Emerging economies and cross-border insolvency regimes: missing BRICs in the international insolvency architecture (Part I)

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Many of the world's major advanced economies are subject to some form of cross-border insolvency regime, whether of an international or regional scope. However, despite this clear and important progress in the adoption of cross-border insolvency regimes among many advanced economies, there appears to be a glaring gap in the international insolvency architecture. Specifically, very few of the major emerging economies – and none of the BRIC countries (Brazil, Russia, India and China) – have adopted the UNCITRAL Model Law on Cross-Border Insolvency or otherwise enacted effective alternative regimes for handling cross-border insolvencies. With their growing integration into the global economy, these emerging economies may face a rising number of cross-border insolvencies at some point in the coming years. Nonetheless, while the current absence of cross-border insolvency regimes in major emerging economies may not represent an immediate problem in the next few years, it may pose challenges for the international insolvency framework over the longer term.

In recent years, many countries around the world have recognised the importance of establishing a regime for addressing cross-border insolvencies, a topic that is becoming more and more significant given the ever-increasing globalisation of the world economy. Indeed, the UNCITRAL Model Law on Cross-Border Insolvency, which was promulgated by the United Nations in 1997 and which established the international standard in this area, has so far been adopted by 19 jurisdictions across the globe according to the tally kept by UNCITRAL.[1]

The states that have adopted the UNCITRAL Model Law reflect a diverse group of countries economically and geographically. Importantly, this group of adopting states includes among its ranks leading advanced economies[2] such as the United States, Japan and the United Kingdom – each of which ranks as one of the top ten economies in the world[3] – as well as other advanced economies such as Australia, Canada and South Korea. In Europe, while adoption of the UNCITRAL Model Law has been fairly limited (particularly among the larger economies of Western Europe),[4] all of the Member States of the European Union are bound by the EU Insolvency Regulation which, broadly speaking, effectively establishes a regional cross-border insolvency regime among the EU states themselves with respect to cross-border insolvency cases arising within the EU itself.[5]

Thus, between the countries that have adopted the UNCITRAL Model Law and/or the EU Regulation, many of the world's major industrialised or advanced economies are subject to some form of cross-border insolvency regime, whether of an international or regional scope.

However, despite this clear and important progress in the adoption of cross-border insolvency regimes among many advanced economies, there appears to be a glaring gap in the international insolvency architecture.[6] Specifically, very few of the major emerging economies[7] have adopted the UNCITRAL Model Law or otherwise enacted effective alternative regimes for handling cross-border insolvencies.

As has been widely commented on, these emerging economies are seen as representing some of the most dynamic economies globally. In particular, these economies are considered to be playing an increasingly significant role in the global economy whether measured, for example, in terms of their GDP levels, their growth rates, their contribution to global growth,[8] their growing role in global trade,[9] and/or the increasing investment flows (both inbound[10] and outbound[11]) involving these countries.

Yet, with their growing integration into the global economy, these emerging economies may face a rising number of cross-border insolvencies at some point in the future. Such cross-border insolvencies could arise from any of the several of the key trends affecting the emerging economies. These trends include the growing foreign direct investment into these countries, the increasing trade and investment between and among the emerging economies themselves,[12] and the 'multinationalisation' of leading corporations from the emerging markets as these corporations operate around the globe (including in other emerging markets).

The foreign investment flowing into the emerging economies might eventually give rise to cross-border insolvency situations where individual emerging economies will have to address requests for recognition from insolvency proceedings in foreign jurisdictions – i.e., inbound cross-border insolvencies for the emerging economies in question. Conversely, outward foreign investment from the emerging economies as well as overseas activity by corporations from the emerging markets might eventually lead to cross-border insolvency situations where the emerging economies might wish to have their own domestic insolvency proceedings recognised in foreign jurisdictions – i.e., outbound cross-border insolvencies for the emerging economies in question.

Furthermore, as noted above, with the increasing investment and trade flowing between and among the emerging economies themselves and with emerging market companies operating overseas (including in other emerging markets), there could eventually be cross-border insolvencies involving two or more emerging economies as opposed to cross-border insolvencies involving simply, say, an emerging economy and an advanced economy.

Of course, it remains to be seen how soon, and how many, cross-border insolvencies will eventually arise in these emerging economies, as well as how significant and/or complex these cross-border insolvencies will be.

Nonetheless, while the current absence of cross-border insolvency regimes in major emerging economies may not represent an immediate problem in the next few years, it may pose challenges for the international insolvency framework over the longer term (whether that is in the next decade or over a longer period of time). This challenge may come into sharper focus if and when the number of cross-border insolvencies in these emerging economies reaches a critical mass, particularly if at such time there are no cross-border insolvency regimes in place in these emerging economies to deal with the cross-border insolvencies that do in fact arise.

In Part I of this article, we will provide a broad overview of whether or not various emerging economies – both major emerging economies as well as several rising emerging economies – have adopted cross-border insolvency regimes. In addition, we will consider possible pathways to adoption of cross-border insolvency regimes in emerging economies and outline the types of domestic concerns that may need to be overcome. In Part II of this article, we will explore, among other issues, alternative pathways to the adoption of cross-border regimes for those emerging economies that may need to take intermediate steps or confidence-building measures before such emerging economies may be prepared or in a position to embrace more comprehensive cross-border insolvency regimes.

BRICs and cross-border insolvency

By way of illustration, the so-called BRIC countries[13] – namely, Brazil, Russia, India and China – are often cited as the new star performers in the global economy. Whether or not one agrees with the some of the more optimistic or bullish assessments of the growth prospects of the BRICs over the next few decades and/or with the related predictions that the BRICs will assume a commanding position in the global economy by 2050 (if not sooner), [14] it seems fairly clear that at least some, if not all, of the BRIC countries will continue to be important, if not key, economic players on the global scene in the coming decades.

In fact, the growing economic importance of individual BRIC countries has already begun to manifest itself. For example, as has been widely noted, within the last two years China has claimed the number two spot in the rankings of the world's largest economies jumping ahead of Japan (but still ranking behind the United States).[15] The other three BRICs – Brazil, Russia and India – also now occupy top-ten rankings in the world economy.[16] To be sure, the economic trajectory of the BRICs will not simply be a continuous upward arc, but rather it is virtually inevitable that the BRICs will also experience the normal ups and downs of economic cycles, as reflected, for example, in the current economic slowdowns in the BRICs generally.

Yet, for our purposes, the key point is that despite the growing economic importance of the BRICs in the global economy, not a single one of the four BRIC countries has adopted the UNCITRAL Model Law or otherwise put in place an effective alternative cross-border insolvency regime. For instance, while both Brazil and China modernised and overhauled their insolvency laws in recent years (Brazil in 2005 and China in 2006), neither country adopted the UNCITRAL Model Law or put in place a robust or effective alternative cross-border regime.

China's new insolvency law, the Enterprise Bankruptcy Law of 2006, does in fact contain a cross-border provision in Article 5 of the new law, but this provision is widely considered to be very restrictive in its potential application to foreign insolvency proceedings seeking recognition in China. Among other shortcomings, Article 5 of the new law requires the existence of treaty and/or reciprocity in order for recognition to be granted to a foreign proceeding, but as has been noted by commentators, China does not have any such treaties or clearly established reciprocal relations in place.[17] Article 5 of the new law also contains an extremely expansive public policy exception[18] (which stands in marked contrast to the very narrow 'manifestly contrary' standard for the public policy exception set forth in the UNCITRAL Model Law).[19]

Brazil's new insolvency law, on the other hand, does not contain any provisions at all dealing with cross-border insolvency issues. The result is that there is no clear roadmap for handling cross-border insolvencies in Brazil, with the attendant uncertainty and unpredictability that this could bring to any cross-border situation involving Brazil.[20]

It should be noted that in some (but not all) circles, South Africa is also considered to have joined the original four BRIC countries in forming an expanded five-member country grouping known as the BRICS.[21] In that expanded country grouping, South Africa would be the only country that has enacted the UNCITRAL Model Law having done so in 2000. However, South Africa is basically the exception that proves the rule – that is, while South Africa has adopted the UNCITRAL Model Law, South Africa's cross-border insolvency statute contains a threshold procedural requirement that has not yet been satisfied.[22]

Rising emerging economies beyond the BRICs

Beyond the BRICs, there are other emerging economies smaller than the BRIC economies that are now attracting increasing attention as potential rising stars in the global economy based on their population size, demographics (especially the presence of younger populations) and/or natural resources, among other factors. However, even among these newer groupings of emerging economies,[23] one also finds a fairly limited number of countries that have adopted the UNCITRAL Model Law.[24]

For example, countries that show up on one or more of the various lists of such up-and-coming economies are countries such as Bangladesh, Colombia, Egypt, Indonesia, Mexico, Nigeria, Philippines, South Africa, South Korea, Turkey and Vietnam.[25] But among the foregoing countries, only a few of them – namely, Colombia, Mexico and South Korea[26] – have so far adopted the UNCITRAL Model Law, and this underlines the fact that cross-border insolvency regimes have yet to make significant inroads into the emerging economies.

Viewed from a slightly different perspective, one can look at several geographic regions around the world such as Asia, Latin America and Africa – which are all regions with a strong concentration of emerging market economies and/or developing countries – and consider the extent to which the UNCITRAL Model Law has been adopted by countries in these regions.[27] For instance, in the entire Asia-Pacific region, only four countries have adopted the UNCITRAL Model Law: Australia, Japan, New Zealand and South Korea. Within South East Asia, which is one of the most dynamic parts of Asia consisting of several large, growing emerging market economies, not a single country in the region has adopted the UNCITRAL Model Law.

Similarly, in all of Latin America, only two countries have adopted the Model Law: Colombia and Mexico. In Africa, strictly speaking a region consisting more of 'frontier markets' or developing countries[28] than emerging markets, only two countries, South Africa and Eritrea, have adopted the Model Law (even though, as noted above, South Africa's cross-border statute has not yet fully come into effect).[29]

In other words, there are major parts of the globe – in Asia, Latin America and Africa – where cross-border insolvency regimes, whether in the form of the UNCITRAL Model Law or otherwise, appear to have taken root in only a very limited way.

Pathways to adoption of cross-border insolvency in emerging markets

Nevertheless, given the growing interconnectedness of the global economy, it would arguably be a very positive and desirable development if in the coming years many of the major emerging markets that are currently lacking a cross-border insolvency regime would move to adopt some form of such a cross-border regime. Such a development could be beneficial to cross-border insolvency practice in particular as well as the international insolvency architecture generally.

Some countries may be closer to adopting the UNCITRAL Model Law than others, and other countries may consider it necessary to take some intermediate steps before embracing a comprehensive cross-border insolvency regime such as embodied in the UNCITRAL Model Law. In some major emerging markets, introducing a cross-border insolvency regime may fit into a broader strategy of achieving other reforms and revisions to a nation's existing insolvency law.

For instance, in Brazil, leading professionals and academics in the insolvency and restructuring field have been working diligently on developing a new package of potential amendments to the Brazilian insolvency law that was enacted in 2005.[30] As part of their broader review of Brazil's new insolvency law, these professionals and academics have apparently been considering the issue of cross-border insolvency and the merits of the UNCITRAL Model Law. If these professionals and academics were ultimately to recommend the adoption of the UNCITRAL Model Law as part of an overall insolvency law reform package, it would then be up to the political system to make the adoption of the UNCITRAL Model Law a reality.

Yet, whether or not adoption of the UNCITRAL Model Law would be able to gain the necessary traction in the Brazilian political system – including whether it could get to the point of being taken up for consideration by the Brazilian legislature – might depend on whether the advocates for the UNCITRAL Model Law could generate sufficient support among key stakeholders in Brazil's financial system and economy generally. Key stakeholders would probably need to understand and be able to articulate for other actors in the Brazilian system why, for example, adoption of the UNCITRAL Model Law would make sense for an economy such as Brazil's which has become increasingly integrated into the global economy and which has become an increasingly popular destination for foreign investment.

Ultimately, however, adoption of the UNCITRAL Model Law would require action by Brazil's national legislature and then its president, and both the legislature and president would probably need to understand and/or be convinced that instituting a sound and effective cross-border insolvency regime would bring significant advantages to Brazil and its economy or at least that any domestic concerns with respect to going down this path would be outweighed by the advantages of doing so. Of course, it clearly remains to be seen whether the Brazilian political system will eventually be able to reach this end result of adopting the UNCITRAL Model Law.

Other countries may come at this issue from a slightly different orientation. For instance, it may be that countries such as China will be inclined to take a more gradualist or incremental approach towards adoption of a comprehensive cross-border insolvency regime, and perhaps that will be the only way to introduce a robust cross-border insolvency regime in a country such as China.

Specifically, until the adoption of its new Enterprise Bankruptcy Law of 2006, China had what might be considered as a strictly 'territorialist'[31] approach to cross-border insolvency. While as discussed above the cross-border provision in the new law (ie, Article 5) has some fairly serious limitations, it nonetheless is seen as representing a move away from the strictly territorialist position that China had held previously for many years.[32]

Thus, in future iterations of its insolvency law (whether by amendments to China's new insolvency law or through judicial interpretations of that law),[33] perhaps China will continue down this path and eventually embrace an even more 'universalist' approach to cross-border insolvency than is currently provided for in Article 5 of the new law. If it eventually does so, it may be necessary for China to move down this path on a relatively gradual or incremental basis. However, in order to get to this point in China, it may be necessary (no pun intended) to further 'socialise' the idea of the need for a more universalist cross-border insolvency regime among key stakeholders in China, which is a process that could undoubtedly take some time to carry out.

Nonetheless, whether China ever ends up going the full distance and adopting something along the lines of the UNCITRAL Model Law obviously remains an open question and will be subject to the interplay of political factors within China itself, including crucially whether the political leadership in China sees such a step as being in China's national interest. For the reasons noted below, a country such as China would likely have to address various domestic concerns before it would be in a position to embrace more fully a more universalist approach to cross-border insolvency.

Yet, the issue of when and how China might eventually revisit cross-border insolvency issues could be affected by matters of practical necessity. For example, this might happen if China were to face an upsurge in significant inbound cross-border insolvencies and found itself ill-equipped to address such cross-border insolvencies, or if at some point in the future Chinese policymakers were to become concerned (for reputational reasons or otherwise) that China was seriously out of step with international 'best practices' in this area. Or this might happen if in the future Chinese policymakers were to focus on the importance of cross-border insolvency regimes because Chinese insolvency proceedings were then having difficulty gaining recognition in certain foreign proceedings due to a lack of UNCITRAL Model Law-type statutes in the corresponding foreign jurisdictions, or it might happen for any combination of the foregoing reasons.

Overcoming domestic concerns to cross-border insolvency regimes

As a general matter, the issues of what type of cross-border regime the emerging economies countries will ultimately adopt and when they adopt it will obviously play out in the individual countries themselves and will depend on the unique internal dynamics of each of the individual countries, including the all-important political dynamics within these countries. Some countries may be reluctant to adopt a robust cross-border insolvency regime due to concerns about how such a regime would affect, as they see it, their national sovereignty. Such reservations may flow from concerns traditionally associated with the territorialist conception of cross-border insolvency, but they also may relate to broader nationalist sentiments, including, amongst other things, a possible suspicion of foreign economic interests.

For example, some jurisdictions may be concerned that the primary benefits of such a cross-border insolvency regime will accrue to foreign parties, particularly foreign creditors, at the expense of local creditors (eg, if such a regime leads to the turnover of assets within its jurisdictions to foreign creditors in connection with a foreign insolvency proceeding). These types of concerns, whether valid or not, may strike a discordant note within jurisdictions considering whether they should adopt the UNCITRAL Model Law or any alternative cross-border regime.

In other words, some countries could well have a high hurdle to overcome in implementing an effective cross-border regime if they are faced with deep-seated reservations such as those outlined above. However, that is why the advocates for the adoption of the UNCITRAL Model Law or any alternative cross-border insolvency regime in a given country will probably need to mobilise support among key stakeholders within that country as well as make a persuasive case demonstrating that adopting the UNCITRAL Law or an alternative cross-border regime will be in that country's national interest. Yet, advocates for this position will not have to construct arguments in favour of this position in a vacuum but instead will be able to draw, for instance, on the pioneering work of Professor Jay Westbrook in this area in support of a universalist conception of cross-border insolvency.[34]

Conclusion

In short, those emerging economies that have not yet adopted a cross-border-insolvency regime, in the form of the UNCITRAL Model Law or otherwise, might be well advised to focus on this issue in the coming years before it develops into a problem for these countries in addressing any cross-border insolvencies in which they are involved.

However, to achieve success in putting in place an effective cross-border insolvency regime, individual emerging economies will need to be comfortable that the adoption of a cross-border regime will be consistent with their respective conceptions of what is in their national interest.

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Notes

1 See Status: 1997 – UNCITRAL Model Law on Cross-Border Insolvency (UNCITRAL, 1997) available at **www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html** [last accessed 2 September 2012]. As UNCITRAL notes, a jurisdiction will be considered as having the UNCITRAL Model Law even if its corresponding national legislation has some variations from the UNCITRAL Model Law itself: 'A model law is created as a suggested pattern for law-makers to consider adopting as part of their domestic legislation. Since States enacting legislation based upon a model law have the flexibility to depart from the text, the above list is only indicative of the enactments that were made known to the UNCITRAL Secretariat. The legislation of each State should be considered in order to identify the exact nature of any possible deviation from the model in the legislative text that was adopted.' *Ibid*.

2 'Advanced economies' is a term for which there is not necessarily a uniform definition. However, the International Monetary Fund does classify 34 of the economies in the world as 'advanced economies'. See 'Tensions from the Two-Speed Recovery: Unemployment, Commodities, and Capital Flows', *World Economic Outlook* (International Monetary Fund, April 2011) p 169, available at **www.imf.org/external/pubs/ft/weo/2011/01/pdf/statapp.pdf**. The IMF will classify an economy as an 'advanced economy' based on the following criteria: per capita income level; export diversification; and degree of integration into the global financial system. See Rebecca Nelson, *Sovereign Debt in Advanced Economies: Overview and Issues for Congress*, Congressional Research Service (February 2012) p 1, available at **www.fas.org/sgp/crs/misc/R41838.pdf** (citing IMF criteria).

3 For rankings of world economies, see *The World Factbook*, Central Intelligence Agency (September 2012), available at **www.cia.gov/library/publications/the-world-factbook/rankorder/2001rank.html?countryName=United States&countryCode=us&regionCode=noa&rank=2#us** (2011 estimates of GDP measured on the basis of so-called purchasing power parity (PPP)).

4 In Western Europe – apart from the United Kingdom – none of the major economies such as Germany, France, or Italy have adopted the UNCITRAL Model Law. See Status: 1997 – UNCITRAL Model Law on Cross-Border Insolvency (UNCITRAL, 2007) **www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html** [last accessed 2 September 2012]. By contrast, various countries in Central and Eastern Europe as well as Southern Europe have adopted the UNCITRAL Law, including Greece, Montenegro, Poland, Romania, Serbia, and Slovenia. *Ibid*.

5 Under the EU Regulation, specifically enumerated insolvency proceedings within an individual Member State of the EU (as set forth in Annex A to the EU Regulation) are given cross-border effect within the other member states of the European Union. See Bob Wessels, Bruce Markell and Jason Kilborn, *International Cooperation in Bankruptcy and Insolvency Matters* (Oxford University Press, 2009) p 140. ('Automatic recognition should therefore mean

that the effects attributed to the insolvency proceedings by the law of the State in which the proceedings were opened (*lex concursus*) extend to all other Member States.')

It is important to bear in mind that the EU Regulation does not address the recognition of insolvency proceedings arising from outside of the European Union. See Jay L Westbrook et al, *A Global View of Business Insolvency Systems* (The World Bank, 2010) p 259. ('Another deficiency of the Regulation is its complete neglect of the world outside its member states. There is no indication as to how cases shall be treated with respect to non-EU member states.') The EU Regulation is currently undergoing a process of review and revision, and there have been various proposals for significant changes to the EU Regulation as it is currently formulated. See *Revision of the European Insolvency Regulation, Proposals by INSOL Europe* (INSOL Europe, 2012).

6 By the phrase 'international insolvency architecture', we are referring not just to the relevant legal regime, such as the UNCITRAL Model Law, but also to the number and composition of countries that have signed up to such a legal regime through their respective domestic laws or otherwise.

7 There does not appear to be a single widely agreed upon definition of what constitutes an 'emerging market' or 'emerging market economy'. In one paper, the International Monetary Fund defined an 'emerging market' as follows: 'Developing countries' financial markets that are less than fully developed, but nonetheless broadly accessible to foreign investors.' *Global Financial Stability Report: Market Developments and Issues*, International Monetary Fund: Glossary (International Monetary Fund, September 2004) p 161, available at **www.imf.org/External/Pubs/FT/GFSR/2004/02/pdf/glossary.pdf**. As a matter of terminology, in this article, we use the terms 'emerging market' and 'emerging economy' interchangeably.

Some observers have raised the question as to whether some of these emerging economies have in fact already 'emerged' and thus are no longer strictly speaking 'emerging' economies. Indeed, the terminology may need to change to describe those 'emerging economies' or 'emerging markets' that have truly 'emerged' and which as to some of the countries, at least on the economic dimension, have reached (or even surpassed) the level of many 'advanced economies' or 'industrialised' countries, even if these newly emerged economies lack some of the indicia (eg, well-developed legal systems, etc) that are traditionally associated with what are considered to be advanced economies or industrialised or developed countries. See, generally, Paul La Monica, *Emerging Markets? They've Already Emerged*, (CNN Money, 11 November 2010), **http://money.cnn.com/2010/11/11/markets/thebuzz/index.htm**; Jenara Nerenberg, *Emerging Markets Have Emerged: Next Stop for Some Companies the Global Fortune 500*, (Fast Company, 20 January 2011), **www.fastcompany.com/1719085/emerging-markets-have-emerged-next-stop-some-companies-global-fortune-500**.

8 The contribution of the emerging economies to global growth was particularly striking in the wake of the recent global financial crisis when these countries were credited with playing an important role in helping pull the global economy out of a global recession. On a related point concerning the new dynamism of the emerging economies in the global economy, see Michael Spence, *The Next Convergence: The Future of Economic Growth in a Multispeed World* (Farrar, Straus & Giroux, 2011) p 8. ('The emerging economies have rebounded from the [global financial] crisis surprisingly quickly. They are now the main engine of global growth.')

9 See Jim O'Neill, *The Growth Map: Economic Opportunity in the BRICs and Beyond* (Portfolio/Penguin, 2011) p 40 (noting that, as to a subset of the emerging economies, the role of the BRICs – Brazil, Russia, India and China – in global trade is expanding 'much faster than world trade overall.').

10 See 'Capital Flows to Emerging Market Economies', Institute of International Finance Research Note, (Institute of International Finance, 1 June 2011), available at **www.iif.com/press/press+190.php** (noting increase of capital flows in 2010 and expected increases in such flows for 2011 and 2012). Of course, capital flows into these economies can ebb and flow depending on various international and domestic factors.

11 See *Foreign Direct Investment from the Emerging Markets: The Challenges Ahead*, eds Karl P Sauvant, Wolfgang A Maschek and Geraldine McAllister (Palgrave Macmillan, 2009) p 16, available at **www.vcc.columbia.edu/pubs/documents/FDIfromEMs-FM-13August09.pdf** ('The rise of outward investment from emerging markets has contributed to the growth in FDI [foreign direct investment] globally.').

12 This is sometimes referred to as 'South-South trade'.

13 The origin of the term 'BRICs' is commonly traced to a 2001 paper by Jim O'Neill of Goldman Sachs. See Jim O'Neill, 'Building Better Global Economic BRICs', Goldman Sachs Global Economic Paper No. 66 (30 November 2001), available at **www.goldmansachs.com/our-thinking/topics/brics/brics-reports-pdfs/build-better-brics.pdf**.

14 Dominic Wilson and Roopa Purushothaman, 'Dreaming with BRICs: The Path to 2050', Goldman Sachs Global Economic Paper No. 99 (1 October 2003) p 4, available at **www.goldmansachs.com/our-thinking/topics/brics/brics-reports-pdfs/brics-dream.pdf**. Among other predictions, the paper posited propositions such as the following: 'In less than 40 years, the BRICs' economies together could be larger than the G6 [US, Japan, Germany, France, Italy and UK] in US dollar terms. By 2025 they could account for over half the size of the G6. Currently they are worth less than 15%.' *Ibid* at 4. 'Of the current G6 […] only the US and Japan may be among the six largest economies in US dollar terms in 2050.' *Ibid*. In more recent years, Jim O'Neill and his colleagues at Goldman Sachs have moved forward some of their timetables for the BRICs achieving a commanding position in the global economy based on faster-than-expected growth rates for the BRICs in recent years. See Jim O'Neill and Anna Stupnytska, 'The Long-Term Outlook for the BRICs and N-11 Post Crisis', Goldman Sachs Global Economic Paper No. 192 (4 December 2009) pp 21–23, available at **www.goldmansachs.com/our-thinking/topics/brics/brics-reports-pdfs/long-term-outlook.pdf** ('Our current projections show that China may now overtake the US 14 years earlier than we thought originally – we now expect it to become the largest economy in the world by 2027, vs 2041 previously.').

To be sure, as popular as the BRIC moniker has become and as widely discussed as the BRIC thesis has been, the BRIC thesis has also received some criticism. See eg, Markus Jaeger, 'COMMENT: Rise of the BRICs Revisited', Deutsche Bank Research (June 2009), available at **www.dbresearch.com/servlet/reweb2.ReWEB?addmenu=false&document=PROD0000000000241888&rdShowArchivedDocus=true&rwnode=DBR_INTERNET_EN-PROD$BANKENTEAM21&rwobj=ReDisplay.Start.class&rwsite=DBR_INTERNET_EN-PROD** (criticising BRIC thesis for understating the role of China vis-à-vis the three other BRICs taken together). See also David Rothkopf, 'The BRICs and what the BRICs would be without China…', Foreign Pol'y (15 June 2009), available at **http://rothkopf.foreignpolicy.com/posts/2009/06/15/the_brics_and_what_the_brics_would_be_without_china**.

15 See Andrew Monahan, 'China Overtakes Japan as World's No 2 Economy', *The Wall Street Journal* (14 February 2011), available at **http://online.wsj.com/article/SB10001424052748703361904576142832741439402.html**.

16 This is based on a so-called purchasing power parity (PPP) measure of GDP as opposed to a nominal value measure of GDP. It should be noted, of course, that China's per capita income is not even in the top 100 in world rankings which still places it squarely in the ranks of developing countries, and China faces other major economic and social challenges such as substantial income inequality and significant regional disparities in levels of development. See *The World Factbook*, Central Intelligence Agency, **www.cia.gov/library/publications/the-world-factbook/geos/ch.html** [last updated 24 August 2012] (source for data on GDP and GDP per capita is based on 2011 estimates). For further discussion of the major challenges facing China, see, generally, Michael Spence, *The Next Convergence: The Future of Economic Growth in a Multispeed World* (Farrar, Straus & Giroux, 2011) pp 194–198.

17 See Charles Booth, *The 2006 Enterprise Bankruptcy Law: The Wait is Finally Over*, [2008] 20 Singapore ACLJ 275, 313–314 ('as China has not entered into any relevant treaties or reciprocal relations on cross-border insolvency, Art 5 is unlikely to have much impact at present.'); Jingxia Shi, *Twelve Years to Sharpen One Sword: 2006 Enterprise Bankruptcy Law and China's Transition to a Market Economy*, [2007] 16 Norton J Bankr L & Prac, 645, 678 (noting absence of cross-border insolvency treaties entered into by China and also noting that the reciprocity requirement 'renders the assistance from Chinese courts unpredictable and subject by and large to the discretion of the judge.') See also Steven T Kargman, 'Solving the Insolvency Puzzle', China Business Review (September–October 2007), p. 48.

18 China's Enterprise Bankruptcy Law contains the following language in Article 5: 'when believing that the said judgment or ruling does not violate the basic principles of the laws of the People's Republic of China, does not jeopardize the sovereignty and security of the State or public interests, does not undermine the legitimate rights and interests of the creditors within the territory of the People's Republic of China…' Enterprise Bankruptcy Law of the People's Republic of China (promulgated by the Standing Committee of the Tenth National People's Congress, 27 August 2006, effective 1 June 2007), available at **www.china.org.cn/china/LegislationsForm2001-2010/2011-02/11/content_21898381.htm** [last updated 11 February 2011].

19 The UNCITRAL Model Law provides as follows in Article 6: 'Nothing in this Law prevents the court from refusing to take an action governed by this Law if the action would be manifestly contrary to the public policy of this State.' UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment, UNCITRAL Article 6, available at **www.uncitral.org/pdf/english/texts/insolven/insolvency-e.pdf** [last visited 2 September 2012]. The narrowness of the public policy exception is further reinforced in the Guide to Enactment: 'The purpose of the expression "manifestly", used also in many other international legal texts as a qualifier of the expression "public policy", is to emphasize that public policy exceptions should be interpreted restrictively and that article 6 is only intended to be invoked under exceptional circumstances concerning matters of fundamental importance for the enacting State.' *Ibid* at paragraph 89.

20 Without any provisions in Brazil's new insolvency law dealing specifically with cross-border insolvency, Brazil essentially remains reliant in the cross-border insolvency area on, among things, decades-old treaties and conventions, such as the Code of Bustamante of 1928 which is only applicable among the signatory countries – mostly smaller Latin American countries – and whose 'practical application has been somewhat limited'. Thomas Felsberg and Paulo Campo Fernando Campana Filho, 'Brazil' in *Restructuring and Insolvency 2012* ed Bruce Leonard (Getting the Deal through, 2011) at 71. See also Thomas Felsberg, Steven Kargman and Andrea Acerbi, 'Brazil Overhauls Restructuring Regime', Int Fin L Rev [2006] 40, 44 (January 2006) ('[the] failure to incorporate the Model Law will maintain the uncertainty and unpredictability that existed under the old law with respect to multi-jurisdictional insolvencies that include a Brazilian component […]'). For a detailed discussion of cross-border insolvency law in Brazil, see Paulo Fernando Campana Filho, 'The Legal Framework for Cross-Border Insolvency in Brazil', 32 Houston J Int'l L Rev 97 (2010).

21 South Africa was invited to attend its first BRIC summit meeting in April 2011 which appeared to confer some BRIC-type status on South Africa. See Nasreen Seria, *South Africa is Asked to Join as a BRIC Member to Boost Emerging Markets* (Bloomberg, 24 December 2010) **www.bloomberg.com/news/2010-12-24/south-africa-asked-to-join-bric-to-boost-cooperation-with-emerging-markets.html**. For the argument as to why South Africa should not be considered in the same grouping as the original BRICs, see Jim O'Neill, *The Growth Map: Economic Opportunity in the BRICs and Beyond* (Portfolio/Penguin, 2011) p 106 ('as far as economic criteria are concerned it is difficult for me to think of South Africa as a genuine BRIC.').

22 It was a requirement of South Africa's cross-border insolvency legislation that the Minister of Justice designate States as to which the legislation would be effective, but apparently the Minister of Justice has not designated any such States. See Clare van Zuylen (Bowman Gilfillan), 'South Africa' in Restructuring and Insolvency 2012 ed Bruce Leonard at 436; *Challenges of Cross-Border Insolvency*, Tanner DeWitt Solicitors, **www.tannerdewitt.com/media/publications/challenges-of-cross-border-insolvencies.php** [last visited 2 September 2012].

23 Some of these groupings include countries that are not, strictly speaking, 'emerging economies' but rather 'frontier markets' or even simply 'developing countries'. For example, countries such as Bangladesh, Nigeria, and Vietnam, which show up on at least one of these lists of up-and-coming economies, might considered to be 'frontier markets'. However, the distinctions between some of these categories can be somewhat blurry (a point that applies as well to the discussion of country categories in other parts of this article). For one listing of 'frontier markets', see Ruchir Sharma, *Breakout Nations: In Pursuit of the Next Economic Miracles* (WW Norton & Co, 2012) p 261–262.

24 For this and related analysis, we are using the UNCITRAL Model Law as a simple proxy for whether countries have an effective cross-border insolvency regime. To be sure, in order to fully address whether a country has adopted a cross-border insolvency regime, one would have to review in detail the individual insolvency legislation of each country in question, but such a country-by-country analysis of the relevant insolvency legislation for all of the emerging economies discussed in this article is beyond the scope of this article. For purposes of determining whether a country has adopted the UNCITRAL Model Law in the ensuing discussion, we refer to the official UNCITRAL website at **www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html** [last visited 2 September 2012].

25 Different analysts have developed different lists of various emerging markets to keep an eye on, and some of these lists have their own acronyms. Jim O'Neill, the creator of the BRIC concept, and his colleagues at Goldman Sachs have developed the concept of the 'Next 11' which includes the next 11 most populous emerging markets after the BRICs. The Next 11 includes the following countries: Bangladesh, Egypt, Indonesia, Iran, South Korea, Mexico, Nigeria, Pakistan, Philippines, Turkey and Vietnam. Of the Next 11, only South Korea and Mexico have adopted the UNCITRAL Model Law. The 'CIVETS' grouping, which focuses in particular on countries with young populations, includes Colombia, Indonesia, Vietnam, Egypt, Turkey and South Africa (The 'CIVETS' countries are the target investee countries for an investment fund run by HSBC Global Asset Management.). In this grouping, only two countries – Colombia and South Africa – have adopted the UNCITRAL Model Law. The 'MAVINS' grouping, which focuses on countries with commodities and expanding domestic markets, includes Mexico, Australia, Vietnam, Indonesia, Nigeria and South Africa, and in this grouping, Mexico, Australia and South Africa have adopted the UNCITRAL Model Law. (As noted above in the case of the CIVETS grouping, some of the groupings are not developed simply for academic purposes, but rather may be tied to specific investment products offered by investment funds and/or investment firms).

For background on the Next 11, see Dominic Wilson and Anna Stupnytska, 'The N-11: More than an Acronym', Goldman Sachs Global Economics Paper No. 153 (28 March 2007) **www.chicagobooth.edu/alumni/clubs/pakistan/docs/next11dream-march%20'07-goldmansachs.pdf**. For information on CIVETS, see John Greenwood, 'After BRICs, CIVETS?', The Wall Street Journal (18 September 18, 2011), **http://online.wsj.com/article/SB10001424053111904716604576546632573895382.html**. For information on the MAVINS, see Vincent Fernando and Jon Wiesenthal, (The Next BRICs: Six Surging Countries You Must Pay Attention to This Decade), Business Insider (6 January 2010), **www.businessinsider.com/the-next-10-brics-2010-1?op=1**.

26 South Korea occupies an interesting position in the classification of economies as it does not seem to fit neatly into the existing classification categories, such as developed country versus developing country or advanced economy versus emerging market. See Jim O'Neill, *The Growth Map: Economic Opportunity in the BRICs and Beyond* (Portfolio/Penguin, 2011) p 98 ('South Korea in particular is closer to a developed country than a developing one, and its GDP per capita and high growth environment scores reflect that.').

27 For the status of states that have adopted the UNCITRAL Model Law, see the UNCITRAL website at **www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html** [last visited 2 September 2012].

28 'Frontier markets' are defined as 'small, illiquid stock markets that are generally considered to be at a much earlier stage of economic and financial market development than emerging markets.' See John Christy, 'Frontier Markets Definition, About.com, **http://internationalinvest.about.com/od/glossary/g/frontiermarket.htm** [last visited 2 September 2012]; See also Ruchir Sharma, *Breakout Nations: In Pursuit of the Next Economic Miracles* (WW Norton & Company, Inc, 2012) p 187 ('"Frontier" is a term that has come into regular use only since about 2007, and it is defined in several different ways, but the simplest way to think about these nations is that they are open to foreign investors but do not follow orthodox market rules.').

29 Of course, South Africa and Eritrea are very much of an odd pairing: South Africa is considered to be the largest economy in Africa whereas Eritrea is only a tiny economy by comparison. However, as a minor historical footnote, Eritrea was, according to UNCITRAL's tally of adopting states, the first country to have adopted the UNCITRAL Model Law having done so in 1998. Status: 1997 – UNCITRAL Model Law on Cross-Border Insolvency, (UNCITRAL, 2007) **www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html** [last visited 2 September 2012].

30 See Thomas Felsberg and Paulo Campo Fernando Campana Filho, 'Brazil' in *Restructuring and Insolvency 2012* ed Bruce Leonard (Getting the Deal through, 2011) at 71.

31 The fundamental dichotomy in cross-border insolvency involves 'universalism', on the one hand, and 'territorialism', on the other hand. Professor Westbrook describes 'universalism' as the 'administration of multinational insolvencies by a leading court applying a single bankruptcy law [...]', and he describes 'territorialism' as the approach by which 'each country would seize local assets and apply them for the benefit of local creditors, with little or no regard for foreign proceedings'. Jay Lawrence Westbrook, *A Global Solution to Multinational Default*, [2000] 98 Mich L Rev 2276, 2277, 2282. For further discussion of the competing approaches of universalism and territorialism, see also Bob Wessels, Bruce Markell and Jason Kilborn, *International Cooperation in Bankruptcy and Insolvency Matters* (Oxford University Press, 2009) p 40–50.

There also variations on pure universalism and pure territorialism such as 'modified universalism' which is considered a decent characterisation of the approach taken by the UNCITRAL Model Law. 'Modified universalism' has been described as 'accept[ing] the central premise of universalism, that is, that assets should be collected and distributed on a worldwide basis, but reserves to local courts discretion to evaluate the fairness of home country procedures and to protect the interests of local creditors.' *See* Look Chan Ho, *Perfecting the Union, Perfecting Universalism*, [2009] 2 Corporate Rescue & Insolvency 71.

32 Indeed, when China enacted its new law in 2006, its cross-border provision, Article 5, while not fully embracing the 'modified universalist' approach embodied by the UNCITRAL Model Law, nonetheless represented an advance over China's former approach of strict territoriality. See Jingxia Shi, *Twelve Years to Sharpen One Sword: 2006 Enterprise Bankruptcy Law and China's Transition to a Market Economy*, [2007] 16 Norton J Bankr L& Prac 645, 677 ('While this clause [Article 5] does not subscribe to a clear-cut universality approach, it moves away from the territoriality approach and can be termed "revised universality."').

33 Judicial interpretations issued by the Supreme People's Court can play an important part in the development of law in China. See Jingxia Shi, *Twelve Years to Sharpen one Sword: 2006 Enterprise Bankruptcy Law and China's Transition to a Market Economy.* note 32 above, at 695 n217 ('In China, the Supreme Court from time to time issues judicial interpretations, ie, guidance on implementation of particular laws. They are very important supplements to the legislation and govern the trial practices of courts on all levels.'); see also Charles Booth, *Drafting Bankruptcy Laws in Socialist Market Economies: Recent Developments in China and Vietnam*, [2005] 18 Colum J Asian L 93, 99–100.

34 See Jay Lawrence Westbrook, *Theory and Pragmatism in Global Insolvencies: Choices of Law and Choices of Forum*, [1991] 65 Am Bankr LJ 457, 464–66 (discussing 'rough wash" and 'transactional gain' arguments in favour of universalism). We will discuss possible arguments that can be made in favour of a robust cross-border insolvency regime in further detail in Part II of this article.