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CROSS-BORDER INSOLVENCIES IN SOUTHEAST ASIA

Regional Insolvency Framework for ASEAN

Natalya Spuling

Cross-Border Insolvencies in Southeast Asia: Regional Insolvency Framework for ASEAN

Proefschrift

ter verkrijging van de graad van doctor aan Tilburg University op gezag van de rector magnificus, prof. dr. W.B.H.J. van de Donk, in het openbaar te verdedigen ten overstaan van een door het college voor promoties aangewezen commissie in de Portrettenzaal van de Universiteit op vrijdag 22 januari 2021 om 10.00 uur

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ABBREVIATIONS

ADB	Asian Development Bank
ALI	American Law Institute
APEC	Asia-Pacific Economic Cooperation
ASEAN	Association of Southeast Asian Nations
B.L.R.O.	Brunei Law Revision Order
COMI	Centre of Main Interests
EBRD	European Bank for Reconstruction and Development
ECJ	European Court of Justice
EFTA	European Free Trade Agreement
EIR	European Insolvency Regulation
e.g.	for example
etc.	et cetera (and so on)
EU	European Union
FAIR	Forum on Asian Insolvency Reform
IBA	International Bar Association
ibid.	ibidem (the same place)
i.e.	id est (that is)
III	International Insolvency Institute
ILSA	International Law Students Association
IMF	International Monetary Fund
INSOL	International Association of Restructuring, Insolvency and Bankruptcy Professionals
NAFTA	North American Free Trade Agreement
OECD	Organization for Economic Cooperation and Development
RETA	Regional Technical Assistance
ROSCs	Reports on the Observance of the Standards and Codes
SME	Small and Medium-sized Enterprises
TIP	Transnational Insolvency Project
UNCITRAL	United Nations Commission for International Trade Law
WB	The World Bank

CHAPTER I – INTRODUCTION

Section I – Problem Outline and Research Question

Globalization and technology are two of the main driving forces of the 21st century. While economic and technological progress has long gone beyond borders, many legal issues remain stuck in the 19th century. Nothing can illustrate this problem better than the insolvencies[1] of multinational companies and groups. Notably, the Asian region proves to be particularly problematic.

Currently, there is no Regional Insolvency Framework in Asia. What's more, no one Asian country – with the exception of Japan and, to some extent, Singapore – has laws on cross-border insolvency. This fact causes difficulties not just for legislators, but for national insolvency courts and other authorities too. Also, parties to cross-border insolvency proceedings find themselves helpless, lost in an opaque jungle of national insolvency rules and exceptions. They often feel themselves unfairly treated and face insurmountable obstacles during insolvency proceedings. Cross-border insolvencies in Asia have caught the world's attention since the outbreak of the Asian financial crisis in 1997. The emergence of regional cross-border insolvency rules has hastened significantly since then. The Asian financial and economic crisis inevitably led to the collapse of global players on the world business stage. A prime example of a company in financial distress on the Asian market is demonstrated by the insolvency of Asia Pulp & Paper. The case occurred in 2001 in Singapore and caught international attention. The Singaporean courts rejected the petition of creditors to appoint a judicial manager because he would not be able to act in other jurisdictions such as China or Indonesia, as he would not have the powers demanded by local insolvency laws. Many other questions also remained unresolved.

However, the problem of cross-border insolvency arose much earlier. In the course of its development, international institutions suggested various legal projects on cross-border

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[1] The term 'insolvency' is used in the same meaning as the term 'bankruptcy'. Different names have purely linguistic nature due to different legal systems. Traditionally, civil law countries use the former while common law countries apply the latter. However, some jurisdictions use the both to determine different stages of proceedings, e.g. in Indonesia 'bankruptcy' is a separate issue from 'insolvency'. *See e.g.* S. Mandala, 'Indonesian Bankruptcy Law: An Update' in Organization for Economic Cooperation and Development (ed.), *Asian Insolvency Systems: Closing the Implementation Gap*. Conclusions of the Fifth Meeting of the Forum for Asian Insolvency Reform (FAIR) on 'Legal and Institutional Reforms of Asian Insolvency Systems' (Paris: OECD Publishing, 2007), pp. 103–8, at p. 107

insolvency rules such as model laws, regional regulations, etc. As a regional set of rules, the European Insolvency Regulation (EIR) proved to be effective.

Being a regional economic and political union, the Association of Southeast Asian Nations[2] is on the way to building a workable cooperation between its member states. Like the European Union, it has a common framework for some fields, but the question of cross-border insolvency remains a missing gap. For this reason, in 2013 the Government of Indonesia raised the question of an urgent need for a Regional Insolvency Framework in ASEAN and its implementation in the foreseeable future. This is a very goal-oriented task and this thesis looks to contribute to it.

This research will examine cross-border insolvency laws in Asia. It looks to find out how to draft a Regional Insolvency Framework and to make the distribution of insolvency estates fair for all parties to cross-border insolvency proceedings. It does not try to give a new Regional Insolvency Framework; rather, it looks to determine influential factors which lawmakers must consider while drafting a new regulation. The thesis will argue that in addition to legal criteria, some new scope is necessary for the implementation of purposeful rules. In order to address cross-border insolvency cases in the 21st century, a simple legal scope will not be sufficient. Historical exigency on the one hand and modern technologies on the other hand demand to play a significant role in supporting the legal approach to this issue.

Section II – Previous Works and Incentives

Diverse projects and incentives on solving the problems entailed by a cross-border collapse have been launched worldwide. International organizations and financial institutions have named some key problems of cross-border insolvency and have undertaken some steps to negotiate sustainable international legal texts, both those currently recognized and those with future potential. This research and these recommendations are by no means conclusive and final; however, they give valuable insights in helping to understand the core problems of cross-border insolvency laws and their business, social and cultural circumstances. Researchers, national governments, international organizations, and other involved institutions tried to work out methods and rules for cross-border insolvency law in Asia. In essence, efforts with this aim can be considered in two groups. The first is those which directly address the question of cross-border insolvency law in Asia. The second is those that are not directly involved in but do still

[2] Hereinafter referred to as ASEAN

have an indirect influence on the development process of this issue. In both cases, the lion's share of the work has been carried out through contributions from institutions.

The pioneer on cross-border insolvency in Asia is the Asian Development Bank.[3] In 1997, it conducted a comparative review of eleven Asian countries[4] over the course of two years.[5] Inspired by the G22 Working Groups'[6] report on the 'International Financial Crisis',[7] in October 1998 it started the regional technical assistance project[8] RETA 5795 dealing with insolvency law reforms in Asia. On 3rd December 1999, the RETA Screening Committee approved the technical assistance under the title 'Developing Cross-Border Insolvency Solutions'. The scope of the RETA 5795 was twofold: in Part A, it deals with cross-border insolvency and international cooperation, and in Part B it focuses on international good practices in informal restructuring processes. In October 1999, the ADB completed the project 'Insolvency Law Reform in the Asian and Pacific Region: Report of the Office of the General Council on TA-5795 Reg: Insolvency Law Reform' and reported it in 2000 in the 'Law and Policy Reform at the Asian Development Bank'. The ADB developed a project of 'ADB Standards' for insolvency law application in every country.[9] In 2000, the ADB presented 16 principles of insolvency law.[10]

RETA 5975 represented another incentive to promote regional cooperation and the development of insolvency law, targeting the interaction between insolvency law regimes and secured transactions. The major outcomes and findings of the project TA-5975 Reg. came up

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[3] R. Harmer, 'Assessing the Assessments', *International Insolvency Review* 23 (2014), 3–19, at 3; hereinafter referred to as ADB.

[4] Those countries are Korea, Japan, Taiwan, Hong Kong, Indonesia, Singapore, Malaysia, Thailand, India, Pakistan, and the Philippines.

[5] R. Fisher and M. Sloan, 'Why Asia Needs a Regional Insolvency Pact?', *International Financial Law Review* 23 (2004), 44–6, at 44

[6] G-22 Working Group is a working group on international financial crisis set up by the International Monetary Fund comprising finance ministers and central bank governors of 22 states.

[7] The report was published by International Monetary Fund on 2nd October 1998. It released a short list of insolvency law principles, however, it does not contain special recommendations, *see* The World Bank (ed.), *Principles and Guidelines for Effective Insolvency and Creditor Rights System* (Washington D.C.: The World Bank, 2001), p. 82

[8] Hereafter RETA; also, another project had been started at that time, namely, RETA 5773 on secured transactions law reform.

[9] Harmer, 'Harmer 2014', 5

[10] The World Bank (ed.), *The World Bank 2001*, p. 82

in the report 'Promotion Regional Cooperation in the Development of Insolvency Law Reforms' in 2008 following RETA 5795 and RETA 5975 associated work.

In 2003, the European Bank for Reconstruction and Development[11] undertook an assessment of insolvency laws in 27 countries by means of a functional approach. The EBRD was also one of the first institutions to have recognized the importance of secured transactions and worked out ten basic principles in relation to it.[12]

One of the most extensive cross-border insolvency projects is the UNCITRAL Model Law on Cross-Border Insolvency.[13] It was launched by the United Nations Commission on International Trade Law[14] and is the most extensive and detailed project, with some explanatory guides following behind. The Model Law was initiated by the UNCITRAL in cooperation with the International Association of Insolvency Practitioners.[15] In 1995, after two joint international colloquia, the Working Group V on Cross-Border Insolvency was given four two-week sessions to draft a project on the Model Law. The draft was discussed in March 1997 by insolvency specialists from all over the world. The concluding discussion took place in May 1997 during the thirtieth session of UNCITRAL.

The Model Law together with the 'Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency'[16] was adopted on 30th May 1997 by judges, government officials and members of different interest groups. In December 1997, the General Assembly expressed its gratitude for the Model Law scheme.

In June 2009, more than 80 judges from over 40 countries took part in a colloquium in Vancouver to elaborate on a text aiding judges in the application of the UNCITRAL Model

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[11] Hereinafter referred to as EBRD

[12] The World Bank (ed.), *Creditors Rights and Insolvency Standard: Based on The World Bank Principles for Effective Creditor Rights and Insolvency Systems and UNCITRAL Legislative Guide on Insolvency Law*, Revised Draft (Washington D.C.: The World Bank, 2005), p. 83

[13] Resolution of the General Assembly 52/158 from 15th December 1997

[14] Hereinafter referred to as UNCITRAL

[15] Hereinafter referred to as INSOL

[16] Hereinafter referred to as 'The Guide to Enactment'; on 18th July 2013, the General Assembly revised the 'Guide to Enactment' by including further explication for interpretation of the 'centre of main interest'. The Commission has adopted it as a 'Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency'.

Law on Cross-Border Insolvency.[17] It came up with the 'UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective'.

In 2010, the UNCITRAL developed and prepared the 'UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation'[18] with a focus on the implementation and commentary of Article 27 (d) of the Model Law, handling at length the forms of cooperation. The 'UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation' was released to provide non-prescriptive information for judges and practitioners on the practical side of communication and cooperation in cross-border insolvency. It focuses on the Article 27 (d) of the UNCITRAL Model Law on Cross-Border Insolvency, dealing with forms of cooperation and discusses various methods of cooperation in cross-border insolvency cases. In also examines the effectiveness of cross-border insolvency agreements.[19]

In April 2001, The World Bank together with its partner organizations such as the Asian Development Bank, African Development Bank, European Bank of Reconstruction and Development, International Finance Corporation, Inter-American Development Bank, Organization for Economic Co-operation and Development, International Monetary Fund, INSOL International, International Bar Association, and United Nations Commission on International Trade Law issued the 'Principles and Guidelines for Effective Insolvency and Creditor Rights System'. It is of use first for financial systems in component identification as well as to assess methodologies for core system milestones and in applying standards. The bank staff prepared a framework for policy makers and businesses under consultation with more than 70 international experts, and more than 700 specialists from the private sector from over 75 countries. Primarily the Principles and Guidelines assess key elements such as the roles of enforcement systems, legal framework for creditors' rights, legal framework for secured lending, legal framework for corporate insolvency, framework for informal corporate workouts, and implementation of the insolvency systems with respect to its international dimensions.[20] In

[17] United Nations Commission on International Trade Law (ed.), *UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation* (New York: United Nations Publication, 2014), p. 9

[18] The Resolution A/RES/64/112 on Practice Guide on Cross-Border Insolvency Cooperation of the United Nations Commission on International Trade Law was adopted by the General Assembly on 16th December 2009 on the report of the Sixth Committee (A/64/447) in the sixty-fourth session.

[19] United Nations Commission on International Trade Law (ed.), *UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation* (New York: United Nations Publication, 2010), 1 et seq., 9

[20] The World Bank (ed.), *The World Bank 2001*, 2 et seqq.

particular, principle 24 discusses international aspects of insolvency law and eliminates the most essential features such as competent jurisdiction, recognition of foreign judgements, choice of applicable law and cooperation among courts in different states; it suggests the implementation of the UNCITRAL Model Law on Cross-Border Insolvency.[21] In February 2000, prior to the publication of the 'Principles and Guidelines for Effective Insolvency and Creditor Rights System' the World Bank published a contextual document 'Building Effective Insolvency Systems: Towards Principles and Guidelines' inspired by a statement from the International Monetary Fund published in May 1999 in relation to the Asian Financial Crisis, 'Orderly and Effective Insolvency Procedures: Key Issues'. The 'Principles and Guidelines for Effective Insolvency and Creditor Rights System' was used as a model for the program 'Review of Systems and Codes' ('ROSC') by The World Bank on the invitation of the participating countries.[22]

In December 2005, the World Bank revised its 'Principles and Guidelines for Effective Insolvency and Creditor Rights System' and issued a new document, 'Creditor Rights and Insolvency Standard'. It was based on the earlier 'Principles and Guidelines for Effective Insolvency and Creditor Rights System' of the World Bank and on the 'UNCITRAL Legislative Guide'.[23] The last revisions took place in 2011 and 2015, after which the World Bank published the revised document.[24]

In 1999, the International Monetary Fund (IMF) released the report 'Orderly and Effective Insolvency Procedures' identifying core elements on insolvency law and examining its policy and design.[25]

Based on the London Rules informal workout methods, INSOL International issued a 'Statement of Principles for a Global Approach to Multi-Creditor Workouts' in October 2008.[26]

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[21] ibid., p. 52

[22] Harmer, 'Harmer 2014', 6

[23] The World Bank (ed.), *The World Bank 2005*, 1 et seqq.

[24] The World Bank (ed.), *Principles for Effective Insolvency and Creditor/Debtor Regime*, Revised Draft (Washington D.C.: The World Bank, 2015)

[25] The World Bank (ed.), *The World Bank 2001*, p. 82

[26] ibid., 82 et seq.

The Forum on Asian Insolvency Law (FAIR) is a prominent platform for insolvency law discussion in East Asia. It has already conducted several meetings[27] on Asian insolvency law.[28] It was set up as part of a common effort from the OECD, ADB, WB and Asia Pacific Economic Cooperation (APEC),[29] and supported by the public and private sector.

In addition, APEC launched another project in this direction called the 'Regional Network on Asian Insolvency Reform'. The proposal was discussed at the 5th FAIR meeting in Beijing, China on 27th and 28th April 2006 and approved in June 2006 in Nha Trang, Vietnam during the meeting of the APEC officials. The purpose of this network is to act as a platform for sharing information, building capabilities and providing technical help for Asian insolvency matters. In short, it should collect information on insolvency laws in Asia and present it for further research.

Apart from Asia-focused projects, further international and regional insolvency projects are worthy of note because they are indirectly related to the research topic and give the theoretical basis for this thesis.

Section III – Methodology and Limitations

The main method of assessment in this thesis shall be a review and analysis of primary and secondary sources. The original legal texts such as the UNCITRAL Model Law on Cross-Border Insolvency, the European Insolvency Regulation as well as the Transnational Insolvency Project will be presented and discussed. An overview of secondary sources to those texts will also be undertaken as well as mentioning fundamental theories in cross-border insolvency law. Additionally, some attention will be paid to accompanying documents such as working papers and protocols. Furthermore, the works of ADB, WB and OECD will be taken into consideration. The purpose of this method is to understand and to digest their existing implications for cross-border insolvency issues and to apply these insights for the issue in question.

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[27] Since its establishment following FAIR meetings took place: 1st in Bali, Indonesia on 7 – 8 February 2001; 2nd in Bangkok, Thailand on 16 – 17 December 2002; 3rd in Seoul, Korea on 10 – 11 November 2003; 4th in New Delhi India 4 – 5 November 2004; 5th in Beijing, China on 27 – 28 April 2006; 6th in Bangkok, Thailand on 16 – 17 July 2009; 7th in Delhi, India on 8 – 9 April 2010; 8th in Kuala Lumpur, Malaysia on 30 November – 1 December 2011; 9th in Manila, The Philippines on 3 – 5 December 2013.

[28] R. Tomasic, 'Insolvency Law Reform in Asia and Emerging Global Insolvency Norms', *Insolvency Law Journal* 15 (2007), 229–42

[29] APEC is a leading economic forum supporting a sustainable economic growth and prosperity in Asia-Pacific region, for details, *see* www.apec.org.

Some interviews with practitioners and researchers have been conducted. In August 2013, an interview was held with insolvency lawyers from the Kitahama law office in Osaka with the aid of Mr. Professor Takahashi from Osaka Graduate School of Law and Politics. In August 2013, another interview was conducted with Mr. Professor Yamamoto in Tokyo under the assistance of Professor Fujimoto from Osaka Graduate School of Law and Politics.

Furthermore, this work will assess the Asia Pulp & Paper case study and the implications of this judgement for a legal problem. In cultural terms, closer observations will be made into the discussion of 'Asian Values' driven by its advocates Mahathir Mohamad and Lee Kuan Yew to analyse its practical significance for cross-border insolvency law. Finally, this work will evaluate and introduce new developments in legal technology and its impact on cross-border insolvency law.

Section IV – The Research Roadmap and Benefits

In addition to this introduction and conclusion in Chapter VII, the thesis consists of following chapters.

Chapter II gives a general overview and more detailed background to the problem of cross-border insolvency issues in Asia. First, it analyses the Asian financial crisis, second, it assesses the Asia Pulp & Paper case study, and finally, it shows the interest groups, that is to say parties to insolvency proceedings.

Chapter III begins by presenting concepts and theories on cross-border insolvency law and continues by giving an overview of earlier global and international projects on cross-border insolvency. At the end, it provides a broader overview of the UNCITRAL Model Law on Cross-Border Insolvency.

Chapter IV addresses regional insolvency projects and regulations, such as the European Insolvency Regulation and Transnational Insolvency Project. In addition, it gives a short overview of some solutions in court-to-court communication. Finally, this chapter tackles the groups of companies facing insolvency.

Chapter V handles national insolvency laws and their traditional impact in ASEAN and ASEAN+3. First, it gives a general overview of ASEAN as a regional union of independent member states. Second, it provides an overview of international initiatives on cross-border

insolvency in Southeast Asia such as proposals of the Asian Development Bank and some of the Forum on Asian Insolvency Law Reform's approaches. In addition, an overview of national insolvency law regimes in the Member States of ASEAN and ASEAN+3 follows. Finally, this Chapter presents traditional terms and 'Asian Values' as general concepts in ASEAN and in ASEAN+3.

Chapter VI assesses and analyses the existing rules and incentives on cross-border insolvency law and again takes up the Asia Pulp & Paper insolvency case study. Then it determines some legal criteria for consideration by legislators for a Regional Insolvency Framework in ASEAN and ASEAN+3. Subsequently, it addresses traditional impacts and their role in the law-making process, and finally, this chapter works out other factors and gives new insights into legal technology and its role in regional insolvency solutions.

This thesis will have the following benefits for law-making institutions, practitioners, courts, and parties to cross-border insolvency proceedings.

First, the thesis will present different legal criteria for a Regional Insolvency Framework in ASEAN and ASEAN+3. This will give lawmakers more information to draw on in the drafting of new rules.

Second, it will show that the legal findings are not enough in addressing cross-border insolvency challenges in Asia. Far more reflection on local conditions and the historical impact in terms of 'Asian Values' is required. This aspect plays a sustainable role in the law-making process. As a result, this thesis will present some other essential factors which demand careful consideration in the law-making process of the Regional Insolvency Framework because those factors entail various limitations.

Finally, this thesis will show that legislators and other institutions must forge new paths in the law-making process and broaden their horizons, moving past a purely legalistic perspective toward the technological challenges.

CHAPTER II – CROSS-BORDER INSOLVENCY PROBLEMS IN ASIA

This Chapter II presents in its Section I the origins of transnational insolvencies and their impact on economic growth in the Asian region. To illustrate the problem, it is worthwhile analysing the causes of cross-border insolvency in the context of the Asian region. In fact, this requires a brief assessment of the Asian financial crisis of 1997. In Section II, a study of the Asia Pulp & Paper case will show legal obstacles that parties face in cross-border insolvency proceedings across multiple jurisdictions. Finally, the last section gives an overview of the various stakeholder interests in insolvency proceedings and asset allocation.

Section I – Globalization and the Asian Economic, Currency and Financial Crisis of 1997

The first issue that led to the appearance of cross-border insolvency is the globalization of the world economy by means of its accelerated development and the birth of international transactions. The second cause of cross-border insolvencies in Asia was the Southeast Asian financial crisis of 1997. This period has not only affected many countries[30] in the Asian region but in its wake has had far-reaching repercussions worldwide.

Initially, the Asian financial crisis began in Thailand[31] and spread to the rest of Southeast and Northeast Asia. Thailand was a starting point because it had up to forty percent of outflowing investment capital and maintained the favourable exchange rate of the Thai baht. After the crisis's outbreak, one third of Thai banks and financial institutions closed, leading to the financial bailout in Thailand and a change of government.[32] The crash of the Thai currency led to a domino effect in other Southeast Asian countries.[33]

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[30] Thailand, Malaysia, Indonesia, and South Korea

[31] R. Wade, 'The Asian Debt-and-Development Crisis of 1997: Causes and Consequences', *World Development* (1998), 1535–53, at 1541

[32] T. Van Hoa, 'Causes of and Prescriptions for the Asian Financial Crisis' in T. Van Hoa and C. Harvie (eds.), *The Causes and Impact of the Asian Financial Crisis* (2000), at p. 12; some authors underline the role of corporate governance playing in the outbreak of the Asian Financial Crisis, *see e.g. T. Mitton, 'A Cross-Firm Analysis of the Impact of Corporate Governance on the East Asian Financial Crisis', Journal of Financial Economics 64 (2002), 215–41, at 216*; S. Johnson, P. Boone, A. Breach and E. Friedman, 'Corporate Governance in the Asian Financial Crisis', *Journal of Financial Economics* 2000 (58), 141–86, at 142 et seqq.

[33] Y. Wang, 'The Asian Financial Crisis and Its Aftermath: Do We Need a Regional Financial Agreement?', *ASEAN Economic Bulletin* 17 (2000), 205–17, at 205; Wade, 'Wade 1998', 1538 et seqq.

The second country which faced the crisis was Malaysia and with it came consequences for the national financial system that saw the devaluation of the Malaysian ringgit, damages to the economy and to growth.[34]

More serious shock waves of the crisis were witnessed in Indonesia. The devaluation of the Indonesian rupiah reached 700 RP/1 US$ at its most critical level, which was then followed by the closure of the country's biggest banks. In addition, the Indonesian economy suffered as a result of burning off the country's forests, causing disastrous ecological problems for itself and neighbouring countries, not least in pulp and paper production. Just some years earlier, these countries had been touted as the developing countries with the best growth potential.

Malaysia was followed by South Korea in facing currency devaluation and the biggest bailout in Asia in December 1997, alongside the Philippines, Hong Kong, and Vietnam.

Before analysing the global impact of the crisis on the qualitative and quantitative increase in cross-border insolvency and lessons learnt from that, an overview of the causes of the crisis is necessary.[35]

1. Origins of the Asian Financial Crisis

Although there is no unanimity about grounds for the Asian financial crisis, without doubt the origins of the crisis are multifaceted and merit detailed investigation and classification. Several authors trace the causes back to moral hazard problems, treating these as different, mutually complementing and interacting dimensions with corporate, financial, and international components. The formal classification of the causes consists of four categories: macroeconomic, financial, structural, and institutional categories,[36] which are in fact broad in themselves. These authors are likely to offer an explanation in the form of a link between the cross-border insolvency phenomenon and the Asian financial crisis, because this explanation

[34] F. Sufian, 'The Impact of the Asian Financial Crisis on Bank Efficiency: The 1997 Experience of Malaysia and Thailand', *Journal of International Development* 22 (2010), 866–89, at 867 et seqq.

[35] M. Khor, *The Economic Crisis in East Asia: Causes, Effects, Lessons*, Third World Network (1998), 1 et seqq.; Van Hoa, 'Van Hoa 2000', 12

[36] G. Corsetti, P. Pesenti and N. Roubini, *Paper Tigers? A Model of the Asian Crisis*, NBER Working Paper Series (1998), vol. 6783, p. 1; for early warning system against financial crisis, *see* G. Kaminsky, S. Lizondo and C. M. Reinhart, 'Leading Indicators of Currency Crises', *IMF Staff Papers* 45 (198), 1–48

follows along general economic and legal lines, enabling an overarching but also pointed analysis of the posited question.

The macroeconomic approach refers to the tight monetary policy practised by Japanese financial authorities who argued that the value of the Japanese yen had been decreasing and had worsened the economic situation in the country. Southeast Asian countries had few macroeconomic problems prior to the crisis. As a matter of fact, those macroeconomic inconsistencies were based on the following indicators: foreign debt and budget and current account deficit, unfavourable rates of growth and inflation, exchange rates, savings and investment proportion, political instability, in- and outflowing capital, debt service ratios and monetary policies, an excessive bank lending system and fragile financial system, debt and profitability measures.[37]

Consequently, the Japanese monetary authorities drastically increased exchange rates. Hence, the demand for Japanese yen achieved an upsurge. Even if this danger had never occurred, those acting in financial markets in Southeast Asian countries would have reacted to this strict policy by the active exchange of national currency against the Japanese yen or US dollar. Therefore, panic spread as soon as bankers started to sell Southeast Asian currency to protect their monetary funds. Even before the aforementioned currencies collapsed, stocks in local currencies – having lost their value – suffered the loss of their attractiveness. Advocates of the financial approach accused the leading managers of financial markets. The financial liberalization strongly affected the countries in Asia where the foreign capital became convertible with local currency for anonymous capital inflow and outflow. This process was extremely deregulated. Thus, local banks and other financial institutions borrowed ample volumes of foreign funds.[38]

The so-called 'carry trades' bankers profited from the threatening financial policy and low interest rates in Japan. They borrowed in yen and US dollars, and then bought short-term securities in Southeast Asian countries which paid higher rates. Thus, they could attract new investors imitating the financial stability of currencies, and yet if the currencies lost their value,

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[37] G. Corsetti, P. Pesenti and N. Roubini, 'What Caused the Asian Currency and Financial Crisis?', *Japan and the World Economy* 11 (1999), 305–73, at 306; A. Berg, *The Asian Crisis: Causes, Policy Responses, and Outcomes*, Working Paper of the International Monetary Fund, WP/99/138 (1999), p. 5

[38]Van Hoa, 'Van Hoa 2000', 14; Khor, *Khor 1998*, 3 et seq.; Corsetti, Pesenti and Roubini, 'Corsetti et al. 1999', 305

it would lead to their fall or even losses for investors. This scenario finally occurred. The depreciation of currencies caused a growth in debts, increasing in proportion with the sums of local currency needed for loan repayments. The short-term foreign loans began to drag out abruptly, triggering the overthrow of local reserves. Having faced their financial limits, Thailand, Indonesia, and South Korea requested the help of the International Monetary Fund.[39]

The crisis had not only affected the financial markets and banking systems, but also the real estate market. Due to the depreciation of currencies, as well as the halting of stock exchange prices, there was decreased demand and an oversupply on the real estate markets. The prices of buildings and housing fell dramatically.[40]

Proponents of the structural view claim the misallocation of foreign investments by local governments within Southeast Asian countries, especially in the case of Thailand on real estate markets and in Indonesia in the aviation and automobile industries, without clear reason. In addition, they reproach the obstruction of development by enormous debts in the private sectors. Being involved in a deregulated financial market, they caused an extensive in- and outflow of capital without the attention of the government. From the perspective of institutional theory advocates, the financial authorities in Southeast Asian countries unofficially introduced the system of instantaneous and implied braces to settle their currencies with US dollars. Big players felt comfortable and did not purchase insurance in case of falling currency exchange rates because of high costs.[41]

To sum up, on the one hand, companies in Asia could obtain funds at comparatively low interest rates from foreign investors interested in the development of new markets. On the other hand, due to favourable exchange rates, Asian debtors felt secured and preferred to borrow funds in US dollars. Finally, the low export volumes in the countries affected by the crisis led to the devaluation of some Asian currencies and loss of markets.[42]

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[39] Wade, 'Wade 1998', 1540; T. ITO, 'Asian Currency Crisis and the International Monetary Fund, 10 Years Later: Overview', *Asian Economic Policy Review* 2 (2007), 16–49, at 23 et seqq.

[40] Khor, *Khor 1998*, 4 et seq.

[41] Van Hoa, 'Van Hoa 2000', 16 et seq.

[42] B. B. Aghevli, 'The Asian Crisis: Causes and Remedies', *Finance & Development* 31 (1999), 28–31, at 28 et seq.

Some authors indicate additional causes for the crisis, e.g. high and very fast growth of the Southeast Asian economies is not necessarily a reliable reference for good performance; rather, it obscures factors having pivotal impacts on the regional economy. What's more, the massive capital outflow from Southeast Asian countries led to vulnerability in the banking sector. Corsetti et al. present two views of the crisis; the unexpected changes in market expectation were the key points of the crisis or are in fact structural and policy distortions.[43]

2. Impact of the Asian Financial Crisis

What the modern world learnt from the crisis is not obvious and depends on the perspective of the respective affected parties. There are some tentative explanations. Coming back to moral hazard issues, i.e. claiming a lack of good sense among bankers, it is worth noting that during the crisis the banking system was in the hands of several big borrowers whose debts accounted for up to 50% of the entire borrowings. Criticizing the principles of the Bretton Woods' institution and sharpening the need for diversity, flexibility, and common sense, for example, Ibrahim encourages cautiousness and prudence[44] in the globalization and liberalization of financial markets. This liberalization is likely to play a positive role for economic development under certain circumstances and there is no question that the globalization, financial liberalization, and deregulation of the financial market enabled economic progress. However, if it gets out of control, the crash cannot be warded off. To function in developing countries, it is essential to have reliable and secure risk limitation mechanisms. Thus, the government should not run a higher risk without having enough collateral. Regardless of that fact, the financial liberalization process should go ahead gradually, step by step. Likewise, the need to regulate and efficiently manage external debts is clear. Countries in emerging markets in particular should be reticent to build up external debts even if they have good export volumes because those volumes could sharply slow down. Notably, financially liberalized states are subject to sizeable risks. The essential strategy for the governments of emerging markets centres on the

[43] S. Young, 'East Asian Crisis: Causes and Prospects' in *Organization for Economic Cooperation and Development (Ed.) 1999 – Structural Aspects of the East* pp. 256–62, at p. 260; Corsetti, Pesenti and Roubini, 'Corsetti et al. 1999', 305 et seq.

[44] A. Ibrahim, 'The Asian Financial Crisis Ten Years Later: What Lessons Have We learned?' in R. Carney (ed.), *Lessons From the Asian Financial Crisis* (London and New York: Routledge, 2009), pp. 78–83, at 79 et seqq.; *see generally*, M. Kawai, R. Newfarmer and S. L. Schmukler, 'Financial Crisis: Nine Lessons from East Asia', *Eastern Economic Journal* (2005), 185–207, at 187 et seqq.

need to build up and manage external reserves. To this end the government should take short-term and long-term measures.[45]

The banking regulatory sector received a proposal of some measures to be taken. The first suggestion concerned the liberalization of domestic financial systems, the second tightening of banking rules, the third keeping foreign exchange rates reliable, and finally, having realistic financial disclosure. In addition, the need for capital control and a global debt workout system grew, notably the possibility of a debt standstill declaration according to the system outlined in Chapter 11 of the US Bankruptcy Code. Finally, social justice should in the long term remain in the rights and interests of workers.[46]

The measures reveal the essence of crisis analysis. However, it seems reasonable to emphasize that such a financial crunch can have an unpredictable effect on transnational companies, and it can cause cross-border insolvency for which there is no adequate solution as we will see later while analysing the Asian Pulp & Paper case.

There are some regional and global solutions already in existence worldwide, e.g. UNCITRAL Model Law on Cross-Border Insolvency, European Insolvency Regulation, NAFTA, etc. Those rules are not directly transferrable because of regional particularities; they can however be considered as an aid in drafting proposals for solutions to cross-border insolvencies in Southeast Asia. Nevertheless, the Asian financial crisis of 1997 has become the pivotal incentive for reforming and harmonizing the insolvency laws in Asia.

How the financial crisis affected the multinational companies, we will see on the case of Asia Pulp & Paper insolvency which is occurred around the turn of the millennium.

[45] Khor, *Khor 1998*, p. 17

[46] S. Sato, 'Asian Financial Crisis', *Japan and the World Economy* 10 (1998), 371–5, at 375; Ibrahim, 'Ibrahim 2009', 80 et seq.; Khor, *Khor 1998*, p. 21

Section II – Case Study: Asia Pulp & Paper Cross-Border Insolvency in 2001

In this section, we will look at the saga of the Asia Pulp & Paper insolvency that occurred in parallel in several states in Southeast Asia where the debtor had his subsidiaries. This section aims to illustrate the existence of urgent cross-border insolvency problems, their complexity and extension caused by an absence of adequate transnational insolvency regulation systems.

1. The Background and Reasons

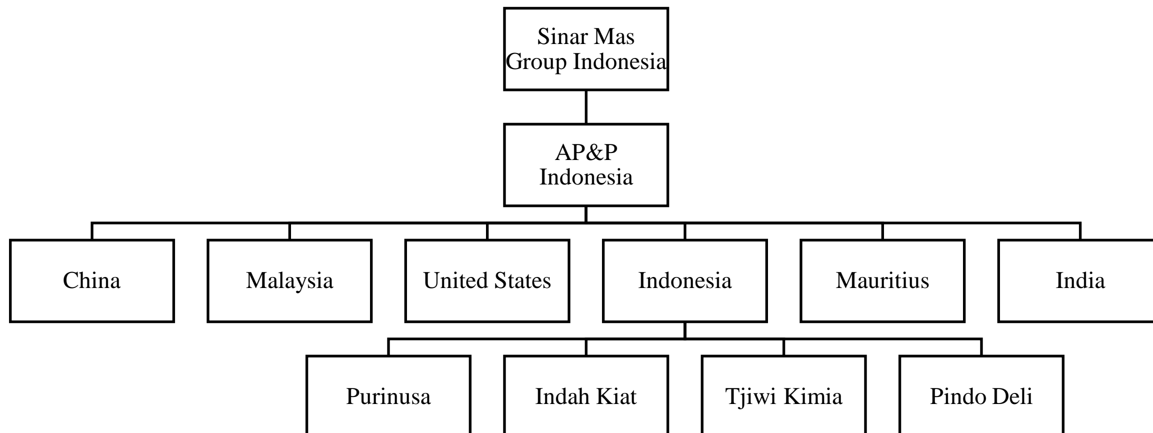
AP&P is a public company[47] with its headquarters in Singapore known not only as the largest producer of paper, making up around 150 companies, but also as the biggest debt defaulter in Asia, as well as the largest debtor in the emerging markets. Its subsidiaries with major assets are situated in Indonesia, China and India; it also has smaller subsidiaries in other jurisdictions. AP&P claimed to be one of the lowest cost producers worldwide. The company generates its income by means of management fees it charges its operating subsidiaries. [48]

The group does not have direct interest as a shareholder in its operating subsidiaries; rather, the interest of the company in these subsidiaries is through its equities in intermediate holding companies. AP&P had accumulated enormous debts originating from the Asian financial crisis of 1997.

[47] Asian Development Bank, *Promoting Regional Cooperation in the Development of Insolvency Law Reforms – RETA 5975: Draft Country Report for Singapore Conference – Indonesia, Korea, Philippines and Thailand* (Manila: Asian Development Bank, 2008), p. 20; for more background for business history of Asia Pulp and Paper, *see generally*, R. Fallon, 'Asian Corporate Finance and Business Strategy: Asia Pulp & Paper Company Ltd.', *Chazen Web Journal of International Business* (2003)

[48] R. Johnstone, *Case Study – Asia Pulp & Paper Group* (2008), p. 12; Asian Development Bank (ed.), *The Lack of Adequate Insolvency Frameworks for Major Corporate Collapses in Asia: Asian Development Bank Presentation*, The Forum on Asian Insolvency Reform: Session III – New Delhi, India (2004), p. 6; AP&P itself and its subsidiaries is a part of the Sinar Mas Group – one of the largest conglomerates in Indonesia.

AP&P Dependence Structure



2. The Facts of the Case

On 12th March 2001, AP&P announced a debt repayment standstill via a press release issued by its Chief Financial Officer. To continue day-to-day operations, AP&P ceased all payments of interest and principally on all holding company debts as well as on debts issued by the company's subsidiaries and sub-subsidiaries. On the advice of AP&P's financial advisors, Credit Suisse First Boston, it intended to give priority to trading partners and to suppliers. Disregarding its promise to creditors to draft the debt restructuring plan within a month after the press release, AP&P delayed its formulation.[49]

The creditors of the AP&P group could not foresee the outcome of the debtor's collapse. Thus, they decided to apply for the appointment of a judicial manager in front of the High Court of Singapore.

3. The Petition of Deutsche Bank & BNP Paribas

The press release showed that AP&P would draw up a restructuring scheme within one month of the statement; however, AP&P did not meet that deadline. The petitioners complained that AP&P did not hold to its promise. The company debt restructuring plan dated 1st February 2002

[49] Johnstone, *Johnstone 2008*, 12 et seq.

was rejected. Creditors' counter proposal from 2nd March 2002 was rejected by AP&P. There was no agreement between AP&P and its creditors as to the company's restructuring. This claim was contested by a member of AP&P's restructuring committee. AP&P appointed diverse advisors with roles regarding the debt restructuring plan, implementation of the disposal of assets under said plan, revision of the group's financial position, international issues, legal issues in Singaporean and Indonesian law, and Chinese financial and legal matters.[50]

During the course of the judgement, the petitioners alleged that AP&P had failed to disclose a swap contract with Deutsche Bank worth 220 million US dollars in their 1997-2000 audited accounts. It had also failed to satisfactorily explain why Indah Kiat (an affiliate in Indonesia) did not disclose the existence of 199.3 million US dollars with BII Cook Islands, a bank owned by the Widjaja family, in its audited accounts for the year 2000. Furthermore, AP&P did not follow a request to explain the qualification put on Indah Kiat's audited accounts for the year 2000 by Arthur Andersen on some essential transactions as well as to explain why Arthur Andersen resigned as a company auditor in November 2001.[51] In addition, the petitioners claimed losses resulting from the swap contract with Deutsche Bank and from funds from the group accounts that had been removed or unlawfully used for questionable transactions involving the Widjaja family. No explanation was given concerning the resignation of Deloitte&Touche as auditor of the company in 2001.

The petitioners further alleged that KPMG had been appointed by creditors to carry out an independent audit of the debtor; however, the progress of the audit had been impeded by the debtor's reluctance to grant KPMG accountants access to diverse sources of information relating to the debtor's business in China, analysis of intergroup debts, internal transactions, and account information. As a result, the KMPG auditors did not meet the deadline of July 2001 or the subsequent deadlines for January and April 2002. However, without the auditors' report, the petitioners would still be able to weigh up the feasibility of debt restructuring proposals submitted by the debtor. The debtor's representative denied the petitioners' claim, arguing that the petitioners and KMPG competed for the fee which KPMG intended to charge the debtor. Furthermore, KMPG had to handle a range of queries from the creditors, causing delays. In

[50] *Deutsche Bank AG & Another v Asia Pulp & Paper Company Ltd [2002] SGHC 257;* (OP No 2 of 2002), Recital 12

[51] ibid., Recital 18

addition, the petitioners alleged that payments were made in rupiah-denominated bonds during a long period of several months after the debt standstill. Those payments began after the opposition of international creditors. AP&P paid interest to Chinese creditors in March 2001. There was some speculation that the Widjaja family was buying their own rupiah-denominated bonds from the third parties to withdraw cash from AP&P. Likewise, it was intended to suborn the creditors in their decision on restructuring plans.[52]

The petitioners sent their petition for the appointment of a judicial manager in the conviction that there was a reasonable possibility of rehabilitation of both the debtor and the AP&P group, of preserving its business as a going concern, by placing the company under judicial management instead of winding it up.

4. Judgements[53]

The High Court of Singapore did not approve the judicial manager to AP&P; the appointment of judicial managers is governed by the Singaporean Company Act. Section 227 A of the Act provides that an application for the judicial manager may be filed to the Court, (a) where a company is or will be unable to pay debts; and (b) where there is a reasonable probability of rehabilitating the company or of preserving all or part of its business as a going concern or that otherwise the interests of creditors would be better served than by resorting to a winding up, under the conditions of Section 227 B according to which such an application can be made by way of petition. The Court will only make such an order if it is satisfied that the company will be unable to pay its debts, as mentioned in subsection (a); and, if it considers that the order would be likely to achieve one or more of the following aims: first, the survival of the company, or the whole or part of its undertaking as a going concern; second, the approval under Section 210 of a compromise or arrangement between the company and any such persons as are mentioned in that section; and, third, a more advantageous realization of the company's assets.

The Judge dismissed the petition to appoint a judicial manager because at that stage it would have merely resulted in more irreversible costs which would be borne by AP&P and its

[52] ibid., Recital 20-23

[53] Two AP&P related judgements will be considered. The both relate the case where the creditors insolvent AP&P Deutsche Bank and BNP Paribas applied for the appointment of a judicial manager.

subsidiaries. What's more, the payment of many committees[54] was to his mind uneconomical and those funds could be spent refunding creditors. These arguments notwithstanding, the bigger obstacles were complications relating to the authority of a judicial manager appointed by the Singaporean Court and legal impediments which would likely arise in case-related jurisdictions such as China and Indonesia where the debtor had its subsidiaries.

The petition of creditors for the appointment of a judicial manager was contested by the debtor's representative because the judicial manager would not smooth the progress of finding a suitable solution between AP&P and its creditors. Moreover, it would not promote a better realization of company assets. The appointment of a judicial manager would further lead its subsidiaries to delay the payment of management fees as well as ring-fencing their own fees and force them to engage in further restructuring with their creditors. Finally, once appointed, the judicial manager would not be able to gain control of the company's assets as they are abroad.

Moreover, no agreement concerning the rehabilitation plan was achieved between AP&P and its creditors. The Widjaja family proposed a consensual restructuring plan which would allow the up streaming of funds from the company's operating subsidiary to the benefit of AP&P's creditors, although the creditors' interest was not at the level of operating subsidiaries. Per debtor's representative, the appointment of the judicial manager would be meaningless. AP&P's main asset was its equity in the operating subsidiaries which were held by Purinusa. Purinusa's main creditor was IBRA, which was separately owned by the operating subsidiaries. If the judicial manager endeavoured to control the Indonesian operating subsidiaries of AP&P, IBRA would likely undertake contraction as a result. The judicial manager would act across legal and pragmatic matters while taking control of the management of the operating subsidiaries in Indonesia and China. This could worsen the existing delay and produce more costs. Furthermore, the operation of the mills owned and run by the operating subsidiaries would need specialist knowledge and a degree of sensitivity to local conditions and circumstances. The judicial manager would not have such an ability.

Another problem that would arise is that the authority of court-appointed judicial managers in Singapore would unlikely be recognized in Indonesia and China. There is a large uncertainty as to whether the court-appointed judicial manager would be able to enforce any rights in the end

[54] ibid., Recitals 56-64

and, if so, which rights. Indonesian law would also not recognize the authority of the judicial manager to exercise control over the AP&P subsidiaries in Indonesia. Hence, a separate application for the appointment of a judicial manager for each jurisdiction would be necessary. As for the restructuring process itself, the debtor's representative contested the petitioners' claim based on complications with the restructuring plan. Singapore Court of Appeal confirmed the first decision and the case was dismissed.[55]

This case study shows the whole complexity of cross-border insolvencies. The interests of various stakeholders are often disregarded by the different national insolvency regimes because they are not handled in same way by different legal systems. A clear identification and common understanding of goals and interests of those groups in a cross-border insolvency proceeding could be a reasonable step to a legally secure reconciliation of interests.

Section III – Identification of the Interest Groups and the Scope of Research

It is not feasible to set up a standard regulation on cross-border insolvency without bearing in mind the interests and needs of diverse players in the cross-border insolvency process as well as the national insolvency regimes.

1. Debtors' Rights

If the debtor is a legal entity, interests of capital and managers fall apart. Managers are willing to pursue their own monetary interests and keep company's assets for themselves. This fact notwithstanding, the debtor merits a certain level of protection and help throughout the proceedings. The debtor might have legitimate interest in continuing his business because he knows his transactions better than somebody else.

2. Creditors' Rights

In their reasoning, the competent judges would limit the interests of creditors, which should be taken into consideration in regulations relating to cross-border collapses. It is self-evident that the first and most pressing interest of each creditor is to get back his monetary funds and benefits in kind granted to the debtor.

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[55] *Deutsche Bank AG and Another v Asia Pulp & Paper Co Ltd [2003] SGCA 19*, 2003 (Court of Appeal of Singapore, 29 April 2003); *see also* C. H. Tan, 'Company Law: Judicial Management', *SAL Annual Review* 4 (2003), 102–17, at 111

AP&P as a debtor intentionally tried to delay the restructuring process. This fact increasingly minimizes the creditors' chances of success. However, it is precisely in the interest of a creditor to reduce the duration of going ahead as much as possible. As practice shows, those two main needs are rarely, if at all, satisfied.

In addition, the judge in the AP&P case ruled that the company had hindered the review of its financial situation and did not cooperate with professional insolvency advisors. Therefore, the information disclosure to the debtors should be a key issue in cross-border insolvency cases. Unequal treatment of creditors represents a serious hindrance. AP&P gave preference to some creditors despite the debt standstill circumstances. It follows that the equal treatment of all creditors is a crucial issue for dealing with such cases. AP&P also did not set up a proper mechanism for group cash flow controlling. This contradicts the concern of creditors as to the future distribution of the company's assets.

3. Social Interests

Another group is the employee group. During the insolvency proceedings, they share the interests of the creditors. In addition, the employees fear unemployment after the winding up of the company or termination of their employment contract because of eventual restructuring. On the one hand, the employee needs to be as protected as the creditors; on the other hand, it would not be right to put a ceiling on the role of workers, such that this is to the detriment of creditors in the insolvency case. This is because the employee is very often much more integrated in the debtor company than creditors are. Their interest is to take part in the making of business decisions as well as to exert restrictions on those business judgements. Many insolvency law professionals support the opinion that insolvency law should protect the rights and obligations of employees which existed while the debtor was solvent, such as the continuation of employees' contractual rights and various other rights concerning participation and consultation of the debtor's management up to the insolvency stage. Many jurisdictions recognise the importance of employee participation in proceedings as a separate interest group. Thus, employees' claims are often settled before those of the secured creditors. Moreover, several jurisdictions provide some public funds to enable overdue payments and supplementary advantages to which the employees are eligible. The reason for this is that the employees get into a position that is worse even than that of unsecured creditors. Hence, it is customary for the employer-debtor to undertake some pension arrangements.

Another major characteristic of the employee group is their role in controlling management. The workers have an official right to take part in the decision-making processes and to influence them. Jay Lawrence Westbrook underlines that, even without a lawfully settled right, it must be possible for an employee to influence the debtor due to their economic power, which could be meaningful in the drafting of the rescue plan of major collapsed companies. Furthermore, collective bargaining agreements represent an important aspect of their role in the debtor's company management. To sum up, there are two main concerns of employees in the insolvency of their employer. First, they require protection of their contractual rights and pensions. Second, it is important to have the possibility of affecting the management of the debtor.[56]

As we can see, although various legislators have come up with sets of rules regarding employee protection in case of insolvency, many questions remain open in relation to cross-border collapses. This matter merits serious contemplation in dealing with cross-border bankruptcy issues as it remains as urgent as the protections afforded to other interest groups like creditors and debtors.

Insolvency also raises the question of the functioning of the markets, especially in the cross-border context. However, it is not clear to what extent the market and its participants should be protected by simple cross-border insolvency regulation. Nor whether the reckless actions of managers and wrongful trading should be punished within the cross-border insolvency process or if they merit separate treatment. Nevertheless, there is a spectrum of interest directly linked to cross-border insolvency and to a concrete debtor whose business partner, even if they are not creditors, act in the market in question.

4. Transaction Costs

Creditors face uncertainty regarding their ability to enforce their rights, further costs of enforcement, lower levels of professional, judicial competence, inefficiency in the justice

[56] Westbrook J. L., Booth C. D., Paulus C. G. and Rajak H. (eds.), *A Global View of Business Insolvency Systems*, Law, Justice and Developments Series (Washington, D.C.: The World Bank, 2010), 183 et seqq. The pension funds include money that the employees contributed themselves. Those funds the employer may invest in his corporation or confer them to a trustee. However, major corporate collapses might cause the losses of those pension funds. A showcase jurisdiction is Germany. In France saving of workplace is the crucial task of insolvency proceeding. In general, it is more likely that the employees seek to support the rescue of the debtor´s company whereas the creditors are not always eager to do so. Extensive overview of employee right in insolvency, *see* J. P. Sarra, *Employee and Pension Claims During Company Insolvency: A Comparative Study of 62 Jurisdictions* (Toronto: Carswell, 2008)

administration, and in some cases corruption. These and other transaction costs hamper cross-border investments and trade in general. At the same time, cross-border insolvency plays an important role in making certain the efficacy of capital markets. The transaction costs mentioned could be minimized by means of cooperation between national courts in transnational bankruptcy cases. The cooperation between judges in cross-border insolvencies could be ensured fulfilled by pursuing proper guideline provisions for judicial aid in civil proceedings, in insolvency proceedings, in the preservation of assets and guarantee of highly qualitative information exchange, but also to aid in freezing and figuring out claims, preserving and realising assets, and obtaining evidence from residents. Lastly, cooperation to aid the detection of falsified and inevitable transactions can also be considered.

5. Multinational Enterprises and Groups of Companies

Although multinational enterprises structured as a group have gained weight on the international stage, legal obstacles remain unsolved with regard to their complexity and dynamics. The definition for group of companies is 'a set of corporations with common ownership or control' as well as a group of companies associated by a common or interlocking shareholding.[57] The determinants reviewed do not satisfy modern economic needs. They may well be applicable for small companies with some subsidiaries abroad; however, essential improvements are necessary to govern a big cross-border collapse such as we have seen in the case of AP&P. Multinational enterprises need a time-efficient and economical proceeding with a fair balance of interests. This interest balance is the hardest puzzle to solve.

In this Chapter II it has been shown the overview of cross-border insolvency problems in Asia. We looked at the main causes of cross-border insolvency cases which are globalization and financial crisis. The AP&P case study has underlined the challenges raised by interest conflicts in various stakeholders' groups to cross-border insolvency proceedings. The national Asian

[57] S. Gopalan and M. Guihot, 'Cross-Border Insolvency Law and Multinational Enterprise Groups – Judicial Innovation as an International Solution', *The George Washington International Law Review* 48 (2016), 549–616, at 564 et seq.; for groups of companies within UNCITRAL, *see* J. Sarra, 'Maidum's Challenge, Legal and Governance Issues in Dealing with Cross-Border Business Enterprise Group Insolvencies', *International Insolvency Review* 17 (2008), 73–122, at 75 et seqq.; *see also* United Nations Commission on International Trade Law (ed.), *UNCITRAL Legislative Guide on Insolvency Law.: Part Three: Treatment of Enterprise Groups in Insolvency* (New York: United Nations Publication, 2012) proposal for groups of companies by INSOL Europe, *see* I. Mevorach, 'INSOL Europe's Proposals on Groups of Companies (in Cross-Border Insolvency): A Critical Appraisal', *International Insolvency Review* 21 (2012), 183–97; for problems of corporate groups, *see also* R. K. Rasmussen, 'The Problem of Corporate Groups: A Comment on Professor Ziegel', *Fordham Journal of Corporate and Financial Law* 7 (2002), 395–405

insolvency regimes are unable to set them up. Consequently, this case study was followed by the identification of the interest groups which are debtors and creditors rights, social interests and transaction costs.

To this end, it is necessary to determine the intersection of common interests as well as signs of potential conflict. This need is clear both from a pragmatic and theoretical perspective; wide-ranging proposals have been brought forward, ranging from national rules on cross-border insolvency and regional cooperation all the way up to global projects. The problem of company groups has also been addressed by international institutional bodies such as UNCITRAL and the European Commission. Prior to proceed to the global and international projects, we will overview some basic theories on cross-border insolvencies in the next Chapter III.

Chapter III – Substantial Theories and International Projects, and Models on Cross-Border Insolvency Law

International insolvency cases can appear in various forms: the debtor has his assets in more than one country, the debtor only has his assets in one country, but the creditors are foreign, and the debtor is in a foreign country while the creditors are domestic.[58] Therefore, cross-border insolvency is a matter which on the one hand affects numerous countries and on the other hand touches on various sectors such as labour, accounting, banking and finance, etc. Once the economic facts are available, it is the task of legal professionals to embed them into a proper legal framework to unearth a solution to this globalization phenomenon. As already mentioned in the introduction, legal theory and practice has developed several relevant legal insolvency projects. The following three sections will give an overview of these projects.

Section I – Basic Concepts and Theories Proven in Multistate Insolvencies

In substance, this issue is nothing new; nonetheless, it remains a highly debated topic in theory and practice. Multiple legislators continue to work on appropriate rules, even if, to some extent, the matter of cross-border insolvency is interconnected with international private law. Roughly speaking, the cross-border insolvency process consists of two elements. The first is the identification of the competent jurisdiction and applicable material law in state A. The second is the process of enforcement preceded by eventual recognition in state B. However, in most cases there is a major gap between law and business concerning the recognition and enforcement of foreign insolvency judgements. The major controversy in dealing with cross-border insolvencies appears between two traditional theories of territorialism and universalism – both extremes of the spectrum of positions. Further theories include cooperative territorialism, modified universalism, and contractualism.[59]

[58] J. Altman, 'A Test Case in International Bankruptcy Protocols: The Lehman Brothers Insolvency', *San Diego International Law Journal* 12 (2011), 463–95, at 464; for different models of international insolvency law, *see* D. T. Trautman, L. J. Westbrook and E. Gaillard, 'Four Models for International Bankruptcy', *The American Journal of Comparative Law* 41 (1994), 573–625

[59] I. Mevorach, *Insolvency within Multinational Enterprise Groups* (Oxford: Oxford University Press, 2009), p. 65; *see also* I. Mevorach, 'Beyond the Search for Certainty: Addressing the Cross-Border Resolution Gap', *Brooklyn Journal of Corporate, Financial & Commercial Law* 10 (2015), 183–223

1. Territorialism

Territorialism[60] is the first extreme approach to cross-border insolvency – also called a 'grab rule' – which decides the applicable insolvency law according to the criterion of its geographical validity belonging to a concrete jurisdiction.[61] The law of the local forum applies to all parts of insolvency proceedings[62] within the territory of the applying state. It does not allow the debtors' assets situated outside of the respective territory to be affected and would seize local debtor's assets and distribute them among the local creditors disregarding foreign creditors, building on the concept of sovereignty developed by French philosopher Jean Bodin[63] in the 16th century. However, its main feature is the idea of 'vested rights'. The territoriality principle narrows down both inbound and outbound insolvency cases.[64] It does not consider debtors' assets abroad, nor does it recognize foreign judgements on insolvency.[65] In short, each jurisdiction deals only with a part of the global business located in its sovereign territory according to the so-called 'state by state' approach, instead of tackling the debtor's assets situated outside of its own jurisdiction. The act of expropriation does not have extraterritorial effect. The remaining part of the connected business is not considered, regardless of whether it is a subsidiary or a member of the group. Cases where a company acts globally and owns entities in multiple jurisdictions are likely to result in more than one insolvency proceeding in more than one country. Often it results in multiple parallel proceedings against the same debtor

[60] Also, it is called the territoriality principle. *See generally* L. M. LoPucki, 'The Case for Cooperative Territoriality in International Bankruptcy: A Post-Universalist Approach', *Michigan Law Review* 98 (2000), 2216–51, at 218; Mevorach, *Mevorach 2009*, 71 et seqq.

[61] Westbrook, Booth, Paulus and Rajak (eds.), *Westbrook et al. 2010*, p. 229;J. L. Westbrook, 'Multinational Enterprises in General Default: Chapter 15, the ALI Principles, and the EU Insolvency Regulation', *American Bankruptcy Law Journal* 76 (2002), 1–42, at 8

[62] R. Mason, 'Cross-Border Insolvency Law: Where Private International Law and Insolvency Law Meet' in P. J. Omar (ed.), *International Insolvency Law: Themes and Perspectives*, Markets and the Law (Aldershot, England, Burlington, USA: Ashgate, 2008), pp. 27–60, at p. 42

[63] For further details, *see* Dunning, Wm. A., 'Jean Bodin on Sovereignty', *Political Science Quarterly* 11 (1896), 82–104, at 92

[64] Westbrook, Booth, Paulus and Rajak (eds.), *Westbrook et al. 2010*, p. 230; ibid., p. 229; Westbrook, 'Westbrook 2002', 5

[65] P. von Wilmowsky, 'Choice of Law in International Insolvencies: A Proposal for Reform' in J. Basedow and T. Kono (eds.), *Legal Aspects of Globalization: Conflict of Laws, Internet, Capital Markets, and Insolvency in a Global Economy* (The Hague: Kluwer Law International, 2000), pp. 197–212, at p. 199

because each judge applies lex loci, and the foreign creditors continue without enforceable rights. This problem raises the issue of forum shopping.[66]

2. Universalism

The opposite approach to territorialism is the universal one or universalism. It speaks of 'the law governing the case' and does not consider the geographical limitations caused by national state borders. Instead, it argues the global applicability of the law governing the case.[67] There are two core elements of the universalist approach: a single law and a single forum. Consequently, it combines the collection and administration of and proceedings regarding the debtor's domestic and foreign assets in the long term.[68] Professor Westbrook suggests two methods for implementing the universalist approach: the first would be to establish a single international insolvency law and court system; the second one would be to stipulate a standard set of rules for choice of law and jurisdiction. A unified insolvency system has, of course, its pros and cons. In universalism's favour is the fact that insolvency administration through a single court is likely to ensure value maximization due to cost reduction and an improvement in the reorganization process, to effect unified methods of distribution owing to a single set of priorities, and to introduce transfer avoidance rules. The main objection to the universalists' solution is the supersession of national policies of individual states. Hence, antagonists of universalism argue that even in the long term, the national laws will prevail in international insolvency cases if they are still applicable; in addition, universalism is realistically only applicable to big multinational companies and groups of companies, but not to middle-sized enterprises and consumers.[69] Needless to say, universalism is only feasible if all the involved states adhere to this approach.[70]

[66] Mason, 'Mason 2008', 43; Mevorach, *Mevorach 2009*, 71 et seq.; for universalism and territorialism controversy, *see further* L. J. Westbrook, 'Multinational Financial Distress: The Last Hurrah of Territorialism', *Texas International Law Journal* 41 (2006), 321–37

[67] Westbrook, Booth, Paulus and Rajak (eds.), *Westbrook et al. 2010*, p. 230; it is also called 'unity of bankruptcy', Mevorach, *Mevorach 2009*, p. 65

[68] L. J. Westbrook, 'A Global Solution to Multinational Default', *Michigan Law Review* 98 (2000), 2276–328, at 2292; G. McCormack, 'Universalism in Insolvency Proceedings and the Common Law', *Oxford Journal of Legal Studies* 32 (2012), 325–47, at 327

[69] Westbrook, 'Westbrook 2000', 2292 et seqq. In his article Professor Westbrook applies the word 'bankruptcy' because he refers to American law. Professor Rasmussen suggests a single insolvency law system, however, not a single jurisdictional environment in this issue.

[70] McCormack, 'McCormack 2012', 328

3. Modified Universalism

As an interim solution between territorialism and universalism, some authors argue for so-called modified territorialism. This approach seems to be closer to reality than universalism in its original form, which is a long way out[71] in a perfect legal environment. This approach combines the advantages of universalism in multi-jurisdictional and multi-law environments. It requires courts to cooperate and to actively take part in international insolvency management.[72] According to this interim theory, the debtor's assets will be piled up and distributed according to a global framework with respect to differences between the national laws on cross-border insolvency. At the centre of this approach is an endeavour to identify a single possible place for the opening of insolvency proceedings against the debtor. However, this approach does not presume any kind of automatic recognition or relief for foreign administrators or representatives generally. Difficulties will arise around secondary proceedings because of the problem of defining the home country as a result of a lack of objectively ascertainable criteria for doing so.[73]

4. Cooperative Territorialism

Cooperative territorialism is a model tracing back to the territorialist approach. Professor Mevorach calls it 'legal realism'. The particularity of this approach is the fact that each country would manage the debtor's assets within its own territory. However, it assumes cooperation with other jurisdictions by means of bilateral and multilateral agreements, because it may require states to change their national laws, though does guarantee a certain degree of flexibility. Despite this, it only facilitates influence on the progress of cross-border insolvency cases to a minor degree and has only limited significance in practical use.[74]

5. Contractualism

The contractualism approach deals with so-called 'bargained bankruptcy' – the unalterably applicable insolvency law will be set ex-ante by a negotiated international contract between all the parties to insolvency proceedings. The debtor and creditors conclude an agreement and

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[71] Westbrook, 'Westbrook 2002', 8; Mevorach, *Mevorach 2009*, p. 69

[72] Westbrook, 'Westbrook 2000', 2302

[73] Mevorach, *Mevorach 2009*, 69 et seqq.; for modified universalism, *see also* L. M. LoPucki, 'Cooperation in International Bankruptcy: A Post-Universalist Approach', *Cornell Law Review* 84 (1999), 696–762, at 725 et seqq.

[74] Mevorach, *Mevorach 2009*, 69 et seqq.; LoPucki, 'LoPucki 2000', 2218

select a proper insolvency framework. This inevitably leads to the result that the debtor will be encouraged to choose the law mostly appropriate to him, but at the same time it would engender concurrence between national insolvency laws and thereby improve the national reorganization systems.[75] Professor Westbrook has expressed his concerns as to the contractual approach, in particular regarding the control of assets and disclosure.[76] The contractual approach does not take into consideration that the insolvency is a complex process that includes many parties,[77] e.g. employees or creditors who have not participated in the contract negotiations and did not give their approval to the new insolvency law applicable.

As already mentioned above, alongside the cross-border insolvency theories, the nation states and international organizations launched various projects in cooperation with legal researchers and practitioners. Those projects relate to global and regional approaches to cross-border insolvency cases. Current international efforts include the UNCITRAL Model Law on Cross-Border Insolvency which will be reviewed in the next section. Before addressing the UNICTRAL contribution, the Model International Insolvency Cooperation Act and Cross-Border Insolvency Concordat will be considered.

Section II – Previous International Initiatives

1. Model International Insolvency Cooperation Act (MIICA)

The Model International Insolvency Cooperation Act (MIICA) appeared among the work of the International Bar Association in 1989. It is one of the first projects on cross-border insolvency cases. It includes a proposal for domestic adoption: the national court should aid proceedings taking place in foreign jurisdictions. Although this project was not successful in being adopted by national states, it proved its workability as a model law system.[78]

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[75] Mevorach, *Mevorach 2009*, 76 et seq.; for further discussion of contractual bankruptcy clauses, *see* R. K. Rasmussen, ‘Resolving Transnational Insolvencies through Private Ordering’, *Michigan Law Review* 98 (2000), 2252–75

[76] Westbrook, ‘Westbrook 2000’, 2304

[77] Mevorach, *Mevorach 2009*, p. 77; for choice of insolvency law in Europe, *see* H. Eidenmüller, ‘Free Choice in International Company Insolvency Law in Europe’, *European Business Organization Law Review (EBOR)* 6 (2005), 423–47

[78] United Nations Commission on International Trade Law (ed.), *United Nations Commission on International Trade Law 2010*, p. 11; *see also* D. M. Glosband and C. T. Katucki, ‘Current Developments in International Insolvency Law and Practice’, *The Business Lawyer* 45 (1990), 2273–80, at 2279

2. Cross-Border Insolvency Concordat

On 31st May 1996, the Committee J of the International Bar Association (IBA) approved the Cross-Border Insolvency Concordat. This was one of the first initiatives regarding the harmonization of international insolvency cases. The Cross-Border Insolvency Concordat is a set of ten principles combining the universality principle with aspects of soft law, based on principles of international law.[79] The project was not intended to be used as a treaty or other governmental document; however, the insolvency courts were welcome to apply those principles in international insolvency cases.

Principle 1[80] addresses the universality principle and suggests a single court for coordinating multiple insolvency proceedings because of the centre of main interests of the debtor company, enabling better control of assets and ensuring fair treatment of creditors.[81] This court should handle several proceedings for the same debtor. This is, however, not always possible.

Principle 2[82] favours equal treatment of creditors of the insolvency proceedings. The main forum should handle the coordination, administration, collection, and distribution of all the debtors' assets among the creditors.[83]

Principle 3[84] deals with plurality of courts. In this case, the courts are requested to ensure transparent communication and seamless coordination of the proceedings and to respect other

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[79] United Nations Commission on International Trade Law (ed.), *United Nations Commission on International Trade Law 2010*, 11 et seq.

[80] Principle 1: 'If an entity or individual with cross-border connections is the subject of an insolvency proceeding, a single administrative forum should have primary responsibility for co-ordinating all insolvency proceedings relating to such entity or individual.'

[81] *Cross-Border Insolvency Concordat* (1996)

[82] Principle 2: 'Where there is one main forum: a) Administration and collection of assets should be coordinated by the main forum. b) After payment of secured claims and privileged claims, as determined by local law, assets in any forum other than in the main forum shall be turned over to the main forum for distribution. c) Common claims are filed in and distributions are made by the main forum. Common creditors not in the main forum must file claims in the main forum but (to the extent allowable under the procedural rules of the main forum) may file by mail, in their local language and with no formalities other than required under their local insolvency law. d) The main forum may not discriminate against non-local creditors. e) Filing a claim in the main forum does not subject a creditor to jurisdiction for any purpose, except for claims administration subject to the limitations of principle 8 and except for any offset (under voiding rules or otherwise) up to the amount of the creditor's claim). f) A discharge granted by the main forum should be recognised in any forum.'

[83] ibid.

[84] Principle 3: 'a) If there is more than one forum, the official representatives appointed by each forum shall receive notice of, and have the right to appear in, all proceedings in any fora. If required in a particular forum, an exequatur

jurisdictions.[85] Information relating to insolvency proceedings should be made available to the stakeholders involved by one single court.

Principle 4[86] addresses the choice of law case if there is more than one competent court or if the assets are found in the jurisdictions of several competent courts. The validity of the claim should not be affected by the choice of the competent jurisdiction. However, the creditor should only be eligible to claim in a single jurisdiction.[87] The distribution of the common claims should be on a pro-rata basis.

Principle 5[88] provides that in case of limited proceedings, after the distribution of assets is made, the surplus should be transferred to the next competent jurisdiction. The court of the limited

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or similar proceeding may be utilised to implement recognition of the official representative. An official representative shall be subject to jurisdiction in all fora for any matter related to the insolvency proceedings but appearing in a forum shall not subject him/her to jurisdiction for any other purpose in the forum state. b) To the extent permitted by the procedural rules of a forum, ex parte and interim orders shall permit creditors of another jurisdiction and official representatives appointed by another jurisdiction the right, for a reasonable period, to request the court to reconsider the issues covered by such orders. c) All creditors should have the right to appear in any forum to the same extent as creditors of the forum state, regardless of whether they have filed claims in that forum, without subjecting themselves to jurisdiction in that forum (including with respect to recovery against a creditor under voiding rules or otherwise in excess of a creditor's claim). d) Information publicly available in any forum shall be publicly available in all fora. To the extent permitted, non-public information available to an official representative shall be shared with other official representatives.’

[85] ibid.

[86] Principle 4: ‘Where there is more than one plenary forum and there is no main forum: a) Each forum should co-ordinate with each other, subject in appropriate cases to a governance protocol. b) Each forum should administer the assets within its jurisdiction, subject to principle 4 (F). c) A claim should be filed in one, and only one, plenary forum, at the election of the holder of the claim. If a claim is filed in more than one plenary forum, distribution must be adjusted so that recovery is not greater than if the claim were filed in only one forum.3 d) Each plenary forum should apply its own ranking rules for classification of and distribution to secured and privileged claims. e) Classification of common claims should be coordinated among plenary fora. Distributions to common claims should be pro-rata regardless of the forum from which a claim receives a distribution. f) Estate property should be allocated (after payment of secured and privileged claims) among, or distributions should be made by, plenary fora based upon a pro-rata weighing of claims filed in each forum. Proceeds of voiding rules not available in every plenary forum should be: ALT A: Allocated pro-rata among all plenary fora for distribution. ALT B: Allocated for distribution by the forum which ordered voiding. g) If the estate is subject to local regulation that involves an important public policy (such as a banking or insurance business), local assets should be used first to satisfy local creditors that are protected by that regulatory scheme (such as bank depositors and insurance policy holders) to the extent provided by that regulatory scheme.’

[87] ibid.

[88] Principle 5: ‘A limited proceeding shall, after paying secured and privileged claims, as determined by local law, transfer any surplus to the main forum or another appropriate plenary forum.’

jurisdiction should have the right to administrate and distribute the assets found in this jurisdiction to common and secured creditors.[89]

Principle 6[90] advocates that if the proceedings runs over multiple jurisdictions, the rules applicable in one forum should be susceptible for application by the insolvency administrator in another jurisdiction. These provisions can be only applied in a manner expected to be to the benefit of all creditors.[91]

Principle 7[92] points out that in multistate proceedings the insolvency administrator may apply voidance rules for all contracts and use voidance rules most apt for all creditors.[93]

Principle 8[94] addresses insolvency proceedings of groups of companies. The applicable material law should be selected upon analysis of the facts of the case. However, it must be taken into consideration that in many jurisdictions the cases will not only be heard in front of insolvency courts, but also in front of other courts.[95]

Principle 9[96] is the matter of composition. Not all national insolvency laws provide a concept of composition between debtor and creditors on economic and social grounds such as maintaining employment and paying social contributions. It is important to bear in mind that

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[89] ibid.

[90] Principle 6: 'Subject to principle 8, the Official Representatives may employ the administrative rules of any plenary forum in which an insolvency proceeding is pending, even though similar rules are not available in the forum appointing the official representative.'

[91] ibid.

[92] Principle 7: 'Subject to principle 8, the Official Representatives may exercise voiding rules of any forum.'

[93] ibid.

[94] Principle 8: 'a) Each forum should decide the value and allowability of claims filed before it uses a choice of law analysis based upon principles of international law. A creditor's rights to collateral and set-off should also be determined under principles of international law. b) Parties are not subject to a forum's substantive rules unless under applicable principles of international law such parties would be subject to the forum's substantive laws in a lawsuit on the same transaction in a non-insolvency proceeding. The substantive and voiding laws of the forum have no greater applicability than the laws of any other nation. c) Even if the parties are subject to the jurisdiction of the plenary forum, the plenary forum's voiding rules do not apply to transactions that have no significant relationship with the plenary forum.'

[95] ibid.

[96] Principle 9: 'A composition is not barred because not all plenary fora have laws which provide for a composition as opposed to a liquidation, or a composition cannot be accomplished in all plenary fora, as long as the composition can be effected in a non-discriminatory manner.'

national states have different concepts of composition which may require certain prerequisites and the fulfilment of special conditions by the parties to insolvency proceedings.[97]

Principle 10[98] underlines that the intention of insolvency law is to guarantee and to protect the integrity and workability of international commerce. This is possible by affording an appropriate weight to claims from different jurisdictions.[99] Divergent priority rules in different national states merit special attention.

Section III – Global Approach – UNCITRAL Model Law on Cross-Border Insolvency

In Section III, the focus will be the Model Law project of the United Nations Commission on International Trade Law (UNCITRAL) concerning cross-border insolvencies, in particular general and historical remarks, goals and approach, main definitions and core subjects of rulings that have been proposed by the project.

1. General Overview of the UNCITRAL Model Law on Cross-Border Insolvency

The UNCITRAL Model Law on Cross-Border Insolvency[100] is a project from the UNCITRAL Working Group V on Insolvency in cooperation with the International Insolvency Institute (INSOL), and formerly Committee J of the International Bar Association. It was developed as a universal insolvency reference source for domestic insolvency law systems in states enacting the law and was adopted in 1997 after the thirtieth session of the UNCITRAL held in Vienna from 12th to 30th May 1997. National states may also run in an independent and flexible manner with regard to the law's enactment. Thus, they shall usually have free choice as to the rules that they implement within the Model Law's suggested scope, and so it should be possible to leave some proposals out of consideration as part of the legislative process, thereby ensuring the essential features and characteristics of the Model Law are preserved. The Secretariat of UNCITRAL also prepared and issued more documents supplementary to the Model Law for background information, explanations, and guidelines.

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[97] The term of *composition* or *settlement* means a contract by which a dispute or uncertainty of the parties regarding a legal relationship is removed by way of mutual concession, *see* e.g. § 779 section 1 of the German Civil Code.

[98] Principle 10: 'To the extent permitted by the substantive law of a forum, courts of that forum will not give effect to acts of state of another jurisdiction used to invalidate otherwise valid pre-insolvency transactions.'

[99] ibid.

[100] Hereinafter referred to as 'the Model Law'

Shortly after the adoption of the Model Law, the Guide to Enactment was adopted in 1999.[101] It has been revised several times, most recently on 18th July 2013 and named: 'UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency'.[102]

On 24th June 2004, UNCITRAL adopted the 'UNCITRAL Legislative Guide on Insolvency Law' (Parts one and two).[103] The proposal for the Legislative Guide was made to the Commission in 1999. The Working Group V developed the first draft in July 2001. In March 2004, the final meeting took place.[104] Parts one and two came to be a reference for national authorities and institutional bodes and be an aid in evaluating different approaches in cross-border insolvency cases.[105]

In July 2012, parts one and two of the Legislative Guide were followed by part three, which deals with cross-border insolvency in groups.[106] Part three addresses the treatment of national and international insolvency proceedings involving one or more group members within the context of an enterprise group.[107]

Another relevant document is the 'UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation'.[108] This Practice Guide was proposed on commission in 2005 to further develop the cooperation and coordination of insolvency proceedings in order to implement Article 27, paragraph (d) of the Model Law with a focus on insolvency agreements, referred to in some states as 'protocols', 'insolvency administration contracts', 'cooperation and compromise agreements', and 'memoranda of understanding', in general 'cross-border insolvency

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[101] United Nations Commission on International Trade Law (ed.), *UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment* (New York: United Nations Publication, 1999)

[102] United Nations Commission on International Trade Law (ed.), *United Nations Commission on International Trade Law 2014*, p. 24

[103] United Nations Commission on International Trade Law (ed.), *UNCITRAL Legislative Guide on Insolvency Law*, Parts One and Two (New York: United Nations Publication, 2005); hereinafter referred to as 'Legislative Guide'.

[104] ibid., iii

[105] ibid., 1 et seq.

[106] United Nations Commission on International Trade Law (ed.), *United Nations Commission on International Trade Law 2012*

[107] ibid., 1 et seq.

[108] United Nations Commission on International Trade Law (ed.), *United Nations Commission on International Trade Law 2010*; hereinafter referred to as 'Practice Guide'.

agreement' or simplified 'insolvency agreement'.[109] The Practice Guide provides information for judges and other insolvency practitioners on cooperation and communication in cross-border insolvency cases involving multiple states.[110] It was adopted on 1st July 2009.[111]

2. Objectives of the Model Law

The objectives of the Model Law are expounded in its Preamble.[112] They consist of offering functional methods in dealing with cross-border insolvency, in particular, to promote cooperation between courts and other authorities in charge of domestic and foreign states, to create more regulatory confidence for international investment and trade, to enable an efficient and equitable stewardship of cross-border insolvencies which respects all participating interests, inter alia those of all creditors and the debtor, to protect and maximize the value of the debtor's assets, as well as to facilitate the rescue of businesses in financial trouble with respect to investment protection and employment preservation.[113]

The Model Law neither intends to unify insolvency laws[114] nor does it aim to formulate design substantive rights.[115] Rather its aim is to enhance the efficiency and coherence of cross-border insolvency issues in matters of cooperation between courts, the efficiency of proceedings and

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[109] ibid., p. 3

[110] ibid., p. 1

[111] ibid., iii

[112] Preamble of the Model Law: 'The purpose of this Law is to provide effective mechanisms for dealing with cases of cross-border insolvency so as to promote objectives of: *(a)* Cooperation between the courts and other competent authorities of this State and foreign States involved in cases of cross-border insolvency; *(b)* Greater legal certainty for trade and investment; *(c)* Fair and efficient administration of cross-border insolvencies that protects interests of all creditors and other interested persons, including the debtor; *(d)* Protection and maximization of the value of the debtor's assets; and *(e)* Facilitating of the rescue of financially troubled businesses, thereby protecting investment and preserving employment.', see for discussion in the UNCITRAL A/52/17, paras. 136-139 and in the Working Group V on Insolvency: A/CN.9/422, paras. 19-23; A/CN.9/WG.V/WP.46, pp. 4–5; A/CN.9/433, paras. 22-28; A/CN.9/WG.V/WP.48, p. 5; A/CN.9/435, para. 100; A/CN.9/436, paras. 37-38; A/CN.9/442, paras. 54-56; A/CN.9/738, paras. 14-16; A/CN.9/WG.V/WP.103, paras. 54, 51-52, 56; A/CN.9/742, para. 23; A/CN.9/WG.V/WP.112, paras. 54, 51-51 A, 56; A/CN.9/766, paras. 21-25.

[113] United Nations Commission on International Trade Law (ed.), *United Nations Commission on International Trade Law 2014*, p. 3

[114] ibid., p. 19

[115] ibid., p. 32

fairness in the treatment of local and foreign creditors as well as other parties involved and, to set up of a multistate insolvency framework.[116]

3. Scope of Application of the Model Law

The Model Law addresses two main situations that may occur in cross-border insolvency issues: first, the debtor has his assets in more than one state; second, creditors of the debtor are not from the state where the insolvency proceeding takes place.[117] Consequently, the Model Law applies in the following cases:[118] first, if a foreign court or foreign representative seeks assistance in the local state in connection with foreign legal proceedings; second, if a local court or local representative seeks assistance in a foreign state in connection with local insolvency proceedings; third, if foreign and local proceedings are taking place concurrently with regard to the same debtor, and finally, if the foreign creditors or other interested persons request the commencement of or participation in local insolvency proceedings.

Per Silverman the accomplishment of the Model Law is threefold: first, the cooperation between courts and insolvency administrators; second, foreign insolvency administrators being able to actively take part in local proceedings and, finally, local and foreign creditors receiving equal treatment.[119]

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[116] R. J. Silverman, 'Advances in Cross - Border Insolvency Cooperation: The UNCITRAL Model Law on Cross-Border Insolvency', *ILSA Journal of International & Comparative Law* 6 (2000), 265–72, at 266; A. J. Berends, 'The UNCITRAL Model Law on Cross-Border Insolvency: A Comprehensive Overview', *Tulane Journal of International and Comparative Law* 6 (1998), 309–99, at 320

[117] United Nations Commission on International Trade Law (ed.), *United Nations Commission on International Trade Law 2014*, p. 19

[118] Article 1 of the Model Law (Scope of application): '1. This law applies where: (a) Assistance is sought by a foreign court or a foreign representative in connection with a foreign proceeding; or (b) Assistance is sought in a foreign State in connection with a proceeding under [*identify laws of the enacting State relating to insolvency*]; or (c) A foreign proceeding and a proceeding under [*identify laws of the enacting State relating to insolvency*] in respect of the same debtor are taking place concurrently; or (d) Creditors or other interested persons in a foreign State have an interest in requesting the commencement of, or participating in, a proceeding under [*identify laws of the enacting State relating to insolvency*]. 2. This Law does not apply to a proceeding concerning [*designate any types of entities, such as banks or insurance companies, that are subject to a special insolvency regime in this State and that this State wishes to exclude from this Law*].', see for discussion in the UNCITRAL: A/52/17, paras. 141-150; in the Working Group V on Insolvency: A/CN.9/WG.V/WP.44, pp. 6-7. A/CN.9/422, paras. 24-33; A/CN.9/WG.V/WP.46, p. 5. A/CN.9/433, paras. 29-32; A/CN.9/WG.V/WP.48, pp. 6 and 15, A/CN.9/435, paras. 102-106 and 179; in the Guide to Enactment: A/CN.9/436, paras. 39-42, A/CN.9/442, paras. 57-66; in the Guide to Enactment and Interpretation: A/CN.9/WG.V/WP.103, paras. 57-59, A/CN.9/742, para. 24. A/CN.9/WG.V/WP.107, para. 65, A/CN.9/763, paras. 22. A/CN.9/WG.V/WP.112, paras. 58-59 and 65, A/CN.9/766, para. 26.

[119] Silverman, 'Silverman 2000', 267

The scope of application includes both liquidation and reorganization as part of collective proceedings. It can be either judicial or administrative. The assets and business affairs of the debtor fall under the judicial control and monitoring.[120] However, the Model Law allows for the exclusion of certain proceedings, e.g. in relation to banks, insurances, etc.[121]

In summary, the Model Law is limited to procedural questions in cross-border insolvency cases which should be incorporated into national insolvency laws.[122] It addresses the issues of terminology and relief. Local creditors are still entitled to initiate and continue insolvency proceedings in the enacting state.[123]

4. Approach of the Model Law

The procedurally focused[124] Model Law is designed for enacting states which have the advancement of their national insolvency systems, in particular regarding the handling of cross-border insolvency cases, as their goal. This law is also pertinent for legal systems with a high probability of cross-border insolvency cases. It does provide for some 'concessions'.[125] For this project the Working Group V applied a model approach; this means that it is not a treaty. Rather it provides functional mechanisms for coordinating cross-border insolvency and is intended to be adopted by nation states. The reason for the Model Law approach concerns the narrowness of national insolvency laws and national civil procedures. A treaty model would demand more time-consuming negotiation work and the adherence of future party states.[126] Therefore, far fewer national states would be prepared to adhere to such a treaty a priori. The Model Law also rules that in case of conflict with any treaty or other exiting obligations on behalf of the enacting

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[120] J. Clift, 'United Nations Commission on International Trade Law (UNCITRAL): The UNCITRAL Model Law on Cross-Border Insolvency – A Legislative Framework to Facilitate Coordination and Cooperation in Cross-Border Insolvency', *Tulane Journal of International and Comparative Law* 12 (2004), 307–45

[121] *See* Article 1 para. 2 of the Model Law

[122] United Nations Commission on International Trade Law (ed.), *United Nations Commission on International Trade Law 2014*, p. 25

[123] ibid., p. 25

[124] Silverman, 'Silverman 2000', 267

[125] S. C. Mohan, 'Cross-Border Insolvency Problems: Is the UNCITRAL Model Law the Answer?', *International Insolvency Review* 21 (2012), 199–223, at 203

[126] Silverman, 'Silverman 2000', 265; Clift, 'Clift 2004', 317

state, those requirements shall prevail.[127] This draws upon the principle of the supremacy of international obligation in model laws. However, such a treaty should be explicitly related to insolvency issues.[128]

From the Model Law we can extrapolate alternative cases where it is justifiably applicable by an enacting state. First, in cases where help is sought by a foreign court or a foreign administrator with respect to a foreign proceeding or in connection with the proceeding under the insolvency law of enacting state. Second, it is applicable in cases of insolvency proceedings concerning the same debtor, taking place concurrently under foreign law and the law of enacting state. Finally, it should enable creditors and other interested groups from the foreign state to request the commencement or their participation in a proceeding under the insolvency law of the enacting state.[129]

5. Key Definitions within the Model Law

Article 2 of the Model Law determines some essential definitions.[130]

Foreign proceeding means a 'collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding

[127] Article 3 of the Model Law (International obligation of this state): 'To the extent that this Law conflicts with an obligation of this State arising out of any treaty or other form of agreement to which it is a party with one or more other States, the requirements of the treaty or agreement shall prevail.', see for discussion in the UNCITRAL A/52/17, paras. 159-162; in the Working Group V on Insolvency: A/CN.9/WG.V/WP.44, p. 11; A/CN.9/422, paras. 66-67; A/CN.9/WG.V/WP.46, p. 7; A/CN.9/433, para. 42-43; A/CN.9/WG.V/WP.48, pp. 7–8; A/CN.9/435, paras. 114-117; in the Guide to Enactment: A/CN.9/436, para. 46; A/CN.9/442, paras. 76-78; in the Guide to Enactment and Interpretation: A/CN.9/WG.V/WP.107, para. 78; A/CN.9/763, para. 26; A/CN.9/WG.V/WP.112, para. 78; A/CN.9/766, para. 29.

[128] United Nations Commission on International Trade Law (ed.), *United Nations Commission on International Trade Law 2014*, p. 48

[129] ibid., p. 3

[130] Article 2 of the Model Law (Definitions); see for discussion in the UNCITAL A/52/17, paras. 152-158; in the Working Group V on Insolvency A/CN.9/419, paras. 95-117, A/CN.9/WG.V/WP.44, pp. 7-10, A/CN.9/422, paras. 34-65. A/CN.9/WG.V/WP.46, pp. 5-7. A/CN.9/433, paras. 33-41 and 147, A/CN.9/WG.V/WP.48, pp. 6-7. A/CN.9/435, paras. 108-113; in the Guide to Enactment: A/CN.9/436, paras. 43-45. A/CN.9/442, paras. 67-75; in the Guide to Enactment and Interpretation: A/CN.9/715, paras. 14-15, 17-22, 32-35 and 46, A/CN.9/738, paras. 17-19, A/CN.9/WG.V/WP.103, paras. 67-68A, 71-72, 23-23G, 69-70, 31-31C and 73-75B, A/CN.9/742, paras. 25-36 and 58. A/CN.9/WG.V/WP.107, paras. 68, 23A-24G, 31 and 73-75B, A/CN.9/763, paras. 23-25, A/CN.9/WG.V/WP.112, paras. 68-68A, 71-72, 23-23C, 24-24G, 70, 31-31C, and 73-75B. A/CN.9/766, paras. 27-28.

the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation'.[131]

Foreign main proceeding means a 'foreign proceeding taking place in the State where the debtor has the centre of its main interests'.[132]

Foreign non-main proceeding means a 'foreign proceeding, other than a foreign main proceeding, taking place in a State where the debtor has an establishment'[133] within the meaning of subparagraph (f) of this article [Article 2]'.[134]

Foreign representative means 'a person or body, including one appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding'.[135]

Foreign court means 'a judicial or other authority competent to control or supervise a foreign proceeding'.[136]

Establishment means 'any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services'.[137]

6. Miscellaneous Provisions of the Model Law

In addition to the definitions in Article 2, the Model Law gives some other important general information such as terms, interpretation rules and limits, which merit brief consideration.

First, the Model Law rules which competent court or other authority[138] should oversee the proceeding. The Guide to Enactment and Interpretation explicitly explains that both courts and

[131] Article 2 (a) of the Model Law

[132] Article 2 (b) of the Model Law; for definition of the notion 'centre of main interest', *see* infra.

[133] Article 2 (c) of the Model Law

[134] Article 2 (b) of the Model Law

[135] Article 2 (d) of the Model Law

[136] Article 2 (e) of the Model Law

[137] Article 2 (f) of the Model Law; other key terminology not officially defined in the Model Law will be given in due course.

[138] Article 4 of the Model Law (Competent court or authority): 'The functions referred to in this Law relating to recognition of foreign proceedings and cooperation with foreign courts shall be performed by [*specify the court, courts, authority or authorities competent to perform those functions in the enacting State*].' see for discussion in

other authorities can be appointed in the enacting state because this would make the Model Law's application more flexible and transparent.[139]

Second, in Article 5 the Model Law introduces the authorization of the foreign representative to act abroad.[140] Article 5 is necessary because experience revealed that the absence of this kind of legitimation caused difficulties in handling international insolvency cases and created a serious obstacle for cooperation. It is not necessary for the State in which the foreign representative shall be acting to have enacted the Model Law.[141]

Third, the Model Law considers the notion of 'public policy exception'.[142] Public policy exception is based on national laws and may differ from state to state. In most states, it is founded by basic legal principles anchored in national constitutions in the form of basic right guarantees. Consequently, those states will refuse to recognize foreign court decisions which are contrary to fundamental principles founded in national law.[143] In the case of the Model Law, most jurisdictions make a distinction between public policy exception on national and

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the UNCITRAL A/52/17, paras. 163-166; in the Working Group V on Insolvency: A/CN.9/419, para. 69; A/CN.9/WG.V/WP.44, p. 11; A/CN.9/422, para. 68-69; A/CN.9/WG.V/WP.46, p. 8; A/CN.9/433, paras. 44-45; A/CN.9/WG.V/WP.48, pp. 8–9; A/CN.9/435, paras. 118-122; in the Guide to Enactment: A/CN.9/436, para. 47-50; A/CN.9/442, paras. 79-83.

[139] ibid., p. 49

[140] Article 5 of the Model Law (*Authorization of* [insert the title of the person or body administering a reorganization of liquidation under the law of enacting state] *to act in a foreign state*): 'A *[insert the title of the person or body administering a reorganization of liquidation under the law of enacting State]* is authorized to act in a foreign State on behalf of a proceeding under *[identify laws of the enacting State relating to insolvency]*, as permitted by the applicable foreign law.'; see for discussions in the UNCITRAL: A/52/17, paras. 167-169, A/CN.9/419, paras. 36-39. A/CN.9/WG.V/WP.44, p. 12, A/CN.9/422, paras. 70-74, A/CN.9/WG.V/WP.46, p. 8, A/CN.9/433, paras. 46-49, A/CN.9/WG.V/WP.48, p. 9, A/CN.9/435, paras. 123-124; in the Guide to Enactment: A/CN.9/436, paras. 51-52. A/CN.9/442, paras. 84-85; in the Guide to Enactment and Interpretation: A/CN.9/WG.V/WP.107, para. 84, A/CN.9/763, para. 26. A/CN.9/WG.V/WP.112, para. 84, A/CN.9/766, para. 30.

[141] ibid., p. 51

[142] Article 6 of the Model Law (Public policy exception): 'Nothing in this Law prevents the court from refusing to take an action governed by this Law if the action would be manifestly contrary to the public policy of this State.'; see for discussion in the UNCITRAL: A/52/17, paras. 170-173; in the Working Group V on Insolvency: A/CN.9/419, para. 40, A/CN.9/WG.V/WP.44, p. 15. A/CN.9/422, paras. 84-85, A/CN.9/WG.V/WP.46, p. 16, A/CN.9/433, paras. 156-160, A/CN.9/WG.V/WP.48, p. 9, A/CN.9/435, paras. 125-128; in the Guide to Enactment: A/CN.9/436, para. 53, A/CN.9/442, paras. 86-89; in the Guide to Enactment and Interpretation: A/CN.9/715, paras. 26-30, A/CN.9/738, para. 32.

[143] ibid., p. 52

international levels. In case of foreign judgements, the notion of public policy exception is subject to more restricted interpretation.[144]

Fourth, the Model Law also anticipates further aid under other laws.[145] Before the introduction of the Model Law, the enacting state might already have some laws applicable in cases of insolvency. According to the Model Law, those laws shall remain applicable and the foreign representative shall obtain assistance pursuant to those laws. The Model Law is not intended to supplant those provisions.[146]

Finally, the Model Law provides for its own interpretation as part of the General Provision.[147] This provision was based on Article 3 of the UNCITRAL Model Law on Electronic Commerce. The Working Group V advances and emphasizes a harmonized and uniform interpretation of the Model Law elucidated in the CLOUT cases.[148]

7. Core Elements of the Model Law

According to the Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency, the Model Law provides non-binding solutions to the particularities of national legislations in various steps and sections of insolvency proceedings.[149]

The Model Law basically handles five main aspects of cross-border insolvency cases, namely general provisions, access, recognition, relief (coordination) and cooperation. The major areas of guidelines focus on foreign representatives, recognition and consequences thereof, rights of

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[144] ibid., p. 52

[145] Article 7 of the Model Law (Additional assistance under other laws): 'Nothing in this Law limits the power of a court or a [*insert the title of the person or body administering a reorganization or liquidation under the law of the enacting State*] to provide additional assistance to a foreign representative under other laws of this State.'; see for discussion in the UNCITRAL: A/52/17, para. 175; in the Guide to Enactment: A/CN.9/442, para. 90.

[146] ibid., p. 54

[147] Article 8 of the Model Law (Interpretation): 'In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.'; see for discussion in the UNCITRAL: A/52/17, para. 174; in the Guide to Enactment: A/CN.9/442, paras. 91-92; in the Guide to Enactment and Interpretation: A/CN.9/715, paras. 23-25, A/CN.9/WG.V/WP.103, para. 92. A/CN.9/742, paras. 37-38, A/CN.9/WG.V/WP.107, para. 91, A/CN.9/763, para. 26, A/CN.9/WG.V/WP.112, para. 91, A/CN.9/766, para. 30.

[148] ibid., p. 54

[149] ibid., p. 24

foreign creditors to initiate and to participate in insolvency proceedings in the enacting state, effective cooperation between domestic and foreign courts, aid for insolvency administrators from abroad, handling of parallel proceedings regarding the same debtor in the enacting and foreign state.[150]

a. Access of Foreign Representatives and Creditors to Courts in the Enacting States

Chapter II of the Model Law describes the access of foreign creditors and representatives to courts in this state[151] and grants foreign representatives and creditors multiple rights.[152]

Firstly, the foreign representatives are, in general, entitled to access to the courts in the enacting state.[153] This principle addresses both inbound and outbound cases.[154] The 'access' principle for foreign representatives is twofold. On the one hand, the foreign representative may directly apply for commencement of insolvency proceedings in a foreign state.[155] However, no details are provided as to which court the proceeding can be commenced in.[156] The reason for this rule is the fact that many national insolvency laws do not mention foreign representatives as an eligible person to apply for insolvency proceedings, hence, this article ensures that a foreign

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[150] ibid., pp. 26–7

[151] The notion of the 'State' sees itself as an entity enacting the Model Law and, hence, those enacting entities may use another terms for this notion, *see* ibid., p. 34.

[152] Silverman, 'Silverman 2000'; United Nations Commission on International Trade Law (ed.), *United Nations Commission on International Trade Law 2014*, p. 27

[153] Article 9 of the Model Law (Right of direct access): 'A foreign representative is entitled to apply directly to a court in this State'. See for discussion in the UNCITRAL A/52/17, paras. 176-178 and in the Working Group V on Insolvency: A/CN.9/419, paras. 77-79, 172-173; A/CN.9/422, paras. 144-151; A/CN.9/WG.V/WP.46, p.9; A/CN.9/433, paras. 50-58; A/CN.9/WG.V/WP.48, p.10; A/CN.9/435, paras. 129-133; A/CN.9/436, para. 54; A/CN.9/442, para. 93; A/CN.9/WG.V/WP.103, para. 93; A/CN.9/WG.V/WP.112, para. 93; A/CN.9/776, para. 31.

[154] United Nations Commission on International Trade Law (ed.), *United Nations Commission on International Trade Law 2014*, p. 27

[155] Article 11 of the Model Law *(Application by a foreign representative to commence a proceeding under* [identify laws of the enacting State relating to insolvency]): 'Foreign representative is entitled to apply to commence a proceeding under [*identify laws of the enacting State relating to insolvency*] if the conditions for commencing such a proceeding are otherwise met'. See for discussion in the UNCITRAL A/52/17, paras 183-187; in the Working Group V on Insolvency: A/CN.9/WG.V/WP.44, pp. 24-25; A/CN.9/422, paras. 170-177; A/CN.9/WG.V/WP.46, p. 11; A/CN.9/433, paras. 71-75; A/CN.9/WG.V/WP.48, p. 11; A/CN.9/435, paras. 137-146; in the Guide to Enactment: A/CN.9/436, para. 57; A/CN.9/442, paras. 97-99; in der Guide to Enactment and Interpretation: A/CN.9/WG.V/WP.107, para. 98; A/CN.9/763, para. 27; A/CN.9/WG.V/WP.112, para. 98; A/CN.9/766, para. 31.

[156] Berends, 'Berends 1998', 338

representative is legitimated[157] in standing[158] to apply.[159] This right is equally conferred to foreign representatives both for main and non-main proceedings.[160] If the conditions for commencing insolvency proceedings are given, the insolvency representative may initiate the insolvency proceeding in this state. This fact ensures efficient and non-bureaucratic progress. On the other hand, a foreign representative is also entitled to take part in proceedings which are already ongoing.[161] On account of the facilitated access to a court in the enacting state, the Model Law also provides for simplified proof requirements for recognition. The foreign representative may thereby be entitled to avoid ineffective and unnecessary actions[162] such as obtaining procedural standing for initiating an insolvency proceeding in the enacting state because this right will be automatically conferred to him. According to this rule, foreign representatives will have the right to intervene in a proceeding concerning an individual in the enacting state affecting the debtor or his assets.

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[157] In Civil Law countries it is also called 'procedural legitimation' or 'competence', *see* ibid., p. 340.

[158] Used term in Common Law, *see* ibid., p. 340.

[159] United Nations Commission on International Trade Law (ed.), *United Nations Commission on International Trade Law 2014*, p. 57

[160] ibid., p. 57

[161] Article 12 of the Model Law (*Participation of a foreign representative in a proceeding under* [identify laws of the enacting State relating to insolvency]): 'Upon recognition of a foreign proceeding, the foreign representative is entitled to participate in a proceeding regarding the debtor under *[identify laws of the enacting State relating to insolvency]*'. See for discussion in the UNCITRAL A/52/17, paras. 188-189; in the Working Group V on Insolvency A/CN.9/422, paras. 114-115, 147 and 149; A/CN.9/WG.V/WP.46, p. 9; A/CN.9/433, para. 58; A/CN.9/WG.V/WP.48, p. 11; A/CN.9/435, paras. 147-150; in the Guide to Enactment: A/CN.9/436, paras. 58-59; A/CN.9/442, paras. 100-102; in the Guide to Enactment and Interpretation: A/CN.9/WG.V/WP.103, para. 100; A/CN.9/WG.V/WP.107, paras. 100-102; A/CN.9/763, para. 27; A/CN.9/WG.V/WP.112, paras. 100-102; A/CN.9/766, para. 31.

[162] Clift, 'Clift 2004', 321

Secondly, the Model Law grants direct access to insolvency proceedings[163] in the enacting state not only to foreign representatives but also to foreign creditors.[164] First of all, it requires equal treatment for local creditors as part of local insolvency proceedings.[165] However, the crucial challenge for foreign creditors is to obtain equal rights in the ranking of the priority claims.[166] The Model Law ensures that foreign creditors will, at the very least, be treated – with the exception of some special cases – equally to unsecured domestic creditors.[167]

The direct access of foreign representatives and foreign creditors is qualified by the principle of limited jurisdiction.[168] The limited jurisdiction is a 'safe conduct' rule and means that the court in the enacting state will not presume to have any jurisdiction over the assets of the debtor solely based on the application of the foreign representative. The jurisdiction of the court does not cover matters unrelated to insolvency proceedings.[169]

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[163] Article 13 of the Model Law (*Access of foreign creditor to a proceeding under* [identify laws of the enacting State relating to insolvency]):'1. Subject to paragraph 2 of this article, foreign creditors have the same rights regarding the commencement of, and participation in, a proceeding under *[identify laws of the enacting State relating to insolvency]* as creditors in this State. 2. Paragraph 1 of this article does not affect the ranking of claims in a proceeding under *[identify laws of the enacting State relating to insolvency]*, except that the claims of foreign creditors shall not be ranked lower than *[identify the class of general non-preference claims, while providing that a foreign claim is to be ranked lower than the general non-preference claims if an equivalent local claim (e.g. claim for penalty or deferred-payment claim)]*'. See for discussion in the UNCITRAL A/52/17, paras 190 – 192; in the Working Group V on Insolvency: A/CN.9/WG.V/WP.44, pp. 25–26; A/CN.9/422, paras. 179-187; A/CN.9/WG.V/WP.46, pp. 11–12; A/CN.9/433, paras. 77-85.; A/CN.9/WG.V/WP.48, pp. 11–12; A/CN.9/435, paras. 151-156; in the Guide to Enactment: A/CN.9/436, paras. 60-61; A/CN.9/442, paras. 103-105.

[164] United Nations Commission on International Trade Law (ed.), *United Nations Commission on International Trade Law 2014*, p. 6

[165] Silverman, 'Silverman 2000', 267

[166] Clift, 'Clift 2004', 321

[167] United Nations Commission on International Trade Law (ed.), *United Nations Commission on International Trade Law 2014*, p. 60

[168] Article 10 of the Model Law (Limited jurisdiction): 'The sole fact that an application pursuant to this Law is made to a court in this State by a foreign representative does not subject the foreign representative or the foreign assets and affairs of the debtor to the jurisdiction of the courts of this State for any purpose other than the application'. See for discussion in the UNCITRAL A/52/17, paras. 179-182; in the Working Group V on Insolvency: A/CN.9/WG.V/WP.44, p. 24; A/CN.9/422, paras. 160-166; A/CN.9/WG.V/WP.46, pp. 10-11; A/CN.9/433, paras. 68-70; A/CN.9/WG.V/WP.48, p. 10; A/CN.9/435, paras. 134-136; in the Guide to Enactment: A/CN.9/436, paras. 55-56; A/CN.9/442, paras. 94-96; in the Guide to Enactment and Interpretation: A/CN.9/WG.V/WP.107, para. 96; A/CN.9/763, para. 27; A/CN.9/WG.V/WP.112, para. 96; A/CN.9/766, para. 31.

[169] ibid., p. 55

Finally, the Model Law proposes to notify creditors of insolvency proceedings in the enacting state.[170] The notification has two functions: first, to inform the creditors of the commencement of the insolvency proceedings and, second, to set the deadline for filing their claims. The notification rule provides, in some cases, for the individual notification of foreign creditors should they have no other opportunity to be informed per publication in the local gazette or via other means of communication not accessible abroad.[171]

b. Recognition of Foreign Proceedings

Chapter III of the Model Law deals with the recognition requirements for foreign proceedings. Primarily, it aims to minimize the lengthy timeframe of cross-border insolvency proceedings; in particular, it waives long-winded letters rogatory and other legal documents required for the recognition process according to international rules. Although the Model Law does not intend to recognize every foreign proceeding,[172] this is a precondition to collaboration under the Model Law.[173] The recognition is realized under two possible outcomes. The first is automatic recognition which arises from the recognition process itself and, second, the recognition results upon court order.[174] Recognition is granted according to the following steps: application for

[170] Article 14 of the Model Law (*Notification to foreign creditors of a proceeding under* [identify laws of the enacting State relating to insolvency]): '1. Whenever under [*identify laws of the enacting State relating to insolvency*] notification is to be given to the creditors in this State, such notification shall also be given to the known creditors that do not have addresses in this State. The court may order that appropriate steps be taken with a view to notify any creditor whose address is not yet known. 2. Such notification shall be made to the foreign creditors individually, unless the court considers that, under the circumstances, some other form of notification would be more appropriate. No letters rogatory or other, similar formality is required. 3. When a notification of commencement of a proceeding is to be given to foreign creditors, the notification shall: (a) Indicate a reasonable time period for filing claims and specify the place of their filing; (b) Indicate whether secured creditors need to file their secured claims; and (c) Contain any information required to be included in such a notification to creditors pursuant to the law of this State and the orders of the court'. See for discussion in UNCITRAL A/52/17, paras. 193 – 198; in the Working Group V on Insolvency: A/CN.9/419, paras. 84-87; A/CN.9/WG.V/WP.44, pp. 19–20; A/CN.9/422, paras. 188-191; A/CN.9/WG.V/WP.46, pp. 11–12; A/CN.9/433, paras. 86-98; A/CN.9/WG.V/WP.48, pp. 12, 16, 20; A/CN.9/435, paras. 157-164; in the Guide to Enactment: A/CN.9/436, paras. 63-65, 84; A/CN.9/442, paras. 106-111; 120-121.

[171] ibid., p. 61

[172] ibid., 28, 64

[173] Silverman, 'Silverman 2000', 268

[174] Berends, 'Berends 1998', 350

recognition,[175] presumption[176] and decision[177] by the court or empowered authority on recognition, effects of recognition of a foreign main proceeding.[178] Despite the option of

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[175] Article 15 of the Model Law (Application for recognition of a foreign proceeding): '1. A foreign representative may apply to the court for recognition of the foreign proceeding in which the foreign representative has been appointed. 2. An application for recognition shall be accompanied by: *(a)* A certified copy of the decision commencing the foreign proceeding and appointing the foreign representative; or (*b)* A certificate from the foreign court affirming the existence of the foreign proceeding and of the appointment of the foreign representative; or *(c)* In the absence of evidence referred to in subparagraphs *(a)* and *(b),* any other evidence acceptable to the court of the existence of the foreign proceeding and of the appointment of the foreign representative. 3. An application for recognition shall also be accompanied by a statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative. 4. The court may require a translation of documents supplied in support of the application for recognition into an official language of this State.'; for discussion see in the UNCITRAL: A/52/17, paras. 199-209; in the Working Group V on Insolvency: A/CN.9/419, paras. 62-69 and 178-189; A/CN.9/WG.V/WP.44, pp. 22–23; A/CN.9/422, paras. 76-93 and 152-159; A/CN.9/WG.V/WP.46, pp. 9–10; A/CN.9/433, paras. 59-67 and 99-104; A/CN.9/WG.V/WP.48, pp. 13–15. A/CN.9/435, paras. 165-173; in the Guide to Enactment: /CN.9/436, paras. 66-69. A/CN.9/442, paras. 112-121; in the Guide to Enactment and Interpretation: A/CN.9/WG.V/WP.103/Add.1, para. 112; A/CN.9/742, para. 40. A/CN.9/WG.V/WP.107, paras. 119-120; A/CN.9/763, para. 28; A/CN.9/WG.V/WP.112, paras. 112 and 119-120; A/CN.9/766, para. 32.

[176] Article 16 of the Model Law (Presumptions concerning recognition): '1. If the decision or certificate referred to in paragraph 2 of article 15 indicates that the foreign proceeding is a proceeding within the meaning of subparagraph *(a)* of article 2 and that the foreign representative is a person or body within the meaning of subparagraph *(d)* of article 2, the court is entitled to so presume. 2. The court is entitled to presume that documents submitted in support of the application for recognition are authentic, whether or not they have been legalized. 3. In the absence of proof to the contrary, the debtor's registered office, or habitual residence in the case of an individual, is presumed to be the centre of the debtor's main interests.'; see for discussion in the UNCITRAL: A/52/17, paras. 204-206; in the Working Group V on Insolvency: A/CN.9/WG.V/WP.46, p. 13; A/CN.9/435, paras. 170-172; in the Guide to Enactment: A/CN.9/442, paras. 122-123; in the Guide to Enactment and Interpretation: A/68/17, para. 197; A/CN.9/715, paras. 14-15, 38-41 and 44-45; A/CN.9/738, paras. 22-30. A/CN.9/WG.V/WP.103, Add.1, paras. 122-122A and 123A-K. A/CN.9/742, paras. 41-56; A/CN.9/WG.V/WP.107, paras. 122B, 123A-123G, 123I and 123K-M. A/CN.9/763, paras. 29-48; A/CN.9/WG.V/WP.112, paras. 122-122B, 123A-D, F-G, I, K and M. A/CN.9/766, paras. 33-40.

[177] Article 17 of the Model Law (Decision to recognize foreign proceeding): '1. Subject to article 6, a foreign proceeding shall be recognized if: *(a)* The foreign proceeding is a proceeding within the meaning of subparagraph *(a)* of article 2; *(b)* The foreign representative applying for recognition is a person or body within the meaning of subparagraph *(d)* of article 2; *(c)* The application meets the requirements of paragraph 2 of article 15; and *(d)* The application has been submitted to the court referred to in article 4. 2. The foreign proceeding shall be recognized: *(a)* As a foreign main proceeding if it is taking place in the State where the debtor has the centre of its main interests; or *(b)* As a foreign non-main proceeding if the debtor has an establishment within the meaning of subparagraph *(f)* of article 2 in the foreign State. 3. An application for recognition of a foreign proceeding shall be decided upon at the earliest possible time. 4. The provisions of articles 15, 16, 17 and 18 do not prevent modification or termination of recognition if it is shown that the grounds for granting it were fully or partially lacking or have ceased to exist.'; see for discussion in the UNCITRAL: A/52/17, paras. 113-116, 201-202 and 207; in the Working Group V on Insolvency: A/CN.9/WG.V/WP.48, p. 15; in the Guide to Enactment: A/CN.9/442, paras. 133-134; in the Guide to Enactment and Interpretation: A/CN.9/WG.V/WP.103/Add.1, paras. 133-134; A/CN.9/742, para. 63; A/CN.9/WG.V/WP.107, paras. 133-134; A/CN.9/763, para. 56; A/CN.9/WG.V/WP.112, paras. 133-134; A/CN.9/766, para. 45.

[178] Article 20 of the Model Law (Effects of recognition of a foreign main proceeding): '1. Upon recognition of a foreign proceeding that is a foreign main proceeding: *(a)* Commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities is stayed; *(b)* Execution against the debtor's assets is stayed; and *(c)* The right to transfer, encumber or otherwise dispose of any assets of the debtor is suspended. 2. The scope, and the modification or termination, of the stay and suspension

presumption, the court in the enacting state retains its full discretion[179] and is entitled to refuse the recognition if it is contrary to public policy,[180] etc.

In addition, Chapter III complements intervention by a foreign representative[181] in insolvency proceedings and prescribes measures for the protection of creditors and other interested persons[182] by avoiding detrimental acts[183] in this regard. As a prerequisite to a successful

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referred to in paragraph 1 of this article are subject to [*refer to any provisions of law of the enacting State relating to insolvency that apply to exceptions, limitations, modifications or termination in respect of the stay and suspension referred to in paragraph 1 of this article*]. 3. Paragraph 1 *(a)* of this article does not affect the right to commence individual actions or proceedings to the extent necessary to preserve a claim against the debtor. 4. Paragraph 1 of this article does not affect the right to request the commencement of a proceeding under [*identify laws of the enacting State relating to insolvency*] or the right to file claims in such a proceeding.'; see for discussion in the UNCITRAL: A/52/17, paras. 47-60; in the Working Group V on Insolvency: A/CN.9/419, paras. 137-143. A/CN.9/WG.V/WP.44, pp. 15-19. A/CN.9/422, paras. 94-110. A/CN.9/WG.V/WP.46, pp. 13-16. A/CN.9/433, paras. 115-126. A/CN.9/WG.V/WP.48, pp. 17–18. A/CN.9/435, paras. 24-48; in the Guide to Enactment: A/CN.9/436, paras. 76-79. A/CN.9/442, paras. 141-153; in the Guide to Enactment and Interpretation: A/CN.9/WG.V/WP.103/Add.1, paras. 141 and 143; A/CN.9/742, para. 64. A/CN.9/WG.V/WP.107, paras. 144-146, 149 and 151-153; A/CN.9/763, para. 58. A/CN.9/WG.V/WP.112, paras. 141, 143, 144-146, 149, 151-153. A/CN.9/766, para. 47.

[179] United Nations Commission on International Trade Law (ed.), *United Nations Commission on International Trade Law 2014*, p. 65

[180] ibid., p. 73

[181] Article 24 of the Model Law (Intervention by a foreign representative in proceedings in this State): 'Upon recognition of a foreign proceeding, the foreign representative may, provided the requirements of the law of this State are met, intervene in any proceedings in which the debtor is a party.'; see for discussions in the UNCITRAL: A/52/17, paras. 117-123; in the Working Group V on Insolvency: A/CN.9/422, paras. 148-149. A/CN.9/433, paras. 51 and 58. A/CN.9/WG.V/WP.48, p. 21; A/CN.9/435, paras. 79-84; in the Guide to Enactment: A/CN.9/436, paras. 89-90; A/CN.9/442, paras. 168-172; in the Guide to Enactment and Interpretation: A/CN.9/WG.V/WP.107, para. 170; A/CN.9/763, para. 62; A/CN.9/WG.V/WP.112, para. 170; A/CN.9/766, para. 51.

[182] Article 22 of the Model Law (Protection of creditors and other interested persons): '1. In granting or denying relief under article 19 or 21, or in modifying or terminating relief under paragraph 3 of this article, the court must be satisfied that the interests of the creditors and other interested persons, including the debtor, are adequately protected. 2. The court may subject relief granted under article 19 or 21 to conditions it considers appropriate. 3. The court may, at the request of the foreign representative or a person affected by relief granted under article 19 or 21, or at its own motion, modify or terminate such relief.'; see for discussion in the UNCITRAL: A/52/17, paras. 82-93; in the Working Group V on Insolvency: A/CN.9/422, para. 113. A/CN.9/WG.V/WP.46, pp. 15–16. A/CN.9/433, paras. 140-146. A/CN.9/WG.V/WP.48, p. 21. A/CN.9/435, paras. 72-78; in the Guide to Enactment: A/CN.9/436, para. 85. A/CN.9/442, paras. 161-164; in the Guide to Enactment and Interpretation: A/CN.9/715, para. 39. A/CN.9/WG.V/WP.107, paras. 162-164. A/CN.9/763, para. 60. A/CN.9/WG.V/WP.112, paras. 162-164. A/CN.9/766, para. 49.

[183] Article 23 of the Model Law (Actions to avoid acts detrimental to creditors): '1. Upon recognition of a foreign proceeding, the foreign representative has standing to initiate [*refer to the types of actions to avoid or otherwise render ineffective acts detrimental to creditors that are available in this State to a person or body administering a reorganization or liquidation*]. 2. When the foreign proceeding is a foreign non-main proceeding, the court must be satisfied that the action relates to assets that, under the law of this State, should be administered in the foreign non-main proceeding.'; see for discussion in the UNCITRAL: A/52/17, paras. 210-216; in the Working Group V on Insolvency: A/CN.9/433, para. 134; A/CN.9/WG.V/WP.48, p. 19; A/CN.9/435, paras. 62-66; in the

recognition process, the Model Law introduces the requirement of subsequent information.[184] The result upon application for[185] recognition of[186] the foreign proceeding is to grant relief. This

Guide to Enactment: A/CN.9/436, paras. 86-88; A/CN.9/442, paras. 165-167; in the Guide to Enactment and Interpretation: A/68/17, para. 197. A/CN.9/WG.V/WP.103/Add.1, paras. 165-167. A/CN.9/742, para. 66. A/CN.9/WG.V/WP.107, paras. 165-167; A/CN.9/763, para. 61; A/CN.9/WG.V/WP.112, paras. 165-167; A/CN.9/766, para. 50.

[184] Article 18 of the Model Law (Subsequent information): 'From the time of filing the application for recognition of the foreign proceeding, the foreign representative shall inform the court promptly of: *(a)* Any substantial change in the status of the recognized foreign proceeding or the status of the foreign representative's appointment; and *(b)* Any other foreign proceeding regarding the same debtor that becomes known to the foreign representative.'; see for discussion in the UNCITRAL: A/52/17, paras. 113-116, 201-202 and 207; in the Working Group V on Insolvency: A/CN.9/WG.V/WP.48, p. 15; in the Guide to Enactment: A/CN.9/442, paras. 133-134; in the Guide to Enactment and Interpretation: A/CN.9/WG.V/WP.103/Add.1, paras. 133-134; A/CN.9/742, para. 63; A/CN.9/WG.V/WP.107, paras. 133-134; A/CN.9/763, para. 56. A/CN.9/WG.V/WP.112, paras. 133-134; A/CN.9/766, para. 45.

[185] Article 19 of the Model Law (Relief that may be granted upon application for recognition of a foreign proceeding): '1. From the time of filing an application for recognition until the application is decided upon, the court may, at the request of the foreign representative, where relief is urgently needed to protect the assets of the debtor or the interests of the creditors, grant relief of a provisional nature, including: *(a)* Staying execution against the debtor's assets; *(b)* Entrusting the administration or realization of all or part of the debtor's assets located in this State to the foreign representative or another person designated by the court, in order to protect and preserve the value of assets that, by their nature or because of other circumstances, are perishable, susceptible to devaluation or otherwise in jeopardy; *(c)* Any relief mentioned in paragraph 1 *(c)*, *(d)* and *(g)* of article 21. 2. [*Insert provisions (or refer to provisions in force in the enacting State) relating to notice.*] 3. Unless extended under paragraph 1 *(f)* of article 21, the relief granted under this article terminates when the application for recognition is decided upon. 4. The court may refuse to grant relief under this article if such relief would interfere with the administration of a foreign main proceeding.'; see for discussion in the UNCITRAL: A/52/17, paras. 34-46. A/CN.9/419, paras. 174-177; in the Working Group V on Insolvency: A/CN.9/WG.V/WP.44, pp. 22–23; A/CN.9/422, paras. 116, 119 and 122-123; A/CN.9/WG.V/WP.46, pp. 9, 13-16; A/CN.9/433, paras. 110-114. A/CN.9/435, paras. 17-23; in the Guide to Enactment: A/CN.9/436, paras. 71-75; A/CN.9/442, paras. 135-140; in the Guide to Enactment and Interpretation: A/CN.9/WG.V/WP.107, paras. 135-140; A/CN.9/763, para. 57; A/CN.9/WG.V/WP.48, pp. 16–17; A/CN.9/WG.V/WP.112, paras. 135-140; A/CN.9/766, para. 46.

[186] Article 21 of the Model Law (Relief that may be granted upon recognition of main proceeding): '1. Upon recognition of a foreign proceeding, whether main or non-main, where necessary to protect the assets of the debtor or the interests of the creditors, the court may, at the request of the foreign representative, grant any appropriate relief, including: *(a)* Staying the commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities, to the extent they have not been stayed under paragraph 1 *(a)* of article 20; *(b)* Staying execution against the debtor's assets to the extent it has not been stayed under paragraph 1 *(b)* of article 20; *(c)* Suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor to the extent this right has not been suspended under paragraph 1 *(c)* of article 20; *d)* Providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities; *(e)* Entrusting the administration or realization of all or part of the debtor's assets located in this State to the foreign representative or another person designated by the court; *(f)* Extending relief granted under paragraph 1 of article 19; *(g)* Granting any additional relief that may be available to [*insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State*] under the laws of this State. 2. Upon recognition of a foreign proceeding, whether main or non-main, the court may, at the request of the foreign representative, entrust the distribution of all or part of the debtor's assets located in this State to the foreign representative or another person designated by the court, provided that the court is satisfied that the interests of creditors in this State are adequately protected. 3. In granting relief under this article to a representative of a foreign non-main proceeding, the court must be satisfied that the relief relates to assets that, under the law of this State, should be administered in the foreign non-main proceeding or concerns information required in that proceeding.'; see for discussion in the

relief may also be afforded on an interim basis.[187] A decision on recognition of the foreign proceeding facilitates the evidence requirements and helps to avoid the arduous and toilsome legalization process of action.[188] The court may grant interim relief pending the assessment on recognition. As part of the recognition procedure, the court examines whether the foreign insolvency pertains to the main or non-main process, whereas the recognition procedure itself is a matter for the respective national law and is not subject to provisions under the Model Law.[189]

The Model Law proposes three recognition options: firstly, by submitting a 'certified copy of the decision commencing the foreign proceeding and appointing the foreign representative', secondly, by submitting a certificate from the foreign court confirming the existence of the foreign proceeding and the proper determination of the foreign representative, and lastly, the Model Law provides for a so-called 'catch-all' method.[190] Despite a lack of evidence presented under the framework of the two previous options, in this last case the court is entitled to approve the recognition if it is persuaded of the legality of the foreign insolvency proceeding or foreign representative.[191]

c. Relief

The Model Law offers two kinds of relief. In the first case, it may offer interim relief. This is a relief which is filed upon application for recognition of the foreign insolvency proceedings. Interim relief is itself twofold: the first subcategory is 'collective provisional' relief.[192] This kind of relief grants a general stay of proceedings, in particular, a stay of execution against the

UNCITRAL: A/52/17, paras. 61-73; in the Working Group V on Insolvency: A/CN.9/419, paras. 148-152 and 154-166; A/CN.9/WG.V/WP.44, pp. 15-19. A/CN.9/422, paras. 111-113. A/CN.9/WG.V/WP.46, pp. 13-16. A/CN.9/433, paras. 127-134 and 138-139; A/CN.9/435, paras. 49-61; in the Guide to Enactment: A/CN.9/436, paras. 80-83; A/CN.9/442, paras.154-159; in the Guide to Enactment and Interpretation: A/CN.9/WG.V/WP.103/Add.1, para. 154; A/CN.9/742, para. 65; A/CN.9/WG.V/WP.48, pp. 18–19; A/CN.9/WG.V/WP.107, paras. 154, 156, 158 and 160; A/CN.9/763, para. 59. A/CN.9/WG.V/WP.112, paras. 154, 156, 158 and 160; A/CN.9/766, para. 48.

[187] ibid., p. 29

[188] Clift, 'Clift 2004', 322

[189] United Nations Commission on International Trade Law (ed.), *United Nations Commission on International Trade Law 2014*, p. 30

[190] Article 15 (2) (c) of the Model Law

[191] Silverman, 'Silverman 2000', 268

[192] Berends, 'Berends 1998', 357

debtor's assets, it hinders commencements or the continuation of current individual actions against the debtor's assets, and finally, it prohibits the debtor from disposing of his assets.[193] The second kind of interim relief is known as ‘individual’ relief, which does not hinder the creditors in pursuing their individual actions against the debtor.[194] Rather the effects of this interim relief are to grant a stay of individual actions against debtor or a stay of the enforcement of actions against the debtor's assets. The debtor is also automatically suspended from transferring, encumbering, or otherwise disposing of his assets to third parties until proper actions are initiated for liquidation or reorganization proceedings.[195]

The Model Law offers a relief upon recognition of foreign insolvency proceedings and describes what types of relief may be granted. Though the list in Article 21(1) is not exhaustive, it does however enumerate essential case groups. Furthermore the court, in its discretion and upon the request of a foreign representative, may order a ‘turnover’ of assets.[196] For this kind of relief, protection of the local creditors must be ensured.[197] Finally, the Model Law narrows[198] the power of foreign non-main proceedings. In short, it means that the relief granted to a foreign representative in a foreign non-main proceeding may only affect the assets subject to this proceeding.[199]

Additionally, the Model Law intends to protect the creditors from any detrimental acts by the debtor.[200]

d. Cooperation between Foreign Representatives and Courts of Enacting States

Nowadays, there is a small set of jurisdictions which can enforce an effective legal mechanism for a purposeful recognition of foreign insolvency judgements. Chapter IV of the Model Law addresses judicial cross-border cooperation between courts and administrators. It is the most

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[193] ibid., p. 357

[194] ibid., p. 357

[195] Clift, ‘Clift 2004’, 324

[196] United Nations Commission on International Trade Law (ed.), *United Nations Commission on International Trade Law 2014*, p. 88

[197] Berends, ‘Berends 1998’, 370

[198] United Nations Commission on International Trade Law (ed.), *United Nations Commission on International Trade Law 2014*, p. 88

[199] Berends, ‘Berends 1998’, 370

[200] *See* Article 23 of the Model Law

important chapter of the Model Law.[201] The principle of cooperation is based on the principle of comity. It is also applicable for countries based on the principle of reciprocity through bilateral, multilateral or other agreements. [202] Commensurately, the national courts and representatives are required to liaise with foreign ones.[203] In essence, the Model Law authorizes two types of cooperation, which are applicable independent of the status of the recognition process: first, cooperation between foreign representatives and foreign courts and, second, cooperation between foreign representatives.[204]

Article 27 of the Model Law presents a catalogue of techniques simplifying this cooperation.[205]The courts are completely free to apply them.[206] This catalogue is, however, not exhaustive.[207]

In common law countries, local courts 'just pick up the phone' to contact foreign courts, while civil law courts are more resistant to this kind of communication.[208] Based on the tradition of common law, the Model Law promotes direct communication[209] to expedite proceedings and achieve more satisfactory results.[210]

[201] United Nations Commission on International Trade Law (ed.), *United Nations Commission on International Trade Law 2014*, p. 93

[202] ibid., p. 96

[203] Berends, 'Berends 1998', 378

[204] United Nations Commission on International Trade Law (ed.), *United Nations Commission on International Trade Law 2014*, p. 30

[205] ibid., p. 31

[206] Silverman, 'Silverman 2000', 270

[207] Important insights to the questions of cooperation and communication are given by the *Practice Guide on Cross-Border Insolvency Cooperation*.

[208] Berends, 'Berends 1998', 379

[209] ibid., p. 380

[210] United Nations Commission on International Trade Law (ed.), *United Nations Commission on International Trade Law 2014*, p. 95

The principle of cooperation[211] is independent from other issues such as the application for recognition, the process of recognition and any other actions connected to cross-border insolvency.[212]

Finally, the Model Law also gives an extensive, but not exhaustive list of cooperative actions.[213] The legislator, in its discretion, may add other ways and means of cooperation in cross-border cases.[214]

e. Management of Multiple Proceedings

The final chapter, Chapter V of the Model Law, focuses on the matter of coordinating multiple[215], parallel local and foreign insolvency proceedings[216] which can be configured in numerous ways.[217] The coordination of concurrent proceedings is another milestone of the Model Law. In cases where the foreign main proceeding has been recognized, it does not

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211 Article 25 of the Model Law (Cooperation and direct communication between a court of this State and foreign courts or foreign representatives): '1. In matters referred to in article 1, the court shall cooperate to the maximum extent possible with foreign courts or foreign representatives, either directly or through a *[insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State].* 2. The court is entitled to communicate directly with, or to request information or assistance directly from, foreign courts or foreign representatives.'

212 Berends, 'Berends 1998', 380

213 Article 27 of the Model Law (*Forms of cooperation*): 'Cooperation referred to in articles 25 and 26 may be implemented by any appropriate means, including: *(a)* Appointment of a person or body to act at the direction of the court; *(b)* Communication of information by any means considered appropriate by the court; *(c)* Coordination of the administration and supervision of the debtor's assets and affairs; *(d)* Approval or implementation by courts of agreements concerning the coordination of proceedings; *(e)* Coordination of concurrent proceedings regarding the same debtor; (f) [*the enacting State may wish to list additional forms or examples of cooperation*].'; see for discussion in the UNCITRAL: A/52/17, paras. 124-129; in the Working Group V on Insolvency: /CN.9/419, paras. 75-76, 80-83 and 118-133; A/CN.9/WG.V/WP.44, pp. 21-22; A/CN.9/422, paras. 129-143; A/CN.9/WG.V/WP.46, p. 17; A/CN.9/433, paras. 164-172; A/CN.9/WG.V/WP.48, p. 22; A/CN.9/435, paras. 85-94; in the Guide to Enactment: A/CN.9/436, paras. 91-95; A/CN.9/442, paras. 173-183; in the Guide to Enactment and Interpretation: A/CN.9/WG.V/WP.103/Add.1, paras. 173-175, 177, 181 and 183A. A/CN.9/742, paras. 67-68; A/CN.9/WG.V/WP.107, paras. 183-183A; A/CN.9/763, para. 63; A/CN.9/WG.V/WP.112, paras. 173A, 181 and 183-183A; A/CN.9/766, para. 52.

214 United Nations Commission on International Trade Law (ed.), *United Nations Commission on International Trade Law 2014*, p. 98

215 Westbrook, 'Westbrook 2002', 17

216 Silverman, 'Silverman 2000', 271

217 Berends, 'Berends 1998', 385

prevent local representatives initiating a local proceeding in the enacting state.[218] However, there are two restrictions in this regard. Firstly, the extension is only permissible 'to the extent necessary to implement cooperation and coordination under Articles 25, 26 and 27' and, secondly, the relevant foreign assets should be subject to the foreign insolvency proceeding.[219]

It does not terminate any proceedings which have already commenced, and it has no impact on the recognition process.[220] The Model Law gives instructions on how the courts must deal with proceedings relating to a debtor who is subject both to foreign and local insolvency proceeding at the same time.[221]

The coordination of concurrent proceedings allows for adjustment of relief[222] as it requires consistency between the relief granted to a recognized proceeding and the relief granted to the

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[218] Article 28 of the Model Law (*Commencement of a proceeding under* [identify laws of the enacting State relating to insolvency] *after recognition of a foreign main proceeding*): 'After recognition of a foreign main proceeding, a proceeding under [*identify laws of the enacting State relating to insolvency*] may be commenced only if the debtor has assets in this State; the effects of that proceeding shall be restricted to the assets of the debtor that are located in this State and, to the extent necessary to implement cooperation and coordination under articles 25, 26 and 27, to other assets of the debtor that, under the law of this State, should be administered in that proceeding.'; see for discussion in the UNCITRAL: A/52/17, paras. 94-101; in the Working Group V on Insolvency: A/CN.9/WG.V/WP.44, pp. 26-29; A/CN.9/422, paras. 192-197.A/CN.9/WG.V/WP.46, p. 18; A/CN.9/433, paras. 173-181; A/CN.9/WG.V/WP.48, p. 23; A/CN.9/435, paras. 180-183; in the Enactment Guide: A/CN.9/436, para. 96; A/CN.9/442, paras. 184-187; in the Guide to Enactment and Interpretation: A/CN.9/WG.V/WP.103/Add.1, paras. 184 and 186-187A.; A/CN.9/742, para. 69; A/CN.9/WG.V/WP.107, paras. 185 and 187A; A/CN.9/763, para. 64; A/CN.9/WG.V/WP.112, paras. 184-186 and 187A; A/CN.9/766, para. 53.

[219] United Nations Commission on International Trade Law (ed.), *United Nations Commission on International Trade Law 2014*, p. 101

[220] ibid., p. 31

[221] ibid., p. 103

[222] Article 29 of the Model Law (*Commencement of a proceeding under* [identify laws of the enacting State relating to insolvency] *and a foreign proceeding*): 'Where a foreign proceeding and a proceeding under [*identify laws of the enacting State relating to insolvency*] are taking place concurrently regarding the same debtor, the court shall seek cooperation and coordination under articles 25, 26 and 27, and the following shall apply: *(a)* When the proceeding in this State is taking place at the time the application for recognition of the foreign proceeding is filed, (i) Any relief granted under article 19 or 21 must be consistent with the proceeding in this State; and (ii) If the foreign proceeding is recognized in this State as a foreign main proceeding, article 20 does not apply; *(b)* When the proceeding in this State commences after recognition, or after the filing of the application for recognition, of the foreign proceeding, (i)Any relief in effect under article 19 or 21 shall be reviewed by the court and shall be modified or terminated if inconsistent with the proceeding in this State; and (ii) If the foreign proceeding is a foreign main proceeding, the stay and suspension referred to in paragraph 1 of article 20 shall be modified or terminated pursuant to paragraph 2 of article 20 if inconsistent with the proceeding in this State; *(c)* In granting, extending or modifying relief granted to a representative of a foreign non-main proceeding, the court must be satisfied that the relief relates to assets that, under the law of this State, should be administered in the foreign non-main proceeding or concerns information required in that proceeding.' See for discussion in the UNCITRAL: A/52/17, paras. 106-110; in the Working Group V on Insolvency: A/CN.9/435, paras. 190-191;

local one, independent of the time of recognition.[223] Nevertheless, the Model Law implicates the precedence of local proceedings over foreign proceedings, though avoids hierarchy so as not to hinder the cooperative process.[224]

Where the debtor is subject to more than one foreign insolvency proceeding in more than one state and with more than one foreign representative initiating relief or recognition in the enacting state,[225] the Model Law rules that courts in the proceedings should act in coordination.[226] If there is a foreign main proceeding, the Model Law gives priority to this proceeding and in cases where there is more than one non-main foreign proceeding, there is no specification as to any priority between these proceedings.[227]

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in the Guide to Enactment: A/CN.9/442, paras. 188-191; in the Guide to Enactment and Interpretation: A/CN.9/WG.V/WP.103/Add.1, para. 188; A/CN.9/742, para. 70; A/CN.9/WG.V/WP.112, para. 188; A/CN.9/766, para. 53.

[223] ibid., p. 31

[224] ibid., p. 103

[225] Article 30 of the Model Law (Coordination of more than one foreign proceeding): 'In matters referred to in article 1, in respect of more than one foreign proceeding regarding the same debtor, the court shall seek cooperation and coordination under articles 25, 26 and 27, and the following shall apply: *(a)* Any relief granted under article 19 or 21 to a representative of a foreign non-main proceeding after recognition of a foreign main proceeding must be consistent with the foreign main proceeding; *(b)* If a foreign main proceeding is recognized after recognition, or after the filing of an application for recognition, of a foreign non-main proceeding, any relief in effect under article 19 or 21 shall be reviewed by the court and shall be modified or terminated if inconsistent with the foreign main proceeding; *(c)* If, after recognition of a foreign non-main proceeding, another foreign non-main proceeding is recognized, the court shall grant, modify or terminate relief for the purpose of facilitating coordination of the proceedings.'; see in discussions in the UNCITRAL: A/52/17, paras. 111-112; in the Guide to Enactment: A/CN.9/442, paras. 192-193.

[226] ibid., p. 104

[227] ibid., p. 105

The Model Law introduces further vehicles for facilitating the proceeding. These tools may either employ presumption rules[228] or the hotchpot rule[229] so as to avoid double or multiple payments to creditors in concurrent proceedings.[230]

Jurisdictions and, in particular, the courts of enacting states are not restricted in commencing or continuing insolvency proceedings.[231] According to the Model Law, the opening of the local proceeding is not a prerequisite for the recognition of the foreign insolvency proceeding.[232] Furthermore, the Model Law allows the courts to recognize a foreign main proceeding in order to obtain proof of the debtor's insolvency and then to commence local proceedings.[233] This option is suitable for insolvency systems requiring factual proof of debtor's inability to pay, e.g. for jurisdictions where the debtor's insolvency is a requirement for the commencement of insolvency proceedings.[234] This presumption applies solely to foreign main proceedings. The court of the enacting state does not, however, remain bound by presumption.[235]

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[228] Article 31 of the Model Law (*Presumption of insolvency based on recognition of a foreign main proceeding*): 'In the absence of evidence to the contrary, recognition of a foreign main proceeding is, for the purpose of commencing a proceeding under [*identify laws of the enacting State relating to insolvency*], proof that the debtor is insolvent.'; see for discussion in the UNCITRAL: A/52/17, paras. 94 and 102-105; in the Working Group V on Insolvency: A/CN.9/WG.V/WP.44, p. 27; A/CN.9/422, para. 196; A/CN.9/WG.V/WP.46, p. 18; A/CN.9/433, paras. 173 and 180-181; A/CN.9/WG.V/WP.48, p. 23; A/CN.9/435, paras. 180 and 184; in the Guide to Enactment: A/CN.9/436, para. 97; A/CN.9/442, paras. 194-197; in the Guide to Enactment and Interpretation: A/CN.9/WG.V/WP.103/Add.1, para. 197; A/CN.9/742, para. 71; A/CN.9/WG.V/WP.112, para. 197; A/CN.9/766, para. 53.

[229] Article 32 of the Model Law (*Rule of payment in concurrent proceedings*): 'Without prejudice to secured claims or rights *in rem*, a creditor who has received part payment in respect of its claim in a proceeding pursuant to a law relating to insolvency in a foreign State may not receive a payment for the same claim in a proceeding under [*identify laws of the enacting State relating to insolvency*] regarding the same debtor, so long as the payment to the other creditors of the same class is proportionately less than the payment the creditor has already received.'; see for discussion in the UNCITRAL: A/52/17, paras. 130-134; in the Working Group V on Insolvency: A/CN.9/419, paras. 89-93; A/CN.9/WG.V/WP.44, pp. 29-30; A/CN.9/422, paras. 198-199; A/CN.9/WG.V/WP.46, p. 18; A/CN.9/433, paras. 182-183; A/CN.9/WG.V/WP.48, p. 23; A/CN.9/435, paras. 96 and 197-198; in the Guide to Enactment: A/CN.9/436, para. 98. A/CN.9/442, paras. 198-200.

[230] ibid., p. 32

[231] ibid., p. 105

[232] Berends, 'Berends 1998', 323

[233] Berends, 'Berends 1998'; Berends, 'Berends 1998', 393

[234] United Nations Commission on International Trade Law (ed.), *United Nations Commission on International Trade Law 2014*, p. 105

[235] ibid., p. 105

The Model Law aims to promote coordination, consistency, and cooperation of relief so as to effect the best outcome for both proceedings.[236]

In short, there are three possible cases: first, the court grants relief to the foreign representative in cases where the foreign main proceeding has already been recognized and the foreign representative demands the recognition of the foreign non-main proceeding with the consequence that relief for foreign non-main proceedings should be identical in content to relief for the foreign main proceeding; the second is the reverse case. In this case, the court will revise the relief for the foreign non-main proceeding in order to bring it in line with the foreign main proceeding. Finally, there could be a case where the court must deal with two foreign non-main proceedings and in this case the court will modify the relief for the first non-main proceeding to facilitate both.[237]

The Model Law suggests the rule of payment in concurrent proceedings or the so-called 'hotchpot rule'. Here the creditor may only receive a percentage of his claim once, even if there are parallel proceedings in several countries against the same debtor. This rule does not affect the ranking of the claims,[238] but avoids situations where a creditor might obtain more favourable treatment by receiving payment for the same claim more than once due to parallel proceedings in different jurisdictions.[239] The calculation method is not provided for in the Model Law. The EU Convention describes a method of calculation.[240] The Model Law merely ensures equal treatment of creditors of the same rank and does not affect the secured debtors with rights in rem or with other securities.[241]

f. Limits of the Model Law

The Model Law holds two limits[242] for the implementing states. The first limit is that any international treaties or other agreements to which the enacting state is legally bound may

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[236] Clift, 'Clift 2004', 329

[237] Silverman, 'Silverman 2000', 271

[238] Berends, 'Berends 1998', 394

[239] United Nations Commission on International Trade Law (ed.), *United Nations Commission on International Trade Law 2014*, p. 107

[240] Berends, 'Berends 1998', 394

[241] United Nations Commission on International Trade Law (ed.), *United Nations Commission on International Trade Law 2014*, p. 107

[242] *See* supra

contradict the regulations of the Model Law.[243] The second limit is the public order rule. The court or other authority is entitled to refuse any actions as part of cross-border insolvency proceedings if, in its opinion, this action is manifestly contrary to the public order of this state.[244] In addition, the Model Law allows for the exclusion of groups of special debtors, e.g. insolvency of banks or insurance companies. The reason is that this limitation is a necessity for special actions or to protect special groups of creditors, or consumers.[245]

Some of the existing national insolvency systems outside of East Asia adopted the UNCITRAL Rules on Cross-Border Insolvency. One excellent example of such an adoption has been shown in the way in which Japan adopted the Model Law.

Summarizing this Chapter III, we overviewed the basic theories and global approaches on cross-border insolvency law. On the one hand, there are five substantial concepts which are territorialism, universalism, modified universalism, cooperative territorialism and, contractualism. On the other hand, the global approach of the UNCTRAL Model Law following the MIICA and Cross-Border Insolvency Concordat, undertakes a practical step in approaching those complex insolvencies challenges of multinational companies. Despite the substantial solution approaches of the Model Law, there are also various restrictions and limits. The Model Law standard meets some obstacles such as contradicting local laws or a public order rule.

In addition to global solutions, there are also several regional attempts that have been undertaken by regional political organisation and bodies. Some essential solution approaches addressing regional cross-border insolvency issues we will analyse in Chapter IV.

[243] Article 3 of the Model Law

[244] Article 6 of the Model Law

[245] ibid., p. 35

CHAPTER IV – REGIONAL APPROACHES

Though the UNCITRAL Model Law is a global intention seeking to accompany cross-border insolvencies all over the world, and has also been approved and recommended for implementation by notable international organizations such as the World Bank and the International Monetary Fund, in effect it remains a kind of first step in international cooperation. The next stage of international cooperation is at a regional level. Such cooperation has a different nature from that of the UNCITRAL Model Law because it sets out a common framework of rules for a certain number of countries. The European Insolvency Regulation No. 1346/2000 and the Recast Regulation No. 2015/848 and the Transnational Insolvency Project of the American Law Institute are worthy of mention in this regard and will be expounded in the following sections.

Section I – Council Regulation (EC) No 1346/2000 from 29th May 2000[246] and Recast Regulation (EU) 2015/848 of the European Parliament and of the Council from 20th May 2015 on Insolvency Proceedings

Although amended by the Recast Regulation (EU) 2015/848 of the European Parliament and of the Council of 20th May 2015 on insolvency proceedings,[247] the European Insolvency Regulation 1346/2000 on cross-border insolvency from 29th May 2000 was the first regional legal document dealing with cross-border insolvency cases within the EU and was directly binding for Member States. In recent times, it has undergone some amendments[248] which will hereafter be discussed. The European Union was the first international body to introduce an initial functioning regional insolvency regulation which was binding for all the Member States of the European Union with the exception of Denmark.

1. Scope of Application

The EU Regulation is applicable to collective insolvency proceedings involving the partial or entire forfeiture of the debtor's assets and the nomination of an administrator[249] in the Member

[246] The Regulation 1346/2000 remains in force for all insolvency proceedings opened before 26th June 2017. The Regulation 2015/848 is applicable for cross-border insolvency cases which arise after the 26th June 2017.

[247] The overview of the Recast Regulation will be made in the following section.

[248] European Commission (ed.), *Proposal for a Regulation of the European Parliament and of the Council: Amending Council Regulation (EC) No 1346/2000 on Insolvency Proceedings*, COM (2012) 744 final 2012/0360 (COD) (Strasbourg, 2012), p. 2

[249] The Council of the European Union, 'Council Regulation (EC) no 1346/2000 of 29 May 2000 on Insolvency Proceedings' L 160/1 (2000), 1–18, at 4, Article 1(1)

States of the European Union. It is not applicable in insolvency proceedings related to other debtors such as credit and investment institutions or insurance companies.[250]

2. Competent Forum and Applicable Laws

The EIR provides two types of jurisdictions. On the one hand, the court of the Member State within the territory in which the centre of a debtor's main interest is situated has the authority to open insolvency proceedings. According to the EIR, this refers to the location of the registered office of the debtor, if a company or legal person, unless upon proof to the contrary.[251] This is the so-called main proceeding.[252] On the other hand, the courts of another Member State are only entitled to open an insolvency proceeding against that debtor under the condition that he has assets within the territory of that other Member State. The effects of such proceedings will be restricted to the debtor's assets situated in this Member State[253] – this is a so-called secondary proceeding and is compulsory as part of winding-up proceedings.[254] Secondary proceedings[255] are also proceedings which have been opened subsequently to the proceeding under Article 3(1) of the EIR.[256] The secondary proceeding may only be opened prior to the main proceeding if either the insolvency proceeding under Article 3(1) cannot be opened[257] or if the commencement is requested by a creditor who has his domicile, habitual residence or registered office in the Member State where the secondary proceeding will take place.[258]

The applicable law is the law of the State in which proceedings are opened.[259] The EIR requires that the law of this State determines the opening conditions for those proceedings and provides a non-exhaustive catalogue of regulatory issues.[260]

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[250] ibid., p. 4, Article 1(2)

[251] ibid., p. 5, Article 3(1)

[252] ibid., p. 5, Article 3(2)

[253] ibid., p. 5, Article 3(2)

[254] ibid., p. 5, Article 3(3)

[255] *Also,* territorial proceeding

[256] ibid., p. 5, Article 3(3)

[257] ibid., p. 5, Article 3(4)(a)

[258] ibid., p. 5, Article 3(4)(b)

[259] ibid., p. 5, Article 4(1); for definition ‘State of the opening of proceedings’, *see* supra.

[260] ibid., p. 6, Article 4(2)

3. Recognition of Proceedings

The recognition principle of the EIR states that any judgement opening insolvency proceedings awarded by a court in one of the Member States pursuant to Article 3 of the EIR shall be recognized in all other Member States as of the moment when this judgement becomes effective in the Member State where the proceeding has been opened. Furthermore, it should also be applicable where insolvency proceedings against the debtor are not feasible in another Member State.[261]

The judgement has the same effect as it has in the awarding Member State under the insolvency law of this State.[262] No further formal steps are required.

4. Secondary Insolvency Proceedings

The opening of the main insolvency proceeding enables the opening of the secondary insolvency proceeding. This action does not require an examination of the debtor's insolvency conditions in the Member State of the secondary insolvency proceeding; however, the effects in the latter Member State shall be restricted to the assets of the debtor situated in said Member State.[263] The law of the Member State where the secondary proceeding takes place is applicable.[264] The opening of territorial proceedings can be initiated either by the liquidator of the main proceeding[265] or by any other competent private or public person, authorized to request the opening of insolvency proceedings under the law of the Member State where the secondary proceeding is to be commenced.[266]

'Synthetic secondary proceedings' are a practical invention from the restructuring of companies. Instead of the formal opening of insolvency proceedings, local creditors are

[261] ibid., p. 7, Article 16(1)

[262] ibid., p. 8, Article 17(1)

[263] ibid., p. 9, Article 27

[264] ibid., p. 10, Article 28

[265] ibid., p. 10, Article 29(a)

[266] ibid., p. 10, Article 29(b)

promised that they will be treated in the same way as if a 'real secondary proceeding' had been initiated.[267]

5. Information of Creditors and Lodgement of Claims

Chapter IV of the Regulation deals with lodging claims and providing information to creditors. It allows any creditor with habitual residence, domicile, or registered office in a Member State other than the State in which proceedings are opened to lodge insolvency claims in writing.[268] After the opening of insolvency proceedings all creditors should be individually notified by the court or liquidator of all documents[269] required for the lodging of the claim.[270]

6. The EU Commission Amendments from 12th December 2012

The European Commission was charged with presenting a report on the application of the Regulation to the European Parliament, the Council and the Economic and Social Committee and – should such a situation arise – accompanied this with a proposal to amend the EIR no later than 1 June 2012, and every five years thereafter.[271] On 12th December 2012, the European Commission published its report with a proposal for the amendment of the EIR.[272] The Proposal amended Regulation 1346/2000.[273]

The main elements for proposed actions pertained to the scope of its application, jurisdiction, secondary proceedings, and publicity of proceedings, lodging claims, and groups of companies.

a. Scope of the Insolvency Regulation

The EIR should apply in hybrid pre-insolvency and debt discharge proceedings. It was also proposed to allow proceedings which do not require the nomination of a liquidator but rather put the debtor's assets and affairs under the control of the court. This option is favourable for

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[267] H. Eidenmüller, 'A New Framework for Business Restructuring in Europe: The EU Commission's Proposals for a Reform of the European Insolvency Regulation and Beyond', *Maastricht Journal of European and Comparative Law* 20 (2013), 133–50, at 134

[268] The Council of the European Union, 'The Council of the European Union 2000', 11, Article 39

[269] ibid., p. 11 Article 40

[270] ibid., p. 12, Article 41

[271] The Council of the European Union, 'The Council of the European Union 2000', 13, Article 46

[272] European Commission (ed.), *European Commission 2012*, p. 2

[273] *See also*, S. L. Bufford, Hon., 'Revision of the European Union Regulation on Insolvency Proceedings – Recommendations', Penn State Law Research Paper, *Penn State Law Legal Studies Research Paper Series* 2 (2014)

situations where the debtor remains in possession of his assets and for personal insolvency proceedings.[274]

Furthermore, it would allow pre-insolvency proceedings where the debtor could reach some out-of-court agreements with his creditors. Pre-insolvency proceedings entailing a moratorium which prevents creditors from filing for insolvency proceedings already exist in many national jurisdictions among the Member States without public notice. These proceedings give the debtor an extended timeframe in order to cope with difficulties he faces. The problem of such proceedings is achieving recognition in Member States that do not have corresponding proceedings in their insolvency systems, in particular, because of non-public scheme.[275]

b. Jurisdiction for Opening Insolvency Proceedings

The European Commission came to the conclusion that the centre of main interest (COMI) concept is difficult to put into practice.[276] While national courts are inclined to take rather a wider interpretation, the ECJ follows a somewhat narrower definition of COMI.[277] Nonetheless, the proposal maintains this concept with supplementary documents. Notably, it makes clear conditions for presuming the COMI[278] in accordance with the ECJ's definition in the 'Interedil' Case: 'For the purposes of determining a debtor company's main centre of interests, the second sentence of Article 3(1) of Regulation No 1346/2000 must be interpreted as follows: 1) a debtor company's main centre of interests must be determined by attaching greater importance to the place of the company's central administration, as may be established by objective factors which are ascertainable by third parties. Where the bodies responsible for the management and supervision of a company are in the same place as its registered office and the management decisions of the company are taken, in a manner that is ascertainable by third parties, in that place, the presumption in that provision cannot be rebutted. Where a company's central administration is not in the same place as its registered office, the presence of company assets and the existence of contracts for the financial exploitation of those assets in a Member State other than that in which the registered office is situated cannot be regarded as sufficient factors

[274] European Commission (ed.), *European Commission 2012*, p. 5

[275] ibid., p. 6

[276] Eidenmüller, 'Eidenmüller 2013', 142

[277] ibid., p. 143

[278] European Commission (ed.), *European Commission 2012*, p. 6

to rebut the presumption unless a comprehensive assessment of all the relevant factors makes it possible to establish, in a manner that is ascertainable by third parties, that the company's actual centre of management and supervision and of the management of its interests is located in that other Member State; 2) where a debtor company's registered office is transferred before a request to open insolvency proceedings is lodged, the company's centre of main activities is presumed to be the place of its new registered office'.

Prior to the opening of insolvency proceedings, every national forum should prove its competence ex officio, thereby ensuring an auspicious procedural framework. In addition, it guarantees that all foreign creditors are able to file insolvency cases, and finally, it minimizes cases of forum shopping.[279]

The court opening insolvency proceedings should also be eligible to take direct action, such as the avoidance actions.[280] This rule is derived from the ECJ decision in the 'DekoMarty' Case C-330/07.

c. Synthetic Insolvency Proceedings

Essentially, there are several core issues requiring amendment. Firstly, the competent court of the Member State where the debtor has an establishment should be able to reject the opening of the secondary insolvency proceeding on request of the liquidator if it is unlikely to protect the debtor, and if the latter together with creditors is likely to avoid the winding-up of the debtor's company through an agreement. Secondly, the Commission proposes a so-called 'synthetic secondary proceeding'. In accordance with this proceeding, the competent court should continue on from the commencement of the proceeding if the local creditors are given a promise by the liquidator to be treated in the same way as if the secondary proceeding had been opened with a guarantee of all the relevant creditors' rights. This is a situation where the liquidator promises creditors that they will be treated as if the secondary insolvency proceeding had been opened in their home country, i.e. with regard to all their rights as creditors. This practice was introduced by English courts in the cross-border cases Collins&Aikman, MG Rover and Nortel Networks, but is not possible under the laws of many other Member States.[281]

[279] ibid., p. 6

[280] ibid., p. 7

[281] ibid., p. 7

By extending the communication and cooperation between the principal and secondary proceedings, the European Commission aims to strengthen the coordination between the competent courts.[282]

Thirdly, the court should be obliged to hear the liquidator of the main proceeding ex officio.[283] Finally, the Proposal abolishes the requirements for winding-up proceedings in cases of territorial proceedings and improves the cooperation between main and secondary proceedings owing to the broadening of cooperation requirements between the courts.[284]

d. Lodging of Claims and Publicity of Insolvency Proceedings

The Proposal obliges Member States to publish judgements in transnational insolvency issues via an electronic register accessible to the public, ensuring interconnection between national insolvency registers. It also imposes a unified system for the lodging of claims.[285] Such a register should be accessible for free to the public via the interconnection of the national central, commercial and company registers over the European e-justice portal. The Proposal also defines compulsory common criteria for publication. This should only be applicable to corporate, but not to consumer insolvency.[286]

The Proposal changes the lodging of claims, leading to some advantages for small creditors by introducing standard European forms for notifying the creditor and for lodging claims. These forms are available in all official languages. The deadline for claim lodging is specified as 45 days. In addition, the assistance of a liquidator will be no longer necessary. These amendments aim to reduce the creditors' costs because no costs for translation or the lodging of claims by the administrator will be incurred. The Proposal maintains the existing entity-by-entity approach. However, it ensures an effective communication between liquidators and the court of the group members. It should function in the same ways as proposed in the main and

[282] Eidenmüller, 'Eidenmüller 2013', 147

[283] European Commission (ed.), *European Commission 2012*, p. 8

[284] ibid., p. 5

[285] ibid., p. 5

[286] ibid., p. 8

territorial proceedings through better information exchange between the courts and liquidators.[287]

7. Overview of the Regulation (EU) 2015/848 of the European Parliament and of the Council of 25th May 2015 on Insolvency Proceedings (Recast)

In his paper, Pedro Hose F. Bernado underlines that existing rules are unlikely to guarantee value maximization of the company and predictability of various interest groups of companies because of a high degree of discretion afforded to the national insolvency authority in the determination of the COMI on the one hand, and, due to the fact that such regimes are unable to resolve the issues of multinational corporate groups on the other hand.[288] Those are some of the challenges that have been addressed in course of amendment of the EIR 1346/2000. After the amendment proposal from 12th December 2012, the European Commission adopted a report on the application of Council Regulation No. 1346/2000. The recast EIR No. 2015/848 entered in force on 26th June 2017 and replaced the EIR No. 1346/2000. It applies to all cross-border insolvency proceedings that are opened after this day.

Similar as the EIR 1346/2000, the EIR 2015/848 does not rule substantive law. It focuses further on proceeding. Substantive insolvency law remains the matter of the Member States. The application of the COMI principle remains the essential regulatory area of the recast EIR. Also, it rules cases falling under the conflict of laws and contains rules on recognition of decision in proceedings or their impacts on running proceedings.

The main novelties of the EIR 2015/848 are: first, applicability to interim proceedings, second, it rules international insolvency proceedings of groups of companies, and thirds, impediment of forum shopping.

In accordance with Article 1 of the EIR 2015/848, it shall apply to interim proceedings. This novelty extends the temporal scope of the law. The interim proceedings serve just to prevent opening of the insolvency proceedings. It shall be conducted and recognized in all Member States.

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[287] ibid., p. 9

[288] P. J. F. Bernardo, 'Cross-Border Insolvency and the Challenges of the Global Corporation: Evaluating Globalization and Stakeholder Predictability through the UNCITRAL Model Law on Cross-Border Insolvency and the European Union Insolvency Regulation', *Ateneo Law Journal* 56 (2012), 799–833, at 802

In the EIR 2015/848 a new frame for international insolvencies for groups of companies has been set. Articles 56-60 of the EIR 2015/848 rule cooperation and communication between different participants on insolvency proceedings involving two or more members of a group of companies. Those rules concern cooperation and communication between insolvency practitioners, between courts, and between insolvency practitioners and courts. The new law gives some additional powers to insolvency practitioners in proceedings concerning members of a group of companies. In addition, the EIR 2015/848 introduces a possibility of coordination of insolvency proceedings of a group of companies if the national substantive insolvency laws of Member States provide for this. Coordination of the group insolvency proceedings is ruled by Articles 61-77 EIR 2015/848.

Finally, the EIR 2015/848 impedes the forum shopping in Europe and reforms the COMI concept. The more detailed evolution of the COMI concept will be discussed in the following paragraph.

8. Centre of Main Interests (COMI) – Key Concept for Cross-Border Insolvency Cases

The concept of COMI is at the heart of the EIR. The COMI is crucial for definition of the scope for debtor's competent jurisdiction. As already briefly introduced in this section, the concept of COMI has experienced some fundamental changes. Originally, the main insolvency proceedings might be opened in the Member State where the debtor had his centre of main interest (COMI). This is the place in a Member State where a debtor conducts his economic life and is closely connected to this legal system and insolvency proceedings correspondingly. In its Article 3 (2) the EIR rules that 'where the centre of a debtor's main interests is situated within the territory of a Member State, the courts of another Member State shall have jurisdiction to open insolvency proceedings against that debtor only if he possesses an establishment within the territory of that other Member State. The effects of those proceedings shall be restricted to the assets of the debtor situated in the territory of the latter Member State'. This rule is a rebuttable presumption. The COMI was supposed to be defined for each subsidiary, even if a parent company controls the debtor's business choices. This has been affirmed by European Court of Justice (ECJ) in Eurofood Case (C-341/04).[289] On 2nd May 2006, the ECJ passed a sentence in the case of Eurofood. This decision stems from a referral made by the Supreme

[289] *Eurofood IFSC Ltd. vs. Commission (C-341/04);* (Judgement of the Court (Grand Chamber), 2nd May 2006); s*ee for discussion of the decision* Bufford, Hon, 'Bufford 2007'

Court of Ireland. Initially, the Supreme Court submitted five questions related to the European law on the European Insolvency Regulation to the ECJ. The Court had to decide concerning a pending appeal in the Dublin High Court as to the opening of main insolvency proceedings in the case of Eurofood IFSC Ltd. At the same time there was a parallel proceeding regarding an Italian company, Parmalat SpA, in Parma. Both the Court in Ireland and the Court in Italy each decided it was competent because, according to the opinions of the courts in both countries, the centre of main interests of Eurofood was in Ireland and Italy respectively. The European Court of Justice defined legal criteria for definition of COMI by defining two sets of factors. First, is the location where the debtor regularly administers his own interests and country where it is incorporated. Second, is the location of the parent company which is able to control policy decisions of the subsidiary. Those criteria must be both objective and ascertainable by the third parties.[290] The EIR 1346/2000 appoints hence in its Recital 13 that the centre of main interests should correspond to the place where the debtor conducts the administration of [its] interests on a regular basis and is therefore ascertainable by third parties.

As many cases show, there were challenges in definition of a relevant time for determination of COMI, e.g. Interedil Case (C-396/09)[291] the Court ruled that the COMI will be determined on the day of filing of insolvency proceedings.[292] The cases became more complex when a debtor moved his business in another Member States (of his choice) just before filing the insolvency proceedings. This phenomenon received the name forum shopping. This problem attempts to be resolved by the new regulation EIR 2015/848. It seeks to prevent the abusive COMI by forum shopping of a debtor company. The law introduces a temporal restriction in Article 3 of the EIR 2015/848: '…the presumption that the centre of main interests is at the place of the registered office …' of the debtor unless '… the debtor has relocated its registered office or principal place of business to another Member State within 3-month period prior to the request for opening insolvency proceedings…'.[293] Whether this regulation will have any effects remains to be seen. However, the new Regulation now expressly specifies that the competent courts must ex officio control their international jurisdiction. Furthermore, the

[290] ibid., 352 et seqq.

[291] *Interedil Srl, C-396/09 vs. Fallimento Interedil Srl and Intesa Gestione Crediti SpA* (Judgement of the Court (First Chamber), 6th July 2009)

[292] ibid., para. 55

[293] Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on Insolvency Proceedings (Recast), Recital 31

opening jurisdiction can now be challenged by creditors. Apart from the cross-border insolvency cases, how Europe deals with cross-border cases will be shown in a short overview in following paragraph.

9. Other Related Regulations in Regional Cross-Border Context in Europe

The European Union is strongly progressive in sense of cross-border rules which have resulted in essential European regulations. Thus, the Regulation (EG) No. 1215/2012 of the European Parliament and of the Council of 12th December 2012 on jurisdiction and the recognition and enforcement of judgement in civil and commercial matters (recast)[294] addresses a jurisdictional regime. This law regulates the international jurisdiction of the courts vis-à-vis a defendant domiciled in an EU Member State as well as the recognition and enforcement of judgments in civil and commercial matters from other Member States.

EFTA[295] Member States adopted likewise a treaty, the Lugano Convention in 2007, which replaced the old Lugano Convention of 1988. The Lugano Convention corresponds with the Brussels I and allows other Member States of EFTA to accede.

The European Union also seeks strengthening of prevention of insolvency. Hence, the European Parliament and the Council adopted Directive (EU) 2019/1023 of the European Parliament and of the Council of 20th June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on Restructuring and Insolvency).

Finally, due to significant business impact of the USA in the world economy, the Chapter 11 (Bankruptcy Code) and its points of convergence with the European insolvency law shall be mentioned because Chapter 11 has been influential in the development of pre-insolvency proceedings globally. One of the formal convergences is the possibility the reorganization bankruptcy. Thus, the EIR enables the 'debtor-in-possession' role in its Art. 2 (3). 'Debtor in possession' means a debtor in respect of which insolvency proceedings have been opened which do not necessarily involve the appointment of an insolvency practitioner or the complete

[294] Also referred to as Brussels Ia; the initial Brussels I Regulation was adopted in 2001 No. 44/2001 (Brussels I).

[295] European Free Trade Association: EU plus Iceland, Liechtenstein, Norway, and Switzerland

transfer of the rights and duties to administer the debtor's assets to an insolvency practitioner and where, therefore, the debtor remains totally or at least partially in control of its assets and affairs. Like this, Section 1107 of the Bankruptcy Code places the debtor in possession in the position of a fiduciary. This fiduciary shall have the rights and powers of trustee of the Chapter 11. The rationale of the both rules is the value of the business is greater if it is sold or reorganized rather than allocate assets between the creditors. The debtor-in-possession rule allows troubled companies to continue running of the business.

Section II – Transitional Insolvency Project and other Projects of the American Law Institute

1. General Overview

The American Law Institute[296] dedicated five years to drafting the work, the Transnational Insolvency Project.[297] Similar to the EU Regulation on Cross-Border Insolvency, the TIP is an American reaction to the increase in transnational insolvency issues in North America and Mexico and was designed by ALI.[298] According to ALI, a regional insolvency solution is the most appropriate means for coping with highly technical and complex questions of insolvency law in a transnational context. It was designated to apply within the North American Free Trade Agreement (NAFTA)[299] in order to develop policies and methods for dealing with defaults of multinational companies which have their centre of main interests in one country, and debtor's assets, business, and creditors in more than one of the NAFTA countries.[300] In contrast to the UNCITRAL Model Law on Cross-Border Insolvency, the ALI Principles were already predestined for specific countries already listed.[301] The ALI Principles are a cooperation project meaning that in effect there are no changes in national law – as in the case of harmonization – but are a system addressing national insolvency laws so that they function together more

[296] Hereinafter referred to as ALI

[297] Hereinafter referred to as TIP

[298] The American Law Institute (ed.), *Transnational Insolvency: Cooperation among the NAFTA Countries*, Principles of Cooperation among the NAFTA Countries (New York: Juris Publishing, Inc., 2003), p. 2

[299] ibid., p. 2; NAFTA countries are the United States of America, Canada, and Mexico.

[300] ibid., p. 1

[301] ibid., p. 2

effectively in cases of multinational defaults.[302] Unlike the EU Regulations on insolvency law, the principles of the ALI are just recommendations and do not have legal force.

The intention of the TIP was to guarantee market symmetry[303] and to supply legal professionals such as lawyers and judges with some guidelines on cooperation in specific cross-border cases.[304] Professor Westbrook underlines that if the market becomes global, bankruptcy law must become global too.[305]

2. Core Elements of the Transnational Insolvency Project

The ALI Principles are divided into three parts: general principles, procedural principles, and legal recommendations.

a. General Principles

General Principles specify seven core matters in the project: cooperation, recognition, moratorium, information, sharing of value, national treatment, and adjustment for distributions.[306] It explains the principles of cooperation, which are, at the same time, the method and goal. Furthermore, it includes near automatic recognition of court decisions among the NAFTA countries as well as an extensive and fast-acting moratorium.[307] It provides for the free sharing of information as well as the adjustment of distribution values or the so-called 'hotchpot rule'.[308]

b. Procedural Principles

The Procedural Principles specify and address key points, mechanisms, and rules of cooperation with illustrative examples.[309] The Procedural Principles consist of three typical bankruptcy stages: initiation, administration, and resolution. However, it does not address all aspects of an

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[302] ibid., p. 3

[303] J. L. Westbrook, 'Global Development: The Transnational Insolvency Project of the American Law Institute', *Connecticut Journal of International Law* 17 (1999), 99–106, at 99

[304] ibid., p. 100

[305] ibid., p. 99

[306] The American Law Institute (ed.), *The American Law Institute 2003*, p. 6

[307] Westbrook, 'Westbrook 1999', 103

[308] ibid., p. 103

[309] The American Law Institute (ed.), *The American Law Institute 2003*, p. 3

insolvency case, but rather focuses on specifics cross-border cases – such as achieving consensus between at least two of the three NAFTA Member States with some advice provided in 'Country Notes'.[310]

During the first insolvency stage, the TIP mainly addresses questions of access to the court and information exchange[311] between the courts and parties, recognition, as well as cases of fraud and stay of proceedings.[312] Information disclosure is one of the main concerns of the TIP.[313] The administration of the proceedings provides for the transfer of assets across the border, financing the debtor and the distribution of assets to creditors in another jurisdiction. Finally, it addresses the handling of corporate groups.[314]

c. Legislative Recommendations

The Legislative Part aims for the Model Law's reception in NAFTA countries. However, it recommends that they adopt aspects of the TIP which a particular country cannot implement under existing domestic legislation. It is also suggesting that countries can expand the scope of the ALI Principles despite national legal limitations.[315] Some recommendations have been adopted by NAFTA jurisdictions such as Guidelines applicable to Court-to-Court communications. In some cases, between USA and Canada reference is made to Court-to-Court Guidelines which is a part of the TIP, e.g. Case In re PSINet: Between Ontario Superior Court of Justice, Toronto, Case No. 01-CL-4155, (10th July 2001), and United States Bankruptcy Court for the Southern District of New York, Case No. 01-13213 (10th July 2001). The reference is made in particular to Principe 1 of the ALI NAFTA Principles (Cooperation) stating 'Courts and administrators should cooperate in a transnational bankruptcy proceeding with the goal of maximizing the value of the debtor's worldwide assets and furthering the just administration of the proceeding'.

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[310] Westbrook, 'Westbrook 1999', 103

[311] Information exchange, sharing and disclosure is one of most disregarded points in international insolvency projects.

[312] ibid., p. 103

[313] ibid., p. 104

[314] ibid., p. 105

[315] ibid., p. 105

d. Global Principles for Cooperation in International Insolvency Cases[316]

Following the TIP, the ALI drafted in 2012 a global work on transnational insolvency 'Global Principles for Cooperation in International Insolvency Cases'[317] and 'Global Guidelines for Court-to-Court Communications in International Insolvency Cases'.[318] These Global Principles and Global Guidelines are supposed to be used in both civil law and common law jurisdictions.

Section III – Court-to-Court Communication Project on Cross-Border Cases

The Guidelines Applicable to Court-to-Court Communication in Cross-Border Insolvency Cases is a product of the American Insolvency Institute in cooperation with the International Insolvency Institute during the course and as a part of the Transnational Insolvency Project. The Guidelines were adopted on 16th May 2000 by the American Law Institute, and on 10th June 2001 by the International Insolvency Institute. The significance of the court-to-court communication can be seen on variety of related projects in recent years. Some examples on it are given below.

In 2007, the European Communication and Cooperation Guidelines for Cross-Border Insolvency were issued by INSOL Europe.

In 2012, the American Insolvency Institute launched a new project, Global Principles for Cooperation in International Insolvency Cases. These Guidelines include 37 Global Principles for Cooperation in International Insolvency Cases and 18 Global Guidelines for Court-to Court Communication in International Insolvency Cases. Both parts are non-binding suggestions for both civil and common-law jurisdictions.

In 2014, the EU Cross-Border Insolvency Court-to-Court Cooperation Principles ('EU JudgeCo Principles') and EU Cross-Border Insolvency Communication Guidelines ('EU JudgeCo Guidelines') were issued by the European Commission and International Insolvency Institute. Those Principles are bases on the Global Principles for Cooperation in International Insolvency Cases. Both texts are not binding and have a recommendation character. The aim to reduce the duration of proceedings by improvement of case management by courts and facilitate

[316] *See* American Law Institute, *Transnational Insolvency: Global Principles for Cooperation in International Insolvency Cases* (2012)

[317] Hereinafter referred to as 'Global Principles'

[318] Hereinafter referred to as 'Global Guidelines'

communication between courts in cross-border cases. They shall help judges to understand the contemporary challenges of international insolvency law and to work more productive.[319]

This development was continued by the Judicial Insolvency Network Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency ('JIN Guidelines') in Spring 2017.

In 2012, the International Insolvency Institute issued Guidelines for Coordination of Multinational Enterprise Group Insolvencies. This incentive addresses insolvency cases in group of companies where different types of creditors with different types of claims and priorities operate under different insolvency rules. It is assumed that the maximization of the debtors value can be more likely reached if its insolvency is administered from a central location.[320] The handling of groups of companies in cross-border insolvency become relevant with globalization of businesses and gain more and more attention of further legislative bodies and institutions.

Section IV – Handling of the Groups of Companies in Insolvency

Despite advanced preparation of international and regional legal texts, there were no binding rules governing insolvency in groups of companies for decades. The European Commission in its amendment picked up on the topic of insolvencies in corporate groups in cases of transnational insolvency because the EIR from 2000 did not address this question.[321]

Consequently, the European Commission undertook legislating steps – as describes in Section I – to regulate future insolvencies in corporate groups which resulted in the recast of the EIR 1346/2000. The insolvency of groups of companies is now ruled in EIR 2015/848.

Also UNCITRAL examined this topic in its Legislative Guide. Part three of the Legislative Guide[322] issued by the UNCITRAL Working Group V addresses insolvency in company

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[319] B. Wessels, 'A Glimpse into the Future: Cross‐border Judicial Cooperation in Insolvency Cases in the European Union', *International Insolvency Review* (2015), 96–121, at 97 et seqq.

[320] International Insolvency Institute, *Guidelines for Coordination of Multinational Enterprise Group Insolvencies*, p. 6

[321] 'Group insolvency' means an insolvency proceeding related to two or more members of a group.

[322] Legislative Guide on Insolvency Law is a work done by the United Nations Commission on International Trade Law to assist the establishment of an effective and efficient legal framework addressing international insolvencies.

groups. While the provisions of the Model Law address the individual debtor having his assets in different states, part three attempts to take a further step and raises the question of how to address the situation of multiple debtors possessing assets in different states, that is to say, in the case of corporate groups. The limits of the Model Law are realized in cases of groups. Alongside national groups, it handles international issues with a focus on cooperation between the courts and those involving representatives and promotes the application of insolvency agreements. According to UNCITRAL, an 'enterprise group' is 'two or more enterprises that are interconnected by control or major ownership'.[323] Thus, the Model Law defines the group under two key elements – control and ownership. On both accounts, the Legislative Guide provides some defining factors. While the aspect of ownership is discernible on the basis of the percentage possession of parts of the company, the aspect of control remains more elusive. The Legislative Guide gives some factors to aid in its definition, such as different group members' capacity to govern the composition of the board of directors or governing bodies; the ability of different group members to appoint or remove all or a majority of the directors or governing body members; the ability of different group members to influence the greater part of the votes cast at board or governing body meetings; and finally, the capacity to influence a majority of the votes which are likely to be cast at a general meeting of group members, regardless of whether that ability arises through options or shares.[324]

Part Three of the Legislative Guide also promotes the implementation of rules on insolvency agreements to facilitate international proceedings.[325]

According to Professor Eidenmüller, there are three options for insolvency in groups of companies. First, there is a so-called 'substantive consolidation', which is a feature of US insolvency law. In special cases, a competent court would permit the pooling of assets and liabilities within a group of companies.[326] The second option is a 'procedural consolidation' meaning that 'one insolvency court would be designated in charge of multiple (main) insolvency proceedings over the assets of multiple debtors within the group setting'. To be more specific, this means that the whole proceedings are also controlled by one court and one

[323] United Nations Commission on International Trade Law (ed.), *United Nations Commission on International Trade Law 2012*, p. 2

[324] ibid., p. 15

[325] ibid., p. 108

[326] Eidenmüller, 'Eidenmüller 2013', 148

administrator and, thus, remain in one set of hands. Handling in this way has also been discussed by the German Ministry of Justice for national insolvency of company groups. Finally, there is the model of ‘procedural coordination’ – a situation in which ‘the communication and cooperation regime in place with respect to main and secondary insolvency proceedings regarding the same debtor would be extended to multiple main proceedings over the assets of distinct debtor companies that are all part of a corporate group’.[327] According to Professor Eidenmüller, the adoption of so-called ‘substantive consolidation’ practices by US insolvency courts would spell adverse economic consequences because it would complicate the pricing of credit risks.[328]

The UNICTRAL Working Group V and International Insolvency Institute[329] also designed proposals to this end. UNCITRAL issued a Draft Model Law on Enterprise Group Insolvency in its fifty-fourth session (A/CN.9/WG.V/WP.161).[330] In this draft UNCITRAL addresses questions regarded the definition of the group COMI and how the group COMI shall be defined.

According to Professor Paulus, regionalism is the future trend in cross-border insolvency regulations and will enjoy widespread recognition and usage because of its close historical, economic, and legal background.[331]

Section V – Other International Projects on Handling of Cross-Border Insolvency Cases

In addition to the special projects that explicitly regulate cross-border insolvencies, there are also cross-border elements in other projects, such as The World Bank Principles for Effective Insolvency and Creditor / Debtor Regimes and UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgements.

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[327] ibid., p. 148

[328] ibid., p. 148

[329] International Insolvency Institute is a non-profit corporation dedicated to the improvement of international insolvency systems and procedures.

[330] United Nations Commission on International Trade Law (ed.), *UNCITRAL Draft Model Law on Enterprise Group Insolvency* (New York: United Nations Publication, 2018)

[331] C. G. Paulus, ‘Future Developments in Cross-Border Insolvency Law’ in Organization for Economic Cooperation and Development (ed.), *Asian Insolvency Systems: Closing the Implementation Gap*. Conclusions of the Fifth Meeting of the Forum for Asian Insolvency Reform (FAIR) on 'Legal and Institutional Reforms of Asian Insolvency Systems' (Paris: OECD Publishing, 2007), pp. 255–7, at p. 255

1. The World Bank Principles for Effective Insolvency and Creditor / Debtor Regimes[332]

In its work the World Bank addresses some aspects of cross-border insolvency issues. Thus, in accordance with The World Bank, in cross-border transactions transparency and corporate governance are needed in all stages of investments.[333] The World Bank emphasizes the importance of a framework for cross-border insolvencies with recognition of foreign proceedings if an insolvency system seeks to be effective[334] Further, the key factors to effective handling of cross-border matters are given, which are: a clear and speedy process for obtaining recognition of foreign insolvency proceedings, relief to be granted upon recognition of foreign insolvency proceedings, foreign insolvency representatives to have access to courts and other relevant authorities, courts and insolvency representatives to cooperate in international insolvency proceedings, and non-discrimination between foreign and domestic creditors.[335] In Addition, the World Bank gives some recommendations of handling international insolvency groups involving following points: access to court and recognition of proceedings, cooperation involving courts, cooperation involving insolvency representatives, appointment of the insolvency representative, cross-border insolvency agreements.[336]

2. UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgements[337]

The UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgements has been adopted in July 2018 and seeks to address special situations and where enforcement and recognition of foreign insolvency judgements is necessary. It provides national states which enacted the UNCITRAL Model Law on Cross-Border Insolvency with a procedure for recognition and enforcement of insolvency-related judgements. The UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgements is complementary to the Articles 7 and 21 of the UNCITRAL Model Law on Cross-Border Insolvency.

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[332] The World Bank (ed.), *Principles for Effective Insolvency and Creditor/Debtor Regimes* (Washington D.C.: The World Bank, 2016)

[333] ibid., p. 9

[334] ibid., p. 20

[335] ibid., p. 26

[336] ibid., p. 28

[337] United Nations Commission on International Trade Law (ed.), *UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments with Guide to Enactment* (New York: United Nations Publication, 2018)

Like for the UNCITRAL Model Law on Cross-Border Insolvency, the UNCITRAL provides national states enacting UNCITRAL Model Law on Cross-Border Insolvency with a Guide to Enactment of the UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgements. The Guide is directed to the governments and legislators undertaking legislative revisions. Also judges and other legal practitioners can use this Guide.[338]

In this Chapter IV, the focus had been put deeply into the structures of regional approaches on cross-border insolvency such as the European Insolvency Regulation, Transnational Insolvency Project and further regional solutions on how an appropriate communication and cooperation might look like. Success of cross-border insolvency proceedings depends consequently not only on a good legal basis. Rather, this requires a clear implementation strategy. Having reviewed the most significant projects on cross-border insolvency on international and regional levels, we will now move on to the Asian region in order to look at its political and legal structures and, into its historical background. Shaped by its cultural diversity and plurality of legal systems, Asia made the first step forward to regionalism by building the Association of Southeast Asian Nations (ASEAN). There have also been some projects on insolvency solutions proposed by international institutions which faced similar obstacles as other projects on cross-border insolvency law. In Chapter V, we will look at national insolvency regimes in the countries of ASEAN and impact of tradition.

[338] ibid., 11 et seqq.

CHAPTER V – NATIONAL INSOLVENCY LAWS AND TRADITIONAL IMPACT IN ASEAN AND ASEAN+3

As already mentioned in Chapter I, the need for cross-border insolvency regulation in ASEAN is crucial. The AP&P case shows how the emergence of cross-border insolvency regulations was complicated by insolvency in company groups. This Chapter V shall analyse the development of, and challenges presented by insolvency laws in Asia to find out to what extent the Member States of ASEAN are prepared to adopt the UNCITRAL Model Law on Cross-Border Insolvency, or whether regionalism is a better option.

Thus, having analysed existing projects attempting to handle cross-border insolvency cases worldwide on international and regional levels, we will now take a deeper look into cross-border insolvency situation in Asia. For this purpose, Section I introduces the Association of Southeast Asian Nations (ASEAN) which is a multistate organization comparable to some extent with the European Union. Section II presents an overview of the initiatives on cross-border insolvency law in Southeast Asian region. Section III gives an overview of the national insolvency regimes in the countries of ASEAN and shows their rudimentary relation to regulation of cross-border insolvency issues. Sections IV and V investigate historical and traditional impacts on the insolvency laws in countries of ASEAN.

Section I – Association of Southeast Asian Nations

Numerous policy makers ask the question of to regulate cross-border insolvency in Southeast Asia so as to escape new APP-type cases in the future. The Indonesian government has expressed the need to establish a common cross-border insolvency framework within ASEAN. To ascertain whether ASEAN is a suitable basis for such a framework, we shall first take a short overview of ASEAN's structure.

1. Foundation and Structure

ASEAN[339] is a union of Southeast Asian States in the Pacific consisting of ten Member States with its head office in Jakarta, Indonesia. It was founded on 8th August 1967. Its first members were Malaysia, Thailand, Philippines, and Singapore which have since then been followed by Cambodia, Brunei, Myanmar, Vietnam, and Laos.

[339] ASEAN succeeded the Association of Southeast Asia.

The aims of ASEAN are manifold: firstly, the acceleration of social progress, economic growth and cultural development in the region through joint endeavours in the spirit of equality and partnership in order to strengthen the foundation for a prosperous and peaceful community of Southeast Asian Nations; secondly, the promotion of regional peace and stability through respecting justice and the rule of law within countries of the region and adhering to the principles of the United Nations Charter; thirdly, the promotion of active collaboration and mutual assistance on matters of common interest in social, economic, scientific, technical, cultural and administrative issues; fourthly, the extension of assistance to one another in the form of training and research facilities in the educational, professional, technical and administrative spheres; fifthly, the promotion of more effective collaboration for greater utilization of agriculture and industries, the expansion of trade, including examining the problems of international commodity trading, improving transportation and communication facilities and raising the living standards of their peoples; the promotion of Southeast Asian studies; and finally, the maintenance of closer and more beneficial cooperation with existing international and regional organizations with similar aims and purposes, thereby exploring all avenues for even closer cooperation among one another.[340]

With regard to the aims of ASEAN countries to expand trade and provide each other with mutual assistance in economic issues, as well as to follow the principle of effective regional cooperation, it seems that a regional regulation on cross-border insolvency within ASEAN would fall neatly within these aims and principles of intraregional collaboration.

2. Regionalism in ASEAN as a Trend

The ASEAN Economic Community is a growth-oriented institution with the target of establishing an economic framework within ASEAN by 2020. Its goals include building: a single market and production base; a highly competitive economic region; a region with equitable economic development; and a region fully integrated into the global economy. A single market and production base comprise five elements: the free flow of goods, services, capital, labour, and investment. The implementation of this target should be affected by the ASEAN Free Trade Agreement.[341] From historical point of view there are the legal norms

[340] http://www.asean.org/asean/about-asean/overview/

[341] Association of Southeast Asian Nations (ed.), *ASEAN Economic Community Blueprint* (Jakarta: Association of Southeast Asian Nations, 2008), p. 6

building the foundation of ASEAN countries: regional autonomy and collective self-reliance, peaceful settlement of disputes, principle of non-interference, bilateral defence cooperation.[342]

A highly competitive economic region necessitates the development of fair competition rules, IPR,[343] infrastructure, taxation, e-commerce and consumer protection. An equitable economic development requires a small and medium-sized enterprises (SME) development.[344]

In addition to the ASEAN Economic Community, there is also a series of regional agreements between the Member States of ASEAN. Finally, integration into the global economy entails such common ground as a coherent approach toward external economic relations.[345] In the last years, European Union developed its vision from the norm exporter to a partner of the ASEAN. The European Union recognizes now the ASEAN as one of the most ambitious regional organizations with respect to its geographical context, own objectives and dynamics. This recognition hast been also documented it the EU Policy Report 2017 and came out in increasing of the funding resources.[346]

3. The 'ASEAN Way'

The 'ASEAN Way' is called the functioning method of the ASEAN[347] and is an unambiguous set of rules governing regional cooperation.[348] The Member States developed their own distinct approach to lead internal relations within the organization, consisting of several interchangeable factors.[349] The 'ASEAN Way' follows a minimalistic organizational order,[350] which is reflected

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[342] I. C. Xuechen, 'The Role of ASEAN's Identities in Reshaping the ASEAN-EU Relationship', ISEAS @ 50 Special Issue: Young Scholars in Southeast Asian Studies, *Contemporary Southeast Asia* (2018), 222–46, at 228

[343] Intellectual Property Rights

[344] Association of Southeast Asian Nations (ed.), *Association of Southeast Asian Nations 2008*, p. 24

[345] ibid., p. 25

[346] Xuechen, 'The Role of ASEAN's Identities in Reshaping the ASEAN-EU Relationship', 234 et seqq.

[347] V. Reyes and C. Tan, *Political Values in Asia, the ASEAN Political Security Community, and Confucius' Philosophy*, PLS Working Papers Series, No. 11 (2014), p. 4

[348] A. Acharya, 'How Ideas Spread: Whose Norms Matter? Norm Localization and Institutional Change in Asian Regionalism', *International Organization* 58 (2004), 239–75, at 249

[349] R. Stubbs, 'ASEAN: Building Regional Cooperation' in M. Beeson (ed.), *Contemporary Southeast Asia: Regional Dynamics, National Differences*, 2nd (New York: Palgrave Macmillan, 2009), pp. 216–33, at p. 222

[350] Acharya, 'Acharya 2004', 256

in its avoidance of strict institutionalization and priority of informal methods.[351] This method is described by three features: first, the respect of sovereignty, second, consultation on a regional level, and, third, the primacy of political pragmatism.[352] ASEAN Members respect their autonomy and confer on each other the capacity to resist external influences.[353] There is no specific procedure for consultations and achieving results, however, it is certainly a process-oriented rather than product-oriented approach, with its focus in decision-making processes firmly on consensus, tracing back to Javanese village society.[354] The decisions are, on the one hand, non-hostile, but on the other hand there is a pronounced difference between consensus and unanimity. While the former does not necessitate total assent in decision-making, the latter requires absolute agreement of all the parties.[355] The Member States agree not to interfere, even in the case of force being used, due to the regional history of inter-state conflicts before the foundation of ASEAN.[356]

Section II – Initiatives on Cross-Border Insolvency in Southeast Asia

On a regional level, there are some valuable initiatives making headway with regard to cross-border insolvency in Southeast Asia. In essence, these initiatives try to raise awareness of the problem by explaining its detrimental effects in the past and by apprising different players of its global impact in the future. Not all movements directly address cross-border insolvency issues, but dealing with economic and financial issues, they touch on transnational insolvency cases in an indirect manner. A variety of projects and incentives to solve the problems implicated by a cross-border bankruptcy have been launched worldwide. Researchers, national governments, international organizations, and other interested players have attempted to formulate methods and rules for cross-border insolvency law in Asia. In general, these efforts fall into one of two categories. The first is those which directly address the question of cross-border insolvency law in Asia. The second is those that are not directly involved in, but still

[351] A. Acharya, ‘Ideas, Identity, and Institution‐Building: From the ‘ASEAN Way’ to the ‘Asia‐Pacific Way'?’, *The Pacific Review* 10 (1997), 319–46, at 329

[352] Stubbs, ‘Stubbs 2009’, 223

[353] ibid., 223

[354] Acharya, ‘Acharya 1997’, 329

[355] ibid., p. 331

[356] Stubbs, ‘Stubbs 2009’, 223

have an indirect influence on the development process of this issue. In both cases, the lion's share of the work has been accomplished by institutional contributions.

1. Asian Development Bank Proposals

The pioneer in addressing of the questions relating to cross-border insolvency law in Asia is the Asian Development Bank.[357] In 1997, it conducted a comparative review of eleven Asian countries[358] over the course of two years.[359] Inspired by the G22 Working Group's[360] report on the 'International Financial Crisis',[361] in October 1998 it started the regional technical assistance[362] project RETA 5795 dealing with insolvency law reforms in Asia.[363] On 3rd December 1999, the RETA Screening Committee approved the technical assistance under the title 'Developing Cross-Border Insolvency Solutions'. The scope of the RETA 5795 was twofold: in Part A it addresses cross-border insolvency and international cooperation, and in Part B it focuses on international good practices in informal restructuring processes. In October 1999, the ADB completed the project 'Insolvency Law Reform in the Asian and Pacific Region: Report of the Office of the General Council on TA-5795 Reg.: Insolvency Law Reforms' and reported it in 2000 in the 'Law and Policy Reform at the Asian Development Bank'. The ADB developed a project of 'ADB Standards' for insolvency law application in every country.[364] In 2000, the ADB presented 16 principles of insolvency law.[365]

2. Principles of Insolvency Law of Asian Development Bank

The ADB proposed 16 Good Practice Standards for the RETA economies:

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[357] Harmer, 'Harmer 2014', 3

[358] Those countries are Korea, Japan, Taiwan, Hong Kong, Indonesia, Singapore, Malaysia, Thailand, India, Pakistan and the Philippines.

[359] Fisher and Sloan, 'Fisher et al. 2004', 44

[360] G-22 Working Group is a working group on international financial crisis set up by the International Monetary Fund comprising finance ministers and central bank governors of 22 states.

[361] The report was published by International Monetary Fund on 2nd October 1998. It released a short list of insolvency law principles, however, it did not contain special recommendations, *see* The World Bank (ed.), *The World Bank 2001*, p. 82

[362] Hereafter RETA; also, another project had been started at that time, namely, RETA 5773 on secured transactions law reform.

[363] Harmer, 'Harmer 2014', 5

[364] ibid., p. 5

[365] The World Bank (ed.), *The World Bank 2001*, p. 82

- Clear distinction between personal and corporate insolvency law;[366]
- Same insolvency regime for private and state-owned corporations;[367]
- 'One law, two systems principles' should reflect both reorganization and liquidation;[368]
- Debtor should have easy access to proceedings by simple proof of insolvency criteria; the creditor must produce proof for evidence of insolvency;[369]
- In cases of reorganization, the power of management should continue under the supervision of the insolvency administrator, while in the case of liquidation those powers must be terminated and entirely transferred to the insolvency administrator;[370] an automatic stay or suspension of actions should be immediate for liquidation proceedings and as wide as possible for reorganizations;[371] in the case of reorganization, the law should afford higher priority to ongoing and urgent business needs;[372]
- Efficient time frames for reorganization and liquidation proceedings;[373]
- The liquidation proceeding should be a public responsibility and creditors should be informed of the relevant stages of proceedings;[374]
- The law should provide information related to the debtor as well as a careful and full evaluation;[375]
- Involvement of creditors in rescue and liquidation process; provision of voting rights and minimum requirements for the approval of the rescue plan; provision of voting for classes of creditors; protection against any manipulation of the voting system; effect of voting should be binding for all creditors of that class;[376]

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[366] Asian Development Bank, *Law and Policy Reform at the Asian Development Bank: Insolvency Law Reforms in the Asian and Pacific Region*, Report of the Office of the General Counsel on TA-5795 Reg: Insolvency Law Reforms (Manila: Asian Development Bank, 2000), vol. 1, p. 28

[367] ibid., p. 29

[368] ibid., p. 30

[369] ibid., p. 32

[370] ibid., p. 34

[371] ibid., p. 35

[372] ibid., p. 37

[373] ibid., p. 38

[374] ibid., p. 39

[375] ibid., p. 41

[376] ibid., p. 43

- The law should not prescribe criteria for commercial decisions; the analysis of the plan should be undertaken by an independent adviser; the plan should be nominally provided by a debtor in the space of a certain time frame;[377]
- In rescue processes, the court should have a general supervisory role and is entitled to set aside the rescue plan should it contradict the interests of creditors;[378]
- The execution of the plan should be supervised and controlled by an independent person; the plan should be amenable if this is in the interest of creditors; liquidation should be possible if the plan is not executed;[379]
- Equal treatment of all creditors and limitation of priority claims;[380]
- Avoidance of transactions should be possible;[381]
- Civil sanctions against fraudulent conduct of management;[382]
- Adoption of the UNCITRAL Model Law.[383]

RETA 5975 was another incentive to promote regional cooperation and the development of insolvency law which targeted the interaction between insolvency law regimes and secured transactions. The major outcomes and findings of the project, TA-5975 Reg, appeared in the Report 'Promotion Regional Cooperation in the Development of Insolvency Law Reforms' in 2008 because of RETA 5795 and 5975 work.

3. Forum for Asian Insolvency Reform

The Forum for Asian Insolvency Reform (FAIR) is an initiative on cross-border insolvency in Asia created by the OECD, ADB, and APEC. Its general purpose is to unify common forces and expedite work on cross-border insolvency challenges in the Asian region.

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[377] ibid., p. 45

[378] ibid., p. 47

[379] ibid., p. 48

[380] ibid., p. 49

[381] ibid., p. 50

[382] ibid., p. 51

[383] ibid., p. 53

FAIR primarily aims to maintain sustained communication among Asian countries, to support the implementation of laws in local economies, to determine the concerns and interests of national legislators as well as to assist them in country-specific questions of legal transplants.

Section III – National Insolvency Laws and Lack of Common Rules on Cross-Border Insolvency

Only few Member States of ASEAN have cross-border insolvency legislation, e.g. Singapore, Myanmar. This shows the high importance of a framework for cross-border insolvency in ASEAN. In the following sections the national insolvency proceedings of the ASEAN Member States and ASEAN+3 Member States will be presented; however, this will be limited to a short historical overview of insolvency law legislation, a brief description of the insolvency law as is and an exploration of cross-border insolvency cases by jurisdiction.[384]

1. Brunei

The Insolvency law of Brunei is incorporated in the Bankruptcy Act of 1984 ed. Chapter 67 Bankruptcy (B.L.R.O.[385] 1/1984).[386] This law has been amended several times, most recently on 4th December 2012 by the Bankruptcy Act (Amendment) Order (communication No S 78/12) and Insolvency Order S1/2016. After the last revision, the Bankruptcy Act contains the following parts: Part I: Preliminary, Part II: Voluntary Arrangements, Part III: Receivers and Managers, Part IV: Judicial Management, Part V: Winding up of Companies Registered under Company Act, Part VI: Winding up of Unregistered Companies, Part VII: General Provisions Applying to Companies Which are Insolvent or in Liquidation, Part VIII: Insolvency Practitioner and Their Qualifications, Part IX: Public Administration, Part X: Executive Manager, Part XI: General, Part XII: Repeals and Consequential Amendments, Part XIII: Transitional and Savings Provisions.[387] No rules on cross-border issues are provided.

[384] Sources relating to national insolvency regimes are usually drafted in national languages of the ASEAN+3 Member States. English sources are available only in a very limited amount. All those sources have been used to reflect this paragraph on national insolvency laws.

[385] Brunei Law Revision Order

[386] 'Bankruptcy Act Chapter 67' in *Laws of Brunei* (1984)

[387] Attorney General's Chambers / Prime Minister's Office of Brunei Darussalam, 'Insolvency Order: S1/2016', Constitution of Brunei Darussalam (Order made under Article 83 (3)), *Brunei Darussalam Government Gazette* No. S1 (2016), at 1

2. Cambodia

At first, the Cambodian Insolvency law was ruled insufficient by the Law on Banking and Financial Institutions dated 1999, only containing provisions for liquidation proceedings.[388] Later the National Assembly adopted the Law on Bankruptcy (Royal Kram NS/RKM/1207/031) on 16th October 2007 at its 7th session in 3rd legislature period with the approval of formal and legal concepts granted by Senate on 21st November 2007 in its 7th plenary session of the 2nd legislature period. It was finally promulgated on 7th December 2007.[389]

The Law on Bankruptcy contains 14 Chapters and 84 Articles governing the following insolvency issues: Chapter 1: General Provisions, Chapter 2: Opening of Insolvency Proceedings (Subject, Grounds and Petition), Chapter 3: Decision on the Petition to Open Insolvency Proceedings, Chapter 4: Effect of the Opening of Insolvency Proceedings (General Effects, Safeguarding and Enhancement of the Estate, Claims), Chapter 5: Plan of Compromise (Planning, Approval of a Plan of Compromise), Chapter 6: The Opening Creditor's Meeting, Chapter 7: Liquidation and Satisfaction of Claims, Chapter 8: Termination of Insolvency Proceedings Following Liquidation, Chapter 9: Resumption of Insolvency Proceedings Which Were Terminated After Liquidation, Chapter 10: Administrator and Creditors (the Administrator, Creditors), Chapter 11: Service of Documents, Chapter 12: Penalties, Chapter 13: Transitional Provisions, Chapter 14: Final Provisions.

More insolvency provisions are stipulated in the draft of the Cambodia Civil Code.[390] Hence, no express rules on cross-border insolvency issues are provided. The Law on Bankruptcy only allows for the opening of proceedings against persons or legal entities whose assets are situated

[388] Y. Ottara, 'Country Report: Cambodia' in The World Bank (ed.), *Global Judges Forum: Commercial Enforcement and Insolvency Systems* (The World Bank, 2003), pp. 1–12, at p. 5

[389] DFDL Mekong (Cambodia) Co. Ltd., 'Creation of Inter-Ministerial Task Force to Facilitate and Prepare Substance for the 4th Meeting Between Governors or Provinces – Municipalities Adjacent to Cambodia – Vietnam Borders', *Weekly Law Update* (2008), 1–5, at 3; DFDL Mekong (Cambodia) Co. Ltd., 'DFDL Mekong (Cambodia) Co. Ltd. 2008', 3

[390] Ottara, 'Ottara 2003', 8

within the territory of the Kingdom of Cambodia and then only if those persons have their office registered within the territory of the Kingdom of Cambodia.[391]

3. Indonesia

Indonesian insolvency and bankruptcy law traces back to a Special Bankruptcy Ordinance introduced by the former government of the Netherlands – Indies for European and Chinese.[392] This Ordinance was known as Regulation of Bankruptcy (Faillissements Verordening), published in the State Gazette in 1905, No. 217 and in the State Gazette in 1917, No. 12.[393] The bankruptcy law came into force on its promulgation in 1906 and is embedded into the Commercial Code (Kitab Undang-Undang Hukum Dagang) of Indonesia.[394] Indonesians were not subject to this law until the country's independence in 1945.[395] Law No. 4 of 1998 and Law No. 37 of 2004 rule bankruptcy & suspension of dept payment obligation.

Filing for bankruptcy in Indonesia always remains an issue which disturbs the preservation of harmony, as in Indonesia people tend to avoid conflict.[396] Therefore, creditors attempt to avoid direct confrontation with the debtor regarding his financial hardship because it may amount to humiliation. As Professor Tomasic notes, Indonesia is a 'non-confrontation society'. Hence, bankruptcy regulations were simply used, explaining the backwardness of insolvency proceedings.[397]

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[391] DFDL Mekong (Cambodia) Co. Ltd., 'DFDL Mekong (Cambodia) Co. Ltd. 2008', 4; see for detail Article 6 of the Law on Bankruptcy: 'Article 6. (1) Insolvency proceedings may be opened under this Law against a debtor who is: (a) a partnership or legal entity formed under the laws of the Kingdom of Cambodia; (b) a natural person who is domiciled and own assets in the Kingdom of Cambodia; (c) a partnership or legal person formed under the laws of a foreign country which owns assets situated in the Kingdom of Cambodia; and (d) a natural person who is domiciled outside the Kingdom of Cambodia and who owns assets situated in the Kingdom of Cambodia. (2) Insolvency proceedings opened under this Law against the persons or partnerships set out in paragraphs (1)(c) and (1)(d) of this Article shall apply only to the assets of such persons or partnerships which are situated in the Kingdom of Cambodia and having its registered address in the Kingdom of Cambodia. The following shall be considered assets situated in the Kingdom of Cambodia: (a) tangible assets located within the territory of the Kingdom of Cambodia; (b) assets and rights for which the ownership of or entitlement to must be entered in a public register under the authority of the Royal Government of Cambodia...'

[392] R. Tomasic, P. Little, A. Francis, K. Kamarul and K. H. Wang, 'Insolvency Law Administration and Culture in Six Asian Legal Systems', *Australian Journal of Corporate Law* 6 (1996), 248–88, at 258

[393] ibid., p. 288

[394] ibid., p. 258

[395] L. A. Burton, 'An Overview of Insolvency Proceedings in Asia', *Annual Survey of International & Comparative Law* 6 (2000), 113–27, at 121

[396] ibid., p. 121

[397] Tomasic, Little, Francis, Kamarul and Wang, 'Tomasic et al. 1996', 259

As such, it would be difficult to explore international insolvency cases. Indonesian Insolvency Law does not recognize foreign judgements in cross-border cases. Consequently, the assets of the debtor situated within the Indonesian state may not be affected by foreign judgements or enforced. However, this topic is increasingly being discussed with the aim of reform, at the very least on the back of the AP&P case.

4. Laos

Lao insolvency law is quite rudimentary. It consists, among other things, of the Law on Bankruptcy, the Secured Transaction Law, and the Business Law together with the Decree concerting its implementation. The major law is the Law on Bankruptcy of Enterprises No. 06/1994.

The National Assembly adopted this law by Resolution No. 010 on 14th October 1994 of the 5th ordinary session of the 3rd legislature period. The Law was promulgated by Decree No. 52/PO on 5th November 1994 in accordance with Chapter 5, Article 53, point 1 of the Constitution of the Lao People's Democratic Republic which provides for the promulgation of the Constitution and of laws which are adopted by the National Assembly.[398]

The Law on Bankruptcy is applicable to all companies incorporated under Lao law; both debtor and creditor are entitled to file the insolvency petition. However, the Law on Bankruptcy does not have any provisions dealing with personal bankruptcy. The Law on Bankruptcy of Enterprises contains 9 Chapters and 56 Articles governing the following insolvency issues: Chapter 1: General Provisions, Chapter 2: Filing of a Petition or Request for Bankruptcy, Chapter 3: Consideration of a Petition or a Request for Bankruptcy, Chapter 4: Rehabilitation of the Enterprise, Chapter 5: omitted, Chapter 6: Bankruptcy and Liquidation, Chapter 7: Measures Against Violators, Chapter 8: Termination of Liquidation and Consequences of Bankruptcy, Chapter 9: Final Provisions. This law has been replaced by the new Enterprise Rehabilitation and Bankruptcy Law (№ 75/NA, 26th December 2019).[399]

Issues concerning cross-border insolvency have not yet arisen in Laos, and current legislation does not reveal to any degree how this might work in practice. It remains unclear whether or

[398] Currently there is no official translation of the Law on Bankruptcy of Lao.

[399] Not available in English.

not Lao courts would recognize foreign judgements on insolvency. In the case of Secured Transactions Law issues, Lao law provides for the recognition of foreign judgements in Laos under the precondition that the Lao court recognizes them; however, this is with uncertain enforceability.[400]

5. Malaysia

Malaysian Insolvency Law is incorporated in the Malaysian Companies Act of 1965 and has been in force since 15th April 1966.[401] The English Company Act of 1948 and Australian Uniform Companies Act of 1961 both served as a model for this law. The Act 360 Bankruptcy Act was first enacted in 1967 and then revised in 1988. The Bankruptcy Rules date back to 1969.

The Act 360 Bankruptcy Act consists of the following parts: Part 1: Proceedings from Act of Bankruptcy to Discharge, Part 2: Disqualification and Disabilities of Bankrupt, Part 3: Administration of Property, Part 4: Director General of Insolvency, Part 5: Constitution, Procedure and Powers of Court, Part 6: Small Bankruptcies, Part 7: Fraudulent Debtor and Creditors, Part 8: Supplemental Provisions.

There are two issues relevant to cross-border insolvency in Malaysia: first, the policy of recognizing foreign insolvency judgements and court orders as well as proceedings related to assistance of courts in foreign jurisdictions. Malaysian insolvency law does not differentiate between local and foreign creditors in insolvency proceedings, and as such, there are no special rules for the admission of foreign claims. In cases of the satisfaction of a foreign claim, approval by a Controller of Exchange Control in accordance with the Exchange Act 1953 is required.[402] One particularity of assisting foreign courts is the rule in Section 104 of the Act 360 Bankruptcy

[400] T. Reid, 'Insolvency Law in Laos' in R. Tomasic (ed.), *Insolvency Law in East Asia*, 3rd edn. (Hampshire: Ashgate Publishing Limited, 2013), pp. 271–90, at 271 et seqq.; for overview of the legal system in Laos, *see generally*, M. Radetzki, 'From Communism to Capitalism in Laos: The Legal Dimension', *Asian Survey* 34 (1994), 799–806, at 801 et seqq.; J. J. Westermeyer, 'Traditional and Constitutional Law: A Study of Change in Laos', *Asian Survey* 11 (1971), 562–9, at 563 et seqq.

[401] Tomasic, Little, Francis, Kamarul and Wang, 'Tomasic et al. 1996', 12

[402] B. K. Kamarul, 'Insolvency Law in Malaysia' in R. Tomasic (ed.), *Insolvency Law in East Asia*, 3rd edn. (Hampshire: Ashgate Publishing Limited, 2013), pp. 321–54, at 321 et seqq.

Act 1967.[403] This rule was initially introduced for the auxiliary assistance of the High Court of Singapore. Other designated countries within Section 104 are the ASEAN Member States.[404]

6. Myanmar

The first insolvency law enacted in Myanmar was the Yangon Insolvency Act of 1908 and was followed by the Myanmar Insolvency Act of 1920[405] and subsequently the Burma Insolvency rules in 1924.[406] The major elements of Myanmar insolvency law are described in Courts Manual published by the Supreme Court of Myanmar. Companies and corporations registered under Myanmar law are exempt from insolvency proceedings; however, the company can be wound up under the Myanmar Company Act 1913.[407] Myanmar is one of the few Member States of ASEAN how adopted UNCITRAL Model Law on Cross-Border Insolvency on 14th February 2020. The government replaced the Yangon Insolvency Act of 1909 and Myanmar

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[403] Article 104 of the Act 360 Bankruptcy Act: 'Reciprocal provisions relating to Singapore and designated countries 104. (1) The High Court and the officers thereof shall in all matters of bankruptcy and insolvency act in aid of and be auxiliary to the courts of the Republic of Singapore or any designated country having jurisdiction in bankruptcy and insolvency so long as the law thereof requires its courts to act in aid of and be auxiliary to the courts of Malaysia. (2) An order of any such court of the Republic of Singapore or any designated country, seeking aid with a request to the High Court, shall be deemed sufficient to enable the High Court to exercise in respect of the matters directed by the order such jurisdiction as either the court which made the request or the High Court could exercise in respect of similar matters within their several jurisdictions. (2A) In exercising its discretion under subsection (2), the High Court shall have regard to the rules of private international law. (3) The Yang di-Pertuan Agong by notification in the Gazette may declare that the Government of Malaysia has entered an agreement with the Government of the Republic of Singapore for the recognition by the Government of Malaysia of the Official Assignee in Bankruptcy appointed by the Government of Singapore and the recognition by the Government of Singapore of the Director General of Insolvency in Bankruptcy appointed by the Government of Malaysia. (4) From the date of such notification where any person has been adjudged a bankrupt by a court of the Republic of Singapore, such property of such bankrupt situate in Malaysia as would, if he had been adjudged bankrupt in Malaysia, vest in the Director General of Insolvency of Malaysia, shall vest in the Official Assignee appointed by the Government of the Republic of Singapore, and all courts in Malaysia shall recognize the title of such Official Assignee to such property: Provided that this subsection shall not apply where a bankruptcy petition has been presented against the bankrupt in Malaysia, until the petition has been dismissed or withdrawn or the receiving order has been rescinded or the order of adjudication has been annulled as the case may be. 84 Laws of Malaysia ACT 360 (5) The production of an order of adjudication purporting to be certified under the seal of the court in the Republic of Singapore making the order by the Registrar of that court or of a copy of the official Gazette of the Republic of Singapore containing a notice of an order adjudging such person a bankrupt shall be conclusive proof in all courts in Malaysia of the order having been duly made and of its date. (6) The Official Assignee of the Republic of Singapore may sue and be sued in any court in Malaysia by the official name of "The Official Assignee of the property of ... a bankrupt under the law of the Republic of Singapore" inserting the name of the bankrupt. (7) In this section "designated country" means any country designated for the purposes of this section by the Yang di-Pertuan Agong by notification in the Gazette.'

[404] P. J. Omar, 'Cross-Border Jurisdiction and Assistance in Insolvency: The Position in Malaysia and Singapore', *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad* 11 (2008), 158–211, at 194

[405] J. Finch, S. P. Myint and S. Y. Win, 'Myanmar', *Project Finance* (2011), 161–7, at 161

[406] The Supreme Court of the Union of Myanmar, *The Courts Manual*, 4th edn. (Yangon: The Supreme Court of the Union of Myanmar, 1999), vol. 1, p. 483

[407] Finch, Myint and Win, 'Finch et al. 2011', 162

Insolvency Act of 1920. The draft of the new law took place in cooperation with Asian Development Bank (ADR).

7. The Philippines

As with many other ASEAN countries after the Asian financial crisis, the Philippines also became aware of the need to revise its laws on insolvency. The history of Philippine insolvency law began in 1906 with the Insolvency Act, which, however, did not contain any provisions on corporate insolvency. In 1980 this was amended in Presidential Decree No. 902 – A (PD 902 - A) which confers jurisdiction on Philippines courts to hear cases of corporate rehabilitation and suspension of payments without provisions of enforcement by creditors.[408] In 1999, in the aftermath of the Asian financial crisis, the debtor-friendly[409] SEC Rules of Procedure on Corporate Recovery were issued.[410] The SEC Rules came into effect formally on 15th January 2000.[411] The SEC Rules served for a certain period of time as a mechanism for resolving corporate insolvency cases, but in principle, there are two valid insolvency laws, first, the Presidential Decree No. 902 – A and, second, the SEC Rules.

The new draft law 'Corporate Recovery and Insolvency Act' unifying all bankruptcy and insolvency rules has been proposed by the House of Representatives. This law refers, among other things, to cross-border insolvency cases and accounts for the following particularities: being subject to reciprocity and foreign representatives participating in foreign insolvency proceedings being entitled to apply for a judicial order to hinder Philippines creditors to act

[408] C. L. Villanueva, 'The Corporate Insolvency System of the Philippines: Experience and Reforms' in R. Tomasic (ed.), *Insolvency Law in East Asia*, 3rd edn. (Hampshire: Ashgate Publishing Limited, 2013), pp. 425–40, at 425 et seqq.

[409] I. C. Nam and S. oh, 'Asian Insolvency Regimes from a Comparative Perspective: Problems and Issues for Reform' in Organization for Economic Cooperation and Development (ed.), *Insolvency Systems in Asia: An Efficiency Perspective*. Conclusions of the Conference on 'Insolvency Systems in Asia: An Efficiency Perspective' (Paris: OECD Publishing, 2001), pp. 19–103, at p. 92

[410] Villanueva, 'Villanueva 2013', 426

[411] D. J. Fitzpatrick, 'Country Report for The Philippines' in Organization for Economic Cooperation and Development (ed.), *Insolvency Systems in Asia: An Efficiency Perspective*. Conclusions of the Conference on 'Insolvency Systems in Asia: An Efficiency Perspective' (Paris: OECD Publishing, 2001), pp. 295–346, at p. 334 For risk management and insolvency, *see* J. de Zuñiga, Jr. and N. A. Espenilla, Jr., 'Trends and Developments in Insolvency and Risk Management in the Philippines' in Organization for Economic Co-operation and Development (ed.), *Credit Risk and Credit Access in Asia*. Conclusions of the Fourth Meeting of the Forum for Asian Insolvency Reform (FAIR) (Paris: OECD Publishing, 2006), pp. 227–44

unilaterally in relation to assets based in the Philippines.[412] UNCITRAL Model Law has been adopted in the Philippines in 2010.

8. Singapore

Singaporean insolvency law is ruled by the Company Act of Singapore 1967, which is in turn based on the Malaysian Company Act of 1965. Being an archetype of Australian and English law, it has often been revised in the direction of the Singaporean system. The Company Amendment Act of 1987 introduced the system of judicial management. The New Bankruptcy Act of 1995 implemented more business-oriented measures, e.g. differentiation of bankruptcy causes such as misfortune or business failure.[413]

However, it is worth noting that Singapore did make some efforts to introduce cross-border insolvency law based on the UNCITRAL Model Law. In 2010, the Singaporean government began a review of its national insolvency law. The Review Committee of the Ministry of Law also spoke out about cross-border insolvency law referencing UNCITRAL Model Law on Cross-Border Insolvency and gave a set of recommendations for implementation. However, it did not expressly recommend implementing the principle of reciprocity because it had unsurmountable doubt in the effectiveness of such a provision until Singapore amended its Company Act in 2017. Also, the UNCITRAL Model Law was finally adopted in 2017.

9. Thailand

Insolvency Law in Thailand is incorporated into commercial law with a focus on rehabilitation by restructuring.[414] It already had its insolvency regime in Ayutthaya period dating back to 843. The first Bankruptcy Act was enacted in 1909, the second in 1911, the third in 1981 with amendments made in 1927 and 1933.[415] Before the Asian financial crisis occurred, there was only the fourth Bankruptcy Act, which dated back to 1940 and applied in cases of liquidation proceedings; however, after the onset of the crisis, the number of bankruptcies in Thailand almost doubled. In April 1998, the government made the first amendment to Bankruptcy Act

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[412] Villanueva, 'Villanueva 2013', 426

[413] Tomasic, Little, Francis, Kamarul and Wang, 'Tomasic et al. 1996', 8

[414] Asian Development Bank, *Asian Development Bank 2008*, p. 78

[415] E. Clark and S. Supanit, 'Thai Insolvency Law: One Step Towards the Developments of the Legal Infrastructure for a Revitalized Economy' in R. Tomasic (ed.), *Insolvency Law in East Asia*, 3rd edn. (Hampshire: Ashgate Publishing Limited, 2013), pp. 291–320, at 392 et seqq.

and introduced rehabilitation/reorganization[416] proceedings. Later, in 1999 bankruptcy law was also modified to make it more efficient. In addition, a special bankruptcy court was set up in Thailand.[417] The Bankruptcy Court Act was ratified on 8th April 1998.[418] Despite all efforts, the handling of insolvency cases became more lenient; hence, the Bank of Thailand and other associations established the Corporate Debt Restructuring Advisory Committee (CDRAC), which often applied informal workouts.[419]

Thailand faces problems in rehabilitation and liquidation proceedings if the debtor's property is situated abroad. Currently, there is neither any firm proposal to enact UNCIRAL Model Law in Thailand nor is Thailand party to any international treaty or convention on insolvency law.[420] However, there have been some tentative efforts to facilitate insolvency proceedings with foreign elements, e.g. for inbound cases the rights of foreign creditors are supported by section 91 of the Bankruptcy Act where the foreign creditor has to fulfil the requirements of section 178 of the Bankruptcy Act; in particular, the foreign creditor has to prove that he would also be entitled under the laws of the country of residence, but Thai insolvency law does not recognize an insolvency administrator appointed under a foreign insolvency law.[421]

Judgements, with exception of arbitration awards, rendered by foreign courts are unlikely to be recognized by local Thai courts; however, those judgements may be used as evidence. In the case of contracts, foreign law may only be recognized by the Thai Court if it not contrary to morals and public order of Thailand.[422] Foreign bankruptcy proceedings still have no effect on the assets of the debtor situated in Thailand. Only if foreign creditors can prove that local Thai

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[416] For further details, *see* P. Vongvipanond, 'Asian Insolvency Systems: The Thai Perspective' in Organization for Economic Cooperation and Development (ed.), *Asian Insolvency Systems: Closing the Implementation Gap*. Conclusions of the Fifth Meeting of the Forum for Asian Insolvency Reform (FAIR) on 'Legal and Institutional Reforms of Asian Insolvency Systems' (Paris: OECD Publishing, 2007), pp. 119–31; for Thai insolvency and bankruptcy law, *see generally* W. Wisitsora-At, 'Lessons Learned: Bankruptcy Reform in Thailand' in Organization for Economic Cooperation and Development (ed.), *Asian Insolvency Systems: Closing the Implementation Gap*. Conclusions of the Fifth Meeting of the Forum for Asian Insolvency Reform (FAIR) on 'Legal and Institutional Reforms of Asian Insolvency Systems' (Paris: OECD Publishing, 2007), pp. 133–7

[417] V. Lampros, 'Legal Issues: Thailand' in Asian Development Bank (ed.), *Guide to Restructuring in Asia* (London: White Page, 2001), pp. 126–34, at p. 126

[418] Clark and Supanit, 'Clark et al. 2013', 291 et seqq.

[419] Lampros, 'Lampros 2001', 126

[420] Asian Development Bank, *Asian Development Bank 2008*, p. 92

[421] ibid., p. 91

[422] Public policy exception was implemented in several national legislations.

creditors would have an entitlement to claim the same rights in the foreign jurisdiction, they can claim the repayment of their debts in Thailand[423] pursuant to section 177 of the Bankruptcy Act.[424]

10. Vietnam

Although the bankruptcy law in Vietnam has various Western elements, up until now it remains underdeveloped. In 1993, the new Law on Business Bankruptcy was enacted in Vietnam and was subsequently replaced by the Bankruptcy Law No. 21/2004/QH11 dated 15th June 2004.[425] However, those laws did not improve the treatment of non-performing loans in Vietnam, specifically because of the lack of court order enforcement and the misreading of creditors rights.[426] The latest Bankruptcy Law No. 51/2014/QH13 was adopted on 19th June 2014 by the National Assembly of Vietnam. This law replaced Bankruptcy Law No. 21/2004/QH11 dated 15th June 2004 as from 1st January 2015.[427] The main insolvency issues pertain to state-owned enterprises (SOEs) and state-owned banks (SOBs).[428]

As for cross-border insolvency cases, it not surprising that Vietnam is not party to any international or regional treaties on insolvency law. Nevertheless, there were various attempts to consider foreign elements in the Draft to Bankruptcy Law in 2002 with a focus on merchants having business operations within Vietnamese territory and for those acting abroad. This draft was however not implemented into the Bankruptcy Law of 2004. Interestingly, Article 4 of the Law of 2004 provides that the bankruptcy is applicable to all enterprises doing business in Vietnam, hence, there is no language excluding or including foreign debtors.[429] There is no

[423] Lampros, 'Lampros 2001', 134

[424] Asian Development Bank, *Asian Development Bank 2008*, p. 91

[425] J. Gillespie, 'Insolvency Law in Vietnam' in R. Tomasic (ed.), *Insolvency Law in East Asia*, 3rd edn. (Hampshire: Ashgate Publishing Limited, 2013), pp. 239–70, at p. 239

[426] H. T. Loi, 'An Update on Non-Performing Loans Resolution and Banking Reform in Vietnam' in Organization for Economic Cooperation and Development (ed.), *Asian Insolvency Systems: Closing the Implementation Gap*. Conclusions of the Fifth Meeting of the Forum for Asian Insolvency Reform (FAIR) on 'Legal and Institutional Reforms of Asian Insolvency Systems' (Paris: OECD Publishing, 2007), pp. 139–43, at p. 140

[427] Clifford Chance, *Vietnam: New Bankruptcy Law 2014*, Briefing Note (2014), p. 3

[428] H. T. Loi, 'Trends and Developments in Insolvency Systems and Risk Management: The Experience of Vietnam' in Organization for Economic Co-operation and Development (ed.), *Credit Risk and Credit Access in Asia*. Conclusions of the Fourth Meeting of the Forum for Asian Insolvency Reform (FAIR) (Paris: OECD Publishing, 2006), pp. 273–9, at p. 273

[429] C. D. Booth and W. Chiu, 'Booth, Drafting Bankruptcy Laws in Socialist Market Economies: Recent Developments in China and Vietnam', *Columbia Journal of Asian Law* 11 (2005), 93–147, at 144

official recognition of a foreign insolvency judgement in Vietnam, which is why foreign creditors are required to initiate local proceedings to obtain an insolvency judgement.[430]

11. ASEAN+3: Insolvency Laws and National Cross-Border Rules

Although the focus of this thesis concerns cross-border insolvency legal solutions within ASEAN countries, ASEAN+3 has a decisive impact on their development, implementation and long-term success because of their economic and political power in the region. What's more, it is worthwhile to examine the structure of insolvency laws in China, South Korea, and Japan as well as to bear in mind that gaps in progress in the insolvency law of these states impacts the future cooperation between ASEAN states and ASEAN+3. What follows is an overview of the insolvency systems in Japan, China and South Korea.

a. Japan

Japan has well-structured national rules regarding cross-border insolvencies. It is divided into consumer[431] and corporate bankruptcy law. Corporate insolvencies are governed by the Corporate Reorganization Act of 2002 and the Bankruptcy Code of 1922.[432]

The UNCITRAL Model Law on Cross-Border Insolvency was successfully enacted in several jurisdictions.[433] The success of its enactment depends, of course, on its methods as well as its legislative and institutional framework.[434] Historically, Japanese insolvency law centred on the territoriality principle,[435] i.e. it not only refused to recognize the effects of foreign insolvency proceedings, but Japanese proceedings were also not recognized by foreign courts. [436] Because

[430] Clifford Chance, *A Guide to Asia Pacific Restructuring and Insolvency Procedures* (2013), p. 141

[431] Consumer bankruptcy is not a subject of the research.

[432] S. Steely, 'Insolvency Law in Japan' in R. Tomasic (ed.), *Insolvency Law in East Asia*, 3rd edn. (Hampshire: Ashgate Publishing Limited, 2013), pp. 13–62, at p. 18

[433] *For example,* Australia (2008), Canada (2005), Chile (2014), Colombia (2006), Eritrea (1998), Greece (2010), Mauritius (2009), Mexico (2000), Montenegro (2002), New Zealand (2006), Poland (2003), Republic of Korea (2006), Romania (2002), Serbia (2004), Slovenia (2007), South Africa (2000), Uganda (2011), United Kingdom of Great Britain and Northern Ireland. British Virgin Islands (2003), Great Britain (2006)

[434] B. Wessels, 'Will UNCITRAL Bring Changes to Insolvency Proceedings Outside the USA and Great Britain? It Certainly Will!', *International Corporate Rescue* 3 (2006), 200–6, at 201

[435] For definitions, *see* supra

[436] H. Hirokoshi, 'Perspective Article: Guide to Japanese Cross-Border Insolvency Law', *Law and Business Review of the Americas* 9 (2003), 725–39, at 729; S. Takagi, 'Japanese Insolvency Laws', *Annual Survey of Bankruptcy Law* (1999 - 2000), 627–51, at 643

of this territorial approach, Japan's treatment of cross-border insolvency cases was criticized by foreign legal professionals.[437]

Alongside other countries, the Japanese government continued to reform insolvency laws in the country in order to comply with the standards of the new international model.[438] After a long legislative process, which started in 1996,[439] Japan successfully adopted the UNCITRAL Model Law on Cross-Border Insolvency in 2000 under the Law of Recognition and Assistance for Foreign Insolvency Proceedings (LRAFIP).[440] Japan itself was one of the 36 UNCITRAL members of the Working Group V on Insolvency Law.[441] Japan accepted the key points of the reform in their entirety, though made some adjustments in accordance with the particularities of its national legislation. However, according to Japanese governmental decisions, foreign insolvency proceedings are only recognized to a certain extent.[442] Professor Yamamoto accounts for these deviations explaining that the Model Law is fundamentally impinged upon by common law. Hence, as a civil law country, it would not be feasible for Japan to implement the Model Law[443] without carrying out some amendments. According to Professor Yamamoto, the difficulties are technical problems.[444]

New Japanese Cross-Border Insolvency Law

Some of the issues introduced by the new Japanese insolvency law are of great significance. These issues are the access and participation of foreign representatives and foreign creditors in insolvency proceedings falling under the Japanese jurisdiction, including cooperation with foreign courts, concurrent proceedings, and the termination of proceedings.

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[437] K. Yamamoto, ‘New Japanese Legislation on Cross-Border Insolvency as Compared with the UNCITRAL Model Law’, *International Insolvency Review* 11 (2002), 67–96, at 67

[438] ibid., p. 69

[439] ibid., p. 67

[440] S. Takagi, ‘Issues Arising in the Cross-Border Insolvency of Groups of Companies in Japan’ in Organization for Economic Cooperation and Development (ed.), *Asian Insolvency Systems: Closing the Implementation Gap*. Conclusions of the Fifth Meeting of the Forum for Asian Insolvency Reform (FAIR) on 'Legal and Institutional Reforms of Asian Insolvency Systems' (Paris: OECD Publishing, 2007), pp. 109–11, at p. 109

[441] Yamamoto, ‘Yamamoto 2002’, 69

[442] Wessels, ‘Wessels 2006’, 202

[443] Yamamoto, ‘Yamamoto 2002’, 68; Hirokoshi, ‘Hirokoshi 2003’, 725

[444] Yamamoto, ‘Yamamoto 2002’, 88

Japanese insolvency law allows for foreign representatives to apply for the commencement of insolvency proceedings on behalf of foreign creditors. What's more the foreign representative is entitled to participate in the insolvency proceedings in Japan, i.e. he will be given legal standing to undertake procedural actions, such as making submissions, requests, petitions etc., which concern the preservation or distribution of the debtor's assets. The foreign representative may also file an appeal against decisions taken by a Japanese court. In addition, Japanese insolvency law treats foreign creditors in the same way as local creditors pursuant to the UNCITRAL Model Law's non-discrimination principle. However, Japan links this principle to principles of reciprocity, i.e. only if the native state of the foreign creditor applied the same non-discriminatory rule would this rule likely be applied by a Japanese court. This principle was called the reciprocity principle, was particularly criticized by foreign lawyers and hence has been abandoned under the new Japanese law. It takes the equality principle into account by notifying foreign creditors in the same way as it does domestic one. Japan has refused the automatic recognition of foreign judgements affecting cross-border insolvency cases. Instead, the Japanese government produced a set of requirements for successful recognition. Firstly, the state where the debtor has his place of business has a jurisdiction over the commencement of an insolvency proceeding. However, Japanese law does not accept judgements rendered by a court in a jurisdiction where the debtor owns assets but does not have his place of business because this is insufficient to link the debtor and the jurisdiction of the insolvency proceedings. Secondly, a competent Japanese court may refuse recognition if the foreign judgement is contrary to public policy or good customs in Japan. Thirdly, the foreign representative must pay fees for said recognition determined by the competent Japanese court. In addition, there are also following considerations: if recognition relief may be not necessary for other reasons; if the foreign judgement may not allow for its effects to extend to the debtor's assets situated in Japan; if the competent court may refuse recognition even if the foreign representative does not communicate the information required to the competent court in Japan or applied for recognition in bad faith.[445]

The Tokyo District Court is exclusively competent for recognition of foreign proceedings and has the power to request assistance from other district courts in Japan who may be more familiar with the case. Japanese law allows foreign representatives to apply for the recognition of foreign

[445] ibid., 69 et seq.

judgements in Japan, but it does not apply for interim proceedings. Japanese law allows foreign representatives to appoint middlemen such as a Japanese lawyer in order to smooth the communication process between foreign representatives and the Japanese court.[446] It also foresees the need for temporary measures from Japanese courts, even if with a lesser degree of discretion, before the recognition of foreign judgements. These may be in the form of a stay or continuation of actions, a ban on the payment of debts or transfer of assets, the appointment of an interim trustee.

The decision regarding recognition differs from the UNCITRAL Model Law because it is not intended to be rendered 'as soon as possible'. According to Professor Yamamoto, the Japanese court has enough powers to assess evidence and to make the decision within its own discretion. The Japanese court will rescind recognition, as Japanese law does not provide for automatic recognition.[447] Finally, the new Japanese cross-border insolvency law does not provide rules for concurrent proceedings proposed by Articles 28-30 of the Model Law.

Within the five years following the enactment of the LRAFIP, two cases were filed claiming assistance and recognition.[448] The new law was applied in the case of Think3 Inc. in 2012.[449]

Think3 Inc.-Case No. 1757 of 2012

The Model Law enables enacting states to interpret the Model Law – as is usual in these treaties – such that the enacting state would have an interest in producing a harmonized interpretation. The Case Law on UNCITRAL Texts (CLOUT) aid with these issues.[450] The Japanese Court has already made a decision regarding cross-border insolvency issues in the case of Think3 Inc. in accordance with the enacted UNCITRAL Model Law on Cross-Border Insolvency.

To be specific, Japan differs on some articles of the Model Law. Article 20 of the Model Law, for instance, was not adopted.[451] Japan does not admit the direct effect of foreign insolvency judgements in Japan. Therefore, the government introduced a framework for the recognition of

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[446] ibid., 79 et seq.

[447] ibid., 81 et seq.

[448] Takagi, 'Takagi 2007', 109

[449] *See* Case Law on UNCITRAL Text (CLOUT)

[450] United Nations Commission on International Trade Law (ed.), *United Nations Commission on International Trade Law 2014*, p. 54

[451] Wessels, 'Wessels 2006', 202

foreign judgements on the decision of Japanese courts.[452] The Tokyo District Court is exclusively competent in handling the recognition of foreign insolvency proceedings and, inter alia, has the exclusive jurisdiction to transfer the issue to another district court with jurisdiction over the insolvent debtor.[453] The capacity to apply for recognition is solely possessed by a foreign representative.[454] However, it does not provide for any kind of communication between Japanese and foreign courts.[455] According to Professor Yamamoto, there is no need for a provision such as this because it only would be applicable in cases of concurrent proceedings.[456] The new Japanese Insolvency Law does not provide the option of procedural consolidation as is the case in the US Bankruptcy Code.[457] After application, the competent court in Japan may grant an interim relief as a result of which the transfer of the debtor's assets in Japan will be prohibited.[458]

b. China

Bankruptcy proceedings in China are not unified under one bankruptcy law; rather they depend upon the type of corporation facing insolvency and as well as being handled by regulatory and governmental institutions, such as the Ministry of Commerce, without limited involvement of the courts.[459] In addition, the Chinese courts do not generally have specialist bankruptcy knowledge.[460] Creditors merely have recourse or other participation rights at their disposal in insolvency proceedings, something that is reflected in the poor recovery outcome of

[452] Yamamoto, 'Yamamoto 2002', 68

[453] ibid., p. 79; *see also* Wessels, 'Wessels 2006', 202

[454] Yamamoto, 'Yamamoto 2002', 79

[455] Wessels, 'Wessels 2006', 202

[456] Yamamoto, 'Yamamoto 2002', 90

[457] Takagi, 'Takagi 2007', 111

[458] Yamamoto, 'Yamamoto 2002', 71

[459] J. LeMaster, C. Downey and F.J. Brewerton, 'Recent Developments in Selected Asian Countries' Bankruptcy Laws: Should Multinational Company Strategists Be Concerned?', *International Business & Economic Research Journal* 6 (2007), 32–8, at 35

[460] V. A. Pace, 'The Bankruptcy of the Zhu Kuan Group: A Case Study of Cross-Border Insolvency Litigation Against a Chinese State-Owned Enterprise', *Journal of International Law* 27 (2006), 517–99, at 588

proceedings.[461] The old Chinese bankruptcy law of 1986 did not sufficiently address the complexity of bankruptcies in the fast developing Chinese economy.[462]

To improve the handling of insolvency cases the Chinese Enterprise Bankruptcy and Insolvency Law[463] also known as the Draft Chinese Bankruptcy Law (DBL) was launched in June 2004. Remarkably, this law does not require grounds for filing an insolvency case against the debtor; however, the new law is applicable within a limited universality model.[464] The Enterprise Bankruptcy Law was promulgated at the 23rd Meeting of the Standing Committee of the Tenth National People's Congress of the People's Republic of China on 27th August 2006 and went into effect as of 1st June 2007.[465] Its success depends, however, on the technical competence and experience as well as availability of the courts.[466] While in the past only corporations had capacity to declare bankruptcy, the new law extends to private persons.[467] The new law makes two formal procedures available: reorganization and settlement.[468]

The Enterprise Bankruptcy Law does not provide rules for cross-border cases with the consequence that when insolvency proceedings touch upon cross-border elements, problems arise without a proper solution. However, the Enterprise Bankruptcy Law contains two

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[461] LeMaster, Downey and Brewerton, 'LeMaster et al. 2007', 35

[462] R. Bendapudi, 'People's Republic of China Bankruptcy Law', *Santa Clara Journal of International Law* 6 (2008), 205–19, at 207

[463] Enterprise Bankruptcy Law (EBL)

[464] LeMaster, Downey and Brewerton, 'LeMaster et al. 2007', 35

[465] http://www.npc.gov.cn/englishnpc/Law/2008-01/02/content_1388019.htm One of the problems in priority ranking is treatment of worker in favour of other creditors, *see for details* W. Huaiyu, 'The Bankruptcy Criteria and Priority of Claims: An International Comparison of Insolvency Laws' in Organization for Economic Cooperation and Development (ed.), *Asian Insolvency Systems: Closing the Implementation Gap*. Conclusions of the Fifth Meeting of the Forum for Asian Insolvency Reform (FAIR) on 'Legal and Institutional Reforms of Asian Insolvency Systems' (Paris: OECD Publishing, 2007), pp. 259–66; *see generally* L. Guoqiang, 'The Establishment of Limited Priority of Workers' Claims in the Enterprise Bankruptcy Law of China' in Organization for Economic Cooperation and Development (ed.), *Asian Insolvency Systems: Closing the Implementation Gap*. Conclusions of the Fifth Meeting of the Forum for Asian Insolvency Reform (FAIR) on 'Legal and Institutional Reforms of Asian Insolvency Systems' (Paris: OECD Publishing, 2007), pp. 169–75

[466] Pace, 'Pace 2006', 588

[467] Y. Junfu and C. Dong, 'Issues in the Acceptance of Bankruptcy Cases by Chinese Courts' in Organization for Economic Cooperation and Development (ed.), *Asian Insolvency Systems: Closing the Implementation Gap*. Conclusions of the Fifth Meeting of the Forum for Asian Insolvency Reform (FAIR) on 'Legal and Institutional Reforms of Asian Insolvency Systems' (Paris: OECD Publishing, 2007), pp. 151–68, at p. 151

[468] A. Godwin, 'Corporate Rescue in Asia – Trends and Challenges', *Sydney Law Revue* 34 (2012), 163–87, at 180

provisions relating to the initiation of insolvency proceedings outside of China as well as enabling local judges to recognize foreign insolvency decisions and judgements.[469]

c. South Korea

Insolvency law in South Korea was governed by the Corporate Reorganization Act, Bankruptcy Act, Composition Act and Individual Debtor Rehabilitation Act. While the Corporate Reorganization Act was applicable for corporations, the Composition Act allowed debtors in difficulties to continue business operations; both legal regulations were designated to deal with insolvency problems.[470] The real bankruptcy cases were experienced by South Korea in 1997 during the Asian economic crisis.[471] On 1st April 2006, those laws were unified under the Debtor Rehabilitation and Bankruptcy Act (DRBA).[472] South Korea was a strong proponent of the territoriality principle in cases with a foreign element.[473] All the regulations predating the Debtor Rehabilitation and Bankruptcy Act did not provide for the handling of cross-border insolvency cases nor issues associated, with the consequence that foreign insolvency judgements did not have any impact on debtors' assets situated within the South Korean territory. Nevertheless, after its introduction, the Debtor Rehabilitation and Bankruptcy Act takes cross-border insolvency cases into consideration. The new law adapted the principle of equality between Korean and non-Korean creditors.[474] Part V of the Debtor Rehabilitation and Bankruptcy Act governs international bankruptcy, in particular, Article 628 (Definitions), Article 629 (Scope of Application), Article 630 (Jurisdiction), Article 631 (Application Filed for Approving Foreign Bankruptcy Procedures), Article 632 (Decision to Approve Foreign Bankruptcy Procedures), Article 633 (Effect of Approval for Foreign Bankruptcy Procedures), Article 634 (Application by Representative of Foreign Bankruptcy Procedures for Commencing Domestic Bankruptcy Procedures, etc.), Article 635 (Order, etc. Prior to Approval), Article 636 (Support for Foreign Bankruptcy Procedures), Article 637 (International Bankruptcy

[469] S. J. Arsenault, 'Leaping Over the Great Wall: Examining Cross-Border Insolvency in China under the Chinese Corporate Bankruptcy Law', *Indiana International & Comparative Law Review* 21 (2011), 1–23, at 19

[470] LeMaster, Downey and Brewerton, 'LeMaster et al. 2007', 34

[471] J. Park, 'Country Report: South Korea' in The World Bank (ed.), *Global Judges Forum: Commercial Enforcement and Insolvency Systems* (The World Bank, 2003), pp. 1–19, at p. 18

[472] S. G. Han and J.-S. Ryu, 'South Korea: Cross-Border Insolvency Proceedings', International Financial Law Review, 1st March 2009

[473] LeMaster, Downey and Brewerton, 'LeMaster et al. 2007', 34

[474] Han and Ryu, 'Han et al. 2009'; Article 2 of DRBA: 'in the application of (DBRA) foreigners and foreign corporations shall have the same status as that of Korean Nationals and Korean Corporations'.

Custodians), Article 638 (Simultaneous Proceedings of Domestic Bankruptcy Procedures and International Bankruptcy Procedures), Article 639 (Multiple International Bankruptcy Procedures), Article 640 (Authority for Custodians to Carry Out Activities Overseas), Article 641 (Cooperation), and Article 642 (General Rules Governing Dividends).

Section IV – Historical Heritage as a Grid for Regional Insolvency Framework

In the past, the 'Asian Values' route into philosophical and religious traditions was impacted by other factors. However, these values are still in the process of development due to social, historical, political and economic change and as such should be evaluated from the modern perspective.[475]

1. Values Debate and its Impact on Legal Development in Southeast Asia

What is the definition of 'values'? According to the Collins dictionary, values are 'the moral principles and beliefs or accepted standards of a person or social group'. Depending on different interpretations, this term may include beliefs, ways of thinking, customs and traditions, or purpose, and hence may be differentiated by various categories such as religion, social expectations, morals, aesthetics, or politics. Summarized under single terms, values can mean a desire for honesty, harmony, patience, respect, wisdom, common will, etc. In Asia, there is no distinction between religious and secular values. Although some values are easily identifiable, some other ethnic groups do not distinguish between values and a code of conduct. It is not only important to know which values govern life in Asia, but also which outcomes are to be expected when they are put into practice.[476]

2. International Law and Cultural Relativism

An awareness of culture's impact on law is crucial. ASEAN launched the ASCC Group to determine principles of national and regional identity. The 'Asian Values' debate is an integral part of Asian economic growth. According to Professor Tomasic, the success of the implementation of insolvency reforms in Asia in terms of their effectiveness depends first on social, historical and cultural elements. He underlines that there has been a gradual shift away from a pronounced cultural attitude to insolvency law in Asia and remarks on a gradual

[475] J. Cauquelin, B. Mayer-König and P. Lim, 'Understanding Asian Values' in J. Cauquelin, P. Lim and B. Mayer-König (eds.), *Asian Values: An Encounter with Diversity* (Richmond: Curzon, 2000), pp. 1–19, at p. 4

[476] ibid., 2

stagnation of cultural issues regarding insolvency and a move to more pragmatic thinking towards the market approach. However, this tendency is likely only among insolvency professionals. Despite this cultural context remains significant in the operation of an insolvency system within the Southeast Asian legal system. This negates an unconsidered effort to copy and paste an insolvency regulation from any capitalistic legal system into that of a developing nation.[477] Justice JJ Spigelman underlines the fact that cultural disputes are the major factors impacting the issue of bankruptcy.[478] According to Ron Harmer, there is also a general framework that highlights some common needs in commercial affairs which are characteristic of every legal tradition. These needs are certainty and predictability, stability and order, fair and equitable treatment, as well as transparency.[479]

What are these 'Asian Values' and what influence do they have on the legal system? These questions have been extensively discussed by distinguished scholars and practitioners. The economic crisis of 1997 shone a light onto the international discussion about the 'Asian Values'[480] and revitalized active discussion both within Asia and the world in general. Despite its origins in human rights discourse,[481] this topic is of equal relevance in other legal issues such as cross-border insolvency in Asia because its roots can be traced back to cultural and traditional values, aspects which may differ by region.

Although there is no concrete definition of 'Asian Values', they are part of the Confucian aim for 'greater peace'.[482] Mark R. Thompson[483] describes 'Asian Values' as 'a doctrine of developmentalism' which 'can be understood as the claim that, until prosperity is achieved,

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[477] R. Tomasic, 'Diversity and Convergence in Insolvency Law in East Asia' in R. Tomasic (ed.), *Insolvency Law in East Asia*, 3rd edn. (Hampshire: Ashgate Publishing Limited, 2013), pp. 1–12, at 2 et seq.

[478] J.J. Spigelman, 'International Commercial Litigation: An Asian Perspective', *Hong Kong Law Review* 37 (2007), 859–891, at 870

[479] Tomasic, 'Tomasic 2013', 4

[480] M. R. Thompson, 'Pacific Asia after 'Asian Values': Authoritarianism, Democracy, and 'Good Governance'', *Third World Quaterly* 25 (2004), 1079–95, at 1079

[481] *See for example* Langlois, Anthony J., 'The Asian Values Discourse' in *The Politics of Justice and Human Rights: Southeast Asia and Universalist Theory* pp. 12–45

Nghia, Hoang Van, 'The 'Asian Values' Perspective of Human Rights: A Challenge to Universal Human Rights', Vietnamese Institute of Human Rights (2009)

[482] W. A. Manan, 'A Nation in Distress: Human Rights, Authoritarianism, and Asian Values in Malaysia', *Journal of Social Issues in Southeast Asia* 14 (1999), 359–81, at 363

[483] Mark R. Thompson is professor of political science at the University of Erlangen-Nuremberg and a visiting scholar at the University of California-Berkeley.

democracy remains an unaffordable luxury', contributing to growth and cultural traits.[484] Hard work and discipline are also typical characteristics of 'Asian Values'.

One of the essential properties of 'Asian Values' is a world view that the idea of Asia as a cultural whole is in direct contrast to the West.[485] Another central element of 'Asian Values' is the fact that the interest of the community exists above that of the individual. This makes for greater group consciousness, loyalty and sacrifice of personal greater goods.[486] The pre-eminence of the group over the individual was introduced into society by Confucianism. In this philosophy priority is given to hierarchical structures such as family and society and this factor is reflected collective elements in business too. In addition to the two main dogmas of collectivism and hierarchy, Confucianism's main values are humility, loyalty, harmony, filial piety, benevolent authority, education and self-education, trust, courtesy, respect of traditions and sincerity.[487] In Asia these values are common across the whole region and are values intrinsic to individual countries. The following values can be regarded as common 'Asian Values' valid across the whole Asian region. Firstly, holism and dialectics – in fact, there are no black and white thoughts; everything casts its own shadows (yin/yang). Secondly, there is the concept of family with its various obligations (financial, moral and ritualistic). Thirdly, respect is afforded to age and seniority expressed via the mode of filial piety. Fourthly, the cultivation of personal networks is of great significance, especially common in Japan (ningen kankei) and China (guanxi). Fifthly, there is the building trust which, according to Francis Fukuyama, can be low (China) or high (Japan).[488] Sixthly, there is the importance of 'face', e.g. in China (mianzi) – the face is associated with human dignity, social status, respect and standing, and face can be lost, restored, or taken away. This is of upmost importance in terms of networking. Seventhly, the avoidance of conflict is one of the typical features of Asian society and is driven by the need for harmony achieved by relying on indirect speech and patience. Harmony is a fundamental value in collective societies. Eighthly, there is the

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[484] M. R. Thompson, 'Whatever Happened to 'Asian Values'?', *Journal of Democracy* 12 (2001), 154–65, at 155

[485] C.J.W.-L. Wee, ''Asian Values', Singapore, and the Third Way: Re-Working Individualism and Collectivism', *Journal of Social Issues in Southeast Asia* 14 (1999), 332–58, at 333

[486] Manan, 'Manan 1999', 363

[487] K. Bogart, 'Asian Values and Their Impact on Business Practices' in J. Cauquelin, P. Lim and B. Mayer-König (eds.), *Asian Values: An Encounter with Diversity* (Richmond: Curzon, 2000), pp. 139–63, at 141 et seq.

[488] F. Fukuyama, 'Asian Values in the Wake of Asian Crisis' in F. Iqbal and J.-I. You (eds.), *Democracy, Market Economics & Development: An Asian Perspective* (Washington D.C.: The World Bank, 2001), pp. 149–67, at p. 151

importance of rank and status, and finally the value of the contractual obligation, which, in contrast with the West, is not stable and sure and may be renegotiated.[489]

The Asian way of thinking is characterized by a holistic approach, which is remarkable not only in the way of thinking but also in the behaviour and structures in society. Meanwhile the European *Weltanschauung* is influenced by the Cartesian concept, which only considers part of the whole, though views it as a whole.[490] China maintains a predominant place in Asia and is influential in terms of its Confucian values not just East Asian countries like Japan and South Korea, but also in Southeast Asian states.[491] Confucian dynamism sets out the core values: persistence, relationship by status, thrift, and a sense of shame.[492] It also requires conformism.[493]

Advocates of 'Asian Values' criticize the individualistic approach of the West.[494] At the same time, they insist that government and elite groups should manage the economy of the state.[495]

Although based mainly on Confucianism, 'Asian Values' contain other non-Confucian elements.[496] Confucianism contain many elements detrimental to economic development, firstly, centralised control without freedom or diversity, secondly, the priority of emotional values over logical ones, and finally, Confucianism prescribes different obligations depending on the level of personal relations.[497]

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[489] Bogart, 'Bogart 2000', 143

[490] Cauquelin, Mayer-König and Lim, 'Cauquelin et al. 2000', 15

[491] Barr M. D. (ed.), *Cultural Politics and Asian Values: The Tepid War*, Advances in Asia Pacific Studies (London: Routledge, 2003), vol. 6, p. 186

[492] C. J. Robertson, 'The Global Dispersion of Chinese Values: A Three-Country Study of Confucian Dynamism', *Management International Review* 40 (2000), 253–68, at 256

[493] N. Spina, D. C. Shin and D. Cha, 'Confucianism and Democracy: A Review of the Opposing Conceptualizations', *Japanese Journal of Political Science* 12 (2011), 143–60, at 146

[494] H. Chaibong, 'Why Asian Values?', *Korea Journal* 41 (2001), 265–91, at 269

[495] S.-H. Jwa and J.-H. Seo, 'Industrial Policies in Korea: Evaluation and Redirection Based on New Asian Values', *Korea Journal* 40 (2000), 322–64, at 357

[496] P. W. Lim, 'The Asian Values Debate Revisited: Positive and Normative Dimensions', *Korea Journal* 40 (2000), 365–84, at 374

[497] ibid., p. 376

3. The Role of Human Rights

Although there is no common definition, there are two extensive models describing the concept of 'Asian Values' – the Singaporean and the Malaysian.[498] The Singaporean model has been promoted by Lee Kuan Yew, the latter by Malaysian political leader, Mahathir Mohamad. While Lee argued that 'Asian Values' derived from 'Confucianism',[499] Mohamad insisted that 'Asian Values' are 'Universal Values' and that 'European Values' are 'European Values'.[500]

According to Lee, the idea of 'Asian Values' is the fundamental separation of West and East into notions of individualism and communitarianism. It presumes that the 'Asian cultural particularity justified the rejection of liberal democracy was matched by impressive economic results'.[501] Hence, in its essence it hinges on this position of social and economic success.[502] The pivotal argument of 'Asian Values' theory is that while individualism advocates the existence of individual rights and promotes democracy, communitarianism defends the pre-eminence of the group interest above the interests of the individual within hierarchical order of society and political leadership.[503] Lee claims that East Asian values do not view the individual as an self-determining entity in society, but rather a member of it much like a member of a family.[504] The hierarchical structure demands servility and deference to those of higher rank and age.[505] The West and East are intrinsically different, and thus what is good for West may not be appropriate for the East.[506] This schema of 'Asian Values' finally states that economic growth is not compatible with democracy.[507]

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[498] Manan, 'Manan 1999', 361

[499] A. Vickers and L. Fisher, 'Asian Values in Indonesia? National and Regional Identities', *Journal of Social Issues in Southeast Asia* 14 (1999), 382–401, at 386

[500] Manan, 'Manan 1999', 362

[501] Thompson, 'Thompson 2001', 154

[502] ibid., p. 154

[503] Manan, 'Manan 1999', 363

[504] M. Elgin, 'Asian Values - A New Model for Development', *Stanford Journal of East Asian Affairs* 10 (2010), 135–45, at 138

[505] J. Öjendal and H. Antlöv, 'Asian Values and its Political Consequences: Is Cambodia the First Domino?', *The Pacific Review* 11 (1998), 525–40, at 528

[506] Elgin, 'Elgin 2010', 138

[507] ibid., p. 138

Mahathir Mohamad defines ‘Asian Values’ as generally belonging to the East, but more specifically to Southeast Asia in particular.[508]

The notion of ‘Asian Values’ is a considerable aspect of a group's identity. However, this notion lost its importance in the wake of the first Asian financial collapse of 1997.[509] To conclude, both political thinkers advocated Asia's position at the centre of the world. However, their advocacy faced harsh global criticism, firstly as many argued that ‘Asian Values’ pave the way for authoritarianism[510] and secondly that ‘Asian Values’ are unrelated to tradition and is rather a purely political ideology preaching strength and power.[511] It has also been argued that the international prominence of ‘Asian Values’ has been undermined by the financial crisis in its aftermath.[512]

In short, the Singaporean and Malaysian models have two elements in common: firstly, that values are different in the East and the West; and secondly, that democracy and human rights are not necessarily conducive to economic success and growth, but rather lead to greater disorder.[513]

4. Characteristics and Roots

‘Asian Values’ have a long evolutionary history, although this belief has been contested from time to time. The two fundamental principles of Asian society, namely hierarchy and collectivism, are strengthened by common values across the Asian region, such as family, the holistic and dialectic nature of the Eastern mindset, respect for age and seniority, personal networking, trust, importance of ‘face’, conflict avoidance, avoidance of physical contact, smiling, importance of education and protocol, as well as the sanctity of contract. Family is the basic unit of society with the male as the principle figure. The sanctity of contract stands in contrast to Western contract theory. With the exception of Malaysia, Singapore and Hong Kong, the contract is not binding but rather represents a form of gentlemen's agreement.[514] That

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[508] Vickers and Fisher, ‘Vickers et al. 1999’, 386

[509] ibid., p. 383

[510] Öjendal and Antlöv, ‘Öjendal et al. 1998’, 527 et seq.

[511] ibid., p. 538

[512] Thompson, ‘Thompson 2001’, 154

[513] Manan, ‘Manan 1999’, 362

[514] Bogart, ‘Bogart 2000’, 142 et seqq.

notwithstanding, there are remarkable differences in Asian cultural affairs. Hoon summarizes four basic claims concerning the ‘Asian Values’ debate: firstly, human rights cannot claim universality and globality of application; secondly, the central unit in Asian tradition is family and not the individual; thirdly, the economic and social interests take priority over those of the individual; fourthly, the nation's interests are above the interests of the individual.[515]

According to Lee, ‘Asian Values’ are family-oriented whereas Western society is indifferent to family and irresponsible.[516] Zialcita observes that before European influence, Asia was community-oriented, putting individual rights behind the interests of community.[517]

‘Asian Values’ can be generally divided into two categories: firstly, there are social values which are attached to social collectivism and concern interpersonal matters such as the authority of seniority, priority of the community over the individual, predominance of collective over individual freedoms and, secondly, political values which primarily address the family, morals, anti-adversarial politics and demographic differences.[518]

In this thesis, only the social part of ‘Asian Values’ will be analysed.

5. Traditional Aspects in National Insolvency Systems in ASEAN Countries

Despite the global approach to ‘Asian Values’, it is possible to examine different local idiosyncrasies which may be essential for the successful implementation of cross-border insolvency rules on the national and regional level. The 1980s saw the rise of the ‘Third Way’ (Blairite), that is ‘the ability to have a notion of collectivism in the face of apparently triumphant free-market and transnational capitalist forces’. It is also called the ‘new centre’.[519]

Corporate insolvency law in Singapore is settled in the Singaporean Companies Act and traces back to the Malaysian Insolvency model, based on principles of Australian and English

[515] C. Y. Hoon, ‘Revisiting the 'Asian Values' Argument Used by Asian Political Leaders and Its Validity’, *The Indonesian Quarterly* 32 (2004), 154–74, at 155

[516] Wai-Teng Leong, Laurence, ‘From 'Asian Values' to Singaporean Exceptionalism’ in L. Avonius and D. Kingsbury (eds.), *Human Rights in Asia: A Reassessment of the Asian Values Debates*, 1st edn. (New York: Palgrave Macmillan, 2008), pp. 121–40, at p. 122

[517] F. N. Zialcita, ‘Is Communitarianism Uniquely Asian? A Filipino's Perspective’, *Journal of Social Issues in Southeast Asia* 14 (1999), 313–31, at 315

[518] C.-M. Park and D. C. Shin, ‘Do Asian Values Deter Popular Support for Democracy in South Korea?’, *Asian Survey* 46 (2006), 341–61, at 345

[519] Wee, ‘Wee 1999’, 334 et seq.

corporate insolvency law. In his survey, Professor Tomasic cites one interviewee saying that cultural attitudes ‘do not influence the law because we have remnants of English law. However, in practice you use culture to your advantage, such as to pressure to debtor’.[520] Cultural attitudes play an important role in dealing with a Chinese company, whereas UK and Australian law based on judicial management is not affected by local conditions at all. On the other hand, Tomasic points out that according to some interviewees Singaporean courts try to push parties in insolvency litigation cases to compromise and negotiate. Some of his interviewees call it the Asian approach because it combines efficiency, promotion, and cultural attitudes. However, within court itself cultural factors can only really play a minor role, this is also true for large non-familial companies, whereas for smaller companies they are likely to fall in the face of cultural attitudes. According to Professor Tomasic, Indonesian insolvency administration of corporate debtors is shaped to a significant extent by cultural and religious attitudes such as non-confrontation and harmony. Consequently, approaches along these lines have led to negotiation and compromise solutions in corporate insolvency. According to his survey, Indonesian bankers are very reluctant to engage in direct confrontation with debtors, meaning it may take many months before the bank contacts the debtors. ‘Indonesian society has traditionally been close and compact, and as a result, people have tried to compromise’. Hence, the litigation solution to insolvency issues in Indonesia barely comes into question because people prefer to arrive at a compromise instead of going to court. However, due to the growth of modern society, this common approach among insolvent debtors has gradually broken down, given that it concerns large debtor companies with separate ownership and control rights. Hence, social values and social harmony are being substituted in part for economic virtues. Aside from cultural attitudes, Professor Tomasic explains this reluctance towards litigation by an enormous lack of confidence in judicial and court practices, because the Indonesian court system is very old, costly, unpredictable, and unreliable. Of lesser influence on Indonesian insolvency law is religion. The Islamic and Confucian backgrounds do not have any deterministic effect on banking policy in Indonesia. Instead, it is the Javanese tradition of avoiding conflict which has impacted on dispute resolution and avoidance.[521]

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[520] Tomasic, Little, Francis, Kamarul and Wang, ‘Tomasic et al. 1996’, 33

[521] ibid., p. 33 et seq.; for recent reflections on cultural impacts on cross-border insolvency in East Asia, *see* G. C. Watters, ‘Cross-Border Insolvency in East Asia: Cooperation and Convergence’ in D. W. Arner, W. Y. Wan, A. Godwin, W. Shen and E. Gibson (eds.), *Research Handbook on Asian Financial Law: Research Handbooks in Financial Law series* (Glos: Edward Elgar Publishing, 2020), pp. 257–72

‘Asian Values’ do have this mutual Confucian background; however, they vary from country to country in Southeast Asia due to their movement from China to other countries,[522] also known as tributary states. In Malaysia, cultural norms are breaking down as well. This is due to increasing levels of education and business awareness among the Malaysian youth and the importance of social and governmental connections in the country. However, this decrease in cultural impact is not valid to the same degree all over Malaysia. In his survey, Professor Tomasic emphasizes the difference between Malaysian and Chinese groups. Chinese communities were likely to support their business partner in economic and financial trouble more than Malaysian communities were willing to do so, this is because the protection of family and business is central to Chinese values and cultural traits and business are generally based on ‘faith and relationship’. Malaysia falls back upon a privileged system of governmental support. Furthermore, there are other factors in Malaysia limiting insolvency proceedings. Among them racial diversity as well as social and political connections are more pronounced in Malaysia than in Indonesia or China, hence, bankers always face difficulties in case of action against politically connected people with high social status.[523]

Singapore, Malaysia, Indonesia, and Myanmar are countries where the democratic establishment requires more time to become established. This has the consequence that in these countries the recourse to ‘Asian Values’ is more prevalent than in other Asian countries.[524]

Section V – Traditional Implications in Member States of ASEAN and ASEAN+3

This section will provide some examples of the notion of ‘Asian Values’ in ASEAN countries which in part differ from those described by Lee Kuan Yew and Mahathir Mohamad. Though seemingly old news, this topic has not completely disappeared owing to its cultural traits.[525]

[522] D. H. Jung, ‘Asian Values: A Pertinent Concept to Explain Economic Development in East Asia?’, *Comparative Civilizations Review* 51 (2004), 107–24, at 113

[523] Tomasic, Little, Francis, Kamarul and Wang, ‘Tomasic et al. 1996’, 36

[524] S. Maisrikrod, ‘Joining the Values Debate: The Peculiar Case of Thailand’, *Journal of Social Issues in Southeast Asia* 14 (1999), 402–13, at 412

[525] Wai-Teng Leong, Laurence, ‘Wai-Teng Leong, Laurence 2008’, 122

The term ‘communitarianism’ is found in each Southeast Asian country but with its own interpretation and local influence.[526]

Although Brunei[527] shares some cultural traits with other Southeast Asian nations, Bruneian values are unique in Southeast Asia, representing a blending of Malay and Islamic values.[528] One must first turn to Brunei's Malays who concentrate in their traditions on values such as power distance, avoidance of uncertainty and abasement of individualism. This means that the distribution of authoritative power is accepted without question and power distance identifies clear hierarchical structure between different social classes. The low regard for individualism is characterized by striving towards collective ideas and goals.[529] The power in avoiding uncertainty is often based on an unwillingness to make decisions even in the face of clear evidence. This explains the prevalence of the fear of losing face which is more severe than in other Southeast Asian countries.[530] Bruneian society is group and family-oriented with a focus on interpersonal relationships founded on Malay-Islamic values.[531]

The ‘Asian Values’ debate in Cambodia is connected with its discourse around democratization and human rights.[532] Hierarchy is essential in Cambodia. Implicit in this hierarchy are varying moral and legalistic hereditary and non-hereditary obligations, which include obedience to the elderly, even outside of the family.[533] Nevertheless, family remains the major social structure in the Cambodian society, in particular the idea of the nuclear family, where all family members

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[526] B. H. Chua, ‘Asian Values: Is an Anti-Authoritarian Reading Possible?’ in M. Beeson (ed.), *Contemporary Southeast Asia: Regional Dynamics, National Differences*, 2nd (New York: Palgrave Macmillan, 2009), pp. 98–117, at p. 99

[527] For general overview, *see* I. Duraman and A. A. H. Hashim, ‘Brunei Darussalam: Developing Within Its Own Paradigm’, *Southeast Asian Affairs* (1998), 53–67

[528] J. R. Minnis, ‘Is Reflective Practice Compatible with Malay-Islamic Values? Some Thoughts on Teacher Education in Brunei Darussalam’, *Australian Journal of Education* 43 (1999), 172–85, at 172

[529] ibid., p. 178

[530] P. Blunt, ‘Cultural Consequences for Organization Change in a Southeast Asian State: Brunei’, *Academy of Management Executive* 2 (1988), 235–40, at 237

[531] Minnis, ‘Minnis 1999’, 179

[532] Öjendal and Antlöv, ‘Öjendal et al. 1998’, 527; For further discussion on ‘Asian Values’ and human rights in Cambodia, *see* T. Duffy, ‘Towards a Culture of Human Rights in Cambodia’, *Human rights Quaterly* 16 (1994), 82–104

[533] A. B. Woodside, ‘Medieval Vietnam and Cambodia: A Comparative Comment’, *Journal of Southeast Asian Studies* 15 (1984), 315–9, at 319

live together; the village community also belongs to this closer circle.[534] Prior to its socialist regime, society was divided into an upper class of elites and a lower peasant class.[535] However, these elites were not particularly interested in the maintenance of indigenous values because of their sympathy for colonialism and its protectorate.[536] Buddhism is the core religion in Cambodia to which more than 90 percent of the Khmer population belong.[537] Traditional Buddhist values gained some significance on the village level, which was reflected by values such as respect for the elderly, e.g. old men and women were treated differently in terms of language and behaviour. Virtues such as honesty, generosity, mercy, conflict avoidance and piety gained an ameliorated image within society.[538] Like other Asian nations, Cambodians are concerned with losing face. They are characterized by a strong feeling of pride toward their village, district, or other communities.[539] When a person is being corrected in the presence of a third party and when this person is unable to perform the assigned work, hence, this person lost her face.

Indonesia has not been included in the discussion surrounding 'Asian Values', however some elements of 'Asian Values' are still typically Indonesian.[540] As the biggest state in ASEAN, Indonesia has grasped this idea. The New Order regime was the most interested in this question of 'Asian Values' because in 1995 Indonesia disseminated the idea of the 'Third World' and the 'Non-Aligned Movement', which was the forerunner to 'Asian Values'. One of the leading advocates of authoritarian developmentalism in Indonesia was General Suharto, father of the 'Non-Aligned Movement', who argued that 'Pancasila Democracy' consisted of indigenous

[534] R. K. Headley, Jr., 'The Society and Its Environment' in R. R. Ross (ed.), *Cambodia: A Country Study*, Area Handbook Series, 3rd edn. (Washington D.C.: Federal Research Division Library of Congress, 1990), pp. 73–137, at p. 88

[535] ibid., 97

[536] R. Elson, 'Reinventing a Region: Southeast Asia and Colonial Experience' in M. Beeson (ed.), *Contemporary Southeast Asia: Regional Dynamics, National Differences*, 2nd (New York: Palgrave Macmillan, 2009), pp. 15–29, at p. 27

[537] Headley, Jr., 'Headley 1990', 112

[538] ibid., 98

[539] ibid., 88

[540] Vickers and Fisher, 'Vickers et al. 1999', 382

values.[541] However, some of these values had been 'sponsored' by the West.[542] The New Order regime abandoned individual rights for the sake of development and defined one important feature of 'Indonesian Values' in particular – indigeneity.[543]

In contrast to Singapore and Malaysia, in Indonesia all the principles of the state drew on cultural roots. These core principles and Indonesian values form the basis of the interpretation of the traditional ideology, Pancasila, and consist of an inherent notion of society and state in Indonesia, communitarianism over individual rights and the dominance of obligations over rights, consensus over conflict, a respect for hierarchies, the 'family principle' (kekeluargaan) with its hierarchical and functional specificities, and mutual assistance (gotong royong). Modern Indonesian society is based on several different layers, inter alia Islamic and Western influences.[544] It also faces some difficulties if 'Asian Values' are defined as a successor to Confucian doctrine, in particular because of the long period of anti-Chinese movements.[545] Vickers and Fisher conclude that 'Asian Values' were to some extent foreign to Indonesia even within the framework of ASEAN because it did not accept broader citizenship and non-indigenous people.[546]

In many respects, the Lao peoples are not collectivist when compared with other Asian societies because it is a very diverse nation containing around 65 minorities with their own languages and customs.[547] Even though there are no explicit individualist tendencies, with some researchers proposing the theory of a loose culture which in Thailand means a diversity of individual behaviours, it was finally rejected as applying to Lao society.[548] Furthermore, the Lao people follow a very strict social hierarchy where authority of the elderly plays a major

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[541] Thompson, 'Thompson 2001', 156

[542] J. O. Halldorsson, 'Particularism, Identities and a Clash of Universalisms: Pancasila, Islam and Human Rights in Indonesia' in M. Jacobsen and O. Bruun (eds.), *Human Rights and Asian Values: Contesting National Identities and Cultural Representation in Asia*, Democracy in Asia Series (London: RoutledgeCurzon, 2000), pp. 111–33, at p. 118

[543] Vickers and Fisher, 'Vickers et al. 1999', 398

[544] Halldorsson, 'Halldorsson 2000', 118; Halldorsson, 'Halldorsson 2000', 112

[545] Vickers and Fisher, 'Vickers et al. 1999', 386

[546] ibid., p. 398

[547] B. Boase, *Understanding Lao Culture* (1997)

[548] B. Rehbein, *Globalisierung in Laos: Transformation des Ökonomischen Feldes*, Market, Culture and Society (Münster: LIT, 2004), vol. 14, p. 125

role. In the particular case of Laos, the hierarchy of the village is of special significance.[549] Further Lao values include responsibility and decision-making, with a preference for authoritarian leaders who give people the right direction; again another key value is the fear of losing face.[550] Face shapes and maintains a defined image in the family and society and wields great power and influence.[551] For the sake of saving face, individuals are always eager to avoid conflict and look for pleasant-natured communication.[552] Relationships are also an issue in Lao society and business spheres.[553] Family relationships imply hierarchy in of themselves because in Lao villages, all the inhabitants belong to one family.[554] This social dimension has a paternalistic structure.[555] The quasi-feudal structure of the family in the village does not tolerate any deviation from an appointed social position within the village hierarchy.[556]

Malaysia was one of the first proponents of 'Asian Values' in the last decade. It employed this notion in manifold contexts, e.g. politics, religion, human rights and economics. Mahathir's model of 'Asian Values' are 'Universal Values' whereas 'European Values' are 'European Values'. The main argument remains that community interests take precedence over individual rights, which promotes more of a group-consciousness, discipline and self-sacrifice for the common goal. This is based on the Confucian philosophy of striving for a 'greater peace' (taiping).[557]

Malaysian values comprise such elements as community spirit, *budi* (moral system of behaviour or social and personal relations) including courtesy, responsibility, respect for elders, harmony within society and family. In business, Malays appreciate trust, sincerity and loyalty.[558]

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[549] Boase, *Boase 1997*

[550] B. Rehbein, *Globalization, Culture and Society in Laos*, Asia's Transformation (London: Routledge, 2007), p. 55

[551] Boase, *Boase 1997*

[552] Rehbein, *Rehbein 2007*, p. 68

[553] Boase, *Boase 1997*

[554] B. Rehbein, 'Religion und Globalisierung in Laos', *Journal of Current Southeast Asian Affairs* 28 (2009), 9–29, at 14

[555] ibid., p. 16

[556] Rehbein, *Rehbein 2007*, p. 67

[557] Manan, 'Manan 1999', 360

[558] Bogart, 'Bogart 2000', 158

In Myanmar, social values were impacted by an authoritarian regime. Hence, the central Confucian value of harmony is lacking here.[559] Prior to the authoritarian regime, Myanmar society was highly influenced by Buddhism.[560] The kings of Burma were considered direct descendants of the Buddha.[561]

The Philippine case is proof that there are different sets of 'Asian Values' though they have many things in common.[562] The Survey on Contemporary Philippines values revealed that the notion of public good is defined by family and not by the individual.[563] The Philippines in contrast to Singapore has a strong civil society.[564]

In the second half of the twentieth century, there was great discussion about Philippine values. The Philippine set of values can be summarized as follows. There are eight levels of interaction between individuals and groups, and one of the most important values is *pakikisama,* which means social acceptance.[565] Another widespread value in the Philippines is *pakikipagkapwa-tao* – a positive contribution to the nation's welfare.[566] It stands for the recognition of humanity and its sharing by others.[567] These values consist of *baynihan* (cooperation), *pakikiramay* (condolences to others in case of their experiencing hard luck) and *pagtitiwala* (trust). Another set of values can be positive as well as negative: *kanya-kanya* is a value described by the denial of public duties and a focus on individual interests and family, *pasulot* (favour for friends and supporters), *matiisin* (patience), *porma* (lack of self-reflection), *ningas cogon* (lack of consistency). A further set of values falls under the category of public values: *maka-Dios* (God-fearing), *maka-bayan* (national or community consciousness), *maka-tao* (orientation to the

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[559] The Irrawaddy, 'Burma Tests Asian Values', *The Irrawaddy Covering Burma and Southeast Asia* 5 (1997)

[560] M. Maung, 'Cultural Value and Economic Change in Burma', *Asian Survey* 4 (1964), 757–64, at 757

[561] W. Vande Walle, 'The Encounter Between Europe and Asia in Pre-colonial Times' in J. Cauquelin, P. Lim and B. Mayer-König (eds.), *Asian Values: An Encounter with Diversity* (Richmond: Curzon, 2000), pp. 164–200, at p. 173

[562] M. S. I. Diokno, 'Once Again, The Asian Values Debate: The Case of the Philippines' in M. Jacobsen and O. Bruun (eds.), *Human Rights and Asian Values: Contesting National Identities and Cultural Representation in Asia*, Democracy in Asia Series (London: RoutledgeCurzon, 2000), pp. 75–91, at p. 76

[563] ibid., 78

[564] R. Pertierra, ''The Market' in Asian Values' in J. Cauquelin, P. Lim and B. Mayer-König (eds.), *Asian Values: An Encounter with Diversity* (Richmond: Curzon, 2000), pp. 118–38, at p. 135

[565] Zialcita, 'Zialcita 1999', 314

[566] Pertierra, 'Pertierra 2000', 132

[567] Zialcita, 'Zialcita 1999', 314

needs of others). In addition, there are some behavioural values named *utaang-na-loob* (balanced reciprocity), *hiya* (loss of face), and *delicadeza* (avoiding shaming others). Also, *makiramay* (communalism) is widespread.[568]

Due to its prevailing economic position it is not surprising that Singapore was the leader in defending ‘Asian Values’; the ‘Singaporean School’ also employs this term in explaining the flourishing economy which includes notions of discipline, communitarianism over individual rights, respect for elders and the state.[569] In 2007, Singaporean Prime Minister Lee Hsien Loong, expanded the notion of ‘Asian Values’ to include cultural patterns and denied the individualistic path taken in the West.[570] Singaporean Exceptionalism describes this as ‘unique’ and differing from others, assuming the positive influence of being different, meaning adherence to international treaties and, as a consequence, rejecting the ‘West’.[571] Singaporean Exceptionalism contains some principles of ‘Asian Values’, developing them into a form of Asian Exceptionalism in opposition to the West. Asian Exceptionalism is far from a single entity while Singaporean Exceptionalism is a single country speaking only for itself and not for another ASEAN Member.[572]

Singaporean society consists of different races and comprises three ethnic groups: Indian – Hindu, Chinese – Confucian and Malay – Muslim.[573] However, according to Chua, Singapore is not an amalgamation of Chinese, Malay, and Indian values. Rather, it is their common essence, resulting in shared values which focus on collectivism.[574] Communitarian values with a reciprocal and family-oriented set of social relations are based on the ideas of Confucianism disseminated by the Chinese.[575] By 1982, Singapore was regarded as a highly Confucian society.[576] In the late eighties, it had been hurled into the ‘Asian Values’ debate.[577] Collective

[568] Pertierra, ‘Pertierra 2000’, 132

[569] Wai-Teng Leong, Laurence, ‘Wai-Teng Leong, Laurence 2008’, 121

[570] ibid., 122

[571] ibid., 129

[572] ibid., 133

[573] Chua, ‘Chua 2009’, 99

[574] ibid., 100

[575] ibid., 103

[576] M. Hill, ‘'Asian Values' as Reverse Orientalism: Singapore’, *Asia Pacific Viewpoint* 41 (2002), 177–90, at 181

[577] Wee, ‘Wee 1999’, 345

thinking is based on the well-being of the family and is translated onto the institutional level such as in business and governmental structures.[578] Singapore has the highest level of codification of these social values and, hence, established communitarianism as its national ideology. This ideology was explored by means of the shared values by the People's Action Party (PAP) in 1991 in the ‘White Paper on Shared Values’ declaring the ‘common good’, ‘nation before community, community before self’, community regard for individual members, family as a basic building block of society, and consensus instead of contention as the basis for resolution of social issues and regard and community support for the individual. This document has an uncertain legal status but enjoys persistent ideological effect by means of its institutionalization as a ‘collective well-being’.[579]

The ‘Singapore School’[580] always relied on ‘Asian Values’. Being a vigorous follower,[581] Singapore does not yet speak on behalf of other Southeast Asian countries such as Thailand or Indonesia.[582] Following the ‘Singaporean School’, the economic prosperity as well as the financial crunch of 1997 can be explained by ‘Asian Values’, viewing them as a weakness.[583] Singaporean Exceptionalism[584] claims that its tradition is individual, unwavering, undeviating and uninfringeable. Singaporean politicians also claimed to be superior in comparison to other Southeast Asian states such as Malaysia, Thailand, Indonesia, Vietnam and others. However, its neighbours were not always agreeing with this positioning calling Singapore a ‘little red dot’ comprising racism, corruption, etc.[585]

There are many similarities between ‘Asian Values’ and Thai values. Due to the manifold social, economic, and ethnic statuses of Thai regions, it is scarcely possible to pin down a set

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[578] Chua, ‘Chua 2009’, 104

[579] ibid., 109

[580] The name ‘Singapore School’ traces back to an ’Asian Version’ of the human rights which were advocated by such Singaporean political leaders as Bilahari Kausikan, Tommy Koh, and Kishore Mahbubani, *see Wai-Teng Leong, Laurence, ‘Wai-Teng Leong, Laurence 2008’, 121*

[581] ibid., 121

[582] ibid., 133

[583] ibid., 121

[584] ‘Singaporean Exceptionalism’ had been used in terms of human rights and means that this country is ‘unique’ and ‘different’ from the rest of the world claiming this difference being positive for the country without an obligation to meet the terms of international law with the consequence that the Western critics has no legitimation to be valid in Singapore, *see* ibid., 129.

[585] ibid., 133

of Thai values as such. There is a proposal to divide Thai values into rural (lower education, passiveness, love for recreation, materialism, respect for benevolence, face-saving, refraining from causing others inconvenience, submission to the powerful, informality and strong kinship obligations) and urban (rationality, competition, materialism, face-saving and promoting, Westernization, respect for legitimate authority, lack of discipline, disregard for public property, paying lip service instead of practical action, jealousy and selfishness). From this comparison, it follows that materialism, a respect for order and the holders of power are common across Southeast Asia. Cross-cultural management experts reiterated the fact that Thai society is in general highly collectivist. Thai scholar Surin Maisrikrod explains this by referencing Thailand's strong notion of hierarchy and explaining that strong hierarchy is necessary in their interactions with one another. Age is a key factor in this process. For example, terms such as *Phi* (elder brother or sister) and *Nong* (younger brother or sister), knowing your place and liking it, respect for elders and loyalty and obedience are used. Hierarchy is intrinsically linked with ideas such as indebted goodness and restraining one's desire or interest which could cause conflict or displeasure to others'.[586] Despite the strong adherence to the collectivist approach, on the whole Thai society accepted Westernization and democracy as an alternative to colonialism.[587]

As in many other Asian countries, Thailand is a conflict-avoiding society with scores of unwritten rules governing personal and social behaviour; the concept of *kreng chai* (a concept of social etiquette) teaches a reluctance to act if the action would hinder someone's convenience. Avoidance of conflict guarantees harmony both on the familial and societal level. *Jai yen* (keeping calm) is always summoned in Thailand in of frustration or conflict. The basic Thai values are status, face, courtesy, seniority, humility and the cultivation of personal relationships.[588]

The term 'Asian Values' first appeared in Vietnam, as it did in many Southeast Asian countries, in the context of human rights. The polarizing nature of this dispute around 'Asian Values' reached its zenith in Vietnam after the introduction of the 'Asian Values' debate at the Bangkok

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[586] Maisrikrod, 'Maisrikrod 1999', 403

[587] ibid., p. 411

[588] Bogart, 'Bogart 2000', 160

Regional Preparatory Meeting to the Vienna World Conference on Human Rights in 1993.[589] The Vietnamese utilized 'Asian Values' to resist the imposed Western concepts.[590] Vietnamese values are not based on cultural conceptualism; instead questions of ethics take precedence over those of law. In the main, it is Buddhism and Confucianism which impact on Vietnamese society, and it is these that have given rise to individual rights and freedoms in Vietnam since ancient times.[591] Confucianism influenced Vietnamese society and was accepted as the country's moral and ethical bedrock, holding strong over the course of several Vietnamese dynasties.[592] Although communist, Ho Chi Minh introduced some Confucian ideas to modern Vietnamese society which later galvanized the fight for liberty.[593]

Gradually, economic rights, which were not part of human rights mechanisms, also made it onto the agenda.[594] In those days, there were two opposing schools of thought. On the one hand, the conservatives generally denied individual rights; complaints against the state were outlawed with an encouragement for everyone to contribute to the Vietnamese State. The reformist movement promoted individual rights and argued for a 'level playing field' across both the state and private sector.[595] However, one Vietnamese values remained central – the duty to one's country: every citizen has a duty to serve their country, which is an archetypical idea among 'Asian Values'.[596] Vietnamese values' are derived from this conservative thinking and encapsulate ideas of collectivism, social hierarchies and duties, as well as obligations.[597]At the

[589] V. V. Ai, 'Human Rights and Asian Values in Vietnam' in M. Jacobsen and O. Bruun (eds.), *Human Rights and Asian Values: Contesting National Identities and Cultural Representation in Asia*, Democracy in Asia Series (London: RoutledgeCurzon, 2000), pp. 92–110, at p. 92

[590] ibid., 93

[591] ibid., 102

[592] Y. Baoyun, 'The Relevance of Confucianism Today' in J. Cauquelin, P. Lim and B. Mayer-König (eds.), *Asian Values: An Encounter with Diversity* (Richmond: Curzon, 2000), pp. 70–95, at p. 90

[593] ibid., 91

[594] T. Gammeltoft and R. Hernø, 'Human Rights in Vietnam: Exploring Tensions and Ambiguities' in M. Jacobsen and O. Bruun (eds.), *Human Rights and Asian Values: Contesting National Identities and Cultural Representation in Asia*, Democracy in Asia Series (London: RoutledgeCurzon, 2000), pp. 159–77, at p. 167

[595] ibid., 169

[596] ibid., 171

[597] ibid., 174

same time, some voices criticized ‘Asian Values’, citing them as a Pandora's box capable of undermining governmental control[598] over the state and populace.

The geographic and economic proximity of ASEAN to East Asian countries like Japan, South Korea and China necessitates and exploration of ‘Asian Values’ in those countries too. Relational hierarchy, interpersonal harmony and traditional conservatism are values that are likely to be associated with East Asia.[599]

Japanese values are based on collective thinking and conflict avoidance practices: the individual exists because of the group.[600] Confucianism was introduced to Japan in the fourth century and in the eighth century played a major role in politics and later impacted various Japanese reforms right up to Japanese modernization in the nineteenth century.[601] Confucianism plays a central role in societal, business and legal practices.[602] For example, *ningen kankei* (the establishment of hierarchical order in society) instructs that the individual cannot be considered isolated from the community, thus complete integration is required for total harmony. In modern language, it is understood as networking. Another feature of Japanese society is implicit communication.

Likewise, business structures in Japan are based on cultural traditions and values, e.g. *newamashi* (consensus-building) is a guiding principle in negotiations and decision-making processes within Japanese companies because it underscores the importance of harmony and informally secures support from all parties affected before the formal decision is made.[603]

As already mentioned, ‘Asian Values’ are based on Confucian doctrine. Collectivism in China is also based on the tradition of rice cultivation. The institution of family retains the highest priority in Chinese society with pre-eminence also afforded to the concept of the clan. The Chinese are keen to maintain harmony and to this end use a subtle pattern of indirect communication, avoiding saying 'no' and respecting the age and status of the communication

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[598] Ai, ‘Ai 2003’, 102

[599] Y. B. Zhang, M.-C. Lin, A. Nonaka and K. Beom, ‘Harmony, Hierarchy and Conservatism: A Cross-Cultural Comparison of Confucian Values in China, Korea, Japan, and Taiwan’, *Communication Research Reports* 22 (2005), 107–15, at 108

[600] Bogart, ‘Bogart 2000’, 145

[601] Baoyun, ‘Baoyun 2000’, 92

[602] Bogart, ‘Bogart 2000’, 145

[603] ibid., 147 et seqq.

partner.[604] Following Chinese yin/yang thinking, the world originated in harmony and everything traces back to this natural order,[605] explaining the concept of the 'indirect'. Harmonious values must be present in all aspects of moral and aesthetic decision-making within the family and community and are consequently of the highest priority.[606] Family and harmony values are reflected in Chinese business, which is itself family based. These values are also based on low trust, i.e. the Chinese would first trust a family member and any other external person is secondary. The value of information sharing is also crucial. As already mentioned, the Chinese use 'guanxi' as a major value in building trust within personal relationships with mutual duties and for networking. Finally, it is important to mention the significance of protocol related to status and seniority, which is essential in the case of negotiations.[607]

The influence of Confucianism in China is present in three types of values: moral-ethical values, social values and spiritual values.[608] Moreover, the Chinese way of thinking is monistic which is influenced by concept of yin/yang, while Europeans follow a dualistic way of thinking.[609] The Chinese way of thinking also incorporates this principle of saving or losing face.[610]

Confucianism has a long history in Korea beginning in 682 and was not only introduced into society but also among the courts, based on the concepts of the 'kingly way' and 'humane government', which led to the successful economic development in today's South Korea.[611] South Korea, surely, differs in its values, e.g. social order will be prized less than in other Asian countries.[612] Alongside this fact, empirical studies have shown that Koreans attach importance to personal achievements and individual rights rather than respect for authority and social order.[613] However South Korea remains attached to 'Asian Values' in various senses, in particular, social harmony, authority, predominance of group interests over personal interests

[604] ibid., 152

[605] Cauquelin, Mayer-König and Lim, 'Cauquelin et al. 2000', 5

[606] ibid., 9

[607] Bogart, 'Bogart 2000', 154

[608] Baoyun, 'Baoyun 2000', 80

[609] Cauquelin, Mayer-König and Lim, 'Cauquelin et al. 2000', 5

[610] ibid., 9

[611] Baoyun, 'Baoyun 2000', 91

[612] Fukuyama, 'Fukuyama 2001', 160

[613] ibid., 161; The empirical study can be found in A.-R. Lee, 'Culture Shift and Popular Protest in South Korea', *Comparative Political Studies* 26 (1993), 63–80, at 73

which is valid both within the family and society.[614] Interpersonal relationships are determined by loyalty, filial piety and human emotion – not taking into consideration a cost-benefit analysis – which forms the basis for a family state.[615] These values were elaborated by Confucius and Mencius and later on by Chu Hsi.[616]

It is not surprising that many scholars and practitioners denied the cultural background of 'Asian Values' and as such do not accept it as a valid argument.

In the Christian Philippines, 'Asian Values' are not able to survive because the 'corrupt Western influence' gradually individualizes, and as such disregards the interests of the community.[617] Chua claims that the 'Asian Values' discourse is more historical than cultural because of the late development of the Southeast Asian region and merits discussion in a global political context.[618] Many other authors contest the use of 'Asian Values' because the diversity of Asia in terms of religion, politics and history.[619] Professor Langguth emphasizes that the notion of 'Asian Values' was destroyed by the crisis of 1997 because this was the main impetus and guarantor of the 'Asian Miracle'.[620] In particular, he denies the exclusivity of 'Asian Values' because some of these values are also present in Europe, e.g. familial role.[621] In addition, in Asia there are no such similarities as those in Europe (language, politics, etc.). In his opinion, the discussion overlooks empirical data, because there is no unified writing system, no common cultural development.[622] However, the idea of 'Asian Values' is a workable tool for the integration of Asian society[623] within the context of ASEAN. This common notion of 'Asian Values' is also incompatible with the myriad languages, religions, and political streams in Asia as well as the fact that the 'Asian Values' discourse is different for each country depending on

[614] Park and Shin, 'Park et al. 2006', 345

[615] C.-S. Chung, 'Korean Confucian Response to the West: A Semiotic Aspect of Culture Conflict', *Journal of Chinese Philosophy* 24 (1997), 361–99, at 371

[616] ibid., p. 372

[617] Zialcita, 'Zialcita 1999', 315

[618] Chua, 'Chua 2009', 116

[619] D. K. Mauzy, 'The Human Rights and Asian Values Debate in Southeast Asia: Trying to Clarify the Key Issues', *The Pacific Review* 10 (1997), 210–36, at 215

[620] G. Langguth, 'Asian Values Revised', *Asian Europe Journal* 1 (2003), 25–42, at 25

[621] ibid., p. 38

[622] ibid., p. 30

[623] ibid., p. 37

its religion and cannot be reduced to mere Confucianism.[624] Finally, the importance of the question around 'Asian Values' remains in the near and far future.[625]

Zialcita contests three presumptuous points in the 'Asian Values' debate: firstly, the meaning of 'community-orientedness' which is supposed to be a common 'Asian Value', secondly, the total opposition of Asia to the West does not assume the existence of common Asian tradition, and finally, 'Asianization' and 'Indigenization' are not to be treated as equal.[626]

The objection that 'Asian Values' have been merely constructed to advocate authoritarian regimes in multiple Asian countries, e.g. Cambodia, Myanmar, etc., and thus these were not compatible with democracy thoughts is another position worthy of note.[627]

Another point of criticism against 'Asian Values' is the influence of globalization, because this has the potential to influence traditional values. According to a study from Kansas University, most influenced by globalization is interpersonal harmony, followed by relational hierarchy; least affected was traditional conservatism as a means of opposing consumerism.[628]

The fundamental principles of the ASEAN are based on the so-called 'ASEAN Way', which identifies the following principles of mutual cooperation: acceptance of the sovereignty, equality, territorial integrity, independence and national customs of all Member States, the right of every State to lead its national existence free from external interference, subversion or coercion, non-interference in internal affairs, settlement of differences or disputes in a peaceful manner, renunciation of the threat or use of force and effective regional cooperation. Although those principles are international, in Asian context they can be traced back to cultural and social values through the Asian history.

Whether ASEAN and ASEAN+3 are likely to be a subject for a regional cross-border insolvency regulation and what criteria are likely to impact this will be discussed in the next chapter. The influence of a cultural grid such as 'Asian Values' will be considered in the further analysis. Although having a structure of trade and economic union in ASEAN, the national

[624] ibid., p. 31

[625] ibid., p. 37

[626] Zialcita, 'Zialcita 1999', 316

[627] Öjendal and Antlöv, 'Öjendal et al. 1998', 528

[628] Zhang, Lin, Nonaka and Beom, 'Zhang et al. 2005', 113

insolvency regimes of its members do not, with exceptions of Singapore, etc., have national insolvency rules for dealing with cross-border issues.

Regarding those implications, it can be concluded that ‘Asian Values’ give on the one hand the sense of the national confidence and differentiation between the national states. On the other hand, the server as antagonist indicators against the Western approach and showing distinctiveness within the region. They show the contrary approach of the Asian region in comparison to Western countries. Group-based social identity in Asia reduces the willingness to open conflicts while Western approach is individualistically based. Also, the fear of losing face is deeply anchored in the society. Being insolvent means in many ways losing face. Finally, the left behind development of the legislation process in national states shows it on the regional level: there is no substantial regional basis yet for working regional framework that would make a collaboration in cases of cross-border insolvency easier.

In this Chapter V, we made a deeper approach to ASEAN as a subject to a regional regulation on cross-border insolvency law. After the introduction of the ASEAN as a regional organization of national states, we made an overview of regional solution proposals on how to fix cross-border insolvency topics in Asian region made by Asian Development Bank and Forum for Asian Insolvency Reform. In two further steps, a short overview of the national insolvency regimes in the countries of ASEAN has been made, followed by an overview of the traditional heritage and historical aspects in countries of ASEAN and their impact on national approach on insolvency laws. For example, the fear of losing face is a serious obstacle to admit an insolvency law while principle of harmony might further the readiness of debtors to conflict resolution in earlier insolvency stages. This leads one to the question how those values can encourage a Regional Insolvency Framework in ASEAN.

Based on foregoing research, Chapter VI will present the most significant criteria for a Regional Insolvency Framework in ASEAN considering legal and traditional aspects of Asian society. The assessment of criteria will base on existing cross-border insolvency projects. In addition to the mentioned criteria, this Chapter VI will consider the world-wide progressive digitalization which will have a significant impact on the law-making process.

CHAPTER VI – CRITERIA FOR A REGIONAL INSOLVENCY FRAMEWORK IN ASEAN AND ASEAN+3

A Regional Insolvency Framework could be a reasonable solution in these times of globalization and transnational business development. This would establish a tangible basis for the legal security of international companies within ASEAN. The goal is to achieve the same legal consequences as the European Cross-Border Insolvency Regulation or another regional entity aims to provide, however with different credentials because it would facilitate the handling of cross-border insolvency proceedings in ASEAN. These should be refined on the basis of more criteria and particularities appropriate to ASEAN countries. These criteria, as we have seen above, are the 'Asian Values'.

The previously explored analysis corroborates the non-negligible role that 'Asian Values' ought to play in designing a Regional Insolvency Framework. It follows then that Western global lawmakers should change perspective and consider global regulations such as UNCITRAL from the Asian viewpoint.

A 'copy-paste method' does not work for the potential drafting of a cross-border insolvency regulation for ASEAN. The European Insolvency Regulation was designed with European democratic principles advocating individual rights and interests at its heart. However, it can serve a basis or guideline on what criteria and areas that shall be rules by the new law.

Hence, rules should be chosen which reflect the multidimensional situation and include this cultural aspect of 'Asian Values'. This culture-sensitive perspective will create a three-dimensional model and thereby establish a new approach in the new cross-border insolvency project.

The starting point is to realize that arriving at different approaches to cross-border insolvency in every country intrinsically incurs a slight inequality. As mentioned above, an ASEAN insolvency rule cannot correspond to the European equivalent even though this would lead to an effective dispute resolution within the field of cross-border insolvency issues in ASEAN countries.

In their survey, Tomasic et al. claim that traditional values have become less important for insolvency administration.[629] However, they remain an invisible but very powerful component of contemporary legislation and the praxis of insolvency law. Their consideration during the law-making process is likely to simplify and ease its later application.

Although the European Insolvency Regulation is a valuable and remarkable model for a stable insolvency framework, its 'one-size-fits-all' method is not workable.[630] The reason for that is – as mentioned above – a different cultural and historical approach in Asia in comparison to Western countries. In further sections, we will look how existing projects can be applied of a regional cross-border insolvency solution in ASEAN. Section I presents the cross-border insolvency elements in context of 'Asian Values' while Section II shows the impacts of different existing approaches to cross-border insolvency laws in Asian context.

Section I – Cross-Border Insolvency Elements in the Context of 'Asian Values'

The RETA project addressed the following areas of application: first, the link between corporate debts and the debtor's insolvency in the given regions; secondly, tailor-made advice for regional problem-solving regarding insolvency and debt recovery; and finally, making related sources and studies publicly available. Insolvency law systems must be regarded as being part of a global system with a concerted consideration of its legal, economic, social, commercial and cultural factors.[631] The following influential cultural factors must be considered in the drafting of a new regional rule. The multiple interests present at insolvency proceedings require a solid structure, effective and systematic legally-based organization; nevertheless, cultural elements in the form of 'Asian Values' have a considerable impact. There is a palpable reluctance towards court-based proceedings, for example, there is a noted degree of non-confrontation and conflict aversion in Thailand and Indonesia with the consequence that most conflicts are resolved by negotiation without involving an ordinary court. It is a non-written rule in those countries to engage in negotiation before filing a case in front of a court, which was a sign of breaching a business relationship, also explaining the low insolvency statistics in Southeast

[629] Tomasic, Little, Francis, Kamarul and Wang, 'Tomasic et al. 1996', 250

[630] C. G. Paulus, 'Global Insolvency Law and the Role of Multinational Institutions', *Brooklyn Journal of International Law* 32 (2007), 755–66, at 765; *see also Watters, 'Cross-Border Insolvency in East Asia: Cooperation and Convergence'*

[631] Asian Development Bank, *Asian Development Bank 2000*, vol. 1, p. 13

Asian countries.[632] This is a marked consequence of the Confucian harmony principle manifested in conflict avoidance. This raises the possibility of informal 'work-out' proceedings. Singapore and Malaysia have rules recognizing inbound and outbound cases. However, these rules are only applicable to individual insolvencies and not in corporate cases.[633]

Section II – Adoption of the International Projects on Cross-Border Insolvency by the Member States of ASEAN

In Section II, an assessment of the international rules on cross-border insolvency will be conducted and their application in the case of ASEAN will be analysed.

1. Adoption of the UNCITRAL Model Law on Cross-Border Insolvency by Asian Countries

In 1994, a colloquium on UNCITRAL was held to develop a solution for cross-border insolvency issues, followed by the creation of the Working Group V on cross-border insolvency. Among the members of the group were representatives from China, South Korea, Singapore, Laos, Thailand, Malaysia, the Philippines and Vietnam.

All nation states in Southeast Asia are encouraged to introduce the UNCITRAL Model Law.[634] Whether or not the adoption of the Model Law would be beneficial in Asian jurisdictions is unclear from the outset. As such, there are a number of sustainable arguments both in favour and against the adoption of the Model Law in Asia. As a matter of fact, any insolvency law is specifically drafted to resolve domestic insolvency cases. Many jurisdictions have drafted principles and guidance to reach the appropriate results. Foreign courts and insolvency administrators do not have any counsel on applications from foreign courts and other insolvency parties seeking assistance and recognition. To overcome these challenges associated with globalization, courts expect to have measurable criteria for handling those requests since multiple proceedings would accumulate greater costs. This situation requires improvement, especially with regard to the facilitation of cooperation between courts in different jurisdictions. Such cross-border inter-court cooperation is possible in cases where certain guidance regarding

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[632] ibid., p. 79

[633] ibid., 52 et seq.

[634] A. Francis, 'Cross-Border Insolvency in East Asia: Formal and Informal Mechanisms and UNCITRAL's Model Law' in R. Tomasic (ed.), *Insolvency Law in East Asia*, 3rd edn. (Hampshire: Ashgate Publishing Limited, 2013), at p. 543

jurisdiction-specific cases is provided explaining how to deal with such cases. As a rule, this kind of cooperation is not included in the court system and the absence of these guidance courts would give the false impression that they are unable to cooperate in such cases.

a. Arguments in Favour of the Adoption of the UNCITRAL Model Law

The Model Law is a completed legal product. A satisfying equilibrium must be reached between recognizing foreign proceedings whilst protecting national interests. There is no need to harmonize aspects such as access, recognition, relief, and judicial cooperation with local laws nor other steps that would impact on domestic insolvency rules. The fact is that there are various obstacles which impede the adoption and integration of the Model Law. One such obstacle is a tendency towards the territorial organization of national insolvency laws, that is if any organization exists. In addition, legislators might make mistakes in the implementation of the Model Law. For this reason, no government is likely to be the first entity to ratify the measures. Although the adoption of the Model Law could be slow, this does not necessarily mean that it is thereby weakened. As previously indicated, in Asia most cases are resolved without litigation and handled by parties themselves.

The COMI question complicates matters significantly. However, there are already a plethora of rules for correctly determining the COMI. An essential element of this process is the location where the business administration is carried out. This criterion can be determined by creditors if they request opening of the insolvency proceedings. There are many further factors which are likely to be afforded court attention in order to enable it to reasonably determine where the COMI is. However, it is up the court alone to independently and honestly verify where the COMI is.

The adoption of the Model Law buoys confidence among international traders and consequently among investors and creditors in the local or regional legal system. The Model Law should be adopted for this reason, as when a creditor goes to another country and seeks relief, this law reassuringly guarantees the stability of the commercial process.

The Model Law contains rather general provision which would allow national states to implement it taking into consideration social, historical and cultural aspects which have a serious impact on legal systems in ASEAN Member States. They would have freedom to decide

who they wish to incorporate it. It can be also seen on examples of the Philippines, Singapore, and Myanmar.

UNCITRAL undertook additional efforts to support national states in implementation process by issuing Guide on Enactment, Legislative Guide, and Practice Guide on Cross-Border Insolvency Cooperation. UNCITRAL also provides technical assistance in countries planning implementation. This would help the Member States of ASEAN to build enough confidence in their own legislative power and to build trust towards UNCITRAL.

In addition, the increasing number of national states have been adopting UNCITRAL Model Law since 1997.

Asia is increasingly reliant on international trade and globalization, a reliance that is only set to continue in the future. Consequently, the need for a Model Law will also be a matter of ever more apparent urgency. Cross-border investment is growing, but probably not to the extent that the world requires and laws such as the Model Law stimulate rather than hamper cross-border investment. For these reasons, the adoption of the Model Law by economies engaging in globalized trade ought to be seriously considered.

As previously mentioned, the prime example of the successful adoption of the Model Law is illustrated by Japan. Although modified, Japan has adopted the Model Law. There have already been cases that Japanese courts have decided on the application of the adopted Model Law. Why should other Asian countries adopt the Model Law? Japan expects that its bankruptcy judgements will be recognized abroad, and the adoption of the Model Law would also allow other countries to expect their judgements to be recognized by Japan based on the principle of reciprocity. If foreign debtors were to endeavour, to preserve and to recover assets in Japan, this might have a longer-term impact on foreign investment in and by Japan. The Japanese government and lawmakers have recognized this trend and have taken efficacious action in implementing the Model Law. Equal, effective, and efficient bankruptcy administration likely does not benefit all participants in proceedings; however, the inefficiency of insolvency proceedings often leads to decline in debtors' assets. The advantages of the Model Law are perceptible for all participants in the cross-border insolvency cases, including Japan and any other Asian country. The security of the funds is considered a major factor among international investors and lenders for encouraging investment in countries which can provide that assurance.

The Model Law can help to achieve idea that the adopting country is suitable for international business and trade.

b. Arguments Against the Adoption of the UNCITRAL Model Law in Asia

Despite the favourable reaction to the Model Law, there are voices among legal scientists and practitioners expressing their opposition to the adoption and implementation of the Model Law. The fact is that the Model Law intends to create an appropriate legal environment for participant of the insolvency proceedings to handle insolvency cases and requires adequate national insolvency laws. The legal reality in Asia is different from this idealistic scenario. Asian jurisdictions may be not ready now or in the foreseeable future for the Model Law. Even in countries which already trust each other such as Singapore and Malaysia, judges who are already inclined to communicate and provide them with the better mechanisms face some difficulties, e.g. the United States and the United Kingdom in the Maxwell Case.[635] These jurisdictions communicated with each other, however, it should be pointed out that both communicated in the same language and have a common law background. If the Maxwell case worked, would it also work for an insolvency case between Cambodia and Indonesia? This is another obstacle to consider – the fact that between Asian countries there are wide language and cultural differences which do not exist between countries that have already adopted the Model Law, and which are hard to overcome. The overarching question is not to clarify whether to adopt the Model Law or not, it is of far greater importance to determine the result, i.e. what advantages all interest parties will benefit from.

Most countries which have already adopted the Model Law share English as a common language; those are countries which share cultural, historic, and legal common ground. With the exception of Japan, South Korea, and Singapore, the legal infrastructure in Asia is more underdeveloped than in other states. One could argue that national insolvency laws must first be developed before the Model Law could make a qualitative difference and bring about the aforementioned benefits. For example, bankruptcy law in China is carried out before court because judges do not have the necessary experience required to address domestic insolvency cases, let alone international cases. This is a kind of imposing solution but provides a critical blueprint. A result-oriented solution in Asian jurisdictions should be an intergroup approach

[635] *See for details* J. L. Westbrook, 'The Lessons of Maxwell Communication', *Fordham Law Review* 64 (1994), 2531–41, at 2531 et seqq.

with judges, courts and insolvency practitioners. In the beginning, some modern and appropriate infrastructures for legal institutions should be established. In addition, the domestic insolvency laws should undergo improvements. The valuable impact of the Model Law will increase if modern insolvency laws that are pertinent to the modern economy develop.

Another objection to the adoption of the Model Law in Southeast Asia centres on the long history of distrust between the Asian legal systems. Before the Model Law can deliver any beneficial results, this wariness must be remedied. The local understanding of fairness which is also address by the UNCITRAL Model Law on Cross-Border Insolvency in the country of proceedings is not necessarily the same notion of fairness in the home country of the investor. In a number of jurisdictions, local politicians always award priority to local creditors, e.g. Thailand and Singapore without the assistance of judges. If a local judge is called, it depends which parties are involved. This is at odds with the nature and intent of the Model Law. With regard to this question of fairness that varies from country to country in Asia, one must consider if this is because they are developing countries and have not yet reached the developed stage economically, politically and in sense of a legal system. In the end, the central issue is not the implementation of the Model Law itself but whether there are incorrupt judges who possess the necessary insolvency experience to apply the law and make the parties understand and follow it. The question for investors to ask is not whether there are any laws in a certain Asian country, but rather whether those laws work effectively.

The discussion regarding the regulation of insolvencies in company groups is still ongoing and remains an open issue because the overwhelming majority of foreign investments in Asia are undertaken via subsidiary companies. In fact, Japan and South Korea have adopted the Model Law and even then, Japan adopted a modified version, not ratifying the Model Law as is. In Singapore, the Model Law was recommended for adoption and incorporated in 2017. The fact is that the countries in Asia do not perceive noticeable results from adopting the Model Law. Indeed, across the globe, few countries perceive these results because only 48 states in 51 jurisdictions have adopted the Model Law.[636] There are various international insolvency cases which utilize Chapter 15 of the US Bankruptcy Code, but until countries in the Asian region

[636] Status as of June 2020

improve their infrastructure and enforce the Model Law where it can make any difference, there will be no major benefit from adopting it in this region.

The definition of public policy might differ from country to country, and with regard to legal consequences, this might be reflected in the unequal treatment of foreign creditors. This might build further obstacles to the adoption of the Model Law. The issue of public policy is in fact the basis for understanding fairness, equity and the consequences of sovereignty. Nevertheless, the term ‘public policy’ will be determined by the country where the investor operates. If the government is involved, public policy is likely to be strong.

Although ASEAN exists as a body, the Southeast Asian region is not particularly homogenous, not in laws, politics or languages. For the Model Law to work, there is no reason to harmonize religions or languages, but there is certainly a need to this across the region's institutions. The benefits will come not as a result of the Model Law. It would rather be a result of an effective and structured legislative work. A further point of mention is that many concessions and amendments will have to be made to the Model Law for any Asian country to reasonably adopt it. These concessions will make the Model Law ineffective because the presence of the law does not guarantee the presence of its enforcement.

c. Mediating Approach

There are various pros and cons in relation to the adoption of the Model Law in Asia. It is not the fast-changing economic and financial environment, globalization or technological development which decide whether to implement the Model Law, rather the decisive factor is far more to use the contra arguments as warnings and indicators for its future adoption.

A standardized insolvency system which offers a link to international proceedings gains multiple advantages. First, it would it more attractive for foreign investments. Second, it enjoys a higher level of trust from all market participant which might be later participants to insolvency proceedings. Finally, by using a trustworthy insolvency system a Member State can build a long-term jurisprudence giving predictability and confidence into the insolvency mechanisms which is crucial not only for local but also for foreign participants to insolvency proceedings.

Although offering persuading advantages, for tradition-based national states adoption of the Model Law relates to difficulties. One the one hand, some Member States do not have a sufficient legal basis and own insolvency system that suffices the structures of the Model Law,

on the other hand, it might lack of experience in applying new rules for judges, but also for other insolvency practitioners.

These drawbacks should be areas which spur the amelioration of the legal situation, but not be obstacles to its implementation. Of course, Japan, Singapore or Myanmar cannot be taken as a sole measure with which to compare other Asian countries among the Members of ASEAN, but it can serve as a reference of the possibility of success. Switching from the UCITRAL Model Law on Cross-Border Insolvency, in the next paragraph we will take a closer look at the European solutions on cross-border insolvency law and their implications for ASEAN cross-border insolvency cases.

2. The European Insolvency Regulation

The European Insolvency Regulation EIR 1346/2000 is a successful instrument in handling cross-border insolvencies within the European Union that has been replaced by EIR 2015/848. As a regional solution, it indisputably simplifies the handling of cross-border insolvency cases arising among the European Union Member States where this Regulation is of direct legal effect. Although being an integral part of the European legal system, it cannot be directly translated to ASEAN for historical and technical reasons. In a nutshell, the EIR is based on a mature political system of European Union which has a long tradition and strongly sophisticated legislative process, training mechanisms and case law. Already W. Alan J. Watson who indicated the moving of a rule or a law system from one sovereign state to another and invented the notion of 'legal transplant'. According to his diffusionism-based arguments, most changes in a legal system are based on borrowings from other legal systems[637] which became universal in the last thirty years.[638] However, the borrowing argument has not been always shared by leading scholarship and arguing that the degree of inspiration by foreign system may vary which leads to the end that some laws are not suitable for a certain local context.[639] Nevertheless, the Member States of ASEAN should consider at least analysing elements of the regulation and

[637] A. Watson, *Legal Transplants: An Approach to Comparative Law*, 1st edn. (University of Georgia, 1974); Watson, *Legal Transplants: An Approach to Comparative Law*, 21 et seqq. This work is also appeared in the new addition in 1993, A. Watson, *Legal Transplants: An Approach to Comparative Law*, 2nd edn. (University of Georgia, 1993)

[638] A. Watson, 'The Birth of Legal Transplants', *Georgia Journal of International and Comparative Law* (2013), 605–8

[639] *See* J. W. Cairns, 'Watson, Walton, and the History of Legal Transplants', *Georgia Journal of International and Comparative Law* (2013), 637–96

reframing them into a new structure which is tailored to the nature, functions, purposes, and methods surrounding the legitimation of this interstate body because first, those sophisticated methods has been already approved by applying them in a regional community such as the European Union, second, at least consideration of those elements would lead the ASEAN Member States to new insights on placing of the foreign elements in a regional insolvency regulation.[640] In a nutshell, the integration of new factors and re-integration of borrowed elements for the adjustment of the customized regulation should be a further step.

3. Good Practice Standards of the Asian Development Bank

In 2000, the Asian Development Bank drafted 'Good Practice Standards' for the RETA economies,[641] applicable in cases of corporate insolvency proceedings.[642] These Standards do not reflect individual insolvency proceedings. Although various legal systems bring with them a number of differences, the 'Good Practice Standards' are based on basic principles and approaches that are common to the RETA economies, in particular concerning the global economic environment, economic expectations and commercial needs, such as the possibility to eliminate and remove an indebted company from the market, enabling creditors' enforcement powers, need for predictability, stability, order, equitable treatment, efficiency, transparency, and the need to meet non-commercial expectations, such as labour and social issues.[643]

The Asian Development Bank recommends that the legislation on insolvency law in RETA countries shall be based on the UNCITRAL Model Law on Cross-Border Insolvency, e.g. Good Practice Standard 16 says: 'An insolvency law regime includes provisions relating to recognition, relief and cooperation in cases of cross-border insolvency, preferably by the adoption of the UNCITRAL Model Law on Cross-Border Insolvency'.

[640] There are also some suggestions on borrowing legal elements from Asia to Europe, *see* e.g. P. Shah, 'Globalisation and the Challenge of Asian Legal Transplants in Europe', *Singapore Journal of Legal Studies* (2005), 348–61

[641] For RETA Project, *see* supra

[642] Tomasic, 'Tomasic 2013', 4; the RETA economies include following countries: Korea, Japan, Hong Kong, Pakistan, Malaysia, the Philippines, Thailand, Singapore, Indonesia, Taiwan, India.

[643] Asian Development Bank, *Asian Development Bank 2000*, vol. 1, p. 27

Section III – Criteria for Scope of the Governing Structure of the Common ASEAN Insolvency Framework

What elements must be considered in designing a common regional cross-border insolvency framework within ASEAN? Such a framework supersedes defective national insolvency laws or the lack thereof, fulfils a need for rules on cross-border insolvency cases. Alongside a legal structure, it must consider cultural traits and systems of values in order to make the law more realizable. In addition, other impacts require analysis and consideration. These impacts are technology and innovation factors, which are left aside by legislators in insolvency proceedings.

1. Legal Criteria

Various legal impacts require essential consideration in drafting a cross-border insolvency regulation in ASEAN. However, some necessary aspects of such a regulation do not speak in its favour. On the one hand, it is a strong intervention in the sovereignty of a national state and yet none of the countries in Southeast Asia currently has a functioning mechanism to resolve insolvencies in a cross-border context. The European Insolvency Regulation was tailor-made for the Member States of the European Union and cannot be directly applied in a non-European context; however, some of its sustainable criteria should be considered for a functional system of handling cross-border insolvency cases.

a. Centre of Main Interests (COMI)

The European Insolvency Regulation applies the COMI principle to define which jurisdiction within the European Union (with exception of the Denmark) takes priority should there be several insolvency proceedings in different Member States. Any conflict of COMI might be solved on a temporary basis, e.g. first come, first served because the competent jurisdiction is where the company seat of the debtor is registered. Whether or not this would be an applicable rule for Asia is unclear before its introduction. Nevertheless, the application of the COMI concept in a regional frame could sustainably converge issues of jurisdiction within ASEAN because it would provide rules on how to define competent jurisdiction. At the very least, the rules governing the identification of the COMI would ease the definition of a competent court. The legislators of the Member States of ASEAN might, however, go a step further and define a single central insolvency court.

b. Central Insolvency Proceedings Court

A central insolvency proceedings court is a slightly different model of the main forum. The introduction of a central insolvency proceedings court in ASEAN could be a suitable solution for several reasons. Although national courts are supposed to ensure a secure, fast and transparent proceeding, this often fails due to lack of resources. Hence, central insolvency courts might deliver pragmatic solutions. Firstly, it facilitates transparency for both debtors and creditors in cases of cross-border insolvencies and enables the same level of information exchange between the parties to insolvency proceedings. This model would ensure more trust and confidence in the judicial authority and for good reason given the low level of confidence in justice and governmental bodies across Southeast Asia caused by numerous corruption scandals. Secondly, the feasibility of effective proceedings would increase. The disclosure of information would be equal across all participants in the insolvency proceedings. Finally, the sole insolvency court would be better informed because it will be the only court receiving this information from the entire proceedings and consolidate it, positively affecting its efficiency and effectiveness. In addition, such handling of proceedings would fasten and standardize insolvency proceedings throughout ASEAN. This would, hence, increase the predictability and reduce duration of the proceedings which also means reduction of the costs.

c. Central Insolvency Proceedings Register

The European Insolvency Regulation suggests furnishing the public with all information about the insolvency proceedings in the Member States. Registers containing information on cross-border cases should be introduced and interconnected on the European level. This avoids parallel cost-intensive insolvency proceedings in Member States.

With the aim of avoiding at least some technically unsurmountable obstacles in cross-border insolvency cases, ASEAN could consider creating a central administration authority for cross-border insolvency cases. Its scope of competencies and tasks would be defined by the Member States. Despite its impingement of the sovereignty of nation states and especially of their respective courts, this structure might be a cost-reducing alternative for some complicated processes within the handling of cross-border insolvency cases by national courts.

This authority could form part of a Regional Insolvency Framework. The composition of this body would require national judges with expertise on national insolvency law to qualify the place proceedings are to be convened, etc.

The following functions would be suggestions for a Central ASEAN Insolvency Authority: addressing insolvency filings, appointing competence for the international (leading) insolvency administrator as well local administrators, performing central administration, and finally distributing the debtor's assets. In addition, this body would advise, control, monitor and support all the interested and affected parties, e.g. creditors and employees.

A favourable feature of the Central ASEAN Insolvency Authority would be an end to the need for court-to-court communication because all the relevant information would be gathered by the Central ASEAN Insolvency Authority and distributed to the competent courts.

Naturally, the centralization of regional insolvency treatment could face various obstacles such as language issues and the timeframe between the registration of proceedings and the beginning of the inability to pay the debts.

Thomson emphasized the dearth of trust and fondness of Singapore towards ASEAN regionalism.[644] Meanwhile, this has changed a lot. Taking into consideration that Singapore is the first country in ASEAN to adopt the UNCITRAL Model Law on Cross-Border Insolvency, one can assume that the Singaporean authorities are open to discussion concerning a Regional Insolvency Framework in ASEAN. The strategic role of Singapore in ASEAN has increased significantly, e. g. in 2015 the International Court of Arbitration of the International Chamber of Commerce (ICC) has announced strong growth in Asia in 2015. It confirmed Singapore's place as the fourth most chosen seat for arbitration worldwide. In addition to legal framework, there are various cultural indicators impacting the structure and functioning of legal documents.

d. Common Language of Insolvency Proceedings and Judgements

As mentioned, when addressing obstacles to the UNICTRAL Model Law implementation, the variety of languages in Asia may seriously hinder the application of common rules. Firstly, the different legal terms cannot be understood in the same way. Secondly, translations from one

[644] E. C. Thompson, ‘Singaporean Exceptionalism and its Implications for ASEAN and Regionalism’, *Contemporary Southeast Asia: A Journal of International Strategic Affairs* 28 (2006), 183–206, at 201

Asian language to another may not entirely capture the meaning of legal concepts applicable in the insolvency proceeding in question. Thirdly, most ASEAN countries do not have insolvency proceedings rules addressing cross-border insolvency issues. For a common insolvency regulation, a common language – which should reasonably be English – would foster common understanding of legal concepts which Member States can agree on. It would require more precise definition of legal terms and concepts as well as a consideration of local legal traditions or the absence thereof. Nevertheless, this sense of having a common denominator will deepen the understanding of the common goal, which is the improvement and increase of debtors' assets and their allocation for a higher, equal and equitable satisfaction of domestic and foreign creditors to cross-border insolvency proceedings. Depending on the requirements of national states, judgements can be translated from English into the languages of parties involved in proceedings.

e. Equal Creditors' Rights Protection System

The protection of creditors' rights within insolvency proceedings differs from that in ASEAN national states. While some suggest an effective protection system, others do not even offer one. A system which equally protects creditors' rights is an essential building block for a common Regional Insolvency Framework. The harmonization of the divergent priorities of secured creditors is the first step to fulfil this requirement. This is achievable through the definition of common rules on secured creditors' rights. In addition, next to the redefinition of priorities on the regional level, equality is necessary in early insolvency stages to guarantee stable rights for creditors to file an application for the commencement of insolvency proceedings as well as for the registration of their claims to the central insolvency proceedings register. This transparent process also reflects the structural 'footprint' of the whole proceeding as well as guaranteeing the equal treatment of all creditors – both domestic and foreign – in all stages of the insolvency proceedings in procedural and substantial legal issues.

2. Cultural Criteria

There are a variety of influential factors that may affect the legal architecture of a nation state. Among others, these factors include: political elements; economic elements; commercial issues such as stability, predictability, efficiency, fairness, and transparency; social elements such as religion, language, and the adherence to particular social values.[645] All of these form the cultural frame of society and reflect its major logical, behavioural and decisional structure. This paragraph will consider the basic nature of culture and how regional cultural traits, such as 'Asian Values', lay the foundation for the future legal environment of Asia.

a. Culture as a Litmus Paper for the Law

To identify the impact of culture on legal regulation, one must first seek a satisfactory definition of the term 'culture'. Although many concepts of culture exist,[646] one of the most widespread is the definition of 'culture' as being 'conceptualized as a phenomenon lacking coherence, full of complexities, something that is dynamic, continuously changeable, fundamentally fluid, and endlessly multiplicity'. The term 'culture' is three-dimensional, the first of these dimensions

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[645] Tomasic, 'Tomasic 2013', 4

[646] N. Mezey, 'Law as Culture', *The Yale Journal of Law & the Humanities* 35 (2001), 35–67, at 39 et seq.

being from the postmodernist perspective. Here one envisages the individual as someone who is producing and not reproducing within his means and for his needs.[647]

'Culture is to society what memory is to individuals'.[648] Triandis explains the individualistic and collectivist ends of the cultural spectrum through the dichotomies of tightness/looseness and simplicity/complexity. Tight and simple cultures tend to be collectivistic, e.g. Japan, while loose and complex ones are more individualistic. In addition, Triandis distinguishes between horizontal and vertical individualism and collectivism: horizontal individualism means that people are independent but claim to be similar and equal; in horizontal collectivism people are interdependent and claim oneness and social cohesion, e.g. Confucian China; vertical individualism emphasizes individual values of 'being the best' and having special privileges, e.g. Germany and France; and vertical collectivism means serving the intra-group, sacrificing one's own interests for those of the group, e.g. Japan.[649] While individualistic societies tend to pursue personal aims, collective societies are set up to strive for the goals of the group.[650]

These four combinations can be explained in terms of being achievement-oriented (vertical individualism), cooperative (horizontal collectivism), dutiful (vertical collectivism) or identifying with the unique self (horizontal individualism).[651]

According to Hofstede, there are five dimensions of governing national cultures: power distance, uncertainty avoidance, individualism/collectivism, masculinity, long-term orientation.[652]

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[647] H. Vinken, J. Soeters and P. Ester, 'Cultures and Dimensions: Classic Perspectives and New Opportunities in 'Dimensionalist' Cross-Cultural Studies' in H. Vinken, J. Soeters and P. Ester (eds.), *Comparing Cultures: Dimensions of Culture in a Comparative Perspective*, International Studies in Sociology and Social Anthropology (Leiden: Brill, 2004), pp. 5–27, at 6 et seq.

[648] H. C. Triandis, 'Dimensions of the Culture Beyond Hofstede' in H. Vinken, J. Soeters and P. Ester (eds.), *Comparing Cultures: Dimensions of Culture in a Comparative Perspective*, International Studies in Sociology and Social Anthropology (Leiden: Brill, 2004), pp. 28–42, at p. 29

[649] Vinken, Soeters and Ester, 'Vinken et al. 2004', 10 et seq.

[650] Triandis, 'Triandis 2004', 37

[651] Vinken, Soeters and Ester, 'Vinken et al. 2004', 12

[652] ibid., 9

Traditionally, individualism stands in opposition with collectivism and whereas individualism is typical of the West, collectivism is inherent to Asian societies.[653] The core message of collectivism is a binding obligation of individuals towards the group and thereby implies the following features: firstly, belonging to a group is a key element of one's personal identity, secondly, sacrifice of one's individual goals for the sake of the group and thirdly, intra-group harmony is more valuable than individual well-being.[654]

According to Schwartz, all individuals in any society recognize tradition and conformity, achievement and power, hedonism and stimulation, self-direction and universalism, security and benevolence.[655] The values within a society identify its dimensions, goals and others of its patterns.[656] In addition, Schwartz identifies seven types of values: conservatism, hierarchy, mastery, intellectual and affective autonomy, harmony and egalitarian commitment.[657] As Schwartz maintains, South Asia shows a strong sense of inertia and hierarchy, although the region is influenced by Confucian philosophy it is even more starkly affected by this embeddedness where intellectual autonomy reveals large differences, particularly in Japan and Singapore.[658] The high level of embeddedness and the fulfilment of obligations within the social hierarchy accounts for the lack of law in the state.[659] Schwartz also speaks about the cultural distinctiveness of the world regions in relation to their geographical proximity.[660]

What is the link between law and local society? Local order is one of the determinants of the legal system and its function. Local and regional aspects affect the structure and the process of law. This too concerns the structure of cross-border insolvency law. The markedness of the law

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[653] R. Ingelhart and D. Oyserman, 'Individualism, Autonomy, Self-Expression: The Human Development Syndrome' in H. Vinken, J. Soeters and P. Ester (eds.), *Comparing Cultures: Dimensions of Culture in a Comparative Perspective*, International Studies in Sociology and Social Anthropology (Leiden: Brill, 2004), pp. 74–96, at p. 75

[654] ibid., 77

[655] Vinken, Soeters and Ester, 'Vinken et al. 2004', 12

[656] S. H. Schwartz, 'Mapping and Interpreting Cultural Differences Around the World' in H. Vinken, J. Soeters and P. Ester (eds.), *Comparing Cultures: Dimensions of Culture in a Comparative Perspective*, International Studies in Sociology and Social Anthropology (Leiden: Brill, 2004), pp. 43–73, at p. 43

[657] Vinken, Soeters and Ester, 'Vinken et al. 2004', 13

[658] Schwartz, 'Schwartz 2004', 63

[659] ibid., 67

[660] ibid., 59

is directly based upon general cultural values that are rooted in the region. This value dimension is one of the major measurements[661] for legal rules.

Japanese society approaches the law in an individual manner. 'Nihonjinron' is a Japanese phenomenon which distinguishes Japan from all other countries and confirms its uniqueness in the world.[662] At the same time, the Japanese are very averse to litigation in order to resolve commercial disputes.

When one speaks about culture, one is intrinsically speaking about cultural values, and in the Asian context about 'Asian Values'. One perspective of 'Asian Values' asserts that the Western legal provisions are not compatible with 'Asian Values' and cannot be implemented in Asian countries.[663] However, this assumption should be regarded from another perspective. 'Asian Values' can be taken into consideration as guiding criteria.

b. Impact of 'Asian Values' on Insolvency Law

In this paragraph the 'Asian Values' will be assessed based on their impact on insolvency law. The following 'Asian Values' will be considered, assessing their merit for integration into the legal process of a common framework: collectivism, fear of losing face, hierarchy, conflict avoidance and harmony.

Collectivism

One of the core cultural values that has a significant impact is the collective society approach. On the meta-level, collectivism as a value in Asian society stands in direct contrast to individualism in Western countries. This aspect results in the lower rate of the pursuit of individual interests via legal means in Asia and to the consequent higher proportion of informal workouts or out-of-court negotiations. In the case of insolvency proceedings, the impact of this cultural value centres on collective action where the debtors' assets are shared on a proportional basis. Collectivism may have a positive effect, at least on national insolvency laws, because

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[661] ibid., 71

[662] K. Manabe, H. Vinken and J. Soeters, 'Cultural Nationalism in Japan: A Starting Point for Comparing Cultures' in H. Vinken, J. Soeters and P. Ester (eds.), *Comparing Cultures: Dimensions of Culture in a Comparative Perspective*, International Studies in Sociology and Social Anthropology (Leiden: Brill, 2004), pp. 141–56, at p. 141

[663] T. Lindsey, 'Culture, Insolvency and Legal Orientalism in Asia: Reaching for Goering's Revolver' in R. Tomasic (ed.), *Insolvency Law in East Asia*, 3rd edn. (Hampshire: Ashgate Publishing Limited, 2013), at p. 518

collective interests are commonly perceived as having higher value than individual ones. It is for the national insolvency lawmaker to reconsider the definition of fairness, especially in issues regarding priority-ranking between domestic and foreign creditors. The issue of fairness may impede the collective proceeding in the way that the asset allocation will differ from those stated by the court; however, this consideration of the collectivist value is necessary. Furthermore, if the central insolvency register were to reflect the collective understanding of the law, this would be a promising step towards its implementation.

Fear of Losing Face

Fear of losing face is of primary concern in many of the Asian countries, e.g. Brunei, China and Laos. There is also talk of the 'stigma of insolvency', in this case it is likely that the local debtor will avoid announcing his inability to pay. In Asian countries where losing of face is of significance, it is advisable when drafting regulations to bring forward the date of insolvency. The expectation is that the debtor will avoid applying for insolvency if possible. Hence, there are new mechanisms required for timely prevention. This element should also be considered on the regional level, e.g. in the case of ASEAN.

Hierarchy

Hierarchy and respect for the elderly is a further element that is characteristic of 'Asian Values'. This value can be seen as going hand in hand with the 'stigma of bankruptcy'. The management team of the debtor can hamper other influential employees from filing insolvency cases. The hierarchical structures in the debtor's company must be observed and respected, even in cases where the conditions for filing an insolvency case are given. For this reason, new mechanisms are essential in enabling the debtor's management to file an insolvency case.

Conflict Avoidance

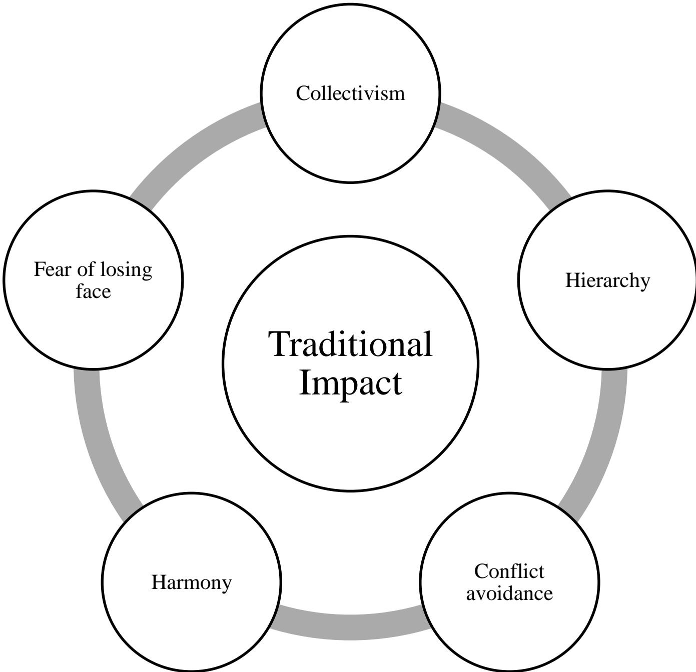
The effect of conflict avoidance in the opening of insolvency proceedings can be double-edged. On the one hand, the Asian tradition of conflict avoidance is an auspicious precondition for out-of-court conflict resolution, saving costs and taking the strain off courts. In China and Japan especially, before filing a claim the parties sit at the negotiation table and endeavour to find an amicable solution. However, this propensity for conflict avoidance also has a negative impact because the debtor may delay filing for insolvency. This is like the delay caused due to the 'stigma of bankruptcy' however it is caused by another motivation, namely, the unwillingness

to face a conflict which would result in having a winner and a loser. These characteristics stem from the Confucian concept of harmony.

Harmony

Harmony in Asia is a philosophy of both life and behaviour. All spheres of society reflect this desire for harmony. What impacts can this desire have? If we touch once more on the value of avoiding conflict, we can see that debtor and creditors would be willing to discuss insolvency issues. Institutional lawmakers can reflect this fact in the priority between local and foreign creditors as well as the general mode of distribution of the debtors' assets.

Although those legal and cultural criteria deserve consideration, another major factor affects the development of transnational cases and cross-border regulations. This is the influence of technology on cross-border cases. Hence, insights drawn based on cultural sensitivities need to account for the role played by technological innovation.



In the Sections I, II and III we dealt with the questions how the traditional matters and cultural matters on the one hand and existing legal projects on the other hand build a complex of criteria which can be assessed for a regional insolvency regulation in ASEAN. However, in the last years the digitalization of business increased its pace. In aftermath of COVID-19 digitalization

plays more and more important role. Thus, this fact will be addressed in the following Section IV.

Section IV – Changing the Frame: Legal Technology as a New Image for Regional Cross-Border Insolvency Mindset

The world of business experiences more and more digitalization of processes in many areas. While private companies integrate this development into its daily business, courts worldwide seem to stay behind this ground-breaking change. The legislators shall integrate the digital component into the new regulations in order to consider the needs of the contemporary requirements of business in difficulties. This this Section IV, we will look at further criteria that might be considered for the Regional Insolvency Framework in ASEAN. Those criteria are artificial intelligence and automated law, big data, blockchain technology and smart contracts, internet of things, social media and data protection.

1. New Implications – Underestimated Role of Innovation and Digital Age

Globalization enables business growth, while digitalization plays a new role, crossing borders with new technologies without taking a single step. Legislators and law practitioners face new challenges. On the one hand, many businesses have gone online, but still act and interact globally while ‘only’ crossing borders online. On the other hand, new technologies have given legislators, litigators, judges, various legal professionals, and institutional legal bodies the chance to use them and carry out their legislative and regulative work more efficiently. The consciousness surrounding technology's impact on legal issues remains insufficient and often misses the spirit of the modern era. The role of technology for law is highly underestimated, indeed there are only few legal initiatives, which are predominantly private, which are undertaking empirical research on legal transformation and the role of new technologies in the future of the law, even though the effects of technology are independent of the steps taken in legal transformation.

Legislators all over the world still ignore, or at least undervalue, the role of technology, its changes and trends. Technology's lacking role in legal regulations, national and international rules, as well as the methods of its interpretation illustrate this gap.

The current technology trends involve big data, social media, cloud computing, digital outsourcing, Internet of things, data privacy, ‘Industry 4.0’, artificial intelligence, new

economy, disruptive technology, virtual and augmented reality, blockchain technology, decentralized autonomous organizations, digital transformation, shared economy, smart contracts, etc. Individual areas of the aforementioned trends' development will be shown further in the following section.

2. Artificial Intelligence and Automated Law

Artificial intelligence and the discussion around automation law traces back to the early 70's and experienced a revival in the 21st century, involving questions of routine legal research within a computer database with indexation, as well as searching for more sophisticated programs that would have the semantic capability to 'understand' and analyse legal blocks.[664] This technology is steadily going to be further developed and open greater opportunities. The process can enhance efficiency and reduce transaction costs. Software will gradually be improved while a human learns and practises less. However, this approach has limits. A machine is not able to think to the breadth and depth that a human being does.

This discussion mainly refers to the application of law in legal praxis, e.g. by lawyers and courts. The same scenario is conceivable at the institutional level, in the case of creating new legislation. Artificial intelligence can be deployed in the regulation drafting process, introducing additional criteria to a legal database, and enhancing the quality and precision of the law-making process. Hereby more criteria are incorporated into the grounds for decision-making, more variations and possibilities for resulting outcomes, e.g. by categorizing clauses, structuring legal questionnaires and other assessments. Legislative institutions and legal professionals will have to develop other professions and subject fields.

3. What is Big Data and Why Does It Matter?

The term 'big data' is characterized by the steadily growing amount of data and IT solutions the attempt to structure and organize them, because most big data emanate from social networks and is consequently unstructured. Those datasets are beyond of the ability of typical software tools. New technologies and communication platforms transformed the human imagination about the collection and processing of data. Big data is typified by the following characteristics:

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[664] B. G. Buchanan and T. E. Headrick, 'Some Speculation about Artificial Intelligence and Legal Reasoning', *Stanford Law Review* 23 (1970), 40, at 41 et seqq.

volume, variety, velocity, variability and veracity.[665] Like every innovative issue, big data bring new opportunities but also new challenges which legislators, courts, insolvency administrators and other participants of insolvency proceedings must overcome.

The positive impacts of big data are multifaceted, though depend on the branch and sector and their application of metadata intelligence. Through digitalization of analogue sources, these were made easily available.[666] Businesses can expect new opportunities on the strategic level. Companies using big data can strengthen themselves and enhance their intelligence in making precise and correct decisions, improve their risk analyses and products, and reduce costs and other expenditures. The intelligent use of big data makes for competitive advantages, and enables better strategic decision-making, effective control of operational processes, as well as higher product and service quality. Another benefit of big data is transparency; knowledge of the customers' needs arises using transaction data and marketing. An organization can find out new facts about their customers, partners, markets, etc.[667] Therefore, big data promotes business intelligence and is an asset in owning a company because it contributes to the added values of the company, helping to reduce costs and refine a company's marketing and other strategies.

The emergence of big data is the result of three main causes: the digitalization of business documents and the business itself, more data accumulation, and data monetization. However, big data does not ensure the quality of the data, this arises only as a result of its quantity because the gathering process of data remains unconnected to the data's eventual structure.[668] A host of issues appear owing to a lack of long-term planning.[669] Furthermore, big data faces challenges in data privacy law through the uncontrolled transfer of personal data. This harbours risks for data security for company data too. The wrong search criteria can lead to wrong results; to get a grip on big data, some instruments, such as big data analytics and data mining, have been developed. Big data analytics help to handle the data while ensuring speed and efficiency. There are tools that describe and analyse big data, facilitating the decision process for companies to reduce costs and launch new products and services. Some organizations apply specific analytics

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[665] J.-P. Dijcks, *Oracle White Paper – Big Data for Enterprises* (Redwood Shores, 2013), 3 et seq.

[666] P. Géczy, 'Big Data Characteristics', *The Macrotheme Review – A Multidisciplinary Journal of Global Macro Trends* 3 (2014), 94–104, at 95

[667] P. Russom, *Big Data Analytics* (Renton, 2011), p. 12

[668] Géczy, 'Géczy 2014', 95

[669] ibid., 94 et seq.

called 'advanced' analytics (also 'discovery' or 'exploratory' analytics).[670] Business intelligence can be informed by data analytics;[671] however, they require high performance and scalability.[672]

Data mining searches for new findings in huge amounts of data entail the goal of presenting new models, templates and other business relevant issues for business analysis and business development. Mining data garners new knowledge from statistics and other knowledge sources. In short, data mining is a technique that extracts knowledge from the large amount of data[673] for its further application in business.

4. Blockchain Technology and Smart Contracts

'A blockchain is a sequential database of information that is secured by methods of cryptographic proof, and it offers an alternative to classical financial ledgers'.[674] One element of technology capable of impacting insolvency proceedings is smart contracts. Smart contracts are software tools which can document, verify, track and negotiate contracts. This is quite an old idea having first been suggested by cryptologist Nick Szabo in 1994 but is only now coming currently into play. A suitable field for the application of the smart contract technology within the context of insolvency proceedings could be insolvency agreements, proposed by the UNCITRAL Practice Guide on Cross-Border Insolvency in 2010[675] which provides information for practitioners and judges on practical aspects of communication and cooperation in cross-border insolvency case'. This technology offers more security in negotiating agreements as well as facilitating their enforcement.

This reframing of traditional values affects both business and law. It does not necessarily remove these from the playing field. However, they are portrayed in a new light. The age of transformation inevitably leads to rethinking the values which affect the economic and legal

[670] Russom, *Russom 2011*, p. 5

[671] ibid., p. 11

[672] ibid., p. 20

[673] A. B. E. D. Ahmed and I. S. Elaraby, 'Data Mining: A Prediction for Student's Performance Using Classification Method', *World Journal of Computer Application and Technology* 2 (2014), 43–7, at 44

[674] D. Yermack, 'Corporate Governance and Blockchains', *Review of Finance* Editor's Choice (2017), 1–24, at 1

[675] *See* United Nations Commission on International Trade Law (ed.), *United Nations Commission on International Trade Law 2010*; e.g. Insolvency Agreements had been applied in case of Lehmann Brothers Holdings Inc. insolvency.

systems that have shaped nation states and multistate unions for decades. Smart contracts can expedite legal and negotiating steps. Smart contracts technology may also be used in the regulation drafting process, for documenting stakeholder's views as well as in insolvency proceedings generally, e.g. as part of creditors' committee etc.

5. The Internet of Things (IoT)

Digitalizing a business changes its nature and pace. In theory it provides new sources of revenue and turnover opportunities. Digitalization of the business creates new relationships between debtors and creditors while easing and expediting information flow and the speed of business transactions. It mainly concerns data, and big data, which is made more accessible and open to analysis. Connecting the physical and digital world, technology pushes the business to a higher level of development and operability. One such technology is the Internet of Things (IoT).

The notion of the IoT first appeared in 1999 and was introduced by Kevin Ashton, but there is no uniform definition of the IoT.[676] It enables control of the objects in the physical world through remote access[677] and includes artificial intelligence. For example in personal health technology, the IoT refers to the use of wearables, and in the case of greenhouses adapting specially to the climate,[678] these are climate control devices.[679] The IoT aims for the standardization of digital services and their components, the introduction of an easy accessible and secure network, the reduction of the transaction costs and the development of an additional network that enables value-added cost-reducing services.

In addition, it allows flexibility of access and facilitates the integration of emerging markets into the global supply chain, as businesses in developing countries often do not have sufficient financial means and logistical resources at their disposal.[680] Companies started to build business models based on the IoT and to introduce IoT-based products and services under the heading

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[676] T. T. Mulani and S. V. Pingle, 'Internet of Things', *International Research Journal of Multidisciplinary Studies* 2 (2016), 1–4, at 1

[677] R. H. Weber and R. Weber, *The Internet of Things: Legal Perspectives* (Berlin Heidelberg: Springer-Verlag, 2010), p. 1

[678] R. M. Dijkman, B. Sprenkels, T. Peeters and A. Janssen, 'Business Models for the Internet of Things', *International Journal of Information Management* 35 (2015), 672–8, at 672

[679] B. D. Weinberg, G. R. Milne, Y. G. Andonova and F. M. Hajjat, 'Internet of Things: Convenience vs. Privacy and Secrecy', *Business Horizons* 58 (2015), 615–24, at 616

[680] Weber and Weber, *Weber et al.* p. 20

‘industry 4.0’. The combination of digital and physical components creates further added value by inventing new products, innovative business models and IT-based services and products, all connected to a global product system.[681]

Although innovative in a broad spectrum of economic sectors, the IoT remains on the edge of transformation in business and society. While business drives forward the process of globalization, most companies are still not prepared to transform to be fully in line with its evolution. Such a transformation requires knowledge and clearly structured processes, first, to be possible at all and second, to be effective and efficient in the long term. The IoT raises different issues such as security, privacy, interoperability and standards, legal and regulatory issues, economic and development matters,[682] transparency,[683] accountability,[684] and the allocation of critical resources[685] which make up modern technology.

The IoT reflects a sustainable need for appropriate legal regulations that are transparent and accessible for each participant of insolvency proceedings. For this reason, the governmental and other public bodies must support private sector. The IoT's administration necessitates a multifaceted and flexible framework which allows for an equally flexible regulatory approach to the handling of cross-border insolvency issues. Businesses and customers are the main stakeholders in the IoT, and hence require access to insolvency proceedings in their roles as debtors and creditors in an equal capacity and with equal rights. Their contributions are valuable inputs for modern law design.[686] Through communication and information exchange on the IoT, the legislator will be kept up to date in business and technology affairs. The same approach is just as indispensable in cross-border insolvency cases. Insights from businesses in their role as debtors and customers in their role as creditors in legal process illustrate their requirements precisely and cement their preferences in terms of formation, shaping and arrangement of proceedings based on efficiency and effectivity and reducing administrative expenses.

[681] F. Wortmann and K. Flüchter, ‘Internet of Things: Technology and Values-Added’, *Business & Information Systems Engineering* 57 (2015), 221–4, at 221 et seqq.

[682] Mulani and Pingle, ‘Mulani et al. 2016’, 2 et seq.

[683] Weber and Weber, *Weber et al.* p. 75

[684] ibid., p. 80

[685] ibid., p. 87

[686] ibid., p. 74

6. Social Media and Insolvency Proceedings

Social media is a part of the Web 2.0 generation.[687] The presence of a corporate entity on social media makes provides a detailed, structured and transparent 'footprint' of the business and associated stakeholders. It is likely to enable and support some unwilling disclosure of information and break sensitive privacy principles affecting one field or another where the business in question is involved. The publication of mistaken, incomplete, or inexact information may lead to the deception of creditors and may show or hide the probability of insolvency if this is the case. Moreover, this is likely to encourage creditors to undertake further business and financial transactions, having a detrimental effect on the security of their invested assets. At same time, social media presence runs a high risk and harbours pitfalls regarding insolvency cases.

The functionality of social media continues to change as it grows. It touches on seven areas of implications, which are identity, sharing, presence, conversations, relationships, reputations and groups.[688] So-called 'citizen journalism'[689] increases the likelihood of spreading incorrect information affecting the way information is portrayed to creditors. Furthermore, this disclosure of information can lead to unequal scattering of information among creditors concerning an imminent insolvency situation. On the other side, creditors who receive unofficial information about the impending insolvency have more of a chance to retrieve their assets from the debtor's possession before other creditors are officially notified by the insolvency administrator, eligible authorities or insolvency professionals.

7. Cross-Border Insolvency in the Digital Age – Technology-Driven Smart Law Design

Insolvency practitioners should be aware of the power modern media and digital age hold in enabling the collection of more data and processing more information than ever before. This data may be not available to the court. Ensuring the existence of and gathering the necessary data may be a challenge which some courts will face. The use of technology as a method for

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[687] C. Elefant, 'The 'Power' of Social Media: Legal Issues & Best Practices for Utilities Engaging Social Media', *Energy Law Journal* 32 (2011), 1–56, at 4

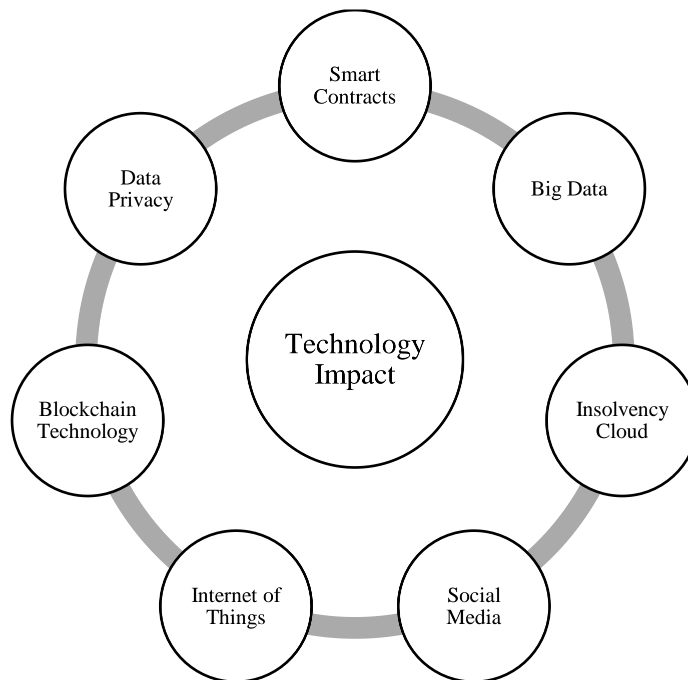
[688] J. H. Kietzmann, K. Hermkens, I. P. McCarthy and B. S. Silvestre, 'Social Media? Get Serious! Understanding the Functional Building Blocks of Social Media', *Business Horizons* 54 (2011), 241–51, at 243

[689] D. S. Chung, S. Nah and M. Yamamoto, 'Conceptualizing Citizen Journalism: US News Editors' Views', *Journalism: Theory Practice and Criticism* 18 (2017), 1–19, at 3

accelerating insolvency proceedings as well as a mean of storage for insolvency data such as a cloud is a new implication on laws of the future. Analysing data streams is likely to improve the quality and precision of legal rules and proceedings. Technological progress raises further questions regarding insolvency proceedings. What happens with big data in the insolvent companies? Who owns those data: debtors or creditors? What are the implications of big data and digital transformation for lawmakers and law practitioners? In the case of exchanging information across borders on insolvency-related issues, technology will grow in quantity. In consideration of the legal criteria, one could create an ‘insolvency cloud’ for gathering information related to insolvency proceedings and thereby build up insolvency proceedings’ ‘footprint’, integrating different categories and taking into consideration constant and variable factors. In this way, the competent court and other participants will be able to cooperate and communicate quickly and efficiently, and hence reduce the costs of insolvency proceedings. In turn, this will increase the debtor's assets to be allocated between the creditors.

8. Data Protection Impact on Cross-Border Insolvency

Although digitalization opens many opportunities for insolvency proceedings, many challenges must still be overcome. Data protection gains more relevance for cross-border insolvency cases after the General Data Protection Regelation (EU) 2016/679 came in force. Considering the increasing importance of privacy law, the court and insolvency administrators must bear in mind the protection of the personal data of all parties taking part in insolvency proceedings. The following questions still require answers. Firstly, what personal data is regulated in the insolvency cloud? This touches on issues such as data anonymization, the ability to access this data, data fragmentation, etc. Secondly, who is responsible for handling data in the insolvency cloud – debtor, creditors, insolvency administrators, insolvency courts or other data processors such as cloud providers? Thirdly, which national data privacy rules apply, i.e. what is the applicable jurisdiction and in relation to which regional insolvency rules? And fourthly, the data processor may not be allowed to release the personal data to an eligible person within insolvency proceedings.



9. Asian Law and Technology Change – Tradition vs. Innovation

Businesses may move faster than the law, but technology moves even faster than businesses. Southeast Asia has become a target for technology investments over the last few years. Companies such as Carousell, Tokopedia and iFlix received huge investments for further development and growth. Hence, the relevance of technological progress will sooner or later affect the process of the law to a greater degree than tradition does.

The rapid development of new technologies must at some point converge with law, law design, the law-making process, and various legal proceedings. This means the appearance of new structures and methods in law design and law application. Regulations must hold technology in one hand, whilst keeping proceeding in the other. These regulatory developments pertain to new spheres such as social media, cloud computing and digital business.

The relevance of technology to some extent infringes upon the existing basics of law. Sources of communication have become various, e.g. social media. Many companies do not afford enough attention to social appearance and public communication. Social media transports information in real time and urges business players to act and interact accordingly. Real-time communication through social media opens up new channels of information exchange, enabling immediate information disclosure. This fact modifies the basic principles of law and information exchange between courts and insolvency professionals. The power of innovation

changes the substance of legal rules and defines different demands of regulations structures, law-designing methods, and processes.

Section V – Asia Pulp & Paper Case – Is Technology the Answer?

Returning to the Asia Pulp & Paper case, what implication does our analysis have? Once a cross-border insolvency case occurred, there were several open issues, based on the missing insolvency framework. The petition of creditors for the appointment of a judicial manager was rejected by the courts on two counts. The court argued that the appointment of the judicial manager in Singapore would not allow him authority over the assets of the debtor in other countries, e.g. in China or Indonesia, because the administration of those assets fell under local laws and regulations which did not allow the participation of foreign insolvency administrators or the enforcement of foreign judgements in insolvency issues. The lack of coordination between legal systems and courts required the reframing of legal criteria and the elaboration of other criteria in order to achieve adequate results because the authority of the Singaporean Court would not be recognized by insolvency courts in Indonesia or China. This would lead to an additional application for the appointment of a judicial manager in each of the affected countries and increase transaction costs. How would the Asia Pulp & Paper case look if the previous analysis of various criteria for a Regional Insolvency Framework in Southeast Asia, in ASEAN+3, were taken into consideration?

The debtor's centre of main interest would form an effective criterion for drafting a cross-border insolvency framework in Asia. It assigns decision competence to one court in one country, party to the cross-border insolvency framework. Hence, the Singaporean Court would be competent for the appointment of the judicial manager in Singapore who would also be entitled to dispose the debtor's assets in Indonesia or China – provided that those countries adhere to the Regional Insolvency Framework. Another legal role would be played by the central insolvency proceedings court. As such, the Singaporean Court would have the authority to coordinate the whole proceedings across different jurisdictions. This possibility would reduce the timeframes for closing insolvency proceedings. In addition, a central insolvency proceeding register would ensure the transparency of simultaneous proceedings in several countries, which could be administrated by a central insolvency authority. Finally, a common language for insolvency proceedings and judgements is required for communication and document workflow between the Singaporean Court and competent authorities in Indonesia, China, and other affected

jurisdictions where Asia Pulp & Paper may have their assets. A common language of proceedings would certainly facilitate this process. However, this would face various challenges, e.g. legal terms which cannot be directly translated because of some legal concepts which are not available in another legal system or if the legal systems use different English terms for one and the same legal concept because it was borrowed from different legal backgrounds, e.g. common law or civil law systems. Nevertheless, the advantages speak in favour of the Regional Insolvency Framework in ASEAN and ASEAN+ 3. Equal treatment of all creditors could be assured by an equal creditors' rights system. This requires creditor-friendly national insolvency systems, though this is unlikely to become the case across all countries in ASEAN and ASEAN+3. For example, while Singapore has a creditor-friendly insolvency system, Japan tends to confer more rights to the debtor. Again, during the Regional Insolvency Framework's implementation this matter would contribute to equal treatment of creditors independent of their corporate seat and the seat of the debtor and his affiliates or the location of the debtor's assets.

These criteria reveal the discrepancy between national rules in various legal systems and the needs of the modern technology-driven business world. They take a different approach and have a traditional impact. The institutional law should consider these criteria in drafting a new Regional Insolvency Framework. These principles would make cross-border insolvency proceedings more effective; however, it would take a significant amount of time to draft a consistent and workable set of rules that will require maintenance and adjustments over time.

In view of traditional and cultural aspects, it is of course necessary to emphasize that traditional background is intrinsically reflected in legal rules. The sense of collectivism dissuades local creditors from commencing the opening of insolvency proceedings and so as not to stand out from the group. In reverse, in the case of Asia Pulp & Paper, Western creditors applied for the appointment of the judicial manager. The local creditors' restraint should be weighed up in the Regional Insolvency Framework and additional motivation given to creditors to apply for the opening of insolvency proceedings. This would have a positive impact on the rights of other stakeholders. Hand in hand with collectivism is the tendency to avoid conflict. A local creditor would rather relinquish his rights within the insolvency proceedings and retain a good business relationship with the debtor, thereby ensuring harmony within the creditors' company too. This trait also affects other foreign creditors, especially if they come from Western countries and are eager to exercise their rights. In connection with these aspects, the question of hierarchy also

plays a crucial role. Respect for elders in local creditors' companies may lead to resistance in filing for insolvency proceedings. Finally, the fear of losing face often drives debtors to insolvency procrastination and leads to higher damages for all stakeholders in insolvency proceedings. This aspect is different from Europe where the only reason not to apply for insolvency proceedings is often the financial motivation of the debtor. The fact that Asia Pulp & Paper did not apply for the opening of insolvency proceedings in time reflects this traditional aspect. A Regional Insolvency Framework in ASEAN and ASEAN+3 should consider this through special rules for the application for opening of insolvency proceedings.

Although the legal criteria and traditional barriers should be considered in drafting a Regional Insolvency Framework in ASEAN and ASEAN+3, it will most likely take many years or even decades to reach an effective Regional Insolvency Framework. This fact serves to highlight the speed with which new solutions are emerging because globalization, alongside technological progress and digitalization, do not wait for the law. In this regard, technology can be of service in setting up for cross-border insolvency cases. A positive aspect is that the technology is the same for everyone; it does not have roots in tradition as the law does; rather, its structures are the same for everyone. Technology is precise and follows clear algorithms. If smart contracts or blockchains had been applied to insolvency legal issues, Asia Pulp & Paper case would have been resolved faster. Digitalizing insolvency proceedings increases their transparency. All creditors in the Asia Pulp & Paper case would have had equal access to debtor-related information. These new means of communication would have expedited the decision-making process because the closely guarded and structured insolvency information with its controlled disclosure rights would also have supported the Singaporean Court. It would have been able to cooperate with other foreign courts and share necessary information with them. An insolvency cloud would facilitate this and supersede paper-based document workflow. A digital information sharing platform has many advantages such as facilitating communication between all participants in insolvency proceedings, reducing transaction costs and saving of time.

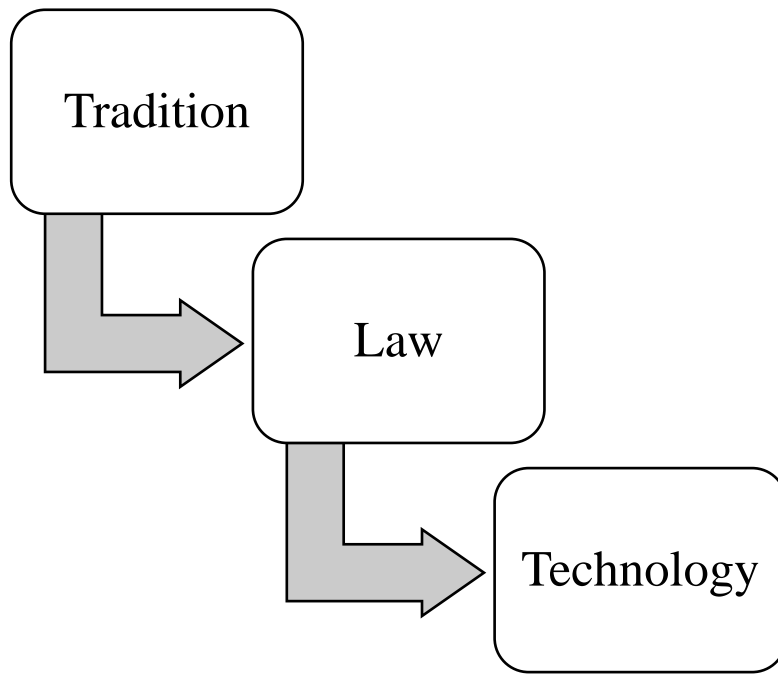
In short, technology is not the answer; however, it is in a way a guideline for the law to follow. Owing to their long historical development, cultural aspects reveal the law's origins as well as its limits, which are defined by traditional tropes. Technology is the future; it guides the way for the law. It removes limitations and gives the law a new identity. For a long time now, the law has in fact impeded stakeholders in cross-border insolvency proceedings from achieving their justified aims. Technology will now help to transform the law into a valuable tool, aiding

the accomplishment of international transactions as well, of course, of cross-border insolvency cases.

In the light of our analysis, it can be concluded that to achieve the most practical and tailor-made solution for cross-border insolvencies in Asia, it is not necessary to decide in favour of one of the existing solutions. It would be of much more interest and effectivity to create a differentiated approach for legislative, judicial, and private legal processes. This is possible under equal consideration of legal, cultural, and technological impacts to support the balance of interests referred to in Chapter I.

Because of different levels of welfare across countries, it makes sense to introduce a local, flexible, cross-border template regulation for ASEAN which can extend to cover ASEAN+3 or further. Elements for a Regional Insolvency Framework for ASEAN should contain the following features: interests of creditors, consideration of 'Asian Values', Central ASEAN Insolvency Authority, judgement enforceable in each ASEAN Member State, regulation for insolvency cases of groups of companies. If we include these types of cooperation principles found in the UNCITRAL Model Law, countries expressing horizontal collectivism are more likely to achieve them successfully.

In this Chapter VI, essential criteria for a regional insolvency regulation have been assessed. It is reasonable to address the various groups of factors impacting the structures of insolvency proceedings on various levels. The first group of criteria is legal: centre of main interests, central insolvency proceedings register, central insolvency proceedings court, common language of proceedings and equal creditors' rights protection system. The second group of criteria is cultural and based on 'Asian Values': collectivism, fear of losing face, hierarchy, conflict avoidance and harmony. Finally, technology and innovation have a very new impact on the cross-border insolvency framework: big data, blockchain technology and smart contracts, Internet of things, social media, cloud-computing, and data privacy.


Tradition
Law
Technology

CHAPTER VII – CONCLUSION

The purpose of this thesis was to determine a set of general, multifaceted criteria rather than to present a ready product, in the form of principles and guidelines for an eventual ASEAN Regional Insolvency Framework. These criteria should serve as a signpost for lawmakers and legal practitioners. Restating principles set by legal theory, national and international legal bodies, these factors move forward to a meta-level and call for global reflections on the complexity and feasibility in the handling of cross-border insolvencies.

Cross-border insolvency has become an integral part of the modern economy. It is characterized by local traditional values and driven by modern technology, both elements which must be considered in the modern law design process. Aside from social and economic factors, it is influenced by society and technology. 'Asian Values' form the groundwork in designing appropriate legal rules, with technology acting as a guiding force.

The challenge for institutional lawmakers is to consider cultural aspects in law-making proceedings, while integrating digitalization and technological innovation. This dynamic process requires a constant awareness and oversight of the changing technological world in order to adequately react to and accommodate it within the law-making process. Likewise, it necessitates a deep and detailed consideration of the cultural challenges inherent to the Asian region. As globalization and technology grow in significance and more similarities in business develop, the aspect of tradition wanes in importance. That notwithstanding, the cultural impact remains ever present in the middle of society, this is reflected in the legal rules and regulations applied in insolvency cases too.

The pressing need for a legal framework in Southeast Asia has been seen in the example of the Asia Pulp & Paper Case that followed the region's financial crisis. Previous legal projects on cross-border insolvency law such as the UNCITRAL Model Law on Cross-Border Insolvency and the European Insolvency Regulation give a solid basis of the substance of fundamental legal rules, which require further development and law-design in the transnational insolvency context. A common legal framework on cross-border insolvency in ASEAN countries calls for a more differentiated approach.

Further considerations have been made in this discussion. Firstly, the options available in governing cross-border insolvency law were evaluated, as well as discussing the pros and cons

surrounding the implementation of the UNCITRAL Model Law on Cross-Border Insolvency within Asian countries. Next, the possibility of a Regional Insolvency Framework within ASEAN was discussed as well as which legal elements are necessary in building an effective framework. Finally, we demonstrated the impact of cultural features in the legal setting and how these cultural elements must be taken into consideration when drafting and implementing the new cross-border insolvency framework within ASEAN.

Counting in favour of the UNCITRAL Model Law on Cross-Border Insolvency's implementation by Asian countries are its flexibility and simplicity of handling because it does not require harmonization with domestic insolvency laws or their amending.

Objections to the Model Law's adoption are mainly rooted in the inadequacy of institutional structure in Asian countries and among ASEAN members as well as the absence or deficiency of national insolvency laws, the insufficient preparation of judges and other legal professionals, deep mutual distrust of jurisdictions, lack of appropriate experience, widespread corruption issues, and divergent definitions in terms of public policy and fairness, in particular, in relation to priority issues between local and foreign creditors. In addition, the adoption of the Model Law may also be an issue of time because it will require longer than, for example, industrial countries do. Finally, difficulties may also be encountered in the definition of the COMI, which is incumbent upon the honesty of the court. The key challenge is not to identify the obstacles arising in adopting the Model Law and so to reject it because of its inadequacy, but rather to transform these into difficulties that simply increase the complexity of the Model Law's adoption but do not preclude its pertinence within the frame of globalization.

On a regional level within ASEAN, a central insolvency authority could be launched and endowed with control functions alongside an ASEAN insolvency proceeding register.

Furthermore, we have also found out that across the law-making criteria, the cultural value system of national states and regions must be integrated into the legal framework in order to reflect the local and regional needs of different interest groups in the international context.

‘Asian Values’ such as the fear of losing face, collectivism, hierarchy, conflict avoidance and harmony would have a latent as well as a visible impact on the design of national and regional insolvency frameworks and the adoption of the Model Law.

By traditional society values we refer to those latent factors which define the frame of the regulation because ‘Asian Values’ are a part of the cultural network and have a fundamental influence on the theoretical drafting, development and practical functioning of the insolvency law. In short, it is up to the national legislators and regional authorities to identify these cultural factors, assess their impact on the legal system and take them into consideration not just in the law-making process but in its implementation too.

To launch a common Regional Insolvency Framework within ASEAN, the governing powers of its Member States should consider implementing the following legal concepts, which form part of the basic structure of the common framework on cross-border insolvency law. Firstly, is the definition of the centre of main interest under consideration of the provisions and amendments of the UNICTRAL and European Commission texts on cross-border insolvency with respect to the insolvency of a group of companies. The second considerable factor would be an interstate court competent for decisions in cross-border insolvency cases within the ASEAN framework. Thirdly, the introduction of the common insolvency proceedings register would enable all participant parties in cross-border insolvency proceedings to have the same level of information, which secures creditors' rights inter alia, especially those of foreign creditors that do not have access to domestic courts. Fourthly, is the introduction of the English language as a common language of the insolvency regulations and insolvency proceedings. Finally, on the interstate level, the Member States should consider implementing a creditor rights protection system. To this end, some rules from the World Bank project dealing with creditors' rights systems should be observed. This will bring all the creditors under the same level of protection, reflecting the importance of rules of this kind for countries with only rudimentary insolvency rules or insolvency proceedings oriented towards the rights of debtors.

We have identified the following cultural criteria which impact on the design of insolvency law and especially cross-border insolvency law within ASEAN. These cultural elements are collectivism, fear of losing face, hierarchy, conflict avoidance and harmony. Firstly, collectivism focuses one's attention on the importance of the group over the individual. Secondly, the fear of losing face reflects the disregard of society, which plays a more fundamental role than in Western societies. What is more, this fear of losing face stems from Confucian societal norms and requires concerted consideration in the law-making process because of the ‘stigma of bankruptcy’. Thirdly, the principle of hierarchy underlines the importance of interpersonal relationships within hierarchical structures as well as the

management mindset within the insolvent company. The filing of insolvency applications by a responsible person may be hindered by a hierarchically higher member of management, which could lead to the absence of an insolvency application by the debtor company. Fourthly, the factor of conflict avoidance can, to some extent, hinder creditors from launching an insolvency to avoid an unpleasant situation for all concerned parties. In addition, this issue concerns cases where the creditors are corporate entities and the management is reluctant to become involved in the conflict by filing an insolvency case. Fifthly, the harmony principle also traces back to Confucian philosophy and reflects an unwillingness to enter the discussion.

However even legal criteria and cultural impacts do not suffice in the development of a Regional Insolvency Framework. Much more significant to this end is technological progress and digitalization which together define legal technology. For this reason, the final implication in this regard concerns the technological mindset in the cross-border insolvency context, which is a driving force for modern businesses. This mindset inevitably touches on legal rules or rather highlights their absence. Technological development challenges legislators and other legal professionals to rethink legal structures and processes not only on the national stage, but also on the regional and international level, which are both becoming more and more relevant through the continuing interconnection of the various spheres of business, technology and law. New concepts necessitate concerted consideration within and alongside a law-making process. Firstly, the issue of big data is of increasing importance because it overhangs all aspects of business and hence the legislative process in regulating economic matters. Secondly, blockchain technology and smart contracts can be considered by legislators for ruling on insolvency agreements and protocols. Thirdly, the IoT requires consideration in the law-making process and broadens the areas of business which require regulation. The technology factor fosters business as well as challenging the law to move towards reframing and re-regulation. Insolvency law and cross-border insolvency law are subject to the implications of technology. These implications substantiate the recreation of new legal areas such as insolvency and cloud-computing, as well as communication and cooperation in data privacy law, which gain importance in the face of extensive data movement. Scalable and differentiated regulation in this field are susceptible to change and must adapt to precisely these changes.

Legislators, legal practitioners, intergovernmental organizations, institutional and other legal bodies involved or otherwise interested in ongoing legal research and technology-driven, modern law design on cross-border insolvencies are welcome to continue investigation into the

appropriate form of legal handling in the cross-border insolvency cases in Southeast Asia. Determining further legal, cultural and technological factors in order to develop a common framework on cross-border insolvency is prerequisite to achieving an effective and fair solution for insolvency asset allocation within ASEAN, which is optimized through the integration of innovations and by respecting traditional notions.

The divergence between the law and technology is becoming an ever-greater issue. Artificial intelligence continues to permeate more and more legal fields. The possible convergence between the law and technology is an exciting field for future research and scholarship.

APPENDICES

General Overview of International Insolvency Projects		
Adoption Date	**Insolvency Project**	**Issuing Institution**
1989	Model International Insolvency Cooperation Act (MIICA)	Committee J of the International Bar Association
31 May 1996	Cross-Border Insolvency Concordat	Committee J of the International Bar Association
30 May 1997	UNCITRAL Model Law on Cross-Border Insolvency	United Nations Commission on International Trade Law
2 August 1999	Orderly and Effective Insolvency Procedures: Key Issues	International Monetary Fund
April 2000	Good Practice Standards for insolvency law (16 Principles)	Asian Development Bank
16 May 2000	Court-to-Court Communication Guidelines in Cross-Border Cases	The American Law Institute in Cooperation
		International Insolvency Institute adopted on **10 June 2001**
April 2001/2016	Principles and Guidelines for Effective Insolvency and Creditor Rights Systems	The World Bank
31 May 2002	European Insolvency Regulation	The Council of the European Union
2003	Transnational Insolvency Project	The American Law Institute
2007	European Communication and Cooperation Guidelines for Cross-Border Insolvency	INSOL Europe
2012	Global Principles for Cooperation in International Insolvency Cases	The American Law Institute
2013	Guidelines for Coordination of Multinational Enterprise Groups	International Insolvency Institute
2014	European Communication and Cooperation Principles on Cross-Border Insolvency (‘EU JudgeCo Principles’)	European Commission and International Insolvency Institute
2014	European Communication and Cooperation Guidelines on Cross-Border Insolvency (‘EU JudgeCo Guidelines’)	European Commission and International Insolvency Institute

Table 1 – Projects on Cross-Border Insolvency

Country	National Insolvency Rules	National Rules on Cross-Border Insolvency
Brunei	Bankruptcy Act 1984	No.
Cambodia	Law on Bankruptcy 2007 Draft of the Cambodia Civil Code	No.
Indonesia	Regulation of Bankruptcy 1906 (embedded in the Commercial Code of Indonesia; applicable to Indonesians since 1945)	No. Relevant since Asia Pulp & Paper Case Reform plans
Laos	Law on Bankruptcy of Enterprises No. 06/1994; Enterprise Rehabilitation and Bankruptcy Law (№ 75/NA, 26th December 2019) (the Bankruptcy Law)	No. Recognition in case of Secured Transactions Law issues.
Malaysia	Malaysian Company Act 1965 The Act 360 Bankruptcy Act 1967	Yes. Recognition of foreign insolvency judgements and court orders as well proceedings related to the assistance of courts in foreign jurisdictions. Section 104 of the Act 360 Bankruptcy Act 1967 – Reciprocal provisions to Singapore and designated countries (Member States of ASEAN).
Myanmar	Yangon Insolvency Act 1908 Myanmar Company Act 1913 (winding-up) Myanmar Insolvency Act 1920 Burma Insolvency Rules 1924 New Insolvency Law 2020	Yes. The UNCITRAL Model Law was adopted on 14 February 2020
The Philippines	Insolvency Act 1906 (corporate insolvency not rules) Presidential Decree No. 902-A (PD 902-A) 1980 SEC Rules of Procedure on Corporate Recovery 1999	Yes. Corporate Recovery and Insolvency Act (Draft)
Singapore	Singapore Company Act 1967 Company Amendment Act 1987 New Bankruptcy Act 1995	Yes. Decided to adopt UNCITRAL Model Law (2017)
Thailand	Bankruptcy Act 1909 Bankruptcy Act 1911 with amendments in 1927 and 1933 Bankruptcy Act 1987 with amendments in 1998 and 1999 Bankruptcy Court Act 1998	No. Section 91 of the Bankruptcy Act requires foreign debtors to fulfil the requirements of section 178 of the Bankruptcy Act; no recognition of insolvency administrator appointed by foreign court; only if foreign creditor proves that local Thai creditors would have an entitlement to claim the same rights in the foreign jurisdiction, can they claim the

		repayment of their debts in Thailand pursuant to section 177 of the Bankruptcy Act.
Vietnam	Law on Business Bankruptcy 1993 Bankruptcy Law No. 21/2004/QH11 2004 Bankruptcy Law No. 51/2014/QH13 2014	No. Attempts to consider foreign elements in the Draft to Bankruptcy Law in 2002. Article 4 of the Law of 2004 provides that the Bankruptcy is applicable to all enterprises doing business in Vietnam, hence, there is no language excluding or including foreign debtors.

Table 2 – National Insolvency Laws in Member States of ASEAN

Country	National Insolvency Rules	National Rules on Cross-Border Insolvency
Japan	Bankruptcy Code of 1922, Corporate Reorganization Act of 2002	Yes. Japan adopted the UNCITRAL Model Law on Cross-Border Insolvency in 2000 under the Law of Recognition and Assistance for Foreign Insolvency Proceedings (LRAFIP) with some deviations. Japan links the non-discrimination principle to reciprocity principles: only if the mother State of the foreign creditor applied the same non-discrimination rule is this rule likely to be applied by a Japanese court. There is no automatic recognition of foreign judgements.
China	PRC Enterprise Bankruptcy and Insolvency Law 2007	No.
South Korea	Corporate Reorganization Act, Bankruptcy Act, Composition Act and, Individual Debtor Rehabilitation Act unified in Debtor Rehabilitation and Bankruptcy Act (DRBA) in April 2006	Yes. The principle of equality between Korean and Non-Korean creditors had been adopted.

Table 3 – National Insolvency Laws in the Member States of ASEAN+3

Country of ASEAN	National 'Asian Values'
Brunei	Power distance, avoidance of uncertainty, abasement of individualism (or low individualism), hierarchy of power structure between different social class, fear of losing face, group and family-oriented.
Cambodia	Hierarchy (hereditary and non-hereditary obligations), family-oriented structure of society (divided into upper class and rural peasants or lower class), respect for elderly, honesty, munificence, mercy, conflict avoidance, piety, fear of losing face.
Indonesia	Indigeneity, communitarianism over individual rights, dominance of obligations over rights, consensus over contest, respect of hierarchy (family principle), mutual help.
Laos	Hierarchy (also hierarchy of the village), authority of elderly, responsibility and decision-making by authoritarian leaders, fear of losing face, conflict avoidance, importance of family relationship in business, no deviation from appointed social position.
Malaysia	Community interests stand over individual interests, self-sacrifice for common goal, self-effacement, courtesy, responsibility, respect for elderly, harmony; in business, trust, sincerity, and loyalty.
Myanmar	Responsibility and decision-making by authoritarian leaders.
The Philippines	Notion of public good is defined by family and not by individual, social acceptance, contribution to national welfare, recognition of humanity and its sharing by others, cooperation, condolences to other in case of hard luck, trust, favour of friends and supporters, patience, God-fearing, national or community consciousness, orientation to needs of others, balanced reciprocity, fear of losing face, avoiding shaming others, communalism.
Singapore	Discipline, communitarianism over individual rights, respect for elderly and the state, collectivism, communitarianism (as a national ideology), reciprocity and family-orientedness, 'nation before community, community before self', consensus instead of contention, community support for individual.
Thailand	Division of values into rural (lower education, passivity, love of recreation, materialism, respect for people doing good things, face-saving, refraining from causing displeasure to others, submission to the powerful, informality and strong kinship obligations) and urban (rationality, competition, materialism, face-saving and face-promoting, Westernization, respect for legitimate authority, lack of discipline, disregard for public property, paying lip-service instead of practical action, jealousy and selfishness); more generally, materialism, respect for order and holders of power, collectivism, hierarchy, knowing your place and liking it, loyalty and obedience, indebted goodness, restraining one's desire or interest which could cause conflict or displeasure to others, conflict avoidance, harmony of family and society, keeping calm in case of frustration or conflict.
Vietnam	Rejection of individual rights against the state, duty to serve one's country, collectivism, social hierarchy, obligations and duties.

Table 4 – National 'Asian Values' in the Member States of ASEAN

Country of ASEAN+3	National 'Asian Values'
Japan	Collective thinking, conflict avoidance, hierarchical order in society, harmony, integration of individual into society (networking), implicit communication, consensus-building, harmony.
China	Collectivism, pre-eminence of the concept of the clan, harmony (the highest priority), indirect communication, avoidance of saying 'no', respecting age and status, family-based business, building trust in family (networking) rather than in society, information sharing, significance of status and seniority in negotiations, principle of saving or losing face (fear of losing face).
South Korea	Social harmony, authority, predominance of group interests over personal interests within both family and society, interpersonal relationships, loyalty, filial piety.

Table 5 – National 'Asian Values' in the Member States of ASEAN+3

Criteria		
Legal Criteria	**Cultural Criteria**	**Technology Criteria**
Centre of Main Interests (COMI)	Collectivism	Big Data
Central Insolvency Register	Fear of Losing Face	Blockchain Technology and Smart Contracts
Central Insolvency Court	Hierarchy	Internet of Things
Common Language of Insolvency Proceedings	Conflict Avoidance	Social Media
Common Creditors Rights Protection System	Harmony	Insolvency Cloud Data Privacy

Table 6 – Criteria for a Reginal Insolvency Framework for ASEAN

REFERENCES

Acharya, A., ‘Ideas, Identity, and Institution‐Building: From the ‘ASEAN Way’ to the ‘Asia‐Pacific Way'?’, *The Pacific Review* 10 (1997), 319–46.

Acharya, A., ‘How Ideas Spread: Whose Norms Matter? Norm Localization and Institutional Change in Asian Regionalism’, *International Organization* 58 (2004), 239–75.

Aghevli, B. B., ‘The Asian Crisis: Causes and Remedies’, *Finance & Development* 31 (1999), 28–31.

Ahmed, A. B. E. D. and Elaraby, I. S., ‘Data Mining: A Prediction for Student's Performance Using Classification Method’, *World Journal of Computer Application and Technology* 2 (2014), 43–7.

Ai, V. V., ‘Human Rights and Asian Values in Vietnam’ in M. Jacobsen and O. Bruun (eds.), *Human Rights and Asian Values: Contesting National Identities and Cultural Representation in Asia*, Democracy in Asia Series (London: RoutledgeCurzon, 2000), pp. 92–110.

Altman, J., ‘A Test Case in International Bankruptcy Protocols: The Lehman Brothers Insolvency’, *San Diego International Law Journal* 12 (2011), 463–95.

American Law Institute, *Transnational Insolvency: Global Principles for Cooperation in International Insolvency Cases* (2012).

Ang, P., ‘Cross-border Insolvency Issues in Asia’, Law Gazette, 2012.

Arsenault, S. J., ‘Leaping Over the Great Wall: Examining Cross-Border Insolvency in China under the Chinese Corporate Bankruptcy Law’, *Indiana International & Comparative Law Review* 21 (2011), 1–23.

Asian Development Bank, *Law and Policy Reform at the Asian Development Bank: Insolvency Law Reforms in the Asian and Pacific Region*, Report of the Office of the General Counsel on TA-5795 Reg: Insolvency Law Reforms (Manila: Asian Development Bank, 2000), vol. 1.

Asian Development Bank (ed.), *The Lack of Adequate Insolvency Frameworks for Major Corporate Collapses in Asia: Asian Development Bank Presentation*, The Forum on Asian Insolvency Reform: Session III – New Delhi, India (2004).

Asian Development Bank, *Promoting Regional Cooperation in the Development of Insolvency Law Reforms – RETA 5975: Draft Country Report for Singapore Conference – Indonesia, Korea, Philippines and Thailand* (Manila: Asian Development Bank, 2008).

Association of Southeast Asian Nations (ed.), *ASEAN Economic Community Blueprint* (Jakarta: Association of Southeast Asian Nations, 2008).

Attorney General's Chambers / Prime Minister's Office of Brunei Darussalam, ‘Insolvency Order: S1/2016’, Constitution of Brunei Darussalam (Order made under Article 83 (3)), *Brunei Darussalam Government Gazette* No. S1 (2016).

‘Bankruptcy Act Chapter 67’ in *Laws of Brunei* (1984).

Baoyun, Y., ‘The Relevance of Confucianism Today’ in J. Cauquelin, P. Lim and B. Mayer-König (eds.), *Asian Values: An Encounter with Diversity* (Richmond: Curzon, 2000), pp. 70–95.

Barr, M. D. (ed.), *Cultural Politics and Asian Values: The Tepid War*, Advances in Asia Pacific Studies (London: Routledge, 2003), vol. 6.

Bendapudi, R., ‘People's Republic of China Bankruptcy Law’, *Santa Clara Journal of International Law* 6 (2008), 205–19.

Berends, A. J., ‘The UNCITRAL Model Law on Cross-Border Insolvency: A Comprehensive Overview’, *Tulane Journal of International and Comparative Law* 6 (1998), 309–99.

Berg, A., *The Asian Crisis: Causes, Policy Responses, and Outcomes*, Working Paper of the International Monetary Fund, WP/99/138 (1999).

Bernardo, P. J. F., ‘Cross-Border Insolvency and the Challenges of the Global Corporation: Evaluating Globalization and Stakeholder Predictability through the UNCITRAL Model Law on Cross-Border Insolvency and the European Union Insolvency Regulation’, *Ateneo Law Journal* 56 (2012), 799–833.

Blunt, P., 'Cultural Consequences for Organization Change in a Southeast Asian State: Brunei', *Academy of Management Executive* 2 (1988), 235–40.

Boase, B., *Understanding Lao Culture* (1997).

Bogart, K., 'Asian Values and Their Impact on Business Practices' in J. Cauquelin, P. Lim and B. Mayer-König (eds.), *Asian Values: An Encounter with Diversity* (Richmond: Curzon, 2000), pp. 139–63.

Booth, C. D. and Chiu, W., 'Booth, Drafting Bankruptcy Laws in Socialist Market Economies: Recent Developments in China and Vietnam', *Columbia Journal of Asian Law* 11 (2005), 93–147.

Buchanan, B. G. and Headrick, T. E., 'Some Speculation about Artificial Intelligence and Legal Reasoning', *Stanford Law Review* 23 (1970), 40.

Bufford, S. L., Hon, 'Center of Main Interests, International Insolvency Case Venue, and Equality of Arms: The Eurofood Decision of the European Court of Justice', *Northwestern Journal of International Law & Business* 27 (2007), 351–420.

Bufford, S. L., Hon., 'Revision of the European Union Regulation on Insolvency Proceedings – Recommendations', Penn State Law Research Paper, *Penn State Law Legal Studies Research Paper Series* 2 (2014).

Burton, L. A., 'An Overview of Insolvency Proceedings in Asia', *Annual Survey of International & Comparative Law* 6 (2000), 113–27.

Cairns, J. W., 'Watson, Walton, and the History of Legal Transplants', *Georgia Journal of International and Comparative Law* (2013), 637–96.

Cauquelin, J., Mayer-König, B. and Lim, P., 'Understanding Asian Values' in J. Cauquelin, P. Lim and B. Mayer-König (eds.), *Asian Values: An Encounter with Diversity* (Richmond: Curzon, 2000), pp. 1–19.

Chaibong, H., 'Why Asian Values?', *Korea Journal* 41 (2001), 265–91.

Chua, B. H., ‘Asian Values: Is an Anti-Authoritarian Reading Possible?’ in M. Beeson (ed.), *Contemporary Southeast Asia: Regional Dynamics, National Differences*, 2nd (New York: Palgrave Macmillan, 2009), pp. 98–117.

Chung, C.-S., ‘Korean Confucian Response to the West: A Semiotic Aspect of Culture Conflict’, *Journal of Chinese Philosophy* 24 (1997), 361–99.

Chung, D. S., Nah, S. and Yamamoto, M., ‘Conceptualizing Citizen Journalism: US News Editors’ Views’, *Journalism: Theory Practice and Criticism* 18 (2017), 1–19.

Clark, E. and Supanit, S., ‘Thai Insolvency Law: One Step Towards the Developments of the Legal Infrastructure for a Revitalized Economy’ in R. Tomasic (ed.), *Insolvency Law in East Asia*, 3rd edn. (Hampshire: Ashgate Publishing Limited, 2013), pp. 291–320.

Clifford Chance, *A Guide to Asia Pacific Restructuring and Insolvency Procedures* (2013).

Clifford Chance, *Vietnam: New Bankruptcy Law 2014*, Briefing Note (2014).

Clift, J., ‘United Nations Commission on International Trade Law (UNCITRAL): The UNCITRAL Model Law on Cross-Border Insolvency – A Legislative Framework to Facilitate Coordination and Cooperation in Cross-Border Insolvency’, *Tulane Journal of International and Comparative Law* 12 (2004), 307–45.

Corsetti, G., Pesenti, P. and Roubini, N., *Paper Tigers? A Model of the Asian Crisis*, NBER Working Paper Series (1998), vol. 6783.

Corsetti, G., Pesenti, P. and Roubini, N., ‘What Caused the Asian Currency and Financial Crisis?’, *Japan and the World Economy* 11 (1999), 305–73.

Deutsche Bank AG & Another v Asia Pulp & Paper Company Ltd [2002] SGHC 257 (OP No 2 of 2002).

Deutsche Bank AG and Another v Asia Pulp & Paper Co Ltd [2003] SGCA 19, 2003 (Court of Appeal of Singapore, 29 April 2003).

Cross-Border Insolvency Concordat (1996).

DFDL Mekong (Cambodia) Co. Ltd., ‘Creation of Inter-Ministerial Task Force to Facilitate and Prepare Substance for the 4th Meeting Between Governors or Provinces – Municipalities Adjacent to Cambodia – Vietnam Borders’, *Weekly Law Update* (2008), 1–5.

Dijcks, J.-P., *Oracle White Paper – Big Data for Enterprises* (Redwood Shores, 2013).

Dijkman, R. M., Sprenkels, B., Peeters, T. and Janssen, A., ‘Business Models for the Internet of Things’, *International Journal of Information Management* 35 (2015), 672–8.

Diokno, M. S. I., ‘Once Again, The Asian Values Debate: The Case of the Philippines’ in M. Jacobsen and O. Bruun (eds.), *Human Rights and Asian Values: Contesting National Identities and Cultural Representation in Asia*, Democracy in Asia Series (London: RoutledgeCurzon, 2000), pp. 75–91.

Duffy, T., ‘Towards a Culture of Human Rights in Cambodia’, *Human rights Quaterly* 16 (1994), 82–104.

Dunning, Wm. A., ‘Jean Bodin on Sovereignty’, *Political Science Quarterly* 11 (1896), 82–104.

Duraman, I. and Hashim, A. A. H., ‘Brunei Darussalam: Developing Within Its Own Paradigm’, *Southeast Asian Affairs* (1998), 53–67.

Eidenmüller, H., ‘Free Choice in International Company Insolvency Law in Europe’, *European Business Organization Law Review (EBOR)* 6 (2005), 423–47.

Eidenmüller, H., ‘A New Framework for Business Restructuring in Europe: The EU Commission's Proposals for a Reform of the European Insolvency Regulation and Beyond’, *Maastricht Journal of European and Comparative Law* 20 (2013), 133–50.

Elefant, C., ‘The 'Power' of Social Media: Legal Issues & Best Practices for Utilities Engaging Social Media’, *Energy Law Journal* 32 (2011), 1–56.

Elgin, M., ‘Asian Values – A New Model for Development’, *Stanford Journal of East Asian Affairs* 10 (2010), 135–45.

Elson, R., ‘Reinventing a Region: Southeast Asia and Colonial Experience’ in M. Beeson (ed.), *Contemporary Southeast Asia: Regional Dynamics, National Differences*, 2nd (New York: Palgrave Macmillan, 2009), pp. 15–29.

European Commission (ed.), *Proposal for a Regulation of the European Parliament and of the Council: Amending Council Regulation (EC) No 1346/2000 on Insolvency Proceedings*, COM (2012) 744 final 2012/0360 (COD) (Strasbourg, 2012).

Fallon, R., ‘Asian Corporate Finance and Business Strategy: Asia Pulp & Paper Company Ltd.’, *Chazen Web Journal of International Business* (2003).

Finch, J., Myint, S. P. and Win, S. Y., ‘Myanmar’, *Project Finance* (2011), 161–7.

Fisher, R. and Sloan, M., ‘Why Asia Needs a Regional Insolvency Pact?’, *International Financial Law Review* 23 (2004), 44–6.

Fitzpatrick, D. J., ‘Country Report for The Philippines’ in Organization for Economic Cooperation and Development (ed.), *Insolvency Systems in Asia: An Efficiency Perspective*. Conclusions of the Conference on 'Insolvency Systems in Asia: An Efficiency Perspective' (Paris: OECD Publishing, 2001), pp. 295–346.

Francis, A., ‘Cross-Border Insolvency in East Asia: Formal and Informal Mechanisms and UNCITRAL's Model Law’ in R. Tomasic (ed.), *Insolvency Law in East Asia*, 3rd edn. (Hampshire: Ashgate Publishing Limited, 2013).

Fukuyama, F., ‘Asian Values in the Wake of Asian Crisis’ in F. Iqbal and J.-I. You (eds.), *Democracy, Market Economics & Development: An Asian Perspective* (Washington D.C.: The World Bank, 2001), pp. 149–67.

Gammeltoft, T. and Hernø, R., ‘Human Rights in Vietnam: Exploring Tensions and Ambiguities’ in M. Jacobsen and O. Bruun (eds.), *Human Rights and Asian Values: Contesting National Identities and Cultural Representation in Asia*, Democracy in Asia Series (London: RoutledgeCurzon, 2000), pp. 159–77.

Géczy, P., ‘Big Data Characteristics’, *The Macrotheme Review – A Multidisciplinary Journal of Global Macro Trends* 3 (2014), 94–104.

Gillespie, J., ‘Insolvency Law in Vietnam’ in R. Tomasic (ed.), *Insolvency Law in East Asia*, 3rd edn. (Hampshire: Ashgate Publishing Limited, 2013), pp. 239–70.

Glosband, D. M. and Katucki, C. T., ‘Current Developments in International Insolvency Law and Practice’, *The Business Lawyer* 45 (1990), 2273–80.

Godwin, A., ‘Corporate Rescue in Asia – Trends and Challenges’, *Sydney Law Revue* 34 (2012), 163–87.

Gopalan, S. and Guihot, M., ‘Cross-Border Insolvency Law and Multinational Enterprise Groups – Judicial Innovation as an International Solution’, *The George Washington International Law Review* 48 (2016), 549–616.

Guoqiang, L., ‘The Establishment of Limited Priority of Workers' Claims in the Enterprise Bankruptcy Law of China’ in Organization for Economic Cooperation and Development (ed.), *Asian Insolvency Systems: Closing the Implementation Gap*. Conclusions of the Fifth Meeting of the Forum for Asian Insolvency Reform (FAIR) on 'Legal and Institutional Reforms of Asian Insolvency Systems' (Paris: OECD Publishing, 2007), pp. 169–75.

Halldorsson, J. O., ‘Particularism, Identities and a Clash of Universalisms: Pancasila, Islam and Human Rights in Indonesia’ in M. Jacobsen and O. Bruun (eds.), *Human Rights and Asian Values: Contesting National Identities and Cultural Representation in Asia*, Democracy in Asia Series (London: RoutledgeCurzon, 2000), pp. 111–33.

Han, S. G. and Ryu, J.-S., ‘South Korea: Cross-Border Insolvency Proceedings’, International Financial Law Review, 1st March 2009.

Harmer, R., ‘Assessing the Assessments’, *International Insolvency Review* 23 (2014), 3–19.

Headley, R. K., Jr., ‘The Society and Its Environment’ in R. R. Ross (ed.), *Cambodia: A Country Study*, Area Handbook Series, 3rd edn. (Washington D.C.: Federal Research Division Library of Congress, 1990), pp. 73–137.

Hill, M., ‘'Asian Values' as Reverse Orientalism: Singapore’, *Asia Pacific Viewpoint* 41 (2002), 177–90.

Hirokoshi, H., ‘Perspective Article: Guide to Japanese Cross-Border Insolvency Law’, *Law and Business Review of the Americas* 9 (2003), 725–39.

Hoon, C. Y., ‘Revisiting the 'Asian Values' Argument Used by Asian Political Leaders and Its Validity’, *The Indonesian Quarterly* 32 (2004), 154–74.

Huaiyu, W., ‘The Bankruptcy Criteria and Priority of Claims: An International Comparison of Insolvency Laws’ in Organization for Economic Cooperation and Development (ed.), *Asian Insolvency Systems: Closing the Implementation Gap*. Conclusions of the Fifth Meeting of the Forum for Asian Insolvency Reform (FAIR) on 'Legal and Institutional Reforms of Asian Insolvency Systems' (Paris: OECD Publishing, 2007), pp. 259–66.

Ibrahim, A., ‘The Asian Financial Crisis Ten Years Later: What Lessons Have We learned?’ in R. Carney (ed.), *Lessons From the Asian Financial Crisis* (London and New York: Routledge, 2009), pp. 78–83.

Ingelhart, R. and Oyserman, D., ‘Individualism, Autonomy, Self-Expression: The Human Development Syndrome’ in H. Vinken, J. Soeters and P. Ester (eds.), *Comparing Cultures: Dimensions of Culture in a Comparative Perspective*, International Studies in Sociology and Social Anthropology (Leiden: Brill, 2004), pp. 74–96.

International Insolvency Institute, *Guidelines for Coordination of Multinational Enterprise Group Insolvencies* (2012).

ITO, T., ‘Asian Currency Crisis and the International Monetary Fund, 10 Years Later: Overview’, *Asian Economic Policy Review* 2 (2007), 16–49.

Johnson, S., Boone, P., Breach, A. and Friedman, E., ‘Corporate Governance in the Asian Financial Crisis’, *Journal of Financial Economics* 2000 (58), 141–86.

Johnstone, R., *Case Study – Asia Pulp & Paper Group* (2008).

Interedil Srl, C-396/09 vs. Fallimento Interedil Srl and Intesa Gestione Crediti SpA (Judgement of the Court (First Chamber), 6th July 2009).

Eurofood IFSC Ltd. vs. Commission (C-341/04) (Judgement of the Court (Grand Chamber), 2nd May 2006).

Junfu, Y. and Dong, C., ‘Issues in the Acceptance of Bankruptcy Cases by Chinese Courts’ in Organization for Economic Cooperation and Development (ed.), *Asian Insolvency Systems: Closing the Implementation Gap*. Conclusions of the Fifth Meeting of the Forum for Asian Insolvency Reform (FAIR) on 'Legal and Institutional Reforms of Asian Insolvency Systems' (Paris: OECD Publishing, 2007), pp. 151–68.

Jung, D. H., ‘Asian Values: A Pertinent Concept to Explain Economic Development in East Asia?’, *Comparative Civilizations Review* 51 (2004), 107–24.

Jwa, S.-H. and Seo, J.-H., ‘Industrial Policies in Korea: Evaluation and Redirection Based on New Asian Values’, *Korea Journal* 40 (2000), 322–64.

Kamarul, B. K., ‘Insolvency Law in Malaysia’ in R. Tomasic (ed.), *Insolvency Law in East Asia*, 3rd edn. (Hampshire: Ashgate Publishing Limited, 2013), pp. 321–54.

Kaminsky, G., Lizondo, S. and Reinhart, C. M., ‘Leading Indicators of Currency Crises’, *IMF Staff Papers* 45 (198), 1–48.

Kawai, M., Newfarmer, R. and Schmukler, S. L., ‘Financial Crisis: Nine Lessons from East Asia’, *Eastern Economic Journal* (2005), 185–207.

Khor, M., *The Economic Crisis in East Asia: Causes, Effects, Lessons*, Third World Network (1998).

Kietzmann, J. H., Hermkens, K., McCarthy, I. P. and Silvestre, B. S., ‘Social Media? Get Serious! Understanding the Functional Building Blocks of Social Media’, *Business Horizons* 54 (2011), 241–51.

Lampros, V., ‘Legal Issues: Thailand’ in Asian Development Bank (ed.), *Guide to Restructuring in Asia* (London: White Page, 2001), pp. 126–34.

Langguth, G., ‘Asian Values Revised’, *Asian Europe Journal* 1 (2003), 25–42.

Langlois, Anthony J., ‘The Asian Values Discourse’ in *The Politics of Justice and Human Rights: Southeast Asia and Universalist Theory*, pp. 12–45.

Lee, A.-R., ‘Culture Shift and Popular Protest in South Korea’, *Comparative Political Studies* 26 (1993), 63–80.

LeMaster, J., Downey, C. and Brewerton, F.J., ‘Recent Developments in Selected Asian Countries’ Bankruptcy Laws: Should Multinational Company Strategists Be Concerned?’, *International Business & Economic Research Journal* 6 (2007), 32–8.

Lim, P. W., ‘The Asian Values Debate Revisited: Positive and Normative Dimensions’, *Korea Journal* 40 (2000), 365–84.

Lindsey, T., ‘Culture, Insolvency and Legal Orientalism in Asia: Reaching for Goering's Revolver’ in R. Tomasic (ed.), *Insolvency Law in East Asia*, 3rd edn. (Hampshire: Ashgate Publishing Limited, 2013).

Loi, H. T., ‘Trends and Developments in Insolvency Systems and Risk Management: The Experience of Vietnam’ in Organization for Economic Co-operation and Development (ed.), *Credit Risk and Credit Access in Asia*. Conclusions of the Fourth Meeting of the Forum for Asian Insolvency Reform (FAIR) (Paris: OECD Publishing, 2006), pp. 273–9.

Loi, H. T., ‘An Update on Non-Performing Loans Resolution and Banking Reform in Vietnam’ in Organization for Economic Cooperation and Development (ed.), *Asian Insolvency Systems: Closing the Implementation Gap*. Conclusions of the Fifth Meeting of the Forum for Asian Insolvency Reform (FAIR) on ‘Legal and Institutional Reforms of Asian Insolvency Systems’ (Paris: OECD Publishing, 2007), pp. 139–43.

LoPucki, L. M., ‘Cooperation in International Bankruptcy: A Post-Universalist Approach’, *Cornell Law Review* 84 (1999), 696–762.

LoPucki, L. M., ‘The Case for Cooperative Territoriality in International Bankruptcy: A Post-Universalist Approach’, *Michigan Law Review* 98 (2000), 2216–51.

Maisrikrod, S., ‘Joining the Values Debate: The Peculiar Case of Thailand’, *Journal of Social Issues in Southeast Asia* 14 (1999), 402–13.

Manabe, K., Vinken, H. and Soeters, J., ‘Cultural Nationalism in Japan: A Starting Point for Comparing Cultures’ in H. Vinken, J. Soeters and P. Ester (eds.), *Comparing Cultures:*

Dimensions of Culture in a Comparative Perspective, International Studies in Sociology and Social Anthropology (Leiden: Brill, 2004), pp. 141–56.

Manan, W. A., 'A Nation in Distress: Human Rights, Authoritarianism, and Asian Values in Malaysia', *Journal of Social Issues in Southeast Asia* 14 (1999), 359–81.

Mandala, S., 'Indonesian Bankruptcy Law: An Update' in Organization for Economic Cooperation and Development (ed.), *Asian Insolvency Systems: Closing the Implementation Gap*. Conclusions of the Fifth Meeting of the Forum for Asian Insolvency Reform (FAIR) on 'Legal and Institutional Reforms of Asian Insolvency Systems' (Paris: OECD Publishing, 2007), pp. 103–8.

Mason, R., 'Cross-Border Insolvency Law: Where Private International Law and Insolvency Law Meet' in P. J. Omar (ed.), *International Insolvency Law: Themes and Perspectives*, Markets and the Law (Aldershot, England, Burlington, USA: Ashgate, 2008), pp. 27–60.

Maung, M., 'Cultural Value and Economic Change in Burma', *Asian Survey* 4 (1964), 757–64.

Mauzy, D. K., 'The Human Rights and Asian Values Debate in Southeast Asia: Trying to Clarify the Key Issues', *The Pacific Review* 10 (1997), 210–36.

McCormack, G., 'Universalism in Insolvency Proceedings and the Common Law', *Oxford Journal of Legal Studies* 32 (2012), 325–47.

Mevorach, I., *Insolvency within Multinational Enterprise Groups* (Oxford: Oxford University Press, 2009).

Mevorach, I., 'INSOL Europe's Proposals on Groups of Companies (in Cross-Border Insolvency): A Critical Appraisal', *International Insolvency Review* 21 (2012), 183–97.

Mevorach, I., 'Beyond the Search for Certainty: Addressing the Cross-Border Resolution Gap', *Brooklyn Journal of Corporate, Financial & Commercial Law* 10 (2015), 183–223.

Mezey, N., 'Law as Culture', *The Yale Journal of Law & the Humanities* 35 (2001), 35–67.

Minnis, J. R., ‘Is Reflective Practice Compatible with Malay-Islamic Values? Some Thoughts on Teacher Education in Brunei Darussalam’, *Australian Journal of Education* 43 (1999), 172–85.

Mitton, T., ‘A Cross-Firm Analysis of the Impact of Corporate Governance on the East Asian Financial Crisis’, *Journal of Financial Economics* 64 (2002), 215–41.

Mohan, S. C., ‘Cross-Border Insolvency Problems: Is the UNCITRAL Model Law the Answer?’, *International Insolvency Review* 21 (2012), 199–223.

Mulani, T. T. and Pingle, S. V., ‘Internet of Things’, *International Research Journal of Multidisciplinary Studies* 2 (2016), 1–4.

Nam, I. C. and oh, S., ‘Asian Insolvency Regimes from a Comparative Perspective: Problems and Issues for Reform’ in Organization for Economic Cooperation and Development (ed.), *Insolvency Systems in Asia: An Efficiency Perspective*. Conclusions of the Conference on 'Insolvency Systems in Asia: An Efficiency Perspective' (Paris: OECD Publishing, 2001), pp. 19–103.

Nghia, Hoang Van, ‘The ‘Asian Values’ Perspective of Human Rights: A Challenge to Universal Human Rights’, Vietnamese Institute of Human Rights (2009).

Öjendal, J. and Antlöv, H., ‘Asian Values and its Political Consequences: Is Cambodia the First Domino?’, *The Pacific Review* 11 (1998), 525–40.

Omar, P. J., ‘Cross-Border Jurisdiction and Assistance in Insolvency: The Position in Malaysia and Singapore’, *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad* 11 (2008), 158–211.

Ottara, Y., ‘Country Report: Cambodia’ in The World Bank (ed.), *Global Judges Forum: Commercial Enforcement and Insolvency Systems* (The World Bank, 2003), pp. 1–12.

Pace, V. A., ‘The Bankruptcy of the Zhu Kuan Group: A Case Study of Cross-Border Insolvency Litigation Against a Chinese State-Owned Enterprise’, *Journal of International Law* 27 (2006), 517–99.

Park, C.-M. and Shin, D. C., ‘Do Asian Values Deter Popular Support for Democracy in South Korea?’, *Asian Survey* 46 (2006), 341–61.

Park, J., ‘Country Report: South Korea’ in The World Bank (ed.), *Global Judges Forum: Commercial Enforcement and Insolvency Systems* (The World Bank, 2003), pp. 1–19.

Paulus, C. G., ‘Future Developments in Cross-Border Insolvency Law’ in Organization for Economic Cooperation and Development (ed.), *Asian Insolvency Systems: Closing the Implementation Gap*. Conclusions of the Fifth Meeting of the Forum for Asian Insolvency Reform (FAIR) on 'Legal and Institutional Reforms of Asian Insolvency Systems' (Paris: OECD Publishing, 2007), pp. 255–7.

Paulus, C. G., ‘Global Insolvency Law and the Role of Multinational Institutions’, *Brooklyn Journal of International Law* 32 (2007), 755–66.

Pertierra, R., ‘'The Market' in Asian Values’ in J. Cauquelin, P. Lim and B. Mayer-König (eds.), *Asian Values: An Encounter with Diversity* (Richmond: Curzon, 2000), pp. 118–38.

Radetzki, M., ‘From Communism to Capitalism in Laos: The Legal Dimension’, *Asian Survey* 34 (1994), 799–806.

Rasmussen, R. K., ‘Resolving Transnational Insolvencies through Private Ordering’, *Michigan Law Review* 98 (2000), 2252–75.

Rasmussen, R. K., ‘The Problem of Corporate Groups: A Comment on Professor Ziegel’, *Fordham Journal of Corporate and Financial Law* 7 (2002), 395–405.

Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on Insolvency Proceedings (Recast).

Rehbein, B., *Globalisierung in Laos: Transformation des Ökonomischen Feldes*, Market, Culture and Society (Münster: LIT, 2004), vol. 14.

Rehbein, B., *Globalization, Culture and Society in Laos*, Asia's Transformation (London: Routledge, 2007).

Rehbein, B., ‘Religion und Globalisierung in Laos’, *Journal of Current Southeast Asian Affairs* 28 (2009), 9–29.

Reid, T., ‘Insolvency Law in Laos’ in R. Tomasic (ed.), *Insolvency Law in East Asia*, 3rd edn. (Hampshire: Ashgate Publishing Limited, 2013), pp. 271–90.

Reyes, V. and Tan, C., *Political Values in Asia, the ASEAN Political Security Community, and Confucius' Philosophy*, PLS Working Papers Series, No. 11 (2014).

Robertson, C. J., ‘The Global Dispersion of Chinese Values: A Three-Country Study of Confucian Dynamism’, *Management International Review* 40 (2000), 253–68.

Russom, P., *Big Data Analytics* (Renton, 2011).

Sarra, J., ‘Maidum's Challenge, Legal and Governance Issues in Dealing with Cross-Border Business Enterprise Group Insolvencies’, *International Insolvency Review* 17 (2008), 73–122.

Sarra, J. P., *Employee and Pension Claims During Company Insolvency: A Comparative Study of 62 Jurisdictions* (Toronto: Carswell, 2008).

Sato, S., ‘Asian Financial Crisis’, *Japan and the World Economy* 10 (1998), 371–5.

Schwartz, S. H., ‘Mapping and Interpreting Cultural Differences Around the World’ in H. Vinken, J. Soeters and P. Ester (eds.), *Comparing Cultures: Dimensions of Culture in a Comparative Perspective*, International Studies in Sociology and Social Anthropology (Leiden: Brill, 2004), pp. 43–73.

Shah, P., ‘Globalisation and the Challenge of Asian Legal Transplants in Europe’, *Singapore Journal of Legal Studies* (2005), 348–61.

Silverman, R. J., ‘Advances in Cross-Border Insolvency Cooperation: The UNCITRAL Model Law on Cross-Border Insolvency’, *ILSA Journal of International & Comparative Law* 6 (2000), 265–72.

Spigelman, J.J., ‘International Commercial Litigation: An Asian Perspective’, *Hong Kong Law Review* 37 (2007), 859–891.

Spina, N., Shin, D. C. and Cha, D., ‘Confucianism and Democracy: A Review of the Opposing Conceptualizations’, *Japanese Journal of Political Science* 12 (2011), 143–60.

Steely, S., ‘Insolvency Law in Japan’ in R. Tomasic (ed.), *Insolvency Law in East Asia*, 3rd edn. (Hampshire: Ashgate Publishing Limited, 2013), pp. 13–62.

Stubbs, R., ‘ASEAN: Building Regional Cooperation’ in M. Beeson (ed.), *Contemporary Southeast Asia: Regional Dynamics, National Differences*, 2nd (New York: Palgrave Macmillan, 2009), pp. 216–33.

Sufian, F., ‘The Impact of the Asian Financial Crisis on Bank Efficiency: The 1997 Experience of Malaysia and Thailand’, *Journal of International Development* 22 (2010), 866–89.

Takagi, S., ‘Japanese Insolvency Laws’, *Annual Survey of Bankruptcy Law* (1999 - 2000), 627–51.

Takagi, S., ‘Issues Arising in the Cross-Border Insolvency of Groups of Companies in Japan’ in Organization for Economic Cooperation and Development (ed.), *Asian Insolvency Systems: Closing the Implementation Gap*. Conclusions of the Fifth Meeting of the Forum for Asian Insolvency Reform (FAIR) on 'Legal and Institutional Reforms of Asian Insolvency Systems' (Paris: OECD Publishing, 2007), pp. 109–11.

Tan, C. H., ‘Company Law: Judicial Management’, *SAL Annual Review* 4 (2003), 102–17.

The American Law Institute (ed.), *Transnational Insolvency: Cooperation among the NAFTA Countries*, Principles of Cooperation among the NAFTA Countries (New York: Juris Publishing, Inc., 2003).

The Council of the European Union, ‘Council Regulation (EC) no 1346/2000 of 29 May 2000 on Insolvency Proceedings’ L 160/1 (2000), 1–18.

The Irrawaddy, ‘Burma Tests Asian Values’, *The Irrawaddy Covering Burma and Southeast Asia* 5 (1997).

The Supreme Court of the Union of Myanmar, *The Courts Manual*, 4th edn. (Yangon: The Supreme Court of the Union of Myanmar, 1999), vol. 1.

The World Bank (ed.), *Principles and Guidelines for Effective Insolvency and Creditor Rights System* (Washington D.C.: The World Bank, 2001).

The World Bank (ed.), *Creditors Rights and Insolvency Standard: Based on The World Bank Principles for Effective Creditor Rights and Insolvency Systems and UNCITRAL Legislative Guide on Insolvency Law*, Revised Draft (Washington D.C.: The World Bank, 2005).

The World Bank (ed.), *Principles for Effective Insolvency and Creditor/Debtor Regime*, Revised Draft (Washington D.C.: The World Bank, 2015).

The World Bank (ed.), *Principles for Effective Insolvency and Creditor/Debtor Regimes* (Washington D.C.: The World Bank, 2016).

Thompson, E. C., ‘Singaporean Exceptionalism and its Implications for ASEAN and Regionalism’, *Contemporary Southeast Asia: A Journal of International Strategic Affairs* 28 (2006), 183–206.

Thompson, M. R., ‘Whatever Happened to 'Asian Values'?’, *Journal of Democracy* 12 (2001), 154–65.

Thompson, M. R., ‘Pacific Asia after 'Asian Values': Authoritarianism, Democracy, and 'Good Governance'’, *Third World Quaterly* 25 (2004), 1079–95.

Tomasic, R., ‘Insolvency Law Reform in Asia and Emerging Global Insolvency Norms’, *Insolvency Law Journal* 15 (2007), 229–42.

Tomasic, R., ‘Diversity and Convergence in Insolvency Law in East Asia’ in R. Tomasic (ed.), *Insolvency Law in East Asia*, 3rd edn. (Hampshire: Ashgate Publishing Limited, 2013), pp. 1–12.

Tomasic, R., Little, P., Francis, A., Kamarul, K. and Wang, K. H., ‘Insolvency Law Administration and Culture in Six Asian Legal Systems’, *Australian Journal of Corporate Law* 6 (1996), 248–88.

Trautman, D. T., Westbrook, L. J. and Gaillard, E., ‘Four Models for International Bankruptcy’, *The American Journal of Comparative Law* 41 (1994), 573–625.

Triandis, H. C., ‘Dimensions of the Culture Beyond Hofstede’ in H. Vinken, J. Soeters and P. Ester (eds.), *Comparing Cultures: Dimensions of Culture in a Comparative Perspective*, International Studies in Sociology and Social Anthropology (Leiden: Brill, 2004), pp. 28–42.

United Nations Commission on International Trade Law (ed.), *UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment* (New York: United Nations Publication, 1999).

United Nations Commission on International Trade Law (ed.), *UNCITRAL Legislative Guide on Insolvency Law*, Parts One and Two (New York: United Nations Publication, 2005).

United Nations Commission on International Trade Law (ed.), *UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation* (New York: United Nations Publication, 2010).

United Nations Commission on International Trade Law (ed.), *UNCITRAL Legislative Guide on Insolvency Law.: Part Three: Treatment of Enterprise Groups in Insolvency* (New York: United Nations Publication, 2012).

United Nations Commission on International Trade Law (ed.), *UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation* (New York: United Nations Publication, 2014).

United Nations Commission on International Trade Law (ed.), *UNCITRAL Draft Model Law on Enterprise Group Insolvency* (New York: United Nations Publication, 2018).

United Nations Commission on International Trade Law (ed.), *UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments with Guide to Enactment* (New York: United Nations Publication, 2018).

Van Hoa, T., ‘Causes of and Prescriptions for the Asian Financial Crisis’ in T. Van Hoa and C. Harvie (eds.), *The Causes and Impact of the Asian Financial Crisis* (2000).

Vande Walle, W., ‘The Encounter Between Europe and Asia in Pre-colonial Times’ in J. Cauquelin, P. Lim and B. Mayer-König (eds.), *Asian Values: An Encounter with Diversity* (Richmond: Curzon, 2000), pp. 164–200.

Vickers, A. and Fisher, L., ‘Asian Values in Indonesia? National and Regional Identities’, *Journal of Social Issues in Southeast Asia* 14 (1999), 382–401.

Villanueva, C. L., ‘The Corporate Insolvency System of the Philippines: Experience and Reforms’ in R. Tomasic (ed.), *Insolvency Law in East Asia*, 3rd edn. (Hampshire: Ashgate Publishing Limited, 2013), pp. 425–40.

Vinken, H., Soeters, J. and Ester, P., ‘Cultures and Dimensions: Classic Perspectives and New Opportunities in 'Dimensionalist' Cross-Cultural Studies’ in H. Vinken, J. Soeters and P. Ester (eds.), *Comparing Cultures: Dimensions of Culture in a Comparative Perspective*, International Studies in Sociology and Social Anthropology (Leiden: Brill, 2004), pp. 5–27.

Vongvipanond, P., ‘Asian Insolvency Systems: The Thai Perspective’ in Organization for Economic Cooperation and Development (ed.), *Asian Insolvency Systems: Closing the Implementation Gap*. Conclusions of the Fifth Meeting of the Forum for Asian Insolvency Reform (FAIR) on 'Legal and Institutional Reforms of Asian Insolvency Systems' (Paris: OECD Publishing, 2007), pp. 119–31.

Wade, R., ‘The Asian Debt-and-Development Crisis of 1997: Causes and Consequences’, *World Development* (1998), 1535–53.

Wai-Teng Leong, Laurence, ‘From 'Asian Values' to Singaporean Exceptionalism’ in L. Avonius and D. Kingsbury (eds.), *Human Rights in Asia: A Reassessment of the Asian Values Debates*, 1st edn. (New York: Palgrave Macmillan, 2008), pp. 121–40.

Wang, Y., ‘The Asian Financial Crisis and Its Aftermath: Do We Need a Regional Financial Agreement?’, *ASEAN Economic Bulletin* 17 (2000), 205–17.

Watson, A., *Legal Transplants: An Approach to Comparative Law*, 1st edn. (University of Georgia, 1974).

Watson, A., *Legal Transplants: An Approach to Comparative Law*, 2nd edn. (University of Georgia, 1993).

Watson, A., ‘The Birth of Legal Transplants’, *Georgia Journal of International and Comparative Law* (2013), 605–8.

Watters, G. C., ‘Cross-Border Insolvency in East Asia: Cooperation and Convergence’ in D. W. Arner, W. Y. Wan, A. Godwin, W. Shen and E. Gibson (eds.), *Research Handbook on Asian Financial Law: Research Handbooks in Financial Law series* (Glos: Edward Elgar Publishing, 2020), pp. 257–72.

Weber, R. H. and Weber, R., *The Internet of Things: Legal Perspectives* (Berlin Heidelberg: Springer-Verlag, 2010).

Wee, C.J.W.-L., ‘'Asian Values', Singapore, and the Third Way: Re-Working Individualism and Collectivism’, *Journal of Social Issues in Southeast Asia* 14 (1999), 332–58.

Weinberg, B. D., Milne, G. R., Andonova, Y. G. and Hajjat, F. M., ‘Internet of Things: Convenience vs. Privacy and Secrecy’, *Business Horizons* 58 (2015), 615–24.

Wessels, B., ‘Will UNCITRAL Bring Changes to Insolvency Proceedings Outside the USA and Great Britain? It Certainly Will!’, *International Corporate Rescue* 3 (2006), 200–6.

Wessels, B., ‘A Glimpse into the Future: Cross‐border Judicial Cooperation in Insolvency Cases in the European Union’, *International Insolvency Review* (2015), 96–121.

Westbrook, J. L., ‘The Lessons of Maxwell Communication’, *Fordham Law Review* 64 (1994), 2531–41.

Westbrook, J. L., ‘Global Development: The Transnational Insolvency Project of the American Law Institute’, *Connecticut Journal of International Law* 17 (1999), 99–106.

Westbrook, J. L., ‘Multinational Enterprises in General Default: Chapter 15, the ALI Principles, and the EU Insolvency Regulation’, *American Bankruptcy Law Journal* 76 (2002), 1–42.

Westbrook, J. L., Booth, C. D., Paulus, C. G. and Rajak, H. (eds.), *A Global View of Business Insolvency Systems*, Law, Justice and Developments Series (Washington, D.C.: The World Bank, 2010).

Westbrook, L. J., ‘A Global Solution to Multinational Default’, *Michigan Law Review* 98 (2000), 2276–328.

Westbrook, L. J., ‘Multinational Financial Distress: The Last Hurrah of Territorialism’, *Texas International Law Journal* 41 (2006), 321–37.

Westermeyer, J. J., ‘Traditional and Constitutional Law: A Study of Change in Laos’, *Asian Survey* 11 (1971), 562–9.

Wilmowsky, P. von, ‘Choice of Law in International Insolvencies: A Proposal for Reform’ in J. Basedow and T. Kono (eds.), *Legal Aspects of Globalization: Conflict of Laws, Internet, Capital Markets, and Insolvency in a Global Economy* (The Hague: Kluwer Law International, 2000), pp. 197–212.

Wisitsora-At, W., ‘Lessons Learned: Bankruptcy Reform in Thailand’ in Organization for Economic Cooperation and Development (ed.), *Asian Insolvency Systems: Closing the Implementation Gap*. Conclusions of the Fifth Meeting of the Forum for Asian Insolvency Reform (FAIR) on 'Legal and Institutional Reforms of Asian Insolvency Systems' (Paris: OECD Publishing, 2007), pp. 133–7.

Woodside, A. B., ‘Medieval Vietnam and Cambodia: A Comparative Comment’, *Journal of Southeast Asian Studies* 15 (1984), 315–9.

Wortmann, F. and Flüchter, K., ‘Internet of Things: Technology and Values-Added’, *Business & Information Systems Engineering* 57 (2015), 221–4.

Xuechen, I. C., ‘The Role of ASEAN's Identities in Reshaping the ASEAN-EU Relationship’, ISEAS @ 50 Special Issue: Young Scholars in Southeast Asian Studies, *Contemporary Southeast Asia* (2018), 222–46.

Yamamoto, K., ‘New Japanese Legislation on Cross-Border Insolvency as Compared with the UNCITRAL Model Law’, *International Insolvency Review* 11 (2002), 67–96.

Yermack, D., ‘Corporate Governance and Blockchains’, *Review of Finance* Editor's Choice (2017), 1–24.

Young, S., ‘East Asian Crisis: Causes and Prospects’ in *Organization for Economic Cooperation and Development (Ed.) 1999 – Structural Aspects of the East* pp. 256–62.

Zhang, Y. B., Lin, M.-C., Nonaka, A. and Beom, K., 'Harmony, Hierarchy and Conservatism: A Cross-Cultural Comparison of Confucian Values in China, Korea, Japan, and Taiwan', *Communication Research Reports* 22 (2005), 107–15.

Zialcita, F. N., 'Is Communitarianism Uniquely Asian? A Filipino's Perspective', *Journal of Social Issues in Southeast Asia* 14 (1999), 313–31.

Zuñiga, J. de, Jr. and Espenilla, N. A., Jr., 'Trends and Developments in Insolvency and Risk Management in the Philippines' in Organization for Economic Co-operation and Development (ed.), *Credit Risk and Credit Access in Asia*. Conclusions of the Fourth Meeting of the Forum for Asian Insolvency Reform (FAIR) (Paris: OECD Publishing, 2006), pp. 227–44.

SUMMARY

Cross-Border Insolvencies in Southeast Asia: Regional Insolvency Framework for ASEAN

Many world economies integrate cross-border insolvency regimes in their national insolvency laws, which is also reflected at regional and international levels. Chapter I introduces the topic. Despite the progress in adoption of cross-border insolvency regimes in advanced economies, there is still a wide gap when it comes to emerging countries. Specifically, numerous Asian economies, with some exceptions, do not have national laws on cross-border insolvency. Although some countries in Asia have adopted the UNCITRAL Model Law on Cross-Border Insolvency, many of them faced significant challenges in the aftermath of the Asian financial crisis of 1997. Asia does not have a Regional Insolvency Framework like the European Insolvency Regulation; however, the government of Indonesia addressed this need in 2013. This shows that the emergence of a regional solution on cross-border insolvency in the Asian region is more than relevant nowadays. One of the prominent examples for cross-border insolvency is Asia Pulp & Paper insolvency.

In the 1990s, several international organizations attempted to address this topic by assessment and comparison of the national insolvency regimes in Asian countries. Despite this, Asian countries have not yet launched a regional solution. This thesis looks to examine probability of a Regional Insolvency Framework in Asia. In a nutshell, it looks to work out impactful criteria that play a significant role in a setting up a regional insolvency solution on cross-border insolvency. To this end, in addition to studying the existing literature, interviews with practitioners in Asian insolvency law were also conducted.

This research approaches and describes different legal criteria for a Regional Insolvency Framework in the Association of Southeast Asian Nations (ASEAN) and ASEAN+3. Moreover, it assesses further impactful elements for cross-border insolvency proceedings based on historical and traditional views. Finally, it addresses the impact of digitalization and its role on cross-border insolvency, specifically, what influential criteria might be considered for a Regional Insolvency Framework. It is to be expected that taking into account further globalization and digitalization of multinational businesses, national legislators in Asia will promote regional insolvency solutions and make business in Asia more attractive.

Chapter II points out in detail cross-border insolvency challenges in Asia. First of all, it addresses the origins and implications of the Asian financial crisis and assesses its macroeconomic, financial, structural, and institutional dimensions. Some authors indicate factors such as enormously fast growth of the national economies, massive capital outflow that led to unexpected changes in the market expectations, structural and policy distortions. Consequently, the crisis led to business collapses that crossed national borders and triggered numerous insolvencies of multinational companies.

A prime example of cross-border insolvency is the Asia Pulp & Paper case, which occurred in 2001 and concerned many cross-border businesses throughout Asia. This case demonstrates effects of the absence of cross-border insolvency law and underlines its urgency, as the Singaporean Court could not handle this case for all Asian subsidiaries of the debtor company. Last, Chapter II identifies interest groups and needs affected by cross-border insolvencies and defines in detail the scope of this research.

Chapter III examines basic concepts and theories proven in multistate insolvencies as well as previous international initiatives. Then, it addresses the most prominent international project on cross-border insolvency law – the UNCITRAL Model Law on Cross-Border Insolvency. The basic concepts on cross-border insolvency comprise territorialism, universalism, modified universalism, cooperative territorialism, and contractualism. Further, the Model International Insolvency Cooperation Act and the Cross-Border Insolvency Concordat laid the foundation for further projects, specifically for the UNCITRAL Model Law on Cross-Border Insolvency.

The Model Law aims to promote cooperation between courts and other authorities in charge of national and foreign states to improve regulatory confidence for international investment and trade, which helps ensure protection and maximization of the asset values for debtors. The Model Law does not aim to unify insolvency laws, nor to formulate design substantive rights; conversely, it aims to enhance the efficiency and coherence of cross-border insolvencies. The Model Law addresses situations that are likely to occur in cross-border insolvency cases: The debtor has his assets in more than one state or creditors of the debtor are not from the state where the insolvency proceeding takes place. The Model Law is limited to procedural questions of cross-border insolvencies, since it is designed for enacting states that have advanced national insolvency regimes and need non-binding solutions to the particularities of national legislations. In detail, it focuses on the following aspects: access of foreign representatives and creditors to

the courts in the enacting state, recognition of foreign proceedings, relief, cooperation between foreign representatives and the courts of enacting states, and management of multiple proceedings.

Chapter IV evaluates regional approaches on cross-border insolvency law and addresses several projects: the European Insolvency Regulation, the Transnational Insolvency Project of the American Law Institute, and other undertakings, e.g. Court-to-Court Communication Project on Cross-Border Cases, and some other smaller initiatives such as the World Bank Principles for Effective Insolvency and Creditor/Debtor Regimes and the UNCITRAL Model Law on Recognition and Enforcement. Some attention is also given to the handling of the groups of companies in insolvency. The focus is put on the European Insolvency Regulation with the analysis of its main subjects of the ruling: scope of application, competent forum and applicable law, recognition of proceedings, secondary insolvency proceedings, information of creditors and lodgement of claims, and centre of main interest. Regarding Transnational Insolvency Project, general overview is presented where core elements of the project are pointed out: general principles, procedural principles, legislative recommendations, and global principles for cooperation in international insolvency cases.

Chapter V outlines an overview of national insolvency laws and traditional impact on the ASEAN and ASEAN+3. Moreover, the Chapter V outlines that Indonesian government emphasizes the emergence of a regional solution on cross-border insolvency within the framework of the ASEAN.

One of the aims of the ASEAN is promotion of active collaboration and mutual assistance on matters of common interest in economic questions. This apparently implicates that cooperation in cross-border insolvency issues is also previewed by the ASEAN Economic Community. 'ASEAN Way' is the mode of operation of the ASEAN. The Member States developed their own distinct approach for cooperation. The Asian Development Bank made some proposals to approach insolvencies in Asia and drafted a Good Practice Standards for RETA economies. Furthermore, the Forum of Asian Insolvency Law Reform supports in developing policies and insolvency regimes that fit to the Asian regional setup.

However, the national insolvency regimes of the Member States of the ASEAN and ASEAN+3 do not have mechanisms to handle cross-border insolvency proceedings. Although some

Member States have adopted the UNCITRAL Model Law on Cross-Border Insolvency (e.g., Singapore, Japan), it is not enough to address cross-border insolvency cases where many jurisdictions are involved. This again emphasizes the necessity of a Regional Insolvency Framework for the ASEAN.

Being culturally and historically different from the Western economies, Asia has its own historical and traditional past based on its own values and approach to regulation of society. Therefore, in this study, historical roots of the ASEAN and ASEAN+3 Member States are assessed and traditional aspects in national insolvency systems are evaluated. It turns out that traditional values significantly impact the legislative setup on the national and regional level.

Therefore, Chapter VI provides important insights into significant factors that build the frame for a future regional regulation that is likely to become a workable solution in practice. However, a copy-paste method in terms of legal transplants is not suitable to find a practical solution. Hence, in the very first step toward a Regional Insolvency Framework, its core criteria must be defined.

Based on the research, different groups of criteria are elaborated. One group relates to legal criteria, which are based on the analysis of the previously mentioned projects on cross-border insolvency. None of those works can be copied to draft a Regional Insolvency Framework. However, it is recommendable to borrow some legal categories and add the new ones such as centre of main interest, central insolvency proceedings court, central insolvency proceedings register, common languages of insolvency proceedings and judgements, and equal creditors rights protection system.

In addition to the legal criteria, cultural criteria are also elaborated. It is suggested to consider the following factors: collectivism, fear of losing face, hierarchy, conflict avoidance, and harmony.

In the 21st century, the role of technology has significantly increased because of digitalization and impact of COVID-19 pandemic in 2020. For this reason, also another group of criteria was suggested for consideration, which includes the following items: artificial intelligence, automated law, big data, block chain technologies, smart contracts, Internet of things, social media, and data privacy.

Finally, Chapter VII concludes that we cannot rely only on legal factors. Also, cultural differences must be considered, which will be difficult to overcome. Moreover, we should probably rely on digital technologies. Although it is too early to draw conclusions, we already can see the first discussions emerging in this area. Hence, a possible convergence between the law and technology in regional and global context offers a new space for future research and scholarship.