33 Insolvency law*

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1 GENERAL

The domain of insolvency law is concerned with the prevention, regulation and administering of the discontinuity in legal relationships of a person (legal person or natural person) which finds itself in financial problems. The inability to fulfil payment obligations and the legal consequences that go with this form the core content of most countries’ existing national insolvency legislation. It is widely known that individual countries’ national legal systems with regard to insolvency differ quite extensively. In general four reasons form the basis for this assessment.

1. Differences in market structure: where ‘insolvency’ is related to the economic and financial structure of a market, and many market regulations take place within the confines of a national state, a government influences this structure, e.g., countries with a market-led economy versus countries with a more social economic policy. The latter for instance contain the former Soviet Bloc countries, with economies in transition. In addition, the tradition of the way business is financed will influence the robustness of rights of a creditor; e.g., in some markets the financing of business through stock-listed shares or bonds is well developed, in others the common method of finance is through (secured) credit either from a bank or from members of the family.

2. Differences in the general legal system: as in other legal domains, insolvency law is under the influence of the overall legal system of a country, being a common law jurisdiction or a civil law jurisdiction. In the former, in general the importance of case law, with an active role for a court, is stressed in comparison with countries based on statute law (law in codes). Some groups of countries may have a general legal system influenced by relatively new sources of law, e.g., in Europe, the so-called ‘acquis communautaire’ (Smits, 2004).

* See also: Consumer protection; Personal and real security; Transfer of movable property.
3. Differences in the structure of private law: in many countries the structure of general civil law and commercial law is a matter of continuous discussion. Some countries aim to insert both into one code (the Netherlands); others (Belgium, Germany, France) use different codes and some adjust the judicial framework accordingly. In some countries specialized bankruptcy courts decide with regard to insolvency proceedings (USA); in most others the general civil or commercial law courts have jurisdiction in these matters. Some law faculties organize courses and lectures on insolvency law within classes on procedural law, others in connection with the laws on security; others again treat insolvency law as an independent field of law. Some academics regard international insolvency law as a matter of national law (because its related provisions are formally included in a nation’s Insolvency Act), others see this part of law as a topic of private international law.

4. Differences in insolvency law itself: in relation to existing market organization, the goals of insolvency proceedings may differ – plain liquidation of assets or, in addition, reorganization with the aim of rescuing the enterprise and/or preserving existing employment. Some insolvency law systems do not provide for insolvency proceedings for certain types of debtors or have (only recently) introduced specific proceedings, such as debt discharge proceedings for natural persons.

In all, ‘national attitudes towards the phenomenon of insolvency are extremely variable, as are the social and legal consequences for the debtors concerned’ (Fletcher, 2005, 4).

2 SHORT HISTORY OF COMPARATIVE INSOLVENCY LAW

Given these differences, one can understand that a general standard work with regard to comparative insolvency law is still lacking. Academics around the turn of the 19th to 20th century developed theories and ideas aimed at resolving the typical questions of private international law (applicable law; international jurisdiction of a court; recognition of a judgment opening insolvency proceedings; recognition of a liquidator’s powers abroad): see Jitta (1895) and Meili (1900). From an international angle, these questions have dominated legal thinking until the last decade (Nadelmann, 1942–3; Blom-Cooper, 1954; the essays in Voskuil et al., 1989). In the 1990s, with Dalhuisen (1968) as a forerunner, treatment of insolvency issues in a comparative context became more common. These publications contain (a) reviews of insolvency law systems of specific
countries (with an overview of current developments and future prospects), (b) descriptions of a country’s treatment of certain specific issues, like the ranking of creditors, voidable transactions or personal liability of company directors, (c) a comparison of certain underlying principles or the specific elements of the available insolvency proceedings, mainly with regard to the US, the UK and Canada (Fletcher, 1990, 1992; Ziegel, 1994) and (d) the treatment of topics of international insolvency law (Ziegel, 1994; Cooper and Jarvis, 1996). Lawyers and legal academics, with good reason, are aware of the limited results that comparing legal systems may offer; see Gilson’s caution: ‘bankruptcy systems in different countries cannot be meaningfully compared without controlling for differences in the legal, regulatory, and economic environment in which firms operate’ (Ziegel, 1994, 266).

3 PROMINENT PRINCIPLES OF DOMESTIC LAW

However, in the legal literature of the last 15 years some common features have been identified, which may be regarded as quite generally accepted prominent principles of insolvency law.

1. The principle of collectivity. Insolvency law results in a system within which actions by individual creditors against the debtor are frozen as these are replaced by the idea of the rule of joint execution against the assets of the insolvent debtor.

2. The notion of a common pool. As a result of the first principle the piecemeal execution of assets by creditors is stayed and replaced by a right to claim for a dividend against the pool. The rule of joint execution concerns all assets in the pool, which is available to pay all creditors’ claims.

3. Equal treatment of creditors. The principle of pari passu payment to creditors means the pro rata payment out of the assets according to their claims.

4. The principle of respect for pre-insolvency rights. In general, insolvency law systems respect duly acquired and perfected rights prior to the commencement of proceedings. Here another principle comes into play: the principle of certainty and predictability of secured rights, created in the context of providing credit.

In 2007, Wood observes that the first principle is almost universally followed, but that the second proposition is eroded by exceptions and the third proposition ‘is a piece of ideology which is nowhere honoured’
(Wood, 2007, 4). The aforementioned principles are connected to a type of proceeding one generally finds in domestic legislation and which has as its focus the liquidation of a debtor’s assets. A common denominator which is now encountered more and more is related to point (5).

5. Several proceedings. Many legislations contain a proceeding (in addition to liquidation) which is based on the principle of a composition or an arrangement concluded between the debtor and his creditors, which is binding upon a given percentage of a dissenting minority of creditors (sometimes referred to as ‘cram-down’). A characteristic feature of these types of proceedings, aimed at reorganizing the debtor’s business, is the fact that attempts to restructure or reorganize enterprises can only be initiated by the debtor himself or at least cannot be against his will.

6. Flexibility of insolvency legislation. Many countries furthermore have come to understand that the existing legal framework does not meet the challenge ‘to achieve economic results that are potentially better than those that might be achieved under liquidation, by preserving and potentially improving the company’s business through rationalization’ (Parry, in Gromek Broc and Parry, 2004, 2). The Chapter 11 rescue proceeding, introduced under the US Bankruptcy Reform Act 1978, has provided an example for legislators in quite a number of countries of how to amend their legislation (e.g., Germany, 1999) or to introduce a model based on the rationale behind these proceedings (e.g., France in 2005).

4 GUIDING APPROACHES TO INTERNATIONAL INSOLVENCY LAW

In spite of the above, Fletcher rightly acknowledges that within insolvency law ‘the dissimilarities are so numerous, and so substantial, as to oblige the realist to accept that the world essentially consists of separate, self-contained systems’ (Fletcher, 2005, 11). The same seems to be true of the treatment of international insolvency cases, being ‘instances of cross-border insolvency’, which include ‘cases where the insolvent debtor has assets in more than one State or where some of the creditors of the debtor are not from the State where the insolvency proceeding is taking place’ (UNCITRAL, Guide to Enactment, 1997, no. 1). International insolvency law contains ‘the body of rules, which concern facts with an international element that are relevant in the context of insolvency law’ (Kolmann, 2001, 3) and in this domain also many states have created their own rules,
as international insolvency law is commonly treated as national law, because every state has to determine how to react to cross-border issues in insolvency proceedings.

International insolvency cases cause a great number of sometimes rather complex legal questions, like the international jurisdiction of a court, the law applicable to insolvency proceedings and on the substantial and procedural effects of these proceedings, for example, on the legal position of creditors from abroad, the issue of recognition of proceedings which have been opened abroad, the powers of a liquidator or administrator who has been appointed abroad, etc. From way back, the issues to be solved concerning cross-border insolvencies are approached from two points of departure, being: universality and territoriality.

In the universality model an insolvency proceeding is seen as a unique proceeding reflecting unity of the estate. The proceedings should contain all of the debtor’s assets, wherever these assets are located. In this approach the whole estate will be administered and reorganized or liquidated according to the rules of the law of the country where the debtor has his domicile (or registered office or a similar reference location) and in which country the proceedings have been opened. The applicable law to the proceedings and its legal and procedural consequences is the law of the state in which the insolvency measure has been issued. This law is referred to as ‘lex concursus’, ‘lex forum concursus’ (or forum law), being the law (‘lex’) of the country where a court (‘forum’) opened an insolvency proceeding (dealing with concurring claims of creditors: ‘concursus’) and which court is (or has been) charged with hearing, conduct and closure of the proceedings. The liquidator (or administrator) in this approach is charged with the liquidation (or reorganization) of the debtor’s assets all over the world of which the debtor himself (partly) has been divested and is respectively charged with the supervision of the administration of his affairs. The ‘lex concursus’ determines all consequences of these proceedings, for example, with regard to current contracts, the powers of an administrator and the bases and system of distributing dividends to creditors.

The territoriality model takes as a basic idea that the respective insolvency measure will only have legal effects within the jurisdiction of the state a court of which has opened the insolvency proceedings. The legal effects of these proceedings therefore will stop abruptly at this state’s borders. The limitations these proceedings will bring to a debtor’s legal authority to administer his assets are not applicable abroad. Assets in other countries will not be affected by these proceedings and the administrator who is appointed will not have any powers abroad.

These points of departure are both ends on a scale. Several other theories or approaches have been developed (LoPucki, Rasmussen, von
Wilmowski, Janger, Kipnis; see Kolmann, 2001, 468; Westbrook, 2004; Wessels, 2012). In practice, most countries modify or limit the sharp edges of these theories and have introduced modified or mixed models. These ‘in between’ models are mostly referred to as ‘modified’, ‘limited’ or ‘controlled’ universalism, as most of them have at their core a universalist element. The EU Insolvency Regulation (see below) is based on a mixed model, also referred to as ‘coordinated’ universality (see Wessels, 2012) or ‘Mitigated Europeanism’ (thus Veder, 2004, 107).

5 FORMS OF REGULATION

Basically three forms of regulation have been applied within which the primary goal has been to prevent or resolve conflicts between systems of insolvency law in international insolvency cases. Some of these forms, directly or indirectly, have led to the alignment or the harmonization of (parts of) insolvency law. They are (i) unilateral regulation, (ii) conventions and treaties, and (iii) regional regulation.

(i) Unilateral regulation  Admitting that a model of (pure) universality would be unfeasible without the support of a worldwide treaty, some states have created in the last quarter of the 20th century and the first decade of the 21st century their own regulation for providing solutions in international cases. The best-known examples are Section 304 US Bankruptcy Code (1978, now repealed) and Section 426 UK Insolvency Act 1986. The central idea is to give assistance to a foreign representative of an insolvency proceeding. Compared to Section 426 Insolvency Act 1986 it is noticeable that the approach of Section 304 US Bankruptcy Code is universal, since foreign representatives of all nations may receive assistance through an ‘ancillary proceeding’, while the English approach is limited to some 20-odd (mainly former Commonwealth) countries. These provisions, however, are similar in that both give discretion to the individual court, although the US court will be guided by the elements, laid down in Section 304(c), more specifically ‘comity’. The model of unilateral regulation is followed by some 20 countries, including Australia, Canada, India and New Zealand and has been followed by Germany, Romania, Poland and Belgium (Wessels, 2004, 201; Ho, 2009).

(ii) Conventions and treaties  To overcome contrasting approaches to international insolvency cases, groups of countries have concluded conventions to align certain legal matters. The phenomenon actually started in the 12th century. For historic data see Omar (2004b) and Wood (2007,
Within a period of over a hundred years, mainly between the 1880s and the 1990s, some 25 bilateral conventions were concluded, mainly between continental European states, aiming at recognition of foreign insolvency proceedings. Mutual recognition was laid down in different forms. In many instances these treaties contain provisions with regard to applicable law. The method of bilateral treaty, however, seems outmoded (Wessels, 1999, 247). Since 31 May 2002, the EU Insolvency Regulation (InsReg) has replaced these conventions, in respect of the matters referred to therein, in the relations between EU member states. Where these had been concluded since the early 1990s between several Central and Eastern European states, they have also been replaced by the EU Insolvency Regulation as of 1 May 2004.

(iii) Regional regulation

Regional initiatives often flow from countries or (economic) groups of countries with a similar or comparable range of thinking on economic and legal issues, shared legal cultures and close commercial relationships. The following regions should be mentioned.

**Latin America**

The Montevideo Treaty on International Commercial Law of 1889 has been concluded between or ratified by Argentina, Bolivia, Columbia, Paraguay, Peru and Uruguay. Its subject is ‘international commercial law’. In 1940, Argentina, Paraguay and Uruguay approved a revision, the Montevideo Treaty on International Commercial Terrestrial Law (Wood, 2007, 892). Fletcher (2005, 285) concludes: ‘Given that the members of this regional grouping of Latin American states are linked by a common legal heritage … it is initially somewhat surprising to discover that the Montevideo Treaties make only a modest attempt to impose a unified, regional approach to the process of administration and distribution of a multi-jurisdictional estate.’ The Havana Convention on Private International Law of 1928, concluded between 15 Latin-American and Middle-American states, builds on the concept of unity of insolvency proceedings and universality in its effect, resulting in an ‘extraterritorial effect’ for the proceeding as well as for the powers and functions of a trustee.

**Northern Europe**

The Nordic Bankruptcy Convention was concluded in 1933, between Denmark, Finland, Iceland, Norway and Sweden. The Convention, revised in 1977 and 1982, is built on the very similar resemblance of the legal systems and the conformity in approach to insolvency law of these countries. The Convention in principle is based, within its Nordic territory, on universality of the insolvency proceeding opened in one of the...
states, applies the lex concursus within the whole territory and attributes to the administrator wide-ranging powers, to be exercised in all five countries. In respect to the matters referred to therein, with regard to Finland and Sweden the Convention has been replaced by the EU Insolvency Regulation. See Bogdan (1994).

**North America**
The North American Free Trade Agreement (NAFTA), concluded in 1994 between the USA, Canada and Mexico, has led to renewed interest in searching for a solution to cross-border insolvencies within the aforementioned states. In the context of NAFTA certain rules have been concluded under the auspices of the American Law Institute (ALI). In 1994, ALI, for the first time in its existence, took up the topic of private international law, the ‘Transnational Insolvency Project’, as part of the process of economic integration between the signatories of NAFTA. The project’s eventual goal was to develop principles and procedures for managing the general default of a debtor having its centre of interest in a NAFTA country and assets, creditors, debtors and operations in more than one NAFTA country (Westbrook, 2001a). In 2001, ALI approved a set of principles, drafted in the context of the Transnational Insolvency Project, called ‘Principles of Cooperation in Transnational Insolvency Cases Among the Members of the North American Free Trade Agreement’ (Beavers, 2003). These ‘Principles’ comprise seven ‘General Principles’, 27 ‘Procedural Principles’ and seven ‘Recommendations for Legislation or International Agreement’. In addition to these Principles, there is an Appendix: ‘Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases’ (Westbrook, 2001b). The Guidelines have been applied by courts in Canada and the USA on a regular basis.

**Central Africa**
OHADA is the abbreviation of ‘Organisation pour l’Harmonisation en Afrique du Droit des Affaires’; in English: Organization for the Harmonization of Business Law in Africa (sometimes: OHBLA). The Treaty was signed in 1993 and, after having received the required number of ratifications, came into effect in July 1995. OHADA has 16 members, West African and Central African countries that have in common the French language and the French legal tradition. The Treaty focuses on economic collaboration and integration by means of harmonization of laws laid down in standardized Acts. OHADA has a Standard Act Relating to Organization of Collateral, Collection and Enforcement Procedures and Bankruptcy Proceedings. Within this legal framework the Uniform Act Organizing Collective Proceedings for Wiping Off Debts has
been introduced. The Uniform Act entered into force on 1 January 1999 (Issa-Sayegh, 1999). It reflects in its key points French national insolvency law as it stood in the mid-1990s, including three insolvency proceedings (Agboyibor, 1999). The Uniform Act contains in Arts 247–56 ten provisions relating to international insolvency law (Assogbavi, 2000; Owusah-Ansah, 2004). The Act excludes from its scope debtors which do not act in the course of a profession or a business. Moreover, the Act excludes farmers and craftsmen. With regard to the international provisions of the Uniform Act itself, the similarities with the EU Insolvency Regulation are striking (Frilet, 2007; Wessels, 2012).

Europe
On 31 May 2002 the Regulation (EC) no. 1346/2000 of 29 May 2000 on insolvency proceedings (InsReg) entered into force. A Regulation is a European Community law measure which is binding and directly applicable in member states. The Regulation does not apply to Denmark. The goals of the Regulation, with 47 articles, are to enable cross-border insolvency proceedings to operate efficiently and effectively, to provide for coordination of the measures to be taken with regard to the debtor’s assets and to avoid forum shopping. The InsReg, therefore, provides rules for the international jurisdiction of courts in a member state for the opening of insolvency proceedings, the (automatic) recognition of these proceedings in other member states and the powers of the ‘liquidator’ in the other member states. The Regulation also deals with important choice of law (or private international law) provisions. The InsReg applies entirely and directly to the ten member states which joined the EU on 1 May 2004 and to Bulgaria and Rumania, joining in 2007. The InsReg has resulted in some 500 court cases, including rather decisive ones, e.g., the Court of Justice of the European Union regarding Eurofood (Parmalat) (Schmidt, 2010), which also influenced US courts’ determination of international insolvency (Duursma-Kepplinger et al., 2002; Pannen, 2007; Moss et al., 2009; Wessels, 2012). Art. 1(1) EU InsReg excludes from its scope insolvency proceedings concerning insurance undertakings, credit institutions, investment undertakings, holding funds or securities for third parties, and collective investment undertakings (Moss and Wessels, 2006).

South-East Asia
Under the auspices of the Asian Development Bank (ADB) progress is made through the provision of regional technical assistance (RETA) to develop a regional regulation of insolvency law, which in principle will be applied to Indonesia, the Philippines and Korea. Two strands of development are crucial: first, renewal of the insolvency law, for which 16 ‘Good
Practice Standards for Insolvency Law’ have been suggested; second, alignment of a system of securities law with the insolvency law being developed has been recommended (Tomasic, 2006).

6 CONVERGENCE

Under the heading of ‘convergence’, I assemble a number of tendencies that reflect the fact that those who are involved in insolvency law (states, insolvency practitioners, courts, academics) are not restricted to their own national set of legislation or rules. The first group reflects general movements in national legislation. The other group of sources provides material which may offer legitimacy in that they come to the surface through (circles in) society, reflecting fairly generally accepted views or practices. It should be noted, though, that the treatment below aims to be just an interim enumeration as the materials are a selection and differ in the sources they are derived from, their legally binding character, the goals they aim to achieve and the different legal underpinnings, let alone the willingness of states and other actors (courts, practitioners, institutions) to appreciate, adopt or carry out their terms conscientiously. The aforementioned groups of tendencies are: harmonization through legislation, soft law, modelling and guiding, and principles.

6.1 Harmonization through Legislation

As demonstrated under ‘regional regulation’, some of the examples align or harmonize certain features or topics of (international) insolvency law. Uniform or harmonized law is aimed at the avoidance or regulation of the problems which arise when two or more different rules of different countries exist. In Europe many countries have revised and amended their legislation on insolvency law over the last two decades. Here one may detect two tendencies. The first is consumer insolvency. Since the 1980s specific legislation to deal with consumer debt has been introduced in more than ten EU countries. Enacted proceedings often mirror the so-called ‘fresh-start’ doctrine, as laid down in Chapter 13 US Bankruptcy Code (Huls, 1994; Jurisch, 2002). The Netherlands, Belgium and Germany followed in the late 1990s.

Corporate rescue is the second tendency. Substantial revision has taken place in countries like England and Scotland, France and Belgium and, in 1999, Germany and Italy. Poland and Romania followed in 2003, Spain in 2004, and in France (again) and Germany (2011) a substantial revision is under way. Although even the more recent insolvency laws in several
European countries continue to show substantial differences in underlying policy considerations, in structure and in the content of these laws, in most of these jurisdictions there is openness towards corporate rescue procedures, which are an alternative to liquidation procedures. In many of these countries the US Chapter 11 procedure has served as a model for legislators (Gromek Broc and Parry, 2004).

6.2 Soft Law

Generally ‘soft law’ is understood to mean a way of regulating certain issues in a non-enforceable way, brought about by (directly) involved participants in a certain sector or field (individuals, representative organizations) by means of mutual discussion and agreement. Soft law expresses itself in forms such as a model contract, ‘precedents’, ‘standards’, guidelines, records of certain customs, codes or protocols. Most notable for insolvency law in this respect are the following.

Cross-Border Insolvency Concordat of 1995  This Concordat is drafted by Committee J on Insolvency, Restructuring and Creditors’ Rights, a section of the Legal Practice Division of the International Bar Association (now named: Section on Insolvency, Restructuring and Creditors’ Rights, SIRC). It contains a design for the approach and harmonization of cross-border insolvency proceedings, aimed at better collaboration and ‘equity’. The idea of a cross-border concordat (or protocol) was realized in practice, during international insolvency cases, such as Re Maxwell Communication Corporation plc [1992] BCLC 465, and Re Olympia & York Developments Ltd v. Royal Trust Co. (1993) 20 CBR (3rd) 165. The experiences gained during these cases were shared with others, discussed and finally described in the Concordat (Nielsen et al., 1996; Culmer, 1999; Wittinghofer, 2004).

Principles for a Global Approach to Multi-creditor Workouts  Under the auspices of INSOL International, the worldwide federation of national organizations of accountants and lawyers, specializing in the broad field of insolvency (law), these principles were issued in 2000. There are eight principles, indicating ‘best practice’: how to act when a company, with a large number of (foreign) creditors, is in financial difficulties (Bond, 2001). The Principles are jurisdiction-neutral and therefore can be made applicable in principle, whatever the legal system in the specific country. The publication of the Principles demonstrates that they are endorsed by the World Bank, the Bank of England and the British Bankers Association. In several jurisdictions (e.g., Korea, Indonesia, Turkey, Greece) this
approach is being followed (World Bank, 2004; Pomerleano and Shaw, 2005).

6.3 Modelling and Guiding

In the aftermath of the Asian financial crisis of 1997–8, the World Bank started an initiative to improve the future stability of the international financial system. The World Bank considers it of importance to identify principles and guidelines for sound insolvency systems and for the strengthening of related debtor–creditor rights in emerging markets. This has led to the acceptance by the Bank in 2001 of the ‘Principles and Guidelines for Effective Insolvency and Creditor Rights Systems’, revised in 2005. These contain 35 Principles the World Bank is using in its global programme of ‘country assessment’.

With a focus on harmonization and basically containing ‘soft law’, drafters of insolvency legislation may be strongly assisted by four tools, all provided by the United Nations Commission on International Trade Law (UNCITRAL). UNCITRAL, sometimes known as the commercial arm of the UN, was established in 1966 to provide a more active role for the UN in pushing back differences in national legal systems in the domain of international trade. In several legal fields UNCITRAL has contributed to the alignment, harmonization or unification of international commercial law: for example, the Vienna Convention on International Sales of Goods (CISG) of 1980, the UNCITRAL Arbitration Rules 1976, the Model Law on International Commercial Arbitration of 1985 and the UNCITRAL Model Law on Electronic Commerce of 1996. A ‘Model Law’ is an instrument for legislation, which in itself is not legally binding, but focuses on a way of harmonizing national law. A Model Law may be viewed as a (strong) recommendation to individual states to incorporate the literary text of the Model into national legislation.

In 1997, the UNCITRAL Model Law on Cross-Border Insolvency was approved. It sets a world standard for national legislative provisions with regard to international insolvency, which model was quite closely followed in drafting a new Chapter 15 to the US Bankruptcy Code (Wessels, 2004, 41) in force as of 17 October 2005 (Bufford, 2009). The Model Law has been followed by, for example, Australia, Mexico, Greece, Japan, South Africa, Spain, and Romania, among others, and the UK in 2006 (Ho, 2009).

In 2000, UNCITRAL started to prepare a comprehensive statement of key objectives and core features for a strong insolvency, debtor–creditor regime, including considerations of out-of-court restructuring, and a legislative guide containing flexible approaches to the implementation of such objectives and features, including a discussion of the alternative
approaches possible and the perceived benefits and detriments of such approaches. In autumn 2004, the work led to UNCITRAL’s Legislative Guide on Insolvency Law (Block-Lieb and Halliday, 2007b; Clift, 2009). The Guide presents a comprehensive exposition of the core objectives and the structure of an effective and efficient commercial insolvency system. Every key provision which is recommended to be included in a national law is discussed and the possible treatment is evaluated. The Guide furthermore takes positions on controversial issues such as automatic stay, post-commencement finance, treatment of financial market transactions and the overriding of contract terms for termination.

In 2009 UNCITRAL published the ‘UNCITRAL Notes on cooperation, communication and coordination in cross-border insolvency proceedings’ to further coordination and cooperation in cross-border insolvency cases, particularly with regard to the use and negotiation of cross-border insolvency agreements, to promote the UNCITRAL Model Law on Cross-Border Insolvency and, in particular, the implementation of Article 27(d) related to the approval or implementation by courts of agreements concerning the coordination of proceedings. This has led to the publication of the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation, which provides information for insolvency practitioners and judges on practical aspects of cooperation and communication in cross-border insolvency cases (Elliott and Griffiths, 2010). The Practice Guide contains information which is based upon a description of collected experience and practice, focusing on the use and negotiation of so-called cross-border agreements. According to the Practice Guide a cross-border agreement is ‘an agreement entered into, either orally or in writing, intended to facilitate the coordination of cross-border insolvency proceedings and cooperation between the courts, between the courts and insolvency representatives and between insolvency representatives, sometimes also involving other parties of interest’. In international practice such an agreement is often called a ‘protocol’. UNCITRAL also has been discussing the treatment of enterprise groups, previously referred to as corporate groups, in insolvency, and has included recommendations on the international treatment of enterprise groups in insolvency as part III of the Legislative Guide (for an analysis of the use of protocols in Europe: Wessels (2011b, 2012).

6.4 Principles

In Europe, it was considered too difficult to implement a universal proceeding without modifying, by the application of the law of the state of the opening of proceedings, pre-existing rights created prior to the insolvency
under the different national laws of the member states. Therefore in the
greater part of Europe the Insolvency Regulation was introduced. The
Regulation may be seen as a symbol of the great diversity of national
insolvency laws too, where it aims to coordinate some 100 types of insol-
vency proceedings in 26 countries. Three developments deserve attention.
The first, an ‘International Working Group on European Insolvency Law’
(founded in 1999, representing ten member states), has studied the ques-
tion of how these differences can be reconciled with the continuing eco-
nomic integration of Europe, especially where the activities of companies
that transgress national borders are regulated by European legislation.
After thorough study it concluded that aforementioned diversities do not
mean that national insolvency laws do not share common characteristics.
These common elements were captured in the Principles of European
Insolvency Law (2003), 14 in number, being presented as reflecting ‘the
essence of insolvency proceedings in Europe as they reflect, on a more
abstract level, the common characteristics of the insolvency laws of the
European Member States’ (McBryde et al., 2003; Wessels, 2004, 212).
To improve the workings of the Insolvency Regulation, the European
Communication and Cooperation Guidelines for Cross-border Insolvency
(‘CoCo Guidelines’) of 2007 have been drafted under the aegis of INSOL
Europe. The CoCo Guidelines aim to provide rules to be applied by
administrators within their duties to communicate and cooperate in
cross-border insolvency instances to which the EU Insolvency Regulation
is applicable. Art. 31 of the Regulation limits the duty to cross-border
communicate to ‘liquidators’, but the CoCo Guidelines also contain rules
regarding communication between courts (Wessels and Virgós, 2007).

The European Bank for Reconstruction and Development (EBRD)
plays an important role in the changing of the former Eastern bloc coun-
tries into market economies. EBRD, established in 1991, serves as an
international financial institution promoting private and enterpreneurial
initiative in 27 ‘countries of operation’. One of the five core commercial law
areas the EBRD is focusing on is insolvency. The general point of view of
EBRD at present is that, whenever EBRD acts as lender or promoter to
a certain project, the respective country will have to take into account the
Principles of the World Bank (see above). Based on measurement against
international standards (UNCITRAL Legislative Guide, the World Bank’s
Principles) EBRD has defined a set of ten core principles for a modern
insolvency law regime (ILR), intended to be the foundation of an ILR.
Recognizing that a solid law is not enough for an effective insolvency
system, the EBRD has endeavoured to build on these core principles and
focus on the effectiveness of an insolvency system by identifying a set of
principles to guide countries in setting standards for the qualifications,
appointment, conduct, supervision, and regulation of office holders (which is the general term for trustees, administrators, liquidators, insolvency representatives, or similar functionaries), known as the EBRD Insolvency Office Holder Principles. The final version is that of 2007 (Cooper, 2009).

On a global level mention is made of the Global Principles for Cooperation in International Insolvency Cases. In 2010, the Preliminary draft of the Global Principles for Cooperation in International Insolvency Cases was published by Professor Ian Fletcher (University College London) and the author of this chapter. These Principles reflect a non-binding statement, drafted in a manner to be used in both civil-law as well as common-law jurisdictions, and aim to cover all jurisdictions in the world. To a large extent these Global Principles for Cooperation in International Insolvency Cases build further on the Principles of Cooperation among the member states of the North American Free Trade Association, developed by the American Law Institute (see above). In their work on the Global Principles, Fletcher and Wessels are co-reporters, having been appointed by the ALI and the International Insolvency Institute (III). The texts of the Global Principles for Cooperation in Global Insolvency Cases, the Global Guidelines for Court-to-Court Communication in International Insolvency Cases, and Global Rules on Conflict of Laws Matters in International Insolvency Cases are at this stage provisional, pending approval and formal adoption by the ALI and III respectively. The text of the preliminary draft, including commentaries and Reporters’ Notes, is available via http://bobwessels.nl/wordpress/?p=996. Taking into account results of discussions and commentaries, in April 2011 a Second Preliminary Draft was published (see http://bobwessels.nl/wordpress/?p=1470). It is expected that the Global Principles will reach their final form in early 2012 (Fletcher, 2008; Fletcher and Wessels, 2010).

7 CURRENT AND FUTURE TRENDS

Although there is no future agenda set in stone, it seems possible to draw some tentative conclusions and point to some areas for future attention, for all stakeholders concerned. The remarks are centred around three core topics in the area of (international) insolvency law: insolvent debtors, applicable rules and the role players involved.

7.1 The Insolvent Debtors

As a consequence of recognizing differences in circumstances or the sheer power of economic and financial market force, a general divide can be
made between: (i) businesses, (ii) consumers, (iii) financial institutions, and (iv) states.

(i) Businesses  Ongoing attention can be expected in the area of ‘corporate rescue’ (see Finch, 2009; Mallon, 2009; Mallon and Waisman, 2011). A recurring theme, especially in the field of Law and Economics, is the general debate on whether managing the ‘insolvency’ of all corporate debtors, especially those with a dispersed ownership structure and financed by multiple creditors, is best served within the constraints of judicial proceedings instead of using alternatives, based on a contractual approach (Franken, 2004), and whether the latter approach is fundamentally sustainable without a serious discussion of the role of secured-credit law (Westbrook, 2004). Within Europe a theme for the future seems to be how best to gear, align or integrate matters of corporate law and corporate insolvency. EU Directives on company law have only haphazardly touched on insolvency (Omar, 2004a), where the effectiveness of a credible corporate insolvency regime is only achievable with, for example, an efficient framework of creditor protection (Kraakman et al., 2004), an aligned system of director’s liability (INSOL International, 2005) and a coordinated approach to corporate groups (e.g., Hirte, 2008; Menjucq and Dammann, 2008; Mevorach, 2009; Wessels, 2009). After Enron, WorldCom and Parmalat, should corporate behaviour not be addressed in a well-considered coordinated way, within which corporate debt or corporate insolvency as a whole is an integral part of the overall attunement of EU measures with regard to corporate governance? And doesn’t (prevention of formal) rescue start with the mandatory improvement of the quality of management decisions and therefore with a mandatory monitoring structure which is tailor-made to the specific requirements of the company (Santen, 2011)?

(ii) Consumers  Furthering and improving systems of ‘consumer bankruptcy’ may be another item on the agenda (Niemi et al., 2009; Kilborn, 2010). Given the fact that ‘financial rehabilitation of over-indebted individuals and families and their reintegration into society’ is regarded as an important goal, it is odd to notice that certain countries have already had such rehabilitation programmes for over ten years (Denmark: 20; Netherlands and Belgium: 12), whilst Greece introduced such a regime only in September 2010 and ordinary people in similar circumstances in Croatia, Italy or Hungary still lack the benefit of such a system. Furthermore the differences in the length of a financial rehabilitation plan in several countries (in France: eight years; Finland: five; Slovakia and Netherlands: three; and England: on average one year) demonstrate
Insolvency law

the way a certain country is prepared (or not) to ‘forgive’ a debtor (see ‘legislature’ below).

(iii) Financial institutions Financial institutions, especially banks, have encountered severe financial problems (Lehman Brothers, Northern Rock, Icelandic banks). In many cases the ‘Too Big to Fail’ syndrome results in governments (taxpayers) paying large sums to keep these institutions alive. On a European level (Wegman, 2010) and nationally, specific legislation has been enacted (UK) or is under way (Germany, the Netherlands) in which the non-insolvency component (avoiding systemic risks) is searching for its best way of reflection in legislation (see Bruno, 2009; Lastra, 2011).

(iv) States Sovereign states have always had debt. Here the ‘insolvency’ angle is that one cannot imagine that a state will go bust (like a corporate business), whilst a state is a ‘public’ entity and typically has specific creditors (bondholders). Since 2001 discussions have been ongoing with regard to the idea of creating formal proceedings, aimed at the orderly and expedited restructuring of state debts. The core of the matter is the establishment of a regime of (international) resolution and insolvency law for a certain group of debtors, being (sovereign) countries. These countries are debtors of credit loans or (international) bond loans and are technically in a (nearly) insolvent position. Argentina has been a prime example since 2002. Nowadays Iraq along with several Northern African States may also be included, plus various other states following the devastating tsunami at the end of 2004, and countries such as Greece as a result of the 2008 financial crisis (see Olivares-Caminal, 2010; Sovereign Insolvency Study Group, 2010).

7.2 The Applicable Rules

Flowing from the above, a differentiation can be made between (i) domestic legislation, (ii) soft law, and (iii) improving present existing regional legal frameworks.

(i) Domestic legislation Whilst growing enormously, the insolvency laws of the BRIC countries (Brazil, Russia, India, China) are still in the first stage of development, whilst in other parts of the world (Middle East) the domain of available insolvency rules is outmoded or incomplete (Hawkamah et al., 2009). I am not hesitant to mention in this grouping the Netherlands, with an Act of 1896, a non-functional reorganization proceeding and one of the few remaining Western European countries lacking a solid international insolvency law framework.
(ii) Soft law  The domain of non-binding soft law in the area of insolvency continues to grow. See the ALI–III project mentioned above, further tailoring, detailing and expanding its NAFTA predecessor. Where these soft law tools have been functioning for some 15 years as quasi-legislation, the time has come to evaluate and test its products, for instance with an overall review of its quality, legitimacy, enforcement and effectiveness (Wessels, 2009a). The tendency referred to above as ‘convergence’ will provide an additional field of research, such as analysing and comparing models or principles (for a comparison of UNCITRAL Model Law and EU Insolvency Regulation, see Berends, 1998) in the way the Model Law is enacted in several countries (Ho, 2009) and in comparing certain topics within these legal frameworks (Veder, 2004; de Weijs, 2010).

(iii) Improving present existing regional legal frameworks  It is fascinating to note that certain important concepts in international insolvency law (e.g., determining the international jurisdiction of a court or the rules for cooperation between role players) in Europe and the Model Law enacting countries (in all some 45) are rather similar, which ‘may foster greater acceptance (or acceptability) of cross-border cooperation’ (Westbrook et al., 2010, 264). In Europe, 2012 and onwards will be dominated by the evaluation of the EU Insolvency Regulation, which is required by its own provision, Article 46 (see Bärenz et al., 2011). Also ‘harmonization’ is in the air. In April 2010, at the request of the European Parliament’s Committee on Legal Affairs, INSOL Europe presented a report on the harmonization of Insolvency Law at the EU level. In the report disparities between several national insolvency laws are described, which can create obstacles, competitive advantages and/or disadvantages and difficulties for companies with cross-border activities or ownership within the EU. The core of the report highlights a number of areas of insolvency law where harmonization at EU level is worthwhile and achievable. See www.bobwessels.nl/wordpress/?attachment_id=1318.

7.3 The Role Players

The typical role players in any (international) insolvency case are (i) practitioners, (ii) courts, (iii) creditors, (iv) the legislature, and (v) academia.

(i) Practitioners  It is rather striking that where business is becoming global and in all forms of rules the international dimension is constantly growing, regulation of the key players regarding professional and ethical rules – if already in place – remains at a domestic level. The time is ripe, globally, to further Insolvency Office Holders Principles (see EBRD, above)
and align or harmonize the requirements for their qualification, including rules on competency, independency and conflict of interest, especially where these persons maintain their role is the broader scope of financial and procedural measures of rescue available to corporate debtors (Wessels, 2010b).

(ii) Courts Where in the field of international insolvency law several of the sources, referred to above, are based on the concept of communication and cooperation (between courts or insolvency practitioners), this theme clearly is open for further analyses (Leonard, 2008; Wessels, 2008; Busch et al., 2010).

(iii) Creditors Comparative insolvency law research comparing substantial rights or legal regimes will continue (Balcerowitcz et al., 2004) as will research on the function of a Bankruptcy Act in relation to lending by banks (Davydenko and Franks, 2008).

(iv) Legislature Nearly all topics referred to above ultimately come down to the competence of national and international legislature, which includes the political will to get things sorted.

(v) Scholars It is noticeable that academics have a role at international level. In addition to inviting foreign guest speakers or materials available in English, for a few years international organizations have had a need to be educated; see, for example, the appointment of regional INSOL Scholars by INSOL International, the functioning of the Academic Forum of INSOL Europe, which since 2010 has also hosted YAN, Young Academic Network, consisting mainly of younger scholars working on their respective PhDs.

It is ‘a fair guess that the law of cross-border insolvencies will increase in importance as the economic world grows more and more integrated’ (Westbrook et al., 2010, 264). International insolvency law is a rapidly evolving body of law, which will grow in the coming decade, not only in areas of research but also in assisting in capacity building for its role players. As demonstrated above, (international) insolvency law isn’t a sport for the faint-hearted. In its pairing to economic, financial and market developments, it can be a fast ride, sometimes dangerous, but never dull!

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