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# Soft law instruments in restructuring and insolvency law: exploring its rise and impact

**Soft law instruments are increasingly prevalent in the area of procedural and substantive restructuring and insolvency law. These instruments, all embodied in legally non-binding texts, originate from so-called standard-setting organisations, such as the United Nations Commission on International Trade Law (UNCITRAL) Working Group V (Insolvency) and the World Bank, as well as mainly insolvency practitioners' organisations, such as INSOL International and INSOL Europe. Ambiguity of what they are and how they impact hard law has blurred the actual role that these soft law instruments have. This raises questions of how soft law instruments can be (legally) characterized, what advantages and disadvantages they have (compared to hard law), and how legislators and policy makers in the field of restructuring and insolvency make use of them.**

## 1. Introduction

The vague nature of soft law instruments is a general impediment to practitioners and scholars in considering its relevance. Still, in recent years, legislators and policy makers have given particular attention to such instruments, especially in the area of restructuring and insolvency. In both the European Insolvency Regulation Recast (EIR 2015) and the proposal for a Preventive Restructuring Directive, the EU legislator makes explicit reference to soft law instruments. Also, the Dutch *Vereniging insolventierecht advocaten* (INSOLAD) and the Dutch national consultative body of supervisory judges in bankruptcy and suspension of payment cases (Recofa) have set soft law standards for practice.

To highlight the rise and impact of soft law instruments, we will explore the meaning and development of soft law instruments in restructuring and insolvency law. From this analysis we observe that soft law instruments are relevant, in practice, as they are used for example by insolvency practitioners, policy makers and courts. The growing group of standard-setting organisations focuses on specific topics, for convergence of law and practice, including cooperation and communication by judges and insolvency practitioners in cross-border insolvency cases, as well as issues pertaining to (preventive) restructuring of distressed companies.

This article is structured as follows: in section two we will introduce the concepts of soft law and standard-setting organisation, in section three this will be related to the field of international restructuring and insolvency law by elaborating on instruments in this area, which is elaborated in section four with an overview of the relevant instruments on cooperation and communication and on restructuring distressed businesses. In section five we discuss various advantages and disadvantages of the use of soft law instruments. Subsequently, in section six, we discuss several examples in order to review the impact that soft law instruments in restructuring and insolvency have. This is followed by a conclusion in section seven.

## 2. Standard-setting organisations in insolvency and restructuring

The development of soft law instruments is apparent in various areas of law, including that of international insolvency law. These texts[1] are commonly referred to as 'soft law' instruments. In this article we first describe what soft law instruments and standard-setting organisations are and, secondly, who drafts such texts in the field of restructuring and insolvency.

### *2.1. Defining soft law instruments*

Often, soft and hard law instruments are distinguished according to whether or not an instrument is (in the strict

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1. In Bob Wessels and Gert-Jan Boon, *Cross-Border Insolvency Law: International Instruments and Commentary*, second edition, Alphen aan den Rijn: Kluwer Law International, 2015, we provide an introduction and an overview of fifty of these texts, including these texts themselves.

legal sense) binding.[2] Hard law is typically thought of as conventions, treaties and domestic laws.[3] Consensus on the meaning of soft law instruments[4] is lacking.[5]

In the international literature Abbott and Snidal propose, for international relations, that hard and soft law are concepts on a continuum with hard law at one end and political arrangements at the other end.[6] Depending on certain traits, an instrument will be considered hard law. This would require the instrument to (i) refer to binding obligations, (ii) provide precise obligations, and (iii) delegate authority for interpreting and implementing the instrument. Here, soft law is the residual category that *'(…) begins once legal arrangements are weakened along one or more of the dimensions of obligation, precision and delegation*.'[7]

To explore the role and influence of soft law instruments, we follow, as a working definition in this article, the previous approach that extends the perception of soft law beyond being merely non-binding.[8] It expands the understanding of soft law and highlights the multi-layered dimensions of soft law instruments and provides different angles for reviewing what the role and impact of these instruments may be.

### *2.2. Drafting soft law instruments*

Soft law instruments are developed by so-called standard-setting organisations.[9] They are also referred to as 'formulating agencies' and are described as organisations with a good reputation and known for their expertise and/or experience. They create soft law instruments with the (direct) involvement of members of a certain sector or field (this may include individuals but also representative organisations) by means of mutual discussion and agreement. Usually, the outcome of their work has no general (legal) binding effect.[10]

Two specific sub-groups of standard-setting organisations can be distinguished. First, we refer to international intergovernmental standard-setting organisations.[11] They are described as '*(…) institutions that create international [soft law] instruments through deliberation, negotiation, and ultimately voting*'.[12] States are usually the main members or participants of these organisations. They are organised and operate in ways that approximate features of domestic legislative institutions, including dividing the work into committees, setting agendas and grant agenda-setting powers to key actors, but also, applying specific voting rules for adoption of soft law instruments.[13] Second, and at the other end of the spectrum, are, what we refer to as, informal standard-setters. The soft law instruments that they develop are not the result of a formal structure or process. This especially concerns gatherings of (insolvency) practitioners, academics and/or judges, assembling best practices. With the general agreement of all parties involved the informal standard-setters can publish their results. They are of a more ad-hoc nature and aim to resolve particular matters. Although these (groups of) individuals may formally not qualify as a standard-setting organisation, they are drivers of soft law instruments.

2. See for instance the different perspectives of legal positivists, rationalists and constructivists as presented in Gregory C. Shaffer and Mark A. Pollack, 'Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance', 94 *Minnesota Law Review* 2010, p. 712ff; Bryan H. Druzin, 'Why does Soft Law Have any Power Anyway?', in: 7 *Asian Journal of International Law* 2017, p. 361.
3. In the area of restructuring and insolvency law, they are considered to have shown disappointing results, see Bob Wessels, *International Insolvency Law, Part I Global Perspectives on Cross-Border Insolvency Law*, Deventer: Wolters Kluwer 2015/10089.
4. In this paper instruments are defined as those texts in which norms and/or standard are included. See also: Dinah Shelton, 'Introduction: Law, Non-Law and the Problem of "Soft Law"', in: Dinah Shelton (ed.), *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System*, Oxford: Oxford University Press, 2000, p. 5.
5. See for instance Gregory C. Shaffer and Mark A. Pollack, 'Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance', 94 *Minnesota Law Review* 2010, p. 706-707 and 712ff. For a more extensive review of international soft law, see Andrew T. Guzman & Timothy Meyer, 'Soft Law', in: Eugene Kontorovich & Francesco Parisi (eds.), *Economic Analysis of International Law*, Cheltenham: Elgar Publishing 2016, p. 123-154 (also available at SSRN: https://ssrn.com/abstract=2437956).
6. Kenneth W. Abbott & Duncan Snidal, 'Hard and Soft Law in International Governance', 54 *International Organization* 3, 2000, p. 422.
7. See Kenneth W. Abbott & Duncan Snidal, 'Hard and Soft Law in International Governance', 54 *International Organization* 3, 2000, p. 421-422; Gregory C. Shaffer and Mark A. Pollack, 'Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance', 94 *Minnesota Law Review* 2010, p. 714.
8. Shaffer and Pollack argue that both the binary perspective and the continuum perspective are right. Ex post, in an enforcement and litigation context, a binary perspective is valid, however, in an ex ante situation they argue that during negotiations the continuum perspective fits better, see Gregory C. Shaffer and Mark A. Pollack, 'Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance', 94 *Minnesota Law Review* 2010, p. 715-716.
9. By some this terminology is applied, in particular, to those organisations that develop industry standards for interoperability, performance or technical standards. See e.g. *Practical Law Glossary*, Thomson Reuters (available at: https://uk.practicallaw.thomsonreuters.com/9-557-1858). We take a broader approach in defining standard-setting organisations, irrespective of the content of a soft law instrument, a 'standard' refers more generally to efforts made by the involved actors with the aim of (international) standardisation and approximation by drafting soft law instruments.
10. See, for instance, Bob Wessels, *International Insolvency Law, Part I Global Perspectives on Cross-Border Insolvency Law*, Deventer: Wolters Kluwer 2015/10003 and 10090.
11. The authors note that the term 'international legislative institutions', as introduced by Guzman and Meyer, seems a *contradictio in terminis*. Since these so-called international legislative institutions produce non-binding instruments the authors suggest referring to this as: 'international intergovernmental standard-setting organisations'.
12. Andrew T. Guzman & Timothy Meyer, 'Soft Law', in: Eugene Kontorovich & Francesco Parisi (eds.), *Economic Analysis of International Law*, Cheltenham: Elgar Publishing 2016, p. 140ff (also available at SSRN: https://ssrn.com/abstract=2437956).
13. Andrew T. Guzman & Timothy Meyer, 'Soft Law', in: Eugene Kontorovich & Francesco Parisi (eds.), *Economic Analysis of International Law*, Cheltenham: Elgar Publishing 2016, p. 140ff (also available at SSRN: https://ssrn.com/abstract=2437956).

## 3. Standard-setting organisations in the field of restructuring and insolvency

There is an increasing body of soft law instruments and more active standard-setting organisations on restructuring and insolvency law. We limit ourselves in this part to the most significant standard-setting organisations. We will discuss and focus on: (i) international intergovernmental standard-setting organisations, (ii) other international standard-setting organisations, (iii) other regional standard-setting organisations, (iv) Dutch standard-setting organisations, and (v) informal standard-setters.

(i) International intergovernmental standard-setting organisations

Important international intergovernmental standard-setting organisations include the United Nations Committee on International Trade Law (UNCITRAL) and the World Bank.[14]

UNCITRAL[15] aims to provide the United Nations with a more active role in reducing differences between national legal systems in the area of international trade. Insolvency law is dealt with predominantly in UNCITRAL Working Group V. The work of this group, comprised of states and non-state observers, has resulted in various soft law instruments.[16] Most significant are the Model Law on Cross-Border Insolvency (1997, with a Guide to Enactment of the same year, which developed into a Guide to Enactment and Interpretation published in 2013) ('Model Law') and the Legislative Guide on Insolvency Law (parts one and two in 2004, part three in 2010, and part four in 2013) ('Legislative Guide').

The Model Law is designed to assist states in equipping national insolvency laws with a harmonised and fair framework for cross-border insolvency cases.[17] The Model Law is limited mainly to procedural aspects of cross-border insolvency cases. It is intended to operate as an integral part of the existing insolvency law in an enacting State, and deals with matters of (i) recognition of foreign insolvency proceedings, (ii) relief, (iii) access for a foreign representative, and (v) cooperation and communication among courts and foreign representatives. To date, the Model Law has been adopted by nearly 50 jurisdictions across the globe, from all continents.[18]

The Legislative Guide developed in three waves, starting in 2004 with a framework for substantive insolvency laws (parts one and two). Provisions on the treatment of enterprise groups in insolvency (part three) and directors' obligations in the period approaching insolvency (part four) were added in 2010 and 2013.[19] The Legislative Guide aims to assist the establishment of efficient and effective legal frameworks to address the financial difficulty of debtors. It is also intended to be used by national authorities and legislative bodies as a reference when preparing new laws and regulations or reviewing the adequacy of existing laws and regulations.[20]

The Netherlands, although represented at these meetings of UNCITRAL, has not adopted soft law instruments from UNCITRAL. However, in 2018 the Minister for Legal Protection announced the setting up of a working group of representatives from practice to review the Dutch legislation on international (non-EU) insolvencies. The minister acknowledges that also in legal doctrine reform of legislation in this regard has been suggested. The soft law instruments of, for instance, UNCITRAL will provide a relevant perspective in reviewing current Dutch international insolvency law.[21]

The World Bank Group[22] is another international intergovernmental standard-setting organisation. It is one of the world's largest sources of funding and knowledge for developing countries. The World Bank has, since the end of the 90s, continued working on (revisions of) a set of principles for sound insolvency systems and for strengthening related debtor-creditor rights in emerging markets. This resulted, since 2001, in several revised versions of the Principles for Effective Insolvency and

14. Other international intergovernmental standard-setting organisations also include: UNIDROIT (in 2013 it published the Principles on the Operation of Close-Out Netting Provisions); G22 (in 1988 it published the Key Principles and Features of Effective Insolvency Regimes).
15. See www.uncitral.org.
16. Besides the instruments discussed in this paragraph, other instruments of UNCITRAL include, for example, the Practice Guide on Cross-Border Insolvency Law (2009), which provides, in particular, guidance on the development of (cross-border) insolvency protocols, (informal) agreements among insolvency practitioners (and courts) on matters pertaining to cooperation and communication in insolvency proceedings. In 2018 the draft Model Law on Insolvency-Related Judgements was finished. This instrument is expected to be adopted by UNCITRAL in 2019.
17. For a more extensive introduction, see e.g. Bob Wessels, *International Insolvency Law, Part I Global Perspectives on Cross-Border Insolvency Law*, Deventer: Kluwer, 2015, par. 10181b-10388.
18. These includes: Eritrea (2000), Japan (2000), Mexico (2000), South Africa (2000), Montenegro (2002), Romania (2002), Poland (2003), Serbia (2004), British Virgin Islands, overseas territory of the United Kingdom of Great-Britain and Northern Ireland (2003), Canada (2005), United States of America (2005), Colombia (2006), Great-Britain (England, Wales and Scotland; 2006), New Zealand (2006), Republic of Korea (2006), Slovenia (2007), Australia (2008), Mauritius (2009), Greece (2010), Uganda (2011), Chile (2013), Seychelles (2013), Vanuatu (2013), Gibraltar (2014), Benin (2015), Burkina Faso (2015), Cameroon (2015), Central African Republic (2015), Chad (2015), Comoros (2015), Congo (2015), Côte d'Ivoire (2015), Democratic Republic of the Congo (2015), Dominican Republic (2015), Equatorial Guinea (2015), Gabon (2015), Guinea (2015), Guinea-Bissau (2015), Kenya (2015), Malawi (2015), Mali (2015), Niger (2015), Senegal (2015), Togo (2015), Singapore (2017), and Israel (2018).
19. For a more extensive analysis see e.g. Bob Wessels, *International Insolvency Law, Part I Global Perspectives on Cross-Border Insolvency Law*, Deventer: Wolters Kluwer 2015/10389-10425kc.
20. Legislative Guide, Chapter I, paragraph 3.
21. *Aanhangsel Handelingen II* 2017/18, 3198, p. 1-2.
22. See www.worldbank.org.

Creditor Rights Systems (World Bank Principles),[23] the latest version being published in 2016.

(ii) Other international standard-setting organisations
In the field of restructuring and insolvency, the organisations mainly consist of practitioners, judges and academics.[24] INSOL International's[25] aim is to compare aspects of national insolvency law between countries, the mutual exchange of information and experience and the building of networks between professional individuals. One of INSOL International's more recent initiatives is the revised Statement of Principles for a Global Approach to Multi-Creditor Workouts II (Statement), published in 2017. It is a set of principles to promote informal restructuring. The Statement comprises eight principles indicating 'best practices' for a company experiencing financial difficulties which also has a large number of (foreign) creditors. The Principles are jurisdiction neutral.

Another international standard-setting organisation is the International Insolvency Institute (III).[26] The III aims to promote and advance international insolvency law, and in particular, to support better cooperation in cross-border insolvency cases. An III Committee on International Jurisdiction and Cooperation drafted Guidelines for Coordination of Multinational Enterprise Groups that were presented in 2013. Whereas, in general, emphasis has been on liquidating rather than restructuring financially overcommitted businesses and single entities rather than enterprise groups, these Guidelines address and incorporate liquidation and restructuring of enterprise groups.[27]

(iii) Other regional standard-setting organisations
For other regional standard-setting organisations we will introduce two organisations active in the European context, INSOL Europe and the European Law Institute (ELI).[28]

INSOL Europe[29] is a European organisation of professionals who specialise in insolvency, business reconstruction and recovery. In 2014 it instigated the development of a (draft) Statement of Principles and Guidelines for Insolvency Office Holders in Europe (INSOL Europe IOH Principles). It sets professional standards for insolvency office holders. Also, in 2015, INSOL Europe presented the Turnaround Wing Guidelines for Restructuring and Turnaround Professionals.[30] This instrument provides guidance for the professional conduct of professionals active in the field of (informal) restructuring.

The ELI[31] aims to improve the quality of European law, understood in the broadest sense. It seeks to initiate, conduct and facilitate research, to make recommendations, and to provide practical guidance in the field of European legal development. In summer 2013, the ELI adopted a project on the Rescue of Business in Insolvency Law, led by prof. em. Bob Wessels and prof. Stephan Madaus. This EU wide study resulted in 2017 in a unanimously adopted Instrument on Rescue of Business in Insolvency Law, with some 115 recommendations to further business rescue laws in Europe.[32]

(iv) Dutch standard-setting organisations
Two prominent standard-setting organisations in The Netherlands are the *Vereniging insolventierecht advocaten* (INSOLAD) and the national consultative body of supervisory judges in bankruptcy and suspension of payment cases (Recofa).

INSOLAD focuses on all matters regarding bankruptcy and restructuring. Its members are lawyers who have taken an oath at the Bar ('advocaten') with at least seven years of practical experience, with a minimum of three years in insolvency law. INSOLAD has developed the INSOLAD (best) practice rules (*praktijkregels*) which provide guidance for insolvency practitioners.[33] The INSOLAD practice rules set (minimum) standards for the conduct of insolvency practitioners, in particular, for

23. These principles were (partially) revised in 2005, 2011 and 2015 (and published in 2016).
24. Another example would be the International Association of Insolvency Regulators (IAIR). This association comprises policy makers and in 2018 developed a set of IAIR Principles, a regulatory regime for insolvency practitioners. See also: www.insolvencyreg.org.
25. See www.insol.org.
26. See www.iiiglobal.org.
27. The III also supported various other projects, some in cooperation with the American Law Institute. This has resulted in the Principles of Cooperation among the NAFTA Countries (ALI NAFTA Principles) in 2003 and in 2012 the Global Principles for Cooperation in International Insolvency Cases and Guidelines. Furthermore, III supported the 2014 EU Cross-Border Insolvency Court-to-Court Cooperation Principles and endorsed in 2014 the Asia-Pacific Informal Workout Guidelines for Promoting Corporate Restructuring in the Region of the Asian Bankers Association.
28. In recent years several regional standard-setting organisations have become actively involved in restructuring and insolvency and have developed soft law instruments. These include, besides INSOL Europe and ELI, the American Law Institute (ALI), Asian Bankers Association (ABA), Asian Business Law Institute, Asian Development Bank (ADB), the Conference of European Restructuring and Insolvency Law (CERIL), the European Bank for Reconstruction and Development (EBRD), and the Nordic-Baltic Insolvency Network.
29. See http://insol-europe.org.
30. In 2007 INSOL Europe endorsed the European Communication and Cooperation Guidelines for Cross-Border Insolvency (CoCo Guidelines) (2007).
31. See www.europeanlawinstitute.eu.
32. The Instrument is available here: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3032309. In 2019 the Instrument and the inventory reports will be published in: European Law Institute, *Rescue of Business in Europe*, Oxford: Oxford University Press (forthcoming). An inventory report on the Netherlands was prepared by prof. Reinout Vriesendorp and Rick van Dommelen.
33. Although the INSOLAD practice rules focus on the liquidator, they can also guide joint administrators where their roles do not differ significantly from that of the liquidator.

those matters that are not covered by law or case law. Although the INSOLAD practice rules state they are of a non-binding nature,[34] the INSOLAD review committee may consider a complaint from a third party against a member based on a violation of the INSOLAD practice rules.[35] It should be noticed that the practice rules are designed as an internal instrument that applies to a limited group of lawyers, who are a member of INSOLAD However, the practice rules aim to fill the gaps where neither the law nor case law provide adequate guidance.[36]

Recofa[37] has developed sets of guidelines that supervisory judges apply with respect to bankruptcy, suspension of payment and personal debt discharge.[38] These guidelines aim to standardise procedural policies among insolvency courts in The Netherlands. The guidelines for bankruptcy and suspension of payment proceedings were last revised as of 1 January 2019. In addition, Recofa developed in 2013 a set of principles on the appointment of insolvency practitioners in bankruptcy and suspension of payment proceedings.

(v) Informal standard-setters

Informal standard-setters have brought forward various instruments. Consider, for instance, the ad-hoc International Working Group on European Insolvency Law that published the Principles of European Insolvency Law in 2003. This set of principles is developed to provide guidance for more convergence of substantive insolvency laws. It provides for the essence of European insolvency proceedings.[39] Another example is the European Communication and Cooperation Guidelines for Cross-Border Insolvency (CoCo Guidelines) (2007), which were drafted by professors Bob Wessels and Miguel Virgós. The CoCo Guidelines provide guidance to insolvency practitioners with regard to their duties under Article 31 of the European Insolvency Regulation 2000 (EIR 2000)[40] to cooperate and communicate.[41] Furthermore, in 2014 the EU Cross-Border Insolvency Court-to-Court Cooperation Principles (EU JudgeCo Principles and Guidelines) were published. They were developed by professor Bob Wessels and dr. Paul Omar and deal with matters of cooperation and communication by judges in cross-border insolvency cases. More recently, a project was conducted by a consortium of universities under the leadership of professor Lorenzo Stanghellini: 'The Contractualised distress resolution in the shadow of the law: Effective judicial review and oversight of insolvency and pre-insolvency proceedings' (CoDiRe). The resulting report of 2018 provides recommendations for (pre-)insolvency proceedings.[42]

The foregoing provides an overview of the growing realm and great variety of standard-setting organisations in restructuring and insolvency. Until recently, the development of soft law instruments in the field of restructuring and insolvency law had been driven by UNCITRAL and the World Bank. They have set important global standards for both procedural and substantive restructuring and insolvency. Currently, more regional and standard-setting organisations are active; they are not intergovernmental organisations, rather groups driven by more (informal) communities of practitioners, judges, academics.

## 4. The rise of soft law instruments on restructuring and insolvency

In this section we elaborate on how soft law instruments are present in the area of international restructuring and insolvency law. We provide an overview of the globally most prominent instruments for two topics. These two topics are current and have received much consideration by standard-setting organisations, they are: (i) cooperation and communication in cross-border insolvency cases, and (ii) restructuring of distressed businesses.

### *4.1. Cooperation and communication in cross-border insolvency cases*

The difficulties in cross-border insolvency cases have driven the need for further cooperation and communication by and between courts and insolvency practitioners.[43] This has been developed and expanded in subsequent soft law instruments over the past decades, including:

- International Bar Association, Model International Insolvency Cooperation Act (1989)
- International Bar Association, Cross-Border Insolvency Concordat (1995);

34. INSOLAD praktijkregels 2011, voorwoord, available at: https://www.insolad.nl/regelgeving/praktijkregels/.
35. See INSOLAD Toetsingsregelement of 15 September 2015, Article 2(1)(2), available at: http://static.basenet.nl/cms/105928/website/Toetsingsreglement.pdf.
36. INSOLAD praktijkregels 2011, voorwoord, available at: https://www.insolad.nl/regelgeving/praktijkregels/.
37. See for more information on Recofa: https://www.rechtspraak.nl/Voor-advocaten-en-juristen/Reglementen-procedures-en-formulieren/Civiel/Insolventierecht/Paginas/Recofa-richtlijnen.aspx. Other instruments and forms are also available here, such as the *Separatistenregeling* (arrangement regarding secured creditors).
38. In developing its guidelines, Recofa cooperates with the Dutch Council for the Judiciary, the Council for Legal Aid and INSOLAD.
39. The principles are available here: https://www.iiiglobal.org/sites/default/files/21-_PEILABIjournal_appended.pdf.
40. Council Regulation (EC) No. 1346/2000 of 29 May 2000 on insolvency proceedings, OJ L160/1.
41. This was a project under the aegis of INSOL Europe, the text is available here: http://www.bobwessels.nl/site/assets/files/2008/coco-text-october-2007.pdf. Currently, the Conference of European Restructuring and Insolvency Law (CERIL) and INSOL Europe are working on a revision of the CoCo Guidelines. See also Reinout Vriesendorp & Paul Omar, 'Communication and Cooperation: The continuing challenge', *Eurofenix* 2017/18 winter, p. 38-39.
42. For more information on CoDiRe, see www.codire.eu. The final report is available here: https://www.codire.eu/publications/stanghellini-mokal-paulus-tirado-best-practices-in-european-restructuring-contractualised-distress-resolution-in-the-shadow-of-the-law-2018-2/.
43. Elizabeth K. Somers, 'The Model International Insolvency Cooperation Act: An International Proposal for Domestic Legislation', *American University International Law Review* 6 (4), 1991, p. 677. Consider specifically also cross-border insolvency cases such as Re Maxwell Communication Corporation plc, [1992] B.C.L.C. 465, and Re Olympia & York Developments Ltd. v. Royal Trust Co (1993), 20 C.B.R. (3d) 165.

- UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation, 1997 (Revised Guide to Enactment and Interpretation, 2013);
- ALI, Transnational Insolvency: Cooperation among the NAFTA Countries: Principles of Cooperation among the NAFTA Countries (2000);
- ALI, Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases (2001);
- CoCo Guidelines (2007);
- UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation (2009);
- ALI and III, Global Principles for Cooperation in International Insolvency Cases (2012) (Global Principles (2012));
- UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective (2013);
- EU Cross-Border Insolvency Court-to-Court Cooperation Principles (2014) (EU JudgeCo Principles (2014));
- The World Bank Principles for Effective Insolvency and Creditor Rights Systems (2016); and
- Judicial Insolvency Network, Guidelines for Communication and Cooperation Between Courts in Cross-Border Insolvency Matters (2017) (JIN Guidelines (2017)).

The early instruments on this topic were developed by the International Bar Association (IBA). In 1989, it presented the Model International Insolvency Cooperation Act and a few years later, in 1995, the Cross-Border Insolvency Concordat. Both are models for incorporation into national laws.[44] They were followed up by the widely adopted UNCITRAL Model Law, which in Chapter IV deals with matters of cooperation (and communication) with foreign courts and foreign representatives.[45] Further details on how courts and insolvency practitioners can cooperate and communicate in cross-border insolvency cases were elaborated in multiple soft law instruments.

Currently, the most relevant soft law instruments on cross-border cooperation and communication would include:[46] (i) the Global Principles (2012), (ii) the EU JudgeCo Principles (2014), and (iii) the JIN Guidelines (2017). The overriding objective of the Global Principles (2012) is to enable *'(…) courts and insolvency administrators to operate effectively and efficiently in international insolvency cases with the goals of maximizing the value of the debtor's global assets, preserving where appropriate the debtors' business, and furthering the just administration of the proceeding*.'[47] Also based on this instrument, but tailored specifically to the EU context, are the EU JudgeCo Principles (2014). Furthermore, the JIN Guidelines (2017) aim to set a global standard for the judiciary, so far adopted by several courts internationally.[48]

### *4.2. Restructuring of distressed businesses*

Whereas, in general, emphasis has been on liquidating rather than restructuring financially overcommitted businesses, various soft law instruments have made recommendations for legislators to improve their restructuring frameworks. Over time, the instruments have become more detailed and in some cases have specifically focused on restructuring. These include:

- Asian Development Bank, Good Practice Standards for Insolvency Law (2000);
- International Working Group on European Insolvency Law, Principles of European Insolvency Law (2003);
- UNCITRAL Legislative Guide on Insolvency Law (2004, 2010, 2013);
- III, Guidelines for Coordination of Multinational Enterprise Groups (2013);
- Asian Bankers Association, Asia-Pacific Informal Workout Guidelines for Promoting Corporate Restructuring in the Region and Model Agreement to Promote Corporate Restructuring: A Model Adaptable for Use Regionally, by a Jurisdiction, or for a Particular Debtor (2013);
- Nordic-Baltic Insolvency Network, Nordic-Baltic Recommendations on Insolvency Law (2015);
- The World Bank Principles for Effective Insolvency and Creditor Rights Systems (2016)
- INSOL International, Statement of Principles for a Global Approach to Multi-Creditor Workouts II (2017);
- ELI, Instrument of the European Law Institute on the Rescue of Business in Insolvency Law (2017) (ELI Instrument on Business Rescue (2017)); and
- Contractualised Distress Resolution in the Shadow of the Law: Effective judicial review and oversight of insolvency and pre-insolvency proceedings (2018) (CoDiRe Project (2018)).

For the European context, the ELI Instrument on Business Rescue (2017) may be of particular relevance. It provides for 115 recommendations on ten substantive topics dealing with businesses in financial distress. It is addressed to European and national legislators, as well as European and national professional bodies to improve existing restructuring frameworks.

44. The Model on International Insolvency Cooperation Act has not been adopted into national insolvency laws. The Cross-Border Insolvency Concordat has been adopted in specific cases, but was superseded by the UNCITRAL Model Law, see: Rosalind F. Mason, 'Cross-Border Insolvency and Legal Transnationalisation', 21 *International Insolvency Review*, 2012, p. 119.
45. See in particular Articles 25-27 Model Law.
46. Also the UK Chancery Guide of 5 May 2017, par. 25.29 highlights these instruments with respect to cross-border court-to-court cooperation and communication, available at: https://www.gov.uk/government/publications/chancery-guide.
47. Global Principle 1.1.
48. These include the US Bankruptcy Court for the District of Delaware, the Supreme Court of Singapore, the US Bankruptcy Court for the Southern District of New York, The Supreme Court of Bermuda, The Chancery Division of England & Wales, the Eastern Caribbean Supreme Court, The Supreme Court Equity Division of New South Wales, the US Bankruptcy Court for the Southern District of Florida, the Seoul Bankruptcy Court, and the Grand Court of the Cayman Islands. For the overview, see: http://www.jin-global.org/jin-guidelines.html.

The foregoing shows that the development of soft law instruments dealing with matters of restructuring and insolvency law is being pursued globally.[49] This includes standard-setting organisations active on almost all continents, although mostly in Europe. We also note that these standard-setting organisations have been increasingly productive. This development has also driven the increased pace at which instruments have been published in recent years. Except for bilateral instruments, there were some twelve international soft law instruments in 2000; this increased to 28 in 2010, 41 in 2015 and some 55 in 2018, a rise of over 400 percent in less than a decade.

## 5. Why bother about soft law instruments?

Drafting and using soft law instruments brings various advantages and disadvantages compared to hard law instruments. This helps the understanding of what soft law instruments are and what role they can play in the area of restructuring and insolvency.
Soft law instruments and their use have various advantages compared to hard law instruments:

*1. More flexibility*. Soft law instruments are not bound in scope, and can extend to topics where political interest or consensus is lacking. Also, they allow for easy (later) ad-hoc adjustments (consider the development of the World Bank Principles),[50] and enable tailor-made solutions (consider the implementation of the Model Law of UNCITRAL).[51]

*2. Drafted and adopted relatively quickly and at lower cost.* The absence of the formalised legislative processes applicable to hard law allows parties to proceed expeditiously.[52] Finalised soft law instruments are directly available to (non-)state actors.[53] In general, it is presumed to be less costly to negotiate them. However, the processes of institutionalised standard-setters in restructuring and insolvency demonstrate that it may take several years before consensus is reached. Consider, for instance, the due process applied by UNCITRAL,[54] where it usually takes several years to draft and adopt an instrument.

*3. A less politicised compromise.* Particularly in the area of international insolvency law, soft law instruments are less politicised than hard law. They are often developed by standard-setting organisations which are composed of experts in the field. Soft law instruments can be the result of stronger participatory governance, as non-state actors can be involved more easily.[55]

*4. Better coordinated action.* The use of soft law instruments resolves coordination deficiencies and problems[56] that may arise on those topics where everybody would benefit from an aligned and coordinated approach. Cross-border insolvency law is the kind of topic where soft law instruments are helpful in setting standards – in the absence of hard law – for example in matters of cross-border cooperation between courts and insolvency practitioners.

*5. No diminishing sovereignty.* States and judges do not lose sovereignty with soft law instruments.[57] They may enable deeper and further cooperation between states, due also to the limited risks regarding enforceability (leaving states with a margin of appreciation), reputation,

49. Compare Bob Wessels, *International Insolvency Law, Part I Global Perspectives on Cross-Border Insolvency Law*, Deventer: Wolters Kluwer 2015/10089.
50. This is in particular reflected in the principles and guidelines in the area of Cooperation and Communication for insolvency practitioners and courts. See for instance the EU Cross-Border Insolvency Court-to-Court Cooperation Principles (2014), that build further on (and tailor to the EU setting) the American Law Institute and International Insolvency Institute, Global Principles for Cooperation in International Insolvency Cases (2012), which in turn were built on (and expanded) the American Law Institute, Transnational Insolvency: Cooperation among the NAFTA Countries: Principles of Cooperation among the NAFTA Countries (2000).
51. Compare Bob Wessels, *International Insolvency Law, Part I Global Perspectives on Cross-Border Insolvency Law*, Deventer: Wolters Kluwer 2015/10089.
52. Dinah Shelton, 'Introduction: Law, Non-Law and the Problem of "Soft Law"', in: Dinah Shelton (ed.), *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System*, Oxford: Oxford University Press 2000, p. 13; Andrew T. Guzman & Timothy Meyer, 'Soft Law', in: Eugene Kontorovich & Francesco Parisi (eds.), *Economic Analysis of International Law*, Cheltenham: Elgar Publishing 2016, p. 135 (also available at SSRN: https://ssrn.com/abstract=2437956).
53. Gregory C. Shaffer and Mark A. Pollack, 'Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance', 94 *Minnesota Law Review* 2010, p. 719; Andrew T. Guzman & Timothy Meyer, 'Soft Law', in: Eugene Kontorovich & Francesco Parisi (eds.), *Economic Analysis of International Law*, Cheltenham: Elgar Publishing 2016, p. 131-132 (also available at SSRN: https://ssrn.com/abstract=2437956).
54. Consider for instance the Model Law (1997), UNCITRAL Legislative Guide (2004, 2010 and 2013), and UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgements (adoption expected in 2019).
55. Dinah Shelton, 'Introduction: Law, Non-Law and the Problem of "Soft Law"', in: Dinah Shelton (ed.), *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System*, Oxford: Oxford University Press, 2000, p. 13 and 19. Compare also: Gert-Jan Boon, 'Harmonising European Insolvency Law: The Emerging Role of Stakeholders', *International Insolvency Review*, 2018/1303, p. 150-177.
56. Andrew T. Guzman & Timothy Meyer, 'Soft Law', in: Eugene Kontorovich & Francesco Parisi (eds.), *Economic Analysis of International Law*, Cheltenham: Elgar Publishing 2016, p. 133-134 (also available at SSRN: https://ssrn.com/abstract=2437956).
57. Kenneth W. Abbott & Duncan Snidal, 'Hard and Soft Law in International Governance', 54 *International Organization* 3, 2000, p. 436; Louise Verill, 'The INSOL-Europe Guidelines for Communication and Co-Operation', in: Bob Wessels and Paul Omar (eds.), *Crossing (Dutch) Borders in Insolvency. Papers from the INSOL Europe Academic Forum and Meijers Institute of the Leiden Law School Joint Insolvency Conference, Leiden, The Netherlands, 5-6 June 2008*, Nottingham, Paris: INSOL Europe 2009, at 43; Gregory C. Shaffer and Mark A. Pollack, 'Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance', 94 *Minnesota Law Review* 2010, p. 719.

and providing a precedent.[58] Very often, instruments have a provision allowing courts to deviate from the instrument when it breaches public policy.[59]

*6. Setting ethical and professional standards.* Compared to hard law instruments, soft law instruments can more easily lay down social ethical norms.[60] Legislators have made use of this, for instance, in Recital 48 of the European Insolvency Regulation 2015 (EIR 2015),[61] which specifically instructs insolvency practitioners and courts when cooperating under the regulation, to make use of soft law instruments on communication and cooperation. Furthermore, the EU proposal for a Preventive Restructuring Directive makes specific reference to the sharing of best practices when training practitioners.[62]

We also note there are, compared to hard law, certain limitations and disadvantages to drafting and using soft law instruments in restructuring and insolvency:

*1. Constrained findability*. There is no central repository or database for instruments in the area of international insolvency law.[63] Some studies have provided an overview of developments in this regard.[64] However, given the high pace at which new soft law instruments are developed, it is complicated to be aware of, especially, new or revised instruments.[65]

*2. Difficulty of interpretation.* A serious problem for interpreting soft law instruments is the diverse, inconsistent, unspecific[66] and sometimes unclear use of language.[67] Many instruments use their own terminology, some develop their own definitions and/or glossary,[68] but this is not always the case.[69] Also, guides to enactment and/or commentaries are valuable for interpreting an instrument.

*3. Ignoring procedural aspects of revisions.* Soft law instruments are often designed as fixed instruments where no procedure is envisaged for revision. Only rarely are they embedded in a governance framework for periodic review.[70] Without revisions, instruments may risk becoming out-dated and losing relevance. Revisions frequently depend on the initiative of certain interested or involved parties.[71]

*4. Non-binding nature.* The effectiveness of soft law instruments is significantly limited by their non-binding nature.[72] Also, the governance framework of soft law instruments is limited: we have found no examples for restructuring and insolvency law that clearly state the consequences for violating the terms of the instrument.[73] Furthermore, it may take considerable time before the impact of soft law instruments becomes apparent. Therefore, some scholars submit that soft law instruments are inferior to hard law.[74]

58. Gregory C. Shaffer and Mark A. Pollack, 'Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance', 94 *Minnesota Law Review* 2010, p. 719.
59. See for instance Model Law, Article 6; Global Principles 3(iii), 7 and 15; EU JudgeCo Principle 2; ALI NAFTA Principle 1.
60. Kenneth W. Abbott & Duncan Snidal, 'Hard and Soft Law in International Governance', 54 *International Organization* 3, 2000, p. 456.
61. Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast) (OJ L 141/19, 5 June 2015).
62. Proposal for a Directive of the European Parliament and of the Council on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30 - Confirmation of the final compromise text with a view to agreement of 17 December 2018, 15556/18, available at: https://data.consilium.europa.eu/doc/document/ST-15556-2018-INIT/en/pdf.
63. Bob Wessels, *International Insolvency Law, Part I Global Perspectives on Cross-Border Insolvency Law*, Deventer: Wolters Kluwer 2015/10089.
64. Bob Wessels and Gert-Jan Boon, *Cross-Border Insolvency Law: International Instruments and Commentary*, second edition, Alphen aan den Rijn: Kluwer Law International 2015.
65. Compare also Louise Verill, 'The INSOL-Europe Guidelines for Communication and Co-Operation', in: Bob Wessels and Paul Omar (eds.), *Crossing (Dutch) Borders in Insolvency. Papers from the INSOL Europe Academic Forum and Meijers Institute of the Leiden Law School Joint Insolvency Conference, Leiden, The Netherlands, 5-6 June 2008*, Nottingham, Paris: INSOL Europe 2009, at 48.
66. Katharina Pistor, 'The Standardization of Law and Its Effects on Developing Economies', 50 *American Journal of Comparative Law* 2002, 97ff; Bob Wessels, *International Insolvency Law, Part I Global Perspectives on Cross-Border Insolvency Law*, Deventer: Wolters Kluwer 2015/10089 and 10116.
67. Bob Wessels, *International Insolvency Law, Part I Global Perspectives on Cross-Border Insolvency Law*, Deventer: Wolters Kluwer 2015/10089.
68. See e.g. Model Law with Guide to Enactment and Interpretation (1997, 2013) and the Legislative Guide (2004, 2010, 2013), but also the Global Principles (2012) and the ELI Instrument on Rescue of Business in Insolvency Law (2017).
69. See e.g. EBRD Core Principles for an Insolvency Law Regime (2004).
70. An exception may be the World Bank Principles for Effective Insolvency and Creditor Rights Systems, which were introduced in 2001 and revised in 2005, 2011 and 2015. The revisions were '[b]ased on the experience gained from the use of the Principles, and following extensive consultations, the publication has been thoroughly reviewed and updated.' An exception, outside insolvency, is the Incoterms. Since 1936 they have been reviewed and adjusted several times, most recently in 2010. See also: https://iccwbo.org/resources-for-business/incoterms-rules/incoterms-rules-history.
71. Consider, for instance, the review of the CoCo Guidelines (2007) by the Conference of European Restructuring and Insolvency Law (CERIL) and INSOL Europe, which are working on a revision of the CoCo Guidelines.
72. Bob Wessels, *International Insolvency Law, Part I Global Perspectives on Cross-Border Insolvency Law*, Deventer: Wolters Kluwer 2015/10089.
73. One of the strongest statements in this respect is included in the ABA Principles provision on Assigning of debts: *'Sellers of debts should ensure that buyers are aware of the Informal Workout Guidelines and that they would be expected to adhere to them.'*
74. Andrew T. Guzman & Timothy Meyer, 'Soft Law', in: Eugene Kontorovich & Francesco Parisi (eds.), *Economic Analysis of International Law*, Cheltenham: Elgar Publishing 2016, p. 123-124 (also available at SSRN: https://ssrn.com/abstract=2437956).

*5. Lack of due process.* Since the process of developing soft law instruments is not regulated, the standing of standard-setting organisations and the working methods they adopt affect the perceived credibility of the instrument(s) they develop. UNCITRAL has set up an extensive set of Rules of Procedure and Methods of Work.[75] In other cases, an ad-hoc process is developed.[76] Standard-setting organisations should put particular emphasis on adopting a process, which may significantly impact the standing of the instrument.

*6. Incompleteness of soft law instruments.* First, the issue of 'incomplete contracts' is difficult to resolve for soft law instruments. They lack a mechanism for interpretation, which is present for hard law.[77] Second, dispute settlement may be more difficult with soft law instruments. Monitoring of compliance with a soft law instrument is usually not present, just as there are no procedures for resolving conflicts. This is different for hard law which is embedded in a larger legal framework involving courts for resolving disputes.[78] These aspects of soft law instruments may lead to higher post-agreement costs for managing, monitoring and enforcing the commitments.[79]

The reasons to develop or to use soft law instruments may be various. The foregoing shows, besides the advantages, several disadvantages in using soft law instruments in the area of restructuring and insolvency. Since soft law instruments are developed and used by legislators as well, we must conclude they are relevant. However, the role of soft law instruments could be improved. Standard-setting organisations should focus on using clear language for ease of interpretation, which can be further benefit from accompanying glossaries or explanatory guides. The development of standards for drafting soft law instruments may be helpful in guiding younger and more informal standard-setters. Practice may also benefit from a better overview of (i) what the important soft law instruments are and where to find them, and (ii) hard law and case law where soft law instruments were involved. In the next section we will elaborate on the extent to which soft law instruments have impacted hard law and case law in the field of restructuring and insolvency.

## 6. Exploring the impact of restructuring and insolvency soft law instruments

In the area of international insolvency there is no global framework and regional frameworks are limited.[80] The alternative, soft law instruments, are of a non-binding nature. This is sometimes explicitly stated in the instrument itself,[81] but this does not imply it has no impact.[82] In this part we will discuss the different ways in which non-binding and non-enforceable soft law instruments have an impact in the field of restructuring and insolvency.

### *6.1. Case law*

In several cases related to restructuring and insolvency, courts have explicitly referred to (international) recommendations made by standard-setting organisations.[83] Soon after the adoption of the Global Principles (2012), they were applied by courts. See for instance the Supreme Court of The United Kingdom, in the Conjoined Appeals in (1) Rubin & Anor v Eurofinance SA & Ors and (2) New Cap Reinsurance Corp Ltd & Anor v Grant and others [2012] UKSC 46 (24), stated that its position was also based on '*(…) the modern approach (…) which is that the jurisdiction with international competence is that of the country of the centre of main interests of the debtor (an expression not without its own difficulties) (…)*' and then referred to the ALI-III Global Principles (2012). Furthermore, the United States Court of Appeals for the Third Circuit (in Re ABC Learning Centres) on 23 August 2013 referred to the Global Principle 1, and cited that '*(…) the overriding objective [is to] enable courts and insolvency administrators to operate effectively and efficiently in international insolvency cases with the goals of maximizing the value of the debtor's global assets, preserving where appropriate the debtors' business, and furthering the just administration of the proceeding.*' Another part of the Global Principles report is cited too: '*[T]he emphasis must be on ensuring that the insolvency administrator, appointed in that proceeding, is accorded every possible assistance to take control of all assets of the debtor that are located in other jurisdictions. Id. at cmt. to Global Principle 24.*' On the Model Law of UNCITRAL

75. See https://uncitral.un.org/en/about/methods/officialdocs.
76. See for instance: Bob Wessels (ed.), *EU Cross-Border Insolvency Court-to-Court Cooperation Principles*, Den Haag: Eleven Publishing 2015, p. 12ff.
77. Gregory C. Shaffer and Mark A. Pollack, 'Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance', 94 *Minnesota Law Review* 2010, p. 718.
78. Gregory C. Shaffer and Mark A. Pollack, 'Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance', 94 *Minnesota Law Review* 2010, p. 718.
79. Kenneth W. Abbott & Duncan Snidal, 'Hard and Soft Law in International Governance', 54 *International Organization* 3, 2000, p. 434.
80. Consider in Latin America the Montevideo Treaty on International Commercial Law (1889); Havana Convention on Private International Law (1928; also: Bustamante Code); Montevideo Treaty on International Commercial Terrestrial Law (1940); Montevideo Treaty on International Procedural Law (1940), in Europe the EIR 2015 (for the EU member states, excluding Denmark), the Nordic Bankruptcy Convention 1933 (latest revision of 1982) (for Denmark, Finland, Iceland, Norway, and Sweden), and for the 17 members of the Organisation pour l'Harmonisation du Droit des Affaire (OHADA) (or: Organisation for the harmonisation of business law), in the central African region, the Uniform Act on Bankruptcy Proceedings (2015).
81. See for instance INSOL Europe IOH Principle 1.1.
82. See, for instance, Dinah Shelton, 'Introduction: Law, Non-Law and the Problem of "Soft Law"', in: Dinah Shelton (ed.), *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System*, Oxford: Oxford University Press 2000, p. 12.
83. See also: Bob Wessels, 'EU Courts Can Rely on Soft Law Principles for Cooperation in International Insolvency Cases', 6 *International Insolvency Law Review* 2015/2, p. 145-160.

there is also extensive case law. This is collected and made available in an online database.[84]

In Dutch case law, references to such international documents have not been found. However, there are some examples where the Advocate-General to the Supreme Court has referred to soft law instruments.[85] Dutch soft law instruments on restructuring and insolvency have been referred to in insolvency cases. The INSOLAD practice rules have been used by creditors and debtors in proceedings against the liquidator.[86] In court, the parties have also relied on instruments from Recofa.[87] Furthermore, in disciplinary proceedings against a lawyer acting as liquidator or joint administrator, the instruments from INSOLAD and Recofa have also been referred to.[88]

### *6.2. Transformation into hard law*

Legislators or courts have taken notice of certain sets of soft law instruments in their policy making. The UK for instance has in its UK Chancery Guide and in its legislative initiative on insolvency and governance referred to soft law instruments.[89] Also, in the light of the cooperation and communication duties under the EIR 2015, the Dutch courts have opened a webpage. Here they elaborate on cooperation and communication, but also refer to soft law instruments, such as the EU JudgeCo Principles.[90] References by these courts will be welcomed in practice. They do not, however, as such alter the nature of such an instrument as being legally non-binding.

Certain standard-setting organisations assist in reviewing and improving insolvency law frameworks based on soft law instruments. Consider the World Bank and UNCITRAL in this regard. The World Bank makes analysis of national laws by performing so-called 'Reports on the Observance of Standards and Codes', which are also performed for insolvency regimes based on its Principles for effective insolvency and creditor/debtor regimes (latest version of 2016). These assessments are also used in assisting countries in the reform of insolvency regimes.[91]

Also, UNCITRAL provides assistance to those countries that are in a processing of adopting legislation based on UNCITRAL instruments.[92] As said, the Model Law has inspired legislation in some 50 jurisdictions. The Model Law has proven to be of significant use in countries with 'obsolete' international insolvency law legislation, for example, Japan and Mexico, both of which are civil law (or non-common law) countries. Some countries stayed very or quite close to the original structure and content (USA and Great Britain), some excluded certain sections (Japan, Mexico) and others build in provisions applying the Model Law on a reciprocal basis, although the nature of these reciprocity provisions varies (British Virgin Islands, Mexico, Romania and South Africa).[93] The EIR 2015 does not deal with cross-border insolvency matters extending beyond a Member State of the European Union (except for Denmark) into a non-Member State. Several of its Member States have adopted the Model Law, including Great Britain.

### *6.3. Extending hard law*

Soft law can act as a stepping-stone for the development of hard law, just as hard law can be elaborated by using

84. See Case Law on UNCITRAL Texts (CLOUT) providing for 118 cases globally, available at: www.uncitral.org/uncitral/en/case_law.html.
85. See for an example: Opinion A-G Huydecoper 28 April 2006, ECLI:NL:PHR:2006:AV0653, at footnote 10, where a reference is made to the (commentary on the) Principles of European Insolvency Law (2003) of the International Working Group on European Insolvency Law. In its judgment, the Supreme Court refers explicitly to several paragraphs of the opinion of the Advocate-General, which includes the aforementioned principles, see HR 28 April 2006, ECLI:NL:HR:2006:AV0653, at 3.4. See furthermore: Opinion A-G Timmerman, 12 April 2013, ECLI:NL:PHR:2013:BY9087, at footnote 7, referring to the UNCITRAL Legislative Guide (2004) and the Principles of European Insolvency Law (2003) of the International Working Group on European Insolvency Law.
86. See District Court Overijssel 4 September 2013, ECLI:NL:RBOVE:2013:2291, at 6.6-6.7. The court based its decision also on the observation that the liquidator – a member of INSOLAD – acted inconsistently with the INSOLAD practice rules. Whereas the District Court of Amsterdam kept it open whether or not the INSOLAD practice rules were binding or only generally guiding (District Court Amsterdam 24 October 2012, ECLI:NL:RBAMS:2012:BY4491, at 4.18-4.19), in 2017 the District Court of Rotterdam stated they are non-binding but can be guiding (District Court Rotterdam 27 July 2011, ECLI:NL:RBROT:2017:5905, at 5.9). In another case at the first instance court in Curaçao, the court approved a pre-pack but ordered the provisional liquidator to adhere to the INSOLAD rules for provisional liquidators, see Court of First Instance 2 February 2017, ECLI:NL:OGEAC:2017:7, at 6.
87. See e.g. Court of Appeal 's-Hertogenbosch 30 January 2014, ECLI:NL:GHSHE:2014:386, at 3.4.4; District Court Rotterdam 21 July 2014, ECLI:NL:RBROT:2014:7099, at 2.7; District Court Den Haag 16 October 2017, ECLI:NL:RBDHA:2017:12289.
88. Violation of the INSOLAD practice rules has been brought forward several times in disciplinary proceedings (see e.g. RvD 's-Hertogenbosch 28 February 2012, ECLI:NL:TADRSHE:2012:YA2614; RvD Rotterdam 9 September 2015, ECLI:NL:TADRSGR:2015:298). The Board of Discipline decided in 2016 that a liquidator who for practical reasons reached out directly to the (director of the) debtor, was not in violation of the INSOLAD practice rules (RvD 's-Gravenhage 12 December 2016, ECLI:NL:TADRSGR:2016:241, at 5.4). For the Recofa guidelines, see e.g. HvD 's-Gravenhage 21 June 2010, ECLI:NL:TADRSGR:2010:YA0985, at 5.8; RvD Arnhem 18 March 2013, ECLI:NL:TADRARN:2013:YA4260, at 5.2 and 5.5.
89. See for instance: UK Chancery Guide of 5 May 2017, par. 25.30, available at: www.gov.uk/government/publications/chancery-guide; UK Government, Insolvency and Corporate Governance, Government Response, 26 August 2018, par. 5.160, available at: www.gov.uk/government/consultations/insolvency-and-corporate-governance.
90. See: https://www.rechtspraak.nl/English/Pages/International-Insolvency.aspx.
91. The assessments are performed by the World Bank, in collaboration with the IMF and UNCITRAL. See for more information: www.worldbank.org/en/programs/rosc.
92. For the technical assistance offered by UNCITRAL, see https://uncitral.un.org/en/TA.
93. See Bob Wessels, 'Will UNCITRAL bring changes to insolvency proceedings outside the USA and Great-Britain? It certainly will!', in: 3 *International Corporate Rescue* 2006, p. 200ff.

soft law.[94] Illustrative is the EIR 2015, which explicitly refers to soft law instruments in Recital 48, stating: '*When cooperating, insolvency practitioners and courts should take into account best practices for cooperation in cross-border insolvency cases, as set out in principles and guidelines on communication and cooperation adopted by European and international organisations active in the area of insolvency law, and in particular the relevant guidelines prepared by the United Nations Commission on International Trade Law (Uncitral).*'[95] Such approaches will, generally, lead to a hybrid of both hard law and soft law instruments.[96] Another example is the proposal for the European Preventive Restructuring Directive which promotes the sharing of best practices in the training of practitioners.[97] Furthermore, case law has also several times referred to soft law instruments on restructuring and insolvency.[98]

Another example is Australia. In 2008 Australia adopted the Model Law in its Cross-Border Insolvency Act. In the years following, this has led to changes in the court rules in several states and territories. For instance, the Court Procedures Rules 2006 of the Australian Capital Territory introduced part 6.15A on proceedings under the Cross-Border Insolvency Act. In 2017 they were amended to include an explicit reference to the Global Principles and the Global Guidelines (2012) of ALI and III.[99] For instance, where a party applies for a form of cooperation (other than under a coordination agreement), they are required to state what provisions of the Global Guidelines would apply.[100]

## 7. Conclusions and suggestions for further research

In this article we have discussed the rise and impact of soft law instruments in the field of restructuring and insolvency law. In section two, we adopted as a working definition of soft law instruments, that it includes those instruments that – contrary to hard law instruments – are weakened on one or more of the following dimensions: (i) it provides binding obligations, (ii) it provides precise obligations, and (iii) it delegates authority for interpreting and implementing the instrument. We observe that the difference between hard and soft law instruments extends beyond the common distinction between binding versus non-binding. We observed that soft law instruments are developed by standard-setting organisations, which are described as organisations with a good reputation and known for their expertise and/or experience.

We highlighted two specific types of standard-setting organisations: (i) those that are composed of governmental members, the so-called international intergovernmental standard-setting organisations (for instance UNCITRAL and the World Bank), and (ii) those where the soft law instrument is the result of a more informal gathering of (insolvency) practitioners, academics or judges, assembling best practices regarding a certain matter and, with the general agreement of all the parties involved, publishing the result, what we have called informal standard-setters.

In section three, we introduced different standard-setting organisations. These include (i) international intergovernmental standard-setting organisations, such as UNCITRAL and the World Bank, (ii) other international standard-setting organisations, such as INSOL International and the International Insolvency Institute, (iii) other regional standard-setting organisations, such as INSOL Europe and the European Law Institute, (iv) Dutch standard-setting organisations, such as INSOLAD and Recofa, and (v) several informal standard-setters. Increasingly, regional standard-setting organisations and informal standard-setters have become active in the area of restructuring and insolvency law, contributing to a process of convergence of insolvency laws.

Subsequently, in section four, we elaborated on the soft law instruments on two current topics: (i) cooperation and communication in cross-border insolvency cases between courts and insolvency practitioners, and (ii) restructuring of distressed businesses (besides liquidation) and to guidance, on matters such as cross-border cooper-

94. Dinah Shelton, 'Introduction: Law, Non-Law and the Problem of "Soft Law"', in: Dinah Shelton (ed.), *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System*, Oxford: Oxford University Press, 2000, p. 14; Louise Verill, 'The INSOL-Europe Guidelines for Communication and Co-Operation', in: Bob Wessels and Paul Omar (eds.), *Crossing (Dutch) Borders in Insolvency. Papers from the INSOL Europe Academic Forum and Meijers Institute of the Leiden Law School Joint Insolvency Conference, Leiden, The Netherlands, 5-6 June 2008*, Nottingham, Paris: INSOL Europe 2009, at 42; Gregory C. Shaffer and Mark A. Pollack, 'Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance', 94 *Minnesota Law Review* 2010, p. 721ff. For an analysis on how soft law elaborates directives in the area of financial law, see M.W. Wallinga, 'De invloed van Europese soft law op privaatrechtelijke normstelling op het gebied van financiële dienstverlening', *NTBR* 2015/40, par. 4.

95. Recital 48 EIR 2015 has also been criticised for its lack of clarity, in particular, as it is unclear which instruments of UNCITRAL are referred to, see e.g. Bob Wessels, 'Article 41-Cooperation and communication between insolvency practitioners', in: Reinhard Bork and Kristin van Zwieten (eds.), *Commentary on the European Insolvency Regulation*, Oxford: Oxford University Press, at 41.12 and 41.38-41.40.

96. Abbott and Snidal present three pathways in which soft laws shift towards harder law in those areas where (international) cooperation is developing: (1) set a framework convention which is legally binding and can be elaborated at a later stage, (2) go for a plurilateral pathway where in time the membership can be extended to others and (3) pursue soft law first and strengthen its legalisation over time. See Kenneth W. Abbott and Duncan Snidal, 'Pathways to International Cooperation', in: Eyal Benvenisti & Moshe Hirsch (eds.), *The Impact of International Law on International Cooperation: Theoretical Perspectives*, Cambridge: Cambridge University Press, 2004, p. 54ff.

97. Article 26(1a) Proposal for a Preventive Restructuring Directive.

98. See e.g. the conjoined Appeals in (1) Rubin & Anor v Eurofinance SA & Ors and (2) New Cap Reinsurance Corp Ltd & Anor v Grant and others) [2012] UKSC 46 (24) and Re ABC Learning Centres of 27 August 2013. For Case Law on UNCITRAL texts, see www.uncitral.org/uncitral/en/case_law.html.

99. See Court Procedures Amendment Rules 2017 (No 3) (No 17 of 2017) – Reg 45, available at: http://www.legislation.act.gov.au/sl/2017-17/default.asp.

100. Court Procedures Rules 2006, 6.15A.10(5)(6)(7). This also applies when the court so decides on its own motion.

ation and communication. From this, we show that the development of soft law instruments that deal with matters of restructuring and insolvency law is pursued globally.

In section five we discussed the various advantages and disadvantages of using soft law instruments. We showed that soft law instruments on restructuring and insolvency law lead to less politicised compromises, provide for more flexibility, and are developed more quickly and at lower cost than hard law. Also, soft law instruments are very suitable for developing ethical and professional standards and their use does not diminish the sovereignty of states and judges. On the other hand, soft law instruments may be subject to serious problems of interpreting their provisions, they may be hard to find and are non-binding or non-enforceable. Also, soft law instruments usually do not provide procedures for revision. They need to develop their own due process for drafting. Furthermore, it may take considerable time before the impact of soft law instruments becomes visible, and when they are used, they may face matters of 'incomplete contracts', such as on monitoring and conflict resolution.

The impact of soft law instruments is discussed in section six. We discuss three ways in which – in the area of restructuring and insolvency - soft law instruments have shown to be relevant. First, case law of the UK and USA has made substantive reference to the Global Principles (2012). Also, Dutch case law has made references to soft law instruments from INSOLAD and Recofa. Second, soft law instruments have also inspired legislators. We have seen reference to soft law instruments in the legislative process in the UK, but most notable is the adoption of the Model Law of UNCITRAL in some 48 jurisdictions worldwide. Based on their soft law instruments, UNCITRAL, as well as the World Bank, assist countries in such legal reforms of insolvency frameworks. Third, legislators have extended their hard law regimes by including explicit references to soft law instruments. Within Europe, the EIR 2015 provides for a reference to soft law instruments on cooperation in cross-border insolvency cases. Consider also the proposed Preventive Restructuring Directive promoting the sharing of best practices in the training of practitioners.

Based on this, we emphasise that soft law instruments can have several roles with respect to hard law instruments. They can (i) complement existing hard law, (ii) be an alternative to hard law, or (iii) conflict with existing hard law (or even soft law). Still, it must also be considered that despite their disadvantages, there has been a significant increase in the number of soft law instruments dealing with international restructuring and insolvency law, more than fifty to date. The sheer number already both signals the interest in soft law (by organisations and by addressees, such as insolvency practitioners and courts) and recognises their relevance.

Study of the full body of these soft law instruments is complicated given the practical difficulties in finding them and the further complexities in assessing their practical impact and relevance. Therefore, we suggest two questions for further research, in particular addressed to (insolvency) practitioners and judges.[101] First, what are their experiences with regard to the advantages and disadvantages of soft law instruments? Second, to what extent are soft law instruments used, more specifically, to what extent is there awareness of the growing body of soft law instruments, to what extent are they used in practice and/or implemented? Responses to these questions will certainly add practical and considerate arguments to a better use of soft law instruments in this area. They will support a better understanding of the development and use of soft law instruments in international restructuring and insolvency law.

101. We invite all with an interest in the subject to respond. Responses will be gratefully received by the corresponding author, Gert-Jan Boon, at j.m.g.j.boon@law.leidenuniv.nl.