GLOBAL RULES ON CONFLICT OF LAWS MATTERS
IN INTERNATIONAL INSOLVENCY CASES
[information via info@bobwessels.nl – September 2014]


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The Final Report, written by the Joint Reporters, was presented to the Annual Meeting of the American Law Institute on May 23, 2012 (Washington), and was unanimously adopted by the International Insolvency Institute at its Annual Conference on June 22, 2012 (Paris), where it was resolved to establish a standing committee to oversee the world-wide promotion and promulgation of the Global Principles and Global Guidelines, contained in the Report.

In an Annex to the Report, prof. Fletcher and Wessels, also have presented Global Rules on Conflict of Law Matters in International Insolvency Cases (‘Global Rules’). They do not form a part of the Report itself, but have been presented as a ‘Statement of the Reporters’. During live, plenary discussions of ALI-III (see the Report, page 20, line 19) the Global Rules were not accorded sufficient time to establish any consensus that they should be included within the main body of the Report. After one hour, the Reporters remember, it was generally felt that the topic on private international law in insolvency would be one step (or even more steps) too far. As a starting point for discussion though the Reporters have included as a Statement the draft of the Global Rules as an Annex to the Report, accompanied by their own comments and notes. The Reporters acknowledge that, after the decision previously taken, they have not discussed those passages further amongst themselves with the same intensity as was applied to the commentary passages to the Global Principles and Global Guidelines, although the entire contents of the Report, including the Annexes, were additionally reviewed by scrutineers on behalf of ALI and III. With the benefit of hindsight, the Reporters recognise that in some places the explanation is less coherent than they would wish. However, the Global Rules serve as a first step in a (long) way of discussion in reaching consensus on a set of rules on conflict of law matters in international insolvency cases. The Reporters stated: ‘It is envisaged that the proposed Global Rules could serve as the basis for international negotiation under the auspices of one or more appropriate organizations.’


Below follows the Statement of the Reporters.
ANNEX

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STATEMENT OF THE REPORTERS

1. Introduction

In the main sections of our Report we have examined the feasibility of transforming the ALI Principles of Cooperation among the NAFTA Countries into a statement of principles suitable for global application. We believe it to be an integral requirement of such a mechanism for cooperation between courts of independent sovereign states that there should be a standard framework of commonly accepted rules to define the circumstances under which insolvency proceedings which are opened in one state are considered eligible to be accorded recognition and cooperation pursuant to the terms of the Global Principles. Also of vital importance is the promotion of internationally standardised definitions of the key terms which are employed in formulating the rules and principles on which the processes of international cooperation are to be based. The aspect of definition is addressed in the Appendix to this Report.

We are also convinced that the operation of these Global Principles would be greatly enhanced by a parallel process aimed at building a consensus regarding the principles to be applied to resolving conflict of laws issues in international insolvency. Even if it is possible to achieve general agreement as to the appropriate jurisdictional criteria to be employed for the purpose of opening insolvency proceedings, it is inevitably going to be the case that for the indefinite future the domestic insolvency laws of the many sovereign states of the world will continue to differ from one another in numerous ways. It is therefore of considerable importance to try to reach consensus as to the choice of law approach to be applied in whichever forum insolvency proceedings happen to be opened. In this way, interested parties will be better able to anticipate the outcome that will result from the application of the provisions and processes of the relevant substantive law or laws to the circumstances of their particular claims or interests. The attainment of enhanced certainty and predictability of such outcomes is therefore a worthwhile goal to pursue. This objective can be facilitated by establishing agreed rules of choice of laws which will be applied by courts in relation to the issues that are encountered in an international insolvency case over which they are exercising jurisdiction. Such uniform rules, operated in conjunction with standardised rules for the exercise of jurisdiction, would introduce much-needed stability in the otherwise volatile and uncertain process of evaluating the possible consequences of insolvency for international commercial relationships.

The range of matters involving a potential choice of law is extremely wide. It would be unduly ambitious, as well as unrealistic, at this time to attempt to establish global rules for every conceivable choice of law issue that might arise in an international insolvency case. In the present state of the movement towards harmonisation of the treatment of international insolvency matters, we believe it would be prudent to limit this exercise to exploring a selection of issues which are perceived to be of fundamental importance when considered in the context of the commercial relationship between a debtor and its creditors. In essence, this entails providing a general rule as to the law by which insolvency proceedings and their
effects are to be governed, and a number of additional rules that are to operate by way of exceptions to that general rule in certain, defined situations. The Reporters’ proposals for addressing that task by means of uniform Rules are set out in full in section 2 below. In section 3 the individual rules are analysed and explained, and the Reporters’ Notes provide additional information incorporating the comments of the consultants who have participated in this project. It is envisaged that the proposed Global Rules could serve as the basis for international negotiation under the auspices of one or more appropriate organisations. To become formally applicable by national courts it would be necessary for the Global Rules to become embodied in an international convention or model law to which a significant number of states might in due course become contracting or enacting parties.


In recent years however national legislators have taken initiatives to draft legislation concerning conflict of laws rules applicable in international insolvency law matters. Although these initiatives are a relatively fresh departure, two approaches seem to emerge. In the first approach, general rules on conflict of laws matters are drafted in the form of a Code, which includes a special section of law applicable to international insolvency matters, see e.g. the Belgian Code of Private International Law of 2004, which includes a Chapter XI on Collective proceedings concerning insolvency (Articles 116 – 121). The second approach, which seems to be favoured by national (European) legislators, is based on an extension model, in which a modified and sometimes selected group of provisions have been drafted, inspired by the conflict of laws rules of the EU Insolvency Regulation (Articles 4 – 15). These latter rules are already binding in their entirety and directly applicable in 26 Member States as regards any matter which falls within the scope of the EU Insolvency Regulation.
The extension relates to applicability of rules inspired by these Articles to matters which happen to fall outside the scope of the Regulation, and more generally to relationships with states which are not bound by the Regulation. See for instance Germany (Articles 336-341 and 351 Insolvency Code), Spain (Articles 201-209 Ley Concursal 22/2003) and the Netherlands (Articles 10.4.1-10.4.11 pre-draft 2007). For discussion, see Anna-Maja Schaefer, *Das autonome internationale Insolvenzrecht Spaniens im Vergleich zum deutschen Recht*, Schriften der Deutch-Spanischen Juristenvereinigung, Band 31, Peter Lang Frankfurt, 2009; Jeroen van der Weide, Conflict of Law Rules: Section 10.4, in: Bob Wessels and Paul Omar (eds.), Crossing (Dutch) Borders in Insolvency, Nottingham, Paris: INSOL Europe 2009, pp. 87-95; Ian Fletcher, Commentary on Section 10.4, in: Bob Wessels and Paul Omar (eds.), Crossing (Dutch) Borders in Insolvency, Nottingham, Paris: INSOL Europe 2009, pp. 95-97; Nauta, M-L, and F. Bulten, Introduction to Spanish Cross-Border Insolvency Law – An Adequate Connection with Existing International Insolvency Legislation, 18 International Insolvency Review, Spring 2009, pp. 59-77.

In an aim to provide “certainty with respect to the effects of insolvency proceedings on the right and claims of parties affected by those proceedings” the UNCITRAL Legislative Guide on Insolvency Law (2004), Part Two, section I.C. (paras. 80-91) has drafted, in close cooperation with the Hague Conference on Private International Law, five recommendations concerning the applicable law in insolvency proceedings. The recommendations, which are numbered as 30-34 inclusive, proclaim as their basic rule a proposition identical to that embodied in the EU Insolvency regulation, namely that the *lex fori concursus* shall govern the commencement, conduct, administration and conclusion of insolvency proceedings. Where the UNCITRAL text parts company with the EU Regulation is in proposing a much more limited range of exceptions to the application of the *lex concursus*. Only two excepted cases are proposed (contained in recommendations 32 and 33), the first to accommodate the special arrangements which are operative among participants in a payment or settlement system or in a regulated financial market, and the second to enable the effects of insolvency proceedings on contracts of employment (“labour contracts”) to remain subject to the law applicable to the contract. With respect, the Reporters consider that so limited a range of exceptions to the dominant role of the *lex concursus* is unlikely to prove commercially convenient or acceptable to the majority of parties engaged in international trade and business, given the present stage of uneven development of national laws governing such sensitive matters as security interests, set-off, and transaction avoidance. We therefore proclaim our allegiance to the alternative approach embodied in articles 4-15 of the EU Regulation (notably in articles 5, 6 and 13) whereby additional exceptions to the application of the *lex concursus* are permitted, under controlled circumstances, in respect of each of the three matters just mentioned.

It should be noted that the proposals set out in this Annex regarding conflict of laws rules do not aim to address “inter-state” conflict of law matters in the sense that is sometimes employed with reference to multi-jurisdictional entities such as federal states. For the purposes of the present Report, the term “state” (or: country) has been defined in the Glossary of Terms and Descriptions in the Appendix to this Report as “The political system of a body of people who are politically organized; the system of rules by which jurisdiction and authority are exercised over such a body of people”. In this context “inter-state” conflict of law may occur internally within states with a mixed jurisdiction; a state with separate regions (the People’s Republic of China, with Special Administrative Regions Hong Kong and Macao may form such an example); or a federation of states, for instance Germany (which has 16 “Bundesländer”), and USA. See James T. Markus and Don J. Quigley, Conflict of Laws-Which State Rules Govern?, ABI Journal, November 1999, p. 18ff.
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A. General Provisions

Rule 1  Scope

These Global Rules shall apply to insolvency proceedings which are opened in a state which has jurisdiction for that purpose according to the provisions of Global Principle 13 of the Global Principles for Cooperation in International Insolvency Cases.

Rule 2  International Obligations of this state

These Global Rules shall not affect whatsoever the effects of binding international rules related to choice of law arising out of any treaty or other form of agreement to which [this state] is a party with one or more other states.

Rule 3  Ex officio application

These Global Rules and the law thereby indicated are to be applied ex officio.

Rule 4  Interpretation

In the interpretation of these Global Rules, regard is to be had to their international origin and to the need to promote uniformity in their application and the observance of good faith.

Rule 5  Exclusion of Renvoi

In applying these Global Rules any reference to the law of a state means the internal ("domestic") rules of law in force in that state other than its rules of private international law.

B. Localisation of Assets

Rule 6  Immovable property
6.1. Immovables, and rights vested in or attached to them, are located at the place where the immovable, the right vested in it or attached to it is registered in a public register designated for the registration of rights.

6.2. If an immovable, the right vested in it or attached to it is not recorded in a public register designated for the registration of rights, then the immovable, the right vested in it or attached to it is located there where the immovable is situated.

Rule 7 Non-registered movables

7.1. Non-registered movables, and rights vested in or attached to them, are located at the place where the non-registered movable is situated.

7.2. For the purposes of paragraph 1 the following legal presumptions apply:
   a. Movables recorded in a vehicle licence register, and rights vested in or attached to them are presumed to be located at the place where the movable is recorded in the vehicle licence register.
   b. Goods in transit as well as rights vested in or attached to them are presumed to be located in the state of destination.

Rule 8 Registered movables

8.1. Registered movables and separately registered rights vested in or attached to them are located at the place where the movable or the right in question is recorded in a public register designated for the registration of rights.

8.2. For the purposes of paragraph 1, unless there is proof to the contrary, registered movables shall be presumed to be located at the place where the movable is recorded in a public register designated for the registration of rights.

Rule 9 Claims

9.1. Claims payable to bearer or order and rights vested in or attached to them are located at the place where the bearer or order document is situated.

9.2. Claims of known creditors and rights vested in or attached to them are located at the place where the debtor has his seat or his domicile.

Rule 10 Shares in joint-stock companies

10.1. Bearer shares and rights vested in or attached to them are located at the place where the bearer share certificate is situated.

10.2. Registered shares and rights vested in them are located at the place where the registered share or the right vested in it is recorded in a register of shareholders kept by the company.

10.3. If a registered share or a right vested in it is not recorded in a register of shareholders, the registered share or the right vested in it is located at the place where the company has the centre of its main interests. The centre of the main interests of the company is presumed to be the place of its registered office.
10.4. Book-entry shares and rights vested in them are located at the place of the registered office of the intermediary with which the securities account is kept in which the book-entry shares are administered.

Rule 11  Intellectual property rights

Patent rights, trademark rights and copyrights and rights vested in them are located at the place where the patent holder, trademark proprietor or copyright holder has his seat or his domicile.

C. General rules of law applicable to insolvency proceedings

Rule 12  Law of the state of the opening of proceedings

12.1. Save as otherwise provided in [this Act/these Rules] the law applicable to insolvency proceedings and their effects shall be that of the state within the territory of which such proceedings are opened, hereafter referred to as “the state of the opening of proceedings”.
12.2. The law of the state of the opening of proceedings shall determine the conditions for the opening of those proceedings, their conduct, administration, conversion and their closure.

Rule 13  Law of the state of the opening of non-main proceedings

If insolvency proceedings are opened in a jurisdiction other than that where the centre of main interests of the debtor is situated (“non-main” proceedings), the effects of the application of the law of the state of the opening of such proceedings shall be restricted to those assets of the debtor situated in the territory of that state at the time of the opening of those proceedings.

Rule 14  Cross-border movement of assets

In relation to any asset of the debtor which is of a moveable character, Global Rules 12 and 13 shall apply subject to the following modifications:
(a) Any rule of insolvency law which is applicable by virtue of the localization of an asset in the territory of the state of the opening of insolvency proceedings at the time of the opening of the proceedings shall not apply if it is shown that the asset in question has been moved to that location from the territory of another state, to whose insolvency law it would otherwise have been properly subject, in circumstances which suggest that the transfer was effected wholly or primarily for the purpose of avoiding the effects of the law of the other state, including its insolvency law.
(b) Conversely, where an asset has been moved from the territory of one state to that of another state under the circumstances stated in paragraph (a), the effects of any insolvency proceedings which are opened in the former state shall apply to the asset in question.
(c) In the absence of evidence to the contrary, it shall be presumed that any asset which has been removed from the territory of the state in which insolvency proceedings are opened within sixty days prior to the opening of such proceedings was made with intent to avoid the effects of the law of that state. It is for the party who seeks to maintain the validity of the act whereby the property was removed from the territory of that state to provide evidence that the transfer was made for a bona fide and legitimate purpose. (d) Except in a case to which paragraph (c) is applicable, it is for the party who alleges that the provisions of paragraphs (a) and (b) of this Rule are applicable in relation to a particular asset to prove that this is the case.

D. Exceptions to the general rules of law applicable to insolvency proceedings

Rule 15 Rights of secured creditors

15.1. Insolvency proceedings shall not affect the rights in rem of creditors or third parties in respect of tangible or intangible, moveable or immovable assets - both specific assets and collections of indefinite assets as a whole which change from time to time - belonging to the debtor which are situated within the territory of another state at the time of the opening of proceedings.

15.2. The rights referred to in Global Rule 15.1 shall in particular mean:
(a) the right to dispose of assets or have them disposed of and to obtain satisfaction from the proceeds of or income from those assets, in particular by virtue of a lien or a mortgage;
(b) the exclusive right to have a claim met, in particular a right guaranteed by a lien in respect of the claim or by assignment of the claim by way of a guarantee;
(c) the right to demand the assets from, and/or to require restitution by, anyone having possession or use of them contrary to the wishes of the party so entitled;
(d) a right in rem to the beneficial use of assets.

15.3. The right, recorded in a public register and enforceable against third parties, under which a right in rem within the meaning of Global Rule 15.1 may be obtained, shall be considered a right in rem.

Rule 16 Exception

16.1. By way of exception to Global Rule 15, a right in rem (“in rem security right”) shall not be exempted from the effects of insolvency proceedings if proof is provided that the state where the assets are situated at the time of the opening of insolvency proceedings has no substantial relationship to the parties or the transaction in relation to which the security right was created and there is no other reasonable basis for the fact that the assets are so situated.

16.2. It is for the party who claims that the conditions specified in Global Rule 16.1 are met in relation to a particular security right to prove that those conditions are in fact met in the relevant case.
Rule 17  Set-off

Insolvency proceedings shall not affect the right of creditors to demand the set-off of their claims against the claims of the debtor, where such a set-off is permitted by the law applicable to the insolvent debtor’s claim.

Rule 18  Exception

Where a right of set-off is demanded on the basis of Global Rule 17, if it is the case that, in the absence of express choice made by the parties, the law applicable to the insolvent debtor’s claim would be that of the state of the opening of main insolvency proceedings, Global Rule 17 shall not apply if the law of the state chosen by the parties has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties’ choice.

Rule 19  Reciprocal Contracts: General Rule

Save as otherwise provided by [this Act/these Rules], mutual obligations in respect of a reciprocal contract, which has been concluded prior to insolvency of one of the parties, shall be governed solely by the law of the state of the opening of proceedings.

Rule 20  Contracts of employment (labour contracts)

The effects of insolvency proceedings on employment contracts and relationships shall be governed solely by the law of the state applicable to the contract of employment.

Rule 21  Restrictions to exceptions

Global Rules 15, 17 and 20 shall not preclude actions for voidness, voidability or unenforceability of legal acts detrimental to the general body of creditors pursuant to the law applicable to the insolvency proceedings as determined by Global Rule 12 or by Global Rule 13 (as the case may be).

Rule 22  Defences to the avoidance of detrimental acts

Global Rule 21 shall not apply where the person who benefited from an act detrimental to the general body of creditors provides evidence that:
(i) the said act is subject to the law of a state other than that of the state of the opening of proceedings; and
(ii) that law does not allow any means of challenging that act in the relevant case.
Rule 23 Exception

23.1. By way of exception to Global Rule 22, a transaction detrimental to the general body of creditors shall not be exempted from the effect of the avoidance rule of the law of the state of the opening of insolvency proceedings if proof is provided that the state to whose law the transaction is subject has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the selection of the law of that state as the law to govern the transaction in question.

23.2. It is for the party who claims that the conditions specified in Global Rule 23.1 are met in relation to a particular transaction to prove that those conditions are in fact met in the relevant case.