INSOL INTERNATIONAL

GLOBAL INSOLVENCY PRACTICE COURSE

2022 / 2023

Module A: Session 1 Materials – Fundamental concepts of insolvency and restructuring

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GLOBAL INSOLVENCY PRACTICE COURSE

STUDY NOTES

A FRAMEWORK FOR INTERNATIONAL INSOLVENCY

2023

Global Insolvency Practice Programme 2023

MODULE A

Session 1: André Boraine

A FRAMEWORK FOR INTERNATIONAL INSOLVENCY

HOW TO USE THE STUDY NOTES

This is a word of welcome and information about the module dealing with the framework for and concepts and instruments of international insolvency law to be presented as Session One of Module A. Please read these Study Notes and the compulsory prescribed materials before this session.

The Study Notes provide you with an overview of the main sources and a framework for the scope of the work the session will cover. They summarise the **required prescribed reading materials and some of the additional materials** against the backdrop of the insolvency law framework.

Read through the Study Notes, at least, to prepare yourself for this session. (Use the Summary in PowerPoint hand-out format to test your knowledge of the basic concepts after working through the Study Notes and the prescribed materials.)

This session establishes the identity of international insolvency law. The development of this field is discussed from the point of view of developing cross-border insolvency rules and setting standards for developing domestic insolvency law systems. The session first examines 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 insolvency matters.

I do not present all the contents of this guide as mine. I build on a summary of the prescribed texts and several other selected sources to make these notes more accessible for the session.

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

OUTCOMES:

SECTION A: GENERAL BACKGROUND

After completing this section, you must know the basics of these 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 completing this section, you must know the basics of these aspects:

- The nature of international insolvency law.
- The sources of international insolvency law.
- Basic principles and approaches to cross-border insolvency cases.
- Various models and instruments available and those 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 completing this section, you must know the basics of these aspects:

- Principles to harmonise national insolvency laws.
- Difficult areas for harmonisation, such as:
  - Voidable dispositions;
  - Labour contracts;
  - Priorities;
  - Securities, and
  - Principles on 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**
- **SOURCE MATERIALS: SEE ANNEXURES AT THE END OF THESE STUDY NOTES.**

A. REQUIRED READING

- **Boraine, André,** Insol Fellowship Study Notes (compiled by André Boraine), with Summary in hand-out slide format for preparation.
- **Omar, Paul.,** "The Landscape of International Insolvency Law" [Updated version] of Omar, Paul J., "The Landscape of International Insolvency. Law", in (2002) 11 *International Insolvency Review*, **173ff**.]
- **Omar, Paul.,** "Diffusion of the Principle in *Cambridge Gas*: A Sad and Singular Deflation" (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. FURTHER REFERENCE SOURCES

- **Bewick, Samantha., et al.,** *Ethical Principles for Insolvency Professionals*, (2019) Insol Int
- **Fletcher, Ian F.,** "Theory and Principle in Cross-Border Insolvency", in **Fletcher, Ian F.,** *Insolvency in Private International Law: National and International Approaches* 2nd ed (Oxford University Press, Oxford, 2005) **pp. 3-17** ("*Insolvency in Private International Law"*.)
- **Fletcher, Ian F.,** *The Law of Insolvency* 5th ed (Sweet and Maxwell London 2017) Ch 1 (Fletcher *"The Law of Insolvency*".)
- **Garrido, José M.,** "The Role of Personal Insolvency in Economic Development: An Introduction to the World Bank Report on the Treatment of the Insolvency of Natural Persons" (2014) 5 *World Bank Legal Review* 111-127 https://elibrary.worldbank.org/doi/abs/10.1596/978-1-4648-0037-5_ch5
- **Hatzimihail, Nikitas E.,** "The Many Lives – and Faces – of *Lex Mercatoria*: History as Genealogy in International Business Law" (2008) 71 *Law and Contemporary Problems* 169-190.
- **Levinthal, Louis Edward.,** "The Early History of Bankruptcy Law" (1919) 66 *University of Pennsylvania Law Review and American Law Register* 223-250.
- **Mevorach, Irit.,** *The Future of Cross-border Insolvency: Overcoming Biases and Closing Gaps* (Oxford University Press, Oxford 2018)
- **Wessels, Bob.,** *International Insolvency Law* 4th ed (Wolters Kluwer, Deventer, 2015)
- Wessels, B. and Boon, Gert-Jan *Cross-Border Insolvency Law: International Instruments and Commentary* 2nd ed (Kluwer Law International, Alphen aan den Rijn, 2015) pp 1-134
- Westbrook, Jay Lawrence "Locating the Eye of the Financial Storm" (2007) 32 *Brooklyn Journal of International Law* 1019-1040
- **Westbrook, J., "**Ian Fletcher and the Internationalist Principle" 2015 (3) *NIBLeJ* 30.

SECTION A: GENERAL BACKGROUND

Outcomes: After completing this study unit, you must know the basics of these 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 of 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: bankruptcy	

	F. EFFECTS	
	F.1. AUTOMATIC STAY (Moratorium on individual collecting and execution procedures)	
	F.2. ESTATE/ PROPERTY/ 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, e.g., labour contracts?	
	F.5. SET-OFF AND NETTING (PRE-COMMENCEMENT 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: workouts • Pre-packs?
	L. CROSS-BORDER DISPENSATIONS	
Some systems: no collective procedures for individuals	**M. SPECIAL RULES/CASES**	Such as: -Banks, financial institutions; -Groups of companies / corporations; -SMEs -State-Owned Enterprises; -Non-profit associations; -Municipalities; -Sovereign debt.

1 FRAMEWORK

For the purposes of international insolvency law (cross-border insolvency), it is important first to establish a general framework to build a mind map of the various components of a modern insolvency law system. This mind map can also be used in a comparative context where different systems are compared to each other. The Framework above will be used for this purpose, and it must be studied together with the legend or explanations of the various aspects in paragraph 1.2 below.

1.1 BACKGROUND TO FRAMEWORK

There are several ways to classify the legal systems or families of the world, but, in general, legal families across the globe will often have a basis in English law or in civil law. In analysing the insolvency laws of various jurisdictions, one finds these foundations reflected in the variety of insolvency laws. But some aspects of insolvency law will be affected by local legal culture, basic rights, and how a system deals with related matters such as security rights or labour issues. Terminology will also vary, though the same principle may be designed by different terminology. Approaches to socio-economic issues will also be reflected in aspects of the country-specific laws. So it is hard to choose a single legal system or insolvency or bankruptcy law systems to begin discussing this course. For this reason, **the UNCITRAL *Legislative Guide on Insolvency Law*, 2004 will largely form the basis for dealing with the various aspects or elements of a developed, efficient insolvency law system. Read this document along with Chapter 1 of this Study guide. (The Legislative Guide can be used by member states of the United Nations needing to reform their existing laws. See A. The Organisation and Scope of the *Legislative Guide*.)**

Part 1 of the *Legislative Guide* deals with the design of an insolvency law. The key objectives and structure of an effective, 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 Framework above, we ask questions about the meaning of insolvency (or bankruptcy) and other matters. Some systems use the term "insolvency" and others, "bankruptcy". Although these terms carry the same meaning and are used as synonyms in many systems, in others the difference is that "insolvency" sometimes means the state of the financial affairs of a debtor but "bankruptcy" refers to the formal state of being put into formal bankruptcy. "Insolvency" itself may refer to the situation where the debtor's liabilities exceeds the debtor's assets (i.e., balance sheet insolvency), or where the debtor cannot repay the debt as it falls due because 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:

- Individual creditors' actions against the bankrupt are frozen. Individual pursuit is stayed: this is also called the automatic stay, signifying a moratorium on individual debt enforcement. Goode sees this as the only truly universal feature.
- The assets are pooled and become available to pay creditors, replacing individual creditors' seizing assets piecemeal. This feature is eroded as a universal principle because different jurisdictions allow different exceptions (the exempt property applies only to individuals).
- Creditors are paid *pari passu* (i.e., in proportion (*pro rata*)) from the debtor's assets according to the creditors' claims. Wood term this a piece of ideology "which is nowhere honoured" because exceptions are allowed for priority creditors and secured creditors. (In practical terms, few prorated unsecured creditors receive any payment from an insolvent estate.)

Sealy and Hooley distinguish between insolvency objectives for individuals and corporations:

- Objectives for individuals: to protect the debtor from harassment by creditors; enable the debtor to make fresh start, especially in less blameworthy cases; reduce indebtedness by the debtor's contributing from present and future income while simultaneously considering the latter's personal circumstances.

- Objectives for corporations: if possible, to preserve the business or its viable parts, not necessarily the company; and if personal liability has been abused, to impose personal liability on persons responsible.

- Principles governing both situations: to ensure *pari passu* distribution, so on equal footing, unless a creditor has priority; ensure that secured creditors deal fairly with the debtor and other creditors; investigate reasons for failure; and reclaim voidable dispositions if the insolvent dealt with the assets improperly.

Although some topics overlap in the cases of insolvency dealing with individuals (consumer insolvency or bankruptcy) and corporate bankruptcy, some pertinent differences exist. So, for instance, only in relation to individuals does the notion of exempt or excluded assets apply. This principle means that some systems allow the insolvent individual to keep some assets required for the maintenance of the debtor or the debtor's dependants.

B. POLICY CONSIDERATIONS

Many policy considerations govern the analysis or reform of a particular insolvency system. Yet a broad generalised approach asks, first, whether the system is orientated more towards creditors in following a more conservative approach to granting debtors a discharge of debt, or more towards debtors in applying a liberal approach to discharge, also called rehabilitation or a fresh start.

C. SOURCES

In the analysis of a jurisdiction's insolvency laws it is essential to find the main sources of the system. Today these rules usually exist in legislation or codes. Some systems such as that of the United States of America (USA) have a single bankruptcy act. So, for instance, the Bankruptcy Reform Act of 1978 (Pub. L. 95–598, 92 Stat. 2549, November 6, 1978; Title 11 of the US Code) ("Bankruptcy Code") applies throughout the USA because it is federal legislation. In other systems such as South Africa, a multiplicity of legislation exists, and these statutes must be studied together to understand the system in full. It is enough to say that in the South Africa legal system, the Insolvency Act 24 of 1936 deals mainly with the insolvency of individuals, but provisions in the legislation on companies must also be considered when one deals with corporate insolvency. Beyond insolvency legislation, many legal principles forming part of general law (in other words, non-bankruptcy law) also have an effect in insolvency. For instance, the rules that regulate the vesting of securities seldom appear in insolvency legislation, but the question arises in

insolvency whether a security right has been vested and is therefore acknowledged as a vested security right in formal insolvency.

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

To analyse the various rules in a particular system, one must 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 apply in both instances. But pertinent differences may depend on the type of debtors, whether human or non-human. Only individuals or consumers may have some assets being exempt or excluded from their insolvent estates. And only individuals survive bankruptcy when their assets are realised to pay their debts. By contrast, corporations or companies disappear when their assets have been liquidated.

E. GATEWAYS AND COMMENCEMENT

All insolvency systems provide for a procedure commencing formal insolvency or bankruptcy. This procedure may take place by court order. Some systems such as the US one have specialised bankruptcy courts, while in other systems the general courts decide these matters. It is also possible that the bankruptcy proceeding may be opened by a more informal process, for example, by an administrative process outside the ambit of the courts. For corporations, some systems allow for the opening of the procedure by a members' resolution. It is also essential to consider who may apply for opening the procedure: in other words, who has *locus standi* to do so. And for several reasons it is crucial to determine the moment when the procedure commences, usually because the status of creditors (whether as secured or unsecured) is determined with reference to their positions at commencement. And some calculations such as time periods may become relevant for avoidable dispositions, which are also determined with reference to commencement.

F. EFFECTS

After the insolvency commences, several consequences or effects follow. Some concern the legal position or status of the insolvent and the insolvent's assets (estate assets), pre-commencement transactions. Other effects relate more to the administration of the estate.

F.1. AUTOMATIC STAY

As a general feature of commencing insolvency procedure, individual actions are stayed as mentioned in A. above. Insolvency or bankruptcy signifies a collective procedure that must in principle be binding on all the creditors. To allow a single creditor to continue with individual debt enforcement mechanisms would render the collective proceeding senseless.

F.2. ESTATE/ ASSETS

Another important effect of the commencement is the determination of which assets are considered estate assets. This effect is vital for consumers or individuals. Many systems allow for some assets to be excluded from the insolvent estate.

This principle of exempt or excluded assets does not really apply to corporate liquidations. Yet it may still be important to find out which assets are in fact those of the insolvent entity, to trace and collect them for realisation and distribution.

F.3. RIGHTS, DUTIES, LIABILITIES, AND LIMITATIONS

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

Formal insolvency or bankruptcy of an individual may affect the individual in several ways. Some systems limit individuals' contractual capacity in relation to new credit, by requiring the consent of their estate representative. Sometimes insolvent individuals are forbidden to take up certain positions such as being a member of parliament, serving as a company director, or being appointed as estate representatives of an insolvent estate.

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

The company liquidation may have personal consequences for its (former) directors and officers. These persons' personal liability to creditors of the insolvent company for reckless or fraudulent trading must be thoroughly considered. The estate for this liability may be more lenient or stringent, depending on the laws of a particular jurisdiction.

F.4. EXECUTORY CONTRACTS

Although insolvency law does in principle respect parties' rights and obligations, it also usually allows the estate representative various ways of dealing with contracts concluded by the insolvent with another party before the insolvency proceeding commences. For example, this representative may choose whether to abide by the contract, leaving the solvent party with certain remedies against the estate. Special legal rules may also determine the position of the solvent party in a particular case and in relation to a specific type of contract, such as a lease. Because of local culture and conditions, the treatment of, especially, contracts of employment varies, depending on the relevant approach to socio-economic matters and the political dispensation of the country. In some systems, contracts of employment may terminate or be suspended when liquidation commences, and may even be transferred to a new owner or employer where the business is transferred to a new owner. (This example of the employment contract refers to the contractual terms; how the employees are remunerated for wages etc in arrears is also a major topic in many systems and is treated in several ways.)

F.5. SET-OFF AND NETTING

For set-off, a distinction must be drawn between pre-commencement set-off and post-commencement set-off that may have happened in relation to claims of and against the insolvent and another party. In this regard, some systems provide specific remedies by which pre-commencement set-off may be ignored in some cases. As for post-commencement set-off, some systems allow it in some cases and others do not.

As to transactions on the financial markets, some systems also have special rules by which netting or set-off that happens in relation to such a transaction may be honoured even when one of the parties is insolvent, because of the risk that not honouring these transactions might jeopardise the economic stability of a country.

F.6. AVOIDABLE DISPOSITIONS

The Insolvency Guide states that as insolvency law establishes a collective debt- collecting device, it is essential to discourage individual creditors from continuing with individual debt-enforcement measures once insolvency commences. But policy considerations dictate that some transactions that preceded commencement may and sometimes must also be investigated. If the requirements are met, these transactions may be set aside and beneficiaries who benefited from these transactions are called on to return the 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 know that last-minute transactions or seizures of assets can be set aside and so creditors are 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, which therefore causes or increases the insolvent's insolvency. A preference is marked by the settlement of a pre-existing debt to a creditor or by affording this creditor real security, thus improving his position in insolvency. The *actio Pauliana* undergirds fraudulent conveyance law in civil-law systems, and the Fraudulent Conveyances Act 1571 (13 Eliz 1, c 5), also known as the Statute of 13 Elizabeth forms the basis of this remedy in English law.

G. ADMINISTRATION

Administering an insolvent estate is the main part of the post-commencement proceedings, and includes a wide range of aspects.

Many systems provide for a type of regulator or at least an official administrative office that has prescribed functions such as the supervision of the administration process of an insolvent estate and sometimes includes extensive regulatory functions in relation to appointing an insolvency practitioner. Supervision may therefore take place by way some official body (a regulator), or in some systems by the courts.

Most systems provide for the office of an insolvent estate representative or administrator. These officeholders' names vary with the jurisdiction: e.g., liquidator, trustee, receiver, curator, or syndic. And the appointment procedure, prescribed qualifications, and regulation of estate administrators varies significantly from system to system. Some systems prefer qualified accountants, others prefer attorneys, and some lack formal prescribed qualifications.

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

An insolvent estate administrator must be appointed under the prescribed rules of the relevant jurisdiction. Provision must be made for the administration by this administrator person, including the power to investigate, verify claims, realise assets, and distribute the proceeds of the assets by dividends under the prescribed rules. Importantly, the administrator must trace assets of the estate and bring them into the estate for distribution amongst the creditors.

Creditors will thus take part, usually through creditors' meetings, or by forming creditor committees where allowed.

H. DISTRIBUTION

The distribution rules, or payment rules of creditors in insolvency, vary from system to system. Systems usually distinguish between those creditors who rely on a type of real security acknowledged by a particular system, and creditors who have not established a security right at the time of commencement and must therefore in principle be treated as unsecured creditors.

Given several important differences between the types of real securities, the procedure to create these rights, and their consequences, this remains one of the challenges to deal with on a cross-border level. For instance, English-law jurisdictions acknowledge the notion of a floating charge; civil-law jurisdictions do not.

Many instruments are based on the principle that bankruptcy must acknowledge pre-required rights acquired under the general law of a particular jurisdictions, such as securities. Accordingly, UNCITRAL has also finalised a Model Law on Security Interests: **www.uncitral.org/uncitral/en/commission/working_groups.**

Many systems also allow prescribed statutory priorities or preferences so that some creditors such as the tax authority or employees in relation to claims for wages in arrears 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 from 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 over secured creditors.

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

Some claims are even further down in the ladder of payments. For example, a system may allow for the subordination of some claims that will then 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 from the proceeds of the realised assets. Sometimes there will be a shortfall. 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 contribute towards settling this shortfall. If litigation is required, for instance to reclaim estate assets, creditors will sometimes finance this litigation and will then usually enjoy some benefit when the litigation succeeds. And some jurisdictions allow a special dispensation for the official regulator to finalise a tiny estate or one with no assets.

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 then be allowed a fresh start. The notion and preconditions of this fresh start vary by jurisdiction. A system could also be termed pro-debtor or pro-creditor, depending on the relative ease or difficulty of the debtor's obtaining this statutory discharge.

J.a. Discharge of individuals

When an insolvent individual's assets are liquidated (see J.a.), rehabilitation allows a discharge and the freedom to continue unburdened by pre-commencement debt. But company liquidation ends the company's existence.

J.b. Corporate / business rescue

Rehabilitation of individuals or rescue of corporations (business rescue, see J.b.) has become the chief area of reform in many systems in the 21st century, and wherever possible is the preferred way to deal with financially distressed entities rather than liquidating them. Preserving a business holds advantages for society in preserving jobs preservation and growing the economy. This rescue attempt can be informal and based on a creditor workout when the parties try to reach an agreement on how to deal with the debt of the particular

entity. This agreement may allow for an extension of the payment periods of debt, discharge of (some of the) debt, and even debt-for-equity swops. The rescue plan may be pre-packed: in other words, the workout is planned in advance and may then be adopted by agreement or following a formal prescribed compromise and/or rearrangement procedure.

In a statutory prescribed rescue procedure, there is usually a process to commence rescue, provisions for a stay of pre-commencement procedures, and arrangements about directors. As for the directors, the concept of the debtor in possession allows the directors to remain in office in some legal systems, such as the US. In other less-forgiving systems, the directors are replaced by the rescue practitioner. Further features of the rescue procedure laid down by statute included the appointment of a rescue practitioner, where applicable, and input and participation by role players such as creditors and employees, sometimes by allowing for creditor and employee committees etc. To make a rescue viable, it will usually be necessary to bring in new or fresh capital, to discharge at least some debts, and sometimes to close some of the units of the business, inevitably leading to some job losses. Usually there will also be provision for the rescue to be converted into a liquidation when it becomes clear that the rescue attempt will fail. The essence of rescuing the struggling debtor is to preserve at least the business or parts of it.

K. ALTERNATIVES TO LIQUIDATION OF ASSETS

Debtors may approach their creditors for an agreement enabling a new arrangement about the existing debts. These agreements may extend the repayment periods (rescheduling of debts) and even discharge some debts. Usually these agreements take the form of a compromise or composition and lead to a contractual novation of the former debt. Rescue as an alternative to liquidating entities such as corporations has been discussed in J.b above.

Some systems also allow formal repayment plans as alternatives to insolvency or liquidation of assets for individuals. These plans may in some prescribed instances follow a majority vote of acceptance by the creditors or may be enforced on the creditors through a court order. Not all systems allow for a discharge of debts here.

L. CROSS-BORDER DISPENSATIONS

Various modes deal with assets of insolvent estates that are situated in foreign jurisdictions: jurisdictions where the insolvency proceeding has not been opened in the first place. Some systems have statutory provisions in place. In other systems lack a statutory dispensation but the courts can be approached *ad hoc* for an order allowing a recognised foreign insolvent estate representative to deal with assets in that jurisdiction. And some countries handle this aspect through treaties amongst themselves.

As will be discussed, several internal initiatives are in place to establish a (more) uniform approach to cross-border insolvency cases. One is the UNCITRAL *Model Law on Cross-Border Insolvency* (1997). This Model Law exemplifies a soft-law option: UN member states are encouraged to adopt this template to improve cross-border cooperation etc in cross-border insolvency cases.

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 has definitions that help develop a common international terminology on aspects of cross-border insolvency. These 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 (My note: this may be known 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 impossible to subject an individual to a collective insolvency procedure. Other systems allow for insolvency procedures only if the individual is a trader.

The insolvency of groups of companies and the insolvency of financial institutions such as banks and insurance companies also pose 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: so a separate application for the commencement of insolvency proceedings must usually be made regarding each group member. Some laws provide limited exceptions allowing 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 could 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 the consideration of the group as a single entity. Sometimes judges have also developed the law to approximate 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 such as insurance companies may create a domino effect because these institutions are usually linked through inter-se transactions and so the insolvency of one can cause the collapse of several of these institutions in a particular country and even beyond its borders. This situation poses a significant risk for local economies and even the global economy. Because of this systemic-risk factor, many jurisdictions allow special insolvency dispensations for these entities, usually under strict controls.

Special rules deal with the insolvency financial stress experienced by small to medium enterprises. Small and medium-sized enterprises (MSMEs) are receiving attention, and the World Bank has developed principles to guide States when considering improvements in this regard. See the 2017 Report "Report on the Treatment of MSME Insolvency" at https://openknowledge.worldbank.org/handle/10986/26709) and the 2021 revised edition.

The Covid-19 pandemic forced many States to provide financial assistance to businesses and individuals. Some states adopted special Covid-19-related insolvency measures to provide relief for debt-stressed businesses. These initiatives have been documented in the *Insol International – World Bank Group Global Guide* (https://insol.azureedge.net/cmsstorage/insol/media/documents_files/covidguide/30%20april%20updates/2-covid-map-17-may.pdf (2021 updated version)).

2 CORE TERMINOLOGY

Notes on terminology

Although the terms discussed below are intended to orientate reading the *UNCITRAL Legislative Guide*, they can also be useful in understanding the different terminology you will face when examining the laws of various States.

Terms such as "secured creditor", "security interest", "liquidation" and "reorganisation" may have fundamentally different meanings in different States. An explanation of the use of the terms in the Guide may help you understand the various terms in their correct context.

Selected terminology

The section below explains the meaning and use of certain expressions that appear often in the *UNCITRAL Legislative Guide* and other UNCITRAL insolvency-related texts.

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.

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.

Avoidance provisions: provisions of the insolvency law that permit transactions or 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.

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 realisation of the asset or give rise to an onerous obligation or a liability to pay money.

Cash proceeds: proceeds of the sale of encumbered assets to the extent that the proceeds are subject to a security interest.

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.

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 States recognise the ability or right, where permitted by applicable law, to recover assets from the debtor as a claim.

Commencement of proceedings: the effective date of insolvency proceedings, whether established by statute or a judicial decision.

Court: a judicial or other authority competent to control or supervise insolvency proceedings.

Creditor: a natural or legal person that has a claim against the debtor that arose on or before the commencement of the insolvency proceedings.

Creditor committee: representative body of creditors appointed in accordance with the insolvency law, having consultative and other powers as specified in the insolvency law.

Debtor in possession: a debtor in reorganisation proceedings, which retains full control over the business, with the consequence that the court does not appoint an insolvency representative.

Discharge: the release of a debtor from claims that were, or could have been, addressed in the insolvency proceedings.

Disposal: every means of transferring or parting with an asset or an interest in an asset, whether in whole or in part.

Encumbered asset: an asset in respect of which a creditor has a security interest.

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.

Establishment: any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services.

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.

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 respectively. The term bankruptcy is also sometimes used but it usually refers to the formal state of being in bankruptcy).

Insolvency estate: assets of the debtor that are subject to the insolvency proceedings.
Insolvency proceedings: collective proceedings, subject to court supervision, either for reorganisation or liquidation.

Insolvency-related judgment:

> "(i) 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; and
>
> (ii) Does not include a judgment commencing an insolvency proceeding."

Insolvency representative: a person or body, including one appointed on an interim basis, authorised in insolvency proceedings to administer the reorganisation or the liquidation of the insolvency estate.

Liquidation: proceedings to sell and dispose of assets for distribution to creditors in accordance with the insolvency law.

***Lex fori concursus*:** the law of the State in which the insolvency proceedings are commenced.

***Lex rei situs*:** the law of the State in which the asset is situated.

Netting: the setting-off of monetary or non-monetary obligations under financial contracts.

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.

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.

***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.

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.

Post-commencement claim: a claim arising after commencement of insolvency proceedings.

Preference: a transaction which results in a creditor obtaining an advantage or irregular payment.

Priority: the right of a claim to rank ahead of another claim where that right arises by operation of law.

Priority claim: a claim that will be paid before payment of general unsecured creditors.

Protection of value: measures directed at maintaining the economic value of encumbered assets and third party owned assets during the insolvency proceedings (in some States

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.

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 who is a natural person, a related person would include persons who are related to the debtor by consanguinity or affinity.

Reorganisation: 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.

Reorganisation plan: a plan by which the financial well-being and viability of the debtor's business can be restored.

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.

Secured claim: a claim assisted by a security interest taken as a guarantee for a debt enforceable in case of the debtor's default.

Secured creditor: a creditor holding a secured claim.

Security interest: a right in an asset to secure payment or other performance of one or more obligations.

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.

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.

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.

Unsecured creditor: a creditor without a security interest.

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 on the notion of international insolvency law. The point of departure is that no set of insolvency rules applies globally.[1] In fact, all States with a developed legal system do have some kind of bankruptcy or insolvency system, also referred to as a collective debt-collecting procedure. But there are differences in approach and policy and in substantive and procedural rules. Apart from different approaches in insolvency law, essential areas of the general law also vary. Amidst these differences, scholars, legislatures, international organisations (such as the United Nations Commission on International Trade Law (UNCITRAL) and the World Bank), and courts continuously seek to devise solutions for dealing with insolvency issues transnationally.

Axiomatically in this course, then, no single set of insolvency rules applies globally.[2] It is still important to have a basic knowledge of the historical roots and essential characteristics of insolvency law to understand the various initiatives for establishing a more effective, uniform approach to cross-border insolvency law dispensation, despite the variations in legal systems, insolvency dispensations, and approaches.

3.1.1 Historical roots of insolvency law

For 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. Table 3 of the Twelve Tables dealt with the execution of judgments. Debt execution developed from the debtor's pledging his own body for the repayment of the loan. He could be imprisoned, sentenced to death, or sold as a slave to secure repayment of the debt.[3]

In the context of insolvency, Fletcher[4] identifies the roots of bankruptcy law (as a collective debt-collecting procedure) in four procedures of the Roman law: *cessio bonorum* (assignment of property); *distractio bonorum* (forced liquidation of assets); *remissio* and *dilatio* (compositions with creditors). These procedures developed from individual debt-collecting procedures, which in turn gave rise to developing collective debt-collecting mechanisms (insolvency law) when the debtor was found to be insolvent.

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1 B Wessels, *International Insolvency Law* (Kluwer, 2006), p 1.
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) 16(2) *Fundamina* 1, 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) 66 *Uni of Pennsylvania Law Review and American Law Register*, p 223.

Insolvency law in Europe developed because of the *Lex Mercatoria*, the customs and usages that developed between merchants on the continent and thus influenced the laws of the countries with 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 centuries. The word "bankruptcy" is said to stem from the Italian *banca rotta*, which means to "break the bench". This phrase referred to the situation where a merchant operating his business in the medieval marketplace 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]

At one stage, only merchants (traders), rather than ordinary wage-earning individuals, could be declared bankrupt. Hard sentences were imposed on debtors by imprisoning those who could not pay.[7]

So bankruptcy began as a collective debt-collecting mechanism that favoured creditors (pro-creditor). The development of the concept of a discharge of debts (sometimes called a "fresh start" or "rehabilitation") and the abolition of imprisonment for debt arrived only 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. At first, English law did not provide for imprisonment for debt, but this option was introduced towards the end of the 13th century by the Statute of Marlborough commonly called Marlbridge in 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 the country, barricaded himself in his house, or neglected to pay his debts or otherwise defrauded his debtors. The fundamental principle of this Act was that, for a fraudulent debtor, there should be a compulsory administration and distribution based on equality amongst all the creditors. The Act therefore contained the two fundamental principles of modern insolvency laws: collective participation by creditors, and a *pari passu* distribution of the available assets amongst them.

As was the case on the continent of Europe, the development of insolvency under English law also first provided for individual debt-collecting procedures before the development of collective (bankruptcy) procedure. The 1570 Act introduced during the reign of Queen

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5 Wood, *supra* note 2, pp 11 – 12.
6 Levinthal, *supra* note 4, p 232.
7 Fletcher, *supra* note 4, p 9.
8 *Ibid*.
9 Levinthal, *supra* note 4, p 3; Calitz, *supra* note 3, p 13.
10 Calitz, *supra* note 3, p 13 and other writers referred to.

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 under 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 obliged to transfer his or her property to the commissioners. They could also summon persons to appear for questioning and could even commit people to prison.

The Statute of Ann of 1705 was important for introducing 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 cooperated during the proceedings. Most of the principles introduced by these statutes have remained part of modern bankruptcy. During the next few decades, a formal system, having been introduced by legislation, quickly fell under the control of the courts of equity.

Further legislative reforms followed and a new office: the office of the Official Receiver, was introduced in 1883 with the responsibility for administering 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:[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 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

- an independent examination should be conducted of the debtor's conduct and the circumstances leading to his insolvency.

The Bankruptcy Act, 1883 (46 & 47 Vict.; ch 52) is viewed by some writers as the foundation of the present system of English bankruptcy law, the statute aiming at a fair procedure with adequate supervision and means to discourage dishonesty. The machinery

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[11] *Ibid*.
[12] *Idem*, p 9.
[13] *Idem*, p 12.
[14] *Idem*, p 13.
[15] *Idem*, pp 17 to 18.

for dealing with bankruptcy matters created by this statute essentially remains in force in contemporary 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 Report of the Review Committee on Insolvency Law and Practice (Cmnd 8558), also known as the "Cork Report" that ultimately led to the promulgation of the Insolvency Act 1986 (c. 45).[16]

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

There are several ways to classify the legal systems or families of the world, but in general legal families across the globe will in many States have a foundation either in English law or civil law.[17] In analysing the insolvency laws of various States, one sees these foundations reflected in the variety of insolvency laws. But some aspects of insolvency law will be affected by local legal culture, basic rights, and how a system deals with related matters such as security rights or the approach to labour issues. Terminology also varies, though the same principle may be designed through different terminology used.[18]

3.1.2.1 Anglo-American (common law) systems

English insolvency law[19]

The main law regulating English insolvency law is the Insolvency Act 1986. The Cork Report led to the introduction of this Act, which applies to England and Wales.

The Insolvency Act 1986 exemplifies unified insolvency legislation because it deals with consumer (personal) and corporate bankruptcy in the same Act. But it duplicates many provisions, as these apply to individuals and companies, respectively.

The Insolvency Act 2000 (c. 39) and the Enterprise Act 2002 (c. 40) 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 were introduced in 2016. Apart from special financial aid schemes, the UK, like some other jurisdictions, adopted several insolvency-related reform measures following the Covid-19 pandemic. In this regard, the Corporate Insolvency and Governance Act 2020 (c. 12) sets out certain reforms to insolvency law that, amongst others, introduced a new restructuring plan, new moratorium rules, the relaxation of wrongful trading liability, and the suspension of winding-up petitions and statutory demands.[20]

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16 *Idem*, pp 15-18.
17 Wood, *supra* note 2, p 55.
18 *Ibid*.
19 Fletcher, *supra* note 4, chap 1.
20 For a good overview of the Covid-19-related insolvency measures introduced by various States, see the updated *INSOL International – World Bank Group Global Guide* (see at https://insol.azureedge.net/cmsstorage/insol/media/documents_files/covidguide/30%20april%20updates/2-covid-map-17-may.pdf - 2021 updated version). Apart from the UK these will not be referred to below. For a detailed discussion of the amendments brought about by the Corporate Insolvency and Governance Act 2020, see G Mc Cormack, "Permanent changes to the UK's corporate restructuring and insolvency laws in the wake of Covid-19" (published by INSOL International as a Special Report, October 2020).

As part of its cross-border rules, England and Wales also adopted the UNCITRAL Model Law on Cross-Border Insolvency by statutory instrument in 2006. Section 426 of the Insolvency Act 1986 still applies to "relevant" countries as listed. Principles of the common law still apply as well. Although the UK is now a former Member State of the EU, for the period it was a member, the EU Insolvency Regulation also applied to cross-border insolvency matters between the UK and other EU Member States. The changes due to the UK leaving the EU are briefly discussed in paragraph 6.4.3 below.

United States 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 the outcome was the Bankruptcy Code of 1978. The Code provides for these procedures:

- liquidation – chapter 7;
- municipalities – chapter 9;
- reorganisation (rescue) – chapter 11;
- family farmer – chapter 12;
- rescheduling of debt (repayment plan) – chapter 13;
- cross-border insolvency – chapter 15.

The work of the Review Commission of the 1990s led to the reforms of 2005 in the form of the Bankruptcy Abuse Prevention and Consumer Protection Act 2005 (BABCPA) (Pub. L. 109–8, 119 Stat. 23, enacted April 20, 2005)).

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

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 or 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.

[21] See JT Ferriell and EJ Janger, *Understanding Bankruptcy* (LexisNexis, 3rd ed, 2012).

The US system is viewed as trendsetting in its liberal fresh-start approach (discharge of debt) and the chapter 11 reorganisation mechanism. For example, in 2019 the USA 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. Yet it also has several Acts dealing with aspects of insolvency and does not have a single unified Bankruptcy or Insolvency Act. Australia also adopted the UNCITRAL Model Law on Cross-Border Insolvency in 2008.

In general, the Corporations Act 2001 regulates corporate insolvency, and the Bankruptcy Act 1966 regulates the insolvency of individuals or natural persons. There have been several recent reforms in Australia, including the introduction of a new restructuring and liquidator process for small businesses into the Corporations Act.

3.1.2.2 Continental European (civil-law) systems

Dutch insolvency law[24]

The Dutch insolvency law exemplifies a civil-law system. In earlier times, various ordinances such as the ordinance of Amsterdam of 1772 applied in parts of the Netherlands. The *Faillisementswet* of 1897 provides for *failliet* or *surséance van betaling* (moratorium) but the work of the *Commissie van Onderzoek* (Research Commission) gave rise to *De Wet Schuldsanering Natuurlijke Personen* (1998)*t* that allows for a fresh start for inidivduals in Dutch bankruptcy law. The *Faillissementswet* provides for bankruptcy of individuals and businesses.

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. But new developments in consumer credit compelled them to introduce the concept of a "fresh start" in view of over-indebtedness.

The Netherlands is reforming its insolvency laws. The Dutch Scheme of Arrangement entered into force on 1 January 2021. In Dutch it is called the "*Wet Homologatie Onderhands Akkoord"* – "WHOA" in short.

French insolvency law[25]

The *Ordonnance de Commerce* of 1673 is an important statute in the history of French commercial and insolvency law because its Chapter XI formed the foundation of later

[22] HR 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* (Lawbook Co, 10th ed, 2018).
[24] As to the Bill and Explanatory memorandum as adopted by Parliament on a proposed "scheme of arrangement" see https://resor.nl/dutch-scheme/ for an unofficial translation of the text.
[25] See https://iclg.com/practice-areas/restructuring-and-insolvency-laws-and-regulations/france. **Error! Hyperlink reference not valid.**

French insolvency law in the commercial codes of 1807 and 1838. (This in turn prompted Napoleonic insolvency codes in several States.)

The 1807 code is said to have treated debtors harshly in allowing for their arrest and detention. 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 through ancillary bankruptcy proceedings against the owners of these 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 also exemplifies unified insolvency legislation.

Spanish insolvency law[27]

In Spain, insolvency is regulated by a single procedure that can be used by individuals and corporations (Spanish Insolvency Act 2003). This Act has been amended several times over the past 20 years.[28]

EU law relating to insolvency

Apart from the EU (Recast) Insolvency regulation that covers cross-border insolvency matters amongst EU member states as discussed below, the AU Parliament is also working on setting standards for harmonising local insolvency laws of member states as discussed below. On 20 June 2019 EUP, for instance, published the Directive 2019/1023 on preventive restructuring frameworks_setting standards on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt.

3.1.2.3 Emerging-market and developing-country systems

General

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

[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.

Africa[29]

African countries still largely follow the laws of the respective former colonial powers. In this regard, countries such as Nigeria, Botswana, and Zambia, and countries in the Eastern part of Africa such as Kenya and Tanzania, have an English- law tradition, but the lusophone countries 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 because both the Roman-Dutch law (civil law) and English law influenced their respective legal systems.

The pattern of insolvency law is that many of the older imported laws undergird current legislation, but several African States have started introducing new, more modern legislation.**India**[30]

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

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

Russia has seen a development of insolvency law since 1992 that began with the Law on Bankruptcy of 1992, containing 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 high degree of control.

In China, the insolvency law developments after 1979 finally gave rise to an extensive bankruptcy law in 2006, applicable to business entities but not individuals. The Civil Code of the People's Republic of China took effect on 1 January 2021, and may affect insolvency laws such as the identification of the debtor's properties and creditor's rights.[32A]

Latin America[33]

South American countries are largely civil-law countries. The law of South America is said to be 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

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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. S Batra, *Corpo-rate 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.

32A See https://practiceguides.chambers.com/practice-guides/insolvency-2020/china/trends-and-developments.

33 Wood, *supra* note 2, p 124 *et seq*; http://www.arabruleoflaw.org/bankruptcyreform/wpcontent/uploads/2014/02/IR_1999_WB_Reforming-Insolvency-Systems-in-Latin-America.pdf.

establish a system of supranational law akin to the European Union.[34] Several South American States are also reviewing their insolvency laws.

East Asia[35]

The aftermath of the 1998 financial crisis in East Asia especially affected Indonesia and Thailand. This crisis gave rise to some insolvency law reforms; Thailand, in particular, overhauled its bankruptcy laws.

Singapore is also now becoming a major role player in the region and in October 2018 passed a new Insolvency, Restructuring and Dissolution Act to consolidate Singapore's corporate and personal insolvency and restructuring laws into a unified Act. It came into force on 30 July 2020.

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

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

SECTION B: THE SOURCES AND NATURE OF INTERNATIONAL INSOLVENCY

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

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

4 WHAT IS CROSS-BORDER INSOLVENCY OR INTERNATIONAL INSOLVENCY?

There are various points of view on the notion of international insolvency law. The point of departure is that no set of insolvency rules applies globally. All states with a developed legal system have some kind of bankruptcy or insolvency system, also called a collective debt-collecting procedure. But there are differences in approaches, policies, and substantive and procedural rules.

Some rights derive from the general law, such as that regulating the establishment of real rights of security in favour of creditors. These legal principles also give rise to different legal positions of creditors once bankruptcy arises.

Because of globalisation, trade, and the movement of assets across borders, creditors may be compelled to deal with the estate(s) of their debtor in several jurisdictions to reclaim their debts. This scenario inevitably leads to cross-border legal and often 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'.

Wessels does acknowledge that this definition is limited because it relates to 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 seen as a situation '… in which an insolvency occurs in circumstances which in some way transcend the confines of a single legal system, so that 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

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

5.1 Introduction

It was no coincidence that more than 200 years ago the founding fathers of the USA 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) where the debtor holds assets when the proceedings are commenced in another state of the common market cannot depend solely on the goodwill of the first state. The European Union, where a common market between nation states exists, has also realised this point.

Irrespective of the existence of a formalised common market and today's communications and interaction between individuals, businesses and states have given rise to transnational or cross-border cases of insolvency. Investments and the 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, most significant corporate collapses involve more than one jurisdiction and so 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 implications across national borders. In general, a state's enforcement of its jurisdiction ends at its national borders. What is on the other side is—without the cooperation of another state—out of reach for the national authorities. The problems are obvious in relation to contemporary mobility, the speed with which assets can be transferred from one place to another, and the complexity of many business transactions.

Without coordination and cooperation, there is always a risk of multiple insolvency proceedings against the same debtor. If these are competing or even incompatible (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 of payments in an insolvency situation may be impossible to predict. This situation may also further a race for assets in which "only the fittest survive". Weaker creditors will be the major losers. This outcome would counter

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

a basic principle in insolvency proceedings worldwide, the principle of equality of creditors (*par conditio creditorum*). Risk of (successful) fraud and forum shopping are further drawbacks of anarchy in respect of cross-border insolvency proceedings.

These shortcomings have, of course, been observed by governments, inter-governmental organisations (e.g., the United Nations Commission on International Trade Law (UNCITRAL), the European Union (EU), the Council of Europe (COE), the North American Free Trade Association (NAFTA), the World Bank, the International Monetary Fund (IMF)), and others, and by organisations for insolvency practitioners such as INSOL and the International Bar Association (IBA), Section J. Various initiatives have been taken. The most significant of these initiatives will be presented in the discussion below.

5.2 Cross-Border Insolvency Cases

Cross-border cases may occur for many reasons, among other things, that the debtor has:
(a) economic affairs with a foreign counterparty;
(b) interests in property located in more than one country;
(c) foreign creditors;
(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 situation may be that "insolvency proceedings" can be opened 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. 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. But the case can be much more complex and involve subsidiaries, assets, operations, and creditors in many states, as well as multiple "insolvency proceedings" (i.e., proceedings in different states at the same time).

Moreover, the problems of addressing "cross-border insolvency cases" start at once in finding a common language. "Insolvency"—i.e., the reason for commencing proceedings—is normally defined in a domestic context. Traditionally, "insolvency" means that the combined total of the outstanding liabilities exceeds the measurable value of all the debtor's assets, and usually some degree of durability of this state of negative net worth is required. Yet mere short-term inability to service debts, e.g., a liquidity crisis, is sometimes also considered sufficient for commencing "insolvency proceedings". So, at an international level, it is hard to define "insolvency".[37] So difficult, indeed, that international conventions and other instruments do not even attempt a proper definition and immediately

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

define "insolvency proceedings" (with or without exhaustive lists of proceedings that are to be covered).

"Insolvency proceedings" are somewhat easier to define, although with some confusion over terminology. "Insolvency proceedings" are often qualified as "collective proceedings" to distinguish them from individual creditors' enforcement actions against the debtor. They traditionally include various forms of proceedings with the aim of winding up the debtor's economic affairs (winding-up, liquidation, sequestration, bankruptcy etc.). Today, though, other proceedings aiming to rescue troubled businesses by means other 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 a "liquidator" even though many different terms are used even within the same legal system for different proceedings. To accommodate different jurisdictions, the definitions must be open-ended.

The EU Regulation on Insolvency Proceedings ("EIR"), 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 the various proceedings in each EU Member State were listed in an Annex.[38] The Recast EU Regulation (Regulation (EU) No 2015/848 of 2015 became operative on 26 June 2017) is broader in scope because it also includes hybrid and pre-insolvency proceedings. Again, 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".

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

To bring the "cross-border" aspects and the "insolvency" aspects together, one may ask three pertinent questions:[40]

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

[38] *Idem* Article 2.c and Annex B.
[39] *Idem* Annex C.
[40] See IF, Fletcher, *The Law of Insolvency*, at 5.

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, so these states must be involved in amending it.[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, one could say that insolvency proceedings could 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 accorded to foreign proceedings. This outcome reflects the difficulties of trying to find cooperation and coordination between different jurisdictions.

One problem is that the standards of insolvency laws in many countries are low. The laws can by outdated (perhaps a remnant of a colonial past) or otherwise framed in way that does not suffice for contemporary trade and investments. Several initiatives have been taken to create an international discussion and provide recommendations for assessment and good minimum standards. These projects include the World Bank's *Principles and Guidelines for Effective Insolvency and Creditor Rights Systems*, the United Nations Commission on International Trade Law (UNCITRAL) work on an *Insolvency Guide*, and a project by the European Commission called *Bankruptcy and a fresh start: stigma on failure and legal consequences of bankruptcy*. A higher general standard 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 on the interests that insolvency proceedings must meet. A common distinction is between pro-creditor and pro-debtor systems.[42] Yet other systems may stress other interests, such as 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". In other words, various jurisdictions compete for the debtor's assets. And insolvency proceedings extra complex in relating not only to procedural law but also, to a high degree, to significant areas of substantive law (both private and public). In general, states are more willing to export than import insolvency proceedings.

In seeking solutions, a theoretical conflict arises between two diametrically opposed principles: universality and territoriality.[43] Both principles are supported by very legitimate and reasonable arguments and underlying interests, and both have their proponents. Yet international observers and commentators generally favour the principle of universality, despite problems, shortcomings, and criticism. At the same time, national governments

[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.
[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.

cannot disregard national interests (and constituencies) that may be easier to identify and defend under the principle of territoriality.

Somewhat simplified, ***universality*** means that only one insolvency proceeding should cover all the debtor's assets and debts worldwide. So, once the proceedings are opened, no other insolvency proceedings ought to be possible, nor any other forms of execution on 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, though, such as 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 obtain and control all the assets. All creditors worldwide should have opportunities to participate in the proceedings with their claims and be treated equally.

Universality is considered (by its proponents) to satisfy the interests of recovering assets best and thus to pay the debts or, even more so, 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 operate in international markets. It does, however, require a high level of trust in foreign legal systems and foreign proceedings, because the single insolvency proceeding would have extraterritorial effects. 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, identify, amongst other things, the problem of establishing the "home country" of the debtor where insolvency proceedings may be opened exclusively. Drawbacks are that domestic markets will be confused, and that home- country standards may be indeterminate (particularly when the debtor is a corporate group) and vulnerable to strategic manipulation.[47]

Territoriality, on the other hand, partly responds to the principle of universality and means that insolvency proceedings may be opened 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.

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[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.

[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.

Territoriality also addresses local interests and local creditors who act in a domestic market, where only an evaluation of local assets is often made before credit is given. Local creditors may also face serious practical and economic problems of participating in proceedings abroad (even if equal in law (*de jure*), they may as a matter of fact (*de facto*) have disadvantages). Without the benefit of local proceedings, perhaps only the strongest creditors would have the opportunity to get paid. A major drawback, however, is that if 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 solvent in another. And the creditors would be deprived of the opportunity of having their claims being paid. That is not to say, though, that cross-border problems are limited to major international businesses; these 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 jurisdictions are more closely associated with universalism.[49] In practice, though, national jurisdictions adopt neither approach in its pure form. Territoriality is found to be too costly, and an essentially universal approach—pure universality requires multilateral efforts—is often politically difficult to follow. Pragmatic approaches have been suggested in the literature, such as an "internationalist principle" based on the common-law concept of comity[50] or a non-territory-oriented approach based on choice-of-law rules.[51] And the international efforts to remedy the lack of cooperation and coordination seek to modify and to find compromises based on elements of both universality and territoriality. There is often room for both primary (universal) and secondary (territorial) proceedings: this blend is 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 Solving the Problem

Several specific matters need to be addressed to confront the problems of cross-border insolvency cases. Professor Jay Lawrence Westbrook, a strong proponent of universalism, has identified nine key issues in these 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]

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[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.

[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.

To bring the "cross-border" aspects and the "insolvency" aspects together, Fletcher asks three pertinent questions:[53]

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

In answering the three questions posed by Fletcher, it could be suggested that insolvency proceedings could 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 accorded to foreign proceedings. This suggestion reflects the difficulties that one may meet in trying to bring about cooperation and coordination between different jurisdictions.

From a practical point of view, though, it remains a first step when seeking assistance in an insolvency matter in a foreign jurisdiction to seek the applicable source to apply to the present case. With no 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 be noted, though, that there is not always a uniform approach between States in applying these rules.

In common-law countries, the common law may also help provide a basis for courts to deal with cross-border insolvency matters, or even to develop these principles. But the courts are sometimes inconsistent in applying or developing common-law principles in this regard. 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 some harmonisation of insolvency laws. The call for global legal rules in general increases with the development of globalisation. How far this is a workable and likely prospect is debatable.[55] The experience of various initiatives so far does not support the feasibility of a more widespread harmonisation, and observers today largely accept that realistic achievements in most cases will be more modest than harmonisation of national insolvency laws. It has been argued, though, that as the fundamental differences between the legal systems and laws of countries are both the root problem of cross-border insolvencies and

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

the major obstacle to their solution, the goal of harmonisation must continue to be pursued.[56]

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

5.4.1 Initiatives at a National Level

National legislation

One approach would be for states to introduce legislation on cross-border insolvency proceedings unilaterally.[57] Though 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 worldwide, entrust 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 usually lacking about recognising foreign proceedings. Unilateral rules of this kind do not, of course, hinder local action against the debtor's assets in another state. And state borders, geographical distances, and cultural and legal differences make this "export" of proceedings largely fictitious. The proceedings are not effective unless many states join in a common, although unilaterally implemented, scheme (see below).

So, even if national law of one country—e.g., the US Bankruptcy Code—pursues a universality approach, other countries may not accept these extraterritorial pretensions. An example was *Felixstowe 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 the Chapter 11 reorganisation of U.S. Lines took place. So a worldwide automatic stay as an effect of the Chapter 11 proceedings was not recognised.

National laws which provide for "import" foreign proceedings by granting them extraterritorial effects are very rare, the former s 304 of the US Bankruptcy Code being one well-known example.[59] That s 304 would include recognising the foreign proceedings (and the "representative") as well as certain effects or rights attached to that recognition. In the USA, for example, even under 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. Or 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 these courts the discretion to decline jurisdiction when the convenience of the parties and the ends of justice would be better served if the case were to proceed in another forum.]

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[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.)
[58] [1989] Q.B. 360.
[59] For a succinct presentation, see S L, Bufford *et al*, *supra*, at 25-52.

The USA replaced s 304 by adopting the UNCITRAL Model Law on Cross-Border Insolvency (1997) 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 several jurisdictions will indeed foster coordination, cooperation, and the development of a more uniform approach to applying 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 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 complex enough 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 may 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 is 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

[60] This section on Chapter 15 has been sourced from:
http://www.uscourts.gov/FederalCourts/Bankruptcy/BankruptcyBasics/Chapter15.aspx

[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).

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 may 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, 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 53 States and 56 jurisdictions, for instance, Australia, Canada, Mexico, Kenya, Japan, South Africa (***though the relevant statute is not in force yet***), and the UK.

Coordination and cooperation between states would also be needed if the domestic approach focused on choice-of-law rules rather than the allocation of jurisdiction.[63] To be

[63] For such a proposal, see Buxbaum, s*upra*.

effective, these rules cannot be developed in isolation but must form part of a larger (bilateral or multilateral) system.[64]

Protocols

Another approach 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 USA. Protocols are based mainly on common law and *ad hoc* arrangements, and successful cases have involved courts of a similar jurisdiction (law, culture, language, etc.), i.e., common-law countries. Similar arrangements would have more difficulty to gain acceptance by courts in, for example, Continental Europe. And Protocols tend to be appropriate mainly for large and important corporate rescues because of the complexity and costs involved.

The best-known example is *Maxwell Communication Corp. Plc.*[66] (M.C.C.) when a worldwide media empire crumbled after defaulting under a huge loan. It was a British holding company (headquarters and management) with more than 400 subsidiaries worldwide. Most creditors, except the creditor of the defaulted loan, were British banks. Most assets, however, were located in subsidiary companies in the USA. Concurrently, two main insolvency proceedings were opened in the UK and the USA. Both proceedings were business rescue proceedings (voluntary Chapter 11 proceedings in the USA, and an administration order in the UK). An administrator was appointed in the British proceedings and a so-called "examiner" in the US ones. The two proceedings had to be coordinated somehow, and cooperation was necessary. So, 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, among other things, 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 then served as the basis for cooperation and coordination. This case has been seen as a breakthrough in cooperation.

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

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[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.

[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*

The Protocol approach has, for instance, also served as inspiration for international efforts, in particular the American Law Institute (ALI) *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 to cross-border insolvency situations. This is particularly the case in international markets for commodities, securities, foreign exchange, options, futures and similarly regulated trading business.[69] The parties can minimise the legal uncertainties amongst themselves by contractual arrangements, and a useful tool is thus to determine close-out positions should one party default or become insolvent. One method is by a set-off arrangement, often called "netting". This contractual arrangement does not work entirely by itself, though, and the law must be designed so that it also meets the tests 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 opened 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, among other things, to provide for a union-wide protection of netting arrangements. Statutory regulation to that effect also exists in many countries.

Another method that has been developed is an informal approach to corporate rescue, which entails a "workout" outside more formally regulated proceedings, the so-called "London Approach".[71] It was developed in the UK as an informal code of practice for multi-bank corporate rescue and depends largely on 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 business plan by an independent accountant, and a composition. So this is not really a coordination of insolvency proceedings by an attempt to avoid these proceedings from being initiated.

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.

[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*.

The scheme has also been applied in other countries but will not necessarily work in every country (e.g., because of complex financial structures, attitudes, expectations and local laws). A related issue is the growing trend of "debt trading", which could both help and hinder "workouts", depending on whether the debt trading gives rise to more or fewer creditors and bank or non-bank creditors. Along with the lack of a formal moratorium, debt trading could undermine any workout attempt.

Private international law also generally recognises the validity of forum-selection clauses and choice-of-law clauses in private contracts. These private solutions will not solve the problem alone, but even so it has been suggested 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] Though the basic idea is that private interests, not governments, should dictate the applicable rules, there would still need to be a reliance on the government to create a default rule if no choice is made and possibly also for establishing the menu. Even more important, though, 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 soon, but one may question whether it has any prospects of succeeding at all.

5.4.2 Initiatives at an International Level

"Supranational" legislation

The first documented cross-border insolvency case was the Ammanati Affair in 1302 when the Ammanati Bank in the Republic of Pistoia (today in Tuscany, Italy) went bankrupt, leaving 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. This case was also the first example of an attempt to handle the cross-border situation because the Holy See (the Pope) in Rome—as a major creditor with much to lose—intervened and had powers that were not territorially restricted. Whether this intervention succeeded is unclear from the archives. Still, it does show that medieval Europe had something that is generally lacking today: a supranational organ with regulatory powers.

European Union Regulation

There is one example today of an almost supranational 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 through a majority decision (i.e., against the will of some Member States). Revolutionary, indeed. With the amendments to the EU's basic regulatory framework in the 1997

[72] See e.g. RK, Rasmussen, *supra*.
[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.

Amsterdam Treaty, much private law was included in this framework (from having been the subject of normal interstate 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 judgment of judgments 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 UK did not sign, so the EU Convention fell through.

A new initiative in 1999 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 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."*)

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.

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[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.)

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

- "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 adopting the revised EU Insolvency Regulation (The recast version) in November 2014. The amended version was adopted in 2015 and was put into operation on 26 June 2017. The Recast Regulation (The EIR Recast), addresses, amongst other things, the issues listed by Wessels and Boon above.

As for Brexit and its impact on the application of the EIR in the UK, note that the decision of the UK to leave the EU became effective on 1 January 2021: http://www.legislation.gov.uk/ukpga/2018/16/contents/enacted.

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-supranational context in Africa, not the UN. The Organisation for Harmonisation of Business Law in Africa (in its French acronym, l'OHADA (denoting "Organisation pour l'harmonisation en Afrique du droit des affaires")[76] is part of a regional framework also

[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.

comprising the West African Monetary and Economic Union (UEMOA) and the Customs Union of Central African States (UDEAC). The organisation now has 17 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 forth in the treaty is based mainly on the French legal tradition.[78] The organisation, which is relatively unknown, has established several institutions, including a Common Court of Justice and Arbitration (CCJA),[79] situated in Abidjan, Ivory Coast.

Under L'OHADA several 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] This Act applies directly in the member states and is accorded primacy over existing or future domestic legislation—a pure form of law harmonisation. The Uniform 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. And the Uniform Act contains a section on insolvency proceedings with cross-border implications. A judgment in one member statehas full effect in the other member states where the judgment:[81]

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

These judgments, 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.

Still, this effect of judgments does not bar the opening of multiple insolvency proceedings against the same debtor. There is, however, a distinction between main and secondary proceedings.[82] And 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 is accounted for in other proceedings.[83]

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[77] The signatories are: Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Comoros, Congo; 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.*
[82] *Id.* Article 251 (very similar to the equivalent definitions of the EU Regulation).
[83] *Id.* Article 255.

This approach avoids some difficulties entrenched in the traditional method of establishing an insolvency convention. 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, so harmonised legislation was an attractive option. First then the question arises whether cross-border issues can be addressed; and here this was taken care of in the same statutory instrument. The uniformity is further enhanced by the opportunity to achieve coordinated interpretation of the law by the Common Court.

It is also relevant to note that all 17 members of OHADA adopted the UNCITRAL Model Law on Cross-Border Insolvency in 2015.

Treaties and other inter-state agreements

The traditional method for legal coordination and cooperation among states is the conclusion of international treaties (conventions). Despite the apparent need, multilateral insolvency treaties are rare.[84] Because of the complexity (and sometimes sensitivity) of the issues involved, an international insolvency treaty is difficult to negotiate and agree upon. The 30-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 become legally binding for the state (i.e., be ratified). A certain number of ratifications, varying from case to case, are needed for the convention's entry into force. So a call for an international convention is regularly a difficult, time-consuming proposition.[85]

Many multilateral conventions exist,, although most have not been particularly effective. To reach agreement, ambitions sometimes had to be lowered and the states given room to opt out of certain provisions (reservations). Ambiguous provisions may lead to implementation which does 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 conventions.[86] Sometimes the main benefit has been to bring insolvency lawyers from different countries together and so put the issue on the agenda and establish 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 (despite serious efforts for many years).[87]

[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.

[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.

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

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

The Montevideo Conventions and the Bustamante Code

Two examples are to be found in Latin America, the 1889 and 1940 Montevideo Conventions and the 1928 Bustamante 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 resulted from 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. Though 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. But local creditors may bring the proceedings to their own country and thus preclude the foreign proceedings. Still, the powers of all receivers, trustees, and their agents should be recognised in all state parties. Universality applies when the debtor consists 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 are enforceable in the other states, but without prejudice to the right of local creditors, priority rights in one state are respected in proceedings in the other states and any surplus in one proceeding is 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. But 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 USA). Fifteen states later ratified the convention (but not the USA, Mexico and four "Montevideo-states"(Argentina, Colombia, Paraguay, and Uruguay)). The Code provides that if a corporation is domiciled in one state party

[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*.

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, though, multiple insolvency proceedings are possible. A final decision on bankruptcy in one state means that the debtor is insolvent in all other state parties, and the appointment of a "liquidator" must have extraterritorial effects without any other local proceedings.

In practice, the Montevideo Conventions and the Bustamante Code do not seem to have worked very well.[91] They have established the broad principles but left the states to work out the details, and this outcome 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 centuries) and many laws on central private-law issues have, essentially, been the same in all the countries. This did not result from formal harmonisation through supranational arrangements or treaties, but from voluntary cooperation in drafting laws together that were then 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; but national insolvency law in general was not an area for harmonisation. The convention, which was amended in 1977 and 1982 (although not regarding Iceland), is brief.[92] A new amendment may be necessary given the EU Regulation, which applies to only three of the Nordic states (not Norway and Iceland). The convention is 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 on the concept of the debtor's domiciliary forum (and is not applicable to non-domiciliary proceedings) and provides for universality (and unity) because domiciliary proceedings must apply also to the debtor's property in the other states. The effect is immediate and automatic without any other 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 the system and rules of insolvency law in force in the country where an insolvency proceeding takes place (*lex concursus*) for certain matters but also that the law of the place where the where the property is situated (*lex rei sitae*) governs whether any particular property should be exempt from seizure (and also for decisions on

[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.

whether property has been illicitly removed). And the *lex rei sitae* determines 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. by. Individual enforcement against the debtor's assets prior to or at the commencement of the insolvency proceedings as well as the right of creditors to pursue these measures are determined later by the law of the state where the enforcement took place. Preferential claims are normally governed by the *lex concursus*, but in some cases by the *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 for the success of the convention, there is little published case law on its application. This should not be taken as proof of its failure, though, but as an indication that the operation works painlessly in practice.[93] Overall, it has proved to be an effective scheme 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. Despite a very low threshold of ratifications for its entry into force (three ratifications), it has still not been ratified. 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, affect 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 multilateral 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, it is noted that the Istanbul Convention is less ambitious than the EU Regulation.[94] It merely provides a regime to recognise 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.

5.4.3 Initiatives being a Combination of International and National Efforts

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

[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.

Without any apparently successful government initiatives, private practitioners have moved to provide guidance (and inspiration) for managing 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 IBA projects 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 through recognition in foreign courts of one single insolvency proceeding. Though MIICA has provided food for thought, it has been recognised that accepting the Model Act would depend on ratification by many, if not all, countries around the world.

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

Some other guidelines to promote cooperation and coordination in cross-border insolvency proceedings are the following:

- The American Law Institute (ALI) Transnational Insolvency Project developed the "ALI NAFTA Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases (2000)" to be applied in international insolvencies involving the United States of America, Canada and Mexico.

- Based on the ALI NAFTA principles, the International Insolvency Institute (III) effected a project that resulted in the "ALI - III Global Principles for Cooperation in International Insolvency Cases and Global Guidelines Applicable to Court-to-Court Communication in Cross-Border Cases (2012)".

[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.

- Within the context of the EIR, the "European Guidelines on Communication and Cooperation (2007)" contain non-binding rules as well as a Draft Protocol for international insolvencies subject to the EIR (developed on the initiative of INSOL Europe).[96]

- The "EU Judge-Co Guidelines" and the "EU Cross-Border Insolvency Court-to-Court Communications Guidelines 2015" with the object of strengthening efficient and effective communication between courts within EU member states were developed and funded by the European Union and the III.

- Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters (titled the "JIN Guidelines") were designed at the inaugural Judicial Insolvency Network (JIN) conference in Singapore in 2016 to improve the efficiency and effectiveness of parallel proceedings in an international insolvency "by enhancing co-ordination and cooperation amongst courts under whose supervision such proceedings are being conducted."[97] The JIN has also developed "Modalities of Court-to-Court Communication" ("JIN Modalities"),[98] which proposes ways to initiate, receive and engage in such communications.

5.4.4 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*

To combine international and national efforts to address cross-border insolvencies, the United Nations Commission on Trade Law (UNCITRAL) has developed a 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 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.[99]

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[96] The Conference of European Restructuring and Insolvency Law ("CERIL") and INSOL Europe have a Joint Working Group since 2017 to review the Guidelines in light of recent practice and the EIR Recast.

[97] Courts in Australia (Federal Court of Australia, New South Wales); Bermuda; Canada (Ontario); Cayman Islands; Eastern Caribbean; England and Wales; Singapore; South Korea (Seoul); the Netherlands; the UK and the United States (Delaware, Southern District of Florida, Southern District of New York Bankruptcy Courts) have adopted these.

[98] See http://jin-global.org/content/jin/pdf/Modalities_for_court-to-court_communication.pdf.

[99] 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", *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

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 considered 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 because of the deterring experiences of earlier treaty-making attempts (i.e., the EU Convention).

The idea is that states should implement the Model Law into existing law, which may require adaptation to a greater or smaller extent. But the closer to the original, the better because foreign practitioners could then understand and interpret the law more easily. And, even more important, this approach would create reciprocity in effect. Reciprocity is not a requirement for cooperation in and coordination of proceedings according to the Model Law, but this outcome 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 substantive law. But a more widespread 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, though, was 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 some debtors (banks, insurance companies, etc.).

The Model Law has been described as a highly promising chapter in managing international insolvency and has been favourably received in many quarters, particularly in common-law countries. The legislative technique used is more suitable for these systems than for civil-law systems, where greater adaptation will probably be called for. Fifty-three States have adopted the Model Law so far - the first states to adopt it were Eritrea, Mexico, South Africa, and Montenegro.[100] In the USA, the Model Law was adopted as Chapter 15 of the US Bankruptcy Code. But in the UK, the Insolvency Act 2000 provided for the Model Law to be brought into operation through regulation in a statutory instrument, a regulation effected in 2006. Not all adopting States have considered implementing the

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.

[100] According to UNCITRAL's website: http://www.uncitral.org.

Model Law without substantive amendments: for instance, South Africa has, introduced a requirement of reciprocity and designation.

How far the Model Law will fulfil its purpose is still too early to assess. Crucial is the attitude taken by larger trading countries towards its implementation. So far, many states seem to wait each other out 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 related to the EU Regulation and it would be advisable also to consider cross-border insolvencies where non-EU countries are involved. As already stated, though, 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 on the application of the extraterritorial effects (so-called "relief"). Whatever the outcome, the work of UNCITRAL (and others) hasplaced international insolvency on the agenda and provided an important framework for future developments.

b. New UNCITRAL Model Laws relating to cross-border insolvency

The UNCITRAL Model Law on Cross-Border Insolvency celebrated the 25th anniversary of its adoption in 1997. So far, it has been enacted in the local legal systems of 53 states. In general, this Model Law provides a procedural basis to deal with recognition in cross-border insolvency and certain related assistance procedures.

It is still clearthat there are certain gaps in the UNCITRAL Model Law.[101] To fill some of these gaps, UNCITRAL has released two further model laws: the Model Law on Recognition and Enforcement of Insolvency-Related Judgments (2018)[102] and the Model Law on Enterprise Group Insolvency (2019).[103] Both these model laws are intended to build on the UNCITRAL Model Law by addressing certain aspects not initially covered.

The Model Law on Recognition and Enforcement of Insolvency-Related Judgments of (2018) aims to help states equip their laws with a framework of provisions for recognising and enforcing insolvency-related judgments that will facilitate the conduct of cross-border insolvency proceedings.[104]

The Model Law on Enterprise Group Insolvency[105] was designed to expand on extant UNCITRAL insolvency texts to equip states with modern legislation addressing the domestic and cross-border insolvency of multiple debtors that are members of the same enterprise group, thus strengthening existing platforms.

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[101] See Mevorach European Business Organization Law Review 2021, 283 (315).
[102] See at https://uncitral.un.org/en/texts/insolvency/modellaw/mlij
[103] See at https://uncitral.un.org/en/MLEGI

[104] It became clear that there is a need for this, for instance in the UK a distinction is drawn between the recognition of foreign insolvency proceedings and enforcement of insolvency related judgments. The judgment in *Rubin v Eurofinance* [2012] UKSC 46, [2013] 1 AC 236, serves as an example where a UK Court maintained its territorial approach by denying assistance in relation to a foreign insolvency related judgment.
[105] See at https://uncitral.un.org/en/MLEGI

These three Model Laws have complementary elements: they use similar terminology and definitions and rely on similar frameworks to achieve their goals.[106] Although it is envisaged that the three Model Laws could be enacted separately, the logical route would be to combine them as a single cross-border platform. To this end, UNCITRAL has also released an illustrative text in the Consolidated Text of the UNCITRAL Model Laws on Cross-Border Insolvency, Recognition and Enforcement of Insolvency-related Judgments and Enterprise Group Insolvency (2021).[107]

5.4.5 Common-law approach

In common-law countries, the common law may also allow courts to deal with cross-border insolvency matters, or even to develop such principles. But it 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.[108]

5.5 Some Concluding Remarks

Only a few years ago, commentators painted a gloomy picture of the possibilities of finding solutions to cross-border insolvency cases. It was noted that neither national nor international initiatives were very effective (except for a few exceptions). Since then, though, the EU Regulation has (finally) been adopted and has entered into force, and countries are still working towards implementing the UNCITRAL Model Law. Other initiatives have continued and new ones have been added, which has placed the issue safely on the international agenda. Additionally, insolvency practitioners, judges, government officials, and academics now meet regularly, providing 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 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. With no domestic rules relating to cross-border insolvency, or where these 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 be noted, though, that there is not always a uniform approach between States in applying these rules.

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[106] See MLCBI Guide paras. 1–4; MLIJ Guide paras. 1, 35–41; and MLEG Guide paras. 1–3 and 14.

[107] **https://uncitral.un.org/en/consolidated-text-uncitral-model-laws-cross-border-insolvency-recognition-and-enforcement**

[108] 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

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

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

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

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 laws are an obstacle to the smooth development of cross-border trade and a uniform global insolvency cross-border dispensation. When countries within certain geographical regions have legal systems (including insolvency law) based on similar outlooks, a good basis exists on which to try to align the national insolvency law systems. Taken from the viewpoint of fair and equal treatment of (classes of) creditors, it may be felt desirable in these countries not to discriminate against creditors and to pay the creditors the same dividends out of a liquidated estate. To reach this result, a legal framework should be created in which insolvency judgments should be recognised or will at least be treated similarly in another country. Regional (multilateral) initiatives may find a fertile breeding ground where the respective countries have similar legal systems, often because 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. These multilateral initiatives are mainly a development of the last century, particularly the 1990s, e.g., NAFTA (between the USA, Canada, and Mexico) in 1994, OHADA (between several African States) in 1995, and finally the entry into force of the EC Insolvency Regulation on 31 May 2002, which perhaps also served as a kind of catalyst for later initiatives to work to harmonise domestic insolvency laws.

To note: 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 Southern African Development Community (SADC) is a treaty signed by five Southern African States in 1992, 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. (Nonetheless, some African countries are introducing new legislation based on the UNCITRAL Model Law on Cross-Border Insolvency (1997).)

In August 1992, in Namibia, a treaty was signed that established the Southern 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 Zimbabwe discouraging joint cooperation.

Boraine and Olivier (2005) added that besides a development in which the UNCITRAL model law is a key driver in the arena of insolvency law, there are important lessons to be learned in the labour relations field in seeking to develop and implement uniform policies for the region in the field of labour law. The disparities in the countries mentioned showa 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 harmonised cross-border insolvency regime, be it through consistent incorporation of the Model Law into domestic law of the member states, or through a SADC treaty, will pave the way for an increase in trade and investment between member states and create the desired legal certainty.

To note: There are, however, no talks underway to work to harmonise 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 developing a regional insolvency law regulation, which in principle will apply to Indonesia, Thailand, The Philippines, and Korea.

***ADB*:** following the financial crises that swept through Asia in the mid 1990s, ADB launched a project at the end of 1998 to review insolvency law and neighbouring laws (company law; securities law) in 11 countries in the region. To solve cross-border insolvency issues (obstacles being 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.

Various national legal systems face the tremendous growth of international trade and the effect of technological developments offering the possibility of communicating and carrying out business in 'real time'. The rise of multinational corporate groups raises many legal questions about how these businesses are organised, financed, and supervised and how they enter, and operate in, certain markets in various countries. International

regulation, in theory, is essential to designing 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'.[109]

Whereas the '***hard law'*** approach (conventions, treaties) shows disappointing results, uniform rules or codes have been developed through 'soft law'. These uniform rules or codes originate from 'standard setting agencies' (or 'formulating agencies') and focus on forms of harmonisation 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 organisations) 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. As these forms 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 less than positive law does, as soft law is not legally enforceable.

Several international initiatives have been launched to enhance the establishment of proper insolvency laws that may go some way to draw systems closer. In this regard, two prime documents are

- **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 and more recent 2021 update, see www.worldbank.org/gild and https://www.worldbank.org/en/topic/financialsector/brief/the-world-bank-principles-for-effective-insolvency-and-creditor-rights**).**

6.4 UNCITRAL Legislative Guide on Insolvency Law of 2004

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

[109] See Rosabeth, Moss & Kanter, *World Class; Thriving Locally in the Global Economy* (1995), 7.

- **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 implementing these 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.

For international insolvencies, Recommendation 172 of the Guide proposes that an insolvency law should specify that similarly ranked creditors, no matter 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 an insolvency law must state 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 before 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 this commencement must be determined in terms of the principles of the private international law 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 applicable law (Recommendations 33 and 34).

The Legislative Guide differs from the EU Regulation in that the Guide has two exceptions and the Regulation in its current format has 11 exceptions to the *lex concursus* principle. The Guide 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 was appointed in 2003 to deal with this difficult aspect. 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 general, the EU is working towards a more harmonised approach to its various domestic insolvency systems, following a 2010 Report on the Harmonisation of Insolvency Law at EU Level.[110] Aspects considered are:

- a common test for insolvency on of the requirements to open a formal insolvency process;
- the procedural aspects in lodging and dealing with claims in insolvency;
- aspects like the adoption and contents of reorganisation plans;
- rules about detrimental acts;
- the interrelationship between contractual rights of termination and insolvency; and
- directors' responsibilities.

Since 2014 there has been some development in relation to business rescue

[110] https://www.eesc.europa.eu/sites/default/files/resources/docs/ipol-juri_nt2010419633_en.pdf.

"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. The EC considers that these differences across the community serve as disincentives for businesses and cross-border investments. The Recommendation is aimed at harmonising and encouraging greater coherence amongst 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).

On 20 June 2019 EUP published Directive 2019/1023 on preventive restructuring frameworks_setting standards on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt.

- **Key elements of the procedure envisaged by the Restructuring Directive include:**
  - (a) **debtors remaining in possession** of their assets and day-to-day operation of their business;
  - (b) a stay of individual enforcement of actions;
  - (c) the ability to propose a restructuring plan that
    - includes a **cross-class cram-down mechanism** whereby the plan is imposed on dissenting creditors in a class and across classes.
  - (d) protection for new financing and other restructuring-related transactions.

7 SELECT ISSUES FOR DISCUSSION

These issues are often 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 to forge 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

Given several important differences between the types of real securities, the procedure to bring about such rights and their consequences, this remains one of the difficult areas to deal with at a cross-border level. In fact, it was described as the next frontier in Cohen *Harmonizing the law Governing Secured Credit* 33 *Texas LJ* 1-16.

Many instruments assume that pre-required rights acquired in terms of the general law of a particular jurisdiction, such as 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

Article 16(3) of the UNCITRAL Model Law creates apresumption that the registered office or the habitual address in the case of an individual is the COMI.

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) 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'.[111] 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 moved to another Member State within a period of 6 months prior to the request for the opening of insolvency proceedings'.[112]

Various notes:

- Compare the EU Insolvency Regulation (current and new, recast) treatment relating to COMI with the UNCITRAL Model Law.

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

- Westbrook identified two primary factors of importance in dealing with cross-border insolvency matters::
    - Predictability, and
    - The likelihood of the selection of acceptable substantive law to be applied in a particular instance.

- These four bankruptcy policies should be governed by the law of the main proceeding:
    - Control;
    - Priority;
    - Avoidance; and
    - Reorganisation.

7.7 Foreign compromises

Within the broad development of international insolvency, the recognition and enforcement of foreign proceedings granting a discharge or compromise of debts, including foreign schemes of arrangement, seems to be rather important lately. In this regard and in view of the judgment in *Gibbs & Sons v. La Société Industrielle et Commerciale des Métaux* [1890] LR 25 QBD 399, (dubbed the "*Gibbs* rule"), English law does not recognise a discharge or compromise resulting from a foreign proceeding when the debt is governed by English law. The result is that in an applicable set of facts English creditors will in spite of a foreign proceeding providing as such, still be able to enforce their debts in England or

[111] "Council Proposal of 3 June 2014, footnote 21" – Wessels and Boon at 87.
[112] *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)."

Wales.[113] The rule still applies in a number of common law jurisdictions.[114] The rule is criticised for flying in the face of modern day views on cross-border insolvency, and in particular for defying modified universalism.[115] This rule is currently a significant discussion point since it may also hamper cross-border efforts to reorganise the affairs of financially distressed companies. In terms of Chapter 15 of the US Bankruptcy Code, a US court may recognise or enforce a debt adjustment, restructuring or liquidation plan, or a similar arrangement, including a scheme of arrangement.[116]

[113] See D, Cottle and K, Tewari, at https://www.lexology.com/ library/ detail.aspx?g=b89363e8-d0b2-4956-9f05-6c065cdce5dc

[114] See for instance A, Smith and A, Boraine, "South African Creditors May Wield the *Gibbs* Rule to Confront an Italian Pre-Insolvency Statutory Restructuring Composition" accepted for publications by *CILSA*, pp. 1-55.
[115] DT, Moss and MG, Douglas, at https://www.jonesday.com/en/insights/2019/04/bankruptcy-court-in-chapter-15-case
[116] SeeF,Vazquez at https://www.nortonrosefulbright.com/en/knowledge/publications/ 615b91bb/united-states

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 operation. These laws are measured not against arbitrary or abstract principles but against international standards and best practices in documents such asthe UNCITRAL Legislative Guide on Insolvency Law and the World Bank's Principles and Guidelines for Effective Insolvency and Creditor Rights Systems. Of course, the nature and content of insolvency laws will, and must, vary from jurisdiction to jurisdiction 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 must 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 lack the core elements 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 applying 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 help read **Bewick., et al.,** *Ethical Principles for Insolvency Professionals* (2019), Insol Int.]

PRINCIPLE 1 – QUALIFICATIONS AND LICENSING GENERALLY

The position is one of trust, so this person should hold qualifications and be of good character, licensed, and regulated by a professional body.

The regulatory framework should therefore provide for:

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

PRINCIPLE 2 – APPOINTMENT IN AN INSOLVENCY CASE

Predictability and fair procedure

The law should thus state:

- Grounds on which an office-holder may be ineligible for appointment in a particular case;
- The body that may appoint this 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 the debtor's 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 for reviewing appointment;
- Process for review;
- If the appointment is set aside, then the appointment of another person.

PRINCIPLE 4 – REMOVAL, RESIGNATION AND DEATH OF 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:

- The basic standards;
- By secondary legislation provide standards for reports, collection and safeguarding of assets, trading, keeping of records, convening and conducting creditors' meetings, sale and other disposal of assets, opening and operating a bank account, and dealing with reorganisation plans.

PRINCIPLE 7 – REPORTING AND SUPERVISION

Creditors and other interested parties need to be informed about progress

The law should thus provide for:

- Regular reporting;
- Creditors' committees to oversee work of office-holder in some cases;
- Monitoring the performance of office-holder.

PRINCIPLE 8 – REGULATORY AND DISCIPLINARY FUNCTIONS

Level of work requires above

The law should thus provide for:

- Government body with powers;
- Grounds for investigation;
- Powers of regulatory body;
- Disciplinary powers;
- Right of appeal.

PRINCIPLE 9 – REMUNERATION AND EXPENSES

Described as critical part.

The law should thus provide for:

- Office holder entitled to remuneration;
- Determined by court or other body;
- Basis for calculating remuneration;

- Review or appeal;
- Payment of remuneration from 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 effluxion of time, court order or upon application.

PRINCIPLE 11 – INSURANCE AND BONDING

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;
- Avoiding the perception of conflict of interests;
- Proper conduct between office holders.
- The Code to be binding and enforced by professional body.

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

- Criteria to who may be a 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.

8.3 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 for 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.

8.4 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 allowed seven Principles and 33 Guidelines. The Guidelines relate 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 [FOR REFERENCE PURPOSES]:

ANNEXURE A: 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 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 (from Wessels and Boon)

International Instruments and Commentary

Global

The World Bank

- 1. The World Bank – The World Bank Principles for Effective Insolvency and Creditor Rights Systems (Revised 2011), 2011 (Note: For 2021 revised text see - https://www.worldbank.org/en/topic/financialsector/brief/the-world-bank-principles-for-effective-insolvency-and-creditor-rights**)**
- **Note in particular its work to establish principles to deal with debt stressed and insolvent MSME's** As mentioned on a World Bank website (https://openknowledge.worldbank.org/handle/10986/26709) "[m]icro, small, and medium enterprises (MSMEs) are among the largest commercial users of insolvency systems. MSMEs are a significant part of the global economy – and just as there are large numbers of MSMEs, there are large numbers of MSME insolvencies. However, there are a very few

specialized legal regimes for MSME insolvency; most jurisdictions treat MSME insolvencies the same as for other corporate entities, or conversely, natural persons, despite MSMEs' unique attributes. This report considers the specific challenges of insolvent MSMEs (including the difficulties of defining MSMEs and distinguishing them from large corporate entities); reviews and analyzes how legislation in different jurisdictions deals with the challenges of MSME insolvency; and considers if existing international standards are sufficient to address MSME insolvency." To establish rules in this regard, the World Bank released report in 2017, namely the "Report on the Treatment of MSME Insolvency" and a revised edition in 2021.

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 B: UNCITRAL LINKS

- **ANNEXURE B.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 comes with a Guide to Enactment and Interpretation. This is directed mainly 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 ("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 B.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 B.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 C.1: UNCITRAL 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

Model Law, a cross-border insolvency is one where the insolvent debtor has assets in more than one State or where some 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 climbed 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 recognising qualifying foreign proceedings to avoid time-consuming legalization or other processes that often apply and to provide certainty with respect to the decision to recognise. 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 recognised 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 granted 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 in 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 in the discretion of the court for both main and non-main proceedings following recognition.

(d) Cooperation and coordination

These provisions address cooperation amongst 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 authorised. 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 comes with a Guide to Enactment. This is directed mainly 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 C2: 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 system aims 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 C3: 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. The Guide illustrates how the resolution of issues and conflicts that might arise in those cases could be facilitated by cross-border cooperation, in particular using 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 these regimes. Facing the difficulties of dealing with cross-border issues every day, 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 on article 27 of the UNCITRAL Model Law, discussing the various ways in which cooperation in cross-border cases might be achieved.

Chapter III examines the use of cross-border insolvency agreements, several 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, particularly the cases summarised in Annex I. "Sample clauses", based to varying degrees on provisions found in these agreements, are included to illustrate how different issues have been or might be addressed in practice**.**

- **ANNEXURE C4: 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. 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 about 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 comes with a Guide to Enactment and Interpretation. This is directed mainly 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
- Digest of Case Law on the UNCITRAL Model Law on Cross-Border Insolvency (2020) (advance copy)

- **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 53 States in 56 jurisdictions as at 19 March 2023: see https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency/status

C6: UNCITRAL INSOLVENCY GUIDELINES, 2004 [see Annexure E.3 below]

ANNEXURE D. INSOLVENCY REFORM MODELS: STANDARDS AND GUIDELINES

ANNEXURE D.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") is one of the twelve areas in which the joint World Bank and International Monetary Fund (IMF) Initiative on Standards and Codes undertakes assessments.

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. These texts serve as reference points for evaluating and strengthening countries' ICR systems.

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

The *Principles* were initially 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, 2011 and 2021.

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;
and for the 2021 revision see https://www.worldbank.org/en/topic/financialsector/brief/the-world-bank-principles-for-effective-insolvency-and-creditor-rights.]

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

The UNCITRAL *Legislative Guide* was completed in 2004 to encourage 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 discuss 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 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 D.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 ("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 D.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.)

- **ANNEXURE D.6: 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.

- **MSME Insolvency rules: World Bank, together with the United Nations Commission on International Trade Law (UNCITRAL) updated Principles for Effective Insolvency and Creditor/Debtor Regimes (ICR Principles)**
  - **Aim at simplifying** and improving the insolvency processes for micro and small enterprises and
    - **ensuring discharge of debts at the end of the process for natural person entrepreneurs**, among other things.

INSOL INTERNATIONAL

GLOBAL INSOLVENCY PRACTICE COURSE

Module A: Session 1
A Framework for International Insolvency

15 May 2023

Presenter: André Boraine

Unit for Business Rescue and Insolvency Law, University of Pretoria

SECTION A: GENERAL BACKGROUND

FRAMEWORK OF ESSENTIAL FEATURES OF AN INSOLVENCY SYSTEM
(Comparative platform)

A.
Essence of insolvency / bankruptcy

- Collective (individual/ piecemeal) nature / procedure
  - What is ?
- Meaning of insolvency?
- Liquidation of assets versus rescue

B.
Policy considerations (classification)

- Pro-creditor
- Pro-debtor
- Discharge (?)

C.
Sources and terminology

- Historical roots: Civil or (English) Common law
- Insolvency legislation (single Act or Code or fragmented)
- General law
- Terminology

Personal insolvency (individuals)	D. Common characteristics	Corporate insolvency
	E. Gateways and commencement (how insolvency proceedings are opened) • Court? • Other? • Who can apply? (*locus standi*) NB: Importance of commencement of formal state of insolvency	

	F. **Effects/ consequences of commencement**	
	F. 1 **Automatic stay** Moratorium on piecemeal/ individual debt collecting and execution procedures	
• Estate assets • Exempt/ excluded • Foreign assets	**F. 2** **Estate / property/ assets**	• Estate assets • Foreign assets
Rights, duties, liabilities and limitations of debtor as an individual	**F. 3** **Personal consequences and liability**	Rights, duties, liabilities and limitations of directors and officers

	F. 4 **Executory contracts** • General powers of Insolvent Estate Representative (IER) • Exceptions, e.g. labour contracts?	
	F. 5 **Set-off and netting (pre- and post-commencement)**	
	F. 6 **Avoidable dispositions**	

	G. **Administration of estate** • 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	
Discharge		**Corporate rescue**
• Process • Time periods		• Initiate - formal • Moratorium • Debtor in Possession / Rescue Practitioner (IER) • Post-commencement finance • Discharge • Creditors' committees

• Formal (statutory) repayment plans • Hybrids	**K.** **Alternatives (creditor workouts: consensual)**	• Formal / prescribed rescue / restructuring procedures • Non-formal: work-outs • Pre-packs
	L. **Cross-border dispensations** • Sources • Terminology • Approaches • Foreign discharge • [Gibs rule] • Differences in domestic laws **[Note: Quest is for predictability]**	

• Some systems: no collective procedures for individuals, or restricted to traders	**M.** **Special rules**	For example: • Banks, financial institutions • Groups of companies / corporations • MSME's • State Owned Enterprises • Non-profit associations • Municipalities • Sovereign debt

AD: SECTION A: GENERAL BACKGROUND

- **1 FRAMEWORK**
  - 1.2 LEGEND TO FRAMEWORK
    - A. ESSENTIALS OF INSOLVENCY/ BANKRUPTCY
- **2 CORE TERMINOLOGY**
- **3 HISTORICAL DEVELOPMENT AND SOME COMPARATIVE ASPECTS**
  - 3.1.2 Different systems of insolvency law (or insolvency law "families")

SECTION B: THE SOURCES AND NATURE OF INTERNATIONAL INSOLVENCY

Facts:

- ABC Co. Incorporated in USA
- Branches, affiliates or subsidiaries in England, Germany and SA
  - Conducts business operations
  - Treatment of branches/ affiliates/ subsidiaries ?
- Order in USA?
  - Effect in England, Germany and SA?

SECTION B: THE SOURCES AND NATURE OF INTERNATIONAL INSOLVENCY

Cross border insolvency:

- Debtor A operates in 20 jurisdictions: 20 cases? Differences in approach?
- Holding-subsidiary company relationships

Questions:

- What is international insolvency law?
- 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.

What is Int Ins law/CBIL?:

- In its simplest forms, a transnational insolvency involves an insolvency proceeding in one country, with creditors located in at least one additional country."
- In the most complex cases, it involves multiple proceedings, subsidiaries, affiliated entities, assets, operations and creditors in dozens of nations"
- Cannot always be fully enforced …

Considerations

- **Recognition** of foreign judgments & Private International Law principles (PIL)
- **Economic affairs** with foreigners
- **Interests in property** in more than one country
- **Contractual obligations** in various countries
- **Different national laws:**
  - Insolvency; and
  - Non-insolvency **(general law)**
- **Absence** of a global court, parliament, law
- **Territorial:** jurisdiction, local laws
- **Approaches:**
  - Universality v territoriality
  - Cooperate
  - Insular

Considerations

- **Risk of multiple insolvencies:**
  - Weaker creditors may lose out
  - Risk of fraud, asset dissipation across borders
  - Thus: dealings in various jurisdictions, assets different jurisdictions

- **Companies:**
  - Incorporated, operating etc
  - Groups of companies

Sources

- **Common law approach:**
  - **Underlying principles: Comity (and reciprocity)**
  - **Court's discretion** (inherent, common law)

- **Legislation:** (national and supra national? – EU; OHADA)
  - National law;
  - May be based on international instrument (Like Uncitral Model Law on Cross-Border Insolvency **and see** UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments)

Sources

- **Treaties**:
  - Historical examples: Verona
  - Nordic countries
  - South America
  - Europe
- **Protocols**:
  - Maxwell; UNICTRAL etc

Terminology

- **Policy based approaches:**
  - **Universality** (unitary approach)
  - **Territoriality** (plurality of proceedings)
  - Modified universality

- Collective proceeding v individual proceeding
  - Liquidation
  - Restructuring and schemes of arrangement

- **COMI**: Place of registration/ incorporation; other than place of incorporation, either headquarters (real seat) or its operations (like business, main assets); nerve centre; ascertainable by third parties.
  - DUAL COMI: Maxwell case: headquarters England but assets in USA
  - EU recast Insolvency Regulation and UNCITRAL

- **Main proceeding**:
  - At domicile; principal office; nerve centre (COMI) – universality
  - What law will regulate?
    - **Lex loci concursus ?**

- **Non main proceeding**: (secondary proceeding)
  - Modified universality (recognition order)
  - Local law will apply

Terminology

- **Concurrent proceeding**
  - Different bankruptcy proceedings running concurrently
- **Concurrent (full blown) insolvency order v Recognition order**
- **Recognition** (ancillary to main proceeding)
- **Foreign main proceeding (COMI issued order)**
- **Foreign non-main proceeding (debtor ahs some presence, establishment)**
- **Cooperation**

Terminology

- **Foreign representative**
- **Lex concursus**
- **Lex loci rei sitae** (property)
- **Inward and outward bound requests**
- **Public policy considerations**
  - **Exempt claims:** tax claims

Essentials for a developed CBI system:

- **Foreign representatives** - direct access
- A clear and speedy recognition procedure
- A moratorium or stay
- Non-discrimination between creditors
- Notifcation procedures
- Courts and administrators to cooperate
  - Goal of maximizing value of debtor's worldwide assets
  - Protecting the rights of both debtors and creditors and
  - Furthering just administration

Some practical considerations/ differences:

- Recognition of foreign judgments v foreign insolvency(collective proceedings)
- Importance of collective proceedings (v individual proceedings)
- Technical meaning of insolvency
  - Balance sheet/ cash flow
- Priorities/ preferential claims
- Avoidance law
- Executory contracts
- Labour dispensations
- Estate representative (IP) and structure for appointment etc
- Prior-acquired rights: securities (floating charge…)
- Rescue v liquidation approaches (pro creditor/ pro debtor)
- Funding of administration?/ contributions

… Some practical considerations:

- Fletcher poses 3 questions:
  - In which jurisdiction must procedure be opened?
  - Which system must rule elements of diversity?
  - International effects to proceedings in a particular forum?

Determinants:

- Type of assets
  - Location (lex loci rei sitae)
- The court first issuing the order:
  - Basis for jurisdiction? COMI – establishment?
  - Will the lex concursus regulate?
  - Adhere: universalism or territorialism?

Some current approaches

Regional supra-national systems:

- EU Recast Insolvency Regulation
  - COMI – determines jurisdiction of main proceeding
  - Lex concursus applies – but some exceptions re property; employment contracts and avoidance actions for instance
  - Procedures included: liquidation as well as hybrid and pre-insolvency proceedings
  - National searchable databases in each member state
  - Groups of companies; group coordination proceedings
  - **Note:** still different insolvency and general law systems
- OHADA
  - French speaking African countries
  - Bound by treaty: same national laws and central commercial court

Some current approaches

- **Own legislation or follow UNCITRAL Model Law on Cross Border Insolvency**
  - **See also UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments**

England and Wales
- Inward bound request for recognition (s 426)
- EU Insolvency Regulation
- UNCITRAL Model Law on Cross-Border Insolvency
- Common law
- Brexit?

USA
- Former s 304 of the USA BR Code
  - Universal effect, modified universality
- Since 2005, Chapter 15 adopted Model Law

Some current approaches

RSA

- Dual system (in theory)
  - Common alw and UNCITRAL based legislation
  - Due to designation and reciprocity

Japan

- At earlier stage no assistance (insular approach)
- Now EU model law

Germany

- Statutory
- EU Insolvency Regulation

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

- Harmonise local laws? (OHADA example)
- Difficult areas for harmonisation, like:
  - **Voidable dispositions**;
  - **Labour contracts**; Special cases: i.e. labour contracts?
  - **Types of claims**:
    - Secured (securities)
    - Priorities
- **Next evolutionary step in EU?** – 12 March 2014 Recommendation: New Approach to Business Failure: harmonise EU members' laws

SECTION C: THE HARMONIZATION OF NATIONAL INSOLVENCY LAW

- **On 20 June 2019 EUP published Directive 2019/1023 on preventive restructuring frameworks**
- setting standards on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt.
- **Key elements of the procedure envisaged by the Restructuring Directive include:**
  - (a) **debtors remaining in possession** of their assets and day-to-day operation of their business;
  - (b) a stay of individual enforcement of actions;
  - (c) the ability to propose a restructuring plan that
    - includes a **cross-class cram-down mechanism** whereby the plan is imposed on dissenting creditors in a class and across classes.
  - (d) protection for new financing and other restructuring-related transactions.

SECTION C: THE HARMONIZATION OF NATIONAL INSOLVENCY LAW

- **Recognition of discharges/ compromises of debt based on foreign proceedings**
- English law, *Gibbs* rule (*Gibbs & Sons v. La Société Industrielle et Commerciale des Métaux* [1890] LR 25 QBD 399) allows creditors to enforce in England and Wales in spite of foreign proceeding
  - *Gibbs* rule still applied in a number of foreign jurisdictions
- Some criticism: out of touch with modified universalism and hampers cross-border recognition of foreign schemes of arrangement etc
- USA ch 15 may also apply to such foreign proceedings

SECTION D: PRINCIPLES RELATING TO THE QUALIFICATIONS OF ESTATE REPRESENTATIVES

- Insolvent Estate Representative (qualifications etc.?)
  - Who?
  - Licensing?
  - Regulation? (Important for recognition)
  - Note: important for cross-border insolvency

Regulation of insolvency representatives

EBRD Principles:

P 1 – Qualifications & licensing generally
P 2 – Appointment in an insolvency case
P 3 – Review of office holder appointment
P 4 – Removal, resignation & death office holder
P 5 – Replacement of office holder
P 6 – Standards professional conduct
P 7 – Reporting and supervision
P 8 – Regulatory and disciplinary
P 9 – Remuneration and expenses
P 10 – Release of office holder
P 11 – Insurance and bonding
P 12 – Code of ethics

World Bank Principles:

UNCITRAL LGIL (2004) [Part 2, chap. III, paras. 35 -74.]

SECTION E: INTERNATIONAL INSTRUMENTS

- **UNCITRAL**: Cross-border insolvency and other instruments
- IMF, World Bank and OECD documents.
- **Other insolvency related documents**
  - Summary: Wessels and Boon

SECTION E: INTERNATIONAL INSTRUMENTS

- **UNCITRAL MODEL LAW: CROSS-BORDER INSOLVENCY (1997)**
  - 2022 celebrated 25 years and 56 States adopted it
  - See also supportive UNCITRAL documents
- **Review?:**
  - **UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments** (2018)
  - To further regulate insolvency related judgments.
    - Adopt as a stand-alone or incorporate - to further support the UNCITRAL Model Law on Cross-Border Insolvency.

SECTION E: INTERNATIONAL INSTRUMENTS

- **UNCITRAL Model Law on Enterprise Group 2019**
  - To provide effective mechanisms to address cases of enterprise group in cross-border matters and cooperation between courts etc.

- **MSME Insolvency rules: World Bank, together with the United Nations Commission on International Trade Law (UNCITRAL) updated Principles for Effective Insolvency and Creditor/Debtor Regimes (ICR Principles)**
  - Aim at simplifying and improving the insolvency processes for micro and small enterprises