

# Conflict and Consistency in Cross border Insolvency Judgments

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## Introduction

It is, as Lord Collins observed in 2012,<sup>3</sup> not just in recent years that there have been large insolvency proceedings with cross border aspects. Nor is it a recent phenomenon that such proceedings can give rise to a legal dispute that is litigated in parallel in courts of different states,<sup>4</sup> creating the potential for, and sometimes the reality of, inconsistent judgments.

However two recent international insolvencies, Nortel and Lehman, demonstrate that such parallel litigation - and the consequent risk of inconsistent judgments - can be present on a truly monumental scale. In addition, the inexorable increase in borderless commerce will no doubt produce more regular instances of multi-state parallel litigation, even if of a more modest dimension than the litigation in Nortel and Lehman described below.

This paper will illustrate, by reference to these two recent insolvencies, the effect of parallel litigation on the efficient administration of insolvency proceedings. Consideration will then be given to the important question whether the risk of inconsistent decisions in such parallel litigation is a problem that is in need of a solution, followed by an examination of the various possible solutions. The hypothesis tested is that while potential solutions that strive to achieve the aspiration of consistency of outcome are laudable at a theoretical level, the better solution is one that avoids the risk of inconsistency arising in the first place. How this may be achieved is then explored, providing potential for a reference to UNCITRAL's Working Group V.

## Approaches to Cross-border Insolvency Disputes

While business is global, law is local.<sup>5</sup> When a debtor becomes subject to a collective insolvency proceeding that crosses jurisdictional borders, a key factor for the international business community is the extent to which their expectations are met through the interplay of the legal systems involved. Despite efforts since the late twentieth century, there remains uncertainty

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<sup>3</sup> *Rubin v Eurofinance SA; New Cap Reinsurance Corp (In Liq) v. Grant* [2012] UK SC46 at [14].

<sup>4</sup> See, for example, the Maxwell Communications cases commenced in both the United Kingdom and United States discussed in this paper.

<sup>5</sup> As Lord Millett wrote: "Legal theory, based on the territorial jurisdiction of the courts of the national state, has parted company with the commercial reality and the needs of modern business": 'Cross-Border Insolvency: The Judicial Approach' (1997) 6 *International Insolvency Review* 99.

around the impact of competing insolvency laws on existing rights and interests and party expectations. This affects international trade and commerce as parties assess a jurisdiction's insolvency laws and its capacity to handle cross-border elements as part of their risk assessment in doing business there.<sup>6</sup>

Where an international business is undergoing a cross-border insolvency, differences in domestic insolvency laws can produce different outcomes on a disputed issue depending on where it is litigated. This may lead to local creditors or the foreign representative initiating additional local insolvency proceedings (followed by the commencement of litigation in that jurisdiction), or simply selecting an alternative location to litigate that issue.<sup>7</sup> Litigation of disputes involves a contest between multiple parties, and those other parties will similarly be examining the various jurisdictions in which proceedings to resolve the dispute may properly be commenced, and making forensic decisions based on the likely outcome(s) in each such location.

Domestic insolvency laws which were once drafted to deal with individual traders or single corporate entities must now deal with multiple forms of business association often interwoven into complex business structures and engaged in integrated business and financial operations. In the cross-border sphere, this complexity increases the risk of multi-state parallel litigation.

## Two examples of Multi-State Parallel Litigation

The September 2008 collapse of Lehman Brothers, a global financial services firm, with various entities within the group filing in insolvency across numerous jurisdictions, provided challenges to debtors, creditors, regulators and courts alike. This has been so despite the adoption of the UNCITRAL Model Law on Cross-border Insolvency in many of the jurisdictions connected with the case.<sup>8</sup> It is also despite the execution of a Cross-border Insolvency Protocol<sup>9</sup> by the insolvency representatives in many of the proceedings involved.

A key challenge in Lehman was the different domestic law on the effect of ipso facto clauses<sup>10</sup> in an insolvency context, evident in conflicting judgments in parallel legal proceedings issued in the

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<sup>6</sup> World Bank, *Doing Business Report 2016*, measures the time, cost, outcome and recovery rate for a commercial insolvency and the strength of the legal framework for insolvency as part of its assessment of countries' business regulation.

<sup>7</sup> For both the commencement of a local insolvency proceeding, and the initiation of litigation, local jurisdictional requirements would need to be met.

<sup>8</sup> For example, the United States of America, the United Kingdom, Japan, Republic of Korea and Australia. Steps were also taken, as permitted under the UNCITRAL Model Law, to communicate by letter between the American Bankruptcy Court and the English High Court: *Perpetual Trustee Co Ltd v BNY Corporate Trustee Services Ltd* [2009] EWHC 2953.

<sup>9</sup> <http://www.ekvandoorne.com/files/CrossBorderProtocol.pdf>

<sup>10</sup> That is, contractual provisions to modify the scheme for payment priority. In the United States, the ipso facto clauses were considered unenforceable and any attempt to enforce them would violate the automatic stay: *Lehman Brothers Holding Inc v BNY Corporate Trustee Services Ltd* 422 BR 407 at 421 (Bankr SDNY 2010).

United States and England.<sup>11</sup>

An Australian collateralised debt obligation (“CDO”) beneficiary, Perpetual, commenced proceedings in England against the Trustee to compel distributions, and the same Trustee was also named as a defendant by the Lehman counterparty in proceedings commenced by Lehman in the Bankruptcy Court in New York. The subject matter of the litigation was essentially identical, but the legal framework differed, with only the US Bankruptcy Court obliged to take account of the ipso facto provisions of the US Bankruptcy Code in deciding the case, a consideration which Judge Peck of the US Bankruptcy Court found to be decisive. Lehman was successful in the US proceedings, whereas the opposite outcome was achieved in the UK proceedings. While the sum in dispute in the litigation was measured in the tens of millions of dollars, the authors understand that the outcome would dictate the position on similar CDOs valued in the multiple billions of dollars. The international element, and the inconsistent outcomes it produced, provided a layer of complexity that has added years to the resolution of the substantive issue in dispute, and the inconsistent decisions have to date compelled private settlement through negotiation to resolve the disputes.

The collapse of Nortel Networks, a global networking and telecommunications firm, operating on an integrated global business model has similarly presented unique cross-border challenges. In January 2009, Nortel Network Corp and other Nortel Canadian debtors filed for insolvency protection under Canadian legislation; the United States debtors filed under Chapter 11; and Nortel entities incorporated in Europe, Middle East and Africa were placed in administration in England. It was agreed, by entry into a protocol, to liquidate the group’s assets, including valuable patents, and, in order to improve their value, to resolve entitlement after the sales were completed. The asset sales produced proceeds to be allocated among stakeholders totalling USD7.3billion, representing USD2.85B on account of the sale of business lines, and USD4.5B on account of the sale of residual intellectual property rights. The business lines were sold in 2009 and 2010, and the residual intellectual property was sold in June 2011.

The Protocol required the parties to attempt to reach agreement on the allocation issue, which they did attempt, though unsuccessfully. The allocation issue was then referred for decision (as contemplated by the Protocol) to a joint hearing by both the US and Ontario courts, conducted between May and September 2014.

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<sup>11</sup> *Perpetual Trustee Co Ltd v BNY Corporate Trustee Services Ltd* [2009] EWHC 1912 (Ch); *Perpetual Trustee Co Ltd v BNY Corporate Trustee Services Ltd* [2009] EWCA Civ 1160; *Belmont Park Investments Pty Ltd v BNY Corporate Trustee Services Ltd* [2011] UKSC 38. *Lehman Brothers Holding Inc v BNY Corporate Trustee Services Ltd* 422 BR 407 (Bankr SDNY 2010). The District Court Southern District New York granted a review of Judge Peck’s decision. However pending the appeal, the parties settled. (Note the Bankruptcy Court had directed the parties (422 BR 407 at 423) to attend a status conference to be held for the purposes of exploring means to harmonize the decision of the US and English courts.

On 12 May 2015, first instance decisions in the parallel proceedings on the allocation issue were issued by the respective Courts,<sup>12</sup> the effect of which was described by Justice Newbould of the Ontario Superior Court of Justice in the following terms:

"Judge Gross in Wilmington and I have communicated with each other in accordance with the Protocol with a view to determining whether consistent rulings can be made by both Courts. We have come to the conclusion that a consistent ruling can and should be made by both Courts. We have come to this conclusion in the exercise of our independent and exclusive jurisdiction in each of our jurisdictions."<sup>13</sup>

Appeals were filed in both Canada and the US, though a Canadian Appeal Court<sup>14</sup> later dismissed the leave application to appeal. At the time of writing,<sup>15</sup> the US appeal proceedings are subject to a settlement agreement, but the approval of that settlement is being vigorously contested.

Although consistent decisions were produced by both Courts, the outcome may well have been otherwise. Indeed, if the settlement is not approved, inconsistent decisions may well be the outcome following the appellate process in the US.

One may ask, rhetorically, how would the allocation of the USD7.3B be addressed in this circumstance of ultimately inconsistent final decisions?

It must be acknowledged that the Nortel proceedings are inherently complex, even disregarding the international element. That said, it is perhaps reasonable to infer that the "international element" - the perceived differences in relevant US and Canadian substantive law and the effect of the difference on potential outcomes - has perhaps largely contributed to the dispute resolution process taking the course it took. The USD7.3 billion in proceeds received between 2009 and 2011 has presumably still not been distributed.

Judges involved in the Nortel litigation have expressed views in their respective judgments that suggest the absence of an alternative process of resolution of the international element was problematic, with Justice Newbould declaring "*A global solution in this unprecedented situation is required.*"<sup>16</sup> His Honour described Nortel's early success in maximising sale proceeds as having "*disintegrated into value-erosive adversarial and territorial litigation described by many as*

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<sup>12</sup> *Re Nortel Networks Corporation* [2015] ONSC 2987; *In re Nortel Networks Inc* (Bankr Court, D Delaware, 2015).

<sup>13</sup> *Re Nortel Networks Corporation* [2015] ONSC 2987 at [10].

<sup>14</sup> *Re Nortel Networks Corporation* [2016] ONCA 332.

<sup>15</sup> At the time of writing, December 2016, the hearing on confirmation of the Debtors' chapter 11 plan is scheduled for 24 January 2017.

<sup>16</sup> *Re Nortel Networks Corporation* [2015] ONSC 2987 at [208].

*scorched earth litigation*."<sup>17</sup> Elsewhere His Honour refers to the insolvency proceedings having stretched "*over six years at unimaginable expense*".<sup>18</sup>

Observations of the Third Circuit Court of Appeals in *Re Nortel Networks*,<sup>19</sup> cited with approval by Judge Gross,<sup>20</sup> pointed to a focus by the parties' lawyers "*on some of the technical differences governing bankruptcy in the various jurisdictions*"<sup>21</sup> as impeding a timely resolution to the dispute. The Court observed that the cost of delay would largely be borne by pension funds,<sup>22</sup> whose members were financially dependent on a very significant component of the USD7.3B tied up by the litigation.

### A problem in need of a solution?

Amongst other important objectives, and together with other policy imperatives such as timeliness and fairness, insolvency laws seek to achieve an efficient "recycling" of capital.

The international dimension in both Lehman and Nortel very substantially increased the resolution timeline. It appears also self-evident that even in insolvencies of a much more modest size, the existence of an international dimension to a dispute will, of itself, likely produce delays where litigation of the dispute is advanced in multiple jurisdictions. The perspective of the Hon Judge James Peck, the US Bankruptcy Court Judge who presided over the Lehman bankruptcy are illuminating on this issue. In a paper presented after his retirement from the bench, the following observations were offered:<sup>23</sup>

"Exercising discretion and applying the law locally is hard enough [for a judge]. Doing so in an international setting "ups the ante" especially when the notional claim amounts exceed \$1 trillion as they did in Lehman."

According to Judge Peck, where judges involved in multistate parallel litigation faithfully perform their judicial function, this will inevitably on occasions lead to conflicting decisions.

Judge Peck was of the view that "such inconsistent results ... [are] not necessarily a bad thing, nor are such inconsistencies impossible to overcome".<sup>24</sup> His Honour pointed to the parties

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<sup>17</sup> *Re Nortel Networks Corporation* [2015] ONSC 2987 at [208].

<sup>18</sup> *Re Nortel Networks Corporation* [2015] ONSC 2987 at [10]. At [208] his Honour suggested the costs "well exceeded \$1 billion".

<sup>19</sup> 669 F 3d 128, 143-44 (3d Cir. 2011).

<sup>20</sup> *In re Nortel Networks, Inc.* (Bankr Court, D Delaware, 2015 at [113].

<sup>21</sup> *In re Nortel Networks, Inc.*, 669 F 3d 128, 143-44 (3d Cir. 2011).

<sup>22</sup> "They are the pawns in the moves being made by the Knights and the Rooks." *Ibid.*, at [144].

<sup>23</sup> "A Cross Border Judicial Dilemma - Conflict and Consistency in Insolvency Cases That Span the Globe", Hon. James M. Peck; Banking & Financial Services Law Association, Brisbane, 4 September 2015.

<sup>24</sup> "A Cross Border Judicial Dilemma - Conflict and Consistency in Insolvency Cases That Span the Globe", Hon. James M. Peck; Banking & Financial Services Law Association, Brisbane, 4 September 2015.

achieving consensus through direct negotiation, mediation and arbitration, declaring:

"If there is no effective judicial remedy, parties have no option other than to find a way to agree."

The authors accept as correct that this reflects the position currently, but do not consider it to be an optimal outcome. Both Lehman and Nortel evidenced that negotiations will not always resolve matters in a timely fashion. Substantial capital is at risk of being tied up for many years by the international element. Indeed, in both cases negotiated outcomes awaited the outcome of the litigation. Secondly, it is legitimate to question whether the interests of justice are well served where, because there is no ultimate judicial outcome, parties have no alternative but to achieve a negotiated solution. In Nortel, and possibly Lehman, significant interest groups were comprised of pension funds. Necessarily, such participants have a shorter term perspective than other participants in the negotiation. This disparity in underlying interest presents at the very least a serious risk that a negotiated outcome will be more reflective of timing imperatives rather than legal merit.

Our view is that the interests of justice compel the conclusion that solutions do now need to be explored to ensure the international element in an insolvency dispute does not unduly delay resolution, or (by virtue of that delay, or the risk of that delay) produce sub-optimal negotiated outcomes.

Various approaches may be taken to avoiding the risk of conflicting judgments on a common issue within a cross-border insolvency. Next this paper outlines these approaches and discusses their success or otherwise in avoiding conflicting judgments.

A number of these approaches involve multilateral bodies, which include the United Nations Commission on International Trade Law (UNCITRAL); the World Bank; and the International Institute for the Unification of Private International Law (UNIDROIT).<sup>25</sup> Professional bodies comprising lawyers, accountants and other professions who advise business on insolvency matters have also engaged with the issues – for example, the International Bar Association (IBA); INSOL International (INSOL); and the International Insolvency Institute (III).

The various responses to these issues can usefully be understood through classifying the different approaches. Some are domestically focussed however most are multilateral in scope

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<sup>25</sup> The Institut International pour l'Unification de Droit Privé (International Institute for the Unification of Private Law) and commonly known as UNIDROIT <http://unidroit.org/> was founded in 1926 and is based in Rome. It is an independent intergovernmental organisation whose purpose is "to study needs and methods for modernising, harmonising and co-ordinating private and in particular commercial law as between States and groups of States and to formulate uniform law instruments, principles and rules to achieve those objectives".

initiated by organisations as well as by the transnational community of business leaders and owners, financiers and professional advisers caught up in a particular business failure.

### "Judicial Restraint" - Can the Judiciary Avoid the Risk of Inconsistent Decisions?

The Maxwell case illustrates one approach aimed at avoiding inconsistent judgments. The approach was endorsed by Lord Millett, writing extra-judicially in 1997, who described the approach as the exercise of "judicial restraint". He discerned three common themes in the English authorities on cross-border insolvency: a need for an international convention and in the meantime, both cooperation between insolvency courts in different jurisdictions, and judicial restraint:

"Pending an international insolvency convention, the basic approach is one of co-operation and judicial restraint. These are two sides of the same coin, and can be accommodated under the heading of judicial comity<sup>26</sup> ...

[In light of Lord Hoffmann's refusal to grant an anti-suit injunction in the *Maxwell Communications* case, discussed below] ... The normal assumption must be that a foreign judge is the person best qualified to decide whether the proceedings in his court should be allowed to continue. Comity demands a general policy of non-intervention."

The Maxwell Communications Corporation plc (MCC) cross-border insolvency perhaps represents the high water mark of this approach.<sup>27</sup> At the time of its collapse in 1991, the MCC multinational group consisted of some 400 public companies intertwined with 400 private companies.<sup>28</sup> Assets were located across numerous states, such as Israel, Bulgaria, Germany, Kenya and Canada, which represented a broad spectrum of legal systems.

The group's principal assets were situated in the United States - some USD700 million to USD1 billion compared to its non-United States' assets estimated at less than GBP100 million<sup>29</sup> - whereas England was the holding company's place of incorporation and the group's place of

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<sup>26</sup> Peter Millett, 'Cross-Border Insolvency: The Judicial Approach' (1997) 6 *International Insolvency Review* 99 at 103.  
<sup>27</sup> It is also a leading example of an approach taken in recent decades to harmonising insolvency systems for the benefit of the debtor and its creditors. In the increasingly global economy of the late twentieth century, the Maxwell case broke new ground in that an Order and Protocol was approved by the courts in separate jurisdictions to case-manage an insolvent international enterprise (or corporate group). Within 16 months a reorganisation was in place, a relatively expeditious resolution at the time for a case of that size.  
<sup>28</sup> Some of this material draws upon R Mason, 'Cross-Border Insolvency Law: Where Private International Law and Insolvency Law Meet' in P Omar (ed), *International Insolvency Law: Themes and Perspectives* (Ashgate, 2008). MCC itself was an English holding company with more than 400 subsidiaries worldwide engaged primarily in information services and electronic publishing, language instruction and general and consumer publishing: Evan Flaschen & Ronald Silverman, 'Maxwell Communication Corporation plc: The importance of comity and co-operation in resolving international insolvencies' in E Bruce Leonard & Christopher Besant (eds) *Current Issues in Cross-Border Insolvency and Reorganisations* (Graham & Trotman and International Bar Association, London, 1994) at 41.  
<sup>29</sup> *Barclays Bank plc v Homan* [1993] BCLC 680 at 683 [*sub nom Re Maxwell Communications Corp plc (No 2)*] [1992] BCC 757].

central management and control. Other significant MCC connections with England were that it traded on the London Stock Exchange, kept its corporate books in pounds sterling and owed most of its USD2.4 billion debt to British banks and London branches of foreign banks.<sup>30</sup>

Two concurrent primary insolvency proceedings were instigated by the MCC Board. On 16 December 1991, they applied in the United States for a debtor-in-possession administration that provided for a creditor moratorium while management structured a Chapter 11 reorganisation. On the following day they sought an administration order in England, which would provide a similar stay on creditor action and avoid wrongful trading liability on the part of the directors. An administration order was granted in England on 20 December.

One of the more significant issues that arose was an allegedly voidable transaction with connections to both the United States and England. Shortly before the administrators were appointed in England, MCC had repaid over USD30 million to Barclays Bank plc (Barclays) from the sale proceeds of an American asset. Barclays sought an injunction in England to prevent the administrators from taking recovery action in the United States. They argued that the action should be determined in England in accordance with English law (under which a defence was available - something not open to them under American avoidance laws).

The English Court of Appeal<sup>31</sup> refused the injunction and upheld the decision of the primary judge (Mr Justice Hoffmann as he then was) that, where the foreign proceedings were not vexatious or oppressive, it was for the foreign court to decide whether or not it was the appropriate forum.

When the preference action was instituted in the United States, the Bankruptcy Court<sup>32</sup> dismissed the proceedings. Subsequently the Second Circuit Court of Appeals<sup>33</sup> also chose to defer to the courts and laws of England, basing its decision instead on the doctrine of international comity precluding the application of the American avoidance law to transfers in which England's interest had primacy.

As suggested above, this case represents the high watermark of "judicial restraint".

The authors wish clearly to record their view that an entirely unobjectifiable application of domestic substantive law, including conflict of laws principles can lead to judges in other cases

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<sup>30</sup> Caryn Chittenden, 'After the Fall of Maxwell Communications: Is the Time Right for a Multinational Insolvency Treaty?' (1993) 28 *Wake Forest Law Review* 161 at 163.

<sup>31</sup> *Barclays Bank plc v Homan* [1993] BCLC 680.

<sup>32</sup> *Maxwell Communication Corporation plc v Société Generale* 170 BR 800 (Bankr SDNY 1994) affirmed 186 BR 807 (SDNY 1995) and 93 F 3d 1036 (2<sup>nd</sup> Cir 1996). The Court went on to examine choice of law in respect of the avoidance action, holding that English law would apply and, on the basis of comity, decided it should also dismiss the proceedings on that ground.

<sup>33</sup> *Maxwell Communication Corporation plc v Société Generale* 93 F 3d 1036 (2<sup>nd</sup> Cir 1996).



declining to stay their own proceedings. There can, for example, be no criticism of either the English or US Courts in the Lehman "flip clause" litigation described above for this concurrent exercise of jurisdiction, given that both Courts had well founded bases for the exercise of local jurisdiction, and for the application of the law applicable in each jurisdiction to determine the dispute. Similarly in Nortel, the complexity of the relevant group insolvency and the respective claims of multiple companies located in different countries rendered the assumption of jurisdiction by both Courts entirely proper. Indeed, it was mandated by the Protocol. The authors respectfully agree with the following observation made by Judge Peck:

"The shared goal of finding a consistent, just and workable solution may conflict with the independent obligation of the trial judge in each Court to decided disputed questions under governing law and procedures. Separate but related insolvency estates necessarily may give rise to irreconcilable separate adjudications".

While the approach taken on both sides of the Atlantic in Maxwell will provide a solution in some circumstances, other international insolvencies will not present the same opportunity.

### Uniform Insolvency Laws

A second approach to avoiding inconsistent judgments is for all states to enact uniform substantive insolvency laws. However, this is not likely to be achieved in any comprehensive manner in the foreseeable future because each state's insolvency laws interact in a complex manner with a range of their other laws.<sup>34</sup> This militates against uniform laws as a solution. However, multilateral bodies with an interest in international trade and commerce have at least promoted convergence of the different domestic insolvency laws.

Model insolvency laws have been drafted with a view to harmonisation, if not uniformity. UNCITRAL produced a *Legislative Guide on Insolvency Law* (2004)<sup>35</sup> which is intended "to be used as a reference by national authorities and legislative bodies when preparing new laws and regulations or reviewing the adequacy of existing laws and regulations".<sup>36</sup> However, UNCITRAL has noted that the rate of adoption of their legislative standards has varied significantly. It has stressed the importance of technical cooperation and assistance by the UNCITRAL Secretariat,

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<sup>34</sup> As Professor Fletcher writes "there is a profound and intimate correlation between insolvency ... and the very wellsprings of policy and social order from which national law ultimately draws its inspiration": Ian F Fletcher, *Insolvency in Private International Law* (Oxford University Press, 2<sup>nd</sup> ed, 2005) at 5.

<sup>35</sup> In 2010 and 2013 guides were added on enterprise group insolvency and directors obligations in the period approaching insolvency.

<sup>36</sup> [http://www.uncitral.org/uncitral/en/uncitral\\_texts/insolvency/2004Guide.html](http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/2004Guide.html) .

because legislative technical assistance, in particular to developing countries, is no less important than the formulation of uniform rules itself.<sup>37</sup>

The World Bank produced their own guidelines entitled *Principles for Effective Insolvency and Creditor Rights Systems* (2005).<sup>38</sup> These Guidelines ‘emphasize contextual integrated solutions and the policy choices involved in developing those solutions’.<sup>39</sup> Significantly, the International Monetary Fund (IMF) and the World Bank at times require bankruptcy reform in developing countries as a condition of loan support, thus promoting the convergence of insolvency law.<sup>40</sup>

States within regional economic groupings have also attempted to arrive at uniform insolvency laws through insolvency treaties. Although never implemented, the first draft *EC Convention on Bankruptcy and Related Matters* (1970)<sup>41</sup> contained draft uniform provisions. It would have required contracting states to enact a ‘Uniform Law’ into domestic law, while permitting states to make reservations on their incorporation.<sup>42</sup>

In 2010, the European Parliament revisited the notion of uniform insolvency laws through its report on the *Harmonisation of Insolvency Law at EU Level*.<sup>43</sup> In November 2016, the European Commission announced a proposed Directive to harmonise laws “on preventative restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures”. It does not seek to harmonise “core aspects of formal insolvency procedures such as conditions for opening insolvency proceedings, definitions of insolvency or ranking of claims”.<sup>44</sup>

The difficulties in achieving universal agreement on substantive provisions are evident in that even these principles and guidelines often contain alternative provisions on important matters of policy. Yet even where there appears to be a common approach on policy, there are often difficulties in achieving uniform enactment and implementation in practice.

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<sup>37</sup> Report of the UNCITRAL General Assembly A/66/17 (44<sup>th</sup> session, 27 June-8 July 2011, New York): <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V11/846/34/PDF/V1184634.pdf?OpenElement>.

<sup>38</sup> These were drafted in 2001 and revised in 2005: Principles for Effective Insolvency and Creditor Rights Systems (2005) <http://siteresources.worldbank.org/GILD/Resources/FINAL-ICRPrinciples-March2009.pdf>.

<sup>39</sup> Gordon Johnson, ‘The World Bank’s Consensus Building Role: Developing Principles for Effective Insolvency and Creditor Rights Systems and Related Efforts to Strengthen Capacity’, Paper presented to the *INSOL Sixth World Congress*, London, 2001 at 3.

<sup>40</sup> Hannah Buxbaum, ‘Conflict of Economic Laws: From Sovereignty to Substance’ (2001-2002) 42 *Virginia Journal of International Law* 931 at 946.

<sup>41</sup> Commission Document 3.327/1/XIV/70-E.

<sup>42</sup> Article 76 (1970 Draft).

<sup>43</sup> European Parliament Directorate General for Internal Policies, Policy Department: Legal and Parliamentary Affairs, *Harmonisation of Insolvency Law at EU Level*, 2010 at 6 <http://www.insol-europe.org/eu-research/>

<sup>44</sup> [http://europa.eu/rapid/press-release\\_MEMO-16-3803\\_en.htm](http://europa.eu/rapid/press-release_MEMO-16-3803_en.htm) “The proposal ... focuses on the key priorities of making sure that effective frameworks for preventive restructuring, insolvency second chance frameworks, as well as discharge procedures are available. In addition, it introduces measures to increase the efficiency – and in particular reduce the length – of all insolvency procedures. The proposal does not harmonise core aspects of formal insolvency procedures such as conditions for opening insolvency proceedings, definitions of insolvency or ranking of claims.”

In addition to specific insolvency texts, multilateral bodies are drafting Legislative Guides on related commercial topics. UNCITRAL has concluded a number of texts on international trade law issues that have the potential to intersect with insolvency laws. UNCITRAL's Working Group VI on Security Interests<sup>45</sup> closely collaborated with UNCITRAL's Working Group V (Insolvency) to produce the *UNCITRAL Legislative Guide on Secured Transactions* (2007).<sup>46</sup> The aim of this project was to ensure coordination of the treatment of security interests in insolvency with the *UNCITRAL Legislative Guide on Insolvency Law*. UNCITRAL cooperated closely with the Permanent Bureau of the Hague Conference on Private International Law.<sup>47</sup> It also coordinated with the International Institute on Private International Law (UNIDROIT) to avoid overlap with its convention on mobile equipment and intermediated securities.<sup>48</sup>

These multilateral efforts provide encouragement that, over time, there will be an increasing convergence of insolvency laws. However, this will take time and is unlikely to achieve uniformity. The authors' view is that while such convergence may eventually reduce the incidence of inconsistent judgments, it will not provide a sufficient solution. Different policy choices (eg the presence or absence of ipso facto clause protection) in different states will leave open the opportunity for inconsistent outcomes in the future.

## Uniform Recognition Laws

Arguably, States and multilateral organisations have achieved some success in addressing international insolvency through adopting (to greater or lesser extent) uniform laws on recognition of insolvency proceedings and insolvency representatives. This approach accepts a lack of agreement on fundamental issues such as jurisdiction. While there is a consequent likelihood of concurrent insolvency proceedings, it also typically focuses on coordination and cooperation between concurrent proceedings.

A number of States legislate for recognition of and cooperation with foreign insolvency adjudications or proceedings. A familiar example is s 426 *Insolvency Act 1986* (UK), the predecessors for which have been influential in common law jurisdictions with an English legal heritage. Significantly, it authorises the local court to “apply, in relation to any matters specified in

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<sup>45</sup> UNCITRAL Working Group VI on Security Interests has drafted a Model Law on Secured Transactions: [http://www.uncitral.org/uncitral/en/uncitral\\_texts/security/2016Model\\_secured.html](http://www.uncitral.org/uncitral/en/uncitral_texts/security/2016Model_secured.html).

<sup>46</sup> [http://www.uncitral.org/pdf/english/texts/security-lg/e/09-82670\\_Ebook-Guide\\_09-04-10English.pdf](http://www.uncitral.org/pdf/english/texts/security-lg/e/09-82670_Ebook-Guide_09-04-10English.pdf)

<sup>47</sup> They collaborated on the chapter on conflict of laws. The Hague Conference on Private International Law [http://www.hcch.net/index\\_en.php](http://www.hcch.net/index_en.php) is an international organisation established in the 19th century to work towards the progressive unification of private international law. It had no success with its 1925 model bankruptcy treaty: Kurt Nadelmann, 'Bankruptcy Treaties' (1943-1944) 93 *University of Pennsylvania Law Review* 58 at 67. In recent years it has concentrated on cross-border cooperation in other civil and commercial matters and insolvency is only mentioned tangentially in a number of texts.

<sup>48</sup> UNIDROIT *Convention on International Interests in Mobile Equipment* (Cape Town, 2001) and UNIDROIT *Convention on Substantive Rules for Intermediated Securities* (Geneva, 2009).

the request, the insolvency law which is applicable by either court in relation to comparable matters falling within its jurisdiction.”

Multilateral organisations have also investigated avenues to encourage recognition and enforcement. The IBA developed a Model International Insolvency Cooperation Act (1989)<sup>49</sup> and in 1996 approved a Cross-Border Insolvency Concordat that provided some generalised principles to guide harmonising cross-border insolvencies.<sup>50</sup> While courts applied the Concordat in 1997,<sup>51</sup> its use was overtaken by an UNCITRAL initiative.

UNCITRAL has promoted uniform recognition laws through states adopting its Model Law on Cross-border Insolvency (1997). At the time of writing, the Model Law has been adopted in 43 jurisdictions.<sup>52</sup> It contains uniform recognition laws – and provides a mechanism for cooperation between jurisdictions and the coordination of concurrent proceedings. However, when adopting it as part of domestic legislation, a State may amend its provisions and so the legislation and the procedures under the Model Law vary from jurisdiction to jurisdiction – sometimes in significant ways.

Finally, in some common law jurisdictions, there are statements to the effect that superior courts may rely upon an inherent jurisdiction to recognise and give effect to foreign insolvency adjudications or proceedings.<sup>53</sup> However in *Rubin v Eurofinance SA; New Cap Reinsurance Corp (in liq) v Grant*,<sup>54</sup> the Supreme Court declined to accept there was a *sui generis* category of insolvency orders or judgments subject to its own special rules.<sup>55</sup> Further, Lord Collins held that “there is nothing to suggest that [Article 21 Model Law] applies to the recognition and enforcement of foreign judgments against third parties.”<sup>56</sup> In light of this uncertainty UNCITRAL Working Group V is working on a draft *Model Law on the Recognition and Enforcement of Insolvency-Related Judgments*.<sup>57</sup>

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<sup>49</sup> This was a draft model statute for enactment as municipal legislation: Timothy Powers, Rona Mears & John Barrett, ‘The Model International Insolvency Co-operation Act’ in Leonard & Besant (eds) *Current Issues in Cross-Border Insolvency and Reorganisations*, Graham & Trotman and International Bar Association, London, 1994.

<sup>50</sup> Its first principle was that there should be a single administrative forum that would have primary responsibility for coordinating all relevant insolvency proceedings. However, it did not prescribe a principal forum or seat for the proceeding. It also allowed for concurrent plenary proceedings with coordination, subject in appropriate cases to a governance protocol setting out ‘the responsibilities and jurisdiction of each.’ Nielsen A, Sigal M & Wagner K, ‘The Cross-Border Insolvency Concordat: Principles to Facilitate the Resolution of International Insolvencies’ (1996) 70 *American Bankruptcy Law Journal* 533 at 549.

<sup>51</sup> *Everfresh Beverages Inc* litigation, see Leonard EB, ‘Committee J’s Initiatives in Cross-border Insolvencies and Reorganisations: The Experience of the Everfresh Case’ (1997) 6 *International Insolvency Review* 127.

<sup>52</sup> [http://www.uncitral.org/uncitral/en/uncitral\\_texts/insolvency/1997Model\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html)

<sup>53</sup> *McGrath v Riddell* [2008] UKHL 21 at [30] per Lord Hoffman.

<sup>54</sup> [2012] UKSC 46.

<sup>55</sup> [2012] UKSC 46 at [128] Lord Collins stated “A change in the settled law of the recognition and enforcement of judgments ... has all the hallmarks of legislation, and is a matter for the legislature and not for judicial innovation. The law relating to the enforcement of foreign judgments and the law relating to international insolvency are not areas of law which have in recent times been left to be developed by judge-made law.”

<sup>56</sup> [2012] UKSC 46 at [143].

<sup>57</sup> Working papers are to be found on the UNCITRAL website.

Meanwhile at the December 2013 meeting of Working Group V, there was discussion of developing an Insolvency Convention, with expressions of support as well as a number of reservations being voiced.<sup>58</sup>

### Cross-border Insolvency Agreements

The growing use of CBI Agreements is noted as a response to cross-border insolvency issues, and these are arguably emerging as customary international commercial law.<sup>59</sup> While Article 27 encourages court approval of CBI Agreements to coordinate insolvency proceedings, they predate the Model Law as exemplified in the Maxwell case and subsequent practice.<sup>60</sup> The evolution of the IBA Concordat led to some commentators in the late 1990s describing this practice as an example of customary international law for dealing with cross-border insolvency.<sup>61</sup>

Subsequent developments have borne this out. The practice of parties arriving at 'in effect' treaties to resolve cross-border insolvency issues and capturing this in CBI Agreements has been accelerated – most significantly through the Guidelines Applicable to Court-to-Court Communication in Cross-Border Cases published by the American Law Institute (ALI) and III in 2001<sup>62</sup> and 2012,<sup>63</sup> the European Communication & Cooperation Guidelines for Cross-border Insolvency adopted by INSOL Europe in 2008,<sup>64</sup> and the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation of 2009.<sup>65</sup>

The UNCITRAL *Practice Guide on Cross-Border Insolvency Cooperation* (2009) contains information 'based upon a description of collected experience and practice and focuses on the use and negotiation of cross-border insolvency agreements, providing an analysis of a number of

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<sup>58</sup> Report of Working Group V (Insolvency Law) (44<sup>th</sup> session, 16-20 December 2013, Vienna):

<https://documents-dds-ny.un.org/doc/UNDOC/GEN/V14/001/48/PDF/V1400148.pdf?OpenElement>

<sup>59</sup> Rosalind Mason, 'Cross-border insolvency and legal transnationalisation' (2012) 21(2) *International Insolvency Review* 105.

<sup>60</sup> The 1993 *Olympia & York Realty Company* case (New York and Ontario) - see Peter Millett, 'Cross-Border Insolvency: The Judicial Approach' (1997) 6 *International Insolvency Review* 99 at 111 and E Bruce Leonard, 'The International Scene: The Way Ahead: Protocols in International Insolvency' (1998) *American Bankruptcy Institute Journal* 191 at 195.

<sup>61</sup> David Culmer, 'The Cross-Border Insolvency Concordat and Customary International Law: Is It Ripe Yet?' (1999) 14 *Connecticut Journal of International Law* 563 and Thomas Gaa, 'Harmonization of International Bankruptcy Law and Practice: Is it possible?' (1993) 27 *The International Lawyer* 881 at 882.

<sup>62</sup> ALI Transnational Insolvency Project (1993–2000) 'to provide a non-statutory basis for cooperation in international insolvency cases involving two or more of the NAFTA states, consisting of the United States, Canada, and Mexico'.  
<http://www.ali.org/doc/Guidelines.pdf>

<sup>63</sup> The objective of the project undertaken by Professor Ian Fletcher and Professor Bob Wessels was to investigate whether the essential provisions of the ALI Principles of Cooperation among the NAFTA Countries (ALI-NAFTA Principles) and the annexed Guidelines Applicable to Court-to-Court Communication in Cross-border Cases (ALI-NAFTA Guidelines) may, with certain necessary modifications, be acceptable for use by jurisdictions across the world.

<sup>64</sup> Bob Wessels, 'European Communication and Cooperation Guidelines for Cross-Border Insolvency' (2007) 4 (4) *ABI Committee News*

<http://www.abiworld.org/committees/newsletters/international/vol4num4/European.html>

<sup>65</sup> [http://www.uncitral.org/pdf/english/texts/insolven/Practice\\_Guide\\_english.pdf](http://www.uncitral.org/pdf/english/texts/insolven/Practice_Guide_english.pdf).

those agreements'.<sup>66</sup> This highlights the significance of a growing international custom around their use.

In its survey of CBI Agreements, the Practice Guide refers to a 1908 British decision<sup>67</sup> in which the court commented that 'such an agreement is a "proper and common-sense business arrangement to make, and one manifestly for the benefit of all parties interested"'.<sup>68</sup> CBI Agreements typically come into effect through negotiation between the parties and may be presented to courts for review and approval<sup>69</sup> while providing for 'the independence of the courts' and affirming 'the principle of comity'.<sup>70</sup> They have been approved in cases between common law jurisdictions as well as in civil law jurisdictions.<sup>71</sup>

The evolution of CBI Agreements may justify classifying the approach as a customary law of international commercial transactions (or law merchant).<sup>72</sup> This approach does not, however, eliminate the risk of inconsistent judgments in parallel litigation. In both Nortel and Lehman, CBI Agreements were in place (albeit, in the case of Lehman, without the English estate as a signatory). The existence of those CBI Agreements did not prevent the dispute from proceeding in parallel in two states,<sup>73</sup> with the consequence risk of inconsistent judgments, and the associated delay in resolution and potential for sub-optimal negotiated outcomes.

It is considered that the continuing evolution of CBI Agreements is a positive move in the right direction, but not an ultimate solution to the problem.

## Uniform Choice of Law Rules

States have achieved more success in addressing cross-border insolvency issues by adopting a uniform approach to choice of law through regional cross-border insolvency treaties or conventions. This has meant that, even with member states' different domestic insolvency laws, a uniform referral to an applicable local or foreign law<sup>74</sup> should result in the same outcome, regardless of the member state in which the dispute arose. Fletcher and Wessels comment that

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<sup>66</sup> *UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation* 2009, at 1.

<sup>67</sup> *Re P MacFayden & Co* [1908] 1 KB 675.

<sup>68</sup> As such, it exemplified a pragmatic approach by the parties to resolving issues where an insolvent debtor had carried on business through two companies, one located in England and the other in India. *UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation* 2009, at 23.

<sup>69</sup> They agreements between the relevant insolvency representatives need not be 'approved' by courts to be effective in practice.

<sup>70</sup> *UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation* 2009, at 32.

<sup>71</sup> For example, the Lehman protocol. Also, see Lucas Daum, "The Future of Cross-border Insolvency Protocols", Leiden Law School November 2009 - Masters Thesis, Supervisor Professor Bob Wessels; Adjunct Supervisor Honourable Justice James Farley QC, Canada.

<sup>72</sup> Rosalind Mason, 'Cross-border insolvency and legal transnationalisation' (2012) 21(2) *International Insolvency Review* 105.

<sup>73</sup> Indeed, the Nortel CBI Agreement mandated the parallel proceedings in the event of the failure of the parties to reach agreement.

<sup>74</sup> Friedrich Juenger, *Choice of Law and Multistate Justice*, Martinus Nijhoff Publishers, Dordrecht, 1993 at 45-6.

with uniform choice of law rules “parties’ legitimate expectations can be more consistently fulfilled, thereby reducing the levels of uncertainty and instability that have a key influence on the assessment of risk by those engaging in international transactions”.<sup>75</sup>

The *Nordic Convention on Bankruptcy between Norway, Denmark, Finland, Iceland and Sweden* (1933) recognises the law of the place of insolvency adjudication<sup>76</sup> as determining almost all the effects of the order in all member states without the need for further formalities.<sup>77</sup>

With effect from 2002, the *EU Insolvency Regulation* (EIR)<sup>78</sup> prima facie applies the law of the ‘home state’ main proceedings to the effects of the insolvency proceedings throughout the applicable European states.<sup>79</sup> A recast Regulation<sup>80</sup> (EIR Recast) will take effect from 26 June 2017 and, subject to any contrary provisions, it likewise applies the insolvency law of the “State of the opening of proceedings” to determining the conditions for the opening of those proceedings, their conduct and their closure.<sup>81</sup> Subsequent provisions address applicable law on specific topics such as third parties’ rights *in rem*; set-off; contracts relating to immoveable property; and acts that are detrimental to all the creditors (e.g. avoidance provisions).<sup>82</sup>

The *UNCITRAL Legislative Guide on Insolvency Law* (2004) contains a small number of draft legislative provisions on applicable law and states: “[b]y specifically addressing, in a transparent and predictable manner, issues of applicable law an insolvency law can assist in providing certainty with respect to the effects of insolvency proceedings on the rights and claims of parties affected by those proceedings”.<sup>83</sup>

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<sup>75</sup> Ian Fletcher and Bob Wessels, “Transnational Insolvency: Global Principles for Cooperation in International Insolvency Cases” (Report, The American Law Institute and the International Insolvency Institute, 30 March 2012) at 20.

<sup>76</sup> This is based on the Convention allocating jurisdiction to a State whose insolvency laws (*lex concursus*) will then take immediate effect, subject to the terms of the Convention, in all the member states.

<sup>77</sup> Article 1 specifies recognition of the divesting of the administration of the debtor’s property; the extent of the assets and the property therein; the bankrupt’s rights and obligations during the bankruptcy; the administration of the bankrupt’s property and transactions in respect thereof; the rights of creditors in respect of the payment of their claims; the allocation of the assets; the composition with creditors or other mode of settlement. There is also an immediate general stay of creditor action: Michael Bogdan, ‘The Nordic Bankruptcy Convention’ in Ziegel JS (ed) *Current Developments in International and Comparative Corporate Insolvency Law*, Clarendon Press, Oxford, 1994 at 702.

<sup>78</sup> EU Insolvency Regulation (1346/2000) <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2000:160:0001:0018:en:PDF>

<sup>79</sup> Article 4(1) (EU Regulation on Insolvency Proceedings) states the law applicable to insolvency proceedings and their effects is prima facie the state where such proceedings were opened. The development of the EIR was influenced by the Council of Europe Convention on Certain International Aspects of Bankruptcy (1990). This Istanbul Convention which never came into effect had provided that the applicable law in secondary proceedings was prima facie to be the state where that insolvency proceeding was opened: Article 19.

<sup>80</sup> Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings, [http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L\\_.2015.141.01.0019.01.ENG](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2015.141.01.0019.01.ENG). See Samantha Bewick, “The European Insolvency Regulation Revisited” (2015) *International Insolvency Review* DOI: 10.1002/iir.1240.

<sup>81</sup> Article 7(1) and 7(2) (EU Regulation on Insolvency Proceedings Recast).

<sup>82</sup> While Article 7(2) includes the rules relating to “the voidness, voidability or unenforceability of legal acts detrimental to the general body of creditors” in the list on the conduct of the insolvency, Article 16 states the law of the ‘home state’ law shall not apply if the act is subject to the law of another Member State, which law “does not allow any means of challenging that act in the relevant case”.

<sup>83</sup> UNCITRAL, *UNCITRAL Legislative Guide on Insolvency Law* (2004) Pt 2, p 68. Recommendations 30-34 address the law applicable to the validity and effectiveness of rights and claims, the law applicable in insolvency proceedings and exceptions thereto. These were drafted by UNCITRAL in close cooperation with the Hague Conference on

In 2012, the ALI and IIL endorsed the Report, *Transnational Insolvency: Global Principles for Cooperation in International Insolvency Cases*,<sup>84</sup> to which were annexed *Global Rules on Conflict-of-Laws Matters in International Insolvency Cases* proposed by the joint reporters, Professor Ian Fletcher and Professor Bob Wessels. It states that these Global Rules were “submitted to ALI and IIL as a useful starting point for further debate on a global level”. Noting that they had not been tested against existing treaties or conventions, they were proffered instead to:

“serve as legislative recommendations in general and sometimes in more detailed terms. They may also serve as a guide for courts, insolvency practitioners, and creditors in those circumstances where applicable law with regard to international insolvency cases fails to deal with a certain point in issue or is vague.”<sup>85</sup>

The Global Rules provide “a general rule as to the law by which insolvency proceedings and their effects are to be governed” followed by a number of rules continuing exceptions to that general rule in certain defined situations.<sup>86</sup> The reporters specifically endorse three EIR exceptions to the ‘global’ application of the *lex concursus* in respect of third parties’ rights in rem, set-off and detrimental acts.<sup>87</sup>

It is to be noted however that the Global Rules rely upon the *Global Principles for Co-operation in International Insolvency Cases* and its Principle 13 allocating “International Jurisdiction” to open an insolvency case in respect of a debtor when “the debtor’s centre of main interests is situated within the state’s territory”.<sup>88</sup> Global Rule 1 on Scope states that the Global Rules “apply to insolvency proceedings that are opened in a state which has jurisdiction for that purpose according to Global Principle 13.”

Thus, in order to achieve a consistent outcome in cross-border insolvencies, a uniform choice of law approach is inextricably linked with uniformity in choice of forum, that is, agreement upon the

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International Law: Fletcher I F and Wessels B, “Transnational Insolvency: Global Principles for Cooperation in International Insolvency Cases” (Report, The American Law Institute and the International Insolvency Institute, 30 March 2012) p 202.

<sup>84</sup> <http://www.iiglobal.org/component/jdownloads/viewdownload/36/5897.html>. The objective of the project undertaken by Professor Ian Fletcher and Professor Bob Wessels was to investigate whether the essential provisions of the ALI Principles of Cooperation among the NAFTA Countries (ALI-NAFTA Principles) and the annexed Guidelines Applicable to Court-to-Court Communication in Cross-border Cases (ALI-NAFTA Guidelines) may, with certain necessary modifications, be acceptable for use by jurisdictions across the world.

<sup>85</sup> Fletcher I F and Wessels B, “Transnational Insolvency: Global Principles for Cooperation in International Insolvency Cases” (Report, The American Law Institute and the International Insolvency Institute, 30 March 2012) p 20. They also state “the main goal [of the Global Rules] is to demonstrate that globally there is a wide measure of support for the enactments of rules of this nature, based on the given principle to avoid miscommunication, to prevent uncertainty, to provide accurate translation, and to ensure smooth cross-border co-operation.”

<sup>86</sup> Fletcher I F and Wessels B, “Transnational Insolvency: Global Principles for Cooperation in International Insolvency Cases” (Report, The American Law Institute and the International Insolvency Institute, 30 March 2012) p 201.

<sup>87</sup> That is Articles 5, 6 and 13 (EIR 2000); Articles 8, 9 and 16 (EIR Recast 2015).

<sup>88</sup> Global Principle 13(1). It also provides for international jurisdiction where “the debtor has an establishment within that state’s territory” however its effects are limited to the assets within the state in question. Global Principle 13(3) defines “center of main interests” (with rebuttable presumptions) and “establishment”.



allocation of jurisdiction to a primary or other insolvency proceeding.<sup>89</sup>

It may also be observed that the choice of law rules identified in the Global Rules do not represent the only, or most recent, attempt to identify a set of choice of law rules. Despite differences in approach, there is considerable agreement that the law of the COMI should govern most issues. It is, perhaps, the identification of the issues that ought be governed by the law of a different jurisdiction that would benefit from an attempt to achieve consensus within the international legal community. As such, Professor Charles Mooney presents an illuminating alternative approach.<sup>90</sup>

If consensus can be achieved regarding the identification of choice of law rules, followed by their international adoption, it is suggested that the risk of inconsistent judgments will largely be avoided. Such rules, if binding in the relevant states, should produce a unique identification of the law to govern the adjudication of the dispute. However, there are, at least two areas where this conclusion may not necessarily follow.

The first is that if such rules do not also include the selection of a unique forum for the resolution of the dispute, there is no guarantee that the dispute, if it advances in parallel in two jurisdictions, will achieve the same outcome even though both jurisdictions apply the same substantive law.<sup>91</sup> To address this risk, the choice of law rules should also include within those rules a binding choice of forum which, in the authors' view, should be the forum whose substantive law is to govern the dispute.

Secondly, in a group context, of which Nortel provides an illustration, the competing claimants were different group companies with different COMIs, adding an additional layer of complexity to the application of choice of law rules. Perhaps any identification of choice of law rules should include within those rules some principles for similarly determining the selection of governing law in a group dispute context (as well as the selection of the forum for determining such a dispute).

### Is there a role for an international commercial court?

The existence of uniform choice of law rules does not eliminate the risk of inconsistency if

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<sup>89</sup> As the current Working Group V project on facilitating the cross-border insolvency of multinational enterprise groups indicates, this is complicated further for international business enterprises, the UNCITRAL Model Law applying to single debtors (eg a corporate entity).

<sup>90</sup> Charles Mooney Jr, "Harmonising Choice-of-Law Rules for International Insolvency Cases: Virtual Territoriality, Virtual Universalism, and the problem of local interests" (2014) 9 *Brooklyn Journal of Corporate, Financial and Commercial Law* 129

<sup>91</sup> Two judges applying the same law in complex or legally difficult matters frequently reach different conclusions. By way of example, of the 9 English judges who were called on to decide the HIH matter - trial judge, three Courts of Appeal judges and a five member House of Lords panel - 5 judges held that the English assets should be remitted to Australia, whilst 4 judges held that they should not.

litigation is commenced in two states. The risk of inconsistency will only be avoided where, by reference to the rules, one of the courts stays its own proceedings.

The application by both courts of the same choice of law rules does not avoid the risk of different outcomes on choice of law and choice of forum, for a number of reasons. First, the rules are fact dependent, and each court will decide the issues on the basis of the evidence placed before that court.<sup>92</sup> Secondly, just as different judges in a single jurisdiction may come to different conclusions on agreed facts, so too may the two judges in the different states come to different decisions despite the agreed facts.

It might be thought that the risk of conflicting decisions on the threshold issue of applying the choice of law rules is small. In a statistical sense, this may well be so. However, at a practical level, it is complexity that is perhaps most likely to lead to different decisions on the threshold choice of law and forum issues. It is this same complexity that is likely to render it imperative, in a policy sense, that such inconsistency not lead to the delayed resolution of the substantive dispute.

Could there be a role here for an International Commercial Court (ICC)? The threshold observation to make is that it is not proposed by the authors that the substantive dispute be resolved by an ICC. It is the courts of the state identified by the choice of forum rules that ought resolve the dispute in the authors' view, the forum whose substantive law will govern the dispute. The problem identified in this paper arises where there is a dispute as to the identity of that state. It is here where an ICC can be deployed as the independent tribunal to authoritatively determine at an early stage this preliminary but fundamental issue.

A decision of an ICC, comprised of international judges with an insolvency speciality from independent jurisdictions, is an option that enables a respected and authoritative outcome to the threshold issue. This, in turn, would avoid the prospect of lengthy delays before the substantive litigation can be pursued to resolution. By authoritatively selecting a single jurisdiction, it eliminates the risk of inconsistent decisions. The solution has the advantage of speed, and the number of presiding judges selected to determine the issue could reflect the monetary size of the issue, its legal complexity or its importance. Speed could, for example, be enhanced by appointing a 3 or 5 member bench in lieu of an entitlement to appeal.

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<sup>92</sup> A joint hearing may at least remove the risk of inconsistent evidence leading to conflicting decisions.

## Conclusion

In summary, the risk of inconsistent judgments from different jurisdictions is a challenging issue to be faced by the debtor, creditors and other parties in a cross-border insolvency. It can produce substantial delays, and may result in sub-optimal outcomes.

A number of ways in which this issue may be approached have been outlined, providing examples of multilateral efforts in recent decades to explore these approaches in practice. The list comprises uniform (or harmonised) insolvency laws, uniform recognition laws, the growing practice around cross-border insolvency agreements, and the adoption of uniform choice of law rules (inextricably linked with issues around choice of forum).

The authors consider that the risk of inconsistent decisions is problematic, and that the existing means for managing the issue, through "judicial restraint" and multilateral efforts to date, do not provide a comprehensive solution. The only way the risk of inconsistent decisions can be avoided is by ensuring there are no multi-state proceedings in respect of the same dispute. Considerable academic work has already been undertaken exploring the option for a comprehensive set of choice of law principles to select, in relation to any dispute with an international element, the law to govern that dispute. The authors' view is that choice of forum, that is the selection of a single forum, is also a critical part of this solution, and that there may be merit in those rules including a referral to an ICC to address at an early stage any attempt to advance the issue in multiple states.

The authors raise for consideration whether UNCITRAL WGV should explore the achievement of international legal consensus on these issues.