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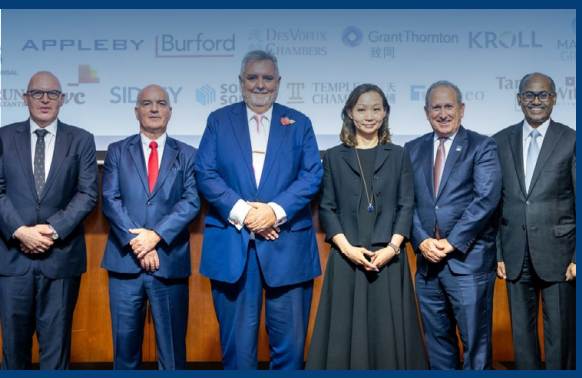
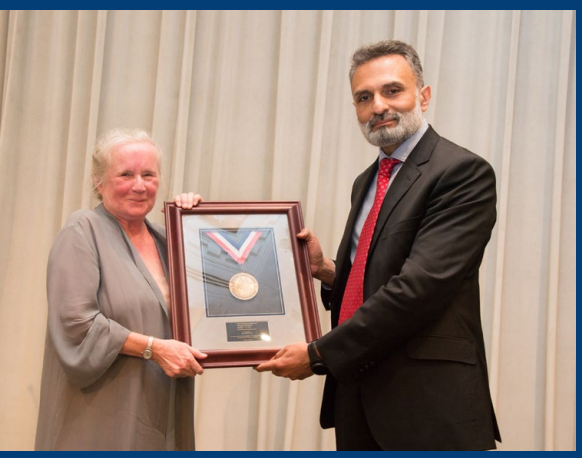
A Publication of the International Insolvency Institute





VOL. 1
MARCH 2025

INTERNATIONAL INSOLVENCY INSTITUTE

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INSIDE THIS ISSUE

President's Remarks

By Justice Kannan Ramesh
FMJA President

Dear Members,

It has been a while since we connected. I would like to thank the Communications Committee in particular Carlota for giving me this opportunity to reconnect.

I hope you are off to a great start to 2025, and the year promises many good things. My very best wishes.

The EC has been very busy on many fronts. Following the spectacular success of the Singapore Annual Conference in June 2024 – we had record attendance and the conference was one of the best in terms of content and returns – much of the EC's attention and energy has been focused on operationalizing the Strategic Plan which was presented in Singapore.

There are many strands to the Plan, and in a short message, it is only possible to give a snapshot. I am pleased to report that many of the major initiatives have moved forward at pace. I highlight four without being comprehensive. First, the outstanding work of the Membership Committee to grow the membership in a proportionate and calibrated manner addressing issues of geographical diversity, gender and age in the process. Instrumental has been the support of the Regional Co-Chairs and all of you in making the nominations. Second, the review of the NextGen programme in close consultation with the NextGen leadership. Important changes have been made following the review. Third, strengthening our relationship with key multilateral institution with tangible and transformative projects. The UNIDROIT Draft Legislative Guide on Bank Liquidation and the World Bank project on Insolvency and Climate Change are two fine examples. Finally, the important work of the Induction Committee in ensuring that all new members are quickly immersed, both in terms of activities and ethos, in the III. There is much more that is going on, and you will receive a full report at the Members Meeting in São Paulo.

I close with a pitch for the São Paulo conference. The EC and the São Paulo Organising Committee have been working very hard on the programme. This is an immensely important conference as the III turns 25 in São Paulo. This is a milestone of significance not only because the institute has been around for 25 years, but more importantly the mark that it has left on the landscape in that period. To celebrate, a special programme has been curated and we must celebrate together. Having all if not most of you in São Paulo will make a special occasion even more special. Please register quickly. There is an early bird!

Thank you and see you soon in wonderful São Paulo.

With warmest wishes,
Ramesh

Welcome New III Members

Samuel Aguirre (FTI Consulting) São Paulo, Brazil

Mr. Aguirre completed his training in Canada, where he was a partner of PricewaterhouseCoopers Toronto prior to his joining FTI Consulting in 2008. Since 2012 he has been based in Brazil and has participated in the largest and most complex restructurings, acted as CRO, structured/managed wind-down plans and participated in distress M & A / financing transactions.

Prof. Dr. Dirk Andres (Andres Partner mbB) Düsseldorf, Germany

Prof. Dr. Andres is a certified specialist in insolvency law since 2007 involved numerous cross-border engagements as an insolvency administrator, a head of insolvency proceedings, and as a restructuring director / advisor. Since 2023, he has been an Honorary Professor, University of Düsseldorf. He has published in monographs and commentaries on the German insolvency law, as well as written chapters in handbooks, numerous journal articles, and given lectures to insolvency related subjects over the last 23 years.

Charles A. Beckham (Haynes and Boone, LLP) Houston, USA

Mr. Beckham has involved in essentially all the major cross-border cases in Texas that have dealt with issues about jurisdiction, abstention, venue, recognition/COMI; currently serves as Chair of the Board of the American College of Bankruptcy's following a term as President (2022-2024); various publications and speaking engagements; received professional recognition e.g. The Best Lawyers in America; Chambers USA, Lawdragon 500, Who's Who Legal USA.

Andrea Harris (Grant Thornton Limited) Guernsey, Guernsey

Ms. Harris has experience in Australia, Cayman Islands, and British Virgin Islands, and now in Guernsey, including in various cross border cases (as well as work in Isle of Man, Cyprus, Malta, the Bahamas and Bermuda); her recent practice has include being a Liquidator, Administrator, Administration Manager, and Director on entities, both solvent and insolvent. She holds voluntary positions with numerous professional associations.

Dr. Héctor José Miguens (National Scientific and Technical Research Council) Buenos Aires, Argentina

Héctor José Miguens, born in Buenos Aires, Argentina, JD, LLM, ESC, PhD, is Extraordinary Professor of Insolvency Law at the National University of Buenos Aires and at the School of Law of the Austral University, Argentina. He is Independent Researcher of the "CONICET" ("Consejo Nacional de Investigaciones Científicas y Técnicas", National Scientific and Technological Research Council), Argentina, since 2007. He has almost 40 years of Insolvency Law experience in practice and Academia in Latin and North America and Europe.

Zentaro Nihei (Anderson Mori & Tomotsune) Toyko, Japan

Zentaro Nihei is a partner in Anderson Mori's financial restructuring and insolvency group, specializing in complex restructurings, bankruptcies, and special situation investing. He advises hedge funds, private equity funds, and distressed investors on cross-border and domestic in- and out-of-court restructurings, distressed M&A, and financing.

Hon. Justice Peter J. Osborne (Ontario Superior Court of Justice) Toronto, Canada

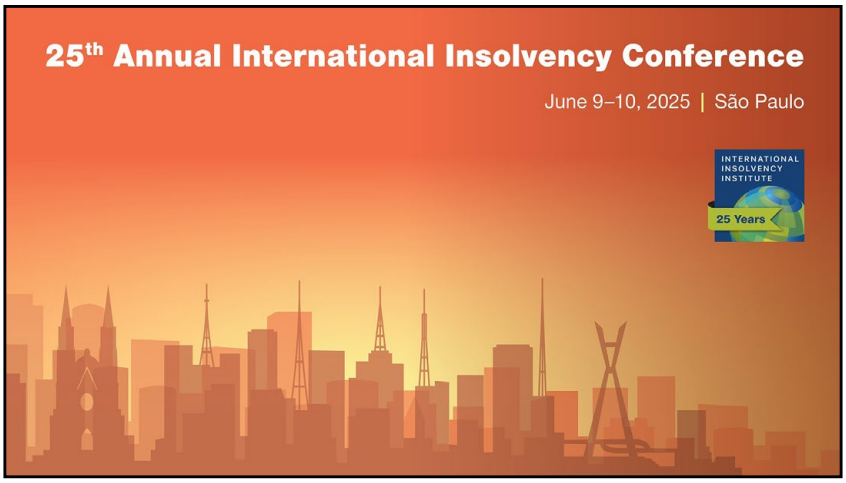
Judge Osborne was appointed as a judge of the Superior Court of Justice in Toronto in June 2022; from 1993-2022, he practised at Lenczner Slaght where he was one of Canada's leading trial and appellate counsel; he was a Fellow of the American College of Trial Lawyers and a Director of the Advocates' Society; he also taught trial advocacy for universities and professional bodies; also Co-Leader of the Commercial List, a team of judges dedicated to managing complex commercial litigation including matters involving insolvency and restructuring.

Sheila Christina Neder Cerezetti (Neder Cerezetti Advocacia) São Paulo, Brazil

Professor of Business Law at São Paulo University with focus in Insolvency Law. She is a member of INSOL and TMA Brazil, and she has authored several books and articles on insolvency, and is an important reference on matters of international insolvency regarding Brazilian Law.

Dr. Dorothee Prosteder (Noerr PartGmbB) Munich, Germany

Dr. Prosteder practiced from 2005-2019 with Baker & McKenzie, Frankfurt-am-Main and subsequently as a member of the Restructuring and Insolvency Group Noerr, Munich with significant professional engagements; publications in monograph, commentaries on German Insolvency Law; Handbook chapters and papers; professional engagement e.g. TMA board of directors and TMA Europe management board; has already participated in a III Partnership Committee meeting.



We Look Forward to Seeing You in São Paulo!

The International Insolvency Institute will convene its 25th Annual Conference in São Paulo, Brazil on June 9-10, 2025. Judicial and Academic Committee Meetings, Class XIV NextGen Program, and NextGen members and the opening reception will be held on Sunday, June 8th. The Annual Conference is the premier international insolvency conference for practitioners, academics, and members of the judiciary.

Conference Co-Chairs Thomas Felsberg (Felsberg Advogados) & Fabio Rosas (Lefosse) and the São Paulo Program Committee and Next Program Committee have set up a thought-provoking lineup of panels on the current trends and questions in the industry.

2025 marks the Institute's 25th Anniversary. We will commemorate this exciting event with a special 25th Anniversary retrospective panel in which esteemed practitioners and judges will reflect on the most significant decisions and changes to the insolvency and restructuring practice over the past 25 years! We hope you and your colleagues can join us in São Paulo for a spectacular 25th Annual International Insolvency Conference.

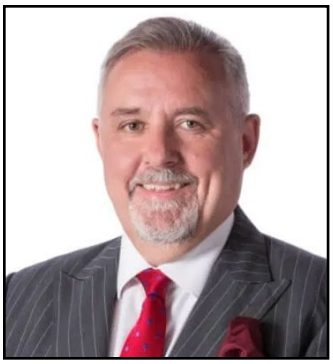
Register here!

Renaissance São Paulo Hotel
Alameda Santos, 2233
Sao Paulo, Brazil, 01419-0002
Toll Free: +0-800-703-1512
Book your group rate here.

Information re: Visa Process
For many countries, there are visa requirements in place by the Government of Brazil. As many of you are already aware, the Government of Brazil will require that all holders of US, Canadian, and Australian passports seeking to enter Brazil on and after April 10, 2025, first obtain a visa. As the III 25th Annual Conference draws closer, we would like to provide the following experience of one of our Executive Committee members who recently obtained a visa on a US passport: Click here.

A Resounding Success: III's Hong Kong Restructuring and Insolvency Conference 2024

By Ian De Witt
Tanner De Witt



In early November Hong Kong had the pleasure of hosting the one-day regional R&I conference. There was a great turnout, and it was enjoyed by many. It was a lovely opportunity for people to remind themselves why this city of Hong Kong is so special. A city so small but which has gained such a strong international presence. A city that is resilient and continues to adapt and evolve to the endless challenges presented to it. A city that has been welcoming and kind to me and which I am lucky to call home. Its vibrancy, diversity and uniqueness are incomparable – they all come part and parcel in making Hong Kong the major R&I hub that it is.

As part of the organising committee, I had the immense pleasure of working with Jose Maurellet SC, Mat Ng, Look Chan Ho, Desmond Ang, Sammy Koo, and Tiffany Wong to create the conference. Serving as the Master of Ceremonies, I am delighted to reflect on the success of the event. Held at the Asia Society in Hong Kong, this conference sold out, attracting delegates who came to learn, understand, and make friends. The conference featured a series of engaging panels and discussions, with speakers who were both knowledgeable and eloquent. They shared valuable insights and sparked lively debates, all while adhering to the strict schedule (a miracle in itself).

The event kicked off with a "state of the Hong Kong economy" address by the Secretary for Financial Services and the Treasury, Mr. Christopher Hui, GBS, JP. His insightful analysis of the economy provided a robust foundation for the day's discussions and set a positive tone for the conference. Throughout the day, attendees engaged in a variety of sessions covering several key topics, including recent developments in the Re Shandong Chenming (a Court of Final Appeal decision) and China Properties cases, enhancing Hong Kong's status as a key insolvency jurisdiction by easing primary liquidations for foreign companies and promoting cross-border cooperation; and recent rulings which have clarified dispute resolution clauses post-Lasmos, influencing how insolvency and arbitration practitioners will draft contracts and approach future situations.

Attendees then delved into the complexities and legal frameworks of handling insolvency cases across multiple jurisdictions. This panel debated contentious insolvency issues and featured diverse perspectives on new recovery routes in liquidations, prompting varied perspectives on creditor definitions, future bond structures, and potential improvement to documentation to clarify the position.

We also had social topics covering the good, the bad, and the ugly side of AI, an engaging topic that showcased how AI has infiltrated almost every sector imaginable. We delved into the ethical dilemmas and the potential for AI to either save or sabotage our future, leaving everyone with plenty of food for thought. Next, we turned our attention to the Chinese financial system, a rollercoaster ride

continued on page 8

Hong Kong continued from page 7

of economic highs and lows. Jason Bedford, a man who has accurately predicted China bank collapses and shadow bank blowups in recent years, was kind enough to fly in from Singapore where he explored the recent collapses and the shadow banking blowups that have sent shockwaves through the financial world. The session was a dive into the complexities of China's economic landscape, revealing the intricate web of factors that have led to its current state. It was a sobering reminder of the volatility and unpredictability of global finance. And then, to my favourite topic—the biggest and most bizarre scandals and frauds in Asia. The famous Hong Kong historian, Jason Wordie, gave us a session that was nothing short of a thriller, with tales that could rival any Hollywood blockbuster. These sessions were not only forward-thinking and highly relevant but also incredibly engaging, leaving attendees both informed and entertained.

Judges Jonathan Harris (of the High Court of Hong Kong) and Anselmo Reyes (of the Singapore International Court) shared experiences and challenges they have faced, providing technical updates and sector-focused solutions for cross-border issues. These were well-received, providing attendees with actionable takeaways. One of the other standout sessions was a look into the recent developments on the Mainland, its cooperation with Hong Kong, and the evolving landmark rulings. Experts provided predictions and analyses on the future direction in this area.

Another highlight of the conference for me was the talk by Mark Agnew, extreme sportsman, speaker, journalist and European Adventurer of the Year, who flew in from the UK. He regaled us with his tale of being the first to kayak the entire Northwest Passage in 103 days (yes, you read that right—103 days!), capturing the imagination of the audience with tales of fighting to escape trapped sea ice and facing down polar bears.

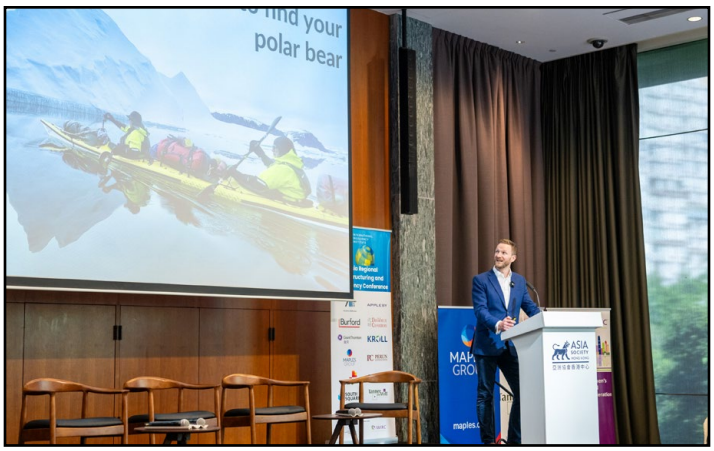
The day concluded with a presentation from the Hong Kong Companies judge, the Honourable Madam Justice Linda Chan. She spoke from the courts' perspective to provide valuable guidance, and with such conviction it felt as though she was delivering a masterclass in judicial wisdom. Her insights were both enlightening and inspiring, leaving the audience with a renewed appreciation for the Hong Kong legal system's role in maintaining economic stability.

The evening ended with drinks on the roof garden, on a beautiful cool and clear autumn evening.

All in all, it was a pleasure to witness attendees connecting, sharing ideas, and discussing the day's insights. I would say this of course, but this conference was a resounding success. It was incredibly rewarding to see the event come to life and provide valuable knowledge, practical tips, and excellent networking opportunities for all who attended. A heartfelt gratitude to the panellists, speakers and all those in attendance for making this event a remarkable success. A special thank you goes out to our sponsors: Alvarez & Marshal, Appleby, Burford, Des Voeux Chambers, Grant Thornton, Kroll, Maples Group, Perun Consultants, PWC, Sidley, South Square, Temple Chambers, Teneo, and Tanner De Witt. Their support made this conference possible and helped us create an enriching experience for everyone involved. We also appreciate the backing from our partner organisations, IWIRC and HKICPA. Their collaboration and support were instrumental in bringing this event to life.

This has been an incredible journey, and I was thrilled to have shared it with such a distinguished group of professionals, all in wonderful Hong Kong. ■

Photos from Hong Kong



Japan's Financial Restructuring Reform: Forthcoming Legislation and Its Implications

By Hiroyasu Ueda and Zentaro Nihei
Anderson Mori & Tomotsune

In recent years, Japan has been actively discussing reforms to its financial restructuring framework. As part of this effort, we introduce in this article two key developments in the forthcoming legislation: the Act on the Promotion of Cash Flow-Based Lending and the Introduction of a New Majority-Based Out-of-Court Workout.

I. Overview of the Act on the Promotion of Cash Flow-Based Lending

1. Background and Purpose of the Act

In June 2024, Japan enacted the Act on the Promotion of Cash Flow-Based Lending, introducing a new collateral framework called the Enterprise Value Charge (EVC). This system is scheduled to come into effect by December 2026. Traditionally, Japan's financing system has relied heavily on physical assets, such as real estate, as collateral. This practice made it difficult for startups and small- to medium-sized enterprises (SMEs), which often lack such assets, to access financing. Moreover, the value of a business itself, including its cash flow, intellectual property, or growth potential, was often overlooked in the lending process. The Act aims to address these issues by promoting financing practices that prioritize a business's operational value and future potential.

2. Mechanism of the Enterprise Value Charge

The Enterprise Value Charge (EVC) enables companies to use their entire enterprise value as collateral, including their cash flow and potential future income. This system is designed to help businesses with limited physical assets secure financing based on their operational value. Importantly, the EVC applies to a company's total assets rather than individual business units. The system initially limits eligibility to corporations, such as stock companies and partnerships, while also imposing qualification requirements on chargeholders to prevent misuse.

3. Execution and Impact on Bankruptcy Proceedings

The EVC's execution process is overseen by the courts, ensuring that business continuity is not compromised. For example, certain claims necessary for ongoing operations can be paid during the execution process. It is anticipated that the EVC will encourage smoother reorganizations to address financial challenges.

In formal bankruptcy proceedings, the EVC integrates with existing processes such as liquidation and civil rehabilitation. This tries to ensure consistency and avoids conflicts between collateral execution and bankruptcy proceedings.

4. Challenges and Future Prospects

The EVC system has not yet been implemented, and uncertainties remain regarding its practical operation. The government plans to issue detailed operational guidelines by spring 2025, but additional challenges may emerge as the system is put into practice.

By enabling businesses to secure financing based on their enterprise value, the system holds significant potential to support startups and SMEs while improving the efficiency of business recovery processes. However, its ultimate success will depend on its implementation and its ability to address the Japan's financing environment.

II. The Introduction of a New Majority-Based Out-of-Court Workout

1. Background and Challenges

Japanese businesses have faced increasing financial difficulties in recent years, and Out-of- court workouts, in comparison with In-court legal restructuring procedures, have been a key mechanism to implement smooth debt restructurings. However, since the existing system requires unanimous consent from all creditors, it is said that making consensus-building sometimes a barrier to swift and effective restructuring. To address these challenges, a new framework introducing majority-based decision-making has been proposed.

2. Discussions on Legalization

This proposed system, which allows majority approval to facilitate debt restructuring outside court supervision, has been a subject of extensive debate. While some view it as a necessary evolution of private restructuring, its necessity and feasibility remain points of contention among practitioners. One of the issues under discussion is whether the limited involvement of courts could violate constitutional property rights.

3. Progress in Government Discussions

In 2024, the government established the "Business Reconstruction Subcommittee" under the Industrial Structure Council to explore the potential legalization of this system. In June 2024, a draft framework was presented, followed by a public consultation process to gather a wide range of opinions. While discussions are ongoing, there are still unresolved concerns regarding the system's practical effectiveness and operational challenges. These issues are being carefully examined to refine the framework further.

4. Future Challenges

The proposed system is expected to enable swift and flexible business revitalization by allowing debt restructuring through majority voting, even without unanimous creditor consent. It offers an opportunity to support financially distressed businesses at an early stage, safeguarding their value and contributing to economic stability. However, at this moment, challenges remain, particularly in ensuring fairness among creditors and addressing practical implementation concerns.

If legalized, this system could mark a turning point in Japan's out-of-court restructuring procedures. Nonetheless, debates within the legal and business communities, as well as within the government, are far from settled, highlighting the need for continued careful deliberation.

Hiroyasu Ueda
Partner, Anderson Mori & Tomotsune

Hiroyasu Ueda has over 30 years of experience in restructuring, insolvency, and bankruptcy, advising debtors, creditors, and stakeholders across various industries. He has served as a liquidator in major bankruptcy cases and is recognized by Chambers Asia-Pacific as a leading insolvency lawyer. Ueda is a member of the International Insolvency Institute.

Zentaro Nihei
Partner, Anderson Mori & Tomotsune

Zentaro Nihei specializes in complex restructuring, insolvency, and special situation investing, advising hedge funds, private equity firms, and secured creditors in both domestic and cross-border cases. He has deep expertise in distressed M&A and asset recovery. Nihei is a member of the International Insolvency Institute. ■

The 2023 Amended Chinese Company Law and Its Impact on Bankruptcy Proceedings: A Look Toward the Future

By Shuai Guo
China University of Political Science and Law

The 2023 revision of the Chinese Company Law marks a significant milestone in modernizing the nation's legal framework. Focused on enhancing corporate governance, transparency, and responsiveness to contemporary economic challenges, the amendments have substantial implications for bankruptcy proceedings. As bankruptcy becomes increasingly central in a globalized economy, the revised law provides a robust foundation for future legal practice.

The 2023 Chinese Company Law and its Impact on Chinese Bankruptcy Practices

Environmental, Social and Governance (ESG) Principles

The amended law strengthens employee participation by mandating the establishment of democratic management systems, such as employee representative conferences, for significant corporate decisions, including dissolution and bankruptcy. Additionally, the law explicitly requires companies to consider stakeholder interests, including employees and consumers, as well as public interests like ecological protection, while actively fulfilling their social responsibilities.

As a result, debtors filing for bankruptcy must consult employee representatives on workforce arrangements and safeguards for employee interests. This includes submitting employee opinions and resolutions alongside workforce settlement plans. Also, ESG-related claims may be treated as priority claims during bankruptcy proceedings. In several cases, environmental remediation costs have been classified as bankruptcy fees subject to priority repayment.

Stricter Rules on Capital Contributions

A major change in the amended law is the requirement for shareholders to fulfill capital contributions within five years of incorporation, thereby eliminating indefinite subscription benefits. Accelerated capital contributions enable creditors to recover debts more efficiently. Consequently, bankruptcy administrators must verify whether shareholders have met their capital obligations, enforcing early capital injections to safeguard creditor claims.

Additionally, the amended law introduces the shareholder forfeiture mechanism, which strengthens the enforcement of shareholder capital contributions. It allows companies to forfeit the rights of non-compliant shareholders, expediting capital replenishment through redistributions or capital reductions. This measure supports efficient bankruptcy administration by ensuring capital adequacy, reducing delays, and protecting the influence of compliant stakeholders in decision-making. It also enhances the fairness and integrity of corporate operations by holding delinquent shareholders accountable, thus improving outcomes for creditors and the overall financial system.

However, concerns remain regarding the implementation of shareholder forfeiture

mechanisms in bankruptcy proceedings. For example, while the Company Law includes specific regulations on the disposal of equity and the recovery of capital contributions, there is a lack of corresponding detailed provisions in bankruptcy law. Thus, it is unclear whether administrators can declare shareholder forfeiture or whether deprived shareholders can still file claims in bankruptcy proceedings.

Enhanced shareholders' rights

Following this amendment, the scope of materials that shareholders can review and copy has been expanded, and it is clarified that they may entrust accounting firms, law firms, and other intermediaries for assistance. Shareholders can now exercise the right of subrogation not only against the company's directors, supervisors, and senior managers but also against the equivalent personnel in the company's wholly-owned subsidiaries.

This revision provides more comprehensive protection for shareholders' rights, particularly for small and medium-sized shareholders, while balancing the relationship between shareholders' rights to information and the interests of the company. In bankruptcy practice, if the bankrupt enterprise is a parent company, the administrator should actively exercise the right to review and copy the information of its wholly- owned subsidiaries, intervening as necessary to determine whether the subsidiaries should be placed into bankruptcy proceedings or continue operations.

Introduction of New Share Categories

The amendments introduce comprehensive regulations for class shares in joint-stock companies, broadening their scope and application. These include extending eligibility to all joint-stock companies, adding diverse share types such as subordinated and restricted transfer shares, and implementing tailored voting rules.

These reforms enhance governance flexibility while establishing new mechanisms for corporate restructurings. In particular, administrators may need to establish distinct voting groups for class shareholders, align voting weights with share priorities, and adhere to company bylaws, provided these do not conflict with laws or reorganization plans. Debt-to-equity conversions may also involve differentiated approaches, such as converting secured debts into preferred shares or creating layered shareholder priorities based on creditor classifications.

Introduction of Non-Par Value Shares

The new amendments introduce provisions for no-par value shares, requiring that at least half of the proceeds from their issuance be included in registered capital. This system allows joint-stock companies to issue no-par value shares regardless of industry or public status. The flexibility to choose and convert between par value and no-par value shares enables companies to adapt to their financial needs.

No-par value shares are especially advantageous for distressed companies, as they bypass the restrictions of par value and discount prohibitions. This flexibility is essential for addressing financing challenges. In practice, distressed companies often convert capital reserves into shares for debt repayment or to attract investment. The new Company Law permits full conversion between par value and no-par value shares, which, combined with capital reserve adjustments or stock splits, could increase the stock supply for reorganization purposes.

Capital Reserves for Loss Offset

The amended Company Law introduces a pivotal change by allowing capital reserves to offset losses—an option not permitted under the previous law.

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The Valuation Of Collateral in the Context of Restructuring Plans[1]

By Rosa M. Gual Tomàs and Désirée Cazorla Feal
Cuatrecasas

1. Background: Integrating the legal and economic realities underlying secured credits

In the last decade, the debt restructuring environment has undergone a significant transformation, especially regarding the role of secured creditors and, therefore, the valuation of their collaterals in the context of pre-insolvency scenarios. This process has been characterized by the transition from the dissociation between the legal system surrounding secured credits and the underlying economic reality towards a more coherent integration conducive to successful restructurings.

Prior to the reform of the Spanish Insolvency Act in 2014, there was a distinction between creditors whose credits were backed by collateral and those who lacked collateral, which granted the former an unbreakable immunity that prevented refinancing agreements from affecting them, thus avoiding being bound by write-offs, extensions, or other restructuring measures (unless they voluntarily decided to submit to them). All this without considering the possible ratio between the amount of the secured credit and the value of the asset on which the collateral was placed, i.e., without considering the true economic value of the granted collateral.

This approach, however, ignored the diversity of situations in which creditors holding secured credits on the debtor's assets could find themselves. In certain cases, the collateral was more symbolic than effective, either due to its subordinate position compared to other collateral on the same asset (at that time, it was common to establish second, third and even fourth mortgage ranks on the same asset) or because the value of the guaranteed asset or right was insufficient to cover the debt.

Awareness of this situation prompted a paradigm shift: the need to move from a subjective classification of creditors, based on the existence or not of collateral, to a much more objective economic evaluation that differentiated between the amount of the credit secured by the value of the collateral and the unsecured amount.

The turning point occurred in 2014 with the enactment of Royal Decree-Laws 4/2014, of March 7, adopting urgent measures on corporate debt refinancing and restructuring, and 11/2014, of September 5, on urgent measures in insolvency matters, by virtue of which various key aspects of Act 22/2003, of July 9, the Insolvency Act, were modified.

Lawmakers, aware that the divergence between the legal and economic realities underlying secured credits had been one of the greatest obstacles to the viability of insolvency

[1] This article is published on the website of the international law firm Cuatrecasas and is part of a collective work prepared by the partners and associates of the Restructuring, Insolvency and Special Situations Group: (https://www.cuatrecasas.com/es/global/reestructuraciones-e-insolvencias/art/reestructuraciones-analisis-cuestiones-relevantes#)

agreements and, subsequently, refinancing agreements, took a new approach to the valuation of this type of guarantees. The new regulatory scenario caused holders of secured credits to play a leading role in both types of agreements, and they could also be dragged along if the necessary majorities were met.

Thus, the condition of secured creditor went from being associated solely with the amount of the credit itself to being linked to its economic reality, i.e., to the value of the asset on which the collateral was granted; in other words, it became linked to the monetization of that asset and, therefore, to the real credit recovery. Therefore, relevance shifted from secured creditors to secured credits.

This regulatory adjustment has provided greater flexibility in designing and implementing pre-insolvency instruments, allowing a more agile and effective response to achieving business viability by giving a more economic sense to the design of these solutions.

1. Implications of valuating collateral in the context of restructuring plans: proper credit class formation and exit right

Identifying the key players of the restructuring is key to its success, so valuation of collateral (i.e., the assets that secure the credits to be affected in the restructuring) is fundamental to the process. This valuation is not only relevant for the formation of credit classes, which can determine both creditor and judicial sanction of the restructuring plan, but also regarding the right of creditors holding secured credits to disassociate themselves, in certain cases, from the measures imposed by the plan.

1.1. On the proper credit class formation

The general criteria for credit class formation provided in article 623 of Act 16/2022, of September 5, amending the consolidated text of the Insolvency Act, allow for wide flexibility in grouping credits, as long as the legally mandated rules are respected, which can never be overridden. One of these imperative criteria (imposed by Directive 2019/1023, article 9.4 and recital 44) is found in article 624 of the Insolvency Act, which provides that credits with collateral on the debtor's assets form a single class.[2]

Therefore, credits with collateral on the debtor's assets will form a single class but only for the amount covered by the value of the collateral (arts. 624 and 617.5 of the Insolvency Act). Consequently, the same credit position may be part of different classes depending on (i) the value of the collateral and also (ii) the nature of the unsecured credit.

The value assigned to collateral assets will be decisive for the proper formation of classes and, therefore, key to the success or failure of the restructuring plan, as explained below.

(a) On the one hand, the value granted to the collateral of each of the credits that make up the collateral class, i.e., the class composed of credits with collateral on the debtor's assets, is directly linked to the approval or rejection of the plan by that class, as it will determine the percentage of credits it represents for voting purposes. Specifically, the collateral class will be considered to approve the plan if at least three-quarters of the amount of the credits corresponding to it vote in favor (art. 629.2 of the Insolvency Act).

(b) Additionally, the approval of the plan by the secured class–linked to the valuation of the collateral–together with the approval by the other classes, will result in a consensual plan.[3] This will lead to the judicial sanction of the plan, provided that the other requirements stipulated in article 638 of the Insolvency Act are met.

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[2] Unless the array of assets or rights on which the collateral is granted justifies splitting them into two or more classes (art. 624 of the Insolvency Act), which, under the previous rule, cannot include unsecured credits.

[3] For a restructuring plan to be consensual, it must be approved by each and every one of the affected classes (art. 638.3 of the Insolvency Act).

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Summary of the First Latin American Regional Conference of the International Insolvency Institute in Chile

Prepared by Carey

On September 6, 2024, the first Latin American Regional Conference of the International Insolvency Institute was held at the offices of Carey Abogados in Santiago, Chile. The event brought together over 65 participants for a day of analysis and debate on the latest trends in international insolvency, with distinguished speakers from various countries. The conference began with welcome remarks by Roberto Villaseca, partner at Carey, and continued with the keynote speaker Hugo Sánchez, Superintendent of Insolvency in Chile, who discussed the 10-year anniversary of Chilean Insolvency Law, statistics, achievements and challenges. The conference featured four panels on pressing topics: (i) DIP Financing: How to increase the availability of finance for insolvency cases in the region, moderated by Rosa Rojas, with speakers Cristina Gómez-Clark, Vicente González, Tomás Araya, and Giuliano Colombo; (ii) Relationship between banks and Fintech in the region. Are Fintech companies displacing banks? moderated by Diana Rivera, with speakers Alejandra Anguita, Rocío Robles, and Devi Rajani; (iii) Cross-border: Why do LatAm companies file for Chapter 11 in the US? Drawbacks and benefits of filing Chapter 11 for LatAm companies, moderated by Roberto Villaseca, with speakers Zamira Ayul, Mark Bloom, Isaac Stevens, and Nyana Abreu; and (iv) Regulated insolvency - Insolvency in the energy and other regulated markets in the region, moderated by Fabio Rosas, with speakers Iván J. Romo, Anthony Lizárraga, Agustina Ranieri, Luciana Celidonio, and Fabiana Balducci. It provided a valuable opportunity for professional networking and insights into the future challenges of the insolvency sector in Latin America. ■

Reassessing the COMI Debate: Insights from an Emerging Economy (Brazil)

By Sabrina Maria Fadel Becue
Post-Doctoral Researcher in Commercial Law, University of São Paulo, Brazil

The UNCITRAL Model Law on Cross-Border Insolvency (MLCBI), which recently celebrated its 25th anniversary, is widely recognized as a thoroughly analyzed instrument by both scholars and courts. Like other legal technologies developed by UNCITRAL, the MLCBI and its accompanying Guide to Enactment employ neutral terminology, purposefully avoiding alignment with any specific legal tradition or existing insolvency regime. To achieve its objectives, the MLCBI introduces novel concepts (Art. 2) and establishes its unique mechanism for international judicial cooperation: the recognition of foreign proceedings (Art. 15).

Despite its function as a legislative harmonization tool, the MLCBI operates through persuasive soft power, requiring countries to be convinced of the benefits of adopting its provisions. To address national resistance or indifference, legislators must view the MLCBI as delivering clear economic and trade advantages—an expectation that may account for its slow adoption rate. However, the reliance on neutral language and a pragmatic approach, while facilitating consensus, comes at a cost: interpretation remains a critical and complex challenge, potentially undermining the effective realization of the MLCBI's objectives.

A key component of the MLCBI, and other model laws proposed by UNCITRAL, is the concept of the Center of Main Interest (COMI). Despite its paramount importance, the MLCBI does not provide a definition of COMI and courts have struggled to agree upon a clear and unified interpretation. The COMI concept was developed in the 1980s, reflecting a very different commercial landscape, one not yet dominated by multinational corporations or a digital economy. Today, the global mobility of capital and the interconnected nature of business transactions do not result in harmonized regulations or uniform legal standards which address the consequences of such commercial relationships.

The debate over the advantages of COMI within the framework of the MLCBI intensified in late 2023, when a group of prominent scholars submitted a letter to UNCITRAL advocating for the elimination of the concept from the Model Law[2]. Professors Anthony J. Casey, Aurelio Gurrea-Martínez, and Robert K. Rasmussen[3] are the leading

[1] This article was originally written for Insolvency Now Magazine.

[2] Available at:https://ccla.smu.edu.sg/sgri/blog/2023/09/15/towards-new-approach-choice-insolvency-forum.

[3] See Casey, Anthony J., and Joshua C. Macey, *Bankruptcy Shopping: Domestic Venue Races and Global Forum Wars*, 37 Emory Bankr. Dev. J. 463 (2021); Gurrea-Martínez, Aurelio, *Reinventing Insolvency Law in Emerging Economies* (Cambridge Univ. Press 2024); Casey, Anthony, Aurelio Gurrea-Martínez, and Robert K. Rasmussen, *A Commitment Rule for Insolvency Forum* (Jan. 23, 2024), European Corporate Governance Institute - Law Working Paper No. 754/2024, USC CLASS Research Paper No. 24-13, Singapore Management University School of Law Research Paper No. 5/2024, Univ. of Chicago Coase-Sandor Inst. for Law & Econ. Research Paper No. 1003, available at http://dx.doi.org/10.2139/ssrn.4704029.

continued on page 36

2025 III North American Regional Conference

The UCC Regional Committee hosted the 2025 III North American Regional Conference on January 15-16, 2025, at Kirkland & Ellis LLP in Chicago, Illinois, USA. The conference, open to all interested parties, drew 55 attendees from the US, Canada, Mexico, the Cayman Islands, and Europe. The program kicked off after lunch on Wednesday, and featured six educational panels, an optional dinner at RPM Steak, and a Women of III breakfast on Thursday morning. The positively freezing temperatures did not stop attendees from having a great time.

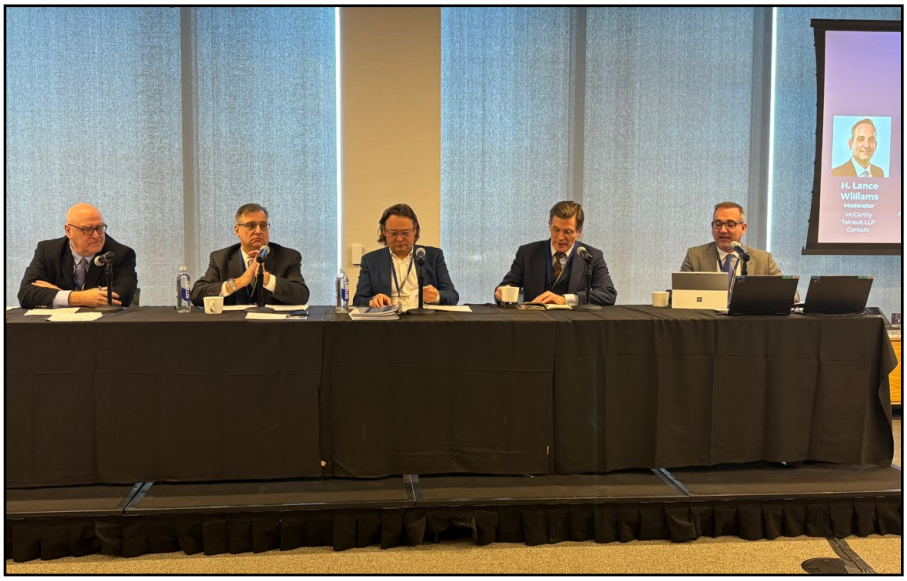
Many thanks to Kirkland & Ellis for hosting the event and to our generous sponsors for their support of this program.

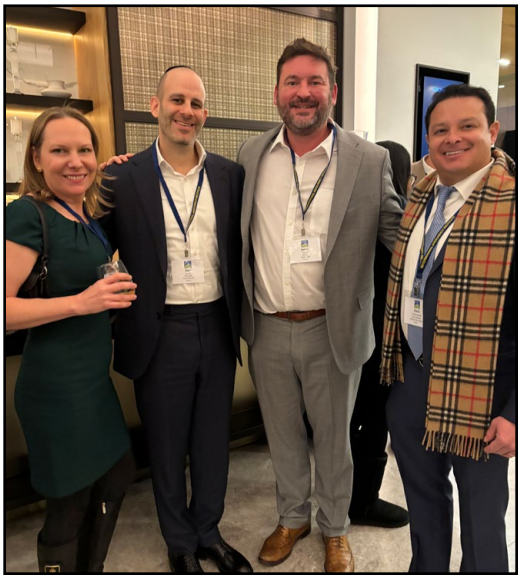
A big thank you to our esteemed speakers who opined on the following topics:

1. Decoding Cryptocurrency Valuation Issues in Insolvency Proceedings and the Use of AI in Expert Testimony
   - Moderator: Liam Faulkner (Cayman)
   - Speakers
     - Joel Cohen (Stout, USA)
     - Vincent Lazar (Jenner & Block, USA)
     - Stacy Lutkus (McDermott Will & Emery LLP, USA)
     - Natasha MacParland (Davies Ward Phillips & Vineberg LLP, Canada)

2. Choosing a Restructuring Forum in Light of Purdue; Should US Companies Restructure Abroad?
   - Moderator: Kat Burke (Maples & Calder (Ireland) LLP, USA/Ireland) (NextGen)
   - Speakers
     - Thomas Kessler (Clearly, USA) (NextGen)
     - Linc Rogers (Blake, Cassels & Graydon LLP, Canada)
     - Sharon Hamilton (Ernst & Young Inc, Canada)
     - Ruairi Rynn (William Fry LLP, Dublin Ireland)
     - Joshua Sturm (Davis Polk, USA) (Guest)

3. Novel Issues in Canada Affecting Cross-Border Insolvencies; A Discussion of Reverse Vesting Orders and the Pension Bankruptcy Protection Bill
   - Moderator: Valerie Cross (Dentons Canada LLP, Canada) (NextGen)
   - Speakers
     - Maria Konyukhova (Stikeman Elliott LLP, Canada)
     - Toni Vanderlaan (Deloitte, Canada) (Financial Advisor)
     - Frank Vazquez (Norton Rose Fulbright, USA) (New Member)
     - Adam Swick (Akerman LLP, USA)



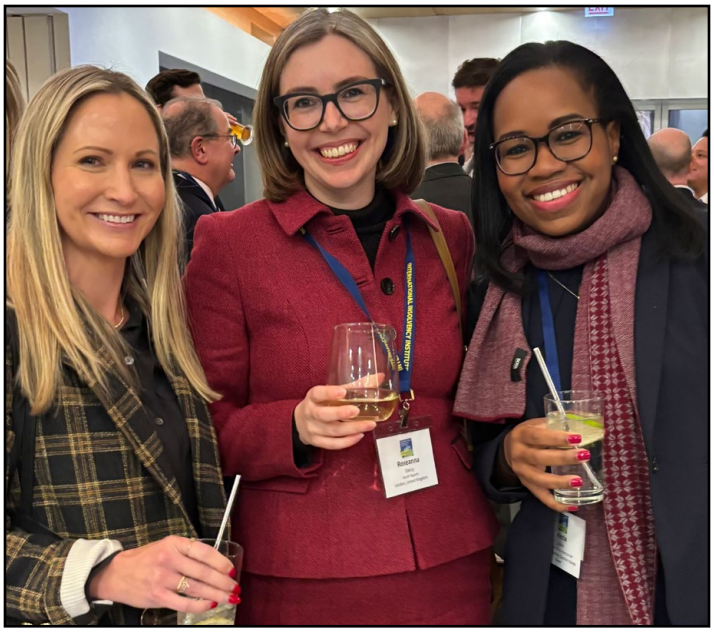


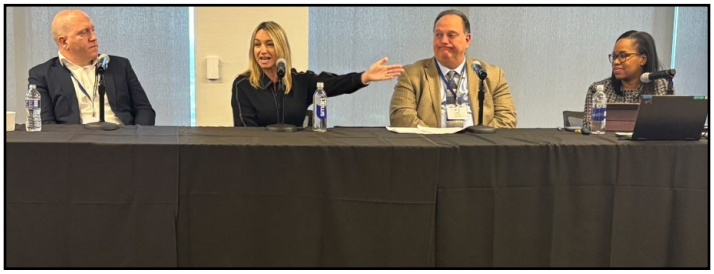
4. New Challenges in Tracing and Recovering Assets in Insolvency Proceedings

- Moderator: Alecia Johns (Conyers, Cayman Islands) (NextGen)
- Speakers
  - Angela Barkhouse (Kroll, Cayman Islands) (Financial Advisor) (New Member)
  - Greg Grossman (Sequor Law, USA)
  - Mark Goodman (Campbells, Cayman Islands)

5. Global Real Estate Crisis and Impact on Cross-Border Insolvency Proceedings

- Moderator: Lance Williams (McCarthy, Canada)
- Speakers
  - Patrick Potter (Pillsbury Winthrop Shaw Pittman LLP, USA)
  - Brendan O'Neill (Goodmans LLP, Canada)
  - Gunnar Branson (Association of Foreign Investors in Real Estate, USA) (Guest)
  - Michael Schaedle (Blank Rome, USA)

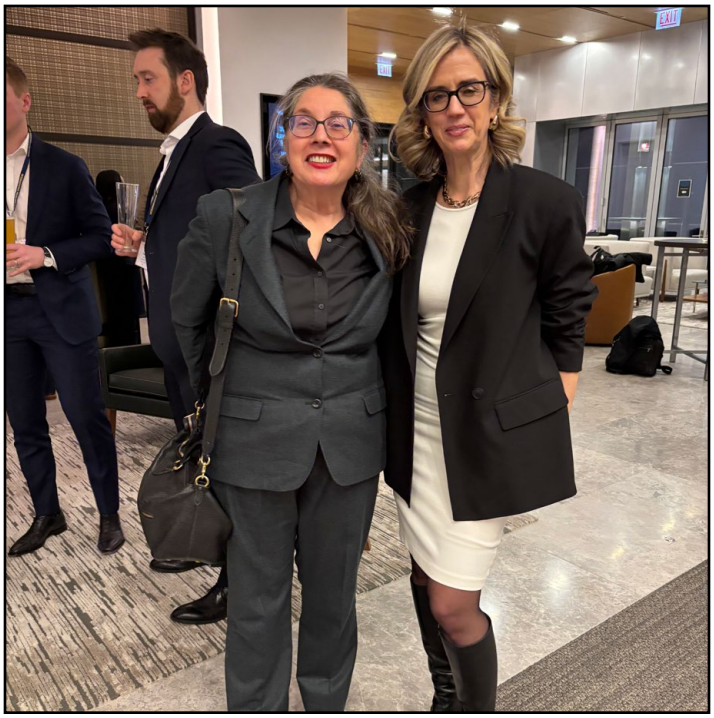




6. Global Perspectives: How Courts are Dealing with Artificial Intelligence in Insolvency Proceedings

- Moderator: Liz Downing (Skadden Arps Slate Meagher & Flom, USA) (NextGen)
- Speakers
  - Hon. Sean Lane (U.S. Bankruptcy Court, USA)
  - Judge Lisa Beckerman (U.S. Bankruptcy Court, USA)
  - Chief Justice Geoffrey Morawetz (Ontario Superior Court of Justice, Canada)

Please mark your calendars for the 2026 North American Regional Conference to be held in sunny Miami, Florida on January 20-21, 2026. ■



Global/Rising Bankruptcy Scholars' Work in Progress Workshop

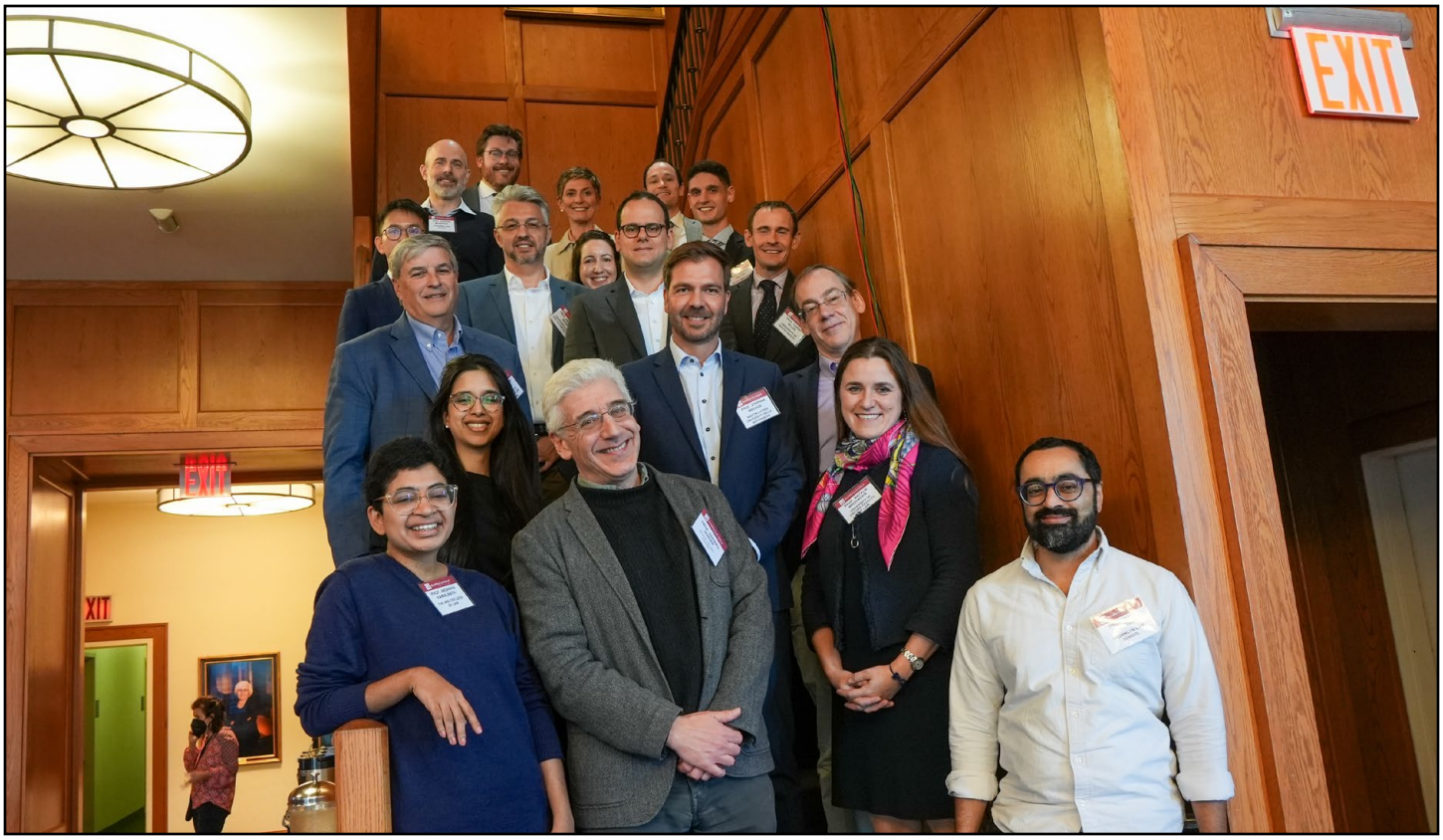
On October 18/19, The Brooklyn Law School and its Center for the Study of Business Law and Regulation hosted the Global Bankruptcy Scholars Work-in-Progress Workshop. The Workshop brings together professors who have recently entered full time teaching to present their scholarship in a workshop setting to each other, and to a group of prominent senior scholars. This year included participants from the US, UK, EU, China, Australia, Brazil. The program is supported by generous grants from the International Insolvency Institute, together with the American Bankruptcy Institute and the National Conference of Bankruptcy Judges.

III members Irit Mevorach, Stephan Madaus, Jay Westbrook, Ted Janger, Francisco Satiro, Anna Gelpern, and John Pottow participated as commentators.

The agenda follows:

Gabriel Buschinelli	Mechanism For The Collective Renegotiation Of Debts By Individuals Inspired By The Auction-Based Creditor Ordering By Reducing Debts (Accord) Model
William Organek	Why Bankruptcy Will Keep Eating Mass Torts
Robert Miller	The Gift of Exit Finance
Nikita Aggarwal	Locating Consumer Financial Regulation
Vijay Raghavan	The Disappearing Logic of Article 9
Akshaya Kamalnath	Space Bankruptcy
Chris Hampson	Law & the Spirit of Jubilee
Eugenio Vaccari	A Comparative Study of Legal and Accountability Frameworks to Promote Effective Governance and Long-term Sustainability across Seven Jurisdictions
Natalie Mrockova	An assessment of the freestanding moratorium
Yige Luu	A Study on the Substantive Consolidation of Multinational Enterprises Groups

Click here to view participant bios.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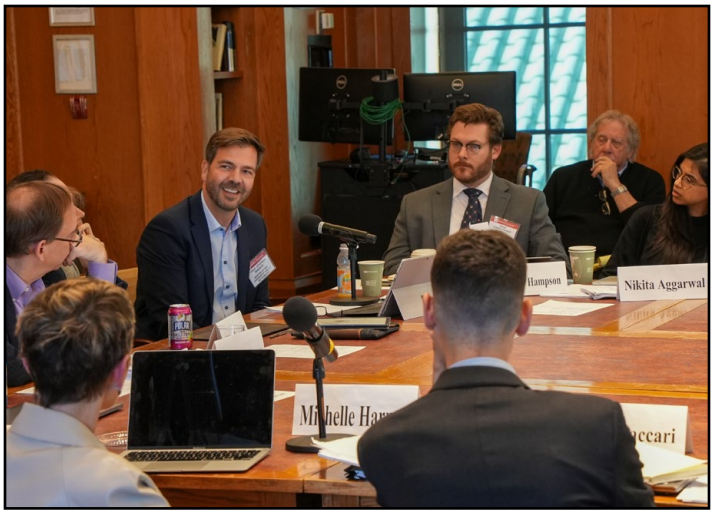
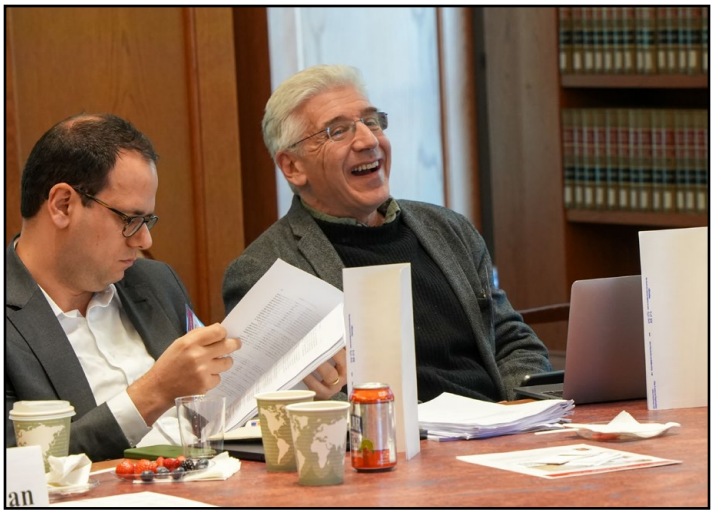
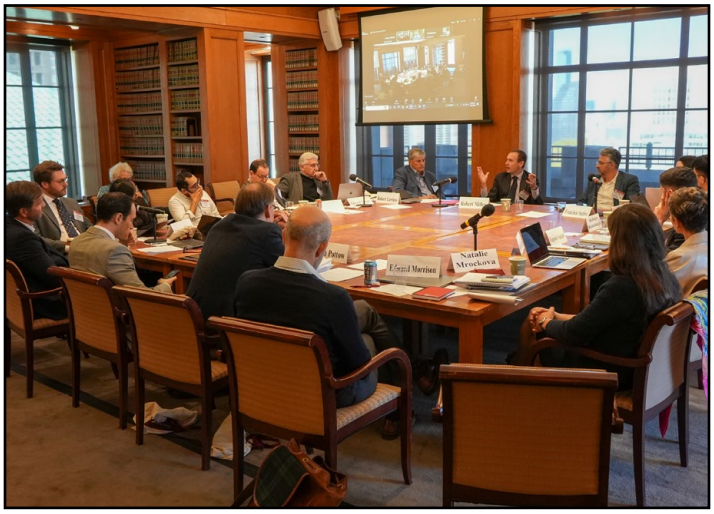
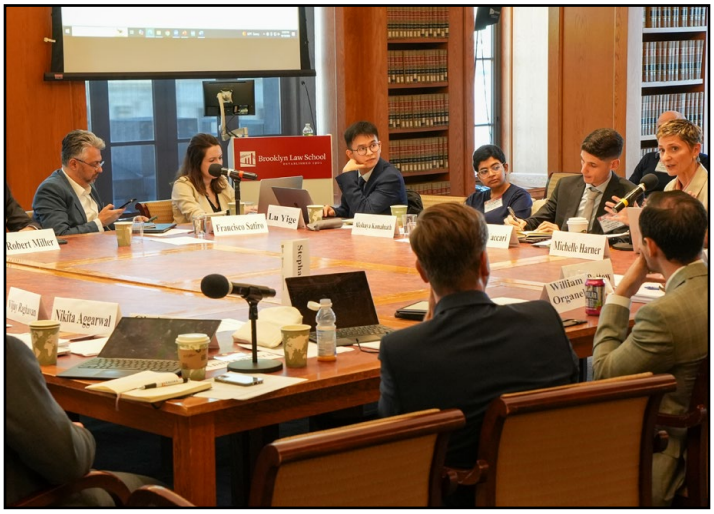

Nikita Aggarwal




Natalie Mrockova


Brooklyn Law School
Robert Müller
Nikita Aggarwal
Michelle Harner

III Prize in International Insolvency Studies

The International Insolvency Institute annually awards a prize in International Insolvency Studies. The III Prize is awarded for original legal research, commentary, or analysis on topics of international insolvency and restructuring significance and on comparative international analysis of domestic insolvency and restructuring issues and developments.

The Prize Competition is open to full and part-time undergraduate and graduate students and to practitioners in practice for nine years or less. Entries must not have been published and must be available to be posted on the International Insolvency Institute website at www.iiiglobal.org. Entries are judged by a jury of distinguished international academics. Medal-winning entries are to be considered for publication in the Norton Journal of Bankruptcy Law and Practice (West) and for inclusion in the Westlaw electronic database.

The prize comprises a Gold Medal Prize for the winning submission as well as Silver Medal Prize and a Bronze Medal Prize. The Prizes are accompanied by an honorarium for the Medal winners.The Gold Medal winner is also honored at the III's Annual International Insolvency Conference and all Medal Winners are invited to attend the Conference and are provided with complementary Conference registration.

2024 Prize in International Insolvency Studies edition was awarded to:

Gold Medal Winner

Chrisandya Sinurat, Leiden University

Enhancing Unsecured Creditors Protection in Indonesia: Analyses on The Best-Interest-of-Creditors Test and The Fairness Test

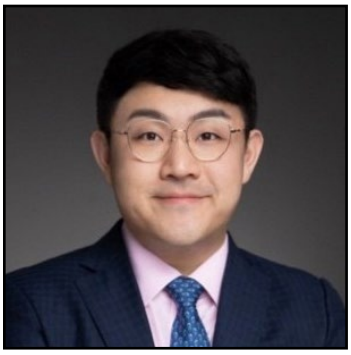
The author analyses the substantive aspects of insolvency law, particularly the protection of unsecured creditors, with a special focus on Indonesian Insolvency Law. The article explains the current status quo, uses a comparative lens to compare the current treatment of unsecured creditors to that in other jurisdictions and concludes with recommendations for the development of Indonesian Insolvency Law.

Silver Medal Winner

Shuaihao Mi, University of Leeds, England

China's Lehman Brother Moment: Will the Mainland China's Courts Recognise Hong Kong High Court's Winding-Up Order Against Evergrande?

The author observes that while China is the world´s second-largest economy, its cross-border insolvency and debt restructuring laws are still quite new. The article examines the possible regulatory stance of Chinese policymakers towards a recent winding-up order issued in Hong Kong.



Bronze Medal Winner
Charles Ho Wang Mak, University of Glasgow
Evaluating Reform Proposals in Sovereign Debt Restructuring: a Path Towards Resilience and Fairness

The author examines proposals for revamping the framework governing sovereign debt restructurings (SDR´s) and critically compares three approaches.

Submissions to 2025 Prize in International Insolvency Studies were due March 15th.

The Gold Medal Winner will be honored at the next in-person Annual International Insolvency Conference, in São Paulo, Brazil on June 9-10 2025.

For further details about the Prize, its terms and conditions, please contact III Administrative Director CC Schnapp (ccschnapp@iiiglobal.org). ■

Recent Publications by III Members

The Greening Of The Insolvency System

(2024) 69:3 Canadian Business Law Journal (forthcoming)

Authors:
Stephan Madaus, Martin-Luther-University Halle-Wittenberg
Janis P. Sarra, University of British Columbia (UBC), Faculty of Law
Irit Mevorach, University of Warwick

Date Written: November 29, 2024

Click here to view the article.

UNCITRAL Working Group V

In December 2024, III sent a delegation to Vienna to participate in the sixty-fifth session of the United Nations Commission on International Trade (UNCITRAL) Working Group V, which focuses on insolvency law. The Working Group continued to consider two topics: (i) asset tracing and recovery in insolvency proceedings, and (ii) applicable law in insolvency proceedings. The Working Group agreed to circulate a draft asset tracing toolkit with background notes for approval at the next session. Several provisions for a potential model law for determining applicable law in insolvency proceedings continue to be debated, primarily the insolvency law to govern secured transactions, set-off, and avoidance actions. The Working Group also agreed to begin discussions at the next session to update the Guide to Enactment and Interpretation of the Model Law on Cross-Border Insolvency.

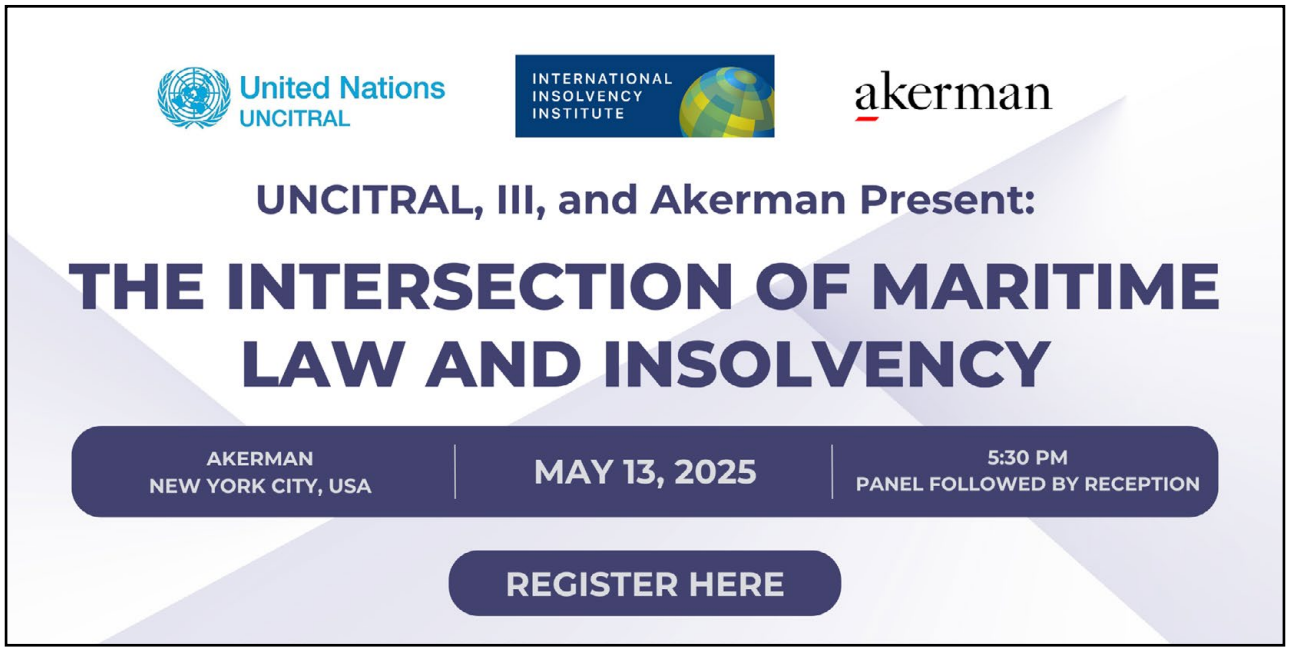
The UNCITRAL Report of Working Group V (Insolvency Law) on the work of its sixty-fifth session (Vienna, 16–20 December 2024) can be found here.

Along with UNCITRAL and Sigmund Freud University, III hosted a program entitled, Mediation as an Effective Tool in Enterprise Group Insolvencies. Panelists included Professor Franz Mohr (Sigmund Freud University), Dr. Susanne Fruhstorfer (Law Office of Dr. Susanne Fruhstorfer), Hon. Leif Clark (Ret.) (Leif M. Clark Consulting), Scott Atkins (Norton Rose Fulbright Australia), and Professor Annika Wolf (Hochschule Emden/Leer). Adam Swick provided opening remarks as Chair of III's Working Group V delegation. Many thanks to III member, Evan Zucker for planning the event. You can see a video of the presentation here.

Finally, III hosted a dinner for those members attending Working Group V at Das Campus Restaurant & Bar. Many thanks to III member, Alexander Klauser, for organizing the dinner.

III looks forward to sending a delegation to the next Working Group V meetings on May 12-16, 2005 in New York and November 10-14, 2025 in Vienna.

The committee would love to have volunteers for written materials for the May Working Group V. If you are interested, please contact Adam Swick at adam.swick@akerman.com. ■



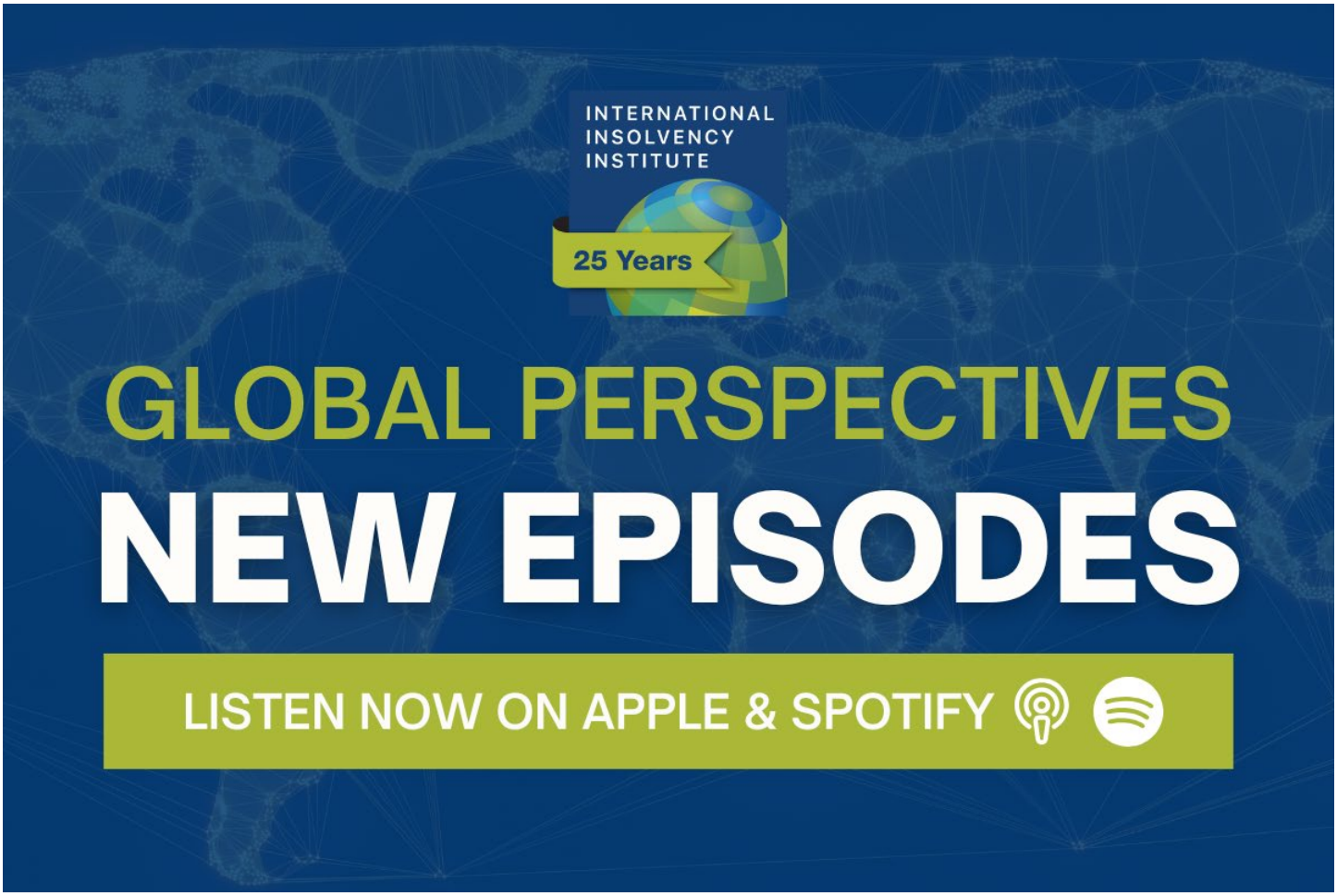
Global Perspectives – The International Insolvency Institute's Podcast Series

The International Insolvency Institute's (III) NextGen members are proud to present *Global Perspectives*, a podcast series offering insightful discussions on the latest developments in cross-border insolvency law. The podcast webpage has been completely overhauled, with episodes now organised by regions and themes: Latin America; Asia; Europe & the Middle East; Africa; North America; Hot Topics; and Interviews.

The series features contributions from III NextGen members worldwide, providing an up-to-date and in-depth look at key trends, legislative changes, and case law shaping insolvency law across jurisdictions. In anticipation of the upcoming III Conference in São Paulo (8–10 June), we are especially proud to have expanded our Latin America section to reflect the region's evolving insolvency landscape.

All *Global Perspectives* episodes are available on Spotify and Apple Podcasts. We encourage III NextGen members to contact Alexandra CC Schnapp at ccschnapp@iiiglobal.org to suggest future podcast topics—particularly those highlighting recent changes in insolvency law and practice or addressing underrepresented regions, such as Africa and North America.

Stay informed and engaged—tune in today! ■



III Model Laws@Work. What's this?

Prepared by Bob Wessels
Professor Em. International Insolvency Law, University of Leiden, the Netherlands

Did you see the III You Tube Videos?

The last half year of 2024 yielded something beautiful for the curious or the interested lawyer. The International Insolvency Institute (III) produced a number of videos (available on YouTube thought the III channel) that are related to the core value III stands for: dedication to the development and improvement of legal systems and processes that govern domestic and international insolvencies and business restructurings in order to promote economic wellbeing, investment, and the efficient administration of justice. These are beautiful, big words, but how can they be put into the unruly and complex practice? The videos produced by the International Insolvency Institute's Model Law@Work Thought Leadership Committee aim to achieve just that: their simple aim is to further contribute to the understanding of the laws and the improvement of practices of cross-border insolvencies and restructurings, with a focus on the themes covered by UNCITRAL's Model Law on Cross-Border Insolvency (MLCBI).

I'll give you a short overview: these videos start off with a general Introduction to the series of videos, the core theme being cross-border insolvency law. The videos also cover an analytical Introduction of the MLCBI, including a version with subtitles in Spanish. Topics also include issues regarding enactment of the MLCBI in national legislations in Bahrein, Brazil, Greece and Singapore, insights regarding cross-border insolvency laws in Japan and Hong Kong, and - in Spanish - developments and thought leadership issues in Latin-America. All in all, this represents the beginning of a fantastic collection of cross-border material that has already been viewed hundreds of times. My personal call to you, as reader of this contribution: use these videos, refer to them to law students or young lawyers in your area or to this information, or repost this contribution, if only for the benefit of all your colleagues around the globe. Or recommend them to foreign experts, colleagues or contacts in your network, for them to look at personally or to pass on the information to members of their country's legislatures to give them a solid basis for legislative initiatives on the inherently difficult subject of cross-border insolvency law. You can refer to III, see www.iiiglobal.org and its references and sources, here.

Responding to new needs

Why is III doing this? That's easy: a third phase in the development of international insolvency law is topical. Whereas regulation until the end of the last century - if it existed at all (!) - was based on national unilateral cross-border insolvency systems (USA; UK) or general private international law (conflicts-of-law rules), the second phase entered a new era. It was characterized by national regulation based on transnational exchange of ideas, leading to non-binding soft law approaches. The UNCITRAL Model Law on Cross-Border Insolvency of 1997 was of course the most striking example. The breakthrough came in the beginning of this century, with MLCBI supporters USA and UK in 2005 and 2006 enacting the large part of the MLCBI text into

its domestic legal regulatory framework. These jurisdictions were preceded by Mexico (2000) and Japan (2001) and followed by Australia (2008). That gave some 60 other countries the confidence to follow these reliable examples.

The current third phase started already in the second decade of this century. The Model Law ideas further spread to younger democracies and to recently emerging economies. Due to the globalization of companies, that sometimes became insolvent, "Model Law" insolvency proceedings applied for recognition to other national legal systems, in Latin-America, in continental Europe and to Asian legal systems.

What did we learn along the way? Definitely some important lessons--for instance, that the MLCBI fits into common law and civil law jurisdictions, although the latter were somewhat reserved and did not adopt all parts of the Model Law or would allow courts greater discretion in the non-recognition of a foreign insolvency proceeding, based on public policy grounds. Enacting the MLCBI is certainly not easy to be done. A headache? In civil law systems especially, the implementation of the Model Law is not without complications (certainly in neighbouring legal areas such as national civil procedural laws or systems of security rights). Another? Attention is required to ensure that the result of the Model Law enactment sufficiently corresponds to the 'international origin' of the Model Law. Also, legal culture plays a role. Some countries have a weak judicial infrastructure. Are all national courts where an 'international insolvency proceeding' can be adjudicated knowledgeable? Is there enough international experience? Do judges understand, read of speak other languages than their own? As an example of the vast dispersion of courts that may be confronted with cross-border cases: 11 courts in the Netherlands, 12 courts in Belgium and many, many dozens in Germany and France. And there are still gaps in securing a solid global system in relation to insolvency and restructuring of businesses. From the global market I understand that many countries are looking for greater legal certainty for trade and investment as well as protecting and maximization of the debtor's assets also in de cross-border restructuring or insolvency. They are assessing the value considering the themes of recognition and court-to-court cooperation and communication. These countries include Argentina, Armenia, Ecuador, Georgia, India, the Netherlands, Peru, Ukraine, Uzbekistan and some central American countries.

III is the organisation to walk the walk

During 2023 III brought together a group of some forty members from its own ranks. Could you form a specific III Committee Model Laws@ Work to assist 'wherever in the world' in the enactment, implementation or interpretation of the MLCBI but also – as the MLCBI itself is over 25 years old – in the revision and updating of enactments of the MLCBI (in all its national variants) done by these 60 states in the past? This is an obvious task for III. As we know, III brings together a unique group of lawyers with different professions (commercial practice, judiciary, academia) from a significant number of countries from all regions of the world. The organisation brings together all legal systems (common law, civil law, mixed legal systems). All III's members' competences cover a wide range of activities: international advice in (cross-border) insolvency and restructuring practice (to businesses and (inter)national setters of legal norms and standards), national and international litigation (regarding all sorts of legal matters), hearing and deciding in related cases and (cross-border) research and training, either in ad hoc or in regional of global programmes and courses. The organisation speaks no less than fifty different languages! The organization, in all, has its experts, contacts and antennae in virtually every country in the world. As a unique global group in III, it is best equipped to draw attention to the MLCBI beyond the traditional jurisdictions within

continued on page 39

Interview Segment: UNFIIILTERED

We are pleased to present the inaugural UnfIIIltered—a brand-new talk show in which our hosts, Dr. Robert Hanel and Steve Golden (NextGen), interview a pre-eminent restructuring professional and III member on both the professional and personal aspects of their life and career. We were honored to be joined by Christoph Paulus on the inaugural program, covering everything from what it was like to have a father as a professor to Christoph's travels to North Korea.

Christoph G. Paulus, Emeritus Professor at Humboldt-Universität zu Berlin, has been a full professor of law at the Humboldt-Universität zu Berlin since 1994, holding a chair for civil law, civil procedure law, insolvency law and Roman law. He previously taught at the universities of Heidelberg and of Saarland. He studied law at the University of Munich and earned his LL.M. at the University of California, Berkeley. As an expert primarily in insolvency law, Christoph has served a consultant for the International Monetary Fund and the World Bank. Moreover, from 2006 through 2011, he was an adviser for the German delegation on the United Nations Commission on International Trade Law insolvency law sessions. He has lectured around the globe and held guest professorships at various universities including Brooklyn Law School in New York and Bocconi University in Milan. In addition, he is a member of various international institutions such as the American College of Bankruptcy and III (of which he was a vice-president until summer 2017).

Watch the interview on Youtube

ASK AIII:

Time to have a bit of a laugh messing with AI!

In this segment we intend to experiment with different ways to play with AI…

To kick things off, Charles Mak challenged ChatGPT to write a poem that includes 'COMI,' 'releases,' 'relevant alternative,' and 'solvent liquidation.'……..

Here's what it wrote[1]:

A Solvent Farewell

In the twilight of commerce, beneath fiscal skies,
Where the ledger lies open, the truth never dies.
COMI whispers of home, where the debts all reside,
A center so pivotal, none can deride.

As twilight embraces the close of the day,
Releases of burden, in quiet array.
They echo through corridors of solvency clear,
A dance of numbers, the outcomes draw near.

Within these hallowed halls of the just,
Lies a path seldom trod, covered in dust—
The relevant alternative, a choice to be made,
Not merely an exit, but a foundation relayed.

For when the assets outweigh the cold claims,
Solvent liquidation, free from all blames.
It promises fresh starts, not just an end,
A respectful closure, on which new hopes depend.

Each line bears the weight of decision's keen edge,
A balance of justice, a solemn pledge.
To honor each creditor, to pay what is due,
In the realm of insolvency, respect is the glue.

May each case find its course in such dignified grace,
Where each entity meets with a rightful place.
In the ledger's last closing, as accounts are reviewed,
Solvent liquidation leaves dignity renewed.

[1] Text generated by ChatGPT, February 10, 2025, OpenAI, https://chat.openai.com.

Chinese Company Law continued from page 13

This change removes longstanding barriers in bankruptcy and reorganization, particularly for debt-to-equity swaps. Under the old framework, reorganization investments recorded as capital reserves could not offset losses, discouraging creditors due to prolonged recovery timelines. The revised law shortens distribution cycles, boosting creditors' willingness to engage in swaps and reducing reorganization investors' cash costs.

Administrators can now optimize reserve fund use, create more attractive reorganization plans, and increase the success rate of restructurings, making this amendment a significant step forward for corporate recovery.

Enhanced Liability of Directors, Supervisors and Officers

Directors, supervisors, and officers (DSOs) now face expanded duties, including enhanced fiduciary obligations, stricter compliance requirements, and responsibilities for maintaining capital adequacy. They also bear joint or compensatory liability for failing to deliver their duties.

The new law explicitly states that directors are responsible for overseeing liquidation and are liable for damages due to negligence—a shift from the previous framework, where only shareholders of limited liability companies would bear these responsibilities. This change reinforces the board of directors' role as the company's operational core, ensuring better protection for shareholders and creditors.

Additionally, individuals listed as dishonest debtors are now barred from serving as DSOs. While this reduces the risk of mismanagement, it may complicate bankruptcy proceedings if such individuals are also guarantors or key stakeholders, potentially lowering the success rate of debtor-led restructurings.

Simplified Deregistration and Mandatory Liquidation

The amended law introduces a streamlined deregistration system, allowing authorities to dissolve inactive companies whose business licenses have been revoked or invalidated. This system addresses "zombie enterprises", thus reducing administrative burdens and improving market efficiency.

The simplified deregistration system also offers a low-cost exit option for small and micro-enterprises, bypassing traditional liquidation procedures and enhancing resource allocation.

Piercing the corporate veil and substantive consolidation

The first and second paragraphs of Article 23 of the new Company Law state: "If a shareholder abuses the company's independent legal personality and their limited liability to evade debts and significantly harm the interests of creditors, they shall bear joint and several liability for the company's debts. If a shareholder uses two or more companies under their control to commit such acts, each company involved shall bear joint and several liability for the debts of any other company."

This newly introduced horizontal corporate personality denial system provides a legal foundation for affiliated companies' substantive consolidation and bankruptcy. The Supreme People's Court, China's highest judicial authority, has clarified that substantive consolidation is permissible in bankruptcy cases involving affiliated enterprises. In such cases, courts are expected to carefully evaluate the relationships between the entities and apply appropriate measures.

As a general principle, courts should individually assess the bankruptcy grounds of each entity and respect the independence of each company's legal personality. However, substantive consolidation may be warranted in exceptional circumstances where the corporate personalities of affiliated enterprises are

deeply intertwined, the cost of distinguishing their assets is prohibitively high, or failing to consolidate would severely undermine creditors' rights to equitable repayment.

Projecting the Future: Chinese Bankruptcy Law Reforms

Looking ahead to the future, the Chinese bankruptcy law is also in the revision process. It has already been included in the legislative plan of the National People's Congress, the highest legislature in China. Several issues could be worth further discussion.

Personal Bankruptcy

China lacks a comprehensive personal bankruptcy law despite growing demand, particularly from SME owners. Starting in 2018, courts in Jiangsu and Zhejiang provinces initiated collective liquidation practices for personal debts, which were later adopted nationwide. In 2021, Shenzhen launched a pilot personal bankruptcy system, establishing a Bankruptcy Administration Office. Despite cultural resistance, the ongoing revision of the Enterprise Bankruptcy Law presents a crucial opportunity to formalize a personal bankruptcy framework.

Prepackaged Reorganization

Though unaddressed in Enterprise Bankruptcy Law, prepackaged reorganizations are increasingly used, with local courts issuing guidelines. However, current practices often deviate from their intended function, with courts being overly involved or using the mechanism to bypass legally mandated procedure deadlines. The future revision would need to formalize and regulate prepackaged reorganizations, enhancing efficiency and compliance.

Cross-Border Issues

As China's Belt and Road Initiative (BRI) expands, cross-border insolvencies are likely to increase. Enhanced legal clarity and alignment with international norms such as UNCITRAL Model Law on Cross-border Insolvency will be essential to address these cases effectively. The 2021 Mainland-Hong Kong cross-border cooperation framework is a notable development. The future revision is expected to establish a comprehensive system to tackle cross-border challenges.

Conclusion

The 2023 revision of the Chinese Company Law represents a significant step forward in modernizing China's corporate and bankruptcy frameworks. By strengthening governance standards, enhancing creditor protection, and promoting corporate social responsibilities, the new law lays a robust foundation for the future. As China continues integrating with the global economy, bankruptcy legislation and practices in the next years are poised to reflect high-level international standards. These developments will bolster public confidence in China's legal system and ensure its resilience in an increasingly complex global landscape. ■

Valuation of Collateral continued from page 15

(c) On the other hand, the favorable vote for the plan by the collateral class would allow, even if the plan is not approved by all classes (non-consensual plan), for the simple majority being sufficient for its judicial sanction (art. 639.1 of the Insolvency Act), as long as the additional requirements provided in the regulation are met.[4]

(d) Finally, approval of the plan by the class composed of credits with collateral on the debtor's assets–again, linked to the value assigned to the collateral–would also enable its judicial sanction if that class is "in the money" (art. 639.2 of the Insolvency Act),[5] even if the other classes vote against it.[6]

1.2. On the valuation of collateral and the "exit right"

Likewise, the valuation of collateral plays a fundamental role in relation to the so-called "exit right" provided in article 651 of the Insolvency Act. This right, available only to those secured creditors that have voted against the plan and belong to a class where the favorable vote have been less than the dissenting vote, allows them to avoid the drag caused by judicial sanction of the plan and request the realization of the encumbered assets or rights within one month after the publication of the sanction order. The valuation of the collateral will determine both the possibility of exercising this right by the creditors and the conditions under which they can do so.

The value assigned to each collateral will determine the role and influence of each of the credits within the class in which it has been included. Thus, the distribution of the intraclass voting right will be based on the value of collateral; and this will impact whether or not, in that class, the favorable vote is less than the dissenting vote (thereby allowing the creditor to exercise its exit right).

Once the requirements to apply this exit right are met, the valuation of the collateral will also directly determine the conditions under which it is exercised. In particular, the value of the collateral is decisive for the treatment of the amount obtained when enforcing the security when it is less than the secured claim (understood as the total credit, regardless of the value assigned to the collateral[7])[8].

[4] Some authors (see PULGAR EZQUERRA, J. `Comentario al artículo 639' in *Comentario a la Ley Concursal*, La Ley, 2023) have pointed out the risk of a possible breach of the majority principle, which is the foundation of the restructuring plans model, through this sanction route. The risk would arise with the artificial multiplication of classes with the sole purpose of achieving a simple majority, thus allowing an insignificant percentage of credits to drag the other classes of credits. However, the truth is that the regulation offers a wide margin of flexibility, even allowing the formation of single-person classes (see Xeldist, Vilaseca, Ecolumber, or Transbiaga cases), which undoubtedly makes the formation of classes often more a strategic than an economic issue.

[5] A class of credits will be considered "in the money" when it can reasonably be presumed that it would have received some payment after a valuation of the debtor as a going concern. For this purpose, a report from the restructuring expert on the value of the debtor as a going concern must accompany the request for judicial sanction (art. 639.2 of the Insolvency Act).

[6] This case was addressed in the order of the Commercial Court No. 1 of Pontevedra on May 20, 2024, which sanctioned the restructuring plan of Fandicosta, S.A. by considering it approved by the in-the-money class of credits with collateral on the debtor's assets.

[7] Although the term "secured debt" used in article 651.3 of the Insolvency Act could initially be interpreted as the part of the secured credit actually covered by the value of the collateral (according to the credit computation rule provided in article 617.5 of the Insolvency Act), the contrast of this term with "value of the security" in the same provision excludes such interpretation.

[8] Article 651.3 of the Insolvency Act foresees the following two scenarios: (i) if the amount obtained exceeds the value of the collateral, the enforcing party is allowed to take it all, allocating that excess to the amount it would have received or must receive according to the restructuring plan for the part of the credit considered unsecured; (ii) if the amount obtained is less than the value of the collateral, that difference will remain unmet, contrary to what some authors have been stating that this seeks to discourage the use of this alternative. See GARCIMARTÍN ALFÉREZ, F., 'Sobre el nuevo régimen aplicable a los planes de reestructuración (y las novedades en el Libro IV)', in *Revista general de*

Finally, it is important to highlight that the exit right, which in principle grants certain secured creditors greater protection in the context of restructuring plans, can imply a potential negative impact. Article 651.2 of the Insolvency Act contemplates the possibility of anticipating the potential exercise and monetization of this right in the restructuring plan. This implies that the plan can neutralize the creditor's right by paying instead the amount of the value assigned to the collateral,[9] thus preventing the creditor from requesting the enforcement of the encumbered asset or right.

This ability to neutralize the creditor's right once again highlights the manifest importance of the valuation of collateral in the context of restructuring plans. It is also important to note that this ability could pave the way for the creation of restructuring plans with ad hoc provisions that allow neutralizing those secured creditors that may be considered an obstacle in the restructuring process, potentially even considering the possibility of using the asset or right that has been removed from their power of enforcement to secure new financing.

2. Determining the value of collateral. Legal criteria and precedents

Given that the valuation of collateral is key, it is worth analyzing how this should be done to avoid it being the basis for a future challenge to the plan (*e.g.*, by invoking the defective formation of classes, which, if accepted, would imply the ineffectiveness of the plan under art. 661.2 of the Insolvency Act).

Thus, as indicated above, resulting from integrating the underlying legal and economic realities of secured credits in the context of restructuring plans, article 617.5 of the Insolvency Act establishes that only the part of the secured obligation covered by the value of the collateral will be considered as secured credit.

The valuation of collateral for these purposes is governed by arts. 273 to 279 of the Insolvency Act. According to the applicable valuation criteria, the valuation process can be summarized in two phases.

1.3. Determining the fair value of the asset on which the collateral is based

Under article 273 of the Insolvency Act, the following valuation methods can be distinguished based on the nature of the asset or right:

(a) In the case of real estate, the value resulting from the report issued by an approved appraisal company registered in the special Register of the Bank of Spain will be taken.

(b) In the case of securities listed on a regulated market, the fair value will correspond to the weighted average price at which they were traded in the last quarter,[10] in accordance with a certification issued by the market governing company.

(c) In the case of other assets or rights, the fair value will be determined by an independent expert in accordance with the generally recognized valuation principles and standards

Insolvencias & Reestructuraciones, No. 7, 2022, p. 77.

[9] Although the provision indicates that "the plan may provide for replacing this right by the option to collect in cash, within a period not exceeding 120 days, the part of the credit covered by the value of the guarantee" *("el plan podrá prever la sustitución de este derecho por la opción de cobrar en efectivo, en un plazo no superior a ciento veinte días, la parte del crédito cubierta por el valor de la garantía")*, waiving the creditor's exit right in exchange for its monetization as optional for the creditor has not been supported (see, among others, SENDRA ALBIÑANA, A., 'Artículo 651' in *Comentarios al articulado del Libro Segundo del Texto Refundido de la Ley Concursal, Sepín, 2023, p. 555)*. However, it is not a question free from debate that could offer the courts a wide margin of interpretation.

[10] The regulation does not specify which quarter should be taken as the "last quarter" for valuation purposes in the context of restructuring plans, as it only addresses this time period within the framework of an insolvency process, linking it to the quarter prior to the declaration of insolvency. However, it is reasonable to assume that, in a pre-insolvency context, the reference quarter should be the one prior to the issuance of the certification itself, which, in turn, should be issued within a timeframe reasonably close to the date of sanction of the restructuring plan (see this argument continued in the next footnote).

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for such assets.

It should be noted that, when determining the fair value of real estate or other assets or rights other than securities, it will not be necessary to prepare a new report, as long as there is one whose date is reasonably close to the approval of the restructuring plan.[11]

Under the second paragraph of article 617.5 of the Insolvency Act, it will be necessary to attach to the public instrument in which the restructuring plan is formalized the certifications, if any, issued by the governing body or the appraisal company that determine the fair value of the assets or rights on which the collateral is based.[12]

1.4. Deductions from the fair value of the collateral asset and limits

On the one hand, an "automatic" deduction of 10% must be applied to the previously determined fair value[13]; and, on the other, the amount of outstanding credits with a preferential collateral, if any, on that same asset must be deducted.[14] Likewise, the resulting value of the collateral may in no case exceed the amount of the secured obligation itself nor the value of the agreed maximum mortgage or pledge liability (art. 275 of the Insolvency Act).

2. Valuating collateral as part of the strategy for designing and approving the plan

As mentioned above, secured creditors may find their credit rights affected by measures imposed even by decision of lower-ranking creditors. However, due to the interference this entails regarding the economic function of secured rights, compensatory measures are foreseen to achieve a balance between the rights of these creditors and the collective interest inherent in the restructuring process of a viable company. It is precisely in this context that the valuation of collateral plays a decisive role.

However, as with all rules, there are exceptions in certain circumstances. As the preamble to Act 16/2022 rightly indicates, restructuring plans are flexible instruments whose purpose is the short- and medium-term viability of debtor companies. No two plans are the same, so the flexibility provided to these instruments should allow them to adapt to the specific case (its tailormade nature is what gives this mechanism its economic and legal appeal), as long as they

[11] Strictly speaking, the regulation does not provide a reasonableness criterion for valuation purposes in a pre-insolvency context, but it merely considers it reasonable to issue a report within the six months prior to the declaration of insolvency. However, it is logical to assume that, in the context of restructuring plans, the reasonableness criterion extends to reports issued within the six months prior to approval of the plan (this opinion is shared, among others, by GALLEGO CÓRCOLES, A., 'Artículo 617' in *Comentarios al articulado del Libro Segundo del Texto Refundido de la Ley Concursal*, Sepín, 2023, p. 311). However, it is not an undisputed issue, as other authors consider it possible to take the date of judicial sanction of the plan as the reference date (see AAVV., 'La aprobación de los planes de reestructuración' in *Reestructuraciones e Insolvencia*, Tirant lo Blanch, 2023, p. 817).

[12] Under article 273.3 of the Insolvency Act, it will not be necessary to provide reports when the collateral is cash, current and savings account balances, electronic money or fixed-term deposits.

[13] Lawmakers justified this deduction in the preamble to Royal Decree-Law 11/2014, of September 5, on urgent measures in insolvency matters, considering "prudent to reduce said fair value by ten percent since the collateral, if enforced, will require the enforcement of the asset or right on which it is constituted, which entails costs and delays that reduce the value of the collateral by at least that percentage" *("una regla de prudencia reducir dicho valor razonable en un diez por ciento por cuanto la garantía, de hacerse efectiva, requerirá la ejecución del bien o derecho sobre el que esté constituida, lo cual entraña unos costes y dilaciones que reducen el valor de la garantía en, al menos, dicho porcentaje").* However, the truth is that this deduction percentage may not adjust to reality in most cases, as enforcements entail very different costs mainly depending on the asset's degree of liquidity.

[14] Although article 275.1.2º of the Insolvency Act does not expressly address this aspect, it is reasonable to interpret that, in view of the rest of the articles of the regulation and the purpose pursued by the lawmakers, the deduction should be at most the amount of the agreed maximum pledged or mortgaged liability.

follow the two principles that govern them: (i) their purpose: business viability and (ii) the majority principle on which they are based.

Thus, only the concurrence of specific circumstances could mitigate the practical relevance of the valuation of collateral for the formation of classes. This situation could arise, as has already happened, in those cases where the unanimous approval of the plan by all debt holders is obtained, so the segregation of credits into secured (as they are covered by the value of the collateral) and unsecured and, consequently, the configuration of the classes, would not alter the approval percentages. In other words, when the numerator (total affected credit voting in favor) and the denominator (total credit affected by the plan) would continue to reflect the same 100%.

This case was addressed by the Commercial Court no. 7 of Madrid in its order of January 23, 2024, sanctioned the restructuring plan of DENEF INVESTMENTS, S.L. (a subsidiary of an international group of companies in the renewable energy sector). In this case, all creditors holding 100% of the affected debt had, prorated to their stake in the financing, collateral on certain shares owned by the debtor and plan proposer. Therefore, solely to comply with the mandatory class formation criterion provided in article 624 of the Insolvency Act, the credits were nominally segregated into two classes: one formed by secured credits, i.e., the part of the debt actually covered by the value of the collateral; and another composed of the affected credits not covered by that value. However, the amount corresponding to each class was not quantified, as it was not considered necessary to carry out a valuation of the collateral, to the extent that such valuation could in no case transcend the requirement of correct class formation, nor modify the plan approval percentage for each of them; it would always be 100%.

The above order, which accepted the arguments of the debtor company, concluded the following: “It is necessary for the plan to have a valuation of the affected collateral to determine the percentage of secured credit and, therefore, its voting percentage. However, this has no practical significance when it is known in advance that 100% of the credit of the class formed by secured credits will vote in favor of the plan. That is why the proposal of 'self-valuation' of the collateral and segregation of the credits into the part secured by the collateral and the unsecured part does not transcend the requirement of correct class formation.”

The strategy adopted in this case, which consisted of a self-assessment, or rather, a lack of explicit valuation of the collateral in the plan itself (therefore, outside the valuation criteria provided in the regulation), allowed for avoiding an unnecessary increase in the time and economic costs of a restructuring that simultaneously affected different jurisdictions (crossborder restructurings). However, the exceptional nature of this precedent precisely demonstrates how crucial it is to thoroughly study each specific case to adequately evaluate the pros and cons of each possible strategy to design and select the most appropriate one.

The importance of properly defining the strategy from the beginning of the restructuring is highlighted when considering that, despite its impact on the success of the process, the valuation of collateral in the context of restructuring plans is a matter that, to date, is characterized by the scarcity of judicial precedents addressing it. This circumstance, while leaving a wide margin of interpretation of the regulation that can be beneficial for debtor and creditors alike, increases uncertainty. A well-conceived action plan from the start and knowing who will play a leading role in the approval of the plan, can determine the success or failure of the restructuring. ■

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proponents of this proposal, suggesting its replacement with a private ordering mechanism known as 'The Commitment Rule.' According to this theory, the COMI rule generates significant legal uncertainty, increases litigation costs, and incentivizes opportunistic behavior in the period preceding insolvency proceedings. Scholars argue that the COMI rule "hinders access to finance and destroys jobs and wealth, even if insolvency never occurs."[4]. By contrast, the Commitment Rule, as they propose, allows debtors to publicly and bindingly select their insolvency forum in advance by incorporating the choice into their company's constitution. Its primary advantage is its potential to benefit companies incorporated in jurisdictions with ineffective restructuring and insolvency frameworks, enabling them to choose a forum that better serves all stakeholders. In essence, the Commitment Rule seeks to create a win-win scenario by encouraging debtors to carefully consider and designate a forum that aligns with the interests of all constituencies before a financial crisis arises.

While their proposal has generated significant debate, eliminating the concept of COMI from the MLCBI would undermine its objectives and the foundational principle of modified universalism. This stance is supported by several reasons, three of which are particularly relevant from the perspective of an emerging economy.

1. The Role of COMI in the MLCBI:

First, because COMI is not a concept that can be cut off without compromising the structure of the MLCBI. It serves as the foundation for identifying the main proceeding, which then determines the relief available upon recognizing a foreign proceeding. Moreover, recognition should not be regarded as a mere formality; it is a carefully designed mechanism to foster closer ties and sustained cooperation among countries. This may be less evident for Common Law countries, but for those rooted in the Civil Law tradition, existing international cooperation tools have proven inadequate for insolvency matters. Designed to execute specific stable judicial decisions or isolated procedural acts, these tools fall short in fostering the extensive, ongoing jurisdictional collaboration that cross-border insolvency requires. Even though cooperation among jurisdictions is not confined to the recognition procedure, it is challenging to envision judges in civil law and developing countries feeling comfortable dialoging directly with foreign authorities just because their countries have adopted a transnational model law or, worse, based on a private ordering mechanism. The understanding of a recognizing court functioning as an auxiliary court is relatively new for many countries, and delineating the limits of its jurisdiction poses significant challenges. However, the recognition process, along with the discretionary reliefs that might be granted, provides local courts with some degree of control over the adequacy of the requests in relation to their own laws. Despite its imperfections, COMI serves to distinguish between main and non-main insolvency proceedings, thereby identifying the central forum and its implications for the applicable bankruptcy rules[5]. While it could be argued that the Commitment Rule would not impact the recognition process, this claim is only partially accurate. Various judgment recognition mechanisms are well-established in Private International Law; however, they have historically proven ineffective in the context of insolvency. What sets UNCITRAL's framework apart is the recognition of foreign proceedings based on their connection to either the debtor's center of administration or their economic

[4] CASEY, Anthony; GURREA-MARTÍNEZ, Aurelio; RASMUSSEN, Robert K.. A Commitment Rule for Insolvency Forum, p. 6.

[5] See Jay Lawrence Westbrook, **Locating the Eye of the Financial Storm**, 32 Brook. J. Int'l L. (2007).

activity. These ties are essential for ensuring that recognition aligns with the broader goals of cross-border insolvency regulation.

Second, replacing COMI with a private ordering mechanism, such as the 'Commitment Rule', undermines a core principle of the MLCBI: modified universalism. The notion that the debtor and its main creditors are best positioned to select the *lex fori concursus* conceals a selective forum shopping practice that benefits only a few jurisdictions while jeopardizing the ideal of universalism. Importantly, the MLCBI is not an insolvency regulation and was not intended to govern the rights of creditors and debtors. Instead, it offers a middle ground by promoting cooperation among jurisdictions. And modified universalism is not a reconfigured version of universalism; rather, it represents a pragmatic and realistic acknowledgment that no country will relinquish its sovereignty and blindly enforce foreign judgments. It is an ideal of universalism permeated by territorial considerations, recognizing that diverse social and political factors must be weighed in insolvency proceedings. In other words, insolvency is not simply a mechanism for the collective enforcement of debts. Countries commit to UNCITRAL texts based on the belief that they will be treated equally and play an active role in managing cross-border insolvency cases, without compromising their sovereignty. However, adherence to the MLCBI heavily depends on courts' willingness to recognize foreign judgments and cooperate with authorities in other countries. For a developing country that has recently adopted the MLCBI, such as Brazil, a forum selection clause relegates these nations to mere 'rubber-stamp' jurisdictions, passively endorsing decisions made by foreign courts while sidelining their own social policies. As initially noted by Ian Fletcher[6], the predominant approach of territoriality allows its own bankruptcy law to extend across borders while denying the effects of foreign decisions on local assets of the debtor. This reflects a parochial and uncooperative attitude. Only in theory does the 'Commitment Rule' or similar contract-based frameworks appear to support a principle of modified universalism. In practice, however, his private ordering mechanism fosters a unilateral viewpoint dictated by a single jurisdiction selected by private actors, failing to account for the social policies that impact other stakeholders.

This mechanism exacerbates the issues inherent in pure universalism—an idealistic and unrealistic framework—but, by centralizing judicial power solely based on a private selection clause, it creates a downside effect akin to territorialism. The privately chosen court may feel empowered globally because the main assets are located abroad; however, as a privately selected forum, it is likely to be less willing to cooperate with foreign jurisdictions. The commitment rule is a contract-based theory; however, it departs from the fundamental principle of unanimous consent and tends to favor the forum chosen by the debtor or a few influential creditors.

Third, the main proceeding should be ascertained by creditors, as it primarily dictates the choice of applicable insolvency law. The Commitment Rule departs from independent and objective criteria, increasing legal uncertainty, as powerful creditors can pressure

[6] FLETCHER, Ian F. **Insolvency in Private International Law**. 2Nd edition. Oxford University Press, 2011, p. 13 (stating that: "The more usual approach [of territorialism] however has been one whereby the State regards its own, domestic bankruptcy laws as producing universal effects, particularly it the debtor's relationship with the country is a close one which enables the case to be classified as a 'domiciliary' proceeding. On the other hand, the notion of territoriality is applied towards foreign proceedings involving debtors with property or other interests which lie within the jurisdiction of the State in question: by denying the capability of the foreign proceedings to produce any effects regarding that part of the debtor's patrimony, the way is left open for local actions to be taken by any party with standing to exercise rights over it.".

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debtors to change the forum selection clause multiple times over the course of the company's business. While it is true that COMI can be moved or manipulated—many courts have accepted the concepts of "COMI migration" and "good forum shopping"—its relocation is typically evaluated in light of the interests of all current creditors and stakeholders, once the insolvency proceeding is initiated and social policy considerations are accounted for. In contrast, the Commitment Rule operates as a non-transparent, privately chosen mechanism that lacks the safeguards of broader judicial scrutiny. The notion that vulnerable creditors will be adequately protected through the preferential ranking of their claims, with disregard for their preferences by the selected jurisdiction serving as grounds for denying recognition, is an insufficient response to a critical social policy issue. Moreover, the concept of vulnerable creditors is far from straightforward. States differ significantly in how they define degrees of vulnerability and assess the ability of insolvency law to protect such creditors. Another challenge arises from the potential misalignment between the timing of recognition requests and the enforceability of preferential rights. Vulnerable creditors often lack the technical expertise and financial resources necessary to assert their claims in a foreign proceeding. UNCITRAL has invested significant effort in promoting cooperation. The Model Law should enhance direct cooperation and the recognition of foreign proceedings, rather than undermining these efforts by adding additional grounds for denying cooperation.

1. Conclusion:

The past quarter-century has exposed several deficiencies in the COMI concept, and Professors Anthony J. Casey, Aurelio Gurrea-Martínez, and Robert K. Rasmussen deserve recognition for sparking this critical debate. However, despite its limitations and areas for improvement, COMI remains the second-best option available. Furthermore, the MLCBI is fundamentally built around the COMI concept, and removing this central pillar would destabilize the entire framework. Rather than advancing the principle of modified universalism—which encourages states to collaboratively develop solutions—these proposals lean toward privatizing forum selection, undermining the core objectives of the MLCBI.

My primary concern, however, lies with the response of emerging economies. Countries that have recently adopted the MLCBI or are contemplating its adoption may be reluctant to recognize foreign decisions if it becomes apparent that a company's commercial ties to its home country are irrelevant, and that private ordering determines jurisdiction. While forum-selection clauses are acceptable in contractual relationships—given their basis in mutual consent and private autonomy—insolvency law operates under fundamentally different principles, prioritizing collective interests over private preferences. Expecting judges to cooperate fully with foreign authorities when a company is incorporated in their jurisdiction but elects to use a foreign court for reorganization is unrealistic. This issue is further exacerbated in civil law countries, where direct judicial communication and cooperation are less established practices.

The notion that certain countries offer superior restructuring frameworks is misleading and should not justify forum selection clauses. UNCITRAL and other international organizations should focus on equipping all nations with robust and effective legislation, rather than creating a dichotomy between (insolvency) dispute resolution hubs and peripheral jurisdictions. Additionally, legal systems improve through practical application and engagement with real cases, making hands-on experience an essential driver of legislative refinement. ■

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which the effects of the MLCBI have been felt in the first two decades of this century.

How so?

The Committee (for its members, see here) is a beautiful blend of professionals. It comprises 40 members:

- Working in 20 countries from all regions of the world;
- Even in numbers of III members and NextGen members (younger professionals and academics in a programme to liaise with experienced III members);
- Mastering over 40 languages, and being
- 60% practitioners, 30% academics and 10% judges.

Once formed, the Committee proceeded thoughtfully and carefully. It distinguished as (possible) activities, (i) technical assistance, (ii) comparative assistance, (iii) scholarly assistance, (iv) anticipatory resolution, (v) dispute resolution. The major bulk of the Committee's assistance relates to the MLCBI. It could, however, also involve additional results of UNCITRAL's work, the Model Law on Insolvency-Related Judgements (MLIJ) (2018 with Guide of Enactment) and the Model law on Enterprise Group Insolvency (MLEGI) (2019 with Guide of Enactment). To date, however, no country has enacted either of those recent Model Laws.

Where can we help?

As an example of technical assistance, it is noted that UNCITRAL texts generally cover commercial transactions and are designed to provide legal certainty for commercial dealings of professional parties. The III Committee Model Laws@Work's technical assistance may include:

- to evaluate a state's present legal system orientation (legal-historic roots, civil law, common law, mixed system) and its present national international insolvency provisions and/or case law), including a gap analysis;

- to discuss the desirability of reciprocity (full reciprocity; reciprocity of certain parts);

- to assess to provide for a mix of legal instruments (certain parts of the MLCBI; certain parts in a bi-lateral treaty; large cases with protocols);

- to discuss core matters (e.g., foreign' tax claims, scope of 'public policy',foreign representative issues, constitutional independence of judges in relation to cross-border cooperation);

- to align or augment, where necessary, provisions with existing soft law (such as other UNCITRAL texts, ALI-III Principles and Guidelines 2012 or JIN Guidelines);

- to align any enactment with the MLCBI text and its compatibility with existing domestic rules (insolvency law, procedural law, corporate law, contract law, labour law);

- to add, if desired, new provisions in as far as not covered by the MLCBI (e.g. registration of 'international' judgments, data protection rules; technological facilities for in court-to-court communication). This type of assistance aims to assist legislators and policy makers.

Raising awareness

We have seen several new democracies and rising economies showing interest in cross-border matters. New generations of lawyers and judges are being confronted with the globalisation of insolvency. Younger insolvency and restructuring researchers are looking for peers in other countries, to prevent working in isolation, i.e. a scholarly environment where at best a few people know the national insolvency system, but are at a loss for words when it comes to the international insolvency system. With this, it is obvious to start with raising the awareness of the UNCITRAL texts and the themes it covers. The next phase could be to advise and to provide assistance to states' legislators, and capacity building through training of legal practitioners and the judiciary.

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So, what's next?

See here the explanation for the group of You Tube videos that were recently published. Do not use these only for your own benefit, but please also be an ambassador for III. Point out the existence of these videos to people who you think can help their country or their practice. And if you have a suggestion for a contribution or want to give a tip to members of the Committee, do not hesitate to contact us: Scott Atkins, Australia (Chair, scott.atkins@nortonrosefulbright.com), Carlota Palazzo, Latin-America (cpalazzo@capdevila-palazzo.com.ar), Ishana Tripathi, India (ishana.tripathi@gmail.com) and Maja Zerjal Fink, USA (Maja.ZerjalFink@CliffordChance.com).

You are there for III, we are there for you. ■

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New York City
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2025 Annual III and NextGen Conference
June 8-10, 2025
Sao Paulo, Brazil
Click here to view the conference schedule and register.

2026 UCC Regional Conference
January 20-21, 2026

The International Insolvency Institute is a non-profit, limited-membership organization dedicated to advancing and promoting insolvency as a respected discipline in the international field.

Its primary objectives include improving international co-operation in the insolvency area and achieving greater coordination among nations in multinational business reorganizations and restructurings. The Institute's membership is drawn from the most senior and respected insolvency practitioners, judges and academics in the world and it has valuable liaisons with many of the most senior regulatory and administrative professionals in the insolvency field. The Institute, due to its exceptional membership, its international leadership, and its resources, plays a valuable and highly significant role in the international insolvency field. It has achieved a worldwide reputation and is developing into a catalyst for improvement and change in the international insolvency area that has few, if any, equals.

Communications Committee

This edition of The DIIIGEST was brought to you by:
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Submissions for the next newsletter should be made online via form and are due July 31.

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