

# Cross-border Insolvency and its Threat to International Trade: Proposal for a Comprehensive UNCITRAL solution

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## A. Introduction

Legal uncertainties that follow from transnational corporate collapses are a major obstacle to the advancement of international trade. Participants cannot predict with certainty the insolvency law(s) that may be applied, and provide for such eventuality. The problem is particularly acute given deep-seated jurisdictional differences in insolvency laws. Attempts at regional and international harmonisation have not to-date found completely viable solutions.

This paper makes the proposition that a viable solution lies in the recognition of the right of companies to select and register (at their inception) the applicable insolvency law. Most jurisdictions today recognise and give effect to the law selected for the company's creation and being. The proposal is an extension of this to the selection of the law by which the company 'dies,' and is supported by the same reasons – it provides certainty that is critical to the facilitation of international trade.

The paper will suggest a convention sponsored by UNCITRAL (hereinafter referred to as the "*proposed Convention*") that will make the proposal law, with companies having the option of selecting from the national insolvency laws of the jurisdiction of incorporation and COMI or a proposed UNCITRAL Insolvency Law (hereinafter referred to as the "*UNCITRAL Insolvency Law*"). These will complement and supplement the UNCITRAL Model Law on Cross-Border Insolvency (1997) (hereinafter referred to as the "*UNCITRAL Model Law*"). Together they should provide a viable and comprehensive solution to a seemingly intractable problem that is threatening the advancement of international trade.

## B. The problem of cross border insolvency

The difficulty with most insolvencies these days is that they are not contained within one jurisdiction. In the distant past where companies had their operations, assets and debts within the jurisdiction where they were incorporated, it was completely logical and within the expectations of their creditors that they would be wound up by the laws of that jurisdiction. The rule that the law that creates is that which can "uncreate" remains the conflicts rule of most jurisdictions today.

Increasingly however companies operate, have their assets and creditors in several countries beyond their jurisdiction of incorporation. Many jurisdictions have responded to this by legislating to confer on their courts the right to wind up foreign companies. Potentially proceedings to wind up the company may be opened in all the jurisdictions in which the company has some connection.

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Jurisdictions are wont to exercise jurisdiction on increasingly thin connection resulting in proliferation of insolvency proceedings. The concern with multiplicity of proceedings has mostly been with larger costs and smaller returns, not inevitable but common, and the problem of recognition and enforcement of orders by courts that are not of the jurisdiction of incorporation. These have been addressed with considerable success by the UNCITRAL Model Law and the EU Insolvency Regulation.<sup>1</sup>

There is however another seemingly intractable problem that affects more directly advancements in international trade. Multiplicity of proceedings almost invariably means a multiplicity of insolvency laws since courts mostly apply the *lex fori* (law of the forum) for insolvency matters. This stands in the way of *ex ante* predictability for creditors as to the applicable insolvency law that is critical to the pricing of risk, and provision against it. The consequence of this is often increased cost of capital for the debtor.

That is the problem of conflict of laws that remains to be addressed in a viable way, and which this paper seeks to suggest a solution for.

### **C. Existing instruments dealing with cross border insolvency**

Efforts have been made at international, regional and domestic<sup>2</sup> levels to address the cross border issues most of which are focused on recognition and cooperation. Amongst them the UNCITRAL Model Law and the EU Insolvency Regulation have had the greatest impact. The former is a non-binding international initiative by UNCITRAL which allows for free divergence by those adopting it, whilst the latter is binding legislation of the EU Member States, with limited divergence permitted. Both implement a system of modified universalism.<sup>3</sup>

The UNCITRAL Model Law facilitates the recognition of foreign insolvency proceedings by mandating and encouraging cooperation and coordination to varying degrees depending on whether the proceedings are “main” or “non-main”. It does not deal with the conflicts issues of jurisdiction and applicable law but is predicated upon jurisdiction to open main insolvency proceedings being with the centre of main interests (hereinafter referred to as the “*COMI*”) of the company,<sup>4</sup> and non-main proceedings where the company has an establishment.<sup>5</sup> It does not, whether directly or indirectly, provide for the law applicable to the proceedings.

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<sup>1</sup> Council regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings

<sup>2</sup> There are national laws that deal with insolvencies with cross border elements and bilateral and multilateral agreements between nations to moderate cross border insolvencies, see Ian Fletcher, *Insolvency in Private International Law* (2<sup>nd</sup> edn), chaps 5-8. These are specific to the contracting parties and or of limited application and are not considered here.

<sup>3</sup> This is not totally uncontroverted. Franken, “*Cross-Border Insolvency Law: A Comparative Institutional Analysis*”92014) 34(1) *Oxford Journal of Legal Studies* 97, at p116 suggested that the Model Law essentially offers a cooperative territorial approach to cross border insolvency law. LoPucki, “*Universalism Unravels*” (2005) 79(1) *American Bankruptcy Law Journal* 143, p 166 on the other hand suggested that it is a form of backdoor universalism. The EU Insolvency Regulation has been said to embody a modified version of territorialism: Horst Eidenmuller, “*Free Choice in International Company Insolvency Law in Europe*” *European Business Organization Law Review* (2005) 423, at p 433.

<sup>4</sup> There is a rebuttable presumption that the COMI and place of incorporation are the same, art 16(3).

<sup>5</sup> See for example art 17 (2).

The EU Insolvency Regulation legislated for both jurisdiction to open insolvency proceedings and the law applicable thereto. For the Member States of the European Union, jurisdiction to open main proceedings is vested in the courts of the COMI as defined in the recast of 20 May 2015.<sup>6</sup> Secondary proceedings are permitted where the debtor possesses an establishment<sup>7</sup>, restricted to the assets located in those jurisdictions. The applicable law is the *lex concursus* or *lex fori*, being the insolvency laws of the COMI or the particular secondary proceedings as the case maybe.<sup>8</sup>

It may be thought that extending the EU Insolvency Regulation's treatment of the conflicts issues outside of the European Union will resolve the problem for the rest of the world. The following section will demonstrate why it will not provide a completely viable solution.

#### **D. Predictability under the EU Insolvency Regulation**

The EU Insolvency Regulation's treatment of the applicable insolvency law is deceptively simple. It is the law of the jurisdiction where insolvency proceedings, whether main or secondary, have been opened, or the *lex concursus*.<sup>9</sup> At first blush the approach is very attractive. The forum of the proceedings should have no difficulty identifying the law, or applying it, as it is also the *lex fori* or the law of the forum.

The difficulty with legislating for the *lex concursus* is that the law is only identifiable when the forum for insolvency proceedings is established. Whilst the EU Insolvency Regulation points to where these should be, they are not always readily identifiable, particularly in advance of the proceedings. This is notwithstanding the definition of COMI under the recast.

The recast has legislated that "The centre of main interests shall be the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties."<sup>10</sup> Recital 28 states that special consideration should be given to the perception of creditors.

Where the debtor has its operations, assets and creditors in a number of jurisdictions it is unclear by which creditor(s) assessment ascertainability is to be made. What is ascertainable is often dependant on where the creditor is. Many companies these days operate through the internet. The COMI of these companies would be inscrutable to third parties. Ironically the qualification intended to enhance predictability may potentially make the COMI, and hence the applicable law of the main proceedings less predictable.

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<sup>6</sup> Regulation(EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast). Unless stated to the contrary, references in this paper will be to the provisions under the 2015 EU Insolvency Regulation recast much of which will come into force on 26 June 2017.

<sup>7</sup> Art 3(2): Courts of another Member State shall have jurisdiction to open insolvency proceedings against that debtor only if it possesses an establishment within the territory of that other Member State. Art 2 defines 'establishment' to mean any place of operations where a debtor carries out or has carried out in the 3-month period prior to the request to open main insolvency proceedings a non-transitory economic activity with human means and assets.

<sup>8</sup> Art 7(1): Save as otherwise provided in this Regulation, the law applicable to insolvency proceedings and their effects shall be that of the Member State within the territory of which such proceedings are opened... See also Recital 66. It is commonly thought or assumed that in an insolvency context the choice of law should follow from the choice of forum. See for eg, Rasmussen, "A New Approach to Transnational Insolvencies" 19 Mich. J. Int'l L. (1997)1, at p 33.

<sup>9</sup> With limited exceptions for *in rem* rights and employment contracts.

<sup>10</sup> Article 3(1). These are also the principal elements of COMI suggested by the Revised UNCITRAL Model Law Enactment Guide.

As and when secondary proceedings are opened, their laws will substitute for the law of the COMI in relation to assets within their territory. Since these secondary proceedings cannot be determined in advance creditors would need to inform themselves *ex ante* of the insolvency laws of every jurisdiction where the debtor has an establishment which may potentially be the venue of secondary proceedings in order to price the risk. The alternative would be to assess the risk on the basis that they would open secondary proceedings in a particular jurisdiction.

Whilst the EU Insolvency Regulation has gone a long way in regulating cross border insolvencies for its Member States, predictability of the applicable law remains problematic, even with the improvements of the recast. It does not provide the ideal blueprint for a global solution to a more predictable applicable law.

#### **E. Predictability with a choice regime**

*Ex ante* predictability, it will be demonstrated, is better achieved by allowing companies to select the applicable insolvency law. The company designates at its inception the insolvency law that will apply in the event it subsequently becomes insolvent. This is the choice by which it is bound, and it is a choice that is made public in its constitution (and the registry of its incorporation). The company's insolvency law, like the law of its incorporation, will then be certain and readily ascertainable in advance by those dealing with the company.

The proposal is not as radical as it may appear at first blush to be. Most jurisdictions today recognise and give effect to the law selected for the company's creation and being. The proposal is but an extension of that to the selection of the law by which the company 'dies.'

There are however greater social implications to the choice of insolvency law than that of incorporation. This is why the proposal does not advocate complete freedom of selection (as proponents of the free choice regime have mostly suggested)<sup>11</sup> but a choice from amongst the following three laws:

1. The insolvency law of the jurisdiction of incorporation
2. The COMI's insolvency law
3. The UNCITRAL Insolvency Law

The first and second of these are not controversial options. The jurisdiction of incorporation and COMI are widely regarded as the jurisdictions whose insolvency laws should apply. The third provides a neutral law specifically tailored to address cross border insolvency issues. It is envisaged that the UNCITRAL Insolvency Law will reflect an acceptable balance between the pro-creditor and pro-debtor approaches.

A more conservative approach would perhaps omit the UNCITRAL Insolvency Law but the writer sees value in its inclusion. This will allow companies to choose a better conceived insolvency law tailored

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<sup>11</sup> The freedom of choice of insolvency regime is not in itself new. Various models of free choice have been suggested by their proponents who have advanced it as a rival principle to universalism and territorialism. The free choice approaches vary from complete/unrestrained freedom to write bankruptcy contracts or select bankruptcy systems to the choice of forum to choice between having either one or multiple insolvency proceedings. See for example Rasmussen "A New Approach to Transnational Insolvencies" 19 Mich. J. Int'l L. (1997) 1; E Warren, "Bankruptcy Policymaking in an Imperfect World " 92 Mich. J. Int'l L. (1994) 336, pp 385-386 and Alan Schwartz, "Bankruptcy Contracting Reviewed" (1999) Yale Law Journal Vol 109, 343.

specifically to deal with cross border insolvencies which may potentially encourage national lawmakers to model their insolvency laws after it.

Conversely it is possible to provide choices of more than the three. For group enterprises this could include the insolvency laws of the holding company's jurisdiction of incorporation or COMI. This will enable group companies to align the applicable insolvency regime with the group's organisation structure and operations. The choice should nevertheless be made separately for each company within the group.

The extent of the selection menu can be finalised after consultation to gauge what is acceptable to stakeholders. Consideration should also be made for a default choice where none is specified. This, it is suggested, should be the insolvency laws of the COMI for EU Member States and that of the jurisdiction of incorporation for others.

The considerations for making these laws available to companies for selection are discussed in the following sections.

#### **F. Insolvency law of the jurisdiction of incorporation**

The insolvency law of the jurisdiction of incorporation is inherently appropriate to the winding up of the insolvent company. The company, being a legal person, is created by the law of its incorporation and it is that law that can remove its existence or 'uncreate' it.

There are also reasons why it is a viable choice for *ex ante* predictability. The jurisdiction of incorporation is ascertainable, most importantly, in advance. It is almost always a single jurisdiction and consequently selects a single insolvency law. Multiple incorporations and re-incorporations are rare. If the jurisdiction of incorporation is selected which subsequently moves to another this is a process normally allowed with adequate publicity and consideration of affected creditors. In the case of multiple jurisdictions of incorporation (which is very rare), the company will select the one whose insolvency laws will apply.

The insolvency laws of the place of incorporation is an appropriate law even for Delaware-type companies where the company's assets and business are outside the jurisdiction of incorporation. Strictly the jurisdiction of incorporation alone has the law that is able to wind up the company (as opposed to merely liquidating its assets). This is regardless of where the company's assets and business are.

It may of course be more efficient for the insolvency proceedings of Delaware-type companies to be opened where the assets and business are, as the English court thought in *Re Harrods*.<sup>12</sup> The company, under the proposal, has the option to select the COMI's insolvency law instead or indeed the UNCITRAL Insolvency Law. But if it does select the law of the jurisdiction of incorporation there is no reason for creditors to complain, having chosen to deal with a company created under those laws.

#### **G. COMI's insolvency law**

The COMI's insolvency law should be an available option as the COMI is that vested with jurisdiction under the EU Insolvency Regulation, and the UNCITRAL Model Law's approach is predicated upon that. Its omission would effectively mean the exclusion of EU Member States' participation in the

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<sup>12</sup> when it sent an English company to be wound up in Argentina where it had all its assets and business: *Re Harrods (Buenos Aires) Ltd* [1992] Ch 72

proposed Convention. Conversely its inclusion allows EU Member States to participate in the proposed Convention beyond the regional legislation and without compromising its policies.

The proposed Convention's definition of COMI should be aligned to that under the recast of the EU Insolvency Regulation to facilitate participation by EU Member States. Companies that have their COMI within the EU are effectively limited in their selection to the insolvency law of the COMI. This can be achieved by allowing the ratification of the proposed Convention subject to the condition that it shall apply to EU Member States only where the COMI's insolvency law is selected. Creditors are not prejudiced since it is the EU COMI's insolvency laws that will apply under the EU Insolvency Regulation.

Whether there should additionally be a right to state a group COMI to supplement group coordinated proceedings introduced by the EU Insolvency Regulation recast<sup>13</sup> is a matter for further consideration. In group enterprises where the operations of the subsidiaries are fully integrated with the holding company's the COMI may well lie with the holding company, but this may not be the case where the entities within the group have independent businesses. These matters are not readily ascertainable by third parties, and is better left to the group enterprise to determine and declare.<sup>14</sup>

The application of the same law to the insolvency of related companies of the group would go some way to address the insolvency problem of group enterprises. It will enable proceedings with respect to companies belonging to the same group to be conducted under the same set of insolvency laws and rules. This is likely to lead to more efficient outcomes where the group's organisational structure and operations are integrated.

#### **H. The UNCITRAL Insolvency Law**

The UNCITRAL Insolvency Law will provide a modern, coherent and comprehensive cross border insolvency regime that is well suited to dealing with the consequences and complexities of cross border insolvencies. The UNCITRAL Legislative Guide on Insolvency Law would be a good reference for the crafting of the Law, with adjustments tailored to address more specifically the cross border issues.

The company's choice of this Law would mean that there is no connection whether by assets, establishment or law but this is not a problem. Since the UNCITRAL Insolvency Law is not the law of any particular jurisdiction it in fact allows the insolvency proceedings to be opened unhindered in the jurisdictions where it would be efficient to do so. These may well be those traditionally thought to be the jurisdictions of the main and secondary proceedings.

If the UNCITRAL Insolvency Law proves to be a popular choice this would send positive signals to national lawmakers to model their insolvency laws after it. This will lead to greater convergence of insolvency laws and their underlying policies.

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<sup>13</sup> Chapter 5.

<sup>14</sup> Enterprise groups are an increasingly common business vehicle. Since the companies within the group are connected in some way, the collapse of one would frequently lead to the insolvency of others within the group, and we have witnessed many of these in the last decade. Much of the efforts relating to the treatment of companies in insolvency however deal with the single corporate entity, or do not properly distinguish the insolvency of a single corporate entity from the insolvency problems of a group enterprise. They do not specify whether the COMI is determined for each company within the group, for the group enterprise as a whole, or the insolvent companies within the group.

### **I. Mechanism and timing for choice**

The choice would be made at incorporation and reflected in the constitution of the company. The COMI should be identified if it's insolvency law is selected to provide clarity and transparency. The publicly declared COMI should satisfy the requirement of the EU Regulation recast that the centre of administration be ascertainable by third parties.

The timing of the choice (at incorporation) when the interests of the company are aligned to those of its creditors and investors will ensure that the choice is not made to prejudice them.<sup>15</sup> It also reduces risk shifting to involuntary and small or less sophisticated creditors. The risk of manipulative conduct is in any event small given the limited choices of applicable insolvency laws.

### **J. Alteration of choice**

Companies should be bound by their choice of the insolvency law of the jurisdiction of incorporation or COMI or the UNCITRAL Insolvency Law. To allow switches from one category to another would be to reintroduce uncertainty. Alterations, if they are to be permitted at all, should be limited to changes to the company's jurisdiction of incorporation (e.g. by way of reincorporation of companies and/or mergers and amalgamations) and COMI. It follows from this that the selection of the UNCITRAL Insolvency Law cannot be changed, nor the law of the COMI or jurisdiction of incorporation without an actual change to those places.

Entrenching choices provide for greater certainty but clearly exceptions can and should be made as thought appropriate. Mechanisms will have to be put in place to safeguard against opportunistic changes such as changes on the eve of insolvency. It may be that processes involved in re-incorporations already provide sufficient protection.

### **K. Jurisdiction for opening of insolvency proceedings**

The selection of the applicable law brings with it a preference for the jurisdiction of the applicable law, and their courts to have conduct of the insolvency proceedings. That would in most part be the most efficient. The proposal does not however make this a requirement. Secondary proceedings may be opened in jurisdictions where assets are located which are not the jurisdiction whose law is applicable to the insolvency proceedings. Where the company (or its group) has assets and businesses in diverse jurisdictions secondary proceedings would facilitate a speedier and less costly administration.

The main proceedings have universal scope, and encompass for purposes of distribution, all the debtor's assets, including those remitted from secondary proceedings. The administration of the secondary proceedings is limited to the collection of assets of the debtor within that jurisdiction and to their remittance to the liquidator of the main proceedings.

As the role of the secondary proceedings is limited, arguments that courts are best equipped to apply the insolvency laws of their own jurisdiction should not stand in the way of the proposal. The separate insolvency proceedings are merely mechanisms for the more convenient collection of assets which are then remitted to the liquidator in the main proceedings.<sup>16</sup> Having the assets administered separately this way will not raise the spectre of inefficient deployment of those assets.

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<sup>15</sup> Indeed, because they need to attract capital and other sources of funds, they are more likely to make choices that offer better protection to creditors and investors. The deterrence against companies choosing overly debtor-protective insolvency laws would be the higher cost of capital and credit.

<sup>16</sup> This is essentially a universalism approach.

To achieve a *pari passu* distribution between all of the debtor's creditors worldwide it is necessary for the pooling of all its assets wherever located and for distribution to be declared out of that pool and by the same set of rules.<sup>17</sup> This may however result in some creditors losing their preferential status or ranking lower because of differences in distribution rules.<sup>18</sup> If there is a strong preference for distributive choices of local laws, then consideration may be made to make an exception for them so that the liquidators of local secondary proceedings can pay off preferential debts before remitting the remaining assets to the jurisdiction of the main proceedings.<sup>19</sup>

The application of a single insolvency law to the main and secondary proceedings will remove an incentive to open proceedings outside of the main to take advantage of another insolvency law. This disincentive against forum shopping should consequently reduce the number of secondary proceedings to those that would actually facilitate distribution of assets within their jurisdiction.

The court competent for the main insolvency proceedings should be able to order provisional and protective measures under the applicable law covering assets situated anywhere. Whether it should additionally be possible for the liquidator to apply for the preservation measures under the law of the jurisdictions of the secondary proceedings is a matter for further consideration.

#### **L. Addressing objections to a choice regime**

The free choice regime in all the manifestations suggested by their proponents remains very much in the shadows of the more established universalism and territorialism. It has not been seriously considered as providing a viable alternative to universalism and territorialism. On the contrary it has been called a radical proposal with close to no political implementation chances.<sup>20</sup>

Objections to the free choice regime centre on the company choosing a law detrimental to its creditors. The company, it is said, is likely to select a law that is pro-debtor to the detriment of all creditors. A variant of this objection points to a choice detrimental to tort victims specifically. Tort victims are said to be particularly vulnerable as they suffer the risks without the benefits. Since involuntary creditors do not choose their debtors the ability to predict the applicable law is not seen to be an advantage. Proponents of the free choice regime have responded to these criticisms with suggestions of either special treatment for tort victims or excepting them from the chosen law.<sup>21</sup>

Restricting choice in the way of the proposal should largely address any risk of manipulative conduct whether detrimental to all creditors or just tort victims. As the laws of the jurisdiction of incorporation and COMI are those most likely to apply in the company's insolvency the selection of either should not provide an advantage to the debtor. The UNCITRAL Insolvency Law is intended to be neutral in its approach and should not tilt the balance either way.

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<sup>17</sup> Which is what the common law envisages to be the function of ancillary proceedings. See *Re Bank of Credit and Commerce International SA (No 10)* [1997] Ch 213.

<sup>18</sup> The reverse could also occur.

<sup>19</sup> Efforts aimed at universalist regimes have largely failed because of differences in distribution rules particularly if they affect priority rights to taxes.

<sup>20</sup> Horst Eidenmuller, "Free Choice in International Company Insolvency Law in Europe" *European Business Organization Law Review* (2005) 423, at pp 433, 441-442.

<sup>21</sup> See Rasmussen, "A New Approach to Transnational Insolvencies" 19 *Mich. J. Int'l L.* (1997)1, at pp 34-35 where he made the proposition in relation to the choice of forum that "weak "creditors receive at least the same treatment that they would have at their home jurisdiction. See also the arguments against that in Horst Eidenmuller, "Free Choice in International Company Insolvency Law in Europe" *European Business Organization Law Review* (2005) 423, at p 437.



Special treatment for tort victims whether by way of exception to the applicable law or something else is therefore unnecessary. To accord special treatment may conversely give them an advantage that they do not currently have.

The writer's proposal may in fact reduce manipulative conduct since the company is bound by its selection. Currently debtors are able to make eve-of -insolvency manoeuvres to change the applicable law.

### **M. Proposal implementation**

This paper has set out the basic framework and principal considerations of the writer's proposal. Clearly more than these have to be considered for its actual implementation. Aside from the issues already considered, and those flagged for further consideration, there will also be a need to decide *inter alia* on the type of insolvency proceedings to be covered,<sup>22</sup> the scope and application of the selected law<sup>23</sup> and its application to existing companies.<sup>24</sup>

It is critical to the proposal's viability that it be adopted widely. To ensure that the proposal will facilitate and not exclude participation of the EU Member States the proposal has included the COMI's law as an option and aligned the COMI to that of the EU COMI as defined in the 2015 recast of the EU Insolvency Regulation. There will be a need to comb through the EU Insolvency Regulation and 2015 recast thoroughly to identify any potential conflicts that should be dealt with before the proposal is made definitive.

This paper has suggested that the proposal be implemented by a convention sponsored by UNCITRAL. The proposal requires complete uniformity of treatment of the conflicts rule and reciprocity amongst contracting states, and this is only achievable by a binding instrument. Whilst the UNCITRAL Model Law has achieved a high degree of international uniformity in the jurisdictions where it has been implemented it has not been complete uniformity.

Thus far UNCITRAL's efforts in relation to cross border insolvency have been by non-binding instruments in recognition of the fact that nations are unlikely to commit to a binding regime because of deeply held divergences in their insolvency laws. The proposal does not require changes to national insolvency laws or reflect a preference for any of them. This should increase

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<sup>22</sup> The UNCITRAL Model Law applies to collective insolvency proceedings whose purpose is the reorganisation or liquidation of the debtor, and where the assets and affairs of the debtor are subject to court control or supervision, see art 2(a). The EU Insolvency Regulation's scope is wider under the recast, covering rescue, adjustment of debt, reorganisation and liquidation: see art 1. In principle the proposal is capable of the wider application but its scope has of course to take into account what is acceptable to most jurisdictions.

<sup>23</sup> Should it govern every aspect of the debtor's affairs, or should its application be restricted to matters usually regulated by insolvency laws such as administration of the assets, priority ranking among creditors, stay of enforcement rights, and clawbacks (avoidance)? Should exceptions be made for in rem rights and employment contracts, as have been made by the EU Insolvency Regulation? There's also the related question of whether criminal sanctions should be confined to that of the chosen law.

<sup>24</sup> Since the applicable insolvency law is selected at the company's incorporation this will effectively exclude existing companies unless a mechanism for selection is made for them specifically. The writer's preference is to confine the choice regime to new companies as a choice mid-life will interfere with expectations of creditors and investors of the company. Whilst it may well be possible to craft Convention rules to provide against abuses the treatment of it will be complex. It is also anticipated that this will give rise to objections on policy grounds that will make the proposed Convention less attractive to stakeholders.

acceptability of the proposal and its implementation by binding instrument since it does not involve resolving differences between them.<sup>25</sup>

The proposal recognises the centrality of cross border cooperation. Liquidators of the main and secondary proceedings should observe proper cooperation in accordance with the relevant guidelines of the UNCITRAL Model Law. These could be incorporated into the proposed Convention directly or by reference.

The UNCITRAL Insolvency Law will provide a non-national insolvency law option specifically tailored for cross border insolvencies that is modern, coherent and comprehensive, and balanced as to the protection of creditor and debtor.<sup>26</sup> The text of the UNCITRAL Insolvency Law will be appended to the proposed Convention, and companies will be able to select it as their applicable insolvency law.

The UNCITRAL Insolvency Law may potentially influence the shape and content of national insolvency laws. If it is widely selected it will create an incentive for national lawmakers to model their insolvency laws after it, or at least some of its rules. This will pave the way to greater convergence in insolvency laws and their underlying policies.

The proposed Convention is not intended to supersede but to complement and supplement existing efforts of UNCITRAL and the 2015 recast of the EU Insolvency Regulation. Together they should provide a viable and comprehensive solution to the seemingly intractable problem of cross border insolvencies that is threatening the advancement of international trade.

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<sup>25</sup> There is little prospect of reaching agreement on resolving differences between national insolvency laws. The divergences are too extensive and deep-seated.

<sup>26</sup> The UNCITRAL Legislative Guide on Insolvency Law will provide a reference for the drafting of the UNCITRAL Insolvency Law with adjustments to address the consequences of cross border insolvencies.