KLUWER LAW INTERNATIONAL

Editor Bob Wessels

Cross-Border Insolvency Law

International Instruments and Commentary

Wolters Kluwer
Law & Business

Cross-Border Insolvency Law

International Instruments and Commentary

Bob Wessels

Professor of Commercial Law, Vrije University, Amsterdam
Distinguished Adjunct Professor of Comparative and International Law, St. John's University, School of Law, New York

KLUWER LAW
INTERNATIONAL

Published by:
Kluwer Law International
P.O. Box 316
2400 AH Alphen aan den Rijn
The Netherlands
E-mail: sales@kluwerlaw.com
Website: http://www.kluwerlaw.com

Sold and distributed in North, Central and South America by:
Aspen Publishers, Inc.,
7201 McKinney Circle
Frederick, MD 21704
United States of America

Sold and distributed in all other countries by:
Turpin Distribution Services Ltd.
Stratton Business Park
Pegasus Drive, Biggleswade
Bedfordshire SG18 8TQ
United Kingdom

ISBN 978-90-411-2526-2

Preface

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 30 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, other 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 21st 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 mainly 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 30 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

Table of Contents

Europe

International Instruments: Commentary

INTRODUCTION

In this commentary the key issues of over thirty instruments in the field of transnational or cross-border insolvency are addressed. In an aim to keep as practically as possible, the numbers preceding the topics covered below relate to the numbers of the Annexes, which start in this publication after page 55. The texts in this publication are organized in an order reflecting the regions of the world. The headings below (and therefore the Annexes too) relating to numbers 1–12 relate to texts or instruments with a global intention or application.

The numbers 13–16 relate to the Latin-American region and 17 and 18 to the North American regions of the world. Numbers 19–29 cover Europe, number 30 Africa, and finally, numbers 31–35 Asia.

GLOBAL

1. World Bank Principles and Guidelines for Effective Insolvency and Creditor Rights Systems, 2001

1.1 Stability of the International Financial System

In the aftermath of the 1997–1998 Asian financial crisis the World Bank introduced an initiative to improve the future stability of the international financial system. Effective and efficient insolvency and creditor rights systems are widely recognized as important elements of the stability of the (international) financial system. In 1999 the International Monetary Fund (IMF) published a survey of the

most important policies for designing a system of insolvency law.[1] The World Bank identified principles and guidelines for sound insolvency systems and for the strengthening of related debtor-creditor rights in emerging markets. Draft reports were discussed in 1999 and 2000 in four regional workshops by representatives of some 75 countries.[2] This resulted in the acceptance by the World Bank of the 'Principles and Guidelines for Effective Insolvency and Creditor Rights Systems' in April 2001. These contain 35 Principles, grouped around the following topics:

- Legal Framework for creditor rights (principles 1–5)
- Legal Framework for insolvency (principles 6–16)
- Features pertaining to corporate rehabilitation (principles 17–24)
- Informal corporate workouts and restructuring (principles 25 and 26), and
- Implementation of the insolvency system (institutional and regulatory systems) (principles 27–35).

1.2. Improving a Country's Commercial Law System

Insolvency is only one topic of the stability of the financial system. Jointly with the International Monetary Fund the World Bank has drafted standards and codes in three categories: transparency (data dissemination, fiscal, monetary, and financial policy), financial stability (banking supervision, insurance supervision, securities regulation, payments systems, anti money laundering/combating the financing of terrorism), and market integrity (accounting, auditing, corporate governance, insolvency and creditor rights). Therefore, insolvency and creditor rights constitute one of the 12 areas that have been identified as useful for the operational work of the World Bank and the IMF. In all, these standards and codes aim to enable commercial stakeholders to better manage financial risk and difficulties in enterprise sectors in a timely way, so as to minimize systemic risk, particularly in the banking system. Furthermore, they ensure efficient access to credit and allocation of resources, enhancing productivity and growth.

In their operational work both IMF and the World Bank use these standards and codes to assist countries in their evaluation and assessment of certain systems and institutional practices and processes. Leading policy here is that a country's

1. Orderly & Effective Insolvency Procedures. Key Issues, composed by the Legal Department, International Monetary Fund, 1999.
2. The Principles were elaborated in collaboration with partner organizations and experts serving on the Bank's Task Force and working groups. Advisory partners in the project creating the Principles were: African Development Bank, Asian Development Bank, European Bank for Reconstruction and Development, Inter-American Development Bank, International Finance Corporation, International Monetary Fund, Organization for Economic Cooperation and Development, UNCITRAL, INSOL International and the International Bar Association's Committee on Insolvency, Restructuring and Creditor's Rights.

commercial law systems are fundamental to a sound investment climate and commerce, including credit access and protection mechanisms, risk management and restructuring practices and procedures, formal commercial insolvency procedures, and related institutional and regulatory frameworks. The World Bank is applying these principles and guidelines in its global programme of 'country assessment', resulting in Reports on the Observance of Standards and Codes (ROSC). In this respect the Principles and Guidelines reflect a benchmark of an internationally recognized standard.

1.3. International

Principle 24 ('International Considerations') determines: 'Insolvency proceedings may have international aspects, and insolvency laws should provide for rules of jurisdiction, recognition of foreign judgments, cooperation and assistance among courts in different countries, and choice of law'.

In a later version (early 2004) the following detail was added:

In particular, an insolvency law should provide for:

- Foreign insolvency administrators to have direct access to courts and other relevant authorities.
- A clear and speedy process for obtaining recognition of foreign insolvency proceedings opened in accordance with internationally recognized standards of jurisdiction.
- A moratorium or stay at the earliest possible time in every country where the debtor has assets.
- Non-discrimination between creditors, regardless of the nationality, residence or domicile of the parties concerned.
- Courts and administrators to cooperate in international insolvency proceedings, with the goal of maximizing the value of the debtor's worldwide assets, protecting the rights of the debtor and creditors, and furthering the just administration of the proceedings.

The IMF report of 1999 encourages the taking of measures aimed at recognizing foreign proceedings and the facilitation by courts and office holders of collaboration and coordination of parallel proceedings: 'The adoption by countries of the Model Law on Cross-Border Insolvency prepared by UNCITRAL would provide an effective means of achieving these objectives'.[3] The report itself builds on a 1998 report submitted by the G-22 Working Group on International Financial Crisis, entitled 'Key Principles and Features of Effective Insolvency Regimes'.[4]

3. Report, at 82.
4. *See* the website of the US Department of Treasury <www.ustreas.gov/press/releas es/docs/g22-wg.3.htm> or the website of the IMF at <www.imf.org/exter nal/np/g22/crep.pdf.if>.

2. United Nations Commission on International Trade Law (UNCITRAL): Model Law on Cross-Border Insolvency, with Guide to Enactment, 1997

2.1. Framework to Effectively Address Cross-Border Insolvency Cases

The United Nations Commission on International Trade Law (UNCITRAL) was established in 1966 with the aim of providing the United Nations with a more active role in pushing back differences of national legal systems in the domain of international trade. UNCITRAL is composed of 36 Member States, chosen for a period of six years by the General Meeting of the UN. In several legal fields UNCITRAL has contributed to the alignment, harmonization or uniformity of international commercial law, e.g. The Vienna Convention on International Sales of Goods (CISG) of 1980, the UNCITRAL Arbitration Rules 1976, the Model Law on International Commercial Arbitration of 1985 and the UNCITRAL Model Law on Electronic Commerce of 1996. UNCITRAL is popularly known as the private (or commercial) arm of the United Nations.

Over 20 years ago, it was suggested that UNCITRAL should involve itself in the problems of cross-border insolvency.[5] UNCITRAL decided to develop a legal instrument relating to cross-border insolvency in 1995. It entrusted the work to one of its six Working Groups (Working Group on Insolvency Law, sometimes referred to as Working Group V). The Working Group devoted several two-week sessions (in Vienna and in New York alternately) to discuss and work on the draft text. During Joint Colloquia, judges separately or jointly discussed and debated all kinds of issues.[6] In 1997, UNCITRAL adopted the outcome of these discussions, the Model Law on Cross-Border Insolvency.

The Model Law on Cross-Border Insolvency ('Model Law') is designed to assist States to equip their national insolvency laws with a harmonized and fair framework that effectively addresses cross-border insolvency cases. The rationale of the Model Law lies in the continuing global expansion of trade and investment leading to an increasing incidence of cross-border insolvencies. National insolvency laws have, by and large, not kept pace with this trend. In the mid-1990s it was recognized that these laws were, in general, ill-equipped to deal with cross-border insolvency cases. The Model Law respects the differences among national insolvency (procedural) laws and therefore does not attempt a substantive harmonization of insolvency law.

The Model Law was adopted by consensus on 30 May 1997. The final approving body, the General Assembly of the UN, adopted resolution 52/158 of 15 December

5. *See* UNCITRAL's 25th year congress on 'Uniform Commercial Law in the 21st Century', New York, May 1992, source: A/CN.9/398, Annexure A.
6. In addition to the 36 States members of UNCITRAL, representatives of 40 observer States and 13 international organizations participated in the deliberations of the Commission and the Working Group.

1997, in which it expressed its appreciation to UNCITRAL for completing and adopting the Model Law, and recommends 'that all States review their legislation on cross-border aspects of insolvency to determine whether the legislation meets the objectives of a modern and efficient insolvency system and, in that review, give favourable consideration to the Model Law, bearing in mind the need for an internationally harmonized legislation governing instances of cross-border insolvency'.

2.2. Scope and Purpose

The scope of the Model Law is mainly limited to some procedural aspects of cross-border insolvency cases. Furthermore the Model Law is intended to operate as an integral part of the existing insolvency law in the enacting State, as in the terms of UNCITRAL, a Model Law is a legislative text that is recommended to States for incorporation into their own national law. The Model Law generally refers to all types of collective proceedings against insolvent debtors. It covers proceedings concerning different types of debtors, encompassing both collective proceedings involving a company or a similar legal person and collective proceedings against a natural person. Furthermore, the Model Law deals with proceedings aimed at reorganizing the debtor and proceedings leading to his liquidation.

According to the Preamble the purpose of the Model Law this Law is to provide effective mechanisms for dealing with cases of cross-border insolvency so as to promote the objectives of:

- Cooperation between the courts and other competent authorities of this State and foreign States involved in cases of cross-border insolvency;
- Greater legal certainty for trade and investment;
- Fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested persons, including the debtor;
- Protection and maximization of the value of the debtor's assets; and
- Facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment.[7]

7. According to Guide to Enactment (1997), No. 18, the Model Law takes into account the results of other international efforts, including the Convention on Insolvency Proceedings 1995 (later nearly literally converted in the EU Insolvency Regulation of 2002), the European Convention on Certain International Aspects of Bankruptcy, signed at Istanbul on 5 June 1990, the Montevideo Treaties on International Commercial Law (1889 and 1940), the Nordic Bankruptcy Convention (1933) and the Convention on Private International Law (Bustamante Code) (1928). Proposals from non-governmental organizations that have been taken into account include the Model International Insolvency Cooperation Act (MIICA) and the Cross-Border Insolvency Concordat, both developed by Committee J of the Section on Business Law of the International Bar Association. The Istanbul Convention has been replaced, for the matters referred to therein, by the EU Insolvency Regulation.

It has not been included in this book. For the text (English and French), *see* Fletcher, Appendix III. As MIICA, although a laudable effort, has not had any enactment by states, it has not reprinted in this book. *See* for the text: T.E. Powers, R.R. Mears and J.A. Barrett, 'The Model