been argued, however, that since the fundamental differences between the legal systems and laws of countries is both the root problem of cross-border insolvencies and the major obstacle to their solution, the goal of harmonisation must continue to be pursued.[56]

Present approaches are more modest, however, and various existing initiatives are presented in the following.

5.4.1 Initiatives on a National Level

National legislation

One approach would be for states to unilaterally introduce legislation on cross-border insolvency proceedings.[57] While several national legal orders prescribe that their insolvency proceedings (at least when jurisdiction is exercised on certain grounds) cover, in principle, all the debtor's assets world-wide, entrusts the "liquidator" with a mandate to try to recover all assets and give foreign creditors equal rights to participate and file claims in the proceedings, legislation is more often than not lacking regarding recognition of foreign proceedings. Unilateral rules of this kind do not, of course, hinder local action against the debtor's assets in another state. Additionally, state borders, geographical

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[54] This aspect is discussed by for instance P, Omar., "Diffusion of the Principle in *Cambridge Gas*: A Sad and Singular Deflation" 2015 (2015) 3 NIBLeJ 31 at https://www4.ntu.ac.uk/nls/document_uploads/194364.pdf

[55] Compare Jay L, Westbrook, *supra*, at 2291-2298 (a universalist with a positive outlook), and LM. LoPucki, "The Case for Cooperative Territoriality in International Bankruptcy", *Michigan Law Review* 98 (June 2000) 2216, 2216 (a territorialist with a more pessimistic view).

[56] See D, McKenzie, "International Solutions to International Insolvency: An Insoluble Problem?", *University of Baltimore Law Review* 26 (Summer 1997) 15-29.

[57] The former s. 304 of the US bankruptcy Code and s. 426 of the English Insolvency Act of 1986 serve as examples in this regard. (Note that in 2005 s.304 was replaced with the adopted version of the UNICTRAL Cross-Border Insolvency Act by means of Chapter 15 of the amended US Code, and England also adopted same over and above its s 426 provision.)

distances as well as cultural and legal differences make such "export" of proceedings largely fictitious. They are not effective unless many states join in a common, although unilaterally implemented, scheme (see *infra*).

So even if national law of one country – e.g. the Bankruptcy Code of the United States – pursues a universality approach, other countries may not accept such extraterritorial pretensions. An example was *Felixstove Dock and Railway Co. v. U.S. Lines Inc.*[58] where a British court refused to allow assets in England to be transferred to the United States where so-called Chapter 11 reorganisation of U.S. Lines took place. Hence, a worldwide automatic stay as an effect of the Chapter 11 proceedings was not recognised.

National laws which provides for "import" foreign proceedings by granting them extraterritorial effects are very rare, the U.S. Bankruptcy Code being one well-known example.[59] [**Note: See next paragraph: The US Code adopted a universal approach in its former s. 304 but this dispensation has been replaced by the adoption in 2005 of the UNCITRAL Model Law on Cross-Border Insolvency as Chapter 15 of the Code.]** The former s. 304 of the Code would include recognition of the foreign proceedings (and the "representative") as well as certain effects or rights attached to that recognition. In the United States, for example, even in terms of the former s 304, the foreign representative may have filed for the opening of ordinary insolvency proceedings (Ch. 7 or 11 of the Code) or for ancillary proceedings which are more limited. Alternatively, the court may have declined to exercise jurisdiction and, thus, deferred to the jurisdiction of the state where the foreign proceedings were opened. [Besides statutory rules on abstention, courts in common law countries can sometimes resort to the doctrine of *forum non conveniens* which gives them discretion to decline jurisdiction when the convenience of the parties and ends of justice would be better served if the case were to proceed in another forum.]

But as stated the USA replaced s 304 by the adoption of the UNCITRAL Cross-Border Insolvency Model Law in Chapter 15 of the US Bankruptcy Code. (This important amendment was effected by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005). The importance of this adoption is of course that many cross-border cases emanate from the USA. (The expectation is that the adoption of the Model Law by a number of jurisdictions will indeed foster coordination, cooperation and the development of a more uniform approach in the application of the essential principles of the Model Law.)

"The purpose of Chapter 15,[60] and the Model Law on which it is based, is to provide effective mechanisms for dealing with insolvency cases involving debtors, assets, claimants, and other parties of interest involving more than one country. This general purpose is realized through five objectives specified in the statute: (1) to promote cooperation between the United States courts and parties of interest and the courts and other competent authorities of foreign countries involved in cross-border insolvency cases; (2) to establish greater legal certainty for trade and investment; (3) to provide for the fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested entities, including the debtor; (4) to afford protection and maximization of the value of the debtor's assets; and (5) to facilitate the rescue of

[58] [1989] Q.B. 360.
[59] For a succinct presentation, see S L, Bufford *et al*, *supra*, at 25-52.
[60] This section on Chapter 15 has been sourced from:
http://www.uscourts.gov/FederalCourts/Bankruptcy/BankruptcyBasics/Chapter15.aspx

financially troubled businesses, thereby protecting investment and preserving employment. 11 U.S.C. § 1501.

Generally, a chapter 15 case is ancillary to a primary proceeding brought in another country, typically the debtor's home country. As an alternative, the debtor or a creditor may commence a full chapter 7 or chapter 11 case in the United States if the assets in the United States are sufficiently complex to merit a full-blown domestic bankruptcy case. 11 U.S.C. § 1520(c). In addition, under chapter 15 a U.S. court may authorize a trustee or other entity (including an examiner) to act in a foreign country on behalf of a U.S. bankruptcy estate. 11 U.S.C. § 1505.

An ancillary case is commenced under chapter 15 by a "foreign representative" filing a petition for recognition of a "foreign proceeding." 11 U.S.C. § 1504.[61] Chapter 15 gives the foreign representative the right of direct access to U.S. courts for this purpose. 11 U.S.C. § 1509. The petition must be accompanied by documents showing the existence of the foreign proceeding and the appointment and authority of the foreign representative. 11 U.S.C. § 1515. After notice and a hearing, the court is authorized to issue an order recognizing the foreign proceeding as either a "foreign main proceeding" (a proceeding pending in a country where the debtor's center of main interests are located) or a "foreign non-main proceeding" (a proceeding pending in a country where the debtor has an establishment,[62] but not its center of main interests). 11 U.S.C. § 1517. Immediately upon the recognition of a foreign main proceeding, the automatic stay and selected other provisions of the Bankruptcy Code take effect within the United States. 11 U.S.C. § 1520. The foreign representative is also authorized to operate the debtor's business in the ordinary course. The U.S. court is authorized to issue preliminary relief as soon as the petition for recognition is filed. 11 U.S.C. § 1519.

Through the recognition process, chapter 15 operates as the principal door of a foreign representative to the federal and state courts of the United States. 11 U.S.C. § 1509. Once recognized, a foreign representative may seek additional relief from the bankruptcy court or from other state and federal courts and is authorized to bring a full (as opposed to ancillary) bankruptcy case. 11 U.S.C. §§ 1509, 1511. In addition, the representative is authorized to participate as a party of interest in a pending U.S. insolvency case and to intervene in any other U.S. case where the debtor is a party. 11 U.S.C. §§ 1512, 1524.

Chapter 15 also gives foreign creditors the right to participate in U.S. bankruptcy cases and it prohibits discrimination against foreign creditors (except certain foreign government and tax claims, which may be governed by treaty). 11 U.S.C. § 1513. It also requires notice to foreign creditors concerning a U.S. bankruptcy case, including notice of the right to file claims. 11 U.S.C. § 1514.

One of the most important goals of chapter 15 is to promote cooperation and communication between U.S. courts and parties of interest with foreign courts and parties of interest in cross-border cases. This goal is accomplished by, among other things,

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[61] A "foreign proceeding" is a "judicial or administrative proceeding in a foreign country ... under a law relating to insolvency or adjustment of debt in which proceeding the [debtor's assets and affairs] are subject to control or supervision by a foreign court for the purpose of reorganization or liquidation." 11 U.S.C. § 101(23). A "foreign representative" is the person or entity authorized in the foreign proceeding "to administer the reorganization or liquidation of the debtor's assets or affairs or to act as a representative of such foreign proceeding."

[62] An establishment is a place of operations where the debtor carries out a long term economic activity. 11 U.S.C. § 1502(2).

explicitly charging the court and estate representatives to "cooperate to the maximum extent possible" with foreign courts and foreign representatives and authorizing direct communication between the court and authorized estate representatives and the foreign courts and foreign representatives. 11 U.S.C. §§ 1525 - 1527.

If a full bankruptcy case is initiated by a foreign representative (when there is a foreign main proceeding pending in another country), bankruptcy court jurisdiction is generally limited to the debtor's assets that are located in the United States. 11 U.S.C. § 1528. The limitation promotes cooperation with the foreign main proceeding by limiting the assets subject to U.S. jurisdiction, so as not to interfere with the foreign main proceeding. Chapter 15 also provides rules to further cooperation where a case was filed under the Bankruptcy Code prior to recognition of the foreign representative and for coordination of more than on foreign proceeding. 11 U.S.C. §§ 1529 - 1530."

The UNCITRAL Model Law has also been adopted (with certain variations) in 44 jurisdictions, for instance Australia, Canada, Mexico, Kenya, Japan, South Africa (not in force yet), and the UK.

Coordination and cooperation between states would also be required if the domestic approach would focus on choice-of-law rules than on allocation of jurisdiction.[63] In order to be effective, such rules cannot be developed in isolation but must be part of a larger (bilateral or multilateral) system.[64]

Protocols

Another approach in order to remedy the lack of national (or international) legislation is the development of so-called Protocols.[65] This is a common law approach, i.e. in systems where the judge typically is entrusted with more freedom from statutory restrictions, particularly in the United States. Protocols are mainly based on common law and *ad hoc* arrangements and successful cases have involved courts of a similar jurisdiction (law, culture, language, etc.), i.e. in common law countries. Similar arrangements would have more difficulty to gain acceptance by courts in, for example, Continental Europe. Additionally, Protocols tend to be appropriate mainly in relation to large and important corporate rescues because of the complexity and costs involved.

The most well-known example is *Maxwell Communication Corp. Plc.*[66] (M.C.C.) where a worldwide media empire crumbled after defaulting under a huge loan. It was a British holding company (headquarter and management) with more than 400 subsidiaries worldwide and most creditors, except the creditor of the defaulted loan, were British banks. Most assets, however, were located in subsidiary companies in the United States.

[63] For such a proposal, see Buxbaum, s*upra*.
[64] See Jay L Westbrook & T, Trautman, *supra*.
[65] For a more detailed presentation and analysis, see e.g. L, Hoffmann, "Cross-Border Insolvency: A British Perspective", *Fordham Law Review* 64 (May 1996) 2507-2520; Jay L, Westbrook, *supra*; IF, Fletcher, "Practicalities of an International Insolvency – The Key Legal Aspects", *Company* Lawyer 17/2 (1996) 47-50; ED, Flaschen & RJ, Silverman, "The Role of the Examiner as Facilitator and Harmonizer in the Maxwell Communications Corporation International Insolvency", in: JS, Ziegler, *Current Development in International and Comparative Corporate Insolvency Law*, Oxford: Clarendon Press, 1994 (pp.621-645), and by the same authors, "Cross-Border Insolvency Cooperation Protocols", *Texas International Law Journal* 33 (Summer 1998) 587-612; G, Moss, "Cross-Frontier Co-Operation in Insolvency – Assistance From the Courts in England and the U.S.", *Insolvency Lawyer* 4 (June 1999) 146-152.
[66] 93 F.3d 1036 (2nd Cir. 1996). [1992] B.C.C. 757.

Concurrently, two main insolvency proceedings were opened in the United Kingdom and in the United States. Both proceedings were business rescue proceedings (voluntary Chapter 11 proceedings in the U.S. and an administration order in the UK). An administrator was appointed in the British proceedings and a so-called examiner in the American. The two proceedings had to be coordinated somehow and cooperation was necessary. Hence, the administrator and the examiner negotiated an overarching agreement, called an "Order and protocol", outlining how the coordination should be achieved. It did set out in detail, *inter alia*, the powers and duties of the US examiner to mediate and maximise the prospects for rehabilitation and reorganisation as well as the roles of the administrator in the scheme. The Protocol was submitted to and approved by the respective courts and thereafter served as the basis for cooperation and coordination. This has been seen as a break-through in cooperation.

The M.C.C. example has been followed by further application, development, tailoring and enhancement of Protocols in subsequent cases.[67]

The Protocol approach has also served as inspiration for international efforts, in particular the *American Law Institute* (A.L.I.) *Transnational Insolvency Project* between the state parties to the North American Free Trade Agreement (NAFTA).[68] It relates to insolvency of corporations and other business enterprises engaged in commercial operations (i.e. not consumers), but not non-profit organisations and financial institutions, and it seeks solutions that require a minimum of legislation or formal treaty arrangements. After an initial inventory of the existing laws, the project aims at creating a series of procedures for insolvency proceedings, e.g. cross-filing of claims, automatic or semi-automatic moratoria (stays) and procedures for cooperation in and coordination of insolvency proceedings.

Contractual and other party initiatives

To a limited extent, private procedures are available to contracting parties with respect of cross-border insolvency situations. This is particularly the case in the area of international markets for commodities, securities, foreign exchange, options, futures and similarly

[67] These cases include: *United States v. BCCI Holdings (Luxembourg) S.A*, 48 F.3d 551 (D.D.C. 1995) (subsidiary banks operating in some 75 countries and proceedings in the UK and the US), *In re Olympia & York Dev. Ltd*., [1993] 12 O.R.3d 500 (Ont. Gen. Div.) (proceedings in Canada and the US), *In re Maruko Inc.,* 160 B.R. 633 (Bankr. S.D.Cal. 1993) (proceedings in the US, Japan and Australia), *In re Axona Int'l Credit & Commerce Ltd.*, 88 B.R. 597 (Bankr. S.D.N.Y 1988) (proceedings in Hong Kong and the US), *In re Everfresh Beverages Inc*, No. 95-B-45405-06 (Bankr. S.D.N.Y. 1995) (proceedings in the US and Canada), *In re Nakash* (Nakash v Zur), 190 B.R. 763 (Bankr. S.D.N.Y. 1996) (proceedings in the US and Israel), *In re Solv-Ex Corporation*, No-11-97-14361 (Bankr. N.M. 1998) (order approving and bringing cross-border insolvency protocol with Canada into effect), and *In re AIOC Corporation and AIOC Resources AG*, No. 96-B-41895 and 96-B-41896 (order authorising the Chapter 11 trustee to execute cross-border liquidation protocol with the Swiss Bankruptcy Office).

[68] For a fuller presentation, see e.g. Jay L, Westbrook, "Creating International Insolvency Law", *American Bankruptcy Law* Journal 70 (Fall 1996) 563-573; Jay L, Westbrook & JS, Ziegler, "The American Law Institute NAFTA Insolvency Project", *Brooklyn Journal of International Law* 23 (1997) 7-24; JA, Barrett, "Various Legislative Attempts with Respect to Bankruptcies Involving More Than One Country", *Texas International Law* Journal 33 (Summer 1998) 557-573; IF, Fletcher, ("*The Law of Insolvency"),*; IF, Fletcher, "The European Union Convention on Insolvency Proceedings: An Overview with U.S. Interests in Mind", *Brooklyn International Law Journal* 23 (1997) 25-55; IF, Fletcher, "Making a Better World – Current International Initiatives in Cross-Border Insolvency: Part 2", *Insolvency Intelligence* 12/3 (1999) 20-22; JS, Ziegler, "Corporate Groups and Canada-U.S. Crossborder Insolvencies: Contrasting Judicial Visions", *Canadian Business Law Journal* 35 (2001) 459-494; SL. Bufford *et al, supra*, at 68-75.

regulated trading business.[69] The parties can minimise the legal uncertainties among themselves by contractual arrangements and a useful tool is thereby to determine close-out positions in the case of insolvency or default of one of the parties. One means is to do so by a set-off arrangement, often called "netting". Such a contractual arrangement does not work entirely by itself, however, and the law must be designed so that it stands the tests also when insolvency proceedings are opened. For international trading arrangements it is important that the same principles apply in all countries where insolvency proceedings may be commenced against a party to the system. Realising this need, a binding Directive on Settlement Finality in Payment and Securities Settlement Systems was adopted 19 May 1998 by the European Union,[70] which seeks, *inter alia*, to provide for a union-wide protection of netting arrangements. Statutory regulation to that effect also exist in many countries.

Another method that has been developed is an informal approach to corporate rescue, which entails a "work-out" outside of more formally regulated proceedings, the so-called "London Approach".[71] It was developed in the United Kingdom as an informal code of practice for multi-bank corporate rescue and largely depends upon the willingness of key creditors to engage in an alternative to formal proceedings, which includes a moratorium on enforcement action, maintenance of credit facilities, coordination and information-sharing, a review and a business plan by an independent accountant, and a composition. Hence, this is not really a coordination of insolvency proceedings by rather an attempt to avoid such proceedings from being initiated.

The scheme has also been applied in other countries, but will not necessarily work in every country (e.g. due to complex financial structures, attitudes, expectations and local laws). A related issue is the growing trend of "debt trading", which could both assist and counteract "work-outs" depending upon whether the debt trading give rise to more or fewer and bank or non-bank creditors. In combination with the lack of a formal moratorium, debt trading could undermine any work-out attempt.

Additionally, private international law generally recognises the validity of forum-selection clauses and choice-of-law clauses in private contracts. Such private solutions alone will not solve the problem, but there are even so suggestions in the literature to base an international regulation of insolvency proceedings on a system where company owners, at the time of incorporation, could select the insolvency rules to apply from a menu of alternatives.[72] While the basic idea is that private interests, and not governments, should dictate the applicable rules, there would still need to be a reliance upon the government to create a default rule if no choice is made and possibly also for establishing the menu. Even more important, however, is that such a scheme for international application requires that states agree to recognise the superiority of a private choice over national regulations that would otherwise apply. Proponents acknowledge that such a radical regime change is unlikely to occur in the near future, but one may question whether it has any prospects to succeeding.

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[69] See R, Obank, "European Recovery Practice & Reform: Part 1", *Insolvency Lawyer* 4 (August 2000) 149-156.
[70] Directive 98/26/EC, *Official Journal* L166, 11.6.98, pp. 45-50.
[71] See R, Obank, *supra*.
[72] See e.g. RK, Rasmussen, *supra*.

5.4.2 Initiatives on an International Level

"Supra-national" legislation

The first documented cross-border insolvency case was the so-called Ammanti Affair in 1302 when a bank (Ammanti) in the Republic of Pistoia (today in Italy) went bankrupt and left branches, assets and creditors all over Europe.[73] The owner disappeared and there was a risk that the assets would go the same way. There was also a race amongst creditors for the assets. Additionally, this case was, however, also the first example of an attempt to handle the cross-border situation since the Holy See (the Pope) – being a major creditor with much to loose – intervened and had powers that were not territorially restricted. However, whether this intervention was successful or not is not clear from the archives. Nonetheless, it does show that medieval Europe had something that is generally lacking today, namely a supra-national organ with regulatory powers.

European Union Regulation

There is one example today of an almost supra-national legislative body, the European Union, where the Council representing national governments may pass legislation that is directly binding and has direct effect in the member states. And this can even be done by way of a majority decision (i.e. against the will of some member states). Revolutionary indeed. With the amendments to EU's basic regulatory framework in the 1997 Amsterdam Treaty, large parts of private law was included in this framework (from having been the subject of normal inter-state agreements where each state has a veto). The project on the creation of a EU Convention on Insolvency Proceedings, which had lasted for almost 30 years but finally failed in 1996, was now the subject of a new legislative regime and new legal instruments.

Insolvency proceedings were deliberately excluded from the 1968 Brussels Convention on jurisdiction and enforcement judgement of judgements in civil and commercial matters with the expectation that a separate convention should soon be agreed. A draft convention was not adopted until September 1995, but the stipulated requirement that all (the then) 15 member states must sign the convention before 23 May 1996 was not met. The United Kingdom did not sign and, thus, the EU Convention fell through. A new initiative in 1999, however, revived the efforts and on 29 May 2000 the EU Regulation No. 1346/2000 on Insolvency Proceedings was adopted.[74] It entered into force on 31 May 2002 and became applicable to the EU member states.[75] (To be more precise and to refer to the

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[73] Depicted in M, Bogdan, *Sveriges och EU:s internationella* insolvensrätt, Stockholm: Norstedts Juridik, 1997, at 14-15; with reference to, A, Fliniaux, "La faillite des Ammanti de Pistoie et le Saint-Siège (debut du XIVe siècle), *Nouvelle revue historique de droit français et étranger*, 1924, pp. 436-472. See also D, Graham, "The Insolvent Italian Banks of Medieval London", *International Insolvency Review* 9 (2000) 213-231.

[74] *Official Journal* L160, 30.6.2000, pp. 1-13. See the separate Note on the EU Regulation with further references, including IF, Fletcher *("The Law of Insolvency")* at 246-302.

[75] The member states are: Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France ,Germany, Greece, Hungary, Ireland (Eire),Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, United Kingdom but the EU regulation does not apply to Denmark since it negotiated an exemption for the regulation. (On Denmark in general, see also: http://www.insol.org/pdf/cross_pdfs/DENMARK.pdf.)

proposal to amend the EU regulation at **http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:52012PC0744:** *"The Insolvency Regulation establishes a European framework for cross-border insolvency proceedings. The Regulation applies whenever the debtor has assets or creditors in more than one Member State, irrespective of whether he is a natural or legal person. The Regulation determines which court has jurisdiction for opening insolvency proceedings: Main proceedings have to be opened in the Member State where the debtor has its centre of main interests (COMI) and the effects of these proceedings are recognised EU-wide. Secondary proceedings can be opened where the debtor has an establishment; the effects of these proceedings are limited to the assets located in that State. The Regulation also contains rules on applicable law and certain rules on the coordination of main and secondary insolvency proceedings. The Insolvency Regulation applies to all Member States with the exception of Denmark which does not participate in judicial cooperation under the Treaty on the Functioning of the European Union." How the Regulation will continue to operate in relation to the UK after Brexit remains to be worked out.*)

The Regulation (like the previous draft Convention) provides for recognition and enforcement of judgements and decisions, allocation of jurisdictional competence and harmonised choice-of-law rules. It is the most advanced effort so far to provide for cooperation and coordination in cross-border insolvency cases (but is only applicable within the EU member states).

Although the member states have transferred exclusive competence to the EU in this field, the member states are still the crucial players in moving and negotiating the issue. And the basic condition for any attempt to reach a regulation is the states' willingness to do so.

However amendments to the EU Insolvency Regulation became necessary and Wessels and Boon state at 86 that as part of the European Commission review of the Regulation, it identified in particular the need for five main shortcomings that a recast proposal aimed to address:

- "The EIR excludes pre-insolvency proceedings, hybrid proceedings, and certain personal insolvency proceedings;
- Application of the COMI principle has led to some difficulties as well as to allow forum shopping by relocating COMI;
- Opening of secondary proceedings has shown to disturb efficient administration of the debtor's assets;
- There is currently no obligation to publicise the opening of proceedings, for lodging of claims creditors need to be aware of an insolvency proceeding; and
- The EIR does not deal with the insolvency of groups of companies."

An agreement was reached on the adoption of the revised EU Insolvency Regulation (The recast version) in November 2014. The amended version was adopted in 2015 and was put into operation as from 26 June 2017. The Recast Regulation (The EIR Recast), amongst others, addresses the issues as listed by Wessels and Boon above.

Brexit - As to the position of UK regarding the EU Insolvency regulation, it must be noted that the EU Bill providing for the withdrawal of the UK was published recently – see http://www.legislation.gov.uk/ukpga/2018/16/contents/enacted. How the process regarding cross-border insolvency between the UK and the EU will unfold is not clear yet but the Recast European Insolvency Regulation will apparently remain part of UK law and the UK would continue to automatically recognise insolvency proceedings from the rest of the EU. The status of recognition of UK insolvency proceedings in the rest of the EU will seemingly depend on the specific terms of Brexit still to be agreed upon.

BASIC SUMMARY OF: THE RECAST EU INSOLVENCY REGULATION (EIR Recast)

In the EURO-Lex online publication the broad scheme of the Recast EU Regulation is summarised as follows (Text and summary available on, and accessed on 12 / 9/2018 -- https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32015R0848):

" WHAT DOES THE REGULATION DO?

It aims to ensure the efficient administration of insolvency proceedings involving an individual or business that has business activities or financial interests in another EU country than the one in which they are usually based.

KEY POINTS

The regulation sets out EU-wide rules to establish:

- *which court has jurisdiction to open an insolvency case;*
- *the applicable national law;*
- *recognition of the court's decision when a company, a trader or an individual becomes insolvent.*

It does not apply to Denmark.

Applicable situations

The regulation applies to proceedings which include all or a significant part of debtor's creditors, are based on insolvency laws and in which, for the purpose of rescue, adjustment of debt, reorganisation or liquidation:

- *1.*

  a debtor has lost all or part of its assets and an insolvency specialist, such as a liquidator, has been appointed;

- *2.*

the assets and affairs of a debtor are under the control or supervision of a court; or

- *3.*

  a proceeding has been halted to allow for negotiations between the debtor and its creditors. This situation is only applicable if:

  - *it takes place in the context of proceedings which aim at protecting the general body of creditors;*
  - *the negotiations fail, one of the 2 other types of proceedings listed above would follow.*

*The regulation covers **'preventive' insolvency proceedings** available under national law which may be launched at an early stage in order to enhance the chances of rescuing the business. These proceedings are listed in Annex A of the regulation. It also covers a larger range of **personal insolvency proceedings**.*

Jurisdiction

*Proceedings take place in the courts of the EU country **where the debtor's main interests are centred**. This is presumed to mean:*

- *the location of the registered office, in the case of **company or legal person**;*
- *the principal place of business, in the case of an **individual running a business or professional activity**;*
- *where they usually live, in the case of **any other individual**.*

These presumptions do not apply if the location has changed within a certain period prior to the start of insolvency proceedings.

*If the debtor has **a place of operation in another EU country than the one where the debtor's main interests are centred**, that EU country may also open insolvency proceedings against the debtor. However, these 'secondary proceedings' are limited to the assets held in that country.*

The regulation enhances chances of rescuing companies by avoiding the opening of so-called synthetic secondary proceedings, where interests of local creditors are otherwise guaranteed.

Applicable law

In general, the applicable law is that of the country in which the proceedings take place. That law governs the conditions for opening and closing the proceedings and their conduct. This includes determining:

- *the debtors against whom a case can be brought;*
- *the assets which form part of the insolvency estate;*
- *creditors' rights after the case is closed;*

- *who bears the costs and expenses of the proceedings.*

Recognition and enforcement

Once a judgment opening insolvency proceedings in one EU country becomes effective it must be recognised in all other EU countries with the same effect.

Insolvency registers

To better ensure creditors and courts receive relevant information and to prevent parallel proceedings being opened, EU countries are required to publish relevant information on cross-border insolvency cases in a publicly accessible online register. These registers will be interconnected via the European e-Justice Portal, in conformity with EU data protection rules.

Group insolvency proceedings

The regulation creates a specific legal framework to deal with the insolvency of members of a group of companies. This includes:

- *rules obliging the various insolvency practitioners and the courts involved to cooperate and communicate with each other;*
- *limited rights of standing for an insolvency practitioner in the proceedings concerning another member of the same group;*
- *a specific system for the coordination of proceedings concerning the same company group ('group coordination proceedings').*

FROM WHEN DOES THE REGULATION APPLY?

It has applied since 26 June 2017. Regulation (EU) 2015/848 revised and replaced Regulation (EC) No 1346/2000 (and its subsequent amendments).

BACKGROUND

Insolvency proceedings

ACT

Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast) (OJ L 141, 5.6.2015, pp. 19-72)

Successive amendments to Regulation (EU) 2015/848 have been incorporated into the basic text. This consolidated version is of documentary value only."

L'OHADA

Another interesting example of harmonisation of insolvency legislation has taken place in a non-supra-national context in Africa. The Organisation for Harmonisation of Business Law in Africa (in its French acronym, l'OHADA)[76] is part of a regional framework, which also consists of the West African Monetary and Economic Union (UEMOA) and the Customs Union of Central African States (UDEAC). The organisation has 16 signatory states (13 have ratified the treaty)[77], but the treaty is open to adhesion by all member states of the Organisation of African Unity (OAU) and even by non-member states of the OAU. It should be seen as part of a regional economic policy and the legal framework set fort in the treaty is mainly based upon the French legal tradition.[78] The organisation, which is relatively unknown, has established a number of institutions, including a Common Court of Justice and Arbitration (CCJA),[79] situated in Abidjan, Ivory Coast.

Within the framework of l'OHADA a number of so-called "Uniform Acts" have been adopted for different areas of business law. On 1 January 1999, the Uniform Act on Insolvency Law came into effect.[80] Such an Act is directly applicable in the member states and also accorded primacy over existing or future domestic legislation – a pure form of law harmonisation. The Unified Act deals with enforcement and recovery measures and the organisation of insolvency proceedings. It introduces three procedures, one for pre-insolvency rescue as well as procedures for liquidation or rescue of an insolvent business. Additionally, the Uniform Act contains a section on insolvency proceedings with cross-border implications. A judgement in one member state shall have full effect in the other member states where the judgement:[81]

(1) deals with the conduct of the procedure,
(2) settle any question relating to elements of the procedure and claims brought by interested parties; or
(3) have arisen in proceedings other than insolvency proceedings but on which the latter proceedings have had an effect.

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[76] See J, Issa-Sayegh, "Quelques aspects techniques de l'intégration juridique: l'exemple des actes uniformes de l'OHADA", *Uniform Law Review* 1999-1, pp. 5-31; J, Issa-Sayegh, "L'OHADA: Bilan et perspectives", *International Law FORUM* 3/3 (2001) 156-162; M, Frilet, "L'OHADA ou l'harmonisation du droits des affaires en Afrique", *International Law FORUM* 3/3 (2001) 163-171.

[77] The signatories are: Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Comoros, Republic of Congo, Gabon, Equatorial Guinea, Guinea, Guinea-Bissau, Ivory Coast, Mali, Niger, Senegal and Togo.

[78] General questions relating to the problem of diversity of laws and issue of harmonisation of business law in general in Africa will not be discussed in this Note. For a general discussion, see M, Ndulo, "Harmonisation of trade laws in the African economic community", *International and Comparative Law Quarterly* 42 (1993) 101, and G, Bamudo, "Transnational Law, Unification and Harmonization of International Commercial Law in Africa", *Journal of African Law* 38/2 (1994) 125-143.

[79] The relative anonymity of l'OHADA is underlined by the fact that the court is not mentioned in comprehensive commentaries on international judiciary bodies, see for example Philip Sands/Ruth Mackenzie/Yuval Shany (eds.), *Manual on International Courts and Tribunals*, London/Edinburgh/Dublin: Butterworths, 1999. It will, however, appear in the research matrix that is being contructed by the Project on International Courts and Tribunals (PICT) on its website: http://www.pict-pcti.org, see C.P.R, Romano, "The Proliferation of International Judicial Bodies: The Pieces of the Puzzle", *New York University Journal of International Law and Politics* 31/4 (Summer 1999) 709-751.

[80] " Acte uniforme portant organisation des procédures collectives d'apurement du passif" (AUPC), published in *Journal Officiel OHADA* on 1 July 1998, No. 7. See PJ, Omar, "Insolvency Law Initiatives in Developing Countries: The OHADA Uniform Law", *Insolvency Lawyer* 6 (December 2000) 257-262.

[81] Article 247 of the Uniform Act, *ibid.*

Such judgements, which render the adjudicated issue *res judicata* in all member states, must be published in public registers of the member states where enforcement is sought.

Nonetheless, this effect of judgements does not bar the opening of multiple insolvency proceedings against the same debtor. There is, however, a distinction between main and secondary proceedings.[82] Moreover, insolvency professionals may exercise powers in any member state available under the law until proceedings have been opened in that state. Creditors are entitled to take part and prove claims in any proceedings they choose and the dividend regarding a claim in one proceeding are taken into account in other proceedings.[83]

With this approach some difficulties entrenched in the traditional method of establishing an insolvency convention are avoided. A convention presupposes that the states parties have pre-existing insolvency proceedings (and generally also proceedings of a certain quality). This was not the case in all the l'OHADA states and harmonised legislation was therefore an attractive option. First thereafter can cross-border issues be addressed and here this was done in the same statutory instrument. The uniformity is further enhanced by the opportunity to achieve coordinated interpretation of the law by the Common Court.

Treaties and other inter-state agreements

The traditional method for legal coordination and cooperation among states is the conclusion of international treaties (conventions). In spite of the apparent need, multilateral insolvency treaties are, however, not common.[84] Due to the complexity (and sometimes sensitivity) of the issues involved, an international insolvency treaty is difficult to negotiate and agree upon. The thirty-year history of the EU negotiations is clear proof of the difficulties even within a limited, regional group of states (although with a diversity of legal traditions). Once negotiated and agreed, the convention must go through adoption and implementation processes at the state level for it to be ratified, i.e. become legally binding for the state. A certain number of ratifications, varying from case to case, are required for the convention's entry into force. So a call for an international convention is regularly a difficult and time-consuming proposition.[85]

There are, nevertheless, a number of examples of multilateral conventions, although most of them have not been particularly effective. In order to reach agreement, the ambitions sometimes had to be lowered and the states be given room to opt-out of certain provisions (reservations). Ambiguous provisions may lead to implementation which do not really serve their purposes and there is normally no mechanism to ensure the future application of the convention. Thus, harmonisation is not a given result of

[82] *Id.* Article 251 (very similar to the equivalent definitions of the EU Regulation).
[83] *Id.* Article 255.
[84] Neither are bilateral treaties and those that are in place are usually very narrow and based principally on mutual recognition of judgements, see M, Prior & Nabarro Nathanson, "Bankruptcy Treaties Past, Present and Future, Their Failures and Successes", in: H, Rajak (ed.), *Insolvency Law – Theory and Practice*, London: Sweet & Maxwell, 1993 (pp. 225-232, at 231), and D, McKenzie, *supra*, at 18-19.
[85] See e.g., DA, Ailola, "Recognition of foreign proceedings, orders and officials in insolvency in Southern Africa: a call for a regional convention", *The Comparative and International law Journal of Southern Africa* 32/1 (March 1999) 54-71.

conventions.[86] Sometimes the main benefit has been to bring insolvency lawyers from different countries together and, thereby, putting the issue on the agenda and establishing contacts between them.

Some efforts have failed completely, for example the 1925 Hague Convention, which was not ratified by a single state, and a United States-Canadian Bankruptcy Convention, which has not progressed since about 1976 (in spite of serious efforts for many years).[87]

Compared with unilateral efforts, international treaties provides automatically for *reciprocity* – "what I do for you, you must also do for me". This is a reassuring feature and does allow for a more advanced regulation of cross-border issues, for example choice-of-law rules. However, also in unilaterally introduced schemes reciprocity may be a requirement. This could be required *in casu* (which is more difficult to establish) or by some kind of official listing of states towards which a certain cross-border scheme shall apply.[88]

The greatest possibility of success exist when the participating states are geographically close to each other and have similar legal systems and traditions in general.

The Montevideo Conventions and the Bustamente Code

Two examples are to found in Latin America, the 1889 and 1940 Montevideo Conventions and the 1928 Bustamente Code.[89] These initiatives stemmed from multilateral conferences to address various issues of private international law where insolvency questions form only a small part.

The 1889 Montevideo Convention was the result of the First South American Congress of Private International Law 1888-89, where eight treaties were concluded and one – the Treaty on International Commercial Law – includes insolvency. The convention was revised at a Second Congress in 1939-40 and amended with a more ambitious scheme – the Treaty on International Commercial Terrestrial Law and the Treaty on International Commercial Law. While six states are parties to the 1889 Convention, only three (Argentina, Paraguay and Uruguay) are parties to the amended version. It seeks to accommodate both universal and plural proceedings. Once insolvency has been declared in one state party, it is equally effective for the property in the other state parties. However, local creditors may bring the proceedings to their own country and, thus, preclude the foreign proceedings. Nevertheless, the powers of all receivers, trustees and their agents should be recognised in all state parties. Universality applies where the debtor consist of one clear main business and several branches or agents and plurality where the entity consists of two or more autonomous businesses in different states. Protective measures in one state shall be enforceable in the other states, but without prejudice to the right of local

[86] See e.g., Indira Carr, "Of Conventions, Model Laws and Harmonisation", *International Trade Law & Regulation* 8/4 (2002) 105-108.

[87] There are sometimes calls for new attempts to conclude a convention, e.g. M, Perry, "Lining-Up at the Border: Renewing the Call for a Canada-U.S. Insolvency Convention in the 21st Century", *Duke Journal of Comparative and International Law* 10 (2000) 469.

[88] Supporting reciprocity requirements, see e.g. DG, Boshkoff, "Some Observations on Fairness, Public Policy, and Reciprocity in Cross-Border Insolvencies", in: JS, Ziegel (ed.), *Current Development in International and Comparative Corporate Insolvency Law*, Oxford: Clarendon Press, 1994 (pp. 677-686). Regarding the British listing technique, see L, Hoffmann, *supra.*.

[89] See also IF, Fletcher, (*"The Law of Insolvency*".) at 221-236, and M, Prior & N, Nathanson, *supra*.

creditors, priority rights in one state shall be respected in proceedings in the other states and any surplus in one proceeding shall be dispersed to proceedings in another state. A liquidator in the proceedings of one state must also be recognised in all other state parties and be allowed to exercise his or her functions. However, no real coordination of multiple proceedings is provided for.

The 1928 Bustamante Code, concluded in Havana, Cuba, forms part of a comprehensive Convention on Private International, adopted by the Sixth Pan-American Conference where 21 states participated (including the United States). Fifteen states later ratified the convention (but not United States, Mexico and four "Montevideo-states", Argentina, Colombia, Paraguay and Uruguay). The Code provides that if there is domicile for a corporation in one state party alone, there can only be one bankruptcy estate covering all the state parties (and, unlike other parts of the Code, no reservations are allowed).[90] If there are separate economic establishments in different states, however, multiple insolvency proceedings are possible. A final decision on bankruptcy in one state means that the debtor shall be insolvent in all other state parties and the appointment of a "liquidator" shall have extraterritorial effects without any additional local proceedings.

In practice, the Montevideo Conventions and the Bustamente Code do not seem to have worked very well.[91] They have established the broad principles but left for the states to work out the details and this has not always been in favour of an effective cross-border insolvency scheme.

The Nordic Bankruptcy Convention

The Nordic countries (Denmark, Finland, Iceland, Norway and Sweden) have a strong common legal tradition in private law. Over the years there have been many projects of unified legislation (particularly in the late 19th and early 20th century) and many laws on central private law issues have, essentially, been the same in all the countries. This was not a result of formal harmonisation through supra-national arrangements or treaties, but rather a voluntary cooperation in drafting laws together that were thereafter brought back to the respective parliaments. In addition, international private law treaties were concluded between the Nordic states.

In 1933, the Nordic Bankruptcy Convention was concluded – national insolvency law in general was not an area for harmonisation. The convention, which has later been amended in 1977 and 1982 (although not regarding Iceland), is very short.[92] A new amendment may be necessary in light of the EU Regulation, which applies to only three of the Nordic states (not Norway and Iceland). The convention is quite comprehensive and includes subjects of jurisdiction, international effects and recognition as well as choice-of-law rules. Liquidation proceedings, judicially approved compositions, bank liquidations and the administration of estates of deceased insolvents are covered. It is based upon the concept of the debtor's domiciliary forum (and is not applicable to non-domiciliary

[90] Articles 414-422 of the Bustamente Code.
[91] Ian F. Fletcher, *"The Law of Insolvency"*), at 235-236.
[92] See M, Bogdan, "The Nordic Bankruptcy Convention: A Healthy Sexagenarian", in: K. Boele-Woelki *et al* (eds.), *Comparability and Evaluation – Essays in Honour of Dimitra Kokkini-Iatridou*, Dordrecht/Boston/London: Martinus Nijhoff Publishers, 1994 (pp. 27-36); M, Bogdan, "The Nordic Bankruptcy Convention", in: JS, Ziegel (ed.), *Current Development in International and Comparative Corporate Insolvency Law*, Oxford: Clarendon Press, 1994 (pp. 701-708); L-O, Svensson, "Inter-Nordic Insolvency Convention", *International Business Lawyer* 24 (May 1996) 226-228.

proceedings) and provides for universality (and unity) in that domiciliary proceedings shall apply also to the debtor's property in the other states. The effect is immediate and automatic without any additional formalities. "Liquidators" have the same rights in the other states as their local equivalents (i.e. not in accordance with their home state).

The choice-of-law rules points out *lex concursus* for certain matters but also that *lex rei sitae* governs whether any particular property should be exempt from seizure (and also for decisions as to whether illicit removal of property has occurred). Additionally, claims secured by mortgage or pledge or a right to retention, rights in respect of immovable property, registered rights, rights against third parties (and the estate) as well as voidability shall be determined by *lex rei sitae*. Individual enforcement against the debtor's assets prior to at concurrent with the commencement of the insolvency proceedings as well as the right of creditors to pursue such measures thereafter, are determined by the law of the state where the enforcement took place. Preferential claims are normally governed by *lex concursus*, but in some cases by *lex rei sitae*. Foreign creditors may not be discriminated against and even foreign public claims could be filed in the proceedings (which is highly unusual).

As to the success of the convention, one may note that there is very little published case law on its application. This should not be taken as proof of its failure, however, but rather as an indication that the operation works painlessly in practice.[93] Over all, it has proved to be an effective scheme which is based on high mutual confidence in the other parties' legal systems and processes.

The Istanbul Convention

The preparatory work on the 1990 European Convention on Certain International Aspects of Bankruptcy (the Istanbul Convention), under the auspices of the Council of Europe, lasted for almost ten years. In spite of a very low threshold of ratifications for its entry into force (three ratifications), it has still not done so. Only one state has ratified the convention and with the EU Regulation now in place and many Council of Europe member states now aspiring to join the EU, there is little hope for much widespread interest in the convention.

The conclusion of the Istanbul Convention did, however, have an impact on the EU Regulation (and the preceding EU Convention, which failed). When the EU negotiations broke down in the early 1980s, it was important to show that a multi-lateral convention could be concluded in Europe. Additionally, certain concepts (such as secondary proceedings) that were later used in the EU instruments were developed here. Without going into greater detail, the Istanbul Convention is less ambitious than the EU Regulation.[94] It merely provides a regime for recognition of proceedings commenced in the state parties and prescribes the conditions under which international recognition will be accorded. It does not, however, impose mandatory provisions on jurisdiction or on direct effects for recognised foreign proceedings. The "liquidator" may exercise certain rights and some rights and safeguards are accorded to foreign creditors, but states may make reservations when ratifying the convention.

[93] M, Bogdan, *ibid.* (in Ziegel), at 706, and IF, Fletcher, *The Law of Insolvency*, at 244-245.
[94] See further, IF, Fletcher, *idem*, at 302-322, and by the same author, "Making a Better World – Current International Initiatives in Cross-Border Insolvency: Part 1", *Insolvency Intelligence* 12/1 (1999) 4-5.

4.3 Initiatives being a Combination of International and National Efforts

Model International Insolvency Co-Operation Act and the Cross-Border Insolvency Concordat

In the absence of any apparently successful government initiatives, private practitioners have moved to provide guidance (and inspiration) for the management of cross-border insolvency cases. Besides active participation in various inter-state discussions, particularly in the work of UNCITRAL, practitioner organisations such as the International Association of Insolvency Practitioners (INSOL) and the International Bar Association (IBA), Committee J of the Section on Business Law, have also taken their own initiatives. In particular IBA has made legislative efforts.[95]

One of the projects of IBA has been the drafting of a Model International Insolvency Co-Operation Act (MIICA). In 1991, the Council of the IBA adopted the Model Act (final draft of 1 November 1988). It is proposed for adoption by states with or without amendments. It is intended to further universality, with a single administration of the debtor's total estate, but not by means of recognition in foreign courts of one single insolvency proceeding. While MIICA has served as food for thoughts, it has been recognised that the acceptance of the Model Act would depend upon ratification by a large number of, if not all, countries around the world.

Another and more recent initiative by IBA was a Cross-Border Insolvency Concordat, which was adopted by the IBA Council in 1996. Here the approach is different and the Concordat is set of principles which are intended to be presented to the judge in any given cross-border insolvency case. If widely recognised by courts, the principles will provide some consistency. It has been utilised mainly in the United States (but also in other common law jurisdictions such as Canada and Bahamas) and has been referred to in some court decisions. It is more difficult, however, to assess the practical use of the Concordat by judges in civil law systems.

UNCITRAL Model Law on Cross-Border Insolvency and the UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments

a. ***UNCITRAL Model Law on Cross-Border Insolvency***

In an attempt to combine international and national efforts to address cross-border insolvencies, the United Nations Commission on Trade Law (UNCITRAL) has developed a so-called Model Law on Cross-Border Insolvency, which was adopted in 1997. Inspiration was found in MIICA and both INSOL and IBA participated actively in the work of UNCITRAL, which was conducted in a relatively short time (four two-week working group meetings in 1995-97 and one session of the Commission). The Model law has received considerable interest and has been widely commented upon.[96]

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[95] See TE, Powers, "The Model International Insolvency Co-operation Act: A Twenty-First Century Proposal For International Insolvency Co-operation", in: JS, Ziegel (ed.), *Current Development in International and Comparative Corporate Insolvency Law*, Oxford: Clarendon Press, 1994 (pp. 687-700); JA, Barrett, *supra*, at 558-559; IF. Fletcher, *"The Law of Insolvency*") , at 325-326; SL. Bufford *et al, supra*, at 85-89.

[96] See H, Friman, "UNCITRAL Model Law on Cross-Border Insolvency – An Introduction", unpublished Note, 2000. See further, e.g., Jay L, Westbrook, "Creating International Insolvency Law", *American Bankruptcy Law Journal* 70 (Fall 1996) 563-573; M, Steiner, "UNCITRAL Model Law on Cross-Border Insolvency – To Enact or Not to Enact",

The Model Law is not an international convention to be ratified by states but a set of provisions on cross-border insolvency to be implemented – with or without amendments – in national legislation. Thus, it is not a legally binding instrument, which made it much easier to negotiate, but a model intended for enactment unilaterally by states. It should be seen as a complement to existing law, which applies to all issues not addressed in the Model Law. Additionally, it could serve as inspiration for international agreements. This type of instrument, which has been used before by UNCITRAL in other areas, was chosen in light of the deterring experiences of earlier treaty-making attempts (i.e. the EU Convention).

The idea is that states shall implement the Model Law into existing law, which may require adaptation to a greater or smaller extent. However, the closer to the original, the better since foreign practitioners could then easier understand and interpret the law. And, even more important, this would create reciprocity in effect. Reciprocity is not a requirement for cooperation in and coordination of proceedings according to the Model Law, but this is also not explicitly ruled out. The lack of reciprocity meant that certain issues could not be included in the Model Law, e.g. choice-of-law rules, which makes it somewhat incomplete. The focus is on procedural law rather than on substantive law. However, a more wide-spread implementation of the Model Law could serve as a vehicle for harmonisation and, thus, pave the way for further efforts.

The Model Law consists of 32 Articles in five Chapters. Some provisions are intended as minimum rules and in some cases alternative provisions are provided for. The point of departure was, however, to have as few exceptions as possible. It could be implemented as a separate Act or a Chapter of an existing Act and needs to be adapted to national conditions and national law (bracketed text is used for references to existing provisions in national law). Application of the enacted Model Law means application of national law. Besides general provisions (Ch. 1), the Model Law deals with access to domestic courts (Ch. 2), recognition of foreign proceedings and "representatives" as well as extraterritorial effects (Ch. 3), coordination and cooperation (Ch. 4) and regulation of concurrent proceedings (Ch. 5). The scope is intended to be broad (businesses and consumers, liquidation and rescue), but there is room for excluding certain kinds of debtors (banks, insurance companies, etc.).

The Model Law has been described as a highly promising chapter in the management of international insolvency and it has been favourably received in many quarters, particularly in common law countries. The legislative technique used is more suitable for such systems than for civil law systems, where a higher degree of adaptation will probably be called for. As of mid-2002, still only a few states have adopted the Model Law (the first states to have adopted it are Eritrea, Mexico, South Africa and Montenegro,

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International Banking and Financial Law 16/11 (1998) 116-118; John A Barrett, *supra*; AJ, Berends, "The UNCITRAL Model Law on Cross-Border Insolvency: A Comprehensive Overview", *Tulane Journal of International and Comparative Law* 6 (1998) 309-399; MT, Cronin, "UNCITRAL Model Law on Cross-Border Insolvency: Procedural Approach to a Substantive Problem", *Journal of Corporation Law* (Spring 1999) 709-726; PJ, Omar, "The UNCITRAL Model Law on Cross-Border Insolvency", *International Company and Commercial Law Review* 10/8 (1999) 242-248; Alastair D Smith & David A Ailola, "Cross-Border Insolvencies: An Overview of Some Recent Legal Developments", *South African Mercantile Law Journal* 11 (1999) 192-209; IF, Fletcher, *"The Law of Insolvency"*), at 323-363; MC, Gilreath, "Overview and Analysis of How the United Nations Model Law on Insolvency Would Affect United States Corporations Doing Business Abroad", *Bankruptcy Development Journal* 16/2 (2000) 399-440; IF, Fletcher, "A New Age of International Insolvency – The Countdown has Begun: Part 2", *Insolvency* Intelligence 13/9 (2000) 68-69; JS, Ziegel, *supra*; SL, Bufford *et al, supra*, at 55-68; PJ, Omar, "The UNCITRAL Initiative: A Five-Year Review", *Insolvency Lawyer* 6 (October 2002) 228-239; P, Torremans, *supra*, 199-228.

and see Annexure "A" for a more current list).[97] In the United Kingdom, the Insolvency Act 2000 provides for the Model Law to be brought into operation through regulation in a statutory instrument. Other states that are considering the Model Law for adaptation, includes Australia, New Zealand, Canada, the United States. Other states such as Thailand and Malaysia have also shown interest. Also other countries, such as Sweden, are considering the Model Law in efforts to reform the law on cross-border insolvency. Not all have considered implementing the Model Law without substantive amendments and, *inter alia*, South Africa has introduced a requirement of reciprocity and the United States considers excluding consumer bankruptcies.

To what extent the Model Law will fulfil its purpose is still too early to assess. Very important is the attitude taken by larger trading countries towards implementation. So far, many states seem to wait out each other before committing themselves to the Model Law. It would also be important to attract interest from non-common law countries, particularly from the EU as a major trading bloc. This might be possible now when necessary modifications of existing insolvency law take place with reference to the EU Regulation and it would be advisable to also consider cross-border insolvencies where non-EU countries are involved. As already stated, however, the actual design of the Model Law's provisions deviates from the design of legislation normally used in civil law countries, especially the lack of guidance regarding the application of the extraterritorial effects (so-called "relief"). Whatever the outcome, the work of UNCITRAL (and others) have placed international insolvency on the agenda and provided a framework for future developments.

5 Some Concluding Remarks

Only a few years ago, commentators painted a rather gloomy picture of the possibilities to find solutions to cross-border insolvency cases. It was noted that neither national initiatives, nor international were very effective (except for a few exceptions). Since then, however, the EU Regulation has (finally) been adopted and entered into force and countries are still working towards implementation of the UNCITRAL Model Law. Other initiatives have continued and new have been added, which makes the issue safely placed on the international agenda. Additionally, insolvency practitioners, judges, government officials and academics now meets on a regular basis which is a fertile ground for new initiatives for improving the situation and for contacts that may assist practical cooperation and coordination when cross-border insolvency cases occur. Over time, perceptions may change so that a more appropriate relationship between internal and external interests as well as between domestic and foreign proceedings can be developed. Globalisation is here to stay and so are cross-border insolvency cases.

But from a practical point of view it still remains a first step when seeking assistance in an insolvency matter in a foreign jurisdictions to seek the applicable source to apply in the matter at hand. In the absence of domestic rules relating to cross-border insolvency, or where such rules exist but are inadequate, answers will be sought in the principles of private or international law (conflicts of law rules) or even public international law. It must

[97] According to UNCITRAL's web site: http://www.uncitral.org.

however be noted that there is not always a uniform approach between States in applying such rules.

In common law countries, the common law may also assist to provide a basis for courts to deal with cross-border insolvency matters, or even to develop such principles. It however seems that the Courts applying or developing common law principles in this regard are not always consistent. For instance the Privy Council in the Cambridge Gas Transport Corporation v Official Committee of Unsecured Creditors of Navigator Holdings [2006] UKPC 26; [2006] 3 WLR 689 followed a more flexible approach in developing common law application in this sphere of the law, but in *Singularis Holdings Ltd v PricewaterhouseCoopers (Bermuda)* [2014] UKPC 36 (10 November 2014), [2015] 2 WLR 971 it followed a more restrictive approach.[98]

[See UNCITRAL website re status of countries that have adopted the UNCITRAL Model Law on Cross-Broder Insolvency.]

b. UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments

It must be noted that a later UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments
(see: http://www.uncitral.org/pdf/english/texts/insolven/Interim_MLIJ.pdf A/CN.9/WG.V/WP.157 with the amendments listed in document A/CN.9/955) has also been adopted.

In 2018 the final version of this Model Law with amendments was adopted with the view of further regulating insolvency related judgments. (This model law could be adopted as a stand alone or to further support the UNCITRAL model law on Cross-Border Insolvency.)

According to its Preamble the purpose of this Law is:
(a) To create greater certainty in regard to rights and remedies for recognition and enforcement of **insolvency-related judgments;**
(b) To avoid the duplication of insolvency proceedings;
(c) To ensure timely and cost-effective recognition and enforcement of insolvency-related judgments;
(d) To promote comity and cooperation between jurisdictions regarding insolvency related judgments;
(e) To protect and maximize the value of insolvency estates; and
(f) Where legislation based on the UNCITRAL Model Law on Cross-Border Insolvency has been enacted, to complement that legislation.

[98] This aspect is discussed by for instance P, Omar., "Diffusion of the Principle in *Cambridge Gas*: A Sad and Singular Deflation" 2015 (2015) 3 NIBLeJ 31 at https://www4.ntu.ac.uk/nls/document_uploads/194364.pdf

In terms of article 1 the scope of application, this Law applies to the recognition and enforcement of an insolvency-related judgment issued in a State that is different to the State in which recognition and enforcement is sought.

An **"insolvency-related judgment"** means: a judgment that:
a. Arises as a consequence of or is materially associated with an insolvency proceeding, whether or not that insolvency proceeding has closed; and
b. Was issued on or after the commencement of that insolvency proceeding but it does not include a judgment commencing an insolvency proceeding.
In terms of article 2. This Law is not intended to restrict provisions of the law of this State that would permit the recognition and enforcement of an insolvency-related judgment; or to replace legislation enacting the UNCITRAL Model Law on Cross-Border Insolvency or limit the application of that legislation; or to apply to the recognition and enforcement in the enacting State of an insolvency related judgment issued in the enacting State; nor to apply to the judgment commencing the insolvency proceeding.

SECTION C: THE HARMONIZATION OF NATIONAL INSOLVENCY LAW AND ITS USE IN INTERNATIONAL INSOLVENCY LAW

After completion of this study unit you must have a good knowledge of:

- Principles to harmonise national insolvency laws.
- Difficult areas for harmonisation, like:
  - voidable dispositions;
  - labour contracts;
  - priorities;
  - securities.

6 HARMONISING NATIONAL INSOLVENCY LAWS TO EASE THE WAY FOR CROSS-BORDER INSOVLENCY PRACTICE: See Wood 10 -11; Wessels International Insolvency (2011) Chapter 1

Conflicting insolvency law is an obstacle for the smooth development of cross-border trade and a uniform global insolvency cross-border dispensation. Where countries within certain geographical regions have legal systems (including insolvency law) based on similar outlooks, a good basis exists on which to try and align the respective national insolvency law systems. Taken from the viewpoint of fair and equal treatment of (classes of) creditors it may be felt desirable in such countries, not to discriminate against creditors and to pay the creditors the same dividends out of a liquidated estate. To reach such a result, a legal framework should be created in which insolvency judgments should be recognized or will at least be treated likewise in another country. Regional (multilateral) initiatives may find a good breeding ground where the respective countries have similar legal systems, often as a result of a shared colonial heritage. In some cases a similar orientation follows similar views on economic and social desirables or similarities in language or culture. Such multilateral initiatives are mainly a development of the last

century, with emphasis on the 1990's, eg. NAFTA (between USA, Canada and Mexico) in 1994, OHADA (between 16 African States) in 1995 and finally the entry into force of the EC Insolvency Regulation on 31 May 2002. These regional initiatives are dealt with separately below.

Regional initiatives often seem to be connected to countries or (economic) groups of countries with similar or comparable thoughts on economic and legal issues, shared legal cultures and close commercial relationships, see Lipstein (1990); Wood (1995), 293; Elliott (2000), 227; Omar (2004b), 8, and the references below to Fletcher (2005).

6.1 Southern African Development Community (SADC) - Wessels International Insolvency (2011) Chapter 1 par 7.5

The South African Development Community (SADC) is a treaty signed by five Southern Africa States in 1992, particularly focusing on the promotion of sustainable and equitable economic growth and socio-economic development through deeper cooperation and integration. It forms a cradle for a form of international insolvency regulation but no such regional cross-border system has been developed yet. (Some African countries are introducing new legislation based on the UCNTIRAL Cross-Broder Insolvency Act though.)

In August 1992, in Namibia, a treaty was signed that established the South African Development Community. In August 2001 Heads of State and government signed an Agreement Amending the SADC Treaty. The States involved were Botswana, Mauritius, Namibia, South Africa and Zimbabwe, despite the political situation in the latter country discouraging joint cooperation.

Boraine and Olivier (2005) have added that in addition to a development in which the UNCITRAL model law is a key driver in the arena of insolvency law, there are important lessons to be learnt in the labour relations field in seeking to develop and to implement uniform policies for the region in the field of labour law. The disparities in the aforementioned countries show that there is a need for harmonisation. The authors conclude that as the increased cooperation amongst SADC states is a matter which enjoys the political support of the governments of member states, a harmonized cross-border insolvency regime, be it by way of a consistent incorporation of the Model Law into domestic law of the member states, or by way of a SADC treaty will pave the way for an increase in trade and investment between member states and create the much wanted legal certainty.

There is, however, no talks underway to work towards harmonizing national insolvency laws in this region or even to adopt a treaty on cross-border insolvency.

6.2 South-East Asia - Wessels International Insolvency (2011) Chapter 1 par 7.7

Under the auspices of the Asian Development Bank (ADB) progress is being made in the development of a regional insolvency law regulation, which in principle, will apply to Indonesia, Thailand, Philippines and Korea.

***ADB*:** In the aftermath of the financial crises that swept through Asia in the mid 90's, ADB launched a project at the end of 1998 to fundamentally review insolvency law and neighboring laws (company law; securities law) in eleven countries in the region. To solve cross-border insolvency issues (obstacles are sovereignty and reciprocity) the report contains in its Annexures a draft regional treaty using a model law approach (draft A) and a draft regional non-treaty arrangement using a basic principles approach (draft B).

6.3 APPROACHES TO HARMONISE INSOLVENCY RULES

'Best practices' as soft law

The tremendous growth of international trade and the impact of technological developments offering the possibility to communicate and carry out business in 'real time', directly confront various national legal systems. The rise of multinational corporate groups raises many legal questions in respect of the way in which these businesses are organized, financed and supervised and the way in which they enter, and operate in, certain markets in a multitude of countries. International regulation, in theory, forms an integral part of the design of commercial law (company law, securities law, law related to collateral, trade law, contract law, competition law, law related to annual accounting). Regulation, in general, presupposes governmental intervention, which, for various reasons, produces in practice, hardly any adequate results in relation to international insolvency law.

***Globalization*.** Globalization is '…. One of the most powerful and pervasive influences on nations, businesses, workplaces, communities and lives at the end of the twentieth century', see Rosabeth Moss Kanter, *World Class; Thriving Locally in the Global Economy* (1995), 7.

Whereas the 'hard law' approach (conventions, treaties) show disappointing results, uniform rules or codes have been developed through the means of 'soft law'. Such uniform rules or codes originate from 'standard setting agencies' (or 'formulating agencies') and focus on forms of harmonization or international regulation of commercial law.

***Soft law*.** Generally 'soft law' is understood to mean a non-enforceable regulation created by the (direct) involvement of members of a certain sector or field (individuals, representative organizations) in mutual discussion and agreement. Soft law expresses itself in forms such as model-contracts, 'precedents', 'standards', guidelines, principles, guides, records of certain customs, codes or protocols. Since they are commonly accompanied by practical and efficient recommendations, which are based on broad support in the respective sector or group of interested parties, 'soft law' in general simplifies mutual

communication and advances predictability of actions, although to a lesser extent than positive law, as soft law is not legally enforceable.

A number of international initiatives to enhance the establishment of proper insolvency laws that may go some way to draw systems closer have been launched. In this regard the UNCITRAL Legislative Guide on Insolvency Law (www.uncitral.org/uncitral/en/commission/working_groups) and the World Bank Principles and Guidelines for Effective Insolvency and Creditors Rights (2001 and the 2005 update, see www.worldbank.org/gild) may be mentioned as two prime documents in this regard.

6.4 UNCITRAL Legislative Guide on Insolvency Law of 2004

In 2004 UNCITRAL adopted this guide with view that member states use it as a platform to reform their local insolvency laws as to establish greater harmony on a global scale. The guide is intended to provide only guidelines regarding substantive insolvency law. The General Assembly of the UN accepted it on 2 December 2004.

- **Scope and purpose**

In 2000 Working group V was mandated to prepare a comprehensive statement of key objectives and key features for a strong insolvency regime that includes considerations of out-of court restructuring and a legislative guide containing flexible approaches to the implementation of such objectives and features.

- **Structure of Guidelines**

Chapter I: Application and commencement criteria

Chapter II: Effects of the commencement of insolvency procedures on the debtor and his or her assets, including the constitutions of the insolvency estate, protection and preservation of the estate, use and disposal of assets, post-commencement finance, treatment of non-executory contracts, exercise of avoidance procedures, rights of set-off, and financial contracts and netting.

Chapter III: The role of the debtor and the insolvency representative and his various duties and functions, as well as measures to facilitate creditor participation.

Chapter IV: This chapter deals with issues relating to the proposal and approval of a reorganization plan and expedited reorganisation proceedings.

Chapter V: Different type of creditors' claims and their treatment as well as the establishment of priorities for distribution.

Chapter VI: Deals with the conclusion of insolvency procedures like discharge and refers to the UNCITRAL Model Law on Cross-Border for issues relating to transnational insolvency.

With regard to international insolvencies, the Guide proposes in Recommendation 172 that an insolvency law should specify that similarly ranked creditors, regardless of whether they are domestic or foreign, are to be treated equally with respect to the submission and processing of their claims. Recommendation 175 proposes that a insolvency law must indicate if a foreign claim must be converted to the relevant currency and if so, the reasons for doing so.

Recommendation 30 proposes that only debts that existed prior to the commencement of the insolvency proceeding must be acknowledged –except for claims forming part of a payment settlement scheme or in a regulated market where the law of the settlement system or market will apply (Recommendation 33). The validity of rights and claims at the moment of such commencement must be determined in terms of private international law principles of the State in which the insolvency proceedings commenced. (Recommendation 31.) The *lex fori concursus* should determine all aspects of the commencement, conduct, administration of the insolvency proceeding and their effects. (Recommendation 32). Only the effects of insolvency on participants in a payment or settlement system or in a regulated financial market and labour contracts may be regulated by the law applicable thereto (Recommendations 33 and 34).

The Legislative Guide differs for the EU regulation in that the former has two exceptions and the latter in its current format has 11 exceptions to the *lex concursus* principle. It also goes beyond the UNCITRAL Model Law in that it proposes rules to deal with substantive issues of insolvency as well.

6.5 Harmonisation (convergence) of national insolvency laws in the EU

A Working Group has been appointed in 2003 to deal with this difficult aspect and according to Wessels and Boon at 96 the following structure of the principles has been adopted:

"The Working Group developed 14 Principles that deal with the following topics:

1. Insolvency Proceedings
2. Institutions and Participants
3. Effects of the Opening of the Proceeding
4. Management of the Assets
5. Obligations Incurred by, and Fees of, the Administrator
6. Treatment of Contracts
7. Position of Employees
8. Reversal of Juridical Acts
9. Security Rights and Set-Off
10. Submission and Admission of Insolvency Claims

11. Reorganisation
12. Liquidation
13. Closure of the Proceeding
14. Debtor in Possession"

In 2014 there was also some development in relation to business rescue

"The European Commission (EC) has issued a recommendation "on a new approach to business failure and insolvency" dated 12 March 2014 (the "Recommendation"). Insolvency laws across the European Union (EU) vary greatly from Member State to Member State in the procedures available to debtors in financial difficulty. These differences across the community the EC considers serve as disincentives for businesses and cross-border investments. The Recommendation is aimed at harmonising and encouraging greater coherence among national insolvency laws, enabling companies to restructure at an early stage to avoid insolvency and maximise returns to creditors, employees, owners and the wider economy. The Recommendation is also aimed at giving honest bankrupt entrepreneurs a second chance, by making provisions for a full discharge of debts after a maximum period of time. The timetable for change is short, just one year." See Notes on EU Recommendation: with acknowledgement to Hardy and Morris (http://www.mondaq.com/unitedstates/x/307240/Insolvency+Bankruptcy/European+Commission+Recommendation+On+A+New+Approach+To+Business+Failure+And+Insolvency).

Note: http://ec.europa.eu/justice/civil/commercial/insolvency/index_en.htm - "As a follow up of the Commission Recommendation of 2014 on a new approach on business failure and insolvency, and in line with the 2015 Capital Markets Union action plan, the European Commission is in the process of preparation of a legislative initiative addressing certain aspects of substantive insolvency laws. This event, which hopefully will bring together the representatives of the Member States, European Parliament, national Parliaments, business and household associations, members of judiciary, legal practitioners, entrepreneurs and academics on issues related to insolvency debt restructuring and second chance, will contribute to the preparatory work of the Commission."

7 SELECT ISSUES FOR DISCUSSION

These issues are in many instances treated differently in various jurisdictions and therefore usually requires exceptions in cross-border dispensations. They should also receive due consideration when national systems are developed or reformed so as to forge a closer connections between different systems.

7.1 Avoidance provisions

7.2 Labour contracts and related aspects

7.3 Priorities

7.4 Real rights of third parties and Securities

Since there are a number of important differences between the types of real securities, the procedure to effect such rights and their consequences, this remains one of the difficult areas to deal with on a cross-border level. In fact it has once been described as the next frontier in Cohen *Harmonizing the law Governing Secured Credit* 33 *Texas LJ*. 1-16.

Many instruments are based on the principle that pre-required rights acquired in terms of the general law of a particular jurisdictions, like securities, must be acknowledged during bankruptcy. At present UNCITRAL is also finalising a Model Law on Security interests. (See **www.uncitral.org/uncitral/en/commission/working_groups.)**

7.5 Groups and financial institutions

7.6 COMI

7.6.1 EU Insolvency Regulation: company place of registered office presumed to be COMI unless presumption rebutted

Art 16(3) of UNCITRAL Model Law – presumption registered office or habitual address in case of individual.

Amendments to the EU Regulation – "There are difficulties in determining which Member State is competent to open insolvency proceedings. While there is wide support for granting jurisdiction for opening main insolvency proceedings to the Member State where the debtor's COMI is located, there have been difficulties in applying the concept in practice. The Regulation's jurisdiction rules have also been criticised for allowing forum shopping by companies and natural persons through abusive COMI-relocation." –see http://ec.europa.eu/justice/civil/files/insolvency-regulation_en.pdf

In discussing the amended EU Insolvency Regulation text (the Recast) that was adopted in 2015, Wessels and Boon at 87 mention that "In order to overcome forum shopping, the proposal contains several measures. Whereas the EP proposes a time based criterion for deciding on COMI and the presence of an establishment, the Council proposes a more holistic approach. It is therefore that '… the court should carefully assess whether the debtor's centre of main interest is genuinely located in that Member State'.[99] For individuals not acting in the course of business '… the centre of main interests shall be presumed to be the place of the individual's habitual residence in the absence of proof to the contrary. This presumption shall only apply if the habitual residence has not been

[99] "Council Proposal of 3 June 2014, footnote 21" – Wessels and Boon at 87.

moved to another Member State within a period of 6 months prior to the request for the opening of insolvency proceedings.[100]"

Compare: EU Insolvency Regulation (current and new) treatment relating to COMI with UNCITRAL Model Law:

See also notion of an "establishment" being "a place of operations where the debtor carries out non-transitory economic activity with human means or goods"

Westbrook
Two primary factors:

- **Predictability**
- **Likelihood of selection of acceptable substantive law**

Big four bankruptcy policies that should be governed by the law of the main proceeding:

- **Control**
- **Priority**
- **Avoidance**
- **Reorganisation**

Modified universalism.

COMI: Other than place of incorporation, either headquarters (real seat) or its operations (like business, main assets.)

DUAL COMI: Maxwell case: headquarters England but assets in USA (but prefer headquarters.)

SECTION D: PRINCIPLES RELATING TO THE QUALIFICATIONS OF ESTATE REPRESENTATIVES

8 PRINCIPLES TO REGULATE INSOLVENCY REPRESENTATIVES:

8.1 EBRD principles to regulate insolvency representatives:

The European Bank for Reconstruction and Development (EBRD) regularly conducts assessments and surveys to measure the extensiveness and effectiveness of insolvency laws in its countries of operations. These laws are measured not against arbitrary or abstract principles but, rather, against international standards and best practices as articulated in, among others, the UNCITRAL Legislative Guide on Insolvency Law and the World Bank's Principles and Guidelines for Effective Insolvency and Creditor Rights Systems. It

[100] Ibid "Council Proposal of 3 June 2014, Article 3. Proof on the contrary can follow from '… all relevant factual elements, in particular the duration and regularity of the individual's presence in the Member State concerned and the conditions and reasons for that presence' (Council proposal of 3 June 2014, footnote 20)."

is axiomatic that the nature and content of insolvency laws will, and indeed must, vary from jurisdiction to jurisdiction in order to accommodate the rich variety of legal and cultural traditions.

Despite the differences of legal systems, insolvency office holders, variously called trustees, administrators, receivers, liquidators, insolvency representative, are at the heart of many insolvency systems within the EBRD countries of operation and around the world. They are required to act honestly, professionally and responsibly. They are usually given control over assets and significant authority to decide how and when assets are distributed. A properly qualified, trained and regulated cadre of office holders is essential for the transparent, effective and efficient functioning of these systems. Our assessments and surveys demonstrate, however, that many insolvency law regimes are lacking the core elements necessary for the proper functioning of such a system.

The EBRD Insolvency Office Holder Principles articulate the core elements which should be reflected in the development or reform of an insolvency legal regime that provides for the appointment of office holders. They build on the World Bank Principles and Guidelines and the UNCITRAL Legislative Guide, by providing greater detail and guidance on the application of the standards and practices advanced by those institutions.

These Principles seek to advance the integrity, fairness and efficiency of the insolvency law system by ensuring that appropriately qualified professionals hold office in insolvency cases. The Principles should be viewed as guidelines that provide a checklist of issues which should be considered and applied when establishing an insolvency law regime that provides for the employment of an office holder in all insolvency cases.

[Note: The responsibilities and ethical behaviour of Insolvency Professionals in various systems have also been examined and it will be of use to read **Bewick., et al.,** *Ethical Principles for Insolvency Professionals*, (2019), Insol Int.]

PRINCIPLE 1 – QUALIFICATIONS & LICENSING GENERALLY

Position of trust, therefore such a person should hold qualifications, be of good character, licensed, and regulated by professional body.

The regulatory framework should therefore provide for:

- Qualifications;
- An examination re insolvency law and practice;
- Licensing or registration;
- Register of office holders;
- Requirement for continuing education;
- Renewal of license or registration;
- Licensing of corporate body.

PRINCIPLE 2 – APPOINTMENT IN AN INSOLVENCY CASE

Predictability and fair procedure

The law should thus state:

- Grounds upon which an office holder may be ineligible for appointment in a particular case;
- The body who may appoint such an office holder;
- Clear guidelines on appointment by court or other body;
- Procedure when appointed by creditors or body of creditors;
- Procedure when appointed by debtor or his or her representative;
- No restriction on number of appointments.

PRINCIPLE 3 – REVIEW OF OFFICE HOLDER APPOINTMENT

Procedure to complain about appointment

The law should thus provide:

- Grounds to review appointment;
- Process for review;
- If set aside, appointment of another person.

PRINCIPLE 4 – REMOVAL, RESIGNATION & DEATH OFFICE HOLDER

Parties wish to remove appointee, retirement or death

The law should thus provide:

- Resignation;
- Grounds for removal;
- Process for removal.

PRINCIPLE 5 – REPLACEMENT OF OFFICE HOLDER

Process must be clear

The law should thus provide:

- Prompt appointment of a new office holder;
- New office holder entitled to books, assets etc;
- Former office holder must cooperate.

PRINCIPLE 6 – STANDARDS OF PROFESSIONAL AND COMMERCIAL CONDUCT

Standards very important

The law should thus state:

- What the basic standards are;
- By way of secondary legislation provide standards regarding reports, collection and safeguarding of assets, trading, keeping of records, convening and conduct creditors meetings, sale and other disposal of assets, opening and operating bank account, dealings with reorganization plans.

PRINCIPLE 7 – REPORTING AND SUPERVISION

Creditors and other interested parties need to be informed about progress etc

The law should thus provide:
- For regular reporting;
- Provide for creditors' committees to oversee work of office holder in some cases;
- Performance of office holder be monitored.

PRINCIPLE 8 – REGULATORY AND DISCIPLINARY FUNCTIONS

Level of work requires above

The law should thus provide:
- Government body with powers;
- Ground to investigate;
- Powers of regulatory body;
- Provide disciplinary powers;
- Provide right of appeal.

PRINCIPLE 9 – REMUNERATION AND EXPENSES

Described as critical part

The law should thus provide:
- Office holder entitled to remuneration;
- Determined by court or other body;
- Basis for calculating remuneration;
- Review or appeal;
- Payment of remuneration out of assets also during the progress of the case;
- Appropriate level of priority for payment.

PRINCIPLE 10 – RELEASE OF OFFICE HOLDER

Subject to objection by regulatory body or interested party

The law should thus provide that office holder be released either by efflux of time, court order or upon application.

PRINCIPLE 11 – INSURANCE AND BONDING
In order to protect third parties

PRINCIPLE 12 – CODE OF ETHICS

This should be encouraged and must deal with the need for:

- Impartiality;
- Integrity and accountability;
- Independence;
- Avoid perception of conflict of interests;
- Proper conduct between office holders.
- Must be binding and enforced by professional body.

World Bank Principles for Effective Creditor Rights and Insolvency Systems: Competence and Integrity of Insolvency Administrators [D 8]:

- Criteria to who may be representative should be objective, clearly established and publicly available;
- Insolvency administrators must be competent to undertake the type of work;
- Must be held to director and officer standards of accountability;
- They must be subject to removal for incompetence, negligence fraud etc.

9.2 UNCITRAL Legislative Guide on Insolvency Law [Part 2, chap. III, paras. 35 -74.]

Purpose of legislative provisions is to:

- Specify qualifications;
- Establish mechanisms for selection and appointment;
- Specify powers and functions;
- Provide remuneration, liability, removal and replacement.

Contents of legislative provisions:

- Qualifications;
- Conflict of interest;
- Appointment;
- Remuneration;
- Duties and functions of representative;
- Right to be heard;
- Confidentiality;
- Liability;
- Removal and replacement;

- Principles to appoint and deal with estates without sufficient funding to meet the costs of administration.

9.3 DRAFT STATEMENT OF PRINCIPLES AND GUIDELINES FOR INSOLVENCY OFFICE HOLDERS IN EUROPE, 2014

Wessels and Boon at 104:
"Structure of the Draft Statement of Principles and Guidelines for IOHs

- The framework developed in Report I and tested in Report II proposed four categories:
- 1. IOH Selection and Appointment
- 2. Professional Standards
- 3. Roles and Responsibilities
- 4. Insolvency Governance

The analysis on the presence of rules on these four categories resulted into room for seven Principles and 33 Guidelines. The Guidelines are related to one of the Principles and provide for further practical guidance.

- Principle 1 Definition of an IOH (three related Guidelines)
- Principle 2 Professional Standards (four related Guidelines)
- Principle 3 Ethical Standards (two related Guidelines)
- Principle 4 Administration (five related Guidelines)
- Principle 5 Communication (eight related Guidelines)
- Principle 6 Coordination and Cooperation (four related Guidelines)
- Principle 7 Insolvency Governance (seven related Guidelines

ANNEXURES:

ANNEXURE A:
NOTE: ANNEXRUE B, BELOW, IS THE INDEX TO THE DOCUMENTS SUMMARISED IN WESSELS AND BOON, AND ANNEXURES C TO E ARE SUMMARIES OF DOCUMENTS THAT CAN BE ACCESSED ONLINE

ANNEXURE B: SUMMARY OF WESSELS and BOON: CROSS-BORDER INSOLVENCY LAW: INSTRUMENTS AND COMMENTARY (2015) Chapter 1
(See also: Wessels *International Insolvency Law* (2012) Chapter 1)

Introduction

This book contains a collection of international best practices in the area of transnational or cross-border insolvency law.

It is to be noted that there are various international initiatives that do not only deal with insolvency or cross-border insolvency directly but seek to regulate aspects related to insolvency. The purpose of the prescribed text is to give the reader an insight in various instruments regarding these issues. Candidates must at least have a basic knowledge of the various instruments and what they purport to achieve and regulate.

The key issues of over fifty instruments in die field of cross-border insolvency are covered in this book.

Some International initiatives:

- World Bank.
- International Monetary Fund – 1999 'Orderly and effective Insolvency Procedures" Key Issues'
- American Law Institute NAFTA. Study systems and then ways of cooperation between member states.
- Asian Development Bank: study amongst eleven jurisdictions re the relationship between corporate debt and recovery and corporate insolvency.
- OECD – developing policies for developing economies re corporate and insolvency law.
- UNCITRAL Insolvency Guide of 2004.

Index (Wessels and Boon)

International Instruments and Commentary

Global

<u>The World Bank</u>

- 1. The World Bank – The World Bank Principles for Effective Insolvency and Creditor Rights Systems (Revised 2011), 2011

Institut International pour l'Unification de Droit Privé ('UNIDROIT')

- 2. UNIDROIT – Convention on International Financial Leasing, 1988
- 3. UNIDROIT – Convention on International Interests in Mobile Equipment, 2001
- 4. UNIDROIT – Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment, 2001
- 5. UNIDROIT and OTIF – Luxembourg Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Railway Rolling Stock, 2007
- 6. UNIDROIT – Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Space Assets, 2012
- 7. UNIDROIT – Principles on the Operation of Close-Out Netting Provisions, 2013

United Nations Commission on International Trade Law ('UNCITRAL')

- 8. UNCITRAL – UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation, 1997 (revised Guide to Enactment and Interpretation, 2013)
- 9. UNCITRAL – UNCITRAL Legislative Guide on Insolvency Law, 2004
- 10. UNCITRAL – UNCITRAL Legislative Guide on Secured Transactions, 2007 (and Supplement on Security Rights in Intellectual Property, 2010)
- 11. UNCITRAL – UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation, 2009
- 12. UNCITRAL – UNCITRAL Legislative Guide on Insolvency Law, Part Three: Treatment of Enterprise Groups in Insolvency, 2010
- 13. UNCITRAL – UNCITRAL Legislative Guide on Insolvency Law, Part Four: Directors' Obligations in the Period Approaching Insolvency, 2013
- 14. UNCITRAL – UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective, 2013

Other

- 15. International Bar Association – Model International Insolvency Cooperation Act, 1989
- 16. International Bar Association – Cross-Border Insolvency Concordat, 1995
- 17. G22 – Key Principles and Features of Effective Insolvency Regimes, 1998
- 18. INSOL International – Statement of Principles for a Global Approach to Multi-Creditor Workouts, 2000
- 19. United Nations – Conventions on the Assignment of Receivables in International Trade, 2001
- 20. AIPPI – Resolution Question 190, Contracts Regarding Intellectual Property Rights (Assignments and Licenses) and Third Parties, 2006

- 21. American Law Institute and International Insolvency Institute – Transnational Insolvency: Global Principles for Cooperation in International Insolvency Cases, 2012
- 22. International Insolvency Institute – Guidelines for Coordination of Multinational Enterprise Groups, New York, 2013
- 23. AIPPI – Resolution Question 241, IP Licensing and Insolvency, 2014

Regional

Africa

- 24. Organization for the Harmonization of Business Law in Africa (OHADA) – Uniform Act Organising Collective Proceedings for Wiping Off Debts, 1999

Asia

- 25. Asian Development Bank – Good Practice Standards for Insolvency Law, 2000
- 26. Asian Development Bank – Promoting Regional Cooperation in the Development of Insolvency Law Reform, 2008
- 27. Asian Bankers Association – Asia-Pacific Informal Workout Guidelines for Promoting Corporate Restructuring in the Region and Model Agreement to Promote Corporate Restructuring: A Model Adaptable for Use Regionally, by a Jurisdiction, or for a Particular Debtor, 2013

Europe

European Bank for Reconstruction and Development ('EBRD')

- 28. EBRD – Model Law on Secured Transactions, 1994
- 29. EBRD – Core Principles for a Secured Transactions Law, 1997
- 30. EBRD – Core Principles for an Insolvency Law Regime, 2004
- 31. EBRD – Insolvency Office Holders Principles, 2007
- 32. EBRD – Core Principles for a Mortgage Law, 2008

European Union

- 33. Council of the European Union – Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours, 1990
- 34. Council of the European Union – Convention on Cross-Border Insolvency, 1995
- 35. Council of the European Union – Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, 2000
- 36. European Commission – Commission Recommendation of 12.3.2014 on a new approach to business failure and insolvency law, C(2014) 1500 final, 2014
- 37. Council of the European Union – Position of the Council at first reading with a view to the adoption of a Regulation of the European Parliament and the Council on insolvency proceedings (recast) – Adopted by the Council on 12 March 2015, 2015

Other

- 38. Nordic Bankruptcy Convention, 1933 (latest revision of 1982)
- 39. Council of Europe – European Convention on Certain International Aspects of Bankruptcy, 1990
- 40. Virgós & Schmit – Report on the Convention on Insolvency Proceedings, 1996
- 41. International Working Group on European Insolvency Law – Principles of European Insolvency Law, 2003
- 42. European Communication and Cooperation Guidelines for Cross-Border Insolvency, 2007
- 43. EU Cross-Border Insolvency Court-to-Court Cooperation Principles, 2014
- 44. INSOL Europe – Draft Statement of Principles and Guidelines for Insolvency Office Holders in Europe, 2014

Latin America

- 45. Montevideo Treaty on International Commercial Law, 1889
- 46. Havana Convention on Private International Law, 1928
- 47. Montevideo Treaty on International Commercial Terrestrial Law, 1940
- 48. Montevideo Treaty on International Procedural Law, 1940

North America

- 49. American Law Institute – Transnational Insolvency: Cooperation Among the NAFTA Countries: Principles of Cooperation Among the NAFTA Countries, 2000
- 50. American Law Institute and the International Insolvency Institute – Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases, 2001"

ANNEXURE C: UNCITRAL LINKS

- **ANNEXURE C.1: Insolvency:**

  http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency.html

- **Cross-border insolvency**

  - 1997 - UNCITRAL Model Law on Cross-Border Insolvency Additional information (The Model Law is accompanied by a Guide to Enactment and Interpretation. This is directed primarily to executive branches of Governments and legislators preparing the necessary enacting legislation, but it also provides useful insight for those charged with interpretation and application of the Model Law, such as judges, and other users of the text, such as practitioners and academics. – 2013 Update.)

- Cases relating to application and interpretation of the Model Law are reported in the CLOUT (Case Law on UNCITRAL Texts) system.
- Related instruments
- UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation (2009)
- UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective
- UNCITRAL Legislative Guide on Insolvency Law, Part Three: Treatment of enterprise groups in insolvency (2010)

See also:

- General Assembly resolution 52/158
- General Assembly resolution 68/107
- Table of concordance: Guide to Enactment (1997)
- Reports from UNCITRAL/INSOL/World Bank colloquia
- 2009 - UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation (the "Practice Guide")
- 2011 and 2013 (update)- The UNCITRAL Model Law on Cross-Border Insolvency: the judicial perspective
- Case Law on UNCITRAL Texts (CLOUT)
- 2013: Updated Guide to Enactment and Interpretation.

- **Insolvency guidelines and insolvency principles**

  - UNCITRAL Legislative Guide on Insolvency Law, Parts One and Two (2004)
  - UNCITRAL Legislative Guide on Insolvency Law, Part Three (2010)
  - UNCITRAL Legislative Guide on Insolvency Law, Part Four (2013)

- **ANNEXURE C.2: Security Interests:**

  http://www.uncitral.org/uncitral/en/uncitral_texts/security.html

  - 2001 - United Nations Convention on the Assignment of Receivables in International Trade
  - 2007 - UNCITRAL Legislative Guide on Secured Transactions

- 2010 - UNCITRAL Legislative Guide on Secured Transactions: Supplement on Security Rights in Intellectual Property
- 2011 - UNCITRAL, Hague Conference and Unidroit Texts on Security Interests

- **ANNEXURE C.3: GENERIC MATERIAL OFTEN COVERING MORE THAN ONE SESSION**

  - **Wood, Philip R.,** *Principles of International Insolvency* (2007) pp. 1 -30 (General Introduction)

ANNEXURE D: SUMMARY OF SOME OF THE SOURCE DOCUMENTS IN PARA C ABOVE: UNCITRAL DOCUMENTS

UNICTRAL: INSOLVENCY AND RELATED TEXTS

http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency.html

- **ANNEXURE D.1: UNICTRAL MODEL LAW CROSS-BORDER INSOLVENCY, 1997**

UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment1997 (with 2013 Update on Guide to Enactment and Interpretation. http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model.html)

Initial date of adoption: 30 May 1997

Purpose

The Model Law is designed to assist States to equip their insolvency laws with a modern legal framework to more effectively address cross-border insolvency proceedings concerning debtors experiencing severe financial distress or insolvency. It focuses on authorizing and encouraging cooperation and coordination between jurisdictions, rather than attempting the unification of substantive insolvency law, and respects the differences among national procedural laws. For the purposes of the Model Law, a cross-border insolvency is one where the insolvent debtor has assets in more than one State or where some of the creditors of the debtor are not from the State where the insolvency proceeding is taking place.

Relevance to international trade

Although the number of cross-border insolvency cases has increased significantly since the 1990s, the adoption of national or international legal regimes equipped to address the issues raised by those cases has not kept pace. The lack of such regimes has often resulted in inadequate and uncoordinated approaches to cross-border insolvency that are not only

unpredictable and time-consuming in their application, but lack both transparency and the tools necessary to address the disparities and, in some cases, conflicts that may occur between national laws and insolvency regimes. These factors have impeded the protection of the value of the assets of financially troubled businesses and hampered their rescue.

Key provisions

The Model Law focuses on four elements identified as key to the conduct of cross-border insolvency cases: access, recognition, relief (assistance) and cooperation.

(a) Access

These provisions give representatives of foreign insolvency proceedings and creditors a right of access to the courts of an enacting State to seek assistance and authorize representatives of local proceedings being conducted in the enacting State to seek assistance elsewhere.

(b) Recognition

One of the key objectives of the Model Law is to establish simplified procedures for recognition of qualifying foreign proceedings in order to avoid time-consuming legalization or other processes that often apply and to provide certainty with respect to the decision to recognize. These core provisions accord recognition to orders issued by foreign courts commencing qualifying foreign proceedings and appointing the foreign representative of those proceedings. Provided it satisfies specified requirements, a qualifying foreign proceeding should be recognized as either a main proceeding, taking place where the debtor had its centre of main interests at the date of commencement of the foreign proceeding or a non-main proceeding, taking place where the debtor has an establishment. Recognition of foreign proceedings under the Model Law has several effects - principal amongst them is the relief accorded to assist the foreign proceeding.

(c) Relief

A basic principle of the Model Law is that the relief considered necessary for the orderly and fair conduct of cross-border insolvencies should be available to assist foreign proceedings. By specifying the relief that is available, the Model Law neither imports the consequences of foreign law into the insolvency system of the enacting State nor applies to the foreign proceedings the relief that would be available under the law of the enacting State. Key elements of the relief available include interim relief at the discretion of the court between the making of an application for recognition and the decision on that application, an automatic stay upon recognition of main proceedings and relief at the discretion of the court for both main and non-main proceedings following recognition.

(d) Cooperation and coordination

These provisions address cooperation among the courts of States where the debtor's assets are located and coordination of concurrent proceedings concerning that debtor. The Model Law expressly empowers courts to cooperate in the areas governed by the Model Law and to communicate directly with foreign counterparts. Cooperation between courts and foreign representatives and between representatives, both foreign and local, is also authorized. The provisions addressing coordination of concurrent proceedings aim to foster decisions that would best achieve the objectives of both proceedings, whether local and foreign proceedings or multiple foreign proceedings.

Additional information

The Model Law is accompanied by a Guide to Enactment. This is directed primarily to executive branches of Governments and legislators preparing the necessary enacting legislation, but it also provides useful insight for those charged with interpretation and application of the Model Law, such as judges, and other users of the text, such as practitioners and academics

- **ANNEXURE D2: Case Law on UNCITRAL Texts (CLOUT)**

The UNCITRAL Secretariat has established a system for collecting and disseminating information on court decisions and arbitral awards relating to the Conventions and Model Laws that have emanated from the work of the Commission. The purpose of the system is to promote international awareness of the legal texts formulated by the Commission and to facilitate uniform interpretation and application of those texts. The system is explained in document A/CN.9/SER.C/GUIDE/1/Rev.2.

- **ANNEXURE D.3: 2009 - UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation**

Date of adoption: 1 July 2009

Purpose

The Practice Guide on Cross-Border Insolvency Cooperation provides information for insolvency practitioners and judges on practical aspects of cooperation and communication in cross-border insolvency cases. It illustrates how the resolution of issues and conflicts that might arise in those cases could be facilitated by cross-border cooperation, in particular through the use of cross-border insolvency agreements, tailored to meet the specific needs of each case and the requirements of applicable law.

Relevance to international trade

As noted with respect to the UNCITRAL Model Law, the development of insolvency regimes to address cross-border cases has not kept pace with the need or demand for such regimes. Faced with the difficulties of dealing with cross-border issues on a daily basis, the insolvency profession has developed various tools, including the cross-border insolvency agreement, which address the procedural and substantive conflicts that may arise in cross-border cases involving potentially competing jurisdictions by focusing on cooperation between courts, the debtor and other stakeholders.

Key provisions

Chapter I discusses the increasing importance of coordination and cooperation in cross-border insolvency cases and introduces various international texts relating to cross-border insolvency that have been developed in recent years.

Chapter II expands upon article 27 of the UNCITRAL Model Law, discussing the various ways in which cooperation in cross-border cases might be achieved.

Chapter III examines in detail the use of cross-border insolvency agreements, a number of which have been entered into in cross-border insolvency cases over the past two decades, ranging from written agreements approved by courts to oral arrangements between parties to the proceedings. The analysis in this chapter is based on practical experience, in particular in the cases summarised in annex I. "Sample clauses", based to varying degrees upon provisions found in these agreements, are included to illustrate how different issues have been or might be addressed in practice**.**

- **ANNEXURE D.4: UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective 2011 AND 2013 UPDATE**

Purpose

The Judicial Perspective is designed to assist judges with questions that may arise in the context of an application for recognition under the UNCITRAL Model Law on Cross-Border Insolvency. As such it is relevant not only to judges from States that have enacted legislation based on the Model Law, but to judges from any State likely to be concerned with cross-border insolvency cases. The text discusses the Model Law from a judge's perspective, identifying issues that may arise on an application for recognition or cooperation under the Model Law and discussing the approaches that courts have taken in countries that have enacted legislation based on the Model Law. The text responds to requests from participants at the biennial UNCITRAL/INSOL/World Bank multinational

judicial colloquia for more information on the application and interpretation of the Model Law.

Relevance to international trade

Legislation based on the UNCITRAL Model Law has been enacted in some 20 States. The number of applications for recognition and assistance made under that legislation is growing, as is the range of jurisdictions involved in those applications. Judges are increasingly being asked to decide issues concerning cross-border cases with which they may have little familiarity or experience. The text is designed to provide an introduction for judges to the use and application of the Model Law, promoting common understanding and uniform interpretation and enhancing predictability.

Key provisions

The text examines the provisions of the UNCITRAL Model Law, ordered to reflect the sequence in which applications for recognition and assistance under the Model Law would generally be considered by a receiving court. It offers general guidance, from a judge's perspective, on the issues relevant to deciding those applications, based on the intentions of those who crafted the Model Law and the experience of its use in practice, including in cases reported in the Case Law on UNCITRAL Texts (CLOUT) system. It does not purport to instruct judges on how to deal with such applications, nor does it suggest that a single approach is either possible or desirable.

The Judicial Perspective will be periodically updated to ensure the information it provides reflects the latest available jurisprudence.

Additional information

The Model Law is accompanied by a Guide to Enactment and Interpretation. This is directed primarily to executive branches of Governments and legislators preparing the necessary enacting legislation, but it also provides useful insight for those charged with interpretation and application of the Model Law, such as judges, and other users of the text, such as practitioners and academics.

Cases relating to application and interpretation of the Model Law are reported in the CLOUT (Case Law on UNCITRAL Texts) system.

Related instruments

- UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation (2009)
- UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective (2013)

- UNCITRAL Legislative Guide on Insolvency Law, Part Three: Treatment of enterprise groups in insolvency (2010)

See also:
- General Assembly resolution 52/158
- General Assembly resolution 68/107
- Table of concordance: Guide to Enactment (1997) - Guide to Enactment and Interpretation (2013)
- Reports from UNCITRAL/INSOL/World Bank colloquia

- **ANNEXURE D.5: STATUS of UNCITRAL Model Law on Cross Border Insolvency: Legislation based on the UNCITRAL Model Law on Cross-Border Insolvency has been adopted in:**

UNCITRAL Model Law on Cross-Border Insolvency (1997)

This page is updated whenever the UNCITRAL Secretariat is informed of changes in enactment of the Model Law.

The UNCITRAL Secretariat also prepares yearly a document containing the Status of Conventions and Enactments of UNCITRAL Model Laws, which is available on the web page of the corresponding UNCITRAL Commission session.

Legislation based on the Model Law has been adopted in 46 States in a total of 48 jurisdictions:

State		Notes
Australia	2008	
Bahrain	2018	
Benin	2015	(b)
Burkina Faso	2015	(b)
Cameroon	2015	(b)
Canada	2005	
Central African Republic	2015	(b)
Chad	2015	(b)
Chile	2013	
Colombia	2006	
Comoros	2015	(b)

Congo	2015	(b)
Côte d'Ivoire	2015	(b)
Democratic Republic of the Congo	2015	(b)
Dominican Republic	2015	
Equatorial Guinea	2015	(b)
Gabon	2015	(b)
Greece	2010	
Guinea	2015	(b)
Guinea-Bissau	2015	(b)
Israel	2018	
Japan	2000	
Kenya	2015	
Malawi	2015	
Mali	2015	(b)
Mauritius	2009	
Mexico	2000	
Montenegro	2002	
New Zealand	2006	
Niger	2015	(b)
Philippines	2010	
Poland	2003	
Republic of Korea	2006	
Romania	2002	
Senegal	2015	(b)
Serbia	2004	
Seychelles	2013	
Singapore	2017	
Slovenia	2007	
South Africa	2000	
Togo	2015	(b)
Uganda	2011	
United Arab Emirates		

Dubai International Financial Centre	2019	
United Kingdom of Great Britain and Northern Ireland		
British Virgin Islands	2003	(a)
Gibraltar	2014	(a)
Great Britain	2006	
United States of America	2005	
Vanuatu	2013	
Zimbabwe	2018	

Notes

(a) Overseas territory of the United Kingdom of Great Britain and Northern Ireland.

(b) Enacting the *Acte uniforme portant organisation des procédures collectives d'apurement du passif* (OHADA), adopted on 10 September 2015 at Grand-Bassam, Côte d'Ivoire.

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(a) Overseas territory of the United Kingdom of Great Britain and Northern Ireland.

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Disclaimer: A model law is created as a suggested pattern for law-makers to consider adopting as part of their domestic legislation. Since States enacting legislation based upon a model law have the flexibility to depart from the text, the above list is only indicative of the enactments that were made known to the UNCITRAL Secretariat. The legislation of each State should be considered in order to identify the exact nature of any possible deviation from the model in the legislative text that was adopted. The year of enactment indicated above is the year the legislation was passed by the relevant legislative body, as indicated to the UNCITRAL Secretariat; it does not address the date of entry into force of that piece of legislation, the procedures for which vary from State to State, and could result in entry into force some time after enactment.

- **D6: UNCITRAL INSOLVENCY GUIDELINES, 2004 [see Annexure E.3 below]**

ANNEXURE E. INSOLVENCY REFORM MODELS: STANDARDS AND GUIDELINES

ANNEXURE E.1: World Bank

Principles and Guidelines:
http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/LAWANDJUSTICE/GILD/0,,contentMDK:20196839~menuPK:146205~pagePK:64065425~piPK:162156~theSitePK:215006,00.html

Insolvency and creditor rights ("ICR") constitutes one of the twelve areas in which the joint World Bank and International Monetary Fund (IMF) Initiative on Standards and Codes undertakes assessments.

In order to carry out these assessments, the World Bank uses the World Bank *Principles for Effective Insolvency and Creditor Rights Systems* (*Principles*) and the UNCITRAL *Legislative Guide on Insolvency Law (Legislative Guide)*. These two complementary texts represent the international consensus on best practices and set forth a unified standard for ICR systems. In addition, these texts serve as reference points for evaluating and strengthening countries' ICR systems.

- **ANNEXURE E.2: World Bank Principles for Effective Insolvency and Creditor Rights Systems**

The *Principles* were developed in 2001 in response to a request from the international community in the wake of the financial crisis in emerging markets in the late 1990s. At that time, they constituted the first internationally recognized benchmarks to evaluate the effectiveness of domestic creditor rights and insolvency systems. The *Principles* were revised in 2005 and 2011.

The original text and the 2005 revised text of the *Principles* are available here:

Revised Insolvency and Creditor Rights Systems Principles [2005]
English Spanish / Español French / Français

Insolvency and Creditor Rights Systems Principles [April 2001]

[Note: Further revised in 2011 –
see http;//siteresources.worldbank.org/INTGILD/Resources/ICRPrinciples_Jan2011.pdf]

- **ANNEXURE E.3: UNCITRAL Legislative Guide on Insolvency Law. 2004**

The UNCITRAL *Legislative Guide* was completed in 2004 with the goal of encouraging the adoption of effective national corporate insolvency regimes. The *Legislative Guide* focuses on the key elements of an effective insolvency law and presents a detailed series of *Legislative Recommendations* ("*Recommendations*") which include a discussion of various options and approaches. The text of the *Legislative Guide* is available on the UNCITRAL website.

Source:

http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/2004Guide.html

Texts

- UNCITRAL Legislative Guide on Insolvency Law, Parts One and Two (2004)
- UNCITRAL Legislative Guide on Insolvency Law, Part Three (2010)
- UNCITRAL Legislative Guide on Insolvency Law, Part Four (2013)

Date of adoption: Parts one and two, 25 June 2004; part three, 1 July 2010; part four, 18 July 2013

Purpose

The Legislative Guide provides a comprehensive statement of the key objectives and principles that should be reflected in a State's insolvency laws. It is intended to inform and assist insolvency law reform around the world, providing a reference tool for national authorities and legislative bodies when preparing new laws and regulations or reviewing the adequacy of existing laws and regulations. The advice provided aims at achieving a balance between the need to address a debtor's financial difficulty as quickly and efficiently as possible; the interests of the various parties directly concerned with that financial difficulty, principally creditors and other stakeholders in the debtor's business; and public policy concerns, such as employment and taxation. The Legislative Guide assists the reader to evaluate the different approaches and solutions available and to choose the one most suitable to the local context.

Relevance to international trade

It is increasingly recognized that strong and effective insolvency regimes are important for all States as a means of preventing or limiting financial crises and facilitating rapid and orderly workouts from excessive indebtedness. Such regimes can facilitate the orderly reallocation of economic resources from businesses that are not viable to more efficient and profitable activities; provide incentives that not only encourage entrepreneurs to undertake investment, but also encourage managers of failing businesses to take early steps

to address that failure and preserve employment; reduce the costs of business; and increase the availability of credit. Comparative analysis of the effectiveness of insolvency systems has become both common and essential for lending purposes, affecting States at all levels of economic development.

Much of the legislation relating to corporations and particularly to their treatment in insolvency deals with the single corporate entity, notwithstanding that the business of corporations is increasingly being conducted, both nationally and internationally, through enterprise groups - groups of corporations, sometimes very large, that are interconnected by various forms of ownership and control. These groups, found extensively in both emerging and developed markets, are a common vehicle for conducting international trade and finance. When some or all of the constituent parts of such groups become insolvent, there are currently very few domestic law regimes and no international or regional legal regimes that can effectively coordinate the conduct of the resulting insolvency proceedings, often involving multiple jurisdictions.

Key provisions

The Legislative Guide is divided into four parts.

Part one discusses the key objectives of an insolvency law, structural issues such as the relationship between insolvency law and other law, the types of mechanisms available for resolving a debtor's financial difficulties and the institutional framework required to support an effective insolvency regime.

Part two deals with core features of an effective insolvency law, following as closely as possible the various stages of an insolvency proceeding from their commencement to discharge of the debtor and closure of the proceedings. Key elements are identified as including: standardized commencement criteria; a stay to protect the assets of the insolvency estate that includes actions by secured creditors; post-commencement finance; participation of creditors; provision for expedited reorganization proceedings; simplified requirements for submission and verification of claims; conversion of reorganization to liquidation when reorganization fails; and clear rules for discharge of the debtor and closure of insolvency proceedings.

Part three addresses the treatment of enterprise groups in insolvency, both nationally and internationally. While many of the issues addressed in *parts one* and *two* are equally applicable to enterprise groups, there are that only apply in the enterprise group context. *Part three* thus builds upon and supplements *parts one* and *two*. At the domestic level, the commentary and recommendations of *part three* cover various mechanisms that can be used to streamline insolvency proceedings involving two or more members of the same

enterprise group. These include: procedural coordination of multiple proceedings concerning different debtors; issues concerning post-commencement and post-application finance in a group context; avoidance provisions; substantive consolidation of insolvency proceedings affecting two or more group members; appointment of a single or the same insolvency representative to all group members subject to insolvency; and coordinated reorganization plans. In terms of the international treatment of groups, *part three* focuses on cooperation and coordination, extending provisions based upon the Model Law on Cross-Border Insolvency to the group context and, as appropriate, considering the applicability to the international context of the mechanisms proposed to address enterprise group insolvencies in the national context.

Part four focuses on the obligations that might be imposed upon those responsible for making decisions with respect to the management of an enterprise when that enterprise faces imminent insolvency or insolvency becomes unavoidable. The aim of imposing such obligations, which are enforceable once insolvency proceedings commence, is to protect the legitimate interests of creditors and other stakeholders and to provide incentives for timely action to minimize the effects of financial distress experienced by the enterprise.

See also:

- General Assembly resolution 59/40
- General Assembly resolution 65/24
- General Assembly resolution 68/107

- **ANNEXURE E.4. Insolvency and Creditor Rights Standard**

The World Bank and UNCITRAL, in consultation with the IMF, have prepared the Insolvency and Creditor Rights Standard for ICR ROSC assessments (the "ICR Standard"). The ICR Standard combines both the *Principles* and the *Recommendations* in one document.

This unified ICR Standard is available here: *Insolvency and Creditor Rights Standard [2005]*

Comments or queries regarding the *Insolvency and Creditor Rights Standard*, may be sent to gild@worldbank.org.

- **ANNEXURE 5: UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments (see http://www.uncitral.org/pdf/english/texts/insolven/Interim_MLIJ.pdf A/CN.9/WG.V/WP.157 with the amendments listed in document A/CN.9/955).**

In 2018 the final version with amendments was adopted with the view of further regulating insolvency related judgments. (This model law could be adopted as a stand alone or to further support the UNCITRAL Model Law on Cross-Border Insolvency.)

- **UNCITRAL Model Law on Enterprise Group 2019**
  [https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/mlegi_-_advance_pre-published_version_-_e.pdf]

  The purpose of this Law is to provide effective mechanisms to address cases of insolvency affecting the members of an enterprise group in cross-border cooperation between courts etc.