

GLOBAL INSOLVENCY LAW AND THE ROLE OF MULTINATIONAL INSTITUTIONS

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The topic of this symposium, *Bankruptcy in the Global Village: The Second Decade*, is grand and demanding. By referring to bankruptcy in the global village it seems to imply something different from the technicalities of particular national laws such as, for instance, those from Japan, the United States, or Germany; instead, what appears to be meant is an understanding of bankruptcy as a term that transcends the national boundaries—something like the essence of bankruptcy law or its meta-level. This is quite a challenging task in light of the notorious and sometimes enormous differences of those national bankruptcy laws. But not enough with that: the additional reference to the second decade includes indirectly the first decade whose beginning is marked by another symposium at Brooklyn Law School organized by Professor Barry Zaretsky that still forms an important cornerstone for many insolvency-related discussions through the publication of its presentations.¹ The topic of this symposium thus includes past and present. It thereby creates the framework for a multi-dimensional picture, which I would like to trace with a few lines as a prelude to the discussions of the next days.

A. THE FIRST DECADE

Speaking about the first decade and thus choosing the year 1996 as a starting point does some injustice to the decades that came before. After all, they too contributed to the development of insolvency law and posted some milestones on its path. Suffice it to mention the introduction of Chapter 11 into the U.S. Bankruptcy Reform Code in 1978, which initiated a worldwide re-thinking of the options that bankruptcy law can offer;² or the invention of the protocols as a powerful tool to overcome

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

2. Outside the United States, the stigmatizing effect of a bankruptcy proceeding has been—and in many regions of this world still has—a powerful blocking impact on the efficiency of a reorganization option. The idea of a fresh start to be offered to a debtor through the bankruptcy proceeding has been for quite a long time unique to the United States.

checkmate situations in cross-border bankruptcies resulting from application of each one of the involved bankruptcy laws.³

But irrespective of these historical progresses, the mid-nineties indeed bestowed bankruptcy law a central position in the globalizing world and are therefore rightfully seen as the nucleus of something new. The beginning of this development, however, was disastrous—it was the East-Asia crisis which ultimately led the world disturbingly close to the edge of a global economic breakdown when Japan, Russia, and finally Brazil one after the other followed the example of the so called Tiger States and had their economies literally collapsing. This threat led the then-G7 States (now G8) to the foundation of a new multilateral institution, the Financial Stability Forum, the task of which is to develop tools that help to prevent a similar crisis in the future.

The efforts made by this forum are reported on its website.⁴ One of its most prominent results is the development of twelve regulatory topics that are seen to be crucial for a country's financial stability and which therefore should be kept to a high standard. These topics encompass such disparate areas such as accounting and auditing, fiscal transparency, and banking and insurance supervision as well as insolvency and creditor rights. This is a new development: insolvency law is seen and understood as a safeguard and anchor for the stability of a country's financial situation! Before going a bit deeper into this somewhat surprising connection, however, it is necessary to say a few words about the multilaterals' involvement with bankruptcy law.

The observation, fostering, and dissemination of each one of the abovementioned twelve areas is entrusted to various institutions such as the International Monetary Fund (IMF), the Organisation for Economic Cooperation and Development (OECD), or the World Bank. And it is the latter, the World Bank, which was bestowed with the mandate as to insolvency and creditors rights. This is the result of an agreement between the two Bretton Wood Institutions. Originally, at the peak of the crisis in early 1998, it was the IMF which had been pushed to take care of this area and which in 1999 came up with its description of something like a

3. The beginning of this invention is marked by the *Maxwell* case. See Evan D. Flaschen & Ronald J. Silverman, *The Role of the Examiner as Facilitator and Harmonizer in the Maxwell Communication Corporation Insolvency*, in CURRENT DEVELOPMENTS IN INTERNATIONAL AND COMPARATIVE CORPORATE INSOLVENCY LAW 621 (Jacob S. Ziegel ed., 1994); Jay Lawrence Westbrook, *The Lessons of Maxwell Communication*, 64 FORDHAM L. REV. 2531 (1996).

4. See Financial Stability Forum, About the Compendium of Standards, www.fsforum.org/compendium/about.html (last visited Apr. 1, 2007).

fundamental pattern of orderly and effective insolvency procedures.⁵ Thereafter, however, responsibility shifted over to the other side of the street, i.e., to the World Bank, which started at about this time to develop much more detailed principles of insolvency law as well as creditor rights systems. Enormous efforts were undertaken and the ultimate result was introduced to the general public in 2001.⁶

However, the increased perception of insolvency law's global importance extended beyond the Bretton Woods sister institutions. Initiated by an Australian proposal, the United Nations—more precisely, the United Nations Commission on International Trade Law (UNCITRAL)—saw the need to come up with still another guidebook for insolvency legislation. One might assume that the background of this claim was the success that this institution had—and still has—with its model law on cross-border insolvency, which is topically somewhat related but, in fact, much more restricted in its scope. Encouraged by this success, the Commission developed guidelines, which were made public in 2004 and are now the most voluminous book on insolvency legislation.⁷ The work of UNCITRAL and the World Bank was, as a matter of fact, not identical so that the addressees—i.e., the legislative decision makers—were somewhat troubled when they had to decide which of the guidebooks they wanted to follow. However, after having clarified the differences, the World Bank drafted in 2005 a revised version of its former Principles and blended them with UNCITRAL's Legislative Guide which, in the future, might set the standards of bankruptcy legislation.⁸ The consequence thereof is that the Financial Stability Forum has entrusted both multilateral institutions with a somewhat shared⁹ responsibility.

5. These procedures are published in a booklet available on the IMF's website. International Monetary Fund (IMF), *Orderly & Effective Insolvency Procedures* (1999), <http://www.imf.org/external/pubs/ft/orderly/index.htm>.

6. World Bank, *Principles and Guidelines for Effective Insolvency and Creditor Rights Systems* (2001), available at <http://siteresources.worldbank.org/GILD/PrinciplesAndGuidelines/20162797/Principles%20and%20Guidelines%20for%20Effective%20Insolvency%20and%20Creditor%20Rights%20Systems.pdf>.

7. United Nations Commission on International Trade Law (UNCITRAL), *Legislative Guide on Insolvency Law* (rev. 2005), available at www.uncitral.org/pdf/english/texts/insolven/05-80722_Ebook.pdf. For a description of its legal parameters, see [S. Block-Lieb and T. Halliday](#); for its contents, see [J. Ziegel's contribution](#).

8. World Bank, *Principles for Effective Insolvency and Creditor Rights Systems* (rev. 2005), available at <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/LAWANDJUSTICE/GILD/0,,contentMDK:20774193~pagePK:64065425~piPK:162156~theSitePK:215006,00.html>.

9. "The World Bank is co-ordinating a broad-based effort to develop a set of principles and guidelines on insolvency regimes. The United Nations Commission on International Trade Law (UNCITRAL), which adopted the Model Law on Cross-Border Insol-

Seen from the outside, one wonders why after years and years of ignorance and disinterest in our first decade, insolvency law all of a sudden became so much the focus of interest not only of one but of three multilaterals. As described above, one of the reasons certainly is that these institutions discovered in the wake of the explosion of the East Asian bubbles that insolvency law was (and still is) perceived as a fundamental factor for any investment interest in a particular jurisdiction; provided that this law is effective and guarantees an orderly proceeding with a fair, transparent, and predictable treatment of the stakeholders.

The question whether or not this perception is right or wrong is extremely hard to answer in spite of its time-honored tradition which induces the assumption of rightfulness; the examples reach back at least to the early sixteenth century in Antwerp, the then economic metropole of Europe, when foreign merchants demanded from the Town Fathers the enactment of a bankruptcy law for their better protection.¹⁰ It must suffice here to present a few thoughts about some of the criteria that might play a role in providing approaches to this answer. The answer itself seems to be irritatingly oscillating. This is not yet true, however, when one takes a psychological stance: from there it is perfectly understandable that the fundamental principle of equitable treatment of a debtor's creditors is preferable to a system in which the creditors must be afraid of that the debtor is playing a game—alone or in a collusive way with some of the other creditors—the outcome of which is not the equal (or at least transparent and predictable) distribution of the remnants but the prelude to another game without these creditors (or most of them). A disturbingly clear example for such a strategy seems to be the present-day *Yukos* case in Russia.¹¹

From a legal stance, however, things are getting more complicated. It begins with the truism that insolvency law is something like the focus point(s) of the commercial law of any jurisdiction: comparable to a two-dimensional painting that gives the impression of three-dimensionality because of the painter's correct adherence to the respective focus point.

veny in 1997, will help facilitate implementation." Financial Stability Forum, 12 Key Standards for Sound Financial Systems, http://www.fsforum.org/compendium/key_standards_for_sound_financial_system.html (last visited Apr. 1, 2007).

10. For this example, see also Christoph G. Paulus, *A Short History of European Insolvency Law*, *INSOL WORLD (SILVER JUBILEE ISSUE)*, 2007, at 14; Christoph G. Paulus, *Entwicklungslinien des Insolvenzrechts*, 61 *KTS ZEITSCHRIFT FÜR INSOLVENZRECHT* 239, 242 (2000) (F.R.G.).

11. See generally Joseph Tanega & Dmitry Gololobov, *Yukos Risk: The Double Edge Sword, A case Note on International Bankruptcy Litigation And The Transnational Limits of Corporate Governance*, 3 *N.Y.U. J. L. & BUS.* (forthcoming 2007).

Numerous legal areas such as the law of secured transactions, corporation law, corporate governance, non-performing loans trading, out-of-court-settlements—to name but a few—become fully understandable only in front of the background of the respective insolvency law.¹² Therefore, it is fair to state that if insolvency law is in fact something like a pillar of a given commercial law, the need is manifest to build it up in a particularly strong, efficient, and stable manner.

This is all the more necessary as insolvency law has the potential to influence not only an economy's micro-level but also its macro-level. This is to say that the law more often than not does get burdened with political expectations or demands. In periods of increased numbers of enterprise breakdowns or when huge companies like Enron, Parmalat, Asia Pulp & Paper, or Varig go bust the efficiency of this particular law is tested in a way that goes far beyond almost any other law. Public scrutiny as well as political guilt-shifting or actionism are then very likely on the agenda. However, after having introduced a reorganization proceeding, the political class is in the comfortable position to reject any claims for a bail-out of firms that are seen by the public as too big to fail and to rather shift the responsibility of their rescue to the administrator or the courts in charge.

And finally it is worthwhile considering in this context that an orderly and effective insolvency law exerts a disciplining function on all actors on the stage. It is the art of good insolvency legislation to strike a balance between disciplining the debtor¹³ as well as the creditors. Experience teaches that this can be done in various ways: there is, for instance, no self-evident prevalence of a creditor-driven system over a court-driven system,¹⁴ as there is no clear evidence that a rather harsh system is better or worse than a lenient one. What is necessary and decisive is the credi-

12. Elsewhere, I have tried to elaborate this idea in more detail. See Christoph G. Paulus, *Verbindungslinien des Modernen Insolvenzrechts*, 49 ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT 2189 (2000) (F.R.G.).

13. In times of systemic economic difficulties, legislators might wish to alter their insolvency laws to an overly protective system for the debtors. If they do so, they are well advised to re-change it after the end of such crisis. The Statute of Colombia from 1996 is a striking example for this attitude and the disadvantages of “sticking to it until now.” See generally Adolfo Rouillon, World Bank, *Colombia: Derechos de Crédito y Procesos Concursales* (May 2006). Note, however, that Colombia is about to change its law (from mid-2007 on) to make it a bit more balanced.

14. An example is comparison between the two neighboring countries of France and Germany: the former has quite a court-driven system, whereas the latter is prominently creditor-driven. For the latter approach, see Manfred Balz, *Market Conformity of Insolvency Proceedings: Policy Issues of the German Insolvency Law*, 23 BROOK. J. INT'L L. 167 (1997).

ble threat for the debtor not to escape into an insolvency proceeding for his own benefit and for the creditors not to push their common debtor into such proceedings for their benefit. No one should stand to gain something in an insolvency proceeding that could not be gained outside of it.

However, even though all these preceding considerations apparently point to the same direction of insolvency law's overarching importance and thus do justify the abovementioned multilaterals' efforts in this field, there do exist irritating counterexamples which undermine the validity of these very considerations. The most important of these examples is the present-day Chinese economy. Even though this jurisdiction has now its insolvency law enacted, which came into force on July 1, 2007,¹⁵ it has a multi-year period of enormous economic growth behind it without precedent in the whole economic history—and without an effective insolvency law!

Be this as it may, history is full of countless examples of the driving force of mere perception without any proven factual justification. Now that there are three guidelines out in the world—the smallest one from the first multilateral IMF; the medium sized from the second, the World Bank; and the most voluminous from the last, from UNCITRAL—there is a momentum to be observed in insolvency law's world which leads towards a certain global convergence. Be it by means of the force of the IMF's and the World Bank's conditionality or the respective anticipated obedience, be it by a political leadership's wish to connect its country with the modern stream of essential legislation, be it by the persuasive power of the quality of these guidebooks—there is a broad movement all over the world to comply with these standards.¹⁶ Even though the expert might recognize considerable differences in each one of them, they have much in common. Suffice it to mention the introduction of a rescue proceeding which was—due to the worldwide predominant perception of a bankruptcy stigma on a bankrupt debtor—unthinkable in many jurisdic-

15. For descriptions of the new law, see Bruno Arboit & Darren FitzGerald, *A Great Leap Forward—China's New Enterprise Bankruptcy Law*, *INSOL WORLD*, Fourth Quarter 2006, at 36; Mike Falke, *China's New Law on Enterprise Bankruptcy*, 16 *INT'L INSOLVENCY REV.* 63 (2007).

16. Elsewhere, I have described this development in somewhat more detail. See Christoph G. Paulus, *Rechtsvergleichung im Nationalen und Internationalen Insolvenzrecht: Eine Erfolgsgeschichte*, in *EINHEIT UND VIELFALT DES RECHTS: FESTSCHRIFT FÜR REINHOLD GEIMER ZUM 65. GEBURTSTAG 795* (Rolf A. Schütze ed., 2002) (F.R.G.).

tions only a decade ago. Nowadays, it is hard to find any insolvency law without this option.¹⁷

However, one has to pay attention and should not be overoptimistic. The convergence described is more often than not referring to the law in books rather the law in action. There are a number of examples in which countries have adopted quite modern insolvency legislation which appears on paper as a successful approximation of the propositions of those guidebooks.¹⁸ But, upon closer inspection of the factual realities, it becomes apparent that the law in action is far from being in compliance with the written law. For various reasons—ranging from opposition against the imposing institution and its dominant shareholder(s) to sheer opportunism—some jurisdictions defy this convergent pull and simply ignore their codified law.

This is to be taken very seriously, not least because this attitude coincides—accidentally or not—with a general problem of anti-globalization: the recipients might have the impression that they are forced to accept an imposed law that is designed to bring them in line with a certain capitalistic idea of bankruptcy law.¹⁹ The answer to such an allegation must be based on a thorough analysis; an analysis that identifies deeper necessities such as the general need for economic development and/or empowerment of the poor²⁰ or the like. If this is not done or—even worse—

17. For an insightful report about the factual problems of implementing the respective rules in the Asia Pacific region, see Nick Hood, INSOL Europe, *Management Change—The Last Restructuring Taboo*, in INTERNATIONAL CASELAW-ALERT No. 11, IV/2006, at 4, (Aug. 27, 2006), available at <http://www.eir-database.com/download/caselaw/7/International-Caselaw---Alert-No-11-IV-2006-August-27,-2006.pdf>.

18. Professor Halliday describes this divergence in his contribution to this symposium as “implementation gap”, [Halliday, sub III](#).

19. See the particularly telling story told by Boris Kozolchyk, *Secured Lending and Its Poverty Reduction Effect*, 42 TEXAS INT’L L. J. (forthcoming 2007) (manuscript at 12), available at <http://www.law.arizona.edu/faculty/FacultyPubs/Documents/Kozolchyk/ALS06-33.pdf>. A Mexican NAFTA negotiator asked him:

why it was that Mexico’s law of secured transactions had to resemble that of the United States and Canada, my reply was that the proper question was not what law Mexico had to emulate but whether Mexico did in fact desire secured lending. If it did, its law had to be based on principles that reflected those practices tried and tested in active financial marketplaces and thus capable of universal usage.

Id.

20. The fact that the enactment of a bankruptcy law has the potential to lead to an empowerment of the poor can be demonstrated in the context of the introduction of an insolvency law for states. See Christoph G. Paulus, *A Statutory Proceeding for Restruc-*

not possible, than the multilaterals would be well advised to refrain from further promotion of their guidebooks.²¹ Just as a question mark or—depending on one's own perspective—exclamation mark, what is irritating in this context as well as in so many others: to the best of my knowledge there is little interest in how Arabic and the majority of African²² countries deal with the break-down of their economic enterprises²³ and there is—irrespective of the *ceteris paribus* impressive internationality of the respective groupings—almost never any Arabic or African representatives participating.

B. TRANSITION FROM THE FIRST TO THE SECOND DECADE

These remarks bring us to the entrance door of the second decade. The pull towards convergence of the world's insolvency laws will predictably increase as the multilaterals appear to have gotten "appetite" for more. UNCITRAL is a striking example with its recently acclaimed search for further fields of engagement in the insolvency area. Now the time begins in which the work will go further into details; be it the treatment of groups in insolvency, court-to-court communication,²⁴ arbitration in insolvency law, or what else. More or less hailed and welcomed by the experts, it should not be forgotten that a further-reaching, common-if-basic understanding should be developed as for the need for this expansion, a need which reaches beyond the mere benefit of multinational companies.

It seems to me that much is to be done in this respect; this has to be stressed particularly in light of the recommendations of one of the members of the World Bank Group. The International Finance Corporation (IFC) publishes every year its *Doing Business* report in which they measure the world's economy on a purely creditor-oriented approach. In 2006, with respect to necessary insolvency reforms, they recommended

turing Debts of Sovereign States, 49 RECHT DER INTERNATIONALEN WIRTSCHAFT 401, 402–05 (2003) [hereinafter Paulus, *Statutory Proceeding*].

21. For this, see also T. Halliday's contribution in this volume, sub I I.

22. An exception might be bigger states such as South Africa or regional attempts such as the Organisation pour l'Harmonisation du Droit des Affaires en Afrique (OHADA).

23. To be sure, most of these countries do have insolvency laws (many of them following quite closely the French model). However, what is questioned here is the law in action.

24. For this see, for instance, Jay Westbrook, *The Duty to Seek Cooperation in Multinational Insolvency Cases*, in THE CHALLENGES OF INSOLVENCY LAW REFORM IN THE 21ST CENTURY 361 (Henry Peter, Nicolas Jeandin & Jason J. Kilborn eds., 2006); Christoph Paulus, World Bank, *Judicial Cooperation in Cross-Border Insolvencies: An Outline of Some Relevant Issues and Literature* (2006), http://siteresources.worldbank.org/GILD/Resources/GJF2006JudicialCooperationinInsolvency_PaulusEN.pdf.

that the best solution is to give the creditors as much say in the proceeding as anyhow possible²⁵—a remarkably simplistic statement which, of course, is heavily influenced by its almost complete exclusion of any lawyer in the writing process. One wonders how countries react that traditionally have a strong emphasis on court-driven proceedings and which are doing fine economically—the present China or India are ideal examples.

The problem with the abovementioned task of providing sound justifications is that it has to be fulfilled in a time in which the pace of the overall insolvency law's changes increases. Like everywhere, things become more complicated and more complex here as well.²⁶ One indicator is that the worldwide expanding trade with non-performing loans has already led in numerous cases to a changed pattern of creditor behavior. Whereas the traditional model of bankruptcy law is based on the assumption of a debtor on one side who is bound together with all his creditors on the other side by bipolar relationships²⁷—a linguistic picture which implies a general mutual knowledge of debtor and creditor—it has nowadays become the increasingly predominant economic reality that in many cases the debtor does not know who his creditors are; irritatingly enough, nor do the creditors know who their debtor is. The trade with these claims on what is commonly called the “secondary market” continues irrespective of a once-started insolvency proceeding. As a German banker once told me: banks are trading with everything that has not climbed the tree by “three.”

It might thus happen that an administrator has engaged in negotiations with creditors about a particular solution of the case—maybe even in the forefront of the upcoming proceeding—and is thereafter confronted with a different set of creditors when it comes to the voting of the plan. To be sure, such a scenario need not automatically be unfavorable for the insolvency proceeding as such. There is, for instance, the possibility that an envisaged reorganization attempt will be enhanced through the new creditors. Assume that they have bought the respective claims from the original creditors for thirty cents on the dollar; this price makes it an economically sound judgment to accept a dividend of fifty cents in a case where

25. See World Bank, *Doing Business 2007—How to reform*, at 55 (2006).

26. See Simon Davis, *Greater Use Should Be Made of Derivatives in Restructuring Transactions*, in *GLOBAL INSOLVENCY & RESTRUCTURING YEARBOOK 2006/07* 21 (4th ed.); Sijmen de Ranitz, *Foreward: Global Trends in the Field of Restructuring and Insolvency*, in *GLOBAL INSOLVENCY & RESTRUCTURING YEARBOOK 2006/07* 1 (4th ed.); See also *INSOL INT'L, CREDIT DERIVATIVES IN RESTRUCTURINGS: A GUIDEBOOK* (2006).

27. Note that the English word “obligation” stems from the Latin word “obligare,” which means primarily “to bind together.”

the original creditors possibly would have had opposed.²⁸ On the other hand, there is an equally large chance that these new creditors just have the sole interest in a quick turnover which, then, prevents any longer term strategy on the administrator's or debtor's side.

As a rule of thumb: the anonymity which is the inevitable companion of this modern development bears the threat of inhumanity. This interrelation is evidenced by a long-lasting historical experience. Therefore, the new pattern of stakeholders might undermine a legislator's consideration of social policy; suffice it to refer to the example of French insolvency law with its strong emphasis on the protection of workers. In any case, work-outs are likely to become more complicated as there are more diverse interests involved. Cautious lenders begin already to exert some control over the formation of future creditor groups in insolvency situations by bringing "unanimous decisions clauses" into their loan agreements, clauses which have achieved some prominence as "collective action clauses" in the context of sovereign debt restructuring attempts.²⁹

A further consequence of converging insolvency laws is that forum shopping is likely to become even more prominent than it already is today.³⁰ The European Insolvency Regulation serves also insofar as a perfect model. Designed with the intent to prevent forum shopping by bringing the disparate insolvency legislations of the various member states closer together, this very regulation seems to have provoked forum shopping! The lesson obviously to be learned therefrom is that approximation incites the search for potential advantages.³¹ This is not the place here to evaluate forum shopping as a general phenomenon and to discuss its pros and cons. All (and only) what is to be derived from this development here is that insolvency practitioners have to adjust to the new pattern and its demands. They are more and more confronted with situations in which they have to evaluate certain behavior or its results on the basis of foreign law. Suffice it to hint at the inevitable question of whether or not a certain act or transaction done in the previous jurisdiction has fulfilled

28. Example taken from Steven T. Kargman, *Addressing Financial Distress in the Emerging Markets: An Overview of Key Concepts in Corporate and Sovereign Debt Restructurings*, 31 *CURSO DE DERECHO INTERNACIONAL* (Organización de los Estados Americanos, Comité Jurídico Interamericano) 453 (2004).

29. See Paulus, *Statutory Proceeding*, *supra* note 20, at 401.

30. For this observation, see in particular [J. Pottow's and R. Rasmussen's articles in this volume.](#)

31. The statutory corner stone for this search is—at least presently—the interpretation of the term "center of main interests"; for this, [see the contributions of G. Moss and J. Westbrook in this volume.](#)

the requirements of the avoidance laws and which ones? Needless to say that these new demands request highly qualified professionals.

And finally—still speaking while standing in the entrance door to the second decade—the increased complexity of insolvency law and its strong emphasis on the reorganization option gives reason to a new positioning of insolvency law in general. Admittedly to varying degrees in different jurisdictions, it used to be seen as a somewhat isolated field with only few direct connections with other areas of law.³² It followed its own set of rules that are conditioned by the particular circumstances of the debtor's insolvency and the therefrom resulting impairment of the creditors' rights. This remains unchanged, of course. What is likely to change, however, is the increasing awareness of an insolvency law's function as part of a broader context. This context is best described (even in German) by "turnaround law." Its unifying property is that it deals with those economic assets (including workers, goods, services, and any other economically useful and valuable good) which, for whatsoever reason, are no longer (or, maybe even, not at all) used in the most efficient manner and which shall be repositioned there. Seen from this perspective, insolvency law forms part of a large spectrum of so far quite disparate areas of law, such as corporate governance, the specific creditor protection rules within corporation law, distressed debt trading, out-of-court settlement law, and many others. Insolvency law is, thus, no longer isolated but just a link—a very important one, of course—in a longer chain of other laws. The consequence of this insight is that examinations become necessary with regard to the adaptability of insolvency law to this new legal surrounding;³³ a task which will to be performed in the second decade.

C. THE SECOND DECADE

Having said this, a few words are in place about the likely further development of insolvency law as well as about certain dangers which call for close observation on the experts' side.

As indicated just before, it is quite likely that the next years will be guided by the search and endeavors for cultivating this new environment and to let it melt into a coherent whole. This is a task which everyone will have to work on, beginning with the academics and then the practi-

32. To be sure, this observation relates to this law's perception and does, therefore, not contradict with what has been stated above about the objective influence of insolvency law on other fields of law.

33. For example, as a consequence of the automatic stay reorganization within an insolvency proceeding, which might contradict the rules of the unfair competition law.

tioners and the multilateral institutions. In a world which is ever-growing together and which is equipped with a limited amount of resources, the need will increase to help these resources to be returned to their best possible efficiency as smoothly and promptly as possible.

The true difficulty with fulfilling this task will be, however, that it has to be done on a multi-dimensional cultural level. A “one-size-fits-all” approach is more than likely bound to fail. Not only that different jurisdictions do have different priorities—suffice it as one example out of many others to refer to the protection of enterprises or workers—they also have different understandings as to how a proceeding has to be managed. In spite of the abovementioned naïve solution of the IFC and its *Doing Business* report, the present political realities will not quite allow for the time to see a pure creditor-driven proceeding as the best possible solution.³⁴

A further prediction shall be mentioned only as an aside: the world’s shrinking towards a global village will inevitably force the question of how to deal with overindebted states—and thus their insolvencies—on top of the agenda. To the extent that this picture of a village becomes reality there is no way not to deal with the disparities. Like in any small village the pressure on the rich will grow to do something about the poverty of the neighbors. It is my strong conviction that the right solution will not be found in the refinement of Collective Action Clauses but in the further development of what the IMF called a Sovereign Dispute Resolution Mechanism (SDRM).³⁵ Therefore, insolvency law will have to play its role in this context.

Another likely development in the second decade calls for the alertness particularly of the experts, maybe even particularly of the academic experts. To the degree that economic globalization transcends the borders of national legislators, the greed of the “big players” in this game will grow to shift aside local obstacles. What they try already now in many jurisdictions with greater or lesser success—namely to get exempted from the applicability of certain legal rules (tax law, labor law, environment protection law, etc.)—is more than likely to be pursued on the global level with much better results because of the scarcity of respective rules there.

A regional example is the decision of the Australian legislator in the late nineties to make netting-agreements insolvency-proof in their insolvency law in order to make this country more attractive for economic

34. See I. Fletcher’s contribution in this volume sub II.

35. See Paulus, *Statutory Proceeding*, *supra* note 20, at 401–02.

investment.³⁶ An even more striking example is the Cape Town protocol as drafted by UNIROIT:³⁷ it provides for a worldwide applicable super-priority for certain collateral in all insolvency laws on the globe. Even though so far restricted to only a few goods, a tendency behind any such attempt is recognizable; global rules shall be set in force which overthrow the application of local laws for the benefit of these lobbying global players (to be sure, not only in the realm of insolvency law³⁸). The primary addressees of these attempts are, of course, the multilateral institutions such as UNIDROIT or IFC. Needless to say that the success of these attempts undermines the fundamentals of insolvency law.

36. See Peter Costello, MP, Treasurer of the Commonwealth of Australia, Second Reading Speech on the Australian Prudential Regulation Authority Bill, 1998, available at http://fsi.treasury.gov.au/content/downloads/PublicInfo/Speeches/FSI_SecondReadingSpeeches.rtf.

37. Convention on International Interests in Mobile Equipment, Nov. 16, 2001, S. Treaty Doc. No. 108-10, available at <http://www.unidroit.org/english/conventions/mobile-equipment/main.htm>. S. Harris mentions in his contribution to this volume (at fn 31) UNIDROIT's drafting of a further Protocol.

38. Another example would be article 54 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID) which provides for an enforcement title that has to be recognized by all states. For this, see Giuliana Canè, *Enforcement of ICSID Awards: Revolutionary or Ineffective?*, 15 AM. REV. INT'L ARB. 439 (2006); for a general description of the procedure, see Giorgio Sacerdoti, *Investment Arbitration Under ICSID and UNCITRAL Rules: Prerequisites, Applicable Law, Review of Awards*, 19 ICSID REV. 1 (2004).