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Criticising the Quest for Global Insolvency Standards

In recent decades, various organisations have been busy in the work of formulating international insolvency[1] standards – norms to guide the opening and conduct of insolvency and restructuring proceedings affecting business enterprises. The bodies involved in this process of norm production include the World Bank and the UN organ – the United Nations Commission on International Trade Law (UNCITRAL) as well as international regional financial institutions such as the Asian Development (ADB) and the European Bank for Reconstruction and Development (EBRD). In general terms, the objectives of these endeavours is to promote trade and development; to improve economic efficiency and the transition from a centrally planned economy to a more free market oriented economy; to assist in the raising of living standards by putting assets to their most effective use; and generally to ensure macro-economic stability. The international insolvency standards are intended as a tool or guide enabling States to improve their relevant laws but have also been used more explicitly as an evaluation tool that enable national laws to be judged and ranked. [2]

This paper examines critically these standard-setting endeavours. It suggests that some of the standards are crude and unsophisticated advancing a questionable set of legal assumption and failing to take adequate account of local conditions. The World Bank Doing Business Resolving Insolvency framework[3] is particularly susceptible to criticism in this regard. Other standards are however, more nuanced and sophisticated such as those contained in the UNCITRAL Legislative Guide on Insolvency.[4] The paper suggests that the latter approach is the better one since it provides policy options for reform and draws attention to the likely consequences of particular reform efforts. In this respect it is more cognisant of political and

[1] This paper uses the expression 'bankruptcy' and 'insolvency' interchangeably though generally insolvency is the preferred expression.

[2] The paper does not specifically deal with the situation where an ailing enterprise has assets in more than one State or the administration of its affairs in insolvency proceedings requires assistance from foreign countries – 'cross border insolvency'. In this area, UNCITRAL has been preeminent with its Model Law on Cross Border Insolvency – see http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model.html. The Model Law has been adopted by many countries including South Korea in 2006.

[3] See http://www.doingbusiness.org/Methodology/Resolving-Insolvency

[4] http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/2004Guide.html

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cultural sensitivities and likely to be more conducive to bringing about genuine real world improvements.[5]

This paper consists of five parts. The first part asks the simple question – why have these standards? The second part asks who formulates these standards? The third part address the ~~detailed~~ content of these standards and highlights differences in the work of the various bodies.[6] The fourth part focuses on the criticisms of the work product emanating from the standard-setting bodies and the fifth part concludes.

1. Why have international insolvency standards?

(a) Facilitating international development and trade

UNCITRAL has produced the most comprehensive text setting international standards in respect of insolvency and its overall mission is to "promote the progressive harmonization and unification of the law of international trade".[7] International trade in turn is seen as facilitating international development. The concept of harmonisation has considerable elasticity of meaning [8] though it can be defined as "making the regulatory requirements or governmental policies of different jurisdictions identical or at least more similar."[9] When UNCITRAL was established,[10] reference was made to harmonisation as a technique for reducing conflicts and divergences in the laws of different countries with unification described as the most effective method of avoiding conflicts. Harmonisation and unification were seen as achievable goals in that the similarity of interests between countries was said to transcend the divide between centrally planned and more market oriented economies – the East/West divide – and between civil law and common law origin countries.

UNCITRAL's overriding goal is international trade, development and friendly relations among States, with harmonisation etc. serving as a means towards this end. This

[5] Ronald H. Coase, The Regulated Industries: A Discussion, 54 American Economic Review 194, 195 (1964) "Contemplation of an optimal system may suggest ways of improving the system…[and] it may go far to providing a solution. But in general its influence has been pernicious. It has directed…attention away from the main question, which is how alternative arrangements will actually work in practice."

[6] For reasons of space however the paper will not investigate the detailed content of all these standards and the balance between liquidation and restructuring proceedings in particular countries such as Koreas.

[7] Official Records of the General Assembly, Twenty-first Session, Resolution 2205 (XXI), A/RES/2205(XXI), 17 Dec. 1966 which is available on the UNCITRAL website, www.uncitral.org.

[8] For different definitions of 'harmonisation' see Patrick Glenn, Harmony of Laws in the Americas, 34 U. of Miami Inter-American L. Rev. 223, 246 (2003); Martin Boodman, The Myth of Harmonization of Laws, 39 American Journal of Comparative Law 699, 707 (1991). See also Camilla Baasch-Andersen, Defining Uniformity in Law, 12 Uniform L. Rev. 5 (2007).

[9] David Leebron, Claims for Harmonization: A Theoretical Framework, 27 Canadian Bus L.J. 63, 66 (1996).

[10] See the 'Schmitthoff Report' (UN Doc A/6396) reprinted in (1966) 1 UNCITRAL Yearbook 2 and available online at www.uncitral.org and associated links.

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characterisation however leaves room for flexibility as well as some ambiguity about exactly what is comprised in the notions of harmonisation and unification. UNCITRAL itself [11] suggests that 'harmonisation' can be thought of as the process through which domestic laws are modified to enhance predictability in cross-border commercial transactions whereas 'unification' is the adoption by States of a common legal standard governing particular aspects of international business transactions.

'Modernisation of laws' as an objective was not made explicit when UNCITRAL was established but the expression 'progressive' in the relevant UN resolution might be construed as implying 'modernisation'. It said that the progressive harmonisation and unification of trade law followed from the broader UN agenda of economic development and promoting friendly relations among States.[12] UNCITRAL however, now defines its mission as the 'modernization and harmonization' of trade law.'[13] This makes explicit what was already implicit but could also be regarded as a form of widening the mission of the organisation - 'mission creep'.

(b) Improving economic efficiency and assisting in the transition from a centrally planned to a more free market oriented economy

These objectives form a specific part of the mandate of EBRD[14] which was established in 1991 to assist the former Socialist States of Eastern Europe and the Soviet Union with the transition to a market economy. EBRD has highlighted the central role of insolvency law in this process stating that any insolvency regime has ultimately, the purpose of redistributing the assets of uncompetitive or inefficient entities. This process can be accomplished in various ways such as selling assets to more efficient entities, distributing assets to various constituencies such as governments and employees, or transforming the inefficient entity itself into a more efficient one through corporate restructuring and financial engineering. According to EBRD, the

[11] www.uncitral.org/uncitral/en/about/origin_faq.html.

[12] See Resolution 2205 (XXI).

[13] See Resolution adopted by General Assembly on Report of the United Nations Commission on International Trade Law on the work of its 42nd session, A/RES/64/111 (December 2009).

[14] See its website www.ebrd.com and in particular http://www.ebrd.com/what-we-do/sectors/legal-reform/debt-restructuring-and-bankruptcy.html

See generally Catherine Bridge, Insolvency – a second chance, Law in Transition 28 (2013); Jan-Hendrik Rover Secured Lending in Eastern Europe: Comparative Law of Secured Transactions and the EBRD Model Law (Oxford, OUP, 2007).

empirical evidence suggests that "legal systems that fulfil this purpose well, in a predictable and efficient manner, will attract greater investment and make the cost of credit more affordable by giving creditors the certainty they crave…"[15] The argument is that free movement of global capital and the desire of all countries, including emerging markets, to attract the same pool of scarce capital makes it necessary for countries to try to attain certain standard levels of extensiveness and effectiveness in their insolvency laws.

(c) Putting assets to their most effective use and raising living standards

The highly influential World Bank Doing Business (DB) project and associated rankings[16] stresses the importance of a well-functioning legal and regulatory system in creating an effective market economy and, as a corollary, the deleterious effects that a poor regulatory environment can have on output, employment, investment, productivity, and living standards.

According to the 2018 Doing Business report, access to finance is key to the development of the private sector with lenders needing tools not only to assess the risk of non-repayment but also the consequences of non–repayment. The Doing Business report states that a good insolvency framework—one which the World Bank identifies as efficiently rehabilitating viable companies and liquidating non-viable ones— enables both lenders and entrepreneurs to evaluate the consequences of non-repayment. It makes a link between insolvency reforms and access to credit and adds that legal protection of creditors in insolvency situations and efficient enforcement are conducive to larger and more developed capital markets.[17]

Inclusive economic development is a theme heavily emphasised in the World Bank's Insolvency and Creditor rights framework (ICR).[18] These standards refer to credit as the

[15] See Mahesh Uttamchandani, Insolvency law and practice in Europe's transition economies, available at http://www.europeanrestructuring.com/05intro/026_035.htm/
See also Anita Ramasastry, Assessing insolvency laws after ten years of transition, Law in transition, EBRD (Spring 2000).

[16] See www.doingbusiness.org/. The 2018 Doing Business report and other Doing Business annual reports are freely downloadable from the World Bank website – http://www.doingbusiness.org/reports/global-reports/doing-business-2018

The report was published on 31st October 2017 and the rankings for all economies are benchmarked to June 2017. See generally Timothy Besley, Law, Regulation and the Business Climate: The Nature and Influence of the World Bank's Doing Business Project, 29 Journal of Economic Perspectives 99 (2015).

[17] See 2018 Doing Business (DB) report at p 56.

[18] Principles for effective insolvency and creditor - debtor rights systems, available at http://documents.worldbank.org/curated/en/557581467990960136/Principles-for-effective-insolvency-and-creditor-debtor-rights-systems.

It is stated therein that the Principles are said to be "a distillation of international best practice on design aspects of these systems, emphasizing contextual, integrated solutions and the policy choices involved in developing those

lifeblood that flows through that circulatory system enabling businesses to innovate and develop and also to sustain and develop employment. The ICR Principles are said to provide a predictable, transparent, and efficient framework to resolve debts in the context of business distress or failure. It is suggested that the principles will facilitate the greater availability of credit at lower costs.

(d) Improving macro-economic stability

The general goal of ensuring macro-financial stability has sometimes been spoken of in the context of promulgating international insolvency standards and the global financial crises has focused attention on this issue. For instance, the World Bank's ICR framework[19] refers to the renewed interest of the international community in ensuring soundness and stability in financial systems. The link between insolvency standards and the mitigation of systemic crises such as the Asian crisis of 1997/1998 has also been emphasised in the work done by other international organisations. The G-22 Working Group report[20] stressed "the critical importance of strong insolvency and debtor-creditor regimes to crisis prevention, crisis mitigation and crisis resolution."

2. Who sets the international standards?

Five classes of actors have placed their stamp on international insolvency standards.[21] The first category are groups of nations such as the G-7 and the G-22 clubs of 'systemically important" countries. Secondly, comes international financial institutions such as the International Monetary Fund (IMF) and World Bank and regional development institutions such as the Asian Development Bank (ADB) and European Bank for Reconstruction (EBRD). Thirdly, comes international professional associations such as INSOL – the international association of insolvency practitioners - and fourthly, international governance bodies such as UNCITRAL. Fifthly and finally, comes sovereign states, principally the United States.

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solutions. Based on the experience gained from the use of the Principles, and following extensive consultations, the publication has been thoroughly reviewed and updated in 2005, 2011 and 2015. The revised Principles contained in this document have benefited from the practical experience of using them in the context of the Bank's assessment and operational work."

[19] http://siteresources.worldbank.org/GILD/PrinciplesAndGuidelines/20162797/Principles%20and%20Guidelines%20for%20Effective%20Insolvency%20and%20Creditor%20Rights%20Systems.pdf

[20] International Financial Crises (October 1998).

[21] Terence C. Halliday and Bruce G. Carruthers, Bankrupt: Global Lawmaking and Systemic Financial Crisis, (2009, Stanford University Press), 73. See also Susan Block-Lieb and Terence Halliday, Global Lawmakers: International Organizations in the Crafting of World Markets, (2017, Cambridge University Press).

This paper concentrates on the standards produced by international financial institutions and international governance bodies and addresses work done by the other international actors insofar as they contribute to these standards. More particularly, it focuses on the ADB, EBRD, the World Bank as well as UNCITRAL whose mandate is partly to coordinate and integrate work done by other bodies into a global consensus. UNCITRAL was established on the basis that its work would acquire legitimacy and credibility from the international representativeness of the UN and accordingly, it could function effectively as a coordinating entity. Its coordinating role means that it can act as a sort of clearing house for other international organisations active in the field.[22]

Legitimacy can be described as "a generalized perception or assumption that the actions of an entity are desirable, proper, or appropriate within some socially constructed system of norms, values, beliefs, and definitions"[23] and the legitimacy of international organisations such as UNCITRAL rests on the foundations of representativeness, procedural fairness and effectiveness.[24] The notion of representativeness is bound up with idea that those responsible for the framing of the new global norms are in some way representative of the kinds of jurisdictions to which these norms are addressed. The notion of procedural fairness implies general participation and 'voice' – peripheral and core actors, the weak and the strong, are all allowed to take part in the norm-making process in ways that are seen to be fair. Effectiveness implies proposals translated into action or, to put it another way, that the accomplishments of an international organisation in the past are likely to be turned into probable future successes.[25]

The Asian Development Bank (ADB) is among the bodies whose work UNCITRAL coordinates. The ADB was founded in 1966 with the objectives of reducing poverty, promoting

[22] See José Angelo Estrella Faria, The Relationship Between Formulating Agencies in International Legal Harmonization: Competition, Cooperation, or Peaceful Coexistence?, 51 Loyola L. Rev. 253, 255–256 (2005). According to Roy Goode, International Restatements of Contract and English Contract Law, Uniform L. Rev. 231, 232 (1997) the "need for such a clearing house is illustrated by the fact that 'the treaty collections are littered with Conventions that have never come into force, for want of the number of required ratifications, or have been eschewed by the major trading States."

[23] See Mark C Suchman, Managing Legitimacy: Strategic and Institutional Approaches, 20 Acad. Manag. Rev 571, 574 (1995).

[24] See Terence Halliday, Legitimacy, Technology and Leverage: The Building Blocks of Insolvency Architecture in the Decades Past and Decades Ahead, 32 Brooklyn J. of Int'l. L. 1081, 1084 (2007), referring to Ian Hurd, After Anarchy: Legitimacy and Power in the United Nations Security Council (Princeton NJ, Princeton University Press, 2007).

[25] It has also been argued that UNCITRAL acts 'incrementally' and this incrementalism is one of its strengths – see John Pottow, Procedural Incrementalism: A Model for International Bankruptcy, 45 Va. J. of Int'l. L. 935l (2005).

economic growth, supporting human development and promoting the environment. It turned its attention to law and development issues more systemically in the 1990s and, after the 1997 Asian Financial Crisis, it produced a comprehensive report analysing insolvency law regimes in East Asia.[26] This report set out 'good practice standards' that would apply to all countries regardless of legal traditions or the rate of economic development. While stated at a fairly high level of generality and abstraction, there are no less than 33 good practice standards and these cover core insolvency law issues.[27] EBRD is another body whose work is 'coordinated' by UNCITRAL. Its areas of operation were originally the formerly Socialist States of Central and Eastern Europe and now include the Middle East and North Africa. EBRD describes its own mission as being to foster the transition to open market-oriented economies and to promote private and entrepreneurial initiative.[28]

Unlike the ADB and EBRD, the IMF has a global remit and was established as part of the international financial framework following the conclusion of World War 11. Alongside the World Bank, it is one of the two so-called Bretton Woods institutions.[29] The IMF's role is to act as lender of last resort to countries with balance of payments problems though this mandate was updated in 2012 and now includes macroeconomic and financial sector issues that bear on global stability.[30] In the new phase of globalisation from the 1990s onwards, the IMF was out of the traps relatively early with a 1999 standard setting report 'Orderly and Effective Insolvency Procedures: Key Issues'[31] prepared in response to the Asian financial crisis. The IMF has since ceded the standard setting territory largely to its sister institution, the World

[26] See generally Terence C. Halliday and Bruce G. Carruthers, Bankrupt: Global Lawmaking and Systemic Financial Crisis, (2009, Stanford University Press), 92-96, who state at p 92 that the 'culture and leadership of the Bank are strongly influenced by Japan'.

[27] Law and Policy Reform at the Asian Development Bank (2000) volume 1, available at https://www.adb.org/sites/default/files/publication/29683/lpr-adb.pdf (visited 26 Jun, 2018).

[28] See the Foreword by EBRD General Counsel Emanuel Maurice in Secured Lending in Eastern Europe: Comparative Law of Secured Transactions and the EBRD Model Law (Jan-Hendrik Rover ed., OUP 2007) at v: "EBRD has a special role amongst international financial institutions, because of the unique nature of its region, because of the emphasis placed on promoting the private sector, and because of widespread expectation that countries in the region should catch up rapidly with their western neighbours."

[29] "The Bretton Woods Institutions are the World Bank, and the International Monetary Fund (IMF). They were set up at a meeting of 43 countries in Bretton Woods, New Hampshire, USA in July 1944. Their aims were to help rebuild the shattered post war economy and to promote international economic cooperation" - see http://www.brettonwoodsproject.org/2005/08/art-320747/

[30] See IMF website – http://www.imf.org which also states in the 'about the IMF' section that the IMF works "to foster global monetary cooperation, secure financial stability, facilitate international trade, promote high employment and sustainable economic growth, and reduce poverty around the world." This is not much different therefore from the World Bank which states that it is "working for sustainable solutions that reduce poverty and build shared prosperity in developing countries" – see http://www.worldbank.org/

[31] http://www.imf.org/external/pubs/ft/orderly/

Bank, which entered the fray with a 2000 background paper, 'Building Effective Insolvency Systems: Toward Principles and Guidelines'. This paper led to the formulation of the Insolvency and Creditor Rights (ICR) Principles in 2001[32] and these principles have gone through various amendments and iterations with the most recent being in 2015.

Since 2004, a team within the World Bank group have also produced the Doing Business reports and rankings which purport to measure a whole host of matters including 'resolving insolvency' and 'getting credit'. The reports and rankings are based on a more sophisticated version of the 'legal origins' or 'law matters' thesis developed by four economists - La Porta, Lopez de Silanes, Shleifer and Vishny[33] and they also draw to a certain extent upon international standards in the field of insolvency and secured credit law that have been developed both by the World Bank itself and by UNCITRAL.

3. The contents of the international standards

This section concentrates on the standards articulated by the World Bank and UNCITRAL. As a broad generalisation it is probably true to say that the work output from the World Bank in this area is more specific and prescriptive than that emanating from other bodies including, in particular, UNCITRAL. It has been argued that the 'Bank's insolvency Initiative articulates a theory of legal development that is heavily weighted toward creditor rights – much more than when it began its enterprise and certainly more so than the EBRD.'[34] ~~But w~~What appeared however, in early drafts of the World Bank Insolvency Principles to be an 'ethcocentric Washington Consensus view of the world' became attenuated in later drafts as diversity in the implementation of the principles came to be recognised.[35] This 'strength in diversity' approach however, is less easily located in the Doing Business standards.

In determining the "Doing Business" rankings, two factors are equally weighted though the second factor was only introduced into the Doing Business methodology in 2015.[36] The first

[32] http://siteresources.worldbank.org/GILD/PrinciplesAndGuidelines/20162797/Principles%20and%20Guidelines%20for%20Effective%20Insolvency%20and%20Creditor%20Rights%20Systems.pdf

[33] See Rafael La Porta, et al., Legal Determinants of External Finance 52 Journal of Finance 1131 (1997) and by the same authors, Law and Finance, 106 Journal of Political Economy 113 (1998). The first three named authors refine the 'legal origins' thesis and ~~provide a~~ defend itce against criticisms in 'The Economic Consequences of Legal Origins', 46 Journal of Economic Literature 285 (2008).

[34] See Carruthers and Halliday op. cit. at p 112.

[35] Ibid.

[36] See 2016 Doing Business report at p iv: "Since the first Doing Business report was published …the team has implemented a number of methodological improvements, expanding the coverage of regulatory areas measured

factor, and which has been part of the 'resolving insolvency' rankings since their inception, is the percentage recovery by secured creditors through restructuring, liquidation or debt enforcement proceedings. A hypothetical case study is posited and then likely recovery rates under the facts of this case study are calculated. The calculation takes into account whether the business emerges from the proceedings as a going concern or whether assets were sold piecemeal. Then the costs of the proceedings are deducted and, in line with international accounting practice, regard is also had to the value lost as a result of the money being tied up in insolvency proceedings for a particular period of time.[37]

There is no attempt however, to measure whether the hypothetical case study is broadly representative of the local economy or whether different outcomes and returns could be expected in relation to different types of enterprises or case studies. The focus is also exclusively on returns to secured creditors. If the insolvency law in a particular country had a redistributionist element this would necessarily depress the returns to secured creditors and therefore lower a country's position in the rankings. Moreover, an assessment of the 'recovery' rate depends in large part on the subjective views of survey respondents on the returns to creditors in their particular countries. In most countries, there will not be publicly available and accurate data on this matter. The Doing Business team has explained that information for the assessments comes from questionnaire responses by local lawyers and insolvency practitioners and then verified through studying the relevant laws, ~~and~~ regulations and other publicly available information on insolvency systems.

The Doing Business report[38] suggests that the recovery rate is a measure of efficiency because time and cost are two important components whereas the second factor in its rankings – the strength of the insolvency framework index - is a proxy for quality because it measures how well insolvency laws accord with internationally recognised good practices. This second factor is made up of the aggregate of scores on an overall index that purports to measure and evaluate provisions on the commencement of proceedings, management of debtor's assets, reorganisation procedures and creditors' rights. Scores on the index range from 0–16, with the higher scores supposed to signify that particular insolvency laws are better designed for

and enhancing the relevance and the depth of the indicators. While initially the report was focused largely on measuring efficiency and the costs of compliance with business regulations, over the past two years there has been a systematic effort to capture different dimensions of quality in most indicator sets."

[37] For a discussion of date and methodology on ~~'~~resolving insolvency~~'~~ see 2018 DB report at pp 111-115.

[38] See 2018 DB Report at pp 111-115

rehabilitating viable firms and liquidating nonviable ones. The 'management of debtor's assets' component of the index consists of the following criteria:

• Whether the debtor (or an insolvency representative acting on its behalf) can continue performing contracts that are essential to the debtor's survival. A score of 1 is assigned if the answer is affirmative with 0 if continuation of contracts is not possible or the law contains no provisions on the matter.

• Whether the debtor (or an insolvency representative acting on its behalf) can reject overly burdensome contracts. A score of 1 is assigned if the question is answered affirmatively but 0 if rejection of contracts is not possible.

• Whether transactions entered into before commencement of insolvency proceedings that give preference to one or several creditors can be avoided after proceedings are initiated. A score of 1 is assigned if the question is answered affirmatively but 0 if avoidance of such transactions is not possible.

• Whether undervalued transactions entered into before commencement of insolvency proceedings can be avoided after proceedings are initiated. A score of 1 is assigned if the question is answered affirmatively but 0 if avoidance of such transactions is not possible.

• Whether the insolvency framework includes specific provisions that allow the debtor (or an insolvency representative acting on its behalf), after commencement of insolvency proceedings, to obtain financing necessary to function during the proceedings. A score of 1 is assigned if the question is answered affirmatively but 0 if obtaining post-commencement financing is not possible or the law contains no provisions on this subject.

• Whether post-commencement financing receives priority over ordinary unsecured creditors during distribution of assets. A score of 1 is assigned if the question is answered affirmatively; 0.5 if post-commencement financing is granted super-priority over all creditors, secured and unsecured; 0 if no priority is granted to post-commencement financing.

The strength of the insolvency framework assessment is relatively blunt and depends largely on binary 'all or nothing' measures assuming that particular legislative solutions are superior to others and missing out subtlety and nuances in the laws of a particular country. An example is in relation to post-commencement financing i.e. financing of the debtor after the commencement of formal insolvency proceedings. Such financing is often seen as necessary to resolve 'debt overhang', i.e. existing assets being fully secured, and to cure

'underinvestment' problems, i.e. lack of incentives to finance value-generating projects.[39] Such financing may be possible as a matter of practice in a particular country but there are no specific provisions of the law that authorise such financing. In these circumstances, it seems likely that the country would get a zero mark, although, as matter of practice, post-commencement financing may be more readily available than in a country where there is specific legislative framework but there are so many restrictions that it is very difficult to access in reality. For instance, the UK lacks a fully set out new financing framework along the lines of s 365 of the US Bankruptcy Code and stakeholders have firmly rejected recent suggestions from the UK government in 2009[40] and 2016[41] that such a framework should be introduced. The available evidence suggests that a lack of rescue finance rarely prevents business rescue, and that as long as a business is truly viable, there was no shortage of funding available. The fear was that any changes made to the order of priority would impact negatively on the lending environment by increasing the cost of borrowing.[42]

The World Bank Doing Business ~~'~~Resolving Insolvency~~'~~ framework has a ~~'~~one size fits all~~'~~ approach ~~mindset~~ that effectively commands States to follow certain rules, absolutely and rigidly, or else be penalised by low marks on the scorecard. The 2004 UNCITRAL Legislative Guide on Insolvency, on the other hand, employs a more sophisticated and flexible repertoire of rules[43] though it undoubtedly borrows heavily from the US Bankruptcy Code and in particular Chapter 11 on corporate reorganisation. The Insolvency Guide, which now comes in four parts, is made up of over 200 recommendations in total divided into over 20 topics plus a detailed commentary.[44] The commentary may stress the importance of a particular issue or

[39] See generally Gerard McCormack, Super-priority New Financing and Corporate Rescue, [2007] Journal of Business Law 701; George G Triantis, A Theory of the Regulation of Debtor-in-Possession Financing, 46 Vanderbilt Law Review 901 (1993); Sandeep Dahiya, Kose John, Manju Puri and Gabriel Ramirez, Debtor-in-Possession Financing and Bankruptcy Resolution: Empirical Evidence, 69 Journal of Financial Economics 259 (2003).

[40] See Encouraging Company Rescue a consultation available at http://webarchive.nationalarchives.gov.uk/20140311023846/http://www.insolvencydirect.bis.gov.uk/insolvencyprof essionandlegislation/con_doc_register/compresc/compresc09.pdf

[41] See UK Insolvency Service A Review of the Corporate Insolvency Framework: summary of responses (September, 2016) at para 5.52.

[42] See generally Jennifer Payne and Janis Sarra, Tripping the Light Fantastic: A comparative analysis of the European Commission's proposals for new and interim financing of insolvent businesses, 27 International Insolvency Review 178 (2018).

[43] See generally Susan Block-Lieb and Terence Halliday, Harmonization and Modernization in UNCITRAL's Legislative Guide on Insolvency Law, 42 Texas Int'l. L. J. 475 (2007); Terence Halliday, Legitimacy, Technology, and Leverage: The Building Blocks of Insolvency Architecture in the Decade Past and the Decade Ahead, 32 Brooklyn J. of Int'l. L. 1081 (2006).

[44] The original guide (Parts 1 and 2) was formulated in 2004 and a third part on the treatment of enterprise groups in insolvency was added in 2010 and a fourth part on directors' obligations in the period approaching insolvency was added in 2013.

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principle and then justify a series of recommendations that give effect to that principle. It may contain a comparative analysis in situations where there is considerable cross-country variation on a particular topic, presenting and discussing alternative approaches and evaluating such approaches. The commentary also serves an important validation function by registering the fact that the views advanced by particular delegates have been listened to, even if they were not ultimately adopted, and also by setting out the reasons in ~~that~~ favour of particular approaches.

The flexibility of the UNCITRAL Guide is demonstrated in relation to debtor-in-possession versus management displacement in the context of reorganisation proceedings. The Guide states that different approaches may be taken on this issue including[45]

(a) retention of full control by the debtor, i.e. debtor-in-possession with appropriate safeguards including varying levels of control of the debtor and debtor displacement in certain circumstances;
(b) limited displacement where the debtor operates the business subject to the supervision of an insolvency representative with an appropriate division of responsibilities between the two;
(c) total displacement of the debtor in favour of an insolvency representative.

Unlike the norm in the US Chapter 11, the UNCITRAL Guide does not recommend adoption of ~~'~~debtor-in-possession~~'~~ as the general norm in respect of corporate reorganisation.[46] While Chapter 11 allows an outside bankruptcy trustee to be appointed for cause to take over the management of a firm in distress, their appointment in Chapter 11 is exceptional.[47]

It has been suggested that the recommendations in the Insolvency Guide can be grouped along a broad spectrum of specificity that runs from broad statements of commercial norms to explicitly detailed language that is ready for enactment.[48] At the most prescriptive end of the spectrum are imperative recommendations suggesting national legislation with a detailed

[45] See Recommendation 112.
[46] See the statement at p 162 of the commentary attached to the Legislative Guide "In reorganization proceedings, there is no agreed approach on the extent to which displacement of the debtor is the most appropriate course of action and, where some level of displacement does occur, on the ongoing role that the debtor may perform and the manner in which that role is balanced with the roles of other participants."
[47] S 1104 US Bankruptcy Code provides that a trustee can be appointed only for cause such as fraud, dishonesty or gross mismanagement and that large numbers of bondholders or shareholders are not enough.
[48] Susan Block-Lieb and Terence Halliday, Harmonization and Modernization in UNCITRAL's Legislative Guide on Insolvency Law, 42 Texas Int'l. L. J. 475 (2007).

content that is expressly set out in each recommendation. But imperative recommendations do not all conform to the same pattern. They may be substantive, procedural or indeed conditional in nature. Conditional recommendations are predicated upon a particular procedure being enacted and specify that if one has this provision then it should have such and such content. For instance, according to Recommendation 151, where the insolvency law does not require a plan to be approved by all classes, it should address the treatment of those classes not voting to approve a plan that has ~~otherwise~~ been approved by other ~~requisite~~ classes. Conditional recommendations are said to give UNCITRAL "the capacity to acknowledge local contingencies and variations in an orderly way".[49]

Constraining recommendations are inclined to point in a particular direction but then leave choices up to local legislation. They can set out a base standard stipulating that there should be a rule on a topic, and then set out certain elements that should be included. Permissive recommendations are in the form that a country may adopt a rule that contains certain things. Imperative plus permissive elements are sometimes combined in the same substantive rule. The Guide also contains minimalism norms specifying that if there is to be a rule on a particular topic, or an exception to a rule, it should be kept to a minimum. For example, Recommendation 188 on secured claims provides that the "insolvency law should specify that a secured claim should be satisfied from the encumbered asset in liquidation or pursuant to a reorganization plan, subject to claims that are superior in priority to the secured claim, if any. Claims superior in priority to secured claims should be minimized and clearly set forth in the insolvency law."

Weaker still are focusing recommendations that seek merely to sharpen the focus of insolvency law. These may take the form of architectural recommendations suggesting the existence of a rule on some specific topic of insolvency law without specifying the content of the rule. Recommendation 185 can be pointed to in this connection. It refers to the need to specify classes of creditors and to make clear what priority they should be accorded, but it does not set out how this should be done.

The DB ~~'~~criteria on the strength of the insolvency framework ~~criteria'~~ seem to be much more prescriptive in this regard. ~~with t~~The relevant provisions contained in 'the reorganization proceedings index'~~.~~ which ~~This index~~ has three elements. The first element requires that ~~If~~ the reorganization plan should be ~~is~~ voted on only by the creditors whose rights are modified or affected by the plan. ~~then a~~A score of 1 is given if this is the case~~e answer is in the~~

[49] Ibid at 503.

~~affirmative~~; 0.5 if all creditors vote on the plan irrespective of the impact on their interests and 0 if either creditors do not vote on the plan or there is no regime for business reorganization. The second element ~~index appears to~~ require~~s~~ that creditors entitled to vote on the plan should be divided into classes, that each class should vote separately and that creditors within the class should be treated equally. A score of 1 is only given when the voting procedure has these three features. The third element ~~index also~~ imports what ~~is~~ in the US is referred to as the 'no creditor worse off' test i.e. that dissenting creditors should receive as much under the reorganization plan as they would in liquidation.[50] A score of 1 is given only if ~~there are such provisions in~~ the relevant law has such a provision.

The DB insolvency ranking criteria ~~appear to~~ draw heavily from the US Bankruptcy Code and in particular, Chapter 11. Perhaps it is not surprising that the US scores a maximum 3 out of 3 on the reorganization proceedings index whereas for example, on the other hand, the UK is marked at a disappointing 1 out of 3[51]. The objective of Chapter 11 has been judicially affirmed to be that of providing the "debtor with the legal protection necessary to give it the opportunity to reorganize, and thereby to provide creditors with going-concern value rather than the possibility of a more meagre satisfaction of outstanding debts through liquidation." [52] Professors Warren and Westbrook[53] suggest that Chapter 11 deserves a prominent place in "the pantheon of extraordinary laws that have shaped the American economy and society and then echoed throughout the world…" Chapter 11 has been hailed in enthusiastic terms by its supporters and as the model to which restructuring laws across the globe should aspire. [54] Nevertheless, Chapter 11 is not above criticism and the US Chapter 11 prescriptions may not be suitable for direct, or indirect, export to the rest of the world. Moreover, it is the case that US insolvency law may change significantly in the next few years due to expansion in the use of secured credit, the growth of distressed-debt markets and other externalities that have

[50] 11 U.S.C. § 1129(a)(7)(A)(ii).

[51] It can however, be noted that the Republic of Korea also scores a maximum 3 out of 3 on the reorganization proceedings index – see http://www.doingbusiness.org/en/data/exploreeconomies/korea#DB_ri. Korea does very well on the World Bank Doing Business indicators with a position of 4th overall including 5th for resolving insolvency which compares with 3rd for the US and 14th for the UK.

[52] Canadian Pacific Forest Products Ltd v JD Irving Ltd (1995) 66 F 3d 1436 at 1442.

[53] See Elizabeth Warren & Jay Lawrence Westbrook, The Success of Chapter 11: A Challenge to the Critics, 107 Michigan L. Rev. 603, 604 (2009).

[54] ——— In a leading study by inter alia, the Association of Financial Markets in Europe (AFME) and Frontier Economics it has been described as an important comparison point for further insolvency law reform in Europe: AFME, Frontier Economics and Weil, Gotshal and Manges LLP, Potential economic gains from reforming insolvency law in Europe (AFME, February 2016), 12 <https://www.afme.eu/globalassets/downloads/publications/afme-insolvency-reform-report-2016-english.pdf>; see generally M Brouwer, Reorganization in US and European Bankruptcy Law, 22 European J. of L. & Econ 5 (2006).

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affected the effectiveness of the current law. The American Bankruptcy Institute (ABI), one of the important actors in insolvency law reform in the US, established a review group to report on Chapter 11[55]and it proposed reforms with a view to achieving a better balance between the effective restructuring of business debtors, the preservation and expansion of employment, and the maximization of asset values for the benefit of all creditors and stakeholders.[56]
In relation to the principle embodied in both Chapter 11 and the DB rankings that creditors should receive at least as much under a restructuring plan as they would in a liquidation, there is some divergence in approach even in respect of developed 'Western' countries. In some countries, the concept that no creditors should be left worst off is a formal requirement of the restructuring law whereas in other countries if the necessary majorities are obtained the restructuring plan is approved and the court does not formally consider alternative values of the debtor's assets such as liquidation value.[57]

The UK, for instance, takes what might be referred to as a 'creditor democracy' approach. In the UK Insolvency Act, the main debt restructuring tool is the Company Voluntary Arrangement (CVA) where creditors are not divided into classes and which do not necessarily come before the court for approval.[58] A CVA however, does not affect secured creditors unless they consent to their inclusion in the procedure.[59] There is a requirement that 75% in value of creditors affected and voting should approve the proposal and once this threshold has been met, the arrangement becomes binding on dissenting creditors.[60] The underlying legislative assumption is that if the returns to creditors in a CVA are in some way unfair including being less than the value obtained in a liquidation, then creditors would not support the CVA proposal. A dissenting creditor however, may challenge the arrangement in court, subject to tight time limits, if it can be established that the arrangement is unfairly prejudicial or there is some procedural irregularity which led to acceptance of the arrangement.[61]

[55] www.commission.abi.org/full-report.
[56] See generally Bob Wessels and Roledanged de Weijs, Revision of the iconic US Chapter 11: its global importance and global feedback, 4 Int'l. Insolvency L. Rev. 441 (2014) who comment that "it would make little sense to try to catch up with the US and end up in a place where the US no longer wants to be."

[57] See generally Susan Block-Lieb, Reaching to Restructure across Borders (without over-Reaching), Even after Brexit, 92 American Bankruptcy Law Journal 1 (2018); Horst Eidenmuller, What Is an Insolvency Proceeding, 92 American Bankruptcy Law Journal 53 (2018).
[58] The law on CVAs is contained in Part 1, Insolvency Act 1986.
[59] Section 4(3) Insolvency Act 1986.
[60] Rule 15.34 Insolvency Rules 2016.
[61] Section 6 Insolvency Act 1986.

In recent years however, the principal restructuring mechanism in the UK for larger companies and for large company debt has been the scheme of arrangement procedure in the Companies Act.[62] There are three stages to the procedure including two court applications. At the first stage, an application is made is to the court to convene meetings of creditors if the scheme is a 'creditor' scheme i.e. it is intended to become binding on creditors. The scheme will generally settle issues of class composition at this convening stage. At the second stage, the relevant class meetings are held and the scheme has to be approved by 75% in value and a majority in number of creditors within that class if it is to become binding on the class as a whole. At the third stage, the scheme comes before the court for approval and in deciding whether or not to give approval, the court will accord considerable latitude to the scheme proponents. The court must be satisfied that it is a fair scheme - one that "an intelligent and honest man, a member of the class concerned and acting in respect of his interest, might reasonably approve."[63] On the other hand, the scheme proposed need not be the only fair scheme or even, in the court's view, the best scheme. There is room for reasonable differences of view on these issues and in commercial matters creditors are considered to be much better judges of their own interests than the courts. The court in Re British Aviation Insurance Co Ltd[64] pointed out that the test is not whether the opposing creditors have reasonable objections to the scheme. A creditor may be equally reasonable in voting for or against the scheme and in these circumstances creditor democracy should prevail.[65]

The overall flexibility of the UK scheme of arrangement has proved attractive to foreign incorporated companies and to international creditors and a number of foreign companies both within Europe, and outside, have UK schemes to restructure their debts.[66] The DB reorganization proceedings rankings appears to ignore schemes in that the UK is given a mark

[62] Schemes are dealt with in Part 26 of the Companies Act 2014 and see generally Geoff O'Dea, Julian Long and Alexandra Smyth, Schemes of Arrangement Law and Practice (Oxford: OUP, 2012); Jennifer Payne, Schemes of Arrangement; Theory, Structure and Operation (Cambridge: CUP, 2014).
[63] See Anglo-Continental Supply Co Ltd [1922] 2 Ch 723 at 736.
[64] [2005] EWHC 1621 at para 75.

[65] For a recent full discussion of the principles ~~applicable~~ that UK courts should take into account in deciding whether or not to approve a scheme see Re Lehman Brothers International (Europe), Re [2018] EWHC 1980 (Ch).

[66] See Re Seat Pagine Gialle SpA [2012] EWHC 3686 (Ch); Primacom Holdings GmbH v Credit Agricole [2011] EWHC 3746 (Ch); Re Rodenstock GmbH [2011] EWHC 1104 (Ch); [2011] Bus LR 1245 and see generally Look Chan Ho, Making and enforcing international schemes of arrangement, 26 Journal of International Banking Law and Regulation 434 (2011); Jennifer Payne, Cross-Border Schemes of Arrangement and Forum Shopping, 14 European Business Organization Law Review 563 (2013).

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of zero in response to the question whether creditors are divided into classes in reorganisation proceedings. The rankings appear to take the CVA procedure as the paradigm perhaps because it is contained in the Insolvency Act whereas the scheme procedure in the Companies Act is ignored even though it is the more significant procedure in practice; certainly for large companies. This example reinforces the general argument in this paper that the DB rankings are crude and over-simplistic while ignoring subtleties and nuances in the laws of a particular country.[67]

4. Criticisms of international harmonisation endeavours

In one sense, it is hard to be against harmonisation of insolvency laws; certainly to the extent that this implies modernisation and the updating of laws that are now obsolete or barely functioning in the light of changed or changing economic and social conditions. How can one be against economic stability and development, a more peaceful global society, the accelerated raising of living standards and putting assets to their most effective use? In a US context, this could be seen as opposing motherhood and apple pie. Nevertheless, there are certain criticisms that may be levelled against the harmonisation endeavour. Essentially these come ~~boil~~ down to three – (a) loss of local national autonomy; (b) absence or diminution of regulatory competition and (c) reliance whether explicit or implicit, on a set of normative assumptions whose relationship with economic growth and development is at best contingent and uncertain.

(a) Loss of national autonomy

This paper has praised the work of UNCITRAL as being more pluralistic and open to different approaches than the DB rankings but even here pluralism and tolerance of diversity has its limits. If harmonisation is merely intended to mean the identification of common approaches among existing national laws then this encroaches only minimally on ~~nation s~~States ~~and governments~~ and in the late 1960s, 'progressive harmonization and unification' of trade law was understood as the reconciliation of divergent practices and the expression of emerging international norms. UNCITRAL however, now puts its focus on 'modernization and harmonization' and this approach sees UNCITRAL in a more pro-active pose actively striving for the reform of global business law.[68] Law reform efforts of this kind may involve 'in with

[67] For criticisms of these rankings see Gerard McCormack, World Bank Doing Business project: Should Insolvency Lawyers take it seriously, [2015] Insolvency Intelligence 119.

[68] Susan Block-Lieb and Terence Halliday, Harmonization and Modernization in UNCITRAL's Legislative Guide on Insolvency Law, 42 Texas Int'l. L. J. 475, 475–478 (2007).

the new' modernisation - the rejection of existing law and the creation of new law since existing national legal provisions are seen as inadequate to keep pace with market-led or technologically-driven innovations. For example, the Insolvency Legislative Guide is designed to modernise insolvency practices and laws by recommending to national governments that they reject their existing domestic insolvency laws in favour of more modern ones. [69]

This form of harmonisation/ modernisation can represent a fairly sharp form of intrusio~~cursio~~n into the sovereignty of States and national legislatures. This is because the existing efforts of some States are viewed as inadequate in the face of a modernist ideal hailing from outside. The idea of law making is closely tied to notions of sovereignty and self-determination which encourages a local process of law production rather than sourcing from a foreign supply. The international harmonisation process may cause States to embrace foreign business law in a somewhat surreptitious fashion in that the construction of an international instrument and its subsequent implementation by States may obscure the influence of a foreign legal ideology or legal order.[70]It may be that so-called '~~'~~modernisation' is really cover for '~~'~~'adaptation of a weaker country's laws in the direction of a powerful sovereign state or international organization which has the cultural authority to define the meaning of modern.'~~'~~'[71] One US commentator has even spoken of harmonisation as a "euphemism for forcing commercially less important countries to adopt the remedies and priorities of the commercially more important countries."[72]

The establishment of UNCITRAL in 1966 it was rooted partly on the ethical principle that newly independent States~~nations~~, who had just been freed from colonialism, needed to be involved in the process of harmonising international business law. Nevertheless, UNCITRAL texts are more likely to reflect the knowledge and experience of the developed countries and in particular the US. The US imprint, whether on the basis of '~~'~~prestige' or '~~'~~economic efficiency' is deeply impressed on '~~'~~harmonised' international business law.[73] This is true in

[69] 'Possible Future Work on Insolvency Law' at p 3 produced by UNCITRAL Working Group on Insolvency Law, 22nd Session (6–17 December 1999), A/CN 9 WG V/WP 50.

[70] See Katharina Pistor, The Standardisation of Law and Its Effect on Developing Economies, 50 American Journal of Comparative Law 97, 108 (2002).

[71] See Susan Block-Lieb and Terence Halliday op. cit. at p. 477 fn 6, and see generally the discussion at pp. 475–478.

[72] See Lynn M LoPucki, Courting Failure: How Competition for Big Cases Is Corrupting the Bankruptcy Courts 231 (Ann Arbor, University of Michigan Press, 2006).

[73] See generally Gerard McCormack, American Private Law Writ Large? The UNCITRAL Secured Transactions Guide, 60 International and Comparative Law Quarterly 597 (2011) and see also Ugo Mattei, Efficiency in Legal

respect of international insolvency texts such as the UNCITRAL Guide and the DB 'Strength of the Insolvency Framework' ~~framework~~ where the US scores 15 out of a possible 16 points.[74]

Related to issues of national sovereignty is the relationship between law and national culture and, more generally, the connectedness of law with a country's history and development. Law is valuable as a facilitator of contractual, commercial and corporate relationships but also as a protector and shaper of traditions, an expression of shared beliefs and ultimate values, and in much less definable ways, as an expression of national expectations, allegiances and emotions.[75] Law can be seen as representing the spirit of a nation and when the German Civil Code, the BGB, was enacted in 1900 a leading German commentator records that a major German publication marked the occasion with a large front-page that read 'Ein Volk, Ein Reich, Ein Recht' which translates as One People, One Empire, One Law.[76]

These basic notions of legal culture and separate legal traditions have been developed by Legrand, who argues that the diversity of legal traditions, and the diversity of forms embodied in these legal traditions, give expression to the human capacity for choice and self-creation and that they also play a constituting role in shaping cultural identity. In his view, harmonisation endeavours can be seen as attempts to undermine national legal culture and he defends such cultures against claims that they are inherently inward-looking and nationalistic in nature.[77] ~~But~~ Legrand's description of legal systems and legal cultures however, tends to place continuity, rather than change, on a pedestal. Legal culture can be ~~is potentially~~ open and dynamic rather than closed and static.

The need to be open and dynamic leads to another objection to, or at least counterweight against, legal harmonisation; namely the proposition that it may cripple creativity and lead to a stifling uniformity. This argument will now be developed.

Transplants: An Essay in Comparative Law and Economics, 14 Int'l. Rev. of L. & Econ 3 (1994); A Theory of Imperial Law: A Study on U.S. Hegemony and the Latin Resistance, 10 Indiana J. of Global L. Stud. 383 (2002).

[74] It may be noted however, the Republic of Korea also does very well here scoring 14 out of a possible 16 points whereas the OECD high income average is 12.1.

[75] See Roger Cotterrell, Comparative Law and Legal Culture, in The Oxford Handbook of Comparative Law (Reinhard Zimmermann and M Reimann eds, (OUP 2006).

[76] See Reinhard Zimmermann, Civil Code and Civil Law: The Europeanisation of Private Law within the European Community and the Re-emergence of a European Legal Science, 1 Columbia J. European L. 63, 65 (1995). See more generally Hugh Collins, European Private Law and Cultural Identity of States, 3 European Review of Private Law 353 (1995).

[77] See, for example, Pierre Legrand, On the Unbearable Localness of the Law: Academic Fallacies and Unseasonable Observations, European Review of Private Law 61 (2002); The Impossibility of Legal Transplants, 4 Maastricht Journal 111 (2003) and Antivonbar, 1 Journal of Comparative Law 1 (2006).

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(b) Loss of opportunities for regulatory competition

The argument is that legal diversity among countries brings about opportunities for competition between national legal orders whereas the relative uniformity achieved through harmonisation reduces or eliminates these opportunities.[78] In short, innovation at the local level is reduced, if not entirely eliminated. Local law making creates the space for initially unpromising, but ultimately beneficial ideas, to win through and gain general national and international acceptance. International uniformity on the other hand, can be stifling and bring about economic sterility.[79] Commerce and economic development may be best served by facilitating the development of different approaches in a climate of free competition and free choice. If there are different approaches to commercial law making, including insolvency law making, in different countries, then the seeds of a potential new approach can be sown, tested and put into play at the both local and national levels and then replicated across international frontiers if it turns out to be generally beneficial. A general 'harmonised' international legal order, on the other hand, may submerge such potentially enriching seedbeds of dynamism and innovation in a morass of sterile uniformity.

In the sphere of local government/central government relationships in the US, it has been argued by Tiebout that a decentralised system of government, with different municipalities competing to attract residents on the basis of differing tax and benefit structures, generates increased social welfare and does not leaving anybody worse off as a result.[80] Applying this analysis, experimentation and beneficial law making is best brought about when innovative rules are adopted at the local or national level rather than by trying to achieve consensus in favour of innovation at the international level. If innovation at the international level requires the exclusion of alternative legal regimes, then obtaining consensus in favour of a novel legal rule would not be an easy task. Allowing individual States the opportunity of experimenting

[78] See Roger Van den Bergh, Forced Harmonisation of Contract Law in Europe: Not to Be Continued, in An Academic Green Paper on European Contract Law (Stefan Grundmann and Julien Stuyck eds., Kluwer Law International, 2002) at 267: "[t]he advantages of competition between legal rules must not be underestimated: if rules differ, more preferences can be satisfied and learning processes remain possible."

[79] See generally Anthony Ogus, Competition Between National Legal Systems: A Contribution of Economic Analysis to Comparative Law, 48 International and Comparative Law Quarterly 405 (1999); Horst Eidenmüller, Free Choice in International Company Insolvency Law in Europe, 6 European Business Organization Law Review 423 (2005; David Cabrelli and Mathias Siems, Convergence, Legal Origins and Transplants in Comparative Corporate Law: A Case-Based and Quantitative Analysis, 63 American Journal of Comparative Law 109 (2015).

[80] Charles M. Tiebout, A Pure Theory of Local Expenditures, 64 J. of Polit. Econ. 416 (1956). Tiebout concedes however (at 424) that his solution may not be perfect because of "institutional rigidities" but he argues that it is "'the best that can be obtained given preferences and resource endowments.'"

instead of searching for international uniformity means that a number of experiments may proceed at the same time.[81] Not all innovations will turn out to be successful and wasted expenditure, and the costs of unforeseen harms, are reduced if unsuccessful experiments are confined to a single country.[82]

There is a debate about whether harmonisation or regulatory competition produces better rules from an efficiency point of view. Regulatory competition opens up the possibility of a more dynamic and innovative law-making process[83] though there are the risks of 'social dumping'[84] and a race to the bottom.[85] The debate has been particularly lively and contentious in 'federal' systems such as the European Union where, for example, a company may incorporate in one EU Member State but then carry on business in another. Regulatory competition advocates argue that harmonisation produces suboptimal rules since the selection of the harmonised rules will, or may, lead to a lowest common denominator being chosen instead of rules that pass muster on an efficiency criterion. Countries are then locked into suboptimal rules through a process of path dependency instead of being free to adopt better rules and respond to changing circumstances. The regulatory competition advocates suggest that, on the other hand, competition between countries engenders rule efficiency, and leads to a race to the top because experience teaches countries them that long term they benefit from having a high-quality and stable legal system. Nevertheless, one could point to 'negative externalities' in the sense of the adverse impact of rules adopted in a particular country on other countries.

In conclusion, both harmonisation and regulatory competition can lead to suboptimal legal standards for different reasons. With harmonisation, the pressure to compromise and achieve

[81] Paul B Stephan, The Futility of Unification and Harmonization in International Commercial Law, 39 Virginia J. *Int'l.* L. 743, 793 (1999).

[82] Ibid at p. 796.

[83] Regulatory Competition and Economic Integration: Comparative Perspectives (Daniel Esty and Damien Geradin eds., Oxford University Press, 2001), and see generally Friedrich Hayek, Competition as a Discovery Procedure, 5(3) Q. J. of Austrian Econ. 9 (2002).

[84] In the context of employment law the European Court of Justice (ECJ) made specific reference to social dumping in Case 341/05 Laval un Partneri Ptd v Svenska Byggnadsarbetareförbundet [2007] ECR I-5751 at para 103. See also Case C-438/05 International Tra*nsport Workers' Federation, Finnish Seamen's Union v Viking* Line ABP [2008] 1 CMLR 51.

[85] See generally John Armour, Who Should Make Corporate Law? EC Legislation versus Regulatory Competition, 58 Current Legal Problems 369 (2005) and Andrew Johnston, EC Freedom of Establishment, Employee Participation in Corporate Governance and the Limits of Regulatory Competition, 6 Journal of Corporate Law Studies 71 (2006). See also Catherine Barnard, Social Dumping and Race to the Bottom: Some Lessons for the EU from Delaware?, 25 EL Rev 57 (2000); Lucian Arye Bebchuk, Federalism and the corporation: the desirable limits on state competition in corporate law, 105 Harvard L. Rev. 1435 (1992); Luca Enriques, A Harmonized European Company Law: Are we There Already?, 66 International and Comparative Law Quarterly 763 (2017).

consensus can lead to imprecision and indeterminacies whereas regulatory competition may lead to 'a race to the bottom' and the unequal allocation of benefits.[86]

(c) Reliance on questionable assumptions

The international insolvency standards, to a greater or lesser extent, acknowledge that there are diverse legal and economic systems and that account needs to be taken of political complexities when framing legal rules and standards in the insolvency sphere. There is however, generally a preference for market oriented solutions and the use of insolvency law to further ~~'non - insolvency'~~ other goals such as social stability and ~~'~~community interests~~'~~ is generally disfavoured.

But there is the so-called 'China paradox'.[87] China's economy has been growing consistently at an average rate of 9-10% since the 'Reform and Opening Up Process' was begun by Paramount Leader Deng Xiaoping in 1978. In recent years, economic growth has slowed to 6-7% and in the 'New Normal' economy a growth rate of 6.5% is targeted. This figure is still remarkably high by the standards of advanced Western economies and also by those of the transition economies in Central and Eastern Europe which in general adopted a 'shock therapy' approach to privatisation and marketization as distinct from the gradualist approach that has found favour in China. [88]

China enacted an Enterprise Bankruptcy Law in 2006 – its first modern insolvency statute applying both to State owned enterprises and private firms. The law has been hailed as providing a better investment climate for the benefit of creditors through increasing legal certainty and transparency in insolvency proceedings. Certainly, in the formulation and enactment of the new law, the expertise of Western legal experts and Western legal experts have been drawn upon. [89] The law contains identifiable Western features including the

[86] See generally Simon Deakin, Legal Diversity and Regulatory Competition: Which model for Europe?, 12 European L. J. 440 (2006).

[87] See e.g. *China's Growth: The Making of an Economic Superpower* 7 (Linda Yueh ed., OUP, 2013): "China's gradual approach to reform has resulted in high and relatively stable growth rates for over three decades. This remarkable growth performance was accompanied by a relatively undeveloped legal and financial system which makes China a puzzle or paradox given the focus of economists on the importance of well-defined legal and formal institutions."

[88] See Joseph Stiglitz, Globalisation and its discontents 6 (Penguin, 2002): "countries were told by the West that the new economic system would bring them unprecedented prosperity. Instead, it brought unprecedented poverty ….The contrast between Russia's transition, as engineered by the international economic institutions, and that of China, designed by itself, could not be greater …"

[89] See generally Terence C. Halliday and Bruce G. Carruthers op. cit. Chapter 7 'China: Global Norms with "Chinese Characteristics"'

possibility of both liquidation and reorganisation proceedings; creditor participation and representation in the process. There is creditor voting on a reorganisation plan; court involvement and the establishment of a ranking system for creditor and other claims.[90]

Nevertheless, the Law can be ~~has been~~ criticised in certain respects for having several obstacles and gaps and, in particular, for containing vague 'trigger' criteria - the procedure that needs to be gone through before formal acceptance of an insolvency case by the court. The ~~charge of~~ vagueness complaint remains even though aspects of the law have been fleshed out in quasi-legislative judicial pronouncements issued by the Supreme People's Court of China.[91] There is still an element of State control— whether exercised by central, provincial or local government - about which companies may enter the formal insolvency process.[92] Moreover, in the asset distribution process, claims of unpaid employees appear in practice, and irrespective of the 'formal' law, to be given a higher priority than the secured creditors.[93] The political and social dynamics of China help to explain the operation of these elements. The prevailing message is one of Socialism with Chinese characteristics for a new era and ~~a~~ great emphasis is placed on maintaining social stability and creating a moderately prosperous harmonious society. The State owned or State controlled enterprises (SOEs) still occupy a large part of the economy particularly in terms of employment and there is not a fully developed and integrated social security net. SOEs pursue a number of different goals; not just profit maximisation, and this may include the maintenance of employment. Traditionally it has included the provision of pension, housing, medical and other benefits for employees and their families. In the interest of social stability, national and regional governments may not wish to have a large pool of unemployed labour in their localities and understandably restrict the access of business enterprises to formal insolvency procedures and/or insist that assets are made available to meet commitments to employees rather than being used to satisfy the claims of the creditors.

[90] For details see the winter 2017 issue of the American Bankruptcy Law Journal which is devoted to the Chinese Enterprise Bankruptcy Law.
[91] See Samuel Bufford and Yichang Chen, China's Bankruptcy Law Interpretations: Provisions Adopted by the Supreme People's Court of the People's Republic of China on the Application of the Enterprise Bankruptcy Law of the People's Republic of China, 91 Am. Bankr. L. J. 38 (2017).
[92] Simin Gao and Qianyu Wang, The U.S. Reorganization Regime in the Chinese Mirror: Legal Transplantation and Obstructed Efficiency, 91 Am. Bankr. L. J. 139 (2017).
[93] See Huimiao Zhao, Reorganization of Listed Companies with Chinese Characteristics, 91 Am. Bankr. L. J. 87 (2017); Zinian Zhang, Corporate Reorganisation of China's Listed Companies: Winners and Losers, 16 Journal of Corporate Law Studies 101 (2016); Roman Tomasic and Zinian Zhang, From Global Convergence in China's Enterprise Bankruptcy Law 2006 to Divergence in Implementation: The Case of Corporate Reorganizations in China, 12 Journal of Corporate Law Studies 295 (2012). But see Articles 113 and 132 Enterprise Bankruptcy Law.

As one commentator has remarked:[94]

"Contrary to many Western economies, where individualism dominates societal relations, the concept of and the philosophical orientation towards community is society rooted and well accepted in many transition economies…. [T]ransition societies function to a considerable decree on a non-legal interdependence among its inhabitants. Western societies, on the contrary, are broadly based on the rule of law and thereby function mainly through the reliance on legal rights and entitlements. Within Western societies predominates the conception of individualism which provides the individual with relative freedom supported by a great variety of legal entitlements. In that way, the legal entitlement has replaced moral and societal obligations."

These comments were specifically directed at countries in Central and Eastern Europe but they may also be apposite about Asian economies including China. The solution offered for economic and legal ills affecting transitional economics is generally Western medicine and Western medicine does not necessarily provide much assistance outside its home environment. Western countries may have attempted to influence the political direction of transition economies by persuading such economies to adopt certain commercial law principles without considering the incompatibilities of their respective legal systems. It is undoubtedly the case however, that foreign models are valuable resources for law makers to draw upon in bringing about changes to the domestic legal system. [95] In this sense, legal transplants are inevitable and foreign legal models, such as the US Chapter 11 and international insolvency standards such as those embodied in the UNCITRAL Legislative Guide, were drawn upon by China when enacting its Enterprise Bankruptcy Law.[96]

The evidence from history suggests that the 'transplant' of legal concepts and institutions from one country to another is common and indeed inevitable to some degree. Legal transplants are not just a phenomenon of the recent period of globalisation as the Turkish example demonstrates. This example involved the transplant of a considerable part of the legal system.

[94] See Mike Falke, Insolvency Law Reform in Transition Economies (doctoral thesis, 2003), at 42 – available at http://siteresources.worldbank.org/GILD/Resources/InsolvencyLawReforminTransitionEconomies.pdf.

[95] See generally Sjef van Erp, Civil and Common Property law: Caveat Comparator-The Value of Legal Historical-Comparative Analysis, 11 European Review of Private Law 394 (2003); Mathias Siems, Legal Origins: Reconciling Law & Finance and Comparative Law 52 McGill L. J. 55 (2007); William Twining, Social Science and Diffusion of Law, 32 J. L. & Soc. 203 (2005); Diffusion of Law: A Global Perspective, 49 J. Leg. Pluralism 1 (2004).

[96] Terence Halliday and Bruce G. Carruthers op.cit. Chapter 7.

As Professor Örücü explains, in the 1920s and1930s President Ataturk had the ambition to make Turkey a 'Westernised', secular and modern society and the reception of foreign laws was part of that process.[97]

In considering transplantation or harmonisation however, the political element cannot be ignored[98] nor can context. In some respects, context is everything and a rule, once transplanted, is different in its new home. It is legal rules, structures and institutions that are 'borrowed' but not the 'spirit' of a legal system.[99]There is empirical evidence from Eastern Europe broadly in support of this thesis.[100] Studies highlight potential inefficiencies when law is transplanted into an 'alien' implementing or enforcing environment.[101] On this analysis, while institutions are necessary for economic development, local 'home grown' institutions function better than transplanted ones.[102] The possibility of borrowing from other countries should not be excluded but meaningful adaptation of imported laws to local conditions makes for a much better fit.

Legal change~~aw is a cognitive institution and therefore~~, to be effective and actually change behaviour, ~~it~~ must be fully understood and embraced by those using the law, so-called ~~i.e.~~ 'customers' and legal intermediaries.[103] If laws are not adapted to local conditions, or the local population are not familiar with the laws, then there is likely to be a weak demand for using these laws and legal intermediaries would have a difficult task.[104]On the other hand, if a transplant is adapted to local conditions, then legal intermediaries are more able to develop the imported law so as to match demand and the demand for the law then provide resources for

[97] See Esin Orucu, Critical Comparative Law: Considering Paradoxes for Legal Systems in Transition, 81 (Deventer, Kluwer, 1999).

[98] See Otto Kahn-Freund, On Uses and Misuses of Comparative Law, 37 Modern Law Review 1, 12 (1974) who suggests that anybody contemplating the use of foreign legislation for law making in his country must consider how far the particular rule owes its existence, or continued existence, to the distribution of power in the foreign country.

[99] See Alan Watson, Legal Transplants and European Private Law, 4 Electronic Journal of Comparative Law (2000) – http://www.ejcl.org/ejcl/44/44-2.html/ and see also Alan Watson, Law out of Context, (Athens GA, University of Georgia Press, 2000).

[100] See Daniel Berkowitz, Katharina Pistor and Jean-Francois Richard, The Transplant Effect, 51 American Journal of Comparative Law 163 (2003).

[101] See also Gunther Teubner, Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences, 61 Modern Law Review 11 (1998).

[102] On these and related issues, see Douglass North Institutions, Institutional Change, and Economic Performance: The Political Economy of Institutions and Decisions (Cambridge, CUP, 1990); Richard Posner, Creating a Legal Framework for Economic Development, 13 World Bank Research Observer 1 (1998).

[103] See Cass Sunstein – 'the meaning of legal statements is a function of social norms, not of the speaker's intentions' in 'On the Expressive Function of Law', 144 U. Pa. L. Rev 2021, 2050 (1996) and see also Cass Sunstein, Social Norms and Social Roles, 96 Columbia L. R. 903, 925 (1996).

[104] See Daniel Berkowitz, Katharina Pistor and Jean-Francois Richard, The Transplant Effect, 51 American Journal of Comparative Law163, 168 (2003). But see also Gunther Teubner, Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences, 61 Modern Law Review 11 (1998).

further legal change. This is a positive feedback-loop. The process of legal change is also path dependent since legal rules are complementary and interdependent and many legal rules can only be understood and applied with reference to other legal rules or concepts.[105]

Arguments about path-dependency have been played out hotly and keenly not so much in relation to corporate insolvency law but in the closely aligned area of corporate governance.[106] In the wake of the fall of the Berlin Wall and the apparent triumph of the US version of capitalism, Professors Hansmann and Kraakman predicted the end of history for corporate law.[107] They spoke of a widespread normative consensus that corporate managers should act exclusively in the interests of shareholders, including minority shareholders. They suggested that while differences might persist as a result of institutional and historical contingencies, the bulk of legal development worldwide would be towards a standard model of the corporation.

Events since Hansmann and Kraakman were writing however, and in particular the example of China, suggest a greater role for path-dependent differences between corporate governance regimes that are deeply embedded in a country's tradition, history and culture.[108]The Chinese case shows the persistence of divergence and the fact that political forces cause legal systems to develop path-dependently.[109] There is no end of history for corporate law, nor for insolvency law and this is contrary to what some of the 'standard-setting' embodied in the World Bank Doing Business 'Resolving Insolvency' framework would have us believe.

5. Conclusion

The new era of globalisation in the past 20 or more years has since the increased promulgation of international insolvency standards. This has been done both by international financial

[105] For a discussion of the importance of historical institutionalism and path dependency in understanding how law and policy evolves differently in different countries see Iain Ramsay, US Exceptionalism, Historical Institutionalism, and the Comparative Study of Consumer Bankruptcy Law, 87 Temple Law Review 947 (2015); Oona A. Hathaway, Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System, 86 Iowa Law Review 601 (2001); John Bell, Path Dependence and Legal Development, 87 Tulane Law Review 787 (2013).

[106] See generally Peter Hall and David W. Soskice eds., Varieties of Capitalism: The Institutional Foundations of Comparative Advantage (Oxford, OUP, 2001).

[107] Henry Hansmann and Reinier Kraakman, The End of History for Corporate Law, 89 Geo. L. J. 439 (2001). The title of this paper consciously and provocatively echoes Francis Fukuyama's The End of History and the Last Man (New York, Free Press, 1992).

[108] See also Klaus Hopt, Common Principles of Corporate Governance in Europe?, in Corporate Governance Regimes, Convergence and Diversity 175 (Joseph McCahery, et al., eds., OUP, 2002).

[109] See Mark Roe, Political Determinants of Corporate Governance (Oxford, OUP, 2003); Mark Roe, Chaos and Evolution in Law and Economics, 109 Harv. L. Rev. 641 (1996); Lucian Arye Bebchuk and Mark Roe, A Theory of Path Dependence in Corporate Ownership and Governance, 52 Stan. L. Rev. 127 (1999) and see generally Peter Gourevitch, The Politics of Corporate Governance Regulation, 112 Yale L. J. 1864 (2003).

institutions such as the World Bank and by the UN body, UNCITRAL. The idea of convergence of insolvency regimes has gained ground and also there has there been the rise of supranational legal institutions, whether at a regional or global level. A once dominant belief in the uniqueness of legal systems has lost ground to a belief in the convergence of legal systems.[110]

These supra-national insolvency standards are used distil 'international best practice' on the design and operation of insolvency and creditor rights' frameworks and then they are used to benchmark the perceived strengths and weaknesses of existing national insolvency law regimes. The international standard setting bodies have drawn heavily in framing their principles on the US Bankruptcy Code, and in particular Chapter 11 on business reorganisation.[111] The US Bankruptcy Code is not without its US critics however, and certainly Chapter 11 practice has changed dramatically in response to changes in the financial marketplace. Moreover, an influential US law shaping body, the American Bankruptcy Institute (ABI), has suggested an overhaul of Chapter 11 though with the current political dynamics in the US there is little prospect of this happening in the immediate future. [112]

One of the major drivers in the renewed interest and formulation of international insolvency standards has been the collapse of communism in Eastern Europe, including the former Soviet bloc, and the rapid transition to a free market economy. China has pursued a more cautious reform path – socialism with Chinese characteristics – with positive results for economic growth though, in the main, it had a much lower starting point in terms of GDP and economic development than the countries of Eastern Europe. Therefore some of the accelerated growth may have been in the nature of 'catching up'. Nevertheless, the Chinese experience demonstrates certain weaknesses with the whole proposition that international business and insolvency law standards drive economic growth.[113] What may be appropriate for one country, given the political context and its state of economic development, may not be appropriate for

[110] See Arthur T von Mehren, The Rise of Transnational Legal Practice and the Task of Comparative Law, 75 Tulane Law Review 1215 (2000).
[111] See John Braithwaite and Peter Drahos, Global Business Regulation (Cambridge: CUP, 2000); Katharina Pistor, The Standardization of Law and Its Effect on Developing Economies, 50 American Journal of Comparative Law 97 (2002) and see also Jacques deLisle, Lex Americana? United States Legal Assistance, American Legal Models and Legal Change in the Post-Communist World and Beyond, 20 U. Pa. J. Int'l Econ. L. 179 (1999) who comments at p 202 about the US government promoting the indirect export of US models through multilateral organisations that shape international standards.

[112] See www.commission.abi.org/full-report.
[113] See Franklin Allen, Jun Qian and Meijun Qian, Law, Finance and Economic Growth in China, 77 J. of Fin & Econ 57 (2005) arguing that China is a 'counterexample to the findings in law, institutions, finance and economic growth literature'.

another country. The initial World Bank Doing Business report in 2004 expressed the overall conclusion that 'one size can fit all' in respect of law making and the legal regulation of business.[114] It has since backed away from this assertion in subsequent reports. But the ranking system used for the 'resolving insolvency' framework in subsequent reports from 2015 onwards embodies somewhat dogmatic assumptions that one form of legal rules leads to superior outcomes than another form, while ignoring subtleties and enforcement difficulties in the application of the rules.

The other major international insolvency standard, the UNCITRAL Legislative Guide, is more flexible in its formulations and rule-making architecture and leaves space for national and regional divergence. This paper has commended the virtues of such an approach. International making seems to run more smoothly and to be more conducive to beneficial outcomes when it incorporates less of a universalist vision; accommodates divergent approaches and recognizes different political regimes and states of development.

[114] See 2004 DB Report at p. xvi. The report concluded at p. xiv that 'Heavier regulation is generally associated with more inefficiency in public institutions— longer delays and higher cost —and more unemployed people, corruption, less productivity and investment, but not with better quality of private or public goods. The countries that regulate the most—poor countries—have the least enforcement capacity and the fewest checks and balances in government to ensure that regulatory discretion is not used to abuse businesses and extract bribes.'