Africa Round Table
25 – 26 October 2018

Multinational insolvencies in an African context
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To download the updated World Bank ICR Principles please use the following link:


UNCITRAL’s reports on insolvency can be found here:

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We value the partnerships we’ve established in the communities around the world where we live and work. Whether we’re sponsoring the arts, sports, children and family programs, education or health care initiatives – or anything in between – we’re proud to join forces with those who share our commitment to making a difference.

DLA Piper is proud to sponsor the African Roundtable hosted by INSOL International and World Bank Group.
Background to the initiative

The 2018 World Bank Doing Business data shows that Sub-Saharan Africa has the lowest creditor recovery rate than any other region in the world (20.3 cents on the dollar, compared to 71.2 cents on the dollar in OECD High Income countries). Clearly, there are many different issues related to financial distress in the region, and the insolvency solutions are complex. There are inadequate mechanisms to prevent the stripping of assets of companies in financial difficulty heading towards insolvency, which means that a business rescue culture is minimal. Many directors lack accountability. In many cases, the insolvency profession is neither institutionalised nor regulated. Delays in finalising cases by courts negatively affect the efficiency of the system. The skills of stakeholders including the judiciary and insolvency practitioners need to be developed, and countries need to focus on both institutional and capacity-building reforms that will seek to preserve value in financially distressed businesses.

Since the introduction of the Africa Round Table initiative in 2010, the focus has been on introducing delegates across the continent to the various insolvency and restructuring tools that are available in an insolvency scenario, with the emphasis on encouraging and supporting insolvency reform. The themes of the events have ranged from value preservation to insolvency frameworks for micro, small and medium enterprises to examining how to encourage more effective implementation of insolvency regimes. The focus, however, remains on developing professional ties with the goal of improving insolvency and restructuring regimes across the African continent.

With multinational insolvencies and non-performing loans (NPLs) increasing globally, but also across Africa, this year’s ART will focus on examining multinational insolvencies in an African context. Topics at this year’s ART will therefore explore issues surrounding the theory and practice of cross-border insolvencies in Africa, lessons learned from other jurisdictions and the standard setting principles in this field promoted by both the World Bank Group and the United Nations Commission on International Trade Law (UNCITRAL).

INSOL International has a significant membership base in Africa. INSOL members, regulators, law-makers, insolvency practitioners, judges and other stakeholders from the region participating in INSOL activities have demonstrated keen interest in learning from the experience of other countries. INSOL and other international bodies have received requests for assistance to work towards the improvement of the insolvency systems in the various countries in the region. In addition to the Africa Round Table initiative, INSOL International is also expanding the services it provides to its membership base in Africa as part of its newly adopted strategy. Included in these plans are the sourcing and publication of technical books, projects and special reports that are relevant to the region and an electronic database that contains the insolvency laws of as many countries in Africa as possible. While the Africa Round Table initiative has been hugely successful, we aim to consolidate the progress made by providing more frequent and useful information to our African membership, both in the short and the long term.

The World Bank and the International Finance Corporation (The World Bank Group) have been assisting countries in Africa to reform their insolvency regimes for more than 17 years. As the global standard setter for insolvency and creditor/debtor regimes (including secured transactions over moveable collateral), together with UNCITRAL, the World Bank Group is well placed to assist countries in Africa with reforms in this area. The World Bank Group’s Finance, Competitiveness and Innovation Global Practice has active insolvency projects in over fifty countries. The projects assist governments through detailed diagnostics and technical assistance.
Unlocking growth in Africa

Our underlying purpose, wherever we operate, is to build a vibrant economy, based on trust and integrity in markets, dynamic businesses, and communities where businesses and people thrive.

We have a strong and growing footprint in Africa with 41 member firm offices in 24 countries and over 2600 people covering the Anglophone, Lusophone and Francophone speaking regions.

Our Africa Business Group collaborates with the African network and the wider global network including key off-shore centres to provide a seamless and streamlined service to you, whatever your business needs may be in the region.

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Africa is a vast region with diverse legal systems and practices. Some multilateral bodies are already engaged in insolvency reforms in some countries and others carry a keen interest in working for the benefit of the insolvency industry in the region. The knowledge, experience and resources available within these global institutions and bodies can be optimised by way of a coordinated regional effort, aimed at addressing the needs of the insolvency industry. The Forum for Asian Insolvency Reforms (FAIR) and the Forum for Insolvency Reforms in MENA are two inspiring models of cooperation by international and regional organisations. It was for these reasons that INSOL International and the World Bank Group established the Africa Round Table: to provide a platform for international bodies, regional institutions, policymakers and stakeholders from the continent, as well as experts in the field from other, and sometimes more mature jurisdictions, to come together and adopt a coordinated approach towards reforms and capacity building in the region.

The Africa Round Table initiative was established at a meeting organised by INSOL International in Dubai, in February 2010. The objectives of the Africa Roundtable were threefold:

- to have a high level dialogue with both private practitioners and public policymakers regarding insolvency reform in Africa, thereby encouraging reform experiences to be shared and challenges to be discussed in an open and frank forum;

- to elevate insolvency reform on the African policy agenda; and,

- to encourage insolvency policymakers and professionals to establish an annual forum to stimulate discourse and learning across the region.

The first meeting was convened on September 30, 2010 in Abuja, Nigeria. Since then, annual ARTs have been held in Mauritius, Ghana, Uganda, Zambia, Kenya and South Africa. Delegates have been drawn from government, the judiciary and the private sector from over 16 African Anglophone and Francophone countries. A growing number of international experts have also been present, including from bodies such as UNCITRAL and the African Development Bank.

A full report of the past roundtable events can be found on the INSOL web site www.insol.org.

Details of the World Bank Group’s insolvency reform program can be found at www.worldbank.org/insolvency.
We work alongside businesses to negotiate great outcomes at speed, finding the optimal solution to financial and operational challenges by reducing risk and protecting value where time and cash are tight.

Whether a company has gone from thriving to surviving an imminent crisis, or is just looking to ‘fix the roof while the sun is shining’, we can support management teams to:

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Programme

Thursday, 25 October 2018

Platinum Sponsors:

08.00 – 08.30 am
Registration and welcome coffee and tea

08.30 – 08.45 am
Welcome and introduction to the Africa Round Table initiative
Adam Harris, President, INSOL International, Bowmans, South Africa
Sebastian-A Molineus, World Bank Group

08.45 – 09.05 am
Welcome Address
Cross-border insolvency law: concepts, principles and theories
Mr. Justice Alastair Norris, Royal Courts of Justice, UK

This session will serve as an introduction to ART 2018 by explaining the concepts, principles and theories that underpin cross-border insolvency law from an international perspective. Concepts such as universalism and territorialism and what exactly cross-border insolvency entails, will be covered.

09.05 – 09.35 am
Keynote Address
Mozambique’s New Insolvency Law and Proposed Reforms
Mr Ragendra de Sousa, Minister of Industry and Commerce, Mozambique

09.35 – 10.45 am
Peer to Peer Discussion
This session provides a regional overview of insolvency law reforms on the continent, focusing on developments in five African countries. This year the emphasis will be on countries that have adopted the UNCITRAL Model Law on Cross-Border Insolvency.

10.45 – 11.10 am
Coffee Break

11.10 – 12.25 pm
The UNCITRAL Model Law on Cross-Border Insolvency: Origins, Development and Context
Moderator: André Boraine, University of Pretoria, South Africa
Jenny Clift, UNCITRAL
Jo-Anne Marais, Barak Fund Management, South Africa
Mustapher Ntale, Uganda Registration Services Bureau, Uganda
Victoria Weyulu, Office of the Attorney General, Namibia

This session will focus on the origins, development and context of the UNCITRAL Model Law. The purpose of the Model Law and the advantages of adopting it will be discussed, with a significant portion of the session being devoted to the issue of reciprocity.
12.25 – 1.30 pm  
**Lunch**

1.30 – 3.00 pm  
**Case Study: Recognition and Relief under the UNCITRAL Model Law on Cross-Border Insolvency**
George Weru, PwC, Kenya  
Chris Parker, DLA Piper, UK  
Stefan Smyth, PwC, South Africa  
Alison Timme, PwC, South Africa

The fact pattern contained in a case study will be used to demonstrate how the issues of recognition and relief are dealt with under the Model Law. This session will be presented in a practical way with judges and practitioners from various jurisdictions participating.

3.00 – 3.15 pm  
**Coffee Break**

3.15 – 4.15 pm  
**Case Study: Recognition and Relief under the UNCITRAL Model Law on Cross-Border Insolvency (Continued)**
This is a continuation of the previous session where the issues of recognition and relief under the Model Law will be demonstrated with the use of a case study.

4.15 – 5.30 pm  
**Co-operation and Co-ordination under the UNCITRAL Model Law on Cross-Border Insolvency**
Moderator: Mr. Justice Alastair Norris, Royal Courts of Justice, UK  
Hon. Justice Ibrahim Buba, Federal High Court, Nigeria  
Justice João Guilherme, Maputo City Court, Mozambique  
Justice Lydia Mugambe, High Court of Uganda, Uganda

In this session the fact pattern of the case study will be expanded further in order to demonstrate the issues of co-operation and co-ordination under the Model Law. Judges from common law and civil law jurisdictions will participate in this session and discuss any issues that arise in the context of co-operation and co-ordination.

5.30 pm  
**Close**

7.00 – 10.00 pm  
**Cocktails and Dinner**
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Friday, 26 October 2018

ART Open Forum

8.30 – 9.00 am Registration and welcome tea and coffee

9.00 – 9.10 am Welcome remarks
Adam Harris, President, INSOL International, Bowmans, South Africa
Antonia Menezes, Fellow, INSOL International, The World Bank Group

9.10 – 9.30 am Bridging the Gap
Antonia Menezes, Fellow, INSOL International, The World Bank Group

In this introductory session to Day 2, delegates who did not attend Day 1 of the programme will be informed and updated as to what transpired during Day 1.

9.30 – 10.45 am Insolvency Practitioners in a Cross-Border Context
Moderator: Amaechi Nsofor, Grant Thornton, UK
Prabha Chinien, Registrar of Companies, Mauritius
Lézelle Jacobs, University of Wolverhampton, UK
Bulisa Mbano, Grant Thornton, Zimbabwe
Alison Timme, PwC, South Africa

In this session the ethical obligations and fiduciary duties of insolvency practitioners in the context of insolvency proceedings will be examined. This session will also look at aspects surrounding the recognition of insolvency practitioners in the context of cross-border insolvencies.

10:45 – 11.10 am Coffee Break

11.10 – 12.10 pm Cross-Border Case Law
Moderator: Peter Declerq, Fellow, INSOL International, DCQ Legal, UK
Kabiito Karamagi, Fellow, INSOL International, Ligomarc Advocates, Uganda
Craig Martin, Fellow, INSOL International, DLA Piper, USA
Joyce Mbui, Bowmans, Kenya

In this session important case law covering principles of cross-border insolvency law will be discussed, highlighting important aspects that have already been addressed by courts in various international jurisdictions.
12.10 – 12.40 pm  **Business Meeting**  
Adam Harris, President, INSOL International, Bowmans, South Africa  
David Burdette, INSOL International  

This session will be used to update delegates on initiatives to improve and expand on the services and benefits INSOL International provides to its membership base in the African region. Technical publications, membership of INSOL International and other projects will inter alia be discussed during this session.

12.40 – 1.45 pm  **Lunch**

1.45 – 3.00 pm  **Available Options for Dealing with Multinational Insolvencies**  
Nastascha Harduth, Fellow, INSOL International  
Werksmans, South Africa  
Amaechi Nsofor, Grant Thornton, UK  
Okorie Kalu, Fellow, INSOL International Punuka & Associates, Nigeria  

This session will examine the available options for dealing with recognition in cross-border insolvency cases in various African jurisdictions. Applications made under the common law, under treaties or conventions and under the Model Law (with and without reciprocity clauses) will be demonstrated on a comparative basis with the use of a fact pattern contained in a basic case study and will cover both common law and civil law jurisdictions. The session will be presented in a moot style, with judges from the relevant jurisdictions hearing applications based on the fact pattern. Practitioners from the relevant jurisdictions will present their arguments in each case, with the judges furnishing their judgments immediately thereafter. The fact pattern will also contain additional aspects, such as the recognition of judgments and the claims of foreign creditors.

3.00 – 3.20 pm  **Coffee Break**

3.20 – 4.35 pm  **Available Options for Dealing with Multinational Insolvencies (Continued)**  
This is a continuation of the previous session.

4.35 – 4.45 pm  **Closing Remarks**
INSOL Africa Roundtable 2016 - Main Organising Committee

Adam Harris, President INSOL International, Bowmans, South Africa (Chair)
Miguel-Angelo Almeida, MA Solutions, Mozambique
David Burdette, INSOL International
José Caldeira, Sal & Caldeira Advogados, LDA, Mozambique
Dr. Nelson Jeque, British American Tobacco, Mozambique
Antonia Menezes, Fellow, INSOL International, The World Bank Group
Mahesh Uttamchandani, The World Bank Group

Africa Roundtable Curriculum Vitae – Moderators/speakers

André Boraine, University of Pretoria, South Africa
André Boraine is the dean of the Faculty of Law at the University of Pretoria, South Africa. His areas of specialisation include insolvency law and aspects of property law. Amongst others, he is the course leader of a short course and a master’s module in international insolvency law. He has published widely, and he is also a co-author of Meskin: Insolvency Law, a seminal work on insolvency law in South Africa. André is an honorary member of the South African Rescue and Insolvency Practitioner’s Association (SARIPA), a member of the Academics Forum of INSOL International and of the International Insolvency Institute. He acted as consultant to the World Bank team who conducted a ROSC analysis of the South African Insolvency and Creditor Rights system, and he served on the World Bank team who conducted a similar analysis of the Namibian system.

Hon. Justice Ibrahim Nyaure Buba, Federal High Court, Nigeria
Hon. Justice Ibrahim Buba was born in Njawai, Taraba State on the Mambilla, Plateau.

He had his early education in Government Secondary School Gembu, Taraba State and his LLB (Hons) from the University of Maiduguri, Nigeria, where he graduated with a Second Class Upper grade. He graduated from the Nigerian Law School with a Second Class Upper grade and was awarded with the Sir Lionel Brett award as the best graduating student in Criminal Procedure. He was called to the Nigerian Bar in 1986.

He was elevated to the Nigerian bench in January 2004. He was the pioneer presiding Judge of the Federal High Court in Katsina, Nigeria and has served in different divisions of the Federal High Court including Port Harcourt, Asaba, Lafia and Jos. He is presently a Judge at the Lagos Division of the Federal High Court of Nigeria.

Prior to his appointment, he was a prosecutor at the Ministry of Justice, Benin, Nigeria, and a lecturer at the University of Maiduguri. He worked for various law firms across Nigeria, and later founded and became principal partner of Fama Firm, Kaduna, Nigeria in 1989 and grew the firm to be one of the foremost law firms in Northern Nigeria. Within this time, he was a foremost criminal defence lawyer, taking part in various landmark criminal trials in Nigeria.

He has delivered various landmark decisions in commercial law during his time as Federal High Court Judge and attended numerous international conferences in Washington, New York, Singapore and the United Kingdom.
David Burdette, World Bank Group
INSOL International, Senior Technical Research Officer

David Burdette is a graduate of the University of South Africa (Bluris, LLB) and the University of Pretoria (LLD), South Africa. Prior to joining INSOL International as Senior Technical Research Officer in January 2017, David was a Professor of Law at the University of Pretoria (1997 to 2007) and a Professor of Insolvency Law at Nottingham Law School in the United Kingdom (2007 to 2016).

David is co-author of the leading insolvency text book in South Africa, Meskin, Insolvency Law and its operation in winding-up (LexisNexis, loose-leaf edition) and contributor to the first issue of Henochsberg on the Companies Act 71 of 2008 in South Africa (LexisNexis, loose-leaf edition). The proposals made in his LLD thesis have been included in draft legislation for the introduction of a unified Insolvency Act in South Africa. In 2007/2008 he was appointed to the King III Committee on Corporate Governance (South Africa) as convener of the subcommittee on corporate rescue.

David is a Senior Consultant for the World Bank (Debt Resolution and Business Exit) and was the INSOL Scholar for the Europe, Middle East and Africa region for the 2006/2007 academic year. David holds appointments as Extraordinary Professor in the Department of Mercantile Law, Faculty of Law at the University of Pretoria, South Africa, Extraordinary Professor in the Department of Mercantile Law, Faculty of Law, University of the Free State, South Africa, and as Visiting Professor at the Faculty of Law, Radboud University in the Netherlands. David has been an Honorary Member of the South African Restructuring and Insolvency Practitioner Association (SARIPA) since 2004, and is also a member of the Insolvency Lawyers Association (ILA) in the UK.

Prabha Chinien, Registrar of Companies/Director of the Insolvency Service, Mauritius

Mrs Prabha D. Chinien is a graduate in Law. She holds a B.A. (Hons) in Law from the U.K. She is a Barrister-at-law from the Middle Temple, London, UK. She is also a fellow of the Institute of Chartered Secretaries and Administrators of UK.

In March 2018, she was awarded the Presidential Medal for Distinguished Service (PDSM) in the public sector.

She was appointed Registrar of Companies in 1989. Since 2006 she is also the Registrar of Businesses and the Director of Insolvency Service as from the 1 June 2009 following the Insolvency Act 2009. She is a member of the Listing Executive committee of the Stock Exchange Limited and of the Financial Reporting Council. She has been involved in the drafting of various laws. Mrs Chinien has been a part time lecturer in Company Law and Insolvency Act at the University of Mauritius for a number of years. She has also been a resource person for the World Bank in the business reforms agenda.

She is presently the Chair of the International Association of Insolvency Regulators (IAIR).

Jenny Clift, Senior Legal Officer, ITLD/OLA, United Nations

Ms Clift is a Senior Legal Officer with the International Trade Law Division, United Nations Office of Legal Affairs, which functions as the Secretariat for the United Nations Commission on International Trade Law (UNCITRAL).

She has been secretary of UNCITRAL’s insolvency working group since December 2000, during which time the Working Group has completed:

- The UNCITRAL Legislative Guide on Insolvency Law (2004);
• The UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation (2009);
• Parts three and four of the Legislative Guide dealing with the treatment of enterprise
groups in insolvency (2010) and directors’ obligations in the period approaching
insolvency (2013);
• The UNCITRAL Model Law on Cross-Border Insolvency: the Judicial Perspective
(2011, updated in 2013), a guide for judges; and
• The Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-
Border Insolvency, a 2013 revision of the text adopted in 1997.

In February 2010, Ms Clift received INSOL International’s Scroll of Honour and in 2011
became a Fellow of the American College of Bankruptcy. She holds a BA. LLB (Hons) and
an LLM from Australia.

Peter J. M. Declercq, Fellow, INSOL International, DCQ Legal, UK
I am a seasoned private practice lawyer specialised in the areas of restructuring, cross-
border insolvency, and distressed investments. In 2018, with over 23 years of experience at
a number of large national and international law firms, I started in London (UK) the
specialised law firm DCQ Legal focused on Special Situations only. At this Firm I provide
legal and strategic counsel to stakeholders and their advisors in Special Situations.
Separately, I have also started an advisory firm that allows me to get directly involved in
Special Situations, either alongside stakeholders or as a representative of stakeholders. As
an English solicitor with a Dutch background who is also licensed to practice in New York
and the Netherlands, I benefit from both common law and civil law expertise and experience,
which greatly assists in finding the bespoke solution a Special Situation typically requires. I
am active member of the trade organisation INSOL International where I – in various roles
– work alongside The World Bank and UNCITRAL. As part of the 2008 pilot class, I
successfully completed the Global Insolvency Practice Course and was named a Fellow of
INSOL International. As a recognised expert, I regularly speak and write on the subject of
global insolvency law.

I am presently serving as chair of the INSOL Fellows UNCITRAL Model Law Implementation
Steering Committee, working closely with the World Bank and UNCITRAL in relation to the
Model Law implementation. I am further a member of the INSOL Fellows Steering
Committee as well as a member of Working Group 17 (Technical Education Production) of
the INSOL Taskforce 2021. I am also a lecturer on the UNCITRAL Model Law on Cross-
Border Insolvency Law at the new INSOL International Foundation Certificate in
International Insolvency Law Course and I have contributed the Module “Key Features of
Insolvency Framework – Commencement Standard” to the Judicial Training College hosted
jointly by The World Bank and INSOL International.

I earned my Propaedeutic in Law degree cum laude from Erasmus University in Rotterdam,
as well as my Juris Doctor degree. I then attended New York University School of Law as a
Fulbright Scholar, where I earned a Master of Laws degree.

Nastascha Harduth, Fellow, INSOL International, Werksmans, South Africa
Nastascha has been with Werksmans since 2008. She was admitted in 2010, and has been
a director within the firm’s Insolvency, Business Rescue and Restructuring practice since
2014. She has wide ranging experience in dispute resolution and commercial litigation, as
well as corporate debt recoveries, insolvency, business rescue and restructuring.
Nastascha often advises on the duties and responsibilities of directors, the risk of incurring
personal liability, and how to mitigate it.
Her experience in these areas of law extends well beyond the South African jurisdiction, and includes cross-border experience in the United States of America, Mauritius, Seychelles, Zambia and Botswana.

Nastascha regularly writes for various publications and contributes to the media on these topics among others. She is a member of the South African Restructuring and Insolvency Practitioners Association (SARIPA) and a fellow of The International Association of Restructuring, Insolvency & Bankruptcy Professionals (INSOL International).

Adam Harris, President INSOL International, Bowmans, South Africa
Adam Harris is a Director of Bowmans and specialises in corporate restructuring, business rescue and insolvency-related matters. He represents lenders, creditors and other institutions (such as professional indemnity insurers), as well as business rescue and insolvency practitioners, in the restructuring of companies, the administration of insolvent estates and the winding-up of companies. He also represents foreign appointees in relation to their recognition and asset recovery both in South Africa and in other African jurisdictions. Adam has advised a number of international creditors and practitioners amongst others in respect of various mining operations regarding the disposal and /or recovery of assets in South Africa.

Adam has attended to some of the leading cases on different aspects of business rescue and insolvency such as the constitutionality of interrogations, impeachable (“claw-back”) transactions, procedural aspects of liquidation applications and practitioners’ remuneration.

He is the current President of INSOL International. He also served for several years as a national councilor of the South African Restructuring and Insolvency Practitioners Association (SARIPA) and chaired the Law Society of South Africa’s Insolvency Committee.

He is one of the co-authors of the latest edition of “Mars, the Law of Insolvency”, a leading insolvency text in South Africa.

He holds BA, LLB and LLM degrees from the University of Cape Town.

Chief Anthony Idigbe, SAN, Fellow, INSOL International, Senior Partner at Punuka Attorneys & Solicitors, Nigeria
A seasoned legal practitioner with 35 years’ experience, Chief Anthony Idigbe is the Senior Partner at Punuka Attorneys & Solicitors, a fully integrated and multi-dimensional business law practice with offices in Lagos, Abuja and Asaba, Nigeria. He was elevated to the rank of Senior Advocate of Nigeria (equivalent of Queen’s Counsel) in 2000 and was admitted to practice law in Ontario, Canada in 2016.

He has advised clients on several complex transactions and has represented major companies and institutions in the highest courts of Nigeria. He is a well-known capital markets legal adviser and has advised and acted as Counsel to the Securities & Exchange Commission. He has also been involved as lead counsel in many ‘big ticket’ litigation briefs such as the Kano Trovan Clinical Trial Cases. He also possesses wealth of knowledge and experience in Telecommunications Law particularly the workings of the Nigerian Telecommunications Industry, having represented numerous clients in various telecommunications disputes. He has extensive experience in insolvency and restructuring, and has acted as counsel to several ex-bank executives in a continuous flow of civil and criminal cases arising from the 2009 Central Bank intervention and restructuring in the banking sector. Anthony Idigbe was appointed in 2013 as the National Coordinator for Nigeria, World Bank Global Forum of Law, Justice and Development Project on Treatment
Anthony graduated from the University of Ife, (now Obafemi Awolowo University), Ile-Ife in 1982 with a 2nd Class Upper Degree (Hons). He also received the Hon. Justice Orojo Prize for the Best Student in Company Law. He finished from the Nigerian Law School, Lagos in 1983 also with a 2:1. He has three Masters of Law degrees from the University of Toronto, Canada (2015), the Robert Gordon University (RGU), Scotland, UK (2012) and the University of Lagos, Akoka (1988); MBA from the Enugu State University of Science and Technology (ESUT) Enugu (1997); Diploma in Advertising from Advertising Practitioners Council of Nigeria (APCON), (1999), and was Lecturer, ESUT Business School, Enugu between 1999 and 2009 and APCON from 2000 – 2002. He is currently pursuing a doctorate in Law, with specialization in insolvency at the Osgoode Hall Law School, York University, Canada.

He is a Fellow of the Chartered Institute of Arbitrators, UK; INSOL International and the International Bar Association. He is also a member of the Institute of Directors and the International Insolvency Institute. He is a past President of the Business Recovery and Insolvency Practitioners Association of Nigeria (BRIPAN). He was the Founder and first Chairman, Capital Markets Solicitors Association (CMSA), and now functions as a Trustee of the Association. He has also served on various arbitration panels and is presently a member of the ICC Arbitral Panel. He is a Notary Public, author of many published books and articles, and a renowned resource person.

Lézelle Jacobs, University of Wolverhampton, UK
Dr Lézelle Jacobs is a senior Lecturer at the University of Wolverhampton, Wolverhampton Law School in the United Kingdom. She recently joined the School from the University of the Free State in South Africa where she taught Insolvency and Company Law. Dr Jacobs still holds a position as a Research Associate at the University of the Free State. In 2015 she graduated with an LLD from the University of the Free State, the focus of which was Fiduciary Duties of Business Rescue Practitioners in South Africa. Furthermore she is an Attorney of the High Court of South Africa.

Dr Jacobs has presented at numerous conferences, both domestic and International. She is a member of TMA South Africa and specialises in Corporate Insolvency, Corporate Rescue and Consumer Insolvency.

Okorie Kalu, Fellow, INSOL International, PUNUKA Attorneys & Solicitors, Nigeria
Okorie Kalu is a Partner in PUNUKA Attorneys & Solicitors. He heads the Insolvency and Business Restructuring, Banking litigation department of the firm.

He holds an LLB in Law and an LLM in Commercial Law from the Universite du Benin (now Universite du Lome, Togo). He also attended the University of Lagos and was called to the Nigerian Bar in 2004.

He is General Secretary of the Council of the Business Recovery and Insolvency Practitioners Association of Nigeria (BRIPAN) and acts as a facilitator in insolvency related training modules for BRIPAN and other bodies.

He also is 2nd Vice Chairman of the Nigerian Bar Association - Section on Business Law (NBA-SBL) Committee on Banking, Finance and Insolvency. In 2017, he was appointed as team lead for reform in the business indicator area of “Resolving Insolvency” on an NBA-SBL collaboration project with the Office of the Vice President of Nigeria which set up the
President of the Enabling Business Environment Council (PEBEC) to draft an Omnibus Bill reforming various laws and improve ease of doing business in Nigeria.

He was recently awarded the Fellow, INSOL International rank in addition to his practical vast experience in insolvency and restructuring practice and litigation in Nigeria, including cross border related insolvency matters.

He regularly contributes to the World Bank annual Doing Business publication on getting credit, closing a business/resolving insolvency and enforcement of contracts, etc. He has also contributed or co-authored several insolvency related articles and papers with Anthony Idigbe SAN.

He also has wide experience in criminal and commercial litigation.

**Kabiito Karamagi, Fellow, INSOL International, Ligomarc Advocates, Uganda**

Kabiito Karamagi is the current Managing Partner of Ligomarc Advocates, based in Kampala Uganda. He is an Advocate of the High Court of Uganda with nearly 20 years’ experience in corporate and financial law. Kabiito is also the leading insolvency and restructuring lawyer and practitioner in Uganda having participated in nearly all notable insolvency and restructuring cases in Uganda, often representing secured lender interest in the enforcement of creditor rights. He is also widely regarded as the architect of modern Insolvency law in Uganda for his notable role in the study and reform of insolvency laws as part of a team of consultants retained by the Government of Uganda. Kabiito has also been retained by the Government of Uganda as part of the team of consultants to study and reform commercial laws governing companies, mortgages, leasing etc. He has also worked as a Consultant for the World Bank Group on assignments in Rwanda and Cameroon.

**Jo-Anne Marais, Barak Fund Management, South Africa**

Jo-Anne is a Chartered Accountant with International corporate distressed restructuring & turnaround experience; from an advisory, executory and bank-side perspective. Jo-Anne is considered to be a Business Rescue industry expert, with in excess of 15 years’ experience and is a frequent speaker at conferences and industry events. Jo-Anne is a board member of the Turnaround Management Association – Southern Africa and leads the Financial Institution subcommittee which is responsible for the liaison between Turnaround practitioners and the banking industry.

Jo has recently joined Barak Fund Management with a view to assist a portfolio of borrowers with operational turnaround and restructuring whilst exploring opportunities for synergistic growth. Prior to joining Barak, Jo spent five years at Absa Bank Limited and was responsible for the Commercial, Agri, CPF, Wealth and Africa distressed portfolios. Jo-Anne’s early career in distressed debt was spent in London working for PwC in the Business Recovery Services division.
Craig Martin, Fellow, INSOL International, DLA Piper, USA
Craig Martin has spent his legal career working on complex distressed situations.

Craig has represented numerous parties in a variety of cases, including equity committees, committees of unsecured creditors, bank groups, indenture trustees and debtors. He has also advised purchasers of assets in bankruptcy auctions and court-approved sales and frequently provides bankruptcy-specific advice in complex mergers and acquisition situations involving distressed entities.

While Craig has appeared in the bankruptcy courts all across the US, his work frequently focuses on cross-border situations. He has acted as counsel in cases in Canada, Germany, Ireland, Hong Kong, Spain, Bermuda, the Dominican Republic, Africa, the UK and Argentina. Craig has also acted as first-chair litigation counsel in a number of cases involving terms of bond indentures, such as x-clauses, permitted indebtedness clauses and other covenants.

Bulisa Mbano, Grant Thornton, Zimbabwe
Bulisa Mbanoan is an Associate Director in the Corporate recovery and re-organisation department and at Grant Thornton Zimbabwe. He holds a Bachelor of Business Administration (Accounting) degree with Solusi University. He is a Chartered Accountant (Zimbabwe); a Certified Public Accountant; a Registered Public Auditor; and a Registered Estate Administrator.

Bulisa has been with Grant Thornton for over 10 years and has experience in audit, tax, transaction advisory services, corporate recovery, re-organisation and restructuring. He has been in the insolvency department at Grant Thornton for the past 7 and has been an integral part in high level judicial management, curatorship, corporate finance and liquidation assignments.

His key responsibilities include:
- Supervising the judicial management and liquidation assignments;
- Statutory appointment to Insolvency Assignments;
- Preparation of members and creditors reports;
- Preparation and implementation of business plans;
- Implementing schemes of arrangement/compromises;
- Managing trust funds for insolvent estates; and
- Overseeing financial management of companies under judicial management.

Bulisa is also a member of the ICAZCPD committee and a tutor for the UNISA undergraduate B. compt programme. He is married and blessed with two daughters and plays Golf when he gets the time.

Joyce Mbui, Bowmans, Kenya
Joyce Mbui is a partner at Bowmans Kenya (Coulson Harney LLP) in the corporate commercial department. Her ability to skilfully navigate the legal landscape has earned her respect from clients (both locally and internationally) and made her immensely instrumental in the success of key transactions including the recent USD 2.2 billion restructuring of Kenya Airways Plc – the largest restructuring deal in Africa.

Joyce has vast experience in financing, capital markets, restructuring and corporate and commercial law. She qualified as an English solicitor in England & Wales and is an advocate of the High Court of Kenya. She has recently been named one of the ‘Top 40 Women under 40’ in Kenya by the Business Daily.
Antonia Menezes, Fellow, INSOL International, World Bank Group
Antonia is a Senior Financial Sector Specialist with the Debt Resolution & Insolvency Team based in Washington D.C. The focus of her work is providing technical assistance and advice to governments on insolvency and debt resolution reforms and NPL management, with a particularly emphasis on work in Sub-Saharan Africa and South Asia. Prior to joining the World Bank Group, Antonia was an attorney at two international law firms in Paris and London. Ms. Menezes holds an LLM from McGill University, an LPC from the Oxford Institute of Legal Practice, and an LLB from the London School of Economics & Political Science. She is a 2014 INSOL Fellow and sits on the INSOL Fellow’s Cross-Border Insolvency Committee. Ms. Menezes has published widely in the field of insolvency and represents the World Bank Group at Working Group V (Insolvency) of the United Nations Commission on International Trade Law. She is from Harare, Zimbabwe.

Sebastian-A Molineus, World Bank Group
Sebastian-A Molineus, a German national, is currently a Practice Director for the World Bank Group’s (WBG) Finance Competitiveness & Innovation Global Practice. In this role, he is responsible for delivering the Practice’s financial, advisory and knowledge, and convening services across the Africa region, in addition to the global agenda on Financial Inclusion and Access.

Sebastian joined the WBG’s International Finance Corporation (IFC) in 2002, where he was a Project Manager for the Russia Corporate Governance Project, based in Moscow. He later worked in the IFC’s Middle East & North Africa Department, where he led a region-wide Corporate Governance Program, based in Cairo. In 2008, he joined the Financial and Private Sector Development Vice-Presidency (FPD) as a Sr. Operations Officer in the Capital Markets Department, and between 2010 and 2012 he co-led the change management initiative to implement Global Practices across FPD. From 2012-2014, Sebastian was the Practice Manager of the Capital Markets Practice, where he was responsible for strategic, knowledge, resource, portfolio, and talent management.

Prior to joining the WBG, Sebastian worked at the OECD in the Financial, Fiscal, and Enterprise Affairs Division, where he focused on corporate governance and financial reporting reforms.

Sebastian holds an MBA from the HEC School of Management in France, and a Masters in European and International Law from the University of Passau’s School of Law in Germany. He is married with four children.

Justice Lydia Mugambe, High Court of Uganda, Uganda
Justice Lydia Mugambe is a versatile female Ugandan lawyer and Judge, with over 20 years legal experience at national, regional and international levels. She holds an LLM in Human Rights and Democratisation in Africa from the Centre for Human Rights at the University of Pretoria in South Africa; an LLM in International Law, Human Rights and Intellectual Property Rights Law from Lund University in Sweden; an LLB (Hons) Degree from Makerere University in Uganda and a Diploma in Legal Practice from the Law Development Centre in Uganda.

Since 2013, Justice Mugambe is a judge of the High Court in Uganda where she works in the Civil Division as well as the International Crimes Division. As part of her docket in the Civil Division, she handles insolvency and winding up matters. She also handles judicial review applications which largely concern human rights violations. She is the chairperson of
the Judiciary Editorial Board in Uganda and a member of the National and International Associations of Women Judges and a trainer in the Public Interest litigation clinic at the School of Law in Makerere University. Before that, she worked for ten years at the International Criminal Tribunal for Rwanda (UNICTR) in Arusha, where she served as a Legal officer in Chambers and as an Appeals Counsel in the Appeals and Legal Advisory Division in the Office of the Prosecutor. Prior to that she worked as a Legal researcher at the Human Rights Institute of the International Bar Association (IBA) in London. She has volunteered as a researcher and rapporteur at sessions of the African Commission on Human and Peoples rights and attended several sittings of the African Court and Commission and was a visiting Fellow and researcher at the Human Rights Institute at Columbia University in New York. She also volunteered as a human rights researcher at the human rights NGO- INTERIGHTS in London. Before this, Justice Mugambe worked as a Magistrate Grade One in the Judiciary of Uganda and as a Legal Officer at the Law Development Centre Legal Aid Clinic from 1997 to 2000.

She has effectively handled and directed landmark insolvency and winding up processes in Uganda and contributed to the development of jurisprudence and standards in this area in this country.

Justice Mugambe is the winner of the global 2017 Women’s Link International Gavel Award for her distinguished work on issues of gender-based justice. Also, in recognition of her hard work, she won the prestigious Isis-WICCE and American Embassy Women of Courage 2015 Award in the Human Rights and Democracy category, for her exceptional qualities of dispensing justice and human rights.

**Hon. Mr. Justice Alastair Norris, High Court of England and Wales, UK**

After reading law at St John’s College, Cambridge Mr Justice Norris was called to the Bar by Lincoln’s Inn and practised in London as a barrister and as Queen’s Counsel until 2001. He was then appointed as the Chancery Judge at Birmingham, where he sat for 6 years, presiding over many insolvency cases (including the insolvency of the MG-Rover Group). Some of his judgments have been adopted as mainstream approaches across the European Union. On appointment to the High Court (Chancery Division) in 2007 he returned to London where his insolvency and restructuring work has continued. He is currently the Chair of the Insolvency Rules Committee and has led the preparation of the new English Insolvency Rules (and assisted in formulating the High Court’s Insolvency Practice Direction.) He is an active participant in the Africa Round Table and has participated in judicial training for insolvency judges in Abuja, Cape Town and Kampala (as well as India, Korea and at Judicial Colloquia convened by INSOL, UNCITRAL, and The World Bank).

**Amaechi Nsofor, Grant Thornton, UK**

Amaechi is a Corporate Finance Practitioner and heads up Grant Thornton UK LLP’s Africa Business Group and Natural Resources industry group. A seasoned provider of corporate advisory services, working alongside the 24 African member firms in the network, he advises corporates facing financial difficulties and their stakeholders.

He supports clients to identify and resolve issues that impact profitability and liquidity in order to protect value and facilitate full rehabilitation through a combination of strategic, operational and financial support. Over the last 18 years, Amaechi has advised Boards in over 75 companies and delivered transactions with an aggregate value of circa £40 billion. Amaechi has worked across Africa including recent and live transactions in Nigeria, Morocco, Burkina Faso, Kenya, DRC, South Africa, Mozambique, Zimbabwe and Zambia on financial restructuring, insolvency, corporate finance, crisis stabilisation, asset tracing and recovery, debt advisory, change management and operational restructuring.
In addition to speaking at the inaugural World Energy Assembly event hosted by World Oil Council in Nigeria in 2016, Amaechi published an article in the Business Restructuring & Insolvency Report in 2017 which shared guidance to enhance a West African country’s insolvency framework and has recently been on a panel at the Financial Times Live event exploring socially responsible investing in Africa.

**Mustapher Ntale, Uganda Registration Services Bureau (URSB), Uganda**

Mr. Mustapher Ntale is the Manager of the Liquidation/Official Receiver Unit at Uganda Registration Services Bureau (URSB). He is key in insolvency reforms within URSB and Uganda as a whole and he is currently involved in the Administration of Uganda Telecom Limited (UTL). He has represented Uganda at both national and international meetings, including the International Association of Insolvency Regulators (IAIR) and United Nations Commission on International Trade Law (UNCITRAL) Working Group V.

Mr. Ntale holds a Master of Laws (LLM) degree from the University of Cambridge (UK), a Bachelor of Laws (LLB) degree from Makerere University and a Postgraduate Diploma in Legal Practice from Law Development Centre. He received the Chief Justice’s Prize (2007), the Attorney General’s Prize (2009) and the Commonwealth Shared Cambridge Scholarship (2009/10) for outstanding academic performance.

Prior to joining URSB, Mr. Ntale worked with Newmark Advocates, Kasimbazi, Kamanzi & Co. Advocates and taught law at Islamic University in Uganda. He is an Advocate, a member of Uganda Law Society and East Africa Law Society.

**Chris Parker, DLA Piper, UK**

Chris is a Partner in DLA Piper’s Restructuring Department based in London.

Chris’ practice is predominantly international. He co-leads DLA Piper’s global bank resolution group and has substantial experience dealing with distressed financial services situations, including under the Bank Recovery and Resolution Directive, having acted as international counsel on the first special administration of an EU branch of a non-EU bank in Cyprus. He regularly advises governments, regulators, development banks and investment banks on restructuring and insolvency matters and has advised on the redrafting of insolvency and bank resolution laws in Europe, Africa and Asia.

Chris has particular focus on complex formal insolvency processes in a global context. He leads the contentious restructuring group in London, working on international fraud and asset recovery, investigations and litigation in relation to various financial structures. Noteworthy investigations experience includes advising on two of the UK’s largest retail collapses of the last few years.

Chris has represented officeholders and institutions on high-profile, complex proceedings including acting for the administrators of Lehman Brothers Limited in the Waterfall I litigation, which was recently successful in the UK Supreme Court.

Further experience includes advising:

- a government ministry in a development bank funded assignment to amend insolvency legislation in that jurisdiction
- the special administrator appointed in relation to the EU branch of an African registered credit institution which had been identified as an institution of primary money laundering concern by FinCEN
- a distressed Sub-Saharan African credit institution in respect of its anticipated resolution and restructuring options
- for a Mauritian protected cell company ("PCC") in litigation in the UK following the English court appointing provisional liquidators over the PCC.
- a UK sector regulator advising on the potential restructuring of a major market participant in that sector
- a government in contingency planning for the potential failure of a key provider of infrastructure services
- the officeholders of a PLC in leading a very substantial and complex investigation and subsequently pursuing directors for breach of duty claims
- the Irish National Asset Management Agency in relation to a circa £200 million debt owed by a group of companies to a high-profile property developer, which was ultimately repaid in full using a series of CVAs
- a global investment bank in proceedings concerning swap priority arrangements relating to the securitisation of a nursing home operator
- the administrators of Lexi Holdings in substantial investigations and consequent cross-border litigation arising from a fraud perpetrated against Lexi Holdings. This included over 15 reported judgments in the High Courts and Court of Appeal as well as court litigation in Spain, Greece, Portugal, France and Pakistan.

Chris joined DLA Piper in 2007. He has previously spent a year on secondment with a major clearing bank. He is a member of the Association of Business Recovery Professionals and a member of INSOL’s Taskforce 2021 Committee.

**Stefan Smyth, PwC, South Africa**

Stefan is the PwC Africa Restructuring and Insolvency leader, based in South Africa, coordinating restructuring solutions through specialist teams and hubs in the South, East and West. He focuses on complex multi-creditor restructuring situations, business rescue, turnaround and strategic business reviews across Africa and most notably was lead of the Executive team of the African Bank Curatorship which successfully implemented a ‘bail in’ resolution of the Bank, driving a change in legislation to achieve this.

He is highly familiar with operational as well financial restructuring and is adept at commercial leadership, strategic repositioning and value preservation. His experience encompasses restructuring, refinancing and distressed M&A in a variety of sectors restoring liquidity, creating stability for restructuring to resolve debt service and rebuild shareholder value.

He takes appointments as both a Business Rescue Practitioner and Receiver and is a regular speaker on Restructuring and Insolvency particularly with INSOL International and SARIPA SA both on the African continent and internationally (most recently leading a panel at INSOL New York 2018). His forte is stakeholder and crisis management in complex, cross border special situations matters and is highly experienced working as lead advisor to both domestic and international lenders. Key sector expertise includes: Mining, Construction, Consumer/Retail, Financial Services and large-scale Agri.

**Alison Timme, PwC, South Africa**

Alison Timme is a Director in PwC’s restructuring division in South Africa. Soon after graduating from the University of Cape Town, Alison specialised in restructuring and business rescue and has since spent approximately 14 years advising on stressed and distressed companies.
Alison spent several years working in London, leading a number of high profile and successful administrations (rescue) and complex restructurings, following which she returned to South Africa to contribute to the development of the local restructuring and rescue industry.

Alison’s key areas of expertise include financial restructuring, rapid assessments and liquidity reviews, operational restructuring (including working capital assessments), contingency planning and options analysis, advising business rescue practitioners and taking Chapter 6 Business Rescue appointments. In addition to both listed and unlisted corporates, key clients include major banks, financial institutions, practitioners and key stakeholders in business rescue.

More recently, she was a member of the senior advisory team on the African Bank curatorship.

Alison currently represents South Africa on the INSOL technical newsletter committee and is the author of published articles for INSOL International and the annual Business Restructuring and Insolvency Report (Times Group), having also lectured on the topic of business rescue as a guest at the Graduate School of Business in Cape Town. Alison is a CA(SA) and licensed Business Rescue Practitioner.

George Weru, PwC, Kenya
George is a Director in PwC’s Business Restructuring Services Practice with over 10 years’ experience in providing business restructuring, independent business reviews and insolvency services in various jurisdictions including Kenya, Ghana, Cayman Islands and Mauritius.

He is a Licensed Insolvency Practitioner in Kenya and he has been involved in and project managed a number of complex restructuring and insolvency assignments. Prior to joining PwC, George worked in the Cayman Islands where he was involved in a number of reorganisation, independent business reviews and insolvency assignments concerning financial services firms (banks and hedge funds).

Some of the matters that George has been involved with over time include the liquidation of the Bank of Credit and Commerce International (BCCI), Ghana Airways Liquidation, Administration of BAI (Mtius), Administration of ARM Cement Plc, Kenya Airways Restructuring, among others.

George holds an MBA in Finance from the University of Leicester, Bachelor of Laws degree from the University of Nairobi, is Certified Public Accountant (Kenya), Chartered Financial Analyst (CFA) and a Certified Fraud Examiner (CFE).

Victoria Weyulu, Office of the Attorney General, Namibia
Ms Victoria Weyulu is an admitted Legal Practitioner of the High Court of the Republic of Namibia and employed as a Senior Legal Officer in the Directorate: Law Reform, Ministry of Justice. The Directorate: Law Reform assists the Namibian Law Reform and Development Commission (LRDC) with the attainment of its objectives under the Law Reform and Development Commission Act, 1991 (Act No. 29 of 1991)(as amended). At the Directorate: Law Reform, Ms Weyulu is tasked to spearhead the review of the Insolvency Act, 1936 (Act No. 24 of 1936), the reform of Namibia’s Secured Transactions regime and also assists the Ministry of Finance with the finalization of Namibia’s Public Finance Management Bill.
Ms Weyulu holds a B.Juris and LL.B from the University of Namibia, as well as an LLM (Cum Laude) in International Trade, Business and Investment Law from the University of the Western Cape. To date, Ms Weyulu has published a number of papers that deal with insolvency law and cross-border insolvency issues in Namibia. Her notable publications include A Critical Examination of Namibia’s Insolvency Procedures for the Sequestration, alternatively, Liquidation and winding-Up of MSMEs published by the International Insolvency Institute, The Reform of Namibia’s Cross-Border Insolvency Framework published by UNCITRAL at its 50th Congress, as well as A Critical Review of Namibian Insolvency Law published in book by the LRDC entitled ‘The LRDC of Namibia at 25’. Ms Weyulu was also instrumental in compiling the Discussion Paper on Issues Relating to the Insolvency Act, 1936 (Act No. 24 of 1936) published by the LRDC in 2015.
INSOL International is a world-wide association of national associations of accountants and lawyers who specialise in turnaround and insolvency. There are currently over 40 Member Associations with over 10,500 professionals participating as members of INSOL International. Individuals who are not members of a member association join as individual members.

INSOL also has ancillary groups that represent the judiciary, regulators, lenders and academics. These groups play an invaluable role within INSOL and provide valuable forums for discussions of mutual problems.

INSOL was formed in 1982 and has grown in stature to become the leading insolvency association in the world. It is a valuable source of professional knowledge, which is being put to use around the world on diverse projects to the benefit of the business and financial communities.

**INSOL’S Mission**

*INSOL with its Member Associations will take the leadership role in international turnaround, insolvency and related credit issues; facilitate the exchange of information and ideas; encourage greater international co-operation and communication amongst the insolvency profession, credit community and related constituencies.*

**Our Goals:**

- To work with and involve our Member Associations in our activities
- To implement research into international and comparative turnaround and insolvency issues
- To participate in Government, NGO and intergovernmental advisory groups and to liaise with these institutions on relevant issues
- To assist in developing cross-border insolvency policies, international codes and best practice guidelines
- To provide a leadership role in international educational matters relating to turnaround and insolvency topics
- To facilitate the exchange of knowledge amongst our Member Associations through our conferences and publications
INSOL Member Benefits

In today’s shrinking global marketplace INSOL International offers the opportunity to network and exchange information with colleagues in over 100 countries around the world. All 10,500+ members are listed in our annual directory, and we work with over 40 members associations to ensure that members benefit from both local and international connections.

Financial savings
As a member of INSOL you can make substantial savings on conference registration fees. With member rates for both early bird and standard registration costs, your membership will help pay for itself!

Our conferences give you the opportunity to network with colleagues from your own country and world-wide, whilst the educational program keeps you up to date with the latest cases and changes in the profession. INSOL also arranges one-day seminars in various destinations to provide educational cross-border programs, members again are entitled to a discounted rate.

International knowledge resource straight to your desk
- INSOL World, quarterly journal. Features current events and developments concerning the profession world-wide.
- Technical Electronic Newsletter emailed monthly. This contains information on recent cases, new and pending legislation, journal articles and new items.
- INSOL Technical Papers Series (2006-) covers a wide variety of hot topics each year.
- Case Studies covering major cross-border cases. The objective of each case study is to give an insight into significant practical issues that have come up in these cases and to find out what lessons can be learned for the future.
- Publications once or twice a year - members of INSOL receive free of charge a personally mailed copy of any publications produced by INSOL.
- www.insol.org is updated regularly to give members current information regarding INSOL International. The members-only section contains past conference papers.
- Small Practitioners website for smaller practitioners to display their personal profiles for other practitioners to view.
- Younger Members website for younger members to display their personal profiles for other practitioners to view.
- www.GlobalINSOLvency.com website hosted by the American Bankruptcy Institute on behalf of the INSOL Member Associations. This is a valuable source of information for members. It provides INSOL members with a comprehensive overview of global insolvency issues.
- Membership Directory published annually. It is a focal point of reference for organisations and individuals working in the business-rescue and insolvency profession in over 80 countries world-wide.

So join today and start networking to maximise your business connections in your own country and throughout the world. Invest in your membership of INSOL and you will find that you benefit from this one small step to sign up and become part of the international profession.

For further information on INSOL International please contact:
Jelena Wenlock, Communications Manager, INSOL International
6-7 Queen Street, London, EC4N 1SP
Tel: (+44) (0) 20 7248 3333
Fax: (+44) (0) 20 7248 3384
E-mail: jelena@insol.ision.co.uk
The Group of Thirty-Six features some of the most prominent and influential firms within the insolvency and turnaround profession. The aim of the Group of Thirty-Six is to work with INSOL to develop best practice guidelines and develop legislation to enhance the ability of practitioners globally to save businesses throughout the world.

AlixPartners LLP
Allen & Overy LLP
Alvarez & Marsal
Baker & McKenzie LLP
BDO
Brown Rudnick LLP
BTG Global Advisory
Clayton Utz
Cleary, Gottlieb Steen & Hamilton LLP
Clifford Chance LLP
Conyers Dill & Pearman
Davis Polk & Wardwell LLP
De Brauw Blackstone Westbroek
Deloitte LLP
Dentons
DLA Piper
EY
Ferrier Hodgson
Freshfields Bruckhaus Deringer LLP
FTI Consulting
Goodmans LLP
Grant Thornton
Greenberg Traurig LLP
Hogan Lovells
Huron Consulting Group
Jones Day
King & Wood Mallesons
Kirkland & Ellis LLP
KPMG LLP
Linklaters LLP
Morgan, Lewis & Bockius LLP
Norton Rose Fulbright
Pepper Hamilton LLP
Pinheiro Neto Advogados
PwC
Rajah & Tann Asia
RBS
RSM
Shearman & Sterling LLP
Skadden, Arps, Slate, Meagher & Flom LLP
South Square
Weil, Gotshal & Manges LLP
White & Case LLP
INSOL International

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Executive Committee Directors
President – Adam Harris, Bowmans, Republic of South Africa
Vice-President – Julie Hertzberg, Alvarez & Marsal, USA
Treasurer – Paul M. Casey, Deloitte Restructuring Inc., Canada
Executive Committee – Scott Atkins, Norton Rose Fulbright, Australia
Chief Executive Officer – Claire Broughton, INSOL International, UK
Chief Operating Officer – Jason Baxter, INSOL International, UK

Directors
Jasper Berkenbosch, Fellow, INSOL International, Jones Day (INSOLAD), The Netherlands
Juanito Damons, Legal Trust (Pty) Ltd. (South African Restructuring & Insolvency Practitioners Association), Republic of South Africa
Hugh Dickson, Grant Thornton (RISA Cayman), Cayman Islands
Jane Dietrich, Fellow, INSOL International, Cassels Brock & Blackwell, Canada*
Nick Edwards, Deloitte (Association of Business Recovery Professionals-R3), UK
Brendon Gibson, KordaMentha (Restructuring, Insolvency & Turnaround Association of New Zealand Incorporated), New Zealand
Timothy Le Cornu, Fellow, INSOL International, KRYs Global, Channel Islands
Mat Ng, JLA Asia (Hong Kong Institute of Certified Public Accountants), China
Catherine Ottaway, HOCHE Société d'Avocats (INSOL Europe), France
Peter Sargent, Kingsland Business Recovery, UK
Ronald Silverman, Hogan Lovells (American Bankruptcy Institute), USA
Mahesh Uttamchandani, The World Bank Group, USA*
Tiffany Wong, KPMG, Hong Kong (PRC)*

*Nominated Directors
INSOL International Member Associations

American Bankruptcy Institute
Asociacion Argentina de Estudios Sobre la Insolvencia
Asociación Uruguaya de Asesores en Insolvencia y Reestructuraciones Empresariales
Association of Business Recovery Professionals – R3
Association of Restructuring and Insolvency Experts
Australian Restructuring, Insolvency and Turnaround Association
Bankruptcy Law and Restructuring Research Centre, China University of Politics and Law
Business Recovery and Insolvency Practitioners Association of Nigeria
Business Recovery and Insolvency Practitioners Association of Sri Lanka
Canadian Association of Insolvency and Restructuring Professionals
Commercial Law League of America (Bankruptcy and Insolvency Section)
Especialistas de Concursos Mercantiles de Mexico
Finnish Insolvency Law Association
Ghana Association of Restructuring and Insolvency Advisors
Hong Kong Institute of Certified Public Accountants (Restructuring and Insolvency Faculty)
INSOL Europe
INSOL India
INSOLAD – Vereniging Insolventierecht Advocaten
Insolvency Practitioners Association of Malaysia
Insolvency Practitioners Association of Singapore
Instituto Brasileiro de Estudos de Recuperacao de Empresas
Instituto Iberoamericano de Derecho Concursal
International Association of Insurance Receivers
International Women’s Insolvency and Restructuring Confederation
Japanese Federation of Insolvency Professionals
Korean Restructuring and Insolvency Practitioners Association
Law Council of Australia (Business Law Section)
Malaysian Institute of Accountants
Malaysian Institute of Certified Public Accountants
National Association of Federal Equity Receivers
NIVD – Neue Insolvenzverwalterverseinfung Deutschlands e.V. (Germany)
Recovery and Insolvency Specialists Association (Bahamas)
Recovery and Insolvency Specialists Association (BVI) Limited
Recovery and Insolvency Specialists Association (Cayman) Limited
Recovery and Insolvency Specialists Association of Bermuda
REFOR-CGE, Register of Insolvency Practitioners within “Consejo General de Economistas, CGE”
Restructuring Insolvency & Turnaround Association of New Zealand
Russian Union of Self-Regulated Organisations of Arbitration Managers (RUSROAM)
Society of Insolvency Practitioners of India
South African Restructuring and Insolvency Practitioners Association
Turnaround Management Association (INSOL Special Interest Group)
Turnaround Management Association Brasil (TMA Brasil)
INSOL Africa Round Table 2018 - CASE STUDY

General Instructions

- You will find several copies of the UNCITRAL Model Law on Cross-border Insolvency on your table. Please look through it and familiarise yourself with the key provisions of the Model Law.

- You will be asked to participate in 2 scenarios based on a single fact pattern:
  - In the first scenario, you will be asked to have a group discussion on your table to answer several questions on recognition and relief of insolvency officeholders ("IOH") in different (fictional) jurisdictions.
  - In the second scenario, each table will be split into three different jurisdictions and asked to negotiate several points on cross-border insolvency. Separate briefs will be given to participants allocated to each of the three jurisdictions. These briefs will contain details of what IOH of each jurisdiction wishes to achieve for their creditors.

- During each scenario, there will be moderators visiting tables to help facilitate the discussion and answer any questions the participants may have.

- After each scenario, there will be a sharing session based on conclusions reached by each table. Then, the moderator will give feedback on the topics discussed.

- The estimated time table for this session is as outlined below:

<table>
<thead>
<tr>
<th>Scenario 1</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Introduction</td>
<td>5 minutes</td>
</tr>
<tr>
<td>Read scenario 1</td>
<td>5 minutes</td>
</tr>
<tr>
<td>Discussion of scenario 1</td>
<td>25 - 30 minutes</td>
</tr>
<tr>
<td>Sharing / feedback</td>
<td>15 - 20 minutes</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Scenario 2</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Read scenario 2</td>
<td>5 minutes</td>
</tr>
<tr>
<td>Discussion among sub-groups</td>
<td>20 - 25 minutes</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Coffee Break</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Negotiation</td>
<td>25 - 30 minutes</td>
</tr>
<tr>
<td>Sharing and closing</td>
<td>30 minutes</td>
</tr>
</tbody>
</table>
Scenario 1

Ujenzi Telecomm Limited ("UTL") is a company incorporated in Country A with its registered office in Country A. UTL is a manufacturer of mobile telephones which it supplies across Africa. UTL has undergone significant financial difficulties in recent years as a result of (1) research and development costs and (2) a fraud perpetrated by one of its directors and it is now in a formal insolvency proceedings in Country A and an insolvency officeholder ("IOH") has been appointed.

The IOH has discovered that one of UTL’s directors has fraudulently transferred money belonging to UTL into his own personal account in Country B. It is believed that the director fled Country A and now resides in Country C.

The legal status of each countries is as follows:

<table>
<thead>
<tr>
<th>Country A</th>
<th>Country B</th>
<th>Country C</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Adopted and implemented UNCITRAL Model Law on cross-border insolvency</td>
<td>• Adopted and implemented UNCITRAL Model Law on cross-border insolvency</td>
<td>• Has not adopted UNCITRAL Model law on cross-border insolvency</td>
</tr>
<tr>
<td>• Local insolvency rules require IOHs to investigate fraud in relation to the debtor (i.e. Country A) company</td>
<td>• Local insolvency rules require IOHs to investigate fraud in relation to the debtor company however there is no specific power to publicly examine a director in court</td>
<td>• Country C is not a party to any intra-African recognition convention/provisions</td>
</tr>
<tr>
<td>• Among IOHs powers is to apply for directors to public examination in court</td>
<td>• Local insolvency rules allow IOH to claw back on assets that have been wrongly transferred</td>
<td>• Country C is a common law jurisdiction</td>
</tr>
<tr>
<td>• Local insolvency rules allow IOH to claw back assets that have been wrongly transferred</td>
<td>• UNCITRAL Model Law as adopted in Country B is subject to there being reciprocal arrangements for recognition</td>
<td>• It does have local insolvency laws which provides IOHs to investigate suspicious transactions, including power to examine officers and third parties in court.</td>
</tr>
</tbody>
</table>

Please consider the following questions:

1. What issues would IOH of Country A wish to determine with his advisors in considering whether he would get recognition in Country B/Country C?
2. What matters might a court consider in recognising an IOH in Country B/Country C? If so, what requirements is he/she likely to need to satisfy?
3. Once the IOH is recognised, what powers (i.e. relief) would he/she ask the court for in Country B/Country C in order to deal with the issues in the insolvent estate?
Scenario 2

Scenario 2 will expand on the facts illustrated in Scenario 1. UTL has two subsidiaries: Ujenzi Software Limited ("USL") in Country B and Ujenzi Phone Limited ("UPL") in Country C. Both USL and UPL manufacture and supply parts that are used in the manufacturing of UTL's telephones. Each are registered as corporate entities in the relevant jurisdictions.

UTL carries out the head office functions and is responsible for most of the main management functions of the entire group. Its board makes executive decisions and most of the group's HR and other ancillary functions are operated through UTL.

USL designs and produces unique software that are fundamental to the operation and desirability of UTL's mobile telephones. This software is sophisticated and market leading and contributed largely to the success of UTL in becoming a notable mobile telephone manufacturer in Africa.

UPL manufactures the handset that houses components for a mobile telephone. The handsets that UPL manufactures are standard quality product that can be easily found in other countries around the region. However, in order to reduce the cost of intermediaries and enjoy benefits of economies of scale, UTL set up a subsidiary company in Country C to manufacture and supply all its telephone handsets.

UTL then takes the software and handsets from USL and UPL and assembles them in its factory in Country A. The finished mobile telephones are therefore sold from UTL using its own distribution system across Africa and beyond.

<table>
<thead>
<tr>
<th>Country A</th>
<th>Ujenzi Telecomms Limited</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>All intellectual property is registered in the name of UTL</td>
</tr>
<tr>
<td></td>
<td>Owns distribution network across Africa</td>
</tr>
<tr>
<td></td>
<td>Assembles parts supplied by USL and UPL</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Country B</th>
<th>Ujenzi Widgets Limited</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Produces software for the mobile telephones</td>
</tr>
<tr>
<td></td>
<td>Top quality software, fundamental to competitiveness of UTL's telephones</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Country C</th>
<th>Ujenzi Phone Limited</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Produces shells for the mobile telephones</td>
</tr>
<tr>
<td></td>
<td>Standard quality shells, easy to find alternatives</td>
</tr>
<tr>
<td></td>
<td>Subsidiary set up to reduce intermediary cost and benefit from economies of scale</td>
</tr>
</tbody>
</table>

There are creditors in all three countries with monies owed from Ujenzi group and IOHs have been appointed in each jurisdictions. However, it is may be possible to achieve greater value from the sale of the whole of the group rather than selling each of the subsidiaries separately. The success of the sale of the entire group is dependent on three jurisdictions being able to cooperate and coordinate the sale.

Each table will be divided into 3 groups, each group representing the IOHs from each of the three jurisdictions. Each table will now negotiate a cross-border insolvency agreement that enhances cooperation of three jurisdictions to maximise return to creditors as a whole.
Each table should choose 3 out of the following 6 topics to negotiate. We have provided a short guidance for each topic to be used as reference when negotiating. Following the negotiation, please provide bullet-points summarising your conclusion.

We will then discuss each table's approach to their cross-border insolvency agreement.

List of Issues

General issue to consider:
- Whether the cross-border insolvency agreement is intended to be binding on IOHs
- Whether the cross-border insolvency agreement will be approved by the court of each jurisdiction.
- What are the objectives of the cross-border insolvency agreement.
- Who will be the parties to the cross-border insolvency agreement.

1. Method of communication, including language, frequency and means
- Country A, B and C all use different languages. In order to facilitate cooperation between IOHs, common language must be agreed.
- Other ancillary matters such as frequency of communication and means of communication must also be agreed, including communication with the courts of each jurisdiction.

2. Use and Disposal of Assets
- Agree on allowing time to ascertain whether a sale of whole can be achieved by putting restrictions on sale by IOHs of each jurisdiction.
- Consider factors such as allocation of assets recovered to each of the subsidiaries, and use of the assets in the interim period.

3. Availability and coordination of relief, especially with regards to treatment of IOH in foreign courts
- Expand on issues that arose in Scenario 1: how much power does each IOH have in its own local jurisdiction?
- Agree on ways to coordinate reliefs based on powers each IOH has on their respective jurisdiction.
- What relief might need to be sought in each jurisdiction?

4. Allocation of responsibilities between the parties to the agreement, including the allocation of jurisdiction
- Consider issues such as investigation for fraud as per Scenario 1: which court/IOH/jurisdictions is able to deal with the issue of fraud best?

5. Method of dispute resolution
- If disputes arise regarding any aspect of this agreement, how will this be resolved: consider arbitration, mediation, choice of jurisdiction if taking judicial action.

6. Claims and determination
- Common currency for distribution purposes must be agreed so as to avoid disputes relating to currency exchange rate etc.
- Consider the priority/ranking of payments in each jurisdiction/certain creditors who may be owned money from more than one entity in the group.
- Decide the process in which the creditors can prove their claim for amount owed and agreeing on a bar date across all three jurisdictions.
Available Options for Dealing with Multinational Insolvencies

Fact Pattern

Background

Malawicious, a company registered in Malawi, operates as a manufacturer of spices and food sweeteners from a modern and fully automated factory in Blantyre, Malawi, which was commissioned in 2014. Since inception, the business has relentlessly pursued international expansion and in addition to operations in Malawi, it also has a presence in:

- South Africa: where South Spices, a registered foreign company has entered into a distribution agreement with Spice & Dice (Pty) Ltd to supply products to manufacturers and producers of food and beverages throughout South Africa.

- Nigeria: where Sweet & Spice Today operates from Lagos and Kano as distributors to cater for the huge Nigerian spice and food sweeteners market. The Nigerian operation consists of two large warehouses, one leasehold and one freehold, housing equipment for packaging distribution and export of products.

- Mozambique: where a division of Malawicious provides a considerable presence in the country comprising a factory in Maputo and centralised management, financial and administrative function.

The address that appears on Malawicious’ letterhead and invoices is a Malawian address.

The Company holds bank accounts in Nigeria and South Africa to receive funds from its operations in those jurisdictions, but the funds held in these accounts are then transferred to a Mozambican account where all the financial and administrative functions are conducted. The group structure shown below sets out the ownership structure and intercompany debt position within the group.

Group Structure

$50 million

Malawicious
(Malawi)

Sweet & Spice Today
(Nigeria)

South Spices
(South Africa)

$50 million
## Financials

### Malawicious (Malawi)

<table>
<thead>
<tr>
<th></th>
<th>Balance Sheet</th>
<th>31-Dec-16</th>
<th>30-Jun-17</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Fixed assets</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>- Plant and machinery</td>
<td>28</td>
<td>32</td>
</tr>
<tr>
<td></td>
<td>- Investments</td>
<td>15</td>
<td>15</td>
</tr>
<tr>
<td></td>
<td>- Intangibles</td>
<td>2</td>
<td>-</td>
</tr>
<tr>
<td></td>
<td>Current assets</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>- Intercompany</td>
<td>95</td>
<td>125</td>
</tr>
<tr>
<td></td>
<td>Total assets</td>
<td>140</td>
<td>172</td>
</tr>
<tr>
<td></td>
<td>Current liabilities</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>- Bank loans</td>
<td>1</td>
<td>10</td>
</tr>
<tr>
<td></td>
<td>- Trade creditors</td>
<td>26</td>
<td>60</td>
</tr>
<tr>
<td></td>
<td>Total liabilities</td>
<td>27</td>
<td>70</td>
</tr>
<tr>
<td></td>
<td>Net assets</td>
<td>113</td>
<td>102</td>
</tr>
</tbody>
</table>

### South Spices (South Africa)

<table>
<thead>
<tr>
<th></th>
<th>Balance Sheet</th>
<th>31-Dec-16</th>
<th>30-Jun-17</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Fixed assets</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>- Plant and machinery</td>
<td>5</td>
<td>5</td>
</tr>
<tr>
<td></td>
<td>- Investments</td>
<td>10</td>
<td>10</td>
</tr>
<tr>
<td></td>
<td>Current assets</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>- Cash</td>
<td>5</td>
<td>2</td>
</tr>
<tr>
<td></td>
<td>Total assets</td>
<td>20</td>
<td>17</td>
</tr>
<tr>
<td></td>
<td>Current liabilities</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>- Trade creditors</td>
<td>25</td>
<td>35</td>
</tr>
<tr>
<td></td>
<td>- Intercompany</td>
<td>35</td>
<td>50</td>
</tr>
<tr>
<td></td>
<td>- Bank loans</td>
<td>12</td>
<td>15</td>
</tr>
<tr>
<td></td>
<td>Total liabilities</td>
<td>72</td>
<td>100</td>
</tr>
<tr>
<td></td>
<td>Net assets</td>
<td>(52)</td>
<td>(83.0)</td>
</tr>
</tbody>
</table>

### Sweet & Spice Today (Nigeria)

<table>
<thead>
<tr>
<th></th>
<th>Balance Sheet</th>
<th>31-Dec-16</th>
<th>30-Jun-17</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Fixed assets</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>- Plant and Machinery</td>
<td>2</td>
<td>3</td>
</tr>
<tr>
<td></td>
<td>- Land</td>
<td>10</td>
<td>15</td>
</tr>
<tr>
<td></td>
<td>Current assets</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>- Trade debtors</td>
<td>18</td>
<td>2</td>
</tr>
<tr>
<td></td>
<td>- Prepayments</td>
<td>2</td>
<td>2</td>
</tr>
<tr>
<td></td>
<td>- Cash</td>
<td>1</td>
<td>(5)</td>
</tr>
<tr>
<td></td>
<td>Total assets</td>
<td>33</td>
<td>43</td>
</tr>
<tr>
<td></td>
<td>Current liabilities</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>- Intercompany</td>
<td>60</td>
<td>50</td>
</tr>
<tr>
<td></td>
<td>- Trade creditors</td>
<td>50</td>
<td>75</td>
</tr>
<tr>
<td></td>
<td>- Bank loans</td>
<td>10</td>
<td>25</td>
</tr>
<tr>
<td></td>
<td>Total liabilities</td>
<td>120</td>
<td>150.0</td>
</tr>
<tr>
<td></td>
<td>Net assets</td>
<td>(87)</td>
<td>(107.0)</td>
</tr>
</tbody>
</table>
AVAILABLE OPTIONS FOR DEALING WITH MULTINATIONAL INSOLVENCIES

FACT PATTERN

Bank debt
The Group funded its expansion and operations by obtaining bilateral facilities from a syndicate of Nigerian, South African and Mozambique banks. Each facility is governed under the legal jurisdictions of the respective lenders. The amounts outstanding and indebted entities are as follows:

- South Africa Bank: $15 million (to South Spices)
- Nigeria Bank: $25 million (to Sweet & Spice Today)
- Mozambique Bank: $10 million (to Malawicious)

The security for each loan is provided by way of fixed and floating charges over the respective entities on a pari passu basis. Share pledges have also been provided by each indebted entity. An ultimate parent guarantee has also been provided by South Spices, which cross guarantees all the bank debt in the group.

Intercompany position
The intercompany balances came into existence when funds were hived down to build the manufacturing plants in other countries. Sweet & Spice Today (Nigeria) owes Malawicious (Malawi) $50 million; South Spices (South Africa) owes Malawicious $50 million. The loans are unsecured, non-interest bearing and have no repayment terms.

Factors leading to the current situation
Since inception, the newly established operations in Nigeria have failed to reach capacity due to a combination of:

- poor management,
- unresolved snags with the equipment,
- slowdown in consumer spending and
- fiercely competitive market.

All the entities have been trading at a loss and consequently are now over-leveraged and in breach of bank loan financial covenants and repayment terms. As evidenced in the financials provided, there is limited liquidity across the group to settle liabilities and debts as they fall due.

Consequently, trading creditors have started to restrict credit to the companies, including South Spices’s local warehousing and distribution partner who has refused to release food products to retailers meaning that South Spices has been unable to satisfy orders that have been placed by those retailers.

A similar situation exists in Mozambique, where local creditors have started to get agitated. This has culminated in legal action brought by the factory construction company resulting in a settlement award in favour of the construction.

As a result, all the directors in the group have held separate board meetings in parallel to consider their future strategy. Subsequently the directors of Malawicious have filed for insolvency under the reorganisation mechanism provided under the Malawian Insolvency Act 2016. The reorganisation order was granted and the administrator, Mr Tofera, was appointed thereafter on 20 September 2017. The administrator filed a reorganisation strategy that was duly approved.

Tasks
1. As directors of Malawicious, set out the solvent and insolvent options available to you in the current circumstances.
2. As legal advisors of Malawicious, prepare arguments for recognition of Malawian insolvency proceedings in South Africa with the objective of establishing a moratorium in South Africa.
3. As legal advisors of Malawicious, prepare arguments for recognition of Malawian insolvency proceedings in Nigeria with the objective of establishing a moratorium in Nigeria.
4. As legal advisors of Malawicious, prepare arguments for recognition of the Malawian proceedings in Mozambique with the objective of establishing a moratorium in Mozambique.
The UNCITRAL Model Law on Cross-Border Insolvency: an introduction
Prepared by the UNCITRAL Secretariat

One of the problems with insolvency laws is that generally they can only be effective within the confines of the jurisdiction in which those laws had been enacted. Problems arise when an insolvent debtor from one State has assets and affairs in another State. Even if the national law of the debtor's State purports to give to the debtor's insolvency representative control over the assets and affairs located in the other State, the representative can take effective control of those assets only to the extent permitted by the law of the other State.

This inability to effectively control a debtor's assets has several potentially detrimental consequences. Debtors with assets in different countries can shield or conceal them from their creditors and from their insolvency representative. Where an insolvency representative cannot get access to those assets, they may be unable to reorganize the debtor and save an essentially viable business or, where the debtor has to be liquidated, be unable to realize those assets in an effective manner that will maximize returns for creditors.

What is needed is a framework for cooperation and coordination that both respects the sovereignty of national laws and procedural systems and allows the assets located in different countries to be treated comprehensively, transparently and fairly. Such a framework is provided by the UNCITRAL Model Law on Cross-Border Insolvency. It focuses upon what is required to facilitate the administration of cross-border insolvency cases, but does not address issues of substantive law, which are left up to the law of the State enacting the Model Law.

What is cross-border insolvency?
- Where the insolvent debtor has assets in more than one State
- Where some of the creditors of the debtor are not from the State where the insolvency proceeding is taking place
- Where insolvency proceedings concerning the same debtor have commenced in more than one State

Why are we concerned about cross-border insolvency?
- Increasing incidence of cross-border insolvency proceedings
- Numerous difficulties associated with those proceedings – delay, cost, cumbersome procedures and formal requirements, lack of authorization to cooperate, conflicting court decisions on the same or similar matters, uncertainty and unpredictability
- Lack of national and international legal regimes providing solutions
- Insolvency law is seen as a “frontline factor” in financial crisis prevention and management

A. BACKGROUND

1. The Model Law was negotiated between 1995 and 1997 by an intergovernmental working group comprising representatives of 72 States, seven inter-governmental organizations (IGOs) and ten non-governmental organizations (NGOs). This diversity of representation may be seen as key to the wide acceptance and adoption of the text by States from different legal traditions and stages of economic development.

2. The negotiation of the Model Law had a number of clear objectives, which are set out in the Preamble:
   (a) Promoting cooperation between the courts and other competent authorities of this State and foreign States involved in cases of cross-border insolvency;
   (b) Providing greater legal certainty for trade and investment;
(c) Facilitating the fair and efficient administration of cross-border insolvencies in a manner that protects the interests of all creditors and other interested persons, including the debtor;
(d) Protecting and maximizing the value of the debtor’s assets; and
(e) Facilitating of the rescue of financially troubled businesses, thereby protecting investment and preserving employment.

Two key points to note about the Model Law is that it does not attempt unification of substantive insolvency law and respects differences in procedural law.

4. The framework provided is unilateral – the Model Law relies for its effect on enactment by individual States. Such enactment generally signals that a State will accept applications for recognition of foreign insolvency proceedings from all other States, irrespective of whether those other States have adopted the Model Law. The only exception is where the Model Law has been enacted on the basis of reciprocity and provides, for example, that applications for recognition will only be accepted from other enacting States.

- Article 8

5. Because of its unilateral nature, it is important for its effective cross-border application that the text be interpreted uniformly by different States. That interpretation is aided by the objectives set out in the preamble and also by article 8. This article encourages States to have regard to the international origin of the text and the need to promote uniform interpretation. In practice, this may mean considering the decisions of courts of other States when determining how certain issues should be resolved – some States have included this provision as a direction to the courts (USA). This uniform interpretation is facilitated by tools prepared by UNCITRAL. These include the system which reports case law on the application of the Model Law (Case Law on UNCITRAL Texts or CLOUT), and a guide for judges on how to apply and interpret the Model Law (The Judicial Perspective).

B. ENACTMENTS BASED ON THE MODEL LAW

6. As at the end of September 2016, legislation based on the Model Law has been enacted by 41 States in a total of 43 jurisdictions:

Australia (2008); Benin (2015); Burkina Faso (2015); British Virgin Islands (overseas territory of the United Kingdom of Great Britain and Northern Ireland) (2003); Cameroon (2015); Canada (2005); Central African Republic (2015); Chad (2015); Chile (2013); Colombia (2006); Comoros (2015); Republic of the Congo (2015); Côte d’Ivoire (2015); Democratic Republic of Congo (2015); Equatorial Guinea (2015); Gabon (2015); Gibraltar (2014); Greece (2010); Great Britain (2006); Guinea (2015); Guinea-Bissau (2015); Japan (2000); Kenya (2015); Malawi (2015); Mali (2015); Mauritius (2009); Mexico (2000); Montenegro (2002); New Zealand (2006); Niger (2015); Philippines (2010); Poland (2003); Republic of Korea (2006); Romania (2002); Senegal (2015); Serbia (2004); Seychelles (2013); Slovenia (2007); South Africa (2000); Togo (2015); Uganda (2011); the United States of America (2005); and Vanuatu (2013).

A number of States are actively considering enacting the Model Law or have already drafted legislation to enact it, including: Brazil, India, Ireland, Singapore, and Thailand.

7. As a model law, the text is flexible and can be amended by enacting States. In recommending the text to States, the United Nations General Assembly suggests it be given favourable consideration, “bearing in mind the need for an internationally harmonized legislation governing instances of cross-border insolvency”. Clearly, the more changes made to the text, the less the harmonizing effect of the resulting legislation and the less certainty and predictability there will be for cross-border insolvency proceedings.

8. While many of the States noted above have followed the Model Law quite closely in enacting their legislation, some changes have been made and the enacting legislation needs
to be carefully examined; it should not be assumed that it corresponds exactly to the terms of
the Model Law. Some of the changes made expand the application of the Model Law to
reflect local insolvency law (e.g. the US provisions on automatic relief refer to the relief
available under the Bankruptcy Code, which is somewhat broader in scope than that available
under the Model Law); other changes limit the application of the Model Law (e.g. in Japan the
relief available on recognition is not automatic but requires an application to the court or may
be ordered by the court on its own initiative, art. 25 is omitted and art. 26 is limited to
cooperation between insolvency representatives; South Africa, Romania, Mexico and Uganda
have included a reciprocity provision).

9. Different methods of enactment have been used. Some States have drafted specific
provisions either using the drafting of the Model Law or based, to a greater or lesser extent,
upon that drafting (many enacting States); some have included the Model Law, as drafted, in
a schedule to the enabling legislation (Australia and New Zealand); some have enacted it by
way of regulation (Great Britain).

C. SCOPE

10. The Model Law applies in 4 specified situations, where (art.1):

(a) Requests from a foreign court for assistance from the enacting State (inbound
requests);
(b) Request by the enacting State to a foreign State (outbound requests);
(c) There are concurrent proceedings concerning the same debtor;
(d) Creditors or other interested parties in a foreign State have an interest in requesting
commencement of, or participation in an insolvency proceeding under the law of the
enacting State.

11. The text covers foreign proceedings that (art.2):

(a) Relate to insolvency
(b) Are for the purpose of reorganization or liquidation of the debtor
(c) Are “collective” and
(d) Subject the assets and affairs of the debtor to control or supervision by a court.

12. Under the Model Law scheme, proceedings that do not meet those criteria would not
qualify for recognition. The 2013 revision of the Guide to Enactment provides more
information on the meaning of article 2, clarifying for example, that:

(a) A “collective proceeding” is one in which substantially all of the assets and liabilities
of the debtor are dealt with, subject to local priorities and statutory exceptions, and to local
exclusions relating to the rights of secured creditors. A proceeding that does not deal with a
certain class of claim, such as those of secured creditors, should not be excluded if it satisfies
the other elements of article 2, subparagraph (a) (for court decisions on this point see The
Judicial Perspective (2013), paras. 71-78);

(b) A simple proceeding for a solvent legal entity that does not seek to restructure the
financial affairs of the entity, but rather to dissolve its legal status, is likely not one pursuant to
a law relating to insolvency or severe financial distress for the purposes of the subparagraph.
Financial adjustment agreements or similar contractual arrangements that do not lead to the
commencement of an insolvency proceeding also would not generally satisfy the
requirements of subparagraph (a). However, such agreements would clearly be enforceable
outside the Model Law without the need for recognition; and

(c) Control or supervision by an insolvency representative may be sufficient to satisfy
the requirements of subparagraph (a), even if it is potential rather than actual; mere
supervision of an insolvency representative by a licensing authority however would not be
sufficient (for court decisions on this point see The Judicial Perspective (2013), paras. 84-90).

13. Exclusions are contemplated by the Model Law. Banking and insurance institutions are
a common example – generally on the ground that they are subject to special regulatory
regimes. Exclusions for financial and investment institutions, clearing houses and commodity
brokers have also been introduced in some enacting legislation.
Reciprocity – see further below

UNCITRAL decided against including a requirement for reciprocity in the ML, but several enacting jurisdictions have done so:

South Africa: requires designation by Minister [s. 2(2)(a)] – no countries designated, moves to remove requirement
Mexico: requires “international reciprocity” [art. 280]
Romania: requires international reciprocity with respect to the effects of foreign judgements [art. 18 (1)(e)]
Uganda: requires designation by Minister, as well as reciprocal agreements, treaties etc. [ss. 212-213]

D. KEY ELEMENTS

The basic premise is that the Model Law establishes simple, straightforward requirements that

Minimize formality for recognition of foreign proceedings,
Facilitate predictable outcomes,
Reduce scope for disputes, and
Recognize the need for speedy outcomes.

14. The text is organized around four key elements, identified through a series of studies and consultations conducted in the early 1990s as being the areas upon which international agreement might be possible:

   (a) Access to local courts for representatives of foreign insolvency proceedings and for creditors
   (b) Recognition of certain orders issued by foreign courts
   (c) Relief to assist foreign proceedings
   (d) Cooperation among the courts of States where the debtor's assets are located in order to facilitate coordination of proceedings

1. Access

15. When a foreign representative seeks to manage the assets of the debtor in a foreign country they have to obtain access to the assets. The Model Law does this by giving the foreign representative a right of direct access to the courts of the State where the Model Law has been enacted (art. 9). This right of access is not subject to any special conditions, but what the foreign insolvency administrator will be able to achieve is largely left to the local law and, in a large measure, to the discretion of the local court.

16. These provisions address inbound and outbound aspects of cross-border insolvency. An insolvency representative of the enacting State is authorised to act in a foreign State (art. 5) on behalf of local proceedings. A foreign representative has:

   (a) A right of direct access to courts in the enacting State (art. 9);
   (b) A right to apply to commence a local proceeding in the enacting State on the conditions applicable in that State (art. 11); and
   (c) A right to participate in insolvency-related proceedings in the enacting State under the law of that State (art. 12).

17. The right to commence a local proceeding under art. 11 is not limited to cases where a foreign proceeding has already been recognized. Some States however, have adopted a different view and subjected that right to prior recognition (USA).
18. The fact that a foreign representative has the right to apply to the courts of the enacting State does not subject him/her/the foreign assets and affairs of the debtor to the jurisdiction of the enacting State for any purpose other that that application (art. 10).

19. Foreign creditors have the same right as local creditors to commence proceedings and participate in proceedings (art. 13).

2. Recognition

20. A foreign representative can apply for recognition of a foreign proceeding (art. 15.1). One of the key objectives of the Model Law was to establish simplified procedures that would avoid time-consuming legalization or other processes and provide certainty with respect to the decision to recognize. Where the foreign proceeding is a foreign proceeding within the definition of art. 2 (as discussed above) and certain evidential requirements relating to the appointment of the foreign representative and commencement of the foreign proceedings are met (art. 15.2), the court should recognize the foreign proceedings [subject only to the public policy exception of art. 6].

21. In terms of evidence, the foreign representative is required to provide:
   (a) A certified copy of the decision commencing the foreign proceedings and appointing the foreign representative; or
   (b) A certificate from the foreign court as to the matters in (a); or
   (c) Evidence acceptable to the recognizing court as to the matters in (a); plus
   (d) A statement identifying all foreign proceedings against the debtor that are known to the foreign representative.

22. The only proviso to recognition is found in art. 6, which allows recognition to be refused where it would be “manifestly contrary to the public policy” of the recognizing State. No definition of what constitutes public policy is attempted as notions vary from State to State. However, the intention is that it be interpreted restrictively and that art. 6 be used only in exceptional circumstances. Several United States cases note the need for limited use of this article (for a discussion of article 6, see The Judicial Perspective (2013), paras. 48-54).

23. The court should recognize foreign proceedings as either (art. 17.2):
   (a) Main proceedings, that is proceedings taking place where the debtor has its centre of main interests or COMI as it is commonly known. This concept is not defined in the Model Law, but is based on a presumption of the registered office or habitual residence (in the case of an individual) of the debtor (art. 16.3); or
   (b) Non-main proceedings, that is proceedings taking place where the debtor has an establishment. This is defined as “any place of operation where the debtor carries out non-transitory economic activity with human means and goods or services” (art. 2 (f)).

3. Relief

24. The Model Law principle is that the relief considered necessary for the orderly and fair conduct of a cross-border insolvency should be available to assist foreign proceedings, whether on an interim basis or as a result of recognition. The Model Law provides that:
   (a) Interim relief is available at the discretion of court between the making of an application for recognition and the decision on that application (art. 19);
   (b) Automatic relief specified in the Model Law is available on recognition of main proceedings (art. 20); and
(c) Relief at the discretion of the court is also available for both main and non-main proceedings; for main proceedings it would be in addition to that available automatically on recognition (art. 21).

25. The Model Law adopts the approach of specifying the types of relief that should be automatically available as a minimum. That approach is a compromise between importing the relief available to the foreign proceeding under the law of the foreign State and applying the relief that would be available under the law of the recognizing State.

26. All States that have enacted legislation based on the Model Law, except for Japan and Korea, provide for automatic relief on recognition (both of those States provide for it to be available at the discretion of the court); but the scope of that relief varies slightly. The Model Law provides that with respect to the automatic relief, the scope of the effects of commencement depends upon exceptions/limits existing in the laws of the recognizing State with respect to the stay or suspension (art. 20.2). This might include, for example, exceptions allowing the enforcement of security over the debtor’s property (Great Britain) or allowing commencement or continuation of action or proceedings against the debtor or its assets except execution against its assets (Mexico).

27. With respect to both interim relief and discretionary relief, the court can impose conditions and modify or terminate the relief to protect the interests of creditors and other interested persons affected by the relief ordered (art. 22).

4. Cooperation and coordination

a. Cooperation

28. The Model Law expressly empowers courts to cooperate in the areas governed by the Model Law and to communicate directly with foreign counterparts. This is not dependent upon recognition and may thus occur at an early stage and before an application for recognition. Nor is it limited to proceedings that would qualify for recognition under art. 17 and may thus apply with respect to proceedings commenced on the basis of presence of assets.

29. Cooperation is authorized between courts, between courts and foreign representatives and between foreign representatives.

30. Recognizing that the idea of cooperation might be unfamiliar to many judges and insolvency representatives, art. 27 sets out some of the possible means of cooperation. That article is the basis of further work by UNCITRAL - the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation (2009) discusses the various elements of article 27 and in particular, compiles practice and experience with respect to the use and negotiation of cross-border agreements or protocols as they are often known.

b. Concurrent proceedings

31. The Model Law contains several provisions addressing coordination of concurrent proceedings, which aim to foster decisions that would best achieve the objectives of all of those proceedings.

32. The recognition of foreign main proceedings does not prevent commencement of local proceedings (art. 28), nor does the commencement of local proceedings terminate recognition already accorded to foreign proceedings or prevent recognition of foreign proceedings.

33. Article 29 addresses adjustment of the relief available where there are concurrent proceedings. The basic principle is that relief granted to a recognized foreign proceeding should be consistent with local proceedings, irrespective of whether the foreign proceeding was recognized before or after the commencement of the local proceeding. For example, where local proceedings have already commenced at the time the application for recognition is made, relief granted to the foreign proceeding must be consistent with the local proceeding.
If the foreign proceeding is recognized as a main proceeding, the automatic relief generally available on recognition (art. 20) does not apply.

E. REVISION OF THE GUIDE TO ENACTMENT

34. While the majority of applications for recognition and relief made under the Model Law appear to proceed without issue, a number of cases have raised questions relating to the interpretation of certain provisions. These have included, for example, what is required to satisfy the various elements of the definitions in article 2 of the Model Law, particularly “foreign proceeding” under subparagraph (a); the factors to be considered with respect to rebuttal of the presumption in article 16, paragraph 3 that the centre of the debtor’s main interests is its place of registration (or incorporation under some laws); the relevant time for consideration of the location of the debtor’s centre of main interests; and the scope of the public policy exception under article 6.

35. The degree of unpredictability and uncertainty produced by some of the different decisions on these issues has been the subject of numerous articles and discussions. Although the Guide to Enactment accompanying the Model Law, together with the original working group papers and reports, serve as key sources of information on the policy settings of the Model Law and are often cited by judges in numerous jurisdictions as tools for its interpretation, they do not always provide ready answers to all of the questions that have arisen.

36. In response to a proposal from the United States in 2010 (UNCITRAL document A/CN.9/WG.V/WP.93/Add.3), work was undertaken to provide additional information and clarify a number of the issues arising from its application and interpretation, without revising the text of the Model Law itself. UNCITRAL’s Working Group V decided that that information should be provided by way of revision of the Guide to Enactment of the Model Law on the basis that having a single source of information and guidance might avoid any confusion that potentially could arise from the preparation of a document additional to the existing Guide. The revision was finalised in July 2013 and the resulting text, adopted by the Commission in 2013, is entitled the Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency.

37. The revisions relate, firstly, to the elements of article 2, subparagraph (a), which define what is required for a foreign proceeding to be recognized under the Model Law. That foreign proceeding is required to be (i) a collective judicial or administrative proceeding, (ii) pursuant to a law relating to insolvency, (iii) in which the assets and affairs of the debtor are subject to control or supervision by a foreign court, and (iv) for the purpose of reorganization or liquidation.

38. The Guide to Enactment and Interpretation clarifies that:

(a) A “collective proceeding” is one in which substantially all of the assets and liabilities of the debtor are dealt with, subject to local priorities and statutory exceptions, and to local exclusions relating to the rights of secured creditors. A proceeding that does not deal with a certain class of claim, such as those of secured creditors, should not be excluded if it satisfies the other elements of article 2, subparagraph (a) (for court decisions on this point see The Judicial Perspective (2013), paras. 71-78);

(b) With respect to the requirement for the proceeding to be one “pursuant to a law relating to insolvency”, the Guide suggests that a simple proceeding for a solvent legal entity that does not seek to restructure the financial affairs of the entity, but rather to dissolve its legal status, is likely not one pursuant to a law relating to insolvency or severe financial distress for the purposes of the subparagraph;

(c) Control or supervision of the assets and affairs of the debtor may be exercised directly by a court or by an insolvency representative where the insolvency representative is itself subject to control or supervision by the court, even if that control is potential rather than actual. Mere supervision of an insolvency representative by a licensing
authority however would not be sufficient (for court decisions on this point see The Judicial Perspective (2013), paras. 84-90);

(d) Financial adjustment agreements or similar contractual arrangements that do not lead to the commencement of an insolvency proceeding also would not generally satisfy the requirements of subparagraph (a) that the proceedings be “for the purposes of liquidation or reorganization”. However, such agreements would clearly be enforceable outside the Model Law without the need for recognition.

39. Central to the revision of the Guide to Enactment is the concept of “centre of main interests” or COMI, in particular identification of factors that might be relevant to rebutting the presumption under article 16, paragraph 3 that the debtor’s COMI is its place of registration. The revisions note that where the debtor’s COMI coincides with its place of registration, no issue concerning rebuttal of the presumption will arise. In reality, however, the debtor’s COMI may not always coincide with its place of registration. The party alleging that it is not at that place will be required to satisfy the court of the State receiving an application for recognition as to its location. The court will be required to consider independently where the debtor’s COMI is located. Two principal factors have been identified. Considered together, these factors should indicate whether the location in which the foreign proceeding has commenced is the debtor’s COMI, namely that: (a) the location is where the debtor’s central administration takes place, and (b) the location is readily ascertainable by creditors.

40. Where those two factors don’t yield a ready answer, the Guide suggests that additional factors may be considered, with the court giving greater or less weight to a given factor, depending on the circumstances of the individual case. These factors include, in no particular order or priority: the location of the debtor’s books and records; the location where financing was organized or authorized, or from where the cash management system was run; the location in which the debtor’s principal assets or operations are found; the location of the debtor’s primary bank; the location of employees; the location in which commercial policy was determined; the site of the controlling law or the law governing the main contracts of the company; the location from which purchasing and sales policy, staff, accounts payable and computer systems were managed; the location from which contracts (for supply) were organized; the location from which reorganization of the debtor was being conducted; the jurisdiction whose law would apply to most disputes; the location in which the debtor was subject to supervision or regulation; and the location whose law governed the preparation and audit of accounts and in which they were prepared and audited.

41. The final key revision concerns the time by reference to which the debtor’s COMI (or establishment) should be determined. The revised text suggests that the date of commencement of the foreign proceeding provides a test that can be applied with certainty and consistency to all insolvency proceedings, wherever commenced; the date of an application for recognition, in comparison, will vary from jurisdiction to jurisdiction. Moreover, the choice of the date of commencement also addresses issues that may arise where the business activity of the debtor has ceased at the time of the application for recognition, and, as may occur in cases of reorganization, it is not the debtor entity that continues to have a COMI, but rather the reorganizing entity.

42. The Judicial Perspective has been updated to reflect the changes included in the Guide to Enactment and Interpretation, as well as judicial decisions issued after the first edition was completed in 2011. Quite a few cases of importance were decided in that time, not least of which are those relating specifically to the work being done to identify factors relevant to determining COMI. A number of recent cases also address aspects of the relief provisions of the Model Law (articles 19-21), including the enforceability of insolvency-derived judgements under article 21.

F. ENACTMENT OF THE MODEL LAW: ISSUES AND APPREHENSIONS

43. Discussions about adoption of the Model Law have revealed a few apprehensions. Two principal concerns relate to sovereignty and reciprocity. UNCITRAL is currently undertaking
on a study to gather information on the obstacles to wider adoption of the Model Law. The provisions of the Model Law provide answers to some of these issues; others are not (or cannot be) directly addressed by the terms of the Model Law, as they are of a more general application than insolvency, or they relate to the implementation of insolvency law, raising questions of judicial and institutional capacity.

1. Sovereignty

44. The concern with respect to sovereignty is not one that is limited in its application to cross-border insolvency and adoption of the Model Law, but rather may apply broadly to all situations where recognition of foreign judgments and arbitral awards, as well as exposure to other decisions and processes of foreign courts, can impact upon the local legal system. The concerns focus on the disadvantages likely to accrue from exposing one country to the legal processes and decisions of another, for example, a finding that a debtor is insolvent or the decision to commence insolvency proceedings. This is regarded as having the potential to subordinate national interests and institutions to foreign influence, with a consequent loss of ability to regulate one’s own affairs.

45. A related concern is the potential for inconsistency between royal prerogative (of which judicial power is one part) and the autonomy of the jurisdiction if foreign judgements are to be recognized.

2. Reciprocity

46. A widely discussed issue that is closely related to the concern about sovereignty is that of reciprocity. As noted above, a suggestion to include a reciprocity requirement in the Model Law was ultimately not accepted, and it consequently functions unilaterally on a global basis. Concern that this approach might lead to recognition of inbound requests but not outbound requests has led some countries to include a reciprocity provision in legislation enacting the Model Law. An issue of concern with that approach, however, is the implementation of the reciprocity requirement. To facilitate cross-border insolvency, a clear and quick determination is required as to whether another State’s legislation is sufficiently similar to qualify as being reciprocal. That might be achieved by designating in the law those countries whose laws are regarded as satisfying the requirement. Different approaches, such as a legislative formulation that defines reciprocal treatment by reference to whether or not another country has enacted a law “based on the Model Law,” or a consideration of foreign law by the courts on a case-by-case basis, are unlikely to achieve a quick and certain result. In the first instance, the flexibility allowed by the Model Law and the likelihood of local variations in enactment will require close scrutiny of enacting legislation to ensure the required level of compliance with the requirement. The second approach is likely to involve delay while the court conducts the necessary investigations, which may include, in order to give a true picture of the foreign law, consideration of difficult questions of implementation of that law.

47. A few countries have adopted such a requirement, in various forms, including South Africa, Romania, Mexico and Uganda. They are somewhat different in nature and it remains to be seen how they will be implemented in practice. South Africa will recognize proceedings only from designated countries; Mexico and Romania specify the need for reciprocal treatment but do not provide for the designation of countries that satisfy that requirement, or otherwise indicate how reciprocal treatment will be determined. One commentator on the Japanese law observed that the principle of reciprocity was much criticized in Japan, not only because reciprocity has proven, historically, not to be a useful means of achieving harmonization of law, but also because creditors and other actors in insolvency proceedings who have limited capacity to influence the legislative policy of their governments should not be penalized because of that policy.

3. Other concerns

48. These include:
a. That the Model Law will import the insolvency law of the foreign country if a foreign insolvency order is recognized.

It should be noted that with respect to the automatic stay, the Model Law avoids both the import of foreign law and the application of domestic law by specifying the effects of recognition. At the same time, it defers to local law, providing that the scope, modification, or termination of the relief applicable upon recognition are subject to provisions of the law of the enacting State that applies to such exceptions, limitations, modifications, or terminations. In addition to this provision, the Model Law provides that in granting relief the court may subject that relief to such conditions as it considers appropriate (art. 17.2), and that at the request of the foreign representative or any person affected by the relief granted, or at its own motion, the court may modify or terminate that relief (art. 22). In terms of coordination of concurrent proceedings, the Model Law again defers to the local law by providing that relief must be coordinated and consistent with that granted in the local proceeding, whether it commenced before or after the foreign proceeding (art. 29).

b. That the foreign representative, without any limitations, will be able to administer local proceedings.

As an interim measure, or as discretionary relief available after recognition, the court may entrust the foreign representative with administration or realization of all or part of the debtor's assets located in the enacting State in order to protect and preserve value, but it is not automatic and an order of the court is required under art. 21.1(e). In ordering that relief, the court must be satisfied that that the interests of creditors and other interested persons are adequately protected (art. 22). However, the court is not obliged to appoint the foreign representative to perform that task, and it may designate another person, such as a local practitioner.

The Model Law does give the foreign representative certain entitlements with regard to local proceedings concerning the debtor. For example, the foreign representative may apply to commence local insolvency proceedings ((art. 11) and, following recognition of foreign proceedings, to participate in local proceedings regarding the same debtor (art. 12), or to intervene in local proceedings to which the debtor is a party (art. 24). Applying for commencement and intervening in proceedings are both subject to the requirements of local law being met (arts. 11 and 24).

c. Local creditors will be significantly disadvantaged by the recognition of foreign main proceedings as assets will be turned over to the foreign proceedings where they may be subject to different priorities etc.

With respect to the interests of creditors, particularly local creditors, there will always be an issue of whether recognizing foreign insolvency proceedings in a particular case will be to their advantage or disadvantage. The answer depends upon the case in question and whether quarantining local assets for the benefit of local creditors will ensure a greater return to them than pooling those assets to increase the global assets available to creditors generally. In some cases, quarantining will lead to a greater return, and in others pooling will bring more. The answer may also depend upon whether the foreign proceedings are for liquidation or reorganization. While the answer can be relatively straightforward in the case of liquidation, in reorganization it may depend as much upon the particular interests of a creditor as upon the relative amounts that may be received through quarantining or pooling. Employees, for example, may have a greater interest in ongoing employment than in a distribution, while trade creditors may derive more benefit from a continuing marketplace for goods and services. As one commentator notes, there is no answer to the dilemma of whether or not local creditors will be better off if countries apply cross-border recognition law. He continues that "[i]t might be best addressed by accepting the observation that, in a system of inter-country cooperation, any loss to local interests in one case will be roughly balanced by a gain in another case.". It is possible, therefore, that by participating in the universal insolvency estate, local creditors may gain
access to a larger pool of assets to satisfy their claims than they would have had had they been limited to the local assets.

The Model Law does not (and cannot) provide an answer to this question. Nor, as a unilateral instrument, can it address the treatment of local creditors in foreign proceedings. However, it does seek to ensure the equality of treatment of foreign and local creditors and to ensure that their interests are protected as far as possible. While the Model Law provides that the court may order that assets be turned over for distribution by the foreign representative (art. 21.2), that order is subject to the condition that the interests of local creditors are adequately protected. Foreign creditors are to have the same rights as local creditors with respect to commencement of, and participation in, insolvency proceedings (art. 13). In addition, the rule in article 32 prevents double dipping, particularly by foreign creditors.

G. USE OF THE MODEL LAW

49. The Model Law is being increasingly used by both States that have enacted it and States that have not. The largest number of cases has been heard in the USA. These cases originate from many different jurisdictions, some of which are ML countries, but many of which are not: Australia, Bahamas, Bahrain, Barbados, Bermuda, Brazil, BVI, Canada, Cayman Islands, Colombia, Denmark, France, Germany, Hong Kong, Iceland, India, Indonesia, Ireland, Israel, Italy, Japan, Kazakhstan, Korea, Mexico, Netherlands, New Zealand, Poland, Russia, St Vincent/Grenadines, Singapore, Spain, Switzerland, South Africa, UK, and USA.

50. Cases applying the Model Law are reported in the CLOUT (Case Law on UNCITRAL texts) system; key cases are discussed in The Judicial Perspective (2013) on the Model Law. A digest of case law on the Model Law is currently being prepared.
BENEFITS OF THE MODEL LAW

1. **International business & trade**: In today’s world, business and trade are increasingly international. As a result, investors and companies frequently transact business in more than one sovereign jurisdiction (or “State”). Each State has its own set of substantive rules and laws, which, depending on the topic and absent harmonization, can greatly differ from one State to another State.

2. **Limits of “deemed universal effect”**: In the area of insolvency law and substantive rules dealing with companies in financial difficulties, most of the relevant substantive laws and rules are State-specific and do not have wider application. Even if certain local/national insolvency rules in State A are (in State A) deemed to have “universal effect”, it will depend largely on the principle of comity and rules of recognition in State B whether the local/national insolvency rules of State A with “universal effect” have any effect in State B.

3. **Transparency & predictability**: For investors and companies alike, it is important to know what is going to happen when things go wrong from a financial perspective in a particular State. What are the laws and rules that will apply in those circumstances and, more importantly, how will such laws and rules most likely be applied in practice? In other words: is there sufficient transparency and predictability? Without transparency and predictability, uncertainty is inevitable. The greater the level of uncertainty, the more difficult it will be for investors and companies to formulate investment strategies and business plans involving the State in question.

4. **Cross-border insolvencies**: In cross-border insolvency situations the need for transparency and predictability is even more compelling. In those situations, a company or investor needs to understand not only the relevant substantive laws and rules in State A and how they apply in practice, but also if and how these relevant substantive laws and rules of State A are recognized in other relevant States. Without the existence of a framework that facilitates the effective cross-border administration of a single insolvency proceeding covering all of the debtor’s assets and liabilities in different States, multiple proceedings in different States may ultimately be commenced. Multiple proceedings may be inadequately coordinated and lead to conflict situations, as well as hampering the rescue of financially-troubled businesses and impeding the protection and value-maximization of the debtor’s assets.

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1 In this note “Model Law” refers to the United Nations Commission on International Trade Law (“UNCITRAL”) Model Law on Cross-Border Insolvency, as adopted by UNCITRAL on 30 May, 1997 and endorsed by the General Assembly resolution 52/158 of 15 December 1997 and the Guide to Enactment and Interpretation, as adopted by UNCITRAL pursuant to the decision at the 973rd meeting on 18 July 2013 (“Guide to Enactment”).

2 This internationalization and globalization has been facilitated by more affordable international travel and the explosion of cross-border communications via the internet and the use of devices such as I-phones, smart phones, tablets and the like.

3 Typically, harmonization occurs through bilateral or multilateral treaties or conventions.

4 A “cross-border insolvency” arises when insolvency proceedings are commenced in one State against an insolvent debtor that also has assets and/or liabilities in at least one other State. In the most complex cases, a multinational enterprise (set up as a group of companies) may have business operations in dozens of States carried out by subsidiaries, branches and other affiliated entities, with a wide variety of different types of assets and liabilities in different locations and numerous different creditors.
5. **The Model Law**: This is where the Model Law comes in. The Model Law was adopted by UNCITRAL as part of the United Nations’ effort to further international development by way of trade law reform. The Model Law is a template legislative text which provides for cross-border cooperation in multi-State insolvency cases. It is designed to be incorporated into the domestic law of enacting States, with a view to streamlining the administration of such insolvencies and returning better results for creditors. The Model Law represents best-practice legislation on cross-border insolvency. Its enactment encourages foreign investment and the extension of credit in the enacting State.

6. **Implementation of the Model Law**: The Model Law of itself has no binding force. Rather, it is simply a suggested legislative text, or template law, which States can elect to introduce into their domestic law. Introduction can be in whole or in part and with or without amendment; a State is free to diverge from the suggested text of the Model Law and might do so in order to eliminate inconsistency between the text as drafted and the existing laws of the State, or to take into account the particular social, cultural or economic background against which the Model Law will operate in that State. Like all model laws, however, the Model Law is intended to be capable of wholesale enactment into domestic legislation, without modification or exclusion. Indeed, much of the benefit of the Model Law derives from its uniform adoption in different States.

7. **Aim of this Hand-Out**: In short, the primary aim of the Model Law is to increase transparency and predictability in cross-border insolvency situations. By doing so, the Model Law aims to facilitate protecting or (where possible) restoring value and avoiding value-destruction. The purpose of this note is to explain how the Model Law is designed to achieve its aims and demonstrate how the Model Law has worked in jurisdictions that have implemented it. The focus will be on the following features of the Model Law:

   a. Providing access of foreign representatives and creditors to courts (“Access”)
   
   b. Recognition of foreign proceedings (“Recognition”)
   
   c. Providing relief (“Relief”)
   
   d. Facilitating cooperation with foreign courts and foreign representatives (“Cooperation”)

The note concludes by briefly addressing some perceived disadvantages of the Model Law.

**Access**

8. **Foreign proceedings and foreign representative**: Under the Model Law, a (interim) collective judicial or administrative proceeding in a foreign State pursuant to insolvency laws under which the assets and affairs of the debtor are subject to
supervision by a foreign court, for the purpose of reorganization or liquidation, is a so-called “foreign proceeding”. The person or body authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor’s assets or affairs or to act as a representative of the foreign proceeding is a so-called “foreign representative”.

9. **Direct access of a foreign representative**: Without taking any prior steps, a foreign representative appointed in another State (i.e. “State A”) is entitled to apply directly to a court in the jurisdiction that has implemented the Model Law (i.e. “State B”). Recognition of a foreign proceeding is required before a foreign representative is entitled to participate in a local proceeding regarding the debtor that has been commenced under the insolvency law of State B. For access purposes, recognition is limited to giving standing and does not automatically vest the foreign representative with any other rights or powers.

10. **Access of foreign creditors**: Foreign creditors have the same rights as creditors domiciled in State B regarding the commencement of, and participation in, local proceedings regarding the debtor under the insolvency law of State B. This does not affect the ranking of claims in the local proceedings in State B, except that the claim of a foreign creditor shall not be given a lower priority than that of general unsecured claims solely because the holder of such claim is a foreign creditor. Accordingly, foreign creditors are protected from discrimination, provided with standing and a minimum ranking of their claims. Furthermore, claims may not be challenged solely on the ground that they are claims of a foreign tax or social security authority. Nevertheless, such claims may still be challenged on the ground that they are in whole or in part a penalty or any other ground on which a claim may be challenged under the insolvency law of State B.

11. **Notification of foreign creditors**: Foreign creditors are entitled to individual notification of, among other things, the commencement of the local proceedings regarding the debtor under the insolvency law of State B and of the time-limit to file claims in those proceedings. Foreign creditors should be notified as expeditiously as possible and without the kind of delay and expense which certain methods used in the past would involve, such as letters rogatory, consular permissions and similar formal requests for assistance.

12. **Benefits**: In practice, the access provisions of the Model Law regarding the foreign representative save time and expense which, in turn, avoid value-destruction and, in certain cases, may even facilitate the creation of value for the estate of the debtor. This benefits all creditors of the debtor and will incentivize a foreign debtor to have operations in and transact in State B. Foreign creditors will invariably draw similar comfort from the access and notification provisions of the Model Law. In particular, counter-parties of the foreign debtor are less likely to worry about the fact that the foreign debtor is active or intends to be active in State B, if they know that foreign creditors have standing in State B and benefit from the protections described above.

13. **Practice**: The access provisions of the Model Law allow the foreign representative to open local insolvency proceedings in State B in respect of the debtor (in addition to
the foreign proceedings already opened in State A) without the need first to start separate local proceedings in State B. In other words, the status in State A of the foreign representative is automatically recognized in State B for the purpose of having a right of access in local insolvency proceedings already commenced in State B. This brings both time and costs savings.

Recognition

14. **Intention:** The Model Law is intended to expedite and simplify the process required to recognize foreign proceedings and to provide a clear framework for obtaining recognition. This is done by prescribing straightforward and easy-to-meet conditions for obtaining recognition of a foreign proceeding in State B. On the other hand, State B is permitted to withhold recognition in certain circumstances (for example, where recognition would be manifestly contrary to State B’s public policy).

15. **Benefits:** The clear benefit of recognition in State B of a foreign proceeding opened in State A is that there is no need to open separate local insolvency proceedings in State B. In certain respects, the foreign proceedings in State A are treated in State B as if local insolvency proceedings had been opened in State B, without the need in fact to open such proceedings. Recognition allows the foreign representative to access certain of the tools and protections available to a local insolvency office-holder in State B (see Section III (Relief) below). Significant costs and time can be saved and complications avoided because the foreign representative – through the recognition process – is able to request tailor-made relief without the need to commence local insolvency proceedings. A good example is the ability of a foreign representative to seek powers allowing the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor’s assets, liabilities or affairs more generally. The use of such powers, if granted, can assist in gathering information to ascertain whether insolvency “claw-back” actions or claims against directors exist.

16. **The recognition process:** It is the foreign representative who applies to the local court in State B in order to obtain recognition of the foreign proceedings. The conditions for recognition the foreign representative needs to satisfy before the local court are:

   a. submission of (i) a certified copy of the decision commencing the foreign proceedings and appointing the foreign representative in State A, (ii) a certificate from the foreign court in State A certifying the same, or (iii) other evidence acceptable to the local court in State B; and

   b. submission of a statement identifying all foreign proceedings against the debtor that are known to the foreign representative.

Upon satisfaction of these requirements, it will be open to the local court in State B, in its discretion, to recognize the foreign proceeding; it would normally only fail to do so in exceptional circumstances, for example, where recognition would be manifestly contrary to the public policy of State B. This public policy exception should be applied in a restrictive manner.
Foreign proceedings can be recognized as (i) foreign main proceedings (if the so-called “Center of Main Interest” (or “COMI” 5) of the debtor is in the jurisdiction where the foreign proceedings were opened (i.e. State A)) or (ii) foreign non-main proceedings (if the debtor only had a so-called “establishment” 6 in the jurisdiction in State A). The significance of the distinction is that certain relief is automatically available on recognition in the case of recognition of foreign main proceedings, whereas, in the case of foreign non-main proceedings, it is the responsibility of the foreign representative specifically to request all relief which is required on obtaining recognition.

Relief

17. **Benefits:** the automatic relief available under the Model Law, specifically the stay of actions or of enforcement proceedings, is necessary to provide “breathing space” until appropriate measures are taken for reorganization or liquidation of the assets of the debtor. The suspension of transfers provides an immediate restriction preventing multinational debtors moving money and property across international boundaries, which is essential to prevent fraud and protect the legitimate interests of the parties involved until the position can be assessed and investigated as necessary. The ability to apply for discretionary relief under the Model Law affords foreign representatives maximum flexibility and the ability to devise bespoke solutions tailored to the circumstances of the debtor and other interested parties. Finally, the ability to seek preliminary relief on an urgent basis on the filing of an application for recognition can help prevent dissipation of assets and preserve the *status quo* for the benefit of stakeholders generally until the application can be heard.

18. **Automatic relief:** Upon recognition of foreign main proceedings and subject always to the condition that the court is satisfied that the interests of the creditors and other interested persons are adequately protected, certain “relief” automatically follows. The automatic relief is:

   a. the stay of individual actions or proceedings concerning the debtor’s assets, rights, obligations and liabilities;

   b. the stay of execution against the debtor’s assets; and

   c. the suspension of the debtor’s right to transfer, encumber or otherwise dispose of its assets.

19. **Discretionary relief:** Upon the obtaining of recognition in all cases (i.e. whether foreign main proceedings or foreign non-main proceedings) and subject always to the condition that the court is satisfied that the interests of the creditors and other

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5 The concept of “COMI” has been adopted from the EU Regulation on Insolvency Proceedings (EC No. 1346/2000 of 29 May 2000) and is not defined separately in the Model Law.

6 The concept of “establishment” is adopted from the EU Regulation on Insolvency Proceedings and is defined in the Model Law as “any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services”.

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interested persons are adequately protected, the court may, at the request of the foreign representative, grant any appropriate relief for the protection of the assets of the debtor or the interests of the creditors. The discretionary relief includes:

a. in the case of a foreign non-main proceeding, any of the relief which would follow automatically upon recognition of a foreign main proceeding (see paragraph 18 above);

b. providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor’s assets, affairs, rights, obligations or liabilities;

c. entrusting the administration or realization of all or part of the debtor’s assets in the jurisdiction to the foreign representative;

d. extending any interim or provisional relief that had been granted at the time of the filing of the recognition application for the protection of the assets of the debtor or the interests of the creditors; and

e. any additional relief that may be available to a local insolvency office-holder under the laws of the enacting State.

Cooperation

20. **Aims & Benefits:** The cooperation provisions of the Model Law aim to facilitate courts in separate States providing assistance to each other so that, to the extent possible, insolvency proceedings opened in different States are coordinated and the peculiarities of separate systems in different States are overcome. The aim is to help promote consistency of treatment of stakeholders across different jurisdictions. Such consistency, in turn, should enhance both transparency and predictability in cross-border insolvency cases. It should further avoid traditional time-consuming and cost-inefficient procedures, such as letters rogatory and requests for consular assistance. Putting in place a specific legislative framework (such as that set forth in the Model Law) helps promote international cooperation in cross-border cases.

21. **Cooperation is an independent feature of the Model Law:** The Model Law contains express provisions dealing with cooperation, thereby filling a gap found in many national laws. Cooperation provisions in the Model Law operate independently of recognition. In other words, it is not a prerequisite to the use of the cooperation provisions that recognition of the foreign proceedings be obtained in advance. This reflects the policy underlying the Model Law that rigid rules designed to facilitate cooperation should be avoided.

22. **The scope of cooperation provided for in the Model Law is broad:** Under the Model Law, both courts and local office-holders are empowered, in respect of foreign courts or foreign representatives, to:

a. cooperate to the maximum extent possible;
b. to communicate directly; and

c. to provide each other with information and assistance.

These cooperation provisions greatly enable a consistency of approach to be adopted in cross-border insolvencies. The notion of direct communication between courts and office-holders alike is further intended to enable flexible approaches to be taken and to facilitate expeditious actions in urgent situations.

23. **Flexibility is maintained:** The ability to communicate directly does not ensure absolute consistency of treatment but it does encourage such treatment. The cooperation provisions are typically invoked in circumstances in which different insolvencies are being conducted in different States under different rules. It is important, therefore, that flexibility is maintained in order to help promote a greater degree of certainty of outcome whatever the facts of a particular case.

Perceived Disadvantages of the Model Law

24. **Perceived disadvantages:** Set out below (in bold type) are some commonly encountered perceived disadvantages and (in normal type) explanations as to why these are, in fact, misperceptions.

25. **The Model Law erodes the powers of local courts and judges:** Is there a risk that implementation of the Model Law, once implemented, would significantly limit the role of local courts and judges? No. Although certain consequences follow automatically from recognition of a foreign main proceeding\(^7\) (i.e. the stay on proceedings, as addressed above in Section III (*Relief*)), the Model Law expressly contemplates the inclusion of references to provisions of the laws of State B which would apply by way of exception to, or so as to limit, the automatic consequences of recognition\(^8\). In addition, it is open to the applicant foreign representative to apply for additional or different appropriate relief at the same time as seeking recognition\(^9\). As such, the precise extent of the relief and assistance available under the Model Law is contemplated as being consistent with existing provisions of local law and remains, in large part, a matter for the discretion of the local courts in State B. Finally the Model Law specifically provides that, in granting or denying relief, the court must be satisfied that the interest of the creditors and others are adequately protected, as well as enabling the local court to subject relief to conditions it considers appropriate.

26. **The Model Law advocates the application of foreign law in the local jurisdiction:** A basic principle of the Model Law is that recognition of foreign proceedings by the local court of State B produces effects that are considered necessary for an orderly and fair conduct of a cross-border insolvency. Recognition therefore has its own effects rather than importing the consequences of foreign law of State A into the

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\(^7\) Article 20(1) of the Model Law.
\(^8\) Article 20(2) of the Model Law.
\(^9\) Article 21(1) of the Model Law.
insolvency system of State B.\textsuperscript{10} The principle underlying the Model Law is that recognition of a foreign proceeding does not mean extending the effects of the foreign proceeding as they may be prescribed by the law of State A. Instead, recognition of a foreign proceeding entails attaching to the foreign proceedings consequences envisaged by the law of State B.\textsuperscript{11} The question of whether a local enactment of the Model Law in fact achieves these objectives will be a matter for the courts in the State concerned.

27. **The Model Law favours foreign practitioners at the expense of local practitioners:** The implementation of the Model Law should help to improve transparency and predictability of outcomes in the enacting State. This, in turn, should result in an increase of business and trade in that State. One way of achieving the necessary transparency and predictability in a cross-border insolvency situation is to avoid the need for opening time-consuming, costly and inefficient local proceedings when what is required is speed and tailor-made relief to prevent value-destruction and, in certain cases, even allow for the creation of value. Although it might be thought that avoiding the need for local proceedings might be to the detriment of local practitioners, in practice the enactment of the Model Law tends to benefit local practitioners. Foreign representatives seeking assistance in a particular State will require advice and guidance in relation to the local enactment of the Model Law when seeking recognition and the law, practice and procedure applicable in that jurisdiction, both at the outset of the case and in taking such further steps in that State as are required as the case progresses, including when seeking additional relief. Accordingly, rather than prejudicing local practitioners, the Model Law should be thought of as providing new opportunities where none existed previously, including in fostering relationships with foreign counterparts who may be encountered in subsequent assignments or represent a future source of instructions.

July, 2016

**INSOL Fellows Model Law Implementation Steering Committee\textsuperscript{12}**

\textsuperscript{10} Paragraph 178 of the Guide to Enactment.

\textsuperscript{11} Paragraph 194 of the Guide to Enactment.

\textsuperscript{12} The Steering Committee consists of: Peter J.M. Declercq of Morrison & Foerster (chair), Mark Craggs of Norton Rose Fulbright, Adam Harris of Bowman Gilfillan, Antonia Menezes of the World Bank Group, Zoltán Fabór of Horvát & Partners DLA Piper, Leonard McCarty of K&L Gates, Jeffrey Oliver of Cassels Brock, Paul Keenan of Greenberg Traurig, Rodrigo Callejas Aquino of Carrillo y Asociados, and Mathew Clingerman of KRY'S Global.