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Maintaining the Momentum: The Continuing Quest for Global Standards and Principles to Govern Cross-Border Insolvency

Ian F. Fletcher

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MAINTAINING THE MOMENTUM: THE CONTINUING QUEST FOR GLOBAL STANDARDS AND PRINCIPLES TO GOVERN CROSS-BORDER INSOLVENCY

*Ian F. Fletcher**

FOREWORD—IN MEMORIAM

A little more than ten years ago, on September 19, 1996, to be exact, the author of this Article was privileged to take part in a truly exceptional and ground-breaking symposium conceived and arranged by the friend and colleague whose loss we continue to mourn, and to whose memory we dedicate these present proceedings. The symposium of September 1996 was a co-sponsored venture by Brooklyn Law School together with the Centre for Commercial Law Studies based in Queen Mary & Westfield College, University of London.¹ It followed the precedent of other joint symposia mounted by these two institutions around that time, of presenting the same conference program at consecutive meetings in New York and London, thereby widening the live impact of the proceedings and enabling the high-caliber array of speakers to interact with audiences on two continents. As the Director of the Centre for Commercial Law Studies during that period, the author attended several of the symposia in an *ex-officio* capacity, but when the theme of “Bankruptcy in the Global Village” was first mooted, it was inevitable that my involvement in the proceedings would be more than merely symbolic. Nevertheless, it is appropriate to acknowledge that the original concept for the 1996 symposium came from Professor Barry Zaretsky, and that it was he and his colleagues who worked tirelessly to ensure that the inaugural session held in Brooklyn was an unqualified success, characterized by a sense of infectious energy and enthusiasm that emanated from Barry himself. The professional dedication which Barry brought to the organization of the working sessions of the symposium was matched by a warm and generous spirit of hospitality which he and his wife, Joan, extended to those of us who were visiting from “out of town.” As one reflects on the unaffected conviviality of those times spent together a decade ago, and is then mindful of all that has happened in the intervening years, in New York and beyond, it seems imperative that we reaffirm

* Professor of International Commercial Law, University College London.

1. The College within the University of London formerly known as Queen Mary and Westfield College has subsequently adopted the name “Queen Mary, University of London.” Queen Mary, University of London, Web site, <http://www.qmul.ac.uk> (last visited May 20, 2007).

our commitment to the pursuit of the high scholarly purposes, and to the spirit of international collegiality, which were among the many cherished qualities which will be forever associated with the name of Barry Zaretsky.

I. INTRODUCTION: THEN AND NOW

A. *Work in Progress, 1996*

Surveying the landscape of international insolvency—or bankruptcy—law as it was constituted in 1996 from the vantage point of the closing months of 2006, one is struck by the speed and extent of the changes which have taken place in the intervening years. Perusal of the collected papers from the first Global Village Symposium as published in the *Brooklyn Journal of International Law*² provides a snapshot of the state of evolution of a number of major projects at that point in time. The American Law Institute's (ALI) *NAFTA Insolvency Project*, for which Professor Jay L. Westbrook was the U.S. Reporter, was actively engaged in the task of seeking common ground and shared principles among the laws of the three NAFTA countries with regard to the conduct of cross-border bankruptcies.³ By the fall of 1996, draft statements of the laws of all three jurisdictions had already been prepared,⁴ creating a necessary platform for the completion of the project. However, the exacting process of discovering and formulating the agreed-upon principles still lay in the future, and was only concluded in May 2000.⁵

2. Symposium, *Bankruptcy in the Global Village*, 23 BROOK. J. INT'L L. 1 (1997).

3. Jay Lawrence Westbrook & Jacob S. Ziegel, *The American Law Institute NAFTA Insolvency Project*, 23 BROOK. J. INT'L L. 7 (1997).

4. AM. LAW INST., TRANSNATIONAL INSOLVENCY PROJECT: INTERNATIONAL STATEMENT OF UNITED STATES BANKRUPTCY LAW (Discussion Draft 1996); AM. LAW INST., TRANSNATIONAL INSOLVENCY PROJECT: INTERNATIONAL STATEMENT OF CANADIAN BANKRUPTCY LAW (Council Draft No. 1, 1996); AM. LAW INST., TRANSNATIONAL INSOLVENCY PROJECT: INTERNATIONAL STATEMENT OF MEXICAN BANKRUPTCY LAW (Preliminary Draft No. 1, 1996).

5. Final Drafts of the four volumes comprising the product of the American Law Institute (ALI) Transnational Insolvency Project were approved by the council and members of the ALI at the organization's annual meeting in May 2000. All four volumes were subsequently published in 2003 by Juris Publishing, Inc. The first three volumes contain national reports of the relevant laws of the three NAFTA countries—Canada, Mexico, and the United States—while the fourth volume, entitled *Principles of Cooperation Among the NAFTA Countries*, carries the statements of principles and recommendations. AM. LAW INST.: TRANSNATIONAL INSOLVENCY: COOPERATION AMONG THE NAFTA COUNTRIES: INTERNATIONAL STATEMENT OF CANADIAN BANKRUPTCY LAW (Juris Publishing 2003); AM. LAW INST.: TRANSNATIONAL INSOLVENCY: COOPERATION AMONG THE NAFTA COUNTRIES: INTERNATIONAL STATEMENT OF MEXICAN BANKRUPTCY LAW (Juris

Meanwhile, the long-running saga of the European Union Insolvency Convention had, earlier in the year 1996, suffered the latest of a series of miscarriages of fortune which had consigned the text to an uncertain state of limbo. Although the concluded text of the convention had been signed by fourteen of the fifteen states which then comprised the membership of the European Union, the failure of the United Kingdom to append its signature by May 23, 1996⁶ (the last day of the six-month "window" during which the convention was open for signature), caused the entire convention to lapse.⁷ Although it was technically possible for the project to be resurrected at some future time by unanimous agreement of the entire E.U. membership of fifteen, it was questionable whether the political conditions for such a maneuver would be achievable in the immediate aftermath of the acrimonious events of May 1996. At the Brooklyn Symposium in September of that same year, the author ventured the opinion that the convention might possibly be revived and concluded at some time during 1997, although the process of ratification might occupy several more years before the convention could enter into force.⁸ That opinion was mistaken on a number of counts, although the final outcome can be regarded as having produced a more effective instrument of legal integration than had been in prospect while the project was cast in the form of an international convention.

It was not until 1999 that the requisite circumstances, and the shared political will, were forthcoming to permit the revival of the insolvency project.⁹ On the other hand, the inspired decision to recycle the substantive text of the lapsed convention in the form of a regulation of the Council of the European Community totally transformed the legal potency of the measure and the immediacy of its entry into force.¹⁰ The

Publishing 2003); AM. LAW INST.: TRANSNATIONAL INSOLVENCY: COOPERATION AMONG THE NAFTA COUNTRIES: INTERNATIONAL STATEMENT OF UNITED STATES BANKRUPTCY LAW (Juris Publishing 2003); AM. LAW INST.: TRANSNATIONAL INSOLVENCY: COOPERATION AMONG THE NAFTA COUNTRIES: PRINCIPLES OF COOPERATION AMONG THE NAFTA COUNTRIES (2003) [hereinafter AM. LAW INST., PRINCIPLES].

6. European Union, Convention on Insolvency Proceedings, *done* Nov. 23, 1995, 35 I.L.M. 1223, 1223.

7. *Id.* art. 49.

8. Ian F. Fletcher, *The European Union Convention on Insolvency Proceedings: An Overview and Comment, with U.S. Interest in Mind*, 23 BROOK. J. INT'L L. 25, at 27, 33.

9. Initiative of Germany and Finland on Adoption of a Council Regulation on Insolvency Proceedings, submitted May 26, 1999, 1999 O.J. (C 221) 8 (EC).

10. The measure acquired the force of law, with supremacy over any conflicting provisions of domestic law, on May 31, 2002 throughout all the E.U. Member States with the exception of Denmark. Council Regulation 1346/2000, 2000 O.J. (L 160) 1 (EC). Denmark, a signatory to the Insolvency Convention which lapsed in 1996, secured a spe-

accession of ten further states to membership of the European Union between 1996 and 2004¹¹ has resulted in a total of twenty-four European States being currently subject to the Regulation on Insolvency Proceedings (EC Regulation). This figure was increased still further with the accession of two more states as E.U. Members in January 2007.¹²

Although not in a sufficiently advanced state to be examined in detail during the course of the 1996 Symposium, another significant project in progress at that time was the cycle of twice-yearly meetings of an expert working group convened by the United Nations Commission on International Trade Law (UNCITRAL), aimed at producing model legislative provisions on cross-border insolvency which could be enacted by states as part of their domestic laws.¹³ The concept of the Model Law on Cross-Border Insolvency, as it ultimately came to be known, was a pragmatic response to a growing realization that the rate of progress towards the development of multilateral conventions to provide for the orderly conduct of international insolvencies was impossibly slow and faltering and would be incapable of delivering workable results for global application within any foreseeable time frame. An alternative strategy was therefore adopted with a view to establishing a framework of standardized legislative provisions which, if incorporated in parallel fashion into the domestic laws of a number of commercially significant states, could ensure the

cial exemption under the terms of the Maastricht and Amsterdam Treaties, of 1992 and 1997 respectively, which amended and consolidated the primary treaties on which the European Community and the European Union are based. Protocol on the Position of Denmark arts. 1, 2, 1997 O.J. (C 340) 1, 101; Treaty of Amsterdam Amending the Treaty on European Union, Oct. 2, 1997, 1997 O.J. (C 340) 1 [hereinafter Amsterdam Treaty]; Treaty on European Union, Feb. 7, 1992, 1992 O.J. (C 191) 1 [hereinafter Maastricht Treaty]. Under this so-called "permanent opt-out," Denmark is excluded from the effects of legislation enacted under Articles 61(c) and 67(1) of the Treaty Establishing the European Community. See Treaty Establishing the European Community arts. 61(c), 67(1), Mar. 25, 1957, 298 U.N.T.S. 3, consolidated version at 2002 O.J. (C 325) 33. The EC Regulation on Insolvency Proceedings was adopted under the terms of the two articles in question. The non-participation of Denmark is confirmed by Recital 33 to the Regulation. Council Regulation 1346/2000, para. 33, 2000 O.J. (L 160) 1, 4.

11. European Union, Treaty and Act of Accession (Athens Treaty), Sept. 23, 2003, 2003 O.J. (L 236).

12. Final approval for the accession of Romania and Bulgaria to the status of full membership of the European Union with effect from January 1, 2007, was announced in a press release by the European Commission on September 26, 2006. Press Release, European Comm'n, Commission Confirms Bulgaria's and Romania's EU Accession on 1 January 2007, Completed by a Rigorous Package of Accompanying Measures (Sept. 26, 2006).

13. See U.N. Comm'n on Int'l Trade Law [UNCITRAL], 26th Session, July 5–23, 1993, *Report of the United Nations Commission on International Trade Law on the Work of its 26th Session*, paras. 302–06, U.N. Doc. A/48/17 (Sept. 7, 1993).

minimum conditions necessary to enable multi-jurisdictional insolvency proceedings to be conducted with speed and effectiveness.¹⁴ This would be facilitated through the provision of appropriate enabling powers allowing judges to cooperate with their counterparts in other jurisdictions and to grant assistance to foreign representatives acting in insolvency cases.¹⁵

UNCITRAL, in May 1995, formally decided to pursue the preparation of uniform legislative provisions on judicial cooperation in cross-border insolvencies.¹⁶ The rate of progress achieved by the Working Group was remarkable for its rapidity. By March 1997 a draft version of the Model Law was issued for scrutiny and consultation, and after some consequential revision, the text of the Model Law was adopted by UNCITRAL on May 30 of that same year.¹⁷ Inevitably, some time was needed thereafter for states to absorb the implications of the Model Law and evaluate the case for its enactment, but in due course a steadily growing list of economically significant states, beginning in 2000 with Mexico, introduced legislation based upon its provisions.¹⁸

Although representatives of both the United States and the United Kingdom had been members of the Working Group, and had played significant roles in shaping the contents of the Model Law itself, the original aspirations of the respective governments of those states to set a positive example by quickly enacting it within their insolvency laws fell vic-

14. See UNCITRAL, UNCITRAL Model Law on Cross-Border Insolvency, Preamble, U.N. Doc. A/52/17 annex I at 67 (July 4, 1997) [hereinafter UNCITRAL, Model Law].

15. *Id.* ch. IV (arts. 25–27).

16. UNCITRAL, Twenty-eighth Session, May 2–26, 1995, *Report of the United Nations Commission on International Trade Law on the Work of Its Twenty-eighth Session*, paras. 391–92, U.N. Doc. A/50/17 (adopted May 24–26, 1995).

17. UNCITRAL, Thirtieth Session, May 12–30, 1997, *Report of the United Nations Commission on International Trade Law on the Work of Its Thirtieth Session*, para. 221, U.N. Doc. A/52/17 (July 4, 1997) [hereinafter UNCITRAL, *Report on Thirtieth Session*]; see *id.* at 67–77 (Annex I) (UNCITRAL, Model Law).

18. The following countries have adopted legislation based on the Model Law: Colombia, Great Britain, and New Zealand in 2006; the British Virgin Islands and the United States of America in 2005; Serbia in 2004; Poland and Romania in 2003; Montenegro in 2002; Japan, Mexico, and South Africa in 2000; and Eritrea. UNCITRAL, Status: 1997—Model Law on Cross-Border Insolvency, http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html (last visited May 18, 2007). Countries reported to be actively considering adoption of enacting legislation include Argentina, Australia, Canada, and Pakistan. UNCITRAL, *Developments in Insolvency Law: Adoption and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency and Developments in Interpretation of “Centre of Main Interests” in the European Union*, para. 3, U.N. Doc. A/CN.9/597 (Apr. 11, 2006).

tims to the cross-currents of domestic political and legislative circumstances. It was not until October 17, 2005 that a new Chapter 15 of the U.S. Bankruptcy Code, embodying the terms of the Model Law as applicable in the United States, was able to enter into force as part of a more widely cast statute containing other reforming provisions whose contents had generated much political controversy.¹⁹ In the United Kingdom, an enabling power was supplied by section 14 of the Insolvency Act 2000 to allow the Model Law to be enacted by means of secondary legislation in the form of a statutory instrument.²⁰ Despite this license to bypass the severe constraints of the parliamentary legislative timetable, the task of preparation, including a series of consultative processes, was not completed until March 2006.²¹ Enactment of the Model Law was effected by the Cross-Border Insolvency Regulations 2006, which entered into force within Great Britain on April 4, 2006.²²

B. Some New Initiatives Since 1996

The completion of each of the three major projects which have just been discussed was a matter for celebration as representing a triumph of will in the face of technical and political obstacles. These obstacles would, on the evidence of past history of treaties and agreements in the sphere of international bankruptcy matters, invariably have proved insuperable or, at best, would have resulted in a text of such blandness or opacity that no meaningful benefits could be derived from the finished product.²³ The concrete advances brought about through the American

19. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (codified in scattered sections of titles 11, 12, 15, and 18 of the United States Code). Title VIII of this act amends Title 11 of the United States Code by inserting Chapter 15 ("Ancillary and Other Cross-Border Cases"), and makes consequential amendments to Titles 11 and 28 of the Code. *Id.* §§ 801–02 (codified in 11 U.S.C. §§ 1501–32 and scattered sections of 11 and 28 U.S.C.).

20. Insolvency Act 2000, c. 39, § 14 (U.K.). This section came into force on the day the Act was passed (November 30, 2000). *Id.* § 16(2).

21. For a key document circulated during the consultative process, see THE INSOLVENCY SERV., IMPLEMENTATION OF UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY IN GREAT BRITAIN (2005), available at http://www.insolvency.gov.uk/insolvencyprofessionandlegislation/con_doc_register/registerindex.htm (last visited May 21, 2007).

22. Cross-Border Insolvency Regulations 2006, S.I.2006/1030 § 1. The delimitation of the territorial effect to "Great Britain" signifies that the Model Law currently applies only within England, Wales, and Scotland. *Id.* § 2. Extension to Northern Ireland will be effected by a further instrument of secondary legislation at a date to be determined.

23. As an example, see the Model Treaty on Bankruptcy adopted by the Fifth Session of the Hague Conference on Private International Law in 1925, reproduced in

Law Institute Transnational Insolvency Project, the EC Regulation on Insolvency Proceedings, and the UNCITRAL Model Law respectively, serve as a reminder of what can be accomplished by a less ambitious quest for pragmatic solutions to specific aspects, rather than embarking on the vain attempt to devise an idealized solution to the totality of the issues of principle and process that are encountered in the field of international insolvency. Significantly, none of the three projects attempted to impose changes to the substantive insolvency laws, and related types of proceeding, contained in the domestic legal orders of the states in which their provisions were destined to apply. The ALI Principles, and the UNCITRAL Model Law, aspire to allow the foreign representative to gain access and recognition before the courts of other states, and thereafter to obtain such relief and assistance as is already available under the laws of the recognizing state in relation to cases initiated under its domestic laws.²⁴ And while the EC Regulation embodies a regime of overarching rules controlling the exercise of jurisdiction, the choice-of-law process, and the recognition and enforcement of proceedings opened in other Member States,²⁵ it most emphatically does not purport to rewrite the content of the domestic insolvency laws of the states whose laws are required to be applied substantively in accordance with its controlling provisions.

Diversity of treatment of factually similar situations, as between the laws of two different sovereign states, will thus remain a fact of life for those caught up in a multi-jurisdictional bankruptcy. It will require much effort to minimize the sense of unfairness borne by those parties who experience the effects of asymmetrical outcomes among differently positioned creditors of what is, in functional terms, a single debtor operating on a transnational basis. Instances of such asymmetrical outcomes for functionally similar claimants will continue to occur for as long as the separate sovereign states of the world maintain their individualized approaches to insolvency law and policy. In reality, the elimination of such diversity is unattainable within the foreseeable future. If the otherwise closely aligned states of the European Union have shown themselves unable—indeed unwilling—to countenance the harmonization of their national laws concerning debtor-creditor relations, security, and insolvency, how much more unlikely is it that states from different regions of the world, representing a wide variety of legal traditions, could be in-

CONFÉRENCE DE LA HAYE DE DROIT INTERNATIONAL PRIVÉ, ACTES DE LA CINQUIÈME SESSION 1925, at 341 (1926). No state ever ratified the Treaty.

24. See AM. LAW INST., PRINCIPLES, *supra* note 5; UNCITRAL, Model Law, *supra* note 14.

25. See Council Regulation 1346/2000, 2000 O.J. (L 160) 1 (EC).

duced to abandon their embedded practices in matters of insolvency and subscribe to a common set of principles and procedures?!

Although any attempt at bringing about a complete harmonization of global insolvency laws in the near future could be dismissed as an exercise in futility, there is a good case to be made for sustaining the momentum generated by the successfully completed projects of recent times. This would be in order to pursue more attainable objectives such as raising the level of awareness among national legislators and policymakers regarding the standards of legal provision currently maintained by states, which are demonstrably in the forefront of economic and commercial activity.²⁶ Although it would be unrealistic to pretend that less developed states with fewer resources could, or indeed should, instantly renounce their indigenous practices and seek to emulate an alien legal culture for the sake of the supposed economic benefits that might ensue, a long-term approach to the sharing of expertise and skills could enable such states, over time and at a self-determined pace, to assimilate such standards as they deem to be compatible with their social goals and priorities. This line of reasoning (at least in part) seems to lie at the root of a new wave of initiatives which have been promoted by a number of regional and global organizations during the last decade, including the International Monetary Fund (IMF),²⁷ the Asian Development Bank (ADB),²⁸ and the World Bank,²⁹ and also by UNCITRAL.³⁰ Each in its distinctive way offers an aspirational statement of the norms and standards which are believed by the respective teams of authors to embody the necessary ingredients of a robust and efficient system for regulating debtor-creditor relationships and for administering and distributing the estates of insol-

26. The policy of "global standard setting" by identifying the currently accepted models of "best practice" is notably exemplified by the initiatives mentioned *infra*, notes 27–30.

27. LEGAL DEP'T, INT'L MONETARY FUND, ORDERLY AND EFFECTIVE INSOLVENCY PROCEDURES: KEY ISSUES (1999).

28. Office of the Gen. Counsel, Asian Dev. Bank, *Insolvency Law Reforms in the Asian and Pacific Region*, 1 LAW AND POLICY REFORM AT THE ASIAN DEVELOPMENT BANK 10–85 (2000).

29. WORLD BANK, PRINCIPLES AND GUIDELINES FOR EFFECTIVE INSOLVENCY AND CREDITOR RIGHTS SYSTEMS (REVISED) (2005), available at http://www.worldbank.org/ifa/rosc_icr.html; WORLD BANK, PRINCIPLES AND GUIDELINES FOR EFFECTIVE INSOLVENCY AND CREDITOR RIGHTS SYSTEMS (2001), available at http://www.worldbank.org/ifa/rosc_icr.html.

30. UNCITRAL, LEGISLATIVE GUIDE ON INSOLVENCY LAW, U.N. Sales No. E.05.V.10 (2005) [hereinafter UNCITRAL, GUIDE], available at http://www.uncitral.org/pdf/english/texts/insolven/05-80722_Ebook.pdf. Supporting documentation is available at http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/2004Guide.html.

vent debtors. Although there are obvious variations between the four documents in terms of emphasis and nuance, as well as in some matters of substance, a considerable amount of common ground is also discernible which could become a useful starting point in a future search for further synthesis and convergence.³¹

In the cases of the IMF, the ADB, and the World Bank, their involvement in projects to promote a convergence of national insolvency laws in line with perceived “best practice” is far from coincidental. Indeed, there has at times been an appearance of barely concealed dirigisme on the part of some of the financial institutions, due to their tendency to hint at an eventual correlation between their readiness to provide moral and material support for “client countries” and the degree to which said clients are able to demonstrate that their insolvency laws are in alignment with the “benchmarks” specified in the lender’s manual of best practice.³² Nevertheless, each of the documents generated by the IMF, the ADB, and the World Bank respectively makes a valuable contribution to the process of identifying and articulating the legal provisions and systemic arrangements considered essential for the conduct of orderly financial relationships in support of commerce and development. However, in terms of impact on the global community, comprising both developed and developing states, it is probable that the *UNCITRAL Legislative Guide on Insolvency Law* will receive the closest consideration by policymakers and legislators, both on account of its institutional pedigree and also for the very reason that it appears to adopt a non-prescriptive approach that is free from any overt attempt to impose a legislative matrix upon states as a condition for economic acceptance or access to material benefits for the future. The introductory section of the *Guide* pointedly affirms that its purpose is to assist the user of the document “to evaluate different approaches available and to choose the one most suitable in the national or local context.”³³ With one notable exception, which will be further considered at a later point in this Article,³⁴ the *Guide* succeeds in its self-imposed limitation to refrain from “provid[ing] a single set of model solutions to address the issues central to an effective and efficient insol-

31. This theme is explored below in Part II.

32. See, for example, the systematic process known as “Reporting on the Observance of Standards and Codes” (ROSC), developed and operated by the IMF and the World Bank. Details of this can be viewed at www.worldbank.org/ifa/roscc.html (last visited May 21, 2007).

33. UNCITRAL, *GUIDE*, *supra* note 30, at 2, para. 3.

34. The exception referred to, concerning the treatment of matters of choice of law in Part Two, Chapter I, Section C of the *UNCITRAL Legislative Guide*, is considered below in Part II.

veny law”³⁵ while supplying an eloquently reasoned and quietly authoritative discourse upon ways of supplying the requisite components of a commercially attuned system of insolvency law.

C. Summing Up: A Decade of Progress

Attention has been called above to some of the notable developments in the field of international insolvency during the decade between 1996 and 2006. It has been a period when several important projects came to fruition and subsequently began to make an impact on the day-to-day practice and application of the law. Simultaneously, new projects were embarked upon with the aim of imparting a long-term influence over the shape, and eventual convergence, of insolvency systems on a global or regional basis. It should be noted that this Article has not attempted to provide a comprehensive survey of the latter type of project, and that a number of other initiatives have recently been completed, or are currently ongoing, which have a direct or indirect relation to the refinement and restatement of insolvency law principles.³⁶ Among the conclusions to be drawn from this impressive display of activity are that, while there is both a need and a desire to bring about an alignment of the insolvency and related laws of as many of the world’s sovereign states as possible, the task will inevitably require much patience and sensitivity, and this alignment is best attained through the pursuit of manageable projects whose goal should be the progressive resolution of specific aspects of this vast and complex field. The dreams of former ages, envisioning a comprehensive solution to the problems of international insolvency by means of a single, grand treaty, have long since been abandoned. In their place, the more realistic cultivation of the “Art of the Possible” has been shown to produce worthwhile results. This approach should be continued, thereby maintaining the momentum generated by past successes without incurring the risks of overextension due to a surfeit of ambition.

II. NEW INITIATIVES 2006: THE ALI-III GLOBAL PRINCIPLES PROJECT

One example of the “new wave” of initiatives seeking to build on the foundations which are now in place, the ALI-III Global Principles Pro-

35. UNCITRAL, GUIDE, *supra* note 30, at 2, para. 3.

36. E.g., UNCITRAL, *Draft Legislative Guide on Secured Transactions*, U.N. Doc. A/CN.9/WG.VI/WP.31/Add.1 (Nov. 22, 2006); PRINCIPLES OF EUROPEAN INSOLVENCY LAW (W.W. McBryde et al. eds., 2003). The *Draft Legislative Guide on Secured Transactions* was developed by the UNCITRAL Working Group on Security Interests beginning in 2002. Documentation related to this guide is available at http://www.uncitral.org/uncitral/en/uncitral_texts/security.html (last visited Apr. 16, 2007).

ject, was inaugurated in the winter of 2006 as a joint venture by the American Law Institute and the International Insolvency Institute.³⁷ The project seeks to develop global principles for cooperation in international insolvency cases.³⁸ The author had the honor to be named as co-Reporter for this project, in collaboration with Professor Bob Wessels. The remainder of this Article offers an account of the aims and methods by which the so-called Global Principles Project is being pursued, and the goals which we hope to achieve.

A. Background

In February 2006, the American Law Institute and the International Insolvency Institute (III) announced the inception of a joint dissemination and extension project with respect to the “Principles of Cooperation” developed in the ALI Transnational Insolvency Project.³⁹ The stated objective of the two bodies was to establish acceptance of the ALI’s *Principles of Cooperation Among the NAFTA Countries (NAFTA Principles)*⁴⁰ in jurisdictions across the world, subject to any necessary local modifications, and to obtain the endorsement of leading domestic associations, courts, and other groups in those jurisdictions.⁴¹ The intended time frame for completion was set at within twenty-four to thirty months, thereby envisaging the production of a finalized text before the end of the year 2008.⁴² It was also anticipated that the Joint Reporters would carry out their task in collaboration with an International Advisory Group whose membership would be drawn primarily from the international membership of III.⁴³ Given the specialized nature of the subject matter of the project, and also its international character, the technical expertise and professional stature of the III membership makes them ideally qualified for the task in hand, although it is expected that ALI members with an interest in the field of international bankruptcy will be drawn to par-

37. See Am. Law Inst., *Council Approves Property Draft for Submission to Annual Meeting; New Project Launched on Transnational Insolvency Principles of Cooperation*, A.L.I. REPORTER, Winter 2006, at 1–2 [hereinafter Am. Law Inst., *Insolvency Project*].

38. See *id.*; see also Am. Law Inst., *Institute Moves Forward with International Insolvency Project*, A.L.I. REPORTER, Summer 2006, at 4 [hereinafter Am. Law Inst., *Institute Moves Forward*].

39. *Id.*; see *supra* notes 3 and 4 and accompanying text.

40. AM. LAW INST., PRINCIPLES, *supra* note 5.

41. See Am. Law Inst., *Institute Moves Forward*, *supra* note 38; Am. Law Inst., *Insolvency Project*, *supra* note 37.

42. AM. LAW INST. & INT’L INSOLVENCY INST., MANIFESTO OF AIMS AND OBJECTIVES (2006) (on file with the author) [hereinafter ALI & III, MANIFESTO].

43. *Id.*

ticipate, even if they do not happen to be members of III.⁴⁴ In addition, an ALI Members' Consultative Group will be formed in accordance with the organization's usual procedure for the conduct of projects.⁴⁵

B. Defining the Objectives

The Joint Reporters set about their mission by drawing up a provisional statement of objectives, with a view to launching an interactive discussion with the membership of the Advisory Group and thereafter refining and reshaping the objectives themselves. The Reporters started from the proposition that the *raison d'être* of the Project is already defined, namely to establish the extent to which it is feasible to achieve a worldwide acceptance of the *NAFTA Principles* together with the *Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases* (the *Guidelines*).⁴⁶ It thus seemed appropriate to design a systematic consultation exercise, drawing on the expert, first-hand knowledge of members of the Advisory Group, to determine the extent to which the *NAFTA Principles* and also the *Guidelines* are capable of being applied within a wide and representative range of legal systems around the world, and also the extent to which current practice in those countries may be said to conform to those standards.⁴⁷ Conversely, to the extent that local circumstances give rise to any obstacles to the acceptance of such standards and practices, these should be identified, and consideration should then be given to possible means of resolving them.⁴⁸

Secondly, the Reporters perceived that the Global Principles Project could provide an appropriate vehicle for exploring further the possibilities for devising global standards to regulate the transnational insolvency process itself. A number of issues which have an important bearing upon the overall quality and efficiency of the international insolvency "process" were either not directly addressed in the context of the *NAFTA Principles* Project or were there dealt with on a somewhat tentative basis. These include the principles and procedures to be applied where insolvency occurs within multinational corporate groups (the subject of Pro-

44. The Co-Chairs of the International Advisory Group are Professor Jay L. Westbrook, the Reporter for the *NAFTA Principles* Project, and E. Bruce Leonard, who was Chair and Reporter for Domestic Aspects of Canadian Law for the previous Project, and who is currently Chair of the International Insolvency Institute.

45. See AM. LAW INST., CAPTURING THE VOICE OF THE AMERICAN LAW INSTITUTE: A HANDBOOK FOR ALI REPORTERS AND THOSE WHO REVIEW THEIR WORK 16 (2005).

46. AM. LAW INST., PRINCIPLES, *supra* note 5, app. B.

47. ALI & III, MANIFESTO, *supra* note 42.

48. *Id.*

cedural Principles 23 and 24 of the *NAFTA Principles*).⁴⁹ Further issues which are self-evidently in need of study and development are the conflict-of-laws aspects of insolvency, including choice-of-law rules and the principles relating to the exercise of jurisdiction, together with the elaboration of internationally tenable definitions of some of the fundamental concepts employed in the standardized principles.⁵⁰ Also of direct relevance to the goal of promoting effective cooperation in international cases are some very practical questions, including how to overcome the inevitable problems where the respective courts are operating concurrently in different regions and time zones and have different working languages. In such situations, direct communication between courts may be impracticable, but it may be that some alternative means of achieving cooperation through one or more designated intermediaries could be established.

Thirdly, the Reporters considered this a timely opportunity to take account of the considerable volume of work that had already been developed in this field in recent years. As already indicated in Part I of this Article, the number of recent projects and studies which either directly or indirectly relate to insolvency matters amount to a striking demonstration of the globalization of commercial activity in the present era, and the raised awareness internationally of the need to address insolvency-related issues which arise in a cross-border context. It would therefore seem useful to enlist the collective wisdom of the International Advisory Group to try to distill, and if possible synthesize, the fruits of recent activity, and hopefully thereby provide a legislative tool which can be a point of reference in the future.⁵¹

A meeting with the inaugural members of the Advisory Group was convened at Columbia University School of Law on June 14, 2006, attended by judges, practitioners, and academics from more than ten countries.⁵² The meeting reviewed the Reporters' provisional statement of objectives and discussed a number of associated themes which could po-

49. *Id.* Following the decision by UNCITRAL at its meeting in July 2006, see *infra*, note 57 and accompanying text, to undertake a project dealing with the insolvency of groups of companies, the Co-Reporters concluded that this subject would not be retained as one of the main concerns of the Global Principles Project.

50. ALI & III, MANIFESTO, *supra* note 42. As of May 2007, these subjects continue to be included within the Objectives of the Global Principles Project.

51. With this task in mind, a *Taxonomy of Guidelines and Principles in International Insolvency* was drawn up with the assistance of Dr. Paul Omar. This document (currently unpublished) provides a synoptic display of the principles formulated by eight different studies, arranged thematically (copy on file with the author).

52. See Am. Law Inst., *Institute Moves Forward*, *supra* note 38.

tentially be included within the revised objectives.⁵³ There was a consensus on the need to maximize the opportunities presented by the assembling of a globally drawn group of experts by examining, within the limits of reasonableness, certain related issues which those engaged in the *NAFTA Principles* Project had not managed to resolve. For example, it was considered that some of the practical aspects of cross-border cooperation should be addressed, including, as already mentioned, the resolution of differences of working languages of the courts involved, and of the time zones in which the respective courts are located.⁵⁴ There was also some support for the suggestion that the special difficulties encountered in insolvencies of multinational groups of companies are in urgent need of attention, although it was quickly realized that the complexity of the subject could pose problems of balanced allocation of the available resources.⁵⁵ The subsequent decision by UNCITRAL, at its meeting in July 2006, to establish a working group to consider the treatment of corporate groups in insolvency⁵⁶ has obviated the need for this topic to be brought within the main objectives of the Global Principles Project, although it need not altogether preclude our consideration of some aspects where appropriate. As a consequence of this development, it is likely that the Project can address some of the more pressing issues in the area of private international law which to date have defeated the attempts of international organizations to devise clear and workable solutions.

C. The Continuing Challenge of Private International Law

When courts engage in cross-border cooperation, it can scarcely be supposed that they do so under circumstances where each court is blind to the international implications of the action it is being invited to take at the request of its foreign counterpart or of interested parties including, most prominently, the foreign representative. As has already been noted, existing instruments which regulate aspects of international insolvency, even including the EC Regulation on Insolvency Proceedings, have stopped short of seeking to unify the domestic insolvency laws of the states affected. For the foreseeable future, therefore, it will continue to be relevant to know in which jurisdiction a given debtor is capable of becoming subject to insolvency proceedings, and what the substantive consequences will be of those proceedings for all concerned. For the pur-

53. *Id.*

54. *Id.*

55. *Id.*

56. UNCITRAL, Thirty-ninth Session, June 19–July 7, 2006, *Report of the United Nations Commission on International Trade Law on the Work of Its Thirty-ninth Session*, paras. 207–09(a), U.N. Doc. A/61/17 (July 14, 2006).

poses of international recognition and enforcement of the results of insolvency proceedings, as well as for the purpose of obtaining the cooperation and assistance of foreign courts pursuant to such arrangements as are put in place following enactment of the UNCITRAL Model Law, the court hearing the foreign request must evaluate the circumstances in which the foreign proceedings came to be opened, and may also need to establish such questions as the precise time at which proceedings are to be treated as having been opened.

Regrettably, at present there is an absence of clear, universally agreed-upon rules to determine these issues, so that the outcome of such crucial legal questions is unpredictable at best. This is unfortunately the case even with respect to the EC Regulation and the UNCITRAL Model Law, whose recourse to a near-common vocabulary by the use of key concepts such as “centre of main interests”⁵⁷ and “establishment”⁵⁸ seemed initially to herald a significant leap forward in the standardization of rules of jurisdiction. Despite the enormous efforts expended in negotiating and drafting them, neither the EC Regulation nor the Model Law succeeded in providing a clear and precise definition of “centre of main interests,”⁵⁹ while their respective definitions of “establishment” may also prove to be difficult to apply in relation to some forms of commercial activity.⁶⁰ This definitional deficit has already proved to be the source of troublesome and costly uncertainty in the operation of the EC Regulation, as it has given rise to disputes between interested parties as to the legitimacy of attempts to open proceedings in a given jurisdiction.⁶¹ Similar difficulties, bringing in their wake a plethora of legal uncertainties, have resulted from the lack of technical precision in the drafting of the EC Regula-

57. See Council Regulation 1346/2000 art. 3(1), Recital (13), 2000 O.J. (L 160) 1 (EC); UNCITRAL, Model Law, *supra* note 14, arts. 2(b), 16(3).

58. See Council Regulation 1346/2000 arts. 2(h), 3(2), 2000 O.J. (L 160) 1 (EC); UNCITRAL, Model Law, *supra* note 14, arts. 2(c), 2(f).

59. The statement in Recital (13) to the EC Regulation, to the effect that “[t]he ‘centre of main interests’ should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties,” is more appropriately classified as an indicative description, rather than as a technical definition of the term referred to. There is no comparable statement in the UNCITRAL Model Law.

60. Compare Council Regulation 1346/2000 art. 2(h), 2000 O.J. (L 160) 1 (EC) with UNCITRAL, Model Law, *supra* note 14, art. 2(f). The two definitions are closely similar, but not identical in their wording.

61. See, e.g., Case C-341/04, Eurofood IFSC Ltd., 2006 E.C.R. I-3813; *Re Daisytek-ISA Ltd.*, [2003] B.C.C. 562 (Ch.); Cour d’appel [CA] [Court of Appeal] Versailles, Sept. 4, 2003, 2003 WL 22936778, [2003] B.C.C. 984 (*Klempka v. ISA Daisytek SA*), *aff’d*, Cour de cassation, 2006 WL 3427682, [2006] B.C.C. 841 (Fr.).

tion's definition of "time of the opening of proceedings."⁶² This is a serious defect in view of the notorious problem of the "race to the courthouse," which has a long history in the realm of cross-border insolvency.

The fraught questions of jurisdiction in international insolvency cases, and the vital matter of definition in respect of the concepts embodied in any jurisdictional rule, are inextricably linked to the process of allocating the substantive law by which any insolvency proceedings (or any aspects of such proceedings) are to be governed. The EC Regulation seeks to control these issues by declaring, in its Article 4(1), that "the law applicable to insolvency proceedings and their effects shall be that of the Member State within . . . [whose] territory . . . such proceedings are opened."⁶³ However, this basic rule is subject to specific exceptions prescribed in Articles 5 to 15 of the EC Regulation.⁶⁴ The extent to which such extensive exceptions to the controlling effect of the *lex concursus* have proven necessary, under current circumstances of diversity even among the laws of such closely aligned states as those belonging to the European Union, demonstrates the need for extreme caution when attempting to design a scheme of choice-of-law rules for application on a wider, global canvas.

In the author's estimation, it would be politically naïve to suppose that sovereign states would be prepared, at any time in the foreseeable future, to abandon all possibility of maintaining the benefits of localized rules, under which parties may have based their expectations in their dealings with a debtor, by conceding complete and overarching control to the provisions of some foreign insolvency law under which the debtor's global estate comes to be administered. For this reason it is especially disappointing that the authors of the *UNCITRAL Legislative Guide*, when dealing with the linked subjects of jurisdiction and choice of law, chose to abandon their otherwise admirable policy of refraining from an overly prescriptive presentation of their advice by proclaiming their preference for an unvarying application of the *lex concursus*.⁶⁵ While some of the provisions of the EC Regulation which create exceptions to the applica-

62. See Council Regulation 1346/2000 art. 2(f), 2000 O.J. (L 160) 1 (EC). The meaning of this provision was one of the issues referred to the European Court of Justice in the *Eurofood* case. The court abstained from deciding all aspects of this issue of interpretation, leaving further uncertainties about the full effects of the provision.

63. Council Regulation 1346/2000 art. 4(1), 2000 O.J. (L 160) 1 (EC).

64. *Id.* arts. 5–15.

65. UNCITRAL, GUIDE, *supra* note 30, at 67–72 (Part 2.I.C. ("Applicable Law in Insolvency Proceedings")). For the author's criticism of the approach taken in that section of the *Guide*, see IAN F. FLETCHER, *INSOLVENCY IN PRIVATE INTERNATIONAL LAW* paras. 9.13–9.16 (2d ed. 2005).

tion of the *lex concursus* are also not without difficulty in terms of their conception and drafting,⁶⁶ it is surely premature—and not a little presumptuous—for the authors of the *Legislative Guide* to suggest that there is a consensus among economically advanced nations that the unchallenged domination of the *lex concursus* currently represents “best practice” in the selection of the law to govern all aspects of an international insolvency case.

For all the foregoing, it would be useful to devote some time during the conduct of the Global Principles Project towards ascertaining the extent to which agreement can be reached on such matters as the definition of key terms employed in the rules governing jurisdiction and choice of law and in the actual content of the rules for selection of the applicable law in cross-border cases.

D. Taking the Project Forward

Following a period of reflection in the wake of the initial meeting with the Advisory Group, the Reporters’ next goal was the augmentation of the membership of the Group with a view to its being as widely representative as possible. Concurrently, a systematic questionnaire has been designed to enable us to test the degree of acceptance of the *NAFTA Principles* among the states whose systems can be interrogated via the collective expertise of the Group. Additional questions will be included to try to gather reliable data concerning the additional issues referred to above, and afterwards to yield insights into the readiness of the global community of states to embrace even a limited number of standardized rules and practices which would bring greater stability to debtor-creditor relations.

Going forward, the Reporters wish to emphasize their belief in the need to maintain an open-minded spirit of inquiry, and a transparent process of debate, to ensure that any aspects of the *Principles* which may give rise to difficulties of transposition into the legal culture of a particu-

66. An example would be the provisions of Article 6 of the EC Regulation, concerning the availability of set-off in cases where this would be precluded under the provisions of the *lex concursus*. During the formative process of the Draft Convention on Insolvency Proceedings (the textual precursor to the current Regulation), several alternative versions of what is currently Article 6 were produced, based on a variety of approaches to the central problem of how to accommodate the legitimate expectations of parties dealing with the debtor under circumstances where mutual debits and credits would or might be produced. The rule finally adopted—whereby set-off is claimable if it is “permitted by the law applicable to the insolvent debtor’s claim,” Council Regulation 1346/2000 art. 6(1), 2000 O.J. (L 160) 1 (EC)—is by no means self-evidently the most appropriate solution to the issues of principle which arise in relation to international set-off. The subject undoubtedly merits a re-examination as part of the process of devising rules which are intended to be applied as globally accepted norms.

lar country or region can be properly and sensitively considered. If any particular issue cannot be resolved on the basis of a text of universal application acceptable to all, an accommodation may be sought by means of a proviso to allow the main principle to operate subject to certain necessary local modifications. In the course of this process, the extant array of internationally generated texts which were referred to above will be studied with a view to ascertaining additional, complementary principles of law and practice which are considered to command general support. In this way it is hoped that the final text embodying the Global Principles will obtain the approbation of governmental authorities, domestic and international organizations, practitioners, and (most importantly) courts in their approach to the conduct of international insolvency matters in the future.