



INTERNATIONAL INSOLVENCY INSTITUTE

*Insolvency, Security Interests and Creditor
Protection*

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Introduction

The purpose of this outline, featuring the relationship between insolvency, security and the protection of creditors' interests, is to first ask what constitutes the essence of the procedures, known collectively as insolvency, and to outline the role of the creditor in the process. This chapter then looks at the role of debt in the financing of enterprises and its primary use for the acquisition of assets as well as the means by which creditors seek to protect their interests by agreements with their debtor envisaging the use of security. It continues by analysing the nature of security and differences in legal cultures to the protection of the most fundamental of creditors' interests, the recovery of either physical assets the subject of the agreement or a sum representing the value of the debt.

This outline follows this by sketching some of the hurdles facing creditors seeking to protect their interests when the debtor-creditor relationship transcends national boundaries. Because this inevitably involves potential conflict between legal rules and courts asserting jurisdiction, this outline will illustrate specific aspects of the conflict, where choice of law rules have had to be adapted to the specificities of insolvency. This outline concludes by taking a look at the treaty framework that assists co-operation in international insolvencies and provides illustrations of conventions that govern security interests, whether specifically or as part of the creation of an overall case-management system. Lastly, a view will be taken of whether the development of a treaty framework permits the development of a culture of international co-operation from which creditors can benefit.

The Nature of Insolvency

Insolvency is an old subject at law though its reputation has not always been savoury. It has a long and antique history, the institutions of insolvency which were transmitted to the European commercial and legal worlds being derived from the medium of legal and business practice in the Northern Italian province of Lombardy. Insolvency has traditionally been a repressive regime, owing its institutions, laws and punishments to penal regimes. It was notable that the Roman Laws of the Twelve Tables provided that a debtor who failed to make good payments to his creditors could be cut into pieces (or 'in parti secanto') or sold into slavery. It was comparatively rare that debtors were given any latitude in order to distinguish between those bankrupts who had committed frauds or wrongdoing from those who were insolvent due to misfortunes in trading. The first legislation in this area in England, the Statute of Bankrupts 1542, though providing for the collection and realisation of the debtor's estate, had an overall penal aim. In France, one of the first comprehensive ordinances on the subject was that promulgated in 1673 in the reign of Louis XIV. The codification of the rules relating to bankruptcy appeared in Title XI of this ordinance together with provisions detailing the amnesties to be offered to debtors by means of letters of pardon. This severity of approach continued to characterise the development of insolvency law until very recently, creating a stigma for the subject and making insolvency the subject of disdain by lawyers, lampoonery by authors and dread by the public. This infamy is still evident in press reporting of the vicissitudes of company affairs.

The impact of insolvency has often been felt at the international level over the centuries and incidentally illustrates the complexities of those trading and commercial links that have long been important for the lifeblood of nations. The rise of international commerce and the ease of setting up in more than one jurisdiction now mean that many companies have little difficulty in gearing their economic expansion to a global scale. Interaction between economic entities located in different countries, as a by-product of globalisation and the increasing dependence on new and powerful technologies that effectively 'shrink' the world, has caused the delocalisation of business and the search for new markets to take companies throughout the world. Just as expansion has brought considerations of conflicts of law and choice of law in international contracts and litigation, so too the periodic downturns in the world economy have brought considerations of the rules in relation to insolvencies with an international dimension. Nevertheless, the nature of

international insolvency is such as to raise a considerable number of issues, the attempted resolution of which may bring national systems into conflict.

The diversity of laws applicable to the transactions of a single company is nowhere more important than when their consequences are felt at the time of insolvency. During its lifetime, a company may have acquired assets in the country of its incorporation as well as elsewhere. The rules of law applicable to these assets will often be a matter for the law of the country in which they were acquired and may depend on the nature of the assets, whether real or personal property, moveable or immovable, tangible or intangible. The disposal of the same assets may also be subjected to the same laws, as will the type of security that may be taken over these assets and the nature of execution available against these assets. Quasi-security arrangements will, of necessity, differ in their constitution and their impact depending on the principles of domestic law. Guarantees and support for security by means of registration or notice requirements will, without saying, differ from jurisdiction to jurisdiction. The nature of the protection afforded to creditors and the considerations they may need to take on board in any relationship with a potential debtor will rely on many of these factors.

Liabilities attendant on the use of these assets will also change with the jurisdiction in which the assets are located. For example, the company may have creditors pressing their claims in several jurisdictions. The laws applicable to these claims may raise issues of conflict of laws and the precise nature of the law applicable to the resolution of any dispute arising from the claim. These claims may be made more complex by the presence of qualifications, such as security, set-off and netting arrangements, and retention of title clauses. The identity of the creditors, including whether they are trade creditors, employees or shareholders may affect their treatment, with many national laws giving or refusing priority to certain categories of creditors. The priorities of these debts are also important. Certain creditors are given a statutory ranking, possessing a certain guarantee of payment from the assets of the insolvent company. Others may not have any guarantee, relying on the surplus after distribution is made to preferential creditors to meet their claims. By definition, the assets are never enough to meet all claims. Questions of how classes of creditors are to be treated fairly across all the jurisdictions where the insolvent company possesses assets are fundamental for efficient management of insolvency proceedings.

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Indeed, of importance overall in the insolvency context will be the issues of efficiency and effectiveness of proceedings involving the company. Tied up with the questions of assets and liabilities will also be the matter of jurisdiction in respect of claims over the assets. This is especially important if it results a restriction on the liquidator operating from another jurisdiction entering and claiming the assets in another jurisdiction when assets in any one country are set aside by order of court to meet the needs of the creditors in that jurisdiction before being made available to the rest of the company's creditors. The number of proceedings in existence involving the same insolvent company will have an impact on the assets left for distribution to creditors following the end of proceedings, not solely because of the absorption of fees by the management of the process in the courts but because of the lack of consensus between jurisdictions in dealing with fundamental issues of principle: including the identity and subjection of the debtor to proceedings, the qualification of the moment of insolvency, the availability of preservation measures over assets. It will be particularly important where the diversity of procedures available in different jurisdictions means that rescue procedures are not universally available, resulting in possible disadvantages and the loss of synergy across jurisdictions with regard to saving the company in financial difficulties.

Just as company law has evolved to take account of international business, insolvency law has had to cope with the effects the liquidation of a company may have at an international level. The phenomenon of cross-border insolvency has attracted academic, legislative and judicial attention. Courts have begun to evolve a spirit of co-operation with individuals called in to manage the insolvent company, which results from the realisation that the results of insolvency can have far-reaching consequences on the society whose interests the courts must take into account. Where the consequences of insolvency are felt in several jurisdictions, the attitude an individual court takes to assistance will influence the speed of the process of insolvency and may mean the difference between a swift solution to the problem or lengthy litigation, to the detriment of the company's and its creditors' interests. As will be discussed later, the benefits of negotiated treaty frameworks governing many of the issues previously dealt with by way of judicial discretion and principles of comity or assistance cannot be underestimated. This is particularly because it enhances the predictability of commercial arrangements and allows for creditors to plan their business relationships with their debtors.

The Role of Debt and the Agreement between Debtor and Creditor

Insolvency is fundamentally the inability to pay one's debts at the moment appointed for their settlement. Whether the test used is that of the 'due debt' or the overall balance sheet picture of assets and liabilities, insolvency is a state that is defined at law, unfortunately often without regard for accounting conventions or methodologies, and brings with it a number of important consequences for the participants in the business. Nevertheless, the state of insolvency presupposes a debt, which itself presupposes an arrangement for the granting of credit. It may be a truism to say that debt is necessary for a company to initiate and expand business or that credit is indeed the lifeblood of commerce. Nevertheless, the business world does rely largely on the provision and availability of credit. For that reason, the management of credit and protection of creditors' interests are subjects dear to the hearts of all creditors. The giving of credit is normally the subject of express contractual arrangements between debtor and creditor that provide how the credit is to be repaid. Where the transaction foresees the acquisition of an asset for the needs of the business, the contract will often link in protection of the creditor's interest by making conditional, as alternatives exercisable on the occurrence of pre-determined events, either the repayment of the debt or the surrender of the asset representing the value of the debt.

Every year, an astonishing level of credit is supplied by financial lenders, usually banks, and by other institutions operating in the financial sector. Significantly as well, credit is often advanced through the provision of supplies, whether of goods or services, against future payment. These two forms of credit, usually called loan credit and sale credit, may be further complicated by the existence of mechanisms allowing for the presence of both forms of credit in the same contract or the linkage of a number of separate contracts into an overall framework governing transactions between the same debtor and one or more creditors. The sophistication of asset-financing techniques has led to specific financial instruments being created, nowhere more so than in the realm of high value assets, where syndication of the borrowing involving more than one lender is the norm. Whatever the nature of the instrument allowing for the formation of the obligation by the debtor vis-à-vis the creditor in return for the provision of credit, it is necessary to note that the success of the arrangement from the perspectives of both parties is primarily in the conclusion of the lending or supply arrangement with the satisfaction of the creditor in full.

The interest in insolvency is when the repayments are not made or goods and services are not paid for in full. In fact, the very nature of the lending arrangements might dictate such an outcome if the gearing or leverage, by which the ratio of borrowed funds to internally acquired funds is measured, is wholly unrealistic given the situation and needs of the debtor. This will not occur where business income from the use of supplies or credit is sufficient to service the credit agreement. It may, however, be a reality where business declines or becomes unprofitable and the costs of servicing the agreement exceed the available income of the business, thus inevitably pushing the business into a situation of financial instability. Although such situations are not wholly irremediable for the business, short-term solutions may be difficult to find without severely depleting the working capital or stripping the company of valuable assets in order to meet calls on cash flow. In the long term, severe asset reduction will affect the ability of the business to regenerate itself and reposition itself adequately to meet the challenge of new markets and new opportunities.

In situations such as these, commentators are united in stating that the prime purpose of an effective insolvency regime is to offer business the opportunity of reconsolidation if this is realistic and ‘corporate rescue’ as a concept is indeed a reflection of the ideal of saving the business on the brink of collapse. Nevertheless, considerations of efficiency would also dictate that businesses incapable of revival be dissolved as painlessly as possible. The view held in some quarters is that this is an expression of ‘corporate Darwinism’ by which only the fittest may continue successfully to adapt to changing niches and thus perpetuate their success. Whatever the truth of the above views, it is possible to suggest that insolvency offers an opportunity for the reassessment of business needs, one that is necessarily dependent on the participation of the creditors in the process, this being in part guaranteed by their desire to recover value from the credit arrangement. The attitude creditors take will, it goes without saying, depend on the amount of the indebtedness owed them, but may also rely on other intangible factors such as the business relationship, the importance of the debtor in a local economy and to the creditor who may wish to transact further business with the same debtor.

The assumption of risk is as much inherent in the debtor-creditor relationship as the notion of debt. The repartition of risk is, however, a delicate subject and likely to provoke many of the difficulties in the drafting of an agreement reflecting the interests of both parties to the transaction. With insolvency as a realistic prospect in mind, the interest comes in assessing how creditors meet the challenges posed by the risks of

undertaking business, businesses fortunate enough to be financially well positioned, credit may be obtained often without terms other than the undertaking to repay. Prudence would dictate, however, that in a globalised economy subject to periodic downswings, no debtor is totally immune from the effects of insolvency, even where this is by virtue of the knock-on effect of third party insolvencies where these parties are themselves debtors of the borrowing company. This caution is often reflected in the standard terms of agreements and general conditions of lending applicable in the business sector to all businesses operating on the borrowing market. The ability of borrowers to negotiate individual terms may depend on the same intangible factors mentioned in the preceding paragraph, but is often severely circumscribed, even for companies demonstrating financial acumen and many of the indicia of reliability.

Beyond the immediate contractual arena, the mechanisms most frequently used to protect creditors' interests are varieties of security, by which is meant an interest in property or its equivalent, giving the creditor the choice to reclaim the indebtedness due represented in the form of a physical asset or a sum of money of corresponding value. It also enables greater certainty in connection with the enjoyment or enforcement of a right to be obtained. Security, of which more below, is as much a part of the bargain that is struck between debtor and creditor as the other terms of the agreement, many of which deal with conventional matters such as payment of interest, reflecting often an element of risk, redemption provisions or penalties as well as provisions governing the relationship of the agreement to other agreements (often called subordination). Nevertheless, the major clauses in any agreement will deal with the nature of the security, the assets reflecting the security, restrictions on modifying business activity or assets subject to the security as well as provisions governing the realisation of the security and creditors' remedies in the event of default exercisable directly over the affected assets.

Summary

To the extent that security is the linchpin around which borrowing arrangements revolve, it is necessary to understand that whether security attaches to the debt arrangement and what form this security takes may be a determining factor in creditors' attitudes to the insolvency process. Also of relevance to jurisdictions that allow private recovery measures such as receivership, the enforcement of contractually provided security will also dictate what insolvency measures may be available to the debtor. In any event, security is fundamental in that it will often also dictate the outcome

for other creditors participating in the process because it allows for legitimate avoidance of the *pari passu* rule providing for equal treatment of all creditors. The general interest, it may be said, in insolvency for allowing for this rule to be bypassed is that creditors would not easily engage in lending arrangements without this guarantee that the indebtedness owed them could be recovered without having to compete with other creditors. This in turn affects the risk calculation in any lending transaction and allows for the perpetuation of a culture of lending at levels of interest accessible to most businesses.

The Concept of Security

Security usually attaches to assets. To the extent that there is a classification of assets into real or personal, security may be similarly categorised according to its use in connexion with specific types of assets. This is more usually the case in relation to real property, where the antiquity of security arrangements over this type of property often means that there is a more developed framework governing security in this context with, quite often, more formalities attendant on any transaction. As will be seen below, other forms of security may attach indifferently to groups of assets. Security in general may be divided into traditional security rights and modern types of security, created as a result of an acknowledgement that traditional rights may not be flexible enough to deal with the volume of business transacted by companies in this age and the impact of their trade levels on financing needs. Other considerations in relation to security that will be dealt with below include the attitude of lenders to debt resulting in constraints on the types of financing to which borrowers may have recourse.

The comparison in the section that follows will be largely between the laws of England and Wales, representing the common law position, and those of France, representing the civil law tradition. The protection of real property and other assets by the use of a security is of course intended to guarantee the debt owed to the creditor. There are two varieties of security in France which have traditionally been used by creditors to preserve their interests over particular assets belonging to their debtor and which are commonly found as a means of assisting business lending. These are the mortgage, commonly found in cases of specific protection of real property interests and the legal charge, which applies to all varieties of property. The equivalents in England and Wales are, on the one hand, the similarly titled mortgage and, on the other, the pledge and the contractual lien, which both

have features akin to the legal charge in French law. In addition, the law in England and Wales also recognised the equitable charge, a form of security that, because of the differing legal histories of both jurisdictions, has no direct equivalent in French law. This separate development of equitable principles also affects the mortgage and lien, which have equitable equivalents. All of the above forms of security are termed true security to distinguish them from varieties of quasi-security and other rights aimed at boosting security interests but which do not amount to security in the classic sense. Later developments in France have also used traditional concepts for the development of what might be termed modern security methods.

Security Rights in the French Context

In France, as far as general security is concerned, it appears that the terminology and framework of security is still couched in the language of the early 19th century. It may be said with some justification that the values of security are still firmly linked to the ownership and enjoyment of real property interests. Although, in principle, the rights of a creditor vis-à-vis the debtor, where these are secured against property, are considered to be in the nature of personal rights, the nature of these rights can be equated to those existing in real property. Thus, although these rights are often dealt with as part of the section of the Civil Code that talks of special contracts, they may need to be registered and comply with the type of notice requirements more often found in the context of land so as to be fully effective against third parties. An example may be found in the case of leases, which because of their incidence on land come close to being interests in land, especially in the agricultural and business contexts.

The mortgage (or ‘hypothèque’) is defined in Article 2114 of the Civil Code as being a physical right over real property which covers an obligation contracted by the debtor and may be created according to Articles 2116-7 by operation of law, by a decision of a court or by agreement between the parties. A mortgage may, nevertheless, only be taken out over property that can be subject to sale as part of a commercial transaction although Article 2118 does provide that a mortgage may extend to a right of enjoyment attaching to that property. Complex notice requirements govern the creation of mortgage rights which rank according to the date on which the mortgage was registered or, for registrations on the same date, according to the date of the contracts giving rise to the mortgage. The limitations of the mortgage are that it is to be found exclusively in the real property context and is limited to property already in

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existence, as mortgages may not by virtue of Article 2130 be created over future assets. Thus the availability of the mortgage as a financing tool is clearly seen as being restricted to those companies that already have a substantial asset base including real property elements.

In the French system, the legal charge (or ‘nantissement’) exists in two varieties: the ‘gage’ for moveables and ‘antichrèse’ for immoveables and is a variation on the classical pledge. It is a security created by a deed in which the debtor provides, according to Article 2071, a specified asset to the creditor as security for his debt. It gives the creditor the right to be paid out of proceeds resulting from the use of the property, in preference to other creditors. The effectiveness of this type of charge is subject to it being created by deed, which must contain details of the property subject to the charge and, where the charge applies to incorporeal property, this deed must be the subject of express notification to the debtor. Although the effectiveness of a legal charge may be subject in certain instances to physical transfer of the property to the creditor or to a bailee, who holds it on behalf of the creditor, generally there is no need under Article 2076 for the debtor to be dispossessed of the asset over which security is enjoyed. It is thus an instrument that is found widely and is available also for creation of security over debts under Article 2081. Nevertheless, it is a cumbersome instrument, which must relate to a specified asset subject to the security and entails the creation of separate charges if types of property are considered distinct or come into existence at different times. This was very much the case in relation to the Eurotunnel project which is said to have required separate securities over rolling stock, bank accounts, intellectual property rights, receivables and equity in subsidiaries.

The difficulties with traditional security relate, in the case of the mortgage, to the limitation to real property already in existence and, in the case of the legal charge, to the need to specify the particular assets to which the charge relates. Given the absence of a generic charge that could relate to the totality of assets, it may be argued that French business has been considerably hampered in its ability to raise finance adequately. Nevertheless, an early law provided a partial solution to the problem by allowing the grant of a legal charge over the goodwill (or ‘fonds de commerce’) of the business. The definition of goodwill outlined in Article 9 of the Law of 17 March 1909 was limited to the company name and trademark, furniture and machinery, client lists and any intellectual property rights, including copyrights, industrial designs and patents, associated with the business. A number of means have been used over the years to address this situation, notably by using the technique known in

French as 'debt-mobilisation' (or 'mobilisation de créances). This refers to the technique of using debts, to which the company is or becomes entitled, as a species of security against other loans granted usually by financial institutions. The use of a legal charge backed by a debt was one such method. Other techniques were also developed. Thus there were the examples of the use of bills of exchange guaranteeing payment at a fixed date as consideration for loans, the use of rediscounting by banks, the issue of bills by banks backed by debt and assignment of debt. In this last example, although the transfer of receivables to a third party was permitted, it was limited to instances where the debt was itself guaranteed by a mortgage or legal charge created over real property. In addition, there was a complicated procedure which involved using the services of a notary public and the execution of deeds. As a species of financing, with the costs frequently outweighing any advantage, it has rapidly lost popularity.

The needs of business were not really served until the early 1980s, when concerted lobbying by financial institutions and businesses alike inspired the Government to produce Law no. 81-1 of 2 January 1981, sponsored by Senator Dailly and which ever since has been referred to by his name. The law states as its purpose the facilitating of credit to business and contains in 16 relatively succinct articles a framework that has astonished commentators by the remarkable success it has experienced in the French business context. In brief, the law allows any financial institutions to have made in their favour and delivered a document of title (or 'bordereau'), which will entitle the institution to any debt owed by a third party to the debtor. The document of title must include certain mandatory details permitting the identification of the parties and the debts to which the document relates. Failure to include these mandatory details is strictly sanctioned as the law renders any purported transfers void and ineffective. With the transfer, any security or guarantee attached to it is automatically transferred for the benefit of the financial institution. One point of note is that the law permits creditors to issue instruments on the back of receivables designed to allow the assignment of a part of eventual proceeds. This technique permits wider participation in the financing operation and spreads the risk attendant by regenerating cash flow for the credit institution. Assignments of title under this law are now very common and the use of the technique is widespread.

Security in the English and Welsh Context

In England and Wales, security in its essence developed from the use of real property as a means of representing to the creditor the availability of an

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asset to satisfy the loan. The extension of security to personal property, intangible property and collections of property are developments with which the common law is familiar, but which normally rely on the identification of the asset to be encumbered, often through incorporation by express reference in the contract. The institutions of the trust, floating charge and receivership, although deriving from original ideas associated with land law, have been reused in innovative and creative ways. In this context, the development of the floating charge, a species of charge capable of attaching to an indifferent collection of assets that may fluctuate in content during the currency of the charge, may be fairly described as allowing for the most flexible of all arrangements by which the debtor has full power to control and dispose of the assets subject to the charge provided the asset base does not diminish overall.

The position in England and Wales with regard to mortgages has some resonances with the French system, although the nature of the mortgage is wider in that it may be a conveyance of a legal or equitable interest in property generally, subject to a reconveyance of the property upon repayment of the loan. Sections 85-87 of the Law of Property Act 1925 apply special rules to the creation of legal mortgages of land and there are generally requirements of writing in relation to many forms of mortgages. Legal mortgages are broadly defined as mortgages where the formalities have been complied with in relation to the type of property in question. The equitable mortgage arises either because the interest is an equitable one in the property or because the formalities have not been complied with in full for the creation of a legal mortgage but it would be inequitable to deprive one of the parties concerned of the benefits of any arrangement. In substance, the mortgage is mostly found in the real property context and is similarly available to businesses with assets that are capable of being mortgaged as security for lending arrangements. The position in both jurisdictions may be fairly characterised, in relation to mortgages, as one that favours the borrower with a pre-existing asset base. The major difference in England and Wales is, however, that mortgages can extend to future assets and future indebtedness, thus greatly increasing its remit and making it a very widely used form of security.

The position in England and Wales with respect to other charges displays similarities to the French system. The pledge as a form of security is essentially the delivery of possession of the asset to the creditor without a transfer of ownership taking place, a situation the opposite to that of a mortgage. The requirement for delivery renders some assets, including land and those not subject to physical delivery, normally incapable of being

pledged. The notion of physical delivery has, however, been mitigated by the categorisation of delivery as being constituted by actual or constructive delivery, allowing for the delivery of a representation that the assets are held to the benefit of the creditor by the debtor or a third party. The similarities to the types of legal charge in French law that require delivery up to the creditor are unmistakable, perhaps a tribute to the common inheritance from Roman law principles. The lien, although it appears also at common law and in some statutory provisions, is primarily a contractual provision allowing for the right to retain property belonging to another until a debt has been satisfied. In its usual form, it is likened to a passive right of retention that continues only for so long as the creditor possesses the property. As a species of financing, the lien presents certain inconveniences, particularly because it is normally incapable of assignment. Insofar as the pledge and contractual lien may be comparable, a lien is in principle merely a power to detain property while the pledge carries with it an implied power of sale, allowing the creditor to deal with the property should the debtor default.

The position with regard to the equitable forms of security, which also include equitable liens, mortgages and charges cannot be compared to that prevailing in France. The equitable lien or mortgage represents the recognition of a right that would otherwise be held inadmissible because of some defect at common law that would render title otherwise incapable of enforcement. The equitable charge exists because it does not involve the transfer of possession, one of the hallmarks of the common law development of security interests, or of ownership. It merely represents the right of the creditor to have an asset belonging to the debtor dedicated to the settlement of the indebtedness, the discharge occurring when the debtor voluntarily surrenders the asset or is forced to disgorge it by order of court. The right to appoint a receiver to recover the asset also serves to aid the discharge. The equitable charge is at the base the origin of the floating charge, this having developed by contrast to the fixed charge applying to nominated assets by extending to classes of assets constituting a fund. The interest of the floating as opposed to the fixed charge is in the nature of the creditor's participation, disposals under the fixed charge requiring consent, while those under a floating charge are normally at the disposal of the debtor until such time as the charge crystallises on the occurrence of a determining event. It may be argued that the development of the floating charge represents a considerable advance on earlier security methods that has avoided the need, as in France, for legislative intervention to adopt modern security techniques.

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Summary

A number of conclusions may be drawn from the above outline. It may be said, firstly, that the French law of property is still firmly linked to the values associated with real property in a way that English and Welsh law has been able to move away from. If this view is the correct one, then it would follow that security and the protection of creditors' interests is similarly imbued with notions more properly associated with land and real rights and remains so despite the changing needs of business, thus creating a system that might be fairly described as static, and this despite later legislation introducing new security techniques. It is certainly true in all jurisdictions that new businesses, especially start-up and new technology enterprises, experience annual statistics of failure that are alarming. Some of these failures will be due to the ordinary risks inherent in conducting business in novel and untested conditions. Some, however, will undoubtedly occur because of the difficulties in securing adequate finance. Here, the underlying framework for security is of the utmost importance in facilitating methods for raising business finance. The best position for business is indeed where this framework contains a range of methods permitting finance to be tailored to the needs and situation of the business. In comparing both jurisdictions, the range of security seems to be wider in the English and Welsh context and allows for security to cater to a wide variety of assets. The flexible use of the mortgage and floating charge seem to especially assist this.

In this context, it may be argued that French law lacks the flexibility to adapt financing techniques because of the often very conventional setting for business in France. This situation is dictated for the most part by the orthodoxy of the security available and the attitudes of institutional lenders. The point must also be made that lenders in France may be subject to insolvency liabilities because of the development of principles governing the over- or under-supply of credit, leading to an orthodox approach in lending decisions because of greater risks attendant on the usual business of lending. Undoubtedly, there is a profound impact on business at large and the level of entrepreneurship and a consequent effect on the competitiveness of the French economy as a whole. Part of this impact may stem from macro-economic decisions as to the appropriate level of interest rates governing lending conditions, part lies at a more fundamental level where the interface between law and business operates. Without appropriate security methods, creditors and debtors cannot agree financing initiatives that lie outside the framework the laws of that jurisdiction provide, leading often to loans being negotiated across frontiers

relying on more favourable techniques being available elsewhere. Nevertheless, this form of competition is ineffective if the assets available for security lie within the jurisdiction and remain subject to orthodox rules for recovery and debt-settlement.

It is for this reason that, independently of the recourse to financing and security that creditors and debtors may enjoy by being able to seek the most favourable conditions in other jurisdictions, the arguments around security still return firmly to considerations of domestic law. The examples afforded by the laws of these two jurisdictions of very contrasting antecedents and legal cultures illustrates in miniature the difficulties faced by creditors and debtors seeking the best arrangements for their financing initiatives. It may also be mentioned here for sake of completeness that both jurisdictions are familiar with quasi-security concepts, including the use of set-off and retention of title arrangements, and also have systems boosting security, for example the widespread use of personal and third-party guarantees covering indebtedness. Nevertheless, the systems for security acquisition in the two jurisdictions mentioned may be fairly taken as being at different parts of the spectrum in terms of facilitating business finance. Because domestic law is firmly at the heart of creating security, it should be firmly underlined that it also frequently determines the remedies to which creditors will be entitled in seeking to enforce their security. As the next section will demonstrate, the attitude of domestic courts to assisting creditors and claims from elsewhere will determine whether creditors have the best use of the security for which they may have contracted across national boundaries.

International Insolvency Considerations in Domestic Law

It is almost redundant to suggest that the transaction by an individual or business that crosses an international boundary will raise issues of conflicts of law and resolution of these conflicts by reference to the rules of private international law. It may also be superfluous to note that successful transactions often raise no such questions for resolution. It is only in cases of dispute that an attempt must be made to ascertain the proper law to apply and what the consequences are on the claim and the manner in which it may be raised, resolved or satisfied. As a species of private international law, international insolvency law exhibits many of the characteristics of this body of rules. Thus, international insolvency contains choice of law rules, jurisdiction rules as well as recognition and enforcement rules. Nevertheless, the competition in insolvency between jurisdictions,

‘unusually intense’ as Professor Ian Fletcher argues,¹ has meant that the search for universal or common principles, through the rapprochement of domestic norms, has led to less success in international insolvency than in mainstream conflict of laws. This may be seen especially in relation to the doctrines of renvoi and dépeçage, which acknowledge possibilities for the use of the rules of other legal systems as the means to resolve disputes, either in conjunction with domestic rules or to their exclusion. It may be argued that this competition results from the economic nature of insolvency and its close relationship to state interests in proper management of the economy. Furthermore, this diversity in views may be said to make the task of harmonising legal rules more difficult because of the lack of a median rule or method for reconciling two obvious and contradictory extremes of position.

Apart from the general situation of conflict of laws, differences in domestic norms have a particular impact on the position of creditors and the priorities they assert in insolvency. Where the debtor faces creditors pressing their claims in more than one jurisdiction, this will inevitably raise issues of conflict of laws. The conflict may itself be made more complex by the presence of qualifications, including the presence of security, set-off and netting arrangements, retention of title clauses and other means of protecting title available to creditors in national laws. The treatment of creditors may also depend on their situation under domestic law and the adherence of the jurisdiction concerned to the principle of equality of treatment. Generally in insolvency systems, a variety of creditors exist. These include creditors given statutory ranking, possessing a certain guarantee of payment from the assets of the insolvent company, creditors without guarantee, relying on the surplus after distribution to preferential creditors to meet their claims. Many national laws also exist giving or refusing priority to certain categories of creditors. Furthermore, the priorities of creditors’ claims are also important because of the availability of enhanced protection in certain jurisdictions, for example, the institution of receivership in the United Kingdom, by means of which a creditor may enforce the security owed to him by the appointment of a manager over the debtor’s assets. This may also happen where flexible methods of financing have been developed that are not dependent on the precise identification of assets, for example the floating charge.

As it is almost invariably the case that the insolvent will possess insufficient assets capable of satisfying all of the potential claims, the question of how classes of creditors are to be treated fairly across all the jurisdictions is fundamental for the efficient management of insolvency

proceedings. Allied to this is how creditors are able to effectively participate in insolvency proceedings where these take place outwith their jurisdiction. Some of the difficulties faced by creditors in organising their participation have been catalogued by Professor Kurt Nadelmann.² These include rules discriminating in treatment between foreign and domestic creditors, the lack of prior notice to be able to comply with procedural requirements, the ‘race of diligence’,³ obliging creditors to pursue the execution of judgments and attachment of claims hurriedly to prevent competing interests from acquiring priority. Also counted as problems are forms of legal discrimination permissible when domestic proceedings are opened pending recognition of a foreign judgment, which often allows local creditors to obtain an advantage, as well as impediments within the recognition process conditional on special procedures being followed, for example the use of the ‘*exéquatur*’ procedure in France. Special problems exist for creditors who are unused to the types of remedy available in other jurisdictions and in cases where the debtor has more than one establishment leading to differences in treatment of the assets belonging to these establishments.⁴ Finally, these problems are in addition to the ordinary problems attendant on international litigation such as the effect of time and distance, the costs attendant on making claims and the likely unfamiliarity with the foreign language and legal system.

The effects of decisions as to the assumption of jurisdiction to deal with all aspects of insolvency proceedings are generally classified according to whether the assets that are to be affected lie exclusively within the jurisdiction or include both these assets and all others located outside the jurisdiction concerned. The presumption of control over these assets and the nature of the competence, whether exclusive or conjoint and arrogated by a court to itself, defines to which school of thought that court belongs. Although these positions may seem, according to the definitions outlined below, mutually contradictory, the division between these viewpoints is not entirely clear-cut. Also subsumed into this debate is the question of unity or plurality of proceedings, also referred to as the problem of multiplicity of proceedings. Because this is the case, the question of whether courts adhere to the universality or territorialism principle has a bearing on the overall question of the conduct and efficiency of insolvency proceedings.

Territorialism

Territorialism may be defined as dealing with local assets for the general satisfaction of the claims of local creditors. Territorialism is still the norm

in many jurisdictions, although very few territorial proceedings in modern times explicitly rule out participation by foreign creditors, in spite of this often being the case in earlier times. Nevertheless, participation by foreign creditors remains subject to the availability of knowledge and information, their ability to be diligent and to overcome procedural hurdles. In connection with the unity-plurality question, the adoption of the exclusive right to decide the fate of assets within the jurisdiction leads inevitably to the creation of more than one set of proceedings, especially where assets, establishments and obligations of the debtor are identified with more than one jurisdiction. This is not to say that a court applying the territorialism principle will not attempt to exercise some degree of control over these external assets, but the effect will be limited insofar as other courts purport to exercise exclusive jurisdiction over the same assets and will not allow conjoint control. The major advantage of territorialism will be from the local creditor's perspective where assets are held for the benefit of a smaller pool than might otherwise be the case. This would have an especial advantage for protected categories of creditors like employees, whose reliance on statutory guarantee schemes will lead to subrogation of these state bodies in their rights as against the employer in question. Nevertheless, localised benefit in this case is entirely dependent on the pool of assets available and creditors might find a disadvantage if the establishment or activity in their jurisdiction is minimal compared with elsewhere. The inability of creditors to predict what assets might be available would lead to uncertainty about the benefits of maintaining the territorialism rule.

The major disadvantages of territorialism are that reorganising the company or group of companies is difficult or impossible, as domestic proceedings are not normally geared to maximising the return other than for local creditors. Unless domestic rules specifically authorise this, insolvency officials are often unwilling to transfer domestic assets elsewhere in order to assist other operations involving the company. Quite often, there may be no specific statutory authority for co-operation and any transactions which could assist insolvency proceedings elsewhere may fall foul of domestic law. This factor would impede the likelihood of valuable domestic assets being sold as part of a parcel of assets or going concern where elements of the parcel or business derive from assets held in a number of countries. The net result of jurisdictions subscribing to the territorial rule is that liquidation, and not corporate rescue, becomes the norm when the principle is applied, despite the probability that the jurisdiction will possess quite a sophisticated rescue regime.

Territorialism also produces unequal results for creditors, despite the likelihood that domestic rules will subscribe to the *pari passu* principle of equal treatment of creditors. As noted above, although discrimination in practice at a procedural level against foreign creditors is rare, they may not be able to participate in their debtor's insolvency because of a lack of effective notice of proceedings and difficulties, especially with language and legal barriers, which may result in claims being processed late or out of time. The cost of collecting a debt across international boundaries and the uncertainty of litigation are also factors in denying creditors effective access to their debtor's insolvency. At a more substantive level, differing priority rules in each country will affect the overall distribution of dividends and surplus assets to creditors. Creditors may bear an unequal share of the risk element depending on what assets are available for the insolvency in any particular country. Local creditors will tend to benefit if there are assets in that jurisdiction and will be disadvantaged where assets have been dissipated or transferred out of the jurisdiction.

Shrewd debtors can utilise modern technology to transfer assets with rapid ease from one jurisdiction to another with view to benefiting preferred creditors or other persons. As insolvency practitioners are not always adept at tracing proceeds of insolvencies, creditors may have to pursue their own remedies but only very few creditors will be able to take advantage of multiple proceedings and prove debts in different countries, and then usually only because those creditors are themselves multinationals. This sophistication at the international level is not available to smaller domestic creditors. The results are that distributions are arbitrary and inconsistent and all of the factors of risk will end up being built into the cost of financing international transactions. Overall it might be contended that the net effect of maintaining a territorialism rule will be the consistent preference by creditors for financing arrangements reflecting this risk strategy and debtors seeking international financing will bear the burden of their jurisdiction's choice of legal rule.

Universality

Universality is used in two senses. First, in opposition to territorialism, it means the extension of jurisdiction to cover all of the assets of the debtor wherever situated. Second, in a narrower sense that has an impact on procedure, it refers to the co-ordination of what happens to the debtor's universal assets in a single procedure. Universality is almost always preferred to territorialism by commentators, both legal and academic, for reasons related both to the practical convenience of adopting the rule and

the legal consequences of deference implicit in the recognition by other jurisdictions of the primacy of one set of courts. Thus following the acceptance of the forum as being competent, the universality principle allows for an effective choice of law to deal with all questions related to the debtor, thus resulting in a unified law for the purposes of the insolvency in question. Regardless of the aesthetic and convenient aspect of a single insolvency procedure, choice of a single law would avoid the problematic situation of conflict of laws.

The argument for universality is dealt with by Professor Jay Westbrook by reference to an economic analysis of competition outcomes. The argument here is that appointing the courts of one country as courts of universal jurisdiction produces two effects termed the Rough Wash and Net Gain. The first is an argument depending on the comparison of benefit from the local creditor's standpoint. A universality rule would even out any losses or gains for local creditors who would stand to obtain as much from the choice of the domestic court and acceptance of this fact by foreign courts (who would 'defer' to the local court) in any one set of proceedings as where the converse occurs and the foreign court takes jurisdiction in another set of proceedings. The argument is called isolated by Professor Westbrook because it does not depend on whether there are benefits to commerce generally. Nevertheless, it is accepted that there would be a low incentive to maintain such a scheme without any positive benefits. Thus, the ideal outcome of the Rough Wash effect should be the creation of a net increase of value for creditors overall from the introduction of the system. The Net Gain argument takes the benefit argument further by stating that there would be a gain for commerce from lower transaction costs and the concomitant increase in trade because of the relative certainty that would be introduced by such a rule. Both arguments are however conditional on a high level of reciprocity built into the system. Professor Westbrook also points out an altruistic argument that he acknowledges is often touted as the leading argument for the adoption of the universality principle but contains serious weaknesses.⁵

Universality is not without its own criticisms. Chiefly, these revolve around the difficulties of organising the application of the rules of a single legal system to assets present in a number of jurisdictions. This is especially true in relation to 'difficult' assets, notably real property encumbered with charges, intellectual property and intangible moral rights, other intangible assets such as shares, bonds and debentures, special property such as ships and aircraft and even ordinary assets where peculiarities attached to those assets make their negotiation and realisation

difficult. The hurdles that universality faces also include the impact of sensitive areas of law, such as family law, which may impede seizure of a debtor's assets and the existence of mandatory or *ordre public* rules which may prevent effective recognition of the application and enforcement of laws in another legal system.

Practical Solutions

Advocates of a solution to the problem of international insolvencies look to reconciling the differences between the adoption of either a strict territorialism or universality principle.⁶ In light of these arguments, many of the views on reconciliation comes through observation of the pragmatic attempts by courts and individuals to render the insolvency process more efficient and there are two essential types of practical solution that may be envisaged. The first, at the domestic level, requires recognition by the courts of the desirability of facilitating the administration of the debtor's assets through co-operative procedures. This method requires the evolution of principles of assistance and the eventual exercise of discretion in instances where the overall interests of the insolvency may demand an abnegation of protection for the domestic creditor. Insofar as domestic law may allow latitude of manoeuvre, the domestic judge will be capable of achieving much by way of co-operation between courts called upon to administer the same insolvency. The second, examined in the next section, avoids the problems that may be caused by unhelpful domestic legislation by looking to the creation of supranational instruments, the negotiation of which will involve jurisdictions agreeing to common principles of co-operation and methods for resolving conflicts. This strategy has the advantage in most jurisdictions that adhere to the supremacy of written law by focusing the attention of judges called to enforce these rules to specific co-operation texts contained in the law. The pragmatic approach taken in the management of insolvencies has also led some scholars to attempt a classification of the methods of reconciliation by reference to the principles noted above. Professor Westbrook has noted that practice generally falls into two distinct forms: 'secondary bankruptcies' or 'modified universality.'⁷ Both of these practices modify the territorialism principle by allowing a single judicial forum access to other courts minded to co-operate in order to preserve and deal with assets belonging to the debtor for the benefit of the insolvency overall. Professor Fletcher also looks to the phenomenon of modified universality in discussing what he calls the 'internationalist principle'.⁸

In secondary or ancillary practice, a jurisdiction may distribute local assets to local creditors according to the priority system in force in that jurisdiction. The surplus from distribution would be remitted to the main or principal jurisdiction for distribution in accordance with its priority rules, which may differ in emphasis or content. This practice has received support from a variety of sources, not least in the creation of international initiatives seeking to settle methods of co-operation systems between subscribing states. Instances of this approach may be seen in conventions where the role of jurisdictions is firmly assigned by their being classified into main or ancillary jurisdictions. The effect of orders given in ancillary jurisdictions is thus limited to dealing with assets on an exclusively territorial basis. Commentators note the apparent contradiction in this strategy by pointing to the effect of such a system in effectively maintaining a 'grab-rule' for the benefit of local creditors while paying lip service to the notion of centralised administration of insolvency. This is because of the low probability that assets in any one jurisdiction will realise a surplus adequate enough to meet the needs of unsecured creditors elsewhere as distribution according to priority rules of the main jurisdiction will still privilege secured and priority creditors only. In effect, unsecured creditors would only benefit by being present in the jurisdiction in question. As noted above, this position may be entirely arbitrary or fortuitous. While some instruments provide for creditors to account for dividends received in prior distributions where they also participate in other procedures, this is unlikely to affect all but the more mobile creditors, who will inevitably have the means of protecting their interests.

In the 'modified universality' principle, jurisdictions accept the fact that a single court should manage the insolvency and offer such co-operation as they are able to give, bearing in mind the needs for reciprocity and procedural fairness in the treatment of creditors overall. The needs of local creditors may still form part of the considerations where it is intended that effect be given to orders by the single court in other jurisdictions, thus reserving some domestic control compatible with the overall co-operation framework. Professor Fletcher states that in effect this approach can complement the existing widespread adherence to the territorialism model by requiring co-ordination to the extent that the practical outcome is that the universality principle is attained *de facto*. By respect for the principle of collectivity and the existence of an entitlement to participation by all the creditors at some stage within the proceedings, all creditors will receive the fullest dividend possible. The 'internationalist principle' he outlines is also predicated on the adoption of the modified universality principle as well as the realisation by jurisdictions of the need for a collaborative response to

international insolvencies. This will take place through the evolution of rules of private international law in light of the reality of cross-border activities and the identification of common and flexible principles to regulate the management of such cases.⁹

Summary

The issues governing the organisation of insolvencies at international level raise complex and interesting questions, not just about the nature of the jurisdiction exercised by the courts but on how this has an impact on the position of participants in insolvency and their treatment. Traditional rules for approaching the problem of cross-border insolvency, which as noted above are divided into the territorialism and universality schools, are increasingly seen as inadequate to deal with what has become a significant phenomenon in the 1990s of the rise in international insolvencies. Nevertheless, which philosophical school of jurisdiction a court follows does not, in the opinion of commentators, matter when it comes to international insolvency organisation. If adhering to the universality principle, a court will still wish to ensure that its orders have effect beyond its borders. Even if other courts give this support voluntarily and always assuming reciprocity is not made a pre-condition, full and willing co-operation is only to be achieved through the existence of an appropriate international agreement. For countries adhering to the territorialism principle, the probability of a lack of reciprocity makes the conclusion of an international accord imperative. This view is given considerable credence by a host of commentators, writing on the phenomenon of international financial insolvencies. The failure of the Bank of Credit and Commerce International is held up as a particular example of the cogency of the need for international insolvency organisation.

Despite the questions asked by some commentators as to the necessity for international harmonisation of insolvency law, the consensus is that international organisation in the form of a treaty or other instrument remains the only method of ensuring 'predictability, efficiency, equity and finality' in relation to cross-border instances. This is especially true where ad hoc solutions arrived at in the context of previous international proceedings are insufficient to ensure consistency of treatment in all instances in international insolvency cases. This may be seen in light of the very great differences between national laws relating to essential elements of the insolvency process. The questions of priorities, avoidance of preferences, avoidance of transactions generally, enforcement of revenue claims, equality between creditors and distributions and, crucial for

creditors possessing security, asset recovery are only limited instances of areas where conflict between national laws is the norm. The focus on co-operation methods outlined above provides a partial solution to the differences that exist between the universal and territorial models but, as the next section will illustrate, are no substitute for proper organisation by means of international instruments designed to minimise or avoid conflicts of law.

The International Treaty Framework

International treaties in insolvency date from a very early period, some examples being found in the early Middle Ages, as witness the treaties between Verona and Trent in 1204 as well as that between Verona and Venice in 1304.¹⁰ There exist also as examples of the early drive towards organisation of international proceedings a compact between two Dutch states in 1697 and a French ordinance of the early 18th century. Commentators have also added their voice to the debate. In 1825, Jabez Henry, a member of the English Bar and later judge, published a pamphlet titled ‘Outline of Plan of an International Bankruptcy Code for the Different Commercial States of Europe’, in which he drew attention to the unequal treatment of and discrimination between creditors to justify the adoption of:

‘something like a uniform system... [to] place the subjects of each [state] on a footing of equality as to those rights which they are equally acknowledged to possess, whether as favoured nations by particular conventions or otherwise; and it would besides enable every man, when trading with a foreigner, to know his risk and remedy.’¹¹

Writing just before the turn of the 19th century, Josephus Jitta comments on the alternatives facing those seeking a solution to the evident violations caused by the application of contradictory rules emanating from different insolvency systems applied to the same set of facts.¹² He posits three solutions, the first being a world law, passed by a federal parliament assembled for that purpose, which he considers an unattainable objective. The second is the assimilation of bankruptcy rules through the elaboration of a common set of rules thereafter adopted by domestic legislators, which, although a more practical outcome, seems difficult to achieve. Lastly, he puts the case for a treaty, by which identical rules would be inserted in the laws of state parties.¹³ As to the contents of any such treaty, he posits as the minimum rules on jurisdiction, publicity for proceedings, transactional avoidance and equality of creditors.

One of the methods often used to attempt to achieve a consensus in insolvency law has been through the agreeing of conventions covering situations of conflict and providing for the allocation of jurisdiction and rules governing the resolution of differences in approaches for the management of insolvency proceedings. This approach has the advantage of avoiding a traditional obstacle, where national authorities agree to harmonise the conduct of insolvency proceedings across borders without, however, consenting to any substantial impact on domestic legal rules. Acceptance of this type of convention may in the long run create auspicious conditions for and lead towards gradual rapprochement of fundamental rules, but this is by no means a certainty, particularly between jurisdictions with very different legal ancestries and cultures. The experience of international conventions of this type is not uniform. Often, negotiated at bilateral or on a limited multilateral basis, the conventions have seemed to produce results by achieving cooperation between the courts of a few jurisdictions, often with shared legal cultures or close commercial relationships. In addition, some conventions have been negotiated on specific issues within the insolvency context or that have an insolvency-related dimension. A number of examples with relevance to the security context, including some at draft stage, will be outlined below.

Work leading to the adoption of instruments on a wider multilateral base has received mixed responses. In Europe, the convention in bankruptcy produced by the Hague Conference in 1925, which was never ratified by any signatory country, and the Benelux Convention on Private International Law, are examples of initiatives which have not met with any measure of success. This has also been the fate of the Council of Europe (or Istanbul) Convention 1990. Other examples of this type of convention elsewhere which have had limited effect include the Bustamante Code (Havana Convention) 1928 and the Nordic Convention 1933. Of more recent interest has been the successful conclusion of the European Insolvency Regulation 2000, which will be discussed below. A later evolution of the international form has been the utilisation of model laws. Chiefly found in the context of work by UNCITRAL, model laws are aimed at avoiding lengthy convention adoption and ratification procedures by leaving the enactment of provisions set out in model form to individual jurisdictions. These model laws are often accompanied by a guide to enactment covering the questions resolved by UNCITRAL working groups as to the interpretation of provisions with view to enactment. The advantage of model laws is also that they leave the format of adaptation to domestic legal systems a matter for domestic rules, thus respecting the

individuality of legal traditions. Of relevance to this outline is the UNCITRAL Model Law on Cross-Border Insolvency 1997, the only initiative that may be said to have a truly global remit.

The UNCITRAL Model Law on Cross-Border Insolvency 1997

The United Nations Commission on International Trade Law (UNCITRAL) was established by the General Assembly in 1966 to act as the conduit by which the United Nations would play a more active role in reducing the disparities caused by domestic rules governing international trade. The general mandate of UNCITRAL is to harmonise and unify the law relating to international trade. UNCITRAL organised a Colloquium in Vienna in April 1994, co-sponsored by INSOL, at which suggestions were formulated for work in the insolvency arena by UNCITRAL. The first meeting of the UNCITRAL Working Group on insolvency in fact took place in Vienna in 1995 and four sessions were to go by before a definitive text was produced two years later. The format chosen for the text was that of a Model Law, which would allow countries to enact the measure rapidly as part of their domestic legislation and the final version was adopted by UNCITRAL in May 1997. This Model Law is a relatively brief document at only 32 articles. There are four key areas into which the document can be divided. These include the scope of the Model Law, rules for access by representatives of foreign insolvency proceedings, including the treatment of foreign creditors, and the effects of domestic recognition of foreign procedures. Finally, and most importantly, there are rules for co-operation and for co-ordination of simultaneous proceedings in several jurisdictions over the same debtor. These proceedings are divided into two types: 'main' and 'non-main' proceedings. The text is preceded by a preamble, a legislative form not often seen in common-law jurisdictions, and which is instructive as to the purpose of the Model Law. These are stated to be co-operation between courts, greater legal certainty for trade and investment, the protection of the interests of all creditors and the debtor, the protection and maximisation of assets in the insolvency and the ease in rescuing financially troubled businesses, thus protecting investment and preserving employment.

The Model Law enshrines the principle of creditor equality in four provisions: Articles 13, 14, 22 and 32. It provides in Article 13(1) that foreign creditors are to be treated in the same way as local creditors and gives them the same rights to commence and participate in domestic insolvency proceedings. This right is subject to one important qualification, in that the domestic jurisdiction can provide that local rules as to priorities

and the ranking of claims will apply. Nevertheless, a safeguard against overt discrimination is provided in that the domestic jurisdiction must specify that foreign creditors will not be given a ranking lower than general non-preference claims unless local creditors in a similar position are similarly treated. This provision is included to avoid the claims of foreign creditors being ranked lowest, in contravention of the non-discrimination principle. The Model Law also irons out some of the disadvantages to which foreign creditors are subject by requiring notice to be given to them in any situation where domestic creditors are informed. Requirements under Article 14 provide that notice may be given individually or by any method the court deems appropriate and will include information on when proofs need be made, if these are required, and what form these are to take. With regard to secured creditors, this article also posits the rule that notification must also encompass whether secured claims must be filed, given that many jurisdictions do not have an express rule to this effect. Indeed, some jurisdictions may even discriminate against secured creditors by deeming filing to act as an explicit waiver of all or part of the security or other privileges attached to the credit while others deem a failure to file as being the equivalent of a waiver.

Although Article 19 allows for provisional relief, including stays of execution against the debtor's assets, and Article 21 sets out the varieties of relief that may be obtained, it is Article 22 that is integral to the procedures set out by the Model Law for the granting and modification of relief. This provision requires courts adjudicating on the issue of relief to be satisfied that the interests of creditors are protected, whether the relief is to be granted, terminated or its conditions altered in any way. Article 32 by way of conclusion inserts the 'hotchpot' rule into the Model Law to provide for the equitable distribution of dividends to creditors. This is stated as being without prejudice to any secured claims or rights in rem enjoyed by creditors, the former category covering rights guaranteed by particular assets, the latter meaning those rights in relation to a particular property that may be also enforceable against third parties. In fact, to the extent that claims of secured creditors or creditors with rights in rem are paid in full, a matter entirely for the law of the enacting state, these claims are not affected by the 'hotchpot rule'. The rules governing co-ordination of simultaneous proceedings also have an impact on the situation of creditors. Article 20, which outlines the effect recognition of a main proceeding will have, states that recognition will stay execution against a debtor's assets and suspend any right to transfer, encumber or dispose of any assets. Nevertheless, creditors still enjoy the right to bring proceedings necessary to preserve any right under a claim against the debtor. The availability of

this moratorium provision is firmly stated in the Guide to Enactment accompanying the Model Law as being in order to prevent fraud and to protect the legitimate interests of the participants in the insolvency. Nevertheless, certain exceptions to the general stay rule may be provided by a state enacting the Model Law and may, as the examples in the Guide illustrate, include exceptions for secured claims, set-off and execution involving rights in rem.

The European Regulation on Insolvency Proceedings 2000

This regional project in the insolvency law field stems from the conclusion of a convention on 23 November 1995 by member states of the European Community (later Union) whose purpose was to construct a framework for handling cross-border insolvencies within the European Community. This draft seemed set to create a new framework for dealing with what had by then become a noticeable phenomenon of cross-border insolvencies. It ran, as the official story would relate, into a British Conservative Government that had withdrawn co-operation from European institutions in the wake of unresolved issues over the Bovine Spongiform Encephalitis crisis. One of the tactics used was to refuse to sign or adhere to instruments, of which this measure was one. As the signatures on the document were incomplete, the instrument failed to negotiate the final obstacle before entering into force. Despite this apparent setback, some member states of the European Community still desired the conclusion of an instrument in this area to govern the cross-border insolvency framework. After many years of speculation over the possibility of the convention project being revived, the project received a new lease of life through an initiative jointly proposed by Finland and Germany and submitted to the Council of the European Union on 26 May 1999. This has resulted in the production of the European Regulation on Insolvency Proceedings of 29 May 2000 (or 'Regulation'). This Regulation incorporates, with some necessary textual amendments, the terms of the previous European Insolvency Convention. Nevertheless, because of the legal basis on which it has been adopted, Title IV of the EC Treaty provisions governing judicial co-operation in civil matters, the United Kingdom and Ireland were required to opt in to arrangements while Denmark remains outside the ambit of the Regulation.

The Regulation is intended to apply widely to a number of types of proceedings, irrespective of whether the debtor has incorporated status and whether the debt arises in the course of trade. Exceptions are contained, however, for a number of diverse bodies. These include insurance undertakings, credit institutions, investment undertakings holding funds or

securities for third parties and collective investment undertakings. Legislation has, in fact, already appeared in the shape of two Directives of 19 March 2001 and 4 April 2001 covering the position of insurance undertakings and credit institutions respectively and there are further proposals mooted for the remaining bodies. The Regulation is intended to operate by allowing for the maintenance of simultaneous proceedings termed 'main' and 'secondary' proceedings. The definition in Article 3 of which proceedings are 'main' or 'secondary' is also of importance given that only 'main' proceedings may include rescue-type proceedings, while 'secondary' proceedings are limited to liquidation measures. As a basic rule, insolvency proceedings may be opened in the member state where the debtor has the centre of his main interests. Insolvency proceedings opened in this jurisdiction are deemed to have universal scope and encompass all the debtor's assets. In order to control the proliferation of proceedings, secondary jurisdiction to hear cases is qualified by limiting occasions when independent territorial proceedings may be opened to two specific instances: first, where proceedings are for the benefit of local creditors or creditors of a local establishment and, second, where main proceedings cannot be opened for any reason. This has the benefit of preventing territorial proceedings operating in order to further a localised grab-rule without some form of supervision or control. The Regulation also makes explicit the rule that the existence of main proceedings, once opened, results in all other territorial proceedings being converted to secondary proceedings.

Although the Regulation is intended generally to have a wide scope of application with many of the rules referring to co-ordination between proceedings, there is an acknowledgment in the text that widely differing laws apply across member states in relation to property. In practice, this makes it almost impossible to introduce insolvency proceedings with universal scope covering the totality of a debtor's assets in member states because of the difficulty in securing homogeneous treatment of assets. Drawing a line between the extreme positions of universality and territoriality, the Regulation recognises that strict application of the law of any member state where proceedings are opened to these assets would lead to insuperable problems and likely conflicts. The specific example cited in support of the framework the Regulation introduces is that of security interests. The distinction to be made with regard to select groups of creditors, principally those with preferential claims, also remains of fundamental importance. For that reason, in situations of particular conflict, these will be managed by special references to the relevant governing law. This will be the case of certain significant rights and legal relationships,

rights in rem and contracts of employment being cited as examples. The Regulation acknowledges in its preamble the continuing competing principles and the attractiveness of territoriality by permitting the opening of domestic proceedings with coverage limited to locally situated assets alongside other principal proceedings with universal scope. The benefits heralded by the Regulation are chiefly to enable creditors to avoid over-centralisation of insolvency proceedings to their detriment by being able to rely on a locally created instrument evidencing rights. Despite the potential for fragmentation, the original draft Regulation stated that mandatory rules of co-ordination for all proceedings would avoid the tendency to over-centralisation of proceedings.

Creditors receive, besides the debtor and employees, explicit mention in the Regulation, confirming their central status to the success of any rescue arrangements. Information is felt to be the key to ensuring their active participation. The existence of the decision opening proceedings with regard to any debtor and its content must be notified in other member states. This is a mandatory requirement for the principal liquidator to fulfil. For business considerations, it may also, where there is an establishment in the member state concerned, be the subject of a ruling making notification compulsory. Prior notification is not, however, felt to be a pre-condition for recognition of foreign proceedings. This may not sit easily with the provision on protection of third parties also contained in the Regulation in situations where these parties are unaware of proceedings. This provision deems that persons acting in good faith effecting payment on account of any transaction with the debtor, where this payment should have been made to the liquidator, are taken to have been discharged from any further obligation in this respect. The difficulty for creditors here is that these payments, even if reintegrating the asset base, may by being subject to further claims fall outside those assets which are distributable.

In relation to how creditors may further assert their rights, all creditors, wherever domiciled in the Community, have the right to assert their individual claims in any of the insolvency proceedings that may be pending in relation to their debtor. This provision will also benefit tax authorities and social insurance institutions, which may extend their reach across national boundaries, and is an important departure from the practice in many jurisdictions with regard to the (non-) recognition of foreign penal and revenue laws. In practice, despite the notice requirements, only diligent creditors will be able to take advantage of these provisions and there will be a cost-element prohibiting smaller creditors from participating in more than local proceedings. Nevertheless, in order to ensure equal

treatment of creditors, there is an attempt to co-ordinate overall distribution of proceeds by requiring creditors to account for dividends received in other proceedings. Under this arrangement, the Regulation states that creditors may only participate in the distribution of total assets in other proceedings if creditors with the same standing have obtained the same proportion of their claims.

The Regulation does contain a number of exceptions to the general principle that the law of the 'main' proceeding will govern the conduct of the insolvency. This is because the Regulation recognises that there will be cases in which strict adherence to this principle will interfere with the rules under which transactions are carried out in other member states and that parties' legitimate expectations and the overriding requirement for certainty of transactions in other member states will need to be met by providing for some exceptions from the general rule. The exceptions relate to particular rights, recognised as being useful in the insolvency context, to particular categories of transactions and to particular classes of participants in insolvency. Two forms of particular rights recognised as meriting exceptions from the general rule relate to rights in rem and the exercise of rights of set off, both considered as useful guarantees for the granting of credit. These rights are especially protected because they permit credit to be obtained in conditions not otherwise possible without the presence of a guarantee, even though the effect of this type of security is to insulate holders against the risks of insolvency affecting the debtor and interference by third parties with contractual arrangements governing the supply of credit.

In fact, the Regulation states in Article 5(1) that insolvency proceedings may not affect third party rights in rem in respect of any property situated in another member state at the time insolvency proceedings are initiated. Third party rights in rem are defined in Article 5(2) to include rights in relation to the disposal of assets under liens and mortgages, the right guaranteed by an assignment of security, the right to restitution from possessors or users in cases where use is contrary to the owner's wishes as well as rights in rem to the beneficial use of assets. As defined, these rights also include rights in relation to specified assets as well as collections of assets, as would be the case with the creation of a floating charge. Also included are any rights defined in Article 5(3) as being subject to registration on a public register for purposes of being enforceable against other parties. An exception is, however, provided, in cases where an action is brought on a point covered by Article 4(2)(m) relating to void, voidable and unenforceable rights. The proprietor of the

right in rem can therefore continue to assert his right to separate settlement of his claim, which may rely on separation of the security on which the right depends from other assets. In order to more effectively deal with rights in rem, the liquidator may request the opening of secondary insolvency proceedings in the jurisdiction concerned if the debtor has an establishment there or deal with the security under preservation orders made in the context of principal insolvency proceedings. Proceeds from the sale of the security are first used to settle with the creditor, whose right in rem it is, before any surplus reverts to the asset fund.

As mentioned above, the situation of quasi-security is also covered with set-offs being expressly held in Article 6(1) as unaffected by the opening of insolvency proceedings where these set-offs would be recognised under the law applicable to the debtor's claim against the creditor. As a result, a creditor normally entitled to exercise this type of claim will be permitted to do so, even if it is not available under the law of the jurisdiction where proceedings are opened. The Regulation states that set off acquires as a result the status of a guarantee on which the creditor concerned can rely when the claim eventually arises. In cases of reservation of title, Article 7(1) provides that insolvency proceedings may not affect the rights of a seller where the assets are situated at the time proceedings are opened in another member state. Where it is the seller who is the subject of insolvency proceedings, Article 7(2) also states that this fact may not be used as grounds for the resolution of the contract and does not prevent the acquisition of title by the purchaser where the goods are in another member state. Both set-offs and reservation of title clauses are also subject to the exception made for void, voidable and unenforceable acts.

The preservation of many domestic law rules is expressly stated in the Regulation as applying in cases of assets often found underlying security. For example, Article 8 provides that the law of the member state in which the property is situated expressly governs real property. The protection of specific interests, for examples those of contractual occupiers of property and general interests protected by the state where the property is found justifies this particular exception. Special rules are also provided in situations dealing with securities, which under Article 9 are determined by the law governing the financial market issuing the securities. The aim of this provision is to avoid any modification of the mechanisms for the regulation and settlement of transactions on organised financial markets so as to secure confidence in the integrity of payment or settlement systems. Furthermore, the law applying to rights over immovable property, a ship or aircraft that are subject to registration is under Article 11 that of the

member state under whose authority the register is maintained. The same laws will also, according to Article 14, govern the disposal by the debtor of any property of these types. National rules are preserved in relation to issues governing acts detrimental to creditors, where these acts take place in another member state than where proceedings are opened. However, if the rules of that member state permit challenges to these acts, the main jurisdiction may also decide under Article 13 on the void nature, voidability or unenforceability of that act. The effect of insolvency proceedings on other litigation, however, is under Article 15 a matter exclusively for the member state where the lawsuit is pending.

Security-Specific Treaties and Proposals

UNIDROIT Convention on International Financial Leasing 1988 This convention, concluded in Ottawa on 28 May 1988, represents an early initiative dealing with the phenomenon of insolvency as ancillary to the main purpose of the text, to govern financial leasing transactions involving the conclusion of supply and leasing agreements for the supply of plant, capital goods or other equipment. The convention provides in Article 7 that the lessor's real rights in the equipment are to be valid as against a trustee in bankruptcy and other creditors, even where these creditors have already obtained attachment or execution over the assets of the debtor. The trustee, defined to include any liquidator, administrator or person appointed to administer the debtor's estate for the benefit of the general body of creditors, must therefore comply with any instruction by the lessor for the recovery of the property concerned. Nevertheless, where the exercise of any such rights by the lessor is conditional on certain formalities being complied with, for example the rules as to public notice, the trustee is not bound to take notice of any such rights that have not been notified according to any rules in force in the jurisdiction whose law is applicable. Nevertheless, where the provisions of any other treaty require as a matter of course that these real rights are to be recognised, these provisions will prevail. The law that may apply does differ according to the nature of the asset in question. In the case of a registered ship, the law is that of the state where registration has been effected in the name of an owner. As far as aircraft are concerned, the state of registration whose laws will apply is as defined in the Chicago Convention on Civil Aviation of 7 December 1944, while other mobile equipment, including for this purpose an aircraft engine, will have the law of the state where the lessee has its principal business apply. Cases not governed by any of the preceding definitions will in default have the law of the state where the equipment is situated apply. The rules in Article 7 are stated so as not to affect priority acquired by any

creditor who has a consensual or non-consensual lien or security in equipment arising other than through attachment or execution as well as any rights of arrest, detention or disposal conferred as regards ships and aircraft by the rules of private international law. Two further provisions of the convention may be of application, the first contained in Article 4, stating that the convention rules do not cease to apply merely because the equipment has become a fixture to or incorporated in land, while leaving the matter of adjudication as to the fact of incorporation to the law of the land where the property is situated. The second is the general interpretation provision of Article 6(2), which requires that matters not settled within the convention or in accordance with the general principles addressed by the text are to be settled in conformity with the rules of private international law, thus opening the possibility for conflict between jurisdictions.

International Monetary Fund Report on Orderly and Effective Insolvency Procedures: Key Issues 1999 This report, produced by the legal department of the International Monetary Fund in May 1999, discusses major policy choices facing a country wishing to design or redesign an insolvency regime. It bases its conclusions on a comparative sampling from the laws of selected jurisdictions and identifies the advantages and disadvantages to possible solutions for issues deemed of universal importance. Of relevance to secured creditors, the report makes recommendations including some in relation to issues such as classes of creditors whose actions are to be stayed or prevented, quasi-security rights and the ranking of creditors for the purpose of distribution. In relation to security, the report states as a general principle that insolvency law should strike a balance between preventing secured creditors undermining the objective of maximising the value of the debtor's estate and protecting the interests of such creditors. It suggests that stays should be available not only in the case of unsecured creditors but also extend to secured creditors for a limited period of time so as to protect the asset base of the debtor for the benefit of creditors. Nevertheless, the interests of secured creditors would be protected by requiring that any automatic stay serve solely to allow the administrator a period for the identification and assessment of the debtor's estate. The administrator would only be permitted to seek an extension by demonstrating a cogent need. The protection of the value of a secured claim would also be effected by providing compensation for any depreciation in the value of the asset by providing collateral or period cash payments representing the value of the depreciation, interest, substitute equivalent collateral or by paying the full amount of the claim where the administrator seeks to sell encumbered assets. Alternatively, a valuation of the asset could be carried out at commencement of proceedings, including

an assessment of the secured part of that value and a priority accorded for any subsequent distribution to creditors.

In relation to quasi-security, the report recognises the benefits of set-off to the banking system and acknowledges the reality of the lending environment where debtor-creditor agreements are likely to be concluded with financial institutions. The report concludes that a pre-commencement right to set-off should be protected during insolvency proceedings as well as any post-commencement right if the mutual claims arise from the same transaction, subject in any event to the usual rules governing avoidance provisions. Ranking and priorities are also dealt with in the report with recommendations for the establishment of rules providing for the maintenance of a system of priorities, deeming this important for facilitating the provision of credit, especially that credit which may be secured. The report states that priority rules should pay due regard to contractual terms allowing for security or subordination and provide that, when assets in the debtor's estate are encumbered. Proceeds should first be distributed to secured creditors to the extent of the value of their claim together with any compensation arising from the granting of a stay of attachment or execution to which the creditor was subject during proceedings. The report emphasises the need to ensure throughout the equality of treatment between domestic and foreign creditors. The report was considered by UNCITRAL in December 1999, together with recommendations put forward by other agencies such as the Asian Development Bank, the G22 Working Group on International Financial Crises and the World Bank, as possibly forming the base for a new working project in the insolvency field.

UNIDROIT Draft Convention on International Interests in Mobile Equipment This proposal, authored by UNIDROIT over a period of some years, is expressed with view to replacing the Convention on Financial Leasing, referred to above, and the Convention on Receivables Financing concluded on the same occasion. The proposal is considerably different in that it is proceeding in stages with the main convention being enacted, probably at a conference in South Africa in late 2001, and various protocols dealing with specific examples of high-value mobile equipment being adopted at such times as negotiations on their content are finalised. The project overall is designed so that the main rules governing all categories of mobile equipment remain at a generalised level, with the protocols undertaking the task of containing rules specific to the types of equipment to be covered. The reason this method was chosen was to facilitate the early entry into force of one of the protocols, on which work in conjunction with

the International Civil Aviation Authority had significantly advanced, dealing with the proposed new international regime for aircraft equipment. The participation of representatives of the aviation industry in the drafting of this protocol meant that the proposals met largely with the approval of the industry and in fact attracted considerable support for early enactment without waiting for the conclusion of the remaining protocols, which will deal with the specific rules governing space property and railway rolling stock, this latter being a collaboration between UNIDROIT and the Intergovernmental Organisation for International Carriage by Rail.

The convention states as its objective the facilitation of financing of the acquisition and use of high value or economically significant mobile equipment and the universal recognition and protection of interests in this equipment through the creation of an international registration system. The advantages of such a system will be to permit asset-based financing and leasing in the case of such equipment with lenders being assured of priorities in the case of insolvency of their debtor. Under Draft Article 2(3), the main convention will apply for the moment to these specific categories of high-value mobile equipment, with the possibility being provided in Draft Article 50 for the extension of the remit of the convention to other categories of high-value mobile equipment providing these possess the characteristic of unique identifiability. Both security and quasi-security are dealt with in the convention, the convention applying to all interests granted by a chargor under a security agreement, to any interest vested in a person deemed the conditional seller under an agreement containing a retention of title provision and any right enjoyed by a lessor under a leasing agreement. The provisions of Draft Articles 17-25 sets out the registration system while Draft Article 28 sets out the priority system once an interest has been registered over any subsequent registered interest or any unregistered interest, irrespective of whether the registration was obtained with actual knowledge of the existence of the other interest. Draft Article 29 deals with the specific impact of insolvency by stating that an international interest is regarded as effective where prior to the commencement of insolvency proceedings the interest was in fact registered according to the provisions of the convention. The provision also states that it is not to derogate from a situation where the international interest has effect under the law applicable to the proceedings in question irrespective of its status under the convention. Furthermore, the fact that an international interest has been obtained does not affect insolvency law rules relating to the avoidance of transactions or transfers in fraud of creditors. It also does not act so as to prevent insolvency administrators from enforcing rights in property under their control or supervision. The same rules apply

under Draft Article 33 *mutatis mutandis* to instances where the assignor in an agreement providing for the transfer of an international interest becomes insolvent.

The equipment specific rules in the protocols are more complex with respect to the impact of insolvency. The aircraft equipment protocol in fact contains alternative formulations in Article XI of the protocol setting out two very different schemes for insolvency administration. These are expressed in any event as not to apply unless a contracting state declares under Article XXVIII(3) of the protocol at the time of acceptance, approval, accession or ratification of the protocol which of the alternatives it will apply and which internal insolvency proceedings will be covered by the declaration. The courts of the contracting state are subsequently obliged under Article XXVIII(4) of the protocol to take account of the declaration in administering insolvency proceedings. The first option, titled Alternative A, requires the insolvency administrator to give possession of the aircraft object to the creditor at the earlier of two dates, expressed as either the end of a waiting period specified in the declaration by the contracting state or the date when the creditor would have been entitled to possession were the provisions of the protocol not to apply. Until such time as the creditor indicates it is able to take possession, the insolvency administrator is required to preserve the aircraft object and maintain it so as to preserve its value under the agreement. This is without prejudice to the ability of the creditor to apply for other forms of interim relief. The creditor is assisted in this by the requirement for expeditious assistance by the relevant authorities following due notice being given by the creditor, subject to any applicable aviation safety rules. Furthermore, the insolvency administrator is also permitted to use the aircraft object under any arrangement designed to preserve and maintain it or its value and may also retain the aircraft object where the debtor or the administrator is able to cure any defect that led to the default in the performance of the debtor's original obligations. No obligation of the debtor may be modified without the express consent of the creditor, although this is held not to affect any right the insolvency administrator may have to terminate the agreement. The priority scheme in insolvency proceedings is subject to any declaration made under Draft Article 39(1) of the convention that allows a contracting state to promote a non-consensual right or interest before an interest registrable under the convention.

Alternative B in the aircraft equipment protocol differs in that the insolvency administrator or debtor may give notice at the request of the creditor that within a certain time the debtor or administrator will either

cure all defaults and agree to perform all future obligations or give the creditor the opportunity to take possession of the aircraft object. Where the applicable law requires the creditor to take additional steps to obtain possession or provide a guarantee, the creditor is required to fulfil any such requirement and, further, to provide the court with evidence of its entitlement to claim and that an international interest has in fact been registered. Where the required notice has not been given to the creditor or the aircraft object has not been surrendered, the creditor is at liberty to apply to court for possession. This may be granted on such conditions as the court may order, which may also include the taking of any further procedural steps or the provision of a guarantee. In any event, the aircraft object may not be the subject of a sale without the consent of the court being obtained. The provision of the alternative formulations and the framework they introduce must also be read in light of Article XII of the protocol titled 'Insolvency Assistance'. This sets out as a requirement that the courts of a contracting state where the aircraft object is situated must co-operate, to the maximum extent permissible under the laws of that state, with any foreign court or insolvency administrator seeking to use the provisions of Article XI of the protocol. The protocol on space property also contains alternative formulations similar to that in the aircraft equipment protocol, the relevant articles being Article XI (remedies on insolvency), Article XII (insolvency assistance), Article XXIV(4)-(5) (declaration and court application). Article XII of this protocol contains expanded jurisdictional bases, extending the requirement of co-operation to the courts of jurisdictions in which the property is situated, from which it is being launched into space, to which it is returning from space, from which it may be controlled, in which the debtor is located or which has a close connection with the space property.

The railway equipment protocol is drafted using a similar clausal paradigm: Article IX (remedies on insolvency), Article X (insolvency assistance), Article XXV(1)-(2) (declaration and court application). By way of contrast, however, Article XXV(1) of the protocol allows for the exclusion of the protocol in the case of a purely domestic transaction covering rolling stock that is only capable of operation on a single railway system because the system displays the following characteristics: it has a different gauge system, it has differently designed elements or does not have a connection to any other railway system. Also in opposition to the framework set out in the two other protocols, an entirely different structure is provided for the management of insolvency proceedings. Under Article IX of the protocol, the application of the rules is subordinated to the occurrence of the earlier of two events: the first being the initiation of

insolvency proceedings by the debtor or any other entitled party in a contracting state that is the primary insolvency jurisdiction of the debtor, the second being where the debtor has suspended or declared that it will suspend payments to creditors generally. A period of sixty days from this moment then commences during which the insolvency administrator may elect to cure any default and perform all future obligations or give possession of the rolling stock to the creditor, subject to any provisions expressly stated in the agreement and any related documentation as applying to the transfer. Until the creditor takes possession, the insolvency administrator is bound to preserve the railway rolling stock and its value, which arrangements may also include the continued use of the rolling stock. Retention of the rolling stock is also authorised where the debtor or administrator has cured any default in the performance of any obligations under the contract. Pending possession being taken by the creditor, the creditor may still exercise any other remedy available to it. No obligation of the debtor may be modified without the express consent of the creditor, although this is held not to affect any right the insolvency administrator may have to terminate the agreement. Similarly, the priority scheme in insolvency proceedings is subject to any declaration made under Draft Article 38 of the convention that allows a contracting state to include a non-consensual right or interest among those interests registrable under the convention. Also the subject of an express mention in Article IX of the protocol is the fact that the protocol does not operate to modify the transactional avoidance provisions in Draft Article 29(3) of the convention.

Summary

A clear conclusion that may be drawn from the outline above is that the international harmonisation of rules in the field of insolvency is certainly a desirable objective. The experience in many jurisdictions illustrates that, whether the rules develop from the civil or common law traditions, there is a common perception that insolvency is of prime interest to the creditors. Courts in all jurisdictions seek to preserve assets, define the interests at stake and regulate procedure. This has the effect frequently of also defining the relationship between domestic and foreign participants in insolvency. An element of discretion present in most jurisdictions allows courts to determine the extent to which assistance is given to other courts and insolvency participants from other jurisdictions as well as the articulation between the domestic procedure and any parallel foreign proceedings. Nevertheless, there is a measure of consensus internationally for equality of treatment for creditors and assistance is often given only in instances where there exists substantial reciprocity of treatment for creditors. Nevertheless,

the difficulties placed in the path of creditors seeking to obtain remedies in jurisdictions unfamiliar to them cannot be underestimated. The common problems of any international litigation are well known: differences in language, laws and procedure and legal culture as well as the problems of time, distance and cost. To these must be added those peculiar to insolvency, not the least of which is that this is an area of law where courts have traditionally been slowest to develop principles of co-operation. Because creditors and the protection of their interests remain paramount in the process of developing international insolvency rules, the creation of an appropriate international framework remains a priority.

In this context, the adoption of the UNCITRAL Model Law represents for many the most important step taken in the emergence of a truly international framework for co-operation in insolvencies. The reputation of UNCITRAL as a promoter of harmonisation measures at the international level has done much to ensure that this text genuinely represents the concerns of national governments and domestic courts. It may be said with some conviction that the European Insolvency Regulation 2000 is an important part of the long history of international insolvency initiatives. As the most important of all the initiatives at regional level thus far, the Regulation may be seen as especially deserving of success, perhaps because of the very fate of its predecessors, the European Insolvency Convention 1995 and the related Council of Europe Convention 1990. It is likely that the lead given by the Regulation and its provisions will influence many future proposals in this field and may well lead to more acceptance for similar initiatives elsewhere. With regard to issue-specific conventions, there will always be a demand for clear and concise texts that regulate important facets of commercial life. The various conventions listed above have done much to promote acceptance of insolvency regulation as part and parcel of wholesale regulation in any subject area. In fact, the provisions on insolvency assistance may be said to reflect the current acceptance of co-operation as the norm in cases involving international elements. The impact of security arrangements and the need continually expressed by creditors and debtors operating in the financial lending arena for comprehensive yet user-friendly texts will undoubtedly create a climate for more proposals in this field, including some that may arise from work currently undertaken by UNCITRAL and other international bodies in connexion with the promotion of insolvency law reform at the global level.

Notes

- 1 Fletcher, *Insolvency in Private International Law* (1999) Clarendon Press at 10.
2 Nadelmann, *Legal Treatment of Foreign and Domestic Creditors* (1946) 10 LCP
696.
3 Ibid. at 698.
4 Ibid. at 703-706.
5 Westbrook, *Global Insolvencies in a World of Nation States* in Clarke (ed.),
6 *Current Issues in Insolvency Law* (1991) Stevens & Sons 26-56 at 32-33.
7 Fletcher, *op. cit.* at 12-14.
8 Westbrook, *Choice of Avoidance Law in Global Insolvencies* (1991) 17 BJIL 499
at 516-517.
9 Fletcher, *op. cit.* at 12-14.
10 Ibid. at 14.
11 Wood, *Principles of International Insolvency* (1995) Sweet & Maxwell in Chapter
12 17 at 291.
13 Graham, *Cross-Border Insolvency* (1989) CLP 217 at 224 (citation).
Jitta, *International Bankruptcy Codification* (1895) 7 Jur Rev 305.
Ibid. at 308-309.