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THE AMERICAN LAW INSTITUTE

and

the International Insolvency Institute

Transnational Insolvency: Global Principles for Cooperation in International Insolvency Cases

Report to ALI

(March 30, 2012)

SUBJECTS COVERED

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The American Law Institute

Transnational Insolvency:
Global Principles for Cooperation in International Insolvency Cases

Report to ALI

Comments and Suggestions Invited

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Transnational Insolvency:
Global Principles for Cooperation in International Insolvency Cases

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The bylaws of The American Law Institute provide that "Publication of any work as representing the Institute's position requires approval by both the membership and the Council." Each portion of an Institute project is submitted initially for review to the project's Consultants or Advisers as a Memorandum, Preliminary Draft, or Advisory Group Draft. As revised, it is then submitted to the Council of the Institute in the form of a Council Draft. After review by the Council, it is submitted as a Tentative Draft, Discussion Draft, or Proposed Final Draft for consideration by the membership at the Institute's Annual Meeting. At each stage of the reviewing process, a Draft may be referred back for revision and resubmission. The status of this Report is indicated on the front cover and title page.

The Council approved the start of this project in 2005. Now ready for final promulgation, the work will not be submitted for Council or membership approval; it is a report to ALI of recommended global principles for cooperation in international insolvency cases.

The Reporters have produced drafts of General Principles, Conflict of Laws Principles, and Guidelines on Communications. A Preliminary Draft (2010), a Second Preliminary Draft (2011), and a Report to Council (2012) are available to project participants on the ALI website.

The project's Reporters may have been involved in other engagements on issues within the scope of the project; all Reporters are asked to disclose any conflicts of interest, or their appearance, in accord with the Policy Statement and Procedures on Conflicts of Interest with Respect to Institute Projects; and copies of Reporters' written disclosures are available from the Institute upon request; however, only disclosures provided after July 1, 2010, will be made available and, for confidentiality reasons, parts of the disclosures may be redacted or withheld.

Foreword

At this year's Annual Meeting, the ALI membership will hear a report on the completed project, Transnational Insolvency: Global Principles for Cooperation in International Insolvency Cases, which also includes Global Guidelines for Court-to Court Communications in International Insolvency Cases.

In 2003, the Institute published its work on Transnational Insolvency: Cooperation Among the NAFTA Countries, which recommended insolvency coordination among Canada, Mexico, and the United States. Professor Jay Westbrook of the University of Texas led that effort. Those principles and guidelines have received substantial attention from judges and lawyers in the three NAFTA countries and have improved fairness and efficiency when bankruptcies have cross-border impact. A relatively new organization, the International Insolvency Institute, and its founding leader Bruce Leonard (who had contributed substantially to the NAFTA project) recommended an attempt to adapt the North American work for use in multinational bankruptcies on all continents. That is the work now before the ALI.

The international project was accomplished by two distinguished European experts, Professor Ian Fletcher of the United Kingdom and Professor Bob Wessels of the Netherlands. Their drafts have been reviewed annually by experts at the International Insolvency Institute and by ALI Advisers. It is now ready for final promulgation. The work has been presented to the ALI Council but not debated or approved there and will not be before the Annual Meeting for a vote. Rather, this is a report TO the ALI of recommendations to the world of international bankruptcy that draw heavily on the three-country project that received full ALI approval. I am confident that what has been accomplished is first-class work that will have significant and positive influence.

We thank the two Reporters, Bruce Leonard, and all who have participated in meetings about this effort. It is the latest evidence that the international involvement of the Institute continues to grow.

LANCE LIEBMAN
Director
The American Law Institute

March 26, 2012

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Reporters' Preface

We are honored to present our Report "Global Principles for Cooperation in International Insolvency Cases." The structure of the Report is the following:
- 37 Global Principles for Cooperation in International Insolvency Cases;
- 18 Global Guidelines for Court-to-Court Communications in International Insolvency Cases;
- A list of over 100 terms and expressions with definitions; and
- as an Annex to the Global Principles, the Reporters' Statement with 23 Global Rules on Conflict-of-Laws Matters in International Insolvency Cases.

These Global Principles for Cooperation in International Insolvency Cases reflect a nonbinding statement, drafted in a manner to be used both in civil-law as well as common-law jurisdictions, and aim to cover all jurisdictions in the world. To a large extent, the Global Principles for Cooperation in International Insolvency Cases ("Global Principles") build further on The American Law Institute's Principles of Cooperation among the member states of the North American Free Trade Agreement (NAFTA). Those Principles were evolved within The American Law Institute's Transnational Insolvency Project, conducted between 1993 and 2000, for which the Reporter was Professor Jay L. Westbrook. The objective of that Project was to provide a nonstatutory basis for cooperation in international insolvency cases involving two or more of the NAFTA states, consisting of the United States, Canada, and Mexico.

We believe we can fairly claim that our Report fulfills the commission ALI entrusted to us at the time of our appointment as Joint Reporters for this project in February 2006. We have succeeded in demonstrating that the essential provisions of the ALI's Principles of Cooperation Among the NAFTA Countries, subject to certain necessary modifications, are fully capable of acceptance in jurisdictions across the world. The Report has been produced in collaboration with expert consultants representing more than 30 different countries, reflecting a wide and representative cross section of the different legal traditions and styles. The Global Principles therefore are the result of a combined effort of The American Law Institute (ALI) with the International Insolvency Institute (III), especially the following groups:
1. International Advisers, appointed by ALI and III, chaired by Professor Jay L. Westbrook;
2. Members Consultative Group, formed by other ALI Members with an interest in the project;
3. III Working Group, formed by other III Members with an interest in the project, chaired by E. Bruce Leonard, Chair of III;
4. International Consultants, consisting of recognized experts with an interest in the project, not being members of ALI or III, chaired by the Reporters.

In addition, the Reporters considered it to be both appropriate and necessary to take account of the considerable volume of work that has already been carried out in this field in recent years by a number of organizations, such as UNCITRAL and UNIDROIT, and by other bodies of experts, for example the European Communication and Cooperation Guidelines for Cross-border Insolvency 2007. Collectively, this work amounts to a striking demonstration of the globalization of

commercial activity in the present era and of the need to address the issues associated with insolvency in a cross-border context. Furthermore, account has been taken of the fact that some of the central issues addressed in the original ALI NAFTA Principles (including recognition, relief, and cooperation) have, since ALI's adoption of the text in 2000, found their way into the UNCITRAL Model Law for Cross-border Insolvency and, therefore, in national or federal legislation. In the U.S.A., since October 17, 2005, Chapter 15 U.S. Bankruptcy Code is in place. Other states have also enacted legislation within which the UNCITRAL Model Law, and hence some aspects of the ALI Principles, are reflected. These states include Australia, Canada, England, Japan, Ireland, Mexico, New Zealand, Poland, Romania, South Africa, and South Korea. In Europe, since the entry into force of the EU Insolvency Regulation in 2002, several topics dealt with in ALI's Principles now are applicable on a compulsory basis in 26 of the 27 EU Member States. Hence, we have seen it as an integral part of our task to identify such core values and principles as can be discovered from a comparative analysis of the available texts, evaluated in the context of the consultative debate among the participating experts. We believe that the Global Principles for Cooperation in International Insolvency Cases are therefore in line with other international developments and other attempts of developing modes of international cooperation in the area of international insolvency. We are therefore confident that the Principles and Guidelines contained in this Report can be commended for endorsement by leading domestic associations, courts, and other groups across the world, in the meaning of the terms of our initial engagement.

For convenience of reference, the complete texts of the Global Principles and the Global Guidelines are set out at the front of the Report, and thereafter we provide detailed Comments, Notes, and references pertaining to the individual Principles and Guidelines.

In Section I of the Report, we explain our working method over the last five years. Here we may also mention that, in the same period, six half-day or one-day seminars were held where members of the Consultative Groups and invited guests debated and discussed various sections of the project as the work progressed. These meetings were held at Columbia University (New York) on four occasions, at Humboldt University (Berlin), and in Rome (Italy). Also certain parts of the draft of the Report were exposed for comment at a number of academic, practitioners', and judicial conferences in some 10 countries outside North America. The feedback from all these sessions has been particularly instructive, and the present text is based on the cumulative results of discussions in these meetings and suggestions communicated by individuals to the Reporters. We are immensely grateful for all the assistance received.

The Report was finalized in December 2011, when we were able to take into account extremely valuable and positive comments received since the text was circulated in draft form in September 2011. In particular, we are immensely grateful for the constructive suggestions for improving the drafting of our black-letter provisions received from Judge Elizabeth Stong and from Bruce Leonard, and insightful comments sent on behalf of III by Professor (formerly Judge) Sam Bufford.

The final stage of formal approval of the Report properly belongs to the institutions by which it was commissioned. As the Reporters have reached the completion of our

joint labors, we wish to express our appreciation to the ALI and the III for the privilege of having served as Joint Reporters for this most timely and important project, and to all those who have provided input during its elaboration. We cherish the hope that the outcome will make a significant contribution to the global architecture of international insolvency.

Following the positive review of the Report by the Council at its meeting in Philadelphia on January 27, 2012, we look forward to being in attendance on May 23 next in Washington, D.C., when the Report is scheduled to be considered by the Annual Meeting of the Institute.

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March 2012

GLOBAL PRINCIPLES FOR COOPERATION IN INTERNATIONAL INSOLVENCY CASES

Principle 1 Overriding Objective

1.1. These Global Principles embody the overriding objective of enabling courts and insolvency administrators to operate effectively and efficiently in international insolvency cases with the goals of maximizing the value of the debtor's global assets, preserving where appropriate the debtors' business, and furthering the just administration of the proceeding.

1.2. In achieving the objective of Global Principle 1.1, due regard should be given to the interests of creditors, including the need to ensure similarly ranked creditors are treated equally. Due regard should also be given to the interests of the debtor and other parties in the case, and to the international character of the case.

1.3. All parties in an international insolvency case should further the overriding objective of Global Principle 1.1 and should conduct themselves in good faith in dealing with courts, insolvency administrators, and other parties in the case.

1.4. Courts and insolvency administrators should cooperate in an international insolvency case with the aim of achieving the objective of Global Principle 1.1.

1.5. In the interpretation of these Global Principles, due regard should be given to their international origin and to the need to promote good faith and uniformity in their application.

Principle 2 Aim

2.1. The aim of these Global Principles is to facilitate the coordination of the administration of international insolvency cases involving the same debtor, including where appropriate through the use of a protocol.

2.2. In particular, these Global Principles aim to promote:

(i) The orderly, effective, efficient, and timely administration of proceedings;

(ii) The identification, preservation, and maximization of the value of the debtor's assets, including the debtor's business, on a global basis;

(iii) The sharing of information in order to reduce costs; and

(iv) The avoidance or minimization of litigation, costs, and inconvenience to the parties in the proceedings.

2.3. These Global Principles aim to promote the administration of separate international insolvency cases with a view to:

(i) Ensuring that creditors' interests are respected and that creditors are treated equally;

(ii) Saving expense;

(iii) Managing the debtor's estate in ways that are proportionate to the amount of money involved, the nature of the case, the complexity of the issues, the number of creditors, and the number of jurisdictions involved; and

(iv) Ensuring that the case is dealt with effectively, efficiently, and timely.

Principle 3 International Status; Public Policy

Nothing in these Global Principles is intended to:

(i) Interfere with the independent exercise of jurisdiction by a national court involved, including in its authority or supervision over an insolvency administrator;

(ii) Interfere with the national rules or ethical principles by which an insolvency administrator is bound according to applicable national law and professional rules;

(iii) Prevent a court from refusing to take an action that would be manifestly contrary to the public policy of the forum state; or

(iv) Confer substantive rights, interfere with any function or duty arising out of any applicable law, or encroach upon any local law.

Principle 4 Case Management

4.1. A court should, by actively managing an international insolvency case, coordinate and harmonize the proceedings before it with those in other states except where there are genuine and substantial reasons for doing otherwise and then only to the extent considered to be appropriate in the circumstances.

4.2. A court:

(i). Should seek to achieve disposition of the international insolvency case effectively, efficiently, and timely, with due regard to the international character of the case;

(ii). Should manage the case in consultation with the parties and the insolvency administrators involved and with other courts involved;

(iii). Should determine the sequence in which issues are to be resolved; and

(iv). May hold status conferences regarding the international insolvency case.

Principle 5 Equality of Arms

5.1. All judicial orders, decisions, and judgments issued in an international insolvency case are subject to the principle of equality of arms, so that there should be no substantial disadvantage to a party concerned. Accordingly:

(i). Each party should have a full and fair opportunity to present evidence and legal arguments;

(ii). Each party should have a full and fair opportunity to comment on the evidence and legal arguments presented by other parties.

5.2. When the urgency of a situation calls for a court to issue an order, decision, or judgment on an expedited basis, the court should ensure:

(i). That reasonable notice, consistent with the urgency of the situation, is provided by the court or the parties to all parties who may be affected by the order, decision, or judgment, including the major unsecured creditors, any affected secured creditors, and any relevant supervisory governmental authorities;

(ii). That each party may seek to review or challenge the order, decision, or judgment issued on an expedited basis as soon as reasonably practicable, based on local law;

(iii). That any order, decision, or judgment issued on an expedited basis is temporary and is limited to what the debtor or the insolvency administrator requires in order to continue the operation of the business or to preserve the estate for a limited period, appropriate to the situation. The court should then hold further proceedings to consider any appropriate additional relief for the debtor or the affected creditors, in accordance with Global Principle 5.1.

Principle 6 Decision and Reasoned Explanation

6.1. Upon completion of the parties' presentations relating to the opening of an insolvency case or the granting of recognition or assistance in an international insolvency case, the court should promptly issue its order, decision, or judgment.
6.2. All parties should cooperate and consult with one another concerning scheduling of proceedings.
6.3. The court may issue an order, decision, or judgment orally, which should be set forth in written or transcribed form as soon as possible.
6.4. The order, decision, or judgment should identify any order previously made on any related subject; the period, if any, for which it will be in force; any appointment of an insolvency professional; and any determination regarding costs, the issues to be resolved, and the timetable for the relevant stages of the proceedings, including dates and deadlines.
6.5. If the order, decision, or judgment is opposed or appealed, the court should set forth the legal and evidentiary grounds for the decision.

Principle 7 Recognition

7.1. An insolvency case opened in a state that, with respect to the debtor concerned, has jurisdiction under the rules of international jurisdiction established by these Global Principles, in conformity with Global Principle 13, should be recognized and given appropriate effect under the circumstances in every other state.
7.2. Recognition should be determined in a proceeding that is orderly, effective, efficient, and timely, with a minimum of formalities and with due regard to the requirements of Global Principle 3 (Public Policy) and Global Principle 5 (Equality of Arms).

Principle 8 Stay or Moratorium

8.1. Insolvency cooperation may require a stay or moratorium at the earliest possible time in each state where the debtor has assets or where litigation is pending relating to the debtor or the debtor's assets. The stay or moratorium should impose reasonable restraints on the debtor, creditors, and other parties.
8.2. If the local law does not provide an effective procedure for obtaining relief from the stay or moratorium, then a court should exercise its discretion to provide such relief where appropriate. Exceptions to the stay or moratorium should be limited and clearly defined.

Principle 9 Cooperation and Sharing of Information Between Courts and Administrators

9.1. Cooperation between courts and between administrators should include prompt and full disclosure regarding all relevant information, including assets and claims, with a view to promoting transparency and reducing international fraud.
9.2. Insolvency administrators should provide all other insolvency administrators involved with prompt and full disclosure about the existence and status of the insolvency proceedings in which they have been appointed.
9.3. Insolvency administrators should share relevant nonpublic information with other insolvency administrators, subject to applicable law and appropriate confidentiality arrangements.
9.4. Following recognition, a foreign representative should be entitled to use all available legal means to obtain information about the debtor's assets in all jurisdictions where those assets may be found.
9.5. An insolvency administrator, debtor, or creditor filing an insolvency case or seeking recognition of a foreign insolvency proceeding should provide prompt and full disclosure about the existence and status of any foreign insolvency case that concerns the same or a related debtor at the time of filing.
9.6. An insolvency administrator should provide prompt and full disclosure to other insolvency administrators of material developments in any foreign insolvency case that concerns the same or a related debtor.

Principle 10 Sharing of Value

Where a court has recognized a foreign insolvency case that has been opened in another state having international jurisdiction according to these Global Principles, the court should approve the sharing of the value of the debtor's assets on a global basis.

Principle 11 Nondiscriminatory Treatment

Subject to Global Principle 3, a court should not discriminate against creditors or claimants based on nationality, residence, registered seat or domicile of the claimant, or the nature of the claim.

Principle 12 Adjustment of Distributions

Where there is more than one insolvency case pending with respect to the debtor, a creditor should not receive more through the distributions made in a particular case than the percentage recovered by other creditors of the same class in that case, having regard to distributions already received in other cases concerning the same debtor. A creditor who receives more than one distribution should account for all previous distributions as a condition to participating in a subsequent distribution in another case.

Principle 13 International Jurisdiction

13.1. For the purposes of these Global Principles, the courts or other authorities of a state should have jurisdiction to open an insolvency case in respect of a debtor when either:

(i) The debtor's center of main interests is situated within that state's territory; or

(ii) The debtor has an establishment within that state's territory.

13.2. Where an insolvency case is opened on the basis of Global Principle 13.1(ii), its effects should generally be restricted to those assets of the debtor situated in the state in question. Such a case may be accorded more extensive effect if an insolvency case cannot be opened under Global Principle 13.1(i) because of conditions laid down by the law of the state in which the center of main interests is situated.

13.3. For the purposes of these Global Principles:

(i) "Center of main interests" means the place where the debtor conducts the administration of its interests on a regular basis, to be determined on the basis of objective factors that are known to or are readily ascertainable by third parties.

(ii) In the case of a company or legal person, the place of the registered office should be presumed to be the center of its main interests, unless the contrary is proved.

(iii) In the case of an individual, the debtor's habitual residence should be presumed to be the center of his or her main interests, unless the contrary is proved. In the case of an individual who is engaged in a business, trade, or profession, the debtor's professional domicile or, if there is none, the debtor's registered business address should be presumed to be his or her center of main interests, unless the contrary is proved.

(iv) An "establishment" means a place of operations where or through which the debtor carries out an economic activity on a nontransitory basis, with human means and assets or services, to be determined on the basis of objective factors that are known to or are readily ascertainable by third parties. Such activities may be commercial, industrial, or professional.

13.4. Where an insolvency case is opened on the basis of Global Principle 13.1(i), the court should determine whether the center of main interests is situated within the territory of the forum state. For this purpose, the location of the center of main interests should be determined as of the earliest date on which the debtor or a party with standing seeks to invoke the jurisdiction to open the insolvency case.

13.5. If the debtor's center of main interest was previously in a different state (the "Prior State") from the state in which the insolvency case was opened, the international jurisdiction of the Prior State should not be displaced unless either (i) at the time of the alleged relocation of the center of main interests, the debtor was able to pay all debts and liabilities incurred prior to that time or (ii) the debtor has fully paid or concluded a composition or compromise in respect of its obligations incurred before the relocation of its center of main interests. Alternatively, jurisdiction of the Prior State may be displaced if there is no undue prejudice to creditors whose claims arose from dealings with the debtor during the time when the debtor's center of main interest was in the Prior State.

Principle 14 Alternative Jurisdiction

14.1. In the absence of international jurisdiction based on Global Principle 13.1, a court may exercise jurisdiction to open an insolvency case under its local law.
14.2. In an insolvency case where jurisdiction is based on Global Principle 14.1 and the local law, the court should cooperate with the court in an insolvency case in another state where jurisdiction is based on Global Principle 13.1.
14.3. In an insolvency case where jurisdiction is based on Global Principle 14.1 and the local law, the court should normally restrict its actions to assets and operations within the forum state.

Principle 15 Request for Recognition

15.1. In an insolvency case where jurisdiction is based on Global Principle 13.1, courts and relevant authorities in all other states should provide access to the representative of that case and should grant recognition to that case and its representative.
15.2. A court should deny recognition to an insolvency case pending in another state if recognition would be manifestly contrary to public policy in the forum state.
15.3. In an insolvency case where jurisdiction is based on Global Principle 14.1 and the local law, a court in another state may grant such recognition and assistance to that case and its representative as permitted by the forum state's local law. For this purpose, the court may give due regard to the extent to which the court exercising jurisdiction under Global Principle 14.1 and the local law is cooperating with any insolvency case concerning the same debtor that is pending in a court exercising jurisdiction under Global Principle 13.

Principle 16 Modification of Recognition

Recognition may be modified if the court becomes aware of evidence that warrants such action. Such evidence may include evidence:

(i) That there was fraud in the opening of the foreign insolvency case or in obtaining recognition in the recognizing court,
(ii) That the foreign insolvency case was opened in the absence of international jurisdiction based on Global Principle 13,
(iii) That the initial decision to recognize the foreign insolvency case was based on an incomplete or erroneous understanding of the relevant facts, or
(iv) That there has been a material change of circumstances following the opening of the foreign insolvency case or its recognition by the court.

Principle 17 Stay or Moratorium upon Recognition

17.1. Unless a stay already exists because of a domestic insolvency case concerning the same debtor, if a court recognizes a foreign insolvency case as a main proceeding with respect to the debtor it should promptly grant a stay or moratorium prohibiting the

unauthorized disposition of the debtor's assets and restraining actions by creditors to enforce their rights and remedies against the debtor or the debtor's assets.

17.2. In a reorganization case, the stay or moratorium should normally permit the continued operation of the debtor's business.

17.3. Where there is no domestic insolvency proceeding pending in the recognizing state, if the court recognizes a foreign insolvency case as a main proceeding with respect to the debtor, and has granted a stay or moratorium that is substantially equivalent to the stay or moratorium in a domestic insolvency case, the stay or moratorium in the main proceeding should not apply in the recognizing state and, conversely, the stay or moratorium in the recognizing state should not apply in the state of the main proceeding.

Principle 18 Reconciliation of Stays or Moratoriums in Parallel Proceedings

18.1. Where there is more than one insolvency case pending with respect to a debtor, each court should minimize conflicts between the applicable stays or moratoriums.

18.2. Where there is more than one insolvency case pending with respect to a debtor and an insolvency case in one state has been recognized as a main proceeding by the court in a second state, the stay or moratorium applicable or issued in the recognizing state should apply in a third state only to the extent that the stay or moratorium in the main proceeding does not apply.

Principle 19 Abusive or Superfluous Filings

19.1. Where there is more than one insolvency case pending with respect to a debtor, and the court determines that an insolvency case pending before it is not a main proceeding and that the forum state has little interest in the outcome of the proceeding pending before it, the court should (i) dismiss the insolvency case, if dismissal is permitted under its law and no undue prejudice to creditors will result; or (ii) ensure that the stay or moratorium in the proceeding before it does not have effect outside that state.

19.2. Global Principle 19.1 should not be applied until a main proceeding has been opened by a court that has international jurisdiction on the basis of these Global Principles.

Principle 20 Court Access

20.1. Upon recognition, a representative of a foreign insolvency case should have direct access to any court in the recognizing state necessary for the exercise of its legal rights.

20.2. Upon recognition, a representative of a foreign insolvency case that is a main proceeding should have access to any court to the same extent as a domestic insolvency administrator.

20.3. Upon recognition, a representative of a foreign insolvency case that is a main proceeding should be able to request the opening of a domestic insolvency case with respect to the debtor.

Principle 21 Language

21.1. Where there is more than one insolvency case pending with respect to a debtor, the insolvency administrators should determine the language in which communications should take place with due regard to convenience and the reduction of costs. Notices should indicate their nature and significance in the languages that are likely to be understood by the recipients.
21.2. Courts should permit the use of languages other than those regularly used in local proceedings in all or part of the proceedings, with due regard to the local law and available resources, if no undue prejudice to a party will result.
21.3. Courts should accept documents in the language designated by the insolvency administrators without translation into the local language, except to the extent necessary to ensure that the local proceedings are conducted effectively and without undue prejudice to interested parties.
21.4. Courts should promote the availability of orders, decisions, and judgments in languages other than those regularly used in local proceedings, with due regard to the local law and available resources, if no undue prejudice to a party will result.

Principle 22 Authentication

Where authentication of documents is required, courts should permit the authentication of documents on any basis that is rapid and secure, including via electronic transmission, unless good cause is shown that they should not be accepted as authentic.

Principle 23 Communications Between Courts; Intermediaries

23.1 Courts before which insolvency cases or requests to recognize foreign insolvency proceedings or requests for assistance are pending should, if necessary, communicate with each other directly or through the insolvency administrators to promote the orderly, effective, efficient, and timely administration of the cases.
23.2. Such communications should utilize modern methods of communication, including electronic communications as well as written documents delivered in traditional ways. The Global Guidelines for Court-to-Court Communications, set out in Section III of these Global Principles, should be employed. Electronic communications should utilize technology that is commonly used and reliable.
23.3. Courts should consider the use of one or more protocols to manage the proceedings with the agreement of the parties, and approval by the courts concerned.
23.4. Courts should consider the appointment of one or more independent intermediaries, within the meaning of Global Principle 23.5, to ensure that an international insolvency case proceeds in accordance with these Global Principles. The court should give due regard to the views of the insolvency administrators in the pending insolvency cases before appointing an intermediary. The role of the intermediary may be set out in a protocol or an order of the court.
23.5. An intermediary:
(i) Should have the appropriate skills, qualifications, experience, and professional knowledge, and should be fit and proper to act in an international insolvency proceeding;

(ii) Should be able to perform his or her duties in an impartial manner, without any actual or apparent conflict of interest;
(iii) Should be accountable to the court that appoints him or her;
(iv) Should be compensated from the estate of the insolvency case in which the court has jurisdiction.

Principle 24 Control of Assets

24.1 If there is not a domestic insolvency case pending with respect to the debtor, then:
(i) upon recognition, a representative of a foreign insolvency case should be given legal control, and assistance in obtaining practical control, of the debtor's assets, wherever they are located, to the same extent as a domestic insolvency administrator;
(ii) upon recognition, a representative of a foreign insolvency case should be permitted to remove assets to another jurisdiction, where doing so is appropriate for the purposes of the insolvency case and if there is no undue prejudice to creditors.
24.2. If Global Principle 24.1 applies, the representative of a foreign proceeding is subject to the same level of accountability towards the court of the situs as would be required of an insolvency administrator appointed in a domestic proceeding.

Principle 25 Notice

25.1. If an insolvency case appears to include claims of known foreign creditors from a state where an insolvency case is not pending, the court should assure that sufficient notice is given to permit those creditors to have full and fair opportunity to file claims and participate in the case. Such notice should include publication in the Official Gazette (or equivalent publication) of each state concerned.
25.2. For the purposes of notification within the meaning of Global Principle 25.1, a person or legal entity is a known foreign creditor if:
(i) The debtor's business records establish that the debtor owes or may owe a debt to that person or legal entity; and
(ii) The debtor's business records establish the address of that person or legal entity.

Principle 26 Cooperation

26.1. Insolvency administrators in parallel proceedings should cooperate in all aspects of the cases. The use of an agreement or "protocol" should be considered to promote the orderly, effective, efficient, and timely administration of the cases.
26.2. A protocol for cooperation among insolvency administrators should address the coordination of requests for court approvals of related decisions and actions when required and communication with creditors and other parties. To the extent possible, it should also provide for timesaving procedures to avoid unnecessary and costly court hearings and other proceedings.

Principle 27 Coordination

27.1. Where there are parallel proceedings, each insolvency administrator should obtain court approval of an action affecting assets or operations in that forum if required by local law, except as otherwise provided in a protocol approved by that court.
27.2. An insolvency administrator should seek prior agreement from any other insolvency administrator as to matters that concern proceedings or assets in that administrator's jurisdiction, except where emergency circumstances make this unreasonable.
27.3. A court should consider whether the insolvency administrator in a main proceeding, or his or her agent, should serve as the insolvency administrator or coadministrator in another proceeding to promote the coordination of the proceedings.

Principle 28 Notice Among Administrators

An insolvency administrator should receive prompt and prior notice of a court hearing or the issuance of a court order, decision, or judgment that is relevant to that administrator.

Principle 29 Cross-Border Sales

When there are parallel insolvency proceedings and assets will be sold, courts, insolvency administrators, the debtor, and other parties should cooperate in order to obtain the maximum aggregate value for the assets of the debtor as a whole, across national borders. Each of the courts involved should approve sales that will produce the highest overall price for the debtor's assets.

Principle 30 Assistance to Reorganization

If a court recognizes a foreign insolvency case that is a reorganization case as a main proceeding with respect to the debtor according to these Global Principles, the court should conduct any parallel domestic case in a manner that is as consistent with the reorganization objective in the main proceeding as is possible under the circumstances, with due regard to the local law.

Principle 31 Post-Insolvency Financing

Where there are parallel proceedings, especially in reorganization cases, insolvency administrators and courts should cooperate to obtain necessary post-insolvency financing, including the granting of priority or secured status to lenders, with due regard to local law.

Principle 32 Avoidance Actions

Where there are parallel proceedings, insolvency administrators should cooperate to reach a common position with respect to the avoidance of pre-insolvency transactions involving the debtor, with due regard to local law.

Principle 33 Information Exchange

Insolvency administrators in parallel proceedings should make prompt and full disclosure to each other on a continuing basis of all relevant information they have, including a list of all claims and claimants indicating whether the claims are asserted as secured, priority, or ordinary claims, and whether they are approved, disputed, or disapproved.

Principle 34 Claims

Where there are parallel proceedings, each of which is taking place in a state whose courts have international jurisdiction with respect to the debtor according to these Global Principles, claims admissible and allowable in one proceeding should be accepted in each of the other proceedings, except as to distinct factual and legal issues arising under the other state's applicable law.

Principle 35 Limits on Priorities

35.1. A claim that is governed by the law of a state other than that in which insolvency proceedings are taking place should in principle have only the priority it would have in a strictly territorial process conducted in the state whose law governs the insolvency proceedings, and restricted to assets located in that state.
35.2. In exceptional circumstances an exclusion of Global Principle 35.1 can be accepted.

Principle 36 Plan Binding on Participant

36.1. If a Plan of Reorganization is adopted in a main proceeding pending in a court with international jurisdiction with respect to the debtor under Global Principle 13.1, and there is no parallel proceeding pending with respect to the debtor, the Plan should be final and binding upon the debtor and the creditors who participate in the main proceeding.
36.2. For this purpose, participation includes (i) filing a claim; (ii) voting on the Plan; or (iii) accepting a distribution of money or property under the Plan.

Principle 37 Plan Binding: Personal Jurisdiction

If a Plan of Reorganization is adopted in a main proceeding in a court with international jurisdiction with respect to the debtor under Global Principle 13.1, and there is no parallel proceeding pending with respect to the debtor, the Plan should be final and

binding upon an unsecured creditor who received adequate individual notice and over whom the court has jurisdiction in ordinary commercial matters under the local law.

GLOBAL GUIDELINES FOR COURT-TO-COURT COMMUNICATIONS IN INTERNATIONAL INSOLVENCY CASES

Guideline 1 Overriding Objective

1.1. These Global Guidelines embody the overriding objective to enhance coordination and harmonization of insolvency proceedings that involve more than one state through communications among the jurisdictions involved.

1.2. These Global Guidelines function in the context of the Global Principles of Cooperation in International Insolvency Cases and therefore do not intend to interfere with the independent exercise of jurisdiction by national courts as expressed in Global Principles 13 and 14.

Guideline 2 Consistency with Procedural Law

Except in circumstances of urgency, prior to a communication with another court, the court should be satisfied that such a communication is consistent with all applicable rules of procedure in its state. Where a court intends to apply these Global Guidelines (in whole or in part and with or without modifications), the Guidelines to be employed should, wherever possible, be formally adopted in each individual case before they are applied. Coordination of Global Guidelines between courts is desirable and officials of both courts may communicate in accordance with Global Guideline 9(d) with regard to the application and implementation of the Global Guidelines.

Guideline 3 Court-to-Court Communication

A court may communicate with another court in connection with matters relating to proceedings before it for the purposes of coordinating and harmonizing proceedings before it with those in the other jurisdiction.

Guideline 4 Court to Insolvency Administrator Communication

A court may communicate with an insolvency administrator in another jurisdiction or an authorized representative of the court in that jurisdiction in connection with the coordination and harmonization of the proceedings before it with the proceedings in the other jurisdiction.

Guideline 5 Insolvency Administrator to Foreign Court Communication

A court may permit a duly authorized insolvency administrator to communicate with a foreign court directly, subject to the approval of the foreign court, or through an insolvency administrator in the other jurisdiction or through an authorized representative of the foreign court on such terms as the court considers appropriate.

Guideline 6 Receiving and Handling Communication

A court may receive communications from a foreign court or from an authorized representative of the foreign court or from a foreign insolvency administrator and should respond directly if the communication is from a foreign court (subject to Global Guideline 8 in the case of two-way communications) and may respond directly or through an authorized representative of the court or through a duly authorized insolvency administrator if the communication is from a foreign insolvency administrator, subject to local rules concerning ex parte communications.

Guideline 7 Methods of Communication

To the fullest extent possible under any applicable law, communications from a court to another court may take place by or through the court:

(a) Sending or transmitting copies of formal orders, judgments, opinions, reasons for decision, endorsements, transcripts of proceedings, or other documents directly to the other court and providing advance notice to counsel for affected parties in such manner as the court considers appropriate;

(b) Directing counsel or a foreign or domestic insolvency administrator to transmit or deliver copies of documents, pleadings, affidavits, factums, briefs, or other documents that are filed or to be filed with the Court to the other Court in such fashion as may be appropriate and providing advance notice to counsel for affected parties in such manner as the court considers appropriate;

(c) Participating in two-way communications with the other court by telephone or video conference call or other electronic means, in which case Global Guideline 8 should apply.

Guideline 8 E-Communication to Court

In the event of communications between the courts in accordance with Global Guidelines 2 and 5 by means of telephone or video conference call or other electronic means, unless otherwise directed by either of the two courts:

(a) Counsel for all affected parties should be entitled to participate in person during the communication and advance notice of the communication should be given to all parties in accordance with the rules of procedure applicable in each court;

(b) The communication between the courts should be recorded and may be transcribed. A written transcript may be prepared from a recording of the communication that, with the approval of both courts, should be treated as an official transcript of the communication;

(c) Copies of any recording of the communication, of any transcript of the communication prepared pursuant to any direction of either court, and of any official transcript prepared from a recording should be filed as part of the record in the proceedings and made available to counsel for all parties in both courts subject to such directions as to confidentiality as the courts may consider appropriate.

(d) The time and place for communications between the courts should be to the satisfaction of both courts. Personnel other than judges in each court may communicate fully with each other to establish appropriate arrangements for the communication without the necessity for participation by counsel unless otherwise ordered by either of the courts.

Guideline 9 E-Communication to Insolvency Administrator

In the event of communications between the court and an authorized representative of the foreign court or a foreign insolvency administrator in accordance with Global Guidelines 4 and 6 by means of telephone or video conference call or other electronic means, unless otherwise directed by the court:

(a) Counsel for all affected parties should be entitled to participate in person during the communication and advance notice of the communication should be given to all parties in accordance with the rules of procedure applicable in each court;

(b) The communication should be recorded and may be transcribed. A written transcript may be prepared from a recording of the communication that, with the approval of the court, can be treated as an official transcript of the communication;

(c) Copies of any recording of the communication, of any transcript of the communication prepared pursuant to any direction of the court, and of any official transcript prepared from a recording should be filed as part of the record in the proceedings and made available to the other court and to counsel for all parties in both courts subject to such directions as to confidentiality as the court may consider appropriate;

(d) The time and place for the communication should be to the satisfaction of the court. Personnel of the court other than judges may communicate fully with the authorized representative of the foreign court or the foreign insolvency administrator to establish appropriate arrangements for the communication without the necessity for participation by counsel unless otherwise ordered by the court.

Guideline 10 Joint Hearing

A court may conduct a joint hearing with another court. In connection with any such joint hearing, the following should apply, unless otherwise ordered or unless otherwise provided in any previously approved protocol applicable to such joint hearing:

(a) Each court should be able to simultaneously hear the proceedings in the other court.

(b) Evidentiary or written materials filed or to be filed in one court should, in accordance with the directions of that court, be transmitted to the other court or made available electronically in a publicly accessible system in advance of the hearing. Transmittal of such material to the other court or its public availability in an electronic system should not subject the party filing the material in one court to the jurisdiction of the other court.

(c) Submissions or applications by the representative of any party should be made only to the court in which the representative making the submissions is appearing

unless the representative is specifically given permission by the other court to make submissions to it.

(d) Subject to Global Guideline 8(b), the court should be entitled to communicate with the other court in advance of a joint hearing, with or without counsel being present, to establish Guidelines for the orderly making of submissions and rendering of decisions by the courts, and to coordinate and resolve any procedural, administrative, or preliminary matters relating to the joint hearing.

(e) Subject to Global Guideline 8(b), the court, subsequent to the joint hearing, should be entitled to communicate with the other court, with or without counsel present, for the purpose of determining whether coordinated orders could be made by both courts and to coordinate and resolve any procedural or nonsubstantive matters relating to the joint hearing.

Guideline 11 Authentication of Regulations

The court should, except upon proper objection on valid grounds and then only to the extent of such objection, recognize and accept as authentic the provisions of statutes, statutory or administrative regulations, and rules of court of general application applicable to the proceedings in the other jurisdiction without the need for further proof or exemplification thereof.

Guideline 12 Orders

The court should, except upon proper objection on valid grounds and then only to the extent of such objection, accept that orders made in the proceedings in the other jurisdiction were duly and properly made or entered on or about their respective dates and accept that such orders require no further proof or exemplification for purposes of the proceedings before it, subject to all such proper reservations as in the opinion of the court are appropriate regarding proceedings by way of appeal or review that are actually pending in respect of any such orders.

Guideline 13 Service List

The court may coordinate proceedings before it with proceedings in another jurisdiction by establishing a service list that may include parties that are entitled to receive notice of proceedings before the court in the other jurisdiction ("nonresident parties"). All notices, applications, motions, and other materials served for purposes of the proceedings before the court may be ordered to also be provided to or served on the nonresident parties by making such materials available electronically in a publicly accessible system or by facsimile transmission, certified or registered mail or delivery by courier, or in such other manner as may be directed by the court in accordance with the procedures applicable in the court.

Guideline 14 Limited Appearance in Court

The court may issue an order or issue directions permitting the foreign insolvency administrator or a representative of creditors in the proceedings in the other jurisdiction or an authorized representative of the court in the other jurisdiction to appear and be heard by the court without thereby becoming subject to the jurisdiction of the court.

Guideline 15 Applications and Motions

The court may direct that any stay of proceedings affecting the parties before it shall, subject to further order of the court, not apply to applications or motions brought by such parties before the court in the foreign jurisdiction or that relief be granted to permit such parties to bring such applications or motions before the court in the foreign jurisdiction on such terms and conditions as it considers appropriate. Court-to-court communications in accordance with Global Guidelines 7 and 8 hereof may take place if an application or motion brought before the court affects or might affect issues or proceedings in the court in the other jurisdiction.

Guideline 16 Coordination of Proceedings

A court may communicate with a court in another jurisdiction or with an authorized representative of such court in the manner prescribed by these Global Guidelines for purposes of coordinating and harmonizing proceedings before it with proceedings in the other jurisdiction regardless of the form of the proceedings before it or before the other court wherever there is commonality among the issues and/or the parties in the proceedings. The court should, absent compelling reasons to the contrary, so communicate with the court in the other jurisdiction where the interests of justice so require.

Guideline 17 Directions

Directions issued by the court under these Global Guidelines are subject to such amendments, modifications, and extensions as may be considered appropriate by the court for the purposes described above and to reflect the changes and developments from time to time in the proceedings before it and before the other court. Any directions may be supplemented, modified, and restated from time to time and such modifications, amendments, and restatements should become effective upon being accepted by both courts. If either court intends to supplement, change, or abrogate directions issued under these Global Guidelines in the absence of joint approval by both courts, the court should give the other courts involved reasonable notice of its intention to do so.

Guideline 18 Powers of the Court

Arrangements contemplated under these Global Guidelines do not constitute a compromise or waiver by the court of any powers, responsibilities, or authority and do not constitute a substantive determination of any matter in controversy before the court

or before the other court nor a waiver by any of the parties of any of their substantive rights and claims or a diminution of the effect of any of the orders made by the court or the other court.

SECTION I. INTRODUCTION AND OVERVIEW

Introduction

These Global Principles for Cooperation in International Insolvency Cases reflect a nonbinding statement, drafted in a manner to be used both in civil-law as well as common-law jurisdictions, and aim to cover all jurisdictions in the world. To a large extent these Global Principles for Cooperation in International Insolvency Cases ("Global Principles") build further on The American Law Institute's Principles of Cooperation among the member-states of the North American Free Trade Agreement (the "ALI NAFTA Principles").[1] These Principles were evolved within The American Law Institute's Transnational Insolvency Project, conducted between 1993 and 2000, for which the Reporter was Professor Jay L. Westbrook. The objective of that Project was to provide a nonstatutory basis for cooperation in international insolvency cases involving two or more of the NAFTA states, consisting of the United States, Canada, and Mexico. The ALI NAFTA Principles were published as a separate volume in the four volume text of the Transnational Insolvency Project (2003).[2] In their work for the Global Principles for Cooperation in International Insolvency Cases[3] the authors are Co-Reporters, having been appointed by The American Law Institute (ALI) and the International Insolvency Institute (III).[4]

Global Principles: Structure and Contents

The Global Principles for Cooperation in International Insolvency Cases cover mainly three areas. After an introduction in this section, Section II constitutes the heart of the statement, the *Global Principles for Cooperation in International Insolvency Cases*. These Global Principles are the result of a global research survey that established the extent to which it is feasible to achieve a worldwide acceptance of the ALI NAFTA Principles, either in their existing form or, if necessary, with modifications or variations. Then follows Section III, which includes a review of the appreciation of the Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases ("Court-to-Court Guidelines"). These Guidelines in their original form were included in Appendix B of the ALI NAFTA Principles and represent procedural suggestions for increasing communications between courts and between insolvency

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[1] For its website, see: www.ali.org.

[2] See American Law Institute, Transnational Insolvency: Cooperation Among the NAFTA Countries: Principles of Cooperation Among the NAFTA Countries (2003) (adopted in 2000), hereinafter "ALI NAFTA Principles." As in the ALI NAFTA Principles, the terms "bankruptcy" or "insolvency" are herein used as synonyms, although in worldwide English-language usage "insolvency" is the more common term for such proceedings where a business debtor is involved, whilst in the North American region "bankruptcy" is at least as often used for business proceedings as well as those involving consumers. See ALI NAFTA Principles Report (2003), at 1.

[3] In this Report, the Reporters have chosen to use the expression "international insolvency," although throughout the explanations and the Notes sometimes the word "cross-border insolvency" is used, which is in conformity with language found both in practice and in scholarly literature. The Reporters' intention is that both expressions are identical.

[4] For its website, see: www.iiiglobal.org.

administrators in cross-border insolvency cases. They have been revised in the light of subsequent developments in relation to this important form of cross-border cooperation that have been strongly influenced by the original Guidelines themselves. The text of the result of this review is recorded in Section III, with the heading *Global Guidelines for Court-to-Court Communications in International Insolvency Cases.*

An Appendix provides a *glossary of terms and descriptions*. As is explained in the Report, in recent times many states, regional public institutions, international nongovernmental organizations, and practitioners' associations have produced many laws, regulations, principles, guidelines, and statements of best practices, all aiming for the better coordination of insolvency measures or proceedings concerning economic enterprises that have operations, assets, activities, debtors, or creditors in more than one state. The resulting complexity is compounded by a bewildering variety of technical terms and expressions used in the various texts. The Appendix aims to promote the development of a uniform global legal terminology in matters relating to insolvency and therefore to assist insolvency practitioners, courts, and legislators in their efforts of improving the components to smoothen cross-border communication and coordination.

Finally, a separate Annex presents a Statement of the Reporters, setting out their proposals for *Global Rules on Conflict-of-Laws Matters in International Insolvency Cases*. These proposals are not included in the Global Principles for Cooperation in International Insolvency Cases, but have been submitted to ALI and III as a useful starting point for further debate on a global level, bearing in mind the necessity to have these proposals tested against existing treaties or conventions and ALI's other work products and ongoing work on Principles related to other topics with conflict-of-law consequences.

In the Reporters' Statement, the Global Rules on Conflict-of-Laws Matters in International Insolvency Cases serve as legislative recommendations in general and sometimes in more detailed terms. They may also serve as a guide for courts, insolvency practitioners, and creditors in those circumstances where applicable law with regard to international insolvency cases fails to deal with a certain point in issue or is vague. They do not purport to employ specific statutory language however, as expressing conflict-of-laws rules in an appropriate way is a challenge for national or regional legislators. The main goal is to demonstrate that globally there is a wide measure of support for the enactments of rules of this nature, based on the given principle to avoid miscommunication, to prevent uncertainty, to provide accurate translation, and to ensure smooth cross-border cooperation. A primary benefit brought about by achieving uniformity in the area of conflict of laws is that parties' legitimate expectations can be more consistently fulfilled, thereby reducing the levels of uncertainty and instability that have a key influence on the assessment of risk by those engaging in international transactions.

Background of the Project

Having laid the groundwork for a wider dissemination of the ALI NAFTA Principles and their accompanying Guidelines, The American Law Institute and the International Insolvency Institute considered that it would be timely and appropriate to undertake a systematic evaluation of the possibility of adapting them so as to provide a standard statement of principles suitable for application on a global basis in international insolvency cases. The ALI NAFTA Principles, though written with the specific needs of the three NAFTA states

primarily in mind, are necessarily of an international nature and the Reporters for that project had expressed the hope that the Principles "may be helpful to our colleagues in other countries as well".[5] The Global Principles Project was conceived and approved as a joint venture between ALI and III. In February 2006, ALI appointed the Reporters for the project, initially titled "Transnational Insolvency: Principles of Cooperation," which during the course of research and discussions was changed to: "Global Principles for Cooperation in International Insolvency Cases." The most important objective within the remit of the project was to establish the extent to which it is feasible to adopt at a global level the ALI NAFTA Principles together with the Guidelines, including their alignment with certain comments received.[6] The Reporters therefore developed a systematic consultation exercise, conducted with the help of experts drawn from a wide range of jurisdictions and legal traditions around the world and able to pronounce authoritatively on the feasibility of applying the Principles (or conversely, any obstacles to doing so) from the perspective of each state and legal system with which they have direct personal experience. In addition, the Reporters considered it to be both appropriate and necessary to take account of the considerable volume of work that has already been carried out in this field in recent years.

Fitting the project in the current developments in soft law and legislation

A number of projects and studies that either directly or indirectly relate to insolvency matters have been conducted by such organizations as the Asian Development Bank, the World Bank, the IMF, the European Bank for Reconstruction and Development, UNCITRAL, UNIDROIT, the ALI and III, and by other bodies of experts (for example, the Principles of European Insolvency Law 2003, and the European Communication and Cooperation Guidelines for Cross-border Insolvency 2007). As a result of the work of these organizations and bodies, there have emerged a number of texts, variously called "principles," "guidelines," "good practice standards," or "recommendations." These texts include the following:

- UNCITRAL: Model Law on Cross-border Insolvency 1997;
- American Law Institute: Principles of Cooperation Among the NAFTA Countries 2003 (adopted in 2000);
- American Law Institute: Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases 2003 (adopted by the ALI in 2000 and by the III in 2001);
- Asian Development Bank: Good Practice Standards for Insolvency Law 2000;
- World Bank: 2011 Principles for Effective Insolvency and Creditor/Debtor Regimes;[7]
- Principles of European Insolvency Law 2003;

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[5] See American Law Institute, Transnational Insolvency: Cooperation Among the NAFTA Countries: Principles of Cooperation Among the NAFTA Countries, 2003, Reporter's Preface, at xxi. See Jay Lawrence Westbrook, Chapter 15 and Discharge, 13 American Bankrupty Institute Law Review 2005, p. 515. As a reminder, contrary to USA and Canada, Mexico belongs to the family of civil-code countries.

[6] The method of our research is explained in the Report.

[7] The 2011 Principles replace the Principles and Guidelines for Effective Insolvency and Creditor Rights Systems 2001. See also the report "Orderly & Effective Insolvency Procedures. Key Issues," composed by the Legal Department, International Monetary Fund of 1999, which builds on a 1998 report submitted by the G-22 Working Group on International Financial Crises, entitled "Key Principles and Features of Effective Insolvency Regimes." These reports are not included in the list, mentioned in the text, as most of the topics they address are covered in the more recent sources. See Jay Lawrence Westbrook, Charles D. Booth, Christoph G. Paulus & Harry Rajak, A Global View of Business Insolvency Systems, The World Bank, Washington DC, 2010.

- European Bank for Reconstruction and Development: Core Principles for an Insolvency Law Regime 2004;
- American Law Institute/UNIDROIT: Principles of Transnational Civil Procedure 2006 (adopted in 2004);
- UNCITRAL: Legislative Guide on Insolvency Law 2005 (adopted in 2004); In 2010 the Guide was augmented with a Part Three: "Treatment of enterprise groups in insolvency";[8]
- European Bank for Reconstruction and Development: Office Holders Principles 2007;
- European Communication & Cooperation Guidelines for Cross-Border Insolvency 2007;
- UNICITRAL: Practice Guide on Cross-Border Insolvency Cooperation 2009 ("UNCITRAL Practice Guide").[9]
- Prospective Model International Cross-Border Insolvency Protocol;[10]
- Model Law on Cross-Border Insolvency: the Judicial Perspective (July 2011) ("UNCITRAL Judicial Perspective");[11]
- Guidelines for Coordination of Multi-National Enterprise Group Insolvencies (November 2011 Draft)).[12]

Collectively these documents amount to a striking demonstration of the globalization of commercial activity in the present era, and the raised awareness internationally of the need to address the issues associated with insolvency in a cross-border context.[13] A number of the international organizations mentioned above work in the insolvency-law field, including the World Bank, although their work is not principally concerned with the harmonization or renovation of legal systems. These organizations work mainly within the international

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[8] Developed by UNCITRAL Working Group V. Available at www.uncitral.org (38th session, April 19-23, 2010, New York).

[9] Adopted by UNCITRAL on July 1, 2009, see www.uncitral.org/uncitral/en/uncitral_texts/insolvency/2009PracticeGuide.html (last visited Mar. 2, 2012). See Libby Elliott and Neil Griffiths, UNCITRAL Practice Guide on cross-border insolvency co-operation, Corporate Rescue and Insolvency, February 2010, pp. 12-14. For an overview of a comprehensive collection of essential texts, see Bob Wessels (Ed.), Cross-Border Insolvency Law: International Instruments and Commentary, Alphen aan den Rijn: Kluwer Law International 2007. For a more systematic overview of these sources, see Bob Wessels, Bruce A. Markell, and Jason J. Kilborn, International Cooperation in Bankruptcy and Insolvency Matters, Oxford University Press, New York, 2009 (passim); Terence C. Halliday and Bruce G. Carruthers, Bankrupt. Global Lawmaking and Systemic Financial Crisis, Stanford University Press, California: Stanford, 2009, p. 70 ff.

[10] Joseph J. Bellissimo and S. Power Johnston, Cross Border Insolvency Protocols: Developing an International Standard, in: Norton Annual Review of International Insolvency 2010, p. 37ff.

[11] Developed by UNITRAL Working Group V. Available at www.uncitral.org (39th session, December 6-10, 2010, Vienna). Adopted by UNCITRAL on July 1, 2011. In this Report, use has been made of the text as published under A/CN.9/WG.V/WP.97.

[12] See http://iiiglobal.org/images/pdfs/711841v8_NY_full%20form%20guidelines-sept2011.pdf (last visited Mar. 2, 2012). These are developed by an III Committee, chaired by Hon. Ralph R. Mabey and Susan Power Johnston, building further on an earlier draft, see www.amercol.org/resources.cfm (go to: Appendix H) (last visited Mar. 2, 2012). See Ralph R. Mabey and Susan Power Johnston, Coordination Among Insolvency Courts in the Rescue of Multinational Enterprises, in: Norton Annual Review of International Insolvency 2009, p. 33ff.

[13] In the same way Roman Tomasic, Insolvency Law Reform in Asia and Emerging Insolvency Norms, 15 Insolvency Law Journal 2007, pp. 229-242.

financial system and deal with insolvency matters only insofar as they recognize that effective insolvency regimes play a major role in strengthening economic and financial systems in any jurisdiction, particularly those in course of transition or in emerging economies. In this context, work by regional entities such as the Asian Development Bank and the European Bank for Reconstruction and Development assist the particular needs of their constituency, especially by enhancing domestic legal systems 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 inquiries of these organizations in the field. In 1999, the IMF published a survey of the most important policies for designing a system of insolvency law. These include the goal and function of insolvency proceedings, the task of a "liquidator" or an "administrator," and the functions of the court system.[14]

Furthermore, account has been taken of the fact that some of the central issues addressed in the original ALI NAFTA Principles (including recognition, relief, and cooperation) have since

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[14] The Reporters appreciate that the growing volume of these documents are the result of the search for compatibility of the effects of globalization for national legal systems. One of these effects is the decreasing autonomy of national legal systems. The problems confronting countries increasingly transcend national boundaries, either because the problems do not lend themselves to solely national regulation or because they involve the interests of the international community as a whole. In this new environment, the traditional areas of national law (such as private law, criminal law, or administrative law) acquire an increasingly internationalized character, in which its content is formed on different levels, see, e.g., Petra Buck-Heeb and Andeas Dieckmann, *Selbstreguliering im Privatrecht*, Mohr Siebeck, 2010; Matthias Knauf, *Der Regelungsverbund: Recht und Soft Law im Mehrebenensystem*, Mohr Siebeck, 2010; Jan M. Smits, The Complexity of Transnational Law: Coherence and Fragmentation of Private Law, in: Netherlands Reports to the Eighteenth International Congress of Comparative Law (Washington 2010), Antwerpen-Oxford 2010, 113ff.; Jan M. Smits, Private Law 2.0. On the Role of Private Actors in a Post-National Society, Eleven International Publishing, The Hague, 2011; Muller, Sam, et al. (eds.), The Law of the Future and the Future of Law, Torkel Opsahl Academic Epublisher, Oslo, 2011; J. Luijendijk and L.A.J. Senden, *De gelaagde doorwerking van Europese administratieve soft law in de nationale rechtsorde*, SEW Tijdschrift voor Europees en economisch recht, juli/augustus 2011, pp. 312-352. Principles and Guidelines, in the nature of the ones that are subject of this report, may have several disadvantages: (i) they have an uncertain legal status, (ii) it may be problematic to ascertain these texts, (iii) they may lack quality and clarity, (iv) their legitimacy may be questioned, (v) their application or enforcement seldom is reported, and (vi) their effectiveness seldom is tested. It is beyond the boundaries of the project to further access certain concerns of a regulatory nature of measures of soft law. See Kenneth W. Abbott and Duncan Snidal, Hard and Soft Law in International Governance, in: John J. Kirton, with Jelena Madunic (eds.), Global Law, Ashgate 2009, pp. 257-292; Bob Wessels, ALI—III Global Principles—New Strategies for Cross-Border Cooperation?, in: Janis Sarra (ed.), Annual Review of Insolvency Law 2009, pp. 587-611. For scholarly work on the general theme of the sources and development of international law, see John J. Kirton and Jelena Madunic (eds.), Global Law, Ashgate, 2009. In the context of the European Union, attention should be paid to Article 288 TFEU (formerly Article 249 EC Treaty), which allows for the introduction of measures of "soft law," as its last paragraph states: "Recommendations and opinions shall have no binding force." See L.A.J. Senden, Soft Law in European Community Law, Oxford: Hart Publishing 2004; D.M. Curtin, *Europese Juridische Integratie: 'Paradise Lost'?*, Preadvies Nederlandse Juristen Vereniging 2006; Dagmar Schiek, Private rule-making and European governance—issues of legitimacy, in: 32 European Law Review 2007, 443ff; L.A.J. Senden and A. Tahtah, *Reguleringsintensiteit en regelgevingsinstumentarium in het Europese Gemeenschapsrecht. Over de relatie tussen wetgeving, soft law en de open methode van coördinatie*, in: SEW Februari 2008, 43ff; Filippo Fontanelli et al. (ed.), Shaping Rule of Law Through Dialogue, Europe Law Publishing, 2009.

ALI's adoption of the text in 2000 found their way into national or federal legislation. In the USA, since October 17, 2005, Chapter 15 U.S. Bankruptcy Code is in place.[15] It enacts virtually all of the provisions of the UNCITRAL Model Law on Cross-Border Insolvency of 1997 and thereby encapsulates several of the ALI's Principles. In Great Britain, an amended version of the Model Law became effective as of April 4, 2006. Other states have also enacted legislation within which the Model Law, and hence some aspects of the ALI Principles, are reflected. These states include Australia, British Virgin Islands, Canada, Cayman Islands, Colombia, Greece, Japan, Ireland, Mauritius, Mexico, Montenegro, New Zealand, Poland, Romania, Serbia, Slovenia, South-Africa, and South Korea.[16]

Since 2002, a significant contribution to the process of international insolvency has been made by the entry into force of the EU Insolvency Regulation. Several topics dealt with in ALI's Principles now are applicable on a compulsory basis in 26 of the 27 EU Member States. These topics include, for example, cooperation (between "liquidators") in parallel proceedings, recognition, access to court, information and communication, claims filing, and avoidance actions, as well as rules governing—for intra-Union cases—jurisdiction to open insolvency proceedings and jurisdiction in respect of insolvency-related matters, the recognition of foreign proceedings, and uniform rules of conflict of laws. In 2005, the United Nations Committee on International Trade Law (UNCITRAL) published its Legislative Guide on Insolvency Law (adopted in 2004), which forms a comprehensive statement of key objectives and core features for a strong insolvency, debtor-creditor regime, including out-of-court restructuring, and a legislative guide containing flexible approaches to the implementation of such objectives and features. As a novelty, the Guide contains certain recommendations regarding applicable law in international insolvency cases. Like the ALI NAFTA Principles, the Legislative Guide contains considerations and suggestions with regard to group consolidation. In July 2009, UNCITRAL adopted the Practice Guide on Cross-Border Insolvency Cooperation ("UNCITRAL Practice Guide") containing information for insolvency office holders and judges on practical aspects of cooperation and communication in cross-border insolvency cases.[17] The Guide's recommendations regarding applicable law in international insolvency cases sparked our intention to suggest our personal proposals for such matters in our work, laid down in a separate Annex to the Report, which sets out Global Rules on Conflict-of-Laws Matters in International Insolvency Cases. Here, another source should be mentioned that has facilitated the Reporters' work, namely the steadily growing body of in-

[15] Pursuant to Recommendations 1 and 6, see American Law Institute, Transnational Insolvency: Cooperation Among the NAFTA Countries: Principles of Cooperation Among the NAFTA Countries, 2003, p. 93 and p. 99.

[16] These countries are listed by UNCITRAL as having enacted legislation based on the Model Law, see http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html (last visited Mar. 2, 2012). It should be noted however that also the *Ley Concursal* of Spain (2003), and draft legislation in the Netherlands (2007) have been inspired by the Model Law, see Bob Wessels, Judicial Cooperation in Cross-border Cases, Inaugural Lecture University of Leiden, Deventer: Kluwer 2008, p. 19, and Carlos Aurelio Esplugues Sr. and Silvia Barona-Vilar, International Bankruptcy in Spain (November 1, 2011). Available at SSRN: http://ssrn.com/abstract=1952782 (last visited Mar. 2, 2012).

[17] See Jenny Clift, International Insolvency Law: The UNCITRAL Experience With Harmonization and Modernization Techniques, in: Yearbook of Private International Law, Volume 11 (2009), p. 405ff.

depth studies devoted to many varied topics of international and comparative insolvency law in this decade.[18]

Hence, as an integral part of the Global Principles Project, we believe it would be a challenging but valuable task—indeed a necessary one—to identify such core values and principles as can be discovered from a comparative analysis of the available texts, evaluated in the context of the consultative debate among the participating experts. We believe that the Global Principles for Cooperation in International Insolvency Cases are therefore in line with other international developments and other attempts of developing modes of international cooperation in the area of international insolvency.

The Reporters are conscious of the fact that their research, from which the Global Principles were produced, could have included other matters which it would have been appropriate to explore with a view to ascertaining the prospects for acceptance of global standards to be applied in the transnational insolvency process. A number of issues that have an important bearing upon the overall quality and efficiency of the international insolvency "process" were either not directly addressed in the context of the earlier project that yielded the ALI NAFTA Principles, or were dealt with on a somewhat tentative basis. These include the principles and procedures to be applied where insolvency occurs within multinational corporate groups (the subject of Procedural Principles 23 and 24 of the ALI NAFTA Principles). Further issues that we believe to be in need of study and development are the elaboration of internationally tenable standardized principles of professional behavior of insolvency office holders. Although of direct relevance to the goal of promoting effective cooperation in international insolvency cases, it was decided that these and other issues should be studied and dealt with by other international institutions or associations, which have taken these topics on their respective agendas.[19]

Regarding multinational corporate groups, the Reporters welcome UNCITRAL's publication, in July 2010, of Part Three of the Legislative Guide ("Treatment of enterprise groups in insolvency'). In the light of this development, which started in the period the Reporters were appointed, it was decided that it was unnecessary to undertake a parallel exercise as part of the Global Principles Project. In line with Procedural Principles 23 and 24 of the ALI NAFTA Principles, we feel that it should be permissible to commence an insolvency proceeding for an insolvent subsidiary in the same jurisdiction as the parent's insolvency, and to have either procedural or substantive coordination or (partly) consolidation under applicable law, absent a proceeding involving the subsidiary in the state of its main interests. Where the subsidiary is in a parallel proceeding in the state of its main interests, coordination between the two

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[18] However, based on the languages at the Reporters' command, only a selection written in German, French, or Dutch could be analyzed, along with those published in an English version.

[19] An overall view, also describing UNCITRAL's developing work regarding "enterprise groups," is provided by: Janis Sarra, Maidum's Challenge, Legal and Governance Issues in Dealing with Cross-Border Business Enterprise Group Insolvencies, 17 International Insolvency Review 73 (2008). The European Bank for Reconstruction and Development (EBRD) has released the EBRD Insolvency Office Holder Principles (June 2007), intended to assure that member-countries employ qualified, regulated, and impartial persons for positions that are key in insolvency proceedings, see http://www.ebrd.com/downloads/legal/insolvency/ioh_principles.pdf (last visited Mar. 2, 2012). See Adrian Walters, Regulating the Insolvency Office-Holder Profession across Borders, in: Bob Wessels and Paul Omar (eds.), Crossing (Dutch) Borders in Insolvency, Nottingham, Paris: INSOL Europe 2009, pp. 49-56.

proceedings should achieve the benefits of consolidation where possible. The principles of coordination and cooperation should include parallel proceedings involving a subsidiary of a foreign parent debtor to the same extent as with parallel proceedings involving the debtor, although certain decisions, such as allocation of value, may be differently determined because of the need to honor the corporate form. We consider this approach to be fully consistent with the overall spirit and substance of the surrounding Global Principles and therefore would encourage, wherever possible, the use of these Principles so as to facilitate or increase the prospects of cooperation in other proceedings taking place. We are, however, obliged to acknowledge that the responses of our consultants and interviewees have indicated that it can not be claimed that this point of view commands widespread acceptance in national law and practice at the present time.

In formulating their proposals, the Reporters have used texts or explanations to their meaning without taking into account the nature of a debtor or its particular status under national or regional law. However, we must acknowledge that certain categories or types of debtor will possess characteristics that mark them out for distinctive treatment in the event of insolvency. These include financial institutions and natural persons. With regard to financial institutions (credit institutions, insurance undertakings, (collective) investment undertakings, etc.) several international standard-setting organizations or national and regional legislatures have developed or are in the process of developing rules or recommendations that—in a variety of ways—stress the paramount importance of the stability of the (international) financial markets, including the protection of financial interests of a large number of individuals concerned, and the prevention of systemic risks. These goals often result in specific regulatory regimes and in specific aims of the respective legislation or recommendations, including swift and targeted actions of authorities and specific international rules regarding cooperation, given the public nature of supervisory institutions involved. Although some of the Reporters' recommendations may serve the purposes mentioned or could assist in earlier phases of financial distress of such institutions or some of its entities, which are excluded from said specific rules, the present proposals make no claim to deal with these financial institutions.[20]

The same approach has been chosen with regard to natural persons (sometimes also "consumers," "non-merchants," or "non-traders"). Although, in recent years, several states have adopted special insolvency regimes for non-traders or natural persons, such rules are lacking in many countries, including—in Europe—for example, in Italy, Hungary, and Croatia. Also in the area of natural persons, some other purposes in legislation have a primary attention, such as the protection of a certain minimum of assets and income, available for an individual natural person (and his household) or the "financial rehabilitation of over-indebted individuals and families and their reintegration into society."[21] While some of these

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[20] See Jay Lawrence Westbrook, The elements of Coordination in International Corporate Insolvencies: What Cross-border Bank Insolvency Can Learn from Corporate Insolvency, in: Rosa M. Lastra (ed.), Cross-border Bank Insolvency, Oxford University Press 2011, 185ff.

[21] See recommendation 4(f) of the Council of Ministers of the Council of Europe (June 20, 2007) to its (over 40) member states "[to] introduce mechanisms necessary to facilitate rehabilitation of over-indebted individuals and families and their reintegration into society in particular by: …. f. encouraging effective financial and social inclusion of over-indebted individuals and families, in particular by promoting their access to the labour market," Recommendation CM/Rec(2007)8, https://wcd.coe.int/ViewDoc.jsp?Ref=CM/Rec(2007)8&Language=lanEnglish&Site=COE&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864 (last visited Mar. 2,

recommendations could provide guidance in certain matters, the Reporters do not primarily address such natural persons as insolvent debtors.[22] Overall, the Global Principles apply to those groups of (legal) persons that play their part in (international) commerce and business.

Method of the Project

As outlined above, the aim of the Project is to have a global reappraisal of the ALI NAFTA Principles and its accompanying Court-to-Court Guidelines from the perspective of a wide and diverse array of national insolvency systems and legal traditions, in order to test the feasibility of their being endorsed as the embodiment of "global best practice" or "world standard" in the matters addressed therein. The approach chosen has been an open-minded spirit, aiming at transparent and open debate, to ensure that any aspects of the Principles that may give rise to difficulties of transposition into the legal culture of any particular state or region can be properly and sensitively considered. This approach resulted in the formation—in line with the applicable rules governing publications of the ALI—of consultative groups and in the convening of discussions and debates in many international gatherings, seminars, and lectures. The consultative process was based on two questionnaires, sent out in 2006 and 2007, specifically relating to the ALI NAFTA Principles and the accompanying Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases, and a third questionnaire concerned with choice-of-law questions.

As the Global Principles Project is a combined effort of ALI with III, the following groups were formed:
1. International Advisers, appointed by ALI and III, chaired by Professor Jay Westbrook;
2. Members Consultative Group, formed by other ALI Members with an interest in the project;
3. III Working Group, formed by other III Members with an interest in the project, chaired by E. Bruce Leonard, Chair of III;
4. International Consultants, consisting of recognized experts with an interest in the project, not being members of ALI or III, chaired by the Reporters.

As engaging in work for ALI may create tension between the best interest of lawyers' clients and ALI's vision and philosophy, both the Reporters and all Advisers and Consultants (lawyers, judges, professors, and other scholars) were asked to make appropriate disclosure of ways in which the position they take may be influenced by their professional obligations and relations. Altogether the Advisers and Consultants, whose names are listed elsewhere, originate from over 30 jurisdictions in five continents.

2012). See Jason J. Kilborn, Expert recommendations and the Evolution of European Best Practices for the Treatment of Overindebtedness, 1984-2010, see http://ssrn.com/abstract=1663108 (last visited Mar. 2, 2012).

[22] See Global Principle 13.3(iii) concerning the matter of international jurisdiction to open an insolvency case in respect of a natural person as a debtor. General on the overindebtedness of individual persons, see Johanna Niemi, Iain Ramsey and William C. Whitford (eds.), Consumer Credit, Debt & Bankruptcy. Comparative and International Perspectives, Hart Publishing, Oxford and Portland, Oregon, 2009; Nick Huls, Consumer Bankruptcy: A Third Way Between Autonomy and Paternalism in Private Law, Erasmus Law Review, Vol. 3, issue 1 (2010) (http://www.erasmuslawreview.nl/files/ELR_2010-1_03_Consumer_Bankruptcy.pdf (last visited Mar. 2, 2012).

We have thus had the privilege of collaborating with a wide circle of International Advisers, who volunteered to participate, notably by supplying expert advice about the suitability (or otherwise) of the Principles for application in systems of which they have first-hand knowledge, and also by commenting on the evolving drafts of our Report at various stages of its gestation. The support thus provided by our collaborators, being practitioners, scholars, and judges, has enabled us to base our Report on surveys of more than 30 separate jurisdictions representing a variety of different legal traditions. Between Summer 2006 and Summer 2011 six half-day or one-day seminars were held where members of all the Consultative Groups and invited guests have debated and discussed several topics of the project. These meetings were held at Columbia University (New York) on four occasions, at Humboldt University (Berlin), and in Rome (Italy). In April 2010, the Preliminary Draft of the Report of the Global Principles Project was circulated on a restricted basis among the panels of International Advisers, and this text provided the focus of the meetings held in 2010 and 2011. In addition to the meetings each year of the Consultative Groups, certain parts of the project have been discussed at a number of academic conferences organized under the aegis of INSOL International or INSOL Europe's Academic Forum, at which one or both of the Reporters were in attendance. The latter included international conferences arranged in Scottsdale (Arizona, USA), Cape Town (South Africa), Shanghai (People's Republic of China), Vancouver (Canada), Singapore, and regional conferences in North America, Kelowna (Canada), and in Europe, in London (England), Barcelona (Spain), Riga (Latvia), Leiden (the Netherlands), Cologne (Germany), Helsinki (Finland), Athens (Greece), Stockholm (Sweden), and Oslo (Norway). Also, during other occasions, the Reporters were able to discuss items with groups of academics, practitioners, law students, and judges. The feedback from all these sessions has been particularly instructive. The present text[23] is based on the cumulative results of discussions in these meetings and suggestions communicated by individuals to the Reporters.[24] We are immensely grateful for all the assistance received.

The mechanism for decision that has been adopted by the Reporters has been the following: if any particular issue cannot be resolved on the basis of a text of universal application acceptable to all members of the Consultative Groups, accommodations have been sought by means of a proviso to allow the main principle to operate subject to certain necessary local modifications. In the course of this process, the extant array of internationally generated texts mentioned earlier have been studied with a view to ascertaining additional, complementary principles of law and practice that are considered to command general support. Both institutes share the aspiration that the recommendations within this Report shall accurately represent a consensus shared among a large group of leading consultants from a large group of jurisdictions. Where this mechanism led to recasting the original ALI NAFTA Principles into a form suitable for fully global application, references to "NAFTA country" in the ALI-NAFTA Principles have been reformulated so that they refer to "a state that . . . has jurisdiction for that purpose."

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[23] The present text has been finalized in February 2012.

[24] See Ian F. Fletcher and Bob Wessels, A First Step in Shaping Rules for Cooperation in International Insolvency Cases, in: International Corporate Rescue, Vol. 7, Issue 3, 2010, pp. 149-153; Bob Wessels, Global Principles for Cooperation in International Insolvency Cases, Tijdschrift voor Insolventierecht juli/augustus 2010, 154; Ian F. Fletcher and Bob Wessels, Shaping Rules for Coordination in International Corporate Insolvency Cases through Dialogue, in: European Company Law 7, issue 4 (2010), pp. 149-154.

On the whole, the Reporters are of the opinion that the texts of the Global Principles reflect such a consensus. No term, principle, guideline, or legislative recommendation has been adopted that was substantially opposed by two or more of the Consultants. The Global Principles for Cooperation in International Insolvency Cases represent, therefore, a truly international, global consensus among the Consultants, not always reflecting unanimous agreement on every particular, but expressing agreement on fundamental values and general standards, preventing disagreement on certain matters.[25] Furthermore, the Global Principles' aim is in general to be compatible with the pursuit of a variety of ultimate outcomes in terms of the method of administering an insolvent estate including, if appropriate, the distribution of the debtor's worldwide assets, while ensuring the protection of creditors' rights. Given the variety of different legal systems and policies and values reflected in different types of legal tradition, the Global Principles leave room for states with differing systems of insolvency law to find common cause in ensuring that the debtor's assets are administered in the most efficient way achievable, while reserving the ultimate right to determine the mode of distribution of such assets as they are able to, subject to their local jurisdiction and control.

In the text, the terms "cooperation," "coordination," and "communication" play a major role. Within the ALI NAFTA Principles "cooperation" encompasses "a variety of approaches to make legal systems work together better in addressing multinational problems, without necessarily making the systems more similar." The term "coordination" "is sometimes used to mean a limited harmonization aimed at making two different systems work better together, without being fully harmonized."[26] "Communication" relates to certain forms of exchange of information between different jurisdictions via various role players (courts, insolvency office holders, court clerks, certain other authorities) as a means to cooperate or to coordinate pending insolvency proceedings or developments within an international insolvency case.[27] In the approach taken in the ALI NAFTA Principles, the Global Principles project is directed

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[25] As Reporters, we are of the opinion that the Global Principles have as their foundation, in the words of Paul L. Friedman, Chair of the ALI Program Committee: "the Institute's traditional and primary goals: achieving coherence, reflecting current best practices, and better adapting the law to social needs," see The President's Letter, 32 The ALI Reporter, nr. 2, Winter 2010, p. 3.

[26] American Law Institute, Transnational Insolvency: Cooperation Among the NAFTA Countries: Principles of Cooperation Among the NAFTA Countries, 2003, p. 3.

[27] Where the Reporters aim to further build on the accepted concepts and terms of the ALI NAFTA Principles, the Report does not follow the distinctions recently made by the Austrian author Geroldinger, to use the term "coordination" as the result of "collaboration," which term itself covers all topics of information exchange ("communication"), all other matters in which different proceedings pending in different states can influence each other ("intervention" possibilities), "cooperation" (actually aligning approaches to pending proceedings), and "harmonisation" or "uniformation" (as found in certain provisions of the EU Insolvency Regulation, such as Articles 7(2) (reservation of title), 20 (return and imputation), 29 (right to request the opening of secondary proceedings), 30 (advance payments of costs and expenses), 31 (duty to cooperate and to communicate), 32 (exercising creditors' rights), 33 (stay of the process of liquidation in secondary proceedings), 34 (measures ending secondary proceedings), 35 (assets remaining in the secondary proceedings), 39 (right to lodge claims), and 40 (duty to inform creditors). See Andreas Geroldinger, *Verfahrenskoordination im Europäischen Insolvenzrecht. Die Abstimmung von haupt- und Sekundärinsolvenzverfahren nach der EuInsVO*, Veröffentlichungen des Ludwig-Boltzmann-Institutes für Rechtsvorsorge und Urkundenwesen, Manzsche Verlags- und Universitätsbuchhandlung, Wien, 2010, p. 25ff. See Bob Wessels, Harmonization of Insolvency Law in Europe, in: European Company Law 8, issue 1 (2011), p. 27ff.

primarily at cooperation, but in its recommendations seeks a measure of coordination as well.[28]

Aims and Purposes of the Global Principles

The main goal of The American Law Institute and the International Insolvency Institute is for the Global Principles to provide a standard statement of principles suitable for application on a global basis in international insolvency cases. As in the ALI NAFTA Principles, a "principle" is a statement of value serving as a guide for behavior in cross-border insolvency cases. While the Global Principles are linked to the ALI NAFTA Principles, the present Report is to be regarded as an independent text.

We think that the Global Principles may serve several purposes. They are worded in language that permits courts to apply them in a flexible way, tailored to the specific circumstances of each individual case. Where the Global Principles reflect a nonbinding statement, we have chosen—contrary to several examples of soft-law documents—not to include words such as "to the maximum extent possible" or "as far as possible," which allows the application of any national rule with which a given principle would conflict. The Global Principles may serve as an indication for insolvency office holders of the best, or preferred, approach in cross-border cases. Both for judges (and sometimes arbitrators) and for practitioners, the Global Principles may apply in cases where (international) insolvency legislation has been formulated in general, open terms or provisions, or in cases where the existing body of binding legislation does not cover a specific matter. Furthermore, the Global Principles may serve as nonbinding codified customs and norms that may assist in matters of interpretation. They therefore may indicate an alternative or a solution in cases where it proves to be impossible to determine a specific rule of the law applicable or the law relating to (insolvency) proceedings. In this way, too, the Global Principles may stimulate convergence and coherence between several regional or national legal systems. The Global Principles could assist as a model or a guide for national or regional legislators.[29] Finally, it is suggested that the Global Principles could form a part of courses and classes in academia all over the world and in postgraduate programs (of continuing education), so students and other interested professionals could be taught some of the principles that guide or steer international approaches. The true aspiration for cooperation in international insolvency cases will be stimulated by educating younger generations within the spirit that the Global Principles aim to reflect: the embodiment of what is globally perceived as the best solution in certain matters of international insolvency cases. In these ways, it is hoped that, as embodied in the final text, the Global Principles possess persuasiveness, as they are supported by a large global consensus, and will obtain the approbation of governmental authorities, domestic and international organizations, practitioners, and (most importantly) courts in their search for suitable solutions and their approach to the conduct of international insolvency matters in the future.

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[28] Cooperation in cross-border cases between courts is based on the premise that these courts in principle act on the same footing and are not subordinated to one another, see in general Michael Nunner, *Kooperation internationaler Gerichte*, Jus Internationale et Europaeum 36, Mohr Siebeck, 2009, p. 112ff.

[29] In relation to Europe, the Global Guidelines could be considered in the context of the work following from the European Parliament resolution of November 15, 2011, with recommendations to the European Commission on insolvency proceedings in the context of EU company law (2011/2006(INI).

Global Principles for Cooperation in International Insolvency Cases: A Collaborative Effort

The Global Principles for Cooperation in International Insolvency Cases contain 37 Global Principles for Cooperation in Global Insolvency Cases and 18 Global Guidelines for Court-to-Court Communications in International Insolvency Cases, in each case accompanied by commentary. The commentary contains—comparative—elucidations and provides informed background on how a certain rule, including its specific terms, is applied in a certain legal context. Often the considerations at stake are outlined and balanced, whilst many times a specific chosen rule is illustrated by examples or Illustrations. In this way users of the Global Principles are able to understand more fully the background and meaning of a certain rule or its application in a certain situation. The commentary forms an integral part of the Global Principles. Notes (or Reporters' Notes) have been used to set forth or discuss legal and other sources, the legal position in certain national or regional legal systems, and, where relevant, the current position on certain matters in instruments of soft law. When provided, they appear at the end of a segment of black-letter commentary. The Reporters' Notes should enable readers to better evaluate the background of certain principles and sometimes suggest avenues for further investigation or additional research.

A separate Annex contains the Reporters' personal proposals for 23 Global Rules on Conflict-of-Laws Matters in International Insolvency Cases (also accompanied by a commentary).

SECTION II

GLOBAL PRINCIPLES FOR COOPERATION IN INTERNATIONAL INSOLVENCY CASES

INTRODUCTION

The existing Principles and Guidelines

In this section, we set out our proposals for the extended application of the ALI Principles of Cooperation among the NAFTA Countries ("ALI NAFTA Principles"), remodelled and developed in such a way as to express Global Principles for Cooperation in International Insolvency Cases. In Section III of this Report, we also set out our proposals for the extended application of the ALI NAFTA Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases, similarly remodelled and developed so as to form a set of rules which, for the matters covered thereby, are in alignment with the Global Principles for Cooperation in International Insolvency Cases. The original Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases ("Court-to-Court Guidelines") were published as an Appendix to the ALI NAFTA Principles.[30]

The ALI Report, published in 2003, arranged the ALI NAFTA Principles into two groups, General Principles and Procedural Principles. The General Principles were numbered using Roman numerals I-VII, and the Procedural Principles were numbered using Arabic numerals 1-27. In the present Report, we have adopted a different approach, presenting a single series of Global Principles numbered continuously while endeavoring as far as possible to follow the structure and sequence of the original Principles. Naturally, since those Principles were drafted with specific reference to their intended application by the three NAFTA countries, it has been necessary to undertake a certain amount of redrafting in order to adapt them for operation in a global context. In other respects, much of the substance of the original principles has been left unchanged. As designed for use together with the ALI NAFTA Principles, the original Court-to-Court Guidelines were also drafted with specific reference to their intended application by two of the three NAFTA countries, Canada and the U.S.A. Any effort to apply these Guidelines beyond these states may expect to be confronted with many questions, such as the differences in procedural laws, the differences in working languages, uncertainty with regard to certain concepts of foreign insolvency law, poor technological facilities of certain courts, and the requirement that judges, operating concurrently in different regions and time zones, are to maintain their independence and retain control over the proceeding over which they are respectively presiding. We therefore also judged it to be appropriate to introduce certain additional principles whose purpose is to strengthen the extent to which the Global Principles as a whole can be understood and applied in countries having widely differing legal traditions and practices. Our intention is to provide all those who may use them all over the world with a structured set of Principles and Guidelines and supporting exposition that can be applied in the situations which will be encountered in an actual case.

Given the existing state of diversity among the nations of the world with respect to insolvency law and policy, it must be acknowledged that there is limited value in seeking to lay down absolute and inflexible propositions of an abstract character. A more realistic, and even

[30] American Law Institute, Transnational Insolvency: Cooperation Among the NAFTA Countries: Principles of Cooperation Among the NAFTA Countries (2003) (adopted in 2000), Appendix B.

pragmatic, approach is recommended whereby courts and administrators are exhorted to aspire to the highest standards in terms of international cooperation, while retaining a margin of discretion in which to accommodate the practical constraints imposed by the almost infinite diversity of laws and circumstances that are capable of impacting upon the process of any given, live case.

A Holistic Approach

The original ALI-NAFTA General Principles (numbered I-VII) and the Procedural Principles (1-27) together reflect the common values of the bankruptcy laws of the NAFTA countries as applied to multinational cases, and the practical approaches to cooperation that are attainable within the existing legal competence of the courts without new legislation or treaties. In compiling this Report, we have remained sensitive to the contrast to be drawn between broad principles of a fundamental character, and more concrete propositions bearing upon matters of procedure. We have chosen, however, not to maintain such a differentiation in the form in which the Global Principles are set out. Overall, each domestic insolvency case, whether liquidation, winding-up, reorganization, rehabilitation, or adjustment of debts, essentially consists of three stages: initiation, administration, and resolution. These stages are the key elements in an international insolvency case as well:

- Initiation (or: commencement of the proceedings) includes (i) analysis of a court's international jurisdiction; (ii) recognition of a foreign representative from a foreign insolvency proceeding; (iii) establishment of court control over domestic assets (via a moratorium, a stay, or a specific measure); (iv) giving a foreign representative access to local courts; and (v) obtaining and disclosing information for the benefit of each court and administrator;
- Administration (or conduct of the proceedings) in an international case includes: (vi) coordination among courts and administrators, especially with respect to the operation of the assets (including management of the business) or liquidation of assets and any refinancing of debt; (vii) mutual sharing of information and reaching for an agreement (protocol) concerning any aspect of the case; (viii) dealing with pre-existing contracts;[31] (ix) undoing pre-insolvency transactions (applying avoiding powers); (x) procedures for handling claims from foreign creditors and for disclosing claims information among courts and administrators; and (xi) consolidated treatment of corporate groups where appropriate and legally permissible;
- Resolution includes: (xii) the substantive determination of claims; (xiii) priority (preference or privilege) in distribution; (xiv) plans and proposals in reorganizations, including determination of the extent to which they are binding in each country; and (xv) conversions or closure of the proceedings.

Despite the sharp historical distinction between liquidation and reorganization, in modern insolvency theory proceedings of a different nature and goal lie on a spectrum of techniques for reacting to a general default. The Global Principles apply to both liquidation and reorganization and are important in both situations. It may sometimes be the case that in liquidation there will be a sale of the entire business as a going concern, thus raising many of the concerns relevant to reorganization. More often, a sale of all or a large part of the business, although a liquidation in one sense, can be best accomplished through a reorganization plan in those countries where procedures permit greater flexibility and

[31] Questions of the treatment of pre-existing contracts trigger conflict-of-laws questions. The Annex to this Report provides the Reporters' personal Statement regarding the need to develop unified rules of conflict of laws (or: private international law or international private law, as in some countries this legal domain is named), to be applied in international insolvency cases.

therefore greater cross-border cooperation. Although the Global Principles apply to all sorts of insolvency proceedings, different approaches may be relevant in liquidation versus reorganization. In general, in a liquidation proceeding there will be more emphasis on the exchange of information about individual assets (e.g., location and value), on joint marketing efforts to maximize sale value, and on resolution of issues concerning claims and distribution. In reorganization, central problems will be maintaining the organization as an operating entity pending a plan, closing unprofitable operations, and pulling together interested parties to agree to a financial restructuring. Our overall philosophy of approach to the problems of international insolvency in the 21st century may therefore be summed up as one that is holistic in character, that seeks to promote orderly and workable solutions which preserve value rather than being destructive of it, and that respect reasonable and legitimate expectations rather than sacrificing them for purely dogmatic reasons.

The nature of an international insolvency case

In practice, an international insolvency case will assume one or other of two alternative forms: either there will be a single proceeding in one jurisdiction—which will usually, though not invariably, be the state in which the debtor has its center of main interests—or there will be two or more parallel proceedings in states with which the debtor has had varying types and degrees of forensic connection. Global Principles 15 to 20 for instance are concerned with the former type of case, while Global Principles 22 to 23 and 24 to 31 are concerned with the second type.

The concluding phase of an insolvency proceeding—its resolution—generally consists either of a distribution (in the case of a liquidation proceeding) or of the implementation of a confirmed plan (in the case of a reorganization). The substantive aspects of each of these matters are determined by the domestic law under which the proceeding is conducted, and are applicable to all parties who participate in that process regardless of their personal origins or current forensic connections. By the very act of participation, such parties necessarily submit to the regime of insolvency law that is operative in the state in question, including its rules concerning priority of distribution, the treatment of security interests and analogous rights, and the consequences of any discharge of the debtor from pre-existing liabilities either as a consequence of a liquidation process or as part of the terms of a confirmed plan of reorganization or composition. In an international case, while the provisions of the domestic system must necessarily control the process, they should nevertheless be deployed with due regard to the international dimension of the process in question. The purpose of each of the three Global Principles, numbered as 33 to 35 inclusive, is to serve to reinforce the essential values of international cooperation and hence to encourage such conduct in practice, rather than the converse.

International cooperation

In developing our proposals for international cooperation, the Reporters also have adopted a pragmatic approach whereby courts and administrators are exhorted to aspire to attain the highest standards in terms of international cooperation. They should do so while retaining a margin of freedom in which to seek to accommodate the practical constraints imposed by the almost infinite diversity of laws and circumstances that are capable of impacting upon the process of any given, live case. Although prior to mid-2011 the Reporters have not found evidence of the application of the ALI Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases outside Canada and the U.S.A., it is acknowledged

that efforts have been made to create awareness of the ALI Guidelines in circles of insolvency practitioners and judges all over the globe.[32] Most notably in 2009, both in the Lehman Brothers Group of Companies Protocol and in the Bernard Madoff Securities Protocol,[33] the Court-to-Court Guidelines were accepted in full in proceedings which, though based in the United States, involved several countries (common-law or civil-law based) in Europe and Asia.

In assessing the reactions to the Questionnaires that the Reporters sent out to consultants and interviewees regarding the "Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases,"[34] it is striking from the very outset to see the accelerating pace of developments regarding the topic of cross-border communication between courts and between administrators during the last 10 years. Generally speaking, one single ALI NAFTA Procedural Principle (Principle 10 "Communications") in conjunction with Articles 25–27 of the UNCITRAL Model Law, is presently mirrored in the laws of some 20 countries. In addition, in Europe, in all 27 EU Member States (except for Denmark), in 2002, Article 31 of the EU Insolvency Regulation introduced cross-border communication and cooperation between insolvency office holders (not being courts). Altogether, the landscape of international insolvency law has changed dramatically since the issuance of said ALI Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases. In addition, as will be set out below, the use of a "protocol," which includes matters communicated, is becoming more and more an accepted tool for cross-border coordination of international insolvency cases in several non-NAFTA jurisdictions. Recent instances regarding common understanding between administrators in insolvencies, laid down in a protocol, mark the transition to a next phase, as these protocols apply to some 15 jurisdictions, including over 10 non-NAFTA jurisdictions. Although several legal and practical barriers stand in its way (to be discussed below), communication and coordination of cross-border insolvency cases, either by courts and/or insolvency office holders, in the first decade of the 21st century has clearly become the paradigm in solving questions in cross-border insolvency matters. Communication and cooperation have emerged as the driving force in the area of methods or principles that have been debated since time immemorial, along with—in their most extreme forms—the principles of universality and territoriality. Mitigated, modified, and mixed forms of these methods have obtained a presence in many insolvency statutes all over the world, to which the procedural paradigm of communication and cooperation has been or is added in a way which interconnects the legal systems of the jurisdictions involved. Cross-border court-to-court coordination of specific cases, developed by many insolvency practitioners since the beginning of the 1980s and supported by such institutions as UNCITRAL, ALI, and III, are now the benchmark for the present generation of standards and norms.[35]

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[32] III has distributed worldwide thousands of sets of the ALI Guidelines, translated into some 15 languages.

[33] For further references, see Reporters' Notes accompanying Global Principle 1.

[34] The methodology of the project is set out in Section I.

[35] See, for instance, for 16 countries in Central Africa: Article 252 of the Organization of the Harmonization of Business Law in Africa (OHADA) - Standard Act Relating to Organization of Collateral, Collection and Enforcement Procedures and Bankruptcy Proceedings - Uniform Act Organizing Collective Proceedings for Wiping Off Debts, 1999: "The receivers of principal collective proceedings and secondary collective proceedings shall have a duty of reciprocal information. They shall communicate, without delay, all information which may be useful for other proceedings, in particular the statement of production and verification of claims and measures aimed at putting an end to the collective proceedings for which they are appointed. The

In assessing the reactions to the Questionnaires the Reporters sent out regarding the "Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases," two clear lines of reasoning can be detected. Firstly, the degree of global consensus that has emerged from the questionnaires and the discussions the Reporters have had in many parts of the world is significant. Outside the NAFTA countries, there are only a handful of jurisdictions whose laws and practice largely embrace the contents of the ALI Guidelines, but—besides legal and practical obstacles, discussed below—there is generally large support for the core of the ALI Guidelines themselves, although it is noted (as will be discussed below) that the professional quality of the logistics of institutions such as courts is a candidate for improvement, and the problem of language barriers is seen as a significant challenge to be overcome. Secondly, the objections articulated against court-to-court communication still hold to a great extent. These key objections will be analyzed below, as they may provide awareness and a better understanding of the limitations courts feel in this regard.

The text of the proposed Global Principles for Cooperation in International Insolvency Cases, numbered 1-37, is set out in full in the beginning of this Report.
This Section is arranged as follows:
Below in this Section are set out the individual Global Principles, which are examined sequentially with supporting Comment, sometimes accompanied by Reporters' Notes, with more detailed explanation or references to legal sources.
The text of the proposed Global Guidelines for Court-to-Court Communications in Cross-Border Cases, numbered 1-18, is provided in Section III of this Report. As with the Global Principles, the individual Global Guidelines for Court-to-Court Communications in Cross-Border Cases, are examined sequentially, sometimes with supporting Comment.

Principle 1 Overriding Objective

1.1. These Global Principles embody the overriding objective of enabling courts and insolvency administrators to operate effectively and efficiently in international insolvency cases with the goals of maximizing the value of the debtor's global assets, preserving where appropriate the debtors' business, and furthering the just administration of the proceeding.
1.2. In achieving the objective of Global Principle 1.1, due regard should be given to the interests of creditors, including the need to ensure similarly ranked creditors are treated equally. Due regard should also be given to the interests of the debtor and other parties in the case, and to the international character of the case.
1.3. All parties in an international insolvency case should further the overriding objective of Global Principle 1.1 and should conduct themselves in good faith in dealing with courts, insolvency administrators, and other parties in the case.
1.4. Courts and insolvency administrators should cooperate in an international insolvency case with the aim of achieving the objective of Global Principle 1.1.

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receiver of secondary collective proceedings shall, at the right time, enable the receiver of principal collective proceedings to present proposals relating to the liquidation of property or to any use of assets of the secondary collective proceedings."

1.5. In the interpretation of these Global Principles, due regard should be given to their international origin and to the need to promote good faith and uniformity in their application.

Introductory Comment:

These Global Principles for Cooperation in International Insolvency Cases (the "Global Principles") are standards to apply in insolvency cases regarding the same debtor pending in two or more countries, or alternatively in cases where the debtor may potentially be made the subject of parallel proceedings, even if that does not ultimately occur. These Global Principles reflect the central principle of cooperation and coordination between parallel insolvency proceedings and aim to offer a realistic set of rules that should ensure that either a reorganization or a liquidation of the debtor's estate is dealt with efficiently and effectively. These Global Principles further the existing rules and standards available to solve transnational commercial disputes and to align international insolvency cases, such as the American Law Institute/UNIDROIT Principles of Transnational Civil Procedure 2006 (adopted in 2004) ("ALI/UNIDROIT Principles"), the European Communication & Cooperation Guidelines for Cross-border Insolvency 2007 (the "CoCo Guidelines"), and the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation of July 2009 (the "Practice Guide"). Creditors have a strong mutuality of interests in the management and execution of effective operations of cross-border insolvency cases. It is therefore important that countries, courts, and any other competent legal authority and associations of insolvency practitioners develop arrangements for effective and efficient cooperation in enforcing these proceedings and in order to minimize conflict in the application of these Global Principles.

The role of courts is paramount in insolvency matters and, particularly with a view to reorganizations, consolidations, or rescues, experience often is that the attitude taken by courts may be determinative of the eventual outcome. These Global Principles also refer to courts (see Principle 1.3 and 1.4), but it must be remembered—as for any other party addressed—that these Global Principles are nonbinding (see Principle 3).[36] The text as a whole is to be understood as being predicated upon respect for the individuality of courts and legal cultures, and therefore the Global Principles are so written as to be facilitative. They should not, for that reason, offend judges' or courts' views of their roles, nor should they serve to undermine notions of judicial independence or respect for national sovereignty. The mutual interrelationship of insolvency proceedings, originating from specific procedural rights of an insolvency administrator—for example, requesting the opening or recognition of certain insolvency proceedings, or requesting the stay of an execution against a debtor's assets or the stay of a process of liquidation—and the interwovenness of the claims of creditors, who often have the right to lodge claims in any of the pending insolvency proceedings, supplies the practical necessity for the effective and efficient operation of cross-border insolvency proceedings. The text of Global Principle 1.1 is largely based on the text of Guideline 1.1 of the CoCo Guidelines.

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[36] Although, in certain areas of law, duties to cooperate exist between courts, either based on a treaty or on customary law, unless specifically mentioned, the Global Principles have been drafted on the assumption that such duties cannot be found, see Anne Peters, Cooperation in International Dispute Settlement, in: Jost Delbrück (ed.), International Law of Cooperation and State Sovereignty, Berlin 2002, pp. 108-162; Michael Nunner, *Kooperation internationaler Gerichte*, Jus Internationale et Europaeum 36, Mohr Siebeck, 2009, p. 141ff.

REPORTERS' NOTES

Rules for civil proceedings have been described as "the most difficult candidate for worldwide harmonisation," see J. Zekoll, Comparative Civil Procedure, in: Reimann and Zimmermann (eds.), The Oxford Handbook on Comparative Law, Oxford: Oxford University Press 2006, p. 1345. The American Law Institute/UNIDROIT Principles of Transnational Civil Procedure ("ALI/UNIDROIT Principles"), adopted in 2004, aim to contribute to the worldwide harmonization of civil procedural law and contain universal principles and points of view for the judicial solution of transnational commercial disputes. See: Principles of Transnational Civil Procedure, Cambridge: ALI/UNIDROIT, Cambridge University Press 2006, earlier versions also available via http://www.unidroit.org/english/studies/study76/main.htm (last visited Mar. 2, 2012). The ALI/UNIDROIT Principles may be regarded as a first attempt to create a generally accepted basis for the operation of international disputes and litigation in civil and commercial matters. See for literature: M. Andenas, N. Andrews, and R. Nazzini (eds.), The Future of Transnational Civil Litigation. English responses to the ALI/UNIDROIT Draft Principles and Rules of Transnational Civil Procedure, London: British Institute of International and Comparative Law 2004; R. Stürner, The Principles of Transnational Civil Procedure. An Introduction to their Basic Conception, Rabels Zeitschrift 69 (2005), p. 203; R.R. Verkerk / R. Verkijk, *Principles of Transnational Civil Procedure, vanuit een Nederlands perspectief*, Nederlands Tijdschrift voor Burgerlijk Recht (NTBR), 2006, p. 30; N.H. Andrews, *La Giustiza Civil Inglese e Il Mondo Esterno*, LXI Rivista Trimestrale di Diritto e Procedura Civile 2007, p. 829; N.H. Andrews, A Modern Procedural Synthesis, Tijdschrift voor Civiele Rechtspleging 2009, p. 52ff. Although these ALI/UNIDROIT Principles have been designed as standards for adjudication of transnational commercial disputes, they do not apply to domestic relations nor to insolvency proceedings, see G. C. Hazard, Jr., A Drafters's Reflections on the Principles of Transnational Civil Procedure, in: Principles of Transnational Civil Procedure, Cambridge: ALI/UNIDROIT, Cambridge University Press 2006, p. xlvii. We agree with Krans and Van Rhee (H.B. Krans / C.H. van Rhee, *De Principles of Transnational Civil Procedure: een inleiding*, Tijdschrift voor Civiele Rechtspleging 2009, p. 49ff) that the principles reflect a search for generally accepted procedural principles and points of view, which is possible without taking into account the nature of a case. Where such principles have been drafted, for instance regarding the principle of "equality of arms," the judicial process of recognition, or general case management, the Reporters have considered these in drafting the Global Principles.

In general, unrelated to insolvency, in international commercial disputes a new concept of "judicial comity" is evolving, providing a framework of ground rules for establishing and developing judicial dialogue both in a general context and in relation to a specific case. According to Slaughter, judicial comity has four strands: (i) respect for a foreign court in its ability to apply the law honestly and competently, (ii) the entitlement, in the global task of judging foreign courts, to adjudicate those matters where local interests are closely involved, (iii) the strong judicial role in protecting individual rights, and (iv) a greater willingness to clash with other courts when necessary, "as an inherent part of engaging as equals in a common judicial enterprise," see A. Slaughter, A Global Community of Courts, 44 Harvard International Law Journal 2003, p. 191ff, at 206. On the origin (*comitas gentium*) and development of comity, see Michael Nunner, *Kooperation internationaler Gerichte*, Jus Internationale et Europaeum 36, Mohr Siebeck, 2009, p. 144ff, and Thomas Schultz and David Holloway, *Retour sur la comity.—Première parti: les origines de la comity au carrefour de droit international privé et du droit international public*, Journal de Droit International, 2011/4. Judge Kawaley (Supreme Court Bermuda), submits that the principle of judicial comity "appears to be essentially a legal expression of the globally recognised moral and religious principle, 'do unto others as you would have them do unto

you,'" see Ian Kawaley, in: Kawaley, Bolton and Mayor, Cross-Border Judicial Cooperation in Offshore Litigation (The British Offshore World), Wildy, Simmonds & Hill Publishing, London, 2009, p. 220ff. In the context of international insolvency cases, Hon. J.J. Spigelman (recently retired Chief Justice of New South Wales, Australia) says that direct court-to-court communication in the context of cross-border insolvency is a particular manifestation "of the new sense of international collegiality that has emerged amongst judges of different nations, who now meet in many different multilateral, regional and bilateral contexts." This phenomenon has variously been called "judicial globalisation," a "global community of courts," "international judicial negotiation" (footnotes omitted), see J.J. Spigelman, Cross-border Insolvency: Co-operation or Conflict? (2009) 83 Australian Law Journal, 44ff. See also Jay Lawrence Westbrook, International Judicial Negotiation, in: 38 Texas International Law Journal (2003), 567, and Lord Neuberger, The International Dimension of Insolvency, 23 Insolvency Intelligence 2010, pp. 42-45, submitting the possibility of division of issues between courts: "I suspect that we are moving inexorably towards the development of inter-court, cross-jurisdictional, framework agreements, of joint and simultaneous hearings via videolink, and so on. It may well see, who knows, the development of insolvency jurisdiction *sans frontières* to match capitalism and bankruptcy *sans frontières*." Against this background, the Reporters drafted the Global Principles, see as an example Global Principle 1. See also the Polish judge Anna Hrycaj, The Cooperation of Court Bodies of International Insolvency Proceedings, International Insolvency Law Review 2011/1, p. 7ff., in relation to cross-border judicial collaboration observing: "There are no doubts that the essence of collaboration is striving to achieve common goals."

The European Communication & Cooperation Guidelines for Cross-border Insolvency ("CoCo Guidelines") of 2007 aim to provide rules to be applied by insolvency administrators within their duties to communicate and cooperate in cross-border insolvency instances to which the EU Insolvency Regulation is applicable. Their reception has been welcomed by scholars (Mario Hortig, *Kooperation von Insolvenzverwaltern*, Schriften zum Insolvenzrecht, Diss. Köln, Band 25, Baden-Baden: Nomos 2008: ". . . it is to be expected that the Guidelines will develop to the European standard of cooperation," at p. 258), and insolvency practitioners (Stephen J. Taylor, The Use of Protocols in Cross Border Insolvency Cases, in: Pannen (ed.), European Insolvency Regulation, Berlin: De Gruyter Recht, 2007, 678ff ("highly laudable initiative," p. 681); Lars Westpfahl, Uwe Goetker, Jochen Wilkens, *Grenzüberschreitende Insolvenzen*, Köln: RWS Verlag, 2008 ("extremely helpful," p. 125); Louise Verrill, The INSOL Europe Guidelines for Cross Border Communication, in: Bob Wessels and Paul Omar (eds.), Crossing (Dutch) Borders in Insolvency, Nottingham, Paris: INSOL Europe 2009, pp. 39-48 ("[it is] important for the professions to be aware of and understand the need to adopt the CoCo Guidelines," at p. 45). See also Andreas Geroldinger, *Verfahrenskoordination im Europäischen Insolvenzrecht. Die Abstimmung von haupt- und Sekundärinsolvenzverfahren nach der EuInsVO*, Veröffentlichungen des Ludwig-Boltzmann-Institutes für Rechtsvorsorge und Urkundenwesen, Manzsche Verlags- und Universitätsbuchhandlung, Wien, 2010, p. 31, qualifying the CoCo Guidelines as a first and by all means very promising attempt ("*Ein erster durchaus vielversprechender Versuch*") and Paul H. Zumbro, Cross-border Insolvencies and International Protocols—an Imperfect but Effective Tool, 11 Business Law International no. 2, May 2010, 157ff, at p. 167 ("The CoCo Guidelines reflect best practices both inside and outside Europe").

The CoCo Guidelines have indeed been used in the draft of February 2009 of the Cross-Border Insolvency Protocol for the Lehman Brothers Group of Companies, which governs the conduct of Lehman Brothers Holdings Inc. ("LBHI") and its affiliated debtors worldwide. The draft refers to several other bits of soft law and to several Protocols of international cases, which are reflected in the

Draft. It specifically refers to CoCo Guidelines 3 (Status), 17 (Notices), and 12.1 ("Liquidators are required to cooperate in all aspects of the case").[37]

Comment to Global Principle 1:

Principle 1.1 expresses the overriding objective of these Global Principles as they relate to courts and insolvency administrators in the context of cross-border (or: international) insolvency cases. The twin goals that are also stated here—the maximization of value and the furthering of the just administration of the proceeding—are identical to those proclaimed in General Principle I of the ALI NAFTA Principles.

It is to be observed that the expressions "international insolvency" and "cross-border insolvency" are used interchangeably throughout the Global Principles and its accompanying explanations and Notes. This usage is in conformity with practice and scholarly literature. The Reporters' intention is that both terms are identical. The words "preserving where appropriate the debtor's business" are intended to give further emphasis to the overriding aim by explicitly stating that any form of the available variations of administration that contributes to the primary goal of maximizing the value of the debtor's assets is likewise addressed in these Global Principles.

Principle 1.2 uses the term "should," while in other Principles sometimes "shall" or "may consider" is used. It is stressed that throughout the texts, the explanations, and the Notes the Reporters have intended to use neutral language as well as "well considered options." They have abstained from formulating recommendations as presenting a "best solution" or in anyway binding, as "binding" in legal terms can only be achieved in a national context (or international convention), in which alternatives may also be appropriate. In its substance, Principle 1.2 underlines the importance of acting in the interest of the debtor's creditors. In many countries, creditors have the right to receive information, the right to lodge a claim in all insolvency proceedings regarding the debtor, the right to be heard concerning any proposal for a rescue and, overall, the right of equal treatment. The words "the interests of . . . other parties," cover other interests involved in an international case, such as the interests of maintaining employment or the interest of shareholders, while treated "equally"means the treatment of the same class of creditors in a similar way and without discrimination as worded in Principle 11.

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[37] The annotated Draft for the Lehman Brothers Group of Companies is available via www.bobwessels.nl, weblog: 2009-02-doc7. The protocol that was approved by the New York Bankruptcy Court (Southern district) is available via: http://chapter11.epiqsystems.com. The Protocol has been signed by 10 of the official representatives of (companies of) Lehman Brothers Group in Australia, the Netherlands, the Netherlands Antilles, Germany, Hong Kong, Luxembourg, Singapore, Switzerland, and the United States of America. Official representatives of Bermuda and Japan are still considering signing the protocol, but have participated in a series of activities and meetings designed to advance the objectives of the Protocol. Only the administrators of a number of UK-based companies did not sign the protocol. They argued that they were in favor of cooperation, but were required by UK law to treat each insolvent entity as a separate one. See: Bankruptcy report number 3 (July 22, 2009) and number 5 (Mar. 12, 2010), available at the website www.lehmanbrotherstreasury.com (last visited Mar. 2, 2012). The Protocol in Bernard L. Madoff Investment Securities llC is available via: http://www.iiiglobal.org/component/jdownloads/finish/573/4344.html (last visited Mar. 2, 2012).

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The other purpose of this Principle is to set a benchmark for professional actions and behavior of administrators involved. The application of the Global Principles in their entirety should be conditioned by the interests of creditors, and for this reason Principle 1.2 also requires that insolvency administrators, especially in countries where professional or ethical rules for administrators may not be available, act fairly and proportionately in charging fees or costs. The text of Global Principle 1.2 reflects the nearly similar text of Guideline 1.2 of the CoCo Guidelines. See also Global Principle 2.

Global Principle 1.3 requires all interested parties in cross-border insolvency proceedings to act in accordance with the Global Principles. It should encourage all players in cross-border insolvency proceedings, including the debtor, creditors, employees, and public authorities, to respond to the necessity for the effective and efficient operation of these proceedings. It is envisaged that the Global Principles apply analogously to instances that fall (partly) outside the context of cross-border insolvency cases, for example, to administrators acting outside their home country or courts dealing with issues of evidence. However, nothing in these Global Principles can alter or infringe the right or duties of these participants. The text of Global Principle 1.3 is a further development of the text of Guideline 1.3 of the CoCo Guidelines and Principle 11.1 of the ALI/UNIDROIT Principles. The significance of the opening words in Global Principle 1.3 ("All parties . . .") should be noted. This signifies that the duty to observe the requirement of good faith applies equally to the debtor, and those who represent the debtor, as it applies to creditors and other interested parties. For example a debtor's conduct in failing to disclose material information, which might have led the court to conclude that it did not have jurisdiction to open the insolvency proceedings requested by the debtor himself, was the subject of adverse judicial comment by the High Court in Northern Ireland on the occasion of the subsequent annulment of the bankruptcy order.[38]

In the modern era, a gradual reconsideration of the appropriate approach to international bankruptcy has been observable. This has been prompted to some extent by a realization that under current conditions of globalized trade and the ease of mobility of high-value assets, the location of the debtor's property at any given time can become an almost arbitrary matter, but one with major significance for interested parties. There are related opportunities for the debtor (or other parties) to manipulate the positioning of certain significant assets with a view to exploiting differences between the laws of the various countries concerned. Accordingly, some states that had formerly pursued a strictly "territorialist" approach to international bankruptcy have revised their laws so as to incorporate a more internationalist philosophy. These countries include Austria, China, Colombia, Germany, and Japan. In other countries, by means of their jurisprudence (case law), a more international view has been developed, for example, in France, the Netherlands, and Singapore. Also, there are increasing indications of a greater readiness in many hitherto "isolationist" states to at least permit the exchange of information to take place between courts, subject to prescribed safeguards and limitations. The latter movement is examined in the Reporters' Notes below and the comments made in relation to the Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases.

The terms in which Global Principle 1 is expressed are neutral in relation to the underlying philosophy concerning the ultimate mode of administration of the debtor's worldwide assets.

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[38] Irish Bank Resolution Corporation Ltd v. Quinn [2012] NICh 1 (10 January 2012) (High Court of Justice in Northern Ireland, Deeny J), at paragraph [56] et seq. (esp. at [62]-[65]).

There is no attempt to insinuate a particular principle of treatment—such as the imposition of a single system of distribution in accordance with the precepts of the "unity and universality" school of opinion. The declared objective is that of "maximizing the value of the debtor's global assets," together with the somewhat question-begging, additional goal of "furthering the just administration of the proceeding." Thus, Principle 1 is compatible with the pursuit of a variety of ultimate outcomes in terms of the method of administering and distributing the debtor's global assets. The concept of "just administration of the proceeding" is also capable of receiving more than one interpretation, according to the system of values prevailing in different types of legal tradition. Hence, it could be possible for states with differing systems of bankruptcy law to find common cause in ensuring that the debtor's assets are administered in the most efficient way achievable, while reserving the ultimate right to determine the mode of distribution of such assets as are properly subject to their local jurisdiction and control.

Having regard to the "critical mass" of European states that have become bound by the obligation to engage in and to facilitate cooperation imposed by the EU Insolvency Regulation, as well as the separate, but steadily expanding, caucus of states across the world that have enacted the Model Law, it can be concluded that the proposition in Principle 1 has already gathered a strong consensus of acceptance in global terms. No insuperable opposition to its acceptance has been encountered, even from jurisdictions that traditionally have followed the territorialist approach. It must be conceded, however, that the extent of such cooperation, and the conditions and limits within which cooperation can be provided by the administrator and courts of a given state, are subject to wide variation at this time. However, in conjunction with the more specific guidelines that are embodied in the proposals below for practical application in cases coming before the courts, Global Principle 1 is to be regarded as a suitable platform on which to build for the future.

Also relevant in this context is the generally positive response to the European Communication and Cooperation Guidelines for Cross-border Insolvency (the CoCo Guidelines) following their publication in 2007. A notable feature of the opening Guideline 1 is the reference to the "overriding objective," which should be constantly observed throughout the conduct of any international insolvency case. Although anchored in the context of the European theater of application—as is clearly signalled by the reference in 1.1 to the role of the EU Regulation on Insolvency Proceedings—Guideline 1 succeeds in providing an indication of the underlying purposes that the principle of cooperation is intended to serve and to promote. Accordingly, elements of this Guideline are incorporated into Global Principle 1. The paradigm of cross-border cooperation in international insolvency cases also is the underlying rationale in two recent texts of UNCITRAL, that is, UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation (2009), which provides information for insolvency practitioners and judges on practical aspects of cooperation and communication in cross-border insolvency cases, and "UNCITRAL Model Law on Cross-Border Insolvency: the judicial perspective" (2011), providing information and guidance for judges using and interpreting the Model Law.

The provision in Principle 1.5 is similar to those contained in several private-law treaties, while in its text it is nearly identical to Article 8 UNCITRAL Model Law on Cross-Border Insolvency. It should function as a reminder for courts and parties that application of all the Global Principles always will carry the potential to engage foreign legal cultures where certain legal effects may create confusion or even aggravation, without interfering with a foreign court's exercise of jurisdiction, a foreign administrators' powers, or a foreign state's public policy. Principle 1.5 aims to ensure that the Global Principles are applied with sensitivity and

in a uniform way, while in certain circumstances where the Principles allow, a court should apply analogous legal rules to produce effects that are akin to those achievable under the legal system to which they are addressed.

REPORTERS' NOTES

Regarding "Cooperation," General Principle I of the ALI NAFTA Principles stated: "Courts and administrators should cooperate in a transnational bankruptcy proceeding with the goal of maximizing the value of the debtor's worldwide assets and furthering the just administration of the proceeding." The ALI Reporters' Comment to the original General Principle I aptly declares: "This statement is not a truism."[39] Even as an aspiration, the proposition that courts and administrators should engage in transnational cooperation is by no means universally acknowledged. In many legal systems and traditions, such a practice would actually contravene received notions of the proper role of the judge as a detached and impartial figure who must neither seek nor accept advice or guidance from any other source, domestic or foreign, concerning the conduct of the matter over which he or she is presiding. The motivating objective of "maximizing the value of the debtor's global assets," as formulated in Global Principle 1.1, would also encounter resistance from those jurisdictions that continue to subscribe to some form of the "territorialist" theory of bankruptcy, whereby each state should only exercise bankruptcy jurisdiction over such parts of the debtor's estate as happen to be located within their territory.[40] Both in the original ALI NAFTA Principles, and in the Global Principles, "cooperation" is the paradigm foundation. For examples of international texts in which the principle of cooperation is made a cornerstone of the approach to be followed in bringing about the more effective, efficient, and fair administration of international insolvency proceedings, and of civil proceedings generally, see: UNCITRAL Model Law (1997), Articles 25-27; 29-30; EU Insolvency Regulation (2000), Article 31; ALI/UNIDROIT Principles of Transnational Civil Procedure (2006) (adopted in 2004), Principle 31; Co-Co Guidelines (2007), Guideline 1.

While there is a gratifying body of evidence to indicate an extensive, and growing, acceptance of the principle of cooperation in its broadest and most general level of articulation when embodied in international instruments and statements of "good practice," the extent to which such aspirations are translated into concrete rules of law and practice at the national level is variable and uneven. Among the jurisdictions surveyed for the purposes of this Report, the principle of cooperation was found to be already widely accepted and applied, apart from only some countries that remain ideologically committed to the doctrine of territoriality of insolvency. Even in the latter type of system, there were indications that the absence of a formal legislative command providing for cooperation would not necessarily be an obstacle to the acceptance of the principle of cooperation, although the nature of such cooperation would in practice be determined by considerations of the interests of local creditors. Some jurisdictions currently lack positive legal enactments to authorize, much less to command, courts or insolvency administrators to engage in transnational cooperation (e.g. Brazil, Egypt, India,

[39] ALI Transnational Insolvency: Cooperation Among the NAFTA Countries. Principles of Cooperation Among the NAFTA Countries (2003), p. 23.

[40] For an account of the rival theories of international bankruptcy, including the territorialist theory, see I.F. Fletcher, Insolvency in Private International Law, 2nd edition (2005), Chap.1, paras. 1.11 to 1.15; Bob Wessels, Bruce A. Markell, and Jason J. Kilborn, International Cooperation in Bankruptcy and Insolvency Matters, Oxford University Press, New York, 2009, p. 39ff; International Bar Association Legal Practice Division, Report of the Task Force on Extraterritorial Judisdiction, 2009, Chapter 6 (Insolvency) (Selinda A. Melnik and Stephen Raslavich, coord.), p. 304ff.; Jay Lawrence Westbrook, Breaking Away: Local Priorities and Global Assets, 46 Texas International Law Journal 2011/3, p. 602ff. (with further references).

Kuwait), yet there are indications that such cooperation should encounter little or no objection in practice. Elsewhere, the replacement of previously insular legislative provisions by more internationally aligned ones is still at a transitional stage, so that there has been limited opportunity to apply the new laws in practice (e.g., South Africa). On the other hand, there are examples of concrete and quite detailed provisions regarding cooperation with foreign courts and representatives to bring about fair and efficient execution of multiple insolvency procedures involving the same or mutually related debtors. Such provisions can be found both in those states that have enacted the UNCITRAL Model Law (e.g., Australia, Mexico, Poland, Rumania, U.S.A., UK), and in others that have drawn upon its provisions when revising their domestic laws, for example, Belgium, Germany, and Korea.[41] Indeed, in the case of the UK, the modern legislation pursuant to the Model Law has been allowed to coexist with far more ancient principles of cooperation and assistance, which originated from case decisions as early as the 18th century, and which became part of the established law by virtue of the common-law doctrine of precedent.[42] The case-based doctrine of assistance is expressly preserved by the provisions that have enacted the Model Law for the UK[43] and the vitality of that jurisdiction continues to be demonstrated in fresh situations arising before the courts.[44]

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[41] Republic of Korea: Debtor Rehabilitation and Bankruptcy Act (2006), Article 641 (collaboration):
"1. For efficient and fair execution among the domestic and the foreign insolvency procedures or multiple foreign insolvency procedures that are underway in respect of the same debtor or mutually related debtors, the court shall collaborate with the foreign court and the representative of the foreign insolvency procedures for the matters of the following subparagraphs:
(i) Exchange of opinions;
(ii) Administration and supervision of the property and business of the debtor;
(iii) Coordination of the process of multiple procedures;
(iv) Other necessary matters
2. The court may exchange information and opinions directly with the foreign court or the representative of the foreign insolvency procedures for the collaboration pursuant to the provision of Paragraph 1.
3. The receiver or the bankruptcy trustee of the domestic insolvency procedures may exchange information and opinions directly with the foreign court or the representative of the foreign insolvency procedures under supervision of the court.
4. The receiver or the bankruptcy trustee of the domestic insolvency procedures may, with permission of the court, consult with the foreign court or the representative of the foreign insolvency procedures regarding coordination of the insolvency procedures."

[42] E.g., Solomons v. Ross (1764) 1 Hy.Bl. 131n; 126 E.R. 79; Odwin v. Forbes (1817) 1 Buck. 57 (P.C.); Re Kooperman [1928] W.N. 101, 72 Sol. Jo. 400.

[43] Cross Border Insolvency Regulations 2006, S.I. 2006/1030, Regulation 3, together with Schedule 1, Arts. 2(a),(q), 3, and 7.

[44] See, e.g., Cambridge Gas Transport Co v. Official Committee of Unsecured Creditors of Navigator Holdings plc [2006] UKPC 26; [2007] 1 A.C. 508 (PC). For a vigorous reaffirmation of the universalist tradition of the English common law (blended with the qualities of pragmatism and realism that are integral features of the notion of "modified universalism"), see McGrath v. Riddell (Re HIH Casualty & General Insurance Ltd) [2008] UKHL 21; [2008] 1 W.L.R. 852; [2008] BCC 349 (judgment of Lord Hoffmann, esp. at paragraphs 6-7, 30, and 36 of the judgment of the House of Lords). "In many ways we live in a world of capitalism sans frontières. . . . In such a world it seems to me, and I am not alone in this, that we must do everything we properly can to ensure that such cross-border insolvencies are capable of being administrated seamlessly across those very borders," see Lord Neuberger, The International Dimension of Insolvency, 23 Insolvency Intelligence 2010, p. 43. In Rubin v Eurofinance [2010] EWCA Civ 895; [2011] Ch. 133 Ward LJ (delivering the unanimous judgment of the Court of Appeal) stated (par. 62): "I accept the general principle of private international law that bankruptcy, whether personal or corporate, should be unitary and universal. There should be a unitary bankruptcy proceeding in the

The original ALI Procedural Principle 10 ("Communications")[45] was suggested by unanimity among the experts involved in drafting the ALI NAFTA Principles. It has found its counterpart in Articles 25–27 in Chapter IV ("Cooperation with foreign courts and foreign representatives") UNICITRAL Model Law, which aspire to a somewhat broader scope by including also the desirability of cross-border communication and cooperation between courts and foreign representatives. Within the NAFTA jurisdictions originally, the ALI Guidelines contemplate application only between Canada and the United States. The exclusion of Mexico was based on the very different rules governing communications with and among courts in Mexico. In Mexico, communication with courts without notice to other parties (so-called "ex parte" communications) is a common theme, whereas in Canada and the United States communications between courts are increasingly accepted, as long as they take place on notice to the parties and with appropriate safeguards. Nearly a decade after the introduction of the ALI Guidelines, Mexico (LCM Art. 304), the United States (Section 1525), and the Canadian Act amended Autumn 2009 (Article 52(1)-(3) CCAA) have, however, introduced their versions of Article 25–27 UNCITRAL Model Law. Therefore, the domestic laws of these jurisdictions will decide on the matter of notice to parties and other procedural details, having regard to the international character of these provisions, see Article 8 UNCITRAL Model Law and Global Principle 1.5.

Although, in the three NAFTA jurisdictions, local law has replaced best-practice recommendations, it is generally felt that the Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases could fill gaps or could add detail to existing local (procedural or substantive) law or could otherwise function within the context of existing law related to communication procedures for use among courts in insolvency matters. In many of the recent protocols, involving Canada and the U.S.A, reference is made to the application of the Court-to-Court Guidelines. Moreover, in Canada the Court-to-Court Guidelines have been accepted and applied on a fairly routine basis following their endorsement in Re Matlack Inc. (2001), 26 C.B.R. (4th) 45 (Ont. S.C.J.) (see also Re Babcock & Wilcox Canada Ltd. (2000), 18 C.B.R. (4th) 157 (Ont S.C.J.) re other elements re communication through court-appointed officers). See Samuel L. Bufford, United States International Insolvency Law 2008–2009, New York: Oxford University Press, p. 547ff. See recently in Re Nortel Network SA & Others, 11th February 2009 [2009] EWHC 206 (Ch). The Court-to-Court Guidelines were also endorsed by various organizations ranging initially from the Toronto List Users' Committee in 2001 to the Canadian Judicial Council, the supervising judiciary body comprised of all federal and chief

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court of the bankrupt's domicile which receives world wide recognition and it should apply universally to all the bankrupt's assets." Ward LJ observed that this is the law stated in *Cambridge Gas* and *HIH Insurance*, which he would follow, adding: "Add to that the further principle that recognition carries with it the active assistance of the court which should include assistance by doing whatever this court could have done in the case of domestic insolvency . . . applying the common law I would therefore allow the appeal." The American position also rests upon the notion of "modified universalism," that is, "the idea that national courts should resolve such bankruptcies by pragmatic cooperation that seeks results as close as possible to those that would be obtained in a single worldwide bankruptcy proceeding," thus Jay L. Westbrook, Multinational Insolvency: A First Analysis of Unilateral Jurisdiction, in: Norton Annual Review of International Insolvency 2009, pp. 11-32, at 12, refering to In re Treco, 240 F.3d 148, 153-154, 37 Bankr. Ct. Dec. (CRR) 125 (2d Cir. 2001); In re Marconi PLC, 363 B.R. 361 (S.D.N.Y. 2007).

[45] "To the maximum extent permitted by domestic law, courts considering bankruptcy proceedings or requests for assistance from foreign bankruptcy courts should communicate with each other directly or through administrators. To the maximum extent, such communications should take advantage of modern methods of communication including telephone, telefacsimile, teleconferencing, and electronic mail, as well as written documents delivered in traditional ways. Any such communications should at all times follow procedures consistent with domestic law as to such matters."

justices, in 2006. In the U.S.A., the Court-to-Court Guidelines have not been adopted on a nationwide basis. Since October 2005, in the U.S.A., 11 U.S.C. §§ 1525, 1526, and 1527 apply, inspired by Articles 25–27 UNCITRAL Model Law. See generally In re Tri-Cont'l Exch. Ltd., 349 B.R. 627, 640 (Bankr. E.D. Cal. 2006) (referencing ALI Court-to-Court Communications Guidelines). Formal adoption of the ALI Guidelines, per se, has occurred in several cases, such as re Systech Retail Systems Corp: Between the Ontario Court of Justice, Toronto (Mr. Justice J.D. Ground), Court File No. 03-CL-4836, (Jan. 20, 2003), and the United States Bankruptcy Court for the Eastern District of North Carolina, Raleigh Division, (Hon. A. Thomas Small), Case No. 03-00142-5-ATS, (Jan. 30, 2003), including approval and adoption of the ALI Guidelines or between the Superior Court, Province of Quebec, District of Montreal, and the United States Bankruptcy Court for the Eastern District of Kentucky, Lexington Division), see In re Satisfied Brake Products, Inc. (Bankr. E.D. Ky. 2011; Case No. 11-51427) (generally referring to "the proposed guidelines for court-to-court communications").[46] All of the Court-to-Court Guidelines have been adopted by the Central District of California. The Court-to-Court Guidelines also have been adopted by the Commercial Court of Bermuda (Practice Direction, Circular No 17 of 2007, 1 October 2007), whilst these have also been adopted in a part of Australia, based on Supreme Court of New South Wales, Practice Note No. SC Eq 4, characterised as "the harmonised Australian practice," see Hon. Justice Spigelman, Cross Border Issues for Commercial Courts: An Overview, Second Judicial Seminar on Commercial Litigation, Hong Kong 13 January 2010 (on file with Reporters).

In as far as the matters regulated in Articles 25–27 UNCITRAL Model Law were not already existent in domestic law, they have been taken into account by those jurisdictions which have introduced or amended their legal system concerning provisions of international insolvency law, inspired by the UNCITRAL Model Law. As a result, by the end of 2011, the following countries had adopted rules concerning communication and cooperation in cross-border cases: United States: U.S. Bankruptcy Code (Chapter 15); United Kingdom: the Cross-Border Insolvency Regulations 2006 (S.I.2006/1030), Schedule 1, Articles 25-27, and the Cross-Border Insolvency Regulations (Northern Ireland) 2007 (S.R.N.I. 2007/115), Schedule 1, Articles 25-27; New Zealand: Cross-Border (Insolvency) Act 2006, Schedule 1, Articles 25-27; Australia: Cross-Border Insolvency Act 2008, Part 1 together with Schedule 1, Articles 25-27. South Africa has adopted the UNCITRAL Model Law (enacted as the Cross-Border Insolvency Act 42 of 2000 in South Africa) that allows for coordination and cooperation between courts.[47] In Slovenia, Articles 471 and 473/2 in connection to Article 473/1-4 of the proposed

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[46] In re Mosaic Group Inc.: Between the Ontario Court of Justice, Toronto (Mr. Justice J.M. Farley) Court File No. 02-CL-4816, (December 7, 2002), and the United States Bankruptcy Court for the Northern District of Texas (Hon. Harlin DeWayne Hale), Case No. 02-81440, (January 8, 2003), including approval and adoption of the ALI Guidelines.

- In re PSINet: Between Ontario Superior Court of Justice, Toronto (Mr. Justice J.M. Farley), Case No. 01-CL-4155, (July 10, 2001), and United States Bankruptcy Court for the Southern District of New York (Hon. Robert E. Gerber), Case No. 01-13213, (July 10, 2001), including approval and adoption of the ALI Guidelines.

- In re Matlack Systems: between Ontario Superior Court of Justice, Toronto (Mr. Justice J.M. Farley), Case No. 01-CL-4109, (April 19, 2001) and the United States Bankruptcy Court for the District of Delaware (Hon. Mary F. Walrath), Case No. 01-01114 (MFW), (May 24, 2001), including approval and adoption of the ALI Guidelines. For a general overview, referring to other sources, see Bob Wessels, Bruce A. Markell, and Jason J. Kilborn, International Cooperation in Bankruptcy and Insolvency Matters, Oxford University Press, New York, 2009, especially Chapter 6 ("Convergence through Legislation and Professional Cooperation").

[47] The Act itself is not in operation because of its designation/reciprocity clause that calls for the Minister of Justice to designate countries to which the Act would apply. The Minister has not yet designated any such countries. See for detailed references for those countries that have enacted or adopted the Model Law the

new Slovenian Insolvency Code are underway, while in the Netherlands (Subchapter 10.5 of the proposed pre-draft Insolvency Act) have been drafted, but early 2011 have been withdrawn from the parliamentary process due to reasons unrelated to the contents of this Subchapter.

Not (directly) related to the Model Law, but inspired by it and by other examples, rules regarding cross-border communication and cooperation have been adopted in other states, although these mainly relate to communication between insolvency administrators. Examples include Belgium, Cayman Islands, Croatia, Germany, Japan, Spain, Ukraine, and Vietnam. In 2004, in Belgium, as part of a full overhaul of existing private international law in Belgium, as of October 1, 2004, Chapter XI ("Collective Insolvency Proceedings") was introduced, and it applies to relationships to non-EU Member States. Chapter XI contains only five Articles, among which is Article 120 ("Duty to inform and cooperate"). The provision creates a conditional duty, it only applies on a reciprocal basis, and it does not cover duties of cooperation by a Belgian court. In Cayman, the Foreign Bankruptcy Proceedings (International Cooperation) Rules 2008 implement Part XVI of the Companies Law, thus allowing foreign Cayman registered companies to be wound up in the Cayman Islands, which makes the need for cooperation with foreign insolvency office holders obvious. According to Article 307 of Croatian Bankruptcy Law ("BL") the representative/trustee of the foreign bankruptcy proceedings and the representative/trustee of the domestic bankruptcy proceedings shall cooperate with each other. They should be bound to exchange all legally permitted information that may be of importance for conducting both of the proceedings. There is no express statutory provision on cooperation between domestic and foreign courts, but the necessity of this cooperation arises from Article 328 BL that regulates the distribution of bankruptcy estate in domestic secondary proceedings. It should be noted that Croatia will become an EU Member State on July 1, 2013. In Germany, § 357 German Insolvency Act obliges the administrator to inform the foreign administrator without delay of all circumstances that may be significant for the implementation of the foreign insolvency proceedings. The foreign administrator is entitled to attend the creditors' meetings and also to submit proposals for the distribution or other use of the domestic assets. In Japan, the Corporate Rehabilitation Law became effective in 2000, while the Law on Recognition of and Assistance in Foreign Insolvency Proceedings came into effect in 2001, and the Reorganisation Law and Bankruptcy Law were reformed in 2002 and 2004, respectively. The Model Law had important influences on each of these new and reformed laws. The Corporate Rehabilitation Law and the Reorganisation Law and Bankruptcy Law contain provisions for the harmonization with foreign insolvency proceedings. For example, a trustee must cooperate with foreign trustees; the cause for commencement of a bankruptcy or corporate reorganization proceeding is presumed when similar insolvency proceedings are pending in a foreign country, a foreign trustee is entitled to attend a creditors' meeting and to submit a proposal for a restructuring plan or may participate in a local insolvency proceeding on behalf of foreign creditors who have claims on a debtor in both the foreign and the local insolvency proceedings. In Spain, Article 227 *Ley Concursal* imposes on insolvency organs the obligation to cooperate with foreign insolvency proceedings. The provision includes the exchange of information, the coordination of the administration and control of the insolvent's estate, and the approval and application by the Courts of agreements related to coordination of the proceedings. In Ukraine, a bill is pending, which is based on the Model Law and on the EU Insolvency Regulation.[48] Also, in Greece in 2010, legislation enacting the Model Law has been issued. In Vietnam, communications must be consistent with procedural principles applicable to Vietnam. Pursuant to Article 414 of the Civil Procedure Code, the principles

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country-by-country chapters in Look Chan Ho (ed.), Cross-Border Insolvency. A Commentary on the UNCITRAL Model Law, 2nd ed., London: Globe Business Publishing, 2009.

[48] See Andriy Vyshnevsky, Ukraine, in: Christopher Mallon (ed.), The Restructuring Review, 2nd ed., London: Law Business Research, 2009, p. 349ff.

for legal assistance in civil proceedings prescribe legal assistance between a Vietnamese court and a foreign court in civil proceedings. Assistance shall be carried out in full respect for each other's independence, sovereignty, and national territorial integrity, nonintervention in each other's internal affairs, equality and mutual benefit in compliance with international treaties that the Socialist Republic of Vietnam has signed or acceded to and with the law of Vietnam.

It should be noted, however, that only the British, Polish, and Romanian legal rules, and the draft Dutch rules, provide for cross-border judicial cooperation. The fact that currently over 40 jurisdictions are engaged in certain forms of communication and coordination of cross-border insolvency cases leads German Professor Paulus to suggest that "there is global unanimity with respect to the need and practicability of co-operation of administrators" but that "discord exists when it comes to the inclusion of judges in this scheme."[49]

In May 2010, the German authors Busch, Remmert, Rüntz, and Vallender (three judges and a legal advisor to the German Ministry of Justice ("*Ministerialrad*")) have argued that the ALI Guidelines should be seen as a valuable resource for cross-border judicial communication.[50] They conclude that also, after a detailed analysis of these Guidelines, it now seems that according to the German domestic (procedural) law, much more cross-border communication is possible than expected. Their assessment is made within the context of the authors' reading of three points of departure, laid down in the German Insolvency Act ("*Insolvenzordnung*"), Articles 1 (Objectives of the insolvency proceeding), 5(1) (Principles of the Insolvency Proceeding; the insolvency court shall investigate ex officio all circumstances relevant to insolvency proceedings), and 21(1) (The insolvency court shall take all measures appearing necessary in order to avoid any detriment to the financial status of the debtor for the creditors until the insolvency court decides on the request). In the light of these points of orientation, and tested against German domestic law, the result is that out of 17 ALI Guidelines, more than half of these can be accepted unconditionally and four of them in a modified form. Four ALI Guidelines cannot be accepted and should not be taken into account in a protocol. The authors refer to ALI Guidelines 6, 9(b), 12, and 14. Indeed, in general the authors do not see any objections against a protocol, and they even provide a sample ("*Mustervereinbarung*"). These four noncompatible Guidelines especially relate to certain procedural requirements in exchanging documents and evidence, conducting a joint hearing, the establishment of a Service List mentioning parties that are entitled to notices, and the cancellation of a stay. In the Netherlands, in September 2010, the Amsterdam court's Judge Ms. Melissen, who also presides over an informal commission of insolvency judges in the Netherlands ("*Recofa*"), has published an overview of the tombstone soft-law documents of international insolvency, including the ALI Guidelines. Judge Melissen does not see any objection in principle against cross-border communication, under the condition that certain rights of creditors and legal positions of the administrator and the judge are warranted. See W.A.H. Melissen, *Communicatie en samenwerking tussen insolventierechts in Europees en internationaal verband*,

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[49] Paulus, Judicial Cooperation in Cross-Border Insolvencies, via: http://siteresources.worldbank.org/GILD/Resources/GJF2006JudicialCooperationinInsolvency_PaulusEN.pdf (last visited Mar. 2, 2012) or go to http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/LAWANDJUSTICE/GILD/0,,contentMDK:21090886~menuPK:2869427~pagePK:64065425~piPK:162156~theSitePK:215006,00.html (last visited Mar. 2, 2012) and then to "Global Judges Forum 2006 – Buenos Aires.".

[50] See Busch, Peter, and Andreas Remmert, Stefanie Rüntz, and Heinz Vallender, *Kommunikation zwischen Gerichten in Grenzüberschreitenden Insolvenzen. Was geht and was geht nicht*. NZI 2010, pp. 417-430; a shorter version in English is available via http://www.iiiglobal.org/component/jdownloads/viewdownload/362/5475.html.

Trema 2010, p. 289ff. In France, the President of the Court of Appeal in Colmar (who is also a law professor in Paris and Strasbourg), has suggested proposals to institute "*une veritable coopération judiciaire*" (a real judicial collaboration), see Jean-Luc Vallens, *Réviser le règlement communautaire CE 1346/2000 sur les procédures d'insolvabilité*, Revue des Procédures Collectives, Mai-Juin 2010, p. 25ff. In Italy, such points of departure as mentioned by the German authors are less specific, while general procedural rules for civil procedures only allow courts to communicate with foreign courts after approval of the government. See Justice Luciano Panzani, Cooperation between Courts in Italy. The ALI and International Insolvency Institute Guidelines on Court-to-Court Communications, paper presented at the 11th Annual International Insolvency Conference, New York, June 13-14, 2011. Panzani explains that also domestic procedural rules (in Italy, a hearing does not always take place) establish a procedural environment in which the Court-to-Court Guidelines could only be used "to collect information or to understand what would be the opinion of the foreign Court on the issues of common interest."

As of March 2012 in Germany, new legislation will come into force, as a result of the *Gesetz zur weiteren Erleichterung der sanierung von Unternehmen* (Law for further flexibility of reorganization of businesses), issued by the German Ministry of Justice. § 348(2) of the German Insolvency Act then will contain the following text: "When the requirements for recognition of a foreign insolvency proceeding have been or will be determined to be met, the insolvency court can cooperate with the foreign insolvency court, more particularly provide information, which is meaningful for the foreign proceeding." Although from both its text as well as its place in the German Insolvency Act, it seems to follow that the discretion for a German insolvency court ("can") only relates to those courts that are not bound by the EU Insolvency Regulation, the generally accepted doctrine in Germany is that rules applicable in relation to non-EU Member States may be applied in an EU context, as long as they do not contradict European legislation. In Poland, in relation to non-EU Member States, the Model Law has been enacted as domestic law. Polish Judge Anna Hrycaj, The Cooperation of Court Bodies of International Insolvency Proceedings, International Insolvency Law Review 2011/1, p. 7 ff., submits that the rules for cross-border insolvency-court cooperation do not apply in cases to which the EU Insolvency Law applies.

With the original endorsement, its application in many cases in Canada and the U.S.A., and the present (and still growing) degree of global general consensus on the merits and the practicability of the core content of the Court-to-Court Guidelines that have emerged from the questionnaires the Reporters have sent out, a "global" introduction of the Court-to-Court Guidelines, including such modifications that may be appropriate in the circumstances of each individual case, can be recommended. The preferred form of introduction will be discussed below, having due regard to several of the complications that may arise with global application of the Court-to-Court Guidelines. The Court-to-Court Guidelines are intended to enhance coordination and harmonization of insolvency proceedings that involve more than one country through communications among the jurisdictions involved. Communication can be arranged with and through office holders or in two-way relations between courts themselves, either directly or indirectly, including dispatch of letters or papers. The Court-to-Court Guidelines are meant to permit rapid cooperation in a developing insolvency case while ensuring due process to all concerned. At the same time, they aim to prevent concern on the part of litigants, and to introduce a process that is transparent and clearly fair.

The Court-to-Court Guidelines do not limit their character to a nonbinding set of best practices. It is intended that a court that wishes to employ the Guidelines—in whole or part, with or without

modifications—"should adopt them formally before applying them."[51] It is at this juncture where the survey of the questionnaires point at the problematic dual nature of the ALI NAFTA Principles and the Court-to-Court Guidelines, as in general the Principles have their meaning as a source of "soft law," while the Guidelines suppose that they are applied or adopted by a court. From the Questionnaires the Reporters have sent out, but also in legal literature, the legal nature of the outcome of the approval process (e.g. two—as a minimum, but potentially more—aligned court decisions from courts in different jurisdictions "agreeing" to use the Guidelines, which agreement—in amended form—sometimes is laid down in a "Protocol") raise many questions. In the context of the Reporters' remit, only a few of these questions are addressed below. The most important one is related to the discretion of a court to apply or to adopt Guidelines, such as the Court-to-Court Guidelines. The suggested adopting process of the Court-to-Court Guidelines, including its conditions,[52] is the following:

(i) A Court may wish to make its adoption of the Guidelines contingent upon, or temporary until, their adoption by other courts concerned in the matter;

(ii) The adopting Court may want to make adoption or continuance conditional upon adoption of the Guidelines by the other Court in a substantially similar form, to ensure that judges, counsel, and parties are not subject to different standards of conduct;

(iii) The Guidelines should be adopted following such notice to the parties and counsel as would be given under local procedures with regard to any important procedural decision under similar circumstances.

In addition, in the instance that communication with other courts is urgently needed, the Court-to-Court Guidelines suggest the introduction of a conflict-of-laws rule, that is, in such a case the local procedures, including notice requirements, that are used in urgent or emergency situations should be employed. If this is appropriate, this could include an initial period of effectiveness, followed by further consideration of the Guidelines at a later time. The Guidelines, however, do not address more detailed questions about the parties entitled to such notice (for example, all parties or representative parties or representative counsel) and the nature of the court's consideration of any objections (for example, with or without a hearing). These items are intended to be governed by the Rules of Procedure in each jurisdiction.[53]

From legal literature and the Questionnaires set out by the Reporters, there appear to be four main hindrances to the wider application of the Guidelines in the way that has already been demonstrated in USA and Canada. These hindrances are concerned with the following topics: (i) existing law and the role of the courts, (ii) reciprocity, (iii) language, and (iv) legal terms. It is noted that especially the latter two are of a more general nature and not specifically related to matters of insolvency. They are dealt with in Global Principle 21 (Language) and the Appendix of this report respectively.

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[51] American Law Institute, Transnational Insolvency: Cooperation Among the NAFTA Countries: Principles of Cooperation Among the NAFTA Countries, 2003, Appendix B, Introduction, p. 115.

[52] See American Law Institute, Transnational Insolvency: Cooperation Among the NAFTA Countries: Principles of Cooperation Among the NAFTA Countries, 2003, Appendix B, Introduction, p. 115ff.

[53] The Guidelines originally clearly are intended to serve as a procedural mechanism to be applied "only in a manner that is consistent with local procedures and local ethical requirements." See ALI NAFTA Principles, Appendix B (Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases), Introduction, p. 116. They do not address the details of notice and procedure, as these depend upon the law and practice in each jurisdiction.

(i) Existing law and the role of the courts

In a large group of countries the law, including its constitution and its procedural statutes, determines strictly the powers of a court and the practical procedural actions a court is allowed to take. In their interpretations or decisions courts may be guided by the rationale of several guidelines of the Court-to-Court Guidelines, but it has been brought forward that they lack the authority to "adopt" or "apply" the Guidelines and/or to suggest to another court to "approve" the suggested course of dealing with the specific cross-border insolvency case, or conversely to "approve" certain approaches suggested by a foreign court. In general the sanction is that any breach of domestic rules of such nature, embodied in a judgment of a court of first instance, is subject to nullification. In some countries the rules regarding communication or cooperation may be regarded as limited or with insufficient detail and clarity.

In addition, the Court-to-Court Guidelines assume an active role for the courts involved. In certain countries, a court may have a different role, that is, only acting after having been explicitly requested by the debtor, by the insolvency office holder, by a creditor, or by any other interested party, which is allowed to do so either based on the law of the courts' jurisdiction or the rules applicable in a cross-border insolvency case. The mutuality of court-to-court communication as assumed by the Guidelines (communications are to take place "to the maximum extent" possible) is based on the rationale that courts on an equal footing work together towards a common goal. In an ideal international insolvency case, both courts have an equal interest to know all relevant details of the case to be able to arrange for providing solutions to problems that arise between the proceedings. Where the applicable law does not allow a court (fully) to collect facts or evidence, communication or cooperation with another court is apt to fail.

In a large group of jurisdictions, mostly belonging to the Commonwealth, existing arrangements make it possible for foreign representatives to be recognized or assisted by the court following a formal approach for that purpose. Assistance may be provided based on applicable law and/or based on discretion, applicable principles of international private law, comity, or precedent. See, e.g., for South Africa: Ex parte B Z Stegmann 1902 TS 40; Ex parte Steyn 1979 (2) SA 309 (O); Ward & Another v Smit & Others: In re Gurr v Zambia Airways Corporation Ltd 1998 (3) SA 175 (SCA), where the court will describe the mode of notice of the order to interested parties. The order would usually deal with items such as (i) recognition of the appointment of the foreign representative, (ii) duration of the order, (iii) the general powers of the foreign representative, (iv) security to be afforded by foreign representative to the satisfaction of the Master of the Supreme Court, (v) the service of the order to relevant parties, (vi) supervision by the Master and practical arrangements regarding the administration of the order and the submission of estate accounts, and (vi), special conditions regarding meetings of creditors, proof, admission and rejection of claims, plans of distribution, and (vii) the rights and powers of the foreign representative. In South Africa, these powers will be gleaned from the Insolvency Act 24 of 1936 and the Companies Act 61 of 1973. [See Moolman v Builders & Developers (Pty) Ltd 1990 (1) SA 954 (A); Ex parte Steyn, 1979 (2) SA 309 (O). In China, there might not be strong objection to the acceptance of the Guidelines under the current Chinese laws. Questions exist with regard to the intention or purpose of communication between the Chinese court and its foreign counterparts. It is reported that, in China, it is the general view that court-to-court communication serves as one of the most useful elements of cooperation in cross-border cases. It is seen as a prerequisite, for Chinese courts to adopt the Guidelines, that indeed the facts of the case require the decision to cooperate with foreign counterparts in dealing with a specific cross-border case. Article 5 of P.R. of China's Enterprise Bankruptcy Law (EBL) of 2006 sets several conditions for recognizing a foreign insolvency proceeding and for granting assistance.[54] The question whether a

[54] Article 5: "Once the procedure for bankruptcy is initiated according to this Law, it shall come into effect in respect of the debtor's property outside of the territory of the People's Republic of China. Where a

foreign proceeding accords with these conditions might act as a preliminary element for Chinese courts prior to adopting the Guidelines. In Germany, no cultural objections have been signalled. Practical concerns exist to the effect that the necessity to request internally, at least in some German courts, an approval for every individual international phone call nevertheless may be a hindrance. In China, more practically, there might be local or regional protectionism when such a case involves substantial interests of Chinese creditors or other stakeholders, which possibly may hinder efficient cooperation from Chinese courts. If the economic interest is important enough to affect the international image of China for attracting foreign investment, Chinese courts may readily provide efficient cooperation. The suggested approach in China is that the Supreme Court should be persuaded by a local court, which has been approached by a foreign court, to issue an overall authorization to all Chinese courts, enabling a court to communicate with its foreign counterparts if a foreign proceeding satisfies the conditions set out in Article 5 of the 2006 EBL, and a Chinese court decides to grant recognition and provide cooperation. Also, other jurisdictions signal no objections to applying the Guidelines, including Belgium, South Africa, Hungary, the Netherlands, Poland, Spain, and Vietnam. In Spain, courts must respect, at all times, Spanish rules of procedure. However, rules of procedure do not cover, in such a detailed fashion, communications with foreign courts. There is nothing in the law that prevents a Spanish Court from adopting communication guidelines in an international insolvency case. The Netherlands take the same position. In practice, it may be considered that the approval of these guidelines is included in the obligation of the insolvency organs to cooperate with foreign insolvency proceedings, which explicitly refers to the approval of agreements between courts for the coordination of the proceedings.

In several countries, the Court-to-Court Guidelines are not accepted and/or applied by courts and/or insolvency administrators. In some cases, domestic law does not provide for communications between courts whatsoever. Examples include Austria, where no legal provisions or informal guidelines exist that relate to communication between the courts. Communications, on the other hand, do not seem to be excluded in Austrian law. Much weight is given to the individual judge and the practice of this judge and its court, which can vary immensely from court to court. It has been reported that the Court-to-Court Guidelines presently are not familiar to judges, including judges in several European jurisdictions. Another factor is of influence, too. In general, there will be differences in the judicial attitude of individual judges all over the world. Generally speaking, common-law judges will demonstrate an active position, including the creation of judge-made law, and bring an open-minded approach to their role in furthering cross-border cooperation between insolvency administrators in a certain international insolvency case. See, e.g., Elizabeth Warren and Jay L. Westbrook, Court-to-Court Negotiation, ABI Journal November 2003, p. 29, submitting "courts, who are the ultimate dealmakers." These judges, too, may favor direct court-to-court communication, although several constraints have been put forward, based on the very nature of insolvency proceedings, the safeguards applicable under domestic law, relevant codes of ethics, the need to know about and to respect the procedural requirements of other legal systems, and language, see UNCITRAL, Fortieth session, Vienna, 25 June–6 July 2007, A/CN.9/629 (www.uncitral.org). In civil-law-oriented jurisdictions, a

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legally effective judgment or ruling made on a bankruptcy case by a court of another country involves a debtor's property within the territory of the People's Republic of China and the said court applies with or requests the people's court to recognize and enforce it, the people's court shall, according to the relevant international treaties that China has concluded or acceded to or on the basis of the principle of reciprocity, conduct examination thereof and, when believing that the said judgment or ruling does not violate the basic principles of the laws of the People's Republic of China, does not jeopardize the sovereignty and security of the state or public interests, does not undermine the legitimate rights and interests of the creditors within the territory of the People's Republic of China, decide to recognize and enforce the judgement or ruling."

judge is generally passive or idle, unless requested by a party of interest. Generally speaking, these judges only provide judge-made law when their constitutional or procedural position as applicant of existing law allows them to do so, most probably also after having been invited by the relevant parties to decide in that manner. These judges—again generally speaking—will oppose or at least be reluctant or unresponsive to direct court-to-court communication. See, for these differences, A. Gouron et al., *Europaesiche und Amerikanische Richterbilder*, Frankfurt a.M., Klosterman, 1996. In connection with international insolvency cases: Han Jongeneel, Cross-Border Co-operation for Courts and Administrators, in: Bob Wessels and Paul Omar (eds.), Crossing (Dutch) Borders in Insolvency, Nottingham, Paris: INSOL Europe 2009, pp. 97-105.

Several tendencies however point in the direction that the role of a court is changing into a judicial body that acts, also internationally, in a cooperative mode. These tendencies include (a) the duty to cooperate, which is felt in accordance with the notion of comity and the basis of the system of recognition of insolvency judgments under the application of the EU Insolvency Regulation (see Recital 22: "Recognition of judgments delivered by the courts of the Member States should be based on the principle of mutual trust"), (b) the existence of some anchor points where courts are expected to communicate and to cooperate, see, e.g., Article 8.2 and 19.3 of the Directive 2001/24/EC of 4 April 2001 on the reorganization and winding-up of credit institutions and Article 8 of the EC Regulation 867/2007 of 11 July 2007 establishing a European small-claims procedure (cross-border hearing of parties). (c) Another tendency is the creeping convergence of civil procedural law and common procedural law. It is submitted that, during the last 10 to 15 years, several efforts have been made in harmonizing civil procedural law, including ALI/UNIDROIT projects, which have culminated in the ALI/UNIDROIT Principles of Transnational Civil Procedure (2006), adopted in 2004. See G.C. Hazard et al., Introduction to the Principles and Rules of Transnational Civil Procedure, in: 33 New York University Journal of International law and Politics 2001, 769ff. Furthermore, it has been submitted that the divide concerning procedural rules between civil-law-oriented and common-law-oriented legal systems is narrowing, see C.H. van Ree, Towards a Procedural Ius Commune, in: J. Smits and G. Lubbe (eds.), Remedies in Zuid-Afrika en Europa, Intersentia: Antwerp/Oxford/New York, 2003, 217ff; H. Kötz, Civil Justice Systems in Europe and the United States, in: 13 Duke Journal of Comparative and International Law 2003, 61ff, and Remco van Rhee and Remme Verkerk, Civil Procedure, in: Jan M. Smits, Elgar Encyclopedia of Comparative Law, 2006, 120ff. These latter authors also refer to "a tendency to converge 'naturally'" as a result of the increasing interaction between the systems," providing as examples of a convergence of civil-law procedures to common law: orality, discovery (disclosure), and pre-action protocols. In a broader context on convergence between civil law and common law in such matters as interpretation (an increasing tendency from "literal" to "purposive" approach) and the altering role of civil-law judges (an increasing tendency from "law-applying" to "law-forming" jurisprudence), see Thomas Henninger, *L'harmonisation internationale de la méthode juridique*, in: C. Chappuis et al. (eds.), *L'harmonisation internationale du droit*, Genève: Schulthess 2007, at 3ff.

(ii) Reciprocity

In the area of international insolvency a much wider concept may hinder the application of Guidelines that are based on the Court-to-Court Guidelines. It is the concept of sovereignty in as far as it serves to protect a state's general economic and social policies or its existing judicial framework. An illustration of its wider impact relates to the UNCITRAL Model Law. Although rejected as an approach during the negotiations of the Model Law, a number of countries have adopted provisions applying the Model Law on a reciprocal basis, although the nature of these reciprocity provisions varies: Argentina (draft), Belgium, British Virgin Islands, Canada, Mexico, Romania, and South Africa. Unrelated to the Model Law, Belgium, China, Jersey, Spain, Tanzania, and Turkey apply reciprocity provisions in international insolvency cases.

Data regarding reciprocity have been derived from the Questionnaires, the overview of a member survey of May 2006 of the International Association of Insolvency Regulators (IAIR, see www.insolvencyreg.org) and: Look Chan Ho (ed.), Cross-Border Insolvency. A Commentary on the UNCITRAL Model Law, 2nd ed., London: Globe Business Publishing, 2009. In China, the law requires that mutual recognition and judicial assistance shall be based on the treaties or reciprocity (for example, under the Civil Procedure Law (CPL 1991), as amended in 2007 and entered into effect on October 28, 2007). A request for providing judicial assistance shall be conducted through channels stipulated in the international treaties concluded or acceded to by the People's Republic of China; if there is no treaty regarding judicial assistance between China and the foreign country, such a request may be made through diplomatic channels (Article 261 of CPL). China has so far concluded over 20 bilateral treaties regarding judicial assistance in civil and commercial cases (not specifically on the bankruptcy-related matters), and it is hard to prove whether there is a reciprocity between China and other countries in most circumstances, since China has hitherto lacked practice in cross-border insolvency cases. Article 261 of CPL also mentions diplomatic channels, which might add some uncertain elements to the sustainability of court-to-court communication in the absence of treaties or reciprocal relations between China and the involved foreign country.

In the context of the UNCITRAL Model Law, Wessels has submitted that the concept of reciprocity is quite outdated in terms of cross-border insolvency issues concerning business undertakings (which is the focus of the Model Law). Moreover the Model Law's neutral, procedural nature respects a State's political and legal integrity, whilst ensuring cooperation among courts allowing the administration of international insolvency cases to be dealt with effectively, equitably, and efficiently, while Article 6 Model Law, if enacted literally, allows a domestic court to refuse to take action if such an action would be manifestly contrary to the public policy of the domestic State. See Bob Wessels, International Insolvency Law, Deventer: Kluwer, 3rd ed., (2012), para. 10385. ALI Procedural Principle 1 provides for a public-policy exception concerning recognition of a foreign proceeding. See Global Principle 3 below. For a discussion of the different aspects of reciprocity, see, e.g., Frederic Tung, Skepticism About Universalism: International Bankruptcy and International Relations, U.C. Berkeley Law and Economics Working Paper Series, Working Paper Series 2001; Susan L. Stevens, Commanding International Judicial Respect: Reciprocity and the Recognition and Enforcement of Foreign Judgments, in: 26 Hastings International & Company Law Review 2002, 115; Peter Hay, On Comity, Reciprocity and Public Policy in U.S. and German Judgments Recognition Practice, in: Private Law in the International Arena (Festschrift Kurt Siehr), T.M.C. Asser Institute, 2004, 237; C.G. van der Plas, *De taak van de rechter en het IPR*, Ph.D. Nijmegen, 2005, 495; K.D. Yamauchi, K.D., Should Reciprocity Be a Part of the UNCITRAL Model Cross-Border Insolvency Law?, in: 16 International Insolvency Review, Winter 2007, Issue 3, p. 145ff, and Michael Nunner, *Kooperation internationaler Gerichte*, Jus Internationale et Europaeum 36, Mohr Siebeck, 2009, p. 75ff.

Within the broad concept of "cooperation," adopted by the Reporters, other forms and alternatives that transcend a given case are to be considered and may be recommended. Firstly, in appropriate circumstances, courts or their representatives (e.g., a national body of judges) could share information on a general level, unrelated to specific cases, with each other, either on request or spontaneously, for example, when it is to be foreseen that, in the future, case-to-case contacts are to be expected. Traditionally, international conferences are a prime example of such information sharing. In such a way, a better understanding may be created for the importance of international coordination and generally applied methods. Both the ALI NAFTA Principles and the ALI Guidelines Applicable to Court-to-Court Communication in Cross-Border Cases are much focused on a "court" and on the discretionary and active role of a judge in an (international) insolvency case. As will be commented upon later, in many countries the role of a court, also in insolvency cases, will vary. In the area of direct judicial communication in family-law matters (especially in the context of the Hague Convention of October 19, 1996,

on jurisdiction, applicable law, recognition, enforcement, and cooperation in respect of parental responsibility and measures for the protection of the child) in recent years "judicial networks" have been developed, to enhance effective judicial cooperation between states. An appointing body (e.g., a state) could, for instance, appoint one or more judges who are particularly entrusted with the facilitation of contacts between the courts in their jurisdiction with courts in other jurisdictions, and reciprocally to facilitate contacts initiated by courts from other jurisdictions, with the relevant court in their own jurisdiction. In the given circumstances, a court may, in case it wishes to consult a court in another jurisdiction, avail itself from the intermediation of the said "contact judge." Such intermediation will also be available for the court in the other jurisdictions in case it wishes to consult a court in the other jurisdiction. In case consultation requires translation or the services of an interpreter, the "contact judge" will see to it. Prior to any consultation, the court should inform all affected parties. After consultation, the court reports to these parties. Although the Reporters subscribe to the viewpoint that the establishment and development of judicial networks—to which an Internet website is an invaluable tool—will be of great importance to cross-border practice in this field, it is beyond the remit of the project to discuss this topic further. However, as a potential aid to its development, the experiences gained in cross-border activities in this area of law and the recommendations made by judges and experts in some 50 jurisdictions, together with the European Commission, the International Association of Women Judges, as well as the Hague Conference on Private International Law (HccH), have all been taken into account in drafting the Global Principles. See, from the 2009 conclusions and recommendations (www.hcch.net), conclusion 1 ("The conference emphasises the value of direct judicial communications in international child protection cases, as well as the development of international, regional and national judicial networks to support such communications") and recommendation 17 ("The conference recognises that there is a broad range of international instruments in relation to which direct judicial communications can play a valuable role"). See also James M. Farley, Good practices in the field of cross-border insolvency proceedings in light of the proposed Hague draft General Principles for Judicial Communications, in: The Judges' Newsletter on International Child Protection, vol. XV / autumn 2009 Special Focus, Theme 3 (www.hcch.net). In their proposals, the Reporters have taken notice of the Report on Judicial Communications in Relation to International Child Protection, April 2011 (drawn up by Philippe Lortie, First Secretary Permanent Bureau HccH) and its accompanying Report of March 2011, which includes "Principles for Direct Judicial Communications in specific cases including commonly accepted safeguards."

Principle 2 Aim

2.1. The aim of these Global Principles is to facilitate the coordination of the administration of international insolvency cases involving the same debtor, including where appropriate through the use of a protocol.

2.2. In particular, these Global Principles aim to promote:

(i) The orderly, effective, efficient, and timely administration of proceedings;

(ii) The identification, preservation, and maximization of the value of the debtor's assets, including the debtor's business, on a global basis;

(iii) The sharing of information in order to reduce costs; and

(iv) The avoidance or minimization of litigation, costs, and inconvenience to the parties in the proceedings.

2.3. These Global Principles aim to promote the administration of separate international insolvency cases with a view to:

(i) Ensuring that creditors' interests are respected and that creditors are treated equally;

(ii) Saving expense;

(iii) Managing the debtor's estate in ways that are proportionate to the amount of money involved, the nature of the case, the complexity of the issues, the number of creditors, and the number of jurisdictions involved; and

(iv) Ensuring that the case is dealt with effectively, efficiently, and timely.

Comment to Global Principle 2:

The focus of the Global Principles is on the alignment and attuning of two or more insolvency proceedings and therefore to facilitate coordination within the context of a common purpose regarding the debtor, his assets, and the treatment of his creditors. This results in two principal rules, one concerning the aim of the Global Principles themselves, and one governing the specific insolvency proceeding concerning the said debtor. Principles 2.1 and 2.2 are related to the general aim of the Global Principles, always covering two or more insolvency proceedings in two or more countries. Principle 2.3 covers each separate insolvency proceeding that takes place, whether it is the sole proceeding, or one that is taking place at the same time as other, parallel proceedings. The text of Global Principle 2 follows, in many respects, Guideline 2 of the CoCo Guidelines.

The text of Principle 2.1 underlines the function of the Global Principles as facilitating the coordination between insolvency cases pending in several countries. Coordination is possible through all types of modern international modes of professional communication (telephone, e-mail, fax, or video link, including conferencing arrangements enabling discussions to take place simultaneously with creditors in several jurisdictions) and through the use of a protocol. A protocol is a means of agreeing to the alignment between different insolvency proceedings or pre-reorganization measures, which is designed to overcome certain legal or factual obstacles. Office holders often enter into such protocols, which have been used in (mostly non-European) cross-border insolvency cases. In Principle 2.1, the word "protocol" has been used as it builds on a term used in many international cases during the last two decades, although in practice several other terms have been used, too, to—broadly—refer to the same instrument, such as "(governance) protocol,"[55] "cooperation agreement or protocol,"[56] and "cross-border agreement" in international insolvency cases.[57]

The text of Principle 2.2 specifies the central objectives of the Global Principles. It sets out the context for professional action and behavior and may assist in providing guidance in those matters of the Global Principles that need interpretation or that are not covered at all. The first two objectives have broader meaning[58] or a stronger historic base in other statements of best

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[55] See CoCo Guideline 2.1.

[56] See CoCo Guideline 16.2.

[57] The UNCITRAL Practice Guide (2009), under B "Glossary," in "1, Notes on terminology" states: "Cross-border agreements are most commonly referred to in some States as "protocols," although a number of other titles have been used including insolvency administration contract, cooperation and compromise agreement, and memorandum of understanding. These Notes attempt to compile practice with respect to as many forms of cross-border agreement as possible and, since the use of the term "protocol" does not necessarily reflect the diverse nature of the agreements being used in practice, these Notes use the more general term "cross-border agreement."

[58] Principle 11.2 ALI/UNIDROIT Principles: "The parties share with the court the responsibility to promote a fair, efficient, and reasonably speedy resolution of the proceeding. The parties must refrain from procedural abuse, such as interference with witnesses or destruction of evidence." Cross-border insolvency proceedings involve an amalgam of interests of many types of creditors (secured; unsecured; subordinated),

practice.[59] Principle 2.2(ii) stresses the importance of business preservation as a means of maximizing value, see also the Comment to Principle 1.1.

Principles 2.1 and 2.2 relate to connected jurisdictions or related insolvency proceedings, while Principle 2.3 concerns itself with each of the respective proceedings where there are separate, parallel insolvency proceedings to be coordinated. The formulation of Principle 2.3 is inspired by the Overriding Objective in Part 1 of the Civil Procedure Rules (England and Wales) 1998 (S.I. 1998/3132, as amended). The specific objectives align with those mentioned in Principle 2.2. The duty to ensure the creditors' interests flows logically from the similar aim mentioned in Principle 1.2.

REPORTERS' NOTES

In Principle 2.1, reference is made to a "protocol." The legal questions and practical problems inherent to the use of protocols have been noted by UNCITRAL, which has taken up the work regarding the implementation of the coordination and cooperation provisions of the UNCITRAL Model Law, including how implementation could be facilitated by making the legal and judicial experience with respect to the negotiation, use, and content of protocols available, in some form, to the international legal community.[60] The work under the auspices of UNCITRAL has led to the adoption by UNCITRAL on July 1, 2009, of the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation ("Practice Guide"), presently in the form of an interim final text, which provides information for insolvency practitioners and judges on practical aspects of cooperation and communication in cross-border insolvency cases. The Practice Guide provides an analysis of some 40 agreements, ranging from written agreements approved by courts to oral arrangements between parties to proceedings taking place in the past decade. The Practice Guide illustrates how the resolution of issues and conflicts that might arise in cross-border insolvency cases could be facilitated by cross-border cooperation, in particular the use of such agreements or protocols. It includes sample clauses to illustrate how different issues have been, or might be, addressed.[61] See also the Comment accompanying Principle 26 (Cooperation).

According to the UNCITRAL Practice Guide cross-border agreements (or: protocols) may be used for different purposes:
"(a) To promote certainty and efficiency with respect to management and administration of the proceedings;
(b) To help clarify the expectations of parties;
(c) To reduce disputes and promote their effective resolution where they do occur;
(d) To assist in preventing jurisdictional conflict;

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including nonprivate interests, such as continuation of employment, which are too varied to support the idea of "shared responsibility" in the sense it is intended to bear in the cited principle.

[59] ALI General Principle I ("Cooperation"): "Courts and administrators should cooperate in a transnational bankruptcy proceeding with the goal of maximizing the value of the debtor's worldwide assets and furthering the just administration of the proceeding."

[60] See the UNCITRAL Practice Guide, available at www.uncitral.org/uncitral/en/uncitral_texts/insolvency/2009PracticeGuide.html. Page iii.

[61] Accessible via www.uncitral.org/uncitral/en/uncitral_texts/insolvency/2009PracticeGuide.html (last visited Mar. 2, 2012). See also the Guidelines for Coordination of Multi-National Enterprise Group Insolvencies (November 2011 Draft) developed by an III Committee, chaired by Hon. Ralph R. Mabey and Susan Power Johnston, available at http://iiiglobal.org/images/pdfs/711841v8_NY_full%20form%20guidelines-sept2011.pdf.

(e) To facilitate restructuring;
(f) To assist in achieving cost savings by avoiding duplication of effort and competition for assets and avoiding unnecessary delay;
(g) To promote mutual respect for the independence and integrity of the courts and avoid jurisdictional conflicts;
(h) To promote international cooperation and understanding between judges presiding over the proceedings, and between the insolvency representatives of those proceedings; and
(i) To contribute to the maximization of value of the estate."[62]

The Practice Guide also specifies the circumstances that might support the use of a protocol, subject to consideration as to what might be permitted under the laws of each state involved:

"(a) Cross-border insolvency proceedings with a considerable number of international elements, such as significant assets located in multiple jurisdictions;
(b) A complex debtor structure (for example, an enterprise group with numerous subsidiaries);
(c) Different types of insolvency procedures in the States involved, for example, reorganization with replacement of the management by insolvency representatives in one forum and the debtor in possession in the other;
(d) Sufficiency of assets to cover the costs of drafting the agreement;
(e) The availability of time for the negotiations. Cross-border agreements may not always be an option as they require time for negotiation. This might be problematic where urgent action is required;
(f) The similarity of substantive insolvency laws;
(g) Legal uncertainty regarding the resolution of choice of law or choice of forum questions;
(h) Contradictory stays have been ordered in the different proceedings;
(i) The existence of a cash management system providing for the deposit of cash into a centralized account and the sharing of cash among members of an international group of companies; and
(j) The employment of the insolvency representatives appointed to the different proceedings by the same international company."[63]

Principle 3 International Status; Public Policy

Nothing in these Global Principles is intended to:

(i) Interfere with the independent exercise of jurisdiction by a national court involved, including in its authority or supervision over an insolvency administrator;

(ii) Interfere with the national rules or ethical principles by which an insolvency administrator is bound according to applicable national law and professional rules;

(iii) Prevent a court from refusing to take an action that would be manifestly contrary to the public policy of the forum state; or

(iv) Confer substantive rights, interfere with any function or duty arising out of any applicable law, or encroach upon any local law.

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[62] Id. at p. 27ff (footnote omitted).

[63] Id. at p. 28ff (footnote omitted).

Comment to Global Principle 3:

As was stated at the outset in the general Comment to Global Principle 1, their nonbinding nature is an integral feature of these Global Principles. The text of Principle 3 explicitly expresses this character. It is nearly literally identical to Guideline 3 of the CoCo Guidelines. Principle 3 seeks to ensure that the Global Principles do not cause friction with existing applicable laws or professional rules or with duties flowing from applicable international law, such as the EU Insolvency Regulation or bi- or multilateral conventions or treaties, nor that the Global Principles themselves create any substantive rights. The nature of these Global Principles is nonbinding for anyone concerned, that is, a court, an insolvency administrator, a debtor, or a creditor.

The Global Principles do not contain rules regarding the basic requirements for courts, for judges,[64] or for insolvency office holders.[65] Where the Global Principles may serve as a source of guidance or as an aid to interpretation in certain situations, it is evident that the autonomous position of a national court and the independence of a judge should be respected unconditionally at all times. The same goes for national rules concerning the court's supervision regarding insolvency proceedings or the performance of an insolvency office holder's tasks.[66] See Global Principle 3(i).

Global Principle 3(ii) likewise leaves untouched the position of the insolvency office holder and the way he exercises his function. Any rules regarding professional sanctions or the insolvency office holder's civil liability is, where appropriate, determined by applicable national law. In assessing relevant criteria with regard to professional sanctions or civil liability, a court may take notice of certain of the Global Principles. This does not mean that these Principles have any binding force by themselves, but that they are seen by the court in the given circumstances of a case as reflecting a general consensus with regard to professional trustworthiness and due care.

In many countries, some of the matters falling within the scope of paragraphs (i) and (ii) of Principle 3 are likely to be classified as belonging to the realm of public policy, and as such would be considered as subject to the ultimate control of the applicable national rules even in a case possessing international characteristics. The concept of public policy can extend to a wider range of matters than those which are expressed by paragraphs (i) and (ii), however. Accordingly, for the removal of doubt, Global Principle 3(iii) expressly confirms that these Global Principles are not intended to detract from the accepted freedom of a national court to refuse to take an action that would be manifestly contrary to the public policy of the state to which that court belongs. This concession to national sovereignty is not intended to be

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[64] Reference is made to Principle 1 ("Independence, Impartiality, and Qualifications of the Court and Its Judges") of the ALI/UNIDROIT Principles.

[65] Reference is made to the European Bank of Reconstruction and Development Office Holders Principles 2007. See Neil Cooper, The EBDR Office-Holder Principles, in: Bob Wessels and Paul Omar (eds.), Crossing (Dutch) Borders in Insolvency, Nottingham, Paris: INSOL Europe 2009, pp. 15-19; Adrian Walters, Regulating the Insolvency Office-Holder Profession across Borders, in: Bob Wessels and Paul Omar (eds.), Crossing (Dutch) Borders in Insolvency, Nottingham, Paris: INSOL Europe 2009, pp. 49-56.

[66] Principle 1.1 of the ALI/UNIDROIT Principles: "The court and the judges should have judicial independence to decide the dispute according to the facts and the law, including freedom from improper internal and external influence."

employed as a means whereby courts can readily avoid playing their expected part in the resolution of issues in accordance with internationally agreed principles, merely because the concrete outcome happens to vary in some way from that which would occur in a purely domestic case. The expression "manifestly contrary to public policy" has become a widely accepted drafting convention to indicate that the refusal to act on the ground of public policy must be based on some serious, and fundamental, reason going to the core of the system of values of the state in question.

Finally, Global Principle 3(iv) expresses the intention that the Global Principles do not create additional, substantive rights, as they are not intended to breach binding rules of any applicable law or encroach upon any applicable local law.

REPORTERS' NOTES

Regarding "public policy" it is noted that it has become a standard feature of international instruments that provide for assistance, recognition, and the coordination of laws and practices between the courts of sovereign states that a provision is included to allow for an exception to be made in circumstances where a court would otherwise be faced with the alternatives of either violating a fundamental principle belonging to the social order and public policy of its own state, or contravening an international obligation undertaken by that state. The concession to allow the court to defer to the authority of the state under whose ultimate jurisdiction it is established is intended to be reserved for use in only the most serious situations involving a conflict of norms of behavior and social mores. This is signified by the use of the drafting expression "manifestly contrary to public policy." Examples of such provisions allowing refusal of recognition or assistance on the "public policy" ground are found in the EU Insolvency Regulation (Article 26); the UNCITRAL Model Law on Cross-Border Insolvency (Article 6); Regulation (EC) No. 593/2008 on the law applicable to contractual obligations (Rome I)[67] (Article 21); Regulation (EC) No.44/2001 on jurisdiction and the recognition of judgments in civil and commercial matters[68] (Article 34(1)); ALI Intellectual Property: Principles Governing Jurisdiction, Choice of Law, and Judgments in Transnational Disputes (§ 322). Several states also have their own formulation of the "public policy" concept, such as Article 343(1)(2) *German Insolvenzordnung*, allowing a court to refuse recognition of a foreign insolvency judgment where this would lead "to a result which is manifestly incompatible with major principles of German law, in particular where it is incompatible with basic rights." Article 452 of the Slovenian Insolvency Act provides: "A domestic court may refuse to recognise foreign insolvency proceedings or a request of a foreign court or administrator for assistance or cooperation if this could have a negative impact on the sovereignty, safety and the public interest of the Republic of Slovenia." While the drafting of such exclusionary provisions is therefore by no means completely standardized, a broad distinction can be made between those that are so designed as to confer a discretion on the national court (or other authority) whether to refuse to recognize or enforce a foreign judgment or proceeding that is found to be manifestly contrary to the public policy of the state, and those that declare that under such circumstances nonrecognition is to be an automatic consequence.[69] The former approach can be

[67] O.J. L177/6, 4.7.2008.

[68] O.J. L12/1, 16.1.2001.

[69] The "automatic" exclusion of recognition is a feature of both the ALI Transnational Intellectual Property Principles § 322, and the EC Judgments Regulation, No.44/2001 (mentioned in the Reporters' Notes), Art. 34: "A judgment shall not be recognised: (1) if such recognition is manifestly contrary to public policy in the Member State in which recognition is sought; . . . .")

indicated by the use of such expressions as "may refuse" or "may be refused"[70] or less directly by means of a negative assertion such as that employed in Article 6 of the UNCITRAL Model Law to the effect that: "Nothing in this law prevents a court from refusing to take an action governed by this law if the action would be manifestly contrary to the public policy of the State." Global Principle 3(iii) is based upon the permissive, and generalized, approach of the Model Law. For further scholarly sources, reference is made to the Bibliography.

Principle 4 Case Management

4.1. A court should, by actively managing an international insolvency case, coordinate and harmonize the proceedings before it with those in other states except where there are genuine and substantial reasons for doing otherwise and then only to the extent considered to be appropriate in the circumstances.

4.2. A court:

(i). Should seek to achieve disposition of the international insolvency case effectively, efficiently, and timely, with due regard to the international character of the case;

(ii). Should manage the case in consultation with the parties and the insolvency administrators involved and with other courts involved;

(iii). Should determine the sequence in which issues are to be resolved; and

(iv). May hold status conferences regarding the international insolvency case.

Comment to Global Principle 4:

This Global Principle underlines the central role the court in many countries plays in furthering the efficient and timely administration of an (international) insolvency case. In formulating this Principle, regard has been taken to Global Principle 2 above and Principles 9.3 and 14 of the ALI/UNIDROIT Principles. An exclusion has been added: "except where there are genuine and substantial reasons for doing otherwise and then only to the extent considered to be appropriate in the circumstances." This exclusion should only be applied in extraordinary circumstances, such as sincere doubts whether the court in a given country is able to function properly in the light of prevailing circumstances such as widespread riots or war, or other factors bringing about the disruption of the administration of justice.

Principles 4.2(i), 4.2(ii), and 4.2(iii) are closely similar to Principles 14.1, 14.2, and 14.3 of the ALI/UNIDROIT Principles.[71] Global Principle 4.2(i) furthers the overarching objective of

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[70] Of the international instruments mentioned in the foregoing text, see, e.g., the EU Insolvency Regulation, Art. 26 ("may refuse"), the Rome Convention, Art. 16, and the Rome I Regulation (mentioned in the Reporters' Notes), Art. 21 ("may be refused").

[71] See Principle 14 ("Court Responsibility for Direction of the Proceeding") ALI/UNIDROIT Principles: "14.1 Commencing as early as practicable, the court should actively manage the proceeding, exercising discretion to achieve disposition of the dispute fairly, efficiently, and with reasonable speed. Consideration should be given to the transnational character of the dispute.

14.2 To the extent reasonably practicable, the court should manage the proceeding in consultation with the parties.

the Global Principles. It adds that consideration should be given to the transnational character of the case, which relates to the speed of the case and the methods of communication used, sometimes with translators in different time zones. The consultation as required in Global Principle 4.2(ii) allows a court to assess or anticipate any issues that need to be addressed. Global Principle 4.2(iii) is important in cases that relate to assets, administrators, or creditors in several countries which may involve different time zones, which need an orderly schedule to facilitate expeditious proceedings, including hearings. The determination of the order or the sequence in which issues are to be resolved could include fixing a timetable for all stages of the proceeding, including dates and deadlines, preferably as much as possible in alignment with the wishes of foreign courts involved. It will also include the court's determination to revise the given order, taking into account a foreign court's wishes and the procedural interests of the parties involved.

In its active role, a court may hold a status conference, see Global Principle 4.2(iv). Such a status conference is justified given the involvement of insolvency administrators from several jurisdictions, the use of a different language that could give rise to the need to verify that what has been said or decided is correctly understood by all those involved, and the dimensions of the chosen method of communication. Case management includes (i) identifying issues at an early stage; (ii) encouraging administrators to cooperate with each other or with other courts in the conduct of the proceedings; (iii) deciding promptly which issues need full investigation; (iv) fixing timetables or otherwise controlling the progress of the proceedings, considering whether the likely benefits of taking a particular step justify the cost of taking it; (v) giving directions to ensure that the treatment of the case proceeds quickly and efficiently; (vi) setting dates by which a party in interest or an administrator provides (written) information; (vii) verifying that all matters communicated have been fully understood; (viii) paying attention to all interests concerned, including those of other courts; (ix) addressing the matters appropriate for early attention, such as questions of international jurisdiction, the law applicable, and provisional measures; (x) addressing availability, admission, disclosure, and exchange of evidence; and (xi) identifying potentially dispositive issues for early determination of all or part of a dispute.[72] The topics mentioned are illustrative, not exhaustive.

REPORTERS' NOTES

Regarding case management, see in general C.H. van Rhee, The Development of Civil Procedural Law in the Twentieth-Century Europe: From Party Autonomy to Judicial Case Management and Efficiency, in: C.H. van Rhee (ed.), Judicial Case Management and Efficiency in Civil Litigation, Antwerpen, 2008, pp. 11-25. W.D.H. Asser, *Burgerlijk (proces)recht: bewijs in het spanningsveld tussen rechter en partijen*, in: *Bewijsrecht: het bewijs geregeld*, Preadvies voor de Nederlandse Vereniging Voor Rechtsvergelijking, Nijmegen: Wolf Legal Publishers 2010, pp. 11-61 (p. 22ff)—analyzing German, Dutch, French, and English reforms (amongst others referring to the English rules regarding case management) in the law of civil proceedings—signals a general trend to allow courts

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14.3 The court should determine the order in which issues are to be resolved and fix a timetable for all stages of the proceeding, including dates and deadlines. The court may revise such directions."

[72] The last three elements are inspired by Principles 9.3.3–9.3.5 of the ALI/UNIDROIT Principles. Certain other elements of describing case management have been taken from the Rules & Practice Directions, Part 1 (October 2005), of the Civil Procedure Rules of the Ministry of Justice of England (www.justice.gov.uk). In the U.S.A., its rationale can be found, too, in U.S. Bankruptcy Code Chapter 11 § 105(d) and Rule 16(a) of the Federal Rules of Civil Procedure.

more direct influence in civil proceedings, while it is expected that parties are loyal, in Asser's words: "are expected to cooperate."

Principle 5 Equality of Arms

5.1. All judicial orders, decisions, and judgments issued in an international insolvency case are subject to the principle of equality of arms, so that there should be no substantial disadvantage to a party concerned. Accordingly:

(i). Each party should have a full and fair opportunity to present evidence and legal arguments;

(ii). Each party should have a full and fair opportunity to comment on the evidence and legal arguments presented by other parties.

5.2. When the urgency of a situation calls for a court to issue an order, decision, or judgment on an expedited basis, the court should ensure:

(i). That reasonable notice, consistent with the urgency of the situation, is provided by the court or the parties to all parties who may be affected by the order, decision, or judgment, including the major unsecured creditors, any affected secured creditors, and any relevant supervisory governmental authorities;

(ii). That each party may seek to review or challenge the order, decision, or judgment issued on an expedited basis as soon as reasonably practicable, based on local law;

(iii). That any order, decision, or judgment issued on an expedited basis is temporary and is limited to what the debtor or the insolvency administrator requires in order to continue the operation of the business or to preserve the estate for a limited period, appropriate to the situation. The court should then hold further proceedings to consider any appropriate additional relief for the debtor or the affected creditors, in accordance with Global Principle 5.1.

Comment to Global Principle 5:

As is indicated by Principle 3.2 of the ALI/UNIDROIT Principles of Transnational Civil Procedure, the right to equal treatment in the context of international legal proceedings entails more than the mere avoidance of overt discrimination based on such factors as nationality or residence. Attention must be given to such modifications of the standard rules and procedures that would govern the conduct of a purely domestic case as may be practicable and proportionate for the purpose of ensuring that all parties in interest are afforded a genuine opportunity to participate fully and effectively in the proceeding. This includes the right to be notified of procedural documents and, more generally, the right to be heard, with adequate time and opportunity to arrange for representation at any hearing at which a decision having a material bearing upon the outcome of the matter may be taken. While it must be recognized that certain urgent matters may sometimes require a rapid response whereby not all parties are enabled to participate in the first instance, any such action should be accompanied by procedural guarantees to ensure that each party in interest shall have an adequate opportunity to challenge subsequently any measures adopted under such circumstances. Further aspects of the application of the principle of "equality of arms" are included among the other Global Principles, notably numbers 21 (Language) and 25 (Notice).

REPORTERS' NOTES

The fundamental importance of the principle of equality of arms in ensuring the actual, as well as the merely theoretical, attainment of fairness in an international legal proceeding was emphasized by the European Court of Justice in the case of *Re Eurofood IFSC Ltd*, (Case C341/04) [2006] ECR I-3813, at paragraph 66 of the judgment:

"66. Concerning more particularly the right to be notified of procedural documents and, more generally, the right to be heard, …….., these rights occupy an eminent position in the organisation and conduct of a fair legal process. In the context of insolvency proceedings, the right of creditors or their representatives to participate in accordance with the equality of arms principle is of particular importance. Though the specific detailed rules concerning the right to be heard may vary according to the urgency for a ruling to be given, any restriction on the exercise of that right must be duly justified and surrounded by procedural guarantees ensuring that persons concerned by such proceedings actually have the opportunity to challenge the measures adopted in urgency."

See also S. Bufford, Center of Main Interests, International Insolvency Case Venue and Equality of Arms: The Eurofood Decision of the European Court of Justice, 27 Northwestern Journal of International Law and Business, at 351 ff. (2007). Also relevant are Principles 5, 8, and 19 of the ALI/UNIDROIT Principles of Transnational Civil Procedure.

As a matter of international judicial practice, the principle of equality of arms should be applied to all judgments, decisions, or orders that are within the scope of an insolvency proceeding. Inspired by Bufford's recommendations, the Reporters suggest that in each individual international case a court could be guided by checking the following steps:

1. Each party in interest in an international insolvency case shall be given a full and fair opportunity to present both the facts and the law on its side;
2. Each party shall be given a full and fair opportunity to comment on the evidence and legal arguments of an opponent;
3. Steps 1 and 2 may only be restricted when the urgency of a given ruling calls for it;
4. Such a ruling will only have the character of a "first day order" or other individual measures that "absolutely" cannot wait;
5. If such a ruling is considered before the court issues first-day orders, either the parties or the court must provide maximum reasonable notice consistent with the urgencies of the case to the major unsecured creditors, any affected secured creditors, and any supervisory governmental authorities;
6. The court should take such procedural guarantees to ensure that each party in interest in fact will have the opportunity to challenge any measure adopted in urgency;
7. In such a case, the court should consider that any such measure is temporary and limited to what the insolvent debtor requires to continue its business or to what the administrator needs to preserve the estate, such as for a period of three days; and
8. The court should then schedule further proceedings to consider additional relief for each party, including the debtor and the affected creditors, at which time all parties in interest enjoy the full and unconditional application of the principle of equality of arms.

As an example of step 1, see for instance the Irish High Court of Justice: "I think in the circumstances, it would be more prudent to give a short period of time, in which the Official Receiver, if he wishes to do so, can come into this jurisdiction and seek whatever orders are appropriate or he may decide not to do so. Indeed that may well be the course the Receiver takes. I propose to grant a short adjournment so as to afford that courtesy to a court officer of an adjoining jurisdiction, where there is mutual respect

between the courts of this State and the courts of Northern Ireland. I would not wish it to be said that the Official Receiver was taken short by any order that I might make today. So I do it in that context, with a view to ensuring that the mutual respect between our respective courts is observed and that the Official Receiver gets at least an opportunity to consider the position." (order with respect to a hearing of Monday 14th November, 2011, abstaining from entering a summary judgment), cited by High Court of Justice 23rd November 2011 [2011] IEHC 428 (Irish Bank Resolution Corporation Ltd. V. Seán Quinn et al.), (Kelly J). In contemporaneous proceedings concerning the same debtor, whereby the debtor sought to bring about his own bankruptcy, under the law of Northern Ireland, so as to preempt the continuation of proceedings against him in the Irish Republic, the High Court of Justice in Northern Ireland, upholding an appeal against the making of the bankruptcy order, indicated that it was a matter of concern that a petition filed by the debtor on 10 November had been dealt with on the 11 November without the Official Receiver being given the opportunity to reflect on whether he would wish to make any representations in opposition to the making of the bankruptcy order. On that occasion, remarkably, it was the state's own official who had been denied the benefit of equality of arms thereby impeding his ability to carry out his public functions effectively.[73]

Principle 6 Decision and Reasoned Explanation

6.1. Upon completion of the parties' presentations relating to the opening of an insolvency case or the granting of recognition or assistance in an international insolvency case, the court should promptly issue its order, decision, or judgment.
6.2. All parties should cooperate and consult with one another concerning scheduling of proceedings.
6.3. The court may issue an order, decision, or judgment orally, which should be set forth in written or transcribed form as soon as possible.
6.4. The order, decision, or judgment should identify any order previously made on any related subject; the period, if any, for which it will be in force; any appointment of an insolvency professional; and any determination regarding costs, the issues to be resolved, and the timetable for the relevant stages of the proceedings, including dates and deadlines.
6.5. If the order, decision, or judgment is opposed or appealed, the court should set forth the legal and evidentiary grounds for the decision.

Comment to Global Principle 6:

In many insolvency cases, the circumstances are hectic, particularly during the initial phase, and the need for an order, decision, or judgment cannot be postponed. Global Principle 6.1 therefore requires a court to give any decision promptly, which in appropriate circumstances

[73] Irish Bank Resolution Corporation Ltd v. Quinn [2012] NICh 1 (10 January 2012) (High Court of Justice in Northern Ireland, Deeny J), at paragraph [23]. See also Re Standish and others, Receivers of the Assets of Mr. Mukhtar Ablyazov [2011] JRC 239A (Royal Court of Jersey, 23 December 2011), at paragraphs [18] to [22] (where the Jersey court, upon granting recognition to foreign, court-appointed receivers in the interests of comity, reserved to itself the right to hear and determine questions of the lawfulness of the future exercise by the receivers of their investigative powers in relation to persons in Jersey).

means: within a reasonable time.[74] Promptness[75] requires parties to cooperate (Global Principle 6.2)[76] and should allow, when circumstances require, an oral decision, which should be available in a written form (verbatim or transcribed) as soon as possible (Global Principle 6.3).[77] Such a decision contains the necessary information for all parties concerned (Global Principle 6.4)[78] and provides a record of the judgment, including its reasoning on all contentions made (Global Principle 6.5),[79] which often is a requirement for recognition of such an order, decision, or judgment in another country. Global Principle 6.5 relates to an order, decision, or judgment that is "opposed or appealed," to allow that, in "unopposed" cases, a reasoned explanation is not necessary. When an order, decision, or judgment determines less than all the issues to be resolved, it should specify the matters that remain open for further proceedings and/or the period the order, decision, or judgment will have force of law.

Principle 7 Recognition

7.1. An insolvency case opened in a state that, with respect to the debtor concerned, has jurisdiction under the rules of international jurisdiction established by these Global Principles, in conformity with Global Principle 13, should be recognized and given appropriate effect under the circumstances in every other state.
7.2. Recognition should be determined in a proceeding that is orderly, effective, efficient, and timely, with a minimum of formalities and with due regard to the requirements of Global Principle 3 (Public Policy) and Global Principle 5 (Equality of Arms).

Comment to Global Principle 7:

Provisions concerning the recognition of foreign proceedings and related decisions are to be found in a number of international instruments, both of a "hard law" and of a "soft law" character. As examples of the benchmark standards currently to be found, see: UNCITRAL Model Law, Articles 15, 16, and 17; EU Insolvency Regulation, Articles 3, 16, 17, 19, and 25;

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[74] Principle 7.1 of the ALI/UNIDROIT Principles provides: "The court should resolve the dispute within a reasonable time."

[75] Comment *P-7B* to Principle 7 of the ALI/UNIDROIT Principles determines: "Prompt rendition of justice is a matter of access to justice and may also be considered an essential human right, but it should also be balanced against a party's right of a reasonable opportunity to organize and present its case."

[76] Principle 7.2, first sentence, of the ALI/UNIDROIT Principles provides: "The parties have a duty to cooperate and a right of reasonable consultation concerning scheduling." Principle 7.2, second sentence, adds: "Procedural rules and court orders may prescribe reasonable time schedules and deadlines and impose sanctions on the parties or their lawyers for noncompliance with such rules and orders that is not excused by good reason."

[77] Principle 23.1 of the ALI/UNIDROIT Principles states: "Upon completion of the parties' presentations, the court should promptly give judgment set forth or recorded in writing."

[78] Principle 23.1, second sentence, of the ALI/UNIDROIT Principles provides: "The judgment should specify the remedy awarded and, in a monetary award, its amount."

[79] Principle 23.2 of the ALI/UNIDROIT Principles states: "The judgment should be accompanied by a reasoned explanation of the essential factual, legal, and evidentiary basis of the decision." Principle 5.6 of the ALI/UNIDROIT Principles provides: "The court should consider all contentions of the parties and address those concerning substantial issues."

ALI/UNIDROIT Principles of Transnational Civil Procedure, Principles 2, 30; UNCITRAL Legislative Guide on Insolvency Law (2005) (adopted in 2004), Part I, B.9, para.14; The 2011 World Bank Principles for Effective Insolvency and Creditor/Debtor Regimes, Principle C15 ("International Considerations"); ADB Good Practice Standards for Insolvency Law (2000), Good Practice Standard 16; EBRD Core Principles for an Insolvency Law Regime (2004), Principle 10. All of the foregoing texts display a consensus in favor of the development of clear rules for the recognition of foreign (insolvency) proceedings.

The concept of "recognition" of a foreign insolvency proceeding is a fundamental requirement that, logically, must take place anterior to the according of any legal effects to that proceeding outside its state of origin. A distinction is drawn between "recognition" on the one hand, and such concepts as "enforcement," "execution," "cooperation," or "assistance" on the other. Logically, in the absence of recognition of a foreign proceeding under the laws of a given state, other legal effects cannot be accorded to that proceeding in the state in question. Recognition is therefore the key step in any systematic arrangement for international cooperation. Consequently, the terms on which such recognition may be obtained should be carefully defined.

The drafting of the original version of Global Principle 7.1, as General Principle II, paragraph A, of the ALI NAFTA Principles, was narrowly drawn, reflecting its original purpose of regulating insolvencies occurring among the three states that have entered into an international agreement to collaborate under the framework of the NAFTA. Essentially, the scope of Principle II.A is limited to ensuring that an insolvency proceeding opened in any one of those states will be recognized in each of the other two. Paragraph A does not specify any criteria by which the validity or appropriateness of the opening of proceedings is to be tested as a precondition to the granting of recognition: seemingly the very fact that the proceedings have opened in one of the NAFTA countries is deemed sufficient of itself. However, the inclusion of the phrase "given appropriate effect under the circumstances" might indicate that the courts in which recognition is sought are entitled to have regard to the circumstances under which proceedings were originally commenced, and that, in an extreme case of exorbitant or inappropriate exercise of jurisdiction, the granting of recognition might even be withheld, or be severely limited in its effect. For transposition to a global application, the Principle has been redrafted so that the references to "NAFTA country" are replaced in Global Principle 7.1 by an expression of more universal application. At the same time, it was necessary to attach a qualifying condition to the requirement that recognition is to be accorded, in a given state, to proceedings opened in a foreign state with which it may not have any close or immediate legal relations, such as would arise under a treaty or convention to which both countries happen to be parties. As explained in Section I, in recasting the original ALI NAFTA Principles into a form suitable for fully global application, references to "NAFTA country" in the ALI-NAFTA Principles have been reformulated so that they refer to "a state that . . . has jurisdiction for that purpose," which for this purpose is defined as a foreign state in which the relevant proceeding has been opened under circumstances that conform to the general standards for the exercise of international jurisdiction and, hence, for receiving international recognition, which are identified in these Global Principles. See the definition included in the Appendix, and the provisions regarding international jurisdiction stated in Principles 13 and 14. In this way, it is accepted that any state in which the issue of recognition of a foreign insolvency proceeding is raised has the preliminary right to conduct an evaluation of the circumstances under which the foreign proceeding was commenced in its state of origin, and to base the decision whether to recognize the proceeding by measuring

those circumstances against internationally agreed standards of acceptability for the exercise of jurisdiction.

The provision in Principle 7.2 has been transposed, in slightly amended form, from the original version as General Principle II.B of the ALI NAFTA Principles. In an insolvency proceeding, it is self-evidently the case that time is of the essence. The collective nature of the proceedings makes it imperative that an orderly regime of administration of all of the debtor's property should be established as quickly as possible. To the extent that the administrator encounters delays or obstacles in gaining control of assets that are located in other states, opportunities are created that individual creditors may exploit, for example by levying execution against property under circumstances that confer on them a title that, in the eyes of the local law at least, will prevail as against that of the foreign representative who is conducting the case on behalf of the general body of creditors. Where international arrangements are in place—whether by reason of unilaterally enacted provisions, an international treaty, or under a supranational instrument such as the EU Insolvency Regulation—the states that are participating in that special regime may have agreed that a proceeding opened in any one of their number shall be automatically recognized, and produce immediate effects, in all the other states as from the time of first becoming effective in the state of opening, without any additional formality.[80] Such arrangements are exceptional at the present time, but they establish a benchmark towards which states should aspire to align their own practice in matters of cross-border recognition and assistance. As a first step towards the attainment of more efficient and effective international cooperation in insolvency cases, states should ensure that the procedures for hearing and determining foreign representatives' applications for recognition are regularly reviewed with a view to improving the speed and economy with which they are administered.

REPORTERS' NOTES

The maintenance of controls to deny international effectiveness to insolvency proceedings that are commenced in jurisdictionally improper fora is an essential safeguard against the creation of perverse incentives for parties to use such means to seek some personal advantage at the expense of the global body of creditors. By linking the grant of recognition to the test of international jurisdictional competence embodied in these Global Principles, a vital controlling mechanism is provided against the subversion of the very goals that the Global Principles are designed to advance. The obvious need to prevent abusive exploitation of the hospitable legal regimes of certain "bankruptcy havens" is one of the reasons why states have historically been reluctant to commit to any globally operative rules of recognition and enforcement of foreign proceedings. Global Principle 7 is intended to ensure that recognition will be conditional upon the proceedings having opened in conformity with internationally accepted criteria. Indeed, in an egregious case of improper commencement of foreign proceedings, the exclusionary ground based on public policy, expressed in Global Principle 3, might be invoked. The nature of any assistance to be given, following upon recognition, may also be matched to the categorization of the foreign proceeding as either a "main" or a "non-main" (but recognizable) proceeding, as embodied in the provisions of the UNCITRAL Model Law, notably in Articles 20 and 21, in conjunction with Article 2(b) and (c).

Clear rules for the recognition of foreign proceedings must necessarily be based on agreed criteria for the granting of such recognition. Moreover, to minimize the possibility that divergent approaches may

[80] See EU Insolvency Regulation, Arts.16-18 inclusive.

be followed by the courts of different countries when purporting to apply those criteria, they should be drafted and defined with considerable care and precision. Both the EU Insolvency Regulation and the UNCITRAL Model Law introduce specific criteria for allocating jurisdiction to open an insolvency proceeding in an international case, and by extension to decide on matters concerning an action that is related to insolvency as it derives directly from the insolvency and is closely connected with the proceedings (EU Regulation, Articles 3, 16, and 25; UNCITRAL Model Law, Articles 15-17). Both the text of the EU Regulation and the text of the UNCITRAL Model Law make use of the same terms of art for this purpose, namely the state in which the "centre of main interests" of the debtor is situated, and a state in which the debtor has "an establishment." The former criterion is intended to denote the "main" forum in which insolvency proceedings should be opened in relation to the debtor in question, while the latter criterion is used to denote one or more additional jurisdictions in which insolvency proceedings are permitted to be opened, albeit with circumscribed effect (limited to property of the debtor located within the country in question). Although both texts contain provisions defining the term "establishment" for their respective purposes (EU Insolvency Regulation Article 2(h); Model Law Article 2(f), where it does not serve as locating international jurisdiction, but rather as a criterion to recognize a main or a non-main proceeding respectively), neither embodies a properly designed definition of the expression "centre of main interests." The lack of a clear definition for such a key term of art is detrimental to the orderly operation of global principles of international insolvency law in the present day. Although definitions have been suggested of both "centre of main interests" and "establishment" in the Appendix to this Report, international consensus on the precise definitions of these terms is currently lacking, especially in relation to groups of companies. Much more empirical research—for instance of international cases and the specific role of domestic courts—is needed to validly come to workable recommendations.[81] See Global Principle 13.

Although the EU Regulation provides a working example of the manner in which the principle of recognition of a foreign insolvency proceeding may be operated by courts of independent, sovereign states in circumstances where such recognition is virtually automatic and instantaneous, it is important to bear in mind the very special character of the Regulation, and of the European Union under whose auspices the Regulation enjoys the force of binding law within all the Member States (with the exception of Denmark). It is an integral aspect of the Regulation's legal structure that, in those cases that are within its scope of application, jurisdiction to open main proceedings is confined exclusively to the Member State in which the debtor's COMI is situated, while the opening of secondary or territorial proceedings is only possible in those Member States in which the debtor has an establishment. It follows from this that any proceeding opened in a jurisdiction where neither of the two possible criteria are fulfilled is ineligible to be accorded the benefits of recognition and effect under the further provisions of the EU Insolvency Regulation. It is open to any party with an interest in such a proceeding to make an appropriate application to the court by which it has been opened, for the purpose of persuading that court that the case falls within the scope of the Regulation, and that the circumstances are such that the court's jurisdiction has been incorrectly exercised, contrary to the requirements of EU law. Accordingly, the provisions of the Regulation expressly preclude the possibility that the courts of

[81] See for an analysis Irit Mevorach, Insolvency Within Multinational Enterprise Groups, Oxford University Press 2009; Bob Wessels, The Ongoing Struggle of Multinational Groups of Companies under the EC Insolvency Regulation, European Company Law Vol. 6, Issue 4, August 2009, pp. 169-177; Ralph R. Mabey and Susan Power Johnston, Coordination Among Insolvency Courts in the Rescue of Multinational Enterprises, in: Norton Annual Review of International Insolvency 2009, pp. 33-69 (providing preliminary analysis); Heinz Vallender and Stephan Deyda, *Brauchen wir einen Konzerninsolvenzgerichtsstand ?,* Neue Zeitschrift für das Recht der Insolvenz und Sanierung (NZI), 4. December 2009, pp. 825-834 (answering in the negative the question they pose in the title of the article: Do we need one jurisdiction for insolvency of corporate groups?).

other Member States may venture to conduct their own assessment of the manner in which the proceedings have been opened elsewhere in a sister state.[82]

The exceptional nature of the EU Regulation may be contrasted with the approach employed in the UNCITRAL Model Law, whose provisions are drafted with the aim of their being applicable on a global basis in matters arising between states that are otherwise unconnected by any treaty arrangements relating to recognition of each other's judgments. Articles 15, 16, and 17 of the Model Law clearly make it incumbent on the foreign representative to apply for recognition to the court of an enacting state, and to satisfy that court as to the circumstances under which the foreign proceeding has been opened, in order to enable it to reach a decision whether to recognize the proceeding as a foreign main, or as a foreign non-main, proceeding.[83] Although this process is conducted with the assistance of presumptions regarding certain key matters, these are rebuttable.[84] The true facts or circumstances, as disclosed in evidence submitted to the court hearing the application for recognition, are ultimately decisive.[85]

Outside the special context of the EU Insolvency Regulation it is self-evidently unrealistic to expect that the courts of one country will accept the premise that they are required to recognize an insolvency proceeding that has been opened in any other state throughout the world, without first satisfying themselves that the proceeding was opened under circumstances corresponding to accepted standards of international jurisdictional competence, and in conformity with agreed benchmarks in terms of due process.[86] Accordingly, Global Principle 7.1 incorporates a qualifying condition whereby the

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[82] EC Regulation No.1346/2000, Recital (22); See Re Eurofood IFSC Ltd, (Case C341/04) [2006] E.C.R. I-3813, at paragraphs 38-44 of the ECJ judgment. The Insolvency Regulation should be seen from a much wider perspective of judicial cooperation in civil matters between Member States in the EU, see—in effect as of December 1, 2009—Chapter 3 ("Judicial Cooperation in Civil Matters") of the Lisbon Treaty (amending the Treaty on European Union and the Treaty establishing the European Community), especially paragraphs 1 and 2 of Article 81 TFEU (was Article 65 TEC): "1. The Union shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases. Such cooperation may include the adoption of measures for the approximation of the laws and regulations of the Member States. 2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures, particularly when necessary for the proper functioning of the internal market, aimed at ensuring: (a) the mutual recognition and enforcement between Member States of judgments and of decisions in extrajudicial cases; (b) the cross-border service of judicial and extrajudicial documents; (c) the compatibility of the rules applicable in the Member States concerning conflict of laws and of jurisdiction; (d) cooperation in the taking of evidence; (e) effective access to justice; (f) the elimination of obstacles to the proper functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States; (g) the development of alternative methods of dispute settlement; (h) support for the training of the judiciary and judicial staff."

[83] UNCITRAL Model Law (1997), Article 17(2)(a), (b).

[84] UNCITRAL Model Law (1997), Article 16(1), (2), and (3).

[85] UNCITRAL Model Law (1997), Articles 15(2), 17(1) and (4).

[86] See, for instance, for Germany § 343 Insolvency Act ("Recognition"): "(1) Any judgement opening insolvency proceedings handed down by a foreign country shall be recognized. This shall not apply 1. if the courts of the state in which the insolvency proceedings have been opened have no jurisdiction in accordance with German law; 2. if the recognition leads to an effect which is manifestly incompatible with the major principles of German law, especially its basic rights ("*Grundrechte*"). (2) Sec.(1) shall be applied mutatis mutandis to preservation measures initiated after application for insolvency proceedings, as well as measures for the execution or completion of the recognized insolvency procedings." See, for Spain, Section 220 "Recognition of

recognizing court should first ascertain whether the foreign proceeding has been opened in a state that has "international jurisdiction" for the purposes of the instant case, namely that it is a state having international jurisdiction over the debtor within the meaning of these Global Principles.

The sub-principle expressed in Global Principle 7.2, to the effect that recognition should be granted in a proceeding that is as effective and timely as possible, and with a minimum of legal formalities, is in step with the tendency exhibited in several of the international instruments mentioned in the beginning of the Comment to Global Principle 7. The elaborate, expensive, and time-consuming procedures that even today are a notorious impediment to the recognition and enforcement of foreign judgments in many countries are particularly inimical to the effective conduct of international insolvency proceedings. Although it is necessary to concede some margin of tolerance to allow individual countries' procedural requirements to be fulfilled, the formal expression of the need to respect the urgency that usually attends cases of insolvency is fully warranted.[87] There is a clear consensus among the countries surveyed by this project that the principle of recognition is to be supported subject to the recognizing court being properly satisfied, on the basis of authentic evidence, that the original proceeding has been opened under circumstances that are in conformity with appropriate standards of international jurisdictional competence. Examination by the recognizing court of the circumstances of the foreign court's exercise of jurisdiction is not to be confused with the separate process of conducting a review of the merits and substance of the foreign decision to open a proceeding. The latter process—often termed *révision au fond*—is increasingly considered to have no proper place in international insolvency matters, save in cases where issues of fundamental public policy of the recognizing country are engaged. While the recognizing court may properly seek information from participants in the recognition proceedings, or even from the foreign court or body whose decision it is invited to recognize, to enable it to determine whether the statutory preconditions for recognition exist, it should not routinely engage in a review of the substance of the foreign decision (cf. Croatian Bankruptcy Law 1996, Article 314; Korean Debtor Rehabilitation and Bankruptcy Act 2006, Article 631).

Among the states surveyed, there were some that had made special provision in their laws to direct their courts to give prompt attention, if necessary on an emergency basis, to applications for recognition of foreign insolvency proceedings. Notable are the provisions of Croatia (Art. 314(3) BL) and of the Republic of Korea (Art. 632 of the Debtor Rehabilitation and Bankruptcy Act 2006, which requires the court to determine a recognition application within one month of filing). In other states, despite the absence of specific provisions to impose a time limit within which the court is required to determine such applications, it was expected that urgent cases would be dealt with on their merits using

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resolution of commencement" of the Spanish Bankruptcy Act: "Foreign resolutions declaring the commencement of insolvency proceedings shall be recognized in Spain by the judicial exequatur procedure regulated by the Civil Procedure Law, if they meet the following requirements: 1º The resolution relates to collective proceedings based on the insolvency of the debtor, under which his/its property and activities are subject to the control or supervision of a foreign court or authority for the purposes of the reorganisation or liquidation thereof, 2º The resolution is definitive according to the law of the State of commencement, 3º The competence of the court or of the authority which commenced the insolvency proceedings is based on any of the criteria contained in section 9 of this Law or on a reasonable connection of an equivalent nature, 4º The resolution was not declared in a case of default of the debtor or, if so, was preceded by due service or notification of the summons or equivalent document sufficiently in advance in order to object, 5º The resolution is not contrary to Spanish public policy." Many countries have rather similar systems of recognition, see, for example, Belgium, Cyprus, and Lebanon, or will accord recognition on a case-by-case basis, for example, Denmark, Finland, France, Kuwait, Peru, and Saudi Arabia.

[87] See, e.g., UNCITRAL Model Law (1997), Article 17(3); 2011 World Bank Principles C.15(i).

established arrangements for bringing such matters before the courts. Unsurprisingly, there were no provisions dealing with the question of the speed of determination of such applications under the laws of states that continue to observe the territorialist approach.

Principle 8 Stay or Moratorium

8.1. Insolvency cooperation may require a stay or moratorium at the earliest possible time in each state where the debtor has assets or where litigation is pending relating to the debtor or the debtor's assets. The stay or moratorium should impose reasonable restraints on the debtor, creditors, and other parties.
8.2. If the local law does not provide an effective procedure for obtaining relief from the stay or moratorium, then a court should exercise its discretion to provide such relief where appropriate. Exceptions to the stay or moratorium should be limited and clearly defined.

Comment to Global Principle 8:

A moratorium (or stay) is very often of vital importance since it is essential that courts and administrators should cooperate with foreign courts and administrators on an expedited basis in the interest of ensuring the preservation of value and the prevention of fraud. A moratorium, in many cases, is essential to prevent seizure and other actions by individual creditors and dissipation of assets by debtors. In several jurisdictions, and also recommended by the World Bank or the UNCITRAL Legislative Guide, a "stay" is *ex officio*, *ex lege*, mandatory or automatic. However, such a mechanism raises two concerns: (i) not all jurisdictions contain a concept of a "stay," nor have knowledge about its effects: is it staying a pending insolvency proceeding? Does a stay postpone these proceedings, or does it postpone certain actions of the administrator within these proceedings? Does it stay litigation against the estate? Where a stay is intended to have cross-border effect, what are its legal consequences in other countries? The second concern is (ii) that the automatic force of a stay can be used as a tactical weapon in those jurisdictions where the court or creditors cannot oversee the whole case. Principle 8.1 therefore uses the word "may" to leave the decision concerning the imposition of a stay to a court's discretion, to avoid these uncertainties or this tactical behavior.

For the remainder, the wording of this Global Principle follows closely that of General Principle III of the ALI NAFTA Principles, and is readily transposable to a global application. The phrase "at the earliest possible time" leaves open the possibility that, as a matter of law, the entry into effect of the moratorium may occur at different points in time, having regard to national standards and procedures. Ideally, the moratorium should enter into effect, at least on a provisional basis, as soon as a decision on such a request for cooperation has been made. In practice, a more durable moratorium is likely to enter into effect following a judgment, considering all the relevant circumstances, delivered in response to an application for recognition, possibly combined with a specific request for a moratorium. In international cases, a moratorium should be able to have its legal effects beyond the scope of the court's jurisdiction.

REPORTERS' NOTES

Propositions corresponding to Global Principle 8 are included in the leading standard-setting instruments and texts promulgated by international organizations in the modern era. As examples, see: (1) UNCITRAL Model Law (1997), Articles 19, 20; (2) UNCITRAL Legislative Guide on Insolvency Law (2005) (adopted in 2004), Recommendations 39-51; (3) 2011 World Bank Principles for Effective Insolvency and Creditor/Debtor Regimes, Provisional Measures and Effects of Commencement [C5].

Among the jurisdictions surveyed, there was virtually universal acceptance of the principle that, upon recognition of a foreign insolvency proceeding according to the criteria for recognition applicable under the respective laws of each state, a moratorium (stay) over the assets of the debtor that are located within that jurisdiction could be obtained. In some states, this would occur as an automatic consequence of recognition (e.g., Austria, §§ 221 ff. KO; § 235 KO; Croatia, Art. 312 BL), whereas in other cases it would be necessary to make specific application for a moratorium to be imposed by order of the court (e.g., The Netherlands; South Africa). The concept of "moratorium" does not have a single, standard meaning but is subject to considerable variation in terms of its substance and extent. A description of the expression "stay of proceedings" (equating to "moratorium") is included in the Appendix.

Principle 9 Cooperation and Sharing of Information Between Courts and Administrators

9.1. Cooperation between courts and between administrators should include prompt and full disclosure regarding all relevant information, including assets and claims, with a view to promoting transparency and reducing international fraud.
9.2. Insolvency administrators should provide all other insolvency administrators involved with prompt and full disclosure about the existence and status of the insolvency proceedings in which they have been appointed.
9.3. Insolvency administrators should share relevant nonpublic information with other insolvency administrators, subject to applicable law and appropriate confidentiality arrangements.
9.4. Following recognition, a foreign representative should be entitled to use all available legal means to obtain information about the debtor's assets in all jurisdictions where those assets may be found.
9.5. An insolvency administrator, debtor, or creditor filing an insolvency case or seeking recognition of a foreign insolvency proceeding should provide prompt and full disclosure about the existence and status of any foreign insolvency case that concerns the same or a related debtor at the time of filing.
9.6. An insolvency administrator should provide prompt and full disclosure to other insolvency administrators of material developments in any foreign insolvency case that concerns the same or a related debtor.

Comment to Global Principle 9:

This Principle is central to the attainment of all other objectives comprised within these Global Principles. Access to relevant information is a vital requirement for the efficient

conduct of an insolvency proceeding by the representative who has responsibility for the case. In order that timely and effective action may be taken by courts and administrators involved in an international case, it is essential that all those who are in a position to make a constructive contribution to the conduct of the matter should provide cooperation to ensure that the foreign representative is enabled to perform their functions on the basis of optimal information becoming available to them as freely and rapidly as is reasonably practicable. Moreover, the right of the foreign representative to utilize remedies under local law in furtherance of the task of administering the debtor's assets should also be respected.

Global Principles 9.1 and 9.4 are nearly identical in their wording to General Principles IV.A and IV.B, respectively, of the ALI NAFTA Principles. Principles 9.2 and 9.3 have the purpose of reinforcing and amplifying the scope of this Global Principle, and are inspired by several recent international instruments that have given expression to benchmarking provisions concerning this crucial aspect of international legal cooperation. Principles 9.5 and 9.6 are closely aligned with the core values expressed in the first four subsections of Global Principle 9, together with those stated in Global Principle 6.2. See below, and also the Reporters' Notes, for further information and references.

The term "cooperation," as employed in Principle 9.1, should be understood to denote that the duties in question are reciprocal, in that it is incumbent on the respective participants—whether courts or insolvency administrators—to respect the needs of their counterparts in other countries to be provided with such information as happens to be in the possession of the one and that is relevant to the functions that the other is or may be required to perform. Similarly, the concept of "prompt and full disclosure" characterizes the spirit in which such cooperation should take place, and indicates that this should be one of openness and transparency, even to the extent of anticipating the requirements of the other in a proactive manner. However, such a degree of cooperation can only be attained if all participants are able to place complete trust in the integrity and professional discretion of their counterparts with regard to the use that is made of the information provided. This includes the provision of adequate safeguards concerning secure storage of the information so as to maintain the confidentiality of sensitive data and to prevent its misuse by third parties.

From practical experience, it follows that proper decisionmaking by all parties concerned is heavily dependent on information available. Principle 9.1 therefore adds that consideration should be given to improving transparency of the method of sharing information. According to LoPucki, transparency means "when all relevant aspects of its operation [meaning: a "court system"] are revealed to policymakers, litigants, and the public in forms that they can readily comprehend."[88] This would preferably be the mutual distribution of information via the use of existing websites, as such systems are in place for specific court filings (e.g., U.S., PACER) or for general information-sharing possibilities, such as www.austlii.edu.au (Australia), www.bailii.org (England, Wales, Ireland, Scotland), www.rechtspraak.nl (The Netherlands), or regionally focused websites, such as INSOL Europe Case Register Database (launched in October 2011), see www.insolvencycases.eu. In appropriate cases, tailor-made websites could be created. A concern to be addressed in the sharing of information and the method to be chosen to do so is the reduction of fraud. Consideration should be given to ensuring that certain information of a sensitive nature, whether from the aspect of public, private, or

[88] Lynn M. LoPucki, Court-System Transparency, in: 94 Iowa Law Review, February 2009, nr. 2, 481ff. LoPucki defends a full-court electronic transparency.

commercial sensitivity (such as information regarding financial amounts, login codes, security measures, certain public or fiscal data, identifiable names of certain persons, etc.) is shared in such ways that this information will not be accessible for parties that do not have an interest in the international case at hand.

To ensure that certain key aspects of the duty of cooperation in matters of the provision of information are properly understood by those acting in a global context, two additional sub-principles have been added, numbered as 9.2 and 9.3. These reflect CoCo Guidelines 7.1 and 7.5, respectively. The provision of information should be unhindered and direct and should take place as soon as is reasonably practicable. It is stressed again that all Global Principles only apply to the fullest extent permissible under any applicable law. Therefore, Principle 9.3 invites an administrator to apply national rules relating to confidentiality of relevant information, which is not available in the public domain.

The proposition in the original sub-principle IV.B of the ALI NAFTA Principles, now numbered as 9.4, goes farther, and requires the making available of all positive legal powers available under the laws of the country where cooperation is requested, to enable a recognized foreign representative to obtain information about the debtor's assets in each jurisdiction. Such enhanced access to powers of investigation is predicated upon the foreign representative having been "recognized," which should be understood to refer to the act of the local court in recognizing the foreign insolvency proceeding within the sense conveyed by Global Principle 7, and to its further act of confirmation that the foreign representative is the proper person to conduct the international administration of the debtor's estate. The right of access to investigative powers under the laws of the recognizing state is embodied in Article 21(1)(d) of the UNCITRAL Model Law. See further Global Principle 20.

Principle 9.4 should allow a recognized foreign representative to use all legal methods of obtaining information that would be available to a creditor or to an administrator in a domestic insolvency proceeding. This reflects Procedural Principle 9 of the ALI NAFTA Principles, with the omission of the limiting references to NAFTA countries. For the purposes of these Global Principles, a foreign representative will only obtain recognition in other states if the proceedings have opened in a state whose courts have international jurisdiction according to the rules as herein specially defined (see Global Principle 13). These jurisdictional criteria, in combination with the safeguards embodied in Global Principle 3 to allow considerations of public policy and national rules or ethical principles to prevail in the final resort, should provide sufficient assurance to enable states to accept the propositions contained in Global Principles 9.1-9.3.

Principles 9.5 and 9.6 are overarched by Global Principle 1.4: courts and administrators should cooperate in an international insolvency case as far as possible with the aim of achieving the objective to operate efficiently and effectively in cross-border insolvency proceedings with the goal of maximizing the value of the Debtor's worldwide assets and furthering the just administration of the proceeding. It is also identical in substance to Procedural Principle 8 of the ALI-NAFTA Principles. To ensure that the full benefits of international cooperation are realized it is essential that courts are able to place their trust in the integrity and candor of those parties who appear before them to apply for recognition and assistance or, conversely, to oppose such applications. In the absence of such trust, courts will invariably be inclined to exercise a high degree of caution in their approach to the granting of assistance, to the ultimate detriment of the legitimate interests affected by the case. It is therefore appropriate to impose an active duty of disclosure on all those who seek to

participate in a hearing at which a court is being asked to grant recognition or assistance, so that it is incumbent on them to make full disclosure of any relevant information that could have a bearing on the outcome of the application, such as the existence of concurrent or related proceedings in other jurisdictions, or of any material development in those proceedings of which the court should be made aware.

The imposition of an active, and continuing, duty of disclosure forms an integral aspect of the process under the UNCITRAL Model Law. When an application for recognition is initially made, article 15(3) imposes a positive obligation to disclose to the court all foreign proceedings in respect of the debtor that are known to the foreign representative. Subsequently, by article 18 the foreign representative is subject to a continuing obligation to inform the court promptly of any substantial change in the status of the recognized foreign proceeding or the status of the foreign representative's appointment, and of any other foreign proceeding regarding the same debtor that becomes known to him or her. Under Guideline 7 of the CoCo Guidelines, an active and ongoing duty to share information is made applicable between liquidators.

REPORTERS' NOTES

For provisions in international standard-setting instruments that relate to the sharing of information among administrators acting in concurrent proceedings concerning the same debtor, and the provision of information to other interested parties, together with applicable safeguards for the protection of sensitive or privileged information, see: (1) UNCITRAL Model Law (1997), Article 21(1)(d), (e), and (g); (2) EU Insolvency Regulation (2000), Article 31; (3) ALI/UNIDROIT Principles of Transnational Civil Procedure (2006) (adopted in 2004), Principles 11, 16, and 31; (4) CoCo Guidelines (2007), Guidelines 6, 7, and 8; (5) ADB Good Practice Standards for Insolvency Law (2000), Good Practice Standards 8.1, 8.2; (6) OHADA Uniform Act Organizing Collective Proceedings for Wiping Off Debts, Part VI—International Collective Proceedings, Article 252.

In their respective ways, the texts referenced above are supportive of the propositions expressed in the first four paragraphs of Global Principle 9. Indeed, it would be remarkable if they did not, since it is scarcely conceivable that the efficient conduct of an international insolvency case could be accomplished in the absence of the sharing of relevant information on a free and timely basis, subject to essential safeguards respecting confidentiality and secure management of data. The most forward-looking and detailed formulations of the practical extent of this Principle are found in the ALI/UNIDROIT Principles (which are designed for use in orthodox, inter-party litigation), and the CoCo Guidelines (which apply specifically to cross-border insolvency in a European context). The latter are notable for the assertion, in CoCo Guideline 6.1, that the duty to communicate with his or her counterparts arises immediately upon appointment. Also notable is the provision in CoCo Guideline 6.2 that the liquidator in the main proceeding should take the initiative in the matter of communications with the other office holders involved in the case. While that is a sensible proposition in the interests of ensuring that such matters are actively addressed by the office holder likely to have the leading interest in the proceeding, the additional provisions of CoCo Guideline 8 in relation to the liquidator in secondary proceedings are also highly important.

The majority of the jurisdictions surveyed in this study reported that provisions corresponding to Global Principle 9 are already accepted and applied in their laws. Among the national jurisdictions surveyed, there was a generally high degree of acceptance of Principle 9.4 allowing a recognized foreign representative to have access to domestic procedures that would facilitate the obtaining of information relevant to the conduct of the insolvency case.

Of those that had indicated the current absence of provisions laid down in Global Principle 9, Brazil, the Netherlands, and South Africa appear to entertain no strong objection to the acceptance of the Principle, while in Vietnam the absence of such provisions in the insolvency law is mitigated to some degree by the possibility of seeking judicial assistance in respect of a foreign civil procedure, with the further possibility of obtaining a direction from the Vietnamese court for the obtaining of information. However, all such assistance is currently predicated on there being an international treaty between the two countries concerned, or alternatively on proof of the existence of reciprocity between the two jurisdictions.[89]

Principle 10 Sharing of Value

Where a court has recognized a foreign insolvency case that has been opened in another state having international jurisdiction according to these Global Principles, the court should approve the sharing of the value of the debtor's assets on a global basis.

Comment to Global Principle 10:

This Principle, which is closely linked to the fundamental proposition in Global Principle 1, is a logical counterpart of the initial conception that the debtor's worldwide assets should be administered on a universal basis for the benefit of all the creditors. It follows logically that once a foreign insolvency proceeding is recognized according to the criteria for international jurisdiction of the country in question (refer to Global Principle 7 above, and to Global Principle 13 below), it becomes the duty of the recognizing court to cooperate in whatever way it can to facilitate the attainment of that overall objective. The exact nature of that cooperation will vary according to the circumstances of the case, and will involve a consideration of such factors as the relative disposition of the debtor's assets throughout the world, the nature of those assets, and the most cost-efficient means of administering and, where appropriate, realizing their value for purposes of distribution. The original terms of this Global Principle, as embodied in Principle V of the ALI NAFTA Principles, are expressed with reference to the recognition of a foreign representative of a proceeding "in another NAFTA country," without any qualifying condition in that Principle, or in the related ALI NAFTA Principle II, as to the circumstances under which the proceedings have been commenced, or as to the grounds on which jurisdiction was exercised. The wording has been amended to adapt this principle for global application, so as to introduce the precondition that the court's recognition of the foreign proceeding must be based on a finding that the foreign proceeding has been opened in another state having international jurisdiction according to the jurisdictional criteria laid down for the purposes of these Global Principles.

Part of the purpose of this Principle is to overcome the type of unfair outcome that can result from the arbitrary disposition of assets in such a way that in some states the debtor's local assets are relatively high in value in relation to the aggregate of claims generated from within that state, whereas in other states the converse may be true. If assets and claims were to be processed on a purely territorial basis, some creditors would receive a proportionately higher return on their claims relative to the level of recovery to be experienced by other creditors whose relations with the debtor might otherwise place them on a factually equivalent footing.

[89] Vietnamese Civil Procedure Code, Articles 414(2), 415.

By adopting an approach under which a global "pooling" of assets, and likewise of claims, is used as a basis for calculating the appropriate levels of distribution to be made to the worldwide creditors, this Principle seeks to suppress incentives for individual creditors to engage in self-serving tactics that can be both destructive of value and also detrimental to any prospects for a successful reorganization of the debtor, where that might otherwise have been undertaken. As a logical and necessary counterpart of this objective, Global Principle 10 is complemented by Global Principle 12 (the so-called hotchpot rule), which addresses the concern that individual creditors might obtain an unfair advantage, relative to other creditors of equivalent standing, by multiple filings of the same claim in distributions that happen to take place in different states.

Moreover it should be noted that the concept of "sharing of the value of the debtor's assets on a global basis" does not preclude the possibility that the systems of asset distribution, or other relevant provisions, under the laws of more than one country may be engaged in the overall process of administration of the debtor's estate. It has to be acknowledged that the rules of priority, and the systems for granting security in favor of certain creditors, differ from state to state, and that the precise content of these provisions can be a material factor influencing debtor-creditor relationships. Therefore, while it may be considered acceptable to allow assets collected in a given state to become part of a "pooled" process of distribution among the worldwide creditors, this should not take place at the expense of respecting the expectations of creditors who would have priority or secured status under the laws of a given state to have those privileges applied in relation to any assets that happen to be collected in that place. This concern may be accommodated by making it a condition of any order for the turnover of assets that provision must be made to ensure that any locally valid security rights are not adversely affected, and that full provision is made for all creditors (not merely local creditors) to receive the benefit of any locally conferred rights of priority that would not be replicated under the other state's system of distribution (for example, by retaining or deducting an appropriate portion of the assets).

In addition to the above, it is a legitimate consideration for a court that is requested to order the turning over of assets for distribution according to the laws of a different state to make inquiry as to the extent to which the latter system operates in accordance with generally accepted norms and standards of insolvency law. For example, it would be logically contradictory for assets to be turned over on the premise that they are to be administered as part of a global estate if, under the laws of the receiving state, nondomestic creditors (or claims so classified under the local law) are subjected to discriminatory treatment purely on that basis.[90] However, the existence of some points of difference between the insolvency systems of different states, for example with regard to the number and composition of the categories of preferential debts, or the range of security or quasi-security devices that are sanctioned under the law (including, where relevant, the mode of treatment accorded to claims to set-off) should not be considered to give rise to an automatic bar to the remittal of assets between any two such states unless it is demonstrable in the actual case that the divergence is

[90] See Swissair Schweizerische Luftverkehraktiengessellschaft [2009] EWHC 2099 (Ch); [2009] BPIR 1505, in which the High Court held that it has a common-law power to order an English liquidator to pay asset realizations, made in England and Wales, to foreign administrators, provided that the foreign insolvency regime provides for a *pari passu* distribution of such asset realizations to creditors, even if those foreign administrators are not located in "relevant countries" for the purposes of section 426 UK Insolvency Act (in this case Swiss administrators).

such as to contravene the public policy of the remitting state in a manifest and fundamental manner.

REPORTERS' NOTES

The principle of sharing of value is included as an integral aspect of the EU Insolvency Regulation (2000). Article 32 (applicable where there are both main and secondary proceedings) and Article 39 (applicable as a general principle, irrespective of whether there is a single proceeding or multiple, concurrent proceedings) proclaim the right of any creditor to lodge claim in the main proceeding and in any secondary proceeding. The potential administrative complexity of such multiple cross-border filings, and the consequential added costs for all concerned, are mitigated by the provision in Article 32(2) allowing the liquidators in the main and any secondary proceedings each to function as the collective representative of all creditors who have lodged claims in the proceeding for which they are respectively responsible, provided that this best serves the interests of creditors in those proceedings and that the latter do not oppose such a process. The principle under which every one of the debtor's creditors has the right to participate in the process or processes of distribution of each and every component of the debtor's global estate is central to the fulfilment of the aim of administering that estate on a universal basis. Procedural safeguards are required to ensure that no individual creditor is enabled to participate in any single process of distribution in more than one capacity, as could arise if the creditor's claim is lodged on an individual basis, having already been included within the collective claim submitted by the liquidator of a concurrent proceeding in which proof has already been lodged. The rule against double-proof, which is an established element of such national insolvency laws as that of the United Kingdom,[91] should be invoked to strike out one of the duplicate filings of claim.

Historically, the concept of a sharing of value would be considered inimical to the philosophical approach embraced by those states that adhered to the "territoriality" principle in matters of international insolvency, including such states as Brazil, Japan, and the Netherlands. In recent years, states such as Austria and Japan have become converted to the universality principle, and, while the formal positions of Brazil and the Netherlands seem to remain unaltered, there appear to be reasonable prospects that a policy of cooperation may evolve there over time.

Principle 11 Nondiscriminatory Treatment

Subject to Global Principle 3, a court should not discriminate against creditors or claimants based on nationality, residence, registered seat or domicile of the claimant, or the nature of the claim.

Comment to Global Principle 11:

This Global Principle expresses a fundamental tenet of the modern era in terms of the application of remedies and standards of treatment on a basis of equality before the law. In the particular field of international insolvency this principle bears a special significance in

[91] See *Re Oriental Commercial Bank* (1871) 7 Ch. App. 99. For an account of the rule against double proof in English insolvency law, see I.F. Fletcher, The Law of Insolvency 4th edition (2009), paras. 9-015, 9-016.

relation to the concept of *pari passu* distribution of the assets among creditors, and likewise in relation their eligibility to participate fully and effectively in the relevant proceeding, whether its purpose is reorganization or liquidation of the debtor's estate. In terms of substantive rights of participation, the provisions of a state's insolvency law should be applicable on a nondiscriminatory basis to all persons occupying the status of creditor by virtue of their having some kind of claim against the debtor. In former times, this principle was expressed in the doctrinal literature of insolvency law using the Latin maxim: *par est condicio omnium creditorum* (literally: "the condition of all creditors is equal").[92]

It can be argued that the application of insolvency laws on a nondiscriminatory basis with respect to all claimants is a necessary corollary of the universalist approach to international insolvency. If the debtor's global assets are to be administered in accordance with the laws of one state or country on the premise that the debtor's global estate is to be treated as a single entity, it must be accepted that all claimants against that estate must be accorded parity of treatment by the law that aspires to exert such omnipotent authority. To translate this aspiration into genuine reality, both in terms of the process as well as the substance of the insolvency proceeding, may require the taking of some additional measures to compensate for the inevitable effects of factors such as distance, publicity, lack of information, and language on the ability of creditors to participate effectively despite being based beyond the frontiers of the state in which the proceeding is taking place. It is partly for this reason that Global Principle 5 ("Equality of Arms") has been included in these Global Principles in the interests of assuring that the principle of nondiscrimination is respected and applied in practice, and not merely on an abstract or theoretical level (see Reporters' Notes, below).

Acceptance of the principle of nondiscrimination between domestic and foreign creditors need not preclude the continued application of rules whereby certain categories of claims are allocated differing priorities of ranking according to the system of distribution maintained under the insolvency laws of a given state. What is required is that the claims of foreign creditors should not be ranked lower than those of domestic creditors whose claims are of a similar character (subject to what is said below in the Reporters' Notes).

Having regard to Principle 3, a foreign "tax" or "social security" claim will not be discriminated against, while such claims, either in full or part of them that have a "penal" or "fine" character most probably cannot be acted upon by the court where such an action would be manifestly contrary to the public policy of the forum state (see Principle 3(iii)). It is noted that all Global Principles apply, subject to Principle 3, and that in some of the Principles or their accompanying Comments it has been felt more necessary than in others to make an express reference to Principle 3.

Although it could be suggested that claims of such a nature should not be allowed in the light of Principle 1.1 (taking such a claim into account may seriously endanger the efficient and effective operation of an international insolvency proceeding), the Reporters submit that such an approach would be too general and would not be in line with Principle 1.2, which

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[92] See Stefan Weiland, *Par condition creditorum. Der insolvenzrechtliche Gleichbehandlungsgrundsatz und seine Durchbrechungen zugunsten öffentlich-rechtlicher Gläubiger*, Saarbrücker Studien zum Privat- und Wirtschaftsrecht, Band 67, Frankfurt am Main: Peter Lang, 2010. This author refers for the maxim *par condicio creditorum* to Corpus Iuris Civilis, Ulp. D. 42, 8.6, § 7.

prescribes to take into account the interests of creditors (without limitation) and the need to ensure equal treatment among them.

REPORTERS' NOTES

Historically, the principle of nondiscrimination has admitted of certain exceptions, including that derived from the separate principle under which sovereign states have declined to serve as agents or instruments for the enforcement of each other's penal or revenue laws. This exclusionary principle continues to be applied in many countries as part of their private international law.[93] In relation to international insolvency proceedings, this has been frequently applied as a basis for rejecting any claims lodged by the public authorities of a foreign state in respect of taxes or other publicly imposed liabilities, or by some private figure whose claim is ultimately based upon such a liability. In modern times, there have been two separate trends whose combined effect has been to erode the force of the traditional exclusionary practice. These are, firstly, the reforms to the laws of a number of states that have resulted in the diminishing or even the elimination of domestic taxes and public liabilities from the categories of debts that are accorded priority under domestic insolvency law, and secondly, the inclusion in internationally operative instruments of provisions to permit the lodging of proof for public-law claims and taxes by the authorities of states that are subject to the effects of the instruments in question.[94] These developments, if continued over time, should eventually lead to an abatement of the traditional discrimination against foreign-tax and social-security laws under the insolvency laws of many, if not most states. For the time being, however, it must be acknowledged that this exception to the principle of nondiscrimination continues to be widely applied. In certain circumstances, it may be possible to base a refusal to admit a claim submitted by a foreign state or public authority on the ground that it is a penal claim of a kind whose enforcement would be manifestly contrary to the public policy of the forum state, thereby bringing the issue within the scope of Global Principle 3.

The formal position under the domestic laws of almost every one of the states surveyed is that the principle of equality is accepted, and that it is applied in practice. Even where such equality of treatment is maintained as a matter of general practice, it can still be the case that certain provisions in the insolvency laws of some states would have the effect of according favorable treatment to creditors who would—either expressly or in point of fact—be citizens or residents of the state in question. As

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[93] See, e.g., Dicey, Morris, and Collins, The Conflict of Laws, 14th edition (2006), Rule 3 (p.100): "English courts have no jurisdiction to entertain an action: (1) for the enforcement, either directly or indirectly, of a penal, revenue or other public law of a foreign state: or (2) founded upon an act of state." (authorities omitted). Netherlands Supreme Court 11 July 2008, LJN: BD1387 (Azeta B.V. v Japan Collahuasi Resources B.V.), observed that, in general, tax claims are regarded as goods with a public destination and therefore are not subject to rules of execution.

[94] EU Insolvency Regulation, Art. 39; UNCITRAL Model Law (1997), Article 13 (note, however, that the variant of Art. 13(2) permits a state to continue to discriminate against foreign-tax and social-security claims if it desires to do so). In Schedule 1 to the UK Cross-Border Insolvency Regulations 2006 (S.I. 2006/1030), which gives effect to the UNCITRAL Model Law within Great Britain, the enacted version of Article 13 stipulates that in a proceeding conducted under British insolvency law, a claim may not be challenged solely on the grounds that it is a claim by a foreign-tax or social-security authority, but that such a claim may be challenged on the ground that it is in whole or in part a penalty, or on any other ground that might enable a claim to be rejected under British insolvency law (Art. 13(3)).

an example, a special category of priority creditor is established for the benefit of "U.S. fishermen" under the U.S. Bankruptcy Code.[95]

As an essential aspect of the principle of equality of treatment, all reasonable care should be taken to minimize, as far as possible, the relative disadvantages that will be experienced by nonlocal creditors when exercising their rights of participation in an insolvency proceeding. Every effort should be made to ensure that, so far as is practicable, all creditors and parties in interest in an international case are afforded the opportunity to participate fully and effectively in the proceeding in accordance with the principle of "equality of arms" as expressed in Global Principle 5.

Principle 12 Adjustment of Distributions

Where there is more than one insolvency case pending with respect to the debtor, a creditor should not receive more through the distributions made in a particular case than the percentage recovered by other creditors of the same class in that case, having regard to distributions already received in other cases concerning the same debtor. A creditor who receives more than one distribution should account for all previous distributions as a condition to participating in a subsequent distribution in another case.

Comment to Global Principle 12:

This Principle articulates an important aspect of the fundamental concept of equality between creditors, as expressed through the rule of *pari passu* distribution of the debtor's estate. It also forms an essential counterbalance to the application of the Principles stated above as Global Principle 10 (Sharing of Value) and Global Principle 11 (Nondiscriminatory Treatment), in the furtherance of the overriding objective of Global Principle 1. For a genuinely equal distribution to take place on a global basis in a case where the debtor's property is being administered through concurrent proceedings in two or more different jurisdictions, it is necessary that a controlling principle should be applied to limit the extent of the net recovery that any individual creditor is entitled to receive when the distributions from all the different proceedings are aggregated together. If the amount received, expressed as a percentage of the original indebtedness, exceeds the percentage recovered by other creditors of the same class, then it follows that the principle of equality has not been maintained. In order to reconcile the requirement of equality with the right of creditors to participate in all the proceedings in which the debtor's property is administered (a process sometimes referred to as "universal cross-filing of claims"),[96] it is necessary to apply an adjustment mechanism on each occasion when a distribution is being made in any of the multiple proceedings, taking full account of each creditor's current situation relative to that of other participating creditors who occupy the same class or ranking for purposes of distribution according to the rules of the state in question. That mechanism is traditionally known as the hotchpot rule, and is especially relevant to the application of the principle of sharing of value expressed in Global Principle

[95] 11 U.S.C. § 508. See Allen L. Gropper, The Payment of Priority Claims in Cross-Border Insolvency Cases, 46 Texas International Law Journal, p. 559ff (2011).

[96] See Jay L. Westbrook, Universal Participation in Transnational Bankruptcies, in: Making Commercial Law, Essays in Honour of Roy Goode (R. Cranston, Ed., 1997), 419-437; Jay Lawrence Westbrook, Breaking Away: Local Priorities and Global Assets, 46 Texas International Law Journal 2011/3, p. 602ff.

10. The rule was developed under equitable doctrines by courts in England and elsewhere during the 19th century, and was assimilated in the 20th and 21st centuries into the legislative provisions of some states, as well as into the texts of several international instruments relating to insolvency.[97]

Principle 13 International Jurisdiction

13.1. For the purposes of these Global Principles, the courts or other authorities of a state should have jurisdiction to open an insolvency case in respect of a debtor when either:

(i) The debtor's center of main interests is situated within that state's territory; or

(ii) The debtor has an establishment within that state's territory.

13.2. Where an insolvency case is opened on the basis of Global Principle 13.1(ii), its effects should generally be restricted to those assets of the debtor situated in the state in question. Such a case may be accorded more extensive effect if an insolvency case cannot be opened under Global Principle 13.1(i) because of conditions laid down by the law of the state in which the center of main interests is situated.

13.3. For the purposes of these Global Principles:

(i) "Center of main interests" means the place where the debtor conducts the administration of its interests on a regular basis, to be determined on the basis of objective factors that are known to or are readily ascertainable by third parties.

(ii) In the case of a company or legal person, the place of the registered office should be presumed to be the center of its main interests, unless the contrary is proved.

(iii) In the case of an individual, the debtor's habitual residence should be presumed to be the center of his or her main interests, unless the contrary is proved. In the case of an individual who is engaged in a business, trade, or profession, the debtor's professional domicile or, if there is none, the debtor's registered business address should be presumed to be his or her center of main interests, unless the contrary is proved.

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[97] For examples of national laws' application of the hotchpot rule, see, e.g., Canada: Bankruptcy and Insolvency Act (as amended), s.274; U.S.A.: 11 U.S.C. § 1532; Croatia: Bankruptcy Law, Arts. 306 and 309; Korea: Debtor Rehabilitation and Bankruptcy Act (2006), Art. 642; Netherlands: Bankruptcy Act (1896), Arts. 203-205. For the original formulation of the principle under English common law, see Selkrig v. Davies (1814) 2 Dow. 230; 3 E.R. 848 (HL); Banco de Portugal v. Waddell (1880) 5 App. Cas 161 (HL); Cleaver v. Delta American Reinsurance Co [2001] 2 A.C. 328 (PC). For the hotchpot provisions included in international instruments, see, e.g., UNCITRAL Model Law (1997), Article 32; EU Insolvency Regulation, Article 20; OHADA's Uniform Act Organizing Collective Proceedings for Wiping off Debts, Article 255. For a concise comparative study of the topic, see H. Hanisch, Crediting a creditor with proceeds recovered abroad out of the debtor's assets recovered abroad in domestic insolvency proceedings, in: I.F. Fletcher (Ed.), Cross-Border Insolvency, Comparative Dimensions (1990, UKNCCL Publications, Volume 12), Ch. 11 (pp.192-204). For a comparison of Article 32 Model Law and Article 20 InsReg, see Ilka Annette von Boehmer, (Deutsches) Internationales Insolvenzrecht im Umbruch. Grundfragen grenzüberschreitender Insolvenzen, unter Berücksichtigung der UNCITRAL-Modellbestimmungen über grenzüberschreitende Insolvenzverfahren, Diss. Göttingen, 2006, p. 197ff.

(iv) An "establishment" means a place of operations where or through which the debtor carries out an economic activity on a nontransitory basis, with human means and assets or services, to be determined on the basis of objective factors that are known to or are readily ascertainable by third parties. Such activities may be commercial, industrial, or professional.

13.4. Where an insolvency case is opened on the basis of Global Principle 13.1(i), the court should determine whether the center of main interests is situated within the territory of the forum state. For this purpose, the location of the center of main interests should be determined as of the earliest date on which the debtor or a party with standing seeks to invoke the jurisdiction to open the insolvency case.

13.5. If the debtor's center of main interest was previously in a different state (the "Prior State") from the state in which the insolvency case was opened, the international jurisdiction of the Prior State should not be displaced unless either (i) at the time of the alleged relocation of the center of main interests, the debtor was able to pay all debts and liabilities incurred prior to that time or (ii) the debtor has fully paid or concluded a composition or compromise in respect of its obligations incurred before the relocation of its center of main interests. Alternatively, jurisdiction of the Prior State may be displaced if there is no undue prejudice to creditors whose claims arose from dealings with the debtor during the time when the debtor's center of main interest was in the Prior State.

Comment to Global Principle 13:

Central to any set of principles concerning international recognition and assistance in legal proceedings, such as insolvency, is the question of authentication of the original proceeding to which such recognition and assistance are to be accorded. It is essential that the court or administrator responsible for taking the requested action in support of a foreign proceeding is furnished with the minimum information necessary to confirm that the foreign proceeding has been opened in accordance with internationally recognized standards for the exercise of jurisdiction in such matters.

When a court exercises jurisdiction in accordance with principles laid down in the domestic law of the state in which it is established, the validity of such a proceeding, for the purposes of international recognition and enforcement, will depend on whether the circumstances under which such an exercise of jurisdiction by the first court has taken place are in conformity with the criteria established under the private international law of the recognizing state. Where those criteria are met, the first court is said to have had "international jurisdiction" over the matter in question. There can be considerable variation between the private international law rules applied by different states with regard to the criteria that are applied for this purpose, thereby resulting in uneven (or "limping") levels of recognition and enforcement among the various sovereign states. Under international agreements, certain agreed criteria may come to be accepted as giving rise to international jurisdictional competence for the court in relation to which they are met in a given case, thereby transcending the rules of recognition of individual states and giving rise to a more uniform level of acceptance of the proceedings in question.

The Reporters have been reflecting on the need to express Global Principles on International Jurisdiction that can supply the common basis for application of the Principles and Guidelines contained within this Report (and the Rules in the Reporters' Statement in the Annex to the Report). We believe that the most fruitful approach is likely to be one that builds upon the

emerging practices of recent times in relation to the international regulation of cross-border insolvency. Both the EU Regulation on Insolvency Proceedings and the UNCITRAL Model Law on Cross-Border Insolvency have chosen the "centre of the debtor's main interests" (COMI), and the place at which the debtor possesses an "establishment" as their criteria for attribution of international jurisdiction. A hierarchy of jurisdictional competence is created under both of the international instruments mentioned, in that the state in which the COMI of the debtor is located is considered to have full international jurisdiction of a universal nature, whereas any state in which the debtor possesses an establishment is considered to have international jurisdiction of a territorial nature, that is to say one whose effects are restricted to the property of the debtor situated in the territory of the state in which the establishment is located (see EU Insolvency Regulation, Articles 3(1), (2), and 27, together with Article 2(h) and Recital (13) and (17); UNCITRAL Model Law, Articles 15, 16, 17, and 2(f)). We have formulated Global Principle 13 to complement this shared approach to the key issue of international jurisdiction that is now applicable by the courts of some 45 states (26 European states that are subject to the EU Regulation, in all cases that come within the scope of the Regulation, and by the courts of some 20 states worldwide that have enacted the Model Law, in matters coming within the scope of their national enacting legislation). In particular, Principles 13.1 and 13.2 reflect the hierarchy of competence as between the court of the COMI (to which international jurisdiction is accorded accompanied in many states by universality of effect, thereby constituting those proceedings as the main insolvency proceeding concerning the debtor), and the court of any state in which the debtor possesses an establishment (to which international jurisdiction is accorded albeit with an effect which is in most cases restricted to property of the debtor located in the state in question, thereby constituting such proceedings as secondary or territorial proceedings). However, in cases where some obstacle exists to preclude the opening of main proceedings in the state of the debtor's COMI, the proviso to Principle 13.2 indicates that proceedings opened in a state where the debtor possesses an establishment may be accorded a more extensive effect. Such recognition will be subject to the discretion of the court of the recognizing state, and will reflect the willingness of such court to assist in facilitating the most effective administration of the foreign insolvency proceeding.[98] Late in 2011, the Court of Justice of the European Union conveniently summarized the system of the EU Insolvency Regulation, see CJEU 17 November 2011, Case C-112/10 (*Procureur-generaal bij het hof van beroep te Antwerpen v Zaza Retail BV*):

"16 Before examining the questions referred, it is important to recall the system put in place by the Regulation.

17 In that regard, Article 3 of the Regulation makes provision for two types of insolvency proceedings. Insolvency proceedings opened, in accordance with Article 3(1), by the competent court of the Member State within the territory of which the centre of a debtor's main interests is situated, described as the 'main proceedings', produce universal effects in that the proceedings apply to the debtor's assets situated in all the Member States in which the Regulation applies. Although proceedings under Article 3(2) may be opened by the competent court of the Member State where the debtor has an establishment, those proceedings, described as 'secondary proceedings' or 'territorial proceedings', produce effects which are restricted to the assets of the debtor situated in the territory of the latter State (see, to that effect, Case C-341/04 Eurofood IFSC [2006] ECR I-3813, paragraph 28, and Case C-444/07 MG Probud Gdynia [2010] ECR I-417, paragraph 22).

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[98] On the question of jurisdictional hierarchy in international proceedings, see J.A.E. Pottow, Procedural Incrementalism: A Model for International Bankruptcy, 45 Va. J. Int'l L. 935-1015 (2005).

18 The opening of secondary or territorial proceedings is subject to different conditions according to whether or not main proceedings have already been opened. In the first situation, the proceedings are described as 'secondary proceedings' and are governed by the provisions of Chapter III of the Regulation. In the second, the proceedings are described as 'territorial insolvency proceedings' and the circumstances in which proceedings can be opened are determined by Article 3(4) of the Regulation. That provision concerns two situations: first, where it is impossible to open main proceedings because of the conditions laid down by the law of the Member State where the debtor has the centre of its main interests and, secondly, where the opening of territorial proceedings in the Member State within the territory of which the debtor has an establishment is requested by certain creditors having a particular connection with that territory."

We readily acknowledge that a vital aspect of applying any jurisdictional rule whereby competence is allocated by means of conceptual terms such as, here, the place of the center of the debtor's main interests and the place where the debtor possesses an establishment is that there should be general and uniform understanding as to the meaning of the terms in question. Both the EU Regulation and the UNCITRAL Model Law contain formal definitions of the term "establishment" (in Articles 2(h) and 2(f) respectively), and the definition stated in Global Principle 13.3(iv) is closely modeled on those definitions. The CJEU has clarified that the definition in Article 2(h) of the Insolvency Regulation, which "links the pursuit of an economic activity to the presence of human resources shows that a minimum level of organisation and a degree of stability are required."[99] The CJEU observed furthermore: "In order to ensure legal certainty and foreseeability concerning the determination of the courts with jurisdiction, the existence of an establishment must be determined, in the same way as the location of the centre of main interests, on the basis of objective factors which are ascertainable by third parties."[100]

In turn, neither the Regulation nor the Model Law contains a formal definition of "COMI," although each instrument supplies a rebuttable presumption as to the location of the COMI of the debtor in certain cases (see Articles 3(1) and 16(3) respectively). In Global Principle 13.3(i), we have formulated a definition of COMI that seeks to reflect the essential concept of that term as construed by the European Court of Justice, notably in the *Eurofood* Case, (Case C-341/04 [2006] ECR I-3813) in relation to the EU Regulation, and by national courts that have performed a similar exercise in interpretation in relation to the Model Law (e.g., Re Stanford International Bank Ltd [2010] EWCA Civ 137; [2011] Ch. 33, (Court of Appeal, England); Re Bear Stearns High-Grade Structured Strategies Master Fund Ltd, 389 B.R. 325 (Bankr. S.D.N.Y. 2008)). Principle 13.3(i) indicates that the location of the debtor's COMI is to be identified as being at the place where the debtor conducts the administration of its interests on a regular basis and in a manner that is known to or readily ascertainable by third parties. Emphasis is therefore placed on the twin requirements of consistency and transparency, in that the debtor's administrative functions must be conducted in a sustained and consistent manner, and the location at which the administration takes place must be

[99] CJEU 20 October 2011, Case C-396/09 (Interedil Srl, in liquidation v Fallimento Interedil Srl, Intesa Gestione Crediti SpA), affirmed explicitly by CJEU 15 December 2011, Case C-191/10 (Rastelli Davide e C. Snc v Jean-Charles Hidoux, in his capacity as liquidator appointed by the court for the company Médiasucre international).

[100] CJEU 20 October 2011, Case C-396/09 (Interedil Srl, in liquidation v Fallimento Interedil Srl, Intesa Gestione Crediti SpA).

known to or readily ascertainable by third parties—namely creditors of the debtor. Global Principle 13.3(ii) supplies a rebuttable presumption as to the location of the COMI of a corporate debtor, and is expressed in similar terms to the equivalent provisions in Article 3(1) of the EU Regulation and Article 16(3) of the Model Law, respectively, by reference to the place of the registered office of the company. Global Principle 13.3(iii) supplies rebuttable presumptions as to the location of the COMI of an individual debtor under the alternative circumstances that the debtor is not engaged in a business, trade, or profession or that he or she is so engaged. The provisions of Principle 13.3(iii) are correspondent to the terms of Article 16(3) of the Model Law, and also to the discussion of the application of the concept of COMI to natural persons that is contained in paragraph 75 of the Virgós / Schmit Report to the EU Insolvency Convention of 1995 that is, in all essential respects, identical to the EU Insolvency Regulation. In Global Principle 13.3 ("establishment") the words "with human means and assets or services" have been added to avoid the presence of an establishment merely on the presence of one asset, such as a mailbox, a parked car, left luggage, or a bank account. The "presence alone of goods in isolation or bank accounts does not, in principle, meet" the definition of establishment in Article 2(h) of the EU Insolvency Regulation.[101]

In addition to the matter of definition of the concept of COMI, we believe it to be of considerable importance that the Global Principles should address two particular issues that have been identified as giving rise to uncertainty, and to potential unfairness, in the operation of this jurisdictional rule. We refer to the separate, but in many cases related, questions of the date as at which the location of the COMI of the debtor is to be ascertained and of the conditions under which it is to be acceptable for a debtor to effect a change in the location of the COMI such that jurisdictional competence is transferred from one state to another. Certain aspects of these questions were addressed by the European Court of Justice (ECJ) in the case of *Susanne Staubitz-Schreiber* (Case C-1/04, Judgment 17 January 2006 [2006] ECR I-3813) and in the case of Interedil Srl, in liquidation v Fallimento Interedil Srl, Intesa Gestione Crediti SpA) by (ECJ's successor) the Court of Justice of the European Union (Case C-396/09, Judgment 20 October 2011).

Global Principle 13.4 is developed from the central propositions within the European judgments in these cases, based on the provisions of the EU Regulation, and makes it a positive requirement that where proceedings are opened on the basis of Global Principle 13.1(i) (i.e., on the premise that the debtor's COMI is situated within the territory of the state of the forum), there must be a positive determination by the court to confirm that this is in fact the case. In order to preclude the possibility that a debtor may seek to undermine the jurisdictional competence of the court by effecting a migration of the COMI between the time when steps are first taken to invoke the jurisdiction of the forum and the time when the court makes a formal decision to open such proceedings, Global Principle 13.5 provides that the relevant time for determining the whereabouts of the COMI is as of the date on which a party with standing to do so first seeks to invoke the jurisdiction. Therefore, as was ruled by the ECJ in the *Staubitz-Schreiber* case mentioned, any efforts by the debtor to move the COMI to another state between the time when the request to open insolvency proceedings is lodged and the time when the judgment opening the proceedings is delivered does not have the effect of depriving the court first seized of the matter of the jurisdiction that it initially possessed.

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[101] CJEU 20 October 2011, Case C-396/09 (Interedil Srl, in liquidation v Fallimento Interedil Srl, Intesa Gestione Crediti SpA), at paragraph [62] of the judgment.

As a further safeguard against the potentially detrimental consequences for the rights of existing creditors that may be caused by a relocation of the COMI of a debtor at any time (even if no formal steps have been taken to initiate insolvency proceedings at the time in question), Global Principle 13.4 introduces a rule not hitherto expressed in any of the international instruments that have been concluded in the field of cross-border insolvency. The purpose of the rule is to ensure that one of the fundamental justifications for the rule for attribution of jurisdiction on the basis of the location of the COMI of the debtor is not undermined by the otherwise practical concession to the concept of the mobility of the COMI. The rationale that supports the use of an objectively ascertainable factor such as the COMI of a debtor as the basis for identifying the jurisdiction—and hence the system of insolvency law—to which a given debtor will be subject in the event of insolvency is to enable a creditor, at the time of giving credit, to anticipate the legal consequences of such action. If it is open to the debtor subsequently to take advantage of the factor of mobility of the COMI to effect an alteration of these vital aspects of the creditor's original calculations concerning the giving of credit, this would entail a defeat for the creditor's legitimate expectations. Global Principle 13.5 therefore asserts that where a debtor has brought about a migration of the COMI to a different state to that in which it was previously located, the international jurisdiction of the state where the COMI was formerly situated is not displaced, unless it is proved that at the time of the relocation the debtor was able to pay all the liabilities incurred prior to that time, or alternatively that all such preexisting obligations have been fully paid or compounded for by the time that the opening of insolvency proceedings is requested in the state to which the COMI has migrated. It is acknowledged that an excessively rigid application of this protective principle could sometimes have commercially inconvenient consequences by preventing a COMI migration from taking effect, even if it is demonstrable that there will be no material impairment of the interests of creditors whose dealings with the debtor took place prior to the act of migration. For example, it may be the case that the material outcome for some creditors may be unaffected by the COMI migration, simply because they would not be destined to receive any payment under the distributional processes of either of the insolvency laws concerned. Such could be the case if the remaining assets of the debtor are insufficient to support any form of dividend to the class or classes of creditors in question: in such circumstances, it would be counterproductive to allow the impossibility of payment, of and by itself, to furnish a ground on which such "out of the money" creditors could block a COMI migration to a jurisdiction under whose laws a more effective procedure is available whereby other interested parties (including the debtor) might achieve a better outcome. The proviso to Global Principle 13.5 therefore allows for such a migration to be consummated. For the purposes of Global Principle 13.5, the expression "the Prior State" means a state in which the debtor's center of main interests is shown to have been located in accordance with the provisions of Global Principle 13.3(i), (ii), or (iii), during a period prior to the time at which it became located in the state in which it is currently alleged to be.

It may be observed that the underlying motives for a debtor's COMI migration are not necessarily disreputable in all cases. Although so-called "bankruptcy tourism" is generally associated with a debtor's cynical attempt to take refuge in a more benign regime of insolvency law—including, quite often, a much more rapid discharge from the bankruptcy process, accompanied by a discharge from debts that were mostly incurred in the context of a more rigorous legal regime towards defaulting debtors—this is not necessarily true for all cases. Sometimes, the procedures available under the insolvency laws of the original COMI (particularly in the case of corporate debtors) may inhibit the possibilities for achieving a commercially viable reorganization within the time constraints under which the debtor may be obliged to operate. If it is made legally impossible—or commercially impractical—to relocate

the COMI in a jurisdiction whose laws offer a reasonable prospect of achieving the survival of at least some part of the debtor's operations, then a case can be made for enabling such a process to be undertaken subject to suitable and proportionate safeguards.

REPORTERS' NOTES

The legislative history of the term "centre of main interest," as it now appears in the EC Insolvency Regulation is rather short. The Regulation itself does not define COMI despite a definition for COMI having been submitted to the European Parliament (Committee on Law and Internal market, 23 February 2000, A5-0039/2000, in German says: "*der Ort, von dem aus der Schuldner hauptsächlich Geschäfsbeziehungen unterhält sowie andere wirtschaftliche Tätigheiten ausübt und zu dem er deshalb die engsten Beziehungen unterhält*"—which can be translated as—the place, from which the debtor mainly entertains business relations as well as exercises other economic activities and to which place he therefore maintains the closest relationships). In 1999, the initiative of the Federal Republic of Germany and the Republic of Finland, to reopen discussions on the delayed development of the (then) Insolvency Convention (O.J. 1999 C 221/8) provided an alternative text for recital 13: "The centre of main interests is taken as meaning a place with which the debtor regularly has very close contacts, in which his manifold commercial interests are concentrated and in which the bulk of his assets is for the most part situated. The creditor is also very familiar with that place." See Advocate General Kokott in her opinion of 10 March 2011 regarding a case at that time pending at the CJEU (C-396/09; Interedil Srl, in liquidation v Fallimento Interedil Srl, Intesa Gestione Crediti SpA—see below), observing that this legislative history for interpretation purposes is not very helpful (para. 69). It seems to follow from these draft texts that emphasis is laid on business relations or contacts by the debtor with the external market, that is, its (potential) creditors. The present text of recital 13 ("The 'centre of main interests' should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties") clearly flows from the Virgós / Schmit Report, nr. 75, which provides some guidance stating that "centre of main interests" must be interpreted ". . . as the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties." The passage from which these words are extracted carries a "law and economics" dimension, in that the reporters argue: ". . . insolvency is a foreseeable risk. It is therefore important that international jurisdiction (which . . . entails the application of the insolvency laws of that . . . State) be based on a place known to the debtor's potential creditors. This enables the legal risks which would have to be assumed in the case of insolvency to be calculated." See also Miguel Virgós, The 1995 European Community Convention on Insolvency Proceedings: an Insider's View, in: Forum Internationale, no. 25, March 1998, 13, who refers to ". . . the place where the debtor conducts the effective administration of his interests on a regular basis." Here, an emphasis is laid on the effect of the administration of interests. The words cited in recital 13 are considered by Miguel Virgós and Francisco Garcimartín, The EC Regulation on Insolvency Proceedings: A Practical Commentary, Kluwer Law International, 2004, nr. 48, as providing an equally valuable definition to the definitions provided in Article 2 of the Insolvency Regulation, alleging that "should correspond" in recital 13 is an equivalent but stylistic form of "shall be." Although the words cited clearly are derived from a recital, nevertheless also the ECJ in *Eurofood* (see above) refers to the words as a "definition" ("33. That definition shows that the centre of main interests must be identified by reference to criteria that are both objective and ascertainable by third parties. That objectivity and that possibility of ascertainment by third parties are necessary in order to ensure legal certainty and foreseeability concerning the determination of the court with jurisdiction to open main insolvency proceedings."). In its decision in the case mentioned above, decided by the CJEU on 20 October 2011, Case C-396/09 (Interedil Srl, in liquidation v Fallimento Interedil Srl, Intesa Gestione Crediti SpA) the Court of Justice of the European Union provided further guidance, by observing: "49 With reference to recital 13, the Court also stated, at paragraph 33 of Eurofood IFSC,

that the centre of a debtor's main interests must be identified by reference to criteria that are both objective and ascertainable by third parties, in order to ensure legal certainty and foreseeability concerning the determination of the court with jurisdiction to open the main insolvency proceedings. That requirement for objectivity and that possibility of ascertainment by third parties may be considered to be met where the material factors taken into account for the purpose of establishing the place in which the debtor company conducts the administration of its interests on a regular basis have been made public or, at the very least, made sufficiently accessible to enable third parties, that is to say in particular the company's creditors, to be aware of them."

In the English courts, case In re Stanford International Bank Ltd See [2009] EWHC 1441 (Ch); [2009] BPIR 1157 [CLOUT case no. 923]; JOR 2010/24, note Wessels, on appeal [2010] EWCA Civ 137; [2011] Ch. 33 [CLOUT case no. 1004]; JOR 2010/141, note Wessels) is noted here as an important example of which factors to take into account in determining COMI. According to Lewison J at first instance, what is ascertainable by third parties is "what is in the public domain, and what they (third parties; Reporters) would learn in the ordinary course of business with the company." On appeal, the Court of Appeal, notably in the leading judgment delivered by the Chancellor, Sir Andrew Morritt, affirmed full agreement with Lewison J's assessment that COMI in the Model Law and in the Insolvency Regulation (recital 13) bear a similar meaning. The Chancellor then conceded that the same expression used in different documents may bear different meanings because of their respective contexts, but he stated: "I can see nothing in the respective contexts of UNCITRAL and the EC Regulation to require different meanings to be given to the phrase COMI." (at paragraph [54 of the judgment). The Court of Appeal fully embraced the new route set out. The Reporters, however, submit that the interpretation of COMI will be dependent on the legal context. The COMI decision under the Insolvency Regulation is of enormous significance: it establishes international jurisdiction of a court, determines the applicable law to these proceedings, and the powers of the liquidator in the EU. The COMI decision under the Model Law only has bearing on recognition. Secondly, COMI in Europe must be interpreted—as decided in *Eurofood* (see above) in an autonomous way, with a purposive interpretation (related to the goals of the Insolvency Regulation, such as the proper functioning of the internal market, the avoidance of forum shopping, the protection of creditors, and the aim of improving the efficiency and effectiveness of cross-border insolvency proceedings). See too CJEU 20 October 2011, Case C-396/09 (Interedil Srl, in liquidation v Fallimento Interedil Srl, Intesa Gestione Crediti SpA) and CJEU 15 December 2011, Case C-191/10 (Rastelli Davide e C. Snc v Jean-Charles Hidoux, in his capacity as liquidator appointed by the court for the company Médiasucre International), observing that the term "the centre of a debtor's main interests," within the meaning of Article 3(1) of the Regulation, ". . . . is a concept that is peculiar to the Regulation, thus having an autonomous meaning, and must therefore be interpreted in a uniform way, independently of national legislation." In turn, COMI under the Model Law leads to (pure) domestic law, in which the Model Law is enacted, which law (Article 8) is to be interpreted with regard to "its international origin and the need to promote uniformity in its application and the observance of good faith." Given these unaligned legal contexts, COMI will not be univocally interpreted by all courts. In this way, too, e.g., Massaki Haga, *Das europäische Insolvenzrecht aus der Sicht von Drittstaaten*, in: Peter Gottwald (ed.), Europäisches Insolvenzrecht—Kollectiver Rechtsschultz, Veröffentlichen der Wissenschaftlichen Vereinigung für Internationales Verfahrensrecht e.V., Band 18, Gieseking Verlag, Bielefeld, 2008, 169ff. and Look Chan Ho, Misunderstanding the Model Law: Re Stanford International bank, Butterworth Journal of International Banking and Financial Law, July/August 2011, 395ff. See Ackers v Saad Investment Co Ltd. [2010] FCA 1221 (22 October 2010) in which the Federal Court of Australia considers: "49. Given the importance to international commerce, and to third parties, of having an objective ascertainable basis upon which to commence and decide proceedings that will govern winding up and insolvency of a debtor under the Model Law, in my opinion, the approach adopted in *Eurofood* . . . and *Stanford Bank* . . . should be followed here . . . .

That approach leads to a more predictable and orderly international outcome than the less certain approach adopted by some of the Bankruptcy District Courts in the United States . . ."

Since 2002, the interpretation and determination of COMI in court cases, stemming from around 10 countries all over the world, known to the Reporters, have increased to around 250 (some 40 of them are discussed by Klaus Pannen, in: Pannen, Klaus (ed.), European Insolvency Regulation, Berlin: Walter de Gruyter, 2007, p. 73ff.). A debate on its meaning, especially in the treatment of group insolvencies, in legal literature is ongoing. Reference is made to (literature and other sources mentioned by) Samuel L. Bufford, United States International Insolvency Law 2008–2009, New York: Oxford University Press, 2009, p. 116ff; Peter Huber, *Probleme der Internationalen Zuständigkeit und des forum shopping aus Deutscher Sicht*, in: Peter Gottwald (ed.), *Europäisches Insolvenzrecht—Kollectiver Rechtsschultz*, Veröffentlichen der Wissenschaftlichen Vereinigung für Internationales Verfahrensrecht e.V., Band 18, Gieseking Verlag, Bielefeld, 2008, 1ff; Peter Mankowski, *Europäisches Internationales Insolvenzrecht (EuInsVO)*, Kapitel 47, Kölner Schrift zur Insolvenzordnung, 3. Auflage, Münster: ZAP Verlag 2009, nr. 21ff; Gabriel Moss and Tom Smith, Commentary on Council Regulation 1346/2000 on Insolvency Proceedings, in: Gabriel Moss, Ian F. Fletcher, Stuart Isaacs (eds.), The EC Regulation on Insolvency Proceedings—A Commentary and Annotated Guide, Oxford University Press, 2009, 8.72ff; François Mélin, *Le règlement communautaire du 29 mai 2000 relatif aux procédures d'insolvabilité*, Bruylant, Bruxelles, 2008, p. 137ff; Irit Mevorach, Insolvency, Within Multinational Enterprise Groups, Oxford University Press 2009, p. 89ff.; Christine L. Childers, US Courts Grapple with COMI: Are Their Dealings with the Presumption What Was Intended by the Model Law?, 7 International Corporate Rescue 2010, 399ff.; Deborah S. Grieve, The New Canadian Cross-Border Insolvency Regime—Reflections of the First Year, Annual Review of Insolvency Law 2010, Thompson Reuters, Carswell, Toronto, Canada, 299ff.; Stewart Maiden, A comparative analysis of the use of the UNCITRAL Model Law on Cross-border Insolvency in Australia, Great Britain and the United States (2010) 18 Insolvency Law Journal, p. 63ff.; Irit Mevorach, Jurisdiction in Insolvency: A Study of European Courts' Decisions, 6 Journal of Private International Law 2010, p. 327ff.; Gabriel Moss, International jurisdiction of Courts in the USA and England, in: Anthon Verweij and Bob Wessels (eds.), Comparative and International Insolvency Law. Central Themes and Thoughts, Nottingham-Paris, INSOL Europe, 2010, p. 40ff.; Eva M.F. de Vette, Multinational enterprise groups in insolvency: how should the European Union act?, in: www.utrechtlawreview.org Vol. 7, Issue 1 (2011); Anthony Vincenzo Sexton, Current Problems and Trends in the Administration of Transnational Insolvencies Involving Enterprise Groups: The Mixed Record of Protocols, the Uncitral Model Insolvency Law and the EU Insolvency Regulation, Chicago Journal of International Law, 2011 (forthcoming; http://ssrn.com/abstracts=1832967 (last visited Mar. 5, 2012).

From recent case law, however, it is clear that the Court of Justice of the European Union is underlining the importance of the principle that every debtor constitutes a distinct legal entity and that the system established by the Insolvency Regulation requires the international jurisdiction for each debtor to be determined in that Member State in which its COMI is located, see CJEU 15 December 2011, Case C-191/10 (Rastelli Davide e C. Snc v Jean-Charles Hidoux, in his capacity as liquidator appointed by the court for the company Médiasucre International), observing: "25 The Court has held that in the system established by the Regulation for determining the competence of the Member States, which is based on the centre of the debtor's main interests, each debtor constituting a distinct legal entity is subject to its own court jurisdiction (Eurofood IFSC, paragraph 30). 26 It follows that a decision producing, with regard to a legal entity, the same effects as the decision to open main insolvency proceedings can only be taken by the courts of the Member State that would have jurisdiction to open such proceedings. 27 In that regard, it should be noted that Article 3(1) of the Regulation confers exclusive jurisdiction to open such proceedings on the courts of the Member State

within the territory of which the centre of the debtor's main interests is situated. 28 Therefore, the possibility that a court designated under that provision as having jurisdiction, with regard to a debtor, to join another legal entity to insolvency proceedings on the sole ground that their property has been intermixed, without considering where the centre of that entity's main interests is situated, would constitute a circumvention of the system established by the Regulation. This would result, inter alia, in a risk of conflicting claims to jurisdiction between courts of different Member States, which the Regulation specifically intended to prevent in order to ensure uniform treatment of insolvency proceedings within the European Union."

The rebuttable presumption as to the location of the COMI of a corporate debtor, as expressed in Global Principle 13.3(ii), should be seen as a strong one, compare Bob Wessels, The place of the registered office of a company: a cornerstone in the application of the EC Insolvency Regulation, in: 3 European Company Law, August 2006, pp. 183-190. Leaving room for earlier rebuttal, see Philipp M. Reuss, *Forum Shopping in der Insolvenz*, Studien zum ausländischen und internationalen Privatrecht, Band 259, Tübingen: Mohr Siebeck, 2011, 144ff. Referring to earlier case law of the Court of Justice of the European Union, mentioned above, this Court has provided further guidance to the presumption laid down in Article 3(1) of the EU Insolvency Regulation, see CJEU 15 December 2011, Case C-191/10 (Rastelli Davide e C. Snc v Jean-Charles Hidoux, in his capacity as liquidator appointed by the court for the company Médiasucre international), considering (italics by the Reporters): "32 For companies, the centre of main interests is presumed, according to the second sentence of Article 3(1) of the Regulation, to be the place of the company's registered office. That presumption and the reference in recital 13 in the preamble to the Regulation to the place where the debtor conducts the administration of his interests *reflect the European Union legislature's intention to attach greater importance to the place in which the company has its central administration as the criterion for jurisdiction* (Interedil, paragraph 48). 33 With reference to that recital, the Court held that the centre of a debtor's main interests must be identified by reference to criteria that are both objective and ascertainable by third parties, in order to ensure legal certainty and foreseeability concerning the determination of the court with jurisdiction to open the main insolvency proceedings (Eurofood IFSC, paragraph 33, and Interedil, paragraph 49). 34 With regard to a company, the Court held that, *where the bodies responsible for its management and supervision are in the same place as its registered office and the management decisions of the company are taken*, in a manner that is ascertainable by third parties, in that place, the presumption in the second sentence of Article 3(1) of the Regulation is wholly applicable (Interedil, paragraph 50). 35 That presumption may be rebutted where, from the viewpoint of third parties, the place in which a company's central administration is located is not the same as that of its registered office. In that event, the simple presumption laid down by the European Union legislature in favour of the registered office of that company can be rebutted only if factors which are both objective and ascertainable by third parties enable it to be established that an actual situation exists which is different from that which locating it at that registered office is deemed to reflect (Eurofood IFSC, paragraph 34, see also Interedil, paragraph 51). 36 *Those factors must be assessed in a comprehensive manner, account being taken of the individual circumstances of each particular case* (Interedil, paragraph 52)."

Global Principle 13.3(iii) determines that in the case of an individual, unless the contrary is proved, the debtor's habitual residence is presumed to be the center of his or her main interests. In the case of an individual engaged in a business, trade, or profession, unless the contrary is proved, this debtor's professional domicile or [published] business address is presumed to be the center of main interests. The EU Insolvency Regulation does not provide such a presumption in the case of a natural person, see explicitly Netherlands Supreme Court 9 January 2004, JOR 2004/87, comments by Wessels, deciding that it does not automatically follow from the text or the recitals of the Regulation that, in relation to a natural person, his place of residence must be regarded as his center of main interest

pursuant to Article 3(1) EU Insolvency Regulation: "The explanatory report of Virgós and Schmit accompanying the Bankruptcy Convention of 1995, which was not enacted but served as a model for the rules of the EU Insolvency Regulation provides insufficient support for the above argument. The passage cited by the Attorney-General [Citing the English version of Virgós / Schmit Report, nr. 75: "In principle, the centre of main interests will in the case of professionals be the place of their professional domicile and for natural persons in general, the place of their habitual residence"] does not imply that with regard to natural persons the common place of residence has to apply as centre of main interests or that this is a rebuttable presumption." Article 16(3) UNCITRAL Model Law contains a general presumption (not related to international jurisdiction, but to matters concerning recognition of a foreign proceeding): "In the absence of proof of the contrary, the debtor's . . . habitual residence in the case of an individual, is presumed to be the centre of the debtor's main interest"), not distinguishing as to the type of individual, as a private person or in a business or professional status. Global Principle 13.3(iii) is in line with a majority of court cases on the European continent (judgments from England, Germany, Netherlands, France) and legal literature, see Stefan Reinhart, *Münchener Kommentar zur Insolvenzordnung*, Band 3, München: Verlag C.H. Beck 2008, EuInsVO, Art. 3, nr. 40ff; François Mélin, *Le règlement communautaire du 29 mai 2000 relatif aux procédures d'insolvabilité*, Bruylant, Bruxelles, 2008, p. 148; J.D. Weber, The rise of insolvency tourism, Master Thesis Leiden Law School, January 2010, available at www.bobwessels.nl, weblog 2010-03-doc1; A. Walters and A. Smith, 'Bankruptcy Tourism' under the EC Regulation on Insolvency Proceedings: A View from England and Wales, International Insolvency Review, Winter 2010, Vol. 19, Issue 3, p. 181ff.; Markus Hahn, *Die Verortung der natürlichen Person im Europäischen Zivilverfahrensrecht*, Frankfurt am Main: Peter Lang, 2011.

Global Principle 13.5 should be read in the light of the phenomenon in Europe, called "corporate migration" and the queries that have been raised as to its legality, and the question whether a distinction has to be made between "good" and "bad" forum shopping, see e.g. Bob Wessels, Corporate migration or COMI manipulation, in: Ondernemingsrecht 2008-1, pp. 34/35; Horst Eidenmüller, Abuse of Law in the Context of European Insolvency Law, in: European Company and Financial Law Review Vol. 6, No. 1, April 2009, 1-29; Wolf-Georg Ringe, Strategic Insolvency Migration and Community Law, in: Wolf-Georg Ringe, Louise Gullifer and Philippe Théry, Current Issues in European Financial and Insolvency Law. Perspectives from France and the UK, Hart Publishing, 2009, pp. 71-110; Reuss, op. cit., 2011, 6ff; John Pottow, The Myth (and Realities) of Forum Shopping in Transnational Insolvency, Brooklyn Journal of International Law 32, no. 3 (2007): 785-817.

Principle 14 Alternative Jurisdiction

14.1. In the absence of international jurisdiction based on Global Principle 13.1, a court may exercise jurisdiction to open an insolvency case under its local law.
14.2. In an insolvency case where jurisdiction is based on Global Principle 14.1 and the local law, the court should cooperate with the court in an insolvency case in another state where jurisdiction is based on Global Principle 13.1.
14.3. In an insolvency case where jurisdiction is based on Global Principle 14.1 and the local law, the court should normally restrict its actions to assets and operations within the forum state.

Comment to Global Principle 14:

Global Principle 14 addresses certain practical questions, to which attention was drawn by the Reporters' judicial Advisers, as to what happens when the debtor's COMI does not actively exist anymore, either because the debtor has ceased to carry on its activities altogether, or because the COMI has migrated to some other jurisdiction. In the former situation, a possible solution is that a main proceeding can be opened at the last "place" where the COMI functioned, for example, in the case where shops or warehouses have been closed but still contain office furniture or stock. Such a solution does not seem logical, however, when at the date of the petition such physical locations have been fully vacated, but it is uncertain whether the COMI of the debtor is in another state. Similar considerations could apply to cases involving the question of the existence of an "establishment," where business activity has ceased to be carried but some separate assets are still present on-site. For these situations, Principle 14.1 is suggested. The question whether insolvency proceedings can be opened, and if so with what effects internationally, is answered in different ways in practice. So-called "long-arm" rules of jurisdiction are to be found in the laws of many countries, enabling their courts to exercise jurisdiction over debtors who have at some time engaged in activities that are considered to establish a legal *nexus* with the forum and its insolvency law. As a correlative to the exercise of such rules of extended jurisdiction, the conventional practice under private international law is to regard such proceedings as commanding no international effect as far as concerns persons or property outside the territory of the country concerned. Under modern conditions of commercial and financial mobility, such traditional attitudes to the according of recognition and assistance seem ripe for reconsideration. Should it be open to a debtor to strip out the value generated by its activities in one jurisdiction, relocate those assets elsewhere, and purport to disengage from its former place of operation, safe in the knowledge that the international rules subscribed to by the courts will ensure that any insolvency proceedings opened at its erstwhile COMI or establishment will fail to command international enforceability? The purpose of Global Principle 14 is to affirm that, where proceedings are opened by a court in circumstances where neither Principle 13.1(i) nor 13.1(ii) are satisfied, the proceedings should not *ipso facto* be treated as ineligible to be accorded any degree of international acceptance but should be evaluated according to their merits and in the context of the circumstances as a whole. See also Global Principle 15.3.

In the case where the COMI has migrated to a known location where the debtor is continuing to function, the provisions of Global Principle 13.5 should be considered in the first instance to determine whether the jurisdiction previously vested in the courts of the original COMI ("Prior State") has been displaced. Even if it has been displaced, to the extent that there are grounds of jurisdiction under the law of the former COMI that would allow for insolvency proceedings to be opened, Principle 14.1 provides a basis for doing so, if appropriate reasons exist for incurring the costs thereby entailed. In that event, Principle 14.2 requires the court to seek to cooperate "to the maximum extent practicable" with any insolvency proceeding that may be opened in a place where international jurisdiction has now been constituted in accordance with Global Principle 13.1. The extent to which such cooperation is possible will be very much dependent on circumstances, as where the debtor has relocated to a relatively inaccessible jurisdiction, or one whose laws are not conducive to such cooperation.

Finally, by General Principle 14.3 it is proposed that any proceedings that are opened pursuant to this exception to the regime of Principle 13 should be restricted to assets and operations within the court's own territory. Note that this limitation is only to apply "normally,"

however, as there may well be circumstances in which the requirements of justice necessitate the extension of the court's forensic interest to embrace persons or property in other jurisdictions. This may be the case where it is alleged that impeachable transactions have taken place whereby money or other property has been moved abroad.

REPORTERS' NOTES

English law has developed a notably robust approach to countering the possibility that a debtor, having engaged in a business activity of some kind within a particular country, can unilaterally effect a withdrawal from that jurisdiction and simultaneously sever any forensic ties to that country and its courts, by the simple act of ceasing all activity and physically withdrawing from the country. According to a long-established doctrine applied by the English courts, a business is regarded as continuing to be carried on so long as any debts incurred in the course of the business remain unpaid.[102] The concept of "debts of the business" is a broad one, and extends from the debts or liabilities incurred towards customers or suppliers, to such debts as may be due to the Crown or to public authorities in respect of taxation on profits of the business, or other fiscal liabilities or social contributions to which the business is assessable, and which are referable to the period when the debtor was in control of it. Thus, a debtor's attempt to sever his business ties with the country by disposing of his business, or by purporting to close it down, will be unavailing unless all trade debts are shown to have been paid in full. Consequently, jurisdictional rules founded upon the premise that the debtor, by engaging in a business activity within England and Wales (or similarly within other parts of the United Kingdom) thereby becomes amenable to the insolvency laws for so long as that activity continues (and even for a number of years thereafter) remain fully applicable to the debtor despite a complete cessation of such business activity, until all debts have been fully paid or discharged.

In CJEU 20 October 2011, Case C-396/09 (Interedil Srl, in liquidation v. Fallimento Interedil Srl, Intesa Gestione Crediti SpA) the Court decides that the term "centre of main interests" meets ". . . the need to establish a connection with the place with which, from an objective viewpoint and in a manner that is ascertainable by third parties, the company has the closest links. It is therefore logical in such a situation to attach greater importance to the location of the last centre of main interests at the time when the debtor company was removed from the register of companies and ceased all activities." (paragraph [58] of the judgment). The Court continues (at paragraph [59]) that for the purposes of determining a debtor company's main centre of interests, the second sentence of Article 3(1) of the Regulation must be interpreted as follows:

"—a debtor company's main centre of interests must be determined by attaching greater importance to the place of the company's central administration, as may be established by objective factors which are ascertainable by third parties. Where the bodies responsible for the management and supervision of a company are in the same place as its registered office and the management decisions of the company are taken, in a manner that is ascertainable by third parties, in that place, the presumption in that provision cannot be rebutted. Where a company's central administration is not in the same place as its registered office, the presence of company assets and the existence of contracts for the financial exploitation of those assets in a Member State other than that in which the registered office is situated cannot be regarded as sufficient factors to rebut the presumption unless a comprehensive assessment of all the relevant factors makes it possible to establish, in a

[102] Re Dagnall [1896] 2 Q.B. 407; Re Worsley [1901] 1 Q.B. 309 (C.A.); Theophile v. Solicitor-General [1950] A.C. 186 (H.L.); Re Bird [1962] 1 W.L.R. 686, [1962] 2 All E.R. 406 (C.A.). See also Re a Debtor (No.784 of 1991) [1992] Ch. 554 (in which Hoffmann J confirmed that the same approach is operative under the Insolvency Act 1986).

manner that is ascertainable by third parties, that the company's actual centre of management and supervision and of the management of its interests is located in that other Member State;

—where a debtor company's registered office is transferred before a request to open insolvency proceedings is lodged, the company's centre of main activities is presumed to be the place of its new registered office."

The first part of the Court's decision was affirmed by CJEU 15 December 2011, Case C-191/10 (Rastelli Davide e C. Snc v Jean-Charles Hidoux, in his capacity as liquidator appointed by the court for the company Médiasucre International).

Principle 15 Request for Recognition

15.1. In an insolvency case where jurisdiction is based on Global Principle 13.1, courts and relevant authorities in all other states should provide access to the representative of that case and should grant recognition to that case and its representative.

15.2. A court should deny recognition to an insolvency case pending in another state if recognition would be manifestly contrary to public policy in the forum state.

15.3. In an insolvency case where jurisdiction is based on Global Principle 14.1 and the local law, a court in another state may grant such recognition and assistance to that case and its representative as permitted by the forum state's local law. For this purpose, the court may give due regard to the extent to which the court exercising jurisdiction under Global Principle 14.1 and the local law is cooperating with any insolvency case concerning the same debtor that is pending in a court exercising jurisdiction under Global Principle 13.

Comment to Global Principle 15:

This Principle is intended to complement the rules for recognition of foreign insolvency proceedings that are contained in Global Principle 7. The Commentary to that Principle indicates the extent to which, in the provisions contained in international instruments that seek to regulate insolvency proceedings, the concept of recognition is widely accepted as fundamental to the attainment of the overriding objectives of those instruments, and to promote the better management and conduct of international proceedings. In surveying the current state of provision under national laws, however, it transpires that there is considerable unevenness with respect to the actual practice followed in such matters. This is most conspicuous as between those countries that have traditionally adopted the universalist approach to international insolvency, and those which have (at least until recent times) adhered to the territorialist approach. Although there are indications of a tendency on the part of some states within the second category (such as China and Japan) to reassess and alter their policy in response to the realities of globalized commercial activities that are central to their economic wellbeing, there are other states (e.g., Brazil, CIS, India, Vietnam) in which legislative reform would be required at some time in the future in order to establish this internationally commended principle within the domestic legal order. In the absence of clear indication within the published domestic laws that the courts of a given country are authorized to entertain applications for recognition of a foreign proceeding, made by a duly appointed representative according to the foreign system of law, the legal uncertainty created thereby can be a formidable obstacle to the effective conduct of the foreign proceeding. In such a situation, its administrator must calculate whether the potential expenditure of costs to be incurred in any attempt to obtain recognition from the court of the country in question is

justifiable in view of the uncertainty of the outcome. Hence it is particularly desirable for states to ensure that provision is clearly included in the law to indicate both the capability of their courts to grant recognition, and the conditions under which such recognition can be obtained. Global Principle 15.1 expresses—as a prerequisite to recognition—a right of a representative to apply directly to a court in another state, without, for example, an authorization from the court that has appointed the representative. Such a position equals the position of a "foreign representative" in the meaning of Article 9 UNCITRAL Model Law on Cross-Border Insolvency ("Right of direct access").

The criteria that are specified in these Global Principles for the purpose of deciding whether the courts of a particular state can be regarded as having international jurisdiction in relation to a debtor are based upon the concepts formulated under the UNCITRAL Model Law on Cross-Border Insolvency to identify "main" and "non-main" proceedings that are eligible for recognition under the Model Law, which has already been enacted by 19 states (as per December 2011). Similarly conceived criteria for founding jurisdictional competence are also employed under the EU Insolvency Regulation, and are routinely accepted and applied by the 26 European states that are currently bound by that Regulation, in all matters falling within its scope. The legal position a court in a specific international case has taken should, in general, be followed by authorities in the forum state, such as those in charge of the land or trade registry.

Global Principle 15.2 once again expresses that the effects of recognition can be halted in case of an infringement of the public policy in a country addressed. See also Global Principle 3.

Global Principle 15.3 is designed to balance and complement Global Principle 14, whose function is to affirm that insolvency proceedings may be opened in a jurisdiction with which the debtor has some current or previous *nexus*, but which does not amount to a sufficient connection to provide a basis for international jurisdiction in accordance with Global Principle 13.1. Traditionally, such proceedings, which are typically based upon some species of "long-arm" jurisdiction, would operate on a purely territorial basis and would be accorded no recognition or assistance internationally. Just as Global Principle 14.2 seeks to promote cooperation between a court that exercises such jurisdiction and any other court in which the same debtor is the subject of insolvency proceedings, so Principle 15.3 expresses the aspiration that foreign courts may grant recognition and assistance to the court in question, thereby contributing to the more effective administration of the global estate of the debtor while ensuring effective legal scrutiny of the conduct of its affairs at different times and in different locations. It may be that in order to respond to such requests for recognition and assistance it will be necessary for courts—and if necessary legislators—in some countries to undertake a revision of their customary practices in international insolvency cases. To do so, it is strongly suggested, would be in keeping with the genuine needs of justice, given the globally integrated conditions in which business and commerce are conducted in the present day.

Principle 16 Modification of Recognition

Recognition may be modified if the court becomes aware of evidence that warrants such action. Such evidence may include evidence

(i) That there was fraud in the opening of the foreign insolvency case or in obtaining recognition in the recognizing court,

(ii) That the foreign insolvency case was opened in the absence of international jurisdiction based on Global Principle 13,
(iii) That the initial decision to recognize the foreign insolvency case was based on an incomplete or erroneous understanding of the relevant facts, or
(iv) That there has been a material change of circumstances following the opening of the foreign insolvency case or its recognition by the court.

Comment to Global Principle 16:

Global Principle 16 follows rather closely the text of Procedural Principle 3 of the ALI NAFTA Principles and is, in substance, in line with Article 17.4 of the Model Law. There is a familiar legal maxim to the effect that "Fraud undoes all things." The subsequent discovery of material fraud is therefore widely acknowledged to constitute a ground for revocation of transactions or agreements previously concluded. In the context of fraud perpetrated for the purpose of obtaining a legal order or judgment, there is a high level of public interest in ensuring that such actions should not be seen to succeed. Whenever the true facts are brought to the attention of the court, even after its order has begun to be acted upon, the revocation or modification of the order is the appropriate response, subject to any considerations regarding the practicability of fully reinstating the status quo ante. The UNCITRAL Model Law, Article 18, makes it a matter of obligation for the foreign representative to inform the recognizing court promptly of any change in the status of the recognized foreign proceeding or the status of the foreign representative's own appointment. Fidelity to the ethical principles attaching to the foreign representative's own professional organization should also dictate that he or she takes prompt action to notify any court whose jurisdiction has been engaged, as well as other affected parties, of a material discovery affecting the very legitimacy of the proceeding. This is *a fortiori* the required course to be followed where that discovery indicates the existence of fraud.[103]

It is also necessary to maintain a balance between the sanctions to be applied against the perpetrators of fraud, as and when such conduct is discovered, and the need to maintain a proper level of deterrence against the possibility that unfounded or vexatious allegations of fraud may be made by persons seeking to delay proceedings, or to derail them entirely. If there is compelling and uncontested evidence to support the allegation of fraud, the appropriate form of modification could be revocation. In other circumstances, the court should have regard to the relative consequences of the various courses of action open to it, as between refusing (fully) or modifying recognition pending further hearing of the evidence, or granting or maintaining recognition subject to such guarantees and assurances on the part of the foreign representative as will suffice to satisfy the court that no irremediable harm will be done to the interests of those who are alleging fraud, pending determination of the substance of the allegations at an expedited hearing. Erroneous understanding of the facts, in the meaning of Principle 16, second sentence, includes the situation that the decision regarding recognition was based on insufficient information or a failure to disclose relevant information. The failures and omissions in question may relate to the circumstances in which the original

[103] Cf. Re Hans Brochier Holdings Ltd v. Exner [2006] EWHC 2594 (Ch); [2007] BCC 127 (U.K., Chancery Division), in which administrators who discovered that their appointment had been based on the false averment that the COMI of the company was in England, made prompt application to the High Court to have the appointment declared invalid.

insolvency proceedings were opened, or to the circumstances in which recognition was subsequently obtained, or to circumstances that have arisen subsequently to either of those events.[104]

Principle 17 Stay or Moratorium upon Recognition

17.1. Unless a stay already exists because of a domestic insolvency case concerning the same debtor, if a court recognizes a foreign insolvency case as a main proceeding with respect to the debtor it should promptly grant a stay or moratorium prohibiting the unauthorized disposition of the debtor's assets and restraining actions by creditors to enforce their rights and remedies against the debtor or the debtor's assets.
17.2. In a reorganization case, the stay or moratorium should normally permit the continued operation of the debtor's business.
17.3. Where there is no domestic insolvency proceeding pending in the recognizing state, if the court recognizes a foreign insolvency case as a main proceeding with respect to the debtor, and has granted a stay or moratorium that is substantially equivalent to the stay or moratorium in a domestic insolvency case, the stay or moratorium in the main proceeding should not apply in the recognizing state and, conversely, the stay or moratorium in the recognizing state should not apply in the state of the main proceeding.

Comment to Global Principle 17:

Global Principle 17 is essentially identical to Procedural Principle 4 of the ALI NAFTA Principles. The imposition of a stay of all proceedings and actions against the property of the debtor will, in many cases, be a fundamental necessity to the bringing into effect of a collective insolvency procedure covering the debtor's global estate and interests. It is commonly the case that the law of the state of opening of proceedings will impose such a stay, either automatically or upon application, and it is also the case that the law of that state will sometimes assert that the effects of such a stay are of global application. Although the principle of recognition of foreign proceedings that have commenced in a jurisdictionally appropriate forum is generally accepted, save in those states that maintain their adherence to a strictly territorialist approach, there is widespread reluctance to accept the extraterritorial effectiveness, as of right, of a stay or moratorium generated by the law of the state of opening, even where the proceedings in question have the status of main proceedings (and *a fortiori* where they are non-main).

In exceptional cases—such as by virtue of the EU Insolvency Regulation—states that are participating in a treaty-based, multilateral insolvency regime may voluntarily accept that the effects of proceedings that have been opened in any one of the participating states are to have immediate and automatic effect in the other states, and that the extraterritorial effects of any

[104] For example, see the instances of failure by the debtor, when presenting his application for the opening of the original insolvency proceedings, to disclose material information bearing upon the jurisdictional competence of the court by which that bankruptcy order was made: Irish Bank Resolution Corporation Ltd v. Quinn [2012] NICh 1 (10 January 2012) (High Court of Justice in Northern Ireland, Deeny J), at paragraph [56] et seq. (esp. at [62]-[65]). (See above, Comment to Global Principle 1.3).

stay shall be coextensive with those generated under the law of the state of opening. Such is the case with Articles 16, 17, and 18 of the EU Regulation itself. More usually, however, states reserve to themselves and their courts the right to determine the extent to which a stay conforming to the standards of their domestic law shall become applicable to the debtor's estate following recognition of the foreign proceeding. Global Principle 16 is intended to supply a basis for such complementary support for the foreign insolvency proceeding to be forthcoming generally as a matter of course, thereby improving the level of certainty and reducing the potential for delay in bringing about this much-needed effect. It should be noticed however that the nature and extent of the stay or moratorium brought about by this means will be determined in accordance with the law of the recognizing state, rather than by that of the state of opening. There may be significant discrepancies between the two systems in this matter. Moreover, Global Principle 17.3 reaffirms the dominance of the law of the recognizing state with regard to the application of the stay or moratorium, even where no local insolvency proceeding is pending. Consequently, parties who act in accordance with the law of the situs of property of the estate should not encounter the prospect that they may be held in contempt of the law of the state of opening of proceedings, having regard to any different provisions to be found in that system of law concerning the scope of the stay. By parity of reasoning, however, Global Principle 17.3 makes it clear that the stay or moratorium generated under the law of the recognizing state can have no claim to apply to conduct in the country of the main proceeding.

Where a concurrent proceeding already exists in the state where recognition is granted, Global Principle 17.1 indicates that a stay is likely to be already in force by virtue of that proceeding. In such circumstances, it is implicit that the stay under the local law will retain its dominant effect with respect to the debtor's local property.

REPORTERS' NOTES

For non-US countries regarding U.S. Bankruptcy Code, § 1520(a) In re JSC BTA Bank, No. 10-10638; 2010 WL 3306885 (Bankr. S.D.N.Y, Aug. 23, 2010) contains an interesting decision. The court refused to find that the recognition order triggered a global stay of all proceedings against the debtor, JSC BTA Bank, subject to reorganization proceedings, opened on 16 October 2009, in the Republic of Kazakhstan. The Bank was involved in arbitration proceedings, pending in Geneva, Switzerland, initiated by a French bank. The court held that, particularly given the fact that neither the Kazakhstan, nor the French bank had sufficient contacts with the United States, the Swiss arbitration was not connected to Chapter 15 of the U.S. Bankruptcy Code and the stay was not being sought to protect property of the debtor within U.S. territorial jurisdiction. In defining the scope of the automatic stay in a chapter 15, the Bankruptcy Court for the Southern District of New York stated that "at least in the setting of an ancillary chapter 15 case, [the bankruptcy court] should not stand in the way of a foreign arbitration process when the outcome will have no foreseeable impact on any property of the foreign debtor in the United States." Because the Swiss arbitration had already resulted in a judgment by the time the court heard the motion, there was no proceeding to stay.

Principle 18 Reconciliation of Stays or Moratoriums in Parallel Proceedings

18.1. Where there is more than one insolvency case pending with respect to a debtor, each court should minimize conflicts between the applicable stays or moratoriums.

18.2. Where there is more than one insolvency case pending with respect to a debtor and an insolvency case in one state has been recognized as a main proceeding by the court in

a second state, the stay or moratorium applicable or issued in the recognizing state should apply in a third state only to the extent that the stay or moratorium in the main proceeding does not apply.

Comment to Global Principle 18:

The text of Global Principle 18 is largely based on the text of Procedural Principle 5 of the ALI NAFTA Principles. When concurrent insolvency proceedings take place in respect of the same debtor, every effort should be made to minimize the possibility of value-destructive conflict between the respective proceedings. Since it is often the case that the provisions of domestic law purport to have effect in relation to the debtor's property anywhere in the world ("wherever situated"), the logical corollary of that assertion is that any stay or moratorium imposed under the insolvency law in question is also regarded as having global effect. This can readily give rise to irreconcilable conflicts between the respective insolvency administrators of the parallel proceedings as each of them seeks to perform his responsibilities in relation to property situated in the state of his appointment, and additionally in any third state in which property of the debtor is to be found. Global Principle 18.1 therefore advocates the adoption of a policy of moderation in the assertion or exercise of rights that may happen to be expressed in unqualified terms, possibly on account of the omission by the national legislator in former times to envisage the practical consequences of expressing the law in terms of unmodified universalism, regardless of the quality or intensity of the debtor's forensic connections with the jurisdiction in question. Although a court may sometimes go so far as to acknowledge that the enacted law is making unrealistic claims to possess extraterritorial effect, it may also have to concede that it is not empowered to disapply the clear provisions of the legislation, while at the same time conceding that the ambitious claims expressed therein cannot dictate the final terms of the response that will be accorded by foreign courts in whose jurisdiction property may happen to be situated.[105] Global Principle 18.1 therefore recognizes that the courts having jurisdiction over any of the proceedings may encounter some difficulties on account of the provisions within their domestic legislation, but it exhorts each of the courts concerned to use its best efforts to minimize the negative consequences of any conflict between the rival stays.

Global Principle 18.2 addresses the position of a court in a third state, where no parallel insolvency proceeding is in progress, under whose law one of the parallel proceedings has been recognized as a main proceeding. To the extent that such recognition is accompanied by the imposition of a stay under the law of the recognizing state, any potential application of that stay in relation to conduct in other states should be confined to those cases that do not lie within the jurisdiction of the main proceeding so as to be covered by the stay thereby imposed.

[105] See the candid admission of Millett J, in the English High Court, that the universalist claims of an English winding-up order in respect of a foreign company to have effect in relation to the company's property "wherever situated" could not be attained in reality, because the overseas courts of the situs would necessarily have the final word: Re International Tin Council [1987] Ch. 419 at 446.

Principle 19 Abusive or Superfluous Filings

19.1. Where there is more than one insolvency case pending with respect to a debtor, and the court determines that an insolvency case pending before it is not a main proceeding and that the forum state has little interest in the outcome of the proceeding pending before it, the court should (i) dismiss the insolvency case, if dismissal is permitted under its law and no undue prejudice to creditors will result; or (ii) ensure that the stay or moratorium in the proceeding before it does not have effect outside that state.

19.2. Global Principle 19.1 should not be applied until a main proceeding has been opened by a court that has international jurisdiction on the basis of these Global Principles.

Comment to Global Principle 19:

Global Principle 19 has its roots in Procedural Principle 6 of the ALI NAFTA Principles. The purpose of this Global Principle is to minimize the potential harm that may be caused to the legitimate administration of an international case through tactical misuse by some interested parties of the right to initiate non-main proceedings in a certain jurisdiction. Typically, this is a jurisdiction with which the debtor has the minimum contact sufficient for that purpose, but where there is otherwise no genuine purpose to be served save that the superfluous procedure may impede the efficient conduct of the main proceeding, notably by generating issues of conflict regarding the competing effects of the stays imposed under the parallel proceedings. Global Principle 19 recommends that the court where the non-main proceeding is filed should give consideration to the possibility of declining jurisdiction where its law so permits, provided that no legitimate interests would be damaged thereby, or alternatively that the court should apply territorial limitations to the scope of its own stay so that this does not pose any threat of interference with the main proceeding.

Principle 19.2 expresses the desire that a decision of dismissal of a case or limitation to a stay or moratorium can be taken only when, in another state, main insolvency proceedings have been opened. This proviso has the aim of ensuring a coordinated and orderly administration of the international insolvency case.

REPORTERS' NOTES

The subject of declining jurisdiction in relation to international insolvency proceedings is relatively undeveloped. For discussion of English and Commonwealth authorities, see P. Smart, Cross-Border Insolvency, 2nd edition (1998), chapter 3, and also I.F. Fletcher, Insolvency in Private International Law, 2nd edition (2005), paras. 2.45 to 2.54 and at 3.56. On the limitation of a stay or moratorium in the context of Procedural Principles 5 and 6 of the ALI NAFTA Principles, see Jay Lawrence Westbrook, National Regulation of Multinational Default, in: Mario Monti et al. (eds.), Economic Law and Justice in Times of Globalisation (Festschrift Carl Baudenbacher), Nomos, 2007, 777ff.

Principle 20 Court Access

20.1. Upon recognition, a representative of a foreign insolvency case should have direct access to any court in the recognizing state necessary for the exercise of its legal rights.

20.2. Upon recognition, a representative of a foreign insolvency case that is a main proceeding should have access to any court to the same extent as a domestic insolvency administrator.

20.3. Upon recognition, a representative of a foreign insolvency case that is a main proceeding should be able to request the opening of a domestic insolvency case with respect to the debtor.

Comment to Global Principle 20:

Access to justice is a fundamental prerequisite to the exercise of legal rights and remedies in a genuine and concrete sense, instead of as a merely abstract or theoretical possibility. When the process that eventually resulted in the adoption of the UNCITRAL Model Law on Cross-Border Insolvency was under way, during the years between 1993 and 1997, a clear understanding emerged of the need to ensure that provision is included within the laws of enacting states to "provide expedited and direct access for foreign representatives to the courts of the enacting state."[106] This was perceived to be the best way, if not indeed the only way, to avoid the delays and obstacles traditionally encountered by foreign representatives seeking to establish their standing to invoke the assistance of courts in the "race against time" that is invariably present in an international insolvency case. Unless recognition of the foreign representative is accompanied by the conferment of standing to claim direct access to any court in the state of recognition, for the purpose of initiating or participating in proceedings under local law in furtherance of the interests of the insolvency administration, the consequence will be that the gaining of recognition itself will be rendered a hollow achievement, devoid of any practical value or substance. Global Principle 20 expresses this core objective by affirming that the right of direct access is to be accorded on the basis that the foreign representative may act procedurally in a manner coextensive with that in which an equivalent domestic insolvency administrator would be empowered to do. This can result in the foreign representative of a recognized foreign proceeding being accorded standing to take action under domestic law that would only be legally permissible if a domestic insolvency proceeding had been opened, yet without such a procedure having been opened in fact. The act of recognition therefore serves to generate a hypothetical equivalence to the state of affairs that would exist if such a domestic proceeding were to be opened. Nevertheless, if the most effective means of attaining the foreign representative's objectives within the state in question is by way of the opening of a local insolvency proceeding concerning the debtor, standing to do so is also included within the right of access expressed in this Global Principle, the text of which is in substance identical to the text of Procedural Principle 7 of the ALI NAFTA Principles.[107]

The standing of the foreign representative to seek access and assistance before the court addressed is in the first instance dependent upon the authenticity of legal process by which he or she claims to act as the representative of the foreign insolvency proceeding. It is therefore

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[106] Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency (United Nations General Assembly, document A/CN.9/442, 19 December 1997, § 28.

[107] On access under the UNCITRAL Model Law itself, see Articles 9 to 14 inclusive. The text of Procedural Principle 7, laid down in Global Principle 20.1 and 20.2, has been considered when drafting CoCo Guideline 5 ("Direct Access"): "Any foreign liquidator should be granted direct access to any court necessary for the exercise of legal rights to the same extent that a national liquidator is so permitted."

the international legitimacy of the foreign proceeding that is fundamentally in issue, and this in turn depends on the circumstances under which jurisdiction to open those proceedings was exercised in the foreign state. For this purpose, the criteria specified in Global Principle 13 are of crucial importance. If the person claiming the status of foreign representative is unable to show that the proceedings from which his or her appointment is derived have been opened in conformity with the accepted standards of international jurisdiction as expressed in Global Principle 13, the case for recognition is seriously damaged. At best, perhaps, some discretionary assistance might be forthcoming based on the more tentative propositions contained in Global Principle 14, if the facts can support this.

REPORTERS' NOTE

The compound nature of the test for establishing that a person is acting as a representative of a foreign insolvency case for the purposes of the UNCITRAL Model Law is apparent from a careful study of its articles 2, 9, 15, 16, and 17. Under the EU Insolvency Regulation, the task of the liquidator in gaining recognition of the validity of his or her appointment is facilitated by the provisions of article 19, which provides: "The liquidator's appointment shall be evidenced by a certified copy of the original decision appointing him or by any other certificate issued by the court which has jurisdiction. A translation into the official language or one of the official languages of the Member State within the territory of which he intends to act may be required. No legalisation or other similar formality shall be required." While this provision contains several ideas that would be adaptable to situations falling outside the scope of the EU Regulation, it may be anticipated that, in such cases, the court before which the request for recognition is pending is likely to scrutinize the order of appointment with considerable care, and is likely to require a properly authenticated translation of the original document or order into its own working language, in the interests of certainty. Note, however, the provisions of Global Principle 21, which are designed to minimize the extent to which such translations are required to take place.

Principle 21 Language

21.1. Where there is more than one insolvency case pending with respect to a debtor, the insolvency administrators should determine the language in which communications should take place with due regard to convenience and the reduction of costs. Notices should indicate their nature and significance in the languages that are likely to be understood by the recipients.

21.2. Courts should permit the use of languages other than those regularly used in local proceedings in all or part of the proceedings, with due regard to the local law and available resources, if no undue prejudice to a party will result.

21.3. Courts should accept documents in the language designated by the insolvency administrators without translation into the local language, except to the extent necessary to ensure that the local proceedings are conducted effectively and without undue prejudice to interested parties.

21.4. Courts should promote the availability of orders, decisions, and judgments in languages other than those regularly used in local proceedings, with due regard to the local law and available resources, if no undue prejudice to a party will result.

Comment to Global Principle 21:

This is a new Global Principle that has no exact counterpart in the original ALI NAFTA Principles. A widely known fact is that the supposed tool of general communication, namely language, is different all over the world. In relation to matters of cross-border insolvency, within two of the three NAFTA countries, or between the UK, the U.S.A., and Australia for example, the common language is English. In other cross-border cases, languages that will be spoken in two or more jurisdictions may easily facilitate communication, for example, the German language in courts in Germany, Austria, and some courts in Switzerland; the Dutch language in courts in the Netherlands and in the northern part of Belgium; or the Italian language, in courts in Italy and in one or more courts in Austria or Switzerland. In several trans-ocean cases, Spanish or Portuguese can be applied, while in central parts in Africa, French will be used. Even in cases where a common language may be used, it may be the case that legal documents are only allowed to be submitted in the language of the law of the country's court. So, even if an individual judge in the U.S.A. is capable of speaking Spanish, the related documents must be translated into Spanish to have these allowed to be used in courts in Mexico. Likewise, in the case of a Dutch judge who may have the ability to speak English or German: the related legal documents, which are in the Dutch language, must be in English or German as the case may be. In all, transparent and clear communication will not be easy to achieve in many countries where the English language capability is not available or does not meet the standard necessary to communicate with ease and clarity with other judges or insolvency administrators in English, or in another language.

In several cases, the legal language itself could be difficult to understand, especially when it relates to terms that sometimes do not find an equivalent in the jurisdiction of another country. It also could be the case that certain terms have a (slightly) different meaning or may result in (slightly) different legal consequences. It is, in several circumstances, very dangerous if somebody does not know the full meaning of a judicial expression. For a first step to overcome problems as signaled here, see the Appendix to this Report.

Global Principle 21 has its origin in Europe, where under the application of the EU Insolvency Regulation, administrators have a duty to communicate in parallel cross-border insolvency proceedings concerning the same insolvent debtor. It is noted that the text of the Insolvency Regulation is equally authentic in over 20 languages. The potential complexity, and consequent cost, of administering a proceeding under the Insolvency Regulation involving one or more secondary proceedings in Member States having different official languages can readily be appreciated. For this reason, CoCo Guideline 10 has been designed to accommodate the choice of an agreed language for purposes of communication, which is based on international practice, convenience, and agreement. Global Principle 21 is based upon this text, which text itself found its inspiration in Principle 6 of the ALI/UNIDROIT Principles of Transnational Civil Procedure 2006 (adopted in 2004).[108]

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[108] Principle 6 of the ALI/UNIDROIT Principles of Transnational Civil Procedure 2006 (adopted in 2004) provides:

6. Languages

6.1 The proceedings, including documents and oral communication, ordinarily should be conducted in a language of the court.

Although in appropriate cases of cross-border insolvency non-English is used, the general experience is that English is the language of the global business community and also in cross-border communications between advisers, lawyers, and insolvency office holders involved in a cross-border insolvency case. Where courts are involved, the ordinary language will be the language regularly used by the courts, although the court is advised to allow the use of other languages, in all or part of the proceedings, except to the extent necessary to ensure that the local proceedings are conducted effectively and that no prejudice to a party will result. Where a choice of a language is made, a native speaker of that language should be sensitive to the fact that the person(s) he or she is speaking to may be communicating in what is for them a second or third language. Acting fairly (CoCo Guideline 4.2; Insolvency Office Holder Principles 8 and 12) in general will mean the use of simple and clear words spoken with careful articulation, and the avoidance of dialect words, over-sophisticated language, linguistic puns, euphemisms, topical references, or nationally derived cultural allusions that may be incomprehensible to those from outside the state in question.

REPORTERS' NOTES

As with language, the problematic nature of understanding each other's legal terms or norms is not only related to insolvency law. On the issue of understanding and translation of legal words or judicial concepts, see: George Steiner, After Babel: Aspects of Language and Translation, 3rd ed., Oxford University Press, 1998; Bruno de Witte, Language Law of the European Union: Protecting or Eroding Linguistic Diversity?, in: R.C. Smith (ed.), Culture and European law, 2004, 205ff.; Eva Wiesmann, *Rechtsübersetzung und Hilfsmittel zur Translation. Wissenschaftliche Grundlagen und computergestützte Umsetzung eines lexicografischen Konzepts*, Tübingen, Narr, 2004; Vivian Grosswald Curran, Comparative Law and Language, in: Mathias Reimann and Reinhard Zimmermann, The Oxford Handbook of Comparative Law, Oxford University Press, 2006, 675ff; Gerard-René de Groot, Legal Translation, in: Jan M. Smits, Elgar Encyclopedia of Comparative Law, 2006, 423ff. With the absence of a common language, a judge who uses English as a first (and often only) language, should be aware of the fact that in many jurisdictions the other judge, who does not speak, read, or write for most of his working time in English (or in the language of the other concerned court), cannot express himself in English as correctly as he can in his own language.

Due to the efforts of individual members of III, the ALI Guidelines have been translated in some 15 languages, including Arabic, Chinese, and Japanese (www.iiiglobal.org, go to: E-Library, then to: Insolvency Topics, then to: Court-to-Court Communication Guidelines). The existence of the Court-to-Court Guidelines may be familiar in the NAFTA countries, but from the responses to the Questionnaires, sent out in 2006, it must be concluded that in many other countries (e.g., Germany, Hungary, Italy, Spain, The Netherlands) they are simply not known by many judges, which may reflect the fact that cross-border insolvency cases have hitherto been quite rare. Only recently, in their writings, have authors (scholars; judges) introduced the Court-to-Court Guidelines in legal-domestic publications: see the authors from Germany, The Netherlands, and France, referred to in Reporters' Notes accompanying Global Principle 1. See, e.g., the Austrian author Andreas Geroldinger, *Verfahrenskoordination im Europäischen Insolvenzrecht. Die Abstimmung von haupt- und Sekundärinsolvenzverfahren nach der EuInsVO*, Veröffentlichungen des Ludwig-Boltzmann-Institutes für Rechtsvorsorge und Urkundenwesen, Manzsche Verlags- und Universitätsbuchhandlung, Wien,

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6.2 The court may allow use of other languages in all or part of the proceeding if no prejudice to a party will result.

2010, introducing the ALI-NAFTA Principles and the Court-to-Court Guidelines (at 30), welcoming a court's orientation on Guideline 7 (methods of communication; at 393) and Guideline 9 (electronic cross-border communication; at 279) and recommending a court's inspiration by the full set of Court-to-Court Guidelines and the CoCo Guidelines when setting up and organizing cross-border collaboration between judges (at 400). See also the German author Philipp M. Reuss, *Forum Shopping in der Insolvenz*, Studien zum ausländischen und internationalen Privatrecht, Band 259, Tübingen: Mohr Siebeck, 2011, 385ff, expressing appreciation of ALI NAFTA General Principle IV (which has evolved into Global Principle 9 (Cooperation and Sharing of Information) and recommending that courts use the Court-to-Court Guidelines (referring to III's publication with the German translation). For the Netherlands, as a forerunner, B. Wessels, *Internationaal insolventierecht als motor van grensoverschrijdende coördinatie en samenwerking tussen rechters en curatoren*, Tijdschrift voor Insolventierecht 2002, 21ff. (publishing, as an Annex, the English-language version of the Court-to-Court Guidelines). It is recognized (and respected) that national law will provide for rules relating to the translation of documents. Global Principle 1.1 (above)—and in a similar spirit CoCo Guideline 2.2—determines that the Global Guidelines in general promote the orderly, effective, efficient, and timely administration of proceedings, the sharing of information in order to reduce the costs involved, and the avoidance or minimization of litigation, costs, and inconvenience to all parties affected by proceedings. Although the ordinary language will be the language regularly used by the courts, these cost considerations may require the court to decide that translation of lengthy or voluminous documents may be limited to selected portions, as agreed by the parties or as ordered by the court. On the other hand, in the interests of ensuring fair proceedings, translations should be allowed or provided where a party (e.g., a foreign insolvency office holder, debtor, creditor, or expert) is not competent in the language in which the proceedings are being conducted.[109]

Principle 22 Authentication

Where authentication of documents is required, courts should permit the authentication of documents on any basis that is rapid and secure, including via electronic transmission, unless good cause is shown that they should not be accepted as authentic.

Comment to Global Principle 22:

This Global Principle is also new, but is traceable to Recommendation 7 ("Authentication") within Part V of the ALI NAFTA Principles. The efficient and effective operation of cross-border insolvency proceedings is enhanced greatly by authentication procedures with respect to judicial cooperation. National rules and practices may include such procedures; in individual cases they may be agreed on an ad hoc basis. Where certain judgments and orders follow a similar structure, courts may anticipate the use of a foreign language to facilitate coordination and to promote the speedy administration of proceedings. Global Principle 22 is formulated along the lines of CoCo Guideline 9, which in turn was inspired by ALI NAFTA Principles, Recommendation 7.[110]

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[109] Beyond the scope of this project is the use of translators during proceedings or the problems connected to legal translations.

[110] ALI NAFTA Principles, Recommendation 7, provides: "Where authentication of documents is required, the NAFTA countries should establish methods to permit very rapid authentication and secure

Principle 23 Communications Between Courts; Intermediaries

23.1 Courts before which insolvency cases or requests to recognize foreign insolvency proceedings or requests for assistance are pending should, if necessary, communicate with each other directly or through the insolvency administrators to promote the orderly, effective, efficient, and timely administration of the cases.

23.2. Such communications should utilize modern methods of communication, including electronic communications as well as written documents delivered in traditional ways. The Global Guidelines for Court-to-Court Communication, set out in Section III of these Global Principles, should be employed. Electronic communications should utilize technology that is commonly used and reliable.

23.3. Courts should consider the use of one or more protocols to manage the proceedings with the agreement of the parties, and approval by the courts concerned.

23.4. Courts should consider the appointment of one or more independent intermediaries, within the meaning of Global Principle 23.5, to ensure that an international insolvency case proceeds in accordance with these Global Principles. The court should give due regard to the views of the insolvency administrators in the pending insolvency cases before appointing an intermediary. The role of the intermediary may be set out in a protocol or an order of the court.

23.5. An intermediary:

(i) Should have the appropriate skills, qualifications, experience, and professional knowledge, and should be fit and proper to act in an international insolvency proceeding;

(ii) Should be able to perform his or her duties in an impartial manner, without any actual or apparent conflict of interest;

(iii) Should be accountable to the court that appoints him or her;

(iv) Should be compensated from the estate of the insolvency case in which the court has jurisdiction.

Comment to Global Principle 23:

Global Principle 23.1 has been developed from Procedural Principle 10 of the ALI NAFTA Principles. It takes as a starting point that communications through courts in different states take place directly or through the respective insolvency administrators. As to the modes of communication it is obvious that establishing communications through electronic means between courts requires the availability of such means, including teleconferencing, electronic mail, internet video conferencing, and web-based conferencing. The effective conduct of such communication requires the use of technology that is commonly used and that should ensure expeditious sharing of information and the accessibility of electronic data in a traceable, current, and understandable form. Information to be exchanged should be reliable in that data received or sent has not been manipulated, does not originate from an unmentioned person, and is not accessible to persons for whom it is not intended.

Global Principle 23.3 is based on the notion that a court must be ever mindful of its responsibility to uphold the principles of justice that are inherent within its own system of

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transmission of faxes and other electronic communications relating to cross-border insolvencies within the NAFTA on a basis that permits their acceptance as official and genuine by ministries and courts."

law, and to retain the necessary degree of control over the legal process over which it is presiding. When engaging in court-to-court communication in the context of an international insolvency proceeding, it may be advisable to draw up a written framework that expresses the objectives of the cooperative process on which the respective courts, together with all parties in interest, are engaged, and to commemorate the terms of that agreement in the form of a protocol to be approved by the courts concerned. In this way, reference can be made to a formal text in the event of any subsequent disagreement about the course or conduct of the communications that ensue.

Under certain circumstances, the court may wish to refrain from conducting direct communications with another foreign court, or even from doing so through the insolvency administrators who are conducting the respective proceedings in the states concerned. Reasons for considering such a course of action could include the need to attend to other immediate priorities or the general pressure of business upon the court, which require it to limit the time and resources devoted to the demands of the international case. A more obvious consideration may be the anticipated complexity of multilingual communications in different time zones, with more then two insolvency cases pending simultaneously (e.g., in such cases as *Madoff* or *Lehman Brothers*, involving eight or some 15 jurisdictions respectively), the unavailability of e-technological means, and possibly the court's genuine desire to maintain full impartiality, particularly if there are perceived to be conflicts between the administrators. In any such case, the court could consider appointing an independent intermediary. An intermediary's general task is to help ensure that an international insolvency case is operated in accordance with these Global Principles and with any specific provisions that are either set out in a protocol or specified in the order made by the court. In addition, an independent intermediary will be able to alert the court to potential conflicts or problems. It will be part of the intermediary's mission to devise a practical means of conducting communication between the courts concerned, in such a way as to ensure that all parties are properly informed and, where appropriate, involved. The intermediary should also be required to address the practical issues generated by such factors as the different working languages in which the various courts are able to operate, and the logistical problems caused by the fact (if such is the case) that the courts are situated in different time zones thereby impeding the conduct of live communications during normal working hours. Global Principles 23.4 and 23.5 are new compared to the ALI NAFTA Principles, but the appointment of an independent intermediary fully fits within the structure of Articles 25-27 UNCITRAL Model Law[111] while the UNCITRAL Legislative Guide has adopted the figure of a "court representative" having a similar function as an intermediary.[112]

As the term "intermediary" is intended to indicate, the person selected for the task must be, and must be seen to be, suitably qualified for the mission upon which he or she is engaged, and must likewise be manifestly free from any suggestion of bias or conflict of interests. In order to function properly as an "honest broker," the independent intermediary must command the trust and confidence of all parties interested in the matter, and should therefore be capable of engaging in discussions aimed at resolving practical issues within the case on a "without

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[111] Article 27(a) Model Law allows a court to implement cooperation by any appropriate means, including the appointment of a person or body to act at the direction of the court.

[112] A court representative is a person that may be appointed by a court to facilitate coordination of insolvency proceedings concerning enterprise group members taking place in different jurisdictions, see UNCITRAL Legislative Guide, Part Three: Treatment of enterprise groups (2010), para. 37.

prejudice" basis. Parties may thereby participate in a process whose outcome may serve the best interests of all concerned without fearing that they may be at risk of compromising their rights in a way that could result from a direct judicial hearing. Although the act of appointment is performed by the court, it is self-evidently essential that this should be preceded by a process of consultation with interested parties, so far as is reasonably practicable. Such consultations should be conducted by the respective administrators who should report their findings to the court together with such recommendations as they consider appropriate.

Principle 24 Control of Assets

24.1. If there is not a domestic insolvency case pending with respect to the debtor, then:

(i) upon recognition, a representative of a foreign insolvency case should be given legal control, and assistance in obtaining practical control, of the debtor's assets, wherever they are located, to the same extent as a domestic insolvency administrator;

(ii) upon recognition, a representative of a foreign insolvency case should be permitted to remove assets to another jurisdiction, where doing so is appropriate for the purposes of the insolvency case and if there is no undue prejudice to creditors.

24.2. If Global Principle 24.1 applies, the representative of a foreign proceeding is subject to the same level of accountability towards the court of the situs as would be required of an insolvency administrator appointed in a domestic proceeding.

Comment to Global Principle 24:

In a case where only one full insolvency proceeding is taking place, the emphasis must be on ensuring that the insolvency administrator, appointed in that proceeding, is accorded every possible assistance to take control of all assets of the debtor that are located in other jurisdictions. Once formal recognition has been granted by the appropriate court of the situs, that court should also stand ready to empower the foreign representative to exercise effective legal control over all assets, wherever located, and to invoke such remedies and enabling orders as would be available to a domestic administrator in an analogous proceeding in the jurisdiction where these assets are located. As a corollary to the conferment of such power and authority upon the foreign representative, it is appropriate to apply to the latter the same level of accountability towards the court of the situs as would be required of an insolvency administrator appointed in a domestic proceeding. Thus the court would exercise a supervisory role over the actions taken within its jurisdiction, and could hold the foreign representative accountable if procedural requirements, or substantive provisions, of domestic law are thereby infringed. Equally, if local parties attempt to obstruct or defy the authority of the recognized foreign representative, the domestic court should deal with such conduct in the same way as it would in the case of contempt of court, or interference with the legal process, in a domestic proceeding.

The supporting rationale for Principle 24 is that the efficient conduct of a single insolvency proceeding is generally best obtained through the marshalling of all realisable assets in one location where they can be controlled and administered for the benefit of creditors generally. There will inevitably be exceptions to such a general rule, however. Thus, immoveable

property situated in foreign states cannot, by its very nature, be repatriated to the central forum in which the case is being administered. In such cases, a locally conducted disposal for value, followed by remission of the net proceeds of realization, is the appropriate course to pursue. Other cases will require to be dealt with on their merits, as where the costs of transportation and safekeeping of assets that are in a form other than money or commercial paper may prove to be inefficient in relation to the amount expected to accrue from realization after repatriation. Conversely, if there is a relatively limited local market for the asset in question, it may be commercially prudent to incur the costs of relocation to a state where there is a better prospect of an optimum price being realized.

REPORTERS' NOTES

The UNCITRAL Model Law contains provisions whereby a recognized foreign representative may obtain assistance corresponding to the terms of Global Principle 24. In particular, Article 21 includes a number of forms of relief that may be granted at the discretion of the domestic court, including: suspending the right to transfer, encumber, or otherwise dispose of any assets of the debtor to the extent this right has not already been suspended (para. (1)(c)); providing for the examination of witnesses, the taking of evidence, or the delivery of information concerning the debtor's assets, affairs, rights, obligations, or liabilities (para. (1)(d)); entrusting the administration or realization of all or part of the debtor's local assets to the foreign representative or another person designated by the court (para. (1)(e)); granting any additional relief that may be available to an insolvency administrator under domestic law (para. (1)(g)). Of particular significance is Article 21(2), whereby upon recognition of a foreign proceeding the court may, at the request of the foreign representative, entrust the distribution of all or part of the debtor's local assets to the foreign representative or another designated person, provided the court is satisfied that the interests of local creditors are adequately protected. The provision in Article 21(2) safeguarding the interests of local creditors is reaffirmed under Article 22, whose terms are expressed to apply to all instances of the grant, refusal, modification, or termination of relief under any of the provisions of Article 19 or 21.

Provisions contained in Articles 19, 21, and 22 of the UNCITRAL Model Law are also relevant to the question of transfer of assets. We provide an Illustration: Debtor D is the subject of insolvency proceedings in state X, where its COMI is located. The proceeding in state X is the only one that is taking place. D owns real estate located in state Y including a luxury residential property, within which there is a valuable collection of art works. D also has funds on deposit with a local bank in Y. The local economy of Y is relatively underdeveloped, and there are no local citizens with the means to afford to purchase the real estate. There is no prospect of conducting a local sale of the art collection in Y, and only limited prospects of organizing a value-maximizing sale in X. The local court in Y should grant assistance to the foreign representative to enable the real estate to be internationally marketed and sold to a suitably affluent buyer. The proceeds of the sale, together with the funds in the bank account, should be remitted to state X, subject to the provision of adequate protection for any local creditors (including those whose claims enjoy priority under local law) to ensure that those parties will not be prejudiced thereby. If possible, arrangements should be made for the art collection to be transferred to state Z (where there is an established international auction market for fine art) and sold there. Alternatively, if it proves possible to negotiate a sale of the real estate together with the art collection *in situ*, that may prove to be a more cost-effective course to adopt.

Under the EU Insolvency Regulation, Article 18 ("Powers of the Liquidator") declares that a liquidator appointed by a court that has jurisdiction according to the scheme of the Regulation may exercise all the powers conferred on him by the law of the state of the opening of proceedings in another Member State, so long as no other insolvency proceedings have opened there or are potentially

in prospect of being opened. Article 18(1) expressly states that the liquidator may remove the debtor's assets from the territory of the Member State in which they are situated, subject to any rights of secured creditors or of parties having rights under reservation of title agreements. Article 18(3), however, provides that in exercising his powers, the liquidator shall comply with the law of the Member State within the territory of which he intends to take action, in particular with regard to procedures for the realization of assets.

Principle 25 Notice

25.1. If an insolvency case appears to include claims of known foreign creditors from a state where an insolvency case is not pending, the court should assure that sufficient notice is given to permit those creditors to have full and fair opportunity to file claims and participate in the case. Such notice should include publication in the Official Gazette (or equivalent publication) of each state concerned.

25.2. For the purposes of notification within the meaning of Global Principle 25.1, a person or legal entity is a known foreign creditor if:

(i) The debtor's business records establish that the debtor owes or may owe a debt to that person or legal entity; and

(ii) The debtor's business records establish the address of that person or legal entity.

Comment to Global Principle 25:

It is inherently true of any international case that there are likely to be foreign creditors of the debtor. In the interests of maintaining both the appearance and also the substance of due process and fair and equal treatment of all creditors, it is necessary to ensure that such interested parties are enabled to take an effective part in the proceeding, and that they shall not experience unintended prejudice or discrimination due to the factors of distance or language, or through some procedural element such as the operation of time limits for filing claims or for responding to communications. Provisions that have been designed for application in the context of purely domestic proceedings may fail to take account of these matters, and may also lack the necessary element of flexibility to allow for appropriate adjustments to be made with respect to foreign creditors. In order to fulfill the propositions expressed in Global Principles 5 ("Equality of Arms") and 11 ("Nondiscriminatory Treatment") courts should be ready to exercise such inherent discretionary powers as they may have so as to compensate for any potential disadvantage that might otherwise be experienced by foreign creditors due to the likelihood of delay in their reception of notice. Where existing domestic legislation fails to confer such discretion upon the court or to inject an element of flexibility in the operation of the rules where a case has an international dimension, consideration should be given to effecting a suitable amendment to the rules themselves. Global Principle 25 follows rather closely Procedural Principle 13 of the ALI NAFTA Principles.

REPORTERS' NOTES

Among the jurisdictions represented in the consultative survey there was virtually unanimous affirmation that this Global Principle expresses current practice in the respondents' home jurisdictions, or would be capable of doing so without encountering any fundamental objection. The principle that foreign creditors should not be subjected to discrimination was accepted as the theoretical ideal, although it was acknowledged by some that the attainment of absolute fairness might be impracticable under some circumstances, especially when technical difficulties impede the process of notifying foreign creditors. See, e.g., Court of Appeal d'Orleans 9 June 2005 (on file with authors) (R. Jung GmbH v. SIFA SA), allowing a German creditor that received notices in French to lodge proof of its claim after expiration of the domestic French time limit. Traces of the rule laid down in Principle 25.2 can be found in Article 458(3) of the Slovenian Insolvency Act (informing known creditors of the initiation of domestic bankruptcy proceedings).

Principle 26 Cooperation

26.1. Insolvency administrators in parallel proceedings should cooperate in all aspects of the cases. The use of an agreement or "protocol" should be considered to promote the orderly, effective, efficient, and timely administration of the cases.
26.2. A protocol for cooperation among insolvency administrators should address the coordination of requests for court approvals of related decisions and actions when required and communication with creditors and other parties. To the extent possible, it should also provide for timesaving procedures to avoid unnecessary and costly court hearings and other proceedings.

Comment to Global Principle 26:

This Global Principle reflects, to a large extent, Procedural Principle 14 of the ALI NAFTA Principles. It addresses the practical aspects of optimization of cooperation between the administrators engaged in parallel insolvency proceedings. In the current circumstances under which international insolvency cases have to be conducted, acceptance of the proposition that parallel proceedings can take place in different jurisdictions in respect of the same debtor is a pragmatic concession made in the interests of ensuring that the net benefits that should ensue from cross-border recognition and assistance are not sacrificed on the altar of a supposedly "pure" doctrine of universality. In other words, that the best should not be allowed to become the enemy of the good. Given the great diversity between sovereign states in matters of both policy and substance in their approach to insolvency law, the impact upon local creditors of the superimposition upon their anticipated rights, in the event of the other party's insolvency, of a foreign insolvency law's process and provisions may be such as to provoke a drastic response on the part of the domestic authorities of the state concerned. Faced with the prospect that domestic creditors may experience a serious defeat of their expectations, the authorities may resort to defensive policies of various kinds. The most extreme reaction would be to withhold recognition of foreign proceedings and to revert to the territorialist position whereby local assets are administered exclusively according to local principles of insolvency law. The logical conclusion of such an "isolationist" tendency would be the complete fragmentation of international insolvency proceedings, with each case generating a series of "sub-estates," and associated, territorial distributions, in accordance with the territorial

disposition of the various component parts of the debtor's estate. Less radical, but still detrimental from standpoint of the general interests of creditors worldwide, would be the imposition of restrictive conditions limiting the extent to which cooperation could be provided to foreign representatives, thereby increasing the cost and also, in many instances, the effectiveness of all of the parallel proceedings.

For this reason, principally, the overriding objective of these Global Principles aspires to facilitate the highest level of cooperation between the sovereign states that happen to be in some way interested in a given international insolvency case. By according the status of main proceeding to that which is taking place in the jurisdiction identified by means of an internationally agreed criterion, the doctrine seeks to bestow universality of effect upon the law of that state ("*lex concursus*") for most aspects of the proceeding. Two major concessions are made however in the interests of accommodating the legitimate expectations of parties that have had dealings with the debtor. First, by permitting the opening of a non-main or secondary proceeding, governed by its own local insolvency law, in cases where the debtor has had a substantial economic presence amounting to a place of business, the possibility is created for parties who would otherwise experience a relative detriment due to the disparity between the law of the main proceeding and the equivalent provision of their domestic law to retrieve some of that detriment, to the extent that locally situated assets enable this to be achieved. Secondly, by the application of certain, standardized exceptions to the application of the *lex concursus*, both in main and in non-main or secondary proceedings, the possibility is created for individual parties to retain the benefit of rights that were generated in the context of their original dealings with the debtor, and that arose with reference to a system of law other than that of the *lex concursus*. The effectiveness of this second species of concession to the commercial expectations of parties affected by their debtor's insolvency is inevitably dependent upon the extent to which states elect to apply standard principles in their choice of law practice concerning such questions.[113]

Global Principle 26 is directly aligned with the purposes embodied in Principles 1, 2, 9, 20, and 21 (above), and 27-29 and 32-36 (below). The domestic laws of those states that have enacted the UNCITRAL Model Law should already contain provisions, based upon Article 26, imposing upon insolvency administrators appointed in a locally opened proceeding the obligation to cooperate "to the maximum extent possible" with foreign courts or foreign representatives. Global Principle 26.2 actually transcends the terms of Article 26 by expressly contemplating the use of a protocol concluded between insolvency administrators whose provisions would extend to the coordination of court applications and of communications with creditors, and such other procedures to improve the efficiency of the process as may be practicable. The principles laid down in the original Procedural Principle 14 of the ALI NAFTA Principles have inspired the drafters of the CoCo Guidelines in the formulation of CoCo Guidelines 12.1 and 12.4.[114] See also the Comment and Notes to Global Principle 27 below.

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[113] The Reporters have drafted, in a Statement, a legislative model of standardized principles on conflict-of-law matters, which are recommended either for guiding courts in applying their laws, when these do not contain conflict-of-law rules or such rules are expressed with insufficient detail, or for adoption by states. The model is presented as a separate Annex to this Report.

[114] CoCo Guideline 12 ("Cooperation"):

"12.1. Liquidators are required to cooperate in all aspects of the case.

Principle 27 Coordination

27.1. Where there are parallel proceedings, each insolvency administrator should obtain court approval of an action affecting assets or operations in that forum if required by local law, except as otherwise provided in a protocol approved by that court.
27.2. An insolvency administrator should seek prior agreement from any other insolvency administrator as to matters that concern proceedings or assets in that administrator's jurisdiction, except where emergency circumstances make this unreasonable.
27.3. A court should consider whether the insolvency administrator in a main proceeding, or his or her agent, should serve as the insolvency administrator or coadministrator in another proceeding to promote the coordination of the proceedings.

Comment to Global Principle 27:

This Global Principle also follows rather closely the terms of Procedural Principle 15 of the ALI NAFTA Principles. The objectives of Global Principle 27 may best be achieved if each court, as early in the proceeding as is practicable, enters an order imposing the stated requirements on the relevant insolvency administrator, thereby producing a matrix of complementary orders applicable in each of the states concerned. Full and constant disclosure should be the rule. On the other hand, one benefit of a protocol is an agreement that a particular sort of action can be taken without court approval. This Global Principle establishes the basic precondition for cooperation among proceedings because it ensures that the key official in each case, the administrator, has knowledge of important matters as to which interested parties in each proceeding may be entitled to an opportunity to be heard. Whether the insolvency administrator has the obligation in turn to transmit particular information to the court and creditors in the proceeding in which the administrator was appointed will be determined by the national law applicable to that administrator.

In Europe, under the application of the CoCo Guidelines, a "protocol" plays a central role, see, e.g., CoCo Guideline 2.1. ("The aim of these Guidelines is to facilitate the coordination of the administration of insolvency proceedings involving the same debtor, including through the use of a governance protocol"). In the Explanation to the CoCo Guidelines (para. 31), a protocol is described as a means of agreeing to the alignment between different insolvency proceedings or pre-reorganization measures, which has been used in (mostly non-European) cross-border insolvency cases. Such an agreement is concluded in the course of multiple proceedings and is designed to overcome certain legal or factual obstacles. The use of a protocol is inserted in these CoCo Guidelines as reflecting an established and successful

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12.2. Liquidators ensure that cooperation takes place with other liquidators with a view to minimising conflicts between parallel proceedings and maximising the prospects for the rehabilitation and reorganization of the debtor's business or the value of the debtor's assets subject to realisation, as may be the case.

12.3. Cooperation is intended to address all issues that are important to the actual case.

12.4. Cooperation may be best attained by way of an agreement or "protocol" that establishes decision-making procedures, although decisions may continue to be made informally as long as they are compatible with the substance of any such agreement or "protocol".

12.5. In cases where any matter is not specifically provided for within the protocol, the liquidators shall act in a manner designed to promote the overriding objective set out above in Guideline 1.1."

practice outside Europe, mainly in the U.S.A. and Canada, but also in the UK, although the Explanation mentions that it has been reported that courts in other jurisdictions have been involved in such protocols as well, for example, the Bahamas, Israel, Switzerland, Bermuda, and Hong Kong.

Principle 27.3 mirrors CoCo Guideline 16.3 and has been given support by the Reporters' judicial Advisers as well as from insolvency practitioners.

REPORTERS' NOTES

One of the first examples of a protocol filed in conformity with the EU Insolvency Regulation is that concluded in respect of the French branch of Sendo International Limited, signed by (the representatives of) a French liquidator and English liquidators and endorsed by the Commercial Court of Nanterre in France (dated 1 June, 2006). In CoCo Guideline 12 ("Cooperation") and CoCo Guideline 16 ("Courts"), a protocol is also mentioned. See Guideline 12.4, the text of which was inspired by ALI Procedural Principle 14.A.[115] CoCo Guideline 12.5 states that a protocol establishes decisionmaking procedures. It is not meant to limit the content of any arrangement between the liquidators. A protocol for cooperation between proceedings should include, at the very least, provisions for the coordination of court approval for decisions and actions whenever required and for communications with creditors as required under any applicable law. It should also include a statement of the various cross-border issues to be addressed (e.g., reorganization, treatment of claims, realization of assets) and any questions in respect of which the liquidators are required to seek agreement in advance from other liquidators. In practice, cooperation—and therefore a protocol—can take different forms and its contents should adapt to the circumstances of the case. In some cases, a protocol may achieve its purpose in a simple way by aligning the practical means for treating notifications to creditors, the treatment of claims lodged, the verification of claims, and the distribution of dividends. Appendix I to the CoCo Guidelines contains a "Checklist Protocol" addressing the consideration of inserting in a Protocol clauses or statements regarding the basic requirements concerning a Protocol itself, to the relevant administrators ("liquidators"), to the debtor, to the proceedings, or to specific issues for cooperation. Co-Co Guideline 16.2[116] and Guideline 16.5[117] stress the importance that courts not only allow the use of a protocol, but also that they should use it as a mechanism to gain experience from every case.

Another tool for guidance in international practice has been provided in 2009 by the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation. It provides information for insolvency practitioners and judges on practical aspects of cooperation and communication in cross-border insolvency cases, based upon a description of collected experiences and practices, focusing on the use and negotiation of these so-called cross-border agreements. The Practice Guide provides an analysis of some 40 of these "agreements," ranging from written agreements approved by courts to oral

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[115] CoCo Guideline 12.4 states: "Cooperation may be best attained by way of an agreement or "protocol" that establishes decision-making procedures, although decisions may continue to be made informally as long as they are compatible with the substance of any such agreement or "protocol".

[116] CoCo Guideline 16.2 states: "Courts are advised to operate in a cooperative manner to resolve any dispute relating to the intent or application of these Guidelines or the terms of any cooperation agreement or protocol".

[117] CoCo Guideline 16.5 states: "Courts should encourage liquidators to report periodically, as part of national reporting duties, on the way these Guidelines and/or agreed Protocols are applied, including any practical problems which have been encountered".

arrangements between parties to the proceedings, that have been entered into since the early 1990s. It includes a number of sample clauses to illustrate how different issues have been, or might be, addressed. It contains also summaries of the cases in which the cross-border agreements that form the basis of the analysis were used. In recent literature, the Guide has been welcomed as providing useful reference sources and a basic checklist and as underlining the central role of cooperation and the involvement of courts in the process of dealing with tensions or conflicts inherent to any cross-border case, see Libby Elliott and Neil Griffiths, UNCITRAL Practice Guide on cross-border insolvency co-operation, in: Corporate Rescue and Insolvency, February 2010, 12ff; Devi Shah and Jeremy Snead, The UNCITRAL Practice Guide on Cross-border Insolvency Cooperation: A Good Guide to Cross-border Insolvency Agreements, 7 International Corporate Rescue 2010, 326ff. However, it is acknowledged, too, that the information to be used has its limits, which are determined by the national laws of the parties or proceedings involved. German authors (Peter Busch, Andreas Remmert, Stefanie Rüntz, and Heinz Vallender, *Kommunikation zwischen Gerichten in Grenzüberschreitenden Insolvenzen. Was geht and was geht nicht?*, Neue Zeitschrift für das Recht der Insolvenz und Sanierung (NZI) 2010, p. 417ff.; a shorter version in English is available via http://www.iiiglobal.org/component/jdownloads/viewdownload/362/5475.html have provided a sample protocol that is aligned to German procedural law ("*Mustervereinbarung*"). See for a Prospective Model International Cross-border Insolvency Protocol: Joseph J. Bellissimo and S. Power Johnston, Cross Border Insolvency Protocols: Developing an International Standard, in: Norton Annual Review of International Insolvency 2010, 37ff.

The Sendo Protocol is published by Hamilton / Hair, Country Report: Great Britain, in: Pannen (ed.), European Insolvency Regulation, Berlin: De Gruyter Recht, 2007, 660ff. For an overview of "protocol practice," see Bob Wessels, International Insolvency Law, Deventer: Kluwer, 3rd ed., 2012, para. 10115ff and para. 10327; Stephen Taylor, The Use of Protocols in Cross Border Insolvency Cases, in: Pannen (ed.), European Insolvency Regulation, Berlin: De Gruyter Recht, 2007, 678ff (referring for Europe to an ISA Deutschland Protocol, which has taken three years to negotiate); Samuel L. Bufford, United States International Insolvency Law 2008–2009, New York: Oxford University Press, 2009, p. 142ff; Gabriel Moss, A Practitioner's Perspective on the Possible Evolution of European Insolvency Law, in: Bob Wessels and Paul Omar (eds.), Insolvency Law in the United Kingdom: The Cork Report at 30 Years, Nottingham, Paris: INSOL Europe 2010, pp. 107-115 (referring to the unreported protocol in the case of Eurodis, approved between English and Dutch courts); Paul Omar, On the Origins and Challenges of Court-to-Court Communication in International Insolvency Law, in: Anthon Verweij and Bob Wessels (eds.), Comparative and International Insolvency Law: Central Themes and Thoughts, Nottingham, INSOL Europe 2010, 70ff; James Farley, A Practical Approach to Court-to-Court Communication in International Insolvency Law, in: Anthon Verweij and Bob Wessels (eds.), Comparative and International Insolvency Law: Central Themes and Thoughts, Nottingham, INSOL Europe 2010, 76ff. See also the Reporters' Notes accompanying Global Principle 2.

Another notable European involvement in protocols relates to the Cross-Border Insolvency Protocol For the Lehman Brothers Group of Companies, which governs the conduct of Lehman Brothers Holdings Inc. ("LBHI") and its affiliated debtors worldwide. The annotated Draft for the Lehman Brothers Group of Companies is available via www.bobwessels.nl, weblog: 2009-02-doc7. The Protocol, which was approved by the New York Bankruptcy Court (Southern District) in June 2009, is available via: http://www.iiiglobal.org/component/jdownloads/viewdownload/573/4339.html..The Protocol has been signed by 10 of the official representatives of (companies of) Lehman Brothers Group in Australia, the Netherlands, the Netherlands Antilles, Germany, Hong Kong, Luxembourg, Singapore, Switzerland, and the U.S.A. Official representatives of Bermuda and Japan are still considering signing the protocol, but have participated in a series of activities and meetings designed to advance the objectives of the Protocol. Only the administrators of a

number of UK-based companies (Lehman Brothers Inc. Europe, "LBIE") did not sign the protocol. They argued that they were in favor of cooperation, but were required by UK law to treat each insolvent entity as a separate one. See: Bankruptcy report number 3 (22 July 2009) and number 5 (12 March 2010), available at the website www.lehmanbrotherstreasury.com (as at 23 December 2011). Furthermore, the joint administrators argued: "Principally because we believe it [the Protocol; Reporters] was aspirational in its expectation of co-operation, and even though it created no legal obligation, it created a moral one." Quotation from an interview with one of the English administrators, see: 23 Insolvency Intelligence 2010, 32. They, too, submitted that UK administrators cannot, under UK law, subject themselves to a costly agreement, which would imply the sharing of sensitive information across borders that may entangle them in decisions taken by another court. (See John Willcock, eurofenix Winter 2010/2011, 16ff.) Several bilateral "agreements" have been concluded by the UK administrators, "but always on the basis of sound commercial principles rather than a sense of moral obligation." See Tony Lomas, one of the UK administrators, eurofenix Spring 2010, 30ff, disclosing: "Indeed, at a point in time at which LBHI's bankruptcy judge called upon the LBIE administrators to account themselves in his Court, for their rejection of the LBHI's global protocol, we approached our own judge for directions on the matter and Justice Blackburne duly approved of our strategy." According to Dammann, the resentment of the UK administrators is caused by the fact that "a lot of money has been transferred from the United Kingdom to the United States just before the day of filing of insolvency in the United States . . . , which cannot be recovered," see Xinyi Gong and Yanying Li, conference report Insolvency Conference Leiden 1-2 July 2010, in: Bob Wessels and Paul Omar (eds.), Cross-Border management in the Banking Sector, Nottingham-Paris, 2011, 93. In another well-known international case, the Bernard L. Madoff case, a "Cross-border Insolvency Protocol for the Bernard Madoff Group of Companies" and an "Information Sharing Protocol" were approved by the New York Bankruptcy Court (SDNY) in June 2009 (on file with the Reporters).

The original ALI NAFTA Procedural Principles numbered as 14 ("Cooperation") and 15 ("Coordination"), in the specific form in which they are stated, are not addressed in legislation or insolvency procedural practice outside the NAFTA jurisdictions, except for the two cases mentioned. They are quite often seen as potentially conflicting with the discretionary powers of a court. In certain jurisdictions, elements of formally ordained joint cooperation between administrators can be seen, for example, a provision whereby the foreign administrator is allowed the opportunity to consider a rescue plan or a comparable measure (§ 239 (2) KO of Austria). A broad and detailed provision is applicable in the Republic of Korea: Article 641 of the DRBA, 2006 (Collaboration) reads:

"1. For efficient and fair execution among the domestic and the foreign insolvency procedures or multiple foreign insolvency procedures that are under way in respect of the same debtor or mutually related debtors, the court shall collaborate with the foreign court and the representative of the foreign insolvency procedures for the matters of the following subparagraphs:

(i) Exchange of opinions;

(ii) Administration and supervision of the property and business of the debtor;

(iii) Coordination of the process of multiple procedures;

(iv) Other necessary matters

2. The court may exchange information and opinions directly with the foreign court or the representative of the foreign insolvency procedures for the collaboration pursuant to the provision of Paragraph 1."

And Article 638 of the same South Korean statute ("Simultaneous Implementation of Domestic Insolvency Procedure and Foreign Insolvency Procedures") states:

"1. If domestic insolvency procedures and foreign insolvency procedures against the same debtor are implemented simultaneously, the court, based mainly on the domestic insolvency procedures, may decide to provide support pursuant to Article 635 (Order prior to Recognition) and Article 636 (Support to Foreign Insolvency Procedures), change or revoke the decision thereof."

In general, among the International Advisers of the Reporters there was no objection to the acceptance of Procedural Principles 14 and 15 of the ALI-NAFTA Principles (corresponding to Principles 26 and 27 of these Global Principles) under the laws of the respondents. It has been submitted that in the European continental law systems, generally the question has to be clarified as to which provisions of the insolvency law are "*jus cogens*" and which of them are "*jus dispositivum*," so that one can determine the extent of authority and capacity vested respectively in the domestic insolvency courts and in the insolvency representatives under domestic insolvency proceedings for the purpose of creating such protocols.

In the Explanations to the CoCo Guidelines (paras. 101 and 102) it is submitted that national attitudes towards the use of a protocol will differ. There will be countries in which the law allows cross-border protocols to be concluded and executed, especially in those jurisdictions where there is a tradition of judicial assistance. In these cases, an insolvency administrator should be mindful of the fact that the laws of other jurisdictions may not allow a protocol or will at least be very cautious, and even skeptical, in applying it. In such cases, a court may deem it expedient to issue one or more orders explaining the purpose and content of a protocol and include certain elements of it in a separate judicial decision deriving directly from the insolvency proceedings. In cases where the law does not allow cross-border protocols to be concluded or executed, an insolvency administrator, when acting in the role of foreign representative, should explain that the laws of other jurisdictions indeed allow for a protocol and should point to any other available legal bases to enable the exchange of letters or memoranda of understanding between cooperating office holders or courts.

Even when national attitudes seem in general to be receptive towards practical solutions such as a cross-border protocol, currents of critical opinion can be found in the doctrinal literature. On the European continent particularly, the very practice of making use of protocols, the legal difficulties in assessing the nature of a protocol, and the law applicable to a protocol have all been discussed. As an objection to the use of a protocol, it has been submitted that creditors will not know in advance the content of a protocol, for which reason the division of powers between courts and the law applicable are both rendered uncertain. From a practical point of view, it is argued that the costs and the energy put into arriving at agreement regarding a protocol will, in many types of cases, not be worthwhile: see A.J. Berends, *Insolventie in internationaal privaatrecht*, Doct. Thesis, Vrije University Amsterdam, 2005, 53. Sometimes the situation does not allow any agreement about a protocol, for example, if the appointment of an administrator is legally questioned, or the court's jurisdiction is denied, or if there are legal issues concerning the location of certain assets (e.g., shares, certain claims, IP rights), see Jasnica Garašić, *Anerkennung ausländischer Insolvenzverfahren*, Doct. Thesis, Hamburg, 2004, Teil I, 359ff and 370ff. Other questions relate to the legal nature (substantial, procedural, international) of a protocol concluded between administrators in different jurisdictions and the influence of that nature on the qualification of the applicable norms of private international law (e.g., *lex causae*, *lex fori concursus*, or *lex contractus*); the (im)possibility of having a protocol recognized in the other jurisdiction; the law applicable to formal approvals if applicable law so requires; the nature of the "transfer" of the powers of the debtor to an administrator; the (im)possibility of binding creditors to a protocol; the (im)possibility of appealing decisions from the administrators; and the rules applicable to conflicts between creditors and administrators or administrators among themselves, see e.g. H. Eidenmüller, *Der nationale und internationale Insolvenzverwaltungsvertrag*, 114 Zeitschrift für Zivilprocess 2001, 3ff; A. Wittinghofer, *Der nationale und internationale Insolvenzverwaltungsvertrag. Koordination paralleler Insolvenzverfahren durch Ad hoc-Vereinbarungen*, Diss. München, 2004, 339ff; U. Ehrike, *Zur Kooperation von Insolvenzgerichten bei grenzüberschreitenden Insolvenzverfahren*, Zeitschrift für Wirtschaftrecht ZIP 2007, 2395ff; U. Ehrike, *Probleme der Verfahrenscoordination*, in: Gottwald (ed.), *Europäisches Insolvenzrecht—Kollektiver Rechtsschutz*, Bielefeld: Gieseking, 2008, p. 127ff; Lars Westpfahl, Uwe Goetker, Jochen

Wilkens, *Grenzüberschreitende Insolvenzen*, Köln: RWS Verlag, 2008, pp. 244-250; Lothar Czaja, *Umsetzung der Kooperationsvorgaben durch die Europäische Insolvenzverordnung im deutschen Insolvenzverfahren*, Schriften zum Verfahrensrecht, Band 33, Frankfurt am Main: Peter Lang, 2008, 256ff.; Gunnar Lennart Schmüser, *Das Zusammenspiel zwischen Haupt- und Sekundärinsolvenzverfahren nach der EuInsVO*, Internationalrechtliche Studien, Band 55, Frankfurt am Main: Peter Lang, 2009, 165ff; Ulrich Ehricke, The Role of Courts in Cross-border Insolvency, in: Anthon Verweij and Bob Wessels (eds.), Comparative and International Insolvency Law: Central Themes and Thoughts, Nottingham, INSOL Europe 2010.

In Europe, in the context of the Rome I Regulation, which entered into application December 17, 2009, the question may arise whether, as to the law applicable, a protocol is a "contract" for the purposes of the Rome I Regulation. It may be the case that under certain domestic law the answer will be negative, but it is submitted that the term "contract" must be given an independent meaning in the light of the aims of the Regulation, to be understood as having essentially the same meaning as in Article 5(1) of the Brussels I (Judgments) Regulation, in that it refers to obligations that are freely assumed by one party towards the other, see Peter Stone, EU Private International Law, 2nd ed., Cheltenham: Edward Elgar 2010, 80ff and 290. Certain matters, which may have been dealt with in the cross-border agreement, are, however, excluded from Rome I's scope, such as the internal organization or winding up of a company or the personal liability of officers and other members as such for the obligations of a company, see Article 1(2)(f) Rome I. These matters are governed by the law of the place of incorporation. In *Re Base Metal Trading Ltd v Shamurin* [2005] 1 All ER (Comm) 17 (CA), it is decided that the exclusion of Article 1(2)f extends to any liability of a director that arises by virtue of his office. When the protocol contains an arbitration or jurisdiction clause, Article 1(2)(e) excludes the applicability of Rome I with regard to the validity and interpretation of such clauses. Legal questions are to be determined by Article 23 Brussels I (Judgments) Regulation or by Articles II and V of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958. Without such a choice, it seems obvious that in the context of Article 3, the law governing the agreement is the *lex concursus* of the Member State in which the main proceedings have been opened. This is the position in Germany (A. Wittinghofer, *Der nationale und internationale Insolvenzverwaltungsvertrag. Koordination paralleler Insolvenzverfahren durch Ad hoc-Vereinbarungen*, Diss. München, 2004, 382) and in Austria (Andreas Geroldinger, *Verfahrenskoordination im Europäischen Insolvenzrecht. Die Abstimmung von haupt- und Sekundärinsolvenzverfahren nach der EuInsVO*, Veröffentlichungen des Ludwig-Boltzmann-Institutes für Rechtsvorsorge und Urkundenwesen, Manzsche Verlags- und Universitätsbuchhandlung, Wien, 2010, 306). Interestingly, the Rome I Regulation in addition to allowing for a specific choice of law, ". . . does not preclude parties from incorporating by reference into their contract a non-State body of law or an international convention." It has been suggested, in European scholarly literature, that time is ripe to discuss the possibility of drafting "Principles for Insolvency Protocols," to at least prevent some of the disputes mentioned and to create a certain level of predictability and certainty in an area that in itself is interesting, but not without problems. See Bob Wessels, Cross-border Insolvency Agreements: What Are They and Are They Here to Stay?, in: Dennis Faber/Niels Vermunt (Ed.), *Overeenkomsten en insolventie*, Nijmegen, 2012 (forthcoming).

CoCo's Explanatory notes on CoCo Guideline 16.3 reads as follows: "115. When deciding on the opening of secondary proceedings, a court could consider, where domestic law allows so, to appoint or to co-appoint the 'foreign' main insolvency practitioner as a liquidator or as a co-liquidator in secondary proceedings. Consequently, such an appointment shall subject the foreign main liquidator to the regime of supervision or general oversight of the court opening the secondary proceedings. A main liquidator, appointed or co-appointed as secondary liquidator, is advised to seek the assistance of local counsel. This advised approach could also apply to a nominated agent of the main liquidator." Tim Le

Cornu and Mathew Clingerman, "The Cayman Islands new insolvency regime in practice one year on," *Corporate Rescue and Insolvency*, April 2010, 70ff., point to the fact that since new rules on the Cayman Islands came into effect (2008), at least five joint court appointments have been made of a foreign insolvency office holder with a resident insolvency office holder. In the case of District Court 's-Hertogenbosch 24 June 2004, JOR 2004/214 (*Van der Putten/Transbus*), the Dutch court appointed as a liquidator in secondary proceedings a lawyer, related to the UK main proceedings' administrator's firm. Mention is also made of the Belgian Commercial Court Tongeren 16 July 2002 TBH 2004, 811 (*SARL Bati-France*): A French company developed activities in France and Belgium. A French court had decided the company had to dissolve. Where the French court by decision of 14 March 2002 had opened main insolvency proceedings ("*liquidation judiciaire*," which is listed in Annex A), the Belgian court "limits itself" to the opening of secondary proceedings in Belgium, as the company had an establishment in the meaning of Article 2(h) InsReg in Belgium. The court also decides that the court itself did not have to examine whether the company was insolvent, because that problem had already been decided in the French proceedings. The court appointed the French liquidator in the main insolvency proceedings as the liquidator in the Belgian secondary proceeding. On appeal, it is decided that Article 17(1) InsReg has the effect that the (French) powers of the French main liquidator are halted in Belgium. His position as liquidator in the secondary proceedings will be exclusively determined by Belgian law (Article 28), see Commercial Court Charleroi, 14 September 2004, RRD 2004, 358 (SARL Bati France v. Alongi).

Principle 28 Notice Among Administrators

An insolvency administrator should receive prompt and prior notice of a court hearing or the issuance of a court order, decision, or judgment that is relevant to that administrator.

Comment to Global Principle 28:

An essential feature of the required approach to cooperation between administrators in parallel proceedings is the honoring of both the letter and the spirit of the principle of mutual trust that must apply in such situations. Candor and transparency are fundamental aspects of such mutual trust. Whenever any of the insolvency administrators proposes to apply to their national court, or to a court in any third state, in respect of any matter relating to the insolvency proceeding, a duty of candor should be observed whereby advance and timely notice of the proposed application should be provided to all other administrators. This should be done at a sufficiently early time to enable them to consider the implications of the application in question both from the standpoint of their own proceeding and with regard to the general interests of all affected parties. Wherever possible, there should be communication among the administrators to ascertain the extent to which the proposed application can command the assent and support of all of them, and also whether it is appropriate for some or all of them to be represented at the hearing. It is to be understood that there may be occasions when the urgency of the matter necessitates the making of an instant application without there being time for orderly notice to be given in advance to the other insolvency administrators. In such cases, every effort should be made to notify them as soon as possible, to provide an explanation for the lack of advance notice or consultation, and also to make any appropriate representations to the court as may safeguard the interests of the other insolvency administrators.

This Global Principle 28 reflects the notion of Procedural Principle 16 of the ALI-NAFTA Principles. According to the Explanation to the CoCo Guidelines, Guidelines 17.1 and 17.2 are inspired by the Procedural Principle 16 of the ALI-NAFTA Principles.[118]

Principle 29 Cross-Border Sales

When there are parallel insolvency proceedings and assets will be sold, courts, insolvency administrators, the debtor, and other parties should cooperate in order to obtain the maximum aggregate value for the assets of the debtor as a whole, across national borders. Each of the courts involved should approve sales that will produce the highest overall price for the debtor's assets.

Comment to Global Principle 29:

This Principle replicates the essential substance of Procedural Principle 17 of the ALI NAFTA Principles, but extends the scope of its provision so as to apply to a wider circle of parties and entities in addition to the insolvency administrators. Although its purpose is to enhance the benefits of international cooperation for the benefit of the global body of creditors by seeking to maximize the value realized through sale of any part of the debtor's property that happens to be administered in one of the parallel proceedings, it would appear that there are few concrete examples of such a practice being the subject of express legislative authorization at the present time.[119] On the other hand, the purpose and content of Procedural Principle 17 itself formed the basis for CoCo Guideline 13.[120] Furthermore, among the jurisdictions surveyed, there were indications that a positive response might be expected if such an approach were to be proposed, either in a specific proceeding or at the level of legislative enactment. It was also indicated that spontaneous collaboration between insolvency administrators, acting in a manner corresponding to the terms of Global Principle 29, already

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[118] CoCo Guideline 17 ("Notices"):

"17.1. Notice of any court hearing or the making of any order by a court should be given to each of the liquidators at the earliest possible point in time where the hearing or order is relevant to that liquidator.

17.2. Where a liquidator cannot be present in person before the court, the court is advised to invite the liquidator to communicate any observations to the court prior to any order being made.

17.3. The liquidators should provide for the keeping of an accessible record of notices in the meaning of Guideline 17.1, which shall be regularly updated, to note the dates and relevant descriptions of any legal documents communicated, including those filed or transferred electronically."

[119] See, however, s. 641 of the South Korean DRBA (2006), quoted above in the Reporters' Notes to Global Principle 27.

[120] Guideline 13 ("Cross-Border Sales"):

"13.1. Where during any period of cooperation between liquidators in main and any secondary proceedings assets are to be sold or otherwise disposed of, every liquidator should seek to sell these assets in cooperation with the other liquidators so as to realise the maximum value for the assets of the debtor as a whole.

13.2. Any national court, where required to act, should approve those sales or disposals that will produce such maximum value."

takes place on some occasions, where the benefits of such cooperation are apparent to the administrators involved.[121]

Principle 30 Assistance to Reorganization

If a court recognizes a foreign insolvency case that is a reorganization case as a main proceeding with respect to the debtor according to these Global Principles, the court should conduct any parallel domestic case in a manner that is as consistent with the reorganization objective in the main proceeding as is possible under the circumstances, with due regard to the local law.

Comment to Global Principle 30:

Reorganization proceedings are invariably complex and delicate matters, with a considerable degree of inherent uncertainty as to their eventual success. These factors are greatly magnified when the assets and interests of the reorganizing debtor are dispersed among several different states, whose respective laws may also give rise to difficulties when an integrated solution is being sought that will embrace all aspects of the debtor's business. If vital elements of the debtor's operations are located outside the state in which the center of main interest (COMI) is situated, noncooperation on the part of the courts and authorities of the other state or states concerned could stultify all prospects of a meaningful reorganization taking place. The outcome of a fragmented process is likely to be at best a weaker enterprise than might otherwise have been constituted, and at worst a complete failure of the reorganization attempt, resulting in a liquidation. Loss of value is virtually inevitable, with the negative effects being experienced by creditors as well as equity holders in all the states involved. Ideally, parallel reorganization proceedings should take place in each of the states concerned, and they should be conducted as far as possible in a manner that aspires to be in sympathy with the aims and purpose of the main proceeding. Where possible, simultaneous filings under the laws of the states in question are likely to prove efficacious in attaining the benefits of a protective moratorium across the entire enterprise, even if this is built up on a piecemeal basis and is not of a uniform nature across all jurisdictions.

One practical constraint that may be encountered when parallel filings are contemplated is that the different domestic laws may impose diverse criteria for establishing eligibility to commence a reorganization proceeding. For example, the law of the state of the COMI may allow a filing for reorganization to be resorted to as a proactive measure, whereas in some of the other concerned systems it may be necessary to establish that the debtor's local operations are currently in a state of insolvency according to the criteria employed by the local law. If those criteria are not met with regard to the local branch of the debtor's international operations, the domestic law may deny the right to file or disallow an application. Even if the debtor's circumstances are such as to amount to a state of insolvency for the purposes of the law of the COMI (and a fortiori where they do not), there is a possibility that it may prove impossible to open a parallel proceeding in other, strategically significant, jurisdictions. Global Principle 30 addresses this issue by asserting the rational basis for the courts and

[121] In Brazil, for example, such an approach has been followed in relation to the sale of assets in the *Parmalat* case, see www.latincounsel.com.

authorities of other states to adopt a supportive approach towards a proceeding opened in the state of the debtor's COMI for the purpose of attempting a value-preserving reorganization. Such a reorganization could include partial liquidation in that shares in a subsidiary of an insolvent debtor or assets of this subsidiary are divested, and the proceeds will become a part of main insolvency proceedings in the context of the insolvency of a group of companies. This is very much within the spirit of international cooperation that these Global Principles seek to nurture. For example, a court may face a particularly sensitive issue of judgment if local parties seek to initiate a liquidation procedure with respect to the debtor's operations and assets in that jurisdiction. If—as may well be the case—such a proceeding would increase the likelihood that the main reorganization proceeding will be unsuccessful, the court should give careful consideration to the wider implications of what it is being asked to do, and should endeavor to achieve a solution that will avoid inflicting a potentially fatal blow to the prospects of reorganization. It is acknowledged that the court must ultimately balance the interests of local parties against the broader interests of the international body of creditors, and may have to take account of any substantiated indications that the prospective effects of the reorganization upon the local creditors are likely to be disproportionately unfavorable when compared to the position of creditors in other states.[122] The possibilities of court-to-court communication should be explored before any decision is taken to open a liquidation proceeding under domestic law.

Principle 30 is closely based on Procedural Principle 18 of the ALI-NAFTA Principles. In 2007, this Procedural Principle 18 was the source for CoCo Guideline 14.[123]

Principle 31 Post-Insolvency Financing

Where there are parallel proceedings, especially in reorganization cases, insolvency administrators and courts should cooperate to obtain necessary post-insolvency financing, including the granting of priority or secured status to lenders, with due regard to local law.

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[122] See, e.g., the analysis of Hirst J in Felixstowe Dock and Railway Co v. U.S. Lines Inc [1989] Q.B. 360, at 376 and 389, whereby the judge concluded that the prospective benefits of a proposed plan of reorganization of a U.S.-based company under Chapter 11 of the U.S. Bankruptcy Code would be almost exclusively enjoyed by the U.S. creditors, whereas European creditors, including those in the UK, would have little to expect in the future by way of net return.

[123] Guideline 14 ("Assistance in Reorganization"):

"14.1. Where main insolvency proceedings are aimed at ensuring the rehabilitation and reorganisation of the debtor's business, all other liquidators shall cooperate in any manner consistent with the objective of reorganisation or the sale of the business as a going concern wherever possible, mindful of the interests protected by local insolvency proceedings.

14.2. Liquidators should cooperate so as to obtain any necessary post-commencement financing, including through the granting of priority or secured status to lenders providing finance to the debtor and related entities as may be appropriate and insofar as permitted under any applicable law."

Comment to Global Principle 31:

This Principle is closely based on Procedural Principle 19 of the ALI NAFTA Principles. Where parallel insolvency proceedings take place, particularly where they are aimed at bringing about the reorganization of the debtor, the availability of post-insolvency (or post-commencement) financing is among the vital factors bearing upon the prospects of a positive outcome. As is also true in purely domestic cases, unless the providers of such finance can be assured that they will enjoy adequate protection in the event that the reorganization does not succeed, financing is unlikely to be available on affordable terms, or even at all. An additional level of complexity arises in an international case because lenders need to be reassured that their rights will be accorded equal protection—including the enjoyment of priority or secured status—according to the laws of all the states in which the funds may be deployed during the course of the attempted reorganization. To the extent that such priority or security may not be cognizable under the domestic law of any of the states concerned, there needs to be full transparency between all the administrators concerned both in their communications among themselves and in their negotiations with the funding providers. It may be necessary to agree that restrictions shall be placed on the application of at least a portion of the funding to prevent its being deployed in a jurisdiction whose laws would deny the full measure of protection to the lender in the event of a subsequent liquidation following a failed reorganization. In agreeing to such a plan, insolvency administrators should be prepared to engage in a certain amount of "give and take" in the interests of securing the optimum amount of funding, and on the most favorable terms, that will offer the best prospects of success for the coordinated reorganization.

Principle 32 Avoidance Actions

Where there are parallel proceedings, insolvency administrators should cooperate to reach a common position with respect to the avoidance of pre-insolvency transactions involving the debtor, with due regard to local law.

Comment to Global Principle 32:

This Principle, which is closely based on Procedural Principle 20 of the ALI NAFTA Principles, addresses another vital aspect of the conduct of an insolvency proceeding, namely the exercise of remedies to bring about avoidance of transactions entered into by the debtor prior to the opening of insolvency proceedings. Such remedies are to be found in the insolvency laws of virtually every state, as well as in the general law. However, they can exhibit numerous differences when reviewed comparatively, which may result in different outcomes in relation to any given set of facts, depending upon which state's avoidance rule is applied. Where a debtor has engaged in transactions with a range of counterparties, questions of jurisdiction and also of choice of law will play a significant part in determining the outcome of any attempt to seek avoidance with respect to any particular transaction. Each case will be required to be assessed on its individual merits, having regard to such matters as the possibility that the transaction may in principle be impeachable under the laws of more than one state, whereas in practice there may be a better prospect of success if the matter can be determined according to the avoidance rule of a particular state. At the present time, there is relatively little authority to support a practice whereby the court of one state, which happens to have control of an insolvency proceeding, will apply the avoidance rule of some other state

on the basis of having ascertained, by means of its rule of conflict of laws, that the transaction was governed at its inception by the law of the latter state.[124] Generally, there is a tendency for courts to seek to apply their domestic avoidance rule even in an international case.[125] Until such time as it becomes possible to anticipate that a court may be persuaded to apply a foreign avoidance rule as the applicable law of the transaction, insolvency administrators in parallel proceedings will need to identify the forum whose avoidance rule would be most appropriate from the standpoint of the probable outcome of the action. If there are also valid jurisdictional grounds for bringing the action before that court, the administrators should attempt to agree to a common position, in order to minimize the likelihood that the court may be deflected from resolving the matter by concerns that it may also be the subject of an application before the court of some other state.

Principle 33 Information Exchange

Insolvency administrators in parallel proceedings should make prompt and full disclosure to each other on a continuing basis of all relevant information they have, including a list of all claims and claimants indicating whether the claims are asserted as secured, priority, or ordinary claims, and whether they are approved, disputed, or disapproved.

Comment to Global Principle 33:

This Global Principle 33 replicates very closely the terms of Procedural Principle 21 of the ALI NAFTA Principles. It affirms the specific duty of all insolvency administrators engaged in parallel proceedings to share with one another as soon as possible all relevant information, especially relating to claims and claimants of which they are aware. This is of vital importance in the interests of enabling each administrator to process the matters over which

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[124] See Jay L. Westbrook, Choice of Avoidance Law in Global Insolvencies, 17 Brooklyn Journal of International Law 499 (1991); the same author: Avoidance of Pre-Bankruptcy Transactions in Multinational Bankruptcy Cases, 42 Texas International Law Journal 899 (2007). For a rare legislative provision whereby a court (in any part of the UK) is authorized to apply the avoidance rule of a foreign system of law (namely that of the country or territory from which a request to do so has been received), see the United Kingdom Insolvency Act 1986, s.426(4), (5), and (11). Only a limited number of countries have been designated as eligible to submit requests for such assistance pursuant to s.426. See I.F. Fletcher, Insolvency in Private International Law, 2nd edn. (2005), Chap.4, at paras. 4.04 to 4.26. See also the discussion of cases from the United States included in John Pottow, "The Myth (and Realities) of Forum Shopping in Transnational Insolvency." Brooklyn Journal of International Law 32, no. 3 (2007): 785-817.

[125] See, e.g., the case of *Maxwell Communications Corporation plc*, in which the UK administrators' attempt to bring an avoidance action in respect of an alleged preference given by the debtor progressed through several tiers of proceedings in both England and the U.S.A. For the reported proceedings, see: Re Maxwell Communications Corporation plc (No.2), Barclays Bank plc v. Homan [1992] BCC 757 (Hoffmann J) and 767 (CA); Re Maxwell Communications Corporation plc, 170 B.R. 800, 801-807 (Bankr. S.D.N.Y. 1994), (Judge Brozman), aff'd, 186 B.R. 807, 812-815 (S.D.N.Y. 1995) (Scheindlin USDJ), aff'd, 93 F.3d 1036 (2d Cir. 1996) (Cardamone, Circuit Judge). See, too, In re Condor Ins., Ltd., 601 F.3d 319 (5th Cir. 2010) (holding that, while U.S. avoidance powers cannot be utilized in a chapter 15 case, the avoidance powers of foreign law, applicable under choice-of-law rules, can be utilized).

he or she is presiding in the most efficient manner. It also has an important function in ensuring consistency in the processing of claims that are filed in two or more proceedings, and in preventing the accidental overpayment of creditors who engage in multiple filings without properly accounting for payments received in other proceedings. Principle 33 is a particularized application of the general requirements of furnishing information that are expressed in Global Principles 1 and 9 and also follow Article 31 of the EU Insolvency Regulation.

Principle 34 Claims

Where there are parallel proceedings, each of which is taking place in a state whose courts have international jurisdiction with respect to the debtor according to these Global Principles, claims admissible and allowable in one proceeding should be accepted in each of the other proceedings, except as to distinct factual and legal issues arising under the other state's applicable law.

Comment to Global Principle 34:

Global Principle 34 is closely based on Procedural Principle 22 of the ALI NAFTA Principles. The fundamental tenet of the doctrine of universalism is that the debtor's estate, though dispersed across multiple jurisdictions, constitutes a single entity and should be administered on that basis. Under the current conditions of material diversity between the provisions of different domestic insolvency laws, it has so far proved to be politically unacceptable to apply that doctrine in its "pure" form, even as between states that have developed close ties at a commercial and even at the political level. The pragmatic response to this state of affairs has been the application of "modified universalism," whereby certain concessions are made to accommodate the interests and expectations of some elements among the creditors of the estate. The principal feature of this modified approach is that the opening of parallel proceedings is accepted, albeit under carefully defined conditions, resulting in the application of different regimes of domestic insolvency law to the sub-estates to which the respective proceedings are applicable. Overall unity is reasserted, however, through the application of the principle here expressed in Global Principle 34, to the effect that all creditors are eligible to participate and lodge their claims in all of the parallel proceedings, and that the admission of a given creditor's claim in any one of those proceedings is to be treated as establishing the eligibility of that claim to be accepted in each of the other proceedings, save where some distinct factual and legal issue that arises under the domestic law of one of the other states precludes the application of that principle in the state in question. This form of unity has been laid down in Article 32(1) of the EU Insolvency Regulation. Such multiple filing is allowed subject to the proviso that the creditor must make honest disclosure of the relevant facts to each of the insolvency administrators with whom such filing takes place, and must further submit to the application of the rule of hotchpot so as to account for all payments previously received at the time of receiving any payment under any of the proceedings. The rule of hotchpot is expressed in Article 32 of the UNCITRAL Model Law, in Article 20 EU Insolvency Regulation, and is also to be found in the domestic laws of many states.

REPORTERS' NOTES

Here follows an Illustration of Global Principle 34: Debtor D is the subject of insolvency proceedings in states X, Y, and Z. D owes unpaid taxes to the revenue authorities of Y. Under the laws of X, a rule of public policy forbids the enforcement of foreign tax liabilities by either direct or indirect means. The administrator of the proceeding in X accordingly refuses to admit the proof of debt lodged by state Y in respect of the tax liability. In state Z, however, Article 13 of the UNCITRAL Model Law has been enacted in terms which provide that claims in respect of foreign tax liabilities can be lodged in domestic proceedings, provided they do not represent a penalty.[126] The authorities of Y are able to lodge proof for their claim in the proceeding conducted in Z, and also in the proceeding in state Y itself. The issue of the priority accorded to the claim for the purposes of each of the processes of distribution is governed by the respective domestic laws of Y and Z.

Principle 35 Limits on Priorities

35.1. A claim that is governed by the law of a state other than that in which insolvency proceedings are taking place should in principle have only the priority it would have in a strictly territorial process conducted in the state whose law governs the insolvency proceedings, and restricted to assets located in that state.
35.2. In exceptional circumstances an exclusion of Global Principle 35.1 can be accepted.

Comment to Global Principle 35:

Different states' insolvency laws exhibit considerable differences with regard to the treatment of claims, notably concerning the question of the priority to be accorded to a claim possessing a given set of characteristics. Thus, there has been a traditional tendency to accord priority status to fiscal and other public claims asserted by the domestic authorities of the state where the insolvency proceedings are conducted. This is frequently accompanied by an exclusionary rule to prevent the admission of foreign revenue or public claims from participating in the process of distribution. In the modern era, there has been a progressive erosion, under the laws of a number of states, of the privileged position of the state as creditor, but the overall position remains uneven. Separately, in some states the exclusionary rule against foreign revenue claims has been attenuated and in some instances abolished. Likewise, the laws of many states accord some degree of priority to the claims of the debtor's own employees in respect of unpaid salary or associated benefits, but there are wide variations as to the specific terms of such entitlement, which can vary from an unrestricted entitlement, to a more restricted right that may be subject to an individual monetary limit, and also possibly to a limitation relating to the time within which a qualifying claim must have become due.[127]

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[126] See, e.g., the version of Art. 13 of the Model Law enacted in the U.K.: Cross-Border Insolvency Regulations 2006, S.I. 2006/1030, Sched. 1, Art. 13.

[127] See, e.g., J. Israël, *Opmerkingen bij voorrechten in internationaal faillissement. Getting the Priorities Right*, in: Nederlands Tijdschrift voor Burgerlijk Recht (NTBR) 1996, 9; G. McCormack, G., The Priority of Secured Credit: an Anglo-American Perspective, in: Journal of Business Law 2003, 389ff; Jay Lawrence Westbrook, Priority Conflicts as a Barrier to Cooperation in Multinational Insolvencies, 27 Penn State International Law Review 2009, issue 3-4, 869ff.; Stefan Weiland, *Par condition creditorum. Der insolvenzrechtliche Gleichbehandlungsgrundsatz und seine Durchbrechungen zugunsten öffentlich-rechtlicher*

In an international case, a creditor who participates in a distribution administered according to the law of a given state must accept that the principle of equality of treatment of creditors must be applied in accordance with the policy and values embodied in the *lex concursus.* Thus the fact that, on account of the characteristics of the claim in question, a particular creditor would be accorded a position of priority under the insolvency law of the state with which the creditor is primarily connected, or by whose law the actual claim is governed, does not confer any enhanced status on the claim of that claimant, as against the classification employed by the *lex concursus* with respect to factually identical claims. This Global Principle 35, which is closely derived from Procedural Principle 25 of the ALI NAFTA Principles, affirms that this approach is to be respected. To the extent that a given creditor will thereby experience the prospect of an outcome inferior to that which might have resulted from a domestic proceeding conducted under the law of its own "home" country, the possibility of seeking the commencement of a non-main proceeding in the latter jurisdiction could be explored. If, however, the expected value of the debtor's assets that are located in that country is low, or if the criteria for opening a proceeding under that local law cannot be met, the creditor must accept the ultimate authority of the *lex concursus* to control the process of distribution.

The principle allows an exclusion to operate in exceptional circumstances, see Principle 35.2. Such circumstances could include a case where the volume of the assets is such that a claim can be satisfied. Another exclusion could be justified by giving a priority that would lead to a reduction of costly and burdensome procedural complexities for the benefit of an overall reorganization. In the latter case, the justification could be limited in such a way that the priority claim is restricted to the assets located in the other state.

REPORTERS' NOTES

For a broad spectrum of issues with regard to priorities in cross-border insolvencies, see the contributions in: 46 Texas International Law Journal 437-622 (2011). The EU Insolvency Regulation is based on the possibility of having secondary proceedings running parallel to main proceedings, while these secondary proceedings ultimately act as supportive proceedings for the main insolvency proceedings. In legal practice, the different ranking of claims (as a logical consequence of opening secondary proceedings) has been overcome in cases where courts have treated creditors in other Member States "as if," in their respective jurisdiction, indeed secondary insolvency proceedings had been opened, thus simplifying proceedings in a combination with the respect of local priorities. See Bob Wessels, International Insolvency Law, Deventer: Kluwer, 3rd ed., 2012, para. 10616; Gabriel Moss, Group Insolvency—Choice of Forum and Law: the European Experience Under the Influence of English Pragmatism, in: 32 Brooklyn Journal of International Law 2007, 1005ff. This method has been given names, such as "virtual contractual secondary proceedings" (Michel Menjucq/Reinhard Dammann, Regulation No. 1346/2000 on Insolvency Proceedings; Facing the Companies Group Phenomenon, in: 9 Business Law International, No. 2, May 2008, 145ff.), "synthetic secondary proceedings" (John A.E. Pottow, A New Role for Secondary proceedings in International Bankruptcies, 46 Texas International Law Journal 2011, 579ff.) or applying the principle of "virtual territoriality" (Edward J. Janger, Virtual Territoriality, 48 Columbia Journal of Transnational Law 401 (2010), which therefore results in the treatment of such creditors ("as if" secondary proceedings were

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Gläubiger, Saarbrücker Studien zum Privat- und Wirtschaftsrecht, Band 67, Frankfurt am Main: Peter Lang, 2010; Bob Wessels, Tax Claims: Lodging and Enforcing in Cross-Border Insolvencies in Europe, International Insolvency Law Review (IILR) 2/2011, 131ff.

opened) as they could expect under their national law. Examples, in Europe, being MG Rover, Collins & Aikman and Nortel Networks. The chosen solution is "a form of 'procedural consolidation' which allows for different insolvency procedures but unites them in a single forum, thus avoiding at least some transaction costs and discrepancies; in a way, this represents a 'step toward' a group insolvency.", see Heribert Hirte, Towards a Framework for the Regulation of Corporate Groups' Insolvencies, in: European Company and Financial Law Review 2008, 213ff., at 218. See also Irit Mevorach, Appropriate Treatment of Corporate Groups in Insolvency: A Universal View, in: 8 European Business Organisation Law Review 2007, 179ff., at 189, in favor of "the use of COMI in order to achieve 'procedural consolidation,'" although stating that the concept needs "clear rules." In international practice it has been welcomed that the EU Insolvency Regulation facilitates such a treatment (see Allan Bloom et al., Nortel Global Business Rescued via Formal Insolvency, in: International Corporate Rescue 2011, 6ff.), however N.W.A. Tollenaar, Dealing with the Insolvency of Multinational Groups under the European Insolvency Regulation, in: Tijdschrift voor Insolventierecht mei/juni 2010, p. 94ff., has stressed that this approach also has a number of important drawbacks, especially in case secondary proceedings indeed are opened or if secured creditors choose to enforce their rights in rem on foreign assets.

Principle 35 can be illustrated with the following three examples:

1. Debtor A is the subject of an insolvency proceeding opened in State Z, which has enacted the UNCITRAL Model Law in terms that allow foreign tax claims to be admissible in a local proceeding. The tax authorities of State T seek to lodge a claim for tax liabilities incurred by A through activities in T. Under the insolvency law of Z, local tax liabilities of the debtor are classified as preferential claims; under the insolvency law of T, as recently amended, tax liabilities of the debtor have been deprived of their preferential status and rank along with ordinary, unsecured claims. Applying Global Principle 35, the tax claim of T is admissible to proof in the insolvency proceeding in Z, but it ranks for dividend among the nonpreferential claims.

2. Debtor D is the subject of an insolvency proceeding opened in State X. Creditor C, an employee of D, was employed to work in State Y under a contract governed by the law of Y. She is owed a total of $2000 in respect of unpaid salary. Under the insolvency law of Y, employees' claims for unpaid wages or salary count as preferential claims in the employer's insolvency, but only up to a maximum value of $500 (any balance being claimable as a nonpreferential debt). Under the insolvency law of X, employees' claims for arrears of wages or salary count as preferential claims without any limit as to amount. Applying Global Principle 35.1, C's claim is treated as a preferential claim in respect of $500, and her claim for the balance of $1500 is classified as a nonpreferential claim.

3. With the facts otherwise as stated in example 2, it is established that the combined value of the assets of D (including those situated in State Y) will be sufficient to pay all preferential creditors in full, but will only enable the payment of a five percent dividend to nonpreferential creditors. It is also established that, if a secondary insolvency proceeding were commenced in State Y, the value of the local assets would be sufficient to enable all claims classified as preferential under the law of Y to be paid in full, including C's claim. However, the additional costs of conducting the secondary proceeding would exhaust all the funds realized from assets collected in Y leaving nothing for distribution to nonpreferential creditors. This would also diminish the funds available to the liquidator in X, to the inevitable detriment of the creditors participating in that proceeding. Under the circumstances, the liquidator in X can legitimately invoke the exception under Global Principle 35.2 and admit C's full claim for $2000 as a preferential debt, subject to her agreement not to seek to open a secondary proceeding in Y.

Principle 36 Plan Binding on Participant

36.1. If a Plan of Reorganization is adopted in a main proceeding pending in a court with international jurisdiction with respect to the debtor under Global Principle 13.1, and there is no parallel proceeding pending with respect to the debtor, the Plan should be final and binding upon the debtor and the creditors who participate in the main proceeding.

36.2. For this purpose, participation includes (i) filing a claim; (ii) voting on the Plan; or (iii) accepting a distribution of money or property under the Plan.

Comment to Global Principle 36:

This Global Principle, which is closely based on Procedural Principle 26 of the ALI NAFTA Principles, is founded on the further principle that a party who voluntarily submits to the jurisdiction of a given forum by the act of participating in a legal proceeding that is being conducted there is bound by the outcome or result of the proceeding in question. In reorganization proceedings, the basis on which a plan is capable of acquiring binding force upon assenting and nonassenting creditors alike is the subject of domestic provisions that can vary from state to state. Not through the mere fact of receiving a notice as a creditor, but by the act of participation in a reorganization conducted under the regime of a given state, creditors are to be treated as bound in accordance with the terms imposed by the system of law in question. Where only one such proceeding takes place, assuming this takes place in an appropriate jurisdiction, the fact that all creditors have had a fair opportunity to participate on a basis of equality (if such is shown to be the case) should give rise to international recognition of the binding nature of the adopted plan. It should therefore not be open to any creditor who participated in that proceeding (whether they were in fact consenting in terms of the final terms of the adopted plan or not) to resile from that act of participation and to seek to initiate an action or proceeding in some other state with a view to reasserting their original claim. The fact that the reorganization proceeding has taken place under the law of a state whose courts had jurisdiction in terms of the international jurisdictional criteria endorsed by these Global Principles should give rise to an estoppel precluding such a creditor from resorting to any such action, and this consequence should be recognized by courts in other states in which the creditor attempts to invoke any legal process that contravenes this Global Principle.

Principle 37 Plan Binding: Personal Jurisdiction

If a Plan of Reorganization is adopted in a main proceeding in a court with international jurisdiction with respect to the debtor under Global Principle 13.1, and there is no parallel proceeding pending with respect to the debtor, the Plan should be final and binding upon an unsecured creditor who received adequate individual notice and over whom the court has jurisdiction in ordinary commercial matters under the local law.

Comment to Global Principle 37:

This Global Principle 37 is closely based on Procedural Principle 27 of the ALI-NAFTA Principles. It aspires to extend the binding effects of an adopted reorganization plan to creditors who, for some reason, have chosen not to participate in the proceeding despite having received adequate notice and opportunity to do so. If they had participated in the proceeding, Principle 36 would treat them as bound by the outcome even if they happened to form part of a dissenting minority. However, nonparticipating creditors escape being bound under that Principle. In the interests of avoiding the creation of a perverse incentive for certain creditors to abstain from participating in a duly constituted reorganization proceeding that is taking place in a state whose courts have international jurisdiction for the purposes of these Global Principles, Global Principle 37 has the effect of treating any individually notified creditor who would be considered to be subject to the jurisdiction of the courts of the country in question in an ordinary commercial proceeding, according to the provisions of the law of the main proceeding, to be bound by the outcome with respect to the type of claims asserted by that creditor. The effect of this extension will thus depend upon the rules of the state in question with regard to the exercise of jurisdiction in ordinary commercial matters, and on the particular criteria that are applicable, under that system of law, to determine the sufficiency of the connection between the defendant and that state.[128] In some instances, a "doing of business" test may suffice; in other systems, a test based on residence or establishment, or on the maintenance of a place of business, or on the fulfillment of some other connecting factor, may be required.

The requirement that the creditor must have received adequate, individual notice of the reorganization proceeding and of their right to participate must be appraised according to the prescribed standards of the state in which the proceeding is taking place, but it will also be open to the court in any state where the issue of recognition falls to be determined to apply its own judgment concerning the conformity of the original proceeding with the standards of due process that are deemed to be appropriate by the latter state. At a minimum, the conformity of the original proceedings practices in this matter, as well as the actual nature of the reorganization process itself, should be amenable to review, with reference to such matters as are identified in the Global Principles as set out above, and notably Global Principles 5 (Equality of Arms), 9 (Information), and 21 (Language), as well as with Global Principles 11 (Nondiscriminatory Treatment) and 25 (Notice). Finally, the court that is called upon to recognize the binding effect of the reorganization may refer to the provisions of Global Principle 3 (International Status; Public Policy) before deciding whether to acknowledge the

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[128] Jay Lawrence Westbrook, Chapter 15 and Discharge, 13 American Bankruptcy Institute Law Review 2005, p. 515, explains that ALI NAFTA Principle 27 was primarily addressed to application within NAFTA, and poses the question: "to what extent will the United States courts examine the fairness of a foreign proceeding before deciding whether to enforce a plan of reorganisation?" Westbrook seems to come to the conclusion that Chapter 15's section 1506 (public-policy exception) and section 1522(a) (creditors are to be "sufficiently protected") may generate substantive fairness. In re Metcalfe & Mansfield Alternative Investments, the U.S. Bankruptcy Court for the Southern District of New York held that broad nondebtor, third-party releases, previously approved as part of a restructuring proceeding under the Canadian Companies' Creditors Arrangement Act, in which a restructuring plan was adopted by 96 percent of its creditors, would be enforced in the U.S., although such releases might not be approved under chapter 11 U.S. Bankruptcy Code proceedings. Res judicata effect to the foreign judgment was given by the bankruptcy court on the basis of comity (421 B.R. 685, 699 (Bankr. S.D.N.Y. 2010).

jurisdictional legitimacy of the foreign proceeding and the binding effects of its outcome in relation to nonparticipating creditors.

SECTION III

GLOBAL GUIDELINES FOR COURT-TO-COURT COMMUNICATIONS IN INTERNATIONAL INSOLVENCY CASES

1. Introduction

The text of the proposed Global Guidelines for Court-to-Court Communications in Cross-Border Cases, numbered 1-18, is provided in this Section to the Report. The Guidelines are preceded by a Preamble that explains their function and contents, including references to valuable sources, such as the Global Principles for Cooperation in International Insolvency Cases and examples of protocols. The Global Guidelines are very closely based upon the Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases that were included as Appendix B within the ALI Principles of Cooperation Among the NAFTA Countries (the ALI-NAFTA Principles), originally adopted by the ALI in May 2000. The growing acceptance of the latter by courts within the NAFTA countries and in states elsewhere in the world permits the Reporters to regard this document as a benchmark of best practice as understood at the time of its publication. In reviewing its provisions for the purposes of the Report's goal to develop a set of guidelines suitable for global application, it was gratifying to conclude that in many regions of cross-border insolvency practice the ALI-NAFTA Principles have been received well and in such a way that only a small number of modifications, and a few additional provisions, were needed. See the Comments and Reporters' Notes to Global Principles 1 (Overriding Objective) and 21 (Language). The Reporters therefore commend this document for adoption and use by courts whenever they encounter a need to engage in structured communications with one another in international insolvency proceedings.

The full text of the Global Guidelines for Court-to-Court Communications in International Insolvency Cases is set out in section 2 of this Section III, which is preceded by a Preamble to the Global Guidelines that has no counterpart in the original text. In section 3, the individual Global Guidelines are examined sequentially sometimes with supporting Comment. These Comments mainly flow from the Questionnaires (see Section I of the Report) sent out to our international Advisers. It should be noted that, in general, there was an overwhelming consent to both the function and the contents of the ALI Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases, with the proviso that specific legal and practical obstacles should be addressed, for which the Reporters have proposed, for example, Global Principles 5 (Equality of Arms), 21 (Language), and 23.4 (Intermediary).

2. Text of the Global Guidelines

Global Guidelines for Court-to-Court Communications in International Insolvency Cases

Preamble

1. These Global Guidelines for Court-to-Court Communications in International Insolvency Cases comprise a set of 18 guidelines. They build on The American Law Institute Guidelines

Applicable to Court-to-Court Communications in Cross-Border Cases, which operate within The American Law Institute, Transnational Insolvency: Cooperation Among the NAFTA Countries, Principles of Cooperation Among the NAFTA Countries, 2003 (adopted in 2000). Since their issuance, the landscape of international insolvency law has changed dramatically, providing or allowing for several forms of cross-border communication and coordination of insolvency proceedings pending in two or more jurisdictions, either by insolvency office holders and/or courts. The Global Guidelines for Court-to-Court Communications in International Insolvency Cases encapsulate the practical experiences of the international insolvency community that has worked with them, and a systematic evaluation of the possibility of adapting them so as to provide a standard statement of principles suitable for application on a global basis in international insolvency cases.

2. The following Global Guidelines for Court-to-Court Communications in International Insolvency Cases are intended to function within the context of The American Law Institute/International Insolvency Institute (ALI/III) Global Principles for Cooperation in International Insolvency Cases. These reflect a nonbinding statement, drafted in a manner to be used both in civil-law as well as common-law jurisdictions, and aim to cover all jurisdictions in the world. The Global Principles for Cooperation in International Insolvency Cases ("Global Principles") build further on The American Law Institute's Principles of Cooperation Among the NAFTA Countries (the "ALI NAFTA Principles"). These Principles resulted from The American Law Institute's Transnational Insolvency Project, conducted between 1993 and 2000, for which the Reporter was Professor Jay L. Westbrook. The objective of that Project was to provide a nonstatutory basis for cooperation in international insolvency cases involving two or more of the NAFTA countries of the United States, Canada, and Mexico. The Global Principles for Cooperation in International Insolvency Cases cover mainly three areas: (i) the Global Principles for Cooperation in International Insolvency Cases, (ii) the Global Guidelines for Court-to-Court Communications in International Insolvency Cases, and (iii) a glossary of terms and descriptions. In an Annex to the Report on the Global Principles, a Statement of the Reporters has been added, which contains recommended Global Rules on Conflict-of-Laws Matters in International Insolvency Cases.

3. The aim of these Global Guidelines for Court-to-Court Communications in International Insolvency Cases ("Global Guidelines") is to enhance coordination and harmonization of insolvency proceedings that involve more than one state through communications among the jurisdictions involved. The Global Guidelines are meant to permit rapid cooperation in a developing insolvency case while ensuring due process to all concerned. At the same time, they aim to allay many of the concerns typically entertained by litigants in such cases and to introduce a process that is transparent and clearly fair.

4. These Global Guidelines do not limit their character to a nonbinding set of best practices. It is intended that a court that wishes to employ the Guidelines—in whole or part, with or without modifications—should adopt them formally before applying them. The suggested adopting process, including its conditions, is the following:

(i) A court may wish to make its adoption of the Global Guidelines contingent upon, or temporary until, their adoption by other courts concerned in the matter;

(ii) The adopting court may want to make adoption or continuance conditional upon adoption of the Global Guidelines by the other court in a substantially similar form, to ensure that judges, counsel, and parties are not subject to different standards of conduct;

(iii) The Global Guidelines should be adopted following such notice to the parties and counsel as would be given under local procedures with regard to any important procedural decision under similar circumstances.

5. The Global Guidelines assume that in case communication with other courts is needed, the local procedures, including notice requirements, are employed. The Global Guidelines, however, do not address more detailed questions about the parties entitled to such notice (for example, all parties or representative parties or representative counsel) and the nature of the court's consideration of any objections (for example, with or without a hearing). These items are intended to be governed by the provisions of procedural law in each jurisdiction involved.

6. In Canada, The American Law Institute Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases have been accepted and applied on a fairly routine basis. The Guidelines were also endorsed by various organizations ranging initially from the Toronto Commercial List Users' Committee in 2001 to the Canadian Judicial Council, the supervising judiciary body comprised of all federal and provincial chief justices, in 2006. In the United States of America, the Guidelines have not been adopted on a nationwide basis. Since October 2005, in the U.S.A., 11 U.S.C. §§ 1525, 1526, and 1527 apply, inspired by Articles 25–27 UNCITRAL Model Law on Cross-Border Insolvency. See generally In re Tri-Cont'l Exch. Ltd., 349 B.R. 627, 640 (Bankr. E.D. Cal. 2006) (referencing ALI Court-to-Court Communication Guidelines). Formal approval and adoption of the Guidelines, per se, has occurred in several cases involving courts in Canada and the U.S.A. In Bermuda, the Guidelines have been adopted, see Commercial Court of Bermuda (Practice Direction, Circular No 17 of 2007, 1 October 2007). In Australia, based on Supreme Court of New South Wales, Practice Note No. SC Eq 4 (17 October 2008), cooperation between the court and a foreign court or representative in a particular case generally occurs within a framework proposed by the parties and approved by the Court. In formulating a proposed framework, parties should have regard to the Guidelines.

7. Consideration has been given to the fact that in certain jurisdictions several hindrances exist that may forbid or disallow the application of one or more of the Guidelines. See, for an account of these obstacles, the Reporters' Notes to Global Principle 1. In as far as they relate to certain specific jurisdictions, the Comments below will not repeat individual countries' objections or reservations as accounted for. In certain other jurisdictions, the law or the procedural rules concerning courts are silent or do not allow them to take notice of the Guidelines. As the systematic evaluation has demonstrated that in a large majority of jurisdictions there is no objection to court-to-court communication on cultural, economic, or practical grounds, the text of the Global Guidelines for Court-to-Court Communications in International Insolvency Cases follows rather literally the original text of the Court-to-Court Guidelines. Some small amendments have been made or words added to make the English understandable for readers who use English only as their second or third language. Also headings to the individual guidelines have been added. These changes are not intended to be substantial. The Global Guidelines are presented as a flexible tool to manage cooperation and communication in each individual case. These Global Guidelines are not presented as to be static, but in each individual cross-border insolvency case they should be available and open for adaptation, modification, and tailoring to fit the circumstances of individual cases.

8. In consultation with judges and other experts, UNCITRAL has expressed that courts may adopt guidelines, such as the ALI-NAFTA Court-to-Court Guidelines, and explained these Guidelines function "to coordinate their activities, foster efficiency and ensure that

stakeholders in each State are treated consistently. Such guidelines typically are not intended to alter or change the domestic rules or procedures that are applicable in any country, and are not intended to affect or curtail the substantive rights of any party in proceedings before the courts. Rather, they are intended to promote transparent communication between courts, permitting courts of different jurisdictions to communicate effectively with one another, and may be adopted by courts for general use or incorporated into specific insolvency agreements." See UNCITRAL Practice Guide (2009), para. 10.

Guideline 1 Overriding Objective

1.1. These Global Guidelines embody the overriding objective to enhance coordination and harmonization of insolvency proceedings that involve more than one state through communications among the jurisdictions involved.
1.2. These Global Guidelines function in the context of the Global Principles of Cooperation in International Insolvency Cases and therefore do not intend to interfere with the independent exercise of jurisdiction by national courts as expressed in Global Principles 13 and 14.

Guideline 2 Consistency with Procedural Law

Except in circumstances of urgency, prior to a communication with another court, the court should be satisfied that such a communication is consistent with all applicable rules of procedure in its state. Where a court intends to apply these Global Guidelines (in whole or in part and with or without modifications), the Guidelines to be employed should, wherever possible, be formally adopted in each individual case before they are applied. Coordination of Global Guidelines between courts is desirable and officials of both courts may communicate in accordance with Global Guideline 9(d) with regard to the application and implementation of the Global Guidelines.

Guideline 3 Court-to-Court Communication

A court may communicate with another court in connection with matters relating to proceedings before it for the purposes of coordinating and harmonizing proceedings before it with those in the other jurisdiction.

Guideline 4 Court to Insolvency Administrator Communication

A court may communicate with an insolvency administrator in another jurisdiction or an authorized representative of the court in that jurisdiction in connection with the coordination and harmonization of the proceedings before it with the proceedings in the other jurisdiction.

Guideline 5 Insolvency Administrator to Foreign Court Communication

A court may permit a duly authorized insolvency administrator to communicate with a foreign court directly, subject to the approval of the foreign court, or through an insolvency administrator in the other jurisdiction or through an authorized representative of the foreign court on such terms as the court considers appropriate.

Guideline 6 Receiving and Handling Communication

A court may receive communications from a foreign court or from an authorized representative of the foreign court or from a foreign insolvency administrator and should respond directly if the communication is from a foreign court (subject to Global Guideline 8 in the case of two-way communications) and may respond directly or through an authorized representative of the court or through a duly authorized insolvency administrator if the communication is from a foreign insolvency administrator, subject to local rules concerning ex parte communications.

Guideline 7 Methods of Communication

To the fullest extent possible under any applicable law, communications from a court to another court may take place by or through the court:

(a) Sending or transmitting copies of formal orders, judgments, opinions, reasons for decision, endorsements, transcripts of proceedings, or other documents directly to the other court and providing advance notice to counsel for affected parties in such manner as the court considers appropriate;

(b) Directing counsel or a foreign or domestic insolvency administrator to transmit or deliver copies of documents, pleadings, affidavits, factums, briefs, or other documents that are filed or to be filed with the court to the other court in such fashion as may be appropriate and providing advance notice to counsel for affected parties in such manner as the court considers appropriate;

(c) Participating in two-way communications with the other court by telephone or video conference call or other electronic means, in which case Global Guideline 8 should apply.

Guideline 8 E-Communication to Court

In the event of communications between the courts in accordance with Global Guidelines 2 and 5 by means of telephone or video conference call or other electronic means, unless otherwise directed by either of the two courts:

(a) Counsel for all affected parties should be entitled to participate in person during the communication and advance notice of the communication should be given to all parties in accordance with the rules of procedure applicable in each court;

(b) The communication between the courts should be recorded and may be transcribed. A written transcript may be prepared from a recording of the

communication that, with the approval of both courts, should be treated as an official transcript of the communication;

(c) Copies of any recording of the communication, of any transcript of the communication prepared pursuant to any direction of either court, and of any official transcript prepared from a recording should be filed as part of the record in the proceedings and made available to counsel for all parties in both courts subject to such directions as to confidentiality as the courts may consider appropriate.

(d) The time and place for communications between the courts should be to the satisfaction of both courts. Personnel other than judges in each court may communicate fully with each other to establish appropriate arrangements for the communication without the necessity for participation by counsel unless otherwise ordered by either of the courts.

Guideline 9 E-Communication to Insolvency Administrator

In the event of communications between the court and an authorized representative of the foreign court or a foreign insolvency administrator in accordance with Global Guidelines 4 and 6 by means of telephone or video conference call or other electronic means, unless otherwise directed by the court:

(a) Counsel for all affected parties should be entitled to participate in person during the communication and advance notice of the communication should be given to all parties in accordance with the rules of procedure applicable in each court;

(b) The communication should be recorded and may be transcribed. A written transcript may be prepared from a recording of the communication that, with the approval of the court, can be treated as an official transcript of the communication;

(c) Copies of any recording of the communication, of any transcript of the communication prepared pursuant to any direction of the court, and of any official transcript prepared from a recording should be filed as part of the record in the proceedings and made available to the other court and to counsel for all parties in both courts subject to such directions as to confidentiality as the court may consider appropriate;

(d) The time and place for the communication should be to the satisfaction of the court. Personnel of the court other than judges may communicate fully with the authorized representative of the foreign court or the foreign insolvency administrator to establish appropriate arrangements for the communication without the necessity for participation by counsel unless otherwise ordered by the court.

Guideline 10 Joint Hearing

A court may conduct a joint hearing with another court. In connection with any such joint hearing, the following should apply, unless otherwise ordered or unless otherwise provided in any previously approved protocol applicable to such joint hearing:

(a) Each court should be able to simultaneously hear the proceedings in the other court.

(b) Evidentiary or written materials filed or to be filed in one court should, in accordance with the directions of that court, be transmitted to the other court or made available electronically in a publicly accessible system in advance of the hearing. Transmittal of such material to the other court or its public availability in an electronic system should not subject the party filing the material in one court to the jurisdiction of the other court.

(c) Submissions or applications by the representative of any party should be made only to the court in which the representative making the submissions is appearing unless the representative is specifically given permission by the other court to make submissions to it.

(d) Subject to Global Guideline 8(b), the court should be entitled to communicate with the other court in advance of a joint hearing, with or without counsel being present, to establish Guidelines for the orderly making of submissions and rendering of decisions by the courts, and to coordinate and resolve any procedural, administrative, or preliminary matters relating to the joint hearing.

(e) Subject to Global Guideline 8(b), the court, subsequent to the joint hearing, should be entitled to communicate with the other court, with or without counsel present, for the purpose of determining whether coordinated orders could be made by both courts and to coordinate and resolve any procedural or nonsubstantive matters relating to the joint hearing.

Guideline 11 Authentication of Regulations

The court should, except upon proper objection on valid grounds and then only to the extent of such objection, recognize and accept as authentic the provisions of statutes, statutory or administrative regulations, and rules of court of general application applicable to the proceedings in the other jurisdiction without the need for further proof or exemplification thereof.

Guideline 12 Orders

The court should, except upon proper objection on valid grounds and then only to the extent of such objection, accept that orders made in the proceedings in the other jurisdiction were duly and properly made or entered on or about their respective dates and accept that such orders require no further proof or exemplification for purposes of the proceedings before it, subject to all such proper reservations as in the opinion of the court are appropriate regarding proceedings by way of appeal or review that are actually pending in respect of any such orders.

Guideline 13 Service List

The court may coordinate proceedings before it with proceedings in another jurisdiction by establishing a service list that may include parties that are entitled to receive notice of proceedings before the court in the other jurisdiction ("nonresident parties"). All notices, applications, motions, and other materials served for purposes of the proceedings before the court may be ordered to also be provided to or served on the nonresident parties by making such materials available electronically in a publicly

accessible system or by facsimile transmission, certified or registered mail or delivery by courier, or in such other manner as may be directed by the court in accordance with the procedures applicable in the court.

Guideline 14 Limited Appearance in Court

The court may issue an order or issue directions permitting the foreign insolvency administrator or a representative of creditors in the proceedings in the other jurisdiction or an authorized representative of the court in the other jurisdiction to appear and be heard by the court without thereby becoming subject to the jurisdiction of the court.

Guideline 15 Applications and Motions

The court may direct that any stay of proceedings affecting the parties before it shall, subject to further order of the court, not apply to applications or motions brought by such parties before the court in the foreign jurisdiction or that relief be granted to permit such parties to bring such applications or motions before the court in the foreign jurisdiction on such terms and conditions as it considers appropriate. Court-to-court communications in accordance with Global Guidelines 7 and 8 hereof may take place if an application or motion brought before the court affects or might affect issues or proceedings in the court in the other jurisdiction.

Guideline 16 Coordination of Proceedings

A court may communicate with a court in another jurisdiction or with an authorized representative of such court in the manner prescribed by these Global Guidelines for purposes of coordinating and harmonizing proceedings before it with proceedings in the other jurisdiction regardless of the form of the proceedings before it or before the other court wherever there is commonality among the issues and/or the parties in the proceedings. The court should, absent compelling reasons to the contrary, so communicate with the court in the other jurisdiction where the interests of justice so require.

Guideline 17 Directions

Directions issued by the court under these Global Guidelines are subject to such amendments, modifications, and extensions as may be considered appropriate by the court for the purposes described above and to reflect the changes and developments from time to time in the proceedings before it and before the other court. Any directions may be supplemented, modified, and restated from time to time and such modifications, amendments, and restatements should become effective upon being accepted by both courts. If either court intends to supplement, change, or abrogate directions issued under these Global Guidelines in the absence of joint approval by both courts, the court should give the other courts involved reasonable notice of its intention to do so.

Guideline 18 Powers of the Court

Arrangements contemplated under these Global Guidelines do not constitute a compromise or waiver by the court of any powers, responsibilities, or authority and do not constitute a substantive determination of any matter in controversy before the court or before the other court nor a waiver by any of the parties of any of their substantive rights and claims or a diminution of the effect of any of the orders made by the court or the other court.

GLOBAL GUIDELINES FOR COURT-TO-COURT COMMUNICATIONS IN INTERNATIONAL INSOLVENCY CASES

3. Comments to the Global Guidelines

Guideline 1 Overriding Objective

1.1. These Global Guidelines embody the overriding objective to enhance coordination and harmonization of insolvency proceedings that involve more than one state through communications among the jurisdictions involved.
1.2. These Global Guidelines function in the context of the Global Principles of Cooperation in International Insolvency Cases and therefore do not intend to interfere with the independent exercise of jurisdiction by national courts as expressed in Global Principles 13 and 14.

Comment to Global Guideline 1:

The text of Global Guideline 1.1 has been taken from the Introduction of the original Court-to-Court Guidelines. As originally considered, communications by judges directly with judges or administrators in a foreign state may raise issues of credibility and proper procedures. The context alone is likely to create concern in litigants unless the process is transparent and clearly fair. Therefore these Global Guidelines encourage such communications while channelling them through transparent procedures.

REPORTERS' NOTES

The Court-to-Court Guidelines allow courts in different states to directly communicate with each other. Communications may take the form of sending a letter, a specific instruction to an administrator, or the appointment of an intermediary, see Global Principle 23.4. The need to ensure that any direct communication should be conducted in such a way that principles of fairness and due process are adequately observed is recognized in all discussions we have had. In particular, the topic of "judge-to-judge" cross-border communication has raised many questions. See also William Trower, Court-to-Court Communication—The Benefits and the Danger, 4 International Corporate Rescue 2007, p. 111ff; Han Jongeneel, Cross-Border Co-operation for Courts and Administrators, in: Bob Wessels and Paul Omar (eds.), Crossing (Dutch) Borders in Insolvency, Nottingham, Paris: INSOL Europe 2009, pp. 97-105.

In general, three sub-queries have been addressed: (i) Is direct "judge-to-judge" cross-border communication simply to be considered as one of the alternatives in the range of means of communications or should it be used only as a "last resort" (*ultimum remedium*)?, (ii) Can these communications relate to substantial matters (either on a general level or on a case-specific basis)?, and (iii) What are the rights of parties? Although the views of our Consultants and participants in discussions (judges, academics, practitioners) vary, we are confident that the following conclusions can be drawn, which we regard as appropriate safeguards for direct "judge-to-judge" cross-border communication in international insolvency cases:

(i) Direct judicial cross-border communication should occur only where such communication is necessary.

Safeguards should be in place with regard to such matters as whether or not the information given by a judge is "evidence" in another state (and is he or she regarded as a "witness" or "an expert") and therefore regarding the status of the message of a judge.

(ii) Direct "judge-to-judge" cross-border communication should relate to matters that do not concern the substantive merits of any dispute.

Such communications could relate to practical matters such as hours available, names of court staff responsible for setting up a hearing, or order of dealing with certain procedural matters. Everything must be done to ensure that a judge's integrity and impartiality are not compromised; any risk of a judge being regarded as biased should be avoided.

(iii) Direct judicial cross-border communication can only take place where there are sufficient procedural safeguards in place to ensure that parties have an opportunity to be heard on the application to communicate and (if appropriate) to attend (or be represented at) the occasion on which the communication takes place. In urgent circumstances, however, notices to any interested party are not a prerequisite to "judge-to-judge" cross-border communication if the matter communicated is procedural, rather than substantive, and the parties will be notified immediately thereafter.

When in an individual case—prior to Court-to-Court cross-border communication—parties are notified, they should be accorded the following rights: the right to attend the hearing (and therefore in advance a right to receive a notice), the right to present arguments or evidence or make submissions, and the right to respond to an opponent. See Global Principle 5 (Equality of Arms).

The Reporters submit that these safeguards reflect a general standard for such direct court-to-court communications, see, e.g., Principles for Judicial Communications in specific cases including commonly accepted safeguards, which are developed within the context of the International Hague Network of Judges, and drawn up by the Permanent Bureau of the Hague Conference on Private International Law in 2011 (mostly related to child-abduction cases under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction) (available via www.hcch.net) (footnotes omitted):

"Overarching principles

6.1 Every judge engaging in direct judicial communications must respect the law of his or her own jurisdiction.

6.2 When communicating, each judge seized should maintain his or her independence in reaching his or her own decision on the matter at issue.

6.3 Communications must not compromise the independence of the judge seized in reaching his or her own decision on the matter at issue.

Commonly accepted procedural safeguards

6.4 In Contracting States in which direct judicial communications are practised, the following are commonly accepted procedural safeguards:

– ordinarily, parties are to be notified of the nature of the proposed communication;

– a record is to be kept of communications and it is to be made available to the parties;

– any conclusions reached should be in writing;
– parties or their representatives should have the opportunity to be present in certain cases, for example via conference call facilities.
6.5 Nothing in these commonly accepted procedural safeguards prevents a judge from following rules of domestic law or practices which allow greater latitude."

Over 80 judges and government officials, gathered at the 8th Multinational Judicial Colloquium UNCITRAL–INSOL–Worldbank, 20-12 June 2009 (Vancouver, Canada), engaged in a vigorous exchange of views that provide support for observance of the safeguards expressed above (www.uncitral.org/pdf/english/news/EighthJC.pdf) (last visited Mar. 7, 2012).

With their different legal basis and status, and the differences in roles and approaches of different judges to court-to-court communications, it is recommended that the above safeguards are considered in choosing a certain form of communication. Growing practical experience of the benefits and difficulties of court-to-court cross-border communication will inform the approach that judges throughout the world will adopt and may (in the near future) assist in amending these Global Court-to-Court Guidelines and in the development of new ones, and of other appropriate procedures.

Guideline 2 Consistency with Procedural Law

Except in circumstances of urgency, prior to a communication with another court, the court should be satisfied that such a communication is consistent with all applicable rules of procedure in its state. Where a court intends to apply these Global Guidelines (in whole or in part and with or without modifications), the Guidelines to be employed should, wherever possible, be formally adopted in each individual case before they are applied. Coordination of Global Guidelines between courts is desirable and officials of both courts may communicate in accordance with Global Guideline 9(d) with regard to the application and implementation of the Global Guidelines.

Comment to Global Guideline 2:

It is acknowledged that in most civil-law-oriented jurisdictions, the principal point of view is that all procedural rules for all insolvency cases should be known in advance, because of the need for legal certainty and for the protection of procedural rights of all parties involved. Nevertheless, given the wide variety of issues of any international insolvency case, the words "in each individual case" have been inserted to allow a court to exercise its full authority in each individual case and not to be bound by one or more of the Guidelines in other instances. It is expected that parties in certain cases will invite a court to apply or adopt one or more of the Global Guidelines. Global Principle 5 (Equality of Arms Principle) and Global Principles 21 and 23 should ensure that all affected parties or their representatives are able to participate in the methods of communication as mentioned in these Global Guidelines.

Guideline 3 Court-to-Court Communication

A court may communicate with another court in connection with matters relating to proceedings before it for the purposes of coordinating and harmonizing proceedings before it with those in the other jurisdiction.

Comment to Global Guideline 3:

It has been suggested that the word "may" should be altered to "shall" as an expression of the duty of a domestic court to make contacts with a foreign court for the purpose of coordinating and aligning insolvency proceedings against the same debtor. This has not been followed. In the light of Global Principle 3 ("International Status; Public Policy") neither the Global Principles nor the Global Guidelines intend to interfere with the independent exercise of the jurisdiction of a court. However, in states that have enacted the UNCITRAL Model Law, Article 25, utilizing the mandatory form of drafting employed in the original text (". . . the court shall cooperate . . ."), any court in that state is subject to a duty to cooperate "to the maximum extent possible" with foreign courts or foreign representatives.[129] If, in a given case, the other court concerned is not subject to an equivalent obligation, the qualifying words quoted within parentheses serve to absolve the court in the first state from any infringement of its duty where the second court, as a matter of discretion, declines to engage in a process of cooperation.

Guideline 4 Court to Insolvency Administrator Communication

A court may communicate with an insolvency administrator in another jurisdiction or an authorized representative of the court in that jurisdiction in connection with the coordination and harmonization of the proceedings before it with the proceedings in the other jurisdiction.

Guideline 5 Insolvency Administrator to Foreign Court Communication

A court may permit a duly authorized insolvency administrator to communicate with a foreign court directly, subject to the approval of the foreign court, or through an insolvency administrator in the other jurisdiction or through an authorized representative of the foreign court on such terms as the court considers appropriate.

Comment to Global Guideline 5:

In many jurisdictions, the insolvency office holder, in his own right, is authorized to act in as far as it is for the benefit of the estate and fits into the goal of the insolvency proceedings and does not violate the applicable domestic laws, including the insolvency laws.

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[129] In the United Kingdom, Art.25(1) of the Model Law has been enacted in modified terms using the words "the court *may* cooperate to the maximum extent possible" (emphasis added), thereby making it a matter for the court's discretion whether to do so in any given case: Cross-Border Insolvency Regulations 2006, S.I. 2006/1030, Sched. 1. This can be contrasted with § 1525(a) of the U.S. Bankruptcy Code (as amended), which provides: " . . . the court shall cooperate to the maximum extent possible . . .". The mandatory form of drafting, using the word "shall," is also employed in the legislation of New Zealand and Australia respectively in their enactments of the Model Law: Insolvency (Cross-border) Act 2006, Sched. 1 (New Zealand); Cross-Border Insolvency Act 2008, Sched. 1 (Australia).

Guideline 6 Receiving and Handling Communication

A court may receive communications from a foreign court or from an authorized representative of the foreign court or from a foreign insolvency administrator and should respond directly if the communication is from a foreign court (subject to Global Guideline 8 in the case of two-way communications) and may respond directly or through an authorized representative of the court or through a duly authorized insolvency administrator if the communication is from a foreign insolvency administrator, subject to local rules concerning ex parte communications.

Guideline 7 Methods of Communication

To the fullest extent possible under any applicable law, communications from a court to another court may take place by or through the court:

(a) Sending or transmitting copies of formal orders, judgments, opinions, reasons for decision, endorsements, transcripts of proceedings, or other documents directly to the other court and providing advance notice to counsel for affected parties in such manner as the court considers appropriate;

(b) Directing counsel or a foreign or domestic insolvency administrator to transmit or deliver copies of documents, pleadings, affidavits, factums, briefs, or other documents that are filed or to be filed with the court to the other court in such fashion as may be appropriate and providing advance notice to counsel for affected parties in such manner as the court considers appropriate;

(c) Participating in two-way communications with the other court by telephone or video conference call or other electronic means, in which case Global Guideline 8 should apply.

Comment to Global Guideline 7:

The words at the beginning ("To the fullest extent possible under any applicable law") have been added to indicate that an element of flexibility may be required when certain information to be communicated is possibly of a nonpublic nature, either by law or by contract. Only in as far as applicable law so allows are the documents containing this information open for cross-border communication. The same applies to information containing data that is protected from disclosure by any applicable rules of privacy, cross-border data exchange, or protection of computerized personal data or business secrecy.

Guideline 8 E-Communication to Court

In the event of communications between the courts in accordance with Global Guidelines 2 and 5 by means of telephone or video conference call or other electronic means, unless otherwise directed by either of the two courts:

(a) Counsel for all affected parties should be entitled to participate in person during the communication and advance notice of the communication should be given to all parties in accordance with the rules of procedure applicable in each court;

(b) The communication between the courts should be recorded and may be transcribed. A written transcript may be prepared from a recording of the communication that, with the approval of both courts, should be treated as an official transcript of the communication;

(c) Copies of any recording of the communication, of any transcript of the communication prepared pursuant to any direction of either court, and of any official transcript prepared from a recording should be filed as part of the record in the proceedings and made available to counsel for all parties in both courts subject to such directions as to confidentiality as the courts may consider appropriate.

(d) The time and place for communications between the courts should be to the satisfaction of both courts. Personnel other than judges in each court may communicate fully with each other to establish appropriate arrangements for the communication without the necessity for participation by counsel unless otherwise ordered by either of the courts.

Comment to Global Guideline 8:

Although, in practice, it could be more acceptable for certain courts, Global Guidelines 7(a) and 8(a) only provide for a preliminary possibility for the court (possibly with the participation of insolvency administrators) to communicate prior to the participation of counsel, or the absence of counsel of parties, when this is directed by either of the two courts. This could take place in circumstances where it seems unnecessary to have all parties involved in a communication with other courts or insolvency organs. In such a case, Global Guideline 8(c) should ensure that these parties are informed of the contents and outcome of the communication. See Reporters' Notes accompanying Global Guideline 1. Participating in person, in the meaning of Guideline 8(a), includes participation literally "in person" or otherwise by conference call or videoconference.

The word "personnel" in Global Guideline 8(d) does not include the insolvency administrator when he is seen—according to applicable law—as a representative of the court. It is intended to refer to assistants to the judges or to the court, who may function in order to arrange agendas and setting up and breaking off any means of communication.

Guideline 9 E-Communication to Insolvency Administrator

In the event of communications between the court and an authorized representative of the foreign court or a foreign insolvency administrator in accordance with Global Guidelines 4 and 6 by means of telephone or video conference call or other electronic means, unless otherwise directed by the court:

(a) Counsel for all affected parties should be entitled to participate in person during the communication and advance notice of the communication should be given to all parties in accordance with the rules of procedure applicable in each court;

(b) The communication should be recorded and may be transcribed. A written transcript may be prepared from a recording of the communication that, with the approval of the court, can be treated as an official transcript of the communication;

(c) Copies of any recording of the communication, of any transcript of the communication prepared pursuant to any direction of the court, and of any official transcript prepared from a recording should be filed as part of the record in the proceedings and made available to the other court and to counsel for all parties in both courts subject to such directions as to confidentiality as the court may consider appropriate;

(d) The time and place for the communication should be to the satisfaction of the court. Personnel of the court other than judges may communicate fully with the authorized representative of the foreign court or the foreign insolvency administrator to establish appropriate arrangements for the communication without the necessity for participation by counsel unless otherwise ordered by the court.

Comment to Global Guideline 9:

An authorized Representative in the meaning of these Global Guidelines includes an intermediary in the meaning of Global Principle 23.4. The expression "in person," as used in Global Guideline 9(a), includes participation literally "in person" or alternatively by remote participation by means of a conference call or videoconference. The term "recorded" reflects that, of what has been said or discussed, an appropriate selection and a decision will either be written down by an assistant to the court or will be electronically copied (taped).

Guideline 10 Joint Hearing

A court may conduct a joint hearing with another court. In connection with any such joint hearing, the following should apply, unless otherwise ordered or unless otherwise provided in any previously approved protocol applicable to such joint hearing:

(a) Each court should be able to simultaneously hear the proceedings in the other court.

(b) Evidentiary or written materials filed or to be filed in one court should, in accordance with the directions of that court, be transmitted to the other court or made available electronically in a publicly accessible system in advance of the hearing. Transmittal of such material to the other court or its public availability in an electronic system should not subject the party filing the material in one court to the jurisdiction of the other court.

(c) Submissions or applications by the representative of any party should be made only to the court in which the representative making the submissions is appearing unless the representative is specifically given permission by the other court to make submissions to it.

(d) Subject to Global Guideline 8(b), the court should be entitled to communicate with the other court in advance of a joint hearing, with or without counsel being present, to establish Guidelines for the orderly making of submissions and rendering of decisions by the courts, and to coordinate and resolve any procedural, administrative, or preliminary matters relating to the joint hearing.

(e) Subject to Global Guideline 8(b), the court, subsequent to the joint hearing, should be entitled to communicate with the other court, with or without counsel present, for the purpose of determining whether coordinated orders could be

made by both courts and to coordinate and resolve any procedural or nonsubstantive matters relating to the joint hearing.

Comment to Global Guideline 10:

When applying Global Guideline 10(b), courts should consider whether evidentiary or written materials that need to be transmitted to the other court shall be the original documents or copies thereof. If the former, this raises a concern with respect to the preservation of the original copies when they are transmitted to other courts. It is advised in such a case to allow the transmission to be conducted by electronic means. Regarding matters of authentication, reference is made to Global Principle 22.

Guideline 11 Authentication of Regulations

The court should, except upon proper objection on valid grounds and then only to the extent of such objection, recognize and accept as authentic the provisions of statutes, statutory or administrative regulations, and rules of court of general application applicable to the proceedings in the other jurisdiction without the need for further proof or exemplification thereof.

Comment to Global Guideline 11:

Nearly all jurisdictions provide for their own rules concerning evidence, including documentary evidence originating both inside or outside this jurisdiction, and evidence determining foreign law, including such evidence provided by an expert witness. Nearly always these rules also provide for forms of certification as to the genuineness of the signature and official position of the attesting person or other foreign official. Where domestic laws do so allow, the court is advised to accept as authentic the data mentioned in Global Guideline 11. In case of doubt, the matter could be the subject of court-to-court communication in the meaning of Global Guidelines 3, 6, and 8. In certain circumstances, it may be required of a party appearing before a court that demands application of a foreign rule of law that he must give adequate proof of the existence of such foreign law, and of its meaning or substance. Notice may be taken of several solutions suggested by the Hague Conference of Private International Law to allow a court to get acquainted with foreign law, including the creation of "information sheets and country profiles," creating a "network of experts and specialised institutes," and allowing "direct judicial communications": see www.hcch.net/upload/wop/genaff_pd21ae2007.pdf (last visited Mar. 7, 2012).

Guideline 12 Orders

The court should, except upon proper objection on valid grounds and then only to the extent of such objection, accept that orders made in the proceedings in the other jurisdiction were duly and properly made or entered on or about their respective dates and accept that such orders require no further proof or exemplification for purposes of the proceedings before it, subject to all such proper reservations as in the opinion of the

court are appropriate regarding proceedings by way of appeal or review that are actually pending in respect of any such orders.

Comment to Global Guideline 12:

In cases where such orders contain legal effects, for example, relating to the estate of the debtor, located in the other jurisdictions, it should be noted that many jurisdictions will have provisions which determine that these judicial decisions are subject to the domestic system of recognition. That system may include a rule providing that if foreign insolvency proceedings are recognized, the recognition of subsequent orders is automatic, see for instance Article 222 *Ley Concursal* (Spain).

Guideline 13 Service List

The court may coordinate proceedings before it with proceedings in another jurisdiction by establishing a service list that may include parties that are entitled to receive notice of proceedings before the court in the other jurisdiction ("nonresident parties"). All notices, applications, motions, and other materials served for purposes of the proceedings before the court may be ordered to also be provided to or served on the nonresident parties by making such materials available electronically in a publicly accessible system or by facsimile transmission, certified or registered mail or delivery by courier, or in such other manner as may be directed by the court in accordance with the procedures applicable in the court.

Guideline 14 Limited Appearance in Court

The court may issue an order or issue directions permitting the foreign insolvency administrator or a representative of creditors in the proceedings in the other jurisdiction or an authorized representative of the court in the other jurisdiction to appear and be heard by the court without thereby becoming subject to the jurisdiction of the court.

Comment to Global Guideline 14:

The facility whereby an insolvency administrator or creditors' representative may be enabled to appear before a foreign court in which insolvency proceedings relating to the same debtor (including related proceedings) are taking place is a valuable safeguard against potential miscarriages of justice through de facto denial of due process and opportunity to be heard. In the absence of such assurance that the act of intervening in the proceedings for the purpose of informing the court of relevant matters, or to make representations on the merits, an insolvency administrator may be obliged to refrain from engaging in the proceedings lest by so doing he renders himself, and thereby the entire estate for which he is responsible, amenable to the potentially unlimited jurisdiction of the foreign court. For this reason, provision is included in § 306 of the United States Bankruptcy Code, as enacted in 1978 (11 U.S.C.), to permit a foreign representative to make appearance in a U.S. bankruptcy court in connection with a petition or request under §§ 303-305 inclusive, without said foreign representative being treated as having submitted to the jurisdiction of any court in the United

States for any other purpose. (Section 304 was repealed with effect from October 17, 2005). As with Global Guideline 12, the effect of Global Guideline 14 may be limited according to a domestic system for recognition and, if recognition is granted, certain limitations may be imposed to which the foreign insolvency administrator or representative is subject, e.g., prior approval of the court or of the body of creditors.

Guideline 15 Applications and Motions

The court may direct that any stay of proceedings affecting the parties before it shall, subject to further order of the court, not apply to applications or motions brought by such parties before the court in the foreign jurisdiction or that relief be granted to permit such parties to bring such applications or motions before the court in the foreign jurisdiction on such terms and conditions as it considers appropriate. Court-to-court communications in accordance with Global Guidelines 7 and 8 hereof may take place if an application or motion brought before the court affects or might affect issues or proceedings in the court in the other jurisdiction.

Comment to Global Guideline 15:

The words "in the foreign jurisdiction" have been added in two places to ensure that this Global Guideline properly addresses the need to ensure that "any stay of proceedings affecting the parties" does not unintentionally purport to affect applications or motions brought in a foreign jurisdiction. Global Guideline 15, like Global Guidelines 12 and 14, is dependent on the domestic system for recognition or allowing such applications and motions. The laws in the foreign jurisdiction, in addition, may require certain formal provisions to be fulfilled, for example, prior approval of the administrator in any parallel local insolvency proceeding or of the body of creditors.

Guideline 16 Coordination of Proceedings

A court may communicate with a court in another jurisdiction or with an authorized representative of such court in the manner prescribed by these Global Guidelines for purposes of coordinating and harmonizing proceedings before it with proceedings in the other jurisdiction regardless of the form of the proceedings before it or before the other court wherever there is commonality among the issues and/or the parties in the proceedings. The court should, absent compelling reasons to the contrary, so communicate with the court in the other jurisdiction where the interests of justice so require.

Comment to Global Guideline 16:

Also of direct relevance to the goal of promoting effective cooperation in international insolvency cases are some very practical questions, including how best to resolve such issues as the different working languages of courts operating concurrently in different regions and time zones. See Global Principle 21 ("Language"). In such situations, direct communication between courts may be impracticable, but it may be that some alternative means of achieving

cooperation through one or more designated intermediaries could be established. See Global Principle 23.

Guideline 17 Directions

Directions issued by the court under these Global Guidelines are subject to such amendments, modifications, and extensions as may be considered appropriate by the court for the purposes described above and to reflect the changes and developments from time to time in the proceedings before it and before the other court. Any directions may be supplemented, modified, and restated from time to time and such modifications, amendments, and restatements should become effective upon being accepted by both courts. If either court intends to supplement, change, or abrogate directions issued under these Global Guidelines in the absence of joint approval by both courts, the court should give the other courts involved reasonable notice of its intention to do so.

Comment to Global Guideline 17:

Global Guideline 17 presumes that not only a domestic court but also a foreign court applies these Global Guidelines. The Guideline leaves open the outcome of the court's notice of its intention to supplement, change, or abrogate directions under these Global Guidelines in the absence of joint approval by both courts. It is submitted that, provided that due account is taken of the principles of mutual respect and comity between courts and states, the Global Guidelines allow a court to supplement, change, or abrogate as mentioned, as the other court will have the authority to do likewise with the same or other directions. It is clear that, where courts operate on an equal footing, unilateral changes do not bind the other court in any way. See also Global Guideline 18.

Guideline 18 Powers of the Court

Arrangements contemplated under these Global Guidelines do not constitute a compromise or waiver by the court of any powers, responsibilities, or authority and do not constitute a substantive determination of any matter in controversy before the court or before the other court nor a waiver by any of the parties of any of their substantive rights and claims or a diminution of the effect of any of the orders made by the court or the other court.

APPENDIX

Glossary of Terms and Descriptions

As set out in Section I (Introduction and Overview), many states and regional public institutions, international nongovernmental organizations, and practitioners' associations have produced many laws, regulations, principles, guidelines, and statements of best practices. All these forms of expressions aim for the better coordination of insolvency measures or proceedings concerning economic enterprises that have operations, assets, activities, debtors, or creditors in more than one state. In several instances, these laws, regulations, and principles provide for a list of definitions or terms, employed frequently within the legal context within which they function. This Appendix aims to develop a uniform global legal terminology and therefore to assist legislators, insolvency practitioners, and courts in their efforts of improving the components of their respective languages to facilitate and smoothen cross-border communication and coordination. Legislators may find this Appendix helpful in their efforts of creating or amending domestic rules relating to international insolvency.

The methodology followed has been a general gathering of these terms and expressions, from documents referred to in the footnotes, which can contribute to a better understanding and knowledge of insolvency matters in a broader context. Therefore the Glossary also contains terms generally not related to insolvency, such as "contract," "obligation," or "duty."

Certain terms in the Glossary have been adopted by European institutions, especially those terms and definitions stemming from the EU Insolvency Regulation. It is generally accepted that most of these terms or words have "an autonomous meaning and must therefore be interpreted in a uniform way, independently of national legislation."[130] Such a form of interpretation does not exclude the use of its given meaning, for its original purposes, while looking for a specific meaning or interpretation in another context. In many instances, the terms in the Glossary form an inherent part of the Global Principles, which are supported by evaluatory Comments and many times by Reporters' Notes.

The items covered by the Global Principles relate to "insolvency" in an "international" context. The Global Principles are standing on the shoulders of the ALI NAFTA Principles, also international in nature. Such a project, in the middle of the last decade of the 20th century, was new for The American Law Institute, and the Reporters "had to invent the process as well as the text,"[131] at the same time expressing the hope that these Principles "may be helpful to our colleagues in other countries as well."[132] Indeed, the ALI NAFTA Principles have been taken into consideration by the drafters of the European Communication & Cooperation Guidelines for Cross-border Insolvency (2007). In a manner that is possibly unique within practice of The American Law Institute, the Reporters have considered other recent (draft) products and the terms and definitions of which the related documents make use. The most relevant in this regard were the ALI/UNIDROIT Principles of Transnational Civil Procedure (2006) (adopted in 2004), ALI's Principles of the Law of Software Contracts

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[130] Eurofood IFSC Ltd v Bank of America N.A, Case C-341/04, ECJ 2 May 2006, [2006] ECR I-3813, at 31 with regard to the term "centre of main interest."

[131] See American Law Institute, Transnational Insolvency: Cooperation Among the NAFTA Countries: Principles of Cooperation Among the NAFTA Countries, 2003 ("ALI NAFTA Principles"), Reporter's Preface, at xix.

[132] Id., at xxi.

(2010) (adopted in 2009)—hereinafter "Law of Software Contracts Principles"—and Intellectual Property: Principles Governing Jurisdiction, Choice of Law, and Judgments in Transnational Disputes, hereinafter "Intellectual Property Principles," adopted by ALI in 2007, and published in 2008.[133] As the Global Principles, upon final approval, are intended to form part of the cumulative output of the Institute, in several cases that form of definition has been chosen which is similar or most aligned with one that is already used by the Institute. We are in concurrence with the approach followed in the Intellectual Property Principles whereby occasionally a term chosen departs from standard expressions found in U.S. law so as to pay due regard to the fact that the terms are addressed to an international audience of insolvency practitioners, judges, and lawmakers.[134] In addition, the "terms" the Report provides also include descriptions reflecting how existing provisions of soft-law instruments explain a certain term.

In private-international-law (conflict-of-laws) matters, in large parts of the world, use is made of technical terms and expressions that have their origin in the Latin language. These terms and expressions provide a convenient shorthand for many concepts that are mentioned with great frequency, and that generally require many more words to state fully and precisely in English. The "definitions" below include Latin terms and expressions that, in international insolvency cases, are frequently used in practice and in legal discourse.[135]

"Abusive filings"

The term "abusive filings" is used within the context of the ALI NAFTA Principles where it is introduced as a Procedural Principle. Although it is not specifically defined, this legal instrument regulates that "[w]hen a non-main proceeding is filed in a NAFTA country and the court in that country determines that country has little interest in its outcome as compared to the country that is the center of the debtor's main interest, the court should i) dismiss the bankruptcy case, if dismissal is permitted under its law and no legitimate interests would be damaged by dismissal; or ii) ensure that the bankruptcy stay arising from the non-main proceeding has no effect outside that country."[136]

"Administrative claim or expense"

An administrative claim or expense includes costs and expenses of the proceedings, such as remuneration of the insolvency representative and any professionals employed by the insolvency representative for the purposes of the administration, expenses for the continued operation of the debtor, debts arising from the exercise of the insolvency representative's functions and powers, costs arising from continuing contractual and legal obligations, and

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[133] American Law Institute, Principles of the Law of Software Contracts, American Law Institute Publishers, St. Paul, MN 2010; American Law Institute, Intellectual Property: Principles Governing Jurisdiction, Choice of Law, and Judgments in Transnational Disputes, American Law Institute Publishers, St. Paul, MN 2008.

[134] Intellectual Property Principles, at 6.

[135] Most of these Latin terms and expressions have been taken (sometimes in a slightly amended form) from I.F. Fletcher, Insolvency in Private International Law, 2nd ed., Oxford University Press, 2005, at p. xxiii.

[136] ALI NAFTA Principles (2003) (adopted in 2000), Procedural Principle 6.

costs of proceedings.[137] This type of claim is sometimes alternatively referred to as: "Claim of the estate."

"Applicable"

The term "applicable" has a broad meaning within the scope of insolvency issues. However, it may be considered that its most significant meaning is in relation to the applicable law. The EU Insolvency Regulation provides in Article 4 that the law applicable to insolvency proceedings and their effects shall be that of the Member State within the territory of which such proceedings are opened. Articles 5-15 EU Insolvency Regulation provide for exceptions and limitations to this rule.

"Assets"

The term "assets" is referred to in several legal instruments in relation to the debtor's assets. The UNCITRAL Legislative Guide describes "assets of the debtor" as: property, rights, and interests of the debtor, including rights and interests in property, whether or not in the possession of the debtor, tangible or intangible, movable or immovable, including the debtor's interests in encumbered assets or in third-party-owned assets.[138] The EU Insolvency Regulation provides that this "Regulation enables the main insolvency proceedings to be opened in the Member State where the debtor has the centre of his main interests. These proceedings have universal scope and aim at encompassing all the debtor's assets."[139] Moreover, the European Communication & Cooperation Guidelines for Cross-border Insolvency (2007) provide that "In particular, these Guidelines aim to promote: The identification, preservation and maximisation of the value of the debtor's assets (which includes the debtor's undertaking or business) on a world-wide basis."[140]

In addition, the Principles of European Insolvency Law (2003) determine as their first principle that "In an insolvency proceeding the assets of an insolvent debtor are collected and converted into money to be distributed among the creditors ('liquidation'), or the liabilities of an insolvent debtor are restructured in order to re-establish the debtor's ability to meet liabilities ('reorganisation'). The proceeding can be a combination of liquidation and reorganization."[141]

In the context of the Draft Common Frame of Reference (DCFR, 2009), the Study Group on a European Civil Code and the Research Group on EC Private Law (*Acquis* Group) have

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[137] UNCITRAL Legislative Guide (2005) (adopted in 2004), para. 12, under B "Glossary, Terms and definitions." UNCITRAL uses terms and expressions in the UNCITRAL Legislative Guide (2005) (adopted in 2004), and its addition regarding Treatment of Enterprise Groups (2010), the UNCITRAL Practice Guide (2009), and the UNCITRAL Judicial Perspective (2011) in a consistent way. Although several of these terms appear in all documents mentioned, they will not be mentioned in all cases in the following footnotes.

[138] UNCITRAL Legislative Guide (2005) (adopted in 2004), para. 12, under B "Glossary, Terms and definitions." Similar: UNCITRAL Practice Guide (2009), under B "Glossary," in "2. Terms and explanations."

[139] InsReg (2000), Recital 12.

[140] CoCo Guidelines (2007) Guideline 2.2.ii.

[141] PEIL (2003), Principle 1.1.

defined the term "assets" as "anything of economic value, including property; rights having a monetary value; and goodwill."[142]

"Attached right"

An attached right is a quasi property-law right, not vested in an asset, but attached to it. See also "vested right."

"Avoidance provisions"

"Avoidance provisions" are described in various ways: (i) Provisions of the insolvency law that permit transactions for the transfer of assets or the undertaking of obligations, including the granting of security interests, prior to insolvency proceedings to be cancelled or otherwise rendered ineffective and any assets transferred, or their value, to be recovered in the collective interest of creditors.[143] (ii) More generally, the scope of this expression is not necessarily limited to provisions contained within "the insolvency law," but may extend to provisions within the general law of the system concerned. This wider mode of reference is employed by the terms of Article 13 of the EU Insolvency Regulation. Likewise, in the context of the Draft Common Frame of Reference (DCFR), the Study group on a European Civil Code and the *Acquis* Group provides: "Avoidance" of a juridical act or legal relationship is the process whereby a party or, as the case may be, a court invokes a ground of invalidity so as to make the act or relationship, which has been valid until that point, retrospectively ineffective from the beginning.[144]

"Burdensome assets"

"Burdensome assets" are assets that may have no value or an insignificant value to the insolvency estate or that are burdened in such a way that retention would require expenditure that would exceed the proceeds of realization of the asset or give rise to an onerous obligation or a liability to pay money.[145] Such assets are also sometimes termed "onerous property" for the purpose of disclaimer by the administrator of the insolvency proceeding.

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[142] Study Group on a European Civil Code and Research Group on EC Private Law (Acquis Group), Principles Definitions and Model Rules of European Private Law, European Law Publishers (2009), Annex (Definitions), p. 546. The Reporters used the Outline Edition ("DCFR Outline Edition, 2009"). The Full Edition (6500 pages; six Volumes) was published in late 2009, see Christian von Bar and Eric Clive (eds.), Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR). Full Edition, München/Oxford: Sellier. European Law Publishers/Oxford University Press 2009/2010.

[143] UNCITRAL Legislative Guide (2005) (adopted in 2004), para. 12 under B "Glossary, Terms and definitions." UNCITRAL Practice Guide (2009), under B "Glossary," in "2. Terms and explanations." Presented as a blueprint for future European law of obligations and property law, the DCFR is heavily debated, see, e.g., H. Eidenmüller et al., The Common Frame of Reference for European Private Law. Policy Choices and Codification Problems, Oxford Journal of Legal Studies 2008, pp. 659-708.

[144] DCFR Outline Edition 2009, Annex (Definitions), p. 546.

[145] UNCITRAL Legislative Guide (2005) (adopted in 2004), para.12, under B "Glossary, Terms and definitions."

"Business"

The term business means any natural or legal person, irrespective of whether publicly or privately owned, who is acting for purposes relating to that person's self-employed trade, work, or profession, even if the person does not intend to make a profit in the course of the activity.[146] See also: "Ordinary course of business."

"Cash proceeds"

"Cash proceeds" are proceeds of the sale of encumbered assets to the extent that the proceeds are subject to a security interest.[147]

"Center of main interests"

In the EU Insolvency Regulation the term "centre of main interests" is employed to demarcate the territorial applicability of the Regulation's provisions (Recital 14) and as the criterion for jurisdiction in the main proceedings (Article 3(1)). Generally the acronym COMI ("Centre of main interests") is used. In the case of a company or legal person, the Insolvency Regulation provides that the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary. The Regulation also declares that, in general, the term "centre of main interests" should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties.[148]

The UNCITRAL Model Law utilizes this criterion as well and contains the following presumption: "In the absence of proof to the contrary, the debtor's registered office, or habitual residence in the case of an individual, is presumed to be the centre of the debtor's main interests."[149]

As a further explanation: "A debtor's place of incorporation is not independent from its COMI. Indeed, it is closely related. For example, under Chapter 15 U.S. Bankruptcy Code, the UNCITRAL Model Law, and the EU Insolvency Regulation, COMI is legally presumed to be at a corporate debtor's registered office (i.e., its place of incorporation). But precisely because the presumption is rebuttable, COMI and incorporation are only usually, but not always, in the same place."[150] The UNCITRAL Legislative Guide (2005) (adopted in 2004) as well as the UNCITRAL Practice Guide (2009) use a description for COMI that is similar to the one of the Insolvency Regulation and the UNCITRAL Model Law, "'Centre of main

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[146] DCFR Outline Edition 2009, Annex (Definitions), p. 547.

[147] UNCITRAL Legislative Guide (2005) (adopted in 2004), para. 12, under B "Glossary, Terms and definitions."

[148] InsReg (2000), Recital 13.

[149] UNCITRAL Model Law (1997), Article 16.3.

[150] See John A.E. Pottow, The Myth and Realities of Forum Shopping in Transnational Insolvency, Brooklyn Journal of International Law, vol. 32, issue 3, 2007, p. 793.

interests': the place where the debtor conducts the administration of its interests on a regular basis and that is therefore ascertainable by third parties."[151] Case law from the European Court of Justice in relation to the Insolvency Regulation is useful. These cases include *Staubitz-Schreiber*[152] and *Eurofood*.[153]

"Claim"

The UNCITRAL Legislative Guide describes a "claim" as a right to payment from the estate of the debtor, whether arising from a debt, a contract, or other type of legal obligation, whether liquidated or unliquidated, matured or unmatured, disputed or undisputed, secured or unsecured, fixed or contingent, arisen on or before the commencement of the insolvency proceedings.[154] It adds as a "note": "Note: Some jurisdictions recognize the ability or right, where permitted by applicable law, to recover assets from the debtor as a claim." The Draft Common Frame of Reference (DCFR) describes a "claim" as a demand for something based on the assertion of a right,[155] and "claimant" as a person who makes, or who has grounds for making, a claim.[156] A "claim" is held by a "creditor." See "creditor."

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[151] UNCITRAL Legislative Guide (2005) (adopted in 2004), para. 12, under B: "Glossary, Terms and definitions." UNCITRAL Practice Guide (2009), under B "Glossary," in "2. Terms and explanations."

[152] Susanne Staubitz-Schreiber, Case C-1/04, ECJ 17 January 2006, [2006] ECJ I-701: "Article 3(1) of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings must be interpreted as meaning that the court of the Member State within the territory of which the centre of the debtor's main interests is situated at the time when the debtor lodges the request to open insolvency proceedings retains jurisdiction to open those proceedings if the debtor moves the centre of his main interests to the territory of another Member State after lodging the request but before the proceedings are opened."

[153] Eurofood IFCS Ltd v Bank of America N.A, Case C-341/04, ECJ 2 May 2006 [2006] ECR I-3813: "Where a debtor is a subsidiary company whose registered office and that of its parent company are situated in two different Member States, the presumption laid down in the second sentence of Article 3(1) of the EU Insolvency Regulation, whereby the centre of main interests of that subsidiary is situated in the Member State where its registered office is situated, can be rebutted only if factors which are both objective and ascertainable by third parties enable it to be established that an actual situation exists which is different from that which location at that registered office is deemed to reflect. That could be so in particular in the case of a company not carrying out any business in the territory of the Member State in which its registered office is situated. By contrast, where a company carries on its business in the territory of the Member State where its registered office is situated, the mere fact that its economic choices are or can be controlled by a parent company in another Member State is not enough to rebut the presumption laid down by that Regulation." (paragraph 37, and active proposition 1, of the judgment of the court).

[154] UNCITRAL Legislative Guide (2005) (adopted in 2004), para. 12, under B "Glossary, Terms and definitions." UNCITRAL Practice Guide (2009), under B "Glossary," in "2. Terms and explanations." The Concordat uses the term "Common Claim" for "A claim which is neither a secured claim nor a privileged claim."

[155] DCFR Outline Edition 2009, Annex (Definitions), p. 547.

[156] DCFR Outline Edition 2009, Annex (Definitions), p. 547.

"Claim of the estate"

See "Administrative claim or expense."

"Class"

"Class" is used to denominate a group of claims of creditors that have—under an applicable law—a similar legal position, specifically its position in the proceeds to be distributed from the insolvency estate. Although the class relates to the nature of the claim, it is used to nominate the claimants, too. Generally, the following classes can be distinguished: (i) super-priority creditors, (ii) priority creditors, (iii) *pari passu* ("unsecured" or "ordinary") creditors, (iv) subordinated creditors, which may include equity holders. These shareholders also can form a distinct class of creditors.

"Clause"

"Clause" refers to a provision in a document. A clause, unlike a "term," is always in textual form.[157]

"Commencement of proceedings"

"'Commencement of [insolvency] proceedings'" is "the effective date of insolvency proceedings whether established by statute or a judicial decision."[158] See also "Opening of proceedings."

"Communication"

Contact between courts, or between insolvency administrators, or between courts and insolvency administrators, for purposes relating to the conduct of an insolvency proceeding. A potential outcome of such structured "Communication" has been described thus: "To harmonize and co-ordinate the administration of the Insolvency Proceedings, the [Country 1] Court and the [Country A] Court may coordinate activities with each other [and consider whether it is appropriate to defer to the judgment of the other Court]."[159]

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[157] Study Group on a European Civil Code, Principles Definitions and Model Rules of European Private Law, European Law Publishers (2008), Annex I (Definitions), p. 328. The definition is not included in DCFR Outline Edition 2009.

[158] UNCITRAL Legislative Guide (2005) (adopted in 2004), para. 12, under B "Glossary, Terms and definitions." UNCITRAL Practice Guide (2009), under B "Glossary," in "2. Terms and explanations."

[159] III-Committee on International Jurisdiction and Cooperation, Prospective Model International Cross-border Insolvency Protocol (Draft-Annotated, June 2009), Article 5(1)(b) (footnote omitted).

"Composition"

Composition is used as a term to reflect a proceeding with the goal of rehabilitating the business of the entity or individual that is involved in insolvency proceedings, possibly new owners, including arrangement, suspension of payment, reconstruction, reorganization, or similar processes, with distributions to creditors and/or shareholders or other equity holders of cash, property, and/or obligations of, or interests in, the rehabilitated business.[160]

"Condition"

A "condition" is a provision that makes a legal relationship or effect depend on the occurrence or nonoccurrence of an uncertain future event. A condition may be suspensive or resolutive.[161]

"Conduct"

"Conduct" means voluntary behavior of any kind, verbal or nonverbal: it includes a single act or a number of acts, behavior of a negative or passive nature (such as accepting something without protest or not doing something), and behavior of a continuing or intermittent nature (such as exercising control over something).[162]

"Contract"

A "contract" is "the total legal obligation that results from the parties' agreement." The term is taken from U.C.C. § 1-201(b)(12). An "agreement" is "the bargain of the parties in fact as found in their language or other circumstances," see U.C.C. § 1-201(b)(3),[163] an agreement that gives rise to, or is intended to give rise to, a binding legal relationship or that has, or is intended to have, some other legal effect. It is a bilateral or multilateral juridical (or: legal) act.[164]

"Contractual obligation"

A "contractual obligation" is an obligation that arises from a contract, whether from an express term or an implied term or by operation of a rule of law imposing an obligation on a contracting party as such.[165]

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[160] Concordat, Glossary of terms.

[161] DCFR Outline Edition 2009, Annex (Definitions), p. 548.

[162] DCFR Outline Edition 2009, Annex (Definitions), p. 548.

[163] The definitions for "contract" and "agreement" are followed by the Law of Software Contracts Principles (2010) (adopted in 2009), § 1.01(e) and 1.01(b). The Intellectual Property Principles (2008) (adopted in 2007), § 101, Comment *a*, refers to the same terms and uses "contract" and "agreement" interchangeably.

[164] DCFR Outline Edition 2009, Annex (Definitions), p. 549.

[165] DCFR Outline Edition 2009, Annex (Definitions), p. 549.

"Cooperation"

The process of "Cooperation," and its main purpose, has been described thus: "To assist in the efficient administration of the Insolvency Proceedings and in recognizing that any of the Debtors may be creditors of any of the other Debtors' estates, the Debtors and the Estate Representatives shall, where appropriate: (a) cooperate with each other in connection with actions taken in the [Country 1] Court and the [Country A] Court and (b) take any other appropriate steps to coordinate the administration of the Insolvency Proceedings for the benefit of the Debtors' respective estates."[166]

"Coordination"

The ALI NAFTA Principles, Appendix A, Definitions, define "coordination" as referring to "a limited harmonization aimed at making two different systems work better together, without being fully harmonized." The definition then refers to "Harmonization."

"Court"

According to Article 2(d) of the Insolvency Regulation, "Court" shall mean the judicial body or any other competent body of a Member State empowered to open insolvency proceedings or to take decisions in the course of such proceedings.[167] Recital (10) explains that "insolvency proceedings do not necessarily involve the intervention of a judicial authority; the expression 'court' in this Regulation should be given a broad meaning and include a person or body empowered by national law to open insolvency proceedings."[168] It follows from Article 4(2) of the Regulation that the "law of the State of the opening of proceedings shall determine the conditions for the opening of those proceedings, their conduct and their closure."[169] The UNCITRAL Legislative Guide and the UNCITRAL Practice Guide use a rather similar expression for "Court": "a judicial or other authority competent to control or supervise insolvency proceedings,"[170] although it does not contain any similar provision attributing exclusive jurisdiction to control the activity of "opening" of insolvency proceedings. Within the context of Article 234 EC Treaty, the European Court of Justice has decided that a functional criterion, and not the national definition, should be used in order to decide whether an authority is to be regarded as a court.[171]

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[166] III-Committee on International Jurisdiction and Cooperation, Prospective Model International Cross-border Insolvency Protocol (Draft-Annotated, June 2009), Article 5(1)(a) (footnote omitted).

[167] InsReg (2000), Article 2(d).

[168] InsReg (2000), Recital (10).

[169] InsReg (2000), Article 4(2).

[170] UNCITRAL Legislative Guide (2005) (adopted in 2004), para. 12, under B "Glossary, Terms and definitions." UNCITRAL Practice Guide (2009), under B "Glossary," in "2. Terms and explanations."

[171] *HSB Wohnbau*, Case C-86/00, ECJ 10 July 2001.

"Creditor"

The UNCITRAL Legislative Guide provides for "Creditor": a natural or legal person that has a claim against the debtor that arose on or before the commencement of the insolvency proceedings.[172] Within the framework of the DCFR, the Study Group on a European Civil Code and the Acquis Group have defined a creditor as "A person who has right to performance of an obligation, whether monetary or non-monetary, by another person, the debtor."[173] The ALI NAFTA Principles, Appendix A, Definitions provide: "'Creditor' refers to someone with a claim against a debtor, but also includes other persons with an interest in the proceeding, such as co-owners and others claiming property interests in the debtor's property."

"Creditor committee"

A creditor committee is a representative body of creditors appointed in accordance with the applicable insolvency law, having consultative and other powers as specified in the insolvency law.[174]

"Cross-border agreement"

A cross-border agreement is an agreement entered into, either orally or in writing, intended to facilitate the coordination of cross-border insolvency proceedings and cooperation between courts, between courts and insolvency representatives, and between insolvency representatives, sometimes also involving other parties in interest.[175]

"Debtor"

The ALI NAFTA Principles, Appendix A, Definitions, state as definition: "'Debtor' in most contexts refers to a legal person who is the subject of a bankruptcy or insolvency proceeding." The EU Insolvency Regulation states that: "This Regulation should apply to insolvency proceedings, whether the debtor is a natural person or a legal person, a trader or an individual."[176] A further definition is not provided. Within the framework of the DCFR, the

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[172] UNCITRAL Legislative Guide (2005) (adopted in 2004), para. 12, under B, "Glossary, Terms and definitions." UNCITRAL Practice Guide (2009), under B "Glossary," in "2. Terms and explanations."

[173] DCFR Outline Edition 2009, Annex (Definitions), p. 330.

[174] UNCITRAL Legislative Guide (2005) (adopted in 2004), para. 12, under B, "Glossary, Terms and definitions." UNCITRAL Practice Guide (2009), under B "Glossary," in "2. Terms and explanations." For an alternative, descriptive definition: "A committee of creditors recognized by the [Country 1 and/or Country A] Court in the [Country 1 and/or 2] Cases shall be referred to herein as "The Creditors' Committee," see III-Committee on International Jurisdiction and Cooperation, Prospective Model International Cross-border Insolvency Protocol (Draft-Annotated, June 2009), Article 2(1)(vii).

[175] UNCITRAL Practice Guide (2009), under B "Glossary," in "2. Terms and explanations."

[176] InsReg (2000), Recital (9).

following definition is provided: "A person who has an obligation, whether monetary or non-monetary, to another person, the creditor."[177]

"Debtor in possession"

The UNCITRAL Legislative Guide provides a description for a certain kind of debtor, namely "debtor in possession," which is a debtor in reorganization proceedings that are so structured that the debtor him- or herself, or itself, (especially the board of a company) retains full control over the business, with the consequence that the court does not appoint an insolvency representative.[178]

"Deferral"

When one court accepts the limitation of its responsibility with respect to certain issues, including for example, the ability to hear certain matters and issue certain orders, in favor of another court, this is named deferral.[179]

"Discharge"

The release of a debtor from claims that were, or could have been, addressed in the insolvency proceedings.[180] Alternative: a court order or provision of an instrument effecting a composition releasing a debtor from all liabilities that were, or could have been, addressed in the insolvency proceeding, including contracts that were modified as part of a composition.[181]

"Disposal"

Every means of transferring or parting with an asset or an interest in an asset, whether in whole or in part, is named "disposal."[182]

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[177] DCFR Outline Edition 2009, Annex (Definitions), p. 550.

[178] UNCITRAL Legislative Guide (2005) (adopted in 2004), para. 12, under B, "Glossary, Terms and definitions." UNCITRAL Practice Guide (2009), under B "Glossary," in "2. Terms and explanations." The ALI NAFTA Principles, Appendix A, Definitions, provide: "'Debtor in possession' refers to the person or persons entitled to operate the affairs of a debtor under either a Chapter 11 reorganization in the United States or a concurso mercantil in Mexico, and includes a Mexican debtor in conciliation in Mexico."

[179] UNCITRAL Practice Guide (2009), under B "Glossary," in "2. Terms and explanations."

[180] UNCITRAL Legislative Guide (2005) (adopted in 2004), para. 12, under B, "Glossary, Terms and definitions."

[181] Concordat, Glossary of terms.

[182] UNCITRAL Legislative Guide (2005) (adopted in 2004), para. 12, under B, "Glossary, Terms and definitions."

"Distribution"

Distribution means the allocation of estate property among creditors and/or shareholders or other equity interests.[183]

"Domestic assets"

"'Domestic assets' refers to assets within the territorial jurisdiction of a court, usually a recognizing court."[184]

"Duty"

A person has a "duty" to do something if the person is bound to do it or expected to do it according to an applicable normative standard of conduct. A duty may or may not be owed to a specific creditor. A duty is not necessarily an aspect of a legal relationship. There is not necessarily a sanction for breach of a duty. All obligations are duties, but not all duties are obligations.[185] See also "obligation."

"Electronic"

"Electronic" means relating to technology with electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities. An "electronic signature" then means data in electronic form that are attached to, or logically associated with, other data and that serve as a method of authentication.[186]

"Enacting state"

An enacting state is a state that has enacted legislation based on the UNCITRAL Model Law on Cross-Border Insolvency.[187]

"Encumbered asset"

An "encumbered asset" is an expression for an asset in respect of which a creditor has a security interest.[188]

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[183] Concordat, Glossary of terms.

[184] ALI NAFTA Principles, Appendix A, Definitions.

[185] DCFR Outline Edition 2009, Annex (Definitions), p. 553.

[186] See, for both definitions, DCFR Outline Edition 2009, Annex (Definitions), p. 553.

[187] UNCITRAL Judicial Perspective (2011), B "Glossary," under (c).

[188] UNCITRAL Legislative Guide (2005) (adopted in 2004), para. 12, under B, "Glossary, Terms and definitions." UNCITRAL Practice Guide (2009), under B "Glossary," in "2. Terms and explanations."

"Enterprise group"

An "enterprise group" has been described as: "Two or more enterprises that are interconnected by control or significant ownership." In the given description, "enterprise" means "any entity, regardless of its legal form, that is engaged in economic activities and may be governed by the insolvency law," whereas "control" means "the capacity to determine, directly or indirectly, the operating and financial policies of an enterprise."[189]

"Equity holder"

An "equity holder" is the holder of issued stock or a similar interest that represents an ownership claim to a proportion of the capital of a corporation or other enterprise.[190]

"Establishment"

Article 2(h) of the Insolvency Regulation defines "establishment" as meaning: "any place of operations where the debtor carries out a non-transitory economic activity with human means and goods." This term is used primarily for the purpose of establishing territorial/secondary jurisdiction within the meaning of Article 3(2) Insolvency Regulation. In the *Interedil* case, the CJEU provides an interpretation to Article 2(h) of the Insolvency Regulation: "[62] The fact that that definition links the pursuit of an economic activity to the presence of human resources shows that a minimum level of organisation and a degree of stability are required."[191] This proposition was affirmed explicitly by the CJEU in the *Rastelli Davide* case.[192] In *Interedil*, the CJEU continued: "It follows that, conversely, the presence alone of goods in isolation or bank accounts does not, in principle, satisfy the requirements for classification as an 'establishment'. [63] Since, in accordance with Article 3(2) of the Regulation, the presence of an establishment in the territory of a Member State confers jurisdiction on the courts of that State to open secondary insolvency proceedings against the debtor, it must be concluded that, in order to ensure legal certainty and foreseeability concerning the determination of the courts with jurisdiction, the existence of an establishment must be determined, in the same way as the location of the centre of main interests, on the basis of objective factors which are ascertainable by third parties."

A similar, though not completely identical, definition as in Article 2(h) of the Insolvency Regulation is also contained in the UNCITRAL Model Law, which provides that "establishment" means "any place of operations where the debtor carries out a non-transitory

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[189] UNCITRAL Legislative Guide, Part Three: Treatment of enterprise groups in insolvency (2010), "Glossary," under (a), (b), and (c) respectively.

[190] UNCITRAL Legislative Guide (2005) (adopted in 2004), para. 12, under B, "Glossary, Terms and definitions."

[191] CJEU 20 October 2011, Case C-396/09 (Interedil Srl, in liquidation v. Fallimento Interedil Srl, Intesa Gestione Crediti SpA).

[192] CJEU 15 December 2011, Case C-191/10 (Rastelli Davide e C. Snc v. Jean-Charles Hidoux, in his capacity as liquidator appointed by the court for the company Médiasucre International).

economic activity with human means and goods or services."[193] The use of the term "goods" in the English versions of this definition, in both of the quoted texts, is arguably inappropriate as an equivalent to the French term "biens" or the Dutch term "goederen," which can apply to both tangible and intangible property. The English term "assets" would have been a more suitable equivalent. See also "Goods"; "Assets." Although the definition of establishment supplied by the EU Insolvency Regulation has been presented as an independent concept to be followed, separate from the definition of "establishment" as used within the context of construing the right of establishment in another EU Member State,[194] the following case law of the ECJ in relation to the right of establishment under the EC Treaty may be useful. See Commission v. Austria[195] and Schweppes v. Commissioners of Inland Revenue.[196]

"Estate"

The term estate is used several times in the Insolvency Regulation, thought not in the UNCITRAL Model Law. It is generally used to describe the subject of the insolvency proceedings, being the debtors' assets and liabilities, to which the goal of such proceedings (either liquidation or reorganization) relate.

"EU-State"

The concept of EU-State is not precisely defined within the EC Treaty or any other applicable instrument. In general, EU-State or EU Member State means one of the 27 countries that are currently, in 2011, members of the European Union (Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, United Kingdom).[197] However, Denmark is for the

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[193] UNCITRAL Model Law (1997), Article 2(f). This definition also is provided in the UNCITRAL Legislative Guide (2005) (adopted in 2004), para. 12, under B, "Glossary, Terms and definitions" and in the UNCITRAL Practice Guide (2009), under B "Glossary," in "2. Terms and explanations."

[194] Virgós / Schmit Report (1996), para. 70.

[195] Commission of the European Communities v. Republic of Austria, Case C-161/07, ECJ 22 December 2008: "It should be noted that the concept of establishment within the meaning of the EC Treaty is a very broad one, allowing a Community national to participate, on a stable and continuous basis, in the economic life of a Member State other than his State of origin and to profit therefrom, so contributing to economic and social interpenetration within the European Community in the sphere of activities of self-employed persons." See also Centro di Musicologia Walter Stauffer, Case C-386/04, ECJ 14 September 2006.

[196] Cadbury Schweppes plc. v. Commissioners of Inland Revenue, Case C-196/04, ECJ 12 September 2006: "The concept of establishment within the meaning of the Treaty provisions on freedom of establishment involves the actual pursuit of an economic activity through a fixed establishment in that State for an indefinite period. Consequently, it presupposes actual establishment of the company concerned in the host Member State and the pursuit of genuine economic activity there." See also The Queen v. Secretary of State for Transport, ex parte Factortame Ltd and others (Factortame II), Case C-221/89. ECJ 25 July 1991, [1991] ECR I-3905, paragraph 20, and Commission v United Kingdom, Case C-246/89, ECJ 4 October 1991, [1991] ECR I-4585, paragraph 21.

[197] See Member States, at: http://europa.eu/abc/european_countries/eu_members/index_en.htm (last visited Mar. 8, 2012).

purpose of Private International Law Regulations pursuant to Articles 61(c) and Article 65 not regarded as a Member State. An example of this exclusion is found in Brussels I, which determines: "the term "Member State" shall mean Member States with the exception of Denmark."[198] Likewise the Service Regulation, in which it is stated that the term "Member State" shall mean the Member States with the exception of Denmark.[199] Recital 33 of the Insolvency Regulation provides: "Denmark, in accordance with Articles 1 and 2 of the Protocol on the position of Denmark annexed to the Treaty on European Union and the Treaty establishing the European Community, is not participating in the adoption of this Regulation, and is therefore not bound by it nor subject to its application."

"Financial contract"

A financial contract is any spot, forward, future, option, or swap transaction involving interest rates, commodities, currencies, equities, bonds, indices, or any other financial instrument, any repurchase or securities lending transaction, and any other transaction similar to any transaction referred to above, entered into in financial markets, and any combination of the transactions mentioned above.[200]

"Foreign court"

The UNCITRAL Model Law provides a specific definition of this term as: "A judicial or other authority competent to control or supervise a foreign proceeding."[201] See also the description of "Court" above.

"Foreign creditor"

In relation to any given jurisdiction, the term "refers to a creditor whose address as maintained in the business records of the debtor is outside that jurisdiction."[202]

"Foreign (insolvency) proceeding"

A specific definition of the term "foreign proceeding," in relation to insolvency matters, is found in the UNCITRAL Model Law, Article 2(a), which describes it as: "A collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation."

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[198] Brussels I (2001), Article 1.3.

[199] Service Reg. (2007), Article 1.3.

[200] UNCITRAL Legislative Guide (2005) (adopted in 2004), para. 12, under B, "Glossary, Terms and definitions."

[201] UNCITRAL Model Law (1997), Article 2(e).

[202] ALI NAFTA Principles, Appendix A, Definitions.

"Foreign main proceeding"

According to the UNCITRAL Model Law, Article 2(b), "'Foreign main proceeding' means a foreign proceeding taking place in the State where the debtor has the centre of its main interests."

"Foreign non-main proceeding"

According to the UNCITRAL Model Law, Article 2(c), "'Foreign non-main proceeding' means a foreign proceeding, other than a foreign main proceeding, taking place in a State where the debtor has an establishment within the meaning of subparagraph (f) of this article."[203] "'Non-main proceeding' refers to a full domestic bankruptcy case pending in a country other than the country that is the center of the debtor's main interests; an ancillary proceeding is not a non-main proceeding": see ALI NAFTA Principles, Appendix A, Definitions.[204]

"Foreign representative"

The ALI NAFTA Principles, Appendix A, Definitions say: "'Foreign representative' refers to an administrator acting in a foreign proceeding." The UNCITRAL Model Law defines this term as: "A person or body, including one appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding."[205]

"Forum"

Originally "forum" is a Latin term meaning a market place or commercial center; hence by derivation the location of a court or tribunal that hears and determines litigious disputes, especially those of a commercial character. The term "forum" is nowadays used in relation to cross-border matters to denote the law district or country in which a case was, is being, or may be heard; hence also to refer to the court by which an application or a legal action is, or was, heard.

"Forum concursus"

The court within whose jurisdiction an insolvency proceeding is currently taking place, or formerly took place.

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[203] See UNCITRAL Model Law (1997), Article 2(a-c). UNCITRAL Practice Guide (2009), under B "Glossary," in "2. Terms and explanations."

[204] ALI NAFTA Principles, Appendix A, Definitions, adding: "'Ancillary proceeding' refers to a proceeding other than a full domestic bankruptcy proceeding designed to provide assistance to a foreign bankruptcy proceeding."

[205] UNCITRAL Model Law (1997), Article 2(d).

"Forum non conveniens"

A plea or defense alleging that the forum is inappropriately selected and should refrain from exercising jurisdiction.

"**Forum state"**

The term "forum state" is the state within which a formal legal proceeding is taking place. Where two or more proceedings are currently taking place in different states in relation to the same debtor or cause of action, the terms "forum" and "forum state" may be applied successively, according to the context, to whichever of them is functioning in accordance with its own rules and practice under circumstances that require consideration to be given to the relative effects of proceedings or determinations emanating from some other state or states. For example, when a court exercises jurisdiction to open an insolvency proceeding it is customary to refer to that court as the "bankruptcy forum" (see "*forum concursus*" above). If, subsequently, the judgment of the first forum (F1) is under consideration by a court of another state (F2) for such purposes as the recognition or enforcement of the judgment of F1, or the possible opening of a concurrent proceeding in F2, it is customary also to refer to the second court as "the forum" in respect of the operation of its laws and practices in relation to external ("foreign") courts and states, and hence the state in which the F2 court is located may also be referred to as the "forum state" in that context.

"Fraud"

A misrepresentation (or: inaccurate impression) represents "fraud" or is fraudulent if it is made with knowledge or belief that it is false and is intended to induce the recipient to make a mistake to the recipient's prejudice. A nondisclosure is fraudulent if it is intended to induce the person from whom the information is withheld to make a mistake to that person's prejudice.[206]

"General body of creditors"

A collective expression denoting all those whose claims or rights are affected by the debtor's insolvency, and whose interests are therefore of particular concern to the legal regime under whose auspices an insolvency proceeding is taking place. Acts to which the debtor is or has been a party, or that have taken place in relation to property of the debtor, may be subject to impeachment if they can be characterized as having been detrimental to the interests of the general body of creditors, even if one or more individual creditors' interests have not been harmed or may have benefited thereby.

[206] DCFR Outline Edition 2009, Annex (Definitions), p. 554.

"Good faith"

"Good faith" has been described as a mental attitude characterized by honesty and an absence of knowledge that an apparent situation is not the true situation.[207]

"Goods"

The term "goods" means any material object that can be subject to human control. See also "Assets"; "Establishment"; "Immovable property"; and "Movables."

"Harmonization"

The term "'harmonization' refers to efforts to change the laws of two or more countries to be more substantively similar to each other."[208]

"Immovable property"

"Immovable property" means land and anything so attached to land as not to be subject to change of place by usual human action.[209] These would include unextracted minerals, plants growing on land, buildings, and other works durably united with land, either directly or by physical or functional incorporation with buildings or works.

"Incorporeal"

"Incorporeal," in relation to property, means not having a physical existence in solid, liquid, or gaseous form.[210]

"Insolvency"

"Insolvency" generally is described as: when a debtor is generally unable to pay its debts as they mature, or when its liabilities exceed the value of its assets.[211] The term "insolvent" is attributed to: "A debtor having liabilities that exceed the value of assets; having stopped paying debts in the ordinary course of business; or being unable to pay them as they fall due."[212] In the EU Insolvency Regulation, the term "insolvency" is not described as such; it

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[207] DCFR Outline Edition 2009, Annex (Definitions), p. 555.

[208] ALI NAFTA Principles, Appendix A, Definitions.

[209] DCFR Outline Edition 2009, Annex (Definitions), p. 555.

[210] DCFR Outline Edition 2009, Annex (Definitions), p. 556.

[211] UNCITRAL Legislative Guide (2005) (adopted in 2004), para. 12, under B, "Glossary, Terms and definitions." UNCITRAL Practice Guide (2009), under B "Glossary," in "2. Terms and explanations."

[212] Study Group on a European Civil Code, Principles Definitions and Model Rules of European Private Law, European Law Publishers (2008), Annex I (Definitions), p. 333. The definition is not included in DCFR Outline Edition 2009.

only refers to "insolvency proceedings." The term "insolvency" is taken from the national law of the Member State in which insolvency proceedings are opened. An insolvency may be described as: "The condition of being unable to pay debts as they fall due or in the usual course of business. The inability to pay debts as they mature."[213]

Insolvency may be also defined as: "A state of affairs where a debtor is being overwhelmed by liabilities and where, as a consequence, the creditors at large can no longer expect to receive fully and in time what is owed to them from a normal management of the debtor's affairs or business. Viewed by business standards, the debtor tends to act abnormally." [214]
It is important to clarify that in legal literature, the terms "bankruptcy" and "insolvency" are used interchangeably,[215] although it should be noted that the terms have acquired, in modern usage, the separate meanings of procedures to be applied, in the former instance, to individuals, sole traders, and partnerships and, in the latter, to corporate entities. This is not the case in the United States, where bankruptcy is used for all such procedures.[216] See also: "(Insolvency) administrator."

"Insolvency administrator"

The term "Insolvency administrator" refers to "the person or entity that the bankruptcy law in a country places in charge of a bankrupt's property, including trustees, liquidators, sindicos, administrators, monitors, interim trustees, court-appointed trustees . . . and debtors in possession."[217] An "insolvency administrator" is a person or body, including one appointed on an interim basis, authorized in an insolvency proceeding to administer the reorganization or liquidation of the insolvent person's assets or affairs.[218] In the EU Insolvency Regulation, as a general term of reference to denote any of the recognized species and designations of insolvency office holders, the word "liquidator" is used throughout. See also "liquidator" and "office holder."

"Insolvency case"

See "Insolvency proceeding" / "Insolvency proceedings."

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[213] Black's Law Dictionary, Thomson Reuters, 9th Edition (2009).

[214] See W.W. McBryde, A.Flessner, and S.C.J.J. Kortmann, Principles of European Insolvency Law, Law of Business and Finance Vol. 4, Kluwer Legal Publishers (2003), p. 15.

[215] See Bob Wessels, Bruce A. Markell, and Jason J. Kilborn, International Cooperation in Bankruptcy and Insolvency Matters, Oxford University Press Inc., New York, 2009, at 1.

[216] Paul J. Omar, European Insolvency Law, Ashgate (2004), p. 3.

[217] ALI NAFTA Principles, Appendix A, Definitions. In the NAFTA context, "administrator" also includes "sindicos" and "Mexican debtors in conciliations." The same set of definitions provide: "Sindico" refers to an administrator appointed under *La Ley de Concursos Mercantiles* in Mexico, and "Mexican debtor in conciliation" refers to "the person or persons entitled to control the property and affairs of a debtor under a concurso mercantil in Mexico."

[218] Study Group on a European Civil Code, Principles Definitions and Model Rules of European Private Law, European Law Publishers (2008), Annex I (Definitions), p. 335. The definition is not included in the DCFR Outline Edition 2009, see footnote 136.

"Insolvency estate"

An "insolvency estate" is formed by assets of the debtor that are subject to the insolvency proceedings.[219] See also "estate."

"Insolvency presumption"

The UNCITRAL Model Law determines the following presumption in order to initiate a proceeding: "In the absence of evidence to the contrary, recognition of a foreign main proceeding is, for the purpose of commencing a proceeding under [identify laws of the enacting State relating to insolvency], proof that the debtor is insolvent."[220]

"Insolvency proceeding"/ "Insolvency proceedings"

An insolvency proceeding (alternatively referred to in the plural form as "insolvency proceedings") means a collective judicial or administrative proceeding, including an interim proceeding, in which the assets and affairs of a person who is believed to be insolvent are subject to control or supervision by a court or other competent authority for the purpose of reorganization or liquidation.[221] In the NAFTA context, "Proceeding" refers to "bankruptcy or insolvency proceedings, including a bankruptcy 'case' in the United States."[222] The Draft Common Frame of Reference (DCFR) uses a nearly similar description.[223] "Insolvency proceedings" are: collective proceedings, subject to court supervision, either for reorganization or liquidation.[224]

The EU Insolvency Regulation specifies what are to be regarded as insolvency proceedings in the Member States to which this Regulation applies, listed for each Member State in an Annex A to the Regulation. The Regulation excludes insolvency proceedings concerning insurance undertakings, credit institutions, investment undertakings holding funds or securities for third parties and collective investment undertakings from its scope, see Article 1(2). The explanation is that such undertakings should not be covered by the Regulation since they are

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[219] UNCITRAL Legislative Guide (2005) (adopted in 2004), para. 12, under B, "Glossary, Terms and definitions." UNCITRAL Practice Guide (2009), under B "Glossary," in "2. Terms and explanations."

[220] UNCITRAL Model Law (1997), Article 31.

[221] Cf. UNCITRAL Model Law (1997), Article 2(a), quoted above in the definition of "Foreign (Insolvency) Proceeding."

[222] ALI NAFTA Principles, Appendix A, Definitions.

[223] DCFR Outline Edition 2009, Annex (Definitions), p. 556.

[224] UNCITRAL Legislative Guide (2005) (adopted in 2004), para. 12, under B, "Glossary, Terms and definitions." UNCITRAL Practice Guide (2009), under B "Glossary," in "2. Terms and explanations." ALI NAFTA Principles, Appendix A, Definitions: "Bankruptcy proceeding" refers to "a collective proceeding for the adjustment, collection, or payment of debts of a legal person on behalf of all creditors and other interested parties and includes proceedings often called 'insolvency proceedings.' It includes any proceeding under the Bankruptcy and Insolvency Act or the Company Creditors Arrangement Act in Canada, under La Ley de Concursos Mercantiles in Mexico, and under the Bankruptcy Code in the United States." And also: "Insolvency proceeding" refers to "a bankruptcy proceeding as defined above."

subject to special arrangements and, to some extent, the national supervisory authorities have extremely wide-ranging powers of intervention.[225] Here the *Eurofood* case and the *Probud* case are relevant, too.[226]

"Insolvency representative"

An insolvency representative is a person or body, including one appointed on an interim basis, authorized in insolvency proceedings to administer the reorganization or the liquidation of the insolvency estate.[227] The PEIL indirectly defines this term by declaring: "The creditors' collective interests may be represented by a meeting of creditors, a creditors' committee or a creditors' representative."[228]

"Intangible"

See "Incorporeal."

"Intellectual property right"

An intellectual property right is a right in a product or intellectual creation of the human mind. Intellectual property right means any intellectual property right involving copyrights, neighboring rights, patents, trade secrets, trademarks, geographic indications, other intellectual property rights, and agreements related to any of these rights. The description follows § 101(4) juncto § 102(1) of ALI's Intellectual Property Principles adopted in 2007 and published in 2008. Where a national law forms the basis for such a right it is treated as a registered right of the state for which the deposit, registration, or grant is deemed to be effective under the applicable international agreement.[229] It is noted that, for the purposes of the Insolvency Regulation, a Community patent, a Community trademark, or any other similar

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[225] InsReg (2000), Recital (9).

[226] Eurofood IFCS Ltd v Bank of America N.A, Case C-341/04, ECJ 2 May 2006 [2006] ECR I-3813: "On a proper interpretation of the first subparagraph of Article 16(1) of Regulation No 1346/2000, the main insolvency proceedings opened by a court of a Member State must be recognised by the courts of the other Member States, without the latter being able to review the jurisdiction of the court of the opening State. On a proper interpretation of the first subparagraph of Article 16(1) of the Regulation, a decision to open insolvency proceedings for the purposes of that provision is a decision handed down by a court of a Member State to which application for such a decision has been made, based on the debtor's insolvency and seeking the opening of proceedings referred to in Annex A to the Regulation, where that decision involves the divestment of the debtor and the appointment of a liquidator referred to in Annex C to the Regulation. Such divestment implies that the debtor loses the powers of management that he has over his assets." See MG Probud Gdynia sp. z o.o. v Hauptzollamt Saarbrücken, Case C-444/07, CJEU 21 January 2010, [2010] B.C.C. 453.

[227] UNCITRAL Legislative Guide (2005) (adopted in 2004), para. 12, under B, "Glossary, Terms and definitions." UNCITRAL Practice Guide (2009), under B "Glossary," in "2. Terms and explanations."

[228] PEIL (2003), Principle 3.1.

[229] Intellectual Property Principles, at 48.

right established by Community law may be included only in the main insolvency proceedings.[230]

"Intermediary" / "Independent intermediary"

An intermediary or independent intermediary is a person who may be appointed by a court to facilitate coordination between insolvency proceedings concerning an insolvent debtor or a group of companies that will be, are, or were subject to insolvency proceedings in different states. An intermediary's general task is to help ensure that a transnational insolvency proceeding is operated effectively, to establish practical means of conducting communication between the courts concerned, to address the practical issues generated by such factors as the different working languages in which the various courts are able to operate, and the logistical problems caused by the fact (if such is the case) that the courts are situated in different time zones thereby impeding the conduct of live communications during normal working hours. For a person who may be appointed by a court to facilitate coordination of insolvency proceedings concerning enterprise group members taking place in different jurisdictions, the UNCITRAL Legislative Guide uses the term "court representative."[231]

"International insolvency case"

An insolvency case may be said to possess an international character when there are material elements within the case that actually or potentially engage the application of the laws of more than one state and its system of law, including its rules of jurisdiction or recognition and its rules of private international law. Such cases are alternatively known as "cross-border" or "transnational" insolvency cases. See also "Insolvency proceeding."

"International jurisdiction"

When a court exercises jurisdiction in accordance with principles laid down in the domestic law of the state in which it is established, the validity of such a proceeding for the purposes of international recognition and enforcement will depend on whether the circumstances under which such an exercise of jurisdiction by the first court has taken place are in conformity with the criteria established under the private international law of the recognizing state. Where those criteria are met, the first court is said to have had "international jurisdiction" over the matter in question. There can be considerable variation between the private-international-law rules applied by different states with regard to the criteria that are applied for this purpose, thereby resulting in uneven (or "limping") levels of recognition and enforcement among the various sovereign states. Under international agreements, certain criteria may come to be accepted as giving rise to international jurisdictional competence for the court in relation to which they are met in a given case, thereby transcending the rules of recognition of individual states and giving rise to a more uniform level of acceptance of the proceedings in question. See also "Recognition."

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[230] InsReg (2002), Article 12.

[231] UNCITRAL Legislative Guide, Part Three: Treatment of enterprise groups (2010), para. 37.

"Invalid"

"Invalid" in relation to a juridical act or legal relationship means that the act or relationship is void or has been avoided.[232]

"Judge"

In UNCITRAL documents, a "judge" is "a judicial officer or other person appointed to exercise the powers of a court or other competent authority having jurisdiction under legislation based on the Model Law."[233] Under the application of the EU Insolvency Regulation, for a similar function, the term "court" is used. See "court."

"Judgment"

The EU Insolvency Regulation provides that in relation to the opening of insolvency proceedings or the appointment of a liquidator, a judgment shall include the decision of any court empowered to open such proceedings or to appoint a liquidator.[234] This term is also defined under Article 32 of Brussels I, which states: "For the purposes of this Regulation, 'judgment' means any judgment given by a court or tribunal of a Member State, whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as the determination of costs or expenses by an officer of the court."[235] This includes provisional and protective measures, as far as they are not granted *ex parte*.[236]

"Jurisdiction"

The EU Insolvency Regulation provides rules on jurisdiction in Article 3. It provides that in accordance with the principle of proportionality, this Regulation should be confined to provisions governing jurisdiction for opening insolvency proceedings and judgments that are delivered directly on the basis of the insolvency proceedings and are closely connected with such proceedings.[237] The rules of jurisdiction set out in the Insolvency Regulation establish only international jurisdiction; thus they designate the Member State the courts of which may open insolvency proceedings. Territorial jurisdiction within that Member State must be established by the national law of the Member State concerned.[238] The courts of the Member State, within the territory of which the center of a debtor's main interests is situated, shall have jurisdiction to open insolvency proceedings. In the case of a company or legal person, the place of the registered office shall be presumed to be the center of its main interests in the absence of proof to the contrary. Where the center of a debtor's main interests is situated within the territory of a Member State, the courts of another Member State shall have

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[232] DCFR Outline Edition 2009, Annex (Definitions), p. 557.

[233] UNCITRAL Judicial Perspective (2011), B "Glossary," under (e).

[234] InsReg (2000), Article 2(e).

[235] Brussels I (2001), Article 27.1 - 27.2.

[236] Mietz v. Intership Yachting Sneek, C-99/96, ECJ 27 April 1999.

[237] InsReg (2000), Recital (6).

[238] InsReg (2000), Recital (15).

jurisdiction to open insolvency proceedings against that debtor only if he possesses an establishment within the territory of that other Member State. The effects of those proceedings shall be restricted to the assets of the debtor situated in the territory of the latter Member State.[239] See also "International Jurisdiction."

"Law"

This term may be considered in the scope of insolvency, departing from the following approaches:

- Substantive Law

The EU Insolvency Regulation acknowledges the fact that as a result of widely differing substantive laws in the Member States, it is not practical to introduce insolvency proceedings with universal scope in the entire Community. The application, without exception, of the law of the state of opening of proceedings would, against this background, frequently lead to difficulties. This applies, for example, to the widely differing laws on security interests to be found in the Community.[240]

- Soft law

Generally, "soft law" is understood to mean a nonenforceable regulation created by the (direct) involvement of members of a certain sector or field (individuals, representative organizations) by means of mutual discussion and agreement. Soft law expresses itself in such forms as model-contracts, precedents, standards, guidelines, principles, requirements, guides, notes of guidance, directions, governance rules, records of certain customs, policies, codes, or protocols.[241] These legally unenforceable rules are included in the term "law."

- Conflicts of law

The EU Insolvency Regulation sets out, for the matters covered by it, uniform rules on conflict of laws that replace, within their scope of application, the Member States' national rules of private international law. Unless otherwise stated, the law of the Member State of the opening of the proceedings should be applicable (*lex concursus*). This rule on conflict of laws should be valid both for the main proceedings and for local (territorial, or secondary) proceedings; the *lex concursus* determines all the effects of the insolvency proceedings, both procedural and substantive, on the persons and legal relations concerned. It governs all the conditions for the opening, conduct, and closure of the insolvency proceedings.[242]

- Applicable law to main insolvency proceedings

Save as otherwise provided in the Insolvency Regulation, the law applicable to insolvency proceedings and their effects shall be that of the Member State within the territory of which such proceedings are opened.[243] This law is also referred to as *lex concursus.*

- Applicable law to secondary proceedings

Here, the same rule applies. Save as otherwise provided in the Insolvency Regulation, the law applicable to secondary proceedings shall be that of the Member State within the territory of which the secondary proceedings are opened.[244]

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[239] InsReg (2000), Article 3.1-3.2.

[240] InsReg (2000), Recital (11).

[241] The results of soft law are commonly accompanied by explanations or recommendations, which are based on broad support in the respective sector or group of interested parties, which aim at practical and efficient application of its rules.

[242] InsReg (2000), Recital (23).

[243] InsReg (2000), Article 4.1.

"Legislative Recommendations"

"Legislative Recommendations" refers to "recommendations for new legislation or international agreements that will go beyond current law to permit a substantially higher level of cooperation and integration."[245]

"Lex causae"

The legal system whose substantive rule governs the matter in issue, as selected by the private international law of the forum.

"Lex concursus"

The system and rules of insolvency law in force in the country where an insolvency proceeding takes place. Sometimes also referred to as "*lex fori concursus.*"

"Lex domicilii"

The law of the place where a person is domiciled.

"Lex fori"

The legal system, and rules of law, in force in the country where the forum sits.

"Lex loci -" The law of the place where -

- *actus* - the act is performed.
- *contractus* - the contract is made.
- *delicti* - the wrong is committed.
- *laboris* - the work is performed.
- *registri* - the company is registered.
- *rei sitae* - the property is situated.
- *solutionis* - the contract is to be performed, or the debt is due to be paid.

"Lex patriae"

The law of the state of which the person possesses nationality.

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[244] InsReg (2000), Article 28.

[245] ALI NAFTA Principles, Appendix A, Definitions.

"Liquidator"

In general, a liquidator may be defined as "[a] person appointed to wind up a business's affairs, [especially] by selling off its assets."[246] The EU Insolvency Regulation, however, provides under its General provisions that "liquidator" shall mean any person or body whose function is to administer or liquidate assets of which the debtor has been divested or to supervise the administration of his affairs. Those persons and bodies are listed in Annex C.[247] The European Communication & Cooperation Guidelines for Cross-border Insolvency (2007) have adopted this provision, providing that "A liquidator is any appointed person or body whose function is to administer or liquidate assets of which the debtor has been divested or to supervise the administration of its affairs, either in reorganisation or in liquidation proceedings."[248]

With reference to the powers of the liquidator, the EU Insolvency Regulation determines that: the liquidator appointed by a court that has opened main insolvency proceedings (pursuant to Article 3(1) InsReg) may exercise all the powers conferred on him by the law of the state of the opening of proceedings in another Member State, as long as no other insolvency proceedings have been opened there nor any preservation measure to the contrary has been taken there further to a request for the opening of insolvency proceedings in that state.[249] See also: "(Insolvency) administrator" and "Office holder."

"Liquidation"

Proceedings to sell and dispose of assets for distribution to creditors in accordance with the insolvency law.[250]

"Lis alibi pendens"

Plea that the defendant is currently being sued by the same plaintiff before some other forum on the basis of the same cause of action.

"Local creditor"

"Local creditor" refers to "a person who has an interest with an important and specific connection to a jurisdiction, a definition that includes a creditor secured in assets located in that jurisdiction or another person with a property (in rem) interest in assets located in the domestic jurisdiction, regardless of that person's nationality, residence, or domicile."[251]

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[246] Black's Law Dictionary, Thomson Reuters, Ninth Edition (2009).

[247] InsReg (2000), Article 2(b).

[248] CoCo Guidelines (2007), Guideline 4.1.

[249] InsReg (2000), Article 18.

[250] UNCITRAL Legislative Guide (2005) (adopted in 2004), para. 12, under B, "Glossary, Terms and definitions."

[251] ALI NAFTA Principles, Appendix A, Definitions.

"Local law"

"Local law" denotes the body of rules, including both procedural and substantive rules, which together comprise the system of law applicable within a discrete territorial area or region—variously referred to as a "jurisdiction," "law district," "country," or "state." The local law thus provides the basis for the conduct and determination of any formal legal process that takes place before a court or tribunal, or other body or official endowed with quasi-judicial authority, operating within the territorial area in question.

"Main insolvency proceeding" / "Main insolvency proceedings"

Main insolvency proceeding refers to "a full domestic bankruptcy case brought in the country that is the center of the main interests of a debtor," according to the ALI NAFTA Principles, Appendix A, Definitions. In the EU Insolvency Regulation, the term "main insolvency proceedings" refers to the primary proceedings opened in the Member State where the debtor has the center of his main interests. These proceedings have universal scope and aim at encompassing all the debtor's assets.[252] Moreover, the UNCITRAL Model Law defines "foreign main proceeding" as: "a foreign proceeding taking place in the State where the debtor has the centre of its main interests."[253]
See also: "Foreign non-main proceeding."

"Moratorium"

See "Stay."

"Movables"

"Movables" means corporeal and incorporeal property other than immovable property.[254] Movable property includes all movable things serving as household or business objects,

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[252] InsReg (2000), Recital 12. See MG Probud Gdynia sp. z o.o. v Hauptzollamt Saarbrücken, Case C-444/07, CJEU 21 January 2010, [2010] B.C.C. 453: "22 . . . . it should be noted first of all that Article 3 of the Regulation makes provision for two types of insolvency proceedings. Insolvency proceedings opened, in accordance with Article 3(1), by the competent court of the Member State within the territory of which the centre of a debtor's main interests is situated, described as the 'main proceedings', produce universal effects in that the proceedings apply to the debtor's assets situated in all the Member States in which the Regulation applies. Although, subsequently, proceedings under Article 3(2) may be opened by the competent court of the Member State where the debtor has an establishment, those proceedings, described as 'secondary proceedings', produce effects which are restricted to the assets of the debtor situated in the territory of the latter State (see Case C-341/04 Eurofood IFSC [2006] ECR I-3813, paragraph 28)." Referring affirmatively to the cited passage, see CJEU 17 November 2011, Case C-112/10 (Procureur-generaal bij het hof van beroep te Antwerpen v ZaZa Retail BV) and CJEU 15 December 2011, Case C-191/10 (Rastelli Davide e C. Snc v Jean-Charles Hidoux, in his capacity as liquidator appointed by the court for the company Médiasucre international).

[253] UNCITRAL Model Law (1997), Article 2(b). UNCITRAL Practice Guide (2009), under B "Glossary," in "2. Terms and explanations."

[254] DCFR Outline Edition 2009, Annex (Definitions), p. 560.

upholstery or furniture, including collections of art, books, or DVDs and objects of a scientific or historical nature.

"Netting"

Netting is the setting-off of monetary or nonmonetary obligations under financial contracts.[255]

The UNCITRAL Legislative Guide continues for "Netting agreement": a form of financial contract between two or more parties that provides for one or more of the following:
(i) The net settlement of payments due in the same currency on the same date whether by novation or otherwise;
(ii) Upon the insolvency or other default by a party, the termination of all outstanding transactions at their replacement or fair market values, conversion of such sums into a single currency, and netting into a single payment by one party to the other; or
(iii) The set-off of amounts calculated as set forth in subparagraph (ii) of this definition under two or more netting agreements.[256]

"Non-EU-State"

As explained in the context of the term "EU-State," there is not a concrete definition of EU-State within the EC Treaty or any other applicable instrument. It is self-evident that countries that do not form part of the European Union are Non-EU-States. Concerning the question whether Denmark is to be regarded as a Member State within the context of the EU Insolvency Regulation, see under "EU-State" above.

"Nonregistered movables"

Nonregistered movables are movables that are not recorded in a public register designated for the registration of rights.

"Obligation"

An obligation is a duty to perform that one party to a legal relationship, the debtor, owes to another party, the creditor.[257] See also: "Duty."

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[255] UNCITRAL Legislative Guide (2005) (adopted in 2004), para. 12, under B, "Glossary, Terms and definitions."

[256] UNCITRAL Legislative Guide (2005) (adopted in 2004), para. 12, under B, "Glossary, Terms and definitions."

[257] DCFR Outline Edition 2009, Annex (Definitions), p. 338.

"Office holder"

The EBRD Insolvency Office Holder Principles includes detailed rules on office holders, but do not include a clear definition. In Annex A to the EU Insolvency Regulation, nearly one hundred national names are listed for those persons or bodies that in the context of the Regulation have been given one designation, namely "liquidators." See also "Insolvency Administrator." Because of the tasks that an office holder might be expected to perform, the responsibilities that an office holder will have and the trust that is reposed in an office holder, it should be the case that an office holder should have some fundamental qualifications. These include general ability and intelligence, experience, professional knowledge, and good character. Further, in several countries, professions are regulated by a system of licensing. Office holders should be regarded as a professional body of persons and licensed accordingly.[258] Under the application of the EU Insolvency Regulation, a liquidator "is required to act with the appropriate knowledge of the Insolvency Regulation and its application in practice"; a liquidator "is required to act honestly, objectively, fairly and expeditiously in dealing with all parties concerned, including the courts."[259]

"Opening of proceedings"

The relevant instruments do not provide a complete or precise definition of the "opening" of insolvency proceedings. The EU Insolvency Regulation only refers to "the time of the opening of proceedings," which means the time at which the judgment opening proceedings becomes effective, whether it is a final judgment or not.[260] The Principles of European Insolvency Law (2003) ("PEIL") provide that a proceeding can be opened when the debtor is unable or is likely to become unable to pay his debts as they become due. The debtor or a creditor or a public authority can apply for the opening of the proceeding.[261] According to the PEIL, the effect of the opening of proceedings is that assets belonging to the debtor at the time of the opening of the proceeding and assets acquired thereafter are included in the proceeding. When the debtor is a natural person, certain assets are excluded from the proceeding.[262]

"Ordinary course of business"

"Ordinary course of business" generally means transactions consistent with both: (i) the operation of the debtor's business prior to insolvency proceedings; and (ii) ordinary business terms.[263]

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[258] EBRD Principles (2007), Principle 1.

[259] CoCo Guidelines (2007), Guideline 4.2-4.3.

[260] InsReg (2000), Article 2(f).

[261] PEIL (2003), Principle 1.2-1.3.

[262] PEIL (2003), Principle 3.1.

[263] UNCITRAL Legislative Guide (2005) (adopted in 2004), para. 12, under B, "Glossary, Terms and definitions," UNCITRAL Practice Guide (2009), under B "Glossary," in "2. Terms and explanations."

"Ownership"

"Ownership" is the most comprehensive right a person, the owner, can have over property, including the exclusive right, so far as consistent with applicable laws or rights granted by the owner, to use, enjoy, modify, destroy, dispose of, and recover the property.[264]

"Par est condicio omnium creditorum"

(Literally: "The condition of all creditors is: equal"). This maxim is widely employed to express the principle of equality of treatment and status to be accorded to all creditors generally. It is a principle that admits of numerous exceptions, which vary according to the provisions contained in the laws of the various countries.

"Parallel insolvency proceedings"

The EU Insolvency Regulation provides the possibility to open a secondary insolvency proceeding parallel to the main insolvency proceeding. The fundamental principle is that, where the center of a debtor's main interests is situated within the territory of a Member State, the courts of another Member State shall have jurisdiction to open insolvency proceedings against that debtor only if he possesses an establishment within the territory of that other Member State. The effects of those proceedings shall be restricted to the assets of the debtor situated in the territory of the latter Member State.[265] Furthermore, the Regulation provides that the opening of the proceedings referred to in Article 3(1) by a court of a Member State and that is recognized in another Member State (main proceedings) shall permit the opening of secondary proceedings in that other Member State, a court of which has jurisdiction pursuant to Article 3(2), without the debtor's insolvency being examined in that other state. These latter proceedings must be among the proceedings listed in Annex B. Their effects shall be restricted to the assets of the debtor situated within the territory of that other Member State.[266]

According to the EU Insolvency Regulation the opening of secondary proceedings may be requested by the liquidator in the main proceedings, or any other person or authority empowered to request the opening of insolvency proceedings under the law of the Member State within the territory of which the opening of secondary proceedings is requested.[267] In the NAFTA context, "Parallel proceedings" refers to "full liquidation or reorganization cases pending in two or three countries involving the same bankrupt [debtor]; an ancillary proceeding is not a parallel proceeding."[268] The UNCITRAL Model Law also provides for parallel proceedings: "After recognition of a foreign main proceeding, a proceeding under [identify laws of the enacting State relating to insolvency] may be commenced only if the debtor has assets in this State; the effects of that proceeding shall be restricted to the assets of the debtor that are located in this State and, to the extent necessary to implement cooperation

[264] DCFR Outline Edition 2009, Annex (Definitions), p. 561.

[265] InsReg (2000), Article 3.2.

[266] InsReg (2000), Article 27.

[267] InsReg (2000), Article 29.

[268] ALI NAFTA Principles, Appendix A, Definitions.

and coordination under articles 25, 26 and 27, to other assets of the debtor that, under the law of this State, should be administered in that proceeding."[269]

It should be stressed, however, that main proceedings and secondary proceedings under the application of the EU Insolvency Regulation do not operate on the same footing: "Main insolvency proceedings and secondary proceedings can, however, contribute to the effective realisation of the total assets only if all the concurrent proceedings pending are coordinated. The main condition here is that the various liquidators must cooperate closely, in particular by exchanging a sufficient amount of information. In order to ensure the dominant role of the main insolvency proceedings, the liquidator in such proceedings should be given several possibilities for intervening in secondary insolvency proceedings which are pending at the same time. For example, he should be able to propose a restructuring plan or composition or apply for realisation of the assets in the secondary insolvency proceedings to be suspended."[270]

"*Pari passu*" principle

Latin for "equally and without preference" (literally "on an equal footing," hence "proportionately"). This term is often used in bankruptcy proceedings where creditors are said to be paid *pari passu*, that is each creditor is paid pro rata in accordance with the amount of his claim.[271]

The EU Insolvency Regulation provides that in order to ensure equal treatment of creditors, a creditor who has, in the course of insolvency proceedings, obtained a dividend on his claim shall share in distributions made in other proceedings only where creditors of the same ranking or category have, in those other proceedings, obtained an equivalent dividend.[272] The same principle is reflected in the ALI NAFTA Principles: "A creditor should not be able to use distributions in multiple countries to recover in any country more than the percentage recovered by other creditors of the same class in that country."[273] Likewise, for "*pari passu*," the UNCITRAL Legislative Guide states: the principle according to which similarly situated creditors are treated and satisfied proportionately to their claim out of the assets of the estate available for distribution to creditors of their rank.[274]

"Party"

In the context of a legal proceeding, the term "party" may bear a narrow, technical meaning or a broader, more general one. In its narrow, technical sense, more fully expressed as "party to proceedings," the term denotes any person (whether natural or legal) who is formally joined in the legal process, either voluntarily or involuntarily. Such persons may be identified by name

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[269] UNCITRAL Model Law (1997), Article 28.

[270] InsReg (2000), Recital (20).

[271] Sands & Associates, Insolvency Dictionary (2000).

[272] InsReg (2000), Article 20.2.

[273] ALI NAFTA Principles (2003) (adopted in 2000), General Principle VII.

[274] UNCITRAL Legislative Guide (2005) (adopted in 2004), para. 12, under B, "Glossary, Terms and definitions."

in the formal documentation relating to the conduct of the proceeding, or alternatively they may be referred to in less specific terms. In the more general sense, the term "party" may be used to denote any persons who are, or who may be, in some way materially affected by the outcome of the proceeding. Such persons are more aptly referred to as "parties in interest" (see below).

"Party in interest"

A party in interest is any party whose rights, obligations, or interests are affected by insolvency proceedings or particular matters in the insolvency proceedings, including the debtor, the insolvency representative, a creditor, an equity holder, a creditor committee, a government authority, or any other person so affected. It is not intended that persons with remote or diffuse interests affected by the insolvency proceedings would be considered to be a party in interest.[275]

"Plan of reorganization"

See "reorganization plan."

"Plenary proceeding"

A forum or insolvency proceeding that addresses, on a plenary basis, administrative matters, including, on the one hand, operation of the debtor's business or assets, and, on the other hand, the filing, processing, and allowance of claims and distributions to creditors.[276]

"Post-commencement claim"

A claim arising after commencement of insolvency proceedings.[277]

"Preference"

A transaction that results in a creditor obtaining an advantage or irregular payment.[278]

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[275] UNCITRAL Legislative Guide (2005) (adopted in 2004), para. 12, under B, "Glossary, Terms and definitions." UNCITRAL Practice Guide (2009), under B "Glossary," in "2. Terms and explanations."

[276] Concordat, Glossary of terms.

[277] UNCITRAL Legislative Guide (2005) (adopted in 2004), para. 12, under B, "Glossary, Terms and definitions."

[278] UNCITRAL Legislative Guide (2005) (adopted in 2004), para. 12, under B, "Glossary, Terms and definitions."

"Preservation measures"

In relation to this term, the EU Insolvency Regulation provides that the court having jurisdiction to open the main insolvency proceedings should be enabled to order provisional and protective measures from the time of the request to open proceedings. Preservation measures both prior to and after the commencement of the insolvency proceedings serve as an important guarantee to the effectiveness of the insolvency proceedings.[279] Further, the court may grant provisional relief when necessary to preserve the ability to grant effective relief by final judgment or to maintain or otherwise regulate the status quo. "Provisional measures are governed by the principle of proportionality."[280]

"Presumption"

A "presumption" means that the existence of a known fact or state of affairs allows the deduction that something else should be held true, until the contrary is demonstrated.[281]

"Priority"

The right of a claim to rank ahead of another claim where that right arises by operation of law.[282]

"Priority claim"

"Priorities" (or "privileges") refers to "rights to a distribution in a bankruptcy proceeding prior to or with [a priority] over the rights of other creditors."[283] A "priority claim" is a claim that will be paid before payment of general unsecured creditors.[284]

"Privileged claim"

A "privileged" claim is a claim that, pursuant to statutory or other law, or pursuant to ranking rules, is given a preference or priority over common claims, including a public-law claim arising from the public law of a nation.[285]

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[279] InsReg (2000), Recital (16).

[280] ALI/UNIDROIT Principles (2006) (adopted in 2004), Principle 8.1.

[281] DCFR Outline Edition 2009, Annex (Definitions), p. 562.

[282] UNCITRAL Legislative Guide (2005) (adopted in 2004), para. 12, under B, "Glossary, Terms and definitions." UNCITRAL Practice Guide (2009), under B "Glossary," in "2. Terms and explanations."

[283] ALI NAFTA Principles, Appendix A, Definitions.

[284] UNCITRAL Legislative Guide (2005) (adopted in 2004), para. 12, under B, "Glossary, Terms and definitions."

[285] Concordat, Glossary of terms.

"Procedural coordination"

Coordination of the administration of two or more insolvency proceedings in respect of enterprise group members. Each of those members, including its assets and liabilities, remains separate and distinct. See also "enterprise group."[286]

"Protection of value"

"Protection of value" reflects measures directed at maintaining the economic value of encumbered assets and third-party-owned assets during the insolvency proceedings (in some jurisdictions referred to as "adequate protection"). Protection may be provided by way of cash payments, provision of security interests over alternative or additional assets, or by other means as determined by a court to provide the necessary protection.[287]

"Protocol"

The American Law Institute's Procedural Principle 14 ("Cooperation") reads as follows: "A. The administrators in parallel proceedings should cooperate in all aspects of the case. Such cooperation is best obtained by way of an agreement or 'protocol' that establishes decisionmaking procedures, but many decisions may be made informally as long as the essentials are agreed. B. A protocol for cooperation among proceedings should include, at a minimum, provisions for coordinated court approvals of decisions and actions when required and for communication with creditors as required under each applicable law. To the extent possible, it should also provide for timesaving procedures to avoid unnecessary and costly court hearings and other proceedings." From its elucidation, it follows that Procedural Principle 14.A goes to the first level of cooperation (cooperation between administrators), while Procedural Principle 14.B (interpreted as "Protocols approved by the courts") is regarded as a superior method of cooperation.[288] In the European Communication & Cooperation Guidelines for Cross-border Insolvency, a similar description is used: "Cooperation may be best attained by way of an agreement or 'protocol' that establishes decision-making procedures, although decisions may continue to be made informally as long as they are compatible with the substance of any such (insolvency) agreement[289] or 'protocol.'"[290]

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[286] UNCITRAL Legislative Guide, Part Three: Treatment of enterprise groups in insolvency (2010), "Glossary," under (d).

[287] UNCITRAL Legislative Guide (2005) (adopted in 2004), para. 12, under B, "Glossary, Terms and definitions."

[288] See Westbrook (Reporter), American Law Institute, Transnational Insolvency: Cooperation Among the NAFTA Countries, Principles of Cooperation Among the NAFTA Countries, Juris Publishing, Inc., 2003, p. 67.

[289] UNCITRAL Practice Guide (2009), under B "Glossary," in "1, Notes on terminology": "Cross-border agreements are most commonly referred to in some States as 'protocols,' although a number of other titles have been used including insolvency administration contract, cooperation and compromise agreement, and memorandum of understanding. These Notes attempt to compile practice with respect to as many forms of cross-border agreement as possible and, since the use of the term 'protocol' does not necessarily reflect the diverse

"Property"

"Property" means anything that can be owned: it may be movable or immovable, corporeal or incorporeal.[291]

"Public policy"

The UNCITRAL Model Law provides that "Nothing in this Law prevents the court from refusing to take an action governed by this Law if the action would be manifestly contrary to the public policy of this State."[292] The EU Insolvency Regulation follows the same concept, adding some examples: "Any Member State may refuse to recognise insolvency proceedings opened in another Member State or to enforce a judgment handed down in the context of such proceedings where the effects of such recognition or enforcement would be manifestly contrary to that State's public policy, in particular its fundamental principles or the constitutional rights and liberties of the individual."[293] See also the *Eurofood* case[294] and the *Probud* case.[295]

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nature of the agreements being used in practice, these Notes use the more general term 'cross-border agreement.'"

[290] CoCo Guidelines (2007) Guideline 12.4. For a sample of a protocol, see III-Committee on International Jurisdiction and Cooperation, Prospective Model International Cross-border Insolvency Protocol (Draft-Annotated, June 2009), available through www.iiiglobal.org. See for model clauses that can be used in drafting a protocol, UNCITRAL Practice Guide 2009.

[291] DCFR Outline Edition 2009, Annex (Definitions), p. 563.

[292] UNCITRAL Model Law (1997), Article 6.

[293] InsReg (2002), Article 26.

[294] Eurofood IFCS Ltd v Bank of America N.A, Case C-341/04, ECJ 2 May 2006 [2006] ECR I-3813: "On a proper interpretation of Article 26 of the Regulation, a Member State may refuse to recognize insolvency proceedings opened in another Member State where the decision to open the proceedings was taken in flagrant breach of the fundamental right to be heard, which a person concerned by such proceedings enjoys."

[295] MG Probud Gdynia sp. z o.o. v Hauptzollamt Saarbrücken, Case C-444/07, CJEU 21 January 2010, [2010] B.C.C. 453: "In accordance with recital 22 in the preamble to the Regulation, which states that grounds for refusal are to be reduced to the minimum necessary, there are only two such grounds. First, under Article 25(3) of the Regulation, the Member States are not obliged to recognise or enforce a judgment concerning the course and closure of insolvency proceedings which might result in a limitation of personal freedom or postal secrecy. Second, under Article 26 of the Regulation, any Member State may refuse to recognise insolvency proceedings opened in another Member State or to enforce a judgment handed down in the context of such proceedings where the effects of such recognition or enforcement would be manifestly contrary to that State's public policy, in particular its fundamental principles or the constitutional rights and liberties of the individual. With regard to this second ground for refusal, the Court stated initially in the context of the Brussels Convention that, since recourse to the public policy clause contained in Article 27(1) of that Convention constitutes an obstacle to the achievement of one of the fundamental aims of the Convention, namely to facilitate the free movement of judgments, such recourse is reserved for exceptional cases (Case C-7/98 Krombach [2000] ECR I-1935, paragraphs 19 and 21, and Eurofood IFSC, paragraph 62). The case-law relating to Article 27(1) of the Convention is transposable to the interpretation of Article 26 of the Regulation (Eurofood IFSC, paragraph 64)."

"Public register"

In general, a public register means a register, open for the public, in which the legal status of property (assets, goods) is registered. The EU Insolvency Regulation provides that the liquidator may request that the judgment opening the proceedings referred to in Article 3(1) be registered in the land register, the trade register, and any other public register kept in the other Member States. However, any Member State may require mandatory registration.[296]

"Ranking"

"Ranking" in relation to claims means putting the claims in an order of priority or subordination, which is determined by the law applicable.[297]

"Receiving court"

In UNCITRAL contexts, a "receiving court" is the court in the enacting state from which recognition and relief is sought. See "Enacting state."[298]

"Recognition"

Within the field of recognition of judgments, the ALI/UNIDROIT Principles require that "[a] final judgment awarded in another forum in a proceeding substantially compatible with these Principles must be recognized and enforced unless substantive public policy requires otherwise. A provisional remedy must be recognized in the same terms."[299] Moreover, as a general principle of recognition, the ALI NAFTA Principles demand that "[t]he bankruptcy of a debtor in one NAFTA country should be recognized and given appropriate effect under the circumstances in each of the other NAFTA countries. Recognition should be granted as quickly and inexpensively as possible, with a minimum of legal formalities."[300]

The UNCITRAL Model Law for Cross-Border Insolvency establishes criteria for determining whether a foreign proceeding is to be recognized (Articles 15-17) and provides that, in appropriate cases, the court of an enacting state may grant interim relief pending a decision on recognition (Article 19). The decision includes a determination whether the jurisdictional basis on which the foreign proceeding was commenced was such that it should be recognized as a "main" or a "non-main" foreign insolvency proceeding.

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[296] InsReg (2000), Article 22.1-22.2.

[297] Study Group on a European Civil Code, Principles Definitions and Model Rules of European Private Law, European Law Publishers (2008), Annex I (Definitions), p. 339. The definition is not included in DCFR Outline Edition 2009. "Ranking rules" are the rules by which claims and equity interests are ranked, see Concordat, Glossary of terms.

[298] UNCITRAL Judicial Perspective (2011), B "Glossary," under (f).

[299] ALI/UNIDROIT Principles (2006) (adopted in 2004), Principle 30.

[300] ALI NAFTA Principles (2003) (adopted in 2000), General Principle II.A-B.

The EU Insolvency Regulation provides its own system of recognition of judgments concerning the opening, conduct, and closure of insolvency proceedings that come within its scope and of judgments handed down in direct connection with such insolvency proceedings and that are handed down by another Member State. The system is based on immediate recognition. Such an automatic recognition means that the effects attributed to the insolvency proceedings, by the law of the State in which the proceedings were opened, extend to all other Member States, as recognition of judgments delivered by the courts of a Member State should be based on the principle of mutual trust. To that end, grounds for nonrecognition should be reduced to the minimum necessary.[301] Further, the Regulation states that any judgment opening insolvency proceedings handed down by a court of a Member State that has jurisdiction pursuant to Article 3 shall be recognized in all the other Member States from the time that it becomes effective in the State of the opening of proceedings.[302] The Regulation establishes as an effect of recognition of judgments that the judgment opening the proceedings referred to in Article 3(1) shall, with no further formalities, produce the same effects in any other Member State as under the law of the State of the opening of proceedings, unless the Regulation provides otherwise and as long as no proceedings referred to in Article 3(2) are opened in that other Member State.[303]

"Recognizing State"

"Recognizing State" is thus the expression used to refer to the State in accordance with whose law, or by the instrumentality of whose court, tribunal, or other officially sanctioned process, a foreign judgment or proceeding has been, or is in the process of being, recognized.

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[301] InsReg (2000), Recital 22.

[302] InsReg (2000), Article 16.

[303] InsReg (2000), Article 17. See MG Probud Gdynia sp. z o.o. v Hauptzollamt Saarbrücken, Case C-444/07, CJEU 21 January 2010: "Furthermore, it follows from Article 16(1) of the Regulation, read in conjunction with Article 17(1), that the judgment opening insolvency proceedings in a Member State is to be recognised in all the other Member States from the time that it becomes effective in the State of the opening of proceedings and that it is, with no further formalities, to produce the same effects in any other Member State as under the law of the State of the opening of proceedings. In accordance with Article 25 of the Regulation, recognition of all judgments other than that relating to the opening of insolvency proceedings also occurs automatically. As is shown by recital 22 in the preamble to the Regulation, the rule of priority laid down in Article 16(1) of the Regulation, which provides that insolvency proceedings opened in one Member State are to be recognised in all the Member States from the time that they produce their effects in the State of the opening of proceedings, is based on the principle of mutual trust (Eurofood IFSC, paragraph 39). It is indeed that mutual trust which has enabled not only the establishment of a compulsory system of jurisdiction which all the courts within the purview of the Regulation are required to respect, but also as a corollary the waiver by the Member States of the right to apply their internal rules on recognition and enforcement in favour of a simplified mechanism for the recognition and enforcement of judgments handed down in the context of insolvency proceedings (Eurofood IFSC, paragraph 40, and by analogy, with regard to the Brussels Convention, Case C-116/02 Gasser [2003] ECR I-14693, paragraph 72, and Case C-159/02 Turner [2004] ECR I-3565, paragraph 24)."

"Related person"

The term "related person" as to an insolvent debtor is used to express that in the case that the debtor is a legal entity, a related person would include: (i) a person who is or has been in a position of control of the debtor; and (ii) a parent, subsidiary, partner, or affiliate of the debtor. As to a debtor that is a natural person, a related person would include persons who are related to the debtor by consanguinity or affinity.[304]

"Relief"

"Relief" means assistance provided by the court in one state to a court, or to a foreign representative, of another state in which an insolvency proceeding has been commenced. Such assistance is predicated on the recognition of the foreign proceeding by the court by which assistance is provided.

"Remuneration"

In general "remuneration" is the compensation (honorarium) for an insolvency office holder: "Except as otherwise provided . . . . , each Country's Representatives and their respective employees, members, agents and professionals: (a) shall be compensated for their services solely in accordance with the legislation and other applicable laws of that Country or orders of that Country's Court and (b) shall not be required to seek approval of their compensation in the Court of the other Country."[305]

"Reorganization"

A "reorganization" is the process by which the financial well-being and viability of a debtor's business can be restored and the business continue to operate, using various means possibly including debt forgiveness, debt rescheduling, debt-equity conversions, and sale of the business (or parts of it) as a going concern.[306]

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[304] UNCITRAL Legislative Guide (2005) (adopted in 2004), para. 12, under B, "Glossary, Terms and definitions."

[305] III-Committee on International Jurisdiction and Cooperation, Prospective Model International Cross-border Insolvency Protocol (Draft-Annotated, June 2009), Article 6.4.

[306] UNCITRAL Legislative Guide (2005) (adopted in 2004), para. 12, under B, "Glossary, Terms and definitions." UNCITRAL Practice Guide (2009), under B "Glossary," in "2. Terms and explanations."

"Reorganization plan"

A "reorganization plan" (or: plan of reorganization) is thus a plan by which the financial well-being and viability of the debtor's business can be restored.[307]

"Res judicata"

"Res judicata" is the plea that the matter in issue has already been the subject of a final adjudication by a court of competent jurisdiction.

"Right"

Depending on the context, a "Right" may mean (a) the correlative of an obligation or liability (as in "a significant imbalance in the parties' rights and obligations arising under the contract"); (b) a proprietary right (such as the right of ownership); (c) a personality right (as in a right to respect for dignity, or a right to liberty and privacy); (d) a legally conferred power to bring about a particular result (as in "the right to avoid" a contract); (e) an entitlement to a particular remedy (as in a right to have performance of a contractual obligation judicially ordered), or (f) an entitlement to do or not to do something affecting another person's legal position without exposure to adverse consequences (as in a "right to withhold performance of the reciprocal obligation").[308]

"Rights in rem"/In rem security rights

In general, this term may be defined as "A right . . . exercisable against the world at large."[309] Within the context of insolvency proceedings, the EU Insolvency Regulation provides special rules for protecting the rights in rem of third parties in connection with the opening of insolvency proceedings. In this sense, the Regulation states in Article 5:
"1. The opening of insolvency proceedings shall not affect the rights in rem of creditors or third parties in respect of tangible or intangible, moveable or immoveable assets - both specific assets and collections of indefinite assets as a whole which change from time to time - belonging to the debtor which are situated within the territory of another Member State at the time of the opening of proceedings.
2. The rights referred to in paragraph 1 shall in particular mean:
(a) the right to dispose of assets or have them disposed of and to obtain satisfaction from the proceeds of or income from those assets, in particular by virtue of a lien or a mortgage;
(b) the exclusive right to have a claim met, in particular a right guaranteed by a lien in respect of the claim or by assignment of the claim by way of a guarantee;
(c) the right to demand the assets from, and/or to require restitution by, anyone having possession or use of them contrary to the wishes of the party so entitled;
(d) a right in rem to the beneficial use of assets.

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[307] UNCITRAL Legislative Guide (2005) (adopted in 2004), para. 12, under B, "Glossary, Terms and definitions." UNCITRAL Practice Guide (2009), under B "Glossary," in "2. Terms and explanations."

[308] DCFR Outline Edition 2009, Annex (Definitions), p. 565.

[309] Black's Law Dictionary, Thomson Reuters, Ninth Edition (2009).

3. The right, recorded in a public register and enforceable against third parties, under which a right in rem within the meaning of paragraph 1 may be obtained, shall be considered a right in rem."

According to the Principles of European Insolvency Law, a security right continues to exist after the opening of the proceeding. Enforcement, however, may be subject to special rules. An asset subject to a security right is realized by the administrator or the secured creditor. The secured creditor is entitled to the proceeds of such asset, up to the amount of the secured claim and subject to the rights of creditors with higher ranking claims.[310]

"Sale as a going concern"

Sale as a going concern is the sale or transfer of a business in whole or substantial part, as opposed to the sale of separate assets of the business.

"Secondary insolvency proceedings"

The EU Insolvency Regulation aims to protect the diversity of interests, for which reason secondary proceedings can be opened to run in parallel with the main proceedings. Secondary proceedings may be opened in the Member State where the debtor has an "establishment." See "establishment." The effects of secondary proceedings under the EU Insolvency Regulation are limited to the assets located in that State.[311] The major features of this concept in connection with main insolvency proceedings in the Regulation have been included above in the description of "Parallel insolvency proceedings." See also "Foreign non-main proceeding."[312]

"Secured claim"

A "secured" claim is a claim that is a valid charge upon or interest in collateral to the extent of the value of the collateral.[313] Another description is: a "secured claim" is a claim assisted by a

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[310] PEIL (2003), Principle 9.1-9.2.

[311] MG Probud Gdynia sp. z o.o. v Hauptzollamt Saarbrücken, Case C-444/07, CJEU 21 January 2010: ". . . . it should be noted first of all that Article 3 of the Regulation makes provision for two types of insolvency proceedings. Insolvency proceedings opened, in accordance with Article 3(1), by the competent court of the Member State within the territory of which the centre of a debtor's main interests is situated, described as the 'main proceedings', produce universal effects in that the proceedings apply to the debtor's assets situated in all the Member States in which the Regulation applies. Although, subsequently, proceedings under Article 3(2) may be opened by the competent court of the Member State where the debtor has an establishment, those proceedings, described as 'secondary proceedings', produce effects which are restricted to the assets of the debtor situated in the territory of the latter State (see Case C-341/04 *Eurofood IFSC* [2006] ECR I-3813, paragraph 28)."

[312] UNCITRAL Practice Guide (2009), under B "Glossary," in "2. Terms and explanations" provides for "secondary proceedings": "non-main proceedings conducted in European Member States under the EC Regulation."

[313] Concordat, Glossary of terms.

security interest taken as a guarantee for a debt enforceable in case of the debtor's default.[314] Logically, the expression "Secured creditor" means: a creditor holding a secured claim.[315]

"Security interest"

"Security interest" means: a right in an asset to secure payment or other performance of one or more obligations.[316]

"Service list"

A "service list" is the list of interested parties that are given notice of a particular proceeding or step in a proceeding in accordance with the law and/or practice in such state.[317]

"Set-off"

This term may be defined as follows: "Set-off is the process by which a person uses a right to performance held against another person to extinguish in whole or in part an obligation owed to that person."[318] With different language, the UNCITRAL Legislative Guide expresses the same process: for "Set-off": where a claim for a sum of money owed to a person is applied in satisfaction or reduction against a claim by the other party for a sum of money owed by that first person."[319]

In literature, it is said that "Set-offs are not exactly another example of a security interest, but the Regulation treats them in a similar way. In other words, this is another exceptional limitation to the scope of the *lex concursus*. It only applies to those cases where the creditor is also simultaneously a debtor to the insolvent state and where the *lex concursus* would lead to the conclusion that a set-off would not be allowed in this particular case."[320]

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[314] UNCITRAL Legislative Guide (2005) (adopted in 2004), para. 12, under B, "Glossary, Terms and definitions."

[315] UNCITRAL Legislative Guide (2005) (adopted in 2004), para. 12, under B, "Glossary, Terms and definitions."

[316] UNCITRAL Legislative Guide (2005) (adopted in 2004), para. 12, under B, "Glossary, Terms and definitions."

[317] See III-Committee on International Jurisdiction and Cooperation, Prospective Model International Cross-border Insolvency Protocol (Draft-Annotated, June 2009), Article 2(1)(x).

[318] DCFR Outline Edition 2009, Annex (Definitions), p. 566.

[319] UNCITRAL Legislative Guide (2005) (adopted in 2004), para. 12, under B, "Glossary, Terms and definitions."

[320] Paul Torremans, Cross Border Insolvencies in EU, English and Belgian Law, Kluwer Law International (2002), p. 178.

"Shall/should"

The word "shall" as well as such terms as "should" or "may consider" have been used throughout the text as though they were interchangeable. The Reporters have not intended to use a different meaning, where the language of all principles, as a matter of course, is not legally binding or enforceable. The words express a similar meaning and many times fit into the context of the chosen principle, for example, in as far as addressed to courts, the words "may consider" seemed more appropriate.

"Shall not affect"

In the context of the EU Insolvency Regulation, this phrase is employed in several provisions. These are the Articles 5-7:
- The opening of insolvency proceedings shall not affect the rights in rem of creditors or third parties in respect of tangible or intangible, moveable or immoveable assets.[321]
- The opening of insolvency proceedings shall not affect the right of creditors to demand the set-off of their claims against the claims of the debtor, where such a set-off is permitted by the law applicable to the insolvent debtor's claim.[322]
- The opening of insolvency proceedings against the purchaser of an asset shall not affect the seller's rights based on a reservation of title where at the time of the opening of proceedings the asset is situated within the territory of a Member State other than the State of opening of proceedings.[323]

With regard to Articles 5-7 of the Regulation, "shall not affect" means that the *lex concursus* of the main insolvency proceedings shall not affect the rights in rem of creditors or third parties in respect of certain assets belonging to the debtor that are situated within the territory of another Member State at the time of the opening of proceedings. The majority of legal commentary explains the wording "shall not affect" as meaning that the secured creditor may exercise all his rights, undisturbed and unaffected by any legal consequence of the *lex fori concursus*. This is sometimes referred to as the "hard and fast rule" or the "maximalist view," as it also allows an exercise that is not limited by the law applicable to the security right itself.[324]

"Share"

In general, a share means the right to a proportional share in the capital of a company.

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[321] InsReg (2000), Article 5.1.

[322] InsReg (2000), Article 6.1.

[323] InsReg (2000), Article 7.1.

[324] Claudia Naumann, *Die Behandlung dinglicher Kreditsicherheiten und Eigentumsvorbehalte nach den Artikeln 5 und 7 EuInsVo sowie nach autonomem deutschen Insolvenzkollisionsrecht*, Europäische Hochschulschriften, Reihe II, Rechtswissenschaft, Vol. 4011, 2004, at 214, submits, based on a detailed analysis of Articles 5 and 7 and its translation into fourteen languages (however not including Dutch literature) that the wording "shall not affect" *('onverlet' laat; 'nicht berührt', 'n'affecte pas', etc*) in nearly all languages can be read as to mean either "no effect whatsoever on the right in rem" or "not to be influenced to the detriment of the holder of the right in rem."

"Situs"

The place where a thing (i.e., an item of property) is situated.

"Solely"

To delimitate the meaning and scope of this term in the context of insolvency may be an ambiguous task. It may be regarded as denoting "by this alone, and by no other . . . ." Thus, in the EU Insolvency Regulation, it may be found as follows:
- The effects of insolvency proceedings on a contract conferring the right to acquire or make use of immoveable property shall be governed solely by the law of the Member State within the territory of which the immoveable property is situated.[325]
- Without prejudice to Article 5, the effects of insolvency proceedings on the rights and obligations of the parties to a payment or settlement system or to a financial market shall be governed solely by the law of the Member State applicable to that system or market.[326]
- The effects of insolvency proceedings on employment contracts and relationships shall be governed solely by the law of the Member State applicable to the contract of employment.[327]
- The effects of insolvency proceedings on a lawsuit pending concerning an asset or a right of which the debtor has been divested shall be governed solely by the law of the Member State in which that lawsuit is pending.[328]
- "A person should not be required to provide security for costs, or security for liability for pursuing provisional measures, solely because the person is not a national or resident of the forum state."[329]

In these provisions, "solely" can be interpreted as meaning that only the law of the Member State, including its insolvency laws, will determine such effects.[330]

"State"

In general the term "State" (or: country) may be defined as "The political system of a body of people who are politically organized; the system of rules by which jurisdiction and authority are exercised over such a body of people."[331] "State" means an entity with a defined territory and a permanent population, under the control of its own government, that engages in, or has the capacity to engage in, foreign relations with other such entities. The allocation of authority between a State and its territorial subdivisions is determined under the law of that State.[332] Within the scope of international law, it may be said that "State is an entity having exclusive jurisdiction with regard to its territory and personal jurisdiction in view of its nationals. Particularly because of the principle of equality the definition of State can only be of a

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[325] InsReg (2000), Article 8.
[326] InsReg (2000), Article 9.1.
[327] InsReg (2000), Article 10.
[328] InsReg (2000), Article 15.
[329] ALI/UNIDROIT Principles (2006) (adopted in 2004), Principle 3.3.
[330] See Virgós / Schmit Report (1996), para. 118.
[331] Black's Law Dictionary, Thomson Reuters, Ninth Edition (2009).
[332] Intellectual Property Principles, § 101(5).

rudimentary and simplifying character because it must embrace all kind of States."[333] The concept of State within the European context has been previously referred to in the explanations of the concepts "EU-State" and "Non-EU-State."

"State in which assets are situated"

The Insolvency Regulation defines "states in which assets are situated" as, in the case of:
- tangible property, the Member State within the territory of which the property is situated,
- property and rights ownership of or entitlement to which must be entered in a public register, the Member State under the authority of which the register is kept,
- claims, the Member State within the territory of which the third party required to meet them has the center of his main interests, as determined in Article 3(1).[334]

"Stay"

The procedural effect of a stay or a stay of the proceedings is recognized in several legal instruments.
Brussels I determines that "1. Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established" and "2. Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court."[335] In the context of insolvency, the ALI NAFTA Principles establishes as a recommendation for legislation or international agreement that: "The NAFTA countries should provide by law that a bankruptcy case that is a main proceeding in any of them will produce an automatic stay under domestic law in all three countries."[336] The UNCITRAL Legislative Guide provides: "'Stay of proceedings': a measure that prevents the commencement, or suspends the continuation, of judicial, administrative or other individual actions concerning the debtor's assets, rights, obligations or liabilities, including actions to make security interests effective against third parties or to enforce a security interest; and prevents execution against the assets of the insolvency estate, the termination of a contract with the debtor, and the transfer, encumbrance or other disposition of any assets or rights of the insolvency estate."[337]

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[333] Encyclopedia of Public International Law, Vol. 4, published under the auspices of the Max Planck Institute of Compartative Public Law and International Law, under the direction of Rudolf Bernhardt, North-Holland (2000). The Reporters acknowledge that the concept of "state," under certain circumstances, may be problematic to determine, examples being Abkhazia and South Ossetia (self-proclaimed states, broken away from Georgia), Kosovo, Western Sahara, or Northern Cyprus. It is beyond this Report to further discuss this topic.

[334] InsReg (2000), Article 2(g).

[335] Brussels I (2001), Article 27.1-27.2.

[336] ALI NAFTA Principles (2003) (adopted in 2000), Recommendation 2.

[337] UNCITRAL Legislative Guide (2005) (adopted in 2004), para. 12, under B, "Glossary, Terms and definitions." Ditto: UNCITRAL Practice Guide (2009), under B "Glossary," in "2. Terms and explanations."

"Substantive consolidation"

The expression "substantive consolidation" is used to describe the treatment of the assets and liabilities of two or more enterprise group members as if they were part of a single insolvency estate.[338] See "enterprise group."

"Suspect period"

"Suspect period" is an expression for the period of time by reference to which certain transactions may be subject to avoidance. The period is generally calculated retroactively from the date of the application for commencement of insolvency proceedings or from the actual date of commencement.[339]

"Term"

"Term" means any provision, express or implied, of a contract or other juridical act, of a law, of a court order, or of a legally binding usage or practice: it includes a condition.[340]

"Termination"

"Termination," in relation to an existing right, obligation, or legal relationship, means bringing it to an end with prospective effect except in so far as otherwise provided.[341]

"Time of opening of proceedings"

The EU Insolvency Regulation provides that "the time of the opening of proceedings" shall mean the time at which the judgment opening proceedings becomes effective, whether it is a final judgment or not.[342]

"Unsecured creditor"

A creditor without a security interest.[343]

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[338] UNCITRAL Legislative Guide, Part Three: Treatment of enterprise groups in insolvency (2010), "Glossary," under (e).

[339] UNCITRAL Legislative Guide (2005) (adopted in 2004), para. 12, under B, "Glossary, Terms and definitions."

[340] DCFR Outline Edition 2009, Annex (Definitions), p. 568.

[341] DCFR Outline Edition 2009, Annex (Definitions), p. 568.

[342] InsReg (2000), Article 2(f).

[343] UNCITRAL Legislative Guide (2005) (adopted in 2004), para. 12, under B, "Glossary, Terms and definitions."

"Valid"

"Valid," in relation to a juridical act or legal relationship, means that the act or relationship is not void and has not been avoided.[344]

"Vested right"

A vested right is an absolute right, vested in an asset.

"*Vis attractiva concursus*"

(Literally: "The attractive force of the bankruptcy proceeding"). A rule of jurisdiction, based on the premise that the court in which bankruptcy proceedings are taking place should exercise jurisdiction over any related or concurrent proceedings concerning the same debtor.

"Void"

"Void," in relation to a juridical act or legal relationship, means that the act or relationship is automatically of no effect from the beginning.[345] "Voidable," in relation to a juridical act or legal relationship, means that the act or relationship is subject to a defect that renders it liable to be avoided and hence rendered retrospectively of no effect.[346]

"Voluntary restructuring negotiations"

Negotiations that are not regulated by the insolvency law and generally will involve negotiations between the debtor and some or all of its creditors aiming at a consensual modification of the claims of participating creditors.[347]

"Winding-up proceedings"

The EU Insolvency Regulation provides a definition of this term, and states that these are insolvency proceedings that entail the partial or total divestment of a debtor and the appointment of a liquidator: involving realizing the assets of the debtor, including where the proceedings have been closed by a composition or other measure terminating the insolvency,

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[344] DCFR Outline Edition 2009, Annex (Definitions), p. 569.

[345] DCFR Outline Edition 2009, Annex (Definitions), p. 569.

[346] DCFR Outline Edition 2009, Annex (Definitions), p. 569. The Concordat, Glossary of terms, uses "Voiding rules," for "Rules relating to voidness, voidability or enforce-ability of claims or pre-insolvency transactions."

[347] UNCITRAL Legislative Guide (2005) (adopted in 2004), para. 12, under B, "Glossary, Terms and definitions."

or closed by reason of the insufficiency of the assets. Those proceedings are listed in Annex B of the Insolvency Regulation.[348]

[348] InsReg (2000), Article 2(c) combined with Article 1(1).

ANNEX

GLOBAL RULES ON CONFLICT-OF-LAWS MATTERS IN INTERNATIONAL INSOLVENCY CASES

STATEMENT OF THE REPORTERS

1. Introduction

In the main sections of our Report, we have examined the feasibility of transforming the ALI Principles of Cooperation Among the NAFTA Countries into a statement of principles suitable for global application. We believe it to be an integral requirement of such a mechanism for cooperation between courts of independent sovereign states that there should be a standard framework of commonly accepted rules to define the circumstances under which insolvency proceedings that are opened in one state are considered eligible to be accorded recognition and cooperation pursuant to the terms of the Global Principles. Also of vital importance is the promotion of internationally standardized definitions of the key terms that are employed in formulating the rules and principles on which the processes of international cooperation are to be based. The aspect of definition is addressed in the Appendix to this Report.

We are also convinced that the operation of these Global Principles would be greatly enhanced by a parallel process aimed at building a consensus regarding the principles to be applied to resolving conflict-of-laws issues in international insolvency. Even if it is possible to achieve general agreement as to the appropriate jurisdictional criteria to be employed for the purpose of opening insolvency proceedings, it is inevitably going to be the case that for the indefinite future, the domestic insolvency laws of the many sovereign states of the world will continue to differ from one another in numerous ways. It is therefore of considerable importance to try to reach consensus as to the choice-of-law approach to be applied in whichever forum insolvency proceedings happen to be opened. In this way, interested parties will be better able to anticipate the outcome that will result from the application of the provisions and processes of the relevant substantive law or laws to the circumstances of their particular claims or interests. The attainment of enhanced certainty and predictability of such outcomes is therefore a worthwhile goal to pursue. This objective can be facilitated by establishing agreed rules of choice of laws that will be applied by courts in relation to the issues that are encountered in an international insolvency case over which they are exercising jurisdiction. Such uniform rules, operated in conjunction with standardized rules for the exercise of jurisdiction, would introduce much-needed stability in the otherwise volatile and uncertain process of evaluating the possible consequences of insolvency for international commercial relationships.

The range of matters involving a potential choice of law is extremely wide. It would be unduly ambitious, as well as unrealistic, at this time to attempt to establish global rules for every conceivable choice-of-law issue that might arise in an international insolvency case. In the present state of the movement towards harmonization of the treatment of international insolvency matters, we believe it would be prudent to limit this exercise to exploring a

selection of issues that are perceived to be of fundamental importance when considered in the context of the commercial relationship between a debtor and its creditors. In essence, this entails providing a general rule as to the law by which insolvency proceedings and their effects are to be governed, and a number of additional rules that are to operate by way of exceptions to that general rule in certain, defined situations. The Reporters' proposals for addressing that task, by means of uniform Rules, are set out in full in section 2 below. In section 3, the individual rules are analyzed and explained, and the Reporters' Notes provide additional information incorporating the comments of the Consultants who have participated in this project. It is envisaged that the proposed Global Rules could serve as the basis for international negotiation under the auspices of one or more appropriate organizations. To become formally applicable by national courts, it would be necessary for the Global Rules to become embodied in an international convention or model law to which a significant number of states might, in due course, become contracting or enacting parties.

The proposals regarding the principles to be applied to resolving conflict-of-laws issues in international insolvency are timely. In the latter part of the 20th century, rules regarding applicable law in international insolvency cases mainly were developed in the context of the application of general rules of private international law. The situation symbolized great uncertainty and unpredictability for parties concerned, while courts did not have a solid framework as a basis for their judgments. Until the beginning of the 21st century, the creation of a body of rules concerning conflict-of-laws (private-international-law) rules in international insolvency matters came from scholars, although their work may not have been understood or appreciated, see, e.g., D. Prosser, Interstate Publication, (1953) 51 Michigan Law Review 959, at 971: "The realm of the conflict of laws is a dismal swamp, filled with quaking quagmire, and inhabited by learned but eccentric professors who theorise about mysterious matter in a strange and incomprehensible jargon." See, with regard to conflict-of-laws rules in general in private international law, Horatia Muir Watt, Choice of Law in Integrated and Interconnected Markets: a Matter of Political Economy. Ius Commune Lectures on European Private Law No. 7, 2003 and Mathias Reimann and Reinhard Zimmermann (eds.), The Oxford Handbook of Comparative Law, Oxford University Press, 2006, and with regard to cross-border insolvency matters, Jay L. Westbrook, Choice of Avoidance Law in Global Insolvencies, in: 17 Brooklyn Journal of International Law 499, 517 (1991); Richard E. Coulson, Choice of Law in United States Cross-Border Insolvencies, 32 Denver Journal of International Law & Policy 275-314 (2004); Jay L. Westbrook, Universalism and Choice of Law, 23 Penn State International Law Review 625 (2005); Jay L. Westbrook, Avoidance of Pre-Bankruptcy Transactions in Multinational Bankruptcy cases, in: 42 Texas International Law.Journal 899 (2007); Ian F. Fletcher, Insolvency in Private International Law. National and International Approaches, Oxford Private International Law Series, Oxford University Press, 2nd ed. 2005, 1.01ff; Bob Wessels, International Insolvency Law, Deventer: Kluwer, 3rd ed., 2012, K. Pannen / S. Riedemann, in: Klaus Pannen, European Insolvency Regulation, Berlin: Walter de Gruyter, 2007, p. 7ff.

In recent years, however, national legislators have taken initiatives to draft legislation concerning conflict-of-laws rules applicable in international insolvency law matters. Although these initiatives are a relatively fresh departure, two approaches seem to emerge. In the first approach, general rules on conflict-of-laws matters are drafted in the form of a Code, which includes a special section of law applicable to international insolvency matters, see, e.g., the Belgian Code of Private International Law of 2004, which includes a Chapter XI on Collective proceedings concerning insolvency (Articles 116–121). The second approach, which seems to be favored by national (European) legislators, is based on an extension

model, in which a modified and sometimes selected group of provisions have been drafted, inspired by the conflict-of-laws rules of the EU Insolvency Regulation (Articles 4–15). These latter rules are already binding in their entirety and directly applicable in 26 Member States as regards any matter that falls within the scope of the EU Insolvency Regulation. The extension relates to applicability of rules inspired by these Articles to matters that happen to fall outside the scope of the Regulation, and more generally to relationships with states that are not bound by the Regulation. See, for instance, Germany (Articles 336-341 and 351 Insolvency Code), Spain (Articles 201-209 *Ley Concursal* 22/2003) and the Netherlands (Articles 10.4.1-10.4.11 pre-draft 2007). For discussion, see Anna-Maja Schaefer, *Das autonome internationale Insolvenzrecht Spaniens im Vergleich zum deutschen Recht*, Schriften der Deutch-Spanischen Juristenvereinigung, Band 31, Peter Lang, Frankfurt, 2009; Jeroen van der Weide, Conflict of Law Rules: Section 10.4, in: Bob Wessels and Paul Omar (eds.), Crossing (Dutch) Borders in Insolvency, Nottingham, Paris: INSOL Europe 2009, pp. 87-95; Ian Fletcher, Commentary on Section 10.4, in: Bob Wessels and Paul Omar (eds.), Crossing (Dutch) Borders in Insolvency, Nottingham, Paris: INSOL Europe 2009, pp. 95-97; Nauta, M-L, and F. Bulten, Introduction to Spanish Cross-Border Insolvency Law—An Adequate Connection with Existing International Insolvency Legislation, 18 International Insolvency Review, Spring 2009, pp. 59-77.

In an aim to provide "certainty with respect to the effects of insolvency proceedings on the right and claims of parties affected by those proceedings," the UNCITRAL Legislative Guide on Insolvency Law (2005) (adopted in 2004), Part Two, section I.C. (paras. 80-91) has drafted, in close cooperation with the Hague Conference on Private International Law, five recommendations concerning the applicable law in insolvency proceedings. The recommendations, which are numbered as 30-34 inclusive, proclaim as their basic rule a proposition identical to that embodied in the EU Insolvency regulation, namely that the *lex fori concursus* shall govern the commencement, conduct, administration, and conclusion of insolvency proceedings. Where the UNCITRAL text parts company with the EU Regulation is in proposing a much more limited range of exceptions to the application of the *lex concursus*. Only two excepted cases are proposed (contained in recommendations 32 and 33), the first to accommodate the special arrangements that are operative among participants in a payment or settlement system or in a regulated financial market, and the second to enable the effects of insolvency proceedings on contracts of employment ("labour contracts") to remain subject to the law applicable to the contract. With respect, the Reporters consider that so limited a range of exceptions to the dominant role of the *lex concursus* is unlikely to prove commercially convenient or acceptable to the majority of parties engaged in international trade and business, given the present stage of uneven development of national laws governing such sensitive matters as security interests, set-off, and transaction avoidance. We therefore proclaim our allegiance to the alternative approach embodied in articles 4-15 of the EU Regulation (notably in articles 5, 6, and 13) whereby additional exceptions to the application of the *lex concursus* are permitted, under controlled circumstances, in respect of each of the three matters just mentioned.

It should be noted that the proposals set out in this Annex regarding conflict-of-laws rules do not aim to address "inter-state" conflict-of-law matters in the sense that is sometimes employed with reference to multijurisdictional entities such as federal states. For the purposes of the present Report, the term "state" (or: country) has been defined in the Glossary of Terms and Descriptions in the Appendix to this Report as "The political system of a body of people who are politically organized; the system of rules by which jurisdiction and authority are exercised over such a body of people." In this context, "inter-state" conflict of law may occur

internally within states with a mixed jurisdiction; a state with separate regions (the People's Republic of China, with Special Administrative Regions Hong Kong and Macao, may form such an example); or a federation of states, for instance Germany (which has 16 "*Bundesländer*"), and the U.S.A. See James T. Markus and Don J. Quigley, Conflict of Laws-Which State Rules Govern?, ABI Journal, November 1999, p. 18ff.

2. Text of the Global Rules

GLOBAL RULES ON CONFLICT-OF-LAWS MATTERS IN INTERNATIONAL INSOLVENCY CASES

A. General Provisions

Rule 1 Scope

These Global Rules shall apply to insolvency proceedings that are opened in a state which has jurisdiction for that purpose according to the provisions of Global Principle 13 of the Global Principles for Cooperation in International Insolvency Cases.

Rule 2 International Obligations of This State

These Global Rules shall not affect whatsoever the effects of binding international rules related to choice of law arising out of any treaty or other form of agreement to which [this state] is a party with one or more other states.

Rule 3 *Ex Officio* Application

These Global Rules and the law thereby indicated are to be applied *ex officio*.

Rule 4 Interpretation

In the interpretation of these Global Rules, regard is to be had to their international origin and to the need to promote uniformity in their application and the observance of good faith.

Rule 5 Exclusion of Renvoi

In applying these Global Rules, any reference to the law of a state means the internal ("domestic") rules of law in force in that state other than its rules of private international law.

B. Localization of Assets

Rule 6 Immovable Property

6.1. Immovables, and rights vested in or attached to them, are located at the place where the immovable, and the right vested in it or attached to it, is registered in a public register designated for the registration of rights.
6.2. If an immovable, and the right vested in it or attached to it, is not recorded in a public register designated for the registration of rights, then the immovable, and the right vested in it or attached to it, is located where the immovable is situated.

Rule 7 Nonregistered Movables

7.1. Nonregistered movables, and rights vested in or attached to them, are located at the place where the nonregistered movable is situated.
7. 2. For the purposes of Global Rule 7.1, the following legal presumptions apply:

a. Movables recorded in a vehicle license register, and rights vested in or attached to them, are presumed to be located at the place where the movable is recorded in the vehicle license register.

b. Goods in transit, as well as rights vested in or attached to them, are presumed to be located in the state of destination.

Rule 8 Registered Movables

8.1. Registered movables, and separately registered rights vested in or attached to them, are located at the place where the movable or the right in question is recorded in a public register designated for the registration of rights.
8.2. For the purposes of Global Rule 8.1, unless there is proof to the contrary, registered movables shall be presumed to be located at the place where the movable is recorded in a public register designated for the registration of rights.

Rule 9 Claims

9.1. Claims payable to bearer or order, and rights vested in or attached to them, are located at the place where the bearer or order document is situated.
9.2. Claims of known creditors, and rights vested in or attached to them, are located at the place where the debtor has his seat or his domicile.

Rule 10 Shares in Joint-Stock Companies

10.1. Bearer shares, and rights vested in or attached to them, are located at the place where the bearer share certificate is situated.
10.2. Registered shares, and rights vested in them, are located at the place where the registered share, or the right vested in it, is recorded in a register of shareholders kept by the company.

10.3. If a registered share, or a right vested in it, is not recorded in a register of shareholders, the registered share or the right vested in it is located at the place where the company has the center of its main interests. The center of the main interests of the company is presumed to be the place of its registered office.
10.4. Book-entry shares, and rights vested in them, are located at the place of the registered office of the intermediary with which the securities account is kept in which the book-entry shares are administered.

Rule 11 Intellectual Property Rights

Patent rights, trademark rights, and copyrights, and rights vested in them, are located at the place where the patent holder, trademark proprietor, or copyright holder has his seat or his domicile.

C. General Rules of Law Applicable to Insolvency Proceedings

Rule 12 Law of the State of the Opening of Proceedings

12.1. Save as otherwise provided in [this Act/these Rules], the law applicable to insolvency proceedings and their effects shall be that of the state within the territory of which such proceedings are opened, hereafter referred to as "the state of the opening of proceedings."
12.2. The law of the state of the opening of proceedings shall determine the conditions for the opening of those proceedings, their conduct, administration, conversion, and their closure.

Rule 13 Law of the State of the Opening of Non-Main Proceedings

If insolvency proceedings are opened in a jurisdiction other than that where the center of main interests of the debtor is situated ("non-main" proceedings), the effects of the application of the law of the state of the opening of such proceedings shall be restricted to those assets of the debtor situated in the territory of that state at the time of the opening of those proceedings.

Rule 14 Cross-Border Movement of Assets

In relation to any asset of the debtor that is of a moveable character, Global Rules 12 and 13 shall apply, subject to the following modifications:

(a) Any rule of insolvency law that is applicable by virtue of the localization of an asset in the territory of the state of the opening of insolvency proceedings, at the time of the opening of the proceedings, shall not apply if it is shown that the asset in question has been moved to that location from the territory of another state, to whose insolvency law it would otherwise have been properly subject, in circumstances that suggest that the transfer was effected wholly or primarily for the purpose of avoiding the effects of the law of the other state, including its insolvency law.

(b) Conversely, where an asset has been moved from the territory of one state to that of another state under the circumstances stated in paragraph (a), the effects of any insolvency proceedings that are opened in the former state shall apply to the asset in question.

(c) In the absence of evidence to the contrary, it shall be presumed that any asset that has been removed from the territory of the state in which insolvency proceedings are opened, within 60 days prior to the opening of such proceedings, was made with intent to avoid the effects of the law of that state. It is for the party who seeks to maintain the validity of the act, whereby the property was removed from the territory of that state, to provide evidence that the transfer was made for a bona fide and legitimate purpose.

(d) Except in a case to which paragraph (c) is applicable, it is for the party who alleges that the provisions of paragraphs (a) and (b) of this Rule are applicable in relation to a particular asset to prove that this is the case.

D. Exceptions to the General Rules of Law Applicable to Insolvency Proceedings

Rule 15 Rights of Secured Creditors

15.1. Insolvency proceedings shall not affect the rights in rem of creditors or third parties in respect of tangible or intangible, moveable or immoveable assets—both specific assets and collections of indefinite assets as a whole that change from time to time—belonging to the debtor, which are situated within the territory of another state at the time of the opening of proceedings.

15.2. The rights referred to in Global Rule 15.1 shall in particular mean:

(a) The right to dispose of assets or have them disposed of and to obtain satisfaction from the proceeds of or income from those assets, in particular by virtue of a lien or a mortgage;

(b) The exclusive right to have a claim met, in particular a right guaranteed by a lien in respect of the claim or by assignment of the claim by way of a guarantee;

(c) The right to demand the assets from, and/or to require restitution by, anyone having possession or use of them contrary to the wishes of the party so entitled;

(d) A right in rem to the beneficial use of assets.

15.3. The right, recorded in a public register and enforceable against third parties, under which a right in rem within the meaning of Global Rule 15.1 may be obtained, shall be considered a right in rem.

Rule 16 Exception

16.1. By way of exception to Global Rule 15, a right in rem ("in rem security right") shall not be exempted from the effects of insolvency proceedings if proof is provided that the state where the assets are situated, at the time of the opening of insolvency proceedings, has no substantial relationship to the parties or the transaction in relation to which the security right was created, and there is no other reasonable basis for the fact that the assets are so situated.

16.2. It is for the party who claims that the conditions specified in Global Rule 16.1 are met, in relation to a particular security right, to prove that those conditions are in fact met in the relevant case.

Rule 17 Set-Off

Insolvency proceedings shall not affect the right of creditors to demand the set-off of their claims against the claims of the debtor, where such a set-off is permitted by the law applicable to the insolvent debtor's claim.

Rule 18 Exception

Where a right of set-off is demanded on the basis of Global Rule 17, if it is the case that, in the absence of express choice made by the parties, the law applicable to the insolvent debtor's claim would be that of the state of the opening of main insolvency proceedings, Global Rule 17 shall not apply if the law of the state chosen by the parties has no substantial relationship to the parties or the transaction, and there is no other reasonable basis for the parties' choice.

Rule 19 Reciprocal Contracts: General Rule

Save as otherwise provided by [this Act/these Rules], mutual obligations in respect of a reciprocal contract, which has been concluded prior to insolvency of one of the parties, shall be governed solely by the law of the state of the opening of proceedings.

Rule 20 Contracts of Employment (Labor Contracts)

The effects of insolvency proceedings on employment contracts and relationships shall be governed solely by the law of the state applicable to the contract of employment.

Rule 21 Restrictions to Exceptions

Global Rules 15, 17, and 20 shall not preclude actions for voidness, voidability, or unenforceability of legal acts detrimental to the general body of creditors, pursuant to the law applicable to the insolvency proceedings, as determined by Global Rule 12 or by Global Rule 13 (as the case may be).

Rule 22 Defenses to the Avoidance of Detrimental Acts

Global Rule 21 shall not apply where the person who benefited from an act detrimental to the general body of creditors provides evidence that:

(i) The said act is subject to the law of a state other than that of the state of the opening of proceedings; and

(ii) That law does not allow any means of challenging that act in the relevant case.

Rule 23 Exception

23.1. By way of exception to Global Rule 22, a transaction detrimental to the general body of creditors shall not be exempted from the effect of the avoidance rule of the law of the state of the opening of insolvency proceedings if proof is provided that the state to whose law the transaction is subject has no substantial relationship to the parties or the transaction, and there is no other reasonable basis for the selection of the law of that state as the law to govern the transaction in question.
23.2. It is for the party who claims that the conditions specified in Global Rule 23.1 are met, in relation to a particular transaction, to prove that those conditions are in fact met in the relevant case.

3. Comments to the Global Rules

In this section, we set out explanatory Comments and Illustrations relating to the Global Rules on conflict-of-laws matters, as stated above. The Global Rules are treated in groups, or singly, as seems most appropriate. For descriptions of key terms, such as "law," "applicable," "insolvency proceeding," "state," "opening of proceedings," and "center of main interests," see the Appendix to this Report.

A. General Provisions

Rule 1 Scope

These Global Rules shall apply to insolvency proceedings that are opened in a state which has jurisdiction for that purpose according to the provisions of Global Principle 13 of the Global Principles for Cooperation in International Insolvency Cases.

Comment to Global Rule 1:

The ultimate purpose of the proposed uniform rules of choice of law is to bring consistency and predictability into an area that has hitherto been notable—indeed notorious—for the variability of the possible outcomes to the resolution of a given matter. These outcomes are dependent on the approach traditionally favored by the conflict-of-laws rules of the state that happens to serve as the forum for proceedings. If the outcome of that process does not accord with the approach favored by other legal systems, before whose courts the matter may have to be further pursued, contradictory determinations may ensue, with consequent possibilities for the defeat of parties' expectations and considerable wastage of resources. However, before renouncing the rules and approaches that have formerly been followed under the auspices of their independent, sovereign authority, states can reasonably impose a stipulation that the insolvency proceedings to which they are in the future to apply choice-of-law rules of an internationally uniform nature, shall be shown to have taken place in a state whose exercise of jurisdiction has taken place in accordance with internationally agreed standards for so acting. Rule 1 is therefore intended to introduce such a controlling provision to determine the scope of application of the uniform rules that follow. By making reference to the criteria for

according international jurisdiction that are specified in Global Principle 13, this Rule seeks to maintain consistency between the provisions dealing with international recognition and cooperation contained in Section II of this Report, and the complementary provisions concerning choice of law that are contained in this Annex.

Rule 2 International Obligations of This State

These Global Rules shall not affect whatsoever the effects of binding international rules related to choice of law arising out of any treaty or other form of agreement to which [this state] is a party with one or more other states.

Comment to Global Rule 2:

Codified and binding private international law has been laid down in many international and supranational treaties or conventions, or in other legally effective instruments, for example, conventions concluded within the Hague Conference on Private International Law or Regulations of the European Union. In many of these treaties and conventions, the supremacy of the rules they contain will follow from the text or will be produced by virtue of a state's constitution. In these circumstances, Global Rule 2 may seem superfluous, although in practice with a gradually growing body of legislation and regulation with international effects, a legal reminder may serve as a useful tool. It is noted that Article 3 of the UNCITRAL Model Law on Cross-Border Insolvency contains a similar principle.

Rule 3 *Ex Officio* Application

These Global Rules and the law thereby indicated are to be applied *ex officio*.

Comment to Global Rule 3:

This Global Rule addresses itself to a court, although application by a public body or authority is not excluded. An alternative approach would be to apply the Global Rules only in instances where a party has invoked them, with the general consequence that without the Global Rules being invoked in a given case, a court will apply either its own law (i.e., the *lex fori*) as an "automatic default," or alternatively (when dealing with a foreign proceeding) the law of the state where that insolvency proceeding is pending (*lex fori concursus*). In concordance with many codifications of conflict-of-laws provisions, Global Rule 3 has been preferred as it will provide the court, instead of an interested party, with the active role. Global Rule 3 also provides for the ex officio application of the law indicated by the Global Rules, which in certain circumstances could be the law of a state whose content may not be easy to access. Moreover, the rule implies that said law will be applied in the same way as in said state, therefore including the rules that follow from court cases, interpretation followed in legal theory, etc.

REPORTERS' NOTES

In general, a court may rely on certain treaties that provide for the exchange of legal information regarding foreign law (e.g., the European Convention on Information on Foreign Law of 1968, ETS No. 62, of the Council of Europe) or, where national procedural law so allows, to have interested parties to provide an expert opinion. If it should happen that the particular foreign law cannot be authoritatively ascertained, it is to be expected that a court in each individual case will find an appropriate answer, after having heard parties and applying general principles of conflicts of law and giving considerations to the international context of the case. Such a judgment will be carefully reasoned and should avoid overturning parties' reasonable expectations. An ex officio application will be limited by the applicable procedural rules of the state in cases where an appeal from the decision in the case can be heard only on limited grounds. On the English common-law approach to the pleading and proof of foreign law, see Dicey, Morris and Collins, The Conflict of Laws (14th Ed. 2006, London, Sweet & Maxwell), Chapter 9; R. Fentiman, Foreign Law in English Courts (1998, Oxford University Press); S. Geeroms, Foreign Law in Civil Litigation: A Comparative and Functional Analysis (2004, Oxford University Press).

Rule 4 Interpretation

In the interpretation of these Global Rules, regard is to be had to their international origin and to the need to promote uniformity in their application and the observance of good faith.

Comment to Global Rule 4:

Several private-law treaties contain a provision similar to Global Rule 4, while in its text it is nearly similar to Article 8 UNCITRAL Model Law on Cross-Border Insolvency. It should function as a reminder for courts and parties that application of the conflict-of-law rules will always carry the potential to engage foreign legal cultures where certain legal effects may create confusion or even aggravation, without interfering with a foreign court's exercise of jurisdiction, a foreign administrators' powers, or a foreign state's public policy. Global Rule 4 aims to ensure that these Rules are applied with sensitivity and in a uniform way, while in certain circumstances where the Rules allow, a court should apply analogous legal rules to produce effects that are akin to those achievable under the legal system to which they are addressed.

Rule 5 Exclusion of Renvoi

In applying these Global Rules, any reference to the law of a state means the internal ("domestic") rules of law in force in that state other than its rules of private international law.

Comment to Global Rule 5:

The doctrine of renvoi was developed by scholars of private international law (conflict of laws) during the 19th and early 20th centuries. It attempts to address the difficult issues encountered in the choice-of-law process when it transpires that there are significant

differences of approach between the various systems whose laws are perceived to be in competition to supply the *lex causae*. A dilemma is presented to the court that is acting as the forum of the proceedings if it discovers that the result of applying its own choice-of-law process would indicate that the law of another state should serve as the *lex causae*: should the forum interpret the reference to be made exclusively to the internal (domestic) law of the other state, or to the totality of that system of law, including its own, separately evolved rules of conflict of laws? If the latter interpretation is adopted, how should the forum respond if it further transpires that the application of the choice-of-law rules of the *lex causae* to the facts of the instant case would result in the selection of the law of a different state (which could be that of the forum, or of some third state)? It is the potential for such an onward transmission (or renvoi) to occur that gives rise to intractable logical difficulties to which there is no agreed, single solution. Some states have responded to the dilemma by effectively declining to allow their courts to engage with it, and have opted to regard the initial reference made by their own choice-of-law rule as being addressed exclusively to the domestic law of the other state (e.g., Italy, Introductory Law to the *Codice Civile*, Art. 30). Others have opted for a "half-way" solution (also known as "partial renvoi") whereby the initial reference is treated as engaging the totality of the law of the other state, but any onward transmission that is made by application of the choice-of-law rules of that system is then deemed to be addressed exclusively to the domestic law of the state so indicated (e.g., France, L'Affaire Forgo, 1883, 10 Clunet 64).[349]

In the modern era, it has become widely accepted that one conspicuous benefit resulting from the conclusion of international agreements in the field of private international law is, or can be, the removal of the core problem giving rise to the insoluble dilemma that is renvoi, namely the divergent approaches to choice of law that have evolved under the laws of different sovereign states. If a set of uniform rules of choice of law regarding certain matters is adopted by the states ratifying an international treaty or convention, it can be assumed that the *lex causae* of any case falling within the scope of the convention would be identical, irrespective of which of the contracting states happened to serve as the forum for proceedings. Hence it has become a standard practice in the drafting of such conventions to include a provision whose effect is to exclude the application of renvoi by the courts of the states concerned, and to declare explicitly that any reference to the law of a state means the internal ("domestic") law of that state, excluding its rules of private international law.[350] Also, the EU Insolvency Regulation excludes renvoi, see recital (23), which states: "This Regulation should set out, for the matters covered by it, uniform rules on conflict of laws which replace, within

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[349] Various alternative approaches have also been advocated or applied, of which perhaps the most conceptually taxing is that employed under English law whereby the English forum seeks to replicate the *outcome* that would be achieved by a court determining the case according to the full choice-of-law process that would be deployed under the law of the state chosen by the English choice-of-law rule (so-called "double" or "total" renvoi, explained in Dicey, Morris, and Collins, The Conflict of Laws (14th edition, 2006), chapter 4).

[350] As examples of such "Exclusion of renvoi" provisions, see: Convention of 19 June 1980 on the Law Applicable to Contractual Obligations (Rome Convention), Article 15; Regulation (EC) No.593/2008 of 17 June 2008 on the law applicable to contractual obligations (Rome I Regulation), Article 20; Hague Convention (No.XXVII) of 14 March 1978 on the Law Applicable to Agency, Articles 5, 6, 11; Hague Convention (No.XXXI) of 22 December 1986 on the Law Applicable to Contracts for the International Sale of Goods, Article 15 (not yet in force), Regulation (EC) No.864/2007 on the law applicable to noncontractual obligations (Rome II Regulation), Article 24; Article 16 of the Code on Private International Law of Belgium (2004) or Article 10:5 Dutch Civil Code.

their scope of application, national rules of private international law." It is self-evidently the case that the exclusion of renvoi from the choice-of-law process can give rise to new species of forum-shopping tactics, albeit of a different kind from those that may be deployed in proceedings where the court in question is known to apply the renvoi doctrine in some form. In response to such possible practices, it is essential both that the rules which determine the exercise of international jurisdiction in insolvency proceedings are clearly defined, and also that they are scrupulously respected by all courts before which insolvency proceedings are initiated. Hence, the provisions of Global Principle 13 have a vital bearing upon the operation of the Global Rules of Conflict of Laws, as well as forming an integral part of the processes of recognition and cooperation under the Global Principles themselves.

REPORTERS' NOTES

Global Rule 5 is thus designed in accordance with the modern approach to the drafting of uniform rules of choice of law, so as to eliminate any uncertainty as to the outcome of the application of any of the choice-of-law rules embodied in the present Statement. Any court serving as the forum for insolvency proceedings within a state that has embraced the Global Rules would interpret the reference to the law so found as a reference to the internal (domestic) law of the system in question, disregarding any consequences that might hypothetically ensue from the application of the choice-of-law rules of the *lex causae* if it had been the case that the matter had arisen in the first instance before the courts of that other state. In Global Rule 5, the rule is laid down that in applying the Global Rules, any reference to the law of a state means the internal rules of law in force in that state other than its rules of private international law. These internal rules therefore do not contain (a reference to) that state's conflict-of-law rules. Global Rule 5 is intended to be a substantial norm (*Sachnorm*) and not a combined norm (*Gesamtnorm* or *Gesamtverweisung*). The application of conflict-of-laws rules in international insolvency matters is complex enough in itself, and the inherent requirements of the present subject matter—that insolvency issues should be resolved with speed and effectiveness—do not allow additional complications, for example, by using the method of "renvoi," see H.-C. Duursma-Kepplinger, in: Duursma-Kepplinger, H.-C, Duursma, D, Chalupsky, E., Europäische Insolvenzverordnung. Kommentar, Springer, Wien New York, 2002, Art. 4, nr. 10; Verena Lorenz, Annexverfahren bei Internationale Insolvenzen. Internationale Zuständigkeitsregelung der Europäischen Insolvenzverordnung. Max-Planck-Institute für ausländisches und internationales Privatrecht. Studien zum ausländischen und internationalen Privatrecht, nr. 140, Tübingen: Mohr Siebeck, 2005, 45; Ian F. Fletcher, Insolvency in Private International Law, National and International Approaches, Oxford Private International Law Series, Oxford University Press, 2nd ed. 2005, 7.79; Bob Wessels, International Insolvency Law, Deventer: Kluwer, 3rd ed., 2012, para. 10625. It is appreciated that in Germany the combined norm is found, see Jasnica Garašić, Recognition of Foreign Insolvency Proceedings: the Rules that a Modern Model of International Insolvency Law Should Contain, in: Yearbook of Private International Law, 2005, vol. 5, p. 358. For an overview of the discussion, see Peter Mankowski, Europäisches Internationales Insolvenzrecht (EuInsVO), Kapitel 47, Kölner Schrift zur Insolvenzordnung, 3. Auflage, Münster: ZAP Verlag 2009, nr. 97.

B. Localization of assets

Introductory Comment:

In this section, so-called "localization rules" are suggested.[351] A localization rule is a rule that indicates where a debtor's assets must be deemed to be located so that it is possible to determine the scope of operation of (cross-border) insolvency proceedings. The main purpose of these rules is to clearly identify the location of assets that will be subject to, and therefore covered by, insolvency proceedings that have been opened in a certain state. Localization of assets can be relevant in different situations. In the Global Rules, the general principle of universalism is embraced: insolvency proceedings have universal effect and therefore cover all assets of the debtor regardless of their location. Although under these circumstances the problem of asset localization would seem to be less relevant, it is on the contrary relevant whenever the question arises whether the state(s) where assets of the debtor are located recognize the coverage of these assets by foreign insolvency proceedings. Also exceptions to the principle of universalism are suggested. As a consequence, different laws may apply, and it is therefore of utmost importance to determine which assets are subject to which law. Furthermore, in many legal systems the opening of non-main or secondary insolvency proceedings is allowed, often with the inherent consequence that the effects of these proceedings are limited to the state's territory. The legal consequences of these proceedings will only affect the assets located within this state. Laws of this state will only apply to assets that are located in this state, and therefore criteria have to be developed to determine the location of such an asset, as in such situations the question is: which assets are covered by the non-main or secondary proceedings and which are covered by the main insolvency proceedings?

When drawing up localization rules, the Reporters were convinced of the logic of including such rules in the body of rules of private international law, more specifically the conflict-of-laws rules. Conflict-of-laws rules characteristically state a connecting factor linking the legal relationship (reference category) to the applicable law. The connecting factor is often a matter of geographical fact. For this reason, the conflict-of-laws rule, and particularly the connecting factor forming part of the rule, will be a useful instrument to help formulate localization rules in case of cross-border insolvency proceedings.

The localization rules proposed are each focused on particular kinds of asset: tangible property (movables and immovables), as well as intangibles including claims, shares in joint-stock companies, and intellectual property rights (patent rights, trademark rights, and copyrights). The rules do not aim to cover localization issues relating to financial instruments, such as bonds, shares, and derivatives (options, futures, swaps, forwards).[352]

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[351] The Reporters acknowledge their gratitude to Dr. Jeroen A. van der Weide, Leiden Law School, for his thorough analysis of legislation and legal literature and for enabling them to incorporate several sections of his text in their Report.

[352] For the terms used, for example, assets, movables, immovable property, claim, share, intellectual property right, public register, vested right, and attached right, reference is made to the Glossary of Terms and Descriptions in the Appendix.

Rule 6 Immovable Property

6.1. Immovables, and rights vested in or attached to them, are located at the place where the immovable, and the right vested in it or attached to it, is registered in a public register designated for the registration of rights.
6.2. If an immovable, and the right vested in it or attached to it, is not recorded in a public register designated for the registration of rights, then the immovable, and the right vested in it or attached to it, is located where the immovable is situated.

Comment to Global Rule 6:

Property can be broadly divided into movables and immovables. Immovables are, from their nature, incapable of being moved. Movables, on the contrary, can be physically moved or, in the case of intangibles, their notional location may be capable of alteration. Rights vested in assets (ownership, pledge, mortgage) or rights attached to assets (reservation of title) are identified with the property in question. The distinction is generally made that all assets that are not movables are immovables. The term immovables includes land, unextracted minerals, plants growing on land, buildings, and works permanently united with the soil, either directly or by incorporation into other buildings or works. Further examples of immovables are houses, office buildings, and factory buildings, storage tanks for solid or liquid substances permanently attached to the soil, wires, cables, and pipes. Global Rule 6.1 lays down the general rule based on the premise that immovables, and rights vested in or attached to them, are, as a rule, recorded in a public register designated for the registration of rights. A logical choice when localizing immovables is to use the place of registration, which basic principle is here chosen. The term "rights vested in immovables" refers to absolute rights vested in an immovable, for example, the right of ownership and user and security rights such as usufruct, leasehold, and the right of mortgage. These rights are identified with the immovable in which they are vested. Some rights are not vested in the immovable, but are "attached" to it. Such quasi property-law rights occur inter alia in German law and in Dutch law. Examples are *Vormerkung* (§883 *Bürgerliches Gesetzbuch* (German Civil Code); Article 7:3 Dutch Civil Code) and *Auflassungsvormerkung*, which is linked to the *Anwartschaftsrecht*. Such a *Vormerkung* is an entry made in the German land registry (*Grundbuch*) or Dutch registry (*Kadaster*) of an intended transfer of an immovable or of its encumbrance with a right less than ownership. A *Vormerkung* gives the beneficiary a secured position (legally based expectation) with third-party effect. A public register designated for the registration of rights refers to the land register in which the legal status of immovables is recorded.

In the absence of registration in a land register or similar register, the immovable, the right vested in it, or the right attached to it is located at the place where the immovable is (physically) situated, see Global Rule 7. Its rationale is that immovables, by their nature, are incapable of being moved. This means that they are located at the place where they are (physically) situated. From the legal perspective, however, it is more natural in this context to link their location to the place of registration. This is, indeed, the general rule of the proposed localization rule.

REPORTERS' NOTES

Global Rule 6 is similar to Article 2(g) EU Insolvency Regulation. In many occasions governed by such rule, the physical location (territory) and the place of registration will coincide. Under the general

rules of private international law, the actual location is undisputed and universally accepted as a principle of determining which law is applicable to the proprietary regime of immovables. See, inter alia, G.C. Venturini, Property, in: Kurt Lipstein & R. David e.a. (eds.), International Encyclopedia of Comparative Law (Volume III, Private International Law, Chapter 21), Tübingen: J.C.B. Mohr (Paul Siebeck) 1976, p. 3; Hans Stoll, J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen. Internationales Sachenrecht, Berlin: Sellier de Gruyter 1996, no. 124; Christiane Wendehorst, Art. 43, p. 2531, marginal no. 2, in: Hans Jürgen Sonnenberger (ed.), Münchener Kommentar zum Bürgerlichen Gesetzbuch. Einführungsgesetz zum Bürgerlichen Gesetzbuche (Art. 1-46). Internationales Privatrecht (Band 10), München: Verlag C.H. Beck 2006; J.A. van der Weide, Mobiliteit van goederen in het IPR. Tussen situsregel en partijautonomie, PhD Vrije University Amsterdam 2006, p. 17. Explicitly section 99(1) of the Swiss IPRG and Article 87 of the Code on Private International Law of Belgium.

Rule 7 Nonregistered Movables

7.1. Nonregistered movables, and rights vested in or attached to them, are located at the place where the nonregistered movable is situated.

7. 2. For the purposes of Global Rule 7.1, the following legal presumptions apply:

a. Movables recorded in a vehicle license register, and rights vested in or attached to them, are presumed to be located at the place where the movable is recorded in the vehicle license register.

b. Goods in transit, as well as rights vested in or attached to them, are presumed to be located in the state of destination.

Comment to Global Rule 7:

All forms of property that are not immovables are movables. Movables can be distinguished into nonregistered movables and registered movables. Nonregistered movables are movables that are not recorded in a public register designated for the registration of rights. Examples of nonregistered movables are (company) equipment, fittings, and fixtures, stock in trade (inventory), machinery, motor vehicles, nonregistered airplanes, nonregistered vessels, and railroad coaches. Global Rule 7.1 determines that nonregistered movables and the rights vested in or attached to them are deemed to be located at the place where the nonregistered movable is situated. Regarding (nonregistered) movables, location means the place where the movable is usually situated. This does not include a chance holiday country or country of transit. There must be a longer-term connection between the movable and its location. In principle, nonregistered movables including the rights vested in or attached to them can only be localized in the state in which they are (physically) located. Global Rule 7.1 is consistent with Article 2(g) EU Insolvency Regulation. Under the general rules of private international law of several states, the actual location (situs) is undisputed and accepted as a principle of determining which law is applicable to the proprietary regime of movables. See, e.g., section 43(1) of the German EGBGB, Article 87 §1 of the Belgian WIPR, Recommendation no. 203 UNCITRAL Legislative Guide on Secured Transactions (2007): "The law should provide that (. . .) the law applicable to the creation, third-party effectiveness and priority of a security right in a tangible asset is the law of the State in which the asset is located."

There are two categories of movables with respect to which greater certainty is created as to their location by the introduction of a legal presumption. These are subjects of Global Rule 7.2.

These rebuttable legal presumptions pertain to movables recorded in a vehicle license register and to goods in transit (*res in transitu*). The rights vested in nonregistered movables are absolute rights vested in a nonregistered movable, for example, the right of ownership and user and security rights such as usufruct and lien. Some rights do not vest in the nonregistered movable, but are "attached" to it, for example, a stipulated retention of title, certain privileges and priority rights, and retention rights. These rights are not absolute, they are quasi property-law rights. In Global Rule 7.2, two categories of nonregistered movables are designated for which legal presumptions regarding the location of these assets have been formulated. These presumptions may be rebutted. Parties may demonstrate that, contrary to the legal presumption, the actual location is decisive.

REPORTERS' NOTES

The list of Global Rule 7.2 is not exhaustive, as it is conceivable that the list of legal presumptions will be extended with legal presumptions with respect to other nonregistered movables to which special localization rules apply. Global Rule 7.2.a comprises movables that are recorded in a vehicle license register or similar registration system (e.g., railroad coaches) often maintained by (a public body of) the government of a state. Usually, these will be motor vehicles, such as cars, trucks, motorcycles, and mopeds. These movables recorded in a vehicle-licence register are presumed—subject to rebuttal evidence—to be located at the place where the movable is registered. The presumption is based on two arguments: (i) most often movables will usually be physically present in the state in which they are recorded in a vehicle license register; therefore brief removals of the movable to another state do not affect the result of the localization rule, (ii) the presumption serves as a means to fight against fraudulent acts in respect of creditors where a prospective insolvent debtor, for reasons of his own or other's benefit, transfers the movable to another State prior to the bankruptcy. By localizing the movable in the state in which it is registered, such transfers have no legal effect. The well-known phenomenon of "goods in transit" (*res in transitu*) refers to goods that are being transported pursuant to a contract of (international) carriage, performed by truck, train, ship, or aircraft. In practice, it is often difficult to localize *res in transitu*. Their location is an accidental state of transit or there is no location at all, for example because the goods are being transported by the open sea or by air or space. In this case, a fictitious location will have to be found for the purpose of localizing such goods. This may, for example, be the state of dispatch or the state of destination, which latter option has been followed in Global Rule 7.2.b, as in general goods in transit will, as a rule, be most closely connected with the country of destination, being their future location. A similar solution is found in various private-international-law regulations that have opted for the rule of *lex destinationis* to determine which proprietary regime is applicable to goods in transit, see, e.g., section 101 Swiss IPRG, Article 88 Belgium, and Article 10:133 Dutch Civil Code. The term "state of destination" means the state of destination designated by the parties and will refer to the state of final destination and not, for example, a transit port. Until the goods are dispatched, they must be treated as ordinary movables and must be localized at the place where they are located.

Rule 8 Registered Movables

8.1. Registered movables, and separately registered rights vested in or attached to them, are located at the place where the movable or the right in question is recorded in a public register designated for the registration of rights.

8.2. For the purposes of Global Rule 8.1, unless there is proof to the contrary, registered movables shall be presumed to be located at the place where the movable is recorded in a public register designated for the registration of rights.

Comment to Global Rule 8:

Registered movables are movables that are recorded in a public register designated for the registration of rights. Examples are registered vessels and registered aircraft. Some absolute rights vested in movables are recorded separately in a public register designated for the registration of rights. The English floating charge is an example (see below). The term "separately registered rights" attached to the movable refers to rights that are not vested in the movable, but are "attached" to it. Examples of such rights are stipulated retention of title, privileges and priorities, and retention rights. These rights are not absolute, they are quasi property-law rights. Movables (including rights vested in or attached to them) are registered, if they are recorded in a public register designated for the registration of rights. As a rule, movables (including rights vested in or attached to them) recorded in public registers are localized at the place where they are registered. This rule established in Global Rule 8 follows Article 2(g) EU Insolvency Regulation and under the rules of private international law the "*lex registrationis*" is also the generally accepted basis for the localization of registered movables, see section 45(1) of the German EGBGB, Article 89 of the Belgian WIPR, and Article 10:127(2) and (3) Dutch Civil Code.

Global Rule 8.2 aims to provide a practical solution for registered movables that have been moved or are *in transitu*. Global Rule 8.1 for registered movables (including separately registered rights in movables) has been drafted in line with the prevailing view that, for legal purposes, registered movables are located at the place where they are recorded in a public register designated for the registration of rights. The movable is identified with the register, which represents the legal status of the movable in question. In private international law, the law of the place of registration, that is, the *lex registrationis*, is generally accepted as the reference point for the creation and transfer of rights in registered movables (vessels, aircraft). If, however, these movables are transferred from the state of registration to another state, one may wonder whether the *lex registrationis* still is the most obvious connecting factor. An example may clarify the problem. A vessel located in Finland is encumbered with a mortgage under Finnish law. Subsequently, the vessel is transferred to the Netherlands where the ship mortgage is foreclosed. The Finnish ship mortgage should, in principle, be assimilated with the Dutch equivalent. In that case, the *lex registrationis* (the law of Finland) is relevant only to the question whether the ship mortgage was established with legal validity. For the remaining issues, Dutch law will be applied. Another example relates to the question whether insolvency proceedings that have been opened can be enforced. For instance: a yacht building company, established in the Netherlands, is declared bankrupt by the Dutch courts pursuant to Article 3 EU Insolvency Regulation. At the moment that Dutch main insolvency proceedings have been opened, one of the Dutch company's ships is situated in the port of Seoul, Korea, and is arrested there by a Japanese creditor of the Dutch company. The ship sails under the Dutch flag and is registered in the Netherlands. The question is whether this asset is covered by the EU Insolvency Regulation and, therefore, whether the ship forms a part of the estate covered by the Dutch main insolvency proceedings. The answer to this question is affirmative, since the ship is registered in the Netherlands, and pursuant to Article 2(g) EU Insolvency Regulation it is therefore considered to be situated in the Netherlands. It depends, however, from Korean law, as the law of the actual location of the ship, whether the Dutch main insolvency proceedings opened pursuant to the EU Insolvency Regulation can be enforced in Korea. In such a case, the application of the EU Insolvency Regulation cannot interfere with and go against public policy in Korea. It may therefore be questioned whether, in cross-border

insolvency proceedings, the decisive factor for the legal status of a registered movable is the place of registration or whether it should be its actual location. To allow such a solution, Global Rule 8.2 provides a rebuttable presumption.

REPORTERS' NOTES

The term "public register designated for the registration of rights" (see Global Rule 8.1) means a public register recording the legal status of the movable in question. Examples of such public registers within the meaning of Global Rule 8 are the public aircraft registers as referred to in Art. I.1(ii) of the Convention on the International Recognition of Rights in Aircraft (Geneva, 19 June 1948) and the public registers in which seagoing or inland vessels are recorded. The register (nationality of aircraft) referred to in Article 17 of the Convention on international Civil Aviation (Chicago, 7 December 1944) may be equated with the public aircraft registers. Most often vehicle license registers or license registers of motor vehicles and vessels maintained by the authorities of a state will not be public registers within the meaning referred to here, as these registers will not be aimed at recording the legal status of the movables recorded in them. As a rule, a right of pledge on a car will be localized at the place where the car is physically located at that moment. This means that movables recorded in vehicle license registers are not considered registered movables and that they fall under the localization rule for nonregistered movables.

A "floating charge" is a much-used security instrument under English law. A floating charge hovers like a cloud over the business assets (the composition of which changes continuously) of the chargor (party providing security). When the chargor becomes insolvent, the floating charge is converted into a fixed charge. This conversion process is designated by the term "crystallization." Pursuant to section 860 of the English Companies Act 2009, a floating charge is entered into a public register designated for the registration of rights and maintained by the "Registrar of Companies." As a result, a floating charge or a fixed charge is located at the place where the floating charge is registered.

Some European countries have opened the possibility of registering security rights for specific movables. The French "*gage automobile*" is an example. To be effective on third parties, the gage automobile must be recorded in a register kept by the *préfecture* where the car is registered. As a rule, this is also the agency that issues the license (*carte grise*). In these cases, the obvious solution is to localize the security right in question at the place where it is registered. See further Philippe Simler & Philippe Delebecque, Droit civil. Les sûretés. La publicité foncière, Paris: Dalloz 2009, no. 584 et seq.
Special rules have been created for "mobile equipment." On November 16, 2001, under the auspices of UNIDROIT, the "Convention on International Interests in Mobile Equipment" with the accompanying "Aircraft Equipment Protocol" was established in Cape Town, South Africa. As of early 2010, the UNIDROIT convention has been signed or ratified by over 30 countries, including China, France, Germany, India, Indonesia, the United Kingdom, and the United States. This UNIDROIT Convention creates a supranational security right, an international interest, in certain categories of mobile equipment, such as aircraft. The "Aircraft Equipment Protocol" that belongs to the UNIDROIT Convention relates to flying equipment, which pursuant to the Convention and the Protocol means airframes, aircraft engines, and helicopters. In 2007, a separate Protocol was established specifically for railway rolling stock (Luxembourg Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Railway Rolling Stock). At a later stage, another Protocol will be established for spacecraft. The international interest created by the UNIDROIT Convention is not an autonomous security right, but an umbrella term covering three forms of security frequently used in international financing practice. Pursuant to Article 2.2 of the Convention, these are (a) a security agreement, (b) a title reservation agreement, and (c) a leasing agreement. Article 1 of the Convention gives definitions of these three forms of security. Pursuant to

Article 2.4 of the Convention, the existence or otherwise of any of the three forms of security is governed by the conflict-of-laws rules of *lex fori*. The international interests created in accordance with the UNIDROIT Convention are recorded in a fully automated—and currently operative—global registration system accessible to the public via the Internet (www.internationalregistry.aero). This registration system is regulated in Chapters IV-VII (Articles 16-28) of the Convention. These provisions do not only concern the organization of the registration system, they also regulate the liability of the registrar. The "Registrar of the International Registry of Mobile Assets" has his seat in Dublin, Ireland (www.aviaretor.aero). International interests created under the UNIDROIT Convention are entirely virtual. Perhaps they can be localized at the place where the registrar has his seat.

Rule 9 Claims

9.1. Claims payable to bearer or order, and rights vested in or attached to them, are located at the place where the bearer or order document is situated.
9.2. Claims of known creditors, and rights vested in or attached to them, are located at the place where the debtor has his seat or his domicile.

Comment to Global Rule 9:

Another grouping of assets are claims. In the Glossary of Terms and Descriptions, for "claims" a description has been given as a right to payment from the estate of the debtor, whether arising from a debt, a contract, or other type of legal obligation, whether liquidated or unliquidated, matured or unmatured, disputed or undisputed, secured or unsecured, fixed or contingent, arisen on or before the commencement of the insolvency proceedings. Claims in the meaning of Global Rule 9.1 are claims as so described. Claims—rights entitling the creditor to performance by an insolvent debtor—can be distinguished into claims of a known creditor, claims payable to bearer, and claims payable to order.

A claim payable to bearer is a claim embodied in a negotiable document with a bearer clause ("payable to bearer"). A claim payable to order is a claim embodied in a negotiable document with an order clause ("payable to X or order"). Both types of claims are tangible. Bonds are an example of claims payable to bearer. Bills of lading are an example of a claim payable to order, although admittedly in practice a bill of lading often operates as a claim payable to bearer, because the order clause included in the bill of lading has often not been activated by the parties. Rights vested in claims payable to bearer or order are absolute rights vested in a claim payable to bearer or order, for example user and security rights (usufruct, pledge). Rights attached to a claim payable to bearer or order are rights not vested in the claim payable to bearer or order, but "attached" to it, for example, the right of retention. As a general rule, rights attached to a claim payable to bearer or order are not absolute; they are regarded as quasi property-law rights. Finally, unlike claims of a known creditor, claims payable to bearer or order are embodied in a negotiable instrument.

Both types of claims (payable to bearer and to order) are tangible and are therefore localized in the same way. Because claims payable to bearer or order are tangible, they are equated with nonregistered movables and deemed to be located at the place where the bearer or order

document is (physically) located.[353] The same rule applies pursuant to the general rules of private international law, see, e.g., section 106(2) of the Swiss IPRG.

All claims that are not claims payable to bearer or order are claims of a known creditor. A claim of a known creditor is intangible. Claims of a known creditor are characterized by the fact that the creditor is known to the debtor. Examples of such claims are a current account of the insolvent debtor held with a bank or a claim for payment of a purchase price that a creditor has against the insolvent debtor on account of the sale of a movable or immovable. Rights vested in claims with a known creditor are absolute rights, for example user and security rights (usufruct, pledge), while rights attached to a claim with a known creditor are rights that are not vested in a claim with a known creditor, but are "attached" to it, for instance a priority right. As a general rule, rights attached to a claim with a known creditor are not absolute, but seen as quasi property-law rights.

Unlike claims payable to bearer or order, claims with a known creditor are not embodied in a negotiable instrument. They are intangible. This means that, strictly speaking, localizing claims with a known creditor based on their nature is illusory. In the context of insolvency proceedings, however, the location of claims with a known creditor can be a relevant issue, for example in connection with determining the scope of effect of insolvency proceedings that have been opened. In that case, there are several conceivable solutions, which in this Report are limited to three: (i) to localize a claim with a known creditor (fictitiously) at the place where either the creditor or the debtor has his seat or his domicile, (ii) to localize such a claim to the place where its counterpart (the obligation) has to be performed, or (iii) localizing the claim at the seat or domicile of the debtor, in spite of the fact that the claim, being an asset, is included in the creditor's assets. Global Rule 9.2 follows the latter alternative, because a claim with a known creditor must be asserted at the place where the debtor has his seat or his domicile. A comparable solution is found in Article 2(g) EU Insolvency Regulation. Pursuant to this provision, pecuniary claims are localized in the Member State within the territory of which the third party required to meet them has the center of his main interests. The alternative also is reflected in section 167(3) of the Swiss IPRG.[354]

Several claims against the debtor may arise from noncontractual sources, for instance from tort or delict, unjust enrichment, and management of another's business (*negotiorum gestio*). The passive side of such a claim is an obligation of the debtor that corresponds to a claim by a known creditor. For this reason, claims arising from tort or delict, unjust enrichment, undue payment, and management of another's business will have to be localized at the place where the debtor has his seat or his domicile.

REPORTERS' NOTES

For the purposes of determining the domicile of the debtor, a distinction must be made between natural persons and legal entities. Natural persons are domiciled at the place where they have their habitual residence or practice an occupation, if applicable. Legal entities, on the other hand, will, as a rule, have their (registered) seat at the place where they have their registered office. Pursuant to Article 2(g) EU Insolvency Regulation, claims with a known creditor are localized at the place where

[353] See, e.g., Miguel Virgós and Francisco Garcimartín, The EC Regulation on Insolvency Proceedings: A Practical Commentary, Kluwer Law International, 2004, nr. 313.

[354] Compare Swiss Federal Supreme Court 6 March 2008 (no. 4a-231/2007).

the debtor "has the centre of his main interests" as determined in Article 3(1) of the Regulation. For this purpose, the latter provision contains a presumption with respect to companies and legal persons in favor of the registered office. The preamble (recital 13) to the Regulation shows that "the centre of main interests" shall mean the place where the debtor conducts the administration of his interests on a regular basis and that is therefore ascertainable as such by third parties. It is acknowledged that there is legal uncertainty as to the details of this central criterion, which especially has been demonstrated in court cases in which international jurisdiction has to be determined. See, e.g., ECJ 2 May 2006, Case C-341/04 (*Eurofood*). In a case in which the debtor in state A holds a bank account in a branch of bank X, where the branch is in state B and bank X has its registered seat in state C and the center of its main interest in state D, the localization of the claim will be in state D, and not for instance in state B, in which the branch is situated. In this way, too, P.M. Veder, *Goederenrechtelijke zekerheidsrechten in de internationale handels- en financieringspraktijk*, in: R.W. Clumpkens et al., *Zekerhedenrecht in ontwikkeling.* Preadvies voor de Koninklijke Notariële Broederschap 2009, p. 303ff, criticizing Miguel Virgós and Francisco Garcimartín, The EC Regulation on Insolvency Proceedings: A Practical Commentary, Kluwer Law International, 2004, nr. 312, who have defended the latter approach, which clearly deviates from the text of Article 2(g) of the EU Insolvency Regulation.

Rule 10 Shares in Joint-Stock Companies

10.1. Bearer shares, and rights vested in or attached to them, are located at the place where the bearer share certificate is situated.
10.2. Registered shares, and rights vested in them, are located at the place where the registered share, or the right vested in it, is recorded in a register of shareholders kept by the company.
10.3. If a registered share, or a right vested in it, is not recorded in a register of shareholders, the registered share or the right vested in it is located at the place where the company has the center of its main interests. The center of the main interests of the company is presumed to be the place of its registered office.
10.4. Book-entry shares, and rights vested in them, are located at the place of the registered office of the intermediary with which the securities account is kept in which the book-entry shares are administered.

Comment to Global Rule 10:

Following the Glossary of Terms and Descriptions, in general a share means the right to a proportional share in the capital of a company. Three groups of shares can be distinguished, namely bearer shares, registered shares, and book-entry shares. A bearer share is a share embodied in a bearer share certificate. A bearer share is tangible. Global Rule 10.1 provides a localization rule for bearer shares. A registered share is a share to which a specific person is entitled. As a rule, registered shares are intangible. Share certificates may be issued. This does not change the intangible nature of the registered share, however. Localization of registered shares is the subject of Global Rules 10.2 and 10.3. Thirdly, there is a book-entry share, which is a share that is kept and administered exclusively via a securities account. Book-entry shares are intangible. For its localization, see Global Rule 10.4.

Bearer shares are shares embodied in a bearer share certificate. Rights vested in bearer shares are absolute rights vested in a bearer share, for example usufruct or pledge. Rights attached to

a bearer share mean rights that are not vested in the bearer share, but are "attached" to it. The right of retention is an example of such a right. As a rule, rights attached to a bearer share are not absolute; they are quasi property-law rights. In contrast with registered shares, bearer shares are embodied in a bearer share certificate. Although the practical relevance of bearer shares is increasingly diminishing as a result of the advancing dematerialization of security transactions, a localization rule has been drafted in Global Rule 10.1. Because bearer shares are tangible, they are equated with nonregistered movables, bearer documents, and order paper, and they are deemed to be located at the place where the bearer share certificate is (physically) situated. This principle is defended in literature[355] and is applied in codifications of general rules of private international law, for example, Article 91 §2 of the Belgian WIPR.

Registered shares are shares to which a specific person is entitled. Rights vested in registered shares are, for example, user and security rights (usufruct, pledge). In contrast to bearer shares, registered shares are as a rule not embodied in a security certificate. They are intangible. This means that strictly speaking localizing registered shares is a fictitious exercise. In the context of insolvency proceedings, however, the location of registered shares can be a relevant issue, for example in connection with determining the scope of effect of insolvency proceedings that have been opened. Registered shares and user and security rights vested in them must often be entered in a register of shareholders kept by the company. In that case, the obvious solution is to localize the registered shares there. A register of shareholders, in general, will be kept by the management of a company in which the names of all shareholders and, if applicable, of all holders of rights less than ownership (usufructuaries, pledgees) are recorded. Global Rule 10.3 deals with an absence of registration. In instances where there is no register of shareholders, the rule has been adopted that the registered share or the right vested in it is localized at the place where the company has the center of its main interests. See, for the term "center of the main interests," the Comment to Global Rule 9.2.

Book-entry shares are shares that are kept and administered exclusively via a securities account. Rights vested in book-entry shares are absolute rights vested in book-entry shares, for example user and security rights (usufruct, pledge). In contrast to bearer shares, book-entry shares are not embodied in a security certificate. They are intangible, which means that strictly speaking, as with registered shares, localizing of book-entry shares is a fictitious exercise. In the context of insolvency proceedings, however, the location of book-entry shares can be a relevant issue, for example in connection with determining the scope of effect of insolvency proceedings that have been opened. Book-entry shares are always administered in a securities account. It is therefore an obvious solution to localize book-entry shares at the place of the registered office of the intermediary with which the securities account is kept in which the book-entry shares are administered. See Global Rule 10.4. The proposed localization rule in Global Rule 10.4 has a wider scope of application than to book-entry shares alone. The rule can be applied to all securities (shares, bonds, options, and other derivatives) that are administered and traded via a book-entry system.

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[355] See, e.g., Miguel Virgós and Francisco Garcimartín, The EC Regulation on Insolvency Proceedings: A Practical Commentary, Kluwer Law International, 2004, nr. 313, and, with some reluctance, P.M. Veder, *Goederenrechtelijke zekerheidsrechten in de internationale handels- en financieringspraktijk*, in: R.W. Clumpkens et al., *Zekerhedenrecht in ontwikkeling*. Preadvies voor de Koninklijke Notariële Broederschap 2009, p. 304ff.

REPORTERS' NOTES

In Global Rule 10.4, the chosen localization rule follows the internationally accepted "PRIMA rule" ("Place of the Relevant Intermediary Approach"), according to which book-entry securities are localized at the place of the registered office of the intermediary with which the securities account in question is kept. As a rule, this will be the place agreed by the account holder and the intermediary (custodian) in the securities custody agreement. If the securities custody agreement does not give a definite answer on this point, the securities account is deemed to be located at the place where it is kept according to the custodian's books. Although there are practical objections to the PRIMA rule, there is at present no workable alternative, and the PRIMA rule also is the basis for the referral system of the Hague Convention on the Law Applicable to Certain Rights in Respect of Securities held with an Intermediary of 13 December 2002. Article 4 of the Hague Securities Convention allows for a restricted form of choice of law between the account holder and the relevant intermediary subject to the condition that the intermediary has, at the time of the agreement, an office in the state whose law has been chosen and that one of the other requirements mentioned in Article 4 is met. The Hague Securities Convention is thus based on the law of the relevant account-agreement approach. See, inter alia, Fabian Reuschle, *Haager Übereinkommen über die auf bestimmte Rechte in Bezug auf Intermediär-verwahrte Wertpapiere anzuwendende Rechtsordnung*, IPRax 2003, pp. 495-505; Fabian Reuschle, *Grenzüberschreitender Effektengiroverkehr. Die Entwicklung des europäischen und internationalen Wertpapierkollisionsrechts*, Rabels Zeitschrift für ausländisches und internationales Privatrecht 2004, pp. 687-769; Michel Germain & Catherine Kessedjian, *La loi applicable à certains droits sur des titres détenus auprès d'un intermédiaire. Le projet de convention de La Haye de décembre 2002*, Revue critique de droit international privé 2004, pp. 49-81; Roy Goode et al., Hague Securities Convention. Explanatory Report, The Hague: Martinus Nijhoff Publishers 2005; M. Haentjens, The Law Applicable to Indirectly Held Securities, The Hague: SDU Uitgevers 2006; Elke Vandendriessche, *Het Verdrag van Den Haag van 5 juli 2006 inzake het recht toepasselijk op rechten op effecten door een intermediair gehouden: toekomst in Europa*, Tijdschrift@ipr.be, pp. 47-80.

Rule 11 Intellectual Property Rights

Patent rights, trademark rights, and copyrights, and rights vested in them, are located at the place where the patent holder, trademark proprietor, or copyright holder has his seat or his domicile.

Comment to Global Rule 11:

After having proposed localization rules for tangible assets (immoveables, registered and nonregistered moveables), claims (payable to bearer or order or related to a known creditor), and shares (bearer shares, registered shares, and book-entry shares), the remaining category in a group of "other proprietary rights" formulates localization rules for intellectual property rights. An intellectual property right is a right in a product or intellectual creation of the human mind. Intellectual property right means any intellectual property right involving copyrights, neighboring rights, patents, trade secrets, trademarks, geographic indications, other intellectual property rights, and agreements related to any of these rights. The description follows § 101(4) juncto § 102(1) of ALI's Intellectual Property Principles (2008) (adopted in 2007). Global Rule 11 proposes a localization rule for only three types of

intellectual property rights: patent rights, trademark rights, and copyrights. Intellectual property rights are intangible.

For the purposes of determining the seat or domicile of the proprietor of the intellectual property right in question, a distinction must be made between natural persons and legal entities. Reference is made to the Reporters' Notes to Global Rule 9.2.

REPORTERS' NOTES

In general, a patent right is an exclusive right to exploit a new invention in all fields of technology, a trademark right is a person's right in a trademark, which are all signs capable of being represented graphically serving to distinguish the goods or services of an enterprise. This description is derived from Art. 2(1) of the Benelux Convention concerning Intellectual Property (Trademarks and Designs) of 25 February 2005. A copyright is the exclusive right vesting in the maker (author) of a literary, scientific, or artistic work or his successors in title to communicate that work to the public and to reproduce it.

Rights vested in patent rights, trademark rights, and copyrights are absolute rights vested in patent rights, trademark rights, and copyrights, such as user and security rights (usufruct, pledge). Where patent rights, trademark rights, and copyrights are intangible, they qualify as intellectual property rights in a general sense. This means that strictly speaking the localization of intellectual property rights is fictitious. In the context of insolvency proceedings, however, the location of intellectual property rights can be a relevant issue, for example in connection with determining the scope of effect of insolvency proceedings that have been opened. Some intellectual property rights are registered, but the registration of intellectual property rights is, however, a "hotchpotch" (see Th.C.J.A. van Engelen, Intellectuele Eigendomsrechten registergoederen?, Intellectuele Eigendom & Reclamerecht (IER) 2002, pp. 275-281), and for this reason, it cannot be used as a basis for localizing these proprietary rights. It may be this current confusing state of affairs that has led the Insolvency Regulation to adopt the rule that, for the purposes of the Insolvency Regulation, a Community patent, a Community trademark, or any other similar right established by Community law may be included only in the main insolvency proceedings (Article 12 of the EU Insolvency Regulation).

Various EC Regulations in the field of intellectual property rights provide that the law applicable to the intellectual property right in question shall be determined on the basis of the seat or domicile of the proprietor of the intellectual property right. See, for example, Article 16(1) of the Community trademark regulation (Council Regulation (EC) no. 40/94 of 20 December 1993 on the Community trademark (OJ EC 1994, L 11/1) pursuant to which the seat or domicile of the trademark proprietor determines which law is applicable to the Community trademark. Similarly, see Article 22 of the Council Regulation (EC) no. 2100/94 of 27 July 1994 on Community plant variety rights (OJ EC 1994, L 227/1), and Article 27 of Council Regulation (EC) no. 6/2002 of 12 December 2001 on Community designs (OC EC 2002, L 3/1).

For the purposes of determining the seat or domicile of the proprietor of the intellectual property right in question, a distinction must be made between natural persons and legal entities. Reference is made to the Reporters' Notes made to Global Rule 9.2.

C. General Rules of Law Applicable to Insolvency Proceedings

Rule 12 Law of the State of the Opening of Proceedings

12.1. Save as otherwise provided in [this Act/these Rules], the law applicable to insolvency proceedings and their effects shall be that of the state within the territory of which such proceedings are opened, hereafter referred to as "the state of the opening of proceedings."

12.2. The law of the state of the opening of proceedings shall determine the conditions for the opening of those proceedings, their conduct, administration, conversion, and their closure.

Comment to Global Rule 12:

Since May 2002, in the larger part of Europe, a consensus has emerged for the application of the so-called *lex fori concursus* rule. According to that rule, the law of the jurisdiction ("state") in which insolvency proceedings are opened will govern the commencement, conduct, administration, and conclusion of those proceedings. This is perhaps most succinctly expressed by the terms of Article 4(1) of the EU Insolvency Regulation ("Save as otherwise provided in this Regulation, the law applicable to insolvency proceedings and their effects shall be that of the Member State within the territory of which such proceedings are opened, hereafter referred to as "the State of the opening of proceedings"). The UNCITRAL Legislative Guide on Insolvency Law contains a similar rule (recommendation 31).

A common feature found in these legislative provisions—and in Article 4(1) EU Insolvency Regulation—is the choice that has been made for the so-called *lex fori concursus* rule, which should be applied as the general choice-of-law rule for insolvency proceedings. In academic circles, the traditional dichotomy in discussions of international bankruptcy has been between territorialism and universalism. See the ALI-NAFTA report, Lynn M. LoPucki, Universalism Unravels, in: 79 American Bankruptcy Law Journal 2005, 143ff.; Ian F. Fletcher, Insolvency in Private International Law. National and International Approaches, Oxford Private International Law Series, Oxford University Press, 2nd ed. 2005, 1.01ff.; Bob Wessels, International Insolvency Law, Deventer: Kluwer, 3rd ed., 2012, para. 10009ff., also discussion of other concepts); John Pottow, The Myth (and Realities) of Forum Shopping in Transnational Insolvency, in: 32 Brooklyn Journal of International Law 785 (2007); Edward J. Janger, Universal Proceduralism, 32 Brooklyn Journal of International Law 819 (2007); Edward J. Janger, Virtual Territoriality, Brooklyn Law School, Legal Studies Research Paper No. 169, October 2009 (http://ssrn.com/abstract=1468615) (last visited Mar. 9, 2012); Christoph Paulus, *Deutsches Internationales Insolvenzrecht (§§ 335 ff. InsO und Art. 102 EGInsO)*, Kapitel 46, Kölner Schrift zur Insolvenzordnung, 3. Aulage, Münster: ZAP Verlag 2009, nr. 4. The aforementioned legislative developments in Europe and UNCITRAL's recommendation seem to confirm the almost universal agreement that the principle is that, unless otherwise stated, the law applicable to insolvency proceedings and their effects shall be that of the state within the territory of which such proceedings are opened. This proposition is expressed in Global Rule 12.1.

It is possible to further explain which topics are to be covered by the general rule of applicable law, being the law of the jurisdiction in which insolvency proceedings are opened that

governs the commencement, conduct, administration, and conclusion of those proceedings. Article 4(2) of the EU Insolvency Regulation declares expressly as follows: "The law of the State of the opening of proceedings shall determine the conditions for the opening of those proceedings, their conduct and their closure." Article 4(2) also contains a long list of particular matters, contained in sub-paragraphs (a) to (m), which are specifically included within the general proposition expressed in Article 4 to the effect that the *lex fori concursus* has a dominant role at every stage of the insolvency process. The same principle as that found in Article 4 of the EU Regulation is expressed in nonlegislative terms in the UNCITRAL Legislative Guide on Insolvency Law, recommendation 31, which also includes a large group of examples ((a) to (s)), which fall within the remit of the general proposition to the effect that the *lex fori concursus* has controlling application save where an express exception is imposed. As the matters expressed in sub-paragraphs (a) to (m) of Article 4(2) of the EU Insolvency Regulation only have an illustrative character, they are not incorporated in Global Rule 12.2. This approach (mentioning the general rule; abstain from detailed examples) also has been chosen in Germany (Article 335) and the Netherlands (draft Article 10.4.1).

The law of the jurisdiction in which insolvency proceedings are opened that governs the commencement, conduct, administration, and conclusion of those proceedings will, in particular, also determine the rules relating to the voidness, voidability, or unenforceability of legal acts detrimental to the general body of creditors. Rules for the avoidance of prior transactions to which an insolvent debtor has been a party are of particular significance in international cases, because of the numerous ways in which the substantive provisions contained in national laws differ from one another, thereby causing uncertainty for parties in their dealings. The answer to the question whether a given transaction may be successfully impeached in the event of the insolvency of one of the parties to it can, in many instances, depend on the choice-of-law process employed by the court before which the matter is brought. Although, in the interests of reducing that element of uncertainty, it could be considered appropriate to include a clear and explicit affirmation of the basic principle that the *lex fori concursus* shall determine any matter of voidness, voidability, or unenforceability of legal acts on the ground that they are detrimental to the general body of creditors, we have not included this proposition in the express wording. It is noted that Article 4(2)(m) of the EU Insolvency Regulation contains the expression "acts detrimental to all the creditors" instead of "acts detrimental to the general body of creditors." The earlier expression (which appears in the official English version of the EU Regulation) is inappropriate because, literally, it would require proof that the act in question was detrimental to every single creditor including any creditor who happened to be a beneficiary of the very act that is impeached. It should be noted that, in other language versions of the EU Insolvency Regulation, the expression "general body of creditors" is used (French: "*l'ensemble des créanciers*"; German: "*die Gesamtheit der Gläubiger*"; Dutch: "*het geheel van schuldeisers*"). It should be noted too that the rule that the *lex concursus* determines the rules relating to the voidness, voidability, or unenforceability of legal acts detrimental to the general body of creditors, is subject to the further rules contained in Global Rule 21.

REPORTERS' NOTES

In legal literature, the law of the "state of the opening of proceedings," is known as the "*lex concursus*," or the "*lex fori concursus*." The proposition that the law of the state of the opening should be accorded a dominant role in insolvency proceedings is expressed by the further Latin maxims: "*lex fori regit concursus*" or "*lex fori in foro proprio*." The choice in the EU Insolvency Regulation for the *lex concursus* is, in general, justified or at least remains uncriticized by the

majority of legal commentators, see Miguel Virgós and Francisco Garcimartín, The EC Regulation on Insolvency Proceedings: A Practical Commentary, Kluwer Law International, 2004, no. 69; (German authors mentioned by) Verena Lorenz, *Annexverfahren bei Internationele Insolvenzen. Internationale Zuständigkeitsregelung der Europäischen Insolvenzverordnung*. Max-Planck-Institute für ausländisches und internationals Privatrecht. Studien zum ausländischen und internationalen Privatrecht, nr. 140, Tübingen: Mohr Siebeck, 2005, 44; Ian F. Fletcher, Insolvency in Private International Law. National and International Approaches, Oxford Private International Law Series, Oxford University Press, 2nd ed. 2005, 7.80; Bob Wessels, International Insolvency Law, Deventer: Kluwer, 3rd ed., 2012, para. 10624. Global Rule 12 formulates a point of departure as the applicability of the *lex concursus* must be seen in the light of certain exceptions ("Save as otherwise provided in [this Act/these Rules]"). In Global Rule 5 (Exclusion of Revoi), the rule is laid down that, in applying the Global Rules, any reference to the law of a state means the internal rules of law in force in that state other than its rules of private international law. For the descriptions of the key terms "applicable," "insolvency proceeding," "State," and "opening of proceedings," see the Glossary of Terms and Descriptions in the Appendix.

In the context of Global Rule 12, the term "law" deserves attention. Due to the universal effect of the *lex concursus*, the "law" of one state is, in principle, extended to other states. In the light of the Glossary and Global Rule 5 (Exclusion of Renvoi), "law" in principle means a certain state's substantive and procedural law, including its soft law, but excluding its rules of private international law. In respect of the insolvency proceedings and their effects, Article 4(1) of the EU Insolvency Regulation, the English, French, and Dutch texts use the wording "the law applicable" ("*la loi applicable*," "*het recht van de lidstaat*") respectively, whereas the German and the Austrian text refer to the applicability for the insolvency proceedings and their effects of "*das Insolvenzrecht des Mitgliedstaats*," meaning: the applicability of (only) the insolvency laws of the Member State (of the opening of proceedings). In recital 23, it is said: "This Regulation should set out, for the matters covered by it, uniform rules on conflict of laws which replace, within their scope of application, national rules of private international law," which seems to cover a broader scope than what follows from the German text of recital 23, in which "for the matters covered by it" is expressed as "*für den Insolvenzbereich*" (within the scope of insolvency). Consequently, Austrian and German authors are discussing whether certain topics belong to the domain of (German internal) insolvency law, for example, the issue of whether director's liability is an "insolvency" question. See also H.-C. Duursma-Kepplinger, in: Duursma-Kepplinger, H.-C, Duursma, D, Chalupsky, E., *Europäische Insolvenzverordnung. Kommentar*, Springer, Wien New York, 2002, Art. 4, nr.7; Ulrich Huber, *Inländische Insolvenzverfahren über Auslandgesellschaften nach der Europäischen Insolvenzverordnung*, in: Schilken, Eberhard et al., ed., Festschrift für Walter Gerhardt, RWS Verlag Kommunikationsforum 2004, p. 426. If so, these rules are exported to the other EU Member States when main proceedings are opened in Austria or Germany. The wording in the German and Austrian texts certainly indicates a narrower meaning of the *lex concursus* than the wording in other texts, as certain legal rules of "the law applicable to insolvency proceedings" may fall outside a Member State's domain of "insolvency law," falling instead under general civil law or general company law, but nevertheless applicable to insolvency proceedings. The width of the rule of the *lex concursus* is not only a European question, as in the Extract of UNCITRAL Legislative Guide the recommendation with regard to "Law applicable in insolvency proceedings" reads: "(31) The insolvency law of the state in which insolvency proceedings are commenced (*lex fori concursus*) should apply to all aspects of the commencement, conduct, administration and conclusion of those insolvency proceedings and their effects." In this Report, we submit the broader scope of the term "law"; thus the reference to the "law" of the state of the opening of proceedings is not limited to this state's insolvency law. In addition, some states will contain their "insolvency law" within an Act bearing a specific appellation referring to insolvency or bankruptcy and will not include general

corporate, procedural, or civil-law rules related to insolvency under the description of "insolvency" law. To limit the reference only to such legislation as actually bears the terms "insolvency" or "bankruptcy" within its title would be to confuse form with substance, and would give rise to uneven and distorted results according to the variable practices followed by different states. In this way, too, (concerning the specific liability of a company director under Germany's Article 64(1) Gesetz betreffend die Gesellschaften met beschänkter Haftung) Udo Weiss, *Strafbare Insolvenzverschleppung durch den director einer LTD*. Schriftenreihe zum deutsche, europäischen under internationalen Wirtschaftsrecht, 9, Baden-Baden: Nomos Verlag 2009, p. 46ff. For this reason, the reference to the *lex concursus* encompasses the whole system of legal rules of the state in question (apart from its rules of private international law, see Global Rule 5), and not merely those rules that are formally classified as pertaining to the law of insolvency. As a result, the "law" applicable also contains the rules relating to director's liability, rules relating to land pollution or tax laws applicable for action done by a foreign insolvency holder in the respective state. This interpretation also means that "law" should not be understood as the rules of the law that serve as to guarantee that insolvency proceedings are administered to reach their goal of satisfying the general body of creditors (in this way, e.g., Virgós / Schmit Report, nr. 90, H.-C. Duursma-Kepplinger, in: Duursma-Kepplinger, H.-C, Duursma, D, Chalupsky, E., *Europäische Insolvenzverordnung. Kommentar*, Springer, Wien New York, 2002, Art. 4, nr. 7, and Horst Eidenmüller, *Gesellschaftsstatut und Insolvenzstatut*, in: 70 Rabels Zeitschrift für ausländisches und internationales Privatrecht 2006, p. 483).

In many cases, the choice-of-law analysis in insolvency is two-sided, see Jay L. Westbrook, The Present and Future of Multinational Insolvency, in: Bob Wessels and Paul Omar (eds.), The Intersection of Insolvency and Company Laws, Nottingham, Paris: INSOL Europe 2009, pp. 111-125, at p. 113, submitting that, in many instances, the case will involve "non-insolvency law" (e.g., the creation of a right or the existence and performance of a contract, prior to opening of insolvency proceedings and "insolvency law," which will govern the treatment of a right or a contract in the insolvency proceeding, such as the enforceability of the contract claim and the fixing of the amount actually to be paid. Westbrook uses the Lernout & Hauspie case (*Lernout & Hauspie Speech Products N.V. v. Stonington Partners, Inc.*, 268 B.R. 395 (D. Del. 2001), rev'd, 310 F.3d 118 (3d Cir. 2002), on remand In re *Lernout & Hauspie Speech Products N.V.*, 301 B.R. 651 (Bankr. D. Del. 2003)) in the United States and Belgium, in which case the court—thus Westbrook—failed to see that two different choice-of-law questions were presented under the differing priority rules in the two countries (one of "non-insolvency law" and one "insolvency law"). In a recent Dutch case, The Netherlands Supreme Court 19 December 2008, LJN: BG3573, such a distinction is made. The Russian *OAO Yukos Oil Company* is a company having its registered office in Moscow that has been established and is organized under the laws of the Russian Federation ("Yukos Oil"). The shares of Yukos Finance B.V. ("Yukos Finance"), a private company with limited liability, whose registered office is in Amsterdam, are held by Yukos Oil. Therefore, Yukos Oil holds the voting rights on all shares in Yukos Finance B.V, and—generally—should be able to control the assets of Yukos Finance, including (direct and indirect) holdings of shares in several other companies, including an indirect holding of 53.7% in AB Mazeikiu Nafta ("Mazeikiu"), the refinery company in Lithuania. Does the Russian insolvency holder have the power to vote on the shares? The Supreme Court agrees with the opinion of the plaintiffs (Yukos Finance) that, according to Dutch private international law, the question relating to the existence and meaning of the powers of a curator in bankruptcy liquidations proceedings is a question of insolvency law ("Answering this question will be determined by the law which is applicable to such bankruptcy proceedings, and therefore—contrary to what the court of appeal has decided concerning this point—it must be assessed whether the principle of territoriality of a bankruptcy liquidation, which is leading in Dutch private international law, limits the possibility that the defendant in his capacity of temporary administrator in the bankruptcy of Yukos Oil exercises the voting rights based

on the shares in Yukos Finance"). In 2012, the Netherlands Supreme Court will decide on the merits of the case.

After these questions of qualification, the question then arises as to how the validity and the contents of foreign law should be proven to a court in another state if that court wishes to be informed of such matters. See the Reporters' Notes to Global Rule 3.

As mentioned above, Article 4(2) of the EU Insolvency Regulation contains an enunciative list of 13 subjects that are determined by the *lex concursus*. Below follows the text.

2. The law of the State of the opening of proceedings shall determine the conditions for the opening of those proceedings, their conduct and their closure. It shall determine in particular:

(a) against which debtors insolvency proceedings may be brought on account of their capacity;

(b) the assets which form part of the estate and the treatment of assets acquired by or devolving on the debtor after the opening of the insolvency proceedings;

(c) the respective powers of the debtor and the liquidator;

(d) the conditions under which set-offs may be invoked;

(e) the effects of insolvency proceedings on current contracts to which the debtor is party;

(f) the effects of the insolvency proceedings on proceedings brought by individual creditors, with the exception of lawsuits pending;

(g) the claims which are to be lodged against the debtor's estate and the treatment of claims arising after the opening of insolvency proceedings;

(h) the rules governing the lodging, verification and admission of claims;

(i) the rules governing the distribution of proceeds from the realisation of assets, the ranking of claims and the rights of creditors who have obtained partial satisfaction after the opening of insolvency proceedings by virtue of a right in rem or through a set-off;

(j) the conditions for and the effects of closure of insolvency proceedings, in particular by composition;

(k) creditors' rights after the closure of insolvency proceedings;

(l) who is to bear the costs and expenses incurred in the insolvency proceedings;

(m) the rules relating to the voidness, voidability or unenforceability of legal acts detrimental to all the creditors.

Recommendation 31 of the UNCITRAL Legislative Guide on Insolvency Law contains the same structure. Below follows the text.

Law applicable in insolvency proceedings

(31) The insolvency law of the State in which insolvency proceedings are commenced (*lex fori concursus*) should apply to all aspects of the commencement, conduct, administration and conclusion of those insolvency proceedings and their effects. These may include, for example:

(a) Identification of the debtors that may be subject to insolvency proceedings;

(b) Determination of when insolvency proceedings can be commenced and the type of proceeding that can be commenced, the party that can apply for commencement and whether the commencement criteria should differ depending upon the party applying for commencement;

(c) Constitution and scope of the insolvency estate;

(d) Protection and preservation of the insolvency estate;

(e) Use or disposal of assets;

(f) Proposal, approval, confirmation and implementation of a plan of reorganization;

(g) Avoidance of certain transactions that could be prejudicial to certain parties;

(h) Treatment of contracts;

(i) Set-off;

(j) Treatment of secured creditors;

(k) Rights and obligations of the debtor;

(l) Duties and functions of the insolvency representative;
(m) Functions of the creditors and creditor committee;
(n) Treatment of claims;
(o) Ranking of claims;
(p) Costs and expenses relating to the insolvency proceedings;
(q) Distribution of proceeds;
(r) Conclusion of the proceedings; and
(s) Discharge.

Rule 13 Law of the State of the Opening of Non-Main Proceedings

If insolvency proceedings are opened in a jurisdiction other than that where the center of main interests of the debtor is situated ("non-main" proceedings), the effects of the application of the law of the state of the opening of such proceedings shall be restricted to those assets of the debtor situated in the territory of that state at the time of the opening of those proceedings.

Comment to Global Rule 13:

Global Rule 13 lays down the rule that, when proceedings are opened in a jurisdiction other than that where the COMI is located (such as on the basis of an establishment of the debtor or merely the presence of assets of the debtor), the application of the full effects of the *lex fori concursus* is confined to those assets of the debtor that are situated within the territory of the state of the opening of the proceedings. The effect of Global Rule 13 is that its legal norm freezes the legal status quo, especially in relation to tangible assets.

REPORTERS' NOTES

Global Rule 13 epitomizes the pragmatic accommodation of competing principles that lie at the heart of the theory of modified universalism. Global Rule 12 expresses a general rule for all insolvency proceedings that are opened at the debtor's center of main interests. Those proceedings are accorded the maximum degree of authority in relation to the debtor's global estate. In many legal systems in the world, it is contemplated that international insolvency matters, relating to one debtor, may be decided in two or more states where such proceedings are opened concurrently. Logically, only one set of proceedings can correctly claim the status of "main" proceeding by virtue of being opened at the debtor's center of main interests. Other proceedings may nevertheless be eligible for international recognition on the basis that they have been opened in a jurisdiction where the debtor has an establishment, while in other cases the debtor's connection with the place of opening may fall short of meeting that criterion. Global Rule 13, in principle, applies to all such proceedings, independently of their nature or name, (e.g., independent territorial, secondary, parallel, or ancillary) proceedings. The model of allowing two or more separate insolvency proceedings to be conducted parallel to each other has been accepted in all modern models for the regulation of international insolvency proceedings, see, e.g., Articles 28 and 29 of the UNCITRAL Model Law, including those countries that have enacted these provisions: Articles 3 and 27 of the EU Insolvency Regulation and the legislation of, e.g., Croatia (Article 302), Germany (Articles 354-358), Republic of Slovenia (Article 479 Slovenian Insolvency Act), Switzerland (Article 50), and the Netherlands (pre-draft Articles 10.2.1-10.2.6). The general aim of these "non-main" proceedings is: (i) to provide comfort to local creditors to file their claims in a court nearby, (ii) to prevent a race among creditors to initiate

enforcement proceedings regarding the debtor's assets in jurisdictions that would allow them to do so, and (iii) to prevent the insolvent debtor from taking actions that would be detrimental to the creditors. See Jasnica Garašić, Recognition of Foreign Insolvency Proceedings: the Rules that a Modern Model of International Insolvency Law Should Contain, in: Yearbook of Private International Law, 2005, vol. 5, p. 349. The application of the *lex fori concursus* rule, therefore, is not limited to those cases where insolvency proceedings are opened at the place where the debtor's COMI is located.

Rule 14 Cross-Border Movement of Assets

In relation to any asset of the debtor that is of a moveable character, Global Rules 12 and 13 shall apply, subject to the following modifications:

(a) Any rule of insolvency law that is applicable by virtue of the localization of an asset in the territory of the state of the opening of insolvency proceedings, at the time of the opening of the proceedings, shall not apply if it is shown that the asset in question has been moved to that location from the territory of another state, to whose insolvency law it would otherwise have been properly subject, in circumstances that suggest that the transfer was effected wholly or primarily for the purpose of avoiding the effects of the law of the other state, including its insolvency law.

(b) Conversely, where an asset has been moved from the territory of one state to that of another state under the circumstances stated in paragraph (a), the effects of any insolvency proceedings that are opened in the former state shall apply to the asset in question.

(c) In the absence of evidence to the contrary, it shall be presumed that any asset that has been removed from the territory of the state in which insolvency proceedings are opened, within 60 days prior to the opening of such proceedings, was made with intent to avoid the effects of the law of that state. It is for the party who seeks to maintain the validity of the act, whereby the property was removed from the territory of that state, to provide evidence that the transfer was made for a bona fide and legitimate purpose.

(d) Except in a case to which paragraph (c) is applicable, it is for the party who alleges that the provisions of paragraphs (a) and (b) of this Rule are applicable in relation to a particular asset to prove that this is the case.

Comment to Global Rule 14:

Where both Global Rule 12 (for main insolvency proceedings) and 13 (for non-main proceedings) aim to prevent complications relating to the law applicable and to protect the interests of creditors relying on them, the application of the *lex fori concursus* to assets situated in the territory of the state of the opening of insolvency proceedings should not apply to assets or property that have been moved there from the territory of another state, to whose insolvency law they would otherwise have been properly subject, in circumstances that suggest that the transfer was effected wholly or primarily for the purpose of avoiding the effects of the law of the latter state, including its insolvency law. Conversely, the scope of insolvency proceedings, including territorial proceedings opened in the circumstances indicated in Global Rule 13, can be legitimately extended to include property that was transferred from the territory of the state of the opening of those proceedings in circumstances that support the conclusion that the transaction was motivated by the aim of avoiding the

application of that state's law. Global Rule 14 aims to address these situations with the intention to modify the effects of the *lex concursus*, which flows from Global Rules 12 and 13.

It is appreciated that in matters where the operation of a rule of exception is dependent upon establishing the motive or intention that accompanied the acts in question, considerable difficulties concerning the matters of evidence and proof are likely to be experienced by any party—such as the liquidator or trustee in bankruptcy—seeking to invoke the rule. The solution embodied in paragraphs (c) and (d) of Global Rule 14 is to make it incumbent upon any party seeking to maintain the validity of any relocation of property that has taken place within a defined number of days prior to the opening of insolvency proceedings to adduce evidence to show that the transfer of the property was made for a bona fide purpose. The number of days could be 30, 60, 120, or any number of days. A period of 60 days has been found appropriately reflecting a fair balance between the protection of creditors' interest against the interest of the party seeking to prove the validity of his act. If a cross-border relocation of property has occurred at an earlier time than said 60 days, the effect of Global Rule 14, paragraph (d), is to make it incumbent on the party who contends that either paragraph (a) or (b) is applicable, to assume the onus of proving that the circumstances were such as to suggest, on the balance of probabilities, that the transfer was effected wholly or primarily for the purpose of avoiding the effects of the insolvency law of the state in which it was located immediately prior to relocation.

D. Exceptions to the General Rules of Law Applicable to Insolvency Proceedings

Introductory Comment:

In many states, where the general rule regarding law applicable is followed, modifications exist, either laid down in law or based on judgments of courts. Three groups of modification can be distinguished, one of which is of relevance for the present purposes. The effects of law applicable as a result of opening of main insolvency proceedings in state A can be limited by the opening of a non-main proceeding in state B (and state C). In such cases in principle, in state B, the *lex concursus* of state B, therefore the state's own law, will apply (and likewise for state C). A second method to limit the effects of the law of state A is—if no non-main proceedings have been opened—the right to invoke a public-policy exception. Also in the Global Principles, such an exception has been formulated, see Global Principle 3(iii) (public policy). Both these modifications are not further dealt with here. A third possibility is to create an exception to the general rule. In general, two categories of exceptions can be distinguished. One is an exception that takes the form of a substantial norm which expresses such exception. The other one introduces another point of departure in the meaning of a choice-of-law rule; therefore, instead of a choice for the law of the state in which a main insolvency proceeding has been opened (*lex concursus*), there is substituted a choice for another connecting factor, for instance for the law of the state in which an asset is situated (*lex rei sitae*) or the law of the state applicable to a contract of a certain nature (*lex causae*). These forms of exceptions are also to be found in the EU Insolvency Regulation.

The opening words of Article 4(1) of the EU Insolvency Regulation ("Save as otherwise provided in this Regulation . . .") indicate that the general rule of applicability of the *lex fori concursus* is subject to various exceptions. Its rationale is provided in recital 24: "To protect

legitimate expectations and the certainty of transactions in Member States other than that in which proceedings are opened, provisions should be made for a number of exceptions to the general rule." These exceptions are provided by the further provisions of Articles 5 to 15 inclusive, which deal with a number of specific cases. The UNCITRAL Legislative Guide concedes the necessity of achieving a balance between the desirability of exceptions to the application of the *lex fori concursus*, which may produce advantages for certain individuals, and the goal of maximizing the value of the insolvency estate for the benefit of all creditors. The Guide mainly opted for the latter approach (instead of substituting for the *lex concursus* a choice of another law as connecting factor). The EU Insolvency Regulation contains three substantial exceptions to the general rule (for rights in rem, set-off, and reservation of title, Articles 5-7 InsReg) and seven choices of law (other than the *lex fori concursus*, Articles 8-15 InsReg). The UNCITRAL Legislative Guide advocates a position under which the exceptions are largely eliminated (see Recommendations (32) and (33)). Only two exceptions (other choices of law) are accorded any degree of support in the Legislative Guide, namely (a) carveouts that allow the effects of insolvency proceedings on the rights and obligations of participants in a payment or settlement system, or in a regulated financial market, to be governed solely by the law applicable to that system or market, and (b) carveouts that allow the effects of insolvency proceedings on rejection, continuation, and modification of labor (employment) contracts to be governed by the law applicable to the contract. These two categories of exception correspond to those embodied in Articles 9 and 10, respectively, of the EU Insolvency Regulation.

In the light of these developments, the question is whether, in principle, it is currently appropriate, or acceptable, to eradicate virtually all exceptions to the application of the *lex fori concursus*, or whether a number of specific exceptions should be introduced, and if so, which ones. These exceptions are related to certain policy goals that a state may seek to protect against the influence of another state's law that is applicable to the insolvency proceeding, and whose effects relate to legal relationships or assets originating in another state. The common basis of these policy goals, as reflected in the EU Insolvency Regulation, are: (i) the protection of certain creditors' interests, coupled with the complementary goal of ensuring certainty of commercial transactions and the importance for the granting of credit, or (ii) the preservation of the law that is applicable to certain legal relationships, which law applies either by virtue of an express choice-of-law provision or by application of the rules of conflict of laws applicable to the relationship in question. It can often be the case that the relationships to which such protective principles are applied have commenced long before insolvency of the debtor was at hand. In answering the question which exceptions should be drafted in the interests of producing more stable and predictable outcomes in the cases to which they apply, a final consideration should be decisive, namely: (iii) that insolvency proceedings should be organized in such a way as to prevent long deliberations or complexity, or other lengthy delays caused by legal uncertainty, which form an obstacle in the orderly, efficient, and timely administration of proceedings.[356] The third ground indirectly reflects the rationale to protect courts and insolvency office holders against the sometimes overwhelming complexities,

[356] See Miguel Virgós and Francisco Garcimartín, The EC Regulation on Insolvency Proceedings: A Practical Commentary, Kluwer Law International, 2004, nr. 135, referring to recital 11 to the EU Insolvency Regulation, which opens with the acknowledgment that as a result of widely differing substantive laws, it is not practical to introduce insolvency proceedings with universal scope in the entire Community, as "(T)he application without exception of the law of the State of opening of proceedings would, against this background, frequently lead to difficulties."

added costs, and time delays of solving, to every last detail, the more complex issues of conflicts of law. The overall justification for the above exceptions is that they operate to protect legitimate expectations founded upon provisions of law that are not replicated in those of the state in which insolvency proceedings are subsequently opened. In this way, they support commercial predictability and certainty and are intended to ensure a less complicated application of the rules of applicable law.

Based not on the form chosen, but on the interest an exception to the general rule aims to protect, the formulations chosen for drafting the exceptions to the applicability of the *lex concursus* in the EU Insolvency Regulation can be grouped into three categories. There are exceptions: (1) with regard to certain rights in respect of certain goods or property situated in another state than the state of the opening of proceedings, at the time of opening of those proceedings (Articles 5, 6, and 7); (2) with regard to certain legal relationships (Articles 8, 9, 10, 11, 14, and 15); and (3) with regard to certain rights concerning Community patents, trademarks, or any other similar right established by Community law (Article 12). In cases falling under the first two categories, the judicial decision will not be according to the *lex concursus*, but according to the law indicated in the specific conflict-of-laws rule. These categories generally correspond to the policy goals expressed in the paragraph next but one above, as points (i) and (ii) respectively. Rights that fall under the third category may, by virtue of the deliberate wording of Article 12 of the EU Insolvency Regulation, only be included in the main insolvency proceedings. The policy goal mentioned above as point (iii) seems to have been decisive here. The exceptions formulated in Recommendations (32) and (33) of the UNCITRAL Legislative Guide fall within category (2) of the groups of exceptions as listed above. Articles 4-15 of the EU Insolvency Regulation form, in the words of Fletcher (Ian F. Fletcher, Insolvency in Private International Law. National and International Approaches, Oxford Private International Law Series, Oxford University Press, 2nd ed. 2005, 7.78, ". . . . a miniature code of uniform conflict rules," which offer, in practice ". . . . the essential requirement of predictability for parties who need to calculate the legal consequences of their actions within an intra-Union context."

The exceptions, laid down in Articles 5-15 of the EU Insolvency Regulation, have a double function in their effect: (i) they exclude or limit in a specific case the applicability of the *lex concursus* (the law of the state in which main insolvency proceedings were opened); (ii) at the same time, they indicate that national rules of conflict of laws apply where the exceptions indicate the nonapplicability of the law of a Member State. This will, for instance, be the case when an asset is not located in a Member State, when a claim is not governed by the law of a Member State, or the proceeding is not pending in a Member State, see H.-C. Duursma-Kepplinger, in: Duursma-Kepplinger, H.-C, Duursma, D, Chalupsky, E., *Europäische Insolvenzverordnung. Kommentar*, Springer, Wien New York, 2002, 103; Miguel Virgós and Francisco Garcimartín, The EC Regulation on Insolvency Proceedings: A Practical Commentary, Kluwer Law International, 2004, nr. 24. It is appreciated that the dichotomy which is observed under the EU Regulation between assets located in Member States and those located in non-Member States is not suitable for use in the context of principles for the conduct of insolvency proceedings that are set in a global context. In formulating exceptions to the application of the *lex concursus*, it is therefore necessary to give some thought to the possibility that the location of assets at the time of opening of insolvency proceedings may be the consequence of some prior, planned activity designed to exploit the law of the situs in order to generate advantages for a particular party in interest. Similarly, where a concession is made to the effects of a law by which a particular transaction is governed, as opposed to any contrary effects that might otherwise result from the application of the *lex fori concursus*,

it may be demonstrable that the law in question has no substantial relationship to the parties or the transaction, so that it is at least arguable that the sole purpose of the steps taken to cause the transaction to become subject to that law was to avoid the application of some other law that would otherwise have been applicable. One or more subsidiary rules may be needed to counteract any unfair advantages that may be otherwise gained at the expense of the general body of creditors by means of manipulative tactics of that kind. Such rules are herein formulated, see Global Rule 14.

For the purposes of these Global Rules, which are designed for application under the currently prevailing conditions of global diversity of national laws and policies, it is considered appropriate to maintain a certain number of specific exceptions to the general rule as laid down in Global Rule 12. The next question to be addressed is whether there is some international consensus as to which categories of exceptions should be recognized, and how those exceptions should best be formulated. Although, as mentioned above, several European states have followed the extension model and have drafted up to 10 exceptions to the general rule, of the categories of exceptions provided for in Articles 5 to 15 inclusive of the EU Insolvency Regulation only the following are selected for present consideration in the Global Rules: (a) rights of secured creditors ("third parties' rights in rem"), (b) rights of creditors to demand set-off, (c) contractual obligations, with special reference to rights under contracts of employment, and (d) defenses to the avoidance of detrimental acts. In drafting the selected exclusions, the protection of the rights mentioned under (a) and (b) have been drafted as substantial exclusions to the general rule (of *lex fori concursus*). Exceptions (c) and (d) express a choice of another law (than the *lex fori concursus*).

The Global Rules recognize the possibility of two or more insolvency proceedings concerning the same debtor, to which different substantive rules apply. This approach requires a degree of attuning and aligning, for which the Global Principles and Global Court-to-Court Guidelines for coordination and cooperation between office holders and courts have been designed.

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Arguably, other exceptions could have been selected too, including the ones we did not select from a larger group in the EU Insolvency Regulation, as well as others. Proposals for exceptions to the general rule, for instance, have been submitted for contracts with suppliers and tort claimants whose expectations of local-law application should be vindicated (see Jay L. Westbrook, The Present and Future of Multinational Insolvency, in: Bob Wessels and Paul Omar (eds.), The Intersection of Insolvency and Company Laws, Nottingham, Paris: INSOL Europe 2009, pp. 111-125, at p. 114). With this background, also consumer contracts or license contracts will be candidates for consideration. In these Global Rules, we have limited ourselves to those exceptions for which, both in the global domain of the relevant literature and also in the opinion of a large portion of the Advisers to the project, general consent is expressed. The UNCITRAL recommendations in the Legislative Guide suggest, in recommendation 32, an exception to the applicable general rule (*lex fori concursus*): "the effects of insolvency proceedings on the rights and obligations of the participants in a payment or settlement system or in a regulated financial market should be governed solely by the law applicable to that system or market." A similar deviation is provided in Article 9(1) of the EU Insolvency Regulation and, for instance, in § 340 German Insolvency Act (for relations with non-EU Member States). Such an exception has not been drafted in this Report because its necessity or advisability has not been tested by the project's Advisers. Furthermore, in the present overhaul of rules and frameworks in the banking sector, it seems logical to suppose that a rule that is reflected in recommendation 32 is under discussion. In the future, other national or international legislatures will

respond to the need of drafting choice-of-law rules to guide the solutions of applicable law matters. It seems, therefore, wise to formulate Global Rules that address certain immediate needs while at the same time—with the ongoing development of international insolvency law—helping to stimulate longer-term efforts in articulating additional exceptions or, as the case may be, to limit their number, for instance in the light of certain steps to harmonization.

Rule 15 Rights of Secured Creditors

15.1. Insolvency proceedings shall not affect the rights in rem of creditors or third parties in respect of tangible or intangible, moveable or immoveable assets—both specific assets and collections of indefinite assets as a whole that change from time to time—belonging to the debtor, which are situated within the territory of another state at the time of the opening of proceedings.

15.2. The rights referred to in Global Rule 15.1 shall in particular mean:

(a) The right to dispose of assets or have them disposed of and to obtain satisfaction from the proceeds of or income from those assets, in particular by virtue of a lien or a mortgage;

(b) The exclusive right to have a claim met, in particular a right guaranteed by a lien in respect of the claim or by assignment of the claim by way of a guarantee;

(c) The right to demand the assets from, and/or to require restitution by, anyone having possession or use of them contrary to the wishes of the party so entitled;

(d) A right in rem to the beneficial use of assets.

15.3. The right, recorded in a public register and enforceable against third parties, under which a right in rem within the meaning of Global Rule 15.1 may be obtained, shall be considered a right in rem.

Rule 16 Exception

16.1. By way of exception to Global Rule 15, a right in rem ("in rem security right") shall not be exempted from the effects of insolvency proceedings if proof is provided that the state where the assets are situated, at the time of the opening of insolvency proceedings, has no substantial relationship to the parties or the transaction in relation to which the security right was created, and there is no other reasonable basis for the fact that the assets are so situated.

16.2. It is for the party who claims that the conditions specified in Global Rule 16.1 are met, in relation to a particular security right, to prove that those conditions are in fact met in the relevant case.

Comment to Global Rules 15 and 16:

The exceptions that relate to third parties' rights in rem and to set-off (see below, Rules 17 and 18) are structured similarly and use similar wording. For the description of the expressions "shall not affect" and "the time of the opening of proceedings," see the Appendix to this Report.

The main purpose of arrangements for granting some form of real security to a creditor is to provide the creditor with an alternative form of recourse in the event of the debtor's failure to

perform his obligation. This includes the situation where nonperformance is due to the insolvency of the obligated party. Real security, therefore, offers a means of protecting a creditor against risks associated with the extending of credit. The extent to which the rights of a secured creditor are capable of being affected by the debtor's insolvency is an essential aspect of the creditor's assessment of the net risk to which he is exposed, and can have a significant bearing upon the decision whether to extend credit, and if so, on what terms. This rationale forms the basis of the exception created by Article 5 of the EU Insolvency Regulation, as is explained by its Recital (25), which adopts the principle that "the basis, validity and extent of such a right in rem should normally be determined according to the *lex situs* and not be affected by the opening of insolvency proceedings." That solution is embodied in Article 5, whose first paragraph states: "The opening of insolvency proceedings shall not affect the rights in rem of creditors or third parties in respect of tangible or intangible, moveable or immovable assets—both specific assets and collections of indefinite assets as a whole which change from time to time—belonging to the debtor which are situated within the territory of another Member State at the time of the opening of proceedings."

For the reasons not to include the words "opening of," see the Appendix. The rights in rem in respect of the aforementioned assets belonging to the debtor, "which are situated within the territory of another State at the time of the opening of proceedings," are not affected by insolvency proceedings. Article 5 of the EU Insolvency Regulation provides that security rights in respect of assets belonging to the debtor, "which are situated within the territory of another Member State at the time of the opening of proceedings," are not affected by "the opening of" the main insolvency proceedings. In the Global Rules, any judgment (relating to the opening or separate judgments required during insolvency proceedings, e.g., the adoption of a rescue plan) or any specific legal rule (a rebate to all claims filed) is without prejudice to the right in rem. A discussion regarding the precise meaning of "the opening of" and the uncertainty and confusion such a discussion has provoked[357] is prevented under Global Rule 15 as here worded. The state in which assets are "situated" is to be determined by applying Global Rules 6-11.

Global Rule 15 adopts the same substantive approach as Article 5 of the EU Insolvency Regulation and serves, as indicated, as an exception to the enforcement of the *lex fori concursus*, which would be instrumental in governing which assets belong to the estate in the foreign insolvency proceedings. The general rule—founded upon the principle of universality—is that when assets of any kind (moveable or immovable; tangible or intangible, including real estate, a bank account, or other intangible property such as a debt) are situated in another state than the state of the opening of the main insolvency proceedings, they belong

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[357] See H.-C. Duursma-Kepplinger, in: Duursma-Kepplinger, H.-C, Duursma, D, Chalupsky, E., *Europäische Insolvenzverordnung. Kommentar*, Springer, Wien New York, 2002, Art. 5, nr. 37; A.J. Berends, *Insolventie in het internationaal privaatrecht*, Ph.D. Vrije University Amsterdam, 2005, p. 149ff., and Alexander Plappert, *Dingliche Sicherungsrechte in der Insolvenz, Schriften zum Insolvenzrecht*, Band 21, Baden-Baden 2008, p. 268, defending a narrow interpretation of "opening" versus, e.g., Paul Michael Veder, Cross-Border Insolvency Proceedings and Security Rights. For a comparison of Dutch and German law, the EC Insolvency regulation, and the UNCITRAL Model Law on Cross-Border Insolvency, see Ph.D. Nijmegen 2004, p. 352 and Jasnica Garašić, *Anerkennung ausländischer Insolvenzverfahren*, Ph.D. Hamburg 2004, Frankfurt am Main: Peter Lang, 2005, 2 Volumes, Part II, p. 133, defending that "opening" in result means "the insolvency proceedings").

in principle to the estate of these latter proceedings. However, if the debtor happens to have an "establishment" (as specially defined) in the other state where the said assets are situated, these must be considered to belong to a potentially separate estate that may become the subject of a concurrent ("non-main") collective proceeding. Moreover, irrespective of the possibility that the debtor may have an establishment in the state where some assets are situated, some of these assets may be the subject of a creditor's or another third party's rights in rem. The EU Insolvency Regulation does not explicitly provide that these assets belong to the main proceedings, but it explicitly respects (at the moment these proceedings are opened) existing rights over certain assets belonging to the debtor that are located or situated within the territory of another Member State at the time of the opening of proceedings. The same approach respecting existing rights has been applied to Article 6 of the EU Insolvency Regulation (set-off). Global Rule 15 is only applicable to rights that are in existence at the time of the opening of insolvency proceedings. In the event that these rights have been created after the opening of proceedings, Global Rule 12 or 13 is fully applicable without attenuation or exception.

The use of the words "assets . . . belonging to the debtor" in Global Rule 15.1 expresses an intention to enable the rule to operate in a broad and flexible way. The term "belonging" not only covers legal ownership, but also forms of "economic ownership" and certain "proprietary rights" in assets, which according to the governing law are attributed to the estate. An example of such economic ownership is the financial lease.[358] This interpretation follows from the given policy consideration and is justified when, for instance, a certain asset or a right recorded in a public register, as set forth in Global Rule 15.3, is shielded from the applicability of the *lex fori concursus*.

Global Rule 15.1 refers to "rights in rem," but it does not define what these rights are. However, Global Rule 15.2 provides an enunciative, nonexhaustive list of such rights. In view of the variety of such rights, it seems wise to abstain from providing a closed definition of a right in rem, as this may differ from the definition given to "rights in rem" by the specific country in which the assets are located. Therefore, Global Rule 15.2 states that rights in rem "in particular" mean a concentrated group of four legal powers as described in paragraphs (a) to (d). The characterization of a right as a right in rem should be determined by the national law that, according to the general normal pre-insolvency conflict-of-law rules, governs these rights in rem, which in general will be the *lex rei sitae* at the relevant time.

Global Rule 15.1 provides that rights in rem that fall within its defined scope of application remain unaffected by the insolvency proceedings. The rule is broadly expressed so as to apply to third parties' rights in rem that exist ". . . in respect of tangible or intangible, moveable or immoveable assets—both specific assets and collections of indefinite assets as a whole that change from time to time—belonging to the debtor, which are situated within the territory of another state at the time of the opening of proceedings." The quotation carries a substantive component (in terms of which particular assets fall within the ambit of the exception) and a territorial component (in terms of where such assets are situated). Which specific assets are covered by it depends on the provisions and conditions contained in the internal law of the state (not being the state where the proceedings are opened), which dictates what species of

[358] In this way, too, see, e.g., P.M. Veder, *Goederenrechtelijke zekerheidsrechten in de internationale handels- en financieringspraktijk*, in: R.W. Clumpkens et al., *Zekerhedenrecht in ontwikkeling*. Preadvies voor de Koninklijke Notariële Broederschap 2009, p. 305.

assets are capable of being subject to certain rights in rem, for example—as the provision recognizes—tangible and intangible goods. Also, the effect of foreign insolvency proceedings upon the rights in question is determined by the aforementioned internal law. Under the laws of certain states, in addition to establishing rights in rem towards certain specific or existing goods, a security right may exist in respect of "collections of indefinite assets as a whole which change from time to time." For the purposes of ensuring that Global Rule 15.1 is applicable to certain types of security rights that exist in certain states (and often are known as "floating charges"), Global Rule 15.1 follows the approach of Article 5 of the EU Insolvency Regulation and expressly characterizes these as "rights in rem."

The criterion to be applied to qualify a right as a right in rem requires that the "assets" "belong" to the debtor and are "situated" within the territory of another state at the time of the opening of proceedings. Therefore, there must be an "asset" "situated" in a state. Certain "future" assets, for example, future installments of a lease, must exist at the time at which the proceedings are opened abroad.[359]

By virtue of Global Rule 15.3, the right, recorded in a public register and enforceable against third parties, under which a right in rem pursuant to Global Rule 15.1 may be obtained, shall be considered a right in rem. The provision deviates from the conflict-of-law rule of the *lex rei sitae* and determines that, for the application of Global Rule 15.1, the said right is a right in rem directly, without referring to a particular national law. Such a recorded right should also exist prior to the opening of the main proceedings.[360] See also the Comment to Global Rule 6.

Where assets are subject to rights in rem under the *lex rei sitae* in one state, but the insolvency proceedings are being carried out in another state, the liquidator of such proceedings should be able to request the opening of non-main proceedings in the jurisdiction where the rights in rem arise. This is asserted in Recital 25 to the EU Insolvency Regulation, which however provides this power only if the debtor has an establishment in the other state. These (non-main, within the EC "secondary") proceedings are conducted according to national law and will allow the liquidator to affect these rights under the same conditions as are provided for purely domestic proceedings.

Although Global Rule 15 results in the unaffectedness of certain rights in rem, Global Rule 21 ensures that the limitation of this principle does not lead to immunity from the provisions concerning detrimental acts contained in the *lex concursus.* See further below, in relation to Global Rules 21, 22, and 23.

The purpose of Global Rule 16.1 is to provide a counterbalance to the possibilities that a party may seek to take advantage of the "hospitable" laws that are to be found in various states in order to shelter assets from the effects of the insolvency laws to which either or both of the

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[359] This rule can only be the result of an interpretation of the national law of the state, not being the state of the opening of the proceedings, see Ian F. Fletcher, Insolvency in Private International Law. National and International Approaches, Oxford Private International Law Series, Oxford University Press, 2nd ed. 2005, 7.88.

[360] An example of such a right is the German *Vormerkung*, see Stephan Kolmann, *Kooperationsmodelle im Internationalen Insolvenzrecht.* Empfielt sich für das Deutsche internationale Insolvenzrecht eine Neu-orientierung?, Schriften zum Deutschen und Europäischen Zivil-, Handels- und Prozessrecht, Bielefeld: Verlag Ernst und Werner Gieseking, 2001, p. 303, and its Dutch equivalent in Article 7:3 of the Netherlands Civil Code, see Bob Wessels, International Insolvency Law, Deventer: Kluwer, 3rd ed., 2012, para. 10645.

parties are immediately or prospectively subject. While it is important to ensure that such "asset havens" are not exploited under circumstances that are unfairly prejudicial to the interests of the general body of creditors, it is also important to allow any party to conduct its legitimate dealings in a non-artificial manner and to avail themselves of such mechanisms for arranging protection against commercial risks as are offered under the laws of the states with which the party and its transaction are related. The basic protection provided by Global Rule 16.1 therefore admits of an exception where there is proof that the situs of the asset in respect of which a right in rem is claimed has been chosen purely for the purpose of claiming legal advantages, in the event of insolvency, that would not be available under the laws of any other state having a substantial relationship with the parties or their transaction, and provided that there is no other reasonable basis for the fact that the assets are situated in the location in which they are placed at the time of the opening of the insolvency proceedings. The additional provision in Global Rule 16.2, relating to the burden of proof for the purposes of Global Rule 16.1, ensures that it is for those who seek to question the legitimacy or efficacy of an in rem security right to prove that, in the relevant case, it does not enjoy the protection that would otherwise be conferred under Global Rule 15.

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For a more specific discussion of the aforementioned exceptions, specifically those included in the EU Insolvency Regulation, see J. Taupitz, *Das (zukünftige) Europäische Internationale Insolvenzrecht—insbesondere aus international-privatrechtlicher Sicht*, in: Zeitschrift für Zivilprozessrecht (ZZP) 1998, p. 315ff; Ian F. Fletcher, Insolvency in Private International Law. National and International Approaches, Oxford Private International Law Series, Oxford University Press, 2nd ed. 2005, 7.84ff; H.-C. Duursma-Kepplinger, in: Duursma-Kepplinger, H.-C, Duursma, D, Chalupsky, E., *Europäische Insolvenzverordnung. Kommentar*, Springer, Wien New York, 2002, Art. 5 et seq; Miguel Virgós and Fransisco Garcimartín, The EC Regulation on Insolvency Proceedings: A Practical Commentary, Kluwer Law International, 2004, nr.; Bob Wessels, International Insolvency Law, Deventer: Kluwer, 3rd ed., 2012, para. 10629ff; Thomas Ingelmann, in: Pannen, Klaus (ed.), European Insolvency Regulation, Berlin: Walter de Gruyter, 2007, p. 245ff. Peter Mankowski, *Europäisches Internationales Insolvenzrecht (EuInsVO), Kapitel 47*, Kölner Schrift zur Insolvenzordnung, 3. Aulage, Münster: ZAP Verlag 2009, nr. 88ff.

Article 5(1) of the EU Insolvency Regulation merely states that the opening of (main) insolvency proceedings "shall not affect the rights in rem of creditors . . . ." The provision precludes the enforcement of the (universal effect of the) *lex concursus*, but it does not specifically provide when a "right" is a "right in rem." For further discussion on rights in rem, see Miguel Virgós and Fransisco Garcimartín, The EC Regulation on Insolvency Proceedings: A Practical Commentary, Kluwer Law International, 2004, nr. 96. For comments relating to some 10 countries, see Nadine Watté, and Vanessa Marquette, *Faillite internationale—Compétence—Effets d'une faillite prononcée a l'étranger—sûretés réelles—droit de preference*, in: European Review of Private Law 1999, p. 287ff. For the Netherlands, see Paul Michael Veder, Cross-Border Insolvency Proceedings and Security Rights. For a comparison of Dutch and German law, the EC Insolvency regulation, and the UNCITRAL Model Law on Cross-Border Insolvency, see Ph.D. Nijmegen 2004, p. 330ff; A.J. Berends, *Insolventie in het internationaal privaatrecht*, Ph.D. Vrije University Amsterdam, 2005, p. 374ff. It should be noted that if there is no establishment in another Member State, the applicability in Europe of the *lex concursus* is halted by Article 5 in a situation in which secondary proceedings cannot be opened. The assets will be beyond the reach of the liquidator, and the secured creditor may exercise his right as if there were no insolvency. See Jona Israël, European Cross-Border Insolvency Regulation. A Study of Regulation 1346/2000 on Insolvency proceedings in the Light of a Paradigm

of Cooperation and a Comitas Europaea, Ph. D. European University Institute, Florence, 2004, Intersentia, Antwerp-Oxford, 2005, p. 279.

The question of which law is decisive with regard to the basis, validity, and consequences of said right in rem will be determined by the applicable rules of private international law. The basis, validity, and extent of a right in rem, pursuant to Global Rule 15, will normally be determined according to the law of the state within the territory of which the property is situated (*lex rei sitae*). See recital 25 to the EU Insolvency Regulation: ". . . . The basis, validity and extent of such a right in rem should therefore normally be determined according to the lex situs and not be affected by the opening of insolvency proceedings. . . ." See Jasnica Garašić, Recognition of Foreign Insolvency Proceedings: the Rules that a Modern Model of International Insolvency Law Should Contain, in: Yearbook of Private International Law, 2005, vol. 5, p. 369. This right in rem shall not be affected by the opening of the insolvency proceedings. See further Bob Wessels, International Insolvency Law, Deventer: Kluwer, 3rd ed., 2012, para. 10651ff.

It is noted that the combination of Global Rule 15.1 (referring to "rights in rem," without fully defining these), and Global Rule 15.2 (an enunciative list of such rights), can be assessed as rather vague, and that Global Rule 15.3 (certain rights recorded in a public register are seen as rights in rem) may create unforeseen consequences. As indicated, in view of the variety of such rights it has been considered prudent to abstain from providing definitions, where the present formulations avoid doubts and may facilitate a flexible application.

In the Appendix to this Report, the words "shall not affect" have been explained as providing a "hard and fast" rule that appears to be clear-cut. However, it raises the question of precisely which elements of a right in rem will not be affected. Recital 25, second and third line, to the EU Insolvency Regulation provides: "The basis, validity and extent of such a right in rem should therefore normally be determined according to the lex situs and not be affected by the opening of insolvency proceedings. The proprietor of the right in rem should therefore be able to continue to assert his right to segregation or separate settlement of the collateral security." The question arises whether the hard and fast rule protects the right in rem itself or whether it also protects all the powers that are, according to the *lex situs*, attached to the said right. For instance, will the holder of the right be protected against all those rules that may not interfere with the right in rem itself, but that indeed do interfere with the exercising of this right? Examples are the following: the *lex concursus applicable* in the main insolvency proceedings opened in another state may contain certain forms of postponement or dissolution of rights, for example, (i) an overriding power enjoyed by the liquidator to redeem the right in rem, or (ii) a cooling-off period or temporary moratorium may be set in place, either by operation of law related to a certain event or based on a request for the opening of an insolvency proceeding. On different views of European authors, see Bob Wessels, International Insolvency Law, Deventer: Kluwer, 3rd ed., 2012, para. 10655ff. In the event that *the lex concursus* of this state contains a rule prescribing that secured creditors must also pay towards the costs of the insolvency administration (such as Articles 170-172 of the German Insolvency Act), it must be questioned whether this affects the secured creditor's right. According to A.J. Berends, *Insolventie in het internationaal privaatrecht*, Ph.D. Vrije University Amsterdam, 2005, p. 402ff, this rule results *ipso jure* from the opening of the insolvency proceedings and does not affect the creditor's rights. For an alternative view, see Kolja von Bismarck, and Kirsten Schümann-Kleber, *Insolvenz eines ausländischen Sicherungsgebers—Anwendung deutscher Vorschriften auf die Verwertung in Deutschland belegener Kreditsicherheiten*, Neue Zeitschrift für das Recht der Insolvenz und Sanierung (NZI) 2005, p. 149; P.M. Veder, *Goederenrechtelijke zekerheidsrechten in de internationale handels- en financieringspraktijk*, in: R.W. Clumpkens et al., *Zekerhedenrecht in ontwikkeling.* Preadvies voor de Koninklijke Notariële Broederschap 2009, p. 307.

Rule 17 Set-Off

Insolvency proceedings shall not affect the right of creditors to demand the set-off of their claims against the claims of the debtor, where such a set-off is permitted by the law applicable to the insolvent debtor's claim.

Rule 18 Exception

Where a right of set-off is demanded on the basis of Global Rule 17, if it is the case that, in the absence of express choice made by the parties, the law applicable to the insolvent debtor's claim would be that of the state of the opening of main insolvency proceedings, Global Rule 17 shall not apply if the law of the state chosen by the parties has no substantial relationship to the parties or the transaction, and there is no other reasonable basis for the parties' choice.

Comment to Global Rules 17 and 18:

Research has demonstrated that the availability of set-off for a creditor in case its debtor is subject to insolvency proceedings is very different from state to state. Also the requirements to be fulfilled may differ, for example, concerning the "liquidity" of an obligation, the moment of creation of the obligation, the possibility of set-off for a debt owed to the insolvent debtor that has been transferred by a third party pre-insolvency, etc.[361] In addition, the underlying principles are diametrically opposed: the principle of protection of a position amounting to a de facto security in favor of the person authorized to set-off at the moment the power is created (concluding a contract prior to insolvency of the counterparty), versus the principle of equal treatment of all creditors as of the moment of insolvency. Both the smoothness of cross-border trade and the efficient administration of insolvency proceedings indicate the vital importance of a clear rule, which allows the applicable law to be known in advance, to enable the assessment of possible risks.

When searching for the most appropriate rule for global application, Article 6 of the EU Insolvency Regulation deserves further elaboration, given the richness of its drafting history and the fact that some national laws—for example, Germany (Section 338), Spain (Article 205 *Ley Concursal*), Republic of Slovenia (Article 483(1)), and the pre-draft in the Netherlands (Article 10.4.3)—follow a similar approach for international insolvency issues in relation to non-EU states. Article 6 generates a special rule applicable by way of exception to

[361] See Ian F. Fletcher, Insolvency in Private International Law. National and International Approaches, Oxford Private International Law Series, Oxford University Press, 2nd ed. 2005, 7.97; R. Derham, The Law of Set-Off, 4th Edn. (Oxford, Oxford University Press, 2010); P.R. Wood, English and International Set-Off (Sweet & Maxwell, 1989); Christoph Jeremias, *Internationale Insolvenzaufrechnung*, Max-Planck-Institut für ausländisches und internationales Privatrecht, Studien zum ausländischen und internationalen Privatrecht, nr. 150, Tübingen: Mohr Siebeck, 2005; Stefan Rosskopf, *Die Aufrechnung in deutschen und englishen Insolvenzrecht*, Schriften zum Verfahrensrecht, Band 26, Peter Lang Frankfurt, 2008 (comparing German and English insolvency rules regarding set-off).

the general rule laid down by Article 4(1) of the EU Insolvency Regulation, that "the law applicable to insolvency proceedings and their effects shall be that of the Member State within the territory of which they are opened." This anticipates that the availability of set-off will be dependent upon such a demand being allowed under the terms of the *lex concursus*. The same principle would be applicable under Global Rules 12 and 13 as set out above. Under the EU Regulation, the general rule of Article 4(1) is reinforced by a specific provision in Article 4(2)(d) to the effect that the *lex concursus* shall determine in particular "the conditions under which set-offs may be invoked." However, the opening words of Article 4(1) indicate that its provisions are subject to exception where there is contrary provision elsewhere in the Regulation itself. Such a contrary provision, in relation to set-off, is made by Article 6 (as indicated one of the substantial exceptions to the general rule of application). Article 6(1) states: "The opening of insolvency proceedings shall not affect the right of creditors to demand the set-off of their claims against the claims of the debtor, where such a set-off is permitted by the law applicable to the insolvent debtor's claim."

The exception created by Article 6 of the EU Insolvency Regulation is of a very precise character. As explained in the Virgós / Schmit Report (nr. 107), in the comment to Article 6 of the proposed EC Convention on Insolvency Proceedings (whose drafting was in every respect identical to that of Article 6 of the Regulation), the intention of this provision was that "When under the normally applicable rules of conflict of laws the right to demand the set-off stems from a national law other than the '*lex concursus*', Article 6 allows the creditor to retain this possibility as an acquired right against the insolvency proceedings: the right to set-off is not affected by the opening of proceedings." The reference to "the normally applicable rules of conflict of laws" is especially significant because, as is well understood, those rules are capable of giving rise to a situation where contractual or other liabilities are governed by the laws of (potentially) any state in the world. In relation to contractual obligations, among the Member States of the EU this possibility is accepted by the express provision in Article 2 of the Rome Convention, which entered into force on April 1, 1991. Article 2 declares that: "Any law specified by this Convention shall be applied whether or not it is the law of a Contracting State." The substance of this rule is replicated in Article 2 of the Rome I Regulation (Regulation (EC) No.593/2008), which has replaced the Rome Convention in all EU Member States with the exception of Denmark from December 17, 2009 onwards. As the Rome Convention was formerly applicable in all 27 of the current EU Member States, the literal and natural meaning of the expression "the law applicable to the insolvent debtor's claim" in Article 6(1) of the Insolvency Regulation is that it means any law capable of being identified as the applicable law of the obligation in question, according to the choice-of-law rules now standardized among EU Member States, initially by the Rome Convention and currently by the Rome I Regulation. Of additional interest is the provision of Article 17 of the Rome I Regulation, which bears the heading "Set-off." Article 17 paves the way for a more general application of set-off in matters of contract by providing "Where the right of set-off is not agreed by the parties, set-off shall be governed by the law applicable to the claim against which the right to set-off is asserted." Thus, among Member States of the EU, a consistent approach is adopted whereby the availability of set-off is determined by that law which (in the context of the insolvency of one of the parties to a contract) is the law applicable to the insolvent debtor's claim. Of course, non-EU states' rules of choice of law in contractual matters are not affected by the Rome Convention, nor by its successor the Rome I Regulation, and they are free to retain that diversity of approach for which the realm of private international law is notorious.

The above rationalization of the conclusions that follow upon an examination of the literal and natural meaning of Article 6 of the EU Insolvency Regulation is fully consistent with the interpretative guidance supplied by Recital (26) to the Regulation. Recital (26) (which is closely modeled upon statements contained in paragraph 109 of the Virgós / Schmit Report), states as follows: "If a set-off is not permitted under the law of the opening State, a creditor should nevertheless be entitled to the set-off if it is possible under the law applicable to the claim of the insolvent debtor. In this way, set-off will acquire a kind of guarantee function based on legal provisions on which the creditor concerned can rely at the time when the claim arises." It is noteworthy that Article 6 contains no words expressly restricting the scope of the exception to cases where the obligation through which the right to claim set-off is generated is governed by the law of one of the other EU Member States. The rule could therefore, based on its textual scope, be considered as a candidate for more universal acceptance as an exception to the dominant role of the *lex concursus* in main insolvency proceedings opened in any jurisdiction. In the course of developing the provision now embodied in Article 6, the members of the committee of experts established by the EC Council explored a number of alternative formulations that reflect a changing balance of opinion as to the correct principle to be applied. Examination of the textual history of this provision, by studying the successive drafts produced and discussed by the committee of experts between 1989 and 1995, shows that the rule in its current form, as quoted above, only appears in the draft versions of the convention produced after July 1993. Until that date, the proposed provision relating to set-off was expressed in the following terms: "The opening of insolvency proceedings shall not affect the right of creditors to the set-off of a claim forming part of the estate where *the law of a Contracting State other than the State of the opening of proceedings applies* to that claim" (emphasis added). In the subsequent versions of the provision produced between that date and the finalization of the text on September 25, 1995, the drafting was significantly altered with the omission of any reference to the law of a Contracting/Member State, and with the inclusion of wording to clarify the scope of the rule so as to confine its operation to those cases where the right of set-off is permitted by the law applicable to the insolvent debtor's claim (i.e., the claim under which the insolvent debtor stands as creditor towards the party seeking to invoke a right of set-off, also referred to as "the passive claim").[362]

It should be noted from the outset that the EU Insolvency Regulation's set-off rule has a limited scope. The final intentions of the EC committee of experts are summed up by a passage in paragraph 109 of the Virgós / Schmit Report (which supplied the basis for the statement contained in Recital (26) to the Regulation): "If the '*lex concursus*' allows for set-off, no problem will arise and Article 4 should be applied in order to claim the set-off as provided for by the law. On the other hand, if the '*lex concursus*' does not allow for set-off (e.g., since it requires both claims to be liquidated, matured and payable prior to a certain date), then Article 6 constitutes an exception to the general application of that law in this respect, by permitting the set-off according to the conditions established for insolvency set-off by the law applicable to the insolvent debtor's claim ('passive' claim)." Article 6(1) contains therefore a "carefully limited exception" to the *lex concursus*.[363]

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[362] See Ian F. Fletcher, Challenge and Opportunity: the ALI/III Global Principles Project, (2008) Vol. 1 Potchefstroom Electronic Law Journal 2/29-29/29, at pp.18/29-25/29.

[363] Thus, see Ian F. Fletcher, Insolvency in Private International Law. National and International Approaches, Oxford Private International Law Series, Oxford University Press, 2nd ed. 2005), 7.99. See also Christoph Jeremias, *Internationale Insolvenzaufrechnung*, Max-Planck-Institut für ausländisches und

When devising a rule for application in proceedings opened in any part of the world, consideration should be given to two key matters. The first question (or rather, series of questions) is whether the reference to the law applicable to the insolvent debtor's claim, rather than the law governing the obligation under which the insolvent debtor occupies the role of debtor towards the other party, is the appropriate rule in principle; or whether it should be possible to invoke set-off if such a right is available under the law applicable to either claim; or (more restrictively) only if such a right can be shown to be available under the law or laws applicable to both claims (assuming neither claim to be governed by the *lex concursus*).

The following Illustrations are based on the terms of Global Rule 17 as proposed above:

Illustrations:

1. Insolvent Debtor (ID), which is the subject of insolvency proceedings opened in state X, is indebted to Creditor C under a contract governed by the law of state Y. Creditor C is separately indebted to ID under a contract governed by the law of state Z. Under the law of state X, set-off is permissible in respect of the two debts under the circumstances in which they currently exist (i.e., in the actual case). Global Rule 12 accordingly applies without interruption, and the two claims are subject to set-off in accordance with the relevant provisions of the law of state X. The respective provisions of the laws of state Y and state Z, with regard to set-off, are of no relevance to the outcome in this instance.

2. The factual circumstances are as in Illustration 1, save that under the laws of both state X and state Y set-off is not permissible, whereas under the law of state Z ("the law applicable to the insolvent debtor's claim") set-off is permissible. Global Rule 17 applies with the consequence that set-off is permitted in accordance with the provisions of that law. In this instance, the law of state X is displaced and the law of state Y is of no relevance.

3. The factual circumstances are once again as in Illustration 1, save that, in this instance, under the laws of both state X and state Z, set-off is not permissible, whereas under the law of state Y (the law governing the claim of Creditor C) set-off is permissible. Here the circumstances do not bring the case within the scope of Global Rule 17. Accordingly, Global Rule 12 applies without interruption, and set-off is denied in accordance with the law of state X (the *lex fori concursus*).

A second matter for consideration is whether international set-off should be available merely on proof that such entitlement arises under one or other of the laws by which the mutual cross-obligations are governed, or whether there should be a further requirement that the party invoking set-off must show that such a right has formed part of its legitimate expectations arising in the context of the relationship between the creditor and the insolvent debtor, so as to have been part of the calculation of risk during the process of becoming a creditor on the terms agreed. Since it is a fundamental policy of insolvency law that all creditors are eligible to participate upon terms of global equality, any rule that introduces an exception to the *pari passu* principle needs to be justified with care, and should not be allowed to operate as a capricious or arbitrary device without regard to the context under which parties have had

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internationales Privatrecht, Studien zum ausländischen und internationalen Privatrecht, nr. 150, Tübingen: Mohr Siebeck, 2005, p. 261, who refers to Article 6 as a *Helfer in der Not* (A helper in need).

dealings with the debtor. Strictly speaking, however, this second matter of principle does not constitute a choice-of-law rule but, if it is found at all, it may be encountered as part of the domestic law of set-off of one of the states whose laws are potentially engaged, namely the *lex fori concursus*, or the state whose law is applicable to the insolvent debtor's claim. In such circumstances, the need to demonstrate that the creditor formed a legitimate expectation of a right to demand set-off may be interposed as a precondition to the availability of that right, whether it is invoked under the provisions of Global Rule 12 or under those of Global Rule 17. Indeed, it may be arguable that, as a matter of principle, such a precondition (tacitly, if not explicitly) ought to be incorporated in the substantive law of any state that allows the operation of set-off in cases of insolvency. It is noteworthy that the argument founded upon respect for the creditor's legitimate expectations serves as part of the rationale underlying the English common-law approach to such set-offs, since courts have at times appeared to justify its operation on the ground that it is intended "to do substantial justice between the parties" on the premise that the creditor, in giving credit, "must have" placed reliance on the ability to offset his own liability to the debtor.[364]

In adopting in Global Rule 17 the rule of Article 6 of the EU Insolvency Regulation, whereby the policy of the *lex concursus* is displaced by that of the law applicable to the passive claim (in situations where there is a true conflict between the two laws with regard to the availability of set-off *in casu*), the drafters of the Insolvency Regulation (and of the Convention that preceded it) were giving effect to the doctrine that scholars of the modern era seem to regard as the more satisfactory rule of decision for international cases. The "traditional" approach, as advocated by a number of writers in former times, required the cumulative application of both laws—that is, those governing the active and the passive claim respectively—and would deny set-off unless both laws were found to concur in allowing it to operate, thereby increasing the likelihood that the creditor would be denied the right of set-off. Modern analysis, on the other hand, has placed greater emphasis on the need to protect legitimate and reasonable expectations, and therefore on the need for a stable rule that enables the creditor to rely upon the provisions of a single system of law whose provisions are applicable in the context of his incurring an obligation towards the party who is subsequently the subject of main insolvency proceedings. There appears to be a growing consensus among modern scholars that such stability and predictability is best achieved through the application of the rule contained in the law applicable to the passive claim ("the insolvent debtor's claim"). Thus, if that law permits set-off, but the *lex concursus* denies it, the latter will be overridden. This is the approach that would be followed in the present day under English and Netherlands rules of private international law (i.e., quite apart from the rule now imposed under Regulation 1346/2000 for cases to which it applies). It can therefore be argued that the solution supplied by Global Rule 17, which is aligned with that of Article 6 of the EU Insolvency Regulation, is in harmony with modern views of the appropriate way in which to resolve issues of set-off in international cases, and reflects the practice that would be followed in many jurisdictions (including England) even where the Regulation itself is not applicable to the case in question.

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[364] See Forster v. Wilson (1843) 12 M & W 191, 203-204; 152 E R 1165, 1171, per Parke B; Stein v. Blake [1996] AC 243, 251, per Lord Hoffmann. Notably, however, the English doctrine of set-off, as currently expressed in legislation, omits any mention of a need for the creditor to demonstrate an actual reliance on the availability of set-off as a condition to being able to have the benefit accruing from its automatic operation in the event of the debtor's insolvency (Insolvency Act 1986, s.323; Insolvency Rules 1986, rr.2.85, 4.90).

For the purposes of the Global Principles Project, the Reporters have endeavored to approach the issue of set-off with an open mind as to the international acceptability of any rule whereby it may be permissible to disapply the set-off law of the *lex fori concursus* in a way that enables a right of set-off to be claimable, where it can be shown that legitimate expectations of the availability of such a right, in the event of the counterparty's insolvency, have accompanied a creditor's approach to its relationship with the debtor. We are of the opinion that such disapplication should be permitted under defined circumstances, and that it would provide a useful support to trade and commerce if consensus could be achieved on a standard formulation of the basis on which set-off is to operate in international cases. For example, debtors who happen to be based in jurisdictions under whose laws set-off is not available may experience relatively greater difficulty in obtaining credit—including structured loans—from parties based in jurisdictions where set-off would ordinarily be operative in the event of the debtor's insolvency. By permitting such international relationships, if suitably structured, to benefit from the application of the rule and policy found in the legal system under which the creditor habitually operates, the proposed rule could enable such debtors to have access to credit that would otherwise not be so readily available to them.

Although Global Rule 17 results in the unaffectedness of certain rights (i.e., the right of a creditor to demand the set-off of its claims against the claims of the debtor, where such a set-off is permitted by the law applicable to the insolvent debtor's claim), Global Rule 21 ensures that the limitation of this principle does not lead to immunity from the provisions concerning detrimental acts contained in the *lex concursus*.

In proposing a Global Rule for global application, based on that of Article 6 of the EU Insolvency Regulation, the Reporters consider it to be essential to anticipate that some parties may seek to exploit the possibilities presented by the principle of party autonomy in selecting the law to govern an international contract. By so expressing their choice as to engage the law of an otherwise unconnected system of law that happens to be favorable to the doctrine of set-off, they may aspire to circumvent the law and policy of the system of law to which the insolvent debtor would otherwise be subject. Accordingly, Global Rule 18 operates to prevent the effect of Global Rule 17 from being invoked in a case where, in the absence of an express choice made by the parties, the law applicable to the insolvent debtor's claim would be that of the law of the state of the opening of insolvency proceedings, unless it is shown that there is a substantial relationship between the chosen law and the parties or the transaction, or that there is some other reasonable basis for the parties' choice. Moreover, Global Rule 21 ensures that the operation of Global Rule 17 itself does not give rise to immunity from the provisions concerning detrimental acts contained in the *lex fori concursus*. Consequently if, as a result of the application of the avoidance rule of the law of the state of the opening of main insolvency proceedings, the creditor's claim against the insolvent estate is either reduced in amount or is avoided completely, the creditor may be wholly or partly deprived of the benefit of set-off against the insolvent debtor's claim that might otherwise have been available. Finally, Global Rule 21 ensures application of the provisions concerning detrimental acts contained in the *lex concursus*. This principle could, for instance, apply in the event that A has a debt payable to the estate but also has a claim assigned to him by B against the estate and A demands set-off, a situation that, for example, is disallowed under the Netherlands Article 54(1) *Faillissementswet*.

REPORTERS' NOTES

The exceptions that relate to third parties' rights in rem and to set-off are structured similarly and use similar wording. See the Appendix to this Report for the description of "shall not affect." The obligatory aspects concerning set-off are determined by private-international-law rules that form part of a state's law of obligations. Where set-off is concerned, two claims are mutually satisfied. In theory, the right to demand set-off is determined by either (a) the cumulative application of the laws applicable to each of the individual claims, or (b) solely by the law applicable to the debtor's claim ("passive" claim in the set-off; sometimes termed "primary" claim) against which the creditor intends to set-off his counter-claim ("active" claim in the set-off) against the debtor. The EU Insolvency Regulation comprises the latter method in that the right to set-off is derived from "the law applicable to the insolvent debtor's claim," see Article 6, that is, the law applicable to the claim under which the insolvent debtor is the creditor in relation to the other party, see Virgós / Schmit Report, nr. 108. The latter law is sometimes referred to as the *lex debitoris*. The assessment of the law that is applicable to the claim of the insolvent debtor is not the law at the time of the opening of the main proceedings, but at a prior point in time, that is, the moment that the right to set-off was created.

It is explained above that Article 6 of the EU Insolvency Regulation allows the creditor to retain its right to set-off as an acquired right against the insolvency proceedings (the right to set-off is not affected by the opening of proceedings) when "the normally applicable rules of conflict of laws" so provide, which could be the laws of (potentially) any state in the world. This is acknowledged in Article 2 of the Rome Convention. As new Member States have joined the EU since 1980, accession to the Rome Convention has been included among the terms of entry negotiated between the EU and its existing Members and the candidates for membership. For example, Spain (together with Portugal) acceded to the Rome Convention with effect from 1 September 1993 upon ratification of the Funchal Convention of 18 May 1992 (OJ 1992, C333/1). See Dicey, Morris, and Collins, The Conflict of Laws, 14th Ed. 2006, with cumulative supplements, para. 32-011, providing a list of accession conventions, etc., in fn.31.

It should be noted that in the German language, Article 4(2)(d) of the EU Insolvency Regulation reads that the *lex concursus* determines "*die Voraussetzungen für die Wirksamkeit einer Aufrechnung*" (according to our translation: "the presumptions for the effect of set-off"), where the English text reads "the conditions under which set-offs may be invoked"). The (alleged) difference in the text has led to the question being raised in German literature as to whether such presumptions also include material conditions, which according to this interpretation would be determined by the *lex causae*. For a summary of this debate, see Jens Haubold, *Europäische Insolvenzverordnung, Kapitel 32*, in: Gebauer M./ Wiedmann, T. (Eds.), *Zivilrecht unter europäischem Einfluss. Die richt-linienkonforme Auslegung des BGB und andere Gesetze—Erläuterung der wichtigsten EG-Verordnungen*, Richard Boorberg Verlag, 2. Auflage, 2010, nr. 125; Christoph Jeremias, *Internationale Insolvenzaufrechnung*, Max-Planck-Institut für ausländisches und internationales Privatrecht, Studien zum ausländischen und internationalen Privatrecht, nr. 150, Tübingen: Mohr Siebeck, 2005, p. 240ff. The latter author concludes (op. cit., p. 255) that Article 4(2)(d)'s *lex concursus* is decisive with regard to both the substantive legal effects of set-off as well as the permissibility of set-off during insolvency. In this way, too, see Miguel Virgós and Fransisco Garcimartín, The EC Regulation on Insolvency Proceedings: A Practical Commentary, Kluwer Law International, 2004, nr. 181ff.

Article 6 of the EU Insolvency Regulation only concerns a right to set-off arising in respect of mutual claims incurred prior to the opening of the insolvency proceedings. After this moment in time, Article 4 will be applied, without exception, to decide whether or not the set-off is admissible (see the Virgós /

Schmit Report, nr. 110). An obvious question concerns the maturing of claims. According to Miguel Virgós and Francisco Garcimartín, The EC Regulation on Insolvency Proceedings: A Practical Commentary, Kluwer Law International, 2004, nr. 188, Article 6 applies "when the claims arose out of contracts or other dealings entered into prior to the opening of the insolvency proceedings, even if they were, at that moment, mature or unmature, contingent or not." We concur with this statement.

For the earlier statement made above, that presently under English and Netherlands rules of private international law (outside of the scope of the EU Insolvency Regulation) the rule of Article 6 is followed, see the current edition of Dicey, Morris, and Collins, The Conflict of Laws, 14th edition 2006, para. 7-032, where the learned editors, having drawn a distinction between procedural and substantive set-off (the former being concerned with the possibility that certain kinds of claim may be triable together according to the procedural rules of the *lex fori*), then state: "A set-off may, on the other hand, amount to an equity directly attaching to the claim and operate in partial or total extinction thereof; an example is the compensation *de plein droit* of French law. The question whether a set-off of this kind exists is one of substance for the *lex causae*, that is, the law governing the claim that the defendant asserts has been discharged in whole or in part." (footnotes omitted). In the passage quoted above, "the claim which the defendant asserts has been discharged in whole or in part" corresponds to the "passive" claim, as between the creditor and the insolvent debtor, because that is the claim that would be enforced against the creditor (as defendant) by the insolvent debtor (as claimant). For the Netherlands, it has been suggested that in the light of the judgment of the Netherlands Supreme Court 24 October 1997, JOR 1997/146; NJ 1999, 316, the rule laid down in Article 6 may provide the inspiration for solutions in cases that fall outside the scope of the Regulation, see Bob Wessels, International Insolvency Law, Deventer: Kluwer, 3rd ed., 2012, para. 10664. The principle indeed has been applied by District Court Amsterdam 17 December 2009, LJN: BI2613 (Australian parent company with subsidiary in the Netherlands).

Global Rule 17 aims to provide a rule for set-off in general. In as far as set-off covers a phenomenon such as "netting," the Reporters have not drafted a global principle. It is noted that the UNCITRAL Legislative Guide offers the following recommendation nr. 32: "Notwithstanding recommendation (31), the effects of insolvency proceedings on the rights and obligations of the participants in a payment or settlement system or in a regulated financial market should be governed solely by the law applicable to that system or market." Specific rights concerning set-off belonging to the participants of a payment or settlement system or to a financial market, as pursuant to Article 9 of the EU Insolvency Regulation, shall be governed solely by the law of the Member State applicable to that system or market.

There is considerable debate as to the meaning of the reference to "law" as used in various contexts under the EU Insolvency Regulation. With regard to Article 6, the issue is whether the word "law" in the wording of that Article ("the law applicable to the insolvent debtor's claim") refers only to a state's general civil law governing the debtor's claim, or whether "law" also includes the insolvency-law provisions of such law? The wording of Article 6(1) is broad and the Virgós/Schmit Report (1996), para. 109, does not offer further elaboration, merely stating that Article 6 permits ". . . the set-off according to the conditions established for insolvency set-off by the law applicable to the insolvent debtor's claim ('passive' claim)." In literature, generally the approach is followed that in cases in which general civil law and insolvency law of a certain state provide for different requirements, any choice of the law of such a state also encompasses "insolvency law." In this way, several German, Austrian, and Dutch authors: Peter von Wilmowsky, *Aufrechnung in internationalen Insolvenzfällen*, in: Konkurs- Treuhand- und Schiedsgerichtswesen, Zeitschrift für Insolvenzrecht (KTS) 1998, p. 360; Stephan Kolmann, *Kooperationsmodelle im Internationalen Insolvenzrecht. Empfielt sich für das Deutsche internationale Insolvenzrecht eine Neuorientierung?*, Schriften zum

Deutschen und Europäischen Zivil-, Handels- und Prozessrecht, Bielefeld: Verlag Ernst und Werner Gieseking, 2001, p. 312 ("In its result the provision of Article 6 also leads to a most favoured treatment; only very minor limitations of insolvency law will be enforced, so the guarantee function [of set-off] can be realized to the optimal effect"); Christoph Jeremias, *Internationale Insolvenzaufrechnung*, Max-Planck-Institut für ausländisches und internationales Privatrecht, Studien zum ausländischen und internationalen Privatrecht, nr. 150, Tübingen: Mohr Siebeck, 2005, p. 259; H.-C. Duursma-Kepplinger, in: Duursma-Kepplinger, H.-C, Duursma, D, Chalupsky, E., *Europäische Insolvenzverordnung. Kommentar*, Springer, Wien New York, 2002, Art. 6, nr. 18; A.J. Berends, *Insolventie in het internationaal privaatrecht*, Ph.D. Vrije University, Amsterdam, 2005, p. 430 et seq.; Bob Wessels, International Insolvency Law, Deventer: Kluwer, 3rd ed., 2012, 10666.

Rule 19 Reciprocal Contracts: General Rule

Save as otherwise provided by [this Act/these Rules], mutual obligations in respect of a reciprocal contract, which has been concluded prior to insolvency of one of the parties, shall be governed solely by the law of the state of the opening of proceedings.

Rule 20 Contracts of Employment (Labor Contracts)

The effects of insolvency proceedings on employment contracts and relationships shall be governed solely by the law of the state applicable to the contract of employment.

Rule 21 Restrictions to Exceptions

Global Rules 15, 17, and 20 shall not preclude actions for voidness, voidability, or unenforceability of legal acts detrimental to the general body of creditors, pursuant to the law applicable to the insolvency proceedings, as determined by Global Rule 12 or by Global Rule 13 (as the case may be).

Comment to Global Rules 19-21:

Any insolvency of a party will have effect on the existence or the performance of reciprocal (synallagmatic) contracts, which have been concluded prior to insolvency of one of the parties. If, at the time of the opening of main proceedings, mutual obligations are still to be (fully) performed by both parties in respect of a current contract, applicable national insolvency law may contain a provision that the contract is deemed to be dissolved by operation of law. Alternatively, under the relevant national insolvency law, where both parties have failed to perform their obligations (fully or partially) under a reciprocal contract, the liquidator may have the authority, by operation of law, to choose whether he will continue performance or not. When he chooses not to do so, the relevant national insolvency law may contain a specific rule or sanction, in general protecting the interests of the counterparty. In the Netherlands, if a liquidator has not declared himself willing to be bound by the contract within a reasonable term set by the counterparty in writing, the liquidator will forfeit the right to demand performance of the contract (see Article 37(1) Dutch *Faillissementswe*t). A similar rule exists in Germany (§ 103 *Insolvenz Ordnung*). Such rules generally aim to protect the insolvent estate against mandatory performance of the contract

that could be detrimental to the estate, due to the changed circumstances, see Virgós / Schmit Report (1996), nr. 116, to which is added (op. cit., nr. 117), that, in the Insolvency Regulation, the general rule on conflict of laws is that the regulation of the effects of proceedings on current contracts to which the debtor is party falls to the law of the Member State of the opening of the main proceedings, see Article 4(2)(e). Therefore, the *lex concursus* and not the *lex contractus* determines these effects.[365] The applicable national insolvency law interferes with and displaces the rules applicable to contracts, which derive from the law applicable under the Rome Convention. This is generally considered to be to the advantage of creditors, see Virgós / Schmit Report, nr. 117.[366]

Both the EU Insolvency Regulation (Article 4(2)(e)), and the UNCITRAL Legislative Guide (Recommendation 31) assert that the *lex fori concursus* should apply to all aspects of the commencement, conduct, administration, and conclusion of insolvency proceedings and their effects (emphasis added). In neither of these sources does one find an elucidation of the terminology "effects." If and insofar as the opening, the conduct, or the closure of main proceedings has "effects" on a current contract, such effects will be governed by the *lex fori concursus.* According to Global Rule 19, those effects will be extended all over the globe. In literature on the European continent, the question has been raised as to whether an "effect" will include the provision in the *lex fori concursus* that the counterparty has an obligation to continue supplying (or more generally, continue performing), for example, the supply of energy, finance, or bank credit (hypothesising that the *lex concursus* contains such provisions) or that the counterparty may first ask to be paid the overdue payments or lodge a claim against the estate as an unsecured creditor for the total amount. A logical consequence of the proposed Global Rule 19 is that, for instance, the mandatory obligation, for example, to continue performance of certain obligations (e.g., the supply of energy or water) and therefore the injunction to prevent suspension, represents an "effect" of proceedings to which the *lex concursus*, containing such a provision, applies. It appears that, in material terms, the difference will be not so great as the question of which claims may be lodged in the estate, which consequences arise from claims created after the opening of proceedings, and which rules govern the lodging, verification, and admission of claims, all of which will be decided according to the *lex concursus* (Article 4(2)(g) and (h) EU Insolvency Regulation).

Based on perceived impressions of the importance of certain social policies and on several high-profile court cases,[367] the Reporters believe that a rule of global application should be

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[365] See, e.g., Miguel Virgós and Francisco Garcimartín, The EC Regulation on Insolvency Proceedings: A Practical Commentary, Kluwer Law International, 2004, nr. 197; Jasnica Garašić, Recognition of Foreign Insolvency Proceedings: the Rules that a Modern Model of International Insolvency Law Should Contain, in: Yearbook of Private International Law, 2005, vol. 5, p. 349.

[366] This rule must be regarded as current Netherlands' private international insolvency law, which will also therefore govern the consequences of current contracts when the counterparty to a contract is located in another state. On the other hand, under English law, according to settled (albeit controversial) authority, an insolvency proceeding taking place in a foreign jurisdiction that is the debtor's domiciliary forum is not considered to be effective to discharge a contractual obligation of the debtor that is governed by English law (Gibbs v. La Société Industrielle et Commerciale des Métaux (1890) 25 Q.B.D. 399 (CA). See Ian F. Fletcher, Insolvency in Private International Law. National and International Approaches, Oxford Private International Law Series, Oxford University Press, 2nd ed. 2005, 2.124-2.129.

[367] E.g., the *Daisytek* case, Re Daisytek-ISA Ltd [2003] BCC 562 (High Court, UK); JOR 2003/287; NZI 2004, 219.

proposed with regard to current contracts of employment in case of the insolvency of the employer. A clear rule to apply to such contracts will contribute to the certainty that employees should have with regard to the question: what law is to govern the performance of the obligations of the employer versus the employee? This includes such issues as deciding which law is to be applied to a certain term, or what period is to be observed when terminating such a contract, including the legal consequences of such termination. The challenge in drafting an appropriate choice-of-law rule for such cases is therefore to respect the need to prevent possible conflicts between the legislative policies of the various states concerned, which reflect the varying approaches to the protection of different social or general interests with regard to employment.[368] A rule that reflects the balance of current opinion on the best response to this challenge is contained in Article 10 of the EU Insolvency Regulation (stipulating that the applicable law is the law applicable to the contract of employment), see further below. A similar approach has been followed for relations with non-EU states in, for example, Germany (Article 337), Spain (Article 207), Croatia (Article 305), and the Netherlands (Pre-draft Article 10.4.7).[369]

Both the EU Insolvency Regulation and the UNCITRAL Legislative Guide follow an aligned path in their approach to the matter of contracts of employment. Article 10 of the EU Insolvency Regulation declares: "The effects of insolvency proceedings on employment contracts and relationships shall be governed solely by the law of the Member State applicable to the contract of employment." Its rationale is explained in Recital (28): "In order to protect employees and jobs, the effects of insolvency proceedings on the continuation or termination of employment and on the rights and obligations of all parties to such employment must be determined by the law applicable to the agreement in accordance with the general rules on conflict of law. Any other insolvency-law questions, such as whether the employees' claims are protected by preferential rights and what status such preferential rights may have, should be determined by the law of the opening State." The UNCITRAL Legislative Guide determines in recommendation 33: "Notwithstanding recommendation 31, the effects of insolvency proceedings on rejection, continuation and modification of labour contracts may be governed by the law applicable to the contract." The key basis for recommendation 33 is that, in several states, special (often mandatory) protections may be afforded in terms of a financial safety net for employees, or restrictions on the rejection or modification of those contracts in insolvency. The rationale of (mandatory) provisions, according to the Guide, ". . . . lies in protecting the reasonable expectations of employees with respect to their contract of employment, recognizing that workers may have a relatively weaker bargaining position than their employer, and in ensuring non-discrimination amongst workers working in the same state, whether they are employed by a local or by a foreign employer." [para. 87]. Both sources mentioned, therefore, result in the application of the law of the (Member) state applicable to the employment/labor contract, sometimes referred to as "*lex laboris*." It is also notable that special rules of choice of law, whose purpose is to protect the employee against loss of protection resulting from the manipulation of the applicable law of the contract of employment, are included in the Rome Convention of 1980 (Article 6) and in Article 8 of the

[368] See Miguel Virgós and Francisco Garcimartín, The EC Regulation on Insolvency Proceedings: A Practical Commentary, Kluwer Law International, 2004, nr. 201.

[369] As to choice of labor law, for example, see J.L. Westbrook, Multinational Financial Distress: The Last Hurrah of Territorialism, 41 Texas International Law Journal 321 (2006) (reviewing L.M. LoPucki, Courting Failure: How Competition for Big Cases is Corrupting the Bankruptcy Courts (2005)).

Rome I Regulation that has superseded the Rome Convention in respect of all EU Member States, except Denmark, with effect from December 17, 2009 (see further below).

It is noted that both the rules embodied in Article 10 of the EU Insolvency Regulation and in Recommendation 33 of the Legislative Guide represent a limited exception to the application of the *lex concursus*. They both constitute exceptions only with regard to their effects on current employment contracts, but do not cover other aspects regulated by the *lex concursus*, for instance, in the case of the EU Insolvency Regulation, the ranking of the resulting claim (Article 4(2)(i)); the rights of the employee after the proceedings are closed (Article 4(2)(k)); and the voidness, voidability, or unenforceability of acts that are detrimental to the creditors as a whole (Article 4(2)(m) and Article 13). These issues have to be resolved by the *lex concursus*. The *lex concursus* governs the "effects" of the main insolvency proceedings on current employment contracts to which the debtor is party, see Article 4(2)(e). The rights and obligations based on, or derived from, the contract itself remain to be determined by the *lex causae* of the contract of employment. The question who is an "employee" in the meaning of Global Rule 20 is to be determined by the internal law of the state applicable to the contract of employment. In many states, the frontiers of meaning of the term "employee" are tested, for example, quasi self-employed persons, artists or persons who are to deliver a certain result of service, without continuous supervision or control by a third party. It is the law applicable that is decisive.[370]

The proposal for Global Rule 21 can be explained using a European background. In the European context, a rule similar to Global Rule 21 is explicitly drafted for rights in rem and reservation of title (Articles 5 and 7 EU Insolvency Regulation). Under the application of the EU Insolvency Regulation, it has, however, been questioned whether Article 13 is applicable to (detrimental) acts relating to contracts that fall under the scope of Article 10 (employment). The *lex laboris* applies "solely" to such contracts. In agreement with H.-C. Duursma-Kepplinger, in: Duursma-Kepplinger, H.-C, Duursma, D, Chalupsky, E., Europäische Insolvenzverordnung. Kommentar, Springer, Wien New York, 2002, Art. 13, nr. 22, we are of the opinion that the law relating to detrimental acts serves its own purposes, whereas the purpose of Article 10 is to protect certain, defined interests that are unrelated to acts which are detrimental to the general body of creditors. Article 13 of the EU Insolvency Regulation is applicable. No second paragraph with wording similar to, for example, that in Article 6 of the EU Insolvency regulation with regard to set-off ("2. Paragraph 1 shall not preclude actions for voidness, voidability or unenforceability as referred to in Article 4(2)(m)"), appears in the final text of Article 10. Miguel Virgós and Francisco Garcimartín, The EC Regulation on Insolvency Proceedings: A Practical Commentary, Kluwer Law International, 2004, nr. 232, argue that the omission of any reference in Article 10 to the possible application of Article 4(2)(m) is because Article 10 serves as an exception to 4(2)(e) and not as a general exception to Article 4, for which reason allegedly an explicit exception to Article 4(2)(m) was not considered necessary in Article 10. With respect, this reasoning is not readily obvious or apparent to someone reading Articles 4 and 10 as printed. As Global Rule 12 does not contain a list of items that are covered by the general principle of applicability of the *lex concursus*,

[370] See Peter Mankowski, Contracts Relating to Intellectual or Industrial Property Rights under the Rome I Regulation, in: Stefan Leible and Ansgar Ohly (eds.), Intellectual Property and Private International Law, Tübingen: Mohr Siebeck 2009, 31ff, who submits that for the application of Article 8 Rome I Regulation, the persons mentioned should not be regarded as "employees."

and also for the sake of clarity, Global Rule 21 is proposed in order to ensure that the avoidance rules of the *lex fori concursus* as referred to in Global Rule 12 remain applicable.

REPORTERS' NOTES

Based on Global Rules 12 and 13, in principle the law applicable to the effects of insolvency proceedings on current contracts to which the debtor is party is the *lex concursus*. Article 10 of the EU Insolvency Regulation provides for an exception, taking the form of the choice for another law to be applied. We have explained this form of exception in the commentary to Global Rule 12. The words "employment contract and relationships" in Article 10 of the EU Insolvency Regulation include, according to Christoph G. Paulus, *Die europäische Insolvenzverordnung und der deutsche Insolvenzverwalter*, in: Neue Zeitschrift für das Recht der Insolvenz und Sanierung (NZI) 2001, p. 513, collective (bargaining) employment contracts. For another view (limited to: individual employment contracts), see Peter Mankowski, *Europäisches Internationales Insolvenzrecht (EuInsVO), Kapitel 47*, Kölner Schrift zur Insolvenzordnung, 3. Aulage, Münster: ZAP Verlag 2009, nr. 118. On a European level, the broad interpretation is defensible, on a global scale it should indeed be limited to individual employment contracts. It should be noted that the quoted words, under the application of the EU Insolvency Regulation, must be interpreted autonomously and not according to the *lex laboris*, see Jens Haubold, *Europäische Insolvenzverordnung, Kapitel 32*, in: Gebauer M./ Wiedmann, T. (Eds.), *Zivilrecht unter europäischem Einfluss. Die richtlinienkonforme Auslegung des BGB und andere Gesetze—Erläuterung der wichtigsten EG-Verordnungen*, Richard Boorberg Verlag, 2. Auflage, 2010, nr. 135. In addition, when applying Article 10 of the EU Insolvency Regulation, the preliminary question of whether there is indeed an employment contract and what law applies to that contract (according to the *lex contractus*) has to be resolved, see Miguel Virgós and Francisco Garcimartín, The EC Regulation on Insolvency Proceedings: A Practical Commentary, Kluwer Law International, 2004, nr. 209; Jona Israël, European Cross-Border Insolvency Regulation: A Study of Regulation 1346/2000 on Insolvency proceedings in the Light of a Paradigm of Cooperation and a Comitas Europaea, Ph. D. European University Institute, Florence, 2004, Intersentia, Antwerp-Oxford, 2005, p. 284. This meaning also is reflected in Global Rule 19.

The power to terminate an employment contract is imposed according to the law governing the contract of employment. Where the exclusion should be narrowly construed, it follows that any time limits that must be observed must be calculated according to the *lex laboris*. Questions regarding the amount of the employees' claim, for example, whether or not compensation for holidays not taken should be included, is determined by the *lex laboris*. The actual lodging of the claim and the ranking of the claim are determined by the *lex concursus*, which follows from Article 4(2)(h) of the EU Insolvency Regulation (see the Virgós / Schmit Report, nr. 128; A.J. Berends, *Insolventie in het internationaal privaatrecht*, Ph.D. Vrije University Amsterdam, 2005, p. 316) and likewise from the general principle laid down in Global Rules 12 and 13.

Articles 6 and 7 of the Rome Convention (and correspondingly Articles 8 and 9 of the Rome I Regulation) determine which law applies to an individual employment contract, the general principle being that the parties are free to choose to which law the employment contract is subject, see Article 3 Rome Convention (and also Article 3 of the Rome I Regulation). By taking advantage of this free choice, the employee may not be deprived of the protection afforded to him by the mandatory rules of the law that would be applicable under Article 6(2) Rome Convention (see the corresponding provisions within Article 8(2), (3), and (4) of the Rome I Regulation) in the absence of this free choice. Article 6(2) of the Convention (and, to the same effect, Article 8(2) and (3) of the Rome I Regulation) sets out that an employment contract shall be governed (in the absence of a choice in accordance with Article 3): (i) by the law of the country in which the employee habitually carries out

his work in performance of the contract, even if he is temporarily employed in another country, or (ii) if the employee does not habitually carry out his work in one country, by the law of the country in which the place of business through which he was engaged is situated. Both conflict rules are excluded if "it appears from the circumstances as a whole that the contract is more closely connected with another country," in which case the contract shall be governed by the law of that country.

Under the application of the above system, Article 7(1) of the Rome Convention allows effect to be accorded to the mandatory rules of the law of another country with which "the situation has a close connection, if and in so far as, under the law of the latter country, those rules must be applied whatever the law applicable to the contract." However, by Article 22(1)(a) of the Convention, a Contracting State is permitted to lodge a reservation whereby Article 7(1) shall not apply in proceedings that take place before the courts of the State in question. Several Contracting States, including Germany, Luxembourg, and the United Kingdom, have exercised the right of reservation in relation to Article 7(1). Also, by Article 16, the applicability of a rule of the law of any country specified by the Convention (i.e., by initial application of the Convention's choice-of-law rules) may be refused under the public policy (ordre public) of the State whose court is hearing the case, but only if such application is manifestly incompatible with the public policy of the forum. Among authors there has been considerable debate as to whether Article 7 of the Rome Convention allows a court to apply said rules, as this matter is specifically dealt with in Article 10 of the EU Insolvency Regulation (see Jona Israël, European Cross-Border Insolvency regulation. A Study of Regulation 1346/2000 on Insolvency proceedings in the Light of a Paradigm of Cooperation and a Comitas Europaea, Ph. D. European University Institute, Florence, 2004, Intersentia, Antwerp-Oxford, 2005, p. 285; Jasnica Garašić, *Anerkennung ausländischer Insolvenzverfahren*, Ph.D. Hamburg 2004, Frankfurt am Main: Peter Lang, 2005, 2 Volumes, Part II, p. 310). Under the redesigned provisions of the Rome I Regulation, now applicable to all Member States other than Denmark, Article 9(2) provides that "Nothing in this Regulation shall restrict the application of the overriding mandatory provisions of the law of the forum," and Article 21 ("Public policy of the forum") replicates the substance of Article 16 of the Rome Convention. However, Article 9(3) of the Rome I Regulation contains a provision that differs in a significant way from Article 7(1) of the Rome Convention. The new Article 9(3) states: "Effect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful. In considering whether to give effect to those provisions, regard shall be had to their nature and purpose and to the consequences of their application or non-application." It should be noted that, unlike the Rome Convention, the Rome I Regulation contains no provision allowing a Member State any option whether to apply or disapply any provision of the Regulation, which is binding in its entirety and has the direct force of law within all the EU Member States, with the exception of Denmark, since December 17, 2009. The expression "overriding mandatory provisions" is defined in Article 9(3), and means: ". . . provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation."

Rule 22 Defenses to the Avoidance of Detrimental Acts

Global Rule 21 shall not apply where the person who benefited from an act detrimental to the general body of creditors provides evidence that:

(i) The said act is subject to the law of a state other than that of the state of the opening of proceedings; and
(ii) That law does not allow any means of challenging that act in the relevant case.

Rule 23 Exception

23.1. By way of exception to Global Rule 22, a transaction detrimental to the general body of creditors shall not be exempted from the effect of the avoidance rule of the law of the state of the opening of insolvency proceedings if proof is provided that the state to whose law the transaction is subject has no substantial relationship to the parties or the transaction, and there is no other reasonable basis for the selection of the law of that state as the law to govern the transaction in question.
23.2. It is for the party who claims that the conditions specified in Global Rule 23.1 are met, in relation to a particular transaction, to prove that those conditions are in fact met in the relevant case.

Comment to Global Rules 22 and 23:

"Fraud by insolvent debtors, in particular by concealing assets or transferring them to foreign jurisdictions, is an increasing problem, in terms of both its frequency and its magnitude. The modern, interconnected world makes such fraud easier to conceive and carry out," thus the Guide to Enactment to the UNCITRAL Model Law, para. 14. To prevent and to attack fraudulent acts, which are to the detriment of creditors, it is of utmost importance to have a clear and robust rule, while at the same time ensuring that parties who have dealt with the debtor should be afforded measures of protection when they have acted in good faith. In the absence of such a safeguard, confidence in commercial transactions would be considerably weakened, and legitimate expectations of parties who have dealt in good faith, for value, and in the ordinary course of business, could be undermined through the application to the counterparty of a *lex concursus* that applies different rules and criteria for the challenge of transactions. It should also be borne in mind that a party may undergo an alteration of circumstances between the time of entering a transaction and the time of becoming insolvent, such that it becomes amenable to undergo insolvency proceedings in a different state to that whose law would have been reasonably anticipated by the counterparty at the time of the original transaction.

As has been repeatedly stated above, Article 4(2)(m) of the EU Insolvency Regulation supplies a basic choice-of-law rule to the effect that the *lex fori concursus* "shall determine the rules relating to the voidness, voidability or unenforceability of legal acts detrimental to all the creditors." However, the application of this rule is moderated by reason of the opening words of Article 4(1), "Save as otherwise provided in this Regulation . . . ." Article 13 of the Regulation provides for such an exception to the rule of general applicability of the avoidance rules of the *lex fori concursus*. Its text reads:
"Article 4(2)(m) shall not apply where the person who benefited from an act detrimental to all the creditors provides proof that:
- the said act is subject to the law of a Member State other than that of the State of the opening of proceedings, and
- that law does not allow any means of challenging that act in the relevant case."

The antithesis between the provisions of Article 4(2)(m) and Article 13 is explained as follows. While in the first instance, and as a basic rule, the *lex concursus* of the state of the opening of the insolvency proceedings determines the rules relating to the voidness, voidability, or unenforceability of legal acts detrimental to the general body of creditors, it is the aim of Article 13 ". . . . to uphold legitimate expectations (of creditors or third parties) of the validity of the act in accordance with the normally applicable national law, against interference from a different '*lex concursus*,'" see Virgós / Schmit Report (1996), para. 138. The same paragraph of the Report proceeds to express the opinion that the application of Article 13 is justified with regard to acts carried out prior to the opening of the insolvency proceedings, and ". . . . threatened by either the retroactive nature of the insolvency proceedings opened in another country or actions to set aside previous acts of the debtor brought by the liquidator in those proceedings." A similar rule in relationships to non-EU states has been introduced in Germany (Section 339), in Spain (Article 208),[371] and the pre-draft of November 2007 in the Netherlands (Article 10.4.9).[372]

The attainment of enhanced certainty and predictability and the principle of protection of legitimate expectations results in a rule that only applies to acts carried out prior to the opening of the insolvency proceedings. After opening of such proceedings in another state, the creditor's reliance on the validity of the transaction under the national law applicable in noninsolvency situations is no longer justified. From that moment on, all unauthorized disposals by the debtor are, in principle, ineffective by virtue of the divestment of his powers to dispose of the assets. National law may supply answers for situations in which a creditor was not aware of insolvency, including those cases in which this creditor acted in the normal course of business transactions.[373] The provision is based on the premise that all such dispositions are void unless validated by the court. If applied inflexibly and insensitively, such a rule could have devastating consequences for any debtor experiencing a period of financial difficulty during which some unpaid creditor happens to take the first formal step to initiate an insolvency proceeding. Even if the debtor may have genuine grounds for resisting that process, any legal uncertainty as to the integrity of transactions entered into during the interim period, while resolution of the matter is pending, may precipitate the very collapse that the debtor is striving to avert, as business may be stultified in the meantime. The risk of such an unwanted outcome may be mitigated by a prudent judicial approach to the exercise of the power to validate transactions entered into during such a "twilight" period between a third party and the debtor, provided that the dealings are conducted for value, in good faith, and in the ordinary course of business. The confidence thereby engendered in the ultimate confirmation of legitimate transactions may enable the debtor to continue to trade while awaiting the outcome of a pending application to open insolvency proceedings, especially where there is a valid case for resisting the application, or where the completion of transactions will result in a preservation of value for the benefit of creditors generally.

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[371] For a comparison between the German and Spanish rules, see Anna-Maja Schaefer, *Das autonome international Insolvenzrecht Spaniens im Vergleich zum deutschen Recht*, Schriten der Deutch-Spanischen Juristenvereinigung, Band 31, Peter Lang Frankfurt, 2009, p. 188.

[372] In this way, too, see Virgós / Schmit Report, nr. 93, alleging that the need to protect legitimate expectations and the certainty of transactions is equally valid in relations with non-EU states.

[373] For instance, Insolvency Act 1986, s.127 (UK) confers a discretion on the court to validate a post-insolvency disposition of property of the debtor.

Global Rule 22 aspires to complement such rules and practices of domestic law as may be designed to sustain commercial confidence in the integrity of bona fide transactions that take place during a period of uncertainty regarding the debtor's solvency. It is self-evidently based upon the terms of Article 13 of the EU Insolvency Regulation, and in a similar way Global Rule 22 is designed to bring about the displacement of the avoidance rules of the *lex fori concursus* where the person who benefited from the transaction is able to show that it is subject to the law of a state other than that in which insolvency proceedings are opened, and that the *lex causae* does not allow any means of challenging the act in question in the actual circumstances under which it has taken place. Two particular points of divergence should be noticed between the wording of Global Rule 22 and Article 13 of the EU Insolvency Regulation. First, for reasons already explained above, the expression "an act detrimental to the general body of creditors" has been employed in preference to "an act detrimental to all the creditors," as is used in Article 13. Secondly, as befits a rule intended for global application, no qualifying adjective is attached to the word "state" where it is used in paragraph (i) to refer to the act being "subject to the law of a state other than that of the state of the opening of proceedings," whereas in Article 13 the more limited reference is made to "the law of a Member State . . . ." The absence of such a restriction in Global Rule 22 is necessitated by the global context in which the rule is destined to operate, but it is also necessary to create a balancing provision in view of the obvious potential for exploitation of the liberal terms in which the Rule is drafted. Global Rule 23 is designed to answer that need (see below).

The structure of Global Rule 22 is such that the *lex fori concursus* will not apply if the person who benefited from the act whose validity is challenged provides the proof as required in paragraphs (i) and (ii). This entails a two-phase process. It must be presupposed that, in the first instance, a challenge to the validity of the act in question is made in accordance with the provisions of the *lex fori concursus* by a party eligible to do so—typically the insolvency office holder. Two elements that are logically required to be proven are "benefit" to one or more individual persons and "detriment" to creditors generally. Such benefit and detriment are governed in this initial phase of the process by the *lex fori concursus* and have to be stated and proved by the party invoking the avoidance rule of that system of law. This rule of proof is followed under the application of the EU Insolvency Regulation.[374] In the next phase, the burden of proof falls upon the person who seeks to enforce the exception to the avoidance rule of the *lex fori concursus*. To do so, the defendant must show that the *lex causae* does not allow any means of challenging the act in question in the relevant case. The expression "in the relevant case," used both in Global Rule 22 and in Global Rule 23, means that the act should not be capable of being challenged in fact, that is, after taking into account all the concrete circumstances of the given case: "It is not sufficient to determine whether it can be challenged in the abstract" (see Virgós / Schmit Report, nr. 137). Moreover, the process of proving that the *lex causae* does not allow any means of "challenging" that act requires the defendant to demonstrate that neither the insolvency law of that state nor the general (civil) law, if applied to said act, contain any ground on which a successful challenge

[374] See, e.g., Miguel Virgós and Fransisco Garcimartín, The EC Regulation on Insolvency Proceedings: A Practical Commentary, Kluwer Law International, 2004, nr. 240; Jona Israël, European Cross-Border Insolvency regulation. A Study of Regulation 1346/2000 on Insolvency proceedings in the Light of a Paradigm of Cooperation and a Comitas Europaea, Ph. D. European University Institute, Florence, 2004, Intersentia, Antwerp-Oxford, 2005, p. 288; Jasnica Garašić, *Anerkennung ausländischer Insolvenzverfahren*, Ph.D. Hamburg 2004, Frankfurt am Main: Peter Lang, 2005, 2 Volumes, Part II, p. 360.

could be maintained on the basis of the evidence concerning the actual circumstances in which the act took place (see again Virgós / Schmit Report (1996), nr. 137). It should be noted that there is no requirement that any actual proceeding—such as an insolvency proceeding—should actually take place in the state whose law happens to be the *lex causae* of the act that is subject to challenge. The task of ascertaining the contents of that law, and of assessing the consequences of its application to the circumstances of the act in question, involves a special exercise in what is termed the proof of foreign law, which will be conducted according to the practice and tradition of the *forum concursus* regarding such matters, during the course of litigation before the courts of that state.

The two-phase process of challenge, and the complex burden of proof imposed upon the defendant who is required, in effect, to "prove a negative" with respect to every possible ground on which the act could be challenged under the *lex causae*, results in several questions of private international law that are not related to insolvency law itself. For instance, the question how the *lex causae* should be determined remains a matter to be resolved in accordance with the system of private international law of the state before whose court the challenge to the act is taking place. Illustrative of the problems to be encountered in this context is the question of which law is decisive of the (detrimental) act as far as concerns the transfer of assets. The *lex causae* of the act (e.g., the contract) will be relevant to the application of Global Rule 22, also for acts concerning transfer of property of assets. In such a case, the system may be that the *lex rei sitae* of the assets must be assessed (i) in the event of transfer or encumbrance of assets, and (ii) with regard to the voidness etc. of the underlying contract, irrespective of the law that is applicable to the act itself. Conversely, with regard to the law of property, certain aspects of assignment and pledging of claims, the possibility of a choice of law may exist.[375] If the alleged detrimental act is a payment, then a national private-international-law system may contain a rule providing that the *lex causae* of the payment should be the law that governs the obligation to pay and therefore not the *lex contractus* that governs the method of payment.[376] On the other hand, the application of Global Rule 22 assumes that no provision exists ("That law does not allow any means," see Global Rule 22(ii)) which provides grounds to challenge the debtor's act, either under the *lex causae*'s general (civil) law or under its insolvency law. The rationale is, after all, the attainment of enhanced certainty and predictability and the principle of protection of legitimate expectations of a creditor or third party concerning the legal validity and the effectiveness of an act that has been performed, against interferences of the *lex fori concursus* of another state.

Article 13 of the EU Insolvency Regulation is intended to offer only a limited scope for displacement of the avoidance rule of the *lex fori concursus* by some alternative applicable law by which the act is governed. By expressly restricting the scope of the exception to cases where the lex causae is that of an EU Member State, Article 13 gives rise in practice to somewhat limited possibilities of escape from the avoidance rule of the *lex fori concursus*. Even so, the inclusion of this exception in the Insolvency Regulation was not uncontroversial.

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[375] See, e.g., Dutch private international law, see Netherlands Supreme Court 16 May 1997, NJ 1998, 585 (*Hansa Chemie*).

[376] See H.L.E. Verhagen and P.M. Veder, *Faillissementspauliana*, in: Tijdschrift voor Insolventierecht (TvI) 2002/Special—Insolventieverordening, p. 137ff; Miguel Virgós and Francisco Garcimartín, The EC Regulation on Insolvency Proceedings: A Practical Commentary, Kluwer Law International, 2004, nr. 231, and Bob Wessels, International Insolvency Law, Deventer: Kluwer, 3rd ed., 2012, para. 10720.

Ultimately, the possible disadvantage of international forum-shopping was considered to be less important than providing the possibility of protection for a third party against a sudden confrontation with foreign law, that is, the *lex fori concursus*. In transposing this principle to a global level of application, it must be borne in mind that, in some circumstances, a state's law might be selected as the *lex causae* of a transaction purely on account of its unusually favorable provisions from the standpoint of a party who may subsequently wish to resist any challenge to the validity of the transaction, particularly (though not exclusively) in the event of the insolvency of the other party. Global Rule 23 is intended to provide a safeguard against attempts to exploit such advantageous attributes embodied in the law of a state that has otherwise no substantial connection with the transaction or the parties to it, and where there is no other reasonable basis on which the law of that state could be applicable to the transaction.

REPORTERS' NOTES

In literature, the combination of the applicability of the general rule (*lex fori concursus*) together with the defense mechanism, which is contained in Article 13 of the EU Insolvency Regulation (a defense against the application of the *lex concursus*, to be invoked by any interested party), has been greeted with acceptance. At the same time, criticism has been expressed, both on the chosen combination and—accepting the combination—the uncertainties it contains. See, e.g., Jan Peter Klumb, *Kollisionsrecht der Insolvenzanfechtung*, KTS Schriften zum Insolvenzrecht, Band 25, Carl Heymans Verlag, 2005, and Christoph Thole, *Die tatbestandlichen Wertungen der Glaubigeranfechtung*, Zeitschrift für Zivilprocess (ZZP) 2008, Heft 1, pp. 67-92. Both authors point at the difficulty that the legislation in certain states may contain different rules regarding avoidance in insolvency matters and outside insolvency. See also Jay L. Westbrook, Avoidance of Pre-Bankruptcy Transactions in Multinational Bankruptcy Cases, 42 Texas International Law Journal 899 (2007), at 914. As a general rule, we would suggest that there is no free choice for a certain law, but that insolvency avoidance rules should be applied, as these in general will be created for the benefit of the body of creditors, where the noninsolvency rules more probably only benefit one creditor.

The defense operates against a plea for the voidness, etc., of the act, which would follow from the application of the *lex fori concursus* or as a "veto," based on the *lex causae*, against the dominance of the *lex fori concursus*, see Virgós / Schmit Report, nr. 136; H.-C. Duursma-Kepplinger, in: Duursma-Kepplinger, H.-C, Duursma, D, Chalupsky, E., *Europäische Insolvenzverordnung. Kommentar,* Springer, Wien New York, 2002, Art. 13, nr. 5; Sebastian Zeeck, *Das Internationale Anfechtungsrecht in der Insolvenz*. Max-Planck-Institut für ausländisches und internationales Privatrecht, Studien zum ausländischen und internationalen Privatrecht, nr. 108, Tübingen, Mohr Siebeck, 2003, p. 76; Georg E. Kodek, *Die Geltendmachung von Anfechtungsansprüchen nach der EuInsVo*, in: Andreas Knonecny (ed.), *Insolvenz-Forum 2004.* Vorträge anlässlich des 11. Insolvenz-Forums Grundslee im November 2004, Wien Graz: Neuer Wissenschaftlicher Verlag, 2005, p. 119ff. The in-built limitation, referred to above, results in a "veto by the *lex causae*" ("That law does not allow any means of challenging that act in the relevant case," see Global Rule 22(ii)), which could be seen as too broad in a worldwide context, open for manipulation and in its result contradictory to the predictable rule of the application of *lex concursus*, as observed in literature. Critical opinions towards the approach as chosen in Article 13 are expressed by, e.g., Sebastian Zeeck, *Das Internationale Anfechtungsrecht in der Insolvenz.* Max-Planck-Institut für ausländisches und internationales Privatrecht, Studien zum ausländischen und internationalen Privatrecht, nr. 108, Tübingen, Mohr Siebeck, 2003, p. 127ff; Jasnica Garašić, *Anerkennung ausländischer Insolvenzverfahren*, Ph.D. Hamburg 2004, Frankfurt am Main: Peter Lang, 2005, 2 Volumes, Part II, p. 324, and Westbrook, in: 42 Texas International Law Journal (2007). Zeeck has submitted an alternative solution ("The proposed connection alternatively invokes the *lex fori concursus* or the *lex causae* of the legal act to be avoided—subject to which law, in each

individual case, is most favourable to avoidance, thus allowing avoidance wherever possible"). This alternative drifts away from the central principle of the applicability of the *lex fori concursus*, as laid down in Global Rule 12. Jasnica Garašić, *Anerkennung ausländischer Insolvenzverfahren*, Ph.D. Hamburg 2004, Frankfurt am Main: Peter Lang, 2005, 2 Volumes, Part II, p. 324, and Jasnica Garašić, Recognition of Foreign Insolvency Proceedings: the Rules that a Modern Model of International Insolvency Law Should Contain, in: Yearbook of Private International Law, 2005, vol. 5, p. 371, on the other hand favors, as a rule, that the *lex fori concursus* is the applicable law for insolvency-law avoidance as, in her opinion, it represents the law of the closest connection. Applying such a rule would, in our view, diminish a party's justified protection of legitimate expectations arising from the transaction. Westbrook has suggested that, given countries' differences in rules regarding avoidance and distribution, the choice of applicable avoidance law should depend "on which proceeding will be distributing the proceeds of an avoidance recovery," which in general will be the main proceeding, see Jay L. Westbrook, The Present and Future of Multinational Insolvency, in: Bob Wessels and Paul Omar (eds.), The Intersection of Insolvency and Company Laws, Nottingham, Paris: INSOL Europe 2009, 111ff (p. 114). Westbrook disagrees with the defense mechanism, similarly as reflected in Article 13 of the EU Insolvency Regulation, as it results in the principle that a specific transaction is not avoidable unless it would be avoidable under both relevant laws. See Jay L. Westbrook, Avoidance of Pre-Bankruptcy Transactions in Multinational Bankruptcy Cases, 42 Texas International Law Journal 899 (2007), at 913.

Where, in any transaction, parties would be able to maneuver their transaction and bring it under a system with any avoidance rules at all, Global Rule 23.1 aims to avoid the effect of Rule 22 "if proof is provided that the state to whose law the transaction is subject has no substantial relationship to the parties or the transaction, and there is no other reasonable basis for the selection of the law of that state as the law to govern the transaction in question." The rationale of Global Rule 23 is that in the situation in which the Rule applies, the expectations of the person who benefited from an act detrimental to the general body of creditors cannot be said to be legitimate. It is formulated as an exception to the applicability of the *lex causae* at the expense of the avoidance law of the *lex fori concursus*, to stress the importance of the protection of the interests of the body of creditors as a whole.

We conclude these Notes with three examples:

(a) Debtor D, whose COMI is in state X, enters into a transaction with counterparty CP, based in state Y. The parties expressly choose the law of Y to govern the transaction. D undergoes insolvency proceedings in state X, by the law of which the transaction would be voidable at the instance of the insolvency office holder (e.g., a liquidator, L), as detrimental to the general body of creditors. CP can demonstrate that under the law of Y (both under the general law as well as the insolvency law of that state) no action could be successfully brought by L to impeach the transaction under the actual circumstances in which it took place. The court of X should conclude that in view of the connection between CP and state Y, there is a substantial relationship between the parties or the transaction and the law of Y, and additionally that the choice of the law of Y has a reasonable basis. Accordingly the court should uphold the defense invoked by CP based on the law of Y. See Global Rule 22.

(b) With the parties' roles and affiliations as in (a) above, but with the additional feature that the transaction would also be voidable by the law of state Y, the transaction is expressed to be governed by the law of state Z, which has no functional connection with either of the parties or their transaction. However, under the law of Z it is very difficult to bring about the avoidance of consensual transactions, and CP can demonstrate that it would be able to defend L's action. The court in X could properly conclude that the transaction is unconnected with Z and that there is no reasonable basis for the choice of the law of Z (since the only apparent motive for doing so is to avoid the application of

the law of X or Y). Accordingly, L's action, based on the avoidance rule of state X, should succeed. See Global Rule 23.1.

(c) With the parties' roles and affiliations once again as in (a) above, the transaction is expressed to be governed by the law of state M. Although there is no functional connection between the parties or the transaction and state M itself, it can be shown that there is a very common practice, among parties entering into transactions of the kind in question, to specify the law of M as the governing law. This is on account of the fact that M is a major center for international dealings of this type, and its law is widely understood and accepted as providing the standard basis for such business. The court in state X should acknowledge that in view of the established international practice of choosing the law of M, there is a reasonable basis for its choice by CP and D as the governing law of their transaction. If CP can demonstrate that it would be able to defend L's action according to the law of M, that defense should succeed in proceedings brought by L in the court of state X. See Global Rule 23.1.

Glossary of Abbreviations

Introduction

The following glossary of abbreviations provides a brief description of (inter)national organizations, contracted designations, and legislative regulations in the field of international insolvency, which are used throughout the Global Principles.

ABI	American Bankruptcy Institute
ADB	Asian Development Bank
ALI	American Law Institute
ALI NAFTA Principles	ALI Principles of Cooperation Among the NAFTA Countries (2003) (adopted in 2000)
ALI/UNIDROIT Principles	ALI/UNIDROIT Principles of Transnational Civil Procedure (2006) (adopted in 2004)
Brussels I	EU Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, No. 44/2001, of 22 December 2000, O.J. L. 12, 16.01.2001.
Ch.D	Chancery Division
CIS	Commonwealth of Independent States
CJEU	Court of Justice of the European Union
CLOUT	Case Law on UNCITRAL Texts
CoCo Guidelines	European Communication and Cooperation Guidelines for cross-border Insolvency, prepared by INSOL Europe, Academic Wing (2007)
COMI	Center of a debtor's main interests
Concordat	Cross-Border Insolvency Concordat adopted by the Council of the IBA Section on Business Law (Paris, 17 September 1995) and by the Council of the IBA (Madrid, 31 May 1996)
Court-to-Court Guidelines	Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases (adopted by ALI, May 16, 2000 and published in 2003 as Appendix B to the ALI NAFTA Principles; adopted by III, June 10, 2001)

DCFR	Draft Common Frame of Reference, prepared by the Study Group on a European Civil Code and the Acquis Group (2009)
Diss.	Dissertation
Doct. Th.	Doctoral Thesis
EBRD	European Bank for Reconstruction and Development
EBRD Principles	EBRD Principles in respect of the Qualifications, Appointment, Conduct, Supervision and Regulation of Office Holders in Insolvency cases (2007)
ECJ	European Court of Justice; since 1 December 2009: Court of Justice of the European Union (CJEU)
ECT	Consolidated versions of the Treaty on European Union and of the Treaty Establishing the European Community and the Treaty on the Functioning of the European Union (see also TEU and TFEU)
EEA	European Economic Area (EU members, and Norway, Iceland, and Lichtenstein)
EEO	Regulation creating a European Enforcement Order, No 805/2004
EGBGB	Einführungsgezets zum Bürgerlichen Gesetzbuch (Law Enacting Civil Code; Germany)
EOP	Regulation creating a European Order for Payment Procedure, No 1896/2006
ESCP	Regulation establishing a European Small Claims Procedure, No 861/2007
EU	European Union
IBA	International Bar Association
III	International Insolvency Institute
IMF	International Monetary Fund
InsReg	European Insolvency Regulation No. 1346/2000, of 29 May 2000, O.J. L. 160, 30.6 2000.
Intellectual Property Principles	ALI Intellectual Property: Principles Governing Jurisdiction, Choice of Law, and Judgments in Transnational Disputes (2008) (adopted in 2007)

IPRG	Bundesgesetz über das Internationale Privatrecht (Code on Private International Law; Switzerland)
NAFTA	North American Free Trade Agreement
OHADA	Organisation pour l'Harmonisation de Droit des Affaires en Afrique (see OHBLA)
OHBLA	Organization for the Harmonization of Business Law in Africa
O.J.	Official Journal of the European Union
PEIL	Principles of European Insolvency Law (2003)
PRIMA	Place of the Relevant Intermediary Approach
Service Reg.	Service Regulation, No 1393/2007 (new Service Regulation)
TEU	Consolidated version of the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU), in force since 1 December 2009, replacing EUT.
UK	United Kingdom
UNCITRAL	United Nations Committee on International Trade Law
UNCITRAL Legislative Guide	UNCITRAL Legislative Guide on Insolvency Law (2005) (adopted in 2004)
UNCITRAL Model Law	UNCITRAL Model Law on Cross-Border Insolvency Proceedings (1997)
UNCITRAL Practice Guide	UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation (2009)
UNIDROIT	Institut International pour l'Unification de Droit Privé (International Institute for the Unification of Private Law)
U.S.A.	United States of America
U.S.C.	United States Code
WIPR	Wetboek Internationaal Privaatrecht (Code on Private International Law; Belgium)

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