

Second Edition

Bob Wessels & Gert-Jan Boon

Cross-Border Insolvency Law

International Instruments and Commentary



Wolters Kluwer

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Preface to the Second Edition

The economic and financial downturn that has taken place during the last decade, after the first edition of 'Cross-Border Insolvency Law, Instruments and Commentary' of 2006 was published, has led to a significant rise in the development of instruments. All around the globe, the issue of insolvency has received ample attention and various new instruments were prepared. In general, we have noted that the instruments added in this second edition show the increased interest in reorganization, besides liquidation proceedings. They aim to better unify (sometimes even harmonize) insolvency laws and improve coordination of cross-border insolvency proceedings and related practices. Furthermore, pre-insolvency proceedings and out-of-court workouts receive more attention. Frameworks are being developed to build a fundament to facilitate these informal approaches to corporate insolvencies. The need for cooperation and coordination of cross-border insolvencies is being extended towards courts as well as the insolvency of enterprise groups. Consider, for example, the revision of the World Bank Principles for Effective Insolvency and Creditor Rights Systems, the publication of the UNCITRAL Legislative Guide Parts Three and Four on the treatment of enterprise groups and director's obligations (2010 and 2013), the American Law Institute and International Insolvency Institute's Global Principles for Cooperation in International Insolvency Cases (2012), and very recently, the EU Cross-Border Insolvency Court-to-Court Cooperation Principles (2014). Facilitation of informal workouts is promoted, for example, by the Asian Bankers Association's Asia-Pacific Informal Workout Guidelines for Promoting Corporate Restructuring (2013). Finally, in revising the text of the European Insolvency Regulation a final text (Recast) by the European Parliament and the Council was published in June 2015. This recast promotes both better cooperation, communication by courts and insolvency practitioners, as well as emphasizing the rescue of distressed businesses by equalizing the position of reorganization and liquidation proceedings. Accordingly, the volume of instruments has grown tremendous; it has risen from some thirty-five texts in 2006 to some fifty in this second edition. It was decided to focus on those that strive for unification of the greatly differing substantial insolvency laws, as well as those dealing with matters of cross-border insolvency cases (including in particular cooperation and communication). The instruments that relate specifically to the insolvency of financial institutions, insurance

companies and investment companies are not included in this edition. The emerging, though already extensive, body of instruments on the insolvency of these institutions definitively deserve a separate overview.

All texts are updated until 15 January 2015; subsequent changes have only be taken into account when the production process of this publication allowed for it. On the same date, all internet sources have been checked. As with the previous edition, it is hoped that the materials covered in this book as well as the further references they contain are found useful by all those with an interest in cross-border insolvency law, like practitioners, judges, law makers and academics. Recital 48 of the Recast of the European Insolvency Regulation introduces soft law guidance to those that have to work together in international insolvency cases:

[i]n their cooperation, insolvency practitioners and courts should take into account best practices for cooperation in cross-border insolvency cases as set out in principles and guidelines on communication and cooperation adopted by European and international associations active in the area of insolvency law, and in particular relevant guidelines prepared by the United Nations Commission on International Trade Law (UNCITRAL).

We are confident that this publication offers the ingredients insolvency practice is looking for.

We would appreciate any comments or additional instruments that can improve the use of this book. They can be forwarded to: www.tri-leiden.eu or info@tri-leiden.eu.

*Bob Wessels
Gert-Jan (J.M.G.J.) Boon
Spring 2015*

Preface to the First Edition

The volume of legislation and rules of best practice in the area of transnational or cross-border insolvency is tremendous. This book contains international and regional conventions, model laws, EC regulations and directives, uniform rules, guiding principles and practice standards which are relevant for improving national laws and for guidance in international practice. The process of harmonizing or evaluating national laws and aligning international best practices is facilitated or inspired by the documents in this book, which are produced by bodies such as the World Bank, the United Nations Committee on International Trade Law (UNCITRAL), the American Law Institute, INSOL International, Asian Development Bank, the Institut International pour l'Unification de Droit Privé / International Institute for the Unification of Private Law (UNIDROIT), and international and European restatements of insolvency law by scholars and practitioners.

The collection covers over thirty instruments in the field of transnational or cross-border insolvency. They relate to insolvency of companies and financial institutions, but sometimes will address insolvency of consumers too. The aim of the compilation is to overcome the sometimes frustrating but at least time-consuming efforts of practitioners to search for these instruments. The book is unique as a work of this nature does not exist. Recent insolvency instances (and ongoing cases) like Budget Rent-A-Car, Collins & Aikman, Enron, Eurofood (Parmalat), DaisYTEK, Fairchild Dornier, Federal Mogul, Global Crossing, KPNQwest, MG Rover, Swissair, Tyco International, Yukos and Worldcom demonstrate the growing importance of cross-border insolvency matters. To do its work properly a practitioner needs to have access to 'the black letter law in the books'. In addition, several national law makers are in the process of renewing and revising domestic laws, which can be supported by several of the guiding instruments to evaluate and improve its outcome.

The texts in this publication are organized in an order reflecting the regions of the world. They are preceded by texts which intend a global application. In these latter texts, the topic of insolvency mostly is only one item of concern, others topics relate to matters such as security rights or strengthening a country's legal framework. These global instruments have been reproduced in full, to broaden the scope within which

insolvency has its function. In the regional selection, these topics are not covered as otherwise the book would grow out of proportion.

Most of the instruments only originate from the last decade or have just been put in place in the twenty-first century. This demonstrates the explosion in the growth of transnational insolvency law. The instruments themselves are new and the body of them has been developed in an unsurpassed speed. Some texts, e.g., EC Directives, have been implemented in national law of Member States. They are provided not only for the non-EU reader, but also for those users that may benefit understanding national law by looking at its European origin.

To support lawyers in their profession the collection in the book is introduced in introductory chapters, though covering only the key issues of the texts of these instruments. These preceding commentaries will explain the main features of the related instrument in relation to insolvency. Therefore some commentaries are necessarily brief. It would go beyond the main aim of this publication – to have a collection of over thirty instruments in the field of cross-border insolvency in one hand – to describe these instruments in full or in depth. In footnotes, the reader may find references to literature.

All texts were updated until July 2006. Changes after that date have not been taken into account.

It is hoped that the materials covered in this book are found useful by all those with an interest in cross-border insolvency law, like practitioners, judges, law makers and academics.

I am indebted to all organizations for enabling the inclusion of their texts in this book. I would like to thank UNIDROIT and the International Civil Aviation Organization (ICAO) for their kind permission to reproduce the text of the Convention on International Interests in Mobile Equipment.

*Bob Wessels
Amsterdam – New York
Summer 2006*

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PART I

Introduction

In this commentary, the key issues of over fifty instruments in the field of transnational or cross-border insolvency are addressed. With this introduction, we aim to place each of the materials in context to enable users easily find the text he or she is looking for. In an aim to keep as practically as possible, the numbers preceding the topics covered below relate to the numbers of the Annexes. The texts do not cover bilateral treaties or agreements, though still in force between certain countries.¹

The texts in this publication are organized in an order reflecting the regions of the world.

1. For literature see: Kurt H. Nadelmann, 'Bankruptcy Treaties', in: 93 Penn. L. Rev. 58, at 61 (1944) (collection sources); Bob Wessels, 'Bilateral Bankruptcy Treaties: A bygone Instrument?', in: Bob Wessels, *Business and Bankruptcy Law in the Netherlands: Selected Essays*, The Hague-London-Boston: Kluwer Law International 1999, 247; David Brown, 'Beyond the UNCITRAL Model Law in Australasia: The Scope for Bilateral Agreements', in: Paul Omar (ed.), *International Insolvency Law: Reforms and Challenges*, Ashgate, 2013, 361ff.