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Keynote Address: Global Insolvency Law and the Role of Multinational Institutions

Christoph G. Paulus

GLOBAL INSOLVENCY LAW AND THE ROLE OF MULTINATIONAL INSTITUTIONS

Christoph G. Paulus[*]

The topic of this symposium, *Bankruptcy in the Global Village: The Second Decade*, is grand and demanding. The concept of a "global village" implies something beyond the technicalities of particular national laws; instead, it conjures a view of bankruptcy that transcends national legal systems—bankruptcy at a meta-level. But this conference is not only geographically "meta." It is also temporally "meta." It seeks to transcend time as well as space. The reference to "the second decade" harks back to an earlier symposium at Brooklyn Law School organized by Professors Barry Zaretsky and Ian Fletcher that still forms an important cornerstone for many insolvency-related discussions.[1] The topic of this symposium thus includes past and present, national institutions and multinational lawmaking efforts. With these multiple dimensions in mind, I would like to trace a few themes as a prelude to the discussion of the next few days.

I. THE FIRST DECADE

Choosing 1996 as a starting point does some injustice to the decades that came before. The introduction of Chapter 11 into the U.S. Bankruptcy Code in 1978 initiated a worldwide re-thinking of the options that bankruptcy law can offer.[2] Similarly, the invention of "protocols" by creative judges and practitioners created a powerful tool to overcome the stalemate situations that arise frequently in cross-border bankruptcies as a result of conflicts among national bankruptcy laws.[3] But choosing 1996

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* The author is a Professor of Law at the Humboldt Universität zu Berlin of Civil Law, Civil Procedure Law, Insolvency Law, and Ancient Roman Law. He is a member of the International Insolvency Institute, the American College of Bankruptcy, the International Association of Procedural Law, and the International Academy of Commercial and Consumer Law. He has worked as a consultant both for the International Monetary Fund (IMF) and the World Bank.

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

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

3. The beginning of this invention is marked by the *Maxwell* case. *See* Evan D. Flaschen & Ronald J. Silverman, *The Role of the Examiner as Facilitator and Harmonizer in the Maxwell Communication Corporation Insolvency, in* CURRENT DEVELOPMENTS IN INTERNATIONAL AND COMPARATIVE CORPORATE INSOLVENCY LAW 621 (Jacob S.

also recognizes that the mid-nineties saw bankruptcy law elevated to a central position in the globalizing world. The East Asia crisis brought the world perilously close to a global economic breakdown when Japan, Russia, and finally Brazil, one after the other, followed the so called Tiger States to the brink of economic collapse. This threat led the then-G7 States (now G8) to form a new multilateral institution, the Financial Stability Forum, to develop tools to prevent a similar crisis in the future.

The efforts made by this forum are reported on its Web site.[4] One of its most prominent products is the articulation of twelve legal attributes that are crucial for a country's financial stability, such as accounting and auditing standards, fiscal transparency, and banking and insurance supervision as well as insolvency and creditor rights. The inclusion of insolvency law on the list is a new development; insolvency law is newly seen and understood as a safeguard and anchor for the stability of a country's financial health.

The task of supervising and fostering legal developments in each one of the twelve areas is entrusted to various institutions such as the International Monetary Fund (IMF), the Organisation for Economic Cooperation and Development (OECD), or the World Bank. At the peak of the crisis in early 1998, the IMF was pushed to take care of this area and in 1999 it published its description of a fundamental pattern for orderly and effective insolvency procedures.[5] Thereafter, however, responsibility shifted to the World Bank, which developed a more detailed set of principles for insolvency law and creditors' rights. The ultimate result, the *Principles and Guidelines for Effective Insolvency and Creditor Rights Systems,* was made public in 2001.[6]

The perception of insolvency law's global importance extended beyond the Bretton Woods institutions. Initiated by an Australian proposal, the United Nations—more precisely, the United Nations Commission on International Trade Law (UNCITRAL)—sought to draft yet another guidebook for insolvency legislation. UNCITRAL developed guidelines, which were published in 2004 and may now be the most voluminous

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Ziegel ed., 1994); Jay Lawrence Westbrook, *The Lessons of* Maxwell Communication, 64 FORDHAM L. REV. 2531 (1996).

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

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

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

book ever written on global insolvency legislation.[7] The work of UNCITRAL and the World Bank were not identical, so the addressees—that is, the legislative decision makers—were initially somewhat troubled when they had to decide which of the guidelines to follow. However, in 2005, after having clarified the differences, the World Bank drafted a revised version of its Principles and blended them with UNCITRAL's Legislative Guide.[8] The consequence thereof is that the Financial Stability Forum has entrusted both multilateral institutions with shared[9] responsibility.

Why, after years and years of disinterest has insolvency law suddenly become the focus of not one, but three multilaterals? As noted above, the East Asian bubble made it clear that a crucial factor for investors interested in a particular jurisdiction is an insolvency law that is effective, and guarantees an orderly proceeding with a fair, transparent, and predictable treatment of the stakeholders. However, this insight is not new. The roots go back to the early sixteenth century in Antwerp, the then economic metropole of Europe, when foreign merchants demanded from the Town Fathers the enactment of a bankruptcy law for their protection.[10]

Here I can offer a few thoughts about the relevant factors. The answer itself seems, at first, irritatingly ephemeral. When one takes the psychological stance of a foreign investor, however, the lessons of Antwerp and Asia seem obvious: from that perspective it is perfectly understandable that equitable treatment of a debtor's creditors is preferable to a system

7. United Nations Commission on International Trade Law (UNCITRAL), *Legislative Guide on Insolvency Law* (rev. 2005), *available at* www.uncitral.org/pdf/english/texts/insolven/05-80722_Ebook.pdf. For a description of its legal parameters, *see* Susan Block-Lieb & Terence Halliday, *Incrementalisms in Global Lawmaking*, 32 BROOK. J. INT'L L. 851 (2007); for its contents, *see* Jacob Ziegel, *Canada-United States Cross-Border Insolvency Relations and the UNCITRAL Model Law*, 32 BROOK. J. INT'L L. 1041 (2007).

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

9. "The World Bank is co-ordinating a broad-based effort to develop a set of principles and guidelines on insolvency regimes. The United Nations Commission on International Trade Law (UNCITRAL), which adopted the Model Law on Cross-Border Insolvency in 1997, will help facilitate implementation." Financial Stability Forum, 12 Key Standards for Sound Financial Systems, http://www.fsforum.org/compendium/key_standards_for_sound_financial_system.html (last visited Apr. 1, 2007).

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

in which the creditors are afraid that the debtor is playing a game—alone or in a collusive way with some of the other creditors—the outcome of which is not equal (or at least transparent and predictable). In the absence of transparency and equality of distribution, distribution of the remnants of a business may be only the prelude to another game, played without these foreign creditors (or most of them). A disturbingly clear example for such a strategy seems to be the present-day *Yukos* case in Russia.[11]

From a legal perspective, however, things are more complicated. First, it is axiomatic that insolvency law is a focus point for the commercial law of any jurisdiction. Just as a painter creates the impression of three-dimensions by reference to a focus point, numerous legal areas such as the law of secured transactions, corporate law, corporate governance, non-performing loans trading, out-of-court-settlements—to name but a few—become fully understandable only against the background of a nation's insolvency law.[12] Therefore, if insolvency law is a pillar of a jurisdiction's commercial law, the need is manifest to build it up in a particularly strong, efficient, and stable manner.

Second, and perhaps more importantly, insolvency law has the potential to influence not only an economy's micro-level, but also its macro-level. Insolvency law is now (and newly) politically salient. As such, it is burdened with political expectations or demands. As increasing numbers of enterprises break down, and huge companies like Enron, Parmalat, Asia Pulp & Paper, or Varig go bust, the efficiency of insolvency law is tested in a way that goes far beyond almost any other law. Public scrutiny as well as political guilt-shifting and grandstanding are then very likely on the agenda. Reform or introduction of a national insolvency law with the option of a reorganization proceeding is a convenient vehicle that allows the political class to comfortably reject any claims for a bail-out of firms that are seen by the public as too big to fail. Responsibility for rescue is shifted to the administrator or the courts in charge.

And finally, in this context, an orderly and effective insolvency law exerts a disciplining function on all actors on the stage. It is the art of good insolvency legislation to strike a balance between disciplining the debtor[13] as well as the creditors. Experience teaches that this can be done

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

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

13. In times of systemic economic difficulties, legislators might wish to alter their insolvency laws to an overly protective system for the debtors. If they do so, they are well

in various ways: there is no self-evident primacy of a creditor-driven system over a court-driven system,[14] as there is no clear evidence that a harsh system is better or worse than a lenient one. What is necessary and decisive is the credible threat for the debtor not to escape into an insolvency proceeding for his own benefit and for the creditors not to push their common debtor into such proceedings for their benefit. No one should stand to gain something in an insolvency proceeding that could not be gained outside of it.

All of these preceding considerations point towards insolvency law's overarching importance and offer a justification for the multilaterals' efforts in this field. However, irritating counterexamples exist that undermine the validity of these very considerations. The most important of these examples is the present-day Chinese economy. While China's new insolvency law came into force on July 1, 2007,[15] it has a multi-year period of enormous economic growth behind it without precedent in economic history—and without an effective insolvency law! Be this as it may, history is full of countless examples of the driving force of mere perception without any proven factual justification.

Now that there are three guidelines out in the world—the smallest and earliest from the IMF; the medium sized, second, from the World Bank; and the most voluminous and, for now, the last word, from UNCITRAL—there is a momentum that can be observed in insolvency law's world which points towards a certain substantive global convergence. This convergence may occur through the force of the IMF's and the World Bank's conditionality or the respective anticipated obedience, or it may occur through a national political leadership's wish to connect its country with the modern stream of essential legislation, or it might occur simply through the persuasive power and quality of these guidebooks. Regardless of the reason, there is a broad movement all over the

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advised to re-change it after the end of such crisis. The Statute of Colombia from 1996 is a striking example for this attitude and the disadvantages of "sticking to it until now." *See generally* Adolfo Rouillon, World Bank, *Colombia: Derechos de Crédito y Procesos Concursales* (May 2006). Note, however, that Colombia is about to change its law (from mid-2007 on) to make it a bit more balanced.

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

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

world to comply with these standards.[16] Even though the expert might recognize considerable differences in each volume, they have much in common. In particular, they all introduce a rescue proceeding which was—due to the worldwide predominant perception of a bankruptcy stigma on a bankrupt debtor—unthinkable in many jurisdictions only a decade ago. Nowadays, it is hard to find any insolvency law without this option.[17]

However, one must take care not to be overoptimistic. The convergence described, more often than not, refers to the law on the books rather than the law in action. Many countries have adopted quite modern insolvency legislation that appears on paper as successful approximations of the propositions in the guidebooks.[18] But, upon closer inspection, it becomes apparent that the law in action bears little resemblance to the written law. For various reasons—ranging from opposition to intrusion by the imposing multilateral institution and its dominant shareholder(s) to sheer opportunism—institutions within jurisdictions defy this convergent pull and simply ignore their codified law.

This must be taken very seriously, not least because this attitude coincides—accidentally or not—with a general problem of anti-globalization: the national actors might have the impression that they are forced to accept an imposed law that is designed to bring them in line with a certain capitalistic idea of bankruptcy law.[19] Any answer to such an allegation

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

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

18. Professor Halliday describes this divergence in his contribution to this symposium as "implementation gap." Terence Halliday, *Legitimacy, Technology, and Leverage: The Building Blocks of Insolvency Architecture in the Decade Past and the Decade Ahead*, 32 BROOK. J. INT'L L. 1081, 1098-99 (2007).

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

> why it was that Mexico's law of secured transactions had to resemble that of the United States and Canada, my reply was that the proper question was not what law Mexico had to emulate but whether Mexico did in fact desire secured lending. If it did, its law had to be based on principles that reflected those prac-

by advocates of convergence must be based on a thorough analysis; an analysis that identifies deeper necessities such as the general need for economic development and/or empowerment of the poor[20] or the like. If this is not done or—even worse—not possible, then the multilaterals would be well advised to refrain from further promotion of their guidebooks.[21] Indeed, as a question mark, caution flag, or—depending on one's own perspective—exclamation mark, to the best of my knowledge there has been little interest in how Arabic and the majority of African[22] countries deal with the break-down of their economic enterprises.[23] And, almost never—irrespective of the ceteris paribus impressive internationality of the respective drafting groups— are there any Arabic or African representatives participating.

II. Transition from the First to the Second Decade

These remarks bring us to the threshold of the second decade. The pull towards convergence of the world's insolvency laws will predictably increase, as the multilaterals appear to have developed an "appetite" for more. UNCITRAL is a striking example with its recently acclaimed search for further fields of engagement in the insolvency area. Now the work will go further into details; be it the treatment of groups in insolvency, court-to-court communication,[24] arbitration in insolvency law, or something else. While more or less hailed and welcomed by the experts,

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> tices tried and tested in active financial marketplaces and thus capable of universal usage.

Id.

20. The fact that the enactment of a bankruptcy law has the potential to lead to an empowerment of the poor can be demonstrated in the context of the introduction of an insolvency law for states. *See* Christoph G. Paulus, *A Statutory Proceeding for Restructuring Debts of Sovereign States*, 49 Recht der Internationalen Wirtschaft 401, 402–05 (2003) [hereinafter Paulus, *Statutory Proceeding*].

21. For this, *see also* Halliday, *supra* note 18, at 1082-90.

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

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

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

it should not be forgotten that further convergence requires development of a common and basic understanding of the reason and need for this expansion, and the rationale must reach beyond the mere benefit of multinational companies.

It seems to me that much is to be done in this respect; this has to be stressed particularly in light of the recommendations of one of the members of the World Bank Group. Every year, the International Finance Corporation (IFC) publishes its *Doing Business* report, in which they measure the world's economy using a purely creditor-oriented approach. In 2006, with respect to necessary insolvency reforms, they recommended that the best solution is to give the creditors as much say in the proceeding as possible[25]—a remarkably simplistic statement which, of course, is heavily influenced by its own interest and the almost complete exclusion of any lawyer in the drafting process. One wonders how countries that traditionally have a strong emphasis on court-driven proceedings and which are doing fine economically will react—the present China or India are ideal examples.

The problem with the above-mentioned task of developing a sound and broad based justification for harmonization or convergence is that the need is arising at a time when the pace of change is increasing as well.[26] One indicator is that the worldwide expanding trade in non-performing loans has already led, in numerous cases, to a changed pattern of creditor behavior. The traditional model of bankruptcy law is based on the assumption of a debtor bound together with all his creditors on the other side by bipolar face-to-face relationships[27]—a paradigm which implies a general mutual knowledge of debtor and creditor. It has now become the increasingly predominant economic reality that the debtor does not know who his creditors are; irritatingly enough, nor do the creditors know who their debtor is. The trading of claims on what is commonly called the "secondary market" continues even after an insolvency proceeding has commenced. As a German banker once told me: banks are trading with everything that has not climbed the tree by "three."

It might thus happen that an administrator has engaged in negotiations with creditors about a particular solution of the case—maybe even in

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

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

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

advance of opening the proceeding—and is thereafter confronted with a different set of creditors when the case is filed or once time has come to vote on the plan. To be sure, such a scenario need not automatically be unfavorable for the insolvency proceeding as such. There is, for instance, the possibility that an envisaged reorganization attempt will be enhanced by the introduction of new creditors. Assume that they have bought the respective claims from the original creditors for thirty cents on the dollar; this price makes it an economically sound judgment to accept a dividend of fifty cents in a case where the original creditors possibly would, after waiting out the case, have wanted more.[28] On the other hand, there is an equally large chance that these new creditors may be willing to settle for a quick sale of the debtor's business or assets, without any longer term strategy on the administrator's or debtor's side.

As a rule of thumb, the anonymity which is the inevitable companion of this modern development in credit markets bears the threat of inhumanity. This interrelation is evidenced by long-lasting historical experience. Therefore, the new pattern of stakeholders might undermine a legislature's consideration of social policy; for example, French insolvency law with its strong emphasis on the protection of workers may find this policy swept away by the short-term interests of debt traders. In any case, work-outs are likely to become more complicated as there are more diverse interests involved. Cautious lenders are already beginning to exert some control over the possibility of restructurings by inserting "unanimous decisions clauses" into their loan agreements. Such clauses have achieved some prominence in the context of sovereign debt restructuring attempts.[29]

A further consequence of converging insolvency procedures is that by enhancing the power of the court at the debtor's center of main interest, forum shopping is likely to become even more prominent than it already is today.[30] The European Insolvency Regulation presents the paradox clearly. Designed with the intent to prevent forum shopping by bringing the disparate insolvency legislations of the various member states closer together, this very regulation seems to have provoked forum shopping,

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

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

30. For this observation, *see* John A. E. Pottow, *The Myth (and Realities) of Forum Shopping in Transnational Insolvency*, 32 BROOK. J. INT'L L. 785 (2007); Robert K. Rasmussen, *Where are all the Transnational Bankruptcies? The Puzzling Case for Universalism*, 32 BROOK. J. INT'L L. 983 (2007).

and considerable litigation over forum choice! The obvious lesson to be learned therefrom is that partial harmonization, engagement and familiarity may foster a search for potential advantages.[31] This is not here the place to evaluate forum shopping as a general phenomenon and to discuss its pros and cons. All that is to be derived from this development is that insolvency practitioners must adjust to the new pattern and its demands. They are increasingly confronted with situations in which they must evaluate conduct on the basis of foreign (or even multiple foreign) law(s). This hints at the thorny and inevitable question of whether or not a certain act or transaction done in one jurisdiction might trigger the avoidance laws of another? Needless to say that these new demands require highly qualified professionals.

Finally—still speaking from brink of the second decade—the increased complexity of insolvency law and its strong emphasis on the reorganization option gives reason to a new positioning of insolvency law in general. To varying degrees, in many jurisdictions, insolvency law was seen as a somewhat isolated field with few direct connections to other areas of law.[32] It followed its own set of rules, conditioned by the particular circumstances of the debtor's insolvency. This remains unchanged, of course. What is likely to change, however, is the increasing awareness of an insolvency law's function as part of a broader context.

This context is best described (even in German) by "turnaround law." Its unifying property is that it deals with those economic assets (including workers, goods, services, and any other economically useful and valuable good) which, for whatsoever reason, are no longer (or, maybe even not at all) used in the most efficient manner and which shall be repositioned there. Seen from this perspective, insolvency law forms part of a large spectrum of seemingly disparate areas of law, such as corporate governance, the specific creditor protection rules within corporation law, distressed debt trading, out-of-court settlement law, and many others. Insolvency law is, thus, no longer isolated but just a link—a very important one, of course—in a longer chain of other laws. The consequence of this insight is that harmonization of insolvency law may not be

31. The statutory cornerstone for this search is—at least presently—the interpretation of the term "center of main interests"; for this, *see* Gabriel Moss, *Group Insolvency—Choice of Forum and Law: The European Experience Under the Influence of English Pragmatism*, 32 BROOK. J. INT'L L. 1005 (2007); Jay Lawrence Westbrook, *Locating the Eye of the Financial Storm*, 32 BROOK. J. INT'L L. 1019 (2007).

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

enough. It will be necessary to integrate and adapt of insolvency law to this new legal surrounding.[33] This is the task of the second decade.

III. THE SECOND DECADE

Having described the developments of the last decade, a few words about the likely further development of insolvency law are in order, as well as a warning about certain dangers which call for close monitoring by the experts.

As indicated, the next years will likely be dominated by the effort to integrate the new insolvency environment into a coherent whole. This task will require hard work, beginning with the academics and then the practitioners and the multilateral institutions. In a world which is ever-more interdependent, and which is equipped with limited resources, the need will increase to move these resources to their best possible (or highest-valued) use as smoothly and promptly as possible.

The true difficulty with fulfilling this task will be, however, that it has to be done on a multi-dimensional cultural level. A "one-size-fits-all" approach is bound to fail. Not only do different jurisdictions have different priorities, they may have entirely different understandings as to the goals of a proceeding—be it protection of the enterprise, protection of workers, or maximizing value for creditors. Notwithstanding the naïve solution proposed by the IFC in its *Doing Business* report, present political realities will not permit a pure creditor-driven proceeding to be presented as the best possible (and certainly not a consensus) solution.[34]

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

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

34. *See* Ian Fletcher, *Maintaining the Momentum: The Continuing Quest for Global-Standards and Principles to Govern Cross-Border Insolvency*, 32 BROOK. J. INT'L L. 767, 776-84 (2007).

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

Another likely development in the second decade that calls for alertness, particularly of the experts, and maybe even particularly of the academic experts, is greed. To the degree that economic globalization transcends the borders of national legislatures, the greed of the "big players" in this game will likely seek to use harmonization efforts to shift aside local obstacles. Powerful entities seek, with greater or lesser success, exemptions from the applicability of certain local legal rules (tax law, labor law, environmental law, etc.). As lawmaking proceeds at the global level, such efforts may achieve even better results because of the scarcity of respective rules there, and the possibility of "one stop shopping."

A regional example is the decision of the Australian legislator in the late nineties to make netting-agreements insolvency-proof in their insolvency law in order to make the country more attractive for economic investment.[36] An even more striking example is the Cape Town protocol as drafted by UNIDROIT:[37] it provides for a worldwide applicable superpriority for certain collateral in all insolvency laws on the globe. Even though so far restricted to only a few goods, a tendency behind any such attempt is recognizable; global rules shall be set in force which overthrow the application of local laws for the benefit of global players with effective lobbyists (to be sure, not only in the realm of insolvency law[38]). The primary addressees of these attempts are, of course, the multilateral institutions such as UNIDROIT or IFC. Needless to say, the success of these attempts will undermine the fundaments of insolvency law, and in particular any broad-based economic justification for harmonization.

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

37. Convention on International Interests in Mobile Equipment, Nov. 16, 2001, S. Treaty Doc. No. 108-10, *available at* http://www.unidroit.org/english/conventions/mobile-equipment/main.htm. Steven Harris mentions, in his contribution to this volume, UNIDROIT's drafting of a further Protocol. Steven L. Harris, *Choosing the Law Governing Security Interests in International Bankruptcies*, 32 BROOK. J. INT'L L. 905, 913 n.31 (2007).

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