European Company Law

Wolters Kluwer
Law & Business

KLUWER LAW INTERNATIONAL

Published by:
Kluwer Law International
P.O. Box 316
2400 AH Alphen aan den Rijn
The Netherlands

Kluwer Law International
250 Waterloo Road
First Floor
London SE1 8RD
United Kingdom

Sold and distributed by:
Turpin Distribution Services Ltd
Stratton Business Park
Pegasus Drive
Biggleswade
Bedfordshire SG18 8TQ
United Kingdom
E-mail: kluwerlaw@turpin-distribution.com

Subscription enquiries and requests for sample copies should be directed to Turpin Distribution Services Ltd.

Subscription prices, including postage, for 2007 (Volume 4, 6 issues):
EUR 477.00 / USD 596.00 / GBP 351.00.
This journal is also available online. Online subscription price is available upon request. Please contact our sales department for more information at +31 (0)172 641562 or at sales@kluwerlaw.com.

European Company Law is published bi-monthly.

For information or suggestions regarding the indexing and abstracting services used for this publication, please contact our permissions department at permissions@kluwerlaw.com.

ISSN: 1572-4999

Europe Deserves a New Approach to Insolvency Proceedings

BY BOB WESSELS, PROFESSOR OF INTERNATIONAL INSOLVENCY LAW, LEIDEN UNIVERSITY, THE NETHERLANDS

1. Introduction[1]

In March 2007 a colloquium was organized in Belgium to celebrate the 200 years of existence of the Belgium Commercial Code. Among the topics discussed on the premises of the Supreme Court in Brussels was 'insolvency'. Professor Verougstraete, President of the Court of Cassation of Belgium, stated as his final conclusion: Two centuries after the Belgium *Code de Commerce* came into effect 'Europe deserves a new approach to collective insolvency proceedings.' I was invited to respond to his points of view. Said conclusion is based on a – what Verougstraete calls – historical evolution of insolvency law. The report explains that said evolution contains three central trains of thought:

(i) The idea that insolvency law, as it is destined to function in all economic areas, has outgrown the boundaries of classical commercial law;
(ii) The historic evolution from a law of morality to a law of continuity;
(iii) The tendency that central notions of insolvency law (i.e. the principle of *paritas creditorum* or *pari passu*) have developed to rules with a limited meaning.

The first thought is correct, as 'insolvency' by its nature is the litmus test of every legal relationship, irrespective of the type of relationship or the type of counter party. The second one is likewise correct, be it that concepts of continuity (or 'corporate rescue') in Europe generally have found their legal form only since the mid 1980s of the last century.[2] The third element in the evolution described reflects what has been generally felt for quite a long time, *see* Wood, referred to in para. 3. After a typology of several Western-European insolvency systems as reflecting a dual system (liquidation and reorganization), the author then generally describes the Belgian pre-draft of an Act on Business Continuity (*Voorontwerp van wet op de continuiteit van de onderneming*) which seems to contain a spectrum of proceedings, from the classical pro-creditor liquidation type of proceedings to variations on the theme of private arrangements under forms of judicial supervision. Europe deserves a new approach to collective insolvency proceedings, Verougstraete concludes. Is that possible?[3]

2. Europe: a utopian dream?

Some eight year ago, in the first edition of his book, Professor Ian Fletcher concluded: 'National attitudes towards the phenomenon of insolvency are extremely variable, as are the social and legal consequences for the debtors concerned',[4] and five years ago, when in 2002 the EU Insolvency Regulation came into effect, the Regulation expressly stated that it is based on the acknowledgment of 'the fact that as a result of widely differing substantive laws it is not practical to introduce insolvency proceedings with universal scope in the entire Community. The application without exception of the law of the State of opening of proceedings would, against this background, frequently lead to difficulties. This applies, for example, to the widely differing laws on security interests to be found in the Community. Furthermore, the preferential rights enjoyed by some creditors in the insolvency proceedings are, in some cases, completely different.' The EU Insolvency Regulation has taken account of these differences amongst others by introducing in Europe (minus Denmark) a miniature code of uniform conflict of law rules (Articles 4-15 InsReg). Where do these differences stem from? In general, I think, five reasons form the basis for this assessment:

(1) Differences in culture

Martin (referred to in footnote 2) concludes that cultural attitudes play a tremendous role in the efficacy of bankruptcy and insolvency systems. These attitudes are related to differences in appreciation of debt forgiveness and the way people stand in life (philosophically the US approach is that every person is a potential entrepreneur), and a large number of differences – even in common-law systems – reflect differences in historical, legal

1 This article is a slightly revised version of my article 'Europe Deserves A New Approach To Insolvency Proceedings', in: A. Bruyneel *et al.*, Bicentenaire du Code de Commerce – Tweehonderd jaar Wetboek van Koophandel, Larcier, Brussel, 2007, 267ff.
2 'Compared to U.S. bankruptcy laws, many countries' laws read like penal codes', is still a recent observation of Martin, The Role of History and Culture in Developing Bankruptcy and Insolvency Systems: The Perils of Legal Transplantation, in: 28 Boston College International & Comparative Law Review 2005, 46.
3 In this publication I will not deal with insolvency of natural persons.
4 Fletcher, Insolvency in Private International Law. National and International Approaches, Oxford Private International Law Series, Oxford University Press, 2nd ed, 2005, 4.

and cultural contexts[5] and the receptiveness of domestic legal systems to changes (IT, new ways of financing business, sales through internet, etc.).

(2) Differences in market structure

Where 'insolvency' is related to the economic and financial structure of a market and many markets' regulation takes place within the confinements of a national state, a government influences this structure, e.g. countries with a market-led economy versus countries with a more social economic policy. The latter for instance contain the now former Eastern-European countries, with economies in transition. In addition, the tradition of the way business is financed will influence the rights of a creditor, e.g. in some markets the financing of business through stock-listed shares or bonds is well developed, in others the common method of finance is through (secured) credit either from a bank or from members of the family. Also the robustness of protection of secured creditors may be viewed differently.[6] These markets, though, are globalizing, based on principles of the free flow of capital and the upcoming role on the continent of debt traders and hedge funds.[7]

(3) Differences in the general legal system

As in other legal domains, insolvency law is under the influence of the overall legal system of a country, being e.g. a common law jurisdiction or a civil law jurisdiction. In the former in general the importance of case law, with an active role for a court, is stressed in comparison with countries based on statute law (law in codes). Some groups of countries may have their general legal system influenced by relative new sources of law, e.g. in Europe the so-called '*acquis communautaire*'.[8]

(4) Differences in the arrangement of private law

In many countries the disposition of general civil law and commercial law is a matter of continuous discussion. Some countries aim to insert both into one code (the Netherlands), others (Belgium, Germany, France) use different codes[9] and some adjust the judicial framework accordingly. In some countries specialized bankruptcy courts decide with regard to insolvency proceedings (USA), in some laymen are involved (France), in most others the general civil or commercial law courts do have jurisdiction in these matters.[10]

(5) Differences in insolvency law itself

In relation to the existing market structure, the goals of insolvency proceedings may differ, e.g. plain liquidation of assets or in addition reorganization in an aim to rescue the enterprise and/or to preserve existing employment. Some insolvency law systems do not provide for insolvency proceedings for certain types of debtors or have (only recently) introduced specific proceedings, e.g. debt discharge proceedings for natural persons. Some cherish strong security rights, others are open to certain limitations to their enforcement. Fletcher states: 'the dissimilarities are so numerous, and so substantial, as to oblige the realist to accept that the world essentially consists of separate, self-contained systems'.[11]

3. Prominent principles of domestic insolvency law

Is it impossible to find any comparison between states' regulation of insolvency law? Recognizing that one should be reluctant to compare given the aforementioned differences,[12] in legal literature of the last decade some common features have been identified, which may be regarded as quite generally accepted prominent principles of insolvency law:

(1) The principle of collectivity

Insolvency law results in a system within which actions by individual creditors against the debtor are frozen as these are substituted by the idea of the rule of joint execution against the assets of the insolvent debtor.

(2) The notion of a common pool

As a result of the first principle the piecemeal execution of assets by creditors is stayed and replaced by a right to claim for a dividend against the pool. The rule of joint execution concerns

5 *See* Martin, Common-law Bankruptcy Systems: Similarities and Differences, in: 11 American Bankruptcy Institute Law Review 2003, 403; Efrat, Legal Culture and Bankruptcy: A Comparative Perspective, in: 20 Emory Bankruptcy Developments Journal 2004, 351.

6 *See* Flessner, Philosophies of Business Bankruptcy Law: An International Overview, in: Ziegel, (ed.), Current Developments in International and Comparative Corporate Insolvency Law, Oxford: Clarendon Press 1994, 19ff, who is open for certain limitations, versus Mooney as proponent of a 'procedure theory' in order to maximize the recoveries for holders of legal entitlements, *see*: A Normative Theory of Bankruptcy Law: Bankruptcy As (Is) Civil Procedure, in: 61 Washington and Lee Law Review, Summer 2004, 931ff.

7 'Business is being reshaped by a massive borrowing binge, but much of it is unseen, unregulated and little understood', *see* The Economist, 23 September 2006, 69.

8 Smits, The Europeanisation of national legal systems: some consequences for legal thinking in civil law countries, in: Mark van Hoeck (ed.), Epistomology and Methodology of Comparative Law, Oxford: Hart Publishing, 2004, 229.

9 Criticized in Belgium by Dirix, Heirbaut/Martin, *Napoleans nalatenschap/Tweehonderd jaar Burgerlijk Wetboek in België – Un héritage Napoléonien/Bicentenaire de Code civil en Belgique*, Mechelen: Kluwer 2005, 365ff.

10 Some law faculties organize courses and lectures on insolvency law within classes on procedural law, others in connection with the laws on security, again others treat insolvency law as an independent field of law. Some academics do regard international insolvency law as a matter of national law (because its related provisions are formally included in a nation's Insolvency Act), others see this part of law as a topic of private international law.

11 Fletcher, Insolvency in Private International Law. National and International Approaches, Oxford Private International Law Series, Oxford University Press, 2nd ed, 2005, 10.

12 Note Gilson's caution: '[B]ankruptcy systems in different countries cannot be meaningfully compared without controling for differences in the legal, regulatory, and economic environment in which firms operate', in: Ziegel (ed.), Current Developments in International and Comparative Corporate Insolvency Law, Oxford: Clarendon Press 1994, 266.

all assets in the pool, which is available to pay all creditors' claims.

(3) Equal treatment of creditors

The principle of *pari passu* payment to creditors means the *pro rata* payment out of the assets according to the ranking of their claims.

(4) The principle of respect for pre-insolvency rights

In general, insolvency law systems respect duly acquired and perfected rights prior to the commencement of proceedings. Here another principle comes into play: the principle of certainty and predictability of secured rights, created in the context of providing credit.

In 1995 Wood observed that the first principle is almost universally followed, but that the second proposition is eroded by exceptions and the third proposition 'is a piece of ideology which is nowhere honoured'.[13] The aforementioned principles are connected to a type of proceeding one generally finds in Europe and which has its focus on the liquidation of a debtor's assets.

4. New prominent characteristics of domestic insolvency law

Several common dominators which now, more then ten years after Wood's observations, are encountered or seem to emerge,[14] are related to the following:

(1) Flexibility of insolvency legislation

Many countries have come to understand that the existing legal framework does not meet the challenge 'to achieve economic results that are potentially better than those that might be achieved under liquidation, by preserving and potentially improving the company's business through rationalization'.[15] Substantial revision has taken place in countries like England and Scotland, France and Belgium and in 1999 Germany and Italy. Poland followed in 2003, Romania in 2003 (and 2006), Spain in 2004, France (again) in 2006. In the Netherlands a substantial revision is underway. Although even the more recent insolvency laws in several European countries continue to show substantial differences in underlying policy considerations, in structure and in content of these laws, in most of these jurisdictions there is openness towards corporate rescue procedures, which are an alternative to liquidation procedures. In many of these countries the US Chapter 11 procedure has served as a model for legislators.

(2) Several proceedings

Many legislations contain proceedings – in addition to liquidation – which are based on the principle of a composition or an arrangement concluded between the debtor and his creditors, which is binding upon a (given percentage) of a dissenting minority of creditors (sometimes referred to as 'cram-down'). A characteristic feature for these types of proceedings, aiming at reorganization of the debtor's business, is the fact that attempts to restructure or reorganize enterprises only can be initiated by the debtor himself or at least not against his will. The traditional 'post-mortem autopsy' approach is supplemented by instruments which allow for 'real time action' and domestic laws contain several proceedings which reflect different goals of a company in a rescue. For code-based nations the law wins as its functionality has improved. *See*, for instance. legislation in France, which came into force in early 2006, which contains a *procédure de sauvegarde* in which the debtor is still solvent, but expects in the near future to be in financial trouble.

(3) Openness for cross-border rules

Compared to some ten years ago states' attitude regarding cross-border insolvency cases[16] has changed dramatically.[17] Fletcher's observation of countries with 'separate, self-contained systems' has turned as far as cross-border insolvency problems are concerned into rules to coordinate these cases, e.g. within the EU since the adoption of the Insolvency Regulation in 2002,[18] but also by creating rules which deal with these issues in relation to non-EU countries, inspired by the UNCITRAL Model Law (e.g. in Mexico, Japan, USA, UK, Poland, Spain and Romania) or by introducing their own rules (Germany and Belgium). This breakthrough is the most significant development in the early 21st century.[19]

(4) Changing roles of the corporate debtor

Traditionally domestic insolvency law develops within the confinements of an Insolvency Act. The openness for developments

13 Wood, Principles of International Insolvency, London: 1995, 2.

14 Most elements have been addressed in my speech 'Drafting New Insolvency Law: Cherry Picking from Foreign Jurisdictions, International Principles and Model Laws', delivered at the conference 'European Insolvency & Restructuring: Issues, Challenges and Practical Solutions' of the Association of Business Recovery Professionals (R3), 7 July 2006, London.

15 Parry, Introduction, in: Katarzyna Gromek Broc and Rebecca Parry (eds.), Corporate Rescue. An Overview of Recent Developments from Selected Countries in Europe, The Hague/London/New York: Kluwer Law International 2004, 2.

16 *See* Wessels, Insolvency Law, in: Smits (ed.), Elgar Encyclopedia of Comparative Law, Edgar Elgar, Cheltenham, UK – Northampton, MA, USA London, 2006, 294ff.

17 *See* Wessels, International Insolvency Law, Deventer: Kluwer 2006.

18 *See* Wessels, The Changing Landscape of International Insolvency Law in Europe. Paper presented during the Conference 'Developments in Cross-Border Insolvencies: The Changing Landscape of U.S. and Foreign Law' American Bar Association (International Section) New York City, 5-7 April 2006. Available for free at: <www.bobwessels.nl>.

19 *See* Wessels, Will UNCITRAL Bring Changes To Insolvency Proceedings Outside the USA and Great Britain. It certainly Will! Paper presented during the 4th European Corporate Restructuring Summit 26 and 27 April 2006, London. Available for free at: <www.bobwessels.nl>. *See also* Goffman and Michael, Cross Border Insolvencies: A Comparative Examination of Insolvency Laws of Industrialized Countries, in: 12 Journal of Bankruptcy Law and Practice 2003, 5ff.

within other areas of law seems overall rather small. This is to be regretted. Several domestic corporate law regimes for instance contain or prepare for changes which address (indirectly) certain presumptions on which an insolvency law regime is built. Renewed rules on accounting and reporting, increased attention for rules regarding integrity of corporate directors, elements of implemented good governance systems and improvements made to create an efficient framework of creditor protection against business risks (improving wrongful trading rules) are just some characteristics of a 21st century corporate law.[20] As said, insolvency is a litmus test for the entirety of a legal system.[21]

(5) Rebalancing the governance structure

As a logical consequence of (2), (3) and (4) the role of the traditional office holder (liquidator; administrator, etc.) has changed or it will soon. S/he should not only be a specialist in legal, but also in financial matters and certain business mechanics.[22] The role of creditors may change from just passively waiting for hardly any dividend distributed from an estate to a more active role supervising or instructing the new style administrator and in assisting and guiding a debtor. Romania (2006), Czech Republic (2006) and the Netherlands (current thinking) emphasize creditor controlled proceedings. The shift in corporate law – from *ex post* responses to corporate crises to *ex ante* measures to prevent these – seems to be stimulating corporate creditors to become involved earlier in the process. *See*, for instance, the Statement of Principles (July 2005) of the British Bankers Association,[23] the – more limited – Code of Conduct regarding providing credit to SMEs by banks of the Netherlands Bankers Association (NVB), from May 2005 and on the same topic the European Code of Conduct (still in draft) drafted by the European Banking Federation.[24] Also a changing role for the judiciary should be noted. In Italy, Romania and (current thinking in) the Netherlands the role of a court should be more limited, focusing on typical legal issues, such as deciding in disputes and safeguarding the process of administration. A recurring theme, especially in the field of law and economics, is the general debate whether managing of 'insolvency' of all corporate debtors, especially those with a dispersed ownership structure and financed by multi-creditors, is best accompanied by the restraints of judicial proceedings instead of using alternatives, based on a contractual approach[25] and whether the latter approach is fundamentally sustainable without a serious discussion of the role of secured-credit law.[26] And will 'contractualization' be accompanied by 'de-proceduralization' in that instead of the resolving role of the traditional judiciary court system it will be augmented or partly replaced by forms of conciliation (arbitration; mediation)?[27]

(6) Non-state standard setters

With the tendencies of reviewing the roles of the traditional actors, also the role play changes. The law in an act will not be the only reliable compass. Private actors, such as banks as indicated above, will play a role in an area which is not (only) based on rules with *ex post* responses but (also) with *ex ante* prevention mechanisms. *See also* para. 7. In international insolvency affairs, where most states have been passive in the second half of the last century, private actors have demonstrated quite some activity in international 'law'-making.[28]

5. First traces of uniformity

With a focus on harmonization and basically containing 'soft law' drafters of domestic insolvency legislation may be strongly assisted by two tools, the UNCITRAL Legislative Guide (*see hereunder*) and the UNCITRAL Model Law on Cross-Border Insolvency of 1997. It sets a world standard for national legislative provisions with regard to international insolvency and has been followed by the countries mentioned above. The Model Law will allow for aligning legal systems on the way of handling cross-border cases. The Model Law itself contains also very small seeds for global harmonization.[29] As explained, the EU Insolvency Regulation is drafted with the presumption that harmonization of domestic rules relating to insolvency was impossible

20 *See* Kraakman (*et al.*), The Anatomy of Corporate Law. A Company and Functional Approach, Oxford University Press, 2004, and the fine article of Finch, The Recasting of Insolvency Law, in: 68 Modern Law Review 2005, 713ff.

21 In this way already Didier, *Problématique du droit de la faillite internationale*, in: Revue de droit des affaires internationals 1989, 201 ('*la legislation de la faillite est une carrefour où se croisent et se recontrent toutes les composantes du système juridique considéré*').

22 Education will be needed for a renewed role of the liquidator/administrator as his function will have elements of turn around (maybe even risk management) during certain proceedings, acting in a transparent way, and managing change in the business organization.

23 Available via <www.bba.org.uk>. *See*, for instance, Principle 3 a ('If your business is reviewed, we will discuss with you (and your advisers) the information provided before reaching any conclusions or taking any action'), 3 b ('We will support a rescue plan, if we believe it will succeed') and 3 c ('If we do not think that the rescue plan will succeed, we will explain the reasons why and help you and your advisers consider other options').

24 Principles for A Global Approach to Multi-Creditor Workouts, established under the auspices of Insol International, the worldwide federation of national organizations of accountants and lawyers, specializing in the broad field of insolvency (law). These principles have been issued in 2000. *See* Wessels (2006), para. 10107.

25 Franken, Creditor- and Debtor-Oriented Corporate Bankruptcy Regimes Revisited, in: European Business Organization Law Review 2004/4.

26 Westbrook, The Control of Wealth in Bankruptcy, in: 82 Texas Law Review, March 2004, 795.

27 Adriaanse, Restructuring in the Shadow of the Law. Informal Reorganization in the Netherlands, doctoral thesis, University Leiden, Deventer: Kluwer, 2005.

28 *See*, for instance, Flood/Skordaki, Normative Bricolage: Informal Rule-making by Accountants and Lawyers in Mega-insolvencies, in: Teubner (ed.), Global Law Without a State, Dartmouth, Aldershot, 1997, 109ff, and Flood, The Vultures Fly East: The Creation and Globalisation of the Distressed Debt Market, in: Nelken & Feest, Adapting Legal Cultures, Hart Publishing, 2001, 257ff.

29 *See* Pottow, Procedural Incrementalism. A Model For International Bankruptcy, in: 45 Natural Recourses Journal 2005, 935ff, who analyses Article 14 (notification requirements), and Article 31 (presumption of insolvency) as actually achieving global harmonization, both based on universality.

given the differences in substantive laws, including preferential rights. It should nevertheless be mentioned that several provisions of the Regulation are characterized as substantive rules and are therefore now accepted throughout Europe as unified rules concerning the topics to which they relate, *see* e.g. Articles 7(2) (reservation of title), 20 (return and imputation), 29 (right to request the opening of secondary proceedings), 30 (advance payments of costs and expenses), 31 (duty to cooperate and to communicate), 32 (exercising creditors' rights), 33 (stay of the process of liquidation in secondary proceedings), 34 (measures ending secondary proceedings), 35 (assets remaining in the secondary proceedings), 39 (right to lodge claims) and 40 (duty to inform creditors).

6. Stages of convergence

The five characteristics, mentioned in para. 5 above, reflect in my opinion general movements and tendencies in several national legislations in Europe. There are other tendencies too, which prove that those who are involved in creating or renewing insolvency law (drafters, insolvency practitioners, courts, academics) are not thrown back on their own national sets of legislation and rules. I limit myself to three groups of sources and materials, which may offer legitimacy in that they come to the surface through (circles in) society, reflecting fairly generally accepted thoughts or practices.

In 2000 UNCITRAL started the preparation of a comprehensive statement of key objectives and core features for a strong insolvency, debtor-creditor regime, including considerations of out-of-court restructuring, and a legislative guide containing flexible approaches to the implementation of such objectives and features, including a discussion of the alternative approaches possible and the perceived benefits and detriments of such approaches. In autumn 2004, the work led to UNCITRAL's Legislative Guide on Insolvency Law. The Guide presents a comprehensive exposition of the core objectives and the structure of an effective and efficient commercial insolvency system. Every key provision which is recommended to be included in a national law is discussed and the possible treatment is evaluated. The Guide furthermore takes positions on controversial issues such as automatic stay, post-filing finance, treatment of financial market transaction and the override of contract terms for termination.[30] The Guide has been assessed as a very helpful tool of best practices for legislators.[31]

An 'International Working Group on European Insolvency Law' (founded in 1999, representing ten Member States) has studied the question how these differences can be reconciled with the ongoing economic integration of Europe, especially where the activities of companies that transgress national borders are regulated by European legislation. After thorough study it concluded that aforementioned diversities do not mean that national insolvency laws do not share common characteristics. These common elements were captured in the Principles of European Insolvency Law (2003), 14 in number, being presented as reflecting '… the essence of insolvency proceedings in Europe as they reflect, on a more abstract level, the common characteristics of the insolvency laws of the European Member States'.[32]

The European Bank for Reconstruction and Development (EBRD) plays an important role in the reform of the former Eastern bloc countries into market economies. EBRD, established in 1991, serves as an international financial institution promoting private and interpreneurial initiative in 27 'countries of operation'.[33] One of the five core commercial law areas the EBRD is focusing on is insolvency. The general point of view of EBRD presently is, that whenever EBRD acts as lender or promoter to a certain project, the respective country will have to take into account the Principles of the Worldbank (*see above*). Based on measurement against international standards (UNCITRAL Legislative Guide, the Worldbank's Principles) EBRD has defined a set of ten core principles ('Draft Statement of Core Principles for an Insolvency Law Regime') for a modern insolvency law regime (ILR), intended to be the foundation of an ILR.

7. Concluding remarks

Europe deserves a new approach to collective insolvency proceedings. There are very many differences in insolvency regimes and the surroundings within which they have to come into effect. Central principles of liquidation proceedings have been in place in domestic acts for a very long time, but these are eroding. These acts (or parts of them) serve as post-mortem autopsy legislation. Unwinding legal relationships in an orderly way cannot do without this type of legislation, but business needs more legislative supporting facilities in achieving a variety of

30 In the aftermath of the Asian financial crisis of 1997-1998 the Worldbank started an initiative to improve the future stability of the international financial system. The Worldbank considers it of importance to identify principles and guidelines for sound insolvency systems and for the strengthening of related debtor-creditor rights in emerging markets. This has led to a Revised Draft Creditor Rights and Insolvency Standard, based on The World Principles for Effective Creditor Rights and Insolvency Systems and UNCITRAL Legislative Guide on Insolvency Law (Revised Draft December 2005), *see* <www.worldbank.org>.

31 *See*, for instance, Vallens, Towards an Ideal System, the UNCITRAL Guide on Insolvency Law, in: Peter/Jeandin/Kilborn (eds.), The Challenges of Insolvency Law Reform in the 21st Century. Facilitating Investment and Recovery to Enhance Economic Growth, Zürich: Schultess 2006, 489ff, and Klauser/Pogacar, *Der UNCITRAL Legislative Guide on Insolvency Law – Ein Denkanstoss auch für das österreichische Insolvenzrecht*, in: Konecny, Insolvenz-Forum 2005, Wien-Graz, 2006, 179ff.

32 McBryde/Flessner/Kortmann (eds.), Principles of European Insolvency Law, Series Law of Business and Finance, Volume 4, Deventer: Kluwer Legal Publishers 2003. For a short comment, *see* Wessels, Principles of European Insolvency Law, in: American Bankruptcy Institute Journal, September 2003, 28ff.

33 *See* Snoy, *La mise en place d'un droit des procédures collectives: un outil de reconstruction des pays d'Europe centrale et oriëntale et de la CEI – l'expérience de la BERD*, in: Faillite et concordat judiciare: un droit aux contours incertains et aux interferences multiples, Centre J. Renauld, UCL, Vol. 9, Bruylant-Academia 2002, 53ff.

goals when encountering financial problems. The last two decades have demonstrated that Codes on the European continent are flexible enough to insert frameworks which reflect these needs. Globalization has been the driving force to include international insolvency law provisions. Open and transparent markets require corporations acting in a professional and risk aware way. Developments in this area, emerging from globalizing financial markets and EU corporate law directives have led and will lead to changing roles for the traditional actors (administrator, judge, creditor), guided by 'self-regulation' by non-state standard setters.[34] The paradigm of continuity shows several quite similar characteristics in recent domestic legislation, inspired by the original goals of Chapter 11.

Are there any signs of harmonization which will enable us to develop a view to said new approach? Harmonization presently seems incremental and creeping. In the international field certain seeds are sprouting. Some essential common elements of a European insolvency law have been displayed by academics and by a regional development bank (EBRD). Certain ingredients for an aligned approach have been recognized by the European Commission, with its welcome in 2003 of the 'Best Project on Restructuring, Bankruptcy and a Fresh Start.'[35] The policy recommendations relate to (i) introducing early warning systems, (ii) changes to the legal system (introduce crisis management, reorganization procedures, including professionalization of courts), (iii) promote fresh start (reduce 'morality' stigma).

Being a lawyer, not a politician, I understand it may sometimes be worthwhile to wait before deciding to draft legislation.[36] The present discussions re 'where is Europe heading to' may be an obstacle; a 'regional' solution may be seen as a token to create a 'federal' Europe.[37] It should be noted however that the discussion here does not concern private individuals (consumers), it concerns businesses. During the last few years it has been recognized in Europe that small and medium-sized enterprises (SMEs) are the backbone of the European economy, and the best potential source of jobs and growth. The European Commission has stepped up the plate and has put the needs of small business 'at the heart of everything we do and acting to improve the financial and regulatory environment for them', introducing or implementing policies to reduce the costs of bureaucracy for entrepreneurs and for instance screening all new EU laws for their friendliness to smaller companies. Present policies are focusing on educating for entrepreneurship, improving access to finance, ensuring fair competition and supporting research and development and assisting SMEs to go international. What these policies in my opinion presently lack is attention for a logical, but a slightly darker side of business life: assistance in getting things right when the business is in trouble and an efficient and supervised exit from the market when necessary. The elements and patterns described above may, supported by heightened attention for SMEs but leaving room for non-state actors, lead to identifying the core conditions necessary for planning and timing of a new approach to collective insolvency proceedings in Europe.

Postscript

In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd., Case No. 07-12383 (Bankr. S.D.N.Y 30 August 2007)

With the fast growing number of cross-border insolvency cases and the adoption in many jurisdictions of international insolvency rules and provisions, the turnaround and insolvency profession faces new challenges. Recent examples include the judgment of 30 August 2007 of the US Bankruptcy Court (Southern District of New York) with regard to two Bear Sterns Hedge Funds, which were both entities registered in the Cayman Islands. The insolvency law of this country presumes jurisdiction over any entity that is registered in the Cayman Islands. Although Cayman Islands' insolvency law only provides for liquidation proceedings, the practice has developed of appointing provisional liquidators, especially in cases where a Cayman registered company has assets in another country (often in the USA) and coordination between two countries is necessary to maximize the value for the benefit of the creditors.

In the cases of the two hedge funds Joint Provisional Liquidators (JPLs) where appointed. Because nearly all assets were located in the US, the JPLs applied to the New York court for Chapter 15 recognition. Chapter 15 is the chapter related to cross-border insolvency. Its text is rather literally taken from the UNCITRAL Model Law on Cross-border Proceedings. It entered into force in October 2005. The aim of the JPLs, probably, was to act quickly and efficiently in order to marshal the assets. The Cayman JPLs argued that the Cayman proceedings were foreign main proceedings and therefore entitled to obtain automatic stay relief. If this approach should not be followed by the court, they argued that the proceedings were to be recognized as foreign

34 On the subject of efficacy and due representation of privately made 'law', *see* Snyder, Private Lawmaking, in: 64 Ohio State Law Journal, May 2003, available at <http://ssrn.com/abstract=397301>; Wessels, Perspectives on a Principles-based Approach to Transnational Insolvency, presentation at Columbia Law School, New York City, 14 June 2006, available through www.bobwessels.nl/weblog, under 2006-12-doc6.

35 Final Report of the Expert Group, September 2003, further information: <Entr-Business-Support@cec.eu.int>.

36 Parisi/Fon/Ghei, The Value of Waiting in Lawmaking, in: 18 European Journal of Law and Economics, September 2004, Available at <http//ssrn.com/abstract=267719>.

37 *See* Rémery, *La Faillite comme instrument de construction européenne: acquis et perspectives*, in: Faillite et concordat judiciare: un droit aux contours incertains et aux interferences multiples, Centre J. Renauld, UCL, Vol. 9, Bruylant-Academia 2002, 27ff.

non-main proceedings, which would allow the court to exercise its discretion to provide relief.

On 30 August 2007, Judge Burton Lifland issued an opinion (amended 5 September 2007, available via <www.bobwessels,nl/weblog>, under 2007-09-doc3). The judge declines to recognize the Cayman Islands proceedings of the two Bear Stearns' Hedge Funds as foreign main proceedings. It was clear, in the eyes of the court, that the centres of main interest (COMI) of these hedge funds were in the US, given the location in the US of the business operations, assets and the location of its investors. Although registered in the Cayman Islands, neither companies even had an establishment. This is 'any place of operations where the debtor carries out a non-transitory economic activity', *see* Section 1502(2), so the proceedings could not be recognized as foreign non-main proceedings either.

The decision, which must be studied further, is interesting as the court uses as interpretative tools the UNCITRAL Model Law and its Guide to Enactment, the European Insolvency Regulation and the European Court of Justice's Eurofood decision of 2 May 2006. It is interesting too as it makes clear that providing recognition is a discretionary power of the court. A last point of interest to note is, that the judgment takes a different view than the one taken with regard to another Cayman hedge fund, *see In re SPhinX, Ltd., 351 B.R. 103 (Bankr. S.D.N.Y. 2006)*. It seems that Judge Lifland shows some regret for the outcome of his analysis, by considering that he was not refusing altogether the cooperation between courts in two jurisdictions. He implicitly encouraged the JPLs to file an involuntary Chapter 7 or Chapter 11 petition as a vehicle for obtaining such cooperation in the USA. For this reason he extended his temporary restraining order (TRO) for 30 days in order to give the JPLs time to consider whether they wished to do so. They will probably not (yet) do so, as it has been communicated that the JPLs are appealing Judge Lifland's decision.

European Company Law

The increase in cross-border activity, together with the recent expansion of the European Union, has meant that developments in European company and securities law continue to pose a challenge to law firms and corporations. Staying current in this dynamic and rapidly-changing area of practice can be no easy task. To help you manage this challenge Kluwer Law International publishes *European Company Law* (ECL), a legal information service that provides you with an authoritative overview of current developments.

ECL has been designed to be the ideal working tool for all corporate lawyers with a European practice. Published bi-monthly and available in print and online, you'll find it a time saving way of keeping up-to-date with all the issues affecting European company law. *ECL*'s Editorial Board has a thorough understanding of the needs of the legal practitioners and all articles have been written to follow the SCIP principle: Scientific, Concise, Informative and Practical. Also, to aid your research, some articles include hyperlinks to websites where more information about the topic can be downloaded.

Some of the articles appeared in the premier issue:

- Corporate Governance Principles: How Many Are There Around? by Cornelis de Groot
- The Function of Corporate Boards: Toward a New State of Affairs? by Cornelis de Groot
- The Audit Committee from a European Perspective by Erik H.J. Mouthaan
- Squeezing and Selling-out – a Patchwork of Rules in Five European Member States by Christoph Van der Elst

For more information about European Company Law and for information about the International Editorial and Advisory board, please visit www.kluwerlawonline.com/europeancompanylaw