

Bob Wessels

Teaching and research in international insolvency law: challenges and opportunities



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Teaching and research in international insolvency law: challenges and opportunities.

Valedictory lecture by

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**Universiteit
Leiden**

Mister Chancellor of the University, mister Dean of the Faculty of Law, dear colleagues, ladies and gentlemen,

1. Having graduated as a lawyer forty years ago, I had already been working in legal practice for seven years when Joseph Becker wrote in the American Journal of Comparative Law: ‘... Transnational Insolvencies are rare birds. They pass through the court in sudden flights once or twice a generation’.¹ A decade later, in 1991, when I did my first teaching in New York, large insolvency cases started to pile up: Trans World Airlines (TWA) filed for Chapter 11², Olympia & York, a major Canadian international property development firm, that build large office complexes like Canary Wharf in London and the World Financial Centre in New York City, went down³, and in the same year Maxwell Communications Corporation plc, a leading British media business, listed on the stock exchanges of London and New York, entered insolvency following the unresolved death of media-tycoon Robert Maxwell.⁴ Many small businesses suffered from the liquidation of The Bank of Credit and Commerce International (BCCI), a major international bank, registered in Luxembourg with head offices in Karachi and London, which operated in over seventy countries, had over 400 branches, and had assets in excess of US\$ 20 billion, making it at that time the 7th largest private bank by assets in the world. BCCI came under the scrutiny of numerous financial regulators due to concerns that it was poorly regulated. Subsequent investigations revealed that it was involved in large money laundering and related financial crimes for which reasons BCCI became the target of a massive regulatory battle in 1991. On 5 July of that year customs and bank regulators in seven countries raided the bank and locked down records of its branch offices.⁵ The rest of the BCCI case, now known as the Bank for Crooks and Criminals International, is history.⁶ The liquidation came to an end in 2012⁷, and the liquidation proceedings in Luxembourg, Cayman Islands, England and United Arab Emirates were finally closed mid last year.⁸ So it is no surprise that in the mid 90s Jay Westbrook wrote for a US audience: ‘Like the wail of a high

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1 Joseph D. Becker, Transnational Insolvency Transformed, in: 29 American Journal of Comparative Law 1981, 706ff.

2 <http://web.archive.org/web/20010407233345/twacargo.com/about/history.html>.

3 http://en.wikipedia.org/wiki/Olympia_and_York.

4 http://en.wikipedia.org/wiki/Robert_Maxwell. See *Maxwell Communications Corp.*, [1992] B.C.L.C. 465; 170 B.R. 800 (Bankr. S.D.N.Y. 1994); *Aff’d* B.R. 807 (Bankr. S.D.N.Y. 1995); 593 F.3d 1036 (2nd Cir., 1996). Compare Evan D. Flashen and Ronald J. Silverman, The Role of the Examiner as Facilitator and Harmonizer in the Maxwell Communications Corporation International Insolvency, in: Jacob S. Ziegel (ed.), *Current Developments in International and Comparative Corporate Insolvency Law*, Oxford: Clarendon Press 1994, 621; Evan D. Flashen and Ronald J. Silverman, *Maxwell Communication Corporation plc: The Importance of Comity and Co-operation in Resolving International Insolvencies*, in: E. Bruce Leonard and Christopher W. Besant (eds), *Current Issues in Cross-Border Insolvency and Reorganisations*, London: Graham & Trotman and International Bar Association 1994 (International Bar Association Series), 41; Burkhard Jörg Göpfert, In re Maxwell Communications - ein Beispiel einer “koordinierten” Insolvenzverwaltung in parallelen Verfahren, in: *Zeitschrift für Zivilprozessrecht (ZZP)* Int 1, 1996, 269ff; Jay Lawrence Westbrook, The Lessons of Maxwell Communication, in: 64 *Fordham Law Review* 1996, Issue 6, Article 3, available via <http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=3277&context=flr>.

5 http://en.wikipedia.org/wiki/Bank_of_Credit_and_Commerce_International.

6 See Hal S. Scott, Multinational Bank Insolvencies: The United States and BCCI, in: Jacob S. Ziegel (ed.), *Current Developments in International and Comparative Corporate Insolvency Law*, Oxford: Clarendon Press 1994, 733ff; Bob Wessels, Protection of Small Depositors against Banks in Distress, in: Bob Wessels, *Current Topics of International Insolvency Law*, Deventer: Kluwer 2004, 329ff, with a commentary on the Directive on deposit-guarantee schemes (Directive 94/19). The European Commission has proposed to create a common European deposit guarantee scheme as the third leg of the Banking Union, but this seems - mid April 2014 - too ambitious politically, thus M. Haentjens, Work of International Organizations on Bank Recovery and Resolution: an Overview, in: Matthias Haentjens and Bob Wessels (eds), *Bank Recovery and Resolution. A Conference Book*, The Hague: Eleven International Publishing 2014, 1ff, at 5.

7 <http://www.theguardian.com/business/2012/may/17/files-close-bcci-banking-scandal>.

8 <http://www.bcci.info/>.

speed train in the night, the field of transnational and comparative insolvency has come suddenly upon us, transformed from a distant possibility into a surrounding effect ...⁹

2. But these cases have not stopped in the 90s. In this century global business is pushing on, and so the portion of financial distress. Now, in 2014, we know that the ten largest US bankruptcy cases (measured by asset value) only took place from 2000 onwards, for instance Enron, General Motors, Chrysler, and of course, the largest of all: Lehman Brothers.¹⁰ In Europe, the firestorm of international financial distress also has had its structural influences. Cases such as Stanford Bank, the wizard of lies Bernie Madoff¹¹ and in the Netherlands Icesave and DSB Bank, just to name a few, have had large consequences. Since the entry into force of the European Insolvency Regulation (EIR) in 2002, several high profile cases could be resolved reasonably well, for instance Eurofood, Collins & Aikman and Nortel Network.¹²

Therefore, compared with some thirty-forty years ago, the landscape of insolvency cases with international effects has changed drastically.

3. My lecture this afternoon is about many of these cases, it is the area of international insolvency law. But as I am saying farewell to academia, I will only deal with these cases in the context of teaching and research. First, let me say a few words on teaching. Some of you gathered here this afternoon preceding this lecture, discussed problems and opportunities in doing international teaching. An intense foreign teaching experience I had was in 1998 when I was working for the World Bank in Tbilisi, Georgia. After a period of some seventy years of communism Georgia wished to return to the insolvency laws it had known in the pre-communism period, which was an insolvency law very much influenced by the German Insolvency Act.

What I have learned here is to speak and interact with a translator, because by the generation of judges in Georgia in my classroom, the languages spoken were only Georgian and Russian. What I learned too is that being a judge in Georgia some sixteen years ago, with a limited salary, you would at least have a second job (as a teacher, a doorman or a taxi driver) to make ends meet. What I learned also was how to live and do lectures for a week without having a suitcase, as my luggage including a large part of my lectures, stayed behind in London. And I learned to prepare lectures in a hotel where the light was interrupted as a result of lack of energy or other external factors, such as the bombing of the car of president Shevardnadze. So if you go to Georgia bring your flashlight or some candles and matches!

4. In the same year I also went to Jakarta, Indonesia, on behalf of the IMF. After the dramatic fall of the rupiah, the IMF supported the Indonesian economy with large sums of money. One of the conditions was that Indonesia would get rid of its ancient *Faillissements Verordenen*, a 1905 version of the Dutch Bankruptcy Act which was enacted in the Netherlands nine years before, in 1896. Indonesia at that time was still a Dutch colony. The *Verordenen* never had been translated in the Bahasa Indonesia language and had become fully out of use. A new Indonesian Bankruptcy Act had been put in place in just a couple of months of early 1998 and practitioners

9 Jay L. Westbrook, Creating International Insolvency Law, in: 70 American Bankruptcy Law Journal 1996, 563.

10 The website: www.businessinsider.com/largest-bankruptcies-in-american-history-2011-11?op=1 lists the largest 'bankruptcies' ranked by the value of each company's assets before its bankruptcy filing: 1. Lehman Brothers (Filed Chapter 11: 2008; Value at bankruptcy: \$ 691 billion), 2. Washington Mutual (2008; \$ 327.9 billion), 3. WorldCom (2002; \$ 103.9 billion), 4. General Motors (2009; \$ 91 billion), 5. CIT Group (2009; \$ 80.4 billion), 6. Enron (2001; \$ 65.5 billion), 7. Consecro (2002; \$ 61.4 billion), 8. MF Global (2011; \$ 41 billion), 9. Chrysler (2009; \$ 39.3 billion), 10. Thornburg Mortgage (2009; \$ 36.5 billion), 11. Pacific Gas & Electric Co (2001; \$ 36.15 billion).

11 Diana Henriquez, The Wizard of Lies: Bernie Madoff and the Death of Trust, Times Books, 2011.

12 For these and many other cases, see Bob Wessels, International Insolvency Law (Wessels Insolvency Law Volume X), Deventer: Kluwer, 3rd. ed., 2012.

and judges needed training.¹³ What I learned here is that you should be cautious to leave your hotel when in the post-Suharto Habibi-period riots were ongoing. Where I also became aware of is that what the Dutch see as a solid Bankruptcy act, does not work in a social and culture environment where creditors do not force their debtors to pay, let alone ultimately starting insolvency proceedings against them. I also learned another thing. When teaching judges of the Supreme Court in Indonesia I could use English, and I was surprised, when during lunch several of the senior judges came to me and said in impeccable Dutch ‘... *kunt u de groeten doen aan professor zus en zo, want ik studeerde bij hem in 1964 in Leiden*’ (can you give my regards to professor such and so as I studied in Leiden in 1964). A superb indication that the Leiden University name works as a solid brand in this part of the world!

5. Although it may be a good time to tell some war stories from around thirty countries or so where I worked, did research or where I lectured, that is not my intention today. What I would like to do is to introduce you in some of the international turnaround, rescue and insolvency research Leiden Law School is involved in. The reason for choosing this topic the interest Leiden Law School colleagues and master students have shown for this research. Today is a good occasion to inform a larger audience. Let me explain.

6. In August last year, my colleagues of the Leiden Institute for Private Law, prof. Matthias Haentjens and dr. Caspar van Woensel, together with some younger colleagues, organised an institute-wide retreat in *Biezenmortel*, in the Southern part of the Netherlands, on new topics in our field, such as distance learning, research into improving the effect of education, improving the assessment of students’ writings and what was called ‘*academisch ondernemen*’, which may translate as ‘entrepreneurial spirit in academic research’. For the latter topic I was invited, together with dr. Jean-Pierre van de Rest of the department of Business Studies.

I am not sure whether the organisers aimed to curb my enthusiasm for the subject by organising it in a former Roman Catholic convent, but from our experience during the workshop we learned that larger groups of Leiden Law School scholars showed a great interest in expanding their know how and skills in trying to attract (what we call) second and third party (not university related) private funding for research.

7. In December 2013, the Leiden Law School Turnaround, Rescue & Insolvency research team organised a public briefing about its on-going international and comparative research in these areas of rescue and insolvency of (cross-border) businesses. For Dutch lawyers topics of research are obviously substantial in nature, but they also include the roles and responsibilities of key role players, such as insolvency administrators, courts and the legislature. Since 2012 these fields of research are sponsored by for instance the European Commission (its Action grant programme), the European Law Institute, Insol Europe, the American Bankruptcy Institute, the International Insolvency Institute and the World Bank. Our research includes well structured and substantial cooperation between researchers of the Leiden Law School (of some six people) and universities in Amsterdam (University of Amsterdam), Halle-Wittenberg, London (University College London), Nijmegen, Nottingham, Oxford and we hope in the near future Cologne. We as a group encounter the unique experience in doing our independent analysis, in all with over hundred non-Dutch academics, judges and insolvency practitioners from around 15 EU Member States, the USA and Canada (some of them are here, which I greatly appreciate).

¹³ See Bob Wessels, Towards a New Indonesian Bankruptcy Law, in: International Insolvency Review, Winter 1998, Vol: 7, Issue: 3, 171ff. A proposal to create professional rules for insolvency office holders has been made in vain, see Bob Wessels, Insolvency practitioner in Indonesia: some thoughts on professional conduct and ethics, in: Indonesian Law and Administration Review, Special issue ‘The economic crisis and Indonesian bankruptcy law reform’, Volume IV 1998, no. 1, 27ff.

In addition we learned from several Leiden master-students doing an internship for five weeks in our research projects, that they were exited about the experience and learning effect of their work.¹⁴

8. Allow me to explain a bit further what I see as academic entrepreneurship.

I think that in the present day competitive environment of Dutch Law Schools, it must be taken as a matter of course that senior scholars should be active in promoting their School and their work. Generally, being active can be differentiated in two ways: (i) be generally active in your work for the law faculty, and (ii) as the convent-organisers made public: Bob Wessels has much experience with attracting funds.

9. Evidently, the first characteristic is or should be in the genes of every scholar, being active in teaching and research, for instance by providing post-graduate training, editorships of books or law reviews, writing commentaries on court cases, membership of advisory committees, or becoming an expert advisor for new national or European legislation. I admit that these last positions are not available for all. In addition, for a law professor, the supervision of PhD dissertations is a core activity. Until now I was, what the Dutch call 'promotor' of nine PhD research projects, and presently in Leiden I am supervising five PhD's. It's a pleasure to see some of my former PhD students, now doctors, or candidates present.

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10. The suggested capability of attracting funds is less dismal or trivial as it sounds. As a matter of fact it should be seen more broad, resulting in four groups of activities with the aim:

- (i) To create the conditions and facilities for academic training and research in a field where these were still in their infant shoes;
- (ii) To carry the banner of international insolvency law as a prime course subject within the field of company law, as in 2007 Leiden was - as far as I am aware - the first law faculty in Europe (!) with a chair specifically devoted to international insolvency law;
- (iii) To develop research and academic treatment of the subject, and
- (iv) To further professional practice.

11. Further to these goals allow me to present a small picture of my work for the Leiden Law School over the last seven years as a professor for international insolvency law, a chair I accepted with my inaugural lecture in the *Hooglandse Kerk* on 'Judicial Coordination of Cross-border Insolvency Cases'.¹⁵ Together with Miguel Virgós (a professor in Madrid) and Paul Omar (now a professor in Nottingham) we created in 2007 the European Communication and Cooperation Guidelines for Cross-Border Insolvency (also known as the CoCo Guidelines).¹⁶ Our work, the CoCo Guidelines, have assisted several courts and practitioners, most notably

14 Since February 2014 the research group maintains a website, see www.tri-leiden.eu.

15 Bob Wessels, Judicial Coordination of Cross-border Insolvency Cases, Inaugural lecture, University of Leiden Law School, 6 June 2008, Deventer: Kluwer 2008, 47 pp. Several texts that follow have been derived from earlier publications or draft research, discussed with others, but not published yet in its final form.

16 Bob Wessels and Miguel Virgós, European Communication and Cooperation Guidelines for Cross-Border Insolvency, INSOL Europe, 2007. These Guidelines are explained in e.g. Bob Wessels and Miguel Virgós, Accommodating Cross-border Coordination: European Communication and Cooperation Guidelines For Cross-Border Insolvency, in: International Corporate Rescue, Vol. 4, Issue 5, 2007, 250ff. The European Communication & Cooperation Guidelines for Cross-border Insolvency ('CoCo Guidelines') of 2007 aim to provide rules to be applied by insolvency administrators within their duties to communicate and cooperate in cross-border insolvency instances to which the EU Insolvency Regulation is applicable. Their reception has been welcomed by scholars (e.g. Mario Hortig, *Kooperation von Insolvenzverwaltern*, Schriften zum Insolvenzrecht, Diss. Köln, Band 25, Baden-Baden: Nomos 2008: '... it is to be

the leading administrators in the Lehman Brothers case to draft a protocol on coordination of work in nearly all jurisdictions proceedings were pending.¹⁷ Together with Bruce Markell (till last year a judge in Arizona, USA, now a professor at Florida State University) and Jason Kilborn (now a professor at John Marshall Law School in Chicago) I wrote the book 'International Cooperation in Bankruptcy and Insolvency Matters', published by Oxford University Press, New York, in 2009.¹⁸ The book has served as the basic reading material for my Leiden students for the last five years. It has been available for free. And you know, having something without costs touches the heart of every Dutchman. In 2009, some twelve selected Leiden students were fortunate to follow special Honours Classes. With funding of some € 12,000 from the University of Leiden we could organise separate classes with five non-Dutch professors and judges.¹⁹ It is rewarding to see some of these students, much more mature now, here this afternoon. In spreading the gospel of international insolvency law, I have been a visiting professor in e.g. Frankfurt, New York (at St. John's) and Riga (Latvia),

expected that the Guidelines will develop to the European standard of cooperation', at 258), and insolvency practitioners (Stephen J. Taylor, *The Use of Protocols in Cross Border Insolvency Cases*, in: Pannen (ed.), *European Insolvency Regulation*, Berlin: De Gruyter Recht, 2007, 678ff ('highly laudable initiative', at 681); Lars Westpfahl, Uwe Goetker, Jochen Wilkens, *Grenzüberschreitende Insolvenzen*, Köln: RWS Verlag, 2008 ('extremely helpful', p. 125); Louise Verrill, *The INSOL Europe Guidelines for Cross Border Communication*, in: Bob Wessels and Paul Omar (eds), *Crossing (Dutch) Borders in Insolvency*, Nottingham, Paris: INSOL Europe 2009, 39ff ('[it is] important for the professions to be aware of and understand the need to adopt the CoCo Guidelines', at 45). See also Andreas Geroldinger, *Verfahrenskoordination im Europäischen Insolvenzrecht. Die Abstimmung von haupt- und Sekundärinsolvenzverfahren nach der EuInsVO*, Veröffentlichungen des Ludwig-Boltzmann-Institutes für Rechtsvorsorge und Urkundenwesen, Manzsche Verlags- und Universitätsbuchhandlung, Wien, 2010, p. 31, qualifying the CoCo Guidelines as a first and by all means very promising attempt (*Ein erster durchaus vielversprechender Versuch*). See also Paul H. Zumbro, *Cross-border Insolvencies and International Protocols - an Imperfect but Effective Tool*, in: 11 *Business Law International* no. 2, May 2010, 157ff, at 167 ('The CoCo Guidelines reflect best practices both inside and outside Europe'); Patrick E. Mears and Timothy S. McFadden, *Court-to-Court Communications, Reform of European Regulation*, *ABI Journal*, October 2012, at 33ff. For an in depth analysis of the CoCo Guidelines, see Olaf Benning, *International Prinzipien für grenzüberschreitende Insolvenzverfahren*, Schriften zum Verfassungsrecht, Band 45, Frankfurt: Peter Lang 2013, stressing another aspect, in that the CoCo Guidelines also can be used to trace European or even global principles for cross-border insolvency proceedings (...um Europaweit oder sogar weltweit geltenden Prinzipien für grenzüberschreitende Insolvenzverfahren zu ermitteln'), at 83.

- 17 The CoCo Guidelines have indeed been used in the draft of February 2009 of the Cross-Border Insolvency Protocol for the Lehman Brothers Group of Companies, which governs the conduct of Lehman Brothers Holdings Inc. ('LBHI') and its affiliated debtors worldwide. The draft refers to several other bits of soft law and to several Protocols of international cases, which are reflected in the Draft. It specifically refers to CoCo Guidelines 3 (Status), 17 (Notices) and 12.1 ('Liquidators are required to cooperate in all aspects of the case'). The annotated Draft for the Lehman Brothers Group of Companies is available via www.bobwessels.nl, weblog: Archive 2006-2013, document 2009-02-doc7. The protocol which was approved by the New York Bankruptcy Court (Southern district) is available via: <http://chapter11.epiqsystems.com>. See U.S. Bankruptcy Court for the Southern District of New York, *Case No 08-13555* (17 June 2009). The Protocol has been signed by 10 of the official representatives of (companies of) Lehman Brothers Group in Australia, the Netherlands, the Netherlands Antilles, Germany, Hong Kong, Luxembourg, Singapore, Switzerland and USA. Official representatives of Bermuda and Japan were in 2012 still considering signing the protocol, but have participated in a series of activities and meetings designed to advance the objectives of the Protocol. Only the administrators of a number of UK based companies did not sign the protocol. They argued that they were in favour of cooperation, but were required by UK law to treat each insolvent entity as a separate one. See: Bankruptcy report number 3 (22 July 2009) and number 5 (12 March 2010), available at the website www.lehmanbrotherstreasury.com (as at 29 April 2014). In the case concerning Bernard L. Madoff Investment Securities LLC several protocols have been concluded. See for an example <http://www.iiiglobal.org/component/jdownloads/finish/573/4344.html>.
- 18 Bob Wessels, Bruce A. Markell and Jason J. Kilborn, *International Cooperation in Bankruptcy and Insolvency Matters*, Oxford University Press Inc., New York, 2009, XVI and 268 pages.
- 19 See for papers and students' reports of discussions: Anthon Verweij and Bob Wessels (eds), *Comparative and International Insolvency Law. Central Themes and Thoughts*, Nottingham, Paris: INSOL Europe 2010.

the Riga Graduate School of Law. In 2011, with Leiden PhD researcher Anthon Verweij, we established the Netherlands Association for Comparative and International Insolvency Law, now with over 170 members.²⁰ To end this *selfie* of my past work, may I highlight my work with my University College London colleague Ian Fletcher, who is today celebrating its 40th honeymoon with his wife Letitia and therefore could not be here. After several years of work Ian and I published in 2012 the report ‘Global Principles for Cooperation in International Insolvency Cases’, presented to the American Law Institute and the International Insolvency Institute (III).²¹ We also wrote ‘Harmonization of Insolvency Law in Europe’, the 2012 report for the Dutch Association of Civil Law.²² And with professors Janis Sarra from the University of British Columbia, Vancouver, Canada, André Boraine, University of Pretoria, South Africa, Rosalind Mason, Professor Queensland University of Technology, Brisbane, and prof. Ray Warner, St. John’s University in New York we introduced in 2008 a postgraduate certification programme, the INSOL International Global Insolvency Practice Course, which includes an on-line real time virtual restructuring module with courts in New York, Toronto, London and several other courts. This endgame is the great finale to this learning experience, one of the Dutch Insol Fellows, ABN Amro’s Johan Jol, told me.

12. OK. That’s the past. Turn the page.

Let me make a few remarks on comparative and international research in which the Leiden Law School currently is involved. I generally explain these themes here and limit myself to three projects.

One theme is for legal scholars a traditional one, it is related to substantive law. The core question is: how can we solve the conflict between principles of contract law and corporate law with evolving principles of insolvency law. It is a theme I touched upon earlier²³, but this time within a research project initiated by the European Law Institute.

The other two themes, I think, are the result of a distinctively different approach to harmonisation of (substantive and procedural) laws and are looking at the organisational structure within which such laws operate. For matters of insolvency the most important actors in nearly any insolvency proceeding in Europe, more specifically the court and the insolvency office holder, have well extended roles, based on or limited to the provisions of domestic law as well as provisions in the EU Insolvency Regulation. With organisational

20 For its activities, see www.nacill.org.

21 See for the full text <http://www.iiiglobal.org/component/jdownloads/finish/557/5932.htm>. Also referred to as: (June 2012) Global Principles Report. The Global Principles build further on the American Law Institute’s Principles of Cooperation among the member-states of the North American Free Trade Agreement (the ‘ALI/NAFTA Principles’). These Principles were evolved within the American Law Institute’s Transnational Insolvency Project, conducted between 1995 and 2000, for which the Reporter was Professor Jay L. Westbrook, with the objective to provide a non-statutory basis for cooperation in international insolvency cases involving two or more of the NAFTA states, consisting of the United States, Canada and Mexico.

22 Ian F. Fletcher and Bob Wessels, *Harmonization of Insolvency Law in Europe*, Preadvies 2012 uitgebracht voor de Vereniging voor Burgerlijk Recht, Deventer: Kluwer 2012, 135 pp.

23 In my 5th Edwin Coe Lecture, held in Brussels in October 2012 during the Annual Congress of INSOL Europe Academic Forum, I have submitted that with ‘insolvency’ being one of the essential pillars upon which the internal market (in the meaning of Article 114 TFEU) rests, one presently lacks clear concepts, terms and norms as well as guiding principles. This results in the present rather fragmented and inconsistent nature of European insolvency law. The challenge is to understand and to articulate the paradigm shift in insolvency, from the sacrosanct ‘pay what you owe’ to the balanced promotion of the continuity of businesses in distress (and reintegration of over-indebted consumers into society). Overarching and guiding principles must fit in the overall legal structure for an internal market. More specific, European insolvency law’s substantial and procedural forms should be brought into alignment with norms and principles which are predominant in non-insolvency law area. See Bob Wessels, *On the future of European Insolvency Law*, INSOL Europe Academic Forum’s 5th Edwin Coe Lecture, in: Rebecca Parry (ed.), *European Insolvency Law: Prospects for Reform*, INSOL Europe, Nottingham Paris, 2014, 131ff.

structure I mean a country's insolvency governance system in an individual case (the allocation of functions between courts and liquidators, including the legal and operational relationships between them, based on law and additional regulations) as well as a country's institutional system, merely related to the requirements to fulfil these actors' functions, including professional and ethical rules that apply to them. Where a solid contract or a smooth merger largely depends on the good work of a professional involved (a contract drafter or an M&A specialist), a successful insolvency proceeding is heavily dependent on a skilled and experienced insolvency office holder and an efficient and experienced court. Indeed, as has been submitted by Westbrook: 'In the field of insolvency there are two actors whose integrity and experience are central to the functioning of the insolvency system: judges and administrators'.²⁴

(i) European Law Institute: Business rescue

13. First, the substantial theme. In September 2013 the European Law Institute has approved a project in the field of insolvency and company law, namely Business rescue.²⁵ The Institute has appointed prof. Stephan Madaus (University of Halle-Wittenberg), present today, dr. Kristin van Zwieten (from Oxford University) and myself as project reporters. The ultimate aim is to design a set of norms and requirements that will enable the further development of coherent and functional rules for business rescue in Europe. The project is to be carried out over a period of thirty months. During its first year - meaning this year 2014 - some twenty-five National Correspondents (NCs) will draft inventory reports on their respective national insolvency laws, based on a detailed questionnaire which has been prepared by the project reporters last month. NCs are experts from a selected group of thirteen different European countries which each represent different approaches to insolvency law. Some topics that will be covered in those reports include: the governance and supervision of in-court and out-of-court rescue, special protection for financing a rescue, treatment of executory contracts, ranking of creditors' claims, avoidance powers, restructuring plans, special arrangements for small and medium sized enterprises (SMEs), and the position of turn around advisors and insolvency office holders and courts.

In addition to these national reports, an inventory report on international recommendations from standard-setting organizations, such as the World Bank and UNCITRAL, will be drafted. For this work a former Leiden Law School student, Gert-Jan Boon, has joined our team as a junior researcher.

24 Jay Lawrence Westbrook et al., *A Global View of Business Insolvency Systems*, The World Bank, Washington DC, 2010, 203. The view of my former Leiden Law School colleague Martijn Polak, now a member of the Supreme Court of the Netherlands, expressed in his valedictory *IPR-abracadabra: Internationaal privaatrecht voor tovenaars, hogepriesters en mandarijnen*, Leiden, 2013, that the introduction of classes on International Insolvency Law, unless preceded by a thorough training in private international law, should be met with scepticism (p. 11), is therefore too narrow. It is too limited also as within international insolvency 'soft law' is of utmost importance, as will be explained later.

25 The European Law Institute (ELI) is an independent non-profit organisation established to initiate, conduct and facilitate research, make recommendations and provide practical guidance in the field of European legal development. Building on the wealth of diverse legal traditions, its mission is the quest for better law-making in Europe and the enhancement of European legal integration. By its endeavours, ELI seeks to contribute to the formation of a more vigorous European legal community, integrating the achievements of the various legal cultures, endorsing the value of comparative knowledge, and taking a genuinely pan-European perspective. As such its work covers all branches of the law: substantive and procedural; private and public. ELI is committed to the principles of comprehensiveness and collaborative working, thus striving to bridge the oft-perceived gap between the different legal cultures, between public and private law, as well as between scholarship and practice. To further that commitment it seeks to involve a diverse range of personalities, reflecting the richness of the legal traditions, legal disciplines and vocational frameworks found throughout Europe. ELI is also open to the use of different methodological approaches and to canvassing insights and perspectives from as wide an audience as possible of those who share its vision. See www.europeanlawinstitute.eu.

The results of the first year's work will be presented and discussed at a two day conference, which is provisionally scheduled for March 2015 in Vienna. In the later stages of the project, this output will be used by us to formulate our recommendations for harmonisation or reform, which are at this stage expected to be presented in the form of a Legislative Guide. This process will be assisted by input from a specialist Advisory Committee (AC), staffed by experts in relevant areas for business rescue, such as company law, labour law, securities law, competition law and accountancy.

14. What will be the outcome? We have just taken the first steps, so who knows. I am recalling the words of Winston Churchill, saying of politicians that they needed: 'The ability to foretell what is going to happen tomorrow, next week, next month and next year: and the ability afterwards to explain why it did not happen'.

In the beginning of my lecture I took you back some 30-40 years. Well, compared with those times one may see the following trends:²⁶

- business has changed; the biggest companies were manufacturers with domestic operations. Today, many of the biggest businesses are (for a large part) service companies, in the USA for instance Apple, Facebook, Google or Microsoft.²⁷ Many of the manufacturers are less dependent on hard assets, and more dependent on contracts and intellectual property as principal assets; many national legislations do not clearly provide for the treatment of such assets and affected counterparties.
- companies have changed; businesses are much more often multinational companies than thirty+ years ago, with the means of production and other operations offshore, constituting international law and choice of law implications. The same problems are encountered by SMEs with international markets, which in Europe may occur quite easy. Today's financial distressed debtor is likely to be a group of related, often interdependent, entities.
- the availability of capital has changed; companies had assets, which were an object of security. With the slowing down of providing credit or when credit becomes more expensive, however, debt and capital structures of most debtor companies are more complex, with multiple levels of secured and unsecured debt, often governed by equally complex inter-creditor agreements or - in Europe - with funding from private (family or crowd funded) investors.
- creditors have changed; also in Europe one sees the growth of distressed debt markets and claims trading introducing creditors with other interests in mind, such as longer term investment instead of short term liquidity.
- and finally, business environment has changed, with a growing importance of transparent rules for corporate governance, with a greater conscience for climate change, increased emphasis on human rights and desired compliance with environmental and social requirements.²⁸

26 Compare: Marshall S. Huebner and Benjamin A. Tisdell, As the wheel turns: new dynamics in the coming restructuring cycle, in: *The Americas Restructuring and Insolvency Guide 2008/2009*, 77ff; Martin R. Gudgeon and Shirish A Joshi, The restructuring and work out environment in Europe, in: Ben Larkin (ed.), *Restructuring and Workouts: Strategies for Maximising Value*, London: Global Law Publishing Ltd, 2nd ed., 2013, 7ff.; Bob Wessels and Rolef de Weijs, Revision of the iconic U.S. Chapter 11: its global importance and global feed back, in: *International Insolvency Law Review* (forthcoming).

27 When finalizing this text I am reading that measured by market capitalization the largest American public companies are (in this order): Apple, Exxon Mobile, Google, Microsoft and Warren Buffett's investment conglomerate Berkshire Hathaway, see *The Economist*, April 26th 2014, 60.

28 See e.g. the Equator Principles (third version, called EPIII), effective as of 1 January 2014. The EP form a risk management framework, adopted by financial institutions, for determining, assessing and managing environmental and social risk in projects and is primarily intended to provide a minimum standard for due diligence to support responsible risk decision-making. See www.equator-principles.com/index.php/about-ep/about-ep.

15. What we also see that insolvency laws have not changed, or just rather slowly.²⁹

In the USA, the original intention of Chapter 11 U.S. Bankruptcy Code is the rehabilitation of businesses, and the preservation of jobs and tax bases at the state, local and federal level. That intention has eroded. Presently, the emphasis is ‘maximization of value’ as an equal, sometimes competing or even exclusive goal, e.g. by using ‘fire sales’ in the meaning of Section 365 of the U.S. Bankruptcy Code, as was the case in Chrysler and General Motors.³⁰ Changes, however, are on the horizon.³¹

16. Europe seems more vital in re-assessing and amending its insolvency laws. Some 15 years ago, in Western Europe, when a company went bankrupt, many times the board was totally divested, meaning that all the powers were in the hands of the insolvency administrator, he or she sold all the assets and the money received was distributed to the creditors according to their rank. In 2005 Natalie Martin observed: ‘Compared to U.S. bankruptcy laws, many [European] countries’ [insolvency] laws read like penal codes’.³² Prof. Martin probably only analysed - with all respect - obsolete sources, as since over ten years ago, many European countries have come to understand that the existing legal framework does not meet the challenge - in the words of prof. Parry, present here today, and written one year before Martin’s article - ‘... to achieve economic results that are potentially better than those that might be achieved under liquidation, by preserving and potentially improving the company’s business through rationalization.’³³

29 See e.g. Andres F. Martinez, Antonia Menezes and Mahesh Uttamchandani, *Insolvency, restructuring and economic development: the World Bank Group and insolvency systems*, in: Ben Larkin (ed.), *Restructuring and Workouts: Strategies for Maximising Value*, London: Global Law Publishing Ltd, 2nd ed., 2013, 15ff, at 22, submitting: ‘Although the concept of corporate rescue as means of maximising enterprise value and preserving jobs is gaining support among industrial nations and in developing countries, many jurisdictions continue to rely on outmoded laws to address the problems of modern corporate financial distress and insolvency. ... Today’s environment requires statutes that can flexibly accommodate a wide range of business solutions that make economic sense and rationalise debt to actual enterprise value. Moreover, the spreading of constituent elements on an insolvency system across numerous laws, rather than in a single code, inhibits certainty and transparency.’

30 See Anne M. Anderson and Yung-Ya Ma, *Acquisitions in Bankruptcy: 363 Sales Versus Plan Sales and the Existence of Fire Sales*, in: 22 *American Bankruptcy Institute Law Review*, Winter 2014, Number 1, 1ff.

31 Since 2012 the American Bankruptcy Institute (ABI) Commission on the Reform of Chapter 11 is studying the way Chapter 11 will be reformed. See <http://commission.abi.org>. An international workgroup provides the Commission with reports on several topics of business financial distress in several countries, where it seems that their legislation has been inspired by ‘Chapter 11 as example’. Dr. Rolef de Weijts, University of Amsterdam, coordinates the work, while I chair the Committee. Countries involved in these reports are Australia, Austria, Belgium, Canada, France, Germany, Italy, Japan, Korea, the Netherlands, People’s Republic of China, Spain, England and Wales. The ABI Commission has until now (April 2014) requested comparative input on seven questions (1. The Use of Surcharges in Sales; 2. The Treatment of IP Licenses in Insolvency; 3. Financing Options for Insolvent Companies; 4. The Role of Administrators and Monitors; 5. Plan issues: Presenting, Voting, Plans variations & Allocation Rules; 6. Creditors’ or stakeholders’ committees; 7. Claims trading). The ABI Commission is currently anticipating that the delivery of a report is in December 2014. For further information: dr. Rolef de Weijts (chaptereleven-fdr@uva.nl).

32 See Natalie Martin, *The Role of History and Culture in Developing Bankruptcy and Insolvency Systems: The Perils of Legal Transplantation*, in: 28 *Boston College International & Comparative Law Review* 2005, 46.

33 Rebecca Parry, Introduction, in: Katarzyna Gromek Broc and Rebecca Parry (eds), *Corporate Rescue. An Overview of Recent Developments from Selected Countries in Europe*, The Hague / London / New York: Kluwer Law International, 2004, 2. See also Andres F. Martinez, Antonia Menezes and Mahesh Uttamchandani, *Insolvency, restructuring and economic development: the World Bank Group and insolvency systems*, in: Ben Larkin (ed.), *Restructuring and Workouts: Strategies for Maximising Value*, London: Global Law Publishing Ltd, 2nd ed., 2013, 15ff, at 16, submitting that specific research shows that between 2008 and 2011 sixty reforms of insolvency systems worldwide (increasing gradually year-on-year) have/are taking place; see www.doingbusiness.org.

17. In nearly all states in Europe substantial revisions of insolvency laws have taken place or are underway. As it stands now, although even the more recent insolvency laws in several European countries continue to show substantial differences in underlying policy considerations, in structure and in content of these laws, in most of these jurisdictions there is an openness towards ‘corporate rescue’ procedures, as an alternative to liquidation procedures, as well as a growing understanding to align approaches in legislation to allow for such rescues. In many of these countries the US Chapter 11 procedure has served as a model for legislators. In a recent study University of Heidelberg prof. Andreas Pieckenbrock compares insolvency laws of England, Italy, France, Belgium, Germany and Austria. He concludes that there are five common tendencies in these rescue proceedings:

1. The board is not fully replaced by the insolvency administrator; in certain proceedings the board stays in control of the business, what we call ‘debtor-in-possession’;
 2. Sometimes there is an earlier moment of starting a rescue process, for instance in the French *Sauvegarde*: the debtor must encounter problems that he can not solve, which is earlier than the traditional moment that the debtor can not pay its financial obligations when they are due;
 3. In these countries one finds a moratorium or a stay either automatic like in the *Sauvegarde* or at request (for instance the *concordato preventivo* or *réorganisation judiciaire*);
 4. There are special provisions to protect fresh money available for the company while trying to work itself out of its misery;
 5. And there is the possibility of a debt for equity swap, i.e. the conversion of a creditors claim into shares in the capital of the company.
- Generally, as Pieckenbrock explains, such a rescue is based on the principle of a composition or an arrangement concluded between the insolvent debtor and his creditors. Such a rescue plan is binding for those creditors who voted in favour of the plan, but is also binding upon a (given percentage) of a dissenting minority of creditors (sometimes referred to as ‘cram-down’) or a watering down (‘bail-in’) for *altgesellschafter* (existing shareholders).³⁴

18. In a study of INSOL Europe on a new approach to business failure and insolvency, just published last week, the reporters (prof. Stefania Bariatti, present here today, and Robert van Galen) have studied 28 EU Member States. It is interesting to note that generally prof. Pieckenbrock’s characteristics are available in new or renewed recovery proceedings in nearly all member states.³⁵

19. Several of these characteristics will challenge established theories.³⁶ Just to name a few: Is it necessary that a company is in ‘financial distress’ to trigger any corporate rescue mechanism?³⁷ Will the Creditor’s Bargain model, which is reflected in a collective

34 Andreas Pieckenbrock, *Das ESUG - fit für Europa?*, NZI 22/2012, 906ff. By the same author the theme has been presented in a broader context with focus on Germany, as a continuous work in progress, see Andreas Pieckenbrock, *Das Insolvenzrecht zu Beginn des 21. Jahrhunderts: ein Dauerbaustelle*, in: Werner Ebke, Christopher Seagon, Michael Blatz (eds), *Solvenz - Insolvenz - Resolvenz*, Baden-Baden: Nomos 2013, 79ff.

35 For instance: debtor in procession proceedings (in certain cases supervised by an insolvency practitioner appointed by the court), a rescue plan in which creditors, sometimes even secured creditors, can be crammed down provided a certain qualified majority is reached, the ability to order a stay of the enforcement of claims, the possibility of attracting new loans, although these reporters have generally found that no super-priority was granted to new financing.

36 For an overview of issues, see e.g. Stephan Madaus, *Rescuing Companies involved in Insolvency Proceedings with Rescue Plans*, Report to the Netherlands Association for Comparative and International Insolvency Law 2012, 77 e.v., available via www.naciil.org, and Manfred Balz, *Restrukturierung in Perspective*, in: Werner F. Ebke et al. (eds), *Insolvenzrecht 2.020*, Deutsches, Europäisches und Vergleichendes Wirtschaftsrecht, Band 81, Baden-Baden: Nomos 2014, 87ff.

37 The answer starts with trying to define what ‘financial distress’ is, see e.g. John M. Wood, *Defining Corporate Failure: Addressing the ‘Financial Distress’ Concept: Part One*, in: 27 *Insolvency Intelligence* 2014, Issue 3, 38ff

insolvency proceeding³⁸, be substituted by a theory based on (creditors') consensualism.³⁹ Can all matters be addressed by contract⁴⁰ or will we still need some mandatory (contract, company or insolvency) law?⁴¹ Or is there another way of approaching corporate rescue by stressing the promotion of the common good, which should influence how choices should be made in the social and economic world?⁴² Can 'saving jobs' or 'support economic growth' be a goal of insolvency law, which is rescuing a business for the benefit of creditors?⁴³ How to create a transparent rescue process, with legitimate involvement of all interested parties⁴⁴, including unsecured creditors and shareholders? If the directors of the company during a rescue process stay in control, will there be a shift in their fiduciary duties, and if so, in what way?⁴⁵ What is the ultimate justification for cram down, and therefore for a creditor-unfriendly haircut? Will we treat unsecured trade creditors in the same way as hedgefunds or bondholders?⁴⁶ And how to deal with so called contractual hindrance mechanisms, i.e. any sort of contractual device in the contract between the debtor and the creditor that creates a disincentive for the debtor to start a rescuing process or to file for formal insolvency? Will the existing shareholders be protected as if they were creditors, against dilution of their rights of shareholder? Will there be involvement in the process by e.g. unsecured creditors or a Workers Council? What is the role of the court in a pre-insolvency rescue process?

Undoubtedly, ladies and gentlemen, there will be many more of these questions, the answer of which presently up in the air.

Here I am recollecting the only interesting words the unpopular US foreign secretary of state Rumsfeld expressed:

'As we know,

There are known knowns.

There are things we know we know.

We also know there are known unknowns.

That is to say, we know there are some things we do not know.

But there are also unknown unknowns, the ones we don't know we don't know.'⁴⁷

38 See B. Wessels, Collective insolvency proceedings: can we define what it is?, in: J. Jol e.a., *Herstructurering en insolventie: naar een Scheme of Arrangement?*, Zuidas Instituut voor Financieel recht en Ondernemingsrecht (ZIFO), nr. 9, Deventer: Kluwer 2013, 55ff.

39 See e.g. for Germany: Stefan Simon and Christian Brünkman, *Die Ausgliederung von sanierungswürdigen Betriebsteilen mithilfe des Insolvenzplanverfahrens nach der ESUG: Verdrängt die Glaubigerautonomie den institutionalisierten Gläubigerschutz des Umwandlungsgesetzes?*, ZIP 2014, 657ff.

40 In this way e.g. Robert Rasmussen, Debtor's Choice: A Menu Approach to Corporate Bankruptcy, in: 71 Texas Law Review 1992, 71ff; Alan Schwartz, A Contract Theory Approach to Business Bankruptcy, in: 107 Yale Law Journal 1998, 1807ff.

41 See e.g. Roberta Romano, Answering the Wrong Question: The Tenuous Case for Mandatory Corporate Laws, in: 89 Columbia Law Review 1989, 1599ff.; Oscar Couwenberg and Stephen J. Lubben, Essential Corporate Bankruptcy Law, March 2013, available via <http://ssrn.com/abstract=2238613>.

42 For a 'freaky, unorthodox and provocative' view, see Armin J. Kammel, Catholic Social Thought and Corporate Insolvency Law, in: Paul Omar (ed.), *International Insolvency Law. Reforms and Challenges*, Ashgate Publishing Ltd, 2013, 3ff.

43 For a negative answer, see Thomas H. Jackson and David A. Skeel, Jr, Bankruptcy and Economic Recovery, Institute for Law and Economics, University of Pennsylvania Law School, Research Paper No. 13-27, available via: <http://ssrn.com/abstract=2306138>.

44 See Vanessa Finch, Corporate Rescue: Who is Interested?, in: *Journal of Business Law* 2012, 190ff.

45 A question which results from the 2012 renewal of German insolvency on business rescue, see Christopher H. Seibt and Lars Westphal, *Auf dem Weg zu einem 'Neuen Sanierungsgesellschaftsrecht'*?, ZIP 2013, 2333ff.

46 From papers discussed in a symposium organised by the American Bankruptcy Institute in October 2013 on the theme Hedge Funds in Bankruptcy it follows that hedge funds play an increasingly important and positive role in bankruptcy cases as sophisticated creditors that can work with the debtor to achieve an effective reorganization, according to the Introduction (p. ii) to eight symposium papers, published in: 22 American Bankruptcy Institute Law Review, Winter 2014, Number 1.

47 February 12, 2002, Department of Defense news briefing. See Errol Morris' movie 'The Unknown Known', via www.imdb.com/title/tt2390962/.

20. I think the results of our work will be in the general interest of keeping ‘men at work’ and capital or technology in a business intact. In a way corporate rescue is an art of the possible and, sometimes, the improbable. It is a unique art-form that does however not glitter and sparkle without the skill, dedication and hard work of advisors and courts involved, as well as lenders and creditors. In some five years from now for legal matters in the vicinity of insolvency you may however come the conclusion: he was a fine professor, but on this subject he was led by a donkey.⁴⁸

(ii) INSOL Europe: Insolvency Office Holders’ professional principles

21. As said, in insolvency matters there is in many countries a central role for the insolvency administrator. Mid 2012 we started research into the possibilities for the development of a set of principles and best practices for insolvency office holders, or insolvency administrators, what the Dutch call *faillissementscuratoren*. Not in all countries professional and ethical regulation of the role and tasks of these persons is well developed and I believe that an insolvency office holder requires certain specific qualities and skills. In our harmonisation report of 2012 Fletcher and I adhere to a vision which was already expressed over thirty years ago in the Cork Report, the basis for England’s Insolvency Act of 1986. It said: ‘The success of any insolvency system is very largely dependent upon those who administer it. If they do not have the confidence and respect, not only of the courts and of the creditors and debtors, but also of the general public, then complaints will multiply and, if remedial action is not taken, the system will fall into disrepute and disuse’.⁴⁹ It is, however, not only the creditors’ confidence. Ian Fletcher and I submitted in said report that it is also the trust the market

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- 48 On 12 March 2014 the European Commission presented a Recommendation ‘on a new approach to business failure and insolvency’. From the press release it can be taken that the objective of the Recommendation is to shift the focus away from liquidation towards encouraging viable businesses to restructure at an early stage so as to prevent insolvency. With around 200,000 businesses across the EU facing insolvency and 1.7 million people losing their jobs each year as a result, the Commission wants to give viable enterprises the opportunity to restructure and stay in business. The chosen method is to reform national insolvency legislation with the aim to assist viable firms in business and safeguard jobs and at the same time improve the environment for creditors who will be able to recover a higher proportion of their investment than if the debtor had gone in formal insolvency. The Recommendation adopted on 12 March 2014 follows a public consultation last year on a European approach to insolvency. The Recommendation has 20 recitals and 36 recommendations. Within 12 months Member States are invited to implement the Recommendation’s ‘principles’ and therefore to:
1. Facilitate the restructuring of businesses in financial difficulties at an early stage, before starting formal insolvency proceedings, and without lengthy or costly procedures to help limit recourse to liquidation;
 2. Allow debtors to restructure their business without needing to formally open court proceedings;
 3. Give businesses in financial difficulties the possibility to request a temporary stay of up to four months (renewable up to a maximum of 12 months) to adopt a restructuring plan before creditors can launch enforcement proceedings against them;
 4. Facilitate the process for adopting a restructuring plan, keeping in mind the interests of both debtors and creditors, with a view to increasing the chances of rescuing viable businesses;
 5. Reduce the negative effects of a bankruptcy on entrepreneurs’ future chances of launching a business, in particular by discharging their debts within a maximum of three years.
- Eighteen months after adoption of the Recommendation the Commission will assess the state of play, based on the yearly reports of the Member States to evaluate whether further measures to strengthen the ‘horizontal approach’. See for the EC Recommendation: http://ec.europa.eu/justice/newsroom/civil/news/140312_en.htm.
- In the planned later phase of the ELI Business rescue project it is envisaged to balance the Recommendation (and its findings) into the Reporters deliberations.
- 49 Cork Report, *Insolvency Law and Practice – Report of the Review Committee* (Chairman, Sir Kenneth Cork) (June 1982, Cmnd. 8558), London, HMSO ISBN 0 10 185580, at para. 732. This highly influential report, produced between 1976 and 1982, formed the basis for the reform of insolvency law in the UK, centred on the Insolvency Act 1986. See I.F. Fletcher, *The Law of Insolvency*, 4th ed. (2009), with Supplement (2011), paras. 1-027ff.

puts in the insolvency office holders' actions, which may translate in her/his ability to exercise a transparent process, for instance for unsecured creditors to be informed in a clear way about any process and to be able to influence any administration, to understand the way the profession is regulated, which would include a mechanism to maintain trust in any regulatory regime, such as a post-action review or a complaints procedure.⁵⁰

22. The largest European insolvency practitioners association, INSOL Europe⁵¹, has commissioned a project to the Leiden Law School that envisages the design of Principles and Best Practices for Insolvency Office Holders (IOHs). The project is led by my colleagues prof. Jan Adriaanse and prof. Iris Wuisman and is coordinated by dr. Bernard Santen, all present here today. The research involved should lead to the establishment of a certain minimum level of trust for the general public, courts and other IOHs - nationally and internationally - in the way an IOH administers insolvency cases. With the outstanding assistance of Leiden master students, a framework of professional characteristics and requirements has been developed. The result has been discussed with an Academic Advisory Committee and a project Review and Advisory Group. The related report has been presented to INSOL Europe in September 2013. In an additional report the framework is used to further analyse the existing rules for IOHs in some ten European countries, including several eastern-European countries. The analysis was ready early this year and the first draft text of the Principles and Best Practices for IOHs will be discussed with the Review & Advisory Group soon.

23. The IOH project organisation includes a group of some twenty professors and practitioners, mainly from Europe. They represent many legal cultures and provide scholarly input as well as insights from experienced practice. In several Member States I think that the IOH profession is ready for a big step forward towards serious improvement of its know how and skills which should lead towards a mature professional organization. This is the more necessary where in several countries insolvency office holders are involved in pre-insolvency proceedings, such as pre-packs or what the Dutch call restart via silent administration (*doorstart via stille bewindvoering*). Both in in-court and out-of court work creditors and the public in general must be able to trust an IOH to be independent in his work, free of conflicts of interest. The principles and best practices might increase public confidence in IOHs, their work quality, and in the way they are monitored and supervised.

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50 Ian F. Fletcher and Bob Wessels, *Harmonization of Insolvency Law in Europe*, Preadvis 2012 uitgebracht voor de Vereniging voor Burgerlijk Recht, Deventer: Kluwer 2012, 82ff.

51 INSOL Europe is the European organisation of professionals who specialise in insolvency, bankruptcy and business reconstruction & recovery. It has around 1200 members. Its mission is to take and maintain a leading role in European business recovery, turnaround and insolvency issues, to facilitate the exchange of information and ideas amongst its members and to discuss business recovery, turnaround and insolvency issues with official European and other international bodies who are affected by those procedures. The association will encourage greater international co-operation and communication within Europe and also with the rest of the world. See www.insol-europe.org.

Personally I find it interesting and rewarding to work to enhance the confidence in professional role players in insolvency cases and welcome the debate of the present and future rules for IOHs on a European level.⁵²

(iii) European Commission and International Insolvency Institute: EU Cross-Border Insolvency Court-to-Court Cooperation Principles and Guidelines

24. This brings me to the Whatsapp of the third and last topic, our research relating to the promotion and harmonizing of judicial cooperation, so cooperation between courts in different Member States, in cross-border insolvency cases. We call it the JudgeCo-project in which we draft EU Cross-Border Insolvency Court-to-Court Cooperation Principles and Guidelines. The project, jointly developed by Leiden Law School and the Nottingham Law School, is funded by the European Commission and the International Insolvency Institute (III).⁵³ For the Commission, the research fits in the EU's project in the 'Civil Justice' Programme in order to contribute to the strengthening of the area of Freedom, Security and Justice in Europe.⁵⁴

After a nine months period of study and consultation with a Review & Advisory Group, consisting of over forty academics and practitioners, including some twenty judges, we published in March 2014 the First Public Draft of the EU Cross-Border Insolvency Court-to-Court Cooperation Principles and Guidelines. These principles and guidelines will be non-binding, to be applied in cross-

52 The importance of the rescue culture demand new know how and new certain skills (and a robust professional code) for insolvency practitioners, see Frank Kekebus, *Thesen zur deutschen 'Insolvenzzsene 2020'*, in: Werner F. Ebke et al. (eds), *Insolvenzrecht 2.020*, Deutsches, Europäisches und Vergleichendes Wirtschaftrecht, Band 81, Baden-Baden: Nomos 2014, 111ff. See also my editorial 'Changing Rules: Challenges for the Profession', in: *European Company Law* 7, issue 2 (2010), from which I take: 'With all these sweeping reforms, the question forces itself upon us: are insolvency professionals equipped to act and implement the rules, according to its underlying policies? A famous saying in the English Cork report (1982) is that the success of any insolvency system is very largely dependent upon those who administer it. In Europe, insolvency practitioners can be very different animals, with a variety of cultural and professional background, and large differences in legal and disciplinary rules regarding fairness to all interests involved and accountability. They are accountants, lawyers, corporate recovery specialists and turn around professionals. What these substantial reforms ... demonstrate is that it is at least necessary to develop a much broader expertise in matters of insolvency law, company law or general contract law and also to develop know how concerning such matters as financial restructuring, accounting, tax, strategy and communication. An (insolvency) practitioner with this skill set seems the ideal candidate for the recovery of a company in the "twilight" zone. A key point in any system should be that an insolvency practitioner is receiving the confidence and respect from all stakeholders. Without that, any system is due to fail. Therefore, changes in substantial rules, including rules or practices in pre-insolvency stages are just as many challenges for any practitioner to keep pace with these developments. Turbulent times with restless rules require solid and qualified professionals.' Law Schools would better start to think now how to best educate in this area of consensual out-of-court restructuring, leading to a multiparty agreement, with a good understanding what all interested parties wish to gain and to have them understand that they to need to give in (stakeholder management) and to convince holding out creditors to come to unanimity (understanding 'hold out' or 'nuisance value') in the absence of in-court or court-imposed binding decisions.

53 The International Insolvency Institute (III) is a non-profit, limited-membership organization (around 300 members worldwide) dedicated to advancing and promoting insolvency as a respected discipline in the international field. Its primary objectives include improving international co-operation in the insolvency area and achieving greater co-ordination among nations in multinational business reorganizations and restructurings. See www.iiiglobal.org.

54 The so-called Stockholm programme. On 11 March 2014 the European Commission presented its vision for the future EU justice policy until 2020, as a logical successor to the European Council's Stockholm Programme which ends in December 2014. In its Press Release 'Towards a true European area of Justice: Strengthening trust, mobility and growth', the Commission identifies three key challenges. See the Communication on the EU Justice Agenda for 2020 – Strengthening Trust, Mobility and Growth within the Union (COM [2014] 144 final of 11 March 2014; http://ec.europa.eu/justice/effective-justice/files/com_2014_144_en.pdf). The Communication also sets the tone for the preferred approach to 'insolvency'. See my blog at <http://bobwessels.nl/?s=justice+agenda>.

border communication and cooperation in insolvency cases between courts within the European Union. These Principles and Guidelines will further develop court-to-court communication and coordination matters. The need for this development within the context of the European Union is clear: presently there have been several instances of cross-border judicial cooperation, without any clear guidance on how to set up and conduct cross-border cooperation and how to take into account parties' legitimate interests. Examples are the BenQ case, the PIN AG case, a case mentioned by one of our experts (court-to-court communication between Luxembourg and Hungary) or in the matter of Lehman Brothers. Furthermore the December 2012 proposal of the European Commission for an amendment of the Insolvency Regulation is emphasising court-to-court cooperation and calls for a more concrete approach to judicial cross-border cooperation. Our project runs for two years, ending this calendar year. In the fourth quarter of this year prof. Paul Omar and I will provide in two or three cities in Europe training for some sixty judges in working with these non-binding legal texts.⁵⁵

25. Evidently, our proposals have been greatly influenced by the responses received from the Review & Advisory group to two questionnaires, received in July and in October 2013. The questionnaires contain a selection of the (June 2012) Global Principles mentioned earlier. The chosen method to develop the *EU Cross-Border Insolvency Court-to-Court Cooperation Principles and Guidelines* has been a systematic evaluation of the possibility of adapting the June 2012 Global Principles⁵⁶ into an EU-context, as the project's ultimate aim is to provide a standard (legally non-binding) statement of Principles and Guidelines suitable for application within the framework of the EU Insolvency Regulation. This specific EU context is generally reflected in six areas: (1) consistency with international norms, (2) goals of the EU, (3) the existence of national procedural law, (4) the existing Insolvency Regulation, (5) ongoing case law, and (6) developments within the EU legislature and the European Judicial community.

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Consistency with international norms

26. Consistency with available international norms is of utmost importance, as Björn Laukemann has argued recently, referring to the 2012 Harmonisation report of Fletcher and me, submitting that consistency with international norms and EU Principles as well as a fair balance between diverging interests among creditors or between a sufficient degree of legal certainty and regulatory flexibility within a economic context doubtlessly provide significant direction for further harmonisation approaches.⁵⁷ During the development of the Global Principles many of the publications related to 'insolvency', by such organisations as UNCITRAL, EBRD, the World Bank and INSOL Europe have been taken into account.⁵⁸ It has been an integral part of the evaluation to identify core values and principles that respondents to two questionnaires (sent out during 2013) are aware of and which they feel should be considered in the evaluation of the present texts or in a proposal for a revised or a new 'Principle' or 'Guideline'. Such consistency should enhance certainty in European insolvency practice and stability in the furthering of the EU JudgeCo Principles and Guidelines.⁵⁹

55 The Principles are 26 in number, contained in a document of (at present) some 65 pages. The Guidelines contain 18 Guidelines; in all, a document of some 25 pages. If you are interested, you can provide observations and comments on our website, www.tri-leiden.eu.

56 See for the method adopted the June 2012 Global Principles Report, par. 1.4.2.

57 Björn Laukemann, *Structural Aspects of Harmonization in European Insolvency Law*, Liber Amicorum professor Gilberte Closset-Marchal, 2013, 347ff, at 358.

58 See for some ten sources the Global Principles Report, p. 22.

59 In the June 2012 Global Principles Report (at p. 55) it is furthermore explained that it has benefited from the experiences gained in (non-insolvency related) cross-border activities in the area of law and the recommendations made by judges and experts in some fifty jurisdictions, as well as the materials that have led to the 'Principles for Direct Judicial Communications in specific cases including commonly accepted safeguards', included in Direct Judicial Communications, an emerging guidance from the Hague Conference on Private International Law, 2013.

Goals of the EU: Judicial cooperation

27. Within the EU the theme cross-border judicial communication and cooperation is developed for the area ‘Freedom, Security and Justice’. This requires a proper functioning of the internal market on the basis that cross-border insolvency proceedings should operate efficiently and effectively resulting in the goal that the Principles and the Guidelines should be efficient and effective, whilst actively aiming at the strengthening of confidence in the functioning of the European judicial area. This is a challenge as it is acknowledged by several respondents in the JudgeCo project that in some Member States the quality of judges is mediocre, the court’s infrastructure and available means are poor, the knowledge of the Insolvency Regulation is insufficiently developed, the experience to deal with international insolvency cases or the mastering of a second language (for instance English, German or French) is lacking⁶⁰, whilst the awareness of the impact of international business is not often understood.⁶¹

Existence of national procedural law

28. Article 81 paragraph 2 of the Treaty on the Functioning of the EU (TFEU) provides that in developing judicial cooperation in civil matters having cross-border implications, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures, particularly when necessary for the proper functioning of the internal market, aimed at ensuring: ‘... (f) the elimination of obstacles to the proper functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States.’ Several of the Global Principles aim to set non-binding rules related to matters regarding businesses that in many EU Member States form an integral part of national procedural law, many times in domestic legislation regarding civil procedure or insolvency procedural rules. In legal literature, however, it is questioned whether Article 81(2)(f) TFEU may form the basis for an alignment of the civil procedural rules of the Member States irrespective of the national or international character of the litigation at hand.⁶² Where many of these rules not only apply to businesses, but also to natural persons (consumers) the respondents to the survey have been asked to take this observation into account.

The existing European Insolvency Regulation

29. The Insolvency Regulation is binding in its entirety and directly applicable in the Member States in accordance with the Treaty establishing the European Union (see Article 47 EIR). It is therefore nonsensical to test the possible application of Global Principles that would contradict the mandatory, binding rules contained in the Regulation or those matters that clearly belong to the national domain of local procedural or insolvency law of the Member States. For this reason out of the 37 Global Guidelines 10 have been analysed and selected that would most certainly be against the text of the Regulation or domestic law. These are Global Principles 7 (Recognition), 12 (Adjustment of Distributions), 13 (International Jurisdiction), 14 (Alternative Jurisdiction), 24 (Control of Assets),

⁶⁰ In general on this subject: Astrid Sadler, *Practicle Obstacles in Cross-border Litigation and Communication Between (EU) Courts*, in: www.erasmuslawreview.nl (volume 5, Issue 3 (2012)).

⁶¹ It should be added that several respondents have also criticized the quality of persons acting in a role as insolvency office holder, their understanding of the Insolvency Regulation, their lack of expertise and poor quality to deal with foreign insolvency office holders and/or courts.

⁶² For this view, see C.H. van Ree, *Harmonisation of Civil Procedure: An Historical and Comparative Perspective*, in: Xandra E. Kramer and C.H. van Ree (eds), *Civil Litigation in a Globalised World*, T.M.C. Asser Press, The Hague, 2012, 39ff., submitting that business will regard these as obstacles in their decisions where to produce, market or sell their products and services. Strong support for the view that differences in national procedural rules function as trade obstacles can be found by Hon. J.J. Spigelman (retired in 2010 as Chief Justice of New South Wales, Australia), see J.J. Spigelman, *Transaction costs and international litigation*, (2006) 80 *Australian Law Journal*, 438ff; J.J. Spigelman, *Cross-Border Insolvency: Co-operation or conflict?* (2009) 83 *Australian Law Journal*, 44ff.

26 (Cooperation), 32 (Avoidance Actions), 33 (Information Exchange), 34 (Claims) and 35 (Limits on Priorities). These Global Principles were left out of further study and research.

Ongoing case law

30. New case law applying the EU Insolvency Regulation or judgments from national (higher) courts have also been taken into account. An example is provided by the judgment of 22 November 2012 of the Court of Justice of the European Union in the matter of *Bank Handlowy w Warszawie SA, PPHU 'ADAX'/Ryszard Adamiak, V Christianapol sp. z o.o.* (Case C-116/11). Following the approval of a rescue plan (*procédure de sauvegarde*) by the French court in Meaux, the Polish court '... asked the Tribunal de commerce de Meaux whether the insolvency proceedings in France, which were main proceedings for the purposes of the Regulation, were still pending. The answer given by the French court did not provide the necessary clarification. The referring court then consulted an expert.' The Polish court (*Sąd Rejonowy Poznań-Stare Miasto w Poznaniu*) then decided to stay the proceedings pending before it and to refer questions to the Court of Justice of the EU for a preliminary ruling, which led to the judgment that Article 27 of the EIR must be interpreted as meaning that it permits the opening of secondary insolvency proceedings in the Member State in which the debtor has an establishment, where the main proceedings have a protective purpose: '... It is for the court having jurisdiction to open secondary proceedings to have regard to the objectives of the main proceedings and to take account of the scheme of the Regulation, in keeping with the principle of sincere cooperation.'⁶³

31. Therefore, the principle of sincere cooperation laid down in Article 4(3) EU requires the court having jurisdiction to open secondary proceedings to address the challenge (i) to have regard to the objectives of the main insolvency proceedings, and (ii) to take account of the scheme of the Regulation, which aims to ensure efficient and effective cross-border insolvency proceedings through mandatory coordination of the main and secondary proceedings guaranteeing the priority of the main proceedings. The introduction to the EU JudgeCo Guidelines only signals the challenge for such a court to communicate with the liquidator in the main proceedings and to ensure that he will cooperate. The challenge resulting from the judgment for cross-border court-to-court cooperation is addressed in the JudgeCo Principles.⁶⁴

⁶³ From the Court's arguments:

"59 As observed by the referring court, the fact remains that the opening of secondary proceedings, which, under Article 3(3) of the Regulation, must be winding-up proceedings, risks running counter to the purpose served by main proceedings, which are of a protective nature.

60 It should be noted that the Regulation provides for a certain number of mandatory rules of coordination intended to ensure, as expressed in recital 12 in the preamble thereto, the need for unity in the Community. In that system, the main proceedings have a dominant role in relation to the secondary proceedings, as stated in recital 20 in the preamble to the Regulation.

61 The liquidator in the main proceedings thus has certain prerogatives at his disposal which allow him to influence the secondary proceedings in such a way that the protective purpose of the main proceedings is not jeopardised. (...)

62 The principle of sincere cooperation laid down in Article 4(3) EU requires the court having jurisdiction to open secondary proceedings, in applying those provisions, to have regard to the objectives of the main proceedings and to take account of the scheme of the Regulation, which, ..., aims to ensure efficient and effective cross-border insolvency proceedings through mandatory coordination of the main and secondary proceedings guaranteeing the priority of the main proceedings'.

64 The JudgeCo project has taken into account developments in applying Article 31 EIR in court cases, the use of the CoCo Guidelines, scholarly literature regarding 'liquidator-to-liquidator' communication and cooperation and initiatives to harmonise professional and ethical requirements for insolvency office holders. In the JudgeCo project, however, only those matters which have a bearing on court-to-court cooperation can be taken into account. The EU JudgeCo Guidelines relate to court-to-court cooperation; they do not address cross-border cooperation between courts and liquidators.

Developments within the EU legislature and the European Judicial community

32. On 12 December 2012 the European Commission published a Proposal for a Regulation amending the EU Insolvency Regulation [COM(2012) 744], which includes a Report on the application of the EIR [Com(2012) 743].⁶⁵ This latter Application Report summarises experiences reported by all Member States in the course of 2012, and provides (at page 14): ‘... The duties to cooperate and communicate information under Article 31 of the Regulation are rather vague. The Regulation does not provide for cooperation duties between courts or liquidators and courts. There are examples where courts or liquidators did not sufficiently act in a cooperative manner. These findings are confirmed by the results of the public consultation where 48% of the respondents were dissatisfied with the coordination between main and secondary proceedings’.

In the Proposal itself, in Recital 20 to the EIR, it is expressed that main insolvency proceedings and secondary proceedings can only contribute to the effective realisation of the total assets if all the concurrent proceedings pending are coordinated. Then follows (the words underlined are new in comparison to the existing text):

‘(20) ... The main condition here is that the various liquidators and the courts involved must cooperate closely, in particular by exchanging a sufficient amount of information. In order to ensure the dominant role of the main proceedings, the liquidator in such proceedings should be given several possibilities for intervening in secondary insolvency proceedings which are pending at the same time. In particular, the liquidator should be able to propose a restructuring plan or composition or apply for a suspension of the realisation of the assets in the secondary insolvency proceedings. ...’

20

33. The Proposal is infused by the strengthening of the paradigm of communication and cooperation in cross-border cases. Examples are an extended draft Article 31 (Cooperation and communication between liquidators)⁶⁶, a new Article 31a (Cooperation and communication between courts)⁶⁷, and a new article 31b (Cooperation and communication between liquidators

⁶⁵ http://ec.europa.eu/justice/civil/commercial/insolvency/index_en.htm.

⁶⁶ Extended Article 31 - Cooperation and communication between liquidators:

“1. The liquidator in the main proceedings and the liquidators in the secondary proceedings shall cooperate with each other to the extent such cooperation is not incompatible with the rules applicable to each of the proceedings. Such cooperation may take the form of agreements or protocols.

2. In particular, the liquidators shall:

(a) immediately communicate to each other any information which may be relevant to the other proceedings, in particular any progress made in lodging and verifying claims and all measures aimed at rescuing or restructuring the debtor or at terminating the proceedings, provided appropriate arrangements are made to protect confidential information;

(b) explore the possibility of restructuring the debtor and, where such possibility exists, coordinate the elaboration and implementation of a restructuring plan;

(c) coordinate the administration of the realisation or use of the debtor’s assets and affairs; the liquidator in the secondary proceedings shall give the liquidator in the main proceedings an early opportunity to submit proposals on the realisation or use of the assets in the secondary proceedings.”

⁶⁷ New Article 31a - Cooperation and communication between courts

“1. In order to facilitate the coordination of main and secondary insolvency proceedings concerning the same debtor, a court before which a request to open insolvency proceedings is pending or which has opened such proceedings shall cooperate with any other court before which insolvency proceedings are pending or which has opened such proceedings to the extent such cooperation is not incompatible with the rules applicable to each of the proceedings. For this purpose, the courts may, where appropriate, appoint a person or body acting on its instructions.

2. The courts referred to in paragraph 1 may communicate directly with, or to request information or assistance directly from each

and courts).⁶⁸ Articles 31 and 31a explicitly provide that cross-border cooperation between liquidators may take the form of an agreement or a protocol, whilst cooperation between courts could include in the approval of protocols.⁶⁹ Finally, in a new recital 20a it is stressed that the amended Insolvency Regulation should ensure the efficient administration of insolvency proceedings relating to different companies forming part of a group of companies. Where insolvency proceedings have been opened for several companies of the same group, these proceedings should be properly coordinated and the various liquidators and courts concerned are under the same obligation to cooperate and communicate with each other as those involved in main and secondary proceedings relating to the same debtor (Article 42b of the Proposal). In the Proposal the final sentence of Recital 20 reads as follows:

other provided that such communication is free of charge and respects the procedural rights of the parties to the proceedings and the confidentiality of information.

3. Cooperation may be implemented by any appropriate means, including

- (a) communication of information by any means considered appropriate by the court;
- (b) coordination of the administration and supervision of the debtor's assets and affairs;
- (c) coordination of the conduct of hearings,
- (d) coordination in the approval of protocols."

68 New Article 31b - Cooperation and communication between liquidators and courts

"1. In order to facilitate the coordination of main and secondary insolvency proceedings opened with respect to the same debtor,

- (a) a liquidator in main proceedings shall cooperate and communicate with any court before which a request to open secondary proceedings is pending or which has opened such proceedings and
- (b) a liquidator in secondary or territorial insolvency proceedings shall cooperate and communicate with the court before which a request to open main proceedings is pending or which has opened such proceedings,

2. The cooperation referred to in paragraph 1 shall be implemented by any appropriate means including the means set out in Article 31a (3) to the extent these are not incompatible with the rules applicable to each of the proceedings."

69 There is an upcoming tendency to use protocols, in short: agreements between appointed insolvency officeholders to communicate and coordinate parallel pending insolvency proceedings, including group insolvencies. A cross-border agreement in international insolvency cases is '... an agreement entered into, either orally or in writing, intended to facilitate the coordination of cross-border insolvency proceedings and cooperation between the courts, between the courts and insolvency representatives and between insolvency representatives, sometimes also involving other parties in interest.' The quoted description is taken from the Practice Guide on Cross-Border Insolvency Cooperation, which was adopted on 1 July 2009 by UNCITRAL, the United Nations Committee on International Trade Law. See Bob Wessels, Cross-border insolvency agreements: what are they and are they here to stay?, in: N.E.D. Faber, J.J. van Hees, N.S.G.J. Vermunt, *Overeenkomsten en insolventie*, Serie Onderneming en Recht, deel 72, Deventer: Kluwer 2012, 359ff; Moritz Becker, *Kooperationspflichten in der Konzerninsolvenz*, Köln: RWS Verlag Kommunikationsforum GmbH 2012, 109ff. Obvious questions for further research include: (i) Which law governs the protocol? Is Regulation no 593/2008 on the law applicable to contractual obligations (Rome I) applicable? Do parties have the freedom to choose applicable law? How does that relate to mandatory rules for instance on transparency of proceedings, protecting rights of creditors or a stay of proceedings? (ii) What is the legal character of a protocol? Is it substantial and/or procedural; a mix of private law and public law; can it bind courts? (iii) Protocol-parties: do all parties in an insolvency proceeding have permission to agree on a protocol? Must a court approve that an insolvency office holder will be bound by a protocol? What if this permission misses? What are the consequences of not using a protocol? (iv) Treatment of creditors: does the protocol, agreed between insolvency office holders and approved by courts 'bind' creditors? Do they still have additional rights? What is the effect on third parties? What if creditors aren't pleased with the use or the content of a protocol? (v) Could these protocols include mediation and arbitration provisions and is not it time to start thinking about the establish a global 'mediation and arbitration institute in matters of rescue and insolvency'? See e.g. Allen L. Gropper, The Arbitration of Cross-Border Insolvencies, in: 86 American Bankruptcy Law Journal 2012, 201ff.; Edna Sussman and Jenifer L. Gorski, Capturing the benefits of Arbitration for Cross Border Insolvency Disputes, in: Arthur W. Rovine (ed.), Contemporary Issues in International Arbitration and Mediation, Leiden – Boston: Martinus Nijhoff Publishers 2013, 158ff. On mediation, see Hon. James H. Peck, Settlement Talks in Chapter 11 After "WaMu": A Plan Mediator's Perspective, in: 22 American Bankruptcy Institute Law Review, Winter 2014, Number 1, 65ff.

‘In their cooperation, liquidators 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 associations active in the area of insolvency law’.⁷⁰

34. In the light of these developments, it has been submitted that, within the EU, there is an open attitude towards ‘best practices’ such as those under review in the JudgeCo-project. Indeed, an endorsement to take into account the Global Principles follows from Commission Staff Working Document, where it is stated: ‘In order to ensure the coordination of proceedings opened in several Member States, the Regulation obliges insolvency practitioners to communicate information and cooperate with each other. Several guidelines for practitioners on cooperation and communication in cross-border insolvencies have been developed by associations of practitioners [51]’.⁷¹

These developments have led to the question to the respondents in the JudgeCo project to allow themselves a forward-looking vision anticipating the challenges the judiciary in general faces.

By applying the six elements as set out above, the EU JudgeCo Principles - although being a non-binding statement - are in line with the European context as set out and with international developments and other attempts at developing modes of international cooperation in the area of international insolvency.

22

35. So what, you may think, this is all non-binding soft law! I respectfully disagree. A strong signal of the practical use and guidance the 2012 Global Principles provide has been given by the Supreme Court of The United Kingdom (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), that did support its arguments on ‘...the modern approach in the primary international and regional instruments, the EC Insolvency Regulation on Insolvency Proceedings ... and the Model Law, 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 our 2012 Global Principles report.⁷²

36. The Global Principles also contribute to the development of American law. The United States Court of Appeals for the Third Circuit (in *Re ABC Learning Centres*) on 23 August 2013 has made references to Global Principle 1, and cites that it elaborates ‘... 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’

70 On 5 February 2014 the European Parliament (ordinary legislative procedure: first reading) adopted the ‘European Parliament legislative resolution of 5 February 2014 on the proposal for a regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1346/2000 on insolvency proceedings (COM(2012)0744 - C7 0413/2012 - 2012/0360(COD))’. Compared to the European Commission’s December 2012 proposal, there are quite some differences. Over 60 amendments to the Commission’s proposal have been made; the European Parliament supports the suggested extension to the system of cross-border communication and cooperation.

71 Impact Assessment, SWD(2012) 416 final, at 24. Footnote [51] reads: ‘The most recent example are the Global Principles for Cooperation in international insolvency cases from the American Law Institute and the International Insolvency Institute, elaborated by Ian Fletcher and Bob Wessels (2012)’.

72 ‘... It is ultimately derived from the civil law concept of a trader’s domicile, and was adopted in substance in the draft EEC Convention of 1980 as a definition of the debtor’s centre of administration: see ... American Law Institute, *Transnational Insolvency: Global Principles for Co-operation in International Insolvency Cases* (2012), Principle 13, pp 83 et seq.’

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.’⁷³

37. These court cases demonstrate the usefulness of soft law, providing not only food for thought but also guidance for courts. Unrelated to insolvency, in its method and result I regard the JudgeCo project as an instrument of choice in solving international commercial disputes in which a new concept of ‘judicial comity’ is evolving, providing a framework of ground-rules for establishing and developing judicial dialogue both in a general context and in relation to a specific case.⁷⁴ In the light of history in England & Wales cooperation between judges and academics as we have experienced in the JudgeCo project is truly remarkable.⁷⁵

38. Ladies and gentlemen, last Friday Sierd Schaafsma gave his inaugural lecture as a professor of private international law.⁷⁶ Prof. Schaafsma submitted that a faster and direct cross-border information exchange between judges would facilitate and improve the application of foreign law by courts.⁷⁷ I invite Sierd to test whether our JudgeCo principles could serve as such an enabling instrument, and, if necessary, suggest improvements to us.

Unique research

39. I will wrap up now. Again I am in a convent, the function of this Academy building prior to 1581, this time talking about challenges and opportunities in academic research.

Our research is unique in that it is distinctive in four ways: it is (in its method or application) cross-border, it is supported and

73 U.S. Court of Appeals for the Third Circuit (in *re ABC Learning Centres Ltd.*, No. 12-2808 (3rd Cir. 2013)). In the commentaries of Craig M. LaChance, Third Circuit Holds Chapter 15 Relief Extends to Assets Managed by Australian Receivership, ABI Journal November 2013, 55ff, and Maja Zerjal, ABC Learning: The ABC of Chapter 15 is to Rely on Its Plain Meaning, in: 2014 International Corporate Rescue, 37ff, the unique inclusion of soft law into a judicial decision remains unnoticed. In general soft law doesn’t do well before courts, see J. Klabbers, The Undesirability of Soft Law, in: 1998 Nordic Journal of International Law Vol. 67, 381ff, although from a recent study - in competition law - it follows that the EU Court is open for ‘soft instruments of governance’, see Oana Andreea Stefan, Soft Law in Court: Competition Law, State Aid and the Court of Justice of the European Union: An Introduction, available via <http://ssrn.com/abstract=2356227>.

74 As set out in the 2012 Global Principles report, according to Slaughter, judicial comity has four strands: (i) respect for a foreign court in its ability to apply the law honestly and competently, (ii) the entitlement, in the global task of judging foreign courts, to adjudicate those matters where local interests are closely involved, (iii) the strong judicial role in protecting individual rights, (iv) a greater willingness to clash with other courts when necessary, ‘as an inherent part of engaging as equals in a common judicial enterprise’, see A. Slaughter, A Global Community of Courts, 44 Harvard International Law Journal 2003, p. 191ff, at 206. See further the June 2012 Global Principles Report, p. 38ff. For various ways of judicial cooperation see Marco Bronkers, The relationship of the EC courts with other international tribunals: non-committal, respectful or submissive?, in: Common Market Law Review 44: 601-627, 2007; C.W.A. Timmermans, *Voorrang van het Unierecht door multilevel rechterlijke samenwerking*, in: Sociaal-Economische Wetgeving 2012-2, p. 50ff, and Pauline Koskelo, The Need for a Common Judicial Culture in Europe – a Matter for Judges and Lawyers, Address IBA Northern Europe Conference, Helsinki 3-4 September 2009, at www.kko.fi/47788.htm.

75 See Lord Neuberger of Abbotsbury, Judges and Professors – Ships Passing in the Night?, in: 77 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 2013, 233ff.

76 Sierd J. Schaafsma, IPR en EPR, *Over wisselwerking, eenheid en verscheidenheid*, oratie Leiden 2014

77 Op. cit., p. 5.

reviewed by large groups of experienced experts from all over the globe, it focuses on the forefront of legal developments in creating new 'law'⁷⁸, and last but not least: selected students are involved in its development.

40. The involvement of Leiden master students in these projects will greatly enhance their knowledge and more generally will prepare them much better for legal practice. The research involves in depth analysis of specific topics, such as the position of unsecured creditors in over ten EU Member States, the influence of 'insolvency' on the rights of shareholders to convene a meeting, to vote on matters unrelated to the assets, the independency of a judge, the integrity of a insolvency administrator⁷⁹, the efficiency and effectiveness of legal proceedings or the concept of conflicts of interests. These latter topics are themes of utmost importance in nearly every legal job. Also a close involvement in creating non-binding rules and the importance of its effect for behaviour in insolvency cases or the adaptability of soft law by courts provide an insight how law is formed through practice. In our legal teaching, the strength is found in a combination of academy and profession. That is challenging and provides new opportunities. The result is, I think, research that is original and creative with a unique output, with added value for practitioners and judges, for the students and for the understanding and application of insolvency law at large. This type of research is no revolution, but for Leiden an innovative and attractive scenario to develop further the integration of students into research.

41. Non-binding rules as explained may serve as benchmarks for actors in the field of insolvency. These actors include the insolvency legislator in assessing whether present legislation meets the mark of the general non-binding European norms and consider to improve it, or, when there are no rules, use it as a start for the legislation process. In the three projects briefly explained, dialogues with stakeholders (judges, practitioners, academics) lie at the heart of our work. Further, even though the dialogues with interested groups are challenging, they are challenging in ways that have the potential to strengthen the functioning of the EU. Principles and Guidelines, in the nature of the ones which have been described may have several disadvantages. In the June 2012 Global Principles report, Fletcher and I mentioned the

78 My personal approach to the type of projects described I developed in my work with Fletcher. In our 2012 Harmonisation report we confess that we are not specialists in the area of 'law-making', but we do provide seven key indicators which may assist in identifying situations in which harmonisation of insolvency topics in Europe may be beneficial, and the working method to achieve such harmonisation. These seven criteria - not necessarily in this order and overlaps could occur - point at a direction to take in the process of developing a legislative skeleton for harmonisation of insolvency law. We named (and further explained in said report, paragraph 194ff) the following indicators:

1. Consistency with international norms: strive for consistency with international norms, so any rules will be generally applied in the same way in any member State and/or across the EU;
2. Goals for the EU: agree on the basis allowing the European legislator to act and on the goals that the European legislator set himself to achieve;
3. Take stock: map the present level of harmonisation in all areas of law related to insolvency;
4. Overriding objectives: formulate overriding objectives to take into account, such as offering any involved party a sufficient degree of legal certainty;
5. Flexible legislation: draft a legal skeleton which is sustainable, including a process which is sufficiently flexible and capable of adapting to changing circumstances in which businesses operate;
6. Need for action: examine whether there is a specific need for a certain action or legislative intervention, and if so, what would be the most suitable course of action and ensure that its result be supported by a wider group that will have to work with it;
7. Balance: any rules of such a skeleton should reflect a fair balance between the (often competing) interests of creditors and other parties concerned.

79 See (in Dutch) B. Wessels, *De onafhankelijkheid van de faillissementscurator*, preadvies Christen Juristen Vereniging (CJV) 2013, Uitgeverij Paris, 2013, 111 pp.; Michael C. Frege, *Die Unabhängigkeit des Insolvenzverwalters*, in: Werner F. Ebke et al. (eds), *Insolvenzrecht 2.020*, Deutsches, Europäisches und Vergleichendes Wirtschaftrecht, Band 81, Baden-Baden: Nomos 2014, 49ff.

following: (i) they have an uncertain legal status, (ii) it may be problematic to ascertain these texts, (iii) they may lack quality and clarity, (iv) their legitimacy may be questioned, (v) their application or enforcement seldom is reported, and (vi) their effectiveness seldom is tested.⁸⁰ In the context of the European Union attention should be paid to Article 288 TFEU (formerly Article 249 EC Treaty), which allows for the introduction of measures of ‘soft law’, as its last paragraph states: ‘Recommendations and opinions shall have no binding force’. It may be the case that the results of one of our research projects may be a candidate for such a measure. I am confident that the projects mentioned, including the described methodology which are or will be contained in the final reports, present results which are unbiased and of good quality. But, although I am not hesitant in saying that these reports may serve as ‘informal authority’ for European insolvency matters⁸¹, I would be open to discuss the development of criteria or procedures to overcome the disadvantages mentioned.

Mister Vice-Chancellor, mister Dean, dear listeners,

With this valedictory my lecturing to Leiden students has ended including marking their exams, evaluate their papers and assess their presentations during *privatissimum* and the like. I am still a supervisor for five PhD researchers, so if in future you see me in the KOG building don’t be surprised!

I thank the Law School sincerely for selecting in 2007 a 58 years old insolvency veteran and for their trust in appointing me in a new, undeveloped area as a professor of international insolvency law.

With dr. Gert-Jan Vossestein I gave classes in European company and insolvency law and I thank him for our smooth cooperation.

I also thank the Leiden researchers I just mentioned for their enthusiasm and skills in developing our research projects, assisted by very able master students.

Finally, for my Dutch students. I have been fortunate to have been able to introduce many of you in the fascinating, hugely complex and challenging world of international insolvencies. Some twelve of you have written your master theses in English, co-supervised by colleagues of mine from Belgium, Canada, Croatia, England, Germany, Spain, South-Africa and the USA. I thank these colleagues here for their spirit of true cross-border collegiality.

What I personally learned in my professional life is that ambition is not enough. If you are working in a team or doing a job on your own, to succeed in any task there must be planning, purpose, effort and commitment. And personal commitment is of utmost importance. I repeat the words of an American colleague

Arrange more time than you can spare

then spare it

Take on more than you can bear;

then bear it.

⁸⁰ See Global Principles report, at 24. Compare Kenneth W. Abbott and Duncan Snidal, Hard and Soft Law in International Governance, in: John J. Kirton, with Jelena Madunic (ed.), Global Law, Ashgate 2009, 257ff; Bob Wessels, ALI - III Global Principles - New Strategies for Cross-Border Cooperation?, in: Janis Sarra (ed.), Annual Review of Insolvency Law 2009, 587ff.

⁸¹ See N. Jansen, Informal authorities in European Private Law, in: 20 Maastricht Journal of European and Comparative Law, December 2003, nr. 4.

*Plan your castle in the air;
then build a ship
to take you there.*

Thank you for your attention.⁸²

⁸² According to the University of Leiden's protocol after my lecture speeches were given by Dean Rick Lawson, junior researcher Gert-Jan Boon, prof. Matthias Haentjens and prof. Paul Omar. I thank them all for their very friendly and sometimes moving words. As a gift I received a *Liber Amicorum*. Interested? Go to: <http://bobwessels.nl/2014/04/2014-04-doc6-perspectives-on-international-insolvency-law-a-unique-gift/>

BOB WESSELS



Bob Wessels (1949) is an independent legal counsel, advisor and arbitrator. From 2007-2014 he was a professor of International Insolvency Law, University of Leiden. Leiden Law School, The Netherlands. Prior to his Leiden chair, he was Professor of Civil and Commercial Law, Vrije University in Amsterdam (1988 - 2008), where he defended his PhD in 1988.

He served as consultant to IMF (Indonesia), World Bank (Georgia) and the Dutch Ministry of Justice and advises the European Commission for the revision of the EU Insolvency Regulation and the Recommendation on a new approach to business failure and insolvency. He advised with legal opinions or acted as an expert witness in European or international insolvency related questions in Dutch courts as well as in many courts outside the Netherlands.

Published (in Dutch) hundreds of articles in leading legal journals, (co-)authored six books in English and some twenty five books in Dutch. He is the single author of: Wessels *Insolventierecht* (Insolvency Law), a 10 Volume series, presently in its 4th edition.

He furthermore is:

- Deputy Justice at the Court of Appeal in The Hague
- Member of the Joint Board of Appeal of the three European Supervisory Authorities (ESAs; ESMA, EBA and EIOPA respectively)
- Chair of the International working group to assist the American Bankruptcy Institute (ABI) in its programme to renew U.S. Bankruptcy Code's Chapter 11
- Chairman Netherlands Association for Comparative and International Insolvency Law.
- Fellow of the American College of Bankruptcy
- Honorary Member of INSOL Europe
- Member and Co-reporter of the American Law Institute
- Past Chairman of the Academic Forum of INSOL Europe
- Former member of the Committee to renew the Dutch Bankruptcy Act
- Emeritus Director of International Insolvency Institute

In this valedictory lecture a picture is given of comparative and international insolvency research Leiden Law School currently is involved in: the European Law Institute (ELI) research on Business rescue in insolvency, the creation of professional principles for Insolvency Office Holders (a project initiated by INSOL Europe), as well as the creation of EU Cross-Border Insolvency Court-to-Court Cooperation Principles and Guidelines, a project funded by the European Commission and the International Insolvency Institute (III).

These examples of Leiden Law School research are unique in at least four ways: it is (in its method or application) cross-border, it is supported and reviewed by large groups of experienced experts from all over the globe, it focuses on the forefront of legal developments in creating new 'law' (which includes soft law), and last but not least: selected students are involved in its development, which will greatly enhance their knowledge and more generally will prepare them much better for legal practice. This type of research is original and creative with a unique output, with added value for practitioners and judges, for students and for the understanding and application of insolvency law at large.



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