

INSOL Europe Technical Series

Comparative and International Insolvency Law Central Themes and Thoughts

Papers from the Honours Class 'Comparative and International Insolvency Law',  
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1. *General Introduction*  
Anthon Verweij and Bob Wessels  
Page 14-15

## 1. General Introduction

Anthon Verweij and Bob Wessels

Periodic economic downturns often result in creditors chasing the assets of their financially distressed debtors, located all over the world. Over the past two decades, the quest for compensation has driven creditors to seek the assistance of foreign courts to recover debts owed to them. However, the disparate nature of domestic insolvency systems globally and the lack of efficient and effective international conventions give unsatisfactory results. In recent times legislative rules, guidelines and best practices have been developed to promote and enhance cross-border insolvency problems, to cope with the challenges of this aspect of globalisation. Sources of these rules and guidelines include the EU, the USA, Japan, Australia, South Africa, international organisations such as the World Bank and the United Nations Committee on International Trade Law (UNCITRAL), and associations of professionals (e.g. the American Law Institute, INSOL International, INSOL Europe and the International Insolvency Institute).<sup>1</sup>

The first theme of the Honours Class relates to the international jurisdiction of courts. Since May 2002 in Europe (Denmark excluded) jurisdiction for a court to open main proceedings in international insolvency cases is determined by where “the centre of a debtor’s main interests” is situated. In the case of a company or legal party, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary.<sup>2</sup> The judgement with regard to this is of tremendous importance. Whilst confirming the jurisdiction, this decision has such legal consequences as the power of the insolvency administrator to act in the other Member States and the law applicable to the procedural and substantial consequences of these proceedings. These effects are mitigated when insolvency proceedings concerning the same debtor are opened in other countries. The decisive factor for a court to open proceedings is the presence of an ‘establishment’, which means any place of operations where the debtor carries out a non-transitory economic activity with human means and goods.<sup>3</sup> This norm, with minor alterations, has been used in countries that have recently introduced or amended their insolvency legislation, e.g. the USA, Japan, Mexico, South Africa and Australia, which all adopted their version of the UNCITRAL Model Law on Cross-border Insolvency Proceedings. The central topic of this theme is to analyse how this norm is interpreted, the relevant time frame of compliance with said norm and the procedural requirements that have to be met. The theme includes matters of recognition and enforcement.

The second theme chosen, the topic of conflict of laws (or: private international law), is the most troublesome in cross-border insolvency cases. During classes the rules applicable in European cases with regard to security rights of lenders and – on a global scale - the position of employees will be highlighted. Furthermore, the Honours Class will focus on explaining an endeavour to build a consensus for some non-binding principles relating to conflict of law issues in international insolvency matters. Recent developments in the financial crisis have led to the introduction of certain specified financial products (CDOs), which are thought to have contributed largely to the poor state of several global institutions in 2009.

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<sup>1</sup> A recent overview of the field of International Insolvency Law can be found in: Bob Wessels, Bruce A. Markell and Jason J. Kilborn, *International Cooperation in Bankruptcy and Insolvency Matters*, Oxford University Press Inc., New York, 2009.

<sup>2</sup> See Article 3(1) EU Insolvency Regulation (InsReg).

<sup>3</sup> See Article 2(h) EU InsReg.

Since 2002 in Europe, insolvency proceedings pending in several Member States can contribute to the effective realisation of the insolvent debtor's total assets only if all of the concurrent proceedings are coordinated. For this reason insolvency administrators have the obligation to communicate and cooperate with each other.<sup>4</sup> The role of the court in this process is unclear. Outside the EU, recent changes in legislation have also led to the introduction of rules related to direct communication and cooperation between courts in different countries. The concept of cooperation has a long history. In recent times courts, in discussion with international insolvency practitioners, have created 'protocols' that apply in each individual cross-border case. The core topic of the seminar is to discuss and apply guidelines that have been created in the early 2000s by the American Law Institute and in 2007 by a group of academics, practitioners and judges, to facilitate coordination in Europe, including the workings of a 'protocol', which brings into play questions such as the sovereignty of the judge, the safeguarding of judicial independence and the categorisation of these new inventions of international practice: protocols (private contract law, procedural law, public law?).

We are confident that the Honours Class focused on themes of the utmost importance in understanding and applying solutions in cross-border insolvency cases: international jurisdiction of a court, the law applicable and the coordination of parallel insolvency proceedings in multinational cases, including 'protocols', as the recent multilateral insolvency protocols, adopted or approved in the Bernard Madoff investment fraud case and the Lehman Brothers protocol demonstrate.<sup>5</sup>

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<sup>4</sup> As laid down in Article 31 EU InsReg.

<sup>5</sup> Available via [www.iiiglobal.org](http://www.iiiglobal.org).