Emerging Economies and Cross-Border Insolvency Regimes: Missing BRICs in the International Insolvency Architecture (Part II)

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This is the second part of an article published previously in *Insolvency and Restructuring International.* In this part, we will explore intermediate steps that emerging economies might adopt as a means of growing more comfortable with the concepts that are central to any meaningful cross-border insolvency regime – particularly concepts such as recognition of foreign insolvency proceedings in a domestic proceeding, coordination and cooperation between proceedings pending in different jurisdictions, and the proper treatment of foreign creditors in domestic proceedings – as well as how these concepts are applied in practice in actual cross-border situations.

In Part I of this article published in the prior issue of this journal, we surveyed the international landscape and discussed a significant gap in the existing international insolvency architecture – namely, the absence of effective cross-border insolvency regimes in many emerging economies around the world, particularly in each of the so-called BRIC countries (Brazil, Russia, India and China) but also in other major emerging market jurisdictions. Part I focused primarily on the issue of comprehensive cross-border insolvency regimes, notably the UNCITRAL Model Law on Cross-Border Insolvency which establishes the international standard in this area,[1] and the very limited extent to which major emerging economies have adopted such comprehensive cross-border insolvency regimes. In Part I, we also outlined possible pathways that emerging economies might pursue that could lead to the adoption of such comprehensive cross-border insolvency regimes in these jurisdictions.

In Part II, we will explore intermediate steps that emerging economies might adopt as a means of growing more comfortable with the concepts that are central to any meaningful cross-border insolvency regime – especially concepts such as recognition of foreign insolvency proceedings in a domestic proceeding, coordination and cooperation between proceedings pending in different jurisdictions, and the proper treatment of foreign creditors in domestic proceedings – as well as how these concepts are applied in practice in actual cross-border situations. The intermediate steps that we will discuss, including regional approaches to cross-border insolvency, might serve to pave the way ultimately for the adoption by these emerging market jurisdictions of a more comprehensive cross-border insolvency regime. Finally, we will also consider the challenges that emerging economies might face in implementing cross-border regimes, as well as discuss ways in which both national and international policymakers can bring further attention to the issue of cross-border insolvency law reform.

Regional approaches to cross-border insolvency

Some countries that are considering whether to adopt a cross-border insolvency regime, may be inclined to consider the issue from a regional perspective, consisting in taking into account what their neighbouring countries have done or plan to do in the field of cross-border insolvency. In many cases, the neighbouring countries may be some of their largest trading partners, and thus an individual country in a particular region may be reluctant to embrace a cross-border insolvency regime unless its neighbours do so as well, thereby giving rise to the cross-border insolvency equivalent of something akin to an Alfonse-Gaston routine.

Some regions may be relatively well integrated economically and/or politically and thus might be strong candidates for adopting a regional approach to cross-border insolvency issues. For example, the countries of Southeast Asia are increasingly drawing closer together under the rubric of their long-standing regional association, the ten-member Association of Southeast Asian Nations (ASEAN).[2] However, as noted in Part I of this article, not even a single country in the ASEAN region has yet adopted the UNCITRAL Model Law on Cross-Border Insolvency.

Nonetheless, cross-border insolvency matters are not an unknown issue to the ASEAN countries as reflected in the case of the high-profile US$13.9bn Asia Pulp & Paper (APP) restructuring of just over a decade ago. The APP restructuring involved a complex cross-border situation in which the holding company was located in Singapore but the operating companies were located in other jurisdictions, notably Indonesia and China (neither of which had adopted the UNCITRAL Model Law). The APP restructuring spilled over into the Singapore courts (as well as the courts of several other jurisdictions), but the Singapore courts at both the trial court and appellate level refused to grant a petition by certain creditors for so-called judicial management of the Singapore holding company.

The Singapore courts expressed concern that any judicial managers appointed by a Singapore court might experience difficulty in exerting control over the Indonesian and Chinese operating company subsidiaries.[3] One wonders, however, whether the Singapore courts would have come to a different result or at least analysed the case differently if, for example, at the time this litigation was brought, a cross-border insolvency regime such as the UNCITRAL Model Law had been in effect in Indonesia.

Outside of ASEAN, in other parts of the world, new regional groupings are springing up, such as the East African Community,[4] and these new regional groupings might also be good candidates for pursuing a regional approach to cross-border insolvency issues. Some of the countries in such regions are actively pursuing strategies of economic development and such strategies are based in no small part upon strengthening intra-regional trade and investment. In such an environment, issues involving cross-border insolvency are likely to come to the fore at some point in the coming years, as the process of regional economic integration develops further.

Ideally, of course, these regional groupings would encourage all of their members – or even a subset of their members – to adopt the UNCITRAL Model Law on Cross-Border Insolvency (which, after all, stands as the international community's landmark effort in establishing a comprehensive set of rules related to cross-border insolvency). If all of the members of a regional grouping adopted the UNCITRAL Model Law at the same time, this might help an individual member of the regional grouping to overcome any concerns it might have that it would be acting alone in adopting the UNCITRAL Model Law, while perhaps none of its neighbours would follow suit. For some countries, such concerns regarding possible inaction by their neighbours might well serve as a strong disincentive to move forward with the UNCITRAL Model Law or some other full-blown cross-border insolvency regime.

Alternatively but less optimally, individual countries within a given region might adopt what is sometimes referred to as an 'UNCITRAL-lite' approach. Such an approach involves adopting the UNCITRAL Model Law but building into the implementing domestic legislation a reciprocity requirement. Under a reciprocity-based approach, the state that is requesting recognition in a foreign jurisdiction under a Model Law-type statute would only be granted recognition in the receiving state if the requesting state's own domestic insolvency law contained an UNCITRAL Model Law-type statute. [5]

As another fallback to going the full distance and completely embracing the UNCITRAL Model Law (whether in its pure form or UNCITRAL-lite form), the countries comprising a given region might be encouraged to enter into a regional treaty on cross-border insolvency governing cross-border insolvencies arising within that particular region. One obvious template for this approach would be the EU Regulation on Insolvency (which itself is currently undergoing a process of revision within the European Union).[6]

This type of regional treaty-based approach might serve as an important confidence-building measure among the countries in the region with respect to how cross-border insolvency issues are addressed and resolved. To be sure, as noted in Part I, a regional treaty-based approach such as embodied in the EU Regulation on Insolvency may have a serious gap in its coverage if it does not deal by its terms with the issue of how insolvencies arising from jurisdictions outside the particular region in question should be addressed to the extent that such foreign insolvencies intersect with insolvencies in the region itself.

In the area of cross-border insolvency, which is relatively complex and which also involves delicate issues of sovereignty and jurisdiction of national courts (especially with respect to the potential tensions between domestic courts and foreign courts), the value of confidence-building measures should not be underestimated. Moreover, such a regional treaty-based approach might even lead eventually to a greater acceptance among the region's member states of a broader cross-border insolvency regime such as the UNCITRAL Model Law.[7]

Cross-border insolvency protocols as a confidence-building measure

Some countries, particularly those that may be at a relatively early stage of their economic and legal development, may regard establishing a formal, full-blown cross-border insolvency regime as simply a bridge too far at this point in their development. However, even for these countries, there are steps that they can take to acclimate themselves to cross-border insolvency issues without the need at the outset to necessarily introduce a formal or elaborate cross-border insolvency regime.

Specifically, one way to do this would be for emerging economies or developing countries to introduce the use of cross-border insolvency protocols in situations where there are insolvency proceedings pending in multiple jurisdictions.[8] In recent years, protocols have become increasingly more complex as cross-border insolvencies themselves have become increasingly more complex, as was evident for example in the multilateral protocol that was entered into in connection with the Lehman Brothers insolvency proceedings pending in numerous jurisdictions around the world.[9] However, there is no need for emerging economies and developing countries to be intimidated from using protocols simply because certain recent high-profile cross-border insolvencies such as Lehman Brothers have involved fairly intricate protocols.

Instead, emerging economies and developing countries might look to some of the earlier protocols that addressed a range of basic matters that needed to be coordinated in a cross-border insolvency situation.[10] Such simpler, more straightforward protocols might be more appropriate models for emerging economies and developing countries, given that any cross-border insolvencies involving these countries may not raise the difficult challenges that have been faced in recent years in some of the more complicated cross-border insolvencies arising in the advanced economies.

Yet the emerging economies and developing countries might soon discover what the more advanced economies have already discovered: namely, protocols have proven to be fairly useful in coordinating insolvency proceedings pending in multiple jurisdictions[11] and, importantly, protocols give the affected parties flexibility in fashioning a solution well-suited to the specific facts and circumstances of the particular cross-border insolvency situation.

Of course, the judges in the relevant jurisdictions need to be comfortable with their authority in approving protocols. Absent an explicit statutory grant of authority to engage in cooperation with foreign jurisdictions such as set forth in the UNCITRAL Model Law (and thus possibly in any corresponding domestic legislation in the jurisdictions in which the UNCITRAL Model Law has been adopted).[12] This may be easier for common law judges to do than civil law judges in light of the generally broader discretionary authority of common law judges.

Again, however, for those countries that do not yet have in place an effective cross-border insolvency regime, introducing cross-border insolvency protocols into the equation could be a very useful confidence-building measure. The protocols could serve to provide these countries with valuable hands-on experience in dealing with cross-border insolvency issues and coordinating domestic proceedings with proceedings pending in foreign jurisdictions. Moreover, protocols could be a very important building block for what perhaps at a later date might be a broader embrace by these emerging economy jurisdictions of a more full-blown cross-border insolvency regime along the lines of the UNCITRAL Model Law or otherwise.

Challenges to implementing a cross-border insolvency law regime

The usual caveats regarding commercial law reform in domestic systems around the world apply to the introduction of cross-border insolvency law regimes in individual jurisdictions. This is particularly true where such regimes are being introduced in emerging or developing economies whose legal systems are generally less well developed than those of advanced economies.

First, the introduction of such cross-border regimes will depend on already having in place or developing the necessary supporting infrastructure to implement such regimes. In other words, for such a cross-border insolvency regime to work effectively, there should be a capable corps of judges, professionals and other relevant stakeholders present in the relevant jurisdiction. This may require training – in some cases, very extensive training – of the relevant stakeholders in order to familiarise them with the key concepts of cross-border insolvency generally as well as the more specific, technical aspects of the UNCITRAL Model Law.[13]

Secondly, concerns relating to rule of law – or, more precisely, the lack thereof – also apply and can present a potential obstacle to meaningful implementation of a cross-border insolvency regime. Specifically, if courts in a given jurisdiction do not function properly due to corruption, a lack of independence, or even a lack of competence, one cannot reasonably expect a new cross-border insolvency regime (or, for that matter, even the jurisdiction's basic domestic insolvency regime itself) to function effectively, either.

In fact, in some countries where adherence to the rule of law is highly questionable, it may make very little difference as a practical matter whether or not the country adopts the UNCITRAL Model Law. With or without the UNCITRAL Model Law, the outcomes in particular cases in such problematic jurisdictions may tend to rest on extrajudicial factors and influences rather than on the issues that are properly before the reviewing court itself.[14]

Thirdly, in some countries, developing a cross-border insolvency regime may have to wait until those countries first establish a sound and well-functioning domestic insolvency law regime. In such countries, it may be premature to introduce cross-border insolvency regimes if there is not yet a domestic insolvency regime in place that works well. Such countries and their relevant stakeholders may need to develop experience with a domestic insolvency law regime before they embrace a cross-border insolvency regime.

To be sure, emerging market or developing country jurisdictions should not use this as an excuse for inaction in moving towards or ultimately embracing a cross-border insolvency regime. Instead, this is simply to sound a cautionary note, as these jurisdictions may need to give careful and deliberate consideration to the proper sequencing in introducing domestic insolvency law reform relative to introducing cross-border insolvency law reform. While some countries may be comfortable introducing both domestic and cross-border regimes at the same time, other countries may need to deal first with the basic issues of implementing a sound domestic insolvency law before they embark on the challenge of addressing cross-border insolvency issues in their domestic legislation.

Overcoming implementation challenges

Nonetheless, in certain jurisdictions, it may be possible to overcome some of the challenges related to implementation of a cross-border insolvency regime, particularly where those challenges relate principally to the competence or experience levels of the courts and other relevant stakeholders. Specifically, in some jurisdictions, specialised courts such as commercial courts (or special commercial chambers) focused solely on handling commercial matters have shown their value in the insolvency area by bringing specialised expertise to bear on matters that might be too technical or complex for courts of general jurisdiction which do not possess the same level of expertise, sophistication or experience in dealing with complex commercial issues.

Similarly, in the cross-border insolvency context, it might be desirable to designate institutions such as commercial courts or special commercial chambers – whether new or already existing in a given jurisdiction – as the exclusive courts or chambers for handling cross-border insolvency cases that arise in that jurisdiction. In this way, cross-border insolvency cases, with their inherent complexities, would be handled by judges who over time would develop experience and, ideally, expertise in addressing cross-border insolvency cases.

Obviously, however, the mere enactment by a country of the UNCITRAL Model Law does not guarantee that the UNCITRAL Model Law will in fact be resorted to by foreign insolvency representatives in a given case or even that the UNCITRAL Model Law will be applied correctly if recognition of a foreign proceeding is sought by such foreign representatives. Indeed, some countries that have adopted the UNCITRAL Model Law have seen very few cases brought under their cross-border insolvency statutes.[15]

Role of policymakers in making cross-border insolvency regimes a reality

For cross-border insolvency regimes in major emerging markets (and developing countries) to become a reality, there will need to be a concerted focus from national policymakers as well as continued attention from those international institutions that have been actively involved in recent years in promoting insolvency law reform around the world. As noted in Part I, each country in question will have to perform its own individualised assessment and analysis of the advantages and disadvantages of adopting a comprehensive cross-border insolvency regime.

Broadly speaking, countries will need to weigh the perceived costs to their national sovereignty versus the potential broader economic benefits that might accrue to the adopting countries. For instance, one issue that countries might evaluate is whether the adoption of a cross-border regime would strengthen a country's involvement and standing in the global economy.

Weighing such costs and benefits was exactly the type of fine-tuned analysis that was undertaken by

New Zealand when it was considering in the late 1990s whether to adopt the UNCITRAL Model Law.[16] As a country whose economy depends heavily on international trade (especially exports) and inbound foreign investment, New Zealand's Law Commission gave special weight, among other factors, to whether the adoption by New Zealand of the UNCITRAL Model Law would promote globalisation and how such adoption of the UNCITRAL Model Law would affect New Zealand's position in the global economy.[17] The New Zealand Law Commission looked favourably upon the impact of the UNCITRAL Model Law on factors such as these and recommended that New Zealand adopt the UNCITRAL Model Law, a step that New Zealand later took.

Policymakers at the international level should continue to give serious attention to the issue of cross-border insolvency law reform. Such policymakers should continue to consult with officials in these emerging markets on the importance of improving their cross-border regimes, particularly as a means of further integration of their respective economies into the global economy. These international policymakers can point to the existing international standard for insolvency law developed by the World Bank and UNCITRAL, as this international standard includes the establishment of a cross-border insolvency regime as one of the critical features of any individual country's insolvency law. Indeed, when the World Bank is called upon to evaluate the adequacy of a country's insolvency regime, it considers whether the country in question has a sound cross-border insolvency framework.[18]

Nonetheless, as Terence Halliday and Bruce Caruthers have pointed out in their seminal work on dynamics of international insolvency law reform,[19] it is critical that such consultations between international institutions and individual countries should be just that – consultations, not directives from outside actors. As Halliday and Carruthers argue, it can be hard to achieve meaningful and sustainable insolvency law reform in a country where such reform is seen as being imposed by outside institutions or actors.

In the end, as discussed above, all countries considering whether to adopt the UNCITRAL Model Law or another comprehensive cross-border insolvency regime need to decide for themselves whether it makes sense for them to do so. Obviously, such countries will need to take into account what they perceive to be the relative advantages and disadvantages of doing so.

Conclusion

As Professor Jay Westbrook[20] and other commentators have noted, one of the major impetuses for the development of a law of cross-border insolvency is that with the expansion of cross-border trade and investment as well as with so many companies operating internationally, the legal regime for insolvency needed to evolve in order to keep pace with developments in the global economy. This provided the intellectual underpinnings for the development of the UNCITRAL Model Law.

In the same vein, in today's global economy where the major emerging economies are already playing such a significant role and with the widely held expectation that they will play an even more prominent role in the coming years, there should clearly be a legal regime in place in the emerging economies to address cross-border insolvencies involving these countries. Yet, as argued in this article, there is a glaring gap in the international insolvency architecture – namely, the very limited extent to which major emerging economies have adopted cross-border insolvency regimes.

While the consequences of this gap for global trade and investment may seem (and, indeed, may actually be) relatively benign at the present time, that may no longer necessarily be the case in the coming years if the emerging economies play an increasingly crucial (if not central) role in the global economy but yet do not have adequate legal regimes in place to address the cross-border insolvencies that will inevitably arise in those jurisdictions. This is why the development of robust cross-border insolvency regimes in the emerging economies should be a priority item for national and international policymakers as they seek to promote commercial law reform in general and insolvency law reform in particular in these increasingly important emerging economies across the globe.

In summary, the global economy is expected to look very different in the next ten to 25 years than it does today, particularly if the emerging economies continue their ascendancy over this period of time. With these changing contours of the global economy, the establishment of cross-border insolvency regimes in the emerging economies that currently lack such cross-border regimes will likely be necessary if the international insolvency architecture that has developed to date is to function effectively in the new global economic environment of the future.

Notes

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1 The UNCITRAL Model Law on Cross-Border Insolvency effectively sets forth the hallmarks of a comprehensive cross-border insolvency regime. As discussed in the *Guide to Enactment* which accompanies the text of the UNCITRAL Model Law, 'Article I, paragraph 1 [of the UNCITRAL Model Law] outlines the types of issues that

may arise in cases of cross-border insolvency and for which the Model Law provides solutions: (a) inward-bound requests for recognition of a foreign proceeding; (b) outward-bound requests from a court or administrator in the enacting State for recognition of an insolvency proceeding commenced under the laws of the enacting State; (c) coordination of proceedings taking place concurrently in two or more States; and (d) participation of foreign creditors in insolvency proceedings taking place in the enacting State.' *Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency*, paragraph 57, p 36 (published as Part II of a document entitled *UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment*) (adopted by UN in 1997 and published as text in 1999) (available at: www.uncitral.org/pdf/english/texts/insolven/insolvency-e.pdf, last visited on 23 February 2013).

2 Indeed, the ASEAN countries have announced their goal of forming a region-wide ASEAN Economic Community by 2015; of course, whether or not that goal is realized remains to be seen.

3 See *Deutsche Bank AG v Asia Pulp & Paper Co*, [2002] SGHC 257, paragraph 58 (Sing High Ct), *aff'd*, [2003] SGCA 19, [2003] 2 SLR 320 (Sing Ct App). The trial court stated its reasoning on this point as follows: 'Counsel had indicated that the Petitioners intended to assume control of the APP's Indonesian and Chinese subsidiaries by exercising the company's rights as shareholder in the subsidiaries. With respect, I am not at all optimistic that the task can be so easily achieved by such a route. That may well be the case under our system of law but may not be so under Chinese and Indonesian law, given the anticipated opposition from creditors of those subsidiaries to the judicial management order in the first place, as well as conflict in opinions from the parties' Indonesian and Chinese legal advisers.' (The author was actively involved in the APP restructuring on behalf of one of the foreign creditors, but his client was not a party to the Singapore litigation.)

4 This regional grouping, which came into existence in 2000, consists of Burundi, Kenya, Rwanda, Tanzania and Uganda. While this set of countries may be considered to be comprised more of developing countries as opposed to emerging markets per se, several of these countries have ambitions to move up the economic development ladder or otherwise graduate into higher-income countries.

5 See Samuel L Bufford, *United States International Insolvency Law 2008–2009* (Oxford University Press, 2009), p 579 (noting jurisdictions that have adopted the UNCITRAL Model Law but which have incorporated a reciprocity requirement in their legislation implementing the UNCITRAL Model Law).

6 This approach has been tried in at least one other region, namely among the nations of West and Central Africa that operate under the regional grouping known as OHADA. See, for example, Westbrook, Booth, Paulus & Rajak, *A Global View of Business Insolvency Systems* (The World Bank, 2010), pp 262–264. There is an OHADA legislative act on insolvency law, including provisions dealing with cross-border insolvency, but apparently there has not been much experience in the cross-border insolvency area. For a general discussion of insolvency law issues in OHADA, see Joanna A Owusu-Ansah, 'The OHADA Treaty in the Context of International Insolvency Law Developments,' April 2004 (available at **www.iiiglobal.org/component/jdownloads/finish/398/1555.html**, last visited on 23 February 2013).

7 See, for example, Westbrook et al, note 6 above, at pp 263–264.

8 For an excellent introduction to protocols, see the UNCITRAL publication in this area, *UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation* (2009), available at: **www.uncitral.org/uncitral/en/uncitral_texts/insolvency/2009PracticeGuide.html,** last visited on 23 February 2013. For an extensive collection of protocols from many cross-border insolvencies, see the website of the International Insolvency Institute (available at: **www.iiiglobal.org/component/jdownloads/viewcategory/395.html**, last visited on 23 February 2013).

9 A copy of the Lehman Brothers protocol is available at: **www.iiiglobal.org/component/jdownloads/finish/573/4339.html**, last visited on 23 February 2013. Judge Allan Gropper describes some of the unique challenges faced by the Lehman: 'The disputes involving the affiliates of Lehman Brothers, which involved 75 distinct bankruptcy proceedings relating to its more than 7,000 subsidiary entities in over 40 countries, were even more protracted. It took the insolvency administrators of the 18 major foreign subsidiaries of Lehman Brothers seven months to work out a protocol that contained general principles of coordination and cooperation, and in which the administrators agreed to cooperate in attempting to calculate the inter-company claims among the group.' See Allan Gropper, 'The Arbitration of Cross-Border Insolvencies,' *American Bankruptcy Law Journal* (June 2012).

10 See, for example, Samuel L Bufford, *United States International Insolvency Law 2008-2009* (Oxford University Press, 2009), at p 144 (discussing procedural issues commonly addressed by protocols, including claims filing, claims adjudication, notice, asset disposition, and information sharing).

11 See, generally, Paul Zumbro, 'Cross-border Insolvencies and International Protocols – an Imperfect but Effective Tool,' *Business Law International* (May 2010). See also Ralph R Mabey and Susan Power Johnston, 'Coordination Among Insolvency Courts in the Rescue of Multinational Enterprises,' *Norton Annual Review of International Insolvency* (2009 Edition), p 33; and Joseph J Bellissimo and Susan Power Johnston, 'Cross-Border Insolvency Protocols: Developing an International Standard,' *Norton Annual Review of International Insolvency* (2010 Edition), p 37.

12 See, for example, Article 25 of the UNCITRAL Model Law on Cross-Border Insolvency (authorising 'the court to cooperate to the maximum extent possible with foreign courts or foreign representatives…'); and section 1525 of the US Bankruptcy Code (provision corresponding to Article 25 of the UNCITRAL Model Law).

13 In terms of primers on the UNCITRAL Model Law, there is probably no better source than the publication entitled *UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective* (2011) (available at **www.uncitral.org/uncitral/uncitral_texts/insolvency/2011Judicial_Perspective.html**), as well as, of course, the original *Guide to Enactment* (1997) that accompanied the UNCITRAL Model Law and provided extensive commentary on the text of the UNCITRAL Model Law.

14 For instance, in some systems, corruption is so pervasive that court decisions in these jurisdictions are highly suspect.

15 For instance, in Mexico, apparently only a limited number of cases have been brought under its cross-border insolvency statute. See INSOL's new publication on cross-border insolvency indicating that only three cases have been filed under Mexico's cross-border statute since the statute's enactment in 2000, namely *Xacur*, *IFS Financial Corporation*, and *Mark Allen Dennis*. Carlos Sanchez-Mejorada y Velasco, Chapter 26, 'Mexico', *Cross-Border Insolvency II: A Guide to Recognition and Enforcement* (INSOL International, 2012) at pp 172–73. (Yet, other developing countries/emerging markets that have adopted the UNCITRAL Model Law have apparently had even fewer filings than Mexico under their cross-border statutes.) See also Thomas S Heather, Chapter 16, 'Mexico', *The Restructuring Review* (Fifth Edition) (Christopher Mallon, editor, 2012) at pp 219–20 (indicating that while there have been few filings under the Mexican cross-border statute, it has been more common for Mexican companies to file in the US under Chapter 15). The trend of Mexican insolvency proceedings seeking recognition and relief in the US under Chapter 15 recently hit a speed bump in the *Vitro* case where the US Court of Appeals for the Fifth Circuit affirmed a Bankruptcy Court ruling that a Mexican plan of reorganisation (a so-called *concurso* plan), authorising the non-consensual release of third-party releases as part of a plan approved by a Mexican court, should not be enforced in the US under Chapter 15. *In re Vitro, SAB de CV*, No 12-10542, 2012 WL 5935630 (5th Cir 28 November 2012).

It is instructive to note, however, that, according to an empirical study by Professor Jay Westbrook, the United States courts have granted recognition in hundreds of Chapter 15 cases from all over the world since the enactment of Chapter 15 in 2005 and that the US courts 'granted some form of recognition in around 95 per cent of the cases filed. Jay Lawrence Westbrook, 'An Empirical Study of the Implementation in the United States of the Model Law on Cross Border Insolvency' (abstract available at: **http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2162964** (last visited on 11 February 2013). Among other interesting findings, the Westbrook study indicates that approximately two-thirds of the Chapter 15 filings (383 filings out of a total of 577 filings) have come from only two countries, namely the United Kingdom and Canada, notwithstanding the fact that filings have come from approximately 20 separate jurisdictions worldwide.

16 See New Zealand Law Commission, Report 52, February 1999, *Cross-Border Insolvency: Should New Zealand Adopt the UNCITRAL Model Law on Cross-Border Insolvency?* (available at: **www.nzlii.org/nz/other/nzlc/report/R52/**, last visited on 11 February 2013). For countries undertaking the process of deciding whether to adopt the UNCITRAL Model Law, the report of the New Zealand Law Commission provides an excellent template and roadmap for evaluating the myriad considerations involved in such a decision-making process.

17 *Ibid*, at p 39 (referring to various economic factors associated with the possible adoption by New Zealand of the UNCITRAL Model Law that would be 'likely to reduce transaction costs and promote trade and capital flows thereby improving the economic well-being of the New Zealand economy').

18 Such an evaluation would be undertaken as part of a so-called ROSC ('Report on the Observance of Standards and Codes') related to a country's insolvency and creditor/debtor regimes. Principle C15 of the World Bank *Principles and Guidelines for Effective Insolvency and Creditor Rights System*, which is one of the elements of such an insolvency-related ROSC, deals specifically with 'international considerations' of a country's insolvency law. The Principle provides that '[i]nsolvency proceedings may have international aspects, and a country's legal system should establish clear rules pertaining to jurisdiction, recognition of foreign judgments, cooperation among courts in different countries and choice of law'.

19 See, for example, Terence C Halliday and Bruce G Carruthers**,** *Bankrupt: Global Lawmaking and Systemic Financial Crisis* (Stanford University Press, 2009). See also book reviews of the same by Steven T Kargman**,** *Insolvency and Restructuring International*, April 2010, Vol 4 No 1, pp 46–49; and *INSOL World*, First Quarter 2010 , p 9.

20 See, for example, Jay L Westbrook, 'Theory and Pragmatism in Global Insolvencies: Choice of Law and Choice of Forum', 65 *Am Bank LJ* 457 (1991).

Convergence in National and International Insolvency Laws Since 2002

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This article reviews the efforts and progress of international organisations, states and insolvency experts since 2002 towards convergence of national and international insolvency regimes. In 2002, Professor Doctor Christoph Paulus of Humboldt University in Berlin authored a seminal article on this convergence, predicting that its pace would accelerate in the immediate future and move towards harmonisation of insolvency law worldwide. The authors of this article believe that Professor Paulus' prediction was on target and review a number of examples of such convergence including: (i) the increasing enactment of the UNCITRAL Model Law by states; (ii) the enactment of reorganisation statutes permitting management to remain in possession of their assets while they propose a reorganisation plan; and (iii) efforts by the European Commission to tailor the European Insolvency Regulation, adopted in 2002, to modern insolvency practice.

Ten years ago, Professor Doctor Christoph G Paulus, a professor of insolvency law at the Humboldt University in Berlin and a prominent authority in European and international insolvency law, published an article entitled *Comparison of National and International Insolvency Law: A Story of Success.*[1] In his article, Professor Paulus offers a series of specific observations about the then existing trend in insolvency law that, as he noted, had 'in the last few years. . . . moved in a remarkable way into the center of general interest and, in doing so, has become the object of studies about comparative which only ten years ago would not have been thought possible'.[2] According to Paulus, insolvency law worldwide had received 'a push… that had led to a worldwide convergence in this field of law today'.[3]

When Professor Paulus authored this article, sea-changes were occurring in national and international insolvency jurisprudence. In 1997, the United Nations Commission on International Trade Law ('UNCITRAL') adopted its Model Law of Cross-Border Insolvency (the 'Model Law') and, as of 2002, only five nations had adopted the Model Law. In addition, the International Monetary Fund ('IMF') and the World Bank published in 1999 and 2001 respectively, and in direct response to the East Asian Crisis of 1997–1998,