

# The Landscape of International Insolvency Law

*Paul J. Omar\**

## I. Introduction

The organisation of insolvency proceedings with an international element is not an easy or straightforward quest. It is a quest that has attracted considerable academic, legislative and judicial attention. Solutions to the phenomenon of cross-border insolvency are reliant on a number of complex and interrelated questions to which the courts and legislatures in different jurisdictions have provided very varying answers. By far the most important of these questions stems from the relationship between insolvency law and more orthodox private international law doctrines. As a species of conflict of laws, some of these principles have had to undergo a necessary evolution in order to take account of the specific features of insolvency. In insolvency law, the involvement of the state in determining procedural outcomes, the way in which participants in insolvency are treated, particularly employees and local creditors, and how claims of differing natures are reconciled, result in priorities internal to the procedure and to domestic law that are often not shared by other jurisdictions. Especially crucial thus to understanding why cross-border insolvencies are regarded as having this special character is how efforts at managing insolvencies have tried to palliate the differences between domestic systems. The question of multiplicity or proliferation of laws applicable to the resolution of disputes is a particularly important question to ask in international insolvency law and one to which the branch of private international law applied in insolvency does not always provide an answer.

In order to provide a response to the phenomenon of the cross-border insolvency, it is necessary to consider whether the number and variety of proceedings that are likely to be brought into existence to deal with the organisation of the debtor's insolvency and attendant issues have a bearing on the efficiency of the process. This is patently an important consideration for the direct and undeniable relationship between the proliferation of proceedings and the reduction of assets absorbed by costs, leading to the diminution of funds available for the optimal outcome, whether this involves satisfying creditors or organising rescue. The exercise of control over assets by a very limited number of courts is seen as desirable because it is potentially

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\*Paul J. Omar, Law Department, University of Wales Swansea, Singleton Park, Swansea SA2 8PP, UK.

efficient. Conversely, however, an undesirable outcome may result where control by a limited number of courts results in restrictions on creditors or the personnel of insolvency making claims and attaching rights over assets located elsewhere. This is a particular result of curial or legislative practice setting aside assets for the needs of creditors in the domestic context before consideration is given to the international aspects of that insolvency. The limitation on the number of proceedings will be significant where pre-insolvency intervention and diagnosis or rescue procedures are not available and there is a significant impediment to the transfer of assets across boundaries that could assist rehabilitation and rescue. This offers only disadvantages for debtors in financially problematic and delicate situations and does not permit courts the resources to effect the reconsolidation of the debtor's position.<sup>1</sup> As will be noted, the way courts deal with these issues depends on the acknowledgement they give to the international component of insolvencies they examine and the classification of domestic systems into territorial and universal models is a method which attempts to rationalise the views of courts and legislatures as to the proper method of control over assets. It is also necessary to consider the extent to which pronouncements by individual courts will be recognised by other courts and granted effect and the solutions to the evident conflicts these differences in views will engender, not only as questions of conflict of laws but also the priorities that affect the participants in the process.

### **A. Conflict of laws**

It is almost redundant to suggest that the transaction by an individual or business that crosses an international boundary will raise issues of conflict of laws and resolution of this conflict 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. The diversity of laws potentially applicable to the transactions of a single company is, however, nowhere more important than when its consequences are felt at the time of insolvency. Simple illustrations will suffice. Where as a result of business a debtor acquires assets, the law applicable to these assets will depend on the nature of the assets (real or personal, tangible or intangible) and qualifications attached to them. For example, the law of the country of their location will usually govern real assets. Security over assets, a particular concern of creditors, may also depend on the nature and location of the assets. By contrast, it may not always be easy to be so certain with respect to the acquisition and discharge of liabilities or obligations. The law applicable may well depend on a variety of factors, including the law of the instrument by which the obligation is undertaken or where it is to be performed and the identity

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1. See Westbrook, *Global Insolvencies in a World of Nation States*, in Clarke (ed.), *Current Issues in Insolvency Law* (1991) Stevens & Sons 26–56 at 46.

or nationality of the parties. 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,<sup>2</sup> 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. 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.

## **B. Priority issues and the treatment of creditors**

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,<sup>3</sup> often where there have developed flexible methods of financing not dependent on the precise identification of assets.<sup>4</sup> 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

2. See Fletcher, *Insolvency in Private International Law* (1999) Clarendon Press at 10.

3. Receivership is, for example, a form of contractual enforcement by a creditor over the debtor’s assets.

4. The floating charge is just such as an example of a generic charge of assets remaining unspecified until a given moment in time.

jurisdiction. Professor Kurt Nadelmann catalogued some of the difficulties faced by creditors in organising their participation.<sup>5</sup> 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”,<sup>6</sup> 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,<sup>7</sup> which often allows local creditors to obtain an advantage, as well as impediments within the recognition process conditional on special procedures being followed.<sup>8</sup> 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.<sup>9</sup> 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.

## **II. The Organisational Paradigm: Universality v. Territorialism**

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, 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, referred to earlier 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.

### **A. Territorialism**

Territorialism may be defined as dealing with local assets for the general satisfaction of the claims of local creditors. It is also known as the “grab rule”. Territorialism

5. See Nadelmann, *Legal Treatment of Foreign and Domestic Creditors* (1946) 10 LCP 696.

6. *Ibid.* at 698. See also Prentice, Some Observations on the Law Relating to Preferences, Chapter 19 in Cranston (ed.), *Making Commercial Law: Essays in Honour of Roy Goode* (1997) Clarendon Press 439–476 at 439.

7. See Trunk, Recognition of a foreign “automatic stay” in bankruptcy—the position of Germany, France and the United States (1994) 3 IIR 145.

8. The “*exequatur*” is given as an example by Nadelmann.

9. See Nadelmann, *op. cit.* at 703–706.

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 having been 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 joint 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. A further advantage may accrue to foreign creditors who are able to use sophisticated techniques to follow assets and who are consequently able to file claims in more than one jurisdiction for a share in distributions. Although there may be rules governing the equalisation of dividends received in more than procedure, this is not always the case.<sup>10</sup>

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

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10. See Westbrook, Universal Participation in Transnational Bankruptcies, Chapter 18 in Cranston, *op. cit.* (note 6 above).

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. It is the case that 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.

## **B. 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 impacts 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. Professor Jay Westbrook deals with the argument for universality 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.<sup>11</sup> 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.

### III. Reconciling the Differences: Compromise Philosophies

The pragmatic approach often displayed in the management of insolvencies has 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."<sup>12</sup> Both of these practices modify the territorialism principle by

11. See Westbrook, *op. cit.* (note 1 above) at 32–33.

12. See Westbrook, Choice of Avoidance Law in Global Insolvencies (1991) 17 BJIL 499 at 516–517.

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”.<sup>13</sup>

### **A. Ancillary or secondary status procedures**

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 some the conventions concluded during the 1990s, where the role of courts is divided 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.

### **B. The internationalist principle and modified universality**

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 Westbrook offers the view that this principle arose from the practice in the United States of providing for ancillary proceedings whose principal purpose is aid and assistance to another court deemed to

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<sup>13</sup>. See Fletcher, *op. cit.* at 12–14.

be the primary jurisdiction over the (usually corporate) debtor.<sup>14</sup> 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.<sup>15</sup>

#### **IV. Pragmatic Solutions: Judicial and Legislative Involvement**

Advocates of a solution to the problem of international insolvencies also look to reconciling the differences between the adoption of either a strict territorialism or universality principle. In light of these arguments, many of the views on reconciliation come 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 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 on specific co-operation texts contained in the law.

##### **A. Concurrent jurisdiction and judicial co-operation**

It is notable that courts have begun to evolve a spirit of co-operation with insolvency practitioners and with other courts located elsewhere for the management of insolvency involving a single debtor located in a number of jurisdictions. This attitude may result from judicial notice of the fact that the results of insolvency can have

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<sup>14</sup>. See Westbrook, *op. cit.* (note 10 above) at 422.

<sup>15</sup>. See Fletcher, *op. cit.* at 14.

far-reaching consequences on society. Certainly, realisation of this effect has prompted many of the cases to attempt an economic understanding of the implications of taking particular legal steps. Where the consequences of insolvency are felt in several jurisdictions, the attitude an individual court takes in the assistance it secures from or gives to other courts involved in the same insolvency may influence the speed and efficiency of the process of insolvency. With the number of cross-border insolvencies likely to increase, as a function of the decline in the world economy, this judicial attitude 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. Eventually, through the development of a judicial attitude to international insolvencies, there may well appear a consensus at an international level as to how the cross-border dimension of insolvencies may be treated.

Both commentators and judges have asked the question of what such a judicial attitude should be. A Canadian view, taken by Mr Justice Farley,<sup>16</sup> looks at two particular areas in relation to cross-border insolvencies and restructurings where the judiciary might take a view on their involvement in insolvency case-management. The development of the comity principle, also identified by commentators as being desirable,<sup>17</sup> is highlighted as the means by which courts can recognise the judicial acts of other courts so as to fulfil the international duty of the state of which they are representatives and for the purpose of convenience. The old common law rules of recognition and enforcement emphasising sovereignty and national independence are specifically rejected as being outmoded, especially where dealing with international transactions involving "a constant flow of products, wealth and people across the globe".<sup>18</sup> The absence of uniform insolvency laws or international treaties is seen as inevitably requiring judicial co-ordination and management of proceedings and issues of conflict and the taking of views on co-operation. A practical outcome of this is the increasing willingness by courts to make tentative attempts at communicating with other courts to assess the likelihood of resolving potential disputes and to work out methods of co-ordinating proceedings. The benefits of this approach will undoubtedly be felt in the increase of overall efficiency and, more tangentially, in the case of costs and fees incurred.

Substantial agreement is to be found in the views of Lord Justice Millett,<sup>19</sup> who identifies a need for an international insolvency convention as being a priority for the future. The increasing nature of co-operation between courts and the pronouncements of English judges on this matter is favourably reported, with the overall view being that the tradition of assistance and co-operation present in England allows for a flexible approach to case-management. Of especial note is the desirability of a form of "judicial restraint", so-called because it forms the counterpoint to

16. See Farley, *A Judicial Perspective on Cross-Border Insolvencies and Restructurings* (1996) 24 IBL 220.

17. See Flaschen and Silverman, *Maxwell Communication Corporation plc: The Importance of Comity and Co-operation in Resolving International Insolvencies*, Chapter 3 in Leonard and Besant

(eds.), *Current Issues in Cross-Border Insolvency and Reorganisation* (1994) Graham and Trotman/IBA 41–58.

18. See Farley, *op. cit.* at 220-1 citing *La Forest J in Hunt v T&N plc* [1993] 4 SCR 289 at 322.

19. See Millett, *Cross-border insolvency: the judicial approach* (1997) 6 IIR 99.

judicial assistance. A point is made of the *forum non conveniens* rule allowing courts to renounce jurisdiction in the interests of justice and convenience so as to permit the foreign procedure to continue unhindered.<sup>20</sup> The failure to exercise judicial restraint is pointed out as potentially causing harm to judicial relations between courts in otherwise co-operating jurisdictions and would, if unchecked, lead to a diminution in faith accorded to English courts and lower their esteem generally.<sup>21</sup> The *forum non conveniens* argument, although long doubted as having any application in insolvency law,<sup>22</sup> is now also accepted by commentators as being a vital part of the arsenal of instruments courts must consider when deciding on the appropriateness of assuming jurisdiction in insolvency matters.

### **B. Management by treaty—the case for international insolvency organisation**

Commentators have long preached the merits of uniformity of rules at the international level, avoiding uncertain application of purely domestic laws and potential conflicts with jurisdictions applying different rules of treatment, an illustration of which being the dichotomy between universality and territoriality principles previously noted.<sup>23</sup> One of the traditional methods of achieving consensus 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.<sup>24</sup> 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. In fact, 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 such support can be given voluntarily by other courts 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.<sup>25</sup> This view is given considerable credence by a host of commentators, writing on the phenomenon of international

20. *Ibid.* at 103.

21. *Ibid.* at 108. The example given of a situation of failure to exercise restraint is *Felixstowe Dock and Railway Co v US Lines Inc* [1989] QB 360.

22. See Smart, *Forum Non Conveniens in Bankruptcy Proceedings* (1989) JBL 126; Smart, *Cross-Border Insolvency and Judicial Discretion* [1999] 1 *Insolv L* 12.

23. See Jitta, *International Bankruptcy Codification* (1895) 7 *Juridical Review* 305 at 309–313.

24. See Nadelmann, *An International Bankruptcy Code: New Thoughts on an Old Idea* (1961) 10 *ICLQ* 70; Graham, *Cross-Border Insolvency* [1989] *CLP* 217.

25. See Drobnig, *Cross-Border Insolvency: General Problems in Forum Internationale* No. 19, *The Hague*, November 1993 at 14.

financial insolvencies. The failure of the BCCI is held up as a particular example of the cogency of the need for international insolvency organisation.<sup>26</sup> Despite the questions asked by some commentators as to the necessity for international harmonisation of insolvency law,<sup>27</sup> 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.<sup>28</sup> This may be seen in light of the very great differences between national laws relating to essential elements of the insolvency process.<sup>29</sup> The questions of priorities, avoidance of preferences, avoidance of transactions generally, enforcement of revenue claims, equality between creditors and distributions and asset recovery are only limited instances of areas where conflict between national laws is the norm.<sup>30</sup> The practical response to these seemingly intractable problems appears to lie in the successful conclusion of international texts regulating the conflicts.

### C. Early thoughts on initiatives

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.”<sup>31</sup>

Henry pursued his aim of an international bankruptcy code, writing in 1827 to the American jurist, Wheaton, on the subject, asking him whether a general bankruptcy code would be beneficial. The reply was positive, holding that such a project would indeed confer great benefit, but that:

26. See Morris, *Lessons Learnt from the Collapse of BCCI* (1994) 1 RALQ 5 at 9–10; Fletcher, *International Insolvency: The Way Ahead* (1993) 2 IIR 7 at 13–16.

27. See Gaa, *Harmonisation of International Bankruptcy Law and Practice: Is it necessary? Is it possible?* (1993) 27 *International Lawyer* 881, whose conclusions are nevertheless in support of the proposition.

28. *Ibid.* at 903–904.

29. See an excellent treatment of these differences and a classification of national regimes in Wood,

*Principles of International Insolvency* (in two parts) (1995) 4 IIR 94 & 109.

30. See, *inter alia*, Westbrook, *Universal Priorities* (1998) 33 TLIJ 27; Henshaw, *International Insolvency: Whose Law to be Preferred?* (1997) 20 *Ins Law* 5; Smart, *International Insolvency and the Enforcement of Foreign Revenue Laws* (1986) 35 ICLQ 704; Remery, *L'Ordre entre Créanciers et la Distribution par Contribution en DIP*, GP 1989.doctr.654; Morris & Kirschner, *Cross-Border Rescues and Asset Recovery—Problems and Solutions* (1994) 10 IL&P 42.

31. Cited in Graham, *op. cit.* at 224.

“... [He] should think that the difficulties in establishing it by general consent would be found almost insuperable.”<sup>32</sup>

Writing just before the turn of the 19th century, 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.<sup>33</sup> 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.<sup>34</sup> 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. The views on jurisdiction he outlines are interesting. He states the natural norm governing the exercise of jurisdiction as being the “centre of the business life” of the debtor, which though not equivalent to the concept of domicile, confers on the courts where this centre is found natural jurisdiction to hear proceedings.<sup>35</sup> He next identifies what he terms other “secondary” but important norms including the presence of business interests or establishments, on which it is difficult to come to any international agreement for rules either renouncing these norms or allocating jurisdiction. His solution to the apparent conflict is to suggest a rule that courts give effect to foreign adjudications provided that the foreign court establishes the natural norm and that the local court has no grounds under any secondary rule to open proceedings.<sup>36</sup> It may be seen that this dualist approach to jurisdiction and the primary-secondary jurisdictional divide has influenced the drafting of treaties examined below.

#### D. Types of initiatives

Commentators report that arrangements for the treatment of insolvency appear to be known from the 18th century onwards, although instances of international insolvency have made an appearance in history long before this time.<sup>37</sup> The various types of initiative known in the area of international insolvency may be classified on a geographical basis. Firstly, there are initiatives on a bilateral or limited multilateral basis seeking to establish jurisdictional capacity for the courts of a limited number of member states. Second, there are regional initiatives aiming for a wider multilateral basis, but limited in scope to geographically contiguous or proximate states. Often these will be states with related legal orders or which share legal, historical and cultural antecedents. Third, there are initiatives on a wider, often global basis, seeking to involve as many states as possible in achieving consensus on the

32. *Ibid.* at 225.

33. See Jitta, *op. cit.*

34. *Ibid.* at 308–309.

35. *Ibid.* at 310.

36. *Ibid.* at 310–311.

37. See Didier, *La problématique du droit de la faillite internationale* RDAI 1989.3.201 citing the failure of the Bardi Bank in Florence and its overseas branches in 1345.

treatment of cross-border insolvencies. These three types of initiative generally aim to create a text in the form of treaty, convention or model law capable of adoption or subscription by participating member states. The fourth type of initiative generally emanates from international bodies, not necessarily those with a specific legal purpose, but which, as an extension of their financial and economic purpose, seek to introduce reforms to the legal structures of the nations they deal with.

### E. Bilateral initiatives

Bilateral arrangements are the earliest known form of treaty or convention between states. The numbers of such conventions presently in force can be numbered in the thousands. The conclusion of multilateral initiatives are probably related to the development of sophisticated bilateral arrangements between a small group of states which are then extended through negotiations resulting in a single instrument covering the content of the previous texts. Early treaties in this area abound, some of the earliest documented examples being concluded in Europe during the Middle Ages.<sup>38</sup> 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.<sup>39</sup> A later treatment of insolvency occurs in the Franco-Swiss Treaty of 1777, one of whose provisions states that fraudulent bankrupts of either nation may not seek asylum in the other state in order to evade creditors.<sup>40</sup> This treaty is said to be based on an earlier text concluded between France and a number of the Swiss cantons in 1715, which although on the theme of enforcement of foreign judgments, does not expressly mention insolvency.<sup>41</sup> This Treaty was revised between 1798 and 1828, each time carrying forward the insolvency theme. It was joined in 1826 by a Treaty between the Swiss cantons and the German state of Württemberg,<sup>42</sup> which established general jurisdiction in bankruptcy at the debtor's residence and secured equal treatment of creditors in accordance with the law of the jurisdiction, while recognising the principles of unity and universality.<sup>43</sup> The text of this particular treaty was influenced by developments in the German Confederation and the conclusion of a number of treaties between various German states between 1821 and 1827. In these treaties generally, jurisdiction was accorded to the courts of the state where the debtor was domiciled. The proceedings were unitary but did not always have universal effect, since creditors could petition for proceedings by asserting a right to keep the estate separate or where the debtor had a separate branch or establishment in the other jurisdiction.<sup>44</sup> Alternatively, where the debtor was domiciled in one of the states but had residence in the other,

38. Treaty of 1204 (Verona and Trent) and Treaty of 1306 (Verona and Venice), cited in Wood, *Principles of International Insolvency* (1995) Sweet & Maxwell in Chapter 17 at 291.

39. Compact of 1697 (Holland and Utrecht) and Ordinance of Louis XV of 9 April 1747, cited in Nadelmann, *op. cit.* at 75.

40. Article 13, Treaty of 29 May 1777, cited by Lipstein, *Early Treaties for the Recognition and*

*Enforcement of Foreign Bankruptcies*, Chapter 14 in Fletcher (ed.), *Cross-Border Insolvency: Comparative Dimensions* (The Aberystwyth Insolvency Papers) (1990) UKNCCL 223–236 at 223.

41. *Ibid.* at 223.

42. Convention of 13 May 1826.

43. See Lipstein, *op. cit.* at 224.

44. Treaty of 7 May 1821 (Bavaria and Württemberg).

jurisdiction was decided according to where the bulk of assets were situated or the majority of creditors resided.<sup>45</sup> A later German treaty returned to the single jurisdiction principle to allow for conduct of proceedings by the court first seized where the debtor had dual residency.<sup>46</sup>

The modern model in Europe for bilateral treaties is said to be the Franco-Swiss Treaty of 1869, a revision of the Franco-Swiss treaties previously mentioned and which is influenced by the developments in Germany. This treaty applies to nationals and foreigners resident in one of the states with assets or creditors in the other. Jurisdiction is in principle allocated to the courts where the debtor has a commercial establishment or, if a company, its seat. There was a sharp division in practice between French and Swiss courts where the debtor had establishments in both states or was established in one state with residence in the other, situations not provided for in the convention. The Swiss courts took a definitional approach, limiting jurisdiction to instances specifically provided for in the treaty. The French courts, although at first agreeing with this view, later took a more purposive approach, extending jurisdiction to any cross-border instance.<sup>47</sup> In any event, this treaty format served as the model for three further texts concluded between European States.<sup>48</sup> These texts provide for unitary proceedings but leave it open as to whether these have universal effect. In general, recognition of the effect is given but measures of execution generally only being possible following the granting of an *exequatur*. Where this is the case, the administrator's powers extend to assets of any description located in the other jurisdiction.<sup>49</sup> Most of the above treaties have now been superseded by later bilateral arrangements in Europe or have been abrogated as part of the requirements for entry into force of wider multilateral arrangements such as the Brussels Convention 1968 and the European Regulation on Insolvency Proceedings 2000.

## F. Regional or wider multilateral initiatives

The experience of wider multilateral initiatives is generally related to the work of conferences held by associations of states or organisations in which states are represented. Often, these bodies will be organised on a regional basis with geographically proximate states participating in the conclusion of an accord to reflect the regulation of problems identified in the course of their trading links. In fact, early initiatives of this type first emerged in South America, where, following the Montevideo Congress of 1888–1889, eight conventions were prepared in the private international law field, one of which, the Treaty on International Commercial Law of 12 March 1889, deals with insolvency in Chapter X.<sup>50</sup> Four Latin American states

45. Treaty of 12–20 September 1827 (Baden and Hohenzollern-Sigmaringen).

46. Treaty of 14 October 1839 (Prussia and Saxony).

47. See Lipstein, *op. cit.* at 224–225.

48. Treaties of 8 July 1899 (France and Belgium), 28 March 1925 (Belgium and the Netherlands), 3 June 1930 (France and Italy).

49. See Lipstein, *op. cit.* at 225–227.

50. See Dobson, Treaty Developments in Latin America, Chapter 15 in Fletcher, *op. cit.* (note 40 above) 237–262 at 237.

are parties to this treaty.<sup>51</sup> Three states, including a party to the 1889 agreement, are parties to the Montevideo Treaty of 19 March 1940, updating the previous text.<sup>52</sup> The first treaty deals with rules governing liquidation and the second covers compositions, suspension of payments and analogous proceedings in the member states concerned. Both treaties use the concept of the debtor's commercial domicile to found jurisdiction. Unity is expressed to be the desired result only where there was a main business in one state and mere branches in another, although it is unclear whether unity refers to the number of proceedings or the substantive or procedural law governing any proceedings.<sup>53</sup> However, more than one commercial domicile will entitle each jurisdiction where one is found to open proceedings covering that establishment. Under the treaties, the authority of insolvency administrators as expressed in the orders of the competent courts is to be recognised in all other member states. Courts may order provisional and preservation measures over assets, which are to be publicised and given effect in other member states. Local creditors have a certain measure of protection by being given the right to petition for proceedings to be opened and to rely on security rights in moveable and immoveable property, provided these rights are created prior to the opening of insolvency proceedings. According to Professor Fletcher, there is a "curious lack of conclusive data" regarding the use of the Treaties, admittedly perhaps because of the lack of prominence given to case-law in the civil law world, and, as he also argues, the membership of these Treaties, omitting as it does more "economically significant" countries in the region, does not lend them significant prospects of success.<sup>54</sup>

Another example is the Bustamante Code (Havana Convention) 1928, which was adopted on 20 February 1928 by 15 Latin American States. Interestingly, the United States also participated in the discussions but could not bring itself to adhere to the resulting text.<sup>55</sup> The Code provides that the debtor's domicile, whether determined on a civil or commercial basis, is the required link to establish jurisdiction to open insolvency proceedings. The principle of unity is respected where the debtor has only one domicile, insolvency proceedings are only to be opened in that state.<sup>56</sup> Where the debtor has multiple domiciles, defined to mean establishments with separate trading existence, proceedings may be opened in each of the states where a domicile is found.<sup>57</sup> Extraterritorial effect is given to the insolvency or composition order and provisions in the code allow for recognition in other member states of orders given in proceedings, subject to compliance with requirements of publicity.<sup>58</sup> The powers of insolvency administrators appointed by the courts of other member states are also to be recognised without the necessity for further local proceedings.<sup>59</sup> Furthermore, there will be recognition of orders setting aside or modifying transactions concluded within the relation-back period and

51. Argentina, Bolivia, Colombia and Peru.

52. Argentina, Paraguay and Uruguay.

53. See Dobson, *op. cit.* at 238.

54. See Fletcher, *op. cit.* (note 2 above) at 231.

55. See Dobson, *op. cit.* at 250 stating that the argument it used was said to be that the Federal

Government did not have the necessary legislative competence in private international law.

56. Article 414.

57. Article 415.

58. Article 416.

59. Article 418.

provisions on creditors' interests.<sup>60</sup> Finally, compositions and discharge from insolvency are also to have extra-territorial effect in states other than where the order has been obtained from the moment this is made final.<sup>61</sup> Commentators' views on this Code are generally optimistic, with the large membership, some 15 countries, tending to provide evidence of its relative success.<sup>62</sup>

Also an example of a wider multilateral initiative, the member states of the Nordic Council concluded a convention on 7 November 1933 regulating aspects of international practice affecting insolvencies occurring in the Scandinavian states concerned whose legal systems, although not identical, are remarkably similar.<sup>63</sup> The convention is a remarkably succinct document containing its entire framework in 17 articles and has been little amended during its currency.<sup>64</sup> This is said to be part of the recipe for the success of the measure which, although in force for over 60 years, has attracted little case-law interpreting its provisions, thus indicating to commentators its relative facility and lack of legal difficulties connected with its operation.<sup>65</sup> The convention states that a declaration of insolvency in one of the member states will apply to all of the debtor's property situated in other member states without the requirement for further proceedings.<sup>66</sup> Jurisdiction is not limited in any sense, although recognition in other member states is limited to what are termed domiciliary bankruptcies, in other words only those insolvencies opened in any member state where the debtor has a residence or registered office.<sup>67</sup> The convention allows the *lex concursus* to govern many of the issues within proceedings, including the debtor's capacity to deal with assets, rights and obligations of the debtor during insolvency, avoidance and recovery of assets for the insolvency, preferential claims, allocation and distribution of the estate and compositions with creditors. Any questions of private law are decided according to the conflict of laws rules applicable in that jurisdiction.<sup>68</sup> The convention also contains requirements for the judicial recognition of orders and assistance by other courts for the enforcement of measures, which may include assistance for the purposes of confirming a court-approved composition with creditors.<sup>69</sup> This convention is considered to be an outstanding example of how co-operation may be achieved between a small group of contiguous states with relatively homogeneous legal regimes and a great deal of "mutual confidence" in each others' legal systems, leading to the framework being able to embrace even the most contentious of cross-border claims, those fiscal in nature.<sup>70</sup>

Examples of multilateral conventions decline in number somewhat in the field of insolvency until the production, in more modern times, of a convention concluded

60. Article 419.

61. Articles 421–422.

62. Fletcher, *op. cit.* (note 2 above) at 236 in note 26.

63. Nordic Council (Copenhagen) Convention 28 UINT 113 (7 November 1933). See Bogdan, *International Bankruptcy Law in Scandinavia* (1985) 34 ICLQ 49.

64. Two have occurred in 1977 and 1982, published at 38 UINT 251 (7 June 1978) and 76 UINT 447 (19 August 1983) respectively.

65. See Bogdan, *The Nordic Bankruptcy Convention*, Chapter 31 in Ziegel, *op. cit.* 701–708 at 707.

66. Article 1 para. 1.

67. Article 13 provides for disclosure if a non-domiciled debtor or legal entity without its seat in that jurisdiction is involved.

68. Article 1, para. 2.

69. Articles 3 and 10, paras. 2–3.

70. Fletcher, *op. cit.* at 244–245.

by the member states of the European Community on 23 November 1995 whose purpose was to construct a framework for handling cross-border insolvencies within the European Community.<sup>71</sup> Nevertheless, owing to a political dispute, it failed to negotiate the final obstacle before entering into force, although it was later revived as the European Regulation on Insolvency Proceedings 2000.<sup>72</sup> This incorporates, with some necessary textual amendments, the terms of the European Insolvency Convention. The type of co-ordination sought by the Regulation rests on harmonising provisions governing jurisdiction for opening insolvency proceedings and is limited, by application of the principle of proportionality, to these rules and to rules governing the issue of judgments forming the basis of insolvency proceedings or directly connected to these proceedings. There are four conditions for insolvency proceedings intended to be covered by the Regulation. These are that they must be collective in nature and must preclude the scope for individual action by creditors, they must be based on the debtor's "insolvency," a term defined by reference to national criteria for deciding when the debtor has in fact entered the state of insolvency. Furthermore, they must entail the total or partial divestment of power to deal with assets from the debtor and must, in fact, require the appointment of an administrator. 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.<sup>73</sup> 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. Jurisdiction is to be exercised by a court in whose area a debtor has an establishment or assets, although the effect of this type of proceedings are limited to assets situated within the jurisdiction.<sup>74</sup> The Regulation provides for the maintenance of simultaneous proceedings in many member states, though secondary proceedings are generally limited to winding up proceedings.<sup>75</sup> The co-ordination of proceedings occurring in parallel is stated by the Regulation as a must for the efficient realisation of assets and subsequent distribution to creditors. The main pre-condition for achieving proper co-ordination of proceedings relates to the duty on all liquidators to co-operate closely. As an adjunct to the jurisdiction and recognition rules, the Regulation sets out particular rules of uniform application in conflict of laws situations, replacing, insofar as these are also of application to the subject matter, equivalent national rules of private international law for the matters covered by it. It is the law of the jurisdiction where proceedings are opened that will govern many of the substantive issues during proceedings.<sup>76</sup> These issues are defined to include the identity and capacity of debtors against whom proceedings may be brought, the ascertainment of assets which will form

71. See, *inter alia*, Balz, The European Union Convention on Insolvency Proceedings (1996) 70 ABLJ 485; Fletcher, The European Union Convention on Insolvency Proceedings: An Overview and Comment, with US Interest in Mind (1997) 23 BJIL 25.

72. Council Regulation (EC) No 1346/2000 on Insolvency Proceedings of 29 May 2000 OJ 2000 L160/1 (30 June 2000).

73. Article 3(1).

74. Article 3(2).

75. Article 3(3).

76. Article 4(1).

part of the estate as well as the treatment of assets the debtor acquires or inherits after insolvency proceedings begin. Furthermore, the powers of the debtor and liquidator during proceedings, the rules governing the invoking of set-offs, the effects of insolvency on current contracts to which the debtor is a party and on other proceedings are all governed by the substantive law of the main jurisdiction.<sup>77</sup>

A similar convention, concluded by the member states of the Council of Europe on 5 June 1990, provided for jurisdiction in insolvency to be determined by the location of the debtor's "centre of main interests." For companies and incorporated bodies, this is defined to be the place of the registered office, unless evidence to the contrary is brought. Nevertheless, territorial, or secondary, proceedings are permissible, in other places where the debtor's assets are located, but will have effect only on the administration of these assets. The purpose of the convention is to allow the insolvency administrator to act in other jurisdictions on behalf of the creditors, to apply for orders covering provisional and protective measures over assets and to institute legal proceedings. The exchange of information between courts and insolvency administrators is a feature of this convention. Also, there is the possibility for creditors to obtain information about the progress of any proceedings opened and to prove debts in any state where proceedings have been opened, provided they account for prior distributions before receiving further dividends due to debtors in their class. Despite the potentially wide adherence to this convention, given the membership of the Council of Europe, this convention has not known any success. An example further afield of this treaty format is the OHADA Uniform Law on Insolvency Procedures 1998, which is a text influenced by developments in Europe. The principal aim of OHADA<sup>78</sup> is to make available to member states common and simplified rules geared to economic needs and to encourage harmonisation of legal rules as far as possible. This occurs through the production of Uniform Laws, the one on the subject of insolvency procedures coming into effect on 1 January 1999. An interesting feature of this Uniform Law is the inclusion of a section on insolvency proceedings with a cross-border element.<sup>79</sup> According to this, judgments of courts in any member state have full effect in other member states where these judgments deal with the conduct of the procedure, settle any question relating to elements of the procedure and claims brought by interested parties as well as where judgments have arisen in proceedings other than insolvency proceedings but on which the latter have had an effect.<sup>80</sup> These judgments are considered *res judicata* but may be subject to a publication requirement in those states where enforcement is sought.<sup>81</sup> Although judgments obtained in one state are given full effect in other member states, this does not of itself prevent the opening of insolvency proceedings affecting the same debtor in that state. Regulating the potential for conflict in cases where a number of proceedings are likely, the Uniform Insolvency Law adopts definitions of main and secondary proceedings. Main or principal

77. Article 4(2).

78. OHADA is the acronym in French of the Organisation for the Harmonisation of Commercial Law in Africa.

79. Title VI, Articles 247–256.

80. Article 247.

81. Article 248.

proceedings occur in the state where the debtor has its main establishment, headquarters or centre of real management, secondary proceedings being those taking place in any other member state.<sup>82</sup> Remaining provisions in this section place the emphasis on co-operation. Insolvency professionals in charge of main and secondary proceedings are required to share any information, particularly that which could be useful to other proceedings and may also prove debts in other proceedings.<sup>83</sup>

### G. Global initiatives

Global initiatives are so-called because the scope of the instrument that emanates from the discussions, whether of international bodies or associations of states, is not intended to have an effect limited solely to these states. For that reason, the initiatives can be utilised as the basis of a world-wide attempt to harmonise or unify the substantive or procedural law on a particular theme and are open for subscription by any state consenting to see the rules apply to itself. Work by the Hague Conference on the establishment of common rules began as a result of a proposal by the Italian Foreign Minister in 1881 supported by resolutions of the Italian Parliament. Following a long debate and exchanges of correspondence between European Governments, the Government of the Netherlands invited delegates to attend a conference on 12 September 1893 at which work, derived from that of the Institute of International Law of Ghent on private international law rules, was placed on the programme.<sup>84</sup> The subject of insolvency was first taken up at the II Conference in 1894. The first draft did not involve choice of law issues, but concerned itself with jurisdiction principles to be determined not uniformly but by the court first seised.<sup>85</sup> Recognition of any order by another court was subject to an *exéquatur* being obtained where the second court determined that the first court was competent, the order executory in nature and that it covered all of the debtor's assets and was not merely limited to those of a branch. This examination was to be carried out using the criteria applicable in the court of original jurisdiction and not, as may be usual, by using the legal rules of the second court.<sup>86</sup> The effects of an order on the debtor, the debtor's assets, the powers of the insolvency administrator, the proving of debts and distribution of dividends as well as on any compositions with creditors would all be determined by the law of the court to which an application for *exéquatur* had been made.<sup>87</sup> Once obtained, an order with *exéquatur* would prevail over any other order, whether or not enforceable.<sup>88</sup> The explicit rejection in the convention of the unity principle was reversed at the III Conference in 1900, where the new draft expressly provided that exclusive jurisdiction was to be given to the courts of the state where the debtor had a principal establishment or

82. Article 251. These definitions are derived from those in the European Insolvency Convention 1995.

83. Article 253.

84. See Lipstein, *One Hundred Years of Hague Conferences in Private International Law* (1993) 42 ICLQ 553 at 555–7.

85. Articles 1 and 3(a).

86. Article 3(b).

87. Article 5.

88. Article 7.

seat, if a company. The convention was also extended to cover the insolvency of non-commercial persons, a situation left open in the previous draft, although a new exclusion was formulated for enterprises with a public element. The administrator was also to be granted *locus standi* to take out preservation measures in respect of the assets. The law governing the insolvency would now also govern the preferential status of creditors, although proprietary rights and preferences would remain subject to the law of their location. This draft was firmly in the unity and universality school and made a firm attempt to avoid concurrent proceedings. A further revision at the IV Conference in 1904 did not change the substance in any great detail, although an explicit statement was included to the effect that foreign creditors were to enjoy equal status with domestic ones.<sup>89</sup> The 1904 draft in fact was prepared as a text on which bilateral agreements could be drawn up. This was perhaps because the measure as a whole did not seem to meet with any enthusiasm. Work, interrupted by the First World War, resumed at the V Conference, where it was the first item on the agenda. Here, jurisdiction over commercial and non-commercial persons was maintained, the basis of which was decided according to the establishment or domicile of the debtor. For legal entities, this remained the seat, unless proof was brought of an incorporation with fraudulent intent. Further detail was provided of enforcement measures in relation to orders and conditions for obtaining an *exéquatur*. Nevertheless, the proposals, although based on excellent preparatory work and a “straightforward formulation” of a text, did not meet with the approval of many states and the proposals have remained on the table ever since.<sup>90</sup>

Also operating in this field, the International Bar Association began work in 1988 with the formation of a working group of its Committee J, first formed in 1970,<sup>91</sup> looking into the question of international insolvency co-operation.<sup>92</sup> This practitioner-led initiative, deriving from earlier discussions between 1986 and 1988, produced a text called the Model International Insolvency Co-Operation Act, which was circulated through its country committees for comment and revised in light of general support for proposed amendments.<sup>93</sup> The general principles contained in an official comment on the Model Act refer to the principle of universality and are premised on enabling a single court to conduct the administration of the debtor's assets wherever located. The substantive provisions of the Model Act, contained in a remarkably succinct seven sections, cover the duties of the local court to assist foreign proceedings, the procedure for providing any assistance and the relationship of the Model Act to any specific insolvency treaty between the states concerned, and require courts of states enacting the Model Act to recognise foreign insolvency administrators. The courts are also to provide assistance of an ancillary nature to foreign proceedings taking place in a country using the Model Act. In relation to

89. See Lipstein, *op. cit.* at 573.

90. *Ibid.* at 575.

91. See, for an account of the activities of Committee J, Leonard, *Internationalisation of Insolvency and Reorganisations* (1996) 24 IBL 203 at 204–205; Barrett, *Cross-Border Insolvency: Developments, Realities and Solutions* (1996) 24 IBL 208.

92. See Powers, Mears and Barrett, *The Model International Insolvency Co-Operation Act*, Chapter 12 in Leonard and Besant, *op. cit.* 233–243; Powers, *The Model International Insolvency Co-Operation Act: a Twenty-First Century Proposal for International Insolvency Co-Operation*, Chapter 30 in Ziegel, *op. cit.* 687–700.

93. See Powers, *op. cit.* at 690–691.

any other state, assistance may be given only if the other court is the appropriate forum and it is in the creditors' interests.<sup>94</sup> Assistance under the Model Act can include making the debtor's assets available to the administrator, staying or dismissing actions at the request of the administrator, gathering and transmitting evidence in connection with the insolvency, recognising and enforcing foreign orders and any other appropriate relief, but is subordinated to the requirement that the insolvency administrator open proceedings of an ancillary nature in that jurisdiction.<sup>95</sup> The law that applies will depend on the nature of the proceedings and is usually the substantive law of the jurisdiction. Where the proceedings are ancillary, the law applicable is the substantive law unless there are considerations of private international law preventing this.<sup>96</sup> Nevertheless, with view to ensuring substantial harmonisation of rules where possible, the ancillary case should also be conducted according to the substantive law of the foreign jurisdiction.<sup>97</sup> Finally, the Model Act leaves open the question of further harmonisation by way of treaty and is expressed as not applying in cases where such a treaty has been negotiated involving the states concerned.<sup>98</sup> Although a number of states have indicated an interest in its provisions, the Model Act remains currently without issue.

The rising number of international insolvencies and particularly the cases of Olympia and York and Maxwell Communications also prompted the International Bar Association to the view that the development of principles to guide practitioners and judges conducting such cases was necessary. Committee J, also instrumental in developing the Model Act referred to above, set about drafting a text, known as the Cross-Border Insolvency Concordat. Substantial work in 1995 saw the production of written comments representing views from a number of diverse jurisdictions with different legal traditions and a number of meetings on the draft text first produced in 1993, culminating in the production of a revision that year and adopted at a conference in London.<sup>99</sup> The Concordat is intended as a framework for harmonising the conduct of international insolvency proceedings without being a substitute for treaty or domestic legislation regulating this area. It is meant to be a flexible set of guidelines for practitioners and courts that may evolve as it is used and is suitable for adoption as part of a court order or informal arrangement in the context of proceedings with an international dimension.<sup>100</sup> The Concordat states as a general principle that a single administrative forum should have primary responsibility for the co-ordination of insolvency proceedings relating to a debtor with cross-border connections, which should be responsible for the co-ordination of administration and collection of assets, the receipt and distribution of assets after payment in another forum of secured and privileged claims according to local law, the handling of common claims by creditors without discriminating between local or foreign creditors and the granting of discharges.<sup>101</sup> Where more

94. Section 1.

95. Section 2.

96. Section 4.

97. See Powers, *op. cit.* at 695.

98. *Ibid.* at 696.

99. See Leonard *et al.*, Report on the Committee J Cross-Border Insolvency Concordat (International Bar Association, 1995).

100. Introduction to Concordat (International Bar Association, 1995).

101. Principles 1–2.

than one forum exists, official representatives of each forum may appear in other fora for the purpose of proceedings, recognition being given through an *exéquatur* or similar process if required.<sup>102</sup> The Concordat also provides for situations where a main forum does not open proceedings and states that proceedings in other fora should be co-ordinated subject to an agreed protocol with their remit being to govern the assets located within their jurisdiction.<sup>103</sup> The Concordat also provides for choice of law questions by stating that each forum should decide the amount and the extent to which a claim will be allowed according to principles of international law. Questions of jurisdiction are resolved by providing that parties are not subject to insolvency rules in another jurisdiction unless they would be subject in ordinary cases and is of particular importance in relation to transactional avoidance rules.<sup>104</sup> The Concordat also specifies that corporate rescue is also one of its priorities by stating that rescues or compositions are not to be barred, even if the forum in question does not have analogous rules permitting reconstructions, provided that the composition can be effected without discriminating between creditors.<sup>105</sup> In practice, the principles set out by the Concordat have been applied in the conclusion of a number of cross-border protocols dealing with insolvencies in Canada and the United States.

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. UNCITRAL is the vehicle through which the United Nations plays a role in reducing obstacles to international commerce.<sup>106</sup> Its general mandate 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 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 2 years later.<sup>107</sup> 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.<sup>108</sup>

The Model Law in question is a relatively brief document at only 32 articles.<sup>109</sup> 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

102. Principle 3.

103. Principle 4.

104. Principle 8.

105. Principle 9.

106. Outline Introduction at <[www.uncitral.org](http://www.uncitral.org)>.

107. See Glosband, *The UNCITRAL Working Group on Insolvency Law (1997)* <[www.bostonbar.org/sections\\_and\\_committees/bankruptcy\\_law/doc\\_center/uncitral.htm](http://www.bostonbar.org/sections_and_committees/bankruptcy_law/doc_center/uncitral.htm) & [uncitral2.htm](http://www.uncitral.org)>.

108. (1997) 36 ILM 1386 with an Introductory Note by Burman and Westbrook; see also <[www.un.org/uncitral/english/texts/insolven/mlinsolv.htm](http://www.un.org/uncitral/english/texts/insolven/mlinsolv.htm)>.

109. See Krings, *Recent Achievements in the International Unification of Insolvency and Bankruptcy Law (Abstract) (1997)* <[www.unidroit.org/english/publications/art-97-4.htm](http://www.unidroit.org/english/publications/art-97-4.htm)> noting that these provisions are nevertheless the most detailed of all the recent texts in this area.

jurisdictions over the same debtor. In a few instances, noted below, alternative formulations are given for some provisions for adaptation to the requirements of the state's domestic legislation in question. The text is preceded by a preamble, a legislative form not often seen in common-law jurisdictions, 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.<sup>110</sup> Since its production, the Model Law has only been adopted by a limited number of countries: Eritrea, Japan, Mexico, South Africa and Montenegro.<sup>111</sup> A number of other countries are known to be considering the Model Law for adoption, including Australia, Canada, New Zealand and the United States. Furthermore, the United Kingdom has, within legislation recently passed amending parts of the insolvency law framework, included a section providing for the Model Law to be brought into operation through regulations in a statutory instrument.<sup>112</sup> UNCITRAL presently has before it proposals presented by the Australian Government into possible future work in the insolvency arena. The proposals are drawn up in light of the global financial crises affecting many jurisdictions in the late 1990s and the work conducted by international bodies in respect of economic and financial matters, on which insolvency law has a bearing inasmuch as strong insolvency and debtor-creditor regimes are seen as important means for preventing or limiting the effects of financial crises. The effect of a good domestic legal system geared towards co-operation would also facilitate cross-border workouts and rescues.<sup>113</sup> The recommendation of the working group to UNCITRAL was for the development of proposals, either in the form of a model law or model legislative principles, aimed at encouraging the adoption of an ideal corporate insolvency law. Despite the recognition of the difficulties inherent in trying to achieve deep harmonisation of insolvency systems in this manner, the recommendation was that preparatory work first determines what efforts other international bodies in the field were making. This could lead to co-ordination between the various organisations, so that a proper contribution could be made by UNCITRAL to work in this field without unnecessary duplication of effort or inconsistency between the resulting texts.<sup>114</sup>

## H. Economically-related initiatives

Certain international organisations work in the insolvency law field, although their work is not principally concerned with the harmonisation or renovation of legal

110. See Harmer, *UNCITRAL Model Law on Cross-Border Insolvency* (1997) 6 IIR 145 at 148 where he argues that, although the fashion for recitals in legislation seems to have lapsed, it would be unfortunate if this were the only reason for omitting what he considers to be an important statement of objectives.

111. Information from the Status of Texts section at the UNCITRAL Website (as at 30 October 2002).

112. s14, *Insolvency Act 2000*.

113. Provisional Agenda, Twenty Second Session of the Working Group on Insolvency Law (Vienna, 6–17 December 1999) (A/CN.9/WG.V/WP.49) at para. 1.

114. *Ibid.* at paras. 2–4.

systems. These organisations work mainly within the international financial system and deal with insolvency matters only insofar as they recognise that effective insolvency regimes play a major role in strengthening economic and financial systems in any jurisdiction.<sup>115</sup> This occurs in one of two ways, either as a means of preventing the onset of financial crises or, where financial crises do occur, as a means of restoring or rehabilitating entities affected by the crisis. The value of strong domestic insolvency laws is a feature of the reports and enquiries of these organisations in the field. As examples, there might be cited the work of the Asian Development Bank, which hosts a project providing regional technical assistance for the updating of insolvency laws of its member states.<sup>116</sup> A study has been carried out into the relationship between corporate debt and recovery and corporate insolvency in 11 Asian economies. Part of the comparison involved identifying areas of similarity and differences and in light of this, developing key areas for evaluation as well as a model for best practice on which reforms might be attempted. This is then accompanied by technical aid for reform projects the participating Governments wish to carry out. Similarly, the Legal Department of the International Monetary Fund produced in May 1999 a report entitled "Orderly and effective Insolvency Procedures: Key Issues," discussing policy choices facing countries intent on designing new insolvency regimes. This report, based on a comparative survey of selected country legislation, outlines issues relating to possible reform strategies in light of universal importance, although it does not attempt to set standards or preferences with regard to the choices it outlines, ranging broadly between pro-creditor and pro-debtor orientations, and leaves the selection and implementation of reforms to national institutions.<sup>117</sup> There is also the American Law Institute's Transnational Insolvency Project, which began in 1994 and which seeks to examine the laws applicable in the member states of NAFTA. The project consists of two phases. The first will create a text summarising the domestic and international aspects of laws in each country relating to insolvency law and practice, and will also include details of business practices. The second phase will then seek to exchange ideas for specific procedures on the basis of a principle of co-operation that will allow for better cross-border treatment of insolvency procedures.<sup>118</sup>

Other players in the international field include the Privatisation and Enterprise Reform Unit of the OECD, which has been involved since 1992 in a process of developing legal rules and policies for mainly transition and developing economies in the areas of corporate law, insolvency and privatisation.<sup>119</sup> Insolvency law work has centred on the relationship between insolvency law and practice and the needs for restructuring enterprises as well as any implications for privatisation of state-owned businesses. The projects undertaken have recently looked at the law reform

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115. It should also be mentioned that the Bank of England has pioneered a system for the conduct of insolvencies of financial institutions which undoubtedly has an international element, known as the "London Approach."

116. Based on material available at <www.adb.org>.

117. Based on material available at <www.imf.org>.

118. See Westbrook, *Creating International Insolvency Law* (1996) 70 ABLJ 563 at 564–7.

119. Based on material available at <www.oecd.org>.

potential in Russia and, in the context of co-operation with the World Bank, Asia in relation to progress in insolvency law reform and the design of effective insolvency systems to also include a framework for international insolvency. Finally, the World Bank is leading an initiative with the aim of improving the stability of the international financial system. The aim is to build a consensus with regard to the role of insolvency in assisting the management of financial crises through the availability of a sound insolvency system providing good regulation of the debtor-creditor relationship. The World Bank following its 1999 project, aims to map out insolvency systems on a worldwide basis, to provide principles and guidelines to countries wishing to update their insolvency laws. In partnership with other international organisations, a taskforce has been set up, together with advisory panels and working groups comprising over 70 international experts to produce these principles, expected to be published following a series of regional workshops aimed at obtaining views on the proposals.<sup>120</sup>

## V. Summary

The organisation of insolvencies at the international level raises complex questions about the nature of the jurisdiction exercised by courts involved in the process. It also has a profound impact on the position of participants in insolvency and their treatment, which in turn affects how jurisdictions are seen in terms of risk and exposure for investment and trading purposes. This lends this field of law especially an economic flavour that may well explain why states are particularly concerned to ensure that their courts have control over the procedures that come before their jurisdiction. However, the traditional schools of thought, divided into territorialism and universality, which once underlined judicial practice in this field, have been seen as inadequate to deal with what has become a significant phenomenon in the late 20th and early 21st centuries. This, the apparent and inexorable rise in insolvencies with an international element, of which there have been many examples in the corporate, commercial and banking sectors, has created calls for solutions at domestic level through the provision of better legislative models, designed to afford courts the ability to minimise or avoid conflicts of law, many of these being enacted during regular revisions of domestic law. Nevertheless, it may be said that the differences between domestic models for dealing with insolvencies with an international dimension, and the failure of many systems to develop rules adequate to deal with an ever present and growing problem are very evident. The inability of practitioners, judges and commentators to reconcile the two contradictory philosophical systems underpinning domestic approaches to proceedings has also been seen as wanting. These factors have been taken as evidence that cross-border insolvency organisation cannot be left to individual nation states but must be the target of co-ordination at the international level. As discussed above in relation to the

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<sup>120</sup> Based on Johnson, *Towards International Standards on Insolvency: the Catalytic Role of the World Bank*, paper delivered at the Schmitthoff

Symposium, Queen Mary and Westfield College, London, 1-3 June 2000.

universality-territorialism debate, management by treaty is one of the methods often relied on to resolve the choice of jurisdiction issue and any resultant conflict of laws. Organisation at the international level has a rich and varied history, replete with many attempts at finding a practical international solution, which have occupied the labours of many worthy jurists over the years.

The phenomenon of international insolvency is not a novel one. Solutions have, however, been slower in coming and the experience of international insolvency organisation appears to be a history of continual forward movements and (inevitable) reversals of fortune. Even where bilateral and limited multilateral texts have been negotiated as part of a framework of initiatives between neighbouring states, the success of these initiatives has been mixed. Even wider multilateral texts have not known as much success as the amount of time and resources invested in them would almost require to justify the effort spent in reaching accord. The words of Wheaton, cited at the beginning of this article, may be said to be eerily prophetic. By the end of the 20th century, however, the production of initiatives has accelerated to an extent early commentators could not have foreseen. The number of such instruments has risen to the extent that commentators need to take a very short-term view when discussing likely reforms to cross-border insolvency law and practice.<sup>121</sup> Nevertheless, views of how changes may be effected differ, although the consensus largely returns to the existence of a text, seemingly the only method of ensuring respect for provisions intended to have the force of law. The views expressed also range in their optimism. A seminal piece by Boshkoff illustrates a pessimistic view of this area of law.<sup>122</sup> The negotiation of bilateral treaties, he says, is an ineffective process that is unlikely to produce a universalist regime. The lack of comparative scholarship is also an obstacle as is the lack of trust between jurisdictions, in order to achieve mutual understanding of insolvency law and practice. The comment by Professor Westbrook in response points, however, to the emergence of progressive case law and better judicial practice, as well as the number of international initiatives as being signs that a better system is being created.<sup>123</sup>

This may be said to be especially true given the change in emphasis from allocation of jurisdiction to administer the liquidation of estates to the formation of frameworks capable of dealing with the sophisticated needs of insolvencies, including corporate rescue wherever possible. There has also been a change in the remit of later texts, which firmly place the emphasis on co-operation, the communication of information and the co-ordination of proceedings for a more efficient outcome for the insolvency overall. Furthermore, there is a desire to involve more and more states in the conclusion of agreements, often on the basis of regional economic groupings such as the European Union, the Council of Europe, the Nordic Union or OHADA, but also through the work of international bodies like UNCITRAL and the many non-Governmental bodies that have taken an interest in this area.

121. See Zipes, From the Grab Rule to Uniformity: International Bankruptcy Law (1998) < [www.cm-p.com/publications/8\\_98\\_A2.html](http://www.cm-p.com/publications/8_98_A2.html) >.

122. See Boshkoff, Some Gloomy Thoughts Concerning Cross-Border Insolvencies (discussion pa-

per distributed at University of Toronto conference in 1993).

123. See Westbrook, Comment: A More Optimistic View of Cross-Border Insolvency Insolvencies (discussion paper *ibid.*).

The related work by organisations active in the economic field seeking to ensure financial stability in less developed jurisdictions through the enactment of laws designed to ensure systemic integrity often places an emphasis on the adoption of strong laws to deal with credit, security and insolvency. Many of these initiatives will have the benefit of focusing attention on methods for resolving international problems. In summary, it may be a welcome sign that the number of international initiatives is promising evidence that more thought is being put into the hopefully successful resolution of what was once considered an intractable and irresolvable phenomenon.