The Call for Harmonisation of Cross-border Insolvency Laws to enable Cross-border Filing and Litigation in the East African Community

Dr Hamiisi Junior Nsubuga[1]

Abstract

This article analyses the need for the adoption of the UNCITRAL Model Law on Cross-border Insolvency in the East African Community (EAC) to enhance regional cross-border insolvency filing and litigation during corporate insolvency of companies with assets and interests across the EAC region. The article considers the policy and procedural underpinnings, and challenges faced by EAC States on adoption / harmonisation of the Model Law and how adoption of the UNCITRAL Model Law would boost regional cooperation, trade and economic growth, and safeguarding of corporate and creditors interests on corporate cross-border insolvency.

Introduction

Corporate insolvency in the East African Community (EAC) has been perceived with stigma for decades, yet financial distress is a common occurrence in competitive market economies.[2] This stigmatisation has been a major factor in constricting regional economic integration and cooperation across the EAC. Protecting corporations in financial difficulties across the EAC borders has been a major challenge.[3] Official Receivers from the EAC States have advocated the need for harmonisation of corporate insolvency laws in the region to allow regional cross-border filing and litigation but these proposals have yet to be implemented.[4] The UNICITRAL Model Law on Cross-Border Insolvency is designed to assist Member States in

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[1] PhD (Law), LLM, MA, LLB (Hons). Lecturer in Law, School of Law, Middlesex University London, UK.

[2] Kent Anderson, "The Cross-border Insolvency Paradigm: A Defence of the Modified Universal Approach Considering the Japanese Experience" (2000) 21 U. Pa. J. Int'l Econ. L. 679.

[3] Edward Kayiwa, "Harmonize Insolvency Law in the EAC States" *The New Vision* (Uganda, 28 November 2016) 5.

[4] For example, Kenya's official Receiver, Benith Kashegu was of the view that EAC States have for sometimes been trying to amend their laws such that they can harmonise these laws to benefit all citizens but it has been a slow process. See, Kayiwa (n 3) 5.

relation to the regulation of corporate insolvency and financial distress involving companies with assets or creditors in more than one state have yet to be adopted across the EAC States.

This article analyses the EAC Member States' drive towards the adoption and harmonisation of the UNCITRAL Model Law on Cross-Border Insolvency into their domestic legislation to enhance regional cooperation during corporate cross-border insolvency. The article further analyses Member States' roles and priorities in safeguarding financially struggling companies on cross-border insolvency. This is to assess whether corporate insolvency laws and policies adopted by these States 'efficiently' enhance the rescue prospects of insolvent but viable corporations across the region through provisions on cross-border filing. The article concludes by calling for harmonisation of corporate insolvency laws across the EAC region to enable cross-border insolvency filing and litigation where necessary.

The East African Community

The East African Community (EAC) is a regional intergovernmental community made up by Uganda, Kenya, Tanzania, Rwanda and Burundi. The EAC is headquartered in Arusha, Tanzania. The EAC was established by the Treaty for the Establishment of the East African Community (EAC Treaty)[5] which was commissioned on 7 July 2000. The EAC has an established regional parliament known as the East African Legislative Assembly (EALA) comprising of legislators from all EAC Member States. The EAC also has an established Customs Union, which was commissioned on 1 January 2010 following five years of regional negotiations and transitory implementations.

The EAC also has an established Common Market, which was commissioned on 1 July 2010 that allows for the free movement of goods and services, labour and the flow of capital across Member States borders. A Monetary Union among EAC Member States is another symbol of integration in the region. In 2018, negotiations between Member States were commenced in regards to the enactment of the EAC Constitution to govern and regulate interstate legal affairs.

[5] Treaty for the Establishment of the East African Community, Chapter II, Article 2, available at <http://eacj.org/wp-content/uploads/2012/08/EACJ-Treaty.pdf > (accessed 21 April 2019).

Treaty and Protocol Structures on Harmonisation

The Treaty that established the EAC and its Protocols that established the Customs Union[6] and the Common Market[7] have provisions for harmonisation of cross-border insolvency laws within EAC Member States to enhance regional trade and commercial cooperation.[8] The EAC Treaty also sets out the main objectives of the EAC as being the "development of policies and programmes aimed at enhancing regional cooperation, especially on sectoral, legal and judicial affairs."[9]

The Sectoral Council on Legal and Judicial Affairs, and the Sub-Committee on Approximation of Laws

The Sectoral Council on Legal and Judicial Affairs is established by EAC Treaty[10] with the mandate to ensure that legislation passed by the EALA is transposed into EAC Member States' domestic laws, treaty compliant and approximated and harmonised across the region. Under the Sectoral Council on Legal and Judicial Affairs is the Sub-Committee on Approximation of Laws. This Sub-Committee is made up of Chairpersons of the Law Reform Commissions or equivalent government agencies, such as Ministries of Justice or offices of the Attorney Generals of Member States, who are tasked with overseeing law reform exercises within Member states. The main role of the Sub-Committee on Approximation of Laws is to study EAC Member States' domestic laws and to advise the Sectoral Council on Legal and Judicial Affairs on harmonisation and approximation of laws across the region.

The Need for Harmonisation of Cross-border Insolvency Laws

Like in the European Union (EU) and the African Union (AU), free movement of goods, capital and labour are key to regional integration, cooperation and economic development.[11] With the free movement of capital and labour companies and citizens across Member States may be incentivised to pursue opportunities across borders. This is because different Member States are endowed with unique natural resources over the other. While one Member State

[6] Protocol on the Establishment of the East African Customs Union, available at <https://www.ifrc.org/Global/Publications/IDRL/regional/Protocol%20on%20the%20Establishment%20of%20the%20East%20African%20Customs%20Union.pdf > (accessed 22 April 2019) (Customs Union Protocol).
[7] Protocol on the Establishment of East African Community Common Market, available at <http://eacj.org/wp-content/uploads/2012/08/Common-Market-Protocol.pdf> (accessed 22 April 2019) (Common Market Protocol).
[8] EAC Treaty, Art. 126, and Common Market Protocol, Art.47.
[9] EAC Treaty, Art. 5(1).
[10] EAC Treaty, Art. 14(3)(I) and (J).
[11] Jenny Clift, "The UNCITRAL Model Law on Cross-Border Insolvency – A Legislative Framework to Facilitate Coordination in Cross-Border Insolvency" (2004) 12 *Tul. J. Int'l. & Comp. L.* 398.

may have key natural resources such as oil and gas, another Member State may boost a larger population base with cheaper labour. These factors may attract some companies within the EAC region to cross borders to either set up businesses or enter into commercial contracts to utilise the market.

In the EAC moreover, numerous companies, especially in the banking, insurance and commercial sectors operate across the region. From giant chain supermarkets such as Uchumi, Nakumatt and Shoprite, insurance companies such as Insurance Company of East Africa (ICEA Lion Group) to commercial banks such as Kenya Commercial Bank (KCB) operate across EAC Member States. With these cross-border activities between Member States, trading disputes, financial difficulties, liquidations among other concerns are likely to happen as these are a common occurrence in competitive market economies.[12] This therefore calls for stringent laws and policies both at domestic and regional level to govern and regulate cross-border business and commercial dealings between Member States.

The UNCITRAL Model Law on Cross-border Insolvency

The legal frameworks within the EAC Member States vary substantively and procedurally. The differences within the legal frameworks are premised on the legal systems inherent in these Member States. While Uganda, Kenya and Tanzania are common law jurisdictions based on the English legal system as they were colonised by Britain, Rwanda's and Burundi's legal systems are based on civil law having been colonised by German and Belgium. With these differences, attempts at harmonisation of laws across the region may face some challenges, especially on reconciliatory measures to "piece-up" a uniform harmonised cross-border legal regime across Member States.

However, a solution to these perceived challenges may lie in the adoption of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Cross-border Insolvency.[13] The Model Law on Cross-border Insolvency was commissioned on 30 May 1997 to provide a model framework within which cooperation and coordination between jurisdictions in relation to the regulation of corporate insolvency and financial distress involving companies, which have assets or creditors in more than one State. However, although the Model Law is internationally recognised and has been adopted by some

[12] Rosalind Mason, "Cross-Border Insolvency Law: Where Private International Law and Insolvency Law Meet" in Paul J. Omar (ed), *International Insolvency Law* (Ashgate Publishing 2008).

[13] *Report of the United Nations Commission on International Trade Law on the works of its Thirtieth Session*, UNCITRALOR, 30th Sess, Supl No.17, UN Doc A/52/17, (1997), Annex 1 (The Model Law).

countries,[14] it is not mandatory. It only seeks to encourage cooperation between jurisdictions but not to unify substantive insolvency laws of adopting jurisdictions.[15]

Key Elements of the UNCITRAL Model Law and how they would help the EAC

In its preamble, the Model Law sets out to promote five key objectives, which include the following:

(a) Cooperation between courts and competent authorities of the jurisdictions involved in cross-border insolvency.
(b) Greater legal certainty for trade and investment.
(c) Fair and efficient administration of cross-border insolvencies that protect interests of all creditors and debtors.
(d) Protection and maximisation of the value of the debtor's assets.
(e) Facilitating the rescue of financially troubled businesses thereby boosting investment and preserving employment.

To achieve these objectives, EAC Member States would need to develop and design their cross-border insolvency model based on four elements identified by the Model Law as being key to the conduct of cross-border insolvency cases. These include: (i) – Access (ii) Recognition (iii) Relief and, (iv) Cooperation and Coordination. These four elements are analysed below.

Recognition of Foreign Insolvency Representatives and Foreign Proceedings

To enable cross-border filing and litigation across the EAC, there is a need for insolvency representatives from a foreign State to be recognised by the enacting State, especially where the debtor has assets that are subject to the insolvency proceedings. Recognition of foreign insolvency representatives and foreign insolvency proceedings would create a degree of legal certainty in furtherance of cross-border insolvency. Absence of recognition would make such proceedings timely and costly as envisaged by the Model Law.[16]

The Model Law expressly authorises insolvency representatives from the enacting State to act in other States on behalf of the appointer.[17] Under Article 17, the Model Law sets criteria that

[14] Andre' J. Berends, "The UNCITRAL Model Law on Cross-border Insolvency: A Comprehensive Overview" (1998) 6 *Tul J. Int'l & Comp. L.* 309, 321.
[15] UNCITRAL Model Law, (Preamble).
[16] *Guide to the Enactment of the UNCITRAL Model Law on Cross-border Insolvency*, UNCITRAL, 30th Sess, Annex, UN Doc A/CN.9/422 (1997), para.27.
[17] Model Law, Art. 25(2).

must be met by States for foreign proceedings to be recognised subject to public policy exception.[18]

These are:

(i) Foreign proceedings must be the type of proceedings within the meaning of Article 2(a). Under Article 2(a), foreign proceedings are defined as collective proceedings that represent the interests of all creditors, opened with the purpose of liquidation or reorganisation of the debtor, pursuant to a law relating to insolvency and in which assets and affairs of the debtor are under the control or supervision of a judicial or administrative authority.

(ii) Foreign representatives[19] seeking recognition must be those that were appointed to oversee to the insolvency proceeding that is subject to recognition.

(iii) Application for recognition must meet the procedural requirements of Article 15(2). Under Article 15(2), an application for recognition must be accompanied by (a) - a certified copy of the decision commencing foreign proceedings and appointment of foreign representatives, (b) - a certificate affirming existence of foreign representatives and (c) - in the absence of either (a) or (b) above, any other evidence to support the existence of foreign proceedings.

(iv) Application for recognition must be submitted to a competent court or authority.

Therefore, if the above criteria are satisfied, foreign proceedings and foreign representatives may be recognised in foreign States. For example in the EAC, this would mean that insolvency proceedings opened in Kenya in relation to a company with assets or creditors in another EAC Member State, Uganda, may be recognised by Uganda’s legal system. This arrangement among Member States would not only curb unfair practices during cross-border insolvency proceedings such as dissipation and concealment of the debtor’s assets in one State, but would also, maximise the value of the debtor’s bankruptcy estate from which creditor interests and entitlements may be settled.[20]

In addition to the above, recognition of foreign proceedings and foreign representatives would provide a degree of legal certainty to the confusion around the concept of ‘Centre of Main Interest’ (COMI) which has proven to be a challenge in cross-border insolvency

[18] Model Law, Art. 17(1).

[19] Model Law, Art. 2(d) defines a foreign representative as a person or body authorised in a foreign proceeding to act as a representative of the foreign proceeding.

[20] Lynn M. LoPucki, “The Case for Cooperative Territoriality in International Bankruptcy” (2000) 98(7) *Mich. L. Rev.* 2216, 2220.

cases.[21] The Model Law does not provide a definition of the concept of COMI. However, this concept is traceable to the European Union Convention on Insolvency Proceedings.[22] This convention did not come into force but its text was incorporated into the European Community (EC) Regulation on International Insolvency that was adopted by EU Member States except Denmark.[23]

However, the main advantage of this concept is that under cross-border insolvency proceedings, this concept is useful in the recognition of the rules governing jurisdiction in cross-border insolvency and recognition of foreign insolvency proceedings. This is, especially, where companies that are subject to insolvency proceedings have subsidiaries or assets in other States. Therefore, where COMI is established, it gives the courts/ authorities in that jurisdiction power to initiate main insolvency proceedings, a tool that may be useful if EAC Member States adopt and harmonise their cross-border insolvency law.[24]

In addition to the above, the Model Law affords foreign insolvency representatives a right to initiate local insolvency proceedings in the courts of enacting jurisdictions either before, or after an application for recognition is made, accepted or refused.[25] Therefore, where harmonised, this provision would enhance cross-border rescue of financially struggling businesses. This is because the initiation of insolvency proceedings triggers moratoria protection to the debtor. Moratoria protection stays creditor enforcement actions, which in turn, keeps the debtor's bankruptcy estate intact which may increase rescue prospects of the financially struggling business.[26]

Access to Courts, Cooperation and Communication between States

Another feature of the Model Law on cross-border is the provision for the cooperation and coordination between adopting jurisdictions during cross-border insolvency proceedings.[27] The provision is that courts from the enacting State should cooperate and communicate with the courts or their representatives in corresponding jurisdictions. With recognition of foreign

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[21] Adam M. Slavens, "Shifting Gears in Cross-Border Insolvencies: From Comity to COMI" (2008) 24(1) *BFLR* 31.
[22] The European Convention on Insolvency Proceedings was signed in Brussels on 23 November 1995 by 14 out of 15 Member States, except the UK. See also, Ian F. Fletcher, *Insolvency in Private International Law: National and International Approaches*, (2nd edn., OUP, 2005) 352.

[23] Council Regulation (EC) No. 1346/2000 of 29 May 2009 on Insolvency Proceedings [2000] OJ, L160/1.
[24] Slavens, "Shifting Gears" (n 21).
[25] Model Law, Articles 11 and 18.
[26] Ian F. Fletcher, *Insolvency in Private International Law: National and International Approaches*, (2nd edn., OUP, 2005) 474, 475.
[27] Model Law, Art. 25(2).

insolvency proceedings and foreign representatives, it is envisaged that the addition of access to courts by foreign representatives would lead to ease of operation and coordination across borders. However, it is noteworthy, that cooperation and communication between Member States' courts is based on judicial discretion but not legally binding on Member State courts.[28] Therefore, procedural legal differences in EAC Member States laws may inhibit Member States' cooperation and communication in this regard.[29]

EAC Member State Harmonisation Exercise – The Latest Position

The EAC is made up by five Member States. However, out of the five States, only Uganda and Kenya have taken steps to incorporate the Model Law into their domestic laws. Tanzania, Rwanda and Burundi have yet to incorporate the Model Law into their domestic insolvency laws. However, hope is not yet lost as the EAC Member States are still actively engaged in Community exercises around harmonisation of cross-border laws.

Uganda

Under efforts to improve its insolvency laws following the global economic recession, the Ugandan government commissioned the Uganda Law Reform Commission (ULRC) to review its insolvency and bankruptcy laws and to make recommendations for reform to match international trends.[30] This was because Uganda's insolvency model was based on the Bankruptcy Act 1931, which was almost eighty years old. The ULRC's recommendations led to the tabling of the Insolvency Bill 2009 before parliament in 2009 that led to the enactment of the Insolvency Act 2011 (IA 2011 UG). Under the IA 2011 UG, Part IX sets out provisions for cross-border insolvency law in line with the Model Law.

For example, s.212 of the IA 2011 of Uganda provides for reciprocity of other EAC Member States' insolvency laws on corporate insolvency.

The section provides that:

> "Where the Minister is satisfied that any State has enacted laws for reciprocity in bankruptcy / insolvency which has the same effect as Part IX, the Minister

[28] *Guide to the Enactment of the UNCITRAL Model Law on Cross-border Insolvency*, UNCITRAL, 30th Sess, Annex, UN Doc A/CN.9/422 (1997) para. 174.
[29] F. Tung, "Fear of Commitment in International Bankruptcy" (2001) 33 *The George Washing International Law Review*, 555.
[30] C. Nyombi, A. Kibandama & D. Bakibinga, "The Motivation Behind Uganda's Insolvency Act 2011" (2014) (8) *J. B. L* 651, 666; C. Nyombi, "The Development of Corporate Rescue Laws in Uganda and UK" (2015) (57) (2) *International Journal of Law and Management* 214.

> may by statutory instrument declare such a State to be a reciprocating State, whereby any court having jurisdiction in insolvency/ bankruptcy will be a reciprocating court for purposes of the Insolvency Act 2011"[31]

In addition to the above, the same Act also has provisions on harmonisation of cross-border Insolvency Rules across borders subject to Ministerial statutory declaration.

The Act provides that:

> "Cross-border Insolvency Rules shall not come into force until declared by the Chief Justice via statutory instrument that a reciprocating state has similar Insolvency Rules"[32]

In addition to the IA 2011 UG, Uganda also has other statutes such as: The Foreign Judgments (Reciprocal Enforcement) Act Cap 9, The Judgment Extension Act Cap 12, and The Reciprocal Enforcement of Judgments Act Cap 21 which aim to acknowledge, enhance recognition and enforcement of foreign judgments across other Member States. However, it is worth noting that although Uganda has made such efforts through legislation that may offer some hope on cross-border harmonisation of insolvency laws across the EAC, parallel effort within other EAC Member States is required to inform a concerted effort.

Kenya

Kenya is the other EAC Member State to have taken steps to incorporate the Model Law into its domestic insolvency laws. This is through the Insolvency Act of Kenya 2015.[33] Under this Act, s.720 provides that the Model Law on Cross-border insolvency has been transposed and adopted into Kenya's insolvency law to deal with cases on cross-border insolvency.[34]

In addition to the above, s.720(2) sets out the purposes of the provisions on cross-border insolvency within the Kenyan Insolvency Act 2015.

These are mainly:

(a) Cooperation between courts and other competent authorities of Kenya and foreign states in cases of cross-border insolvency.
(b) Greater legal certainty for trade and industry.

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[31] IA 2011 (UG), Part IX, s.212.
[32] IA 2011 (UG), Part IX, s.225(3).
[33] Insolvency Act of Kenya, No. 18 of 2015.
[34] Insolvency Act of Kenya 2015, Part III, 5th Schedule, Supplementary Provisions, s.720.

(c) Fair and efficient administration of cross-border insolvency that protects the interest of all creditors and debtors.
(d) Protection and maximisation of the value of the debtor's assets.
(e) Facilitation of the rescue of financially troubled businesses to protect investment and preserve employment.

Basically, the Insolvency Act of Kenya 2015 adopted in a manner of "copy and paste", the five key objectives of the Model Law as set out in its preamble into its domestic law.

Tanzania, Rwanda and Burundi

Tanzania, Rwanda and Burundi have yet to adopt the Model Law into their domestic legislation.

Cross-border Harmonisation Challenges across the EAC

Although steps have been taken by some EAC Members States to harmonise insolvency laws across the borders, there are challenges that have not only constricted this exercise, but made full implementation of the harmonisation exercise a very slow process. The key challenges are discussed below.

1 - Priority in Scope and Choice of Laws

As discussed above, the Sub-Committee on the Approximation of Laws under the Sectoral Council on Legal and Judicial Affairs is tasked with reviewing every aspect of law within EAC Member States – from immigration law, customs law, to commercial law et cetera. This makes the work of the Sub-Committee very challenging, especially, on what area of law to give priority of review and recommendation to the Sectoral Council. Because insolvency has been looked at with stigma across the region,[35] insolvency laws have not been given utmost attention or/ priority of scope, especially on the agenda for harmonisation, yet a viable cross-border insolvency model would boost regional economic cooperation and integration.[36]

2 - Divergence in Member States' Legal Systems

EAC Member States have different legal systems, traditions and culture. Some EAC Member States such as Uganda, Kenya and Tanzania are common law jurisdictions where as Burundi and Rwanda are civil law systems. The divergence in legal systems, which is precipitated on

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[35] Kayiwa (n 3).
[36] LoPucki (n 20).

colonial structures, has the effect that insolvency laws, rules and proceedings may be in different languages. This poses a convergence challenge to harmonisation and transposition aspects. Where cross-border insolvency proceedings are initiated and governed by different jurisdictional rules, conflict of laws issues may arise.[37] Moreover, the principle of territoriality, that is, the notion to uphold state sovereignty by upholding domestic laws over EAC harmonisation laws is still a key jurisdictional challenge. EAC Member States may weigh up the advantages and disadvantages of adopting harmonised regional laws and processes in resolving cross-border insolvency concerns.[38]

3 - **Funding and Legislative Priorities**

Another harmonisation challenge is that EAC Member States governments may be willing to commit to harmonisation processes but are constricted by funding needs. Review exercises, auditing and implementation of recommended EAC legal and policy reforms require funding, yet Member States usually commit priority of funding to national commitments, such as political commitments on national political agenda.

National governments are the ultimate drivers of legislative changes. Within the EAC, all Member States have the majority of parliamentary representation (in terms of numbers). This has the effect that domestic political ambitions are accorded priority over those of the EAC passed by the EALA. Member States have priority laws to "push through" their domestic legislative assemblies dictated, mostly, by political factors. Very often, Member States give priorities to laws that are politically favourable to leaders. Political ambitions such as re-election strategies and fulfilling pre-election promises in order to win subsequent elections are considered a priority over EAC commitments. Therefore, political factors dictate and influence policies on harmonisation and approximation of EAC laws.[39]

Conclusion

Two years into the life of the UNCITRAL Model Law, two leading academics and experts in the field of international insolvency law, the late professor Ian Fletcher and professor Bob Wessels prophesised on the potential impact or success of the UNCITRAL Model Law in 1999, and 2006.

[37] Ian F. Fletcher, *The Law of Insolvency* (4th edn., Sweet & Maxwell 2009).
[38] On the issue of advantages and disadvantages of adopting various insolvency models, see, Bob Wessels, Bruce Markell and Jason Kilborne, *International Cooperation in Bankruptcy and Insolvency Matters* (Oxford: OUP 2009) Chapter 3.
[39] O. Morrisey, "Politics and Economic Reforms: Trade Liberalisation in Sub-Saharan African" (1995) 7 *Journal of International Development* 4, 599 – 618.

In 1999, professor Ian Fletcher opined that:

> "The proof of the Model Law will be in the enactment. The crucial question is not the number of States which take a conscious decision to enact the law but the extent to which they do so, both individually and collectively"[40]

Professor Wessels also opined that:

> "The Success of the Model Law is heavily dependent upon whether, and in what manner, countries choose to enact it."[41]

Therefore, although it is hard to measure the impact or success of the UNCITRAL Model Law on Cross-border Insolvency based on the number of adopting States, or on the technical quality of the transposed Model Law provisions in assigning States' domestic legislation,[42] for the EAC, incentivising all Member States to adopt the Model Law and transpose it into their domestic insolvency laws would be a great milestone as full adoption and harmonisation of the Model Law would provide a legal tool for regional cooperation on cross-border insolvency concerns.

In 2010, the EAC Secretariat commissioned a study on harmonisation of commercial laws across EAC Member States. This study identified nine categories/ areas of laws in need of harmonisation. These included banking laws, business transactions laws, finance and fiscal laws, insurance laws, et cetera. However, insolvency and bankruptcy laws were omitted, yet this was a crucial period for international trade and commercial law imperatives that required a review following the global economic recession. This further supports the need for affording priority of implementation of insolvency laws and policies across the EAC to boost regional cooperation and protection of debtor and creditor interests during cross-border insolvency across the region.

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[40] Ian F. Fletcher, *Insolvency in Private International Law* (OUP 1999) 361.
[41] Bob Wessels, "Will UNCITRAL Bring Changes to Insolvency Proceedings Outside the USA and Great Britain? It Certainly Will" (2006) 3 *International Corporate Rescue* 200.
[42] Fletcher, (n 40) 486.