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THEORETICAL ASPECTS OF THE CROSS-BORDER INSOLVENCY LANDSCAPE: ISSUES AND PERSPECTIVES FOR SUB-SAHARAN AFRICA

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Abstract: Although a substantial body of literature has developed in recent years in the area of cross-border insolvency, this scholarship has been dominated by scholars from the United States and Europe, so that a perspective from developing countries is lacking**.** This article examines the theoretical approaches to cross-border insolvency in relation to the general theories underlying the policy objectives of an insolvency law system. Salient features of the theories and emerging aspects within the theoretical debate on cross-border insolvency approaches are considered, in particular from a Sub-Saharan African (SSA) perspective while also clearly bringing out the issues that emerge in the quest for crafting a workable and appropriate cross-border insolvency framework for SSA. Notably, the current theories have almost exclusively been developed and addressed from the viewpoints of developed economies, which are not necessarily relevant to SSA. Since examination of this area in relation to SSA has almost been overlooked by existing literature, it is accordingly maintained that the position of developing countries, in particular the least developed economies such as those in SSA, deserves to be considered, given the pressures towards globalisation and the potential for this pressure to result in unsuitable legislative reforms. The article offers a review of existing theoretical models with the intention of developing an important benchmark for any reform measure in SSA, and concludes by underscoring the significance and challenge of prioritising the local contexts in developing a functional cross-border insolvency framework.

1.1 Introduction

Problems that arise in the event of an insolvency in which an insolvent company's creditors and assets are spread across more than one jurisdiction, have long given rise to competing theoretical approaches; each purporting to provide the best solution to overcome the problems that cross-border insolvencies pose. With the globalisation drive, the competing theories have been a subject of intense debate, leading to the consideration of some form of alternative approaches, mainly drawn from the dominant competing theories developed and addressed from the perspective of developed countries. This article provides a perspective that has been hitherto lacking in the cross-border insolvency literature. It examines the theoretical approaches to cross-border insolvency in relation to the general theories underlying the objectives of an effective insolvency law system from the perspective of a major group of developing countries, as represented by Sub-Saharan Africa (SSA). Salient features of the theories and emerging aspects within the theoretical debate on cross-border insolvency approaches will be considered with particular reference to the SSA context and issues that arise between the needs of such jurisdictions and the approaches outlined in literature that has emerged in developed countries, in particular from the US and Europe, will be identified. This article will begin by outlining the basic issues of insolvency and cross border insolvency. Attention will then turn briefly to theories of insolvency law in general and this discussion will be used as a springboard for a

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discussion of the theories of cross border insolvencies, as developed in the literature, before a view from a sub-Saharan perspective is offered.

2.0 The Concept of Insolvency and Cross-border Insolvency

In a modern competitive market economy, which characterises the global economy, and where businesses operations increasingly rely upon credit, insolvency is an inevitable aspect and a truism.[1] It traditionally refers to a situation whereby a company's outstanding liabilities exceed its assets' measurable value.[2] Whereas the traditional approach represents a balance sheet or absolute test of insolvency, the modern approach represents a cash flow test of insolvency which is signified by the company's inability to pay its debts, as and when they fall due.[3]

In the context of efficiency and value maximisation of the insolvent debtor's estate, the cash flow test is the most appropriate. Firstly, it facilitates commencement of insolvency proceedings early enough in the period of insolvency and secondly, it allows other parties, particularly creditors, to ascertain the true position of the debtor's financial position.[4] However, some countries that make use of the cash flow test also make use of the balance sheet test.[5] This is in line with the global convergence which not only gives credence to the cash flow test, but also advises against the use of a balance sheet standard as a single test on account of its inherent weaknesses of relying on information in the control of the debtor to prove insolvency. Such a test would present significant difficulties for creditors seeking to prove that the debtor is insolvent.[6]

Cross-border insolvency describes a situation where an insolvent debtor has assets and or creditors in more than one jurisdiction.[7] As most routine business dealings are becoming global, it is increasingly becoming impossible to avoid the international effect of insolvency. This is attributed to the increased interconnectedness and interdependence between national economies,[8] improvements in technology, particularly in transport and communication, and the resulting reduction in the cost of moving goods, funds and information around

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[1] M Balz, 'The European Union Convention on Insolvency Proceedings' (1996) *Am Bankr L J* 485; and K Anderson, 'The Cross-border Insolvency Paradigm: A Defense of Modified Universal Approach Considering the Japanese Experience.' (2000) 21 *U Fa J Int'l L* 679.

[2] IF Fletcher, *Insolvency Law in Private International Law* 2nd Ed (2nd edn OUP, Oxford 2005), 1-4.

[3] Australia and the Cayman Islands are examples of Commonwealth jurisdictions whose legislation, namely section 95A of the Corporation Law 2001 and section 95(c) of the Companies (Amendment) Act 2007 respectively, provide for a cash flow test only. On the other hand, the UK is a typical example of a jurisdiction whose legislation (section 123 of the Insolvency Act 1986) provides for the employment of both tests, albeit in varying circumstances. It is noteworthy that the Tanzanian Companies Act 2002 has also adopted the UK's approach in that section 280 of the said Act provides for the employment of both tests.

[4] The UNCITRAL Legislative Guide on Insolvency Law 2004, 45 and 46, <www.uncitral.org/pdf/english/texts/insolven/05-80722_Ebook.pdf > accessed 02/06/2009.

[5] T Heaver-Wren, '"Striking a Balance"-the Test for Insolvency in the Cayman Islands' Insolvency' (2008) 22 *Insolvency Intelligence* 152, 152-153; and H Peter *and others* (eds) *The Challenges of Insolvency Law Reform in the 21st Century: Facilitating Investment and Recovery to Enhance Economic Growth* (Zurich, Schulthess Juristische Medien AG 2006) 18-20 which observe that even countries whose legislation provides only for a cash flow test have tended in practice to make use of balance sheet test in providing a complete picture of a debtor's present and prospective financial situation. Australia and recently the Cayman Islands offer good examples.

[6] UNCITRAL Legislative Guide on Insolvency Law 2004 (n 4). See also IMF, Orderly and Effective Insolvency Procedures: Key Issues, Legal Department, IMF, Washington DC, 1999 <http://www.imf.org/external/pubs/ft/orderly/index.htm> accessed 4/6/2009; and World Bank, Principles And Guidelines for Effective Insolvency And Creditor Rights Systems April 2001, <http://www.worldbank.org/ifa/ipg_eng.pdf > accessed 4/6/2009

[7] Other terms that are used interchangeably to describe the same situation include; interstate insolvency, international insolvency, transnational insolvency, multi-state insolvency, multi-jurisdictional insolvency, multinational insolvency and multinational default.

[8] This includes interaction between economic entities located in different countries.

the world which has paved the way for growth of larger corporate entities.[9] However, SSA is less integrated to the world economy given that it is characterised by the United Nations as relatively a least developed economy.[10] As such, the potential effect of cross-border insolvency is relatively much less than in advanced and emerging economies.[11]

Insolvency is described as wholesale as, upon its occurrence, it affects not merely one or a few distinct transactions but also every legal relationship involving the insolvent debtor, including the national economy.[12] As such, insolvency law has been termed as a type of meta-law that '…swoops in and trumps baseline legal relationships in unusual circumstance of general default.'[13] The internationalisation of insolvency law thus multiplies these complexities. The very nature of insolvency, it has thus been argued, influences nations to legislate for it in a manner that takes into account and reflects the nations' historical, social, political and cultural needs.[14] The different policy choices that characterise a given insolvency system are a reflection of such country's norms and inclinations.[15] This explains why insolvency systems of different countries vary from one another. It is however unlikely that this argument can equally hold in Sub-Saharan Africa whose laws and legal system were largely superimposed by and inherited from countries that colonised the region.[16] Given the low level of economic development and integration into the global economy as well as the

[9] This is partly a result of modern features of business consisting of mergers and takeovers. See IMF, Orderly and Effective Insolvency Procedures: Key Issues, Legal Department, IMF, Washington DC, 1999 (n 6); and PR Wood, *Principles of International Insolvency*, 2nd ed., (2nd edn Maxwell,London 2007)

[10] The least developed countries (LDCs) the majority of which being in SSA, represent the poorest and weakest segment of the international community. These countries are characterized by their exposure to a series of vulnerabilities and constraints, such as limited human, institutional and productive capacity; acute susceptibility to external economic shocks, natural and man-made disasters and communicable diseases; limited access to education, health and other social services and to natural resources; poor infrastructure; and lack of access to information and communication technologies. As such, the LDCs are considered to be in need of the highest degree of attention on the part of the international community. Criteria used by the UN to classify a country as among the LDCs include: low income, in the light of a three-year average estimate of the gross national income per capita; weak human assets**,** and economic vulnerability. See for instance UN, Programme of Action for the Least Developed Countries Adopted by the Third United Nations Conference on the Least Developed Countries in Brussels on 20 May 2001 UNITED NATIONSA/CONF.191/11 8 June 2001, <http://www.unctad.org/en/docs//aconf191d11.en.pdf> accessed 24/11/2009

[11] It has been noted that SSA countries are among the countries that were not immediately and directly affected by the current economic recession. This is largely by reason of being less integrated to the world financial system. Accordingly, the only effects that these countries experienced were a reduction in financial aids from developed countries, a fall in the demand for SSA exports, thereby a drop in commodity price and decline in the inflow of foreign direct investment which accounted significantly to the GDP of such countries. See for instance, International Monetary Fund (IMF), Regional Economic Outlook: Sub-Saharan Africa (IMF, Washington, D.C. 2009); and World Bank, The World Development Indicator 2009, <http://siteresources.worldbank.org/DATASTATISTICS/Resources/wdi09introch.pdf > accessed 9/10/20090.

[12] See PR Wood (n 9); and F Tung, 'Fear of Commitment in International Bankruptcy' (2000-2001) 33 *Geo Wash Int'l L Rev* 555, 566; PJ Omar *European Insolvency Law* (n 13) 6-9. The impact of insolvency in national economy is often evidenced in loss of revenues in terms of taxes, loss of jobs to citizens, loss of economic activities and consequently collapse or shrinking of cities and towns which may in turn lead to migration and congestion to other areas.

[13] JAE Pottow, 'Greed and Pride in International Bankruptcy: The Problems of and Proposed Solutions to Local Interests', (2005-2006)104 *Mich L Rev* 1899, 1902; See also M Balz, (n 1) 486.

[14] N Martin 'The Role of History and Culture in Developing Bankruptcy and Insolvency Systems: The Perils of Legal Transplantation' (2005) 28 *BC Int'l & Comp L Rev* 1, 4; F Tung (n 12) 561; and L Hoffmann, 'Cross-Border Insolvency- The 1996 Denning Lecture' < www.filewiz.co.uk/bacfi/1996_denning_lecture.pdf > accessed 12/3/2009.

[15] A Davydenko and JR Franks, 'Do Bankruptcy Codes Matter? A Study of Defaults in France, Germany, and the UK' (2008) 63 *The Journal of Finance* 565. See also PR Wood (n 9) and M Rowat, 'Reforming Insolvency Systems in Latin America', Viewpoint No. 187, World Bank, June, 1999, < http://rru.worldbank.org/documents/publicpolicyjournal/187rowat.pdf> accessed 12/3/2009.

[16] D Berkowitz, K Pistor, and J Richard, 'Economic Development, Legality and the Transplant Effect' (2003) 47 *European Economic Review* 165-195.

hitherto dominance of a centralised economy system, the insolvency laws largely inherited from the colonial powers have not been widely and effectively implemented.[17] This is partly attributable to lack of circumstances that warrant the application of such laws.[18] As such, any initiative for reform of insolvency law systems in majority of SSA countries would supposedly require consideration of the extent to which the inherited laws have been enforced[19] and, additionally, if over the years there have been changes in favour of particular policy choices. This would supposedly need to be undertaken within the wider context of consideration of the SSA countries' historical, socio-economic, political and cultural needs.

Despite the historical divergences that are apparent in national insolvency law systems, it is noteworthy that there have recently been significant pressures towards global convergence and harmonisation of insolvency laws.[20] However, special concerns have been directed at emerging and transitional economies due to the immense commercial interest that advanced countries have in those countries, and the need to ensure stability and the prevention of an occurrence such as the crises of the 1990s. Such interests are largely reflected in the activities of multinational enterprises by advanced countries in terms of trade and foreign direct investment inflow.[21] The interest is also reflected in the academic scholarship and the pressure that has been exerted for reform of these economies, suggesting modernisation of the insolvency laws along the lines of the advanced countries models.

2.1 A Brief Overview of Theoretical and Policy Foundations of Insolvency Systems

There has been controversy over the policy objectives of insolvency systems. Several opposing theoretical explanations have been put forward in an attempt to provide a coherent policy basis for the existence and application of insolvency law systems.[22] The theoretical views have hitherto been used to explore and rationalise the theoretical approaches for cross-border insolvencies.

Two main groups of theoretical views on the policy basis for insolvency systems are worthy of brief attention. The first theoretical view is from the commentators, who view insolvency law systems from the economic analysis point of view, and is mainly based on and draws from Jackson's 'common pool problem' concept.[23]

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[17] South Africa and the Organization of Harmonisation of Business Law in Africa (OHADA) are exceptions in this regard.

[18] This is reflected in the general lack of interest in how these countries deal with insolvency and even involvement of these countries in international insolvency law reform initiatives. On this kind of observation see CG Paulus, 'Global Insolvency Law and the Role of Multinational Institutions' (2006-2007) 32 *Brook J Int'l L* 755, 761.

[19] This is seemingly important because the implementation of law is always likely to result in substantial differences between the law and practice. See CG Paulus, 'Global Insolvency Law and the Role of Multinational Institutions' (n 18) 765

[20] UNCITRAL Model Law on Cross-Border Insolvency 1997; IMF, Orderly and Effective Insolvency Procedures: Key Issues, 1999 (n 6); World Bank., Principles And Guidelines for Effective Insolvency And Creditor Rights Systems, 2001 (n 6); and UNCITRAL Legislative Guide on Insolvency Law 2004 (n 6); and S Block-Lieb and T Halliday, 'Harmonization and Modernisation in UNCITRAL Legislative Guide on Insolvency Law' (2006-2007) 42 *Texas International Law Journal* 475, 511-512

[21] J Stiglitz, *Globalization and Its Discontents* (Penguin Books, London 2002) 98; TC Halliday, and BG Carruthers, Bankrupt: Global Lawmaking and Systemic Financial Crisis (Stanford University Press, California 2009); DW Arner and others 'Property Rights, Collateral, Creditor Rights, and Insolvency in East Asia' (2007) 42 *Tex Int'l LJ* 173

[22] TH Jackson and R Scott. 'On the Nature of Bankruptcy: An Essay on Bankruptcy Sharing and the Creditors' Bargain', (1989) 75 *Va L Rev* 155; and E Warren 'Bankruptcy Policymaking in an Imperfect World' (1993-1994) 92 *Mich L Rev* 336, 337.

[23] TH Jackson, 'Of Liquidation, Continuation, and Delay: An Analysis of Bankruptcy Policy and Nonbankruptcy Rules' (1986) 60 *Am Bankr L J* 399; TH Jackson and R Scott ' On the Nature of Bankruptcy: An Essay on Bankruptcy Sharing and Creditors' Bargain' 75 *Va L Rev* 155 (1989).

According to this group, an insolvency law system is more of a collectivised debt collection device created in response to the common pool problems that arise when individual creditors assert rights against a common pool of assets that is not large enough to pay each of them in full.[24] This view posits that the role of insolvency law therefore is to constrain individual creditor action against an insolvent debtor, and make the creditors act in a cooperative manner to maximise the aggregate value of the debtor's assets to the creditors' collective return. The underlying goal is to ensure that creditors do not make a bad situation worse by engaging in a destructive race to the debtor's assets. Thus, the source of bankruptcy law is in the common pool problem and the 'prisoner's dilemma'[25] that it brings about. In this instance, the company's assets are too few to sufficiently cover payment of the company's debts in their entirety. As such, insolvency law attempts to solve the dilemma by pooling all creditors together and submitting them to collective proceedings.

The theoretical basis for insolvency systems as advanced by law and economics commentators has been heavily criticised, mainly for confining itself solely to creditors' maximum returns and ignoring other non-creditors' interests equally affected by insolvency.[26] In the context of SSA countries, this view might be seen to undermine wider national interests inclined to poverty reduction strategies.[27]

The second group of commentators who have advanced opposing views have taken a broader outlook at the underlying basis for insolvency systems. They view attempts to reckon with a debtor's multiple defaults, distributing the consequences among a number of different actors and providing answers to a wide range of questions emerging there from as the policy basis of an insolvency system.[28] This view may be welcomed by the SSA countries given the possible need of addressing the wider interests of society and the concerns for poverty reduction. However, the view is potentially open to problem of indeterminacy because of the breadth of concerns that it seeks to encompass.[29]

Apart from the foregoing views, there is also a 'contractualism' view emerging from law and economic commentators.[30] They mainly argue that in the event of insolvency the recovery process should be governed by contracts between the

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[24] TH Jackson, 'Of Liquidation, Continuation, and Delay: An Analysis of Bankruptcy Policy and Non-bankruptcy Rules' (n 24) 401-403; TH Jackson and R Scott 'On the Nature of Bankruptcy',(n 24) 75; and V Finch, *Corporate Insolvency Law: Perspectives and Principles* (2nd edn Cambridge University Press, Cambridge2009)29 arguing that ' creditor wealth maximization vision has been highly influential and has been put into legislative effect in some jurisdictions'.

[25] This is a concept used to explain a situation whereby there is higher incentive for parties to defect than to cooperate for the common good of all while the pursuit of self interest by each leads to a poor outcome for all. In the context of insolvency it is used to show the difficulty in securing cooperation of all creditors in an insolvency situation, as what is best for each creditor individually is more likely to lead to mutual defection, whilst every creditor would have been better off with mutual cooperation
For general details of this concept see for instance R Axelrod, *The Evolution of Co-operation* (Penguin, London 1990) 7-24.

[26] V Finch (n 24*)*,28; B Adler 'Financial and Political Theories of American Corporate Bankruptcy' (1992-1993) 45 *Stan L Rev* 311, 313-314; and DG Baird and RK Rasmussen 'End of Bankruptcy' (2002) 55 *Stan L Rev* 751.

[27] Poverty reduction in developing countries is a dominant feature envisaged in the Millennium Development Declaration signed by 189 countries, including 147 heads of state and government, in September 2000. See United Nations, 55/2 United Nations Millennium Declarations, Resolution adopted by General Assembly[without ref to main committee(A/55/L.2)] <www.un.org/millennium/declaration/ares552e.htm> accessed 23/9/2009

[28] E Warren 'Bankruptcy Policy,' (1987) 54 *U Chi L Rev* 775, 777; D Korobkin, 'Rehabilitating Values: A Jurisprudence of Bankruptcy' (1991) 91 *Colum L Rev* 717 (1991).

[29]E Warren ibid 790. See also V.Finch (n 24) 37

[30] S Block-Lieb, 'The Logic and Limits of Contract Bankruptcy', (2001) *Ull. L Rev* 503 referring to these scholars' as neo-libertarian theorists; RK Rasmussen, 'Debtor's Choice: A Menu Approach to Corporate Bankruptcy', (1992) 71 *Texas L Rev* 51; A Schwartz, 'A Contract Theory Approach to Business Bankruptcy', (1998) 107 *Yale L J* 1807.

insolvent debtor and its creditors, with insolvency law only serving as a default option for those who do not enter into insolvency contracts.[31] This view also challenges the argument that the insolvent debtor presents a common pool problem for its creditors and that creditors would voluntarily agree to the enactment of insolvency law.[32] The most radical proposal in this approach advocates for repeal of insolvency law, since private collective action would provide an efficient substitute.[33] This approach has been criticised in a number of respects but mainly for its failure to pay regard to the effects that the contract concluded between the debtor and some creditors might have on the other creditors who are not party to the contract.[34] It has also been argued that this approach labours under a gross mistake in assuming that it is cheaper to agree upon a settlement instead of utilising the legal mechanism available.[35]

Notably, the theoretical attempts to explain the foundations and policy objectives of insolvency systems reveal the following common points. Firstly, insolvency systems characteristically involve collective action whose main preoccupation is to ensure value maximisation to be distributed to designated beneficiaries.[36] Notwithstanding the debate on the choice of beneficiaries, each view would want to maximise value for its favoured beneficiaries. Secondly, that cooperation is necessary in maximising the value for the interested parties' benefits. Thirdly, there is an apparent emphasis on efficiency and the assumption that the protection of entitlements that arose prior to insolvency would maximise the aggregate efficiency.[37] Fourthly, there is an apparent lack of an explicit reference to cross-border insolvency situations though the views have consequently been useful in cross-border insolvency discourse.[38] Accordingly, Westbrook, while arguing as to how the so-called 'grab rule' would lead to lower returns for creditors as a whole in a cross-border insolvency setting, invokes the common pool problem and the 'prisoner's dilemma' conception. He argues:

> Obviously this situation is merely the international version of the problem of collective action- the "Prisoner's Dilemma"-that has been solved by the adoption of collective insolvency proceedings in almost every country. Universalism internationally would provide the same benefit of maximization of asset values for creditors and other parties across the range of cases…….The larger argument,….rests upon the benefits to local citizens from the increased flow of trade at lower transaction costs…[39]

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[31] JL Westbrook 'The Control of Wealth in Bankruptcy' (2003-2004) 82 *Tex L Rev* 794, 798

[32] BE Adler. 'Bankruptcy and Risk Allocation', (1992) 77 Cornell L Rev 439, 441-442; BE Adler, 'A World without Debt', (1994) 72 *Wash U L Q* 811; S Block-Lieb 'The Logic and Limits of Contract Bankruptcy' (n 30) 512.

[33] DG Baird & RK Rasmussen, 'The End of Bankruptcy', (n 26); and S Block-Lieb 'The Politics of Privatizing Business Bankruptcy Law' (2000) 74 *Am Bankr LJ* 77, 82.

[34] S Block-Lieb 'The Logic and Limits of Contract Bankruptcy' (n 30); S Block-Lieb 'The Politics of Privatizing Business Bankruptcy Law' ibid 77.

[35] Ibid

[36] JL Westbrook, (n 30) 821; and JL Westbrook, 'A Global Solution to Multinational Default' (1999-2000) 98 *Mich L Rev* 2276, 2284.

[37] See I Haviv-Segal 'Bankruptcy Law and Inefficient Entitlements', (2005) 2 *Berkeley Bus L J* 355.

[38] JJ Kilborn 'The Raging Debate Between Territorial and Universal Theories of Value Sharing in International Bankruptcy' (November 21, 2008), in B Wessels, BA Markell and JJ Kilborn International Cooperation in *Bankruptcy and Insolvency Matters: On the Origins, Development and Future of Communication and Cooperation in Cross-border Insolvency Cases* (OUP, Oxford 2009) <http://ssrn.corn/abstract=1305320> accessed 18/3/2009; LM LoPucki 'The Case for Cooperative Territoriality in International Bankruptcy' (1999-2000) 98 *Mich L Rev* 2216, 2219; LM LoPucki, 'Cooperation in International Bankruptcy: A Post-Universalist Approach,'(1998-1999) 84 *Cornell L Rev* 696, 703; JL Westbrook 'Theory and Pragmatism in Global Insolvencies: Choice of Law and Choice of Forum' (1991) 65 *Am Bankr LJ* 457, 465- 466; JL Westbrook, 'A Global Solution to Multinational Default,' (n 36) 2285; and F Tung, 'Fear of Commitment in International Bankruptcy' (n 12) 557.

[39] JL Westbrook 'Theory and Pragmatism in Global Insolvencies: Choice of Law and Choice of Forum' (n 38) 466.

Likewise, albeit from a different perspective, Tung argues:

> When a firm fails, bankruptcy law attempts to maximize the value of the firm's assets for the benefit of the firm's creditors. Bankruptcy law also determines how that value should be distributed among those creditors. The failure of a multinational firm typically leaves assets and unpaid creditors in several jurisdictions. However, no overarching international bankruptcy system exists. Instead, the national bankruptcy laws of several states might plausibly apply to govern the firm's bankruptcy or particular aspects of the case. Conflicting claims of jurisdiction often arise. [40]

Fourthly, the views do not take into account the level of the various countries' economic development, despite its potential in influencing policy objectives of a country's insolvency law. Apparently an insolvency system of a well developed country might not necessarily be the same and appropriate for a lesser developed one. In all, the views help to explain the divergence of insolvency systems that exist in the world because of the emphasis that each system places on particular aspects that characterise the theoretical views, reflected through approaches such as redistribution to favoured groups.[41] This is evident among developed nations whose systems significantly influenced the insolvency systems of developing countries, inclusive of the least developed nations, because of colonisation and regularised relationships.[42]

Among the advanced countries, some have traditionally been known to favour the general interests and public order or recovery of the company and maintenance of employment before satisfaction of creditors' claims,[43] whilst others place priority on the satisfaction of creditors' claims.[44] Certainly, the choices that signify the divergence reflect different, and conflicting, policy decisions.[45] It is noteworthy, however, that there are aspects that are shared by all systems, such as the collective nature of insolvency systems, cooperation and the maximisation of the value of the insolvent debtor's estate. SSA countries would probably need to consider this divergence in the context of their lesser developed economies with a view to developing systems that will not only be workable and appropriate but will also boost their national economies and contribute to poverty eradication.

Generally speaking, the characteristic features apparent in the various views advanced have, by and large, been reflected in the drive for global convergence of insolvency laws in which the objectives of an effective and efficient insolvency regime have been held to include the provision of certainty in the market to promote economic stability and growth; maximisation of the value of assets; striking a balance between liquidation and reorganisation; ensuing equitable treatment of similarly situated creditors; provision of timely, efficient and impartial resolution of insolvency; preservation of the insolvency estate to allow equitable distribution to creditors; recognition of existing creditor rights and the establishment of clear rules for the ranking of the priority claims; and the establishment of a framework for cross-border insolvency. [46] Indeed, these policy

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[40] F Tung ibid.
[41] E Warren (n 22); RK Rasmussen, 'Resolving Transnational Insolvencies Through Private Ordering' (1999-2000) 98 *Mich L Rev* 2252, 2253; and CG Paulus (n 18) 765.
[42] A Davydenko and JR Franks (n 15) ; D Berkowitz and others (n 16); and TC Halliday, and BG Carruthers (n 21).
[43] The US and France are always cited as examples of this in this regard.
[44] The UK and Germany are generally referred to as examples of pro-creditor systems. It is emerging from recent experiences that South Africa's system is one that is heavily influenced by labour unions in terms of its political economy.
[45] RK Rasmussen (n 41) 2253.
[46] UNCITRAL Legislative Guide on Insolvency Law 2004 (n 4); IMF, Orderly and Effective Insolvency Procedures: Key Issues, 1999 (n 6); World Bank, Principles And Guidelines for Effective Insolvency

objectives take on board the need of an effective insolvency system to address the intricacies of cross-border insolvencies in a globalised economy which are discussed below.

2.2 Problems and Issues Involved in Cross-Border Insolvencies

Cross-border insolvencies cause complex problems for not only debtors and creditors but also jurisdictions involved.[47] The more a country's economy is integrated to the world economy, the more susceptible to cross-border insolvency it is. The problems arise when an insolvent company has assets or interests in property and creditors located in multiple jurisdictions. The diversified state of the insolvent entity's activities may be such that conditions for opening insolvency proceedings are simultaneously met with regard to more than one country, giving rise to the possibility of multiple proceedings in different jurisdictions. A jurisdiction in which one of the multiple proceedings is initiated may lay claim to universal recognition and enforcement, although in practice the proceeding is likely to be confined to the local estate of the insolvent debtor on which effective control can be exercised. [48]

Thus, the collective action problems which the domestic insolvency laws are primarily designed to address are multiplied and exacerbated by cross-border insolvency. This situation consequently raises 'a considerable number of issues, the attempted resolution of which may bring national systems into conflict'.[49] There is often an issue as to whether the court where such proceedings are commenced will have jurisdiction over foreign assets of the insolvent debtor, and, if so, whether it is likely to have easy access in 'marshalling the assets' to the best interest of creditors. It is again uncertain and unpredictable as to whether and to which extent all creditors, irrespective of their location, will be equally treated as the local ones. The other apparent issue is the extent to which the local court might recognise foreign proceedings and whether the different courts in different jurisdictions are likely to cooperate in 'marshalling the assets'. These issues including many others, such as the manner in which assets should be dealt with in the event of concurrent proceedings in multiple jurisdictions; the law applicable in matters of substance and procedure and whether the local courts have jurisdiction over an insolvent foreign company in the first place are essentially likely to complicate the process.

The diversity that exists between the sovereign legal systems of the world and the lack of a unified framework that is universally enforceable contributes significantly to the existence of the problems that present themselves in a cross-border situation.[50] Equally important in a cross-border insolvency context are issues of efficiency and effectiveness of proceedings. The problems become more complicated when the insolvency laws of the jurisdictions involved are outdated, rigid, formalistic, and above all have a strong bias in favour of particular categories of locally interested parties.[51] It is equally so where there is no law in place; non-enforcement; or a lack of practical experience in administering the

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and Creditor Rights Systems, 2001 (n 6). It is however noteworthy that these benchmarks have been modelled on practices prevailing in developed economies.

[47] IF Fletcher, 'International Insolvency: A Case for Study and Treatment' (1993) 27 *Int'l L* 429, 430; and JL Westbrook and D. Trautman 'Conflict of Laws Issues in International Insolvencies' in J Ziegel (ed), *Current Development in International and Comparative Corporate Insolvency Law* (Clarendon Press, Oxford 1994) 657, 658.

[48] IF Fletcher, 'The European Convention on Insolvency Proceedings: Choice of Law Provisions', (1998) 33 *Tex Int'l LJ* 119,124.

[49] PJ Omar, *European Insolvency Law* (n 13) 15.

[50] See D McKenzie, 'International Solutions to International Insolvency: An Insoluble Problem?' (1997) 26 *U Balt L Rev* 15, p.23; and IF Fletcher (n 47) 430.

[51] M Rowat (n 15). Developing countries inclusive of the least developed ones, such as those in SSA are generally taken to have weak and less developed insolvency systems

law. The additional complexities surrounding cross-border insolvencies necessarily lead to uncertainty, risk, injustice, and ultimately cost to businesses.[52]

The prevailing consensus[53] is that the globalisation of the world economy has enhanced the growth and involvement of companies in international business, and consequently enhanced the challenges posed by cross-border insolvencies.[54] This situation is assumed to lead to a significant increase in international business failures, and hence potential for multiple insolvency proceedings in multiple jurisdictions as creditors seeking recovery attempt to seize assets in any country in which they are located. Admittedly, this assumption is not based on findings of an empirical global study, but rather on an impression seemingly drawn from instances of international business collapses in recent years in developed countries and the increased pace of the globalisation drive. The assumption seems, however, to include all countries, irrespective of their individual level of development and participation in the global economy.

In spite of the increase in prominence of cross-border insolvencies in recent times, it is on record that instances of cross-border insolvencies have occurred in the past to the extent of attracting the attention of creditors and scholars.[55] Notwithstanding the history of cross-border insolvencies and the recent global and regional initiatives, the solution to the numerous issues arising from cross-border insolvency is still a subject of debate.[56] This lack of consensus implies challenges for jurisdictions, particularly the least developed countries, in considering how to approach the crafting of a workable and appropriate cross-border insolvency framework.

2.3 Competing Theories in Cross-border Insolvencies

Traditionally, there have been two competing theories of cross-border insolvencies, namely territoriality and universality. The increasing incidences of cross-border insolvency associated with the globalisation of the world economy have, in recent years, increased the focus on, and given rise to a debate over, the theories.[57] However, while the territorial approach has been much favoured in practice by most jurisdictions, the universality approach has enjoyed tremendous appeal to most theorists and academics.[58]

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[52] JL Westbrook 'Theory and pragmatism in Global Insolvencies: Choice of Law and Choice of Forum' (n 38)460 and 558.

[53] Notably, the consensus is to almost all scholars of insolvency law irrespective of their inclination in the debate on competing theories of cross-border insolvencies.

[54] AT Guzman, 'International Bankruptcy: In Defense of Universalism,' (1999-2000) 98 *Mich L Rev* 2177, 2178. Guzman cites numerous examples of international business failures of recent years and makes reference to a great deal of scholars who share the view that globalization has led to growth of business failures; LM LoPucki, 'Cooperation in International Bankruptcy: A Post-Universalist Approach' (n 38) 699; and PJ Omar, *European Insolvency Law* (n 13)15-18.

[55] For an account of early cases, and in particular *Solomon v. Ross*, 1H. B1. 131, decided in 1764, see KH Nadelmann, 'Solomon v. Ross' (1946) 9 *MLR* 164; KH Nadelmann, 'Bankruptcy Treaties' (1944) 93 *University of Pennsylvania Law Review* 58, 59; IF Fletcher, Insolvency in Private International Law (Clarendon Press, Oxford 2005) 15-19; and J Lowell, 'Conflict of Law as Applied to Assignment of Creditors'(1888) 1 *Harv L Rev* 259.

[56] See the UNCITRAL Model Law (n 20);, and the various instruments designed by the international organizations with a view to forging an effective global system of insolvency law such as IMF (n 6); and World Bank (n 6).

[57] IF Fletcher (n 47)

[58] IF Fletcher (n 47)433; JAE Pottow (n 13)1904 stating that 'Many countries existing bankruptcy laws reflect territorialist conceptions of jurisdictions. The competing paradigm, 'universalism', probably enjoys a privileged academic status inversely proportionate to its current acceptance by policy-makers in countries around the world' ; SM Franken, 'Three principles of Transnational Corporate Bankruptcy Law: A Review,' (2005) 11 *European Law Journal* 232,235 arguing that 'territorialism still is the dominant approach to cross-border insolvency..'. However, JL Westbrook 'Universal Priorities'33 *Tex Int'l L J* 27, 28, maintains that territorialist system is what most people assume exists today.

The two competing theories notwithstanding, there is also the notion of unity, which means that one court administers all assets.[59] However, a wider treatment of universalism, in modern times, has tended to include unity as a form of pure universalism. Fletcher contends that:

> One form of utilisation of the concept of universality is as an integral aspect of the doctrine of unity of bankruptcy…..whereby it mounts to a logical corollary of the idea of unity. Indeed, in this conception the two terms can be treated as virtual synonyms for each other. However, it is important to recognize that the concept of universality is not exclusively dependent upon that of unity.[60]

Accordingly, universalism as envisaged in the current debate is an approach which vests in a single sovereign state, which is the home country of an insolvent debtor, an exclusive right to administer all of the assets and debts of an insolvent debtor wherever located through one central proceeding governed by the court and the law of the home country.[61] The home country's insolvency laws will apply to such issues as the conduct of the administration of the assets, the priority ranking, the stay of enforcements, fraudulent transactions avoidance and whether to liquidate or rescue.[62]

Thus, assets located in countries other than the home country would be repatriated to the home country jurisdiction for administration or subjected to ancillary proceedings conducted under the substantive insolvency law of the home country jurisdiction.[63] The idea is to facilitate global distribution to creditors or approval of a single plan of rescue.[64]

Territorialism[65] is a theory that vests in each sovereign state an exclusive right to administer assets of an insolvent debtor situated within its own borders using its own laws without having regard to the debtor's insolvency proceedings initiated in other sovereign states.[66] The theory denies the extraterritorial effect of an insolvency administration, but caters for assets and persons within the territory of the sovereign state whose jurisdiction is asserted. It is thus only claims that originate within the sovereign state of the relevant jurisdiction that may be

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[59] JL Westbrook, ibid 28.
[60] IF Fletcher (n 48)124.
[61] See JL Westbrook (n 36); I Fletcher (n 47)433. See also LC Ho, 'Navigating the Common Law Approach to Cross-border Insolvency'(2006) 22 *Insolvency Law and Practice* 217 describing universalism as 'no more than a convenient label' which is only used 'when the court feels inclined to grant the assistance sought.'
[62] See LM LoPucki, 'Cooperation in International Bankruptcy: A Post-Universality Approach' (n 38); JL Westbrook, 'Theory and Pragmatism in Global Insolvencies: Choice of Law and Choice of Forum' (n 38).
[63] UR Bang-Pedersen 'Asset Distribution in Transnational Insolvencies: Combining Predictability and Protection of Local Interests' (1999) *73 Am Bankr L J* 385, 386, observing that ' it is common to refer to a system as universalist even if all matters are not settled by the law of the state where the proceedings are initiated.' By way of illustration, a good example of this theory being used in practice is Lord Hoffmann's judgment in the *Re HIH Casualty and General Insurance* [2008] UKHL 21,[2008] 1 WLR 852 where he expressly makes reference to universalism as the justification for repatriating English assets to a liquidation of an Australian insurer taking place in the home country. It is not clear from the House of Lords judgments as a whole how far Lord Hoffmann's approach constitutes majority reasoning.
[64] JL Westbrook ' The Duty to Seek Cooperation in Multinational Insolvency Cases' in H Peter, and others (eds) *The Challenges of Insolvency Law Reform in 21st Century-Facilitating Investment and Recovery to Enhance Economic Growth*, (n 5) 362.
[65] Territorialism is also increasingly referred to as grab rule because of its inherent incentive for each country to use its law to grab insolvent debtor's asset within its jurisdiction for benefit of local creditors.
[66] IF Fletcher, 'International Insolvency: A Case for Study and Treatment,'(n 47), 431; LM LoPucki, 'Cooperation in International Bankruptcy: A Post-Universality Approach' (n 38) 701 and 743; J Pae, 'The EU Regulation on Insolvency Proceedings: The Need for a Modified Universal Approach' (2003-2004) 27 *Hastings Int'l & Comp L Rev* 555, 563.

included on the list of beneficiaries of any resulting distribution.[67] In the context of the insolvency of a multinational corporation, a court has jurisdiction over those portions of the corporation that are within its country's borders.[68]

2.3.1 Theoretical Underpinning for Territorialism and Universalism

The underlying basis of territorialism is the notion of sovereignty.[69] Traditionally, the notion is characterised by the ability of a sovereign state to exercise power to dominate a territory and assets located thereon.[70] It includes the imposition of the law of the sovereign on all within the territorial reach of the sovereign state and the restriction of the application of foreign laws within the borders of the sovereign state. The other theoretical basis for territorialism, which descends from sovereignty, is the desire of a sovereign state to protect its local interests. This justification is related to the claim that insolvency laws often reflect deeply held societal norms, values, interests, policies and priorities of the respective countries.[71]

Conversely, universalism, in the modern parlance, traces its basis from the theory of market symmetry, which requires legal system to be symmetrical with the market, covering all or nearly all transactions and stakeholders with respect to the legal rights and duties embraced by those systems.[72] The theory requires insolvency law systems to reflect and meet the needs and demands of the global market as opposed to merely focussing on national markets.[73] In this way, the insolvency proceedings can reduce the costs which would arise from multiple proceedings, maximise the value of a debtor's assets wherever located and realise the desired effect of principles of equality and priorities by a unified approach that treats the assets of the debtor as a part of a common pool in a global market for the benefit of all stakeholders.[74] It is however noteworthy that the traditional basis of universalism was *in rem* jurisdiction whose effect was to render one court as having jurisdiction to decide all matters involving a debtor's assets.[75]

2.3.2 A Review of the Debate over Territorialism and Universalism

The debate on the cross-border insolvency theories essentially reflects issues that have been raised in the past.[76] However, the current manifestation of the debate encapsulates the current globalisation challenges and the corresponding increase in international business failures that characterised the advanced and emerging economies in the recent decades. The main arguments exchanged in the debate

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[67] JJ Kilborn (n 37) citing LM LoPucki, 'Cooperation in International Bankruptcy: A Post-Universalit Approach' (n 37) 744-748.
[68] LM LoPucki, 'The Case for Cooperative territoriality in International Bankruptcy' (n 38) 2218.
[69] IF Fletcher, 'International Insolvency: A Case for Study and Treatment' (n 47)431; AJ Berends 'The UNCITRAL Model Law on Cross-Border Insolvency: A Comprehensive Overview' (1998) 6 *Tulane J of Int'l L & Comp Law* 309, 314 arguing, 'territoriality …is more or less based on constitutional grounds….'
[70] JJ Kilborn (n 38) 5 & 6; JL Westbrook, 'Multinational Enterprises in General Default: Chapter 15, The ALI Principles, and The EU Insolvency Regulation' (2002) 76 *Am Bankr LJ* 1, 5.
[71] SM Franken, 'Three Principles of Transnational Corporate Bankruptcy Law: A Review (n 58) 233; JJ Chung, 'The New Chapter 15 of the Bankruptcy Code: A Step Towards Erosion of National Sovereignty,' (2006-2007) 27 *Nw J Int'l L & Bus* 89; JAE Pottow (n 13); and N Martin (n 14).
[72] JL Westbrook, 'A Global Solution to Multinational Default' (n 36)2277 and 2283-2292.
[73] Ibid 2308
[74] *Ibid* 2285. See also KH Nadelmann, 'Revision of Conflicts Provisions in the American Bankruptcy Act', (1952) 1 *Int'l and Comp LQ* 484; JJ Chung, 'The New Chapter 15 of the bankruptcy Code: A Step Towards Erosion of National Sovereignty,' (n 71) 94 stating that the underlying theory of universalism posits that the overall value of bankruptcy estate will be maximized because one forum will be able to realize the sum of the parts or the going concern value, as opposed to piecemeal liquidation or treatment.
[75] JL Westbrook, 'Multinational Enterprises in General Default: Chapter 15, The ALI Principles, and The EU Insolvency Regulations' (n 70) 6.
[76] J Lowell (n 55).

mainly focus on local interests protection; predictability; efficiency and value maximisation; and practicality within the broader contexts of addressing the demands arising from the growing operations of multinational corporations.

2.3.2.1 Protection of Local Interests

Territorialism aims to protect local interests in the jurisdiction where the assets of an insolvent debtor are situated.[77] This is achieved by the application of domestic laws, which reflect local policies with regard for instance to priorities of creditors in distribution, security rights, and pre-petition transfers. It is therefore claimed to meet the expectations of the local claimants whose interests in the locally vested assets are accordingly dealt with in insolvency proceedings to satisfy their claims using the local laws to the exclusion of other foreign claimants.

On the contrary, universalism is discredited for downplaying national sovereignty and local interests which lead to local claimants losing the protection of their local laws.[78] Consequently, the entire social and commercial stratum would be carved out of the country's sovereignty and subjected to foreign law.[79] This adds costs to local 'non-adjusting creditors'[80] while large international lenders adjust their contractual terms, hence benefiting from the system.[81]

From universalists' standpoint local claimants are less significant than anticipated by territorialists, as their expectation and attitude as to treatment of their claims and potential risk have no connection at all with the location of the debtor's choice.[82] To circumvent any cost, however, they may charge competitive rates of return on their entire portfolio of loans.[83] Thus there would be no good reason for preferential treatment to individual local expectations as in the globalised market the value is to be distributed to creditors beyond national borders.[84] Much as they deal with a multinational enterprise, they should expect that their insolvency claim will be part of the worldwide collection of claims and that the local assets will be collected in a common pool for satisfying all claimants. The weak local claimants are more likely to be protected under universalism than under a territorial system as most jurisdictions seem not to have law in place for their protection in the event of the insolvency of a multinational corporation.[85] It is argued that universalism is more likely to lead to agreement and enforcement of a limited range of international priorities, which may ensure such protection.[86]

2.3.2.2 Predictability

Predictability has been claimed by each theory as being one of its neutral consequences arising from its implementation. Universalist scholars argue that under universalism, the application of home country law by the single home country court guarantees fairness and equality of distribution among creditors,

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[77] AM Kipnis, 'Beyond UNCITRAL: Alternatives to Universality in Transnational Insolvency', (2008) 36 *Denv J Int'l L & Policy* 155, 169 &170.

[78] It is worth noting the modifications to choice of law made under the EC Regulation on Cross-Border Insolvency Proceedings 2000 in Articles 5 to 15, which are designed to overcome this problem.

[79] F Tung (n 12) 576

[80] The terms adjusting, non-adjusting, weakly non-adjusting and strongly adjusting which frequently feature in the debate originate from LA Bebchuk and JM Fried, 'The Uneasy Case for the Priority of Secured Claims in Bankruptcy' (1996) 105 *Yale Law Journal* 857; and were further explained and used by AT Guzman (n 54) 2181-2182. Accordingly, while fully adjusting creditors can charge their debtors a risk-adjusted market rate of return, non-adjusting creditors which is usually further sub-divided into weakly non-adjusting and strongly non-adjusting refer to those creditors who are generally unable or unwilling to adjust their position by changing the terms of their loan.

[81] LM LoPucki, 'Cooperation in International Bankruptcy: A Post- Universalist Approach' (n 38) 709.

[82] See S M Franken (n 58) 238.

[83] AT Guzman (n 54) 2184, 2187-2191.

[84] JL Westbrook (n 36) 2310

[85] See JL Westbrook, 'Multinational Enterprises in General Default: Chapter 15, The ALI Principles, and The EU Insolvency Regulation' (n 70) 9; JL Westbrook (n 36) 2310-2311

[86] JL Westbrook (n 36) 2310.

which also reduces informational costs and hence enables more accurate credit pricing. In contrast, universalist scholars claim that territorialism does not provide predictability and cost efficiency, as creditors have to inform themselves on the insolvency law position of each country in which the debtor has assets whilst also facing the risk of debtors moving assets to another jurisdiction in the interests of the debtors. [87]

On the other hand, proponents of territorialism maintain that the use of the court and application of the laws of the country where the assets of an insolvent debtor are located offers greater predictability to the lenders than universalism.[88] Since lenders are aware of their debtors, the only information they would need to ascertain to predict their treatment in insolvency proceedings is the countries where the debtor's assets are located, the distributional priorities and other insolvency effects such as the impact of any local stay on enforcement by secured creditors. Unlike the territorial approach, universalism does not create the desired predictability, because the home country standard lacks a workable definition and test to determine a jurisdiction where insolvency proceedings can be commenced.[89] As such, the home country standard could mean and refer to more than one jurisdiction where insolvency proceedings can be commenced. This tarnishes the claimed predictability.

Universalists have also criticised the territorial approach, arguing that basing jurisdiction on the mere existence of assets could increase the possibility of forum shopping as debtors can easily move assets to a jurisdiction of their choice to suit their interests.[90] In response to this, territorialists maintain that the potential harm resulting from international forum shopping is greater than any harm resulting from forum shopping in the domestic context, though the latter has never been practically experienced throughout the dominance of territorialism.[91]

Universalists admit the inherent problem of the home country principle, which is the bedrock of universalism.[92] Some scholars have gone as far as attempting to suggest solutions to deter the possibility of forum shopping. Guzmann is of the view that a universalist jurisdiction should identify the home country using such criteria as the main location of a company's activity or location of assets which can not be easily changed.[93] While Perkin argues for a treaty or convention making a place of incorporation as a determinant of the home country,[94] Bufford advocates that a company's centre of main interests should be located in a

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[87] JL Westbrook (n 38) 460.
[88] LM LoPucki, 'Cooperation in International Bankruptcy: A Post-Universalist Approach' (n 38) 751
[89] LM LoPucki, 'The Case for Cooperative Territoriality in International Bankruptcy' (n 38) 2223-2234; and LM LoPucki, 'Cooperation in International Bankruptcy: A Post-Universalist Approach' (n 38) 713-725.
[90] AT Guzman (n 54) 2212; LM LoPucki, 'The Case for Cooperative Territoriality in International Bankruptcy,' (n 38) 2241-2242 arguing that instances of forum shopping involving shifting of assets do not normally occur nor has it been a serious problem in the existing territorial regime. However he advances means that could be used to restrict the possibility of forum shopping, which are employing contractual restrictions and local legal devices and treaties or conventions that could provide for a return of shifted assets.
[91] JJ Chung (n 71)123.
[92] See AT Guzmann (54); UR Bang-Pedersen (n 63) 418; JL Westbrook (n 36) 2315-2317; DT Trautman, JL Westbrook, and E Gaillard, 'Four Models for International Bankruptcy,' (1991) 41 *Am Bankr LJ* 573, 624; 'RK Rasmussen, 'A New Approach to Transnational Insolvencies' (1997) 19 *Mich J Int'l L* 1.
[93] AT Guzman (n 54) 2214; W Ringe, 'Forum Shopping under EU Insolvency Regulation,' (2008) 9 *European Business Organisation Law Review* 579. Ringe suggests changes of the current COMI approach within the EU Insolvency Regulation in favour of company's registered office, arguing that it will render insolvency law applicable predictable and changeable upon fulfillment of prerequisite conditions.
[94] L Perkins, 'A Defense of Pure Universalism in Cross-border Insolvencies' (2000) 32 *NYU J Int'l L and Pol* 787,815.

country for six months or a year before that country would be regarded as a home country.[95] Westbrook on his part suggests a multidimensional test citing the UNCITRAL Model Law, which presumes the place of incorporation as the debtor's centre of main interest.[96]

2.3.2.3 Efficiency and Value Maximisation

Universalists claim that universalism is the only approach in the globalised economy that would efficiently address the collective action problem discussed above at 2.1 as it provides a unified procedure for administration of all the assets of the insolvent debtor irrespective of their location.[97] The unified procedure reduces the costs of insolvency proceedings by theoretically eliminating multiple proceedings in all the countries where assets happen to be situated, and maximises the value of the assets for distribution to all designated beneficiaries while also offering a workable framework for the rescue of an insolvent debtor. ApparentlThis argument on the reduction of the costs is based on the common pool problem conception, which in the present context is viewed and applied at international level to cater for assets and creditors wherever they are in the global market.

In contrast, territorialism has been criticised for being costly, and inefficient. It is argued that its approach not only limits efficient administration of an insolvent debtor by restricting insolvency proceeding to national borders but it also does not work in favour of rescue proceedings for it is difficult to engage in cooperation with many courts having competing interests.[98] This is a serious shortcoming since a majority of insolvencies of large corporations involve rescue.[99]

The claimed efficiency in universalism is questioned by territorialist advocates mainly for its potential in injuring interests of creditors on account of the application of home country law to the adjudication of claims, which will mean invocation of the home country's own notion of due process of law.[100] This would in effect deprive injured parties of active involvement in court proceedings. Additionally, failure of the universalist approach to provide an efficient manner of dealing with corporate groups is regarded as a serious flaw since most multinational corporations are part of corporate groups.[101] On the contrary, it is argued that territorialism offers an optimal solution to problems of corporate groups. According to LoPucki:

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[95] SM Bufford, 'Global Venue Controls Are Coming: A Reply to Professor LoPucki,' (2005) 79 *Am Bankr LJ* 105, 139.

[96] JL Westbrook (n 36) 2317. It is however a noteworthy that this presumption has not necessarily succeeded in assuaging the concerns of territorialists if experience under the EC Insolvency Regulation is anything to go by! I acknowledge the contribution of Professor Adrian Walters on this point.

[97] Ibid 2285; JJ Kilborn (n 38)17-18.

[98] JL Westbrook, 'Theory and Pragmatism in Global Insolvencies: Choice of Law and Choice of Forum (n 38)460; and RK Rasmussen (n 41) 2252, 2257-2258

[99] AT Guzmann (n 54) 2202-2204.

[100] LM LoPucki, 'The Case for Cooperative Territoriality in International Bankruptcy' (n 38) 2225.

[101] Ibid 2230-2234. Notably, this is the work currently undertaken by UNCITRAL Working Group V on the topic of enterprise groups (including multinational ones) in insolvency. Similarly, scholars have attempted to develop and suggest solutions. See J Sarra, 'Oversight and Financing of Cross-Border Business Enterprise Group Insolvency Proceedings' (2008-2009) 44 *Tex Int'l L J* 547; H Rajak, 'Corporate Groups and Cross-Border Bankruptcy' (2008-2009) 44 *Tex Int'l L J* 521; I Mevorach, *Insolvency Within Multinational Enterprise Groups* (Oxford, OUP, 2009), I Mevorach 'Appropriate Treatment of Corporate Groups In Insolvency: A Universal Solution' (2007) *European Business Organisation Law Review* 179; I Mevorach, 'The Home Country of a Multinational Enterprise Group Facing Insolvency' (2008) ICLQ 427; I Mevorach, 'The Road to a Suitable and Comprehensive Global Approach to Insolvencies Within Multinational Corporate Groups' (2006) 15 *Journal of Bankruptcy Law and Practice* 455; CG Paulus, 'Group insolvencies: Some Thoughts About New Approaches' (2007) 42 *Tex In'l LJ* 819; H Peter, 'Insolvency in a Group of Companies, Substantive and Procedural Consolidation: When and How?' in H Peter and others (eds) (n 5) 199; and G Moss 'Group Insolvency-Choice of Forum and Law: The European Experience under the Influence of English Pragmatism' (2006-2007) *Brook J Int'l L* 1005;

> [T]he territorial solution to the problem of corporate groups is remarkably elegant. It does not rest…..on an assumption that all assets within a country are owned by the same corporation. Rather, it assumes only that each asset is located in some particular country. The solution is that the law of that country governs whether the asset is available to satisfy any particular debt, regardless of the corporate structure and regardless of whether the applicable body of law is denominated veil piercing, consolidation, agency, sham or voodoo. The application of that law will be by the local court, and will have no extraterritorial effect.[102]

2.3.2.4 Practicality

Territorialism remains a practically dominant approach to cross-border insolvencies as various countries continue to apply their own diverse laws to insolvent debtors and their assets within their borders albeit that the approaches adopted tend not to be in territoriality's purest form.[103] In this context, universalism has thus been challenged for being impractical, largely owing to the prevailing notions of sovereignty, which make it unlikely that there is a single country that will easily allow enforcement of foreign law within its borders. Yet, operationalisation of this theory is dependant on other countries accepting and applying the theory.[104] Difficulties and prolonged efforts in working out and operationalising an effective framework have been claimed as evidencing the deep rooted territorialist sentiments and reluctance of nations to commit themselves to a universalist approach.[105] Accordingly, initiatives that have been operationalised so far are modest in their aspirations and fall short of the pure universalist ideal.[106] It is generally accepted that universalism will only flourish in a harmonised world that is not in existence yet.[107] The regional initiatives effected to date, such as the EC Regulation on Insolvency Proceedings 2000, have thus not wholesale adopted the universalism theory. On the other hand, universalists admit that a country adopting a territorial approach can benefit economically from protecting its local interests.[108]

2.4 Alternative Approaches Emerging from the Debate

Amidst the debate there have emerged alternative theoretical approaches signifying a drive towards pragmatic versions and compromise arising from the hitherto competing theories.[109] This development is largely in response to the inherent problems of the two competing theories and 'the resilient power of sovereignty'.[110] The main alternative theories that have also not been free from

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[102] LM LoPucki, 'The Case for Cooperative Territoriality in International Bankruptcy' (n 38)2233

[103] Ibid 2219. LoPucki has named territorialism the international law of bankruptcy. IF Fletcher (n 48) 123; PJ Omar *European Insolvency Law* (n 13) 24 observing that 'very few territorial proceedings in modern times explicitly rule out participation by foreign creditors.'

[104] AJ Berends 'The UNCITRAL Model Law on Cross-Border Insolvency: A Comprehensive Overview' (1998) 6 *Tulane J of Int'l L & Comp. Law* 309, 313; J Wade, 'Not So Welcoming? United States Cross-Border Insolvency Assistance' (2009) 30 *The Company Lawyer* 259; G Moss, 'Refusal of Recognition and Bear Stearns: Is the US Denying to Others that which it Expects for Itself?' (2008) 2 *Insol World* 14; G Locke, 'What Are We Achieving through the UNCITRAL Model Law?' (2008) 2 *Insol World* 20; P Kite, 'The Bear Stearns Decision-A Concerned View from BVI' 2 *Insol World* 22; K George, 'Chapter 15 Recognition of Bermuda Proceedings after Bear Stearns' (2008) 2 *Insol World* 24.

[105] F Tung (n 12) 559, 565; and J Wade (n 4) 259.

[106] Ibid

[107] F Tung ibid; and JL Westbrook, 'Duty to Seek Cooperation in Multinational Insolvency Cases' (n 64) 362; JL Westbrook, 'A Global Solution to Multinational Default,' (n 36) 2299 and 2326; and J Pae (n 66) 555-556 & 558-559.

[108] LA Bebchuk and AT Guzman, 'An Economic Analysis of Transnational Bankruptcies,' (1999) 42 *JL&Econ* 775,778 and 806.

[109] J Pae (n 66) 556 and 561.

[110] JL Westbrook (n 58) 43

criticisms are modified universalism, cooperative territorialism and bankruptcy selection clause theory, which is also called contractualism. [111]

It might be appropriate to argue that the alternative approaches that have emerged fall between the opposite ends of the spectrum, from universalism on the one hand to territorialism on the other.[112] On the part of the universalists the alternative approaches, save for contractualism, are mere transitional solutions towards universalism, which to them is the only proper long term solution.[113]

Despite the differences in the alternative theoretical approaches and the fact that they still characterise the two competing models of cross-border insolvency, they signify compromise in some respects and in particular on the element of cooperation among nations in cross-border insolvency.[114] Thus, the possible difference in outcome between modified universalism and cooperative territoriality is seemingly minute. It would seem that LoPucki had this conclusion in mind when he observed that '[a] cooperative territorial system and a universalist one will differ less in practice than in theory……one can think of cooperative territoriality as a simplification of universalism in which multinationals conclusively are presumed to do what they usually do — incorporate separately in each country.'[115]

Indeed, the alternative approaches advanced suggest that the territorialists and universalists both agree on the suitability of universalism in the globalised era but they only differ on whether the pre-conditions are yet in place to make universalism practical.[116] While territorialism, as mainly represented by LoPucki, suggests that the best way of progressing towards universalism is building a transitional framework based on the existing territorialist practices of national

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[111] JL Westbrook (n 36) 2300, observes that cooperative territorialism is one form of modified territorialism, but he does not explain what it constitutes and what the other forms are. See also JL Westbrook, 'Universal Priorities' (n 58) 43 where Westbrook arrived at this conclusion '…It may be that we must shape our reforms in international insolvency to a version of modified territorialism for the present if they are to work efficiently and fairly in the world as it is…….Accommodation with territorialism….may have the additional virtue of increasing the commercial pressures for universalist approaches.'

[112] JL Westbrook (n 36) 2299. There is also secondary proceeding approach that to a large extent corresponds to modified forms of universalism and territorialism. As provided by R Mason, 'Cross-Border Insolvency Law: Where Private International Law and Insolvency Law Meet' in PJ Omar *International Insolvency Law: Themes and Perspectives* (Ashgate, England 2008) 27, 52 'scholars have typically described the phenomenon rather than proposed it as a theory and placed it within the theoretical framework of universalism and territoriality'. This approach allows concurrent insolvency proceedings in each country where an insolvent debtor has substantial presence. Local proceedings are taken as ancillary proceedings only limited to dealing with assets exclusively on territorial basis.

[113] JL Westbrook ibid 2299-2302. See also JJ Kilborn (n 38).

[114] JAE Pottow, 'Procedural Incrementalism: A Model for International Bankruptcy', (2004-2005) 45 *Va J Int'l L* 936, 955, observing that the modifications effected '...reveal important concessions of theory.'; C Farley, 'An Overview, Survey, and Critique of Administrating Cross-border Insolvencies', (2004-2005)27 *Hous J Int'l L* 181, 218 concluding that '…under both cooperative territorialism and modified universalism, courts must consistently reach a level of unprecedented international legal cooperation.'

[115] LM LoPucki, 'Cooperation in International Bankruptcy: A Post- Universalist Approach', (n 38) 750; LM LoPucki, 'The Case for Cooperative Territoriality in International Bankruptcy' (n 38) 2221 arguing that in certain instances, modified universalism is '..virtually indistinguishable from territoriality.'); and K Anderson (n 1) 679, 692.

[116] LM LoPucki, 'The Case for Cooperative Territoriality in International Bankruptcy' (n 38)2217. LoPucki states that 'I agree with Professor Westbrook that it is likely that the globalisation of business eventually will harmonize the now-divergent debt collection and insolvency systems of the countries of the world, making conditions ripe for universalism. That may take decades, however, or even centuries. The issue is what to do while we are waiting for the new world society…..I believe it is to continue to apply principles of sovereignty…..'. See also JL Westbrook, 'A Global Solution to Multinational Default' (n 36) 2276-2277, 2288-2297; JAE Pottow, 'Procedural Incrementalism: A Model for International Bankruptcy' (n 114) 955.

states, universalism, whose main proponent is Westbrook, suggests a system basing on pure universalism as a starting point.[117]

2.4.1 Cooperative Territorialism

This is a refined form of the territoriality theory of cross-border insolvency law. It accommodates all features of territorialism, in particular the right of a sovereign state to administer assets located within its borders without regard to insolvency proceedings in other jurisdictions. However, it provides room for insolvency courts within jurisdictions engaged in administering assets of the insolvent debtor located within their respective borders to cooperate on a case-by-case basis if and when they deem it fit, in addition to establishing a convention to restrict transfers of assets from one jurisdiction to another.

Cooperation agreements where effected may enable the filing of claims by foreign creditors in local proceedings subject to priorities available to similarly situated domestic creditors and existing restrictions whose effect are to prefer local creditors. This approach also contemplates cooperation in other aspects as may be deemed important, including firstly, the establishment of procedures for replicating claims filed in any one country in any other country where the insolvent debtor has filed; secondly, sharing of distribution lists to restrict double recovery; thirdly, cooperation in joint sales of assets to maximise returns; and lastly, facilitating voluntary investment and reorganisation efforts.[118] The cooperation may also involve deference to a foreign state's laws to control domestic proceedings, if a state determines it to be in its best interests.[119] Although, these areas of cooperation may pave the way to an efficient cross-border insolvency system, the cooperation from other jurisdictions is not guaranteed.

In addition to the advantages that it shares with pure territorialism, cooperative territorialism has the further advantage of being simple and less expensive to undertake as it is based on the current territorialist practices of cross-border insolvencies.[120] Therefore, unlike universalism, cooperative territoriality confines international cooperation to aspects in which cooperation has been most successful in the past. On the contrary, the approach suffers a risk of multiple and inconsistent jurisdictional and choice of law decisions.[121] The nature of the risk is attributed to assets involved which may not do not necessarily fall within one jurisdiction. This creates a potential for difficulties in choice of law. Like pure territorialism, cooperative territorialism has been criticised, among other things, for being non-symmetrical to global markets, as it is based on individual countries' insolvency laws that do not conform to requirements of the global market.[122]

2.4.2 Modified Universalism

As the name suggests, modified universalism is 'a watered down version of universalism'[123] which requires a local court to consider and decide whether to comply with a request from a court or foreign representative emanating from a

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[117] LM LoPucki, ibid; JL Westbrook ibid; JL Westbrook, 'Choice of Avoidance Law in Global Insolvencies' (1991) 17 *Brook J Int'l L* 499

[118] See LM LoPucki, 'Cooperation in International Bankruptcy: A Post- Universalist Approach' (n 38) 750.

[119] JAE Pottow (n 114) 954-955.

[120] LM LoPucki, 'Cooperation in International Bankruptcy: A Post- Universalist Approach' (n 38) 753.

[121] JL Westbrook (n 36) 2320.

[122] Ibid 2319.

[123] LM LoPucki , 'Cooperation in International Bankruptcy: A Post- Universalist Approach'(n 38) 725; and JAE Pottow (n 114) 952, saying that modified universalism gives a deferring court a choice by replacing the 'must' of universalism with 'may' as to application of one country's insolvency law.

foreign insolvency proceeding of an insolvent debtor having assets in the local jurisdiction. The whole idea of this approach is to make each court cooperate with others involved in insolvency proceedings of an insolvent debtor in either an ancillary or parallel approach to attain some form of unified result.[124] According to Westbrook, modified universalism '…permits the court to view the default and its resolution…from a worldwide perspective [rather than as a series of rights vested in each territory] and to cooperate with other courts to produce results as close to those that would arise from a single proceeding as local law will permit.'[125] In effect, while this approach creates a framework open for cooperation and extraterritorial effect, it also accommodates territorial elements characterised by a local court's power to exercise discretion to deny cooperation.[126]

One advantage of modified universalism is that while it maintains some claimed efficiencies of universalism theory in the era of growing globalisation of business enterprise, it is a flexible and simple approach to adopt. It does not of necessity require a convention or treaty for implementation as it can be achieved by domestic legislation. In addition, it contains the sovereignty sentiments that have apparently rendered territorialism a dominant regime of cross-border insolvency. The other advantage is that in the context of the drive towards universalism, it provides the necessary experience needed for formulation of a convention for universalism.[127] On the contrary, modified universalism, by attempting to strike a balance between universalism and territoriality has lost the claimed certainty and predictability of universalism.[128] It is, as such, uncertain and less reliable, as courts still retain power to scrutinise home country laws and exercise discretion whether or not to cooperate. Similarly, transaction costs that seem to be saved by avoiding duplicative proceedings are offset by costs incurred in petitioning for assistance in local courts. Nevertheless, modified universalism, like universalism, still suffers the difficulty of ascertaining the home country of an insolvent debtor.

2.4.3 Contractualism or Bankruptcy Selection Clause Approach

This is a relatively recent alternative theory,[129] tracing its roots from the 'contract bankruptcy movement', which characterises the broader theory of contractualism.[130] It advocates a system whereby each corporation will make a choice regarding the applicable forum and law in the event of its insolvency, which choice has to be made during the incorporation stage and reflected in the corporation's charter. The forum chosen will administer the proceedings in accordance with the principle of universality. To deter possible manipulation of the home country of a debtor and restrict room for forum shopping, the proposal provides for change of the choice of the applicable insolvency regime only with the consent of creditors. The courts of every country would consequently be bound to enforce the choice as reflected in the corporation charter unless the result would be unreasonable and unjust.

The underlying justification for this approach is that allowing companies to specify the relevant insolvency system through a clause in the corporation charter is premised on efficiency reasons.[131] It is assumed that some companies are likely to favour a territorial system, while others may favour a universalist approach or

[124] This is also envisaged in IF Fletcher (n 48) 122.
[125] JL Westbrook (n 36) 2302
[126] See K Anderson (n 1) 679, 690, and 691.
[127] JL Westbrook (n 36) 2319.
[128] LM LoPucki, 'Cooperation in International Bankruptcy: A Post- Universalist Approach' (n 38) 728-732.
[129] See JL Westbrook, 'Control of Wealth in Bankruptcy' (n 31)27-830; JL Westbrook (n 36) 2304; and K Anderson (n 1) 679, 694.
[130] See generally S Block-Lieb (n 30)503; RK Rasmussen (n 30); A Schwartz (n 30).
[131] See RK Rasmussen, 'Resolving Transnational Insolvencies through Private Ordering' (n 41) 2255; and RK Rasmussen (n 92) 22.

other modified forms of dealing with cross-border insolvency.[132] Given this situation, it is the companies that can best choose a regime that suits their situations and interests.[133]

Of significance, this approach claims to overcome the problem of determining an insolvent debtor's home country which is inherent under universalism.[134] More importantly, it is likely to provide an incentive to corporations selecting jurisdictions with the most efficient insolvency system. This could consequently lead to competition among countries in putting in place and enforcing efficient insolvency systems whose ultimate result is improved international insolvency law.[135]

However, critics agree that this approach suffers from theoretical and pragmatic problems.[136] Firstly, it has been condemned for disregarding a number of other interested parties from the contracting process, thereby removing the protection provided by the mandatory domestic legislation.[137] Secondly, the approach encourages debtors to select regimes with laws that are favourable to debtors, as opposed to most efficient regime. Thirdly, it would be difficulty to obtain enforcement of this approach by countries without a convention, which is also unlikely to be concluded.

2.5 Placing the Theoretical Approaches and the Associated Issues in Sub-Saharan Africa (SSA) Context

The theoretical approaches and the resulting debate have emerged and developed from the viewpoint of developed countries which are characterised by highly advanced technology, large and multinational corporations and sophisticated financing systems. This fact therefore necessitates a different debate in order to address the specific needs of the least developed countries such as those in SSA in so far as approaching development of a workable and appropriate cross-border insolvency framework is concerned. However, the current theories on cross-border insolvencies may have potentials to offer what is termed as a 'comparative vocabulary and framework' in investigating the optimal approach to cross-border insolvency problems in SSA that take into account the existing global initiatives and the local contexts.[138]

Important issues arise from the debate for SSA.[139] The first issue is whether and to what extent the claimed growth of international business activity makes SSA susceptible to implications of and growth of insolvencies. The second issue is on the theoretical approach that may be envisaged in the existing SSA insolvency systems and whether it is the most appropriate in responding to the implications

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[132] *Ibid*
[133] *Ibid*
[134] LM LoPucki, 'Cooperation in International Bankruptcy: A Post- Universalist Approach',(n 38) 738. See also AM Kipnis (n 77) 178; K Anderson (n 1) 695.
[135] RK Rasmussen, 'Resolving Transnational Insolvencies Through Private Ordering' (n 41)2273; K Anderson Ibid; and SM Franken (n 57)242-245
[136] LM LoPucki, 'The Case for Cooperative Territoriality in International Bankruptcy' (n 38) 2216, 2243; LM LoPucki, 'Cooperation in International Bankruptcy: A Post- Universalist Approach' (n 38) 738; S Block-Lieb, 'The Logic and Limits of Contract Bankruptcy' (n 30) 528-529; and JL Westbrook, 'A Global Solution to Multinational Default' (n 36) 2303- 230.
[137] LM LoPucki, 'Cooperation in International Bankruptcy: A Post- Universalist Approach' (n 38) 738-740; K Anderson (n 1) 697.
[138] K Anderson (n 1) 699 and 700.
[139] See F Tung (n 12) 577; and IF Fletcher, 'Maintaining the Momentum: The Continuing Quest for Global Standards and Principles to Govern Cross-border Insolvency' (2006-2007) 32 *Brook J Int'l L* 767, 774.

of the growth of international business, while taking into account their concrete socio-economic conditions and the realities of the global economy.

Since the mid 1980s, SSA countries have been implementing economic reforms and liberalisation programmes as part of the conditions of financial aid administered by the IMF and the World Bank in a bid to restructure and build their economies.[140] The adopted approach entails putting in place conducive policy and legal frameworks for attracting, promoting and protecting foreign investment,[141] and the making of bilateral and multilateral agreements on trade and investment. The receipt of disbursements from the international lending agencies and other donor countries, with which SSA maintains bilateral and multilateral arrangements, is at times contingent upon progress in putting such policies and laws into effect.[142]

Given the economic reforms and policy emphasis on the promotion and protection of foreign investments, potential for such countries favouring a universalist stance, including its modified versions, seems to be looming; as is the wholesale adaptation of the prescription of the international bodies with regard to the regulation of cross-border insolvency.[143] Certainly, this endeavour might be pursued by these countries[144] in a bid to further attract foreign investors, for it is now widely acknowledged that an effective and predictable insolvency law is a crucial factor for investors interested in investing in a particular jurisdiction.[145] A universalist argument is such that a universalist insolvency system would effectively enable investors to plan their transactions more effectively while confidently aware that in the event of insolvency, their home country law will apply and govern proceedings, or their home representative will be accorded the requisite recognition and cooperation in the resulting proceedings. The assumption is that such law will lower the cost of credit and stimulate foreign investment, as foreign creditors would be more inclined to invest in such a corporation.

The foreign investors, as well as developed countries with which SSA countries maintain bilateral and multilateral agreements in trade and investments, may, depending on their leverage, influence reform in a manner that is seemingly favourable to them.[146] Equally important, since the legal systems and legal profession and training in SSA countries trace their origin from former colonial powers, there is also a strong chance that the direction of reform will be much influenced by the law and the trend of legal reform in the former colonial powers.[147]

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[140] It is noteworthy that IMF and World Bank are among regional and global organizations that have also been instrumental in devising and promulgating models, principles, and normative standards and paradigms as prescriptive for good insolvency law

[141] Many of SSA countries have enacted specific legislation for investment protection and promotion for example The Investment Promotion Act 2004 and the Tanzania Investment Act 1997 which apply in Kenya and Tanzania respectively.

[142] HS Burman 'Harmonization Of International Bankruptcy Law: A United States Perspective' (1995-1996) *Fordham L Rev* 2543, 2547.

[143] See generally ED Flaschen and T B DeSienno, 'The Development of Insolvency Law as Part of the Transition from a Centrally Planned to a Market Economy,' (1992) 26 *Int'l L* 667; PH Brietzke, 'The Politics of Legal Reform' (2004) 3 *Wash U Global Stud L Rev* 1; and HS Burman (n 142) 2547.

[144] This may depend on prevailing domestic politics of the government that is in power.

[145] CG Paulus (n 18); and R Parry and H Zhang, 'China's New Corporate Rescue Laws: Perspective and Principles' (2008) *Journal of Corporate Law Studies* 113, 123.

[146] TC Halliday, and BC Carruthers (n 21) xxi, stating that '…convergence could occur if creditors or investor groups, which possess considerable international mobility push hard for laws that favour their interests.'

[147] D Berkowitz, K Pistor, and J Richard (n 16) 165-195. See also note 3 above.

Having an effective insolvency system is one thing, but achieving its effective implementation is quite another. Although such countries may effect legal reform of their insolvency systems in a bid to attract investment, they may not possess the requisite institutional capacity, experience and resources necessary in dealing with intricacies arising from cross-border insolvencies.[148] This is particularly so if, for instance, a country assumes a universalist home country status or a territorialist local country jurisdiction which might require judicial cooperation with other territorialist jurisdictions to ensure effective 'marshalling of the assets' of the insolvent company to the advantage of creditors.

On the contrary, the likelihood of refuting such a universalist stance can also not be underestimated. It is commonplace that countries may be reluctant to commit themselves to a universalist stance but may instead opt to cooperate with foreign courts on an *ad hoc* basis. Apparently, nationalist sentiments manifested in the desire to protect local policies[149] and creditors are still dominant in some of these countries.[150] Similar sentiments were apparent during implementation of the IMF/World Bank reform policies in some of these countries.[151] This may in some instances render these countries to favour territorialism or to opt to remain with an outdated system, as they may not be keen to reform. Likewise, legal reform may ostensibly be undertaken for simply creating a good impression with the international lending organisations and investors.[152] The resulting insolvency system is thus unlikely to be followed by effective implementation and enforcement. Additionally, a universalist stance might not be favoured for it may be seen as less advantageous to a least developed country where few local business enterprises might be holding assets in other countries.[153] Thus a universalist stance might imply rendering a SSA country the target for a claim of extraterritorial insolvency jurisdiction. As aptly observed by Tung:

> Given the current pattern of investment flows, less developed countries (LDCs) are far more likely to be the targets for assertion of extraterritorial bankruptcy jurisdiction, rather than their initiators. For most multinational corporations, the home country will be an industrial country. Therefore, under universalism, LDCs would regularly have to defer to industrial country insolvency regimes. In addition to social policy concerns, LDCs creditors would be forced to learn about and function under various foreign systems. But LDCs creditors may be exactly the sorts of creditors most vulnerable to these international complications. In general, they will be less sophisticated than their industrial country counterparts. They are less likely to be able to adjust appropriately- even on average- to the risks of various foreign insolvency regimes.[154]

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[148] The presence and actually development of effective domestic institutions is crucial for the governance of global markets. See K Pistor 'Standardization of Law and its Effect on developing Economies' (2002) 50 *Am J Comp L* 97, 99 noting that 'absent supranational enforcement system, law enforcement [for global markets] is dependant on local institutions.

[149] Unlike in other jurisdictions, especially developed countries, it may be noted that the argument regarding the protection of local policies (upon which insolvency laws were founded) may not have a basis and relevance in most Sub-Saharan Africa where the majority of the existing laws were mainly imposed by, and consequently inherited from, the countries that colonised them e.g. several countries still have laws based on the UK Companies Act 1948.

[150] Interests originating mainly from decolonisation process may as well influence choice and crafting of a regime that is unfavourable to a unified stance but offers favourable treatment to local interests. The crisis in Zimbabwe may loosely evidence such sentiments and their corresponding implications.

[151] TA Kelley, 'Exporting Western Law to the Developing World: The Troubling Case of Niger' (2007) 7 *Global Jurist Frontiers* < http://www.bepress.com/gj/vol7/iss3/art8 > accessed 4/5/2009; and PH Brietzke,(n 143)17.

[152] According to CG Paulus, 'Global Insolvency Law and the Role of Multinational Institutions,' (n 18) 760, 'many countries have adopted quite modern insolvency legislation that appears on paper as successful approximations of the propositions in the guidebooks. But, upon closer inspection, it becomes apparent that the law in action bears little resemblance to the written law.'

[153] L Hoffmann, 'Cross-Border Insolvency: A British Perspective' (1995-1996) 64 *Fordham L Re*v 2507, 2510.

[154] F Tung (n 12) 576-577.

The implication of deferring to advanced nations' regimes as home countries of the insolvent multinational corporations is that the least developed countries will failingly develop and build the requisite internal capacity and experience.

The experience that SSA countries might have, if any, in cross-border insolvency and the extent to which they might have been involved in and affected by the massive and high profile cross-border insolvency cases that troubled the advanced nations in the recent past are also likely to influence the approach to be taken to cross-border insolvency regulation. However, the majority of these countries lack such experience, as they have not been directly involved in and affected by such cases.

The varied interests and the potential for global pressure for convergence of insolvency law may render complexities in determining an appropriate approach that will address the needs of SSA while keeping pace with global trends and international best practices. An approach that may be appropriate and work well within a regional grouping framework in Sub-Saharan Africa, may not necessarily work the same in dealing with other key partners in international commerce that fall outside the regional arrangement.[155] Consideration of the key investment and trading partners[156] within and outside regional groupings as well as Sub-Saharan Africa might thus be inescapable in the endeavour of developing an appropriate framework for regulation of cross-border insolvencies, which takes into account the existing global cross-border insolvency frameworks.

Indeed, an approach that is pragmatic and balances the varied interests might be advantageous in many respects, as opposed to 'dogmatic insistence on the means by which a result is to be achieved'.[157] The question remains how best such a balanced approach could be devised, if it is at all needed.

2.6 Some Thoughts and Issues Relating to Reform Strategies

Some thoughts and issues have evolved over the years and amidst the debate and promulgation of global initiatives with regard to reform strategies of insolvency law systems. The thoughts and issues that have been raised attempt to explain what reform of the insolvency law system should consider and how it should be undertaken.

Firstly, it is increasingly becoming accepted among theorists and academics that there is no 'one size fits all' approach to insolvency law.[158] This view is premised on the assumption that each country has its diverse values and norms, which have to be taken into account in the reform process, as they would require different policy choices for its insolvency system that should not necessarily correspond 'lock stock and barrel' with other countries' insolvency systems or global insolvency norms.[159] Such differences are reflected in divergences in priorities and understandings of the goals of insolvency proceedings, such as the protection of creditors, workers, and companies. This thought seemingly warns

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[155] It is worth noting that at least each and every country in SSA is a member of at least two regional groupings.

[156] This may appropriately involve consideration of the investment and trading partners' legal frameworks for cross-border insolvencies.

[157] IF Fletcher (n 48) 124.

[158] See R Parry and H Zhang (n 145) 125; CG Paulus (n 18) 765; N Martin (n 14) 5; JJ Chung (n 70) 107 and 108.

[159] TC Halliday, 'Lawmaking and Institution Building in Asian Insolvency Reforms: Between Global Norms and national Circumstances', 33, <http://www.oecd.org/DAF/corporate-affairs/>, accessed 17/07/2009.

against the dangers of legal transplantation.[160] However, it seems to over emphasise the peculiarity of the national values and norms that account for the claimed diversity. The implication is that the over emphasis on the peculiarity of the national values, if taken without caution, may unnecessarily complicate the approach to insolvency law reform for it may not be that easy, in contemporary pluralistic societies, to determine those propositions of values that are not truly representative of a national wide consensus but also relevant to cross-border insolvencies.[161] Despite this intricacy, it is necessary to accept the challenge for the purpose of a coherent insolvency policy.

The second theoretical view related to reform of insolvency systems is incrementalism.[162] In relation to insolvency law reform, and in particular the global convergence, this view advocates for modest and gradual reform mechanisms in relation to global insolvency law, allowing for substantial deviation, whilst also reducing the risk of outright rejection. [163] This approach claims to accommodate even the sceptical individuals or states that may not be happy with or ready to carry out a wholesale reform and adaptation as it accords room for gradual and piecemeal reform. This approach is significant in cross-border insolvency by virtue of the absence of theoretical and political consensus of how best to design international insolvency regimes. The benefits of incrementalism in international law making have been summarised thus:

> Rather than confront states immediately with a legal regime that couples challenging goals with strong sanctions for failure to meet them, states can be gradually led towards stronger legal rules. This can be accomplished by starting with relatively weak international rules backed by little or sanctions that all states feel comfortable joining, but then gradually pushing states to accept successfully stronger and more challenging requirements.[164]

An incrementalist approach to the development of global law is more relevant where law reformers possess limited authority and the subject is either controversial or technical.[165] It has been argued that it is this approach that the UNCITRAL Model Law on Cross-border Insolvency adopted, thus making it possible to overcome the theoretical gap between universalism and territorialism whilst also implicitly advancing universalism. According to Block-Lieb and Halliday, incrementalism, in its dynamic form, operates vertically, horizontally and in a pyramidal form, which creates potential for broad, and in depth application involving international organisations and building from prior efforts.[166] Notwithstanding its advantages that include minimising chances for confrontation and resistance, the approach is biased towards a universalist stance and more importantly, it operates in a manner that conceals the ultimate intent of the reform process.

The third thought is based on the assumption that an effective and efficient insolvency law which guarantees certainty, predictability, transparency and efficiency should stimulate efficient market exchange processes and thus

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[160] See for instance, F Dahan and J Dine, 'Transplantation for Transition- Discussion on Concept Around Russian Reform of the Law on Reorganisation' (2003) 23 *Legal Studies* 285-310; and H Xanthaki, 'Legal Transplants in Legislation: Defusing the Trap' (2008) 57 *ICLQ* 659-673.

[161] PH Brietze (n 143) 24 and 25; and G Johnson, 'Towards International Standards on Insolvency: The Catalytic Role of The World Bank' (2000) Law in Transition online 1. <http://www.ebrd.com/pubs/legal/lit072.pdf> accessed 15/6/2009.

[162] JAE Pottow (n 114) 936. This is an international law theory, which in connection with cross-border insolvency law reform was first presented by Pottow.

[163] JAE Pottow (n 114) 936; S Block-Lieb and TC Halliday 'Incrementalisms in Global Lawmaking' (2006-2007) 32 *Brook J Int'l L* 851.

[164] OA Hathaway, 'Between Power and Principle: An Integrated Theory of International Law' (2005) 72 *Univ Chicago Law Rev* 469, 531 also quoted in S Block-Lieb and TC Halliday, ibid 851.

[165] S Block-Lieb and TC Halliday, ibid 852.

[166] Ibid 854

strengthen national and global economies.[167] It thus advocates for strategic reform of insolvency laws so as to conform to the global market and in particular to attract investments and support the operations of the credit system. The argument is that such law enables investors and creditors to effectively plan their commercial transactions while assured that, in the event of insolvency, the proceedings will be conducted fairly and efficiently.

Apparently, this view assumes a correlation between the growth of a country's foreign investment and national economy on one hand and the presence of an effective functional insolvency law, though no global comprehensive empirical study has been undertaken in this regard.[168] The inherent difficulty of measuring such a correlation and obtaining reliable evidence thereof has long been acknowledged though it is a widely held belief that such a relationship does pertain.[169] This view is seen as particularly relevant for economies in transition, as well as developing countries, where it can play a critical role in addressing economic problems in these countries.[170] However, it has been argued that it is unrealistic to expect such countries to adopt a new insolvency law system for the sake of the supposed economic advantage; as such a move would require a long term approach involving the sharing of skills and expertise.[171] As noted earlier, having an effective insolvency law is one thing, but its effective implementation is quite another thing for the latter is highly dependent on the existence of a strong institutional infrastructure, something that cannot be developed within a time frame necessary to respond to immediate and pressing needs.[172]

Arguably, none of the approaches discussed is sufficient in itself to provide an effective reform strategy for SSA which is harboured by a number of problems. To be sure, it may be imperative for these approaches to operate collectively and in a holistic manner for want of an efficient output. This is probably the reason why each of them when viewed critically seems to be just an aspect of the other, such that employment of one strategy would necessarily lead to consideration and application of the other. However, the collective and holistic utilisation of all the strategies is highly demanding in terms of human and financial resources which might be lacking in SSA. Indeed, the drive for international convergence undertaken by the global and regional institutions seems at least in theory to have adopted these strategies, though the resulting benchmarks do not reflect the least developed economies' perspectives.[173]

3.0 Conclusion

It is apparent that every theoretical approach that is being advocated is not free from one disadvantage or another. While one approach might be seen as advantageous from the perspective of globalisation and from the standpoint of multinational corporations, it might not equally be seen as a favourable option to

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[167] S Hagan, 'Insolvency Reform and Economic Policy' (2001-2002) 17 *Conn J Int'l L* 63; R Parry and H Zhang (n 145)123; R Sanderson, 'Making Insolvency System Work' (2007) *Law in Transition online* 1. <http://www.ebrd.com/pubs/legal/lit072.pdf> accessed 15/6/2009; CG Paulus (n 18) 757-759; M Balz, 'Market Conformity of Insolvency Proceedings: Policy Issues of the German Insolvency Law' (1997) 23 *Brook J Int'l L* 167,170-172.

[168] TC Halliday, and BC Carruthers (n 21)440. Halliday and Carruthers state *interlia* that "relationship between good law and investment remains open to empirical confirmation."

[169] See M Balz (n 167) 167,169 and 170 ; and TC Halliday, and BC Carruther(n 21) 440.

[170] IMF(n 6); ED Flaschen and TB DeSieno, 'The Development of Insolvency Law as Part of the Transition from a Centrally Planned to a Market Economy' (n 143) 668.

[171] IF Fletcher (n 139)774.

[172] S Hagan (n 167) 72 and 73.

[173] UNCITRAL (n 4); IMF (n6); and World Bank (n 6); N Onder, 'Global Financial Governance: 'Soft' Law and Neoliberal Domination' A paper prepared for presentation at the Canadian Political Science Association Congress, June 2-4 2005 London, 2 http://www.cpsa-acsp.ac/papers-2005/Onder.pdf 25/11/2009 and B Schneider, 'Do Global Standards and Codes Prevent Financial Crises? Some Proposals on Modifying the Standards-Based Approach' UNCTAD Discussion Paper, No. 177, 1 <http://www.unctad.org/en/docs/osgdp20051_en.pdf > accessed 17/07/2009.

a particular country in view of its domestic policies, level of development and extent of integration to the global economy. While an approach might be theoretically sound, in practical terms it might be unattainable in the near future. The above circumstances seem to justify the emergence of a pragmatic approach, and hence development of the alternative approaches which some scholars have described as transitional strategies to universalism. Nevertheless, the debate serves to expose the benefits and ills of each approach, which then need to be considered in developing a framework for legislation in light of the existing global initiatives and the local contexts. In all, the theoretical models and the resulting debate provide an important benchmark which any reform measure ought to take into account while prioritising the specific needs and values of the SSA countries.

It is however worthwhile to note that the endeavour of exploring the theories for cross-border insolvency has proceeded under the assumption that there is a greater challenge for increasing cases of cross-border insolvency arising from the growing scale of international business. The apparent question is whether this is realistic and equally the same in all countries and in particular SSA countries, bearing in mind that the endeavours to develop coherent theoretical models and the resulting debate over the same have evolved from developed economies which are characterised by multinational corporations, advanced technology and sophisticated financial and credit systems. Certainly, another challenge is on the methodology to be adopted to unveil what would constitute relevant specific needs and values for these developing countries.