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## Toward an International Bankruptcy Policy in Europe: Four Decades in Search of a Treaty

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# TOWARD AN INTERNATIONAL BANKRUPTCY POLICY IN EUROPE: FOUR DECADES IN SEARCH OF A TREATY

LESLIE A. BURTON\*

*As multinational trade has increased, so has the need for cross-border insolvency agreements. For forty years, the European Community and European Union have attempted to agree on cross-border insolvency procedures. The author explores the history of these efforts, the policy issues which have made agreement difficult, and the demise of the EU's best hope for a cross-border insolvency agreement: the failed 1995 Convention. Finally, she compares past and current proposals, and explains why they are inferior solutions to the failed Convention.*

## I. INTRODUCTION

The goal of bankruptcy or insolvency<sup>1</sup> proceedings is for one forum to take control of all of a debtor's assets, and to distribute them under a consistent set of rules which will ensure that the debtor and all of the creditors are treated fairly and equally.<sup>2</sup> Cross-border insolvencies are becoming more

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1. "Insolvency," rather than "bankruptcy," is the term used in most English-speaking countries. Jay Lawrence Westbrook, *Creating International Insolvency Law*, 70 AM. BANKR. L.J. 563, 563 n.3 (1996).

2. Anne Nielsen et al., *The Cross-Border Insolvency Concordat: Principles to Facilitate the Resolution of International Insolvencies*, 70 AM. BANKR. L.J. 533, 533 n.2

common in these modern times of multinational corporations and increasing cross-border business transactions. As a result, a single insolvency filing can involve creditors and property located in many countries, each of which has different insolvency laws, affecting who is eligible to file, where the case should be filed, which creditors will have priority, and whether a liquidation or a reorganization is appropriate. These differences can thwart the purpose of insolvency. Further, countries seeking to favor their own citizens or property may refuse to recognize foreign insolvency proceedings, thus causing inconsistent results for similar creditors who reside in different countries.

Private international law has been unable to ensure equal treatment of creditors across national lines.<sup>3</sup> As a result many countries, particularly in Europe, have looked to the concept of a treaty or convention to resolve these issues. In fact, various European countries have been struggling for more than 40 years to establish an insolvency convention. So far their efforts have been unsuccessful. The reasons for the failure to reach an insolvency convention are procedural as well as substantive.

Jurisdiction is one such problem. A multinational corporation that has assets in one country, debts in another, and assets in yet another, could choose to file insolvency proceeding in one of a number of potential forums. The debtor could, for example, file where it is incorporated; where it owns the most valuable assets; where it owns any assets; where it owes the largest debts; or where it owes any debts.

Another perennial problem arises from the conflict of laws. Choosing a particular forum does not necessarily determine

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(1996), quoting Michael Bogdan, *International Bankruptcy Law in Scandinavia*, 43 INT'L & COMP. L.Q. 49, 50 (1985). "[I]t would be better in nine cases out of ten that all settlements of insolvent debtors with their creditors should be made in a single proceeding, and generally at a single place . . ." Douglas Boshkoff, *Some Gloomy Thoughts Concerning Cross-Border Insolvencies*, 72 WASH. U. L.Q. 931, 939 (1994), quoting John Lowell, *Conflict of Laws as Applied to Assignments for Creditors*, 1 HARV. L. REV. 259, 264 (1888).

3. Ian F. Fletcher, *International Insolvency: A Case for Study and Treatment*, 27 INT'L LAW. 429, 433 (1993).

which substantive law will apply to the insolvency proceedings. If an insolvent corporation owing debts in several countries were formed in one country, maintained offices in other countries, and owned assets in other countries, which country's laws would apply to the insolvency proceeding? If a security interest were valid in the home country but not in the country where the assets are located, which country's laws would govern? If a debtor is "eligible" to file in one country but not another, which country's laws would control?

Differences in national insolvency laws often reflect differing political goals and cultural expectations.<sup>4</sup> In France, for instance, one of the main goals of an insolvency proceeding is to preserve jobs,<sup>5</sup> even to the detriment of creditors' rights. This is far different from the German system, which gives the balance of power to the creditors so they can maximize their recovery.<sup>6</sup> The United Kingdom provides liberal exemptions, especially regarding the "matrimonial home,"<sup>7</sup> while many nations allow few if any exemptions. These differences are compounded by each country's reluctance to turn over assets located in its own territory to an insolvency proceeding in a foreign jurisdiction. Which country's laws should govern the resolution of these issues?

A European insolvency convention would establish policies and procedures to resolve these problems. Yet no policy or treaty exists among European nations.<sup>8</sup> This failure is not, however, due to lack of effort.

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4. Boshkoff, *supra* note 2, at 936.

5. Manfred Balz, *The European Union Convention on Insolvency Proceedings*, 70 AM. BANKR. L.J. 485, 491 (1996).

6. *Id.*

7. Boshkoff, *supra* note 2, at 937 n.28.

8. One exception exists: The Convention Between Denmark, Finland, Iceland, Norway, and Sweden Regarding Bankruptcy, Nov. 7, 1933, 155 L.N.T.S. 133 (1933) (Nordic Convention). The Nordic countries historically have had similar traditions and laws, making it somewhat simpler for them to enter into a treaty. Fletcher, *supra* note 3, at 437; Nielsen, *supra* note 2, at 534; Balz, *supra* note 5, at 491 n.21. Like any treaty, the Nordic Convention established rights and obligations only between those countries that have ratified it, and does not apply elsewhere in Europe.

This article begins with an exploration of the history of European attempts (particularly by the Member States of the European Union<sup>9</sup>) to reach an insolvency convention. Next, it analyzes the problems that have prevented ratification of an insolvency convention, and considers why such attempts have continually failed. Finally, this article regrets the failure of the European Union Convention on Insolvency Proceedings, which offers the most realistic and viable solution to the European insolvency dilemma, and urges the resurrection and ratification of the EU Convention. The EU Convention, agreed to in theory by the fifteen EU countries, was signed by fourteen of them before May 1996. The EU Convention was derailed by the United Kingdom's eleventh hour refusal to sign it, as a reprisal for the EU's ban on beef products in the wake of the U.K.'s epidemic of Bovine Spongiform Encephalopathy (BSE, or "Mad Cow") disease. Finally, this article discusses potential alternatives to the EU Convention, particularly with a view to their advantages and disadvantages vis-à-vis the EU Convention.

## II. THE EARLY ATTEMPTS

### A. THE EEC BANKRUPTCY CONVENTION

Historically, each European nation had its own insolvency law, which generally allowed liquidation (but not reorganization) insolvency proceedings.<sup>10</sup> Each country's insolvency law differed, from the definition of "insolvent"<sup>11</sup> to such issues as

9. The European Union (EU) was established by the Treaty on European Union (Maastricht Treaty), Feb. 7, 1992, 31 I.L.M. 247, by the Member States of the European Communities (European Community for Coal and Steel, European Economic Community, European Atomic Community), in order to create a closer union among them. The European Economic Community (EEC) was established by the Treaty Establishing the European Economic Community (Treaty of Rome), Mar. 25, 1957, 298 U.N.T.S. 11. The EEC has been renamed the European Community (EC). The current EU Member States are: Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden, and the United Kingdom.

10. Balz, *supra* note 5, at 491.

11. Germany uses a balance sheet insolvency test (which is based on a determination of whether the debtor's debts exceed its assets). Balz, *supra* note 5, at 485. France uses an equity insolvency test (which is based on a determination of whether the debtor is unable to pay its debts as they mature). *Id.* Some nations use a

eligibility to file, the extent of “estate property” (i.e., property subject to administration in the insolvency proceeding), validity of security interests, avoidability of certain pre-insolvency transfers, and the applicability of real estate, tax, and labor laws. These differing laws created problems for cross-border or multinational insolvencies. The problems worsened as increasing travel and trade between the European nations resulted in increasing transnational debts and movement of assets from one place to another.

In 1960, the European Economic Community (EEC) began to make a concerted effort to address the problem of cross-border insolvency proceedings.<sup>12</sup> Starting in 1963, a committee working under the auspices of the Commission began drafting a Bankruptcy Convention.<sup>13</sup> The committee’s challenge was to establish a procedure that would harmonize the Member States’ different laws and resolve the issues that arose.

The drafting committee considered two competing approaches to dealing with international insolvency issues: the territorialist approach and the universalist approach.

Under the territorialist approach, the courts of each country would be limited to adjudicating the debtor’s assets and claims located within that country,<sup>14</sup> and would refuse to recognize foreign orders from outside national borders.<sup>15</sup> A country might wish to use a territorialist approach to guarantee that the rights of its own creditors are adequately protected. Carried to the extreme, however, this position would not allow for any cross-border agreement recognizing a foreign insolvency proceeding.

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test of whether a debtor has committed an “act of bankruptcy,” which does not necessarily have to include any insolvency finding. *Id.* The United Kingdom and France do not require that a company meet any insolvency test as a precondition of filing an insolvency proceeding. *Id.* at 499.

12. Balz, *supra* note 5, at 489; *Justice Council: EU Initials “Bankruptcy” Convention*, *supra* note 12. EUROPE INFORMATION SERVICE NO. 55, Oct. 19, 1995, available in LEXIS, International Law Library, ECNEWS File.

13. *Justice Council: EU Initials “Bankruptcy” Convention*, *supra* note 12.

14. Nielsen, *supra* note 2, at 533-34.

15. Fletcher, *supra* note 3, at 432.

The universalist approach, in contrast, requires that each country automatically recognize the authority of other countries' bankruptcy proceedings.<sup>16</sup> Insolvency proceedings in one country would have full effect over all of a debtor's assets and creditors, wherever located.<sup>17</sup> An even more extreme variant of the universalist approach is the so-called unitarian approach, under which all countries would cede their authority to one forum that would be responsible for overseeing the entire insolvency proceeding, to the exclusion of any other forum.<sup>18</sup> Thus, rather than each country recognizing the other countries' insolvency proceedings, one insolvency proceeding would be established to handle all of a debtor's European insolvency proceedings. The one forum would be given powers which would supersede local laws<sup>19</sup> such as those regarding the priority or allowability of claims, ownership of real and personal property, and avoidability of preferential transfers. However, agreeing on which forum should govern has been problematic.

In the 1960s the majority of European states already accorded some degree of recognition to foreign proceedings, but differed as to the amount and type of recognition they would give.<sup>20</sup> None went so far as to embrace a true universalist, let alone a unitarian, approach. A universalist approach, however, is truer to the purpose of insolvency proceedings because it seeks to bring all issues together in one forum that would treat all creditors equally.

After examining the territorialist and universalist approaches, the EEC committee on international insolvency adopted a Draft EEC Bankruptcy Convention<sup>21</sup> in 1970. The 1970 EEC

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16. Balz, *supra* note 5, at 492. The Nordic Convention, *supra* note 8, is based on a universalist theory. Nielsen, *supra* note 2, at 534.

17. Fletcher, *supra* note 3, at 433.

18. Balz, *supra* note 5, at 492.

19. Nielsen, *supra* note 2, at 534.

20. Fletcher, *supra* note 3, at 433.

21. EC Doc. III/72/80 (1990). This convention was drafted under the authority of article 220 of the Treaty of Rome: "Member States shall, so far as is necessary, enter into negotiations with each other with a view to securing for the benefit of their nationals. . . the simplification of formalities governing the reciprocal recognition and enforcement of judgments. . . ." Conventions under article 220, like conventions under

Draft utilized a radical full universality / unitarian approach. It proposed a system under which a single international insolvency law would govern all European liquidation insolvency proceedings,<sup>22</sup> and used uniform laws to determine the rights of the debtor and its creditors, wherever in Europe they might be. One liquidator would be responsible for administering the insolvency both in his own country and outside of it.<sup>23</sup> No ancillary or secondary proceedings were allowed,<sup>24</sup> meaning that once one country had jurisdiction over the insolvency, no other country could conduct any separate insolvency proceedings on its own.<sup>25</sup> Of course, like any treaty, the 1970 EEC Draft would apply only to signatory nations.

After the committee adopted the 1970 EEC Draft, several new countries joined the EEC.<sup>26</sup> Due partly to the new Member States' adverse comments, the committee made changes to the EEC Draft that significantly diluted its uniform law provisions. The new version was called the 1980 EEC Draft Bankruptcy Convention.<sup>27</sup> Under the 1980 EEC Draft, one liquidator would have direct responsibility for administering insolvency proceedings inside and outside the country that appointed him. Outside the country that appointed him, however, the liquidator would have to resolve matters under applicable rules of private international law.<sup>28</sup> The 1980 EEC Draft also called for the creation of "sub-estates" in those countries that

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traditional international law, must be signed and ratified by all of the contacting states.

22. EC Doc. III/72/80 (1990).

23. Carl Tjur, *An Analysis of the 1980 Draft EEC Bankruptcy Convention*, 109 INT'L BUS. LAW. 22, 22 (1982).

24. Explanatory Report to the EU Convention, *supra* note 65 on Insolvency Proceedings, 35 I.L.M. 1223 (1996); Nielsen, *supra* note 2, at 539.

25. *The Two Systems Governing International Bankruptcy*, European Information Service European Report, June 20, 1995, available in LEXIS, INTLAW Library, ECNEWS File.

26. Between 1970 and 1980, three nations joined: the United Kingdom, Ireland, and Denmark.

27. Tjur, *supra* note 23, at 24.

28. *Id.*



contained the debtor's assets, and allowed local creditors to be reimbursed first from the local sub-estate.<sup>29</sup>

Even after having been weakened considerably, the 1980 EEC Draft Bankruptcy Convention remained unpopular. Although it was revised again in 1982, and yet again in 1984, the Convention never gained enough support to be opened for signature.<sup>30</sup> Criticism revolved largely around concerns that it would be unworkable for one forum to administer one centralized insolvency estate, given the enormous range of differences in countries' insolvency laws.<sup>31</sup> Some called the Convention an "overambitious model"<sup>32</sup> requiring an "overly rigid centralization . . . unacceptable for most" European countries.<sup>33</sup>

The committee finally abandoned the EEC Draft in 1985.<sup>34</sup> Negotiations were resumed in 1989 in a different form, known as the European Union Convention on Insolvency Proceedings, discussed in Part III below.

#### B. EUROPEAN CONVENTION ON CERTAIN INTERNATIONAL ASPECTS OF BANKRUPTCY (ISTANBUL CONVENTION)<sup>35</sup>

In 1989 in Strasbourg the Council of Europe<sup>36</sup> convened and began to draft the European Convention on Certain

29. *The Two Systems Governing International Bankruptcy*, *supra* note 25, at 11; Tjur, *supra* note 23, at 24.

30. *The Two Systems Governing International Bankruptcy*, *supra* note 25, at 6; Balz, *supra* note 5, at 492.

31. Balz, *supra* note 5, at 492.

32. Fletcher, *supra* note 3, at 437.

33. *The Two Systems Governing International Bankruptcy*, *supra* note 25, at 13; Justice Council: *EU Initials "Bankruptcy" Convention*, *supra* note 12.

34. Other complaints about the EC Draft included a fear that it discriminated against those outside the community. One commentator referred to its "crudely aggressive attitude toward non-member States." Fletcher, *supra* note 3, at 441.

35. European Convention on Certain International Aspects of Bankruptcy (Istanbul Convention), opened for signature, June 5, 1990, 30 I.L.M. 165 (1991). Some sources refer to this as the Strasbourg Convention. *See, e.g.*, Balz, *supra* note 5, at 485; Jay Lawrence Westbrook, *Theory and Pragmatism in Global Insolvencies: Choice of Law and Choice of Forum*, 65 AM. BANKR. L.J. 457, 487 (1991).

36. The Council of Europe, founded on May 5, 1949, is an organization formed to promote cooperation between the European countries. Most European countries, including those who are not members of the European Union, are members. In 1990 the twenty members were: Belgium, Cyprus, Denmark, Finland, France, Germany,

International Aspects of Bankruptcy.<sup>37</sup> It ultimately proposed a multilateral treaty that was known as the European Convention on Certain International Aspects of Bankruptcy, or the Istanbul Convention.

The Council of Europe commenced its work on the Istanbul Convention during a period of great change in the law of insolvency. In the 1980s, many nations amended their insolvency laws, expanded the use of reorganization proceedings in addition to liquidation proceedings, and in some cases allowed reorganization proceedings for the first time.<sup>38</sup> Ironically, at the same time the Council of Europe was working towards harmonization, the individual countries were enacting national law reforms that resulted in even less harmonization among their insolvency laws.<sup>39</sup>

The Istanbul Convention rejected the maligned unitarian (one forum) approach that had been so heavily criticized in the earlier 1970 EEC Draft. Instead, it adopted a flexible approach to the universalist theory.<sup>40</sup> The central tenet of the Istanbul Convention was that one main insolvency proceeding would be opened in a centralized administrative forum in the country that was the “center of . . . [the insolvent debtor’s] main interests.”<sup>41</sup> Like the EEC Draft Conventions, the Istanbul Convention addressed only liquidating bankruptcies, and provided that a liquidator appointed in the main forum could move to protect assets located in another country.<sup>42</sup> Unlike the EEC Draft, the Istanbul Convention provided that to administer the assets in the second country, the liquidator must seek authority from that country, advertise his

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Greece, Holy See, Ireland, Italy, Liechtenstein, Luxembourg, the Netherlands, Norway, Portugal, Spain, Sweden, Turkey, United Kingdom, and Switzerland. The Council of Europe should not be confused with the Council of Ministers or the European Council, which are organs of the European Union.

37. Istanbul Convention, *supra* note 35, art 4(1).

38. Balz, *supra* note 5, at 499.

39. *Id.* at 498.

40. Nielsen, *supra* note 2, at 540.n. 57.

41. Istanbul Convention, *supra* note 35, art 4(1). The Convention provides a rebuttable presumption that this is the country of incorporation. *Id.*

42. Istanbul Convention, *supra* note 35, art. 10; Fletcher, *supra* note 3, at 438.

appointment, and wait for two months.<sup>43</sup> Also unlike the EEC Draft, the Istanbul Convention provided that the main proceeding need not be the only authorized forum; it could be supplemented by secondary proceedings in any other country in which the debtor had an "establishment."<sup>44</sup> The Istanbul Convention provided that secondary proceedings would be administered under local law, thus resolving problems arising from issues such as the validity of security interests.<sup>45</sup>

Under the Istanbul Convention, certain creditors (generally those holding priority and secured claims) would be allowed to file their claims in a secondary proceeding in their own country, instead of in the main proceeding.<sup>46</sup> Claims filed in the secondary proceeding would be paid first from the assets subject to the secondary proceedings. The balance of the assets remaining would then be forwarded to the main proceeding, where the other creditors could file their claims and be paid.<sup>47</sup>

Objections to this procedure focused on national laws of some countries (e.g. France), which accord "priority status" to a large number of claims in an insolvency proceeding, and thus allow these creditors to be paid in full before any money is paid to any other creditors.<sup>48</sup> Consequently, in a proceeding involving assets in France and assets in other countries, the French creditors would be unfairly favored. Although the Istanbul Convention did not resolve this problem, it did provide that the ordinary, unsecured creditor who obtains partial payment of a claim in one insolvency proceeding, may not participate in any distribution from any other insolvency proceeding, until such time as the other creditors have received an equal pro rata portion of their claims.<sup>49</sup>

Despite its perceived improvements vis-à-vis the earlier EEC Draft, the Istanbul Convention was nonetheless criticized. One

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43. Istanbul Convention, *supra* note 35, arts. 9-11.

44. Istanbul Convention, *supra* note 35, art. 17.

45. Istanbul Convention, *supra* note 35, arts. 19-22.

46. Istanbul Convention, *supra* note 35, arts. 11, 21.

47. Istanbul Convention, *supra* note 35, art. 22, 31; Balz, *supra* note 5, at 521.

48. Balz, *supra* note 5, at 521.

49. Istanbul Convention, *supra* note 35, art. 5.

weakness of the Istanbul Convention was the ambiguity of some of its central concepts, such as the terms “center of main interests” and “establishment.” These terms were not clearly defined in the Convention, and thus were likely to lead to forum shopping and disputes over jurisdiction. Further, the Istanbul Convention relied on “indirect” jurisdiction, meaning that although it contained rules for recognizing and enforcing judgments, it did not impose any mandatory jurisdictional rules,<sup>50</sup> thus creating a further potential for disagreements.

Worse, the Istanbul Convention did not contain any mechanism to resolve interpretation difficulties. The Council of Europe - unlike the European Union - has no European Court of Justice with jurisdiction to interpret provisions of the Istanbul Convention.<sup>51</sup> As a result, any ambiguities in the Istanbul Convention would be subject to differing national interpretations, with no mechanism for uniformity. Paradoxically, the Istanbul Convention, which was meant to lead to more harmony, would in fact lead to more diversity.

The Istanbul Convention’s attempt to give countries some autonomy to apply their own national insolvency law in the secondary proceedings was thought to be unfair and to defeat the purpose of insolvency proceedings, *viz.* administration of the debtor’s assets in one forum, and distribution to all creditors equally under a uniform set of laws. The greatest objections were to the Istanbul Convention’s granting of an “opt out” provision, under which nations would have the ability to choose not to be bound by some of the Convention’s provisions,<sup>52</sup> including the chapters most important to universality. The opt-out provisions apply to chapter II,<sup>53</sup> which establishes the circumstances under which a liquidator’s cross-border powers can be recognized, and chapter III,<sup>54</sup> which authorizes member states to maintain secondary proceedings.

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50. Istanbul Convention, *supra* note 35, art. 4; Ian F. Fletcher, *The European Union Convention on Insolvency Proceedings: An Overview and Comment with U.S. Interest in Mind*, 23 BROOKLYN J. INT’L L. 25, 29 (1997).

51. Fletcher, *supra* note 3, at 439.

52. Istanbul Convention, *supra* note 35, art. 40.

53. Istanbul Convention, *supra* note 35, arts. 6-15.

54. Istanbul Convention, *supra* note 35, arts. 16-28.

By opting out of Chapter II, a country would be free to refuse to recognize an out-of-state liquidator's cross-border powers. By opting out of Chapter III, a country could refuse to relegate its country's insolvency proceedings to "secondary" status.

By allowing countries to opt-out of the universality provisions of the Istanbul Convention, its drafters enervated the Convention. The Istanbul Convention's potential for achieving diverse national rules was high,<sup>55</sup> which defeated its universalist purpose. Because the "opt out" provisions undermined the universalist provisions of the Convention, some called it a "convention a la carte."<sup>56</sup> Others commented that unlike the earlier "overambitious" EEC Draft, the Istanbul Convention was not ambitious enough.<sup>57</sup> In contrast to the EEC Draft, which was too strong, the Istanbul Convention was too weak.

The Istanbul Convention was opened for signature in Istanbul in June 1990.<sup>58</sup> In the end only six nations signed the Istanbul Convention: Belgium, France, Germany, Greece, Luxembourg, and Turkey.<sup>59</sup> None went so far as to ratify or otherwise adopt it.<sup>60</sup>

Some nations did not sign because they were awaiting a new European Union Insolvency Convention, which was expected to be produced by a committee of the Council of Ministers that had been convened the year before.<sup>61</sup> Although it never became law, the Istanbul Convention exerted a significant influence on the EU committee and its Convention on Insolvency Proceedings, discussed in Part III below.

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55. Fletcher, *supra* note 3, at 439.

56. *The Two Systems Governing International Bankruptcy*, *supra* note 25, at 20; Balz, *supra* note 5, at 494.

57. *Id.* at 490.

58. Istanbul Convention, *supra* note 35.

59. *Id.*

60. *Justice Council: EU Initials "Bankruptcy" Convention*, *supra* note 12.

61. Balz, *supra* note 5, at 492 n.30.

### III. EUROPEAN UNION CONVENTION ON INSOLVENCY PROCEEDINGS

The European Union Council of Ministers<sup>62</sup> viewed the absence of a European insolvency treaty as a “shortcoming in the completion of the internal market.”<sup>63</sup> Therefore in 1989 it formed a working group to propose a Convention.<sup>64</sup> In 1995 this working group produced the European Union Convention on Insolvency Proceedings (EU Convention),<sup>65</sup> which came the closest to becoming a ratified multilateral treaty. It ultimately failed as well, albeit for different reasons than those that toppled the EEC Draft and the Istanbul Convention.

Like the Istanbul Convention, the EU Convention was intended to utilize the principle of universality to create a single, main insolvency proceeding<sup>66</sup> and to harmonize rules for the administration of insolvency proceedings.<sup>67</sup> Unlike the Istanbul Convention, however, the EU Convention aimed to allocate direct jurisdiction, and to encompass reorganization as well as liquidation proceedings. The EU Convention’s attempts to cure problems raised in previous conventions had mixed success.

#### A. NEW SOLUTIONS TO PERENNIAL PROBLEMS

Like each of its predecessors, the EU Convention attempted to resolve the uncertainty regarding which law would apply in international insolvency proceedings. The conflict of laws problem arose from the existence of different national

62. The EU Council of Ministers is the principal law-making body of the EU. It is distinct from, and should not be confused with the Council of Europe, *supra* note 36, or the European Council.

63. Explanatory Report to the European Union Convention on Insolvency Proceedings, *supra* note 24.

64. Balz, *supra* note 5, at 494. The working group operated in secret. The first reports of its existence did not emerge until late 1991. *EC: Talks Begin Over European Insolvency Harmony*, REUTERS TEXTLINE, ACCOUNTANCY AGE, Oct. 24, 1991 available on LEXIS, INTLAW Library, ECNEWS File.

65. European Union Convention on Insolvency Proceedings (EU Convention), opened for signature, Nov. 23, 1995, 35 I.L.M. 1223 (1996). Many consider this convention as a continuation or revitalization of the earlier EEC Draft Convention. See, e.g., Fletcher, *supra* note 3, at 439; Nielsen, *supra* note 2, at 540.

66. Explanatory Report, *supra* note 24; Nielsen, *supra* note 2, at 544.

67. Balz, *supra* note 5, at 495.

insolvency laws reflecting different social and economic goals. In France, for example, one of the main goals of a reorganization proceeding is to preserve French jobs; in Germany, the main goal is to allow the creditors to be made whole. In France, whether the insolvency trustee can avoid a pre-insolvency transfer is a question of insolvency law; in Germany, it is an issue of civil procedure law. In some countries, including the part of Germany which formerly was East Germany (the so-called *Neue Bundesländer*), the debtor is entitled to a "fresh start" at the end of an insolvency proceeding in the form of a discharge of the remaining balance of all unpaid debts. But in most European countries, including the part of Germany that was formerly West Germany, no discharge is available.<sup>68</sup>

An example will illustrate this concept: A French company employing many French citizens may owe money to creditors who reside in Germany. In a reorganization proceeding, the French would argue that the company should remain in business because many French jobs are at stake, while the Germans would argue that the company should be liquidated so that creditors can be paid immediately. The East German creditors would not be able to continue to pursue the debtor for payments after the bankruptcy was over; the West Germans would. The EU Convention seeks to harmonize these laws by adopting a modified universality theory, blending a "framework of member state cooperation" with a recognition of the "unique aspects of member state's laws."<sup>69</sup>

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68. Bernard Schollmeyer, *The New European Convention on International Insolvency*, 13 BANKR. DEV. J. 421, 437 (1997); Boshkoff, *supra* note 2, at 936. Under reforms to the German bankruptcy law that will take effect in 1999, discharges will be available to all German debtors. Schollmeyer, 13 BANKR. DEV. J. at 437.

69. *EU Moves Toward the Creation of a European Convention*, EUROWATCH, April 15, 1996, available on LEXIS, INTLAW Library, ECNEWS File. The modified universality theory was not the preferred approach of the Commission, which would have liked to have seen a convention based on the idea of one single insolvency proceeding (i.e., the unity principle). *Bankruptcy Convention*, COMMISSION OF THE EUROPEAN COMMUNITIES RAPID PRESS RELEASE, Sept. 26, 1995, available on LEXIS, INTLAW Library, ECNEWS File.

The EU Convention's solution was to establish one set of insolvency procedures with community-wide effect.<sup>70</sup> Like the Istanbul Convention, the EU Convention would allow an insolvent debtor to file insolvency proceedings at its "main center of interests."<sup>71</sup> For individuals, that is presumed to be the domicile; for a corporation, it is presumed to be its place of incorporation. These presumptions, however, are rebuttable.<sup>72</sup>

Unfortunately the EU Convention — like the Istanbul Convention — does not provide a comprehensive definition for the term "main center of interests."<sup>73</sup> The EU convention also defines the term "establishment" in a way that commentators believe is likely to give rise to arguments over interpretation.<sup>74</sup> Thus, the same danger that existed under the Istanbul Convention persists under the EU Convention: disputes and litigation over the location of a debtor's center of main interests.<sup>75</sup> It does seem, however, that tests applied to resolve other conflict of laws situations or to interpret jurisdiction under other conventions, should provide some guidance.

Assuming for the sake of discussion that there is no dispute over the location of the debtor's main center of interests, the EU Convention provides that an insolvency proceeding filed there would be the "main" proceeding and must be recognized in the other countries.<sup>76</sup> The law of the main forum provides the source of law governing the insolvency proceedings<sup>77</sup> (with minor exceptions explained below). Under the EU Convention, the law of the main insolvency forum will determine who is

70. EU Convention, *supra* note 65, art. 4(1); Schollmeyer, *supra* note 68, at 422.

71. EU Convention, *supra* note 65, art. 3(1).

72. EU Convention, *supra* note 65, art. 3(1); Explanatory Report, *supra* note 24; Schollmeyer, *supra* note 68, at 426.

73. Fletcher, *supra* note 50, at 36.

74. Fletcher, *supra* note 50, at 38. Establishment is defined as "any place of operations where the debtor carries out a non-transitory economic activity with human means and goods." EU Convention, *supra* note 65, art. 2(h).

75. *Few Practitioners' Tears for EU Insolvency Convention*, EUROPE INFORMATION SERVICE NO. 2201, Feb. 22, 1997; available on LEXIS, INTLAW Library, ECNEWS File.

76. EU Convention, *supra* note 65, arts. 3(1), 16(1).

77. EU Convention, *supra* note 65, arts. 3, 4; Balz, *supra* note 5, at 508-09.



eligible to file an insolvency proceeding.<sup>78</sup> For example, if an attorney files a personal insolvency proceeding in Germany, France would have to recognize the proceeding,<sup>79</sup> even though attorneys are not eligible to file insolvency proceedings under French law. The main insolvency forum also would govern which property is "estate property," wherever it may be located.<sup>80</sup> Estate property will be administered in the main insolvency proceeding.<sup>81</sup> In the preceding example, the liquidator would be able to act in France as well as in Germany,<sup>82</sup> including physically removing the debtor's assets to the country in which the main proceeding is pending.<sup>83</sup> Therefore, a German debtor's assets in France would be property of the insolvency estate in Germany. The main insolvency forum would be the source of law for any avoiding powers given to the liquidator.<sup>84</sup> Thus, a liquidator in one forum could use that forum's avoiding laws to pursue recovery of a preferential transfer from a creditor in a different forum. The proceedings in the main insolvency case would be automatically recognized by all other states.<sup>85</sup>

These provisions in the EU Convention are reminiscent of the best parts of the EEC Draft. This universalist treatment seems calculated best to satisfy the main purpose of insolvency proceedings, *viz.* to consolidate assets and debts in one forum which will treat all creditors equally.

Nonetheless the EU Convention excludes certain issues from its scope. The excluded issues are of a kind which the drafters thought were better covered by conflict of laws principles,

78. EU Convention, *supra* note 65, arts. 27-38. The EU Convention by its terms excludes insurance companies, credit companies, and investment companies from eligibility to file insolvency. EU Convention, *supra*, art. 1(2). Although some countries (including Germany) vehemently objected to these exclusions, most felt that these industries would be sufficiently covered by pending EU directives. Schollmeyer, *supra* note 68, at 425; *Justice Council: EU Initials "Bankruptcy" Convention*, *supra* note 12.

79. Balz, *supra* note 5, at 514.

80. The term "estate property" includes all property of the debtor. EU Convention, *supra* note 65, art. 27; Schollmeyer, *supra* note 68, at 422.

81. EU Convention, *supra* note 65, art. 27.

82. See EU Convention, *supra* note 65, art. 18.

83. EU Convention, *supra* note 65, art. 18(1), (2).

84. EU Convention, *supra* note 65, art. 4(2)(m).

85. EU Convention, *supra* note 65, art. 16(1); Schollmeyer, *supra* note 68, at 422.

including the validity of security interests<sup>86</sup> and issues regarding sales of property under a reservation of title,<sup>87</sup> both of which will be determined by the laws of the situs of the property. To resolve issues regarding the rights of secured creditors, as well as the practical problems inherent in liquidating assets from a distance, the EU Convention, like the Istanbul Convention before it, authorizes secondary proceedings to liquidate some assets locally.<sup>88</sup> Secondary proceedings, which can be brought in any country in which the debtor has an “establishment,”<sup>89</sup> would have effect only in that particular country.<sup>90</sup> Secured creditors can use secondary proceedings to protect their interest in collateral,<sup>91</sup> and the insolvency administrator can use secondary proceedings if he finds that the use of local law to collect on a particular asset is more favorable to the insolvency estate.<sup>92</sup>

These provisions for main and secondary proceedings eliminate some of the problems inherent in the “one forum” (unitarian) approach to universality, as employed by the EEC Draft. Secured creditors’ expectation interests, in particular, mandate that rights in assets pledged as collateral should be determined locally, at the situs of the collateral, when the validity of secured interest is governed by local law. Unsecured creditors by definition have no claim to the debtor’s assets and should not be concerned with where those assets are liquidated. Applying a universal law to unsecured creditors seems reasonable in light of the goal to provide equal treatment for such creditors.

Applying a universal law also requires that countries not be allowed to “opt out” of any part of the convention. Although the EU Convention borrowed many concepts from the Istanbul Convention,<sup>93</sup> it eliminated the latter’s principal weakness,

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86. EU Convention, *supra* note 65, art. 5; Schollmeyer, *supra* note 68, at 422.

87. EU Convention, *supra* note 65, art. 6; Schollmeyer, *supra* note 68, at 438.

88. EU Convention, *supra* note 65, art. 3(2).

89. *Id.*

90. *Id.*

91. Balz, *supra* note 5, at 520.

92. *Id.*

93. *The Two Systems Governing International Bankruptcy*, *supra* note 25, at 22.

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which was that it allowed countries to “opt out” of some of its universality provisions. Although the EU Convention’s drafters discarded the Istanbul Convention’s unity theory as impractical,<sup>94</sup> they declined to allow any country to “opt out” of any of the provisions of the Convention. The drafters believed that “[t]he requirements of fairness . . . militate in favor of plural, but properly coordinated, administrations.”<sup>95</sup> Thus the EU Convention far exceeds the Istanbul Convention in its promotion of universality.<sup>96</sup>

In contrast to the Istanbul Convention, the EU Convention relies on direct jurisdiction.<sup>97</sup> It establishes mandatory uniform jurisdictional rules that must be followed by all states. Any pre-existing national laws on jurisdiction are supplanted.<sup>98</sup> This provides a stronger basis for jurisdiction than the “indirect jurisdiction” proposed by the Istanbul Convention, so is more likely to result in a truly international insolvency system.

The EU Convention also has an important feature that the Istanbul Convention lacked: a forum to interpret it. The EU Convention authorizes the European Court of Justice (ECJ) to interpret the Convention with binding effect on all signatories.<sup>99</sup> The EU Convention further authorizes the ECJ to give advisory opinions at the request of national courts.<sup>100</sup> Litigation can be anticipated over the meaning of the EU Convention because it would be the first of its kind in the EU, and comments already have been made over the ambiguity of some of its terms. Prudence dictates that a court be granted the authority to hear these disputes.

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94. Fletcher, *supra* note 3, at 440; Fletcher, *supra* note 50, at 28.

95. Fletcher, *supra* note 3, at 440.

96. *Id.*

97. *Id.*; Fletcher, *supra* note 50, at 28; Balz, *supra* note 5, at 504.

98. Fletcher, *supra* note 3, at 440; Fletcher, *supra* note 50, at 29.

99. EU Convention, *supra* note 65, arts. 43-46; Balz, *supra* note 5, at 528.

100. EU Convention, *supra* note 65, arts. 44; Schollmeyer, *supra* note 68, at 27. This provision is patterned on Article 177 of the Treaty of Rome. Balz, *supra* note 5, at 528 n.224.

## B. THE FATE OF THE EU CONVENTION

The EU Convention seemed to have resolved most of the troublesome issues that plagued past attempts to reach an insolvency convention. When it was opened for signature on November 23, 1995,<sup>101</sup> prospects for a ratified insolvency convention looked promising at last.

The EU Convention, by its own terms, established a deadline of May 23, 1996, for obtaining the signatures of all of member nations.<sup>102</sup> It also provided that the Convention would not be effective, and could not be ratified, unless all fifteen Member States signed it.<sup>103</sup> Twelve of the fifteen signed in November 1995.<sup>104</sup> The Netherlands signed in March 1996, and Ireland in April 1996,<sup>105</sup> bringing the total up to fourteen. As the deadline for signatures approached, only the United Kingdom had not signed; however, the Lords' Select Committee on European Communities, which was studying the Convention, had recommended that the United Kingdom sign it, which commentators expected it to do.<sup>106</sup>

Despite expectations that the United Kingdom would sign the EU Convention, however, it refused in the eleventh hour to do

101. EU Convention, *supra* note 65, art. 49; *Bankruptcy Convention*, *supra* note 69; *Justice Council: EU Initials "Bankruptcy" Convention*, *supra* note 12.

102. EU Convention, *supra* note 65, art. 49; *Bankruptcy Convention*, *supra* note 69; *Justice Council: EU Initials "Bankruptcy" Convention*, *supra* note 12.

103. EU Convention, *supra* note 65, art. 49(3) states: "This Convention shall not enter into force until it has been ratified, accepted or approved by all the Member States of the European Union as constituted on the date on which this Convention is closed for signature."

104. Nielsen, *supra* note 2, citing 1909th Council Meeting - Justice and Home Affairs, Brussels, 19 and 20 March 1996, REUTER EU BRIEFING, April 12, 1996; *EU/United Kingdom-European Convention on Insolvency Proceedings is Deadlocked*, REUTER TEXTLINE AGENCE EUROPE, May 24, 1996, available on LEXIS, INTLAW Library, ECNEWS File.

105. Nielsen, *supra* note 2, citing 1909th Council Meeting - Justice and Home Affairs, Brussels, 19 and 20 March 1996, REUTER EU BRIEFING, April 12, 1996; *EU/United Kingdom-European Convention on Insolvency Proceedings is Deadlocked*, *supra* note 104.

106. UK: *Beef Row Thwarts Insolvency Law*, REUTER TEXTLINE ACCOUNTANCY AGE, May 30, 1996 available on LEXIS, INTLAW Library, ECNEWS File; *U.K. Lords Backing for Insolvency Convention*, REUTER TEXTLINE ACCOUNTANCY AGE, April 18, 1996, available on LEXIS, INTLAW Library, ECNEWS File.

so. The United Kingdom refused to sign the EU Convention in retaliation for the total beef ban,<sup>107</sup> which the EU had imposed on March 27, 1996, because British cattle were suffering from Bovine Spongiform Encephalopathy (BSE, or "Mad Cow" disease).<sup>108</sup> Four decades of working toward a European insolvency treaty thus came to a disappointing halt on the EU's May 23, 1996, deadline.

#### IV. EXPLORING ALTERNATIVES

Despite the United Kingdom's sabotage of the EU Convention, some alternatives remain. The alternatives fall into three categories, discussed at length below. First, the EU Convention could be resurrected. Second, a multi-lateral treaty could be concluded among the fourteen EU Member States that have already signed the EU Convention. And finally, non-treaty methods could be used to fashion a solution to the problems of cross-border bankruptcy.

##### A. RESURRECTING THE EU CONVENTION

The EU Convention itself contained no provision for extending the May 23, 1996, deadline.<sup>109</sup> Thus under its own terms the EU Convention could not become law if it were not signed by all 15 Member States by that date. Still, mechanisms have been proposed by which the Member States could resurrect the EU Convention. The suggestions include: an agreement between all fifteen Member States to extend the deadline;<sup>110</sup> a special conference of the Council of Ministers to re-open the

107. *Id.* The Convention was not the only casualty. The United Kingdom maintained a "systematic reservation on all decisions and acts requiring unanimity." *EU: EU/United Kingdom - European Convention on Insolvency Procedure is Deadlocked*, *supra* note 104.

108. Commission Decision 96/239/EEC, March 27, 1996; *Have Mad Cows Trampled the Insolvency Directive to Death?*, EUROPE INFORMATION SERVICE, No. 2134, May 25, 1996, available on LEXIS, INTLAW Library, ECNEWS File.

109. *White-Knuckle Ride on Final Straight for Bankruptcy Convention*, EUROPE INFORMATION REPORT NO. 2133, May 22, 1996, available on LEXIS, INTLAW Library, ECNEWS File.

110. *Have Mad Cows Trampled the Insolvency Directive to Death?*, *supra* note 108.

Convention for signature;<sup>111</sup> and an intergovernmental conference coupled with the Member States' unanimous agreement to re-open the Convention.<sup>112</sup>

In late 1996 Manfred Balz, chair of the working group which proposed the EU Convention, confidently opined that the Council of Ministers would act to re-open the Convention.<sup>113</sup> The United Kingdom, he predicted, would "come along when enough British cattle have been incinerated and sufficient EU moneys sunk into British agriculture"<sup>114</sup> Others, too, have counted on the United Kingdom's contrition as a powerful force in ensuring that the Convention becomes law.<sup>115</sup> These optimistic forecasts have so far proven incorrect. Although Mario Monti, European Financial Services Commissioner, is quoted in July 1998 as holding out the promise of further efforts,<sup>116</sup> neither the Council of Ministers nor anyone else has taken any action to resurrect the Convention.<sup>117</sup> It remains officially dead.

#### B. CREATING A MULTI-LATERAL TREATY AMONG THE 14 SIGNATORY NATIONS

Even if the EU Convention itself cannot be resurrected, the possibility remains that the fourteen countries that did sign it prior to the deadline might choose to conclude a multi-lateral insolvency treaty among them.<sup>118</sup> So far this is mere speculation, as no move has been reported among the fourteen Member States to adopt a separate multi-lateral treaty.

Even if such a multi-lateral treaty were adopted, it might raise more problems than it solved. Such a treaty would not be

111. *Id.*

112. *European Convention on Insolvency Proceedings is Deadlocked, supra note 104.*

113. Balz, *supra* note 5, at 529.

114. *Id.*

115. Fletcher, *supra* note 50, at 34.

116. *Written Question No. 3450/97*, 1998 O.J. 223, 17/07/1998, at 2; *No Progress Yet on Insolvency Convention*, EUROPE INFORMATION SERVICE EUROPEAN REPORT NO. 2290, Feb. 11, 1998, available on LEXIS, INTLAW Library, ECNEWS File.

117. *No Progress Yet on Insolvency Convention, supra note 116.*

118. Schollmeyer, *supra* note 68, at 32.

pursuant to the provisions of the European Union treaty, so probably would not confer any jurisdiction on the European Court of Justice.<sup>119</sup> It is far from clear that fewer than all EU Member States can make a treaty which would confer authority on the European Court of Justice to resolve disputes.

If the fourteen countries could not confer authority on the European Court of Justice, the states would be left without a mechanism for interpreting the treaty's provisions. And the lack of a court to interpret treaty provisions, it bears repeating, was one of the main objections to the Istanbul Convention.

### C. OTHER ALTERNATIVES

Some European (and American) practitioners would rather not see a convention (whether concluded by fifteen countries or just fourteen). Doubting the efficacy of the EU Convention, they complain that the many compromises in the EU Convention reflected the "lowest common denominator" between nations.<sup>120</sup> They have suggested alternatives including voluntary cooperation between nations, enacting individual state laws, adhering to the Cross-Border Insolvency Concordat, and adopting the United Nations Commission on International Trade Law's Model Law on Cross-Border Insolvency. These alternatives are flawed, however, because each of them seeks to accomplish some goals that can only be accomplished by a convention.

#### 1. Voluntary Cooperation Among Nations

Even before the EU Convention was drafted, there was an "increasing tendency" of the courts in one country to recognize the insolvency laws of other countries.<sup>121</sup> In light of this tendency, it may be possible to allow international insolvencies

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119. *Id.*; Balz, *supra* note 5, at 529.

120. *Few Practitioners' Tears for EU Insolvency Convention, supra* note 75.

121. *EC: Talks Begin Over European Insolvency Harmony*, REUTERS TEXTLINE ACCOUNTANCY AGE, Oct. 24, 1991, available on LEXIS, INTLAW Library, ECNEWS File. See, e.g., *Re Bank of Credit and Commerce International S.A.*, *infra* note 123, and accompanying text.

to be administered by international cooperation between members of the insolvency profession and the courts.<sup>122</sup>

An excellent example is the very successful international insolvency of the Bank of Credit and Commerce International (BCCI).<sup>123</sup> BCCI was successful because it was among those few insolvencies in which the insolvent debtor actually reorganizes and remains in business while paying a substantial dividend to creditors. BCCI was a British company which operated 250 branches in 69 countries, held assets valued at \$23.5 billion located in 70 jurisdictions, and comprised three corporate entities based in Luxembourg and the Cayman Islands.<sup>124</sup> BCCI's controlling interest was owned by the government of Abu Dhabi.<sup>125</sup> Against all odds, liquidators and courts in the United Kingdom, Luxembourg, the Cayman Islands, and the United States cooperated with each other and successfully maximized the return to creditors, from an initially anticipated ten percent, to a final distribution of forty percent.<sup>126</sup>

The initial distribution to the priority creditors was made in the United Kingdom under British law.<sup>127</sup> The funds were then transferred to a court in Luxembourg, which distributed the balance of the money to non-priority creditors under Luxembourg law.<sup>128</sup> The creditors were given a vote as to how payment would be made, and were paid pro-rata, without regard to where they were located.<sup>129</sup>

The BCCI insolvency was a "remarkable triumph of ad hoc, cross-border cooperation, accomplished despite the absence of

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122. *Few Practitioners' Tears for EU Insolvency Convention, supra note 75.*

123. *Re Bank of Credit and Commerce International S.A. (No. 2)* (1992) British Company Cases 715 (C.A.); Judgment of Jan. 3, 1992, District Court of Luxembourg, Sixth Chamber (1431.12P) (M. Welter); *United States v. BCCI Holdings (Luxembourg), S.A.*, No. CR 91-0655, 1992 U.S. Dist. LEXIS 676 (D.D.C. 1992).

124. *Id.*; Fletcher, *supra note 3*, at 434.

125. *Id.*

126. *Id.* at 435.

127. *Id.*

128. *Id.*

129. *Id.* at 436-37.



any formal international provisions.”<sup>130</sup> As remarkable as this accomplishment was, it succeeded in large part because the stakes were so high and so much money was spent on fees for accountants, attorneys, and liquidators.<sup>131</sup> If BCCI's assets had been much smaller, or if no incentives existed for the creditors or courts to cooperate, success would have been far less likely.

The problem with relying on cooperation to sort out the implications of cross-border insolvencies is that it is unreliable. If cooperation were working, we would not see experts working for decades toward insolvency conventions. The soundness of the “voluntary cooperation” alternative is disproved by forty years of unsuccessful work on various insolvency conventions. Depending on voluntary cooperation is akin to depending on the kindness of strangers: it is a gamble, not a certainty, and requires trust. The insolvency field has been “characterized by extreme parochialism and noncooperation.”<sup>132</sup> Rather than working together to assure that all debtors and creditors are treated equally, countries generally are interested in aiding their own debtors to the detriment of foreign creditors, or in aiding their own creditors to the detriment of foreign debtors or foreign creditors. Countries are too interested in protecting their own citizens, policies, and sovereignty, to cooperate readily in cross-border insolvency proceedings, unless they have a strong incentive to do so. Thus the voluntary cooperation alternative is not realistic.

## 2. Enacting Individual National Laws

Individual countries might enact their own national laws to guide their courts through cross-border insolvency proceedings.<sup>133</sup> The national laws would have to specifically cover cross-border insolvencies, whether the debtor or the creditors are residents of that country, and establish specific

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130. *Id.* at 436.

131. *Id.*

132. Harold Burman et al., *Introductory Note*, United Nations Committee on International Trade Law's Model Law on Cross-Border Insolvency, 36 I.L.M. 1386, 1387 (1997).

133. Fletcher, *supra* note 3, at 441.

procedures. Further, the laws must grant the courts the power to act in furtherance of those laws.

The United States is a model, insofar as it passed a specific section of its own Bankruptcy Code, which gives foreign liquidators certain powers to act in American bankruptcy proceedings.<sup>134</sup> Manfred Balz, chairman of the EU Council Group on Bankruptcy and author of the EU Convention, believes that Germany will probably adopt the EU Convention rules as its own German system of international insolvency law, thus applying the Convention rules, to the extent possible, unilaterally and without requiring reciprocity.<sup>135</sup>

Germany's elimination of any reciprocity requirement is essential. One historical problem with the idea that each nation can pass its own laws to deal with insolvency has been that countries often impose a "reciprocity" requirement on each other: a sort of "I will but only if you do too" mentality. Such an approach offers no guarantee that the other country involved in the cross-border proceeding will recognize the proceedings occurring in the first forum. France, Belgium, and Luxembourg typically have applied a reciprocity requirement before recognizing other countries' laws.<sup>136</sup>

If other countries would follow Germany's lead, and impose no reciprocity requirement, then individual national law could provide a solution to the problems caused by cross-border insolvencies. But even then, this solution would only work if each country were to enact the exact same laws. Otherwise the purpose of insolvency proceedings - equal treatment of creditors - cannot be ensured. Enactment of identical national laws is unlikely in light of Europe's historical lack of common insolvency procedures.

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134. 11 U.S.C. § 304(a) (1994) provides: "A case ancillary to a foreign proceeding is commenced by the filing with the bankruptcy court of a petition under this section by a foreign representative."

135. Balz, *supra* note 5, at 530.

136. *Id.* at 488 n.7.

### 3. Adhering to the Cross-Border Insolvency Concordat

The Cross-Border Insolvency Concordat was drafted by a committee of the International Bar Association's Section on Business Law. The committee, justifiably fearing that a convention would not be realized, began drafting the Cross-Border Insolvency Concordat in 1993, and approved the final version in 1995.<sup>137</sup> A concordat is neither a law nor a treaty, but rather a set of principles that provides guidance.<sup>138</sup> The Cross-Border Insolvency Concordat<sup>139</sup> sets forth ten principles<sup>140</sup> to be followed by parties and tribunals in international insolvency proceedings.<sup>141</sup> Because it is neither a law nor a treaty, but only a set of principles, the Concordat can be implemented in insolvency proceedings only by court orders and/or stipulations between various estate representatives.<sup>142</sup> In contrast to the EU Convention, the Concordat is not limited to EU countries, but is intended to be implemented worldwide.

137. Nielsen, *supra* note 2, at 537.

138. "Concordat" is a term applied historically to agreements between a national government and a religious group, in which certain principles are given "eminence" but do not become law. Nielsen, *supra* note 2, at 536, citing WEBSTER'S NEW WORLD INTERNATIONAL DICTIONARY 471 (3d ed. 1993).

139. International Bar Association Section of Business Law's Committee J Cross-Border Insolvency Concordat (Concordat), Sept. 15, 1995, in Nielsen, *supra* note 2.

140. The ten principles are: (1) primary responsibility in a single administrative forum; (2) claims administration in a single administrative forum; (3) liquidator may appear in any forum where an insolvency is pending, and creditors have similar rights; (4) coordination between fora; (5) transfer of asset from local to main insolvency proceeding; (6) liquidator may employ rules of plenary forum even though those rules are not available in the main forum; (7) liquidator may employ voiding rules of any forum; (8) each forum decides the value and allowability of claims before it using a conflict of law analysis; (9) composition proceeding is not barred simply because some of the fora do not provide for compositions; (10) prevents actions that would destroy the reasonable commercial expectations of parties to contacts. *Id.*

141. Cf. UNIDROIT (ed.), Principles of International Commercial Contracts (1994). UNIDROIT's principles are an ambitious proposal for the unification of international contract law through a restatement-like set of neutral rules, issued by a private working group of specialized practitioners and academics. Klaus Peter Berger, *International Arbitral Practice and the UNIDROIT Principles of International Commercial Contracts*, 46 AM. J. COMP. L. 129, 129-30 (1998).

142. Nielsen, *supra* note 2, at 538. The Concordat has been implemented in at least two international insolvency proceedings, although neither involved European nations. One proceeding involved the United States and Canada; the other, the United States and Israel. Nielsen, *supra* note 2, at 535.

The Concordat utilizes a modified universality approach, similar to that used by the EU Convention, but with more flexibility. Like the Istanbul and EU Conventions, the Concordat prefers one central administrative forum as the most efficient. But, unlike the “center of main interests” test used by the Istanbul and EU Conventions, the Concordat provides for filing the main insolvency proceeding in the country that is the debtor’s “nerve center.”<sup>143</sup> The Concordat does recognize, however, that one main proceeding might not always be possible or practical. Therefore it is flexible enough to allow for two or more plenary proceedings to be brought concurrently, or for one main proceeding and one or more limited proceedings to coexist.<sup>144</sup>

The provisions of the Concordat differ from those of the EU Convention with regard to administration of an insolvency when more than one proceeding is pending. Unlike the provisions of the EU Convention, which restrict the liquidator to administering the insolvency under the laws of the country where the main proceeding is pending, the Concordat’s provisions allow the liquidator to use the insolvency administration laws of any forum in which any part of the insolvency is pending.<sup>145</sup>

In addition, although the EU Convention restricts the liquidator to using the voiding laws of the forum where the avoidance action will be brought, the Concordat allows the liquidator to choose between the laws of any forum in which any part of the insolvency is pending when voiding transactions.<sup>146</sup> If, for example, a debtor residing in Germany is indebted to a creditor domiciled in France, and the French company received a pre-insolvency preferential transfer, the EU Convention and the Concordat provide different results. The EU Convention would require the law of France to be used in an avoidance action. The Concordat allows the liquidator to choose to recover the payment under either French or German

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143. Concordat, *supra* note 139, at 9.

144. Nielsen, *supra* note 2, at 535.

145. Concordat, *supra* note 139, principle 6; Nielsen, *supra* note 2, at 551.

146. Concordat, *supra* note 139, principle 7.

insolvency law. The Concordat thus discourages a debtor from “forum shopping” in its choice of a main forum, because its choice of main proceeding cannot thereby limit the liquidator to the laws of that forum.

The Concordat’s provisions, however, are subject to international conflict of laws principles. The remedy sought by the liquidator cannot be a remedy that would be inconsistent with principles of international law.<sup>147</sup> Interestingly, the Concordat offers an example, not using European countries as might be expected, but using parties from Hong Kong and the United States.<sup>148</sup> The liquidator of a Hong Kong company in insolvency proceedings in Hong Kong might seek to use United States law to avoid a transfer made to an American company in the United States. This would be allowed under the Concordat, as it would not be unexpected or unfair. It would be unexpected and unfair, however, to use United States law to try to avoid a transfer between two Hong Kong companies. The Hong Kong companies would not expect the law of the latter country to be used to set aside a transaction which occurred in the bank’s own country, and thus this would not be allowed under the Concordat.<sup>149</sup> The Concordat’s drafters believed that it was important to prevent uncertainty and the disruption of reasonable commercial expectations that might hinder international commerce.<sup>150</sup>

The Concordat’s rules on determining and paying claims are more similar to those found in Istanbul Convention than in the EU Convention. Like both of those two conventions, the Concordat provides that secured and priority claims can be determined on a local basis, through local proceedings (plenary or limited), and that the surplus should be forwarded on to the main proceeding, which then provides for pro-rata distribution to all creditors.<sup>151</sup> The Concordat, like the Istanbul Convention, also provides that if a claim is filed in more than one forum, it

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147. *Id.*

148. Concordat, *supra* note 139, principle 7; Nielsen, *supra* note 2, at 552.

149. *Id.*

150. Concordat, *supra* note 139, principles 8, 10.

151. Concordat, *supra* note 139, arts. 2, 4, 5.

will be adjusted to assure that the claimant does not receive more than its share of the pro-rate distribution.<sup>152</sup> The EU Convention does not so limit claims. The Concordat's provision is more consistent with the purpose of insolvency proceedings: distribution of the debtor's assets under a consistent set of rules which assures that all creditors are treated equally, based on the percentage of claims filed in each forum.<sup>153</sup>

The Concordat's flexible and pragmatic solutions are its main advantages. Nonetheless, the Concordat suffers from a serious weakness: it lacks the force of law. It is optional and cannot be expected to be followed uniformly by all countries in all situations. It ultimately depends on mutual cooperation, which is always subject to political whims, reprisals, desires for protection of nationals, and other factors. Thus the Concordat is as flawed as other non-treaty solutions.

It may be many years before a multi-lateral treaty is adopted in Europe.<sup>154</sup> In the mean time, solutions such as the Concordat offer practical guidelines to those who wish to follow them.

#### 4. Adopting the UNCITRAL Model Law on Cross-Border Insolvency

The rapid growth of international trade has led in turn to an increasing number of cross-border insolvencies, which have affected investment and trade around the world.<sup>155</sup> Attempts to reach a treaty solution have failed repeatedly. Therefore, in 1993, the United Nations Committee on International Trade Law (UNCITRAL), in close cooperation with the International Association of Insolvency Practitioners (INSOL), began work on a Transnational Insolvency Project.<sup>156</sup> UNCITRAL at first considered drafting a treaty, but abandoned the idea because of the historical difficulty of achieving international agreement in

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152. Concordat, *supra* note 139, principle 4; Nielsen, *supra* note 2, at 549.

153. Concordat, *supra* note 139, at 4; Nielsen, *supra* note 2, at 549.

154. Nielsen, *supra* note 2, at 535. N. 10.

155. Burman, *supra* note 132.

156. Westbrook, *supra* note 1, at 569.

insolvency matters.<sup>157</sup> Instead, UNCITRAL directed its efforts toward a model law. These efforts culminated in the Model Law on Cross-Border Insolvency, which was adopted by UNCITRAL on May 30, 1997.<sup>158</sup> In contrast to the Concordat, the provisions of the Model Law will become law in those nations that adopt it.<sup>159</sup>

The Model Law aims to prepare a uniform standard for recognizing foreign insolvency proceedings and facilitating cooperation across the borders.<sup>160</sup> It was intended to cover the many situations in which local law does not authorize the local courts to cooperate in any foreign insolvency proceedings.<sup>161</sup> It expressly empowers courts to recognize foreign insolvency proceedings,<sup>162</sup> and gives the foreign liquidator access to local courts without having to engage in any diplomatic formalities.<sup>163</sup> It not only empowers the court to cooperate with the foreign proceeding,<sup>164</sup> but also directs it to do so to the maximum extent possible.<sup>165</sup>

The Model Law imposes no limit on any country's jurisdiction to commence or continue its own insolvency proceeding. Like the Istanbul and EC Conventions, it uses the concepts of "center of main interests" and "establishment."<sup>166</sup> The debtor may file its main insolvency proceeding in the country where its main center of interests lies. Secondary proceedings may be filed where the debtor has an "establishment." The courts, however, must cooperate to coordinate the proceedings.<sup>167</sup>

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157. Burman, *supra* note 132.

158. United Nations Commission on International Trade Law's Model Law on Cross-Border Insolvency, 36 I.L.M. 1386 (1997)

159. *Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency*, U.N. Commission on International Trade Law, 30<sup>th</sup> Sess., at 7, U.N. Doc. A/CN.9/442 (1997).

160. *Guide to Enactment*, *supra* note 159, at 8.

161. *Guide to Enactment*, *supra* note 159, at 15.

162. Model Law, *supra* note 158, arts. 15-17.

163. Model Law, *supra* note 158, arts. 9-13, 23-24.

164. Model Law, *supra* note 158, arts. 25-27.

165. Model Law, *supra* note 158, arts. 25, 30.

166. Model Law, *supra* note 158, art. 2(a), (f).

167. Model Law, *supra* note 158, arts. 29-30.

The Model Law gives standing to a foreign liquidator to bring avoidance actions. The Model Law does not create any substantive avoidance law, however but limits the types of actions to those available to an insolvency administrator under the law of the enacting country (as distinguished from actions available to ordinary creditors).<sup>168</sup>

The Model Law is very modest in its ambitions. It seeks not so much to create a universal system of substantive insolvency laws, but to effectuate cooperation. This article has demonstrated the difficulties of getting countries to agree on insolvency laws. Still, the Model Law offers a better solution than voluntary cooperation, or even the Concordat, because once enacted, it would have the force of law behind it: a law mandating cooperation.

The Model Law will only be effective in those countries that enact it.<sup>169</sup> UNCITRAL has the goal that the Model Law could be enacted and be effective worldwide. Certainly it would not be particularly helpful or worthwhile unless it were enacted by many countries, and on the same terms. When enacting the Model Law, however, a state may modify or omit any of its provisions.<sup>170</sup> This undermines the concept of universality. To ensure fair and equal treatment of all creditors, universality is the necessary ingredient in an insolvency policy. Similarly, countries also may balk at adopting the Model Law because they do not want to bind themselves where others are not bound. True reciprocity and harmony can be guaranteed only by a treaty, and not by any national law alone.

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168. Model Law, *supra* note 23.

169. *Guide to Enactment*, *supra* note 159, at 7.

170. *Id.* at 8.



The Model Law has not yet been enacted anywhere.<sup>171</sup> Still, some model laws have been widely accepted. Twenty-five countries have adopted UNCITRAL's Model Law on International Commercial Arbitration.<sup>172</sup> If the Model Law on Cross-Border Insolvency obtains half the success of the Model Law on International Commercial Arbitration, that will far surpass the success of any other attempt to solve the problems arising from cross-border insolvency proceedings.

## V. CONCLUSION

An EU-wide convention still offers the best chance for harmonizing European insolvency laws, despite the problems that have dogged efforts to conclude one. Countries do not readily cooperate with foreign insolvency proceedings, owing to their differing insolvency laws and desires to protect their own citizens, assets, and sovereignty. Thus, it is unwise to rely on cooperation to ensure fair and equal treatment of debtors and creditors alike. Enacting purely national legislation is not efficacious and is fraught with reciprocity problems.

Only a Convention — and one without opt-out provisions, at that — will be equally binding on all nations. The most recent EU Convention, though not perfect, is the result of nearly 40 years' worth of cumulative effort, and still represents the best available option. The European Union should find a way to resurrect the European Union Convention on Insolvency Proceedings and ratify it once and for all.

This convention still will not cover those international insolvency proceedings that extend beyond Europe, or into

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171. Ironically the Model Law was passed in the United States by both houses of Congress but became the victim of unrelated arguments, about amending the consumer provisions of the Bankruptcy Code. Conference Report, H.R. CONF. REP. NO. 105-794, reprinted in Cong. Rec. H9954-9985, at 9974-77 (1998).

172. Note by the [UNCITRAL] Secretariat, Status of Conventions (U.N. Doc. A/CN.9/428) (1996), available at [www.smu.edu/~pwinship/arb-21.htm](http://www.smu.edu/~pwinship/arb-21.htm). Klaus; Peter Berger, *The Implementation of the UNCITRAL Model Law in Germany*, Mealey's International Arbitration Report (Mealey Pub. Jan. 28, 1998), available on LEXIS, INTLAW Library, INTLTR File.

Europe from beyond.<sup>173</sup> As such multinational, cross-border insolvency proceedings continue to increase, the EU may decide to enter into treaty discussions with a wider group of nations. The United Nations (and in particular UNCITRAL) may be best equipped to accomplish this, when the time comes.

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173. EU Convention, *supra* note 65, art. 48; Balz, *supra* note 5, at 497.

