

WILL UNCITRAL BRING CHANGES TO
INSOLVENCY PROCEEDINGS OUTSIDE
THE USA AND GREAT BRITAIN?
IT CERTAINLY WILL!

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Bob Wessels
Professor of Commercial Law
Vrije University Amsterdam
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1. General support for the Model Law

The UNCITRAL Model Law on Cross-Border Insolvency¹ generally has been welcomed in literature written by authors from outside the “English language comfort zone” (mainly USA, UK, Canada and Australia). Although some criticism has been expressed at certain aspects of the Model Law there is a general appreciation for its goals and structure. A vast majority of literature advocates the adoption of the Model Law.²

It is significant too that several large global institutions have recommended the adoption of the Model Law:

- *G22*. The Group of 22, comprising Finance Ministers and Central Bank Governors of important economies, gathered in the wake of the international financial crisis which began in 1997 in Asia. In its meeting of October 1998 the Working Group on International Financial Crisis endorsed eight key principles and features, formulated in consultation with INSOL International. One principle, though not a recommendation, is related to the establishment of a framework for cross-border insolvency, highlighting the usefulness of the Model Law. The Working Group encouraged the wider use of the Model Law or the adoption of similar mechanisms. See www.ustreas.gov/press/releases/docs/g22-wg.3.htm

- *IMF*. In the International Monetary Fund 1999 report *Orderly & Effective Insolvency Procedures. Key Issues*, composed by *Legal Department, International Monetary Fund*, the taking of appropriate steps to solve cross-border insolvency issues is encouraged. The report concludes: “The adoption by countries of the Model Law on Cross-Border Insolvency prepared by UNCITRAL would provide an effective means of achieving these objectives”. See www.imf.org

- *ADB*. In the Asian Development Bank’s RETA report 5795 (RETA: Regional Technical Assistance for Insolvency Law Reform), delivered by the Office of the General Counsel of the Asian Development Bank, entitled: *Law and Policy Reform at the Asian Development Bank* (2000 Edition, Vol. I), a project has been launched in several countries to structurally reform the system of insolvency law (amongst other areas of law). It is suggested that the insolvency reform is guided by sixteen so called “*Good Practice Standards for insolvency law.*” ADB’s Good Standard Practice 16 reads: “An insolvency law regime should include provisions relating to recognition, relief and cooperation in cases of cross-border insolvency, preferably by the adoption of the UNCITRAL model law on cross-border insolvency.” See www.adb.org

- *The World Bank*. In April 2001 the World Bank approved the 35 “*Principles and Guidelines for Effective Insolvency and Creditor Rights Systems,*” which will be used in its program of country assessment. Principle 24, headed “*International Considerations*”, states: “Insolvency proceedings may have international aspects, and insolvency laws should provide for rules of jurisdiction, recognition of foreign judgments, cooperation and assistance among courts in different countries, and choice of law.” In its explanation it reads: “The most effective and expeditious way to achieve these

¹ The texts of the UNCITRAL (United Nations Commission on International Trade Law) Model Law and Guide to Enactment are available through the UNCITRAL website at: www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model.html.

² This paper is a short note based on the manuscript of my book: *Wessels, International Insolvency Law*. This forthcoming publication is a second edition, in English, of my 2003 Dutch version of this book, published by Kluwer, the Netherlands.

objectives is enacting the UNCITRAL Model Law on Cross Border Insolvency.” See www.worldbank.org.

2. It's enactment

The ultimate success of the Model Law and the achievement of its objectives is heavily dependent upon whether, and in what manner, countries choose to enact it. It is therefore useful to have an overview of the progress of countries which have already enacted the Model Law, or are in the process of enacting it, or which have established legislation inspired by it. Several countries have indeed enacted legislation that – to a varying extent – incorporates the Model Law into domestic law, these countries are Eritrea, Japan, Poland, South-Africa, Spain, Mexico and within Yugoslavia, Montenegro, USA and (as of 6 April 2006) Great-Britain (England, Wales and Scotland). In some countries legislative proposals have been suggested or have been debated within the legislative forum (the country's parliament), examples of such countries are Australia, Argentina, Cayman Islands (international cooperation provisions in proposed new companies legislation), Canada and Italy.³ Below, I will briefly mention the results in some of these countries.

Australia.

In Australia the general attitude to different kinds of cross-border assistance measures has been favourable. In June 2002 the Federal Government announced the next phase in its Corporate Law Economic Forum Program (CLERP), a review of cross-border insolvency law, including the possible enactment of the Model Law. The review is called CLERP 8. The Government published a paper in August 2003, called “*Cross-Border Insolvency. Promoting international cooperation and coordination.*” In essence it is proposed that the Model Law will be adopted as written. For the text of the paper, see <<www.treasury.gov.au>>.⁴

Canada.

In Canada several major principles of the Model Law were already incorporated into Canada's Bankruptcy and Insolvency Act (BIA) when it was amended in 1997. For the text of Part XIII (“International Insolvencies”) see www.iiiglobal.org. In Canada insolvency law is found primarily in two statutes, BIA and the Companies' Creditors Arrangement Act (CCAA). In June 2005 amendments were made, laid down in Bill C-55 and considered in Canada's House of Commons.

See www.parl.gc.ca/38/1/parlbus/chambus/house/bills/government/C-55/C-55_1/C-55.

Contrary to the US approach, Bill C-55 does not use the language of the Model Law, but adapts it to the BIA and CCAA contexts. Furthermore, the Model Law is dealt with in 17 provisions (sections 267-284 BIA; sections 44-61 CCAA) in Bill C-55. Some provisions of the Model Law may have found their place outside these sections, but e.g. Articles 7 (Additional assistance to a representative of a foreign insolvency proceeding), 8 (Interpretation), 13 (Access of foreign creditors to a proceeding), 14 (Notifications to foreign creditors), 19 (Relief to be granted upon recognition) and 23(1) (Standing to commence actions to render ineffective detrimental acts) have been left out. The obligations to cooperate (Articles 25-27 Model Law) are presented in two sections, also obliging “every person who

³ See Wessels, o.c., and UNCITRAL Note by the Secretariat “Insolvency law: Developments in insolvency law: adoption of the UNCITRAL Model Law on Cross-Border Insolvency; use of the cross-border protocols and court-to-court communication guidelines; and case law on interpretation of “centre of main interest” and “establishment” in the European Union” (Doc. A/CN.9/580 (14 April 2005)).

⁴ See Mason, Cross-border insolvency: Adoption of CLERP 8 as an evolution of Australian insolvency law, *Insolvency Law Journal* 2003/2, 62, and Emmett, Australia Corporate Insolvency Law Reform, in: *Insolvency Law & Practice* 2005, 199.

exercises any powers or performs duties and functions in any proceedings under this Act” to cooperate. The forms of cooperation (Article 27 Model Law) are not reflected in these sections.⁵

Germany.

In Germany, a proposal for a set of rules on international insolvency law was issued within the context of the renewal of its insolvency law (*Insolvenzordnung* (InsO)), which entered into force 1 January 1999. However, the proposal was deleted in anticipation of the EU Bankruptcy Convention of 1995 which was expected to come in force soon after. In the meantime a weak and insufficient Article 102 *EGInsO* came into force, and was severely criticized in literature. At that time, it was accepted that since the German legislator had announced in the mid 1990's that the (now) EC Insolvency Regulation would form the basis of the future legislative form of German international insolvency law, its international provisions would be based on the rationale of reading the Regulation's term 'Member State' as 'any state of the world'. After the entry into force of the EU Insolvency Regulation in May 2002, only ten months later, on March 20, 2003, the new German international insolvency law took effect.⁶ It can be noted that Germany, as a point of departure, recognizes a foreign insolvency proceeding directly, without any specific formality. This is however not the case when:

- (i) The court that opened the proceeding does not have jurisdiction according to German law, or
 - (ii) Recognition would lead to a result which would be manifestly contrary to essential principles of German law (“*wesentlichen Grundsätzen des deutschen Rechts*”), in particular its fundamental rights.
- The same rule applies to security measures and decisions during, and with regard to, closure of recognized insolvency proceedings. Large parts of Germany's international insolvency law are based on the idea of the extension of rules of the EU Insolvency Regulation, including its conflict of law rules. One issue deserves particular attention. The paragraphs on public announcements and costs (§ 345) reflect Article 21 and 23 EU Insolvency Regulation. The foreign 'liquidator' (*Insolvenzverwalter*) shall be evidenced by a certified copy of his appointment and the court may ask for a sworn translation (§ 347). The only (!) reference in the Elucidation to the UNCITRAL Model Law is to be found in the explanation of § 347(2), in which Article 18 of the Model Law is encapsulated: the foreign liquidator informs the court of any substantial change in the foreign proceeding and of any other foreign proceeding regarding the same debtor that becomes known to the foreign representative. The German provision does not specify, as does Article 18 of the Model Law, that the foreign liquidator should provide this information “promptly.”⁷

Japan.

After a total reform of the Code on Civil Procedure in June 1996, a project for comprehensive reform of Japanese insolvency law, including international aspects, commenced in October 1996. Due to a specific governmental measure implemented between 1999 and 1 April 2001, Japanese insolvency proceedings had extraterritorial effect and foreign procedures could be recognized in a limited way. Since April 2001 two other Laws have been enacted, with the result that Japan's legislative domain of cross-border insolvency has been substantially revised. Despite being based on the Model Law, there are some striking differences. Examples include:

- (i) The legislation is divided between three different Laws,

⁵ The approach taken has been severely criticized by Leonard, *The Good, the Bad and the Ugly: Proposed Changes to Canadian Law*, *ABI Journal* July/August 2005, 32, and Bélanger / Peden, *The Changing Framework Relating to the Recognition of Cross-Border Insolvencies in Canada and the United States*, in: *Annual Review of Insolvency Law* 2005, 203.

⁶ For its text, see, including 17 pages Elucidation (all in German): *Deutscher Bundestag, 15. Wahlperiode, Drucksache 15/16* (25.10.2002). See www.bmj.bund.de.

⁷ See Wessels, *Current Developments Towards International Insolvencies in Europe*, in: *International Insolvency Review* 2004, Vol. 13, 43.

- (ii) It does not contain the automatic effect connected to recognition (as in Article 20 of the Model Law),
- (iii) Relief as mentioned in Article 19 and 21 Model Law may be granted by the court on its own motion in the absence of an application, or at the request of an interested party who is not necessarily a foreign representative;
- (iv) It does not create cross-border communication provisions between courts, but only between Japanese and foreign representatives, and
- (v) It excludes the coordination provisions with regard to concurrent proceedings (Article 28-30 Model Law).

The idea is that when an application for recognition of a foreign proceeding is filed when a local proceeding has already commenced, the Japanese court must dismiss the application or must suspend the local proceeding. If the foreign proceeding is a main proceeding then this proceeding will be recognized providing it is in the general interest of the creditors and it is not likely that recognition would be detrimental to the interests of the creditors in Japan. It should be noted that the Tokyo District Court has exclusive jurisdiction to deal with the recognition of foreign proceedings. This court also has the authority to transfer the case to other district courts that have jurisdiction over the debtor.

Mexico.

In Mexico the Mercantile Insolvency Law (“*Ley de Concursos Mercantiles*”) came into force in May 2000. This Law's general aim is to maximise the value of the enterprise in financial distress through its conservation. The repealed law, which dated from 1943, was not considered to reflect the current Mexican economic environment. The new law, in Title XII (“Cooperation in International Proceedings”) generally incorporates the UNCITRAL Model Law.⁸

The first impression is that the Mexican enactment is different in terms of both the wording and style of drafting, but that it quite closely follows the structure (five chapters; 32 articles) of the Model Law. Furthermore:

- (i) In the translator's footnotes it is stated that “insurance companies, surety companies and unincorporated governmental enterprises” are excluded from application;
- (ii) Title XII is applicable to “*comerciantes*,” being natural or legal persons, including a branch of a foreign company engaged in trading commerce or any business activities, whose debts have been incurred for commercial or business purposes. This is specifically remarkable for “branches” as no reference is made to the status (solvent or insolvent) of the debtor-company abroad. It seems that “small debtors” may voluntarily avail themselves of the protection of Title XII;
- (iii) There is no “automatic” stay of individual actions or proceedings against the debtor or his assets as referred to in Article 20(1)(a) Model Law, nor such a stay as an additional relief (Article 21(1)(a) Model Law);
- (iv) Article 304 creates duties for cooperation and direct communication not only between courts but also between Mexican and foreign representatives;
- (v) In Article 280 it has been laid down that if Mexico does not have reciprocity with another state under a treaty, then Title XII should be applied notwithstanding that the treaty addresses this situation. Probably the first case relating to the enacted Model Law in Mexico is Federal District Court Mexico City 19 December 2002 (*Xacur Eljure*), which recognizes a foreign proceeding (U.S. Bankruptcy Court S.D. of Texas (Houston Division) of 22 April 1997) as a main foreign proceeding. The Court assumes the reciprocity provision to mean: (i) that an international treaty on commercial insolvency must exist, (ii) that Title XII will be applied only when the existing treaty on insolvency does not provide an alternative, and, (iii) that international reciprocity must exist due to this treaty. It adds, that the above, if interpreted to the contrary, determines that if there is no international treaty on insolvency

⁸ A non-authorized privately translated (by Fernandez McEvoy) English version of Title XII is available at www.iiiglobal.org.

proceedings, Title XII is to be applied. A treaty exists for the case at hand (Inter-American Convention on International Competency for the Extraterritorial Efficacy of Foreign Decisions and Sentences, subscribed in La Paz, Bolivia on May 24 of 1984), however, the treaty does not cover insolvency matters and, moreover, the USA is not a party to the treaty.

The Mexican Supreme Court of Justice 16 November 2005 has ruled in this case that the Model Law does not violate the Mexican Federal Constitution.

New Zealand.

The Law Commission of New Zealand issued a report in 1999, see “*Cross-Border Insolvency. Should New Zealand adopt the UNCITRAL Model Law on Cross-border Insolvency?*”, Report 52, February 1999, Wellington, New Zealand, available at www.lawcom.govt.nz/publications.html. The Law Commission has recommended the adoption of the Model Law and excluded registered banks from its application. From the Commission's report it can be determined that the intention is to bring the enacted legislation into effect only after the Government of New Zealand is satisfied that a number of countries with which it is involved in major trading relations will be adopting the Model Law. In December 2003 the New Zealand Government produced a Cabinet Paper recommending adoption of the Model Law. See www.med.govt.nz/ri/insolvency/review/cabinet/cross-border.htm. It contains an Appendix (“Details of Recognition Framework”) stating the possibility of surpassing the Model Law by developing a system of agreements that would provide for automatic recognition for specific insolvency proceedings (SIPs) as “foreign main proceedings” under the UNCITRAL Model Law. These SIPs would be insolvency proceedings which fall under the law of particular countries and would be entitled to automatic recognition and relief upon the foreign representative giving notice to a specific public officer.⁹

Poland.

Poland adopted its Insolvency and Restructuring Law in February 2003. Two different Acts from 1934 were replaced. The international provisions generally reflect the Model Law and exclude banks and insurance companies. The provision with regard to recognition includes the recognition of decisions issued in the course of such proceedings and the appointment, recalling and replacement of the foreign receiver, as well as decisions concerning the course of foreign insolvency proceedings, their staying and completion. Articles 25-27 of the Model Law concerning co-operation and co-ordination have been included, without significant deviation, although Article 26(2) has been altered to the effect that communication will not be dealt with directly, but through a judge. Some provisions appear to have been excluded, e.g. Article 9 of the Model Law (A foreign representative’s right of direct access) and Article 14 (Notifications to foreign creditors), however, other provisions seem broad enough to capture their content. Article 19 (Interim relief), Article 29(a) and (c) (Aligning or terminating relief) and Article 32 (Hotch-pot rule) do not seem to be reflected in the text.

South-Africa.

The South African Law Commission issued a report in 2000 (“Interim Report on Review of the Law of Insolvency: The Enactment in South Africa of Uncitral’s Model Law on Cross-Border Insolvency”) and prepared a draft-text in which its preparatory Insolvency Committee, stayed close to the text of the Model Law. The Law Commission recommended adoption and enactment, which has followed in the

⁹ Clift, The UNCITRAL Model Law On Cross-Border Insolvency – A Legislative Framework To Facilitate Coordination And Cooperation In Cross-Border Insolvency, in: 12 Tulane Journal of International & Comparative Law 2004, 307.

“Cross-Border Insolvency Act” (or: “*Wet op Insolvensie oor Landsgrense*”), B4-2000. For the text www.polity.org.za/govdocs/legislation/2000/act42pdf or www.pmg.org.za.¹⁰

The most remarkable provision is the one on reciprocity, Article 2(2)(b) which provides that the Minister of Justice may only designate a State as a State that grants sufficient reciprocity to South African insolvency proceedings where this justifies the application of the Act to foreign proceedings in such a State.

Romania.

By law N° 637 of 7 Dec 2002 Romania adopted the framework for “regulating private international law relations in the field of insolvency. An English text is available through www.iiiglobal.org. Romanian International Insolvency Law consists of three titles dealing with relations with foreign States, relations with the Member States of the European Union and transitional aspects of the new legal regime. Title I follows the Model Law with some slight variations, e.g. in definitions (providing definitions for centre of main interest, main establishment, professional establishment and establishment) and the public policy exception which appears somewhat stricter than that included in Article 6 of the Model Law. Banks and insurance companies are exempted, as are “exchange companies, members of the commodity exchange, clearing houses, clearing members of the commodity exchange, brokerage companies, traders.” The text of Title II is similar to that of the EU Insolvency Regulation, most probably in an aim to align to European rules, given the intention of Romania to become a Member of the EU as per January 2007.

Spain.

In Spain the ‘*Ley Concursal*’ of 9 July 2003, Law 22/2003, which came into force in September 2004, introduces a Title comprising over 30 provisions. The Act follows the Spanish Proposal No 101-1 of 23 July 2002. In section XI of the Preamble to the new Spanish Insolvency Law an explanation is given in the introduction to the section on international insolvency law. The Spanish Parliament intends to implement better legislation having more stable principles, giving equal treatment to creditors of the same class and eliminating bad faith actions or decisions with unfair solutions created by the abusive position of the courts. From the statements, one can conclude that inspiration has been derived from the UNCITRAL Model Law. It is evident that, as in Germany, relevant provisions of the EU Insolvency Regulation have been taken into account. The private international law provisions are inspired by the Regulation, whereas the method of recognition seems to be based on the UNCITRAL Model Law as far as is compatible with the EU Regulation. In its approach to the extrapolation of the contents of the EU Insolvency Regulation for the relationship with non-EU members Spain follows a similar path to Germany.

3. The Model Law as a fait accompli.

The nature of the Model Law is flexible and within some nine years after the Model Law’s creation some ten countries have used the Model Law to revise their legislation. The Model Law seems to be a framework that has now proven to be of significant use in countries with “obsolete” international insolvency law legislation eg. Japan and Mexico, both of which are civil law (or non-common law) countries. In the Netherlands, with international insolvency provisions dating back to 1896, I have

¹⁰ A comprehensive analyses is provided by Smith and Boraine, Crossing Border into South African Insolvency Law: From the Roman-Dutch Jurists to the UNCITRAL Model Law, in: American Bankruptcy Institute Law Review 2002, 135, and by Khumalo, International Response to the Uncitral Model Law on Cross-Border Insolvency, Paper LL.M Vrije University, Amsterdam, June 2004 (on file with author).

recommended several years ago to follow structure and content of the Model Law as close as possible. Some objections related to the Dutch civil law system still have to be overcome.

Common law countries with satisfactory legislation have demonstrated an open attitude towards the Model Law in their drafting process. These countries include Australia, New Zealand, Canada and more importantly the USA and Great Britain. Promisingly, the USA stays very close to the original structure and content of the Model Law. This is wise and efficient as a large part of readers are from abroad and generally knowledgeable of the Model Law. As previously mentioned, Japan and Mexico excluded several important sections of the Model Law. Nevertheless, considering Japan's history, the country is uniquely opening up its insolvency law system to other countries, in what can be seen as a demonstration of their willingness to become a part of a 'global system'. Such willingness has been fueled by the Model law, despite some adaptations reflecting the strong belief in the value of several of its own concepts.

Although rejected as an approach during the negotiations of the Model Law, a number of countries have adopted provisions applying the Model Law on a reciprocal basis, although the nature of these reciprocity provisions varies: Argentina (draft), British Virgin Islands, Mexico, Romania, South Africa and, to a lesser extent, New Zealand have taken this route. It could be argued that the requirement of reciprocity is the most simple method of guaranteeing future performance of a State's previously communicated promises or commitments.

Overall it is my contention, although it is too early to make a conclusive assessment, that (i) it is significant that large global organizations and institutions, like the IMF and the World Bank, have raised the issue of well structured insolvency law, including international Model Law based provisions, and it is important that (ii) it seems that the first clear signs of acceptance in significant markets demonstrate a willingness to enact (larger parts of) the Model Law.

4. UNCITRAL Legislative Guide on Insolvency Law

In June 2004 UNCITRAL adopted the Legislative Guide on Insolvency Law. The purpose of the Legislative Guide is "to assist the establishment of an efficient and effective legal framework to address the financial difficulty of debtors." The Guide is intended to be used by national authorities and legislative bodies as a reference when preparing new laws and regulations or reviewing the adequacy of existing laws and regulations. The Legislative Guide serves as an advisory text and its recommendations "outline the core issues" of what should be addressed in a State's national insolvency law, with some recommendations providing specific guidance on how certain legislative provisions might be drafted. The Legislative Guide is only intended to provide recommendations regarding substantive insolvency law.

The recommendations of the Legislative Guide "are intended to assist in the establishment of a legislative framework for insolvency that is both efficient and effective and reflects modern developments and trends in the area of insolvency." (Chapter I, para. 3). Recommendation (5) provides: "The insolvency law should include a modern, harmonized and fair framework to address effectively instances of cross-border insolvency. Enactment of the UNCITRAL Model Law on Cross-Border Insolvency is recommended."

The Legislative Guide is arranged, as far as possible, according to the order in which the Guide addresses the core elements corresponding to the sequence of insolvency proceedings. Chapter I deals with application and commencement criteria. Chapter II considers the effects of commencement of insolvency proceedings on the debtor and his assets, including constitution of an insolvency estate, protection and preservation of the estate, use and disposal of assets, post-commencement finance, treatment of contracts, exercise of avoidance provisions, rights of set-off, and financial contracts and netting. Chapter III examines the role of the debtor and the insolvency representative in insolvency

proceedings and their various duties and functions, as well as mechanisms to facilitate creditor participation. Chapter IV examines, in particular, issues relating to the proposal and approval of a reorganization plan and expedited reorganization proceedings. Chapter V addresses different types of creditor claims and their treatment, as well as establishment of priorities for distribution. Chapter VI deals with issues relating to the conclusion of insolvency proceedings, including discharge and closure, and concludes with: “Cross-border insolvency issues are addressed in the UNCITRAL Model Law on Cross-Border Insolvency and its Guide to Enactment.”

The core recommendations on international insolvency law, as provided by the Legislative Guide, are undoubtedly dealing with applicable law. As indicated earlier, the Model Law did not concern itself with issues of private international law or conflict of laws. The Legislative Guide takes a deliberate and conscious approach, which essentially consists of four phases.

Firstly, the Legislative Guide determines the purpose of including legislative provisions on the applicable law in insolvency proceedings in a State’s laws. The Legislative Guide then recommends (see Appendix), with regard to the law applicable to the validity and effectiveness of rights and claims, under recommendation (30). As a third step, the Legislative Guide formulates a recommendation concerning the law applicable in insolvency proceedings. It reflects a clear choice for the *lex (forum) concursus*. See recommendation (31). Lastly, the Legislative Guide allows for two exceptions to the application of the law of the insolvency proceedings and recommends a way of drafting these, adding a recommendation for drafters. See recommendations (32) – (34).

It is notable that in its treatment of the applicable law, the Legislative Guide – unlike its stance with regard to commencement and jurisdiction – distances itself from the EU Insolvency Regulation (*lex concursus* with eleven exceptions). The Legislative Guide is to be praised for its daring and clear choice for “one law” (*lex concursus*) with two exceptions and its recommendation to limit other exceptions. However, in considering the central principle and in substantiating exceptions the Guide appears to be guided by uncertain taxations of policy options, its approach results in an unfortunate treatment of certain creditors and it seems – in the light of the history of the EU Insolvency Regulation – unrealistic to expect that countries will actually restrain themselves from providing for additional exclusions.¹¹

Will UNCITRAL bring changes to insolvency proceedings outside the USA and Great Britain? As demonstrated above, it certainly will. It will furthermore confront foreign lawyers and creditors with Model Law based legal systems. It will certainly influence the way in which courts and representatives of insolvency proceedings organise their cross-border communication and cooperation. Future work of UNCITRAL may concern the adoption of principles concerning cross-border communication and cooperation or recommendations on how to deal with multinational group insolvencies. All this may assist in the slow and incremental process to global harmonisation of international insolvency law.

¹¹ For similar criticism see Fletcher, *Insolvency in Private International Law*, Oxford University Press, 2005, 9.13.

UNCITRAL Recommendations Legislative Guide 2004

Contents of legislative provisions [selection]

Law applicable to validity and effectiveness of rights and claims

(30) The law applicable to the validity and effectiveness of rights and claims existing at the time of the commencement of insolvency proceedings should be determined by the private international law rules of the State in which insolvency proceedings are commenced.

Law applicable in insolvency proceedings

(31) The insolvency law of the State in which insolvency proceedings are commenced (lex fori concursus) should apply to all aspects of the commencement, conduct, administration and conclusion of those insolvency proceedings and their effects. These may include, for example:

- (a) Identification of the debtors that may be subject to insolvency proceedings;
- (b) Determination of when insolvency proceedings can be commenced and the type of proceeding that can be commenced, the party that can apply for commencement and whether the commencement criteria should differ depending upon the party applying for commencement;
- (c) Constitution and scope of the insolvency estate;
- (d) Protection and preservation of the insolvency estate;
- (e) Use or disposal of assets;
- (f) Proposal, approval, confirmation and implementation of a plan of reorganization;
- (g) Avoidance of certain transactions;
- (h) Treatment of contracts;
- (i) Set-off;
- (j) Treatment of secured creditors;
- (k) Rights and obligations of the debtor;
- (l) Duties and functions of the insolvency representative;
- (m) Functions of the creditors and creditor committee;
- (n) Treatment of claims;
- (o) Ranking of claims;
- (p) Costs and expenses relating to the insolvency proceedings;
- (q) Distribution of proceeds;
- (r) Conclusion of the proceedings; and
- (s) Discharge

Exceptions to the application of the law of the insolvency proceedings

(32) Notwithstanding recommendation 31, the effects of insolvency proceedings on the rights and obligations of the participants in a payment or settlement system or in a regulated financial market shall be governed solely by the law applicable to that system or market.

(33) Notwithstanding recommendation 31, the effects of insolvency proceedings on rejection, continuation and modification of labour contracts may be governed by the law applicable to the contract.

(34) Any exceptions additional to recommendations 32 and 33 should be limited in number and be clearly set forth or noted in the insolvency law.

About the author

Bob Wessels is a Dutch legal counsel, Professor of Commercial Law, Vrije University Amsterdam, and a Deputy Justice at the Court of Appeal, The Hague. He served as Special Technical Consultant to the IMF and the World Bank advising the Ministry of Justice of Indonesia (Jakarta) and Georgia (Tbilisi) on implementing their new insolvency laws.

He has been writing and speaking on all topics of insolvency law in all parts of the world. Recently he was a visiting professor at universities in Frankfurt, Pretoria and New York.

Author of Wessels, “Insolventierecht” (*Insolvency Law*), a 10 Volume series, which has been published between 1999 – 2003, by Kluwer, The Netherlands.

A selection of his English language publications since 1994 is published in: Bob Wessels, *Business and Bankruptcy Law in the Netherlands; Selected Essays*, Kluwer Law International, The Hague-London-Boston, 1999, 268 pp, and in: ‘*Current Topics in International Insolvency Law*’, Kluwer Law Publishers, Deventer, 2004, 626 pp.

Forthcoming is: Gabriel Moss and Bob Wessels (eds.), *EU Banking and Insurance Insolvency. An Annotated Guide and comments on the implementation of EC Directives 17/2001 and 24/2001 in EU Member States*, Oxford University Press, 2006, and Wessels, *International Insolvency Law*’, Kluwer, The Netherlands.

Several other of his functions/memberships include: Member of the Netherlands Royal Committee on Renewal of the Dutch Insolvency Act; Member Academic Forum of INSOL Europe; Director of the Board of the International Insolvency Institute (III); International Fellow of the American College of Bankruptcy; Member of the American Law Institute. In 2005-2006 he holds a Special Chair (*Chair polyvalente*) ‘International Insolvency Law’, University of Liège, Belgium.

He can be reached at: bwessels@bobwessels.nl.