

**LEGAL CHALLENGES OF CROSS-BORDER INSOLVENCIES IN  
SUB-SAHARAN AFRICA WITH REFERENCE TO TANZANIA AND  
KENYA: A FRAMEWORK FOR LEGISLATION AND POLICIES**

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**A thesis submitted in partial fulfilment of the requirements of  
Nottingham Trent University for the degree of Doctor of Philosophy**

**February 2012**

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## **ABSTRACT**

Although a substantial body of literature has developed in recent years in the area of cross-border insolvency, this scholarship has been dominated by scholars from the United States and Europe, so that a perspective from most of Sub-Saharan African (SSA) countries is lacking. This study addresses this perspective. It makes an in-depth examination and discussion of the challenges that SSA countries face in reform and application of cross-border insolvency law given the ever-growing multinational trade and investment. The study focuses on the risk of failure of SSA legislative processes to properly address the potential challenges of cross-border insolvencies in a manner that is sensitive to the local contexts and which provides a balance with international insolvency benchmarks. It examines cross-border insolvency theories; the global drivers for convergence of insolvency law through global insolvency norms; and the implications for cross-border insolvency regulations arising from cross-border trade and investment arrangements, such as the bilateral investment treaties, before considering the state and future of the legislative frameworks of SSA countries. It then brings out the 'pressures' exerted on and issues that emerge in the consideration and quest for crafting a workable and appropriate cross-border insolvency framework for a SSA country. Notably, the current insights and the pressures from the global convergence may result in unsuitable legislative reforms as such insights and the global insolvency norms are not necessarily and directly relevant to SSA situations. The study offers the perspective that has hitherto been lacking in the current scholarship and provides a theoretical insight and understanding on how the crafting of a workable and appropriate legislative framework may be undertaken, taking account of local policies and providing a balance with the existing international insolvency benchmarks. The study underscores the significance and challenge of prioritising the local contexts in developing a functional cross-border insolvency framework.

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## **LIST OF ABBREVIATION**

ACP	Africa Caribbean Pacific
AGOA	Africa Growth and Opportunity Act
ALI	America Law Institute
AU	African Union
APRM	Africa Peer Review Mechanism
BIT	Bilateral Investment Treaty
BRR	Bankruptcy (Reciprocity) Rules
COMESA	Common Market for Eastern and Southern Africa
COMI	Centre of Main Interest
CERDS	Charter of Economic Rights and Duties Of States
EAC	East Africa Community
EACJ	East Africa Court of Justice
EACA	East Africa Court of Appeal
EBA	Everything But Arms
ECIR	European Council (EC) Regulation on Insolvency Proceedings
ECCAS	Community of Central Africa States
ECOWAS	Economic Community for West African States
EPA	Economic Partnership Agreement
ESA	Eastern and Southern Africa
EU	European Union
FDI	Foreign Direct Investment
FSAP	Financial Sector Assessment Programme
GATT	General Agreement on Tariffs and Trade

ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICSID	International Centre for Settlement of Investment Dispute
IMF	International Monetary Fund
LDC	Least Developed Countries
MENA	Middle East and North Africa
MFN	Most Favoured Nation
MoU	Memorandum of Understanding
NAFTA	North America Free Trade Agreement
NEPAD	New Partnership for Africa's Development
OHADA	Organisation for Harmonisation of Business Law in Africa
PCA	Permanent Court of Arbitration
SADC	Southern Africa Development Community
SACU	South Africa Custom Union
SME	Small and Medium Enterprise
SOEs	State Owned Enterprises
SSA	Sub-Saharan Africa(n)
ROSC	Report on Observance of Standards and Codes
RTA	Regional Trade Agreement
TIDCA	Trade and Investment Development and Cooperation Agreement
TIFA	Trade and Investment Framework Agreements
UN	United Nations
UNCITRAL	United Nations Commission for International Trade Law
UNCTAD	United Nation Conference for Trade and Development
USAID	United States Agency for Aid and Development
WAEMU	West African Economic and Monetary Union

WTO      World Trade Organisation

## **TABLE OF LEGISLATION**

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Bankruptcy Act (Tanzania)

Bankruptcy Act (Chapter 486 of Laws of Kenya)

Bankruptcy Act 1914 (England)

Bankruptcy (Amendment) Act 1926 (England)

Bankruptcy Code (US)

Bankruptcy (Reciprocity) Rules G.N. No. 38 of 1932 (Tanzania)

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Capital Market Authority Act 2002 (Kenya)

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Land (Amendment) Act 2004 (Tanzania)  
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Public Corporation Act 1992 (Tanzania)  
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## ACKNOWLEDGMENT

This thesis is a result of support and assistance of different ways that I received from different people in various capacities. They all deserve my special gratitude. I would like to record my sincere appreciation to a few of them individually or in their generality on behalf of others.

First and foremost I wish to express my heartfelt gratitude to my Director of Studies and Lead supervisor, Professor Rebecca Parry, for her support, confidence, advice and outstanding scholarship and supervision. Had it not been for her encouragements and confidence in my initial draft research proposal, perhaps, I would have not undertaken the study that produced this thesis. Her spontaneous reaction to the earliest version of my draft research proposal that it was ‘very detailed and well thought out’ and that it envisaged ‘the sort of project’ that she would be ‘very keen to supervise’ remained as my inspiration throughout my research and writing of the thesis. I indeed benefitted much from her vast knowledge and experience in research and academic writing in this area of law. Additionally, I particularly and respectively thank my second and third supervisors, Professor Adrian Walters and Professor David Burdette for their distinguished guidance and scholarship. Apart from their incisive comments and well deserved criticisms, they were keen to draw my attention to important issues and perspectives which I would otherwise have overlooked.

I am grateful to acknowledge the generous financial sponsorship I received during my doctoral study from the Commonwealth Scholarship Commission in the United Kingdom. My employer (i.e the Open University of Tanzania) deserves special thanks for nominating me for the scholarship and allowing me to take a study leave. Thanks are also due to some colleagues and friends at NTU and Open University of Tanzania who were kind enough somehow to share their thoughts on some of the relevant issues with me, or otherwise drew my attention to relevant literature.

My wife, Binzua Ally Omar and my children deserve distinguished gratitude for their love, understanding and support in a very special and passionate way that made the completion of this thesis possible. I am glad that they were with me throughout my doctoral study in the UK. My infinite gratitude goes to my parents, Mwl Shaaban Kajatto M. Msuya and Mwl Saada Mussa Msengeli, for their love, prayers, encouragement and the sacrifice they made for my academic advancement and for the academic foundation they built in me since my childhood; and to my brothers and sisters, in Tanzania and United Kingdom, for their moral and material support.

The responsibility for the errors and shortcomings in this thesis is however mine and not those who deserve my gratitude as mentioned above.

## CHAPTER ONE

### THE CONTEXTUAL FRAMEWORK OF THE STUDY

#### 1.1 Introduction

This chapter sets the context in which this study was conducted, using Tanzania and Kenya as representative case studies for Sub-Saharan Africa (“SSA”). The chapter provides the background to the research that culminated in this study; it outlines the focus of the investigation before setting out the aim, objectives, and research questions which guided the study all along. The key propositions of this chapter are as follow: Firstly, much has been done that intensifies the integration of SSA countries into the global market and their interdependence with other countries in trade and investment. The integration into global trade and investment requires SSA countries to consider and actually reform their respective laws relating to cross-border insolvency. The consideration for the reform is critical since the certainty as to the approach to be taken in insolvencies is believed to be one of the factors that fosters confidence and may encourage investment. And the second and last proposition is the challenge as to how best to make such reform in order to avoid the risk of legislative failure. The countries under study are vulnerable to the pressure of convergence of laws and, worse still, the existing materials relevant to the subject of cross-border insolvency lack the perspectives of most of SSA.

#### 1.2 Background

SSA countries have recently been involved in significant amounts of cross-border trade and investment facilitation arrangements.<sup>1</sup> They include bilateral,

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<sup>1</sup> T Ginsburg, ‘International Substitutes for Domestic Institutions: Bilateral Investment Treaties and Governance’ (2005) 25 *Int’l Rev L & Econ* 107; V Mosoti, ‘Bilateral Investment Treaties and the Possibility of a Multilateral Framework on Investment at the WTO: Are Poor Economies Caught in Between?’ (2005-2006) 26 *Nw J Int’l L & Bus* 95, 114; and United Nations Conference on Trade and Development (“UNCTAD”), *World Investment Report 2008: Transnational*

multilateral and regional co-operation arrangements. Development of these forms of arrangements in the recent years was intensified and driven by the implementation of liberalization policies undertaken under the auspices of the multilateral institutions from the mid 1980s and early 1990s in most of the SSA countries.<sup>2</sup> The main aim of the arrangements is to facilitate co-operation in trade and investment through provision of a conducive environment that ensures stability, predictability and certainty in commercial transactions and thus reduction of transaction costs and consequently enhances the accessibility of credits. As far as SSA countries are concerned, the arrangements are meant to boost the inflow of capital, enlarge their markets and enhance their participation in international trade, with the ultimate result of contributing to economic growth and poverty reduction. The co-operation arrangements concluded thus far provide a very strong legal basis for a continued interdependence and cross-border links between SSA countries and the outside world.

Apart from the bilateral trade and investment co-operation arrangements with, mainly, developed countries in Europe and more recently with China, SSA countries are member states of regional arrangements within and to some extent beyond the SSA region.<sup>3</sup> Tanzania and Kenya are, for example, members of the East Africa Community (“EAC”), and individually and respectively are also members of the Southern African Development Community (“SADC”) and the Common Market for Eastern and Southern Africa (“COMESA”). Other SSA countries are also members of other similar arrangements such as the Economic Community for West African States (“ECOWAS”), the Organization for

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*Corporations and Infrastructure Challenge* (United Nations, New York 2008); and UNCTAD, *Economic Development in Africa Report 2009: Strengthening Regional Economic Integration for Africa's Development* (United Nations, New York 2009); and JL Westbrook, *A Global View of Business Insolvency Systems* (World Bank, Washington 2010) 227

<sup>2</sup> J Stiglitz, *Globalisation and its Discontents* (Penguin Books, London 2002) 16, 80-88; A Anghuie, *Imperialism, Sovereignty, and the Making of International Law* (Cambridge, CUP 2004) 245, 258-262. See also generally, M Chossudovsky, *The Globalisation of Poverty: Impacts of IMF and World Bank Reforms* (London, Zed Books 1997) and V Mosoti (n 1)

<sup>3</sup> UNCTAD (n 1) 15 and 34; JW Salacuse, ‘The Treatification of International Investment Law’ (2007) 13 *Law & Bus Rev Am* 155, 163; R Jenkins and C Edwards, ‘The Economic Impacts of China and India on Sub-Saharan Africa: Trends and Prospects’ (2006) 17 *Journal of Asian Economics* 207–225; and F Söderbaum and P Stalgren, *The European Union and the Global South* (Lynne Rienner Publisher, Colorado 2010)

Harmonization of Business Law in Africa (“OHADA”), and the Economic Community of Central Africa States (“ECCAS”).<sup>4</sup> Some statistics suggest that on average each SSA country is a member of at least two regional arrangements and maintains an average of twelve bilateral investment treaties with other countries.<sup>5</sup> The importance of the regional schemes and the other facilitation arrangements is in relation to the opportunity they create for exploitation of economies of scale which entails regional specialization and attraction of investment by enlargement of the market.<sup>6</sup>

Effective implementation of the arrangements enhances cross-border co-operation in trade and investment among the participating member states. The increased cross-border co-operation in trade and investment means increased involvement of business enterprises, especially multinational corporations which transcend their home country’s borders to invest and trade in the host countries such as in SSA. It also implies the increased movement of people across national borders, and the consequent increase in business competition.<sup>7</sup> Indeed, as cross-border trade and investment is enhanced, the integration of SSA countries in the global economy is bolstered, so is the exposure of the countries to cross-border implications whose solution might need a transnational approach.<sup>8</sup> One implication relevant to the present context is the potential problem of insolvencies having an international element which would mandate extra vigilance and co-operation in regulation and dealing with them similar to, and perhaps to a greater extent than other problems that have long received attention. It is, indeed, in this context that some regional communities such as those of the European Union (“EU”), North America Free Trade Agreement (“NAFTA”) and OHADA, have crafted regimes for cross-border insolvency regulation among member countries, based on the recognition of the need to foster free movement

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<sup>4</sup> R Shams, ‘The Drive to Economic Integration in Africa’ (2005) Hamburgisches Welt-Wirtschafts-Archiv (“HWWA”) Discussion Paper No 316 < <http://www.hwwa.de> > accessed 12 March 2009

<sup>5</sup> V Mosoti (n 1)

<sup>6</sup> DK Mbogoro, *Global Trading Arrangements and Their Relevance to Tanzania Economic Development: Challenges and Prospects*, (Friedrich Ebert Stiftung, Dar es salaam 1996)

<sup>7</sup> DK Mbogoro (n 6)

<sup>8</sup> HK Amani, ‘Challenges of Regional Integration for Tanzania and the Role of Research’ (Open University of Tanzania Convocation General Meeting Address 2005)

of goods and service for trade and investment purpose.<sup>9</sup> It is in the same context that treaties for co-operation in cross-border insolvencies among countries with significant commercial relations were concluded in the past.<sup>10</sup>

The arrangements have influenced considerable changes and reforms in SSA countries in regard to cross-border trade and investment.<sup>11</sup> The reforms have been undertaken in the context of the continued implementation of the IMF/World Bank structural adjustment programmes which culminated in the liberalisation of trade and investment and the consistent need for creation of an enabling environment for capital flow and trade.<sup>12</sup> The implication of the reforms includes intensification of the challenges of potential cross-border insolvencies in SSA countries which would ordinarily require an appropriate and relevant legal framework. Since SSA is relatively less integrated into the global economy than are the developed countries and the majority of the emerging economies outside SSA region, the potential effect of cross-border insolvencies might be considerably less than in developed countries.

Despite the potential cross-border insolvencies resulting from the changing business environment and the actual occurrences of a series of high profile cross-border insolvency cases in other jurisdictions which have bilateral co-operation with most of the SSA countries, it has relatively taken long for legislative attention to start to emerge in SSA countries to address the challenge.<sup>13</sup> Regional arrangements of which these countries are members provide an avenue for the making of protocols on trade co-operation, investment and finance in order to address such issues as harmonisation and settlement of trade disputes.<sup>14</sup> The

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<sup>9</sup> B Wessels, BA Markell and JJ Kilborn, *International Cooperation in Bankruptcy and Insolvency Matters* (OUP, Oxford 2009 ) 101

<sup>10</sup> B Wessels, BA Markell and JJ Kilborn (n 9) 101

<sup>11</sup> WP Ofosu-Amaah, *Reforming Business- Related Laws to Promote Private Sector Development: The World Bank Experience in Africa*, (World Bank, Washington 2000) ; and JW Salacuse, *The Law of Investment Treaties* (OUP, Oxford 2010)

<sup>12</sup> WP Ofosu-Amaah (n 11); JW Salacuse, 'From Developing Countries to Emerging Markets: A Changing Role of Law in Third World' (1999) 33 *Int'l L* 875

<sup>13</sup> The exception is Republic of South Africa and Eretria which are among the first countries in the world to adopt the Model Law.

<sup>14</sup> Treaty for Southern African Development Community ("SADC") Art 21 and 22 (1); and Treaty for Establishment of East Africa Community ("EAC") Art 126(2)(b), 131 and 152

inter-regional arrangements provide for requirements for reform in a bid to institutionalise the rule of law, good governance and liberalisation of the market, to mention but a few, as part of the requirements for SSA countries to enjoy the benefits offered by such arrangements.<sup>15</sup> Arguably, the room for the making of protocols and the requirement for reform have all the potential for ensuring the availability of legal frameworks for regulation of cross-border insolvencies. In addition, the requirement for reform to SSA countries potentially means pressure on the part of such countries as regards the reform of insolvency related laws.

It is only OHADA within SSA that has widely been acknowledged for institutionalising a regional cross-border insolvency regime among its sixteen Francophone member states.<sup>16</sup> Based on uniform law, the regime reflects the French civil law and has arguably failed to attract other Franco-phone and Anglo-phone countries as earlier anticipated.<sup>17</sup> Since it was enacted and brought into force, it has been modestly implemented and used in appropriate cases, which could raise questions as to its appropriateness and suitability of the approach it takes.<sup>18</sup>

The drive for global convergence of the insolvency laws and cross-border insolvency in particular (as signified by the enactment of the UNCITRAL Model Law on Cross-Border Insolvency and its adoption by the subsequent international initiatives by the World Bank, IMF and the UNCITRAL) has, under the auspices of the multilateral institutions, paved the way for development of global insolvency norms providing standards of benchmarks on the basis of which and

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<sup>15</sup> Text to part 4.6 in Chapter 4

<sup>16</sup> These are Benin, Burkina Faso, Cameroon, Central African Republic, Comoros, Congo, Ivory Coast, Gabon, Guinea, Guinea-Bissau, Equatorial Guinea, Mali, Niger, Senegal, Chad and Togo. See, B Martor, N Pilkington, DS Sellers and S Thouvenot, *Business Law in Africa: OHADA and the Harmonisation Process* (Kogan, London 2002) 20; and RF Opong 'Re-Imagining International Law: An Examination of Recent Trends in the Reception of International Law into National Legal Systems in Africa' (2007) 30 *Fordham Int'l LJ* 296, 307 and 308

<sup>17</sup> Text to n 179 in chapter 4. Notably, Cameroon which is a member state of the OHADA is both Francophone and Anglophone state given its past French and British colonial history.

<sup>18</sup> JA Owusu-Ansah, 'The OHADA Treaty in the Context of International Insolvency Law Developments' < [www.iiiglobal.org](http://www.iiiglobal.org) > accessed 6/11/2008; and B Wessels, *International Insolvency Law* (Kluwer, Netherland 2006) 47

against which domestic insolvency laws could be crafted and adjudged.<sup>19</sup> The assessment as to the extent to which developing countries observe the norms and provision of advice on how reform ought to be effected on the laws is the domain of the multilateral institutions. Indeed, the leverage of the multilateral institutions, reinforced by the vulnerability of the developing countries and the intricacies of the globalised economy, seems to have the potential to influence developing countries in SSA to comply with the insolvency benchmarks to the extent of undermining the local contexts.<sup>20</sup>

The review of literature that has been undertaken shows that, although a body of literature has developed in recent years in the area of cross-border insolvency, this scholarship has been dominated by scholars from the United States and Europe writing mostly from the perspective of advanced economies. Accordingly, an insight from the perspective of SSA is lacking. There is therefore an apparent dearth of literature that dwells on SSA in respect of the area under study, though the existing literature provides an important theoretical background for examination and discussion of cross-border insolvency from the perspective of SSA.

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<sup>19</sup> World Bank and UNCITRAL, 'The Unified Creditor Rights and Insolvency Standard Based on World Bank Principles for Effective Creditors Rights and Insolvency Systems and UNCITRAL Legislative Guide on Insolvency Law' <<http://www.worldbank.org/ifa/FINAL-ICRStandard-March2009.pdf>> accessed 22 July 2009. The Unified Global Insolvency Standard is based on and integrates the World Bank Principles for Effective Creditor Rights and Insolvency Systems and the UNCITRAL Legislative Guide on Insolvency Law. Thus, the unified standard essentially incorporates the benchmarks of all the previous efforts. It is noteworthy that the UNCITRAL Legislative Guide on Insolvency Law has had advantages of taking into account all the previous efforts including the IMF and World Bank's initiatives documented in IMF, 'Orderly and Effective Insolvency Procedures –Key Issues (IMF, Washington 1999); and World Bank, *Principles and Guidelines for Effective Insolvency and Creditor Rights Systems* (World Bank, Washington 2005). Recently, the UNCITRAL Working Group V dealing with insolvency matters has addressed the problem of multinational groups in insolvency. Its work has led to recommendations for inclusion of a new part of the UNCITRAL Legislative Guide on Insolvency Law providing international standards in the area of insolvency of groups. See I Mevorach, 'European Insolvency Law in a Global Context' [2011] *JBL* 666, 667

<sup>20</sup> TC Halliday, 'Legitimacy, Technology, and Leverage: The Building Blocks of Insolvency Architecture in the Decade Past and the Decade Ahead' 32 *Brook J Int'l L* 1081; TC Halliday, and BG Carruthers, *Bankrupt: Global Lawmaking and Systemic Financial Crisis* (Stanford University Press, California 2009); and K Pistor, 'The Standardization of Law and Its Effect on Developing Economies' (2002) 50 *Am J Comp L* 97, 102

The existing theories on cross-border insolvencies, as well as the global insolvency benchmarks that have emerged in recent years, have almost exclusively been developed and addressed from the viewpoints of developed economies, which are not necessarily relevant to developing countries, especially the least developed economies, such as those of SSA. Accordingly, the position of these countries, the least developed ones in particular,<sup>21</sup> deserves to be considered, given the pressures towards globalisation and convergence of laws. There is thus the potential for the pressure to result in unsuitable legislative reforms in SSA countries which, because of their socio-economic situations, can hardly withstand the pressure.

### 1.3 Research Problem

The focus of this study is on the looming risk of failure of SSA legislative processes to craft appropriate and workable legislation for regulating cross-border insolvencies as a part of the efforts to foster an improved environment for private sector development and economic growth.<sup>22</sup> The failure entails two potential aspects. The first is the failure to recognise and draw on the growing challenge of potential cross-border insolvencies emerging from the increasing cross-border co-operation in trade and investment. And the second is the failure

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<sup>21</sup> The least developed countries (“LDCs”) the majority of which being in SSA, represent the poorest and weakest segment of the international community. These countries are characterized by their exposure to a series of vulnerabilities and constraints, such as limited human, institutional and productive capacity; acute susceptibility to external economic shocks, natural and man-made disasters and communicable diseases; limited access to education, health and other social services and to natural resources; poor infrastructure; and lack of access to information and communication technologies. As such, the LDCs are considered to be in need of the highest degree of attention on the part of the international community. Criteria used by the UN to classify a country as among the LDCs include: low income, in the light of a three-year average estimate of the gross national income per capita; weak human assets, and economic vulnerability. See for instance UN, Programme of Action for the Least Developed Countries Adopted by the Third United Nations Conference on the Least Developed Countries in Brussels on 20 May 2001 UNITED NATIONS/CONF.191/11 8 June 2001, <<http://www.unctad.org/en/docs//aconf191d11.en.pdf>> accessed 24/11/2009. With regard to SSA, this study adopts the ordinary meaning of SSA which refers to the region consisting of countries situated in the area of the African continent which lies South of the Sahara. However, South Africa is excluded from the consideration and treatment of the SSA perspective. This is because South Africa is relatively more advanced than most of SSA countries in economic terms and cross-border insolvency matters.

<sup>22</sup> E Rubin, ‘The Conceptual Explanation for Legislative Failure’ (2005) 30 *Law & Soc Inquiry* 583. Rubin notes how legislative failure has been a subject of concern and attention by scholars from different disciplines such as law, political science and sociology.

to make appropriate choices commensurate with the local contexts and which also takes account of the international insolvency standards.

There are significant challenges that are likely to be faced and encountered in the reform process. The challenges may pose far reaching implications for the legislative processes that SSA countries might undertake. The constant pressure to strengthen their troubled economies, desperation to attract capital inflow and boost trade, the vulnerability to external pressures and the nature of the global norms providing benchmarks for reform, may all present different types of challenges that might need to be carefully dealt with in order to allow reform that would result in to an effective and relevant regime for the countries under study.

It is common knowledge that some laws that were enacted to facilitate the implementation of liberalisation policies imposed by the multilateral institutions have not been working well in some respects, as they do not appropriately reflect the local circumstances.<sup>23</sup> It has been argued that in some instances they have tended to have an adverse impact on the societies that have been required to embrace them. The adverse impact on such societies is mainly because in some respects such laws are designed and implemented with little, if at all, regard for specific needs of the particular countries concerned.<sup>24</sup> In fact, there is an on-going debate, which investigates the effectiveness of the liberalisation policies in developing countries which were imposed under the umbrella of the multilateral institutions, notably the IMF and the World Bank. This debate has produced large volumes of literature with fundamental degrees of divergences.<sup>25</sup> The

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<sup>23</sup> CRP Pouncy, 'Stock Markets in Sub-Saharan Africa: Western Legal Institutions as a Component of Neo-Colonial Project' (2002) 23 *U Pa J Int'l Econ L* 85; TA Kelley, 'Exporting Western Law to the Developing World: The Troubling Case of Niger' (2007) 7 *Global Jurist* (Frontiers) Article 8 < <http://www.bepress.com/gj/vol7/issu3/art8> > accessed 01/06/2010; T Halliday 'Crossing Oceans, Spanning Continents: Exporting Edelman to Global Lawmaking and Market-Building' (2004) 38 *L & Soc'y Rev* 213, 217; and A Anghie (n 2) 259

<sup>24</sup> Ibid

<sup>25</sup> See for example, A Berg and A Krueger, 'Trade, Growth and Poverty: A Selective Survey', (2003) IMF Working Paper 03/30 < <http://www.imf.org/external/pubs/ft/wp/2003/wp0330.pdf> .> accessed 31 August 2009; AL Winter, N McCulloch and A McKay, 'Trade Liberalization and Poverty' (2004) 42 *Journal of Economic Literature* 72-; A Harrison, A and G Hanson G, 'Who Gains from Trade Reforms? Some Remaining Puzzles,' (1999) *Journal of Development Economics* 59; and J Stiglitz (n 2 )

implication of this trend for the reform of insolvency related laws in SSA countries might be far reaching given that insolvency laws and their implementation and usages are considerably sensitive to local policies.<sup>26</sup>

A number of measures have been developed to deal with cross-border insolvencies.<sup>27</sup> Most of these measures have traditionally been effected either by treaties concluded between two or more countries having close commercial relations or unilateral initiatives undertaken by respective countries.<sup>28</sup> More recently, international initiatives have significantly emerged. One of the significant developments in this respect is the UNCITRAL Model Law on Cross-Border Insolvency, which may be adopted by countries as part of their domestic legislation.<sup>29</sup> The EC Regulation on Insolvency Proceedings (“ECIR”) is another example of such initiatives undertaken in respect of a regional community.<sup>30</sup> The measures that have been developed all along underlie the divergence that exists between substantive laws of different countries because of different local contexts to which insolvency laws are sensitive.<sup>31</sup> Lessons that can be learnt from such measures need to be considered in light of the ever increasing cross-border co-operations in trade and investment within and outside the existing regional arrangements. The apparent question is which strategy these countries should use in responding to such challenges and developments, taking into account the socio-economic, cultural, and institutional conditions, to mention but a few, that pertain to these countries and the realities of the world economy.

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<sup>26</sup> N Martin ‘The Role of History and Culture in Developing Bankruptcy and Insolvency Systems: The Perils of Legal Transplantation’ (2005) 28 *BC Int’l & Comp L Rev* 1, 4; JAE Pottow, ‘Greed and Pride in International Bankruptcy’ (2005-2006) 104 *Mich L Rev* 1819; and F Tung, ‘Fear of Commitment in International Bankruptcy’ (2000-2001) 33 *Geo Wash Int’l L Rev* 555, 561

<sup>27</sup> B Wessels, BA Markell and JJ Kilborn (n 9); and Fletcher, *Insolvency in Private International Law* (2<sup>nd</sup> edn OUP, Oxford 2005)

<sup>28</sup> *Ibid*

<sup>29</sup> For the trends on adoption of the Model Law see generally, LC Ho (ed), *Cross-Border Insolvency, A Commentary on the UNCITRAL Model Law* (Globe Law & Business, London 2009)

<sup>30</sup> Council Regulation (“EC”) No 1346/2000 of 29 May 2000 on Insolvency Proceedings

<sup>31</sup> See n 26 above

## **1.4 Aim, Objectives, and Research Questions of the Study**

In view of the focus of the study mentioned above, the aim that this study seeks to achieve is to provide, through doctrinal legal scholarship, and from a SSA perspective, an insight into the challenges involved in the development, implementation and use of law in dealing with and regulating cross-border insolvencies. Tanzania and Kenya are used as case studies for SSA, though occasionally, reference is made to other countries in SSA where it is appropriate to do so.

### **1.4.1 Objectives**

In seeking to attain the aim of this study, the following key objectives guided this study.

- i) Examining the challenges to cross-border co-operation in trade and investment posed by globalisation, bilateralism and multilateralism, as well as regional schemes.
- ii) Investigating the laws and practices on cross-border insolvencies in SSA and establishing the extent to which they recognise and address the challenges of potential cross-border insolvencies arising from cross-border co-operations in trade and investment.
- iii) Exploring the challenges and aspects to be considered in developing a framework to be used as a guide in addressing cross-border insolvencies in SSA countries, given the socio-economic, cultural and institutional environment and aspirations of the countries under study.

### **1.4.2 Research Questions**

To the research problem stated above and based on the above objectives, the following questions guided this study.

- i) What implications do the co-operations in trade and investments have for Tanzanian and Kenyan law and in particular on insolvency issues?
- ii) Do the existing regulatory frameworks and practices for insolvencies in Tanzania and Kenya adequately cater for cross-border insolvency issues that are prone to arise as a result of enhanced cross-border co-operations in investment and trade?
- iii) What challenges, aspects and strategies should respectively be considered and employed in Tanzania and Kenya in formulating, negotiating, enacting, and concluding an effective mechanism for regulation of cross-border insolvencies?

## **1.5 Research Methodology and Sources**

A traditional doctrinal legal scholarship that involves analysis of primary and secondary sources of law has been used in this study to address the focus and aim of this study. This is the methodology that is overwhelmingly used in similar legal studies. A critical legal analysis of relevant legislation, case law, policies, research studies, multilateral and international institutions' reports, governments' reports, treaties, international insolvency standards, and protocols related to or on the subject under study has been undertaken.

The use of various legal methods, especially rules of statutory interpretations, and various forms of legal reasoning such as deductive reasoning and inductive reasoning have been applied in appropriate circumstances in the study. It is through this methodology and from the mentioned sources that materials were generated, analysed and systematically presented and explained in relation to the context of this study.

The sources were obtained mainly from libraries, relevant websites, such as those of governments of the countries under study, law reform commissions of the countries under study and international and multilateral institutions. Relevant

reports/treatises by governments of the countries under study, international and multilateral institutions and law reform commissions in the countries under study have been sought and used in determining whether, and to what extent, consideration of an appropriate approach to cross-border insolvencies co-operation has been made. To some extent, and without compromising the relevance of local contexts, relevant experience from other countries and regions derived from source materials were used to assess the legal frameworks of the countries under study and to gain insights and lessons that could be considered in addressing the challenges and to provide an insight into the crafting of a workable and appropriate cross-border insolvency framework for SSA. Tanzania and Kenya have been used as representative case studies for SSA countries. The use of the case studies was intended to allow in depth investigations of the research questions to be undertaken. The use of the case study approach in this study was however not intended to completely preclude occasional reference to other SSA countries where it was considered desirable to do so. While Tanzania and Kenya are used as case studies, the study was not strictly speaking meant to be a comparative study.

## **1.6 Organisation of the Study**

This study is structured in eight chapters as follows. The present chapter has laid out a contextual framework of the study. Chapter Two provides a critical review of the conceptual and theoretical aspects of the cross-border insolvency landscape from a SSA perspective.<sup>32</sup> Chapter Three revisits the global drive for convergence of insolvency law systems in the context of the international insolvency benchmarks and the quest for a cross-border insolvency framework for SSA. Chapter Four makes an in-depth examination of the arrangements for the facilitation of cross-border trade and investment and inquires into the extent to which they implicate and inform cross-border insolvency regulation in SSA. Accordingly, Chapter Four in particular answers the question whether SSA

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<sup>32</sup> An article based substantially on chapter two of this thesis won the 2010 International Insolvency Institute (2010 III) Bronze Medal Award and has since been published. See BS Masoud, 'Theoretical Aspects of the Cross-Border Insolvency Landscape: Issues and Perspectives for Sub-Saharan Africa' in [2011] *Norton Annual Review of International Insolvency* 338-378

would need a different framework from those suggested by the theories and the benchmarks.

Chapter Five and Six basically look at the existing legal frameworks and practices for cross-border insolvencies in Tanzania and Kenya as case studies for SSA while considering their historical backgrounds and origin as well as the emerging reform trend. The chapters consider the extent to which the existing legal frameworks address cross-border insolvencies in the context of the existing theories, and international insolvency benchmarks. The application of the common law and its impact is used as a case study for the impact of colonial legacy in cross-border insolvency regulation.

Chapter Seven explores the specific practical challenges and aspects that might need to be considered in developing a framework for Tanzania and Kenya-the case studies for SSA- for addressing the challenges of cross-border insolvencies. The chapter demonstrates the manner in which different systems diverge from one another because of differing local policies and the emerging trend of accepting and recognising legitimate local interests that deserves to be protected. It also shows how the existing national policies can be used to identify relevant policy perspectives to be served in the insolvency systems and the challenges involved in negotiating the local contexts and the corresponding policy choices to be made in developing a framework for cross-border insolvency.

Chapter Eight concludes and summarises the main insights from the findings of this study based on the chapters from which they emerge. The chapter states the contribution to knowledge that the study claims to make and outlines limitations of the study and gaps for further research. Notably, the main thrust of the foregoing chapters is to expose the challenges that SSA countries face in addressing the challenges of cross-border insolvencies and providing an insight for crafting of a workable and appropriate cross-border insolvency framework.

## **CHAPTER TWO**

### **CONCEPTUAL AND THEORETICAL ASPECTS OF THE CROSS-BORDER INSOLVENCY LANDSCAPE WITH REFERENCE TO SUB-SAHARAN AFRICA**

#### **2.1 Introduction**

Problems that arise in the event of an insolvency in which an insolvent company's creditors and assets are spread across more than one jurisdiction, have long given rise to competing theoretical approaches; each purporting to provide the best solution to overcome the problems that cross-border insolvencies pose. With the globalisation drive, the competing theories have been a subject of intense debate, leading to the consideration of some form of alternative approaches, mainly drawn from the dominant competing theories developed and addressed from the perspective of developed countries. This chapter provides a perspective that has been hitherto lacking in the cross-border insolvency literature. It examines the theoretical approaches to cross-border insolvency in relation to the general theories underlying the objectives of an effective insolvency law system from a perspective of Sub-Saharan Africa (SSA). Salient features of the theories and emerging aspects within the theoretical debate on cross-border insolvency approaches are considered with particular reference to the SSA context and issues that arise between the needs of such jurisdictions and the approaches outlined in the literature that has emerged in developed countries, in particular from the US and Europe are identified. This chapter begins by outlining the basic issues of insolvency and cross-border insolvency. Attention will then turn briefly to theories of insolvency law in general and this discussion will be used as a springboard for a discussion of the theories of cross border insolvencies, as developed in the literature, before a view from a sub-Saharan perspective is offered and the issues that emerge in the quest for crafting a workable and appropriate cross-border insolvency framework for SSA are outlined.

## 2.2 The Concept of Insolvency and Cross-Border Insolvency

In a modern competitive market economy, which characterises the global economy, and where business operations increasingly rely upon credit, insolvency is an inevitable aspect and a truism.<sup>1</sup> It traditionally refers to a situation whereby a company's outstanding liabilities exceed its assets' measurable value.<sup>2</sup> Whereas the traditional approach represents a balance sheet or absolute test of insolvency, the modern approach represents a cash flow test of insolvency which is signified by the company's inability to pay its debts, as and when they fall due.<sup>3</sup>

In the context of efficiency and value maximisation of the insolvent debtor's estate, the cash flow test is regarded as the most appropriate. Firstly, it facilitates commencement of insolvency proceedings early enough in the period of insolvency and secondly, it allows other parties, particularly creditors, to ascertain the true position of the debtor's financial position.<sup>4</sup> However, some countries that make use of the cash flow test also make use of the balance sheet test.<sup>5</sup> This is in line with the global convergence which not only gives credence

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<sup>1</sup> M Balz, 'The European Union Convention on Insolvency Proceedings' (1996) *Am Bankr L J* 485; and K Anderson, 'The Cross-border Insolvency Paradigm: A Defense of Modified Universal Approach Considering the Japanese Experience.' (2000) 21 *U Fa J Int'l L* 679. As noted in chapter 1, an article based on this chapter (i.e chapter 2) won the 2010 International Insolvency Institute Bronze Medal Award and has since been published. See BS Masoud, 'Theoretical Aspects of the Cross-Border Insolvency Landscape: Issues and Perspectives for Sub-Saharan Africa' in *Norton Annual Review of International Insolvency* (Thomson West, 2011) 338-378

<sup>2</sup> IF Fletcher, *Insolvency Law in Private International Law* (2<sup>nd</sup> edn OUP, Oxford 2005) 1-4

<sup>3</sup> Australia and the Cayman Islands are examples of Commonwealth jurisdictions whose legislation, namely Corporation Law 2001 s 95A and Companies (Amendment) Act 2007 s 95(c) respectively, provide for a cash flow test only. On the other hand, the UK is a typical example of a jurisdiction whose legislation (Insolvency Act 1986 s 123) provides for the employment of both tests, albeit in varying circumstances and alternative manner. It is noteworthy that in Tanzania Companies Act 2002 s 280 has also adopted the UK's approach as it provides for the employment of both tests.

<sup>4</sup> UNCITRAL Legislative Guide on Insolvency Law 2005, 45 and 46, <[www.uncitral.org/pdf/english/texts/insolven/05-80722\\_Ebook.pdf](http://www.uncitral.org/pdf/english/texts/insolven/05-80722_Ebook.pdf)> accessed 02/06/2009

<sup>5</sup> See n 3 above. See also, T Heaver-Wren, "'Striking a Balance"-the Test for Insolvency in the Cayman Islands' Insolvency' (2008) 22 *Insolvency Intelligence* 152, 152-153; and H Peter and others (eds) *The Challenges of Insolvency Law Reform in the 21<sup>st</sup> Century: Facilitating Investment and Recovery to Enhance Economic Growth* (Zurich, Schulthess Juristische Medien

to the cash flow test, but also advises against the use of a balance sheet standard as a single test on account of its inherent weaknesses of relying on information in the control of the debtor to prove insolvency. Such a test would present significant difficulties for creditors seeking to prove that the debtor is insolvent.<sup>6</sup>

Cross-border insolvency describes a situation where an insolvent debtor has assets and or creditors in more than one jurisdiction.<sup>7</sup> As most routine business dealings are becoming global, it is increasingly becoming impossible to avoid the international effect of insolvency. This is attributed to the increased interconnectedness and interdependence between national economies,<sup>8</sup> improvements in technology, particularly in transport and communication, and the resulting reduction in the cost of moving goods, funds and information around the world which has paved the way for growth of larger corporate entities.<sup>9</sup> However, SSA is relatively less integrated to the world economy given that it is characterised by the United Nations as a least developed economy.<sup>10</sup> As such, the potential effect of cross-border insolvency is relatively much less than in advanced and emerging economies.<sup>11</sup>

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AG 2006) 18-20 which observe that even countries whose legislation provides only for a cash flow test have tended in practice to make use of balance sheet test in providing a complete picture of a debtor's present and prospective financial situation. Australia and recently the Cayman Islands offer good examples.

<sup>6</sup> UNCITRAL Legislative Guide on Insolvency Law 2005 (n 4). See also International Monetary Fund ("IMF"), *Orderly and Effective Insolvency Procedures: Key Issues* (Legal Department, IMF, Washington 1999) <<http://www.imf.org/external/pubs/ft/orderly/index.htm>> accessed 4/6/2009; and World Bank's *Principles for Effective Insolvency and Creditor Rights Systems 2005* <<http://www.worldbank.org/ifa/IPG%20-%20Revised%20Pples%20FINAL%20%5B21%20Dec%202005%5D.pdf>> accessed 23/6/2009

<sup>7</sup> Other terms that are used interchangeably to describe the same situation include; interstate insolvency, international insolvency, transnational insolvency, multi-state insolvency, multi-jurisdictional insolvency, multinational insolvency and multinational default.

<sup>8</sup> This includes interaction between economic entities located in different countries.

<sup>9</sup> This is partly a result of modern features of business consisting of mergers and takeovers. See IMF (n 6); and PR Wood, *Principles of International Insolvency* (2<sup>nd</sup> edn, Maxwell London 2007)

<sup>10</sup> Text to n 21 in chapter 1

<sup>11</sup> It has been noted that SSA countries are among the countries that were not immediately and directly affected by the current economic recession. This is largely by reason of being less integrated to the world financial system. Accordingly, the only effects that these countries experienced were a reduction in financial aids from developed countries, a fall in the demand for SSA exports, thereby a drop in commodity price and decline in the inflow of foreign direct investment which accounted significantly to the GDP of such countries. See IMF, *Regional Economic Outlook: Sub-Saharan Africa* (IMF, Washington, D.C. 2009); and World Bank, *The World Development Indicator 2009* (Washington 2009)

Insolvency is described as wholesale as, upon its occurrence, it affects not merely one or a few distinct transactions but also every legal relationship involving the insolvent debtor, including the national economy.<sup>12</sup> As such, insolvency law has been termed as a type of meta-law that ‘...swoops in and trumps baseline legal relationships in unusual circumstance of general default.’<sup>13</sup> The internationalisation of insolvency law thus multiplies these complexities. The very nature of insolvency, it has thus been argued, influences nations to legislate for it in a manner that takes into account and reflects the nations’ historical, social, political and cultural needs.<sup>14</sup> The different policy choices that characterise a given insolvency system are a reflection of such country’s norms and inclinations.<sup>15</sup> This explains why insolvency systems of different countries vary from one another. It is however unlikely that this argument can equally hold in SSA, whose laws and legal systems were largely superimposed by and inherited from countries that colonised the region.<sup>16</sup> Given the low level of economic development and integration into the global economy as well as the hitherto dominance of a centralised economy system, the insolvency laws largely inherited from the colonial powers have not been widely and effectively implemented.<sup>17</sup> This is partly attributable to lack of circumstances that warrant

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<sup>12</sup> See PR Wood (n 9); and F Tung, ‘Fear of Commitment in International Bankruptcy’ (2000-2001) 33 *Geo Wash Int’l L Rev* 555, 566; PJ Omar *European Insolvency Law* (England, Ashgate 2006) 6-9. The impact of insolvency on the national economy is often evidenced in loss of revenues in terms of taxes, loss of jobs to citizens, loss of economic activities and consequently collapse or shrinking of cities and towns which may in turn lead to migration and congestion to other areas.

<sup>13</sup> JAE Pottow, ‘Greed and Pride in International Bankruptcy: The Problems of and Proposed Solutions to Local Interests’, (2005-2006) 104 *Mich L Rev* 1899, 1902; and M Balz, (n 1) 486

<sup>14</sup> N Martin ‘The Role of History and Culture in Developing Bankruptcy and Insolvency Systems: The Perils of Legal Transplantation’ (2005) 28 *BC Int’l & Comp L Rev* 1, 4; F Tung (n 12) 561; and JAE Pottow (n 13)

<sup>15</sup> A Davydenko and JR Franks, ‘Do Bankruptcy Codes Matter? A Study of Defaults in France, Germany, and the UK’ (2008) 63 *Journal of Finance* 565; PR Wood (n 9) and M Rowat, ‘Reforming Insolvency Systems in Latin America’, (Viewpoint No. 187, World Bank, June, 1999) < <http://rru.worldbank.org/documents/publicpolicyjournal/187rowat.pdf>> accessed 12/3/2009

<sup>16</sup> D Berkowitz, K Pistor, and J Richard, ‘Economic Development, Legality and the Transplant Effect’ (2003) 47 *European Economic Review* 165; and SL Sempasa, ‘Obstacles to International Commercial Arbitration in African Countries’ (1992) 41 *Int’l & Com L Q* 387, 413

<sup>17</sup> South Africa and the Organization of Harmonisation of Business Law in Africa (OHADA) are exceptions in this regard. They have received more attention in insolvency discourse than any other SSA country or region organisation.

the application of such laws.<sup>18</sup> As such, any initiative for reform of insolvency law systems in the majority of SSA countries would supposedly require consideration of the extent to which the inherited laws have been enforced<sup>19</sup> and, additionally, if over the years there have been changes in favour of particular policy choices. This would arguably need to be undertaken within the wider context of consideration of the SSA countries' historical, socio-economic, political and cultural needs.

Despite the historical divergences that are apparent in national insolvency law systems, it is noteworthy that there have recently been significant pressures towards global convergence and harmonisation of insolvency laws.<sup>20</sup> However, special concerns have been directed at emerging and transitional economies due to the immense commercial interest that advanced countries have in those economies, and the need to ensure stability and the prevention of an occurrence such as the crises of the 1990s. Such interests are largely evident in the activities of multinational enterprises by advanced countries in terms of trade and foreign direct investment inflow.<sup>21</sup> The interest is also reflected in the academic scholarship and the pressure that has been exerted for reform of these economies, suggesting modernisation of the insolvency laws along the lines of the advanced countries models.

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<sup>18</sup> There has been a general lack of interest in how these countries deal with insolvency and even involvement of these countries in international insolvency law reform initiatives. On this kind of observation see CG Paulus, 'Global Insolvency Law and the Role of Multinational Institutions' (2006-2007) 32 *Brook J Int'l L* 755, 761. However, the general view is that SSA countries have, if at all, weak, outdated and inefficient insolvency systems.

<sup>19</sup> This is seemingly important because the implementation of law is always likely to result in substantial differences between the law and practice. See CG Paulus (n 18) 765

<sup>20</sup> See n 6 above; and S Block-Lieb and T Halliday, 'Harmonization and Modernisation in UNCITRAL Legislative Guide on Insolvency Law' (2006-2007) 42 *Tex Int'l LJ* 475, 511-512

<sup>21</sup> J Stiglitz, *Globalization and Its Discontents* (Penguin Books, London 2002) 98; TC Halliday, and BG Carruthers, *Bankrupt: Global Lawmaking and Systemic Financial Crisis* (Stanford University Press, California 2009); and DW Arner and others 'Property Rights, Collateral, Creditor Rights, and Insolvency in East Asia' (2007) 42 *Tex Int'l LJ* 173

### 2.3 A Brief Overview of Theoretical and Policy Foundations of Insolvency Systems

There has been controversy over the policy objectives of insolvency systems. Several opposing theoretical explanations have been put forward in an attempt to provide a coherent policy basis for the existence and application of insolvency law systems.<sup>22</sup> The theoretical views have hitherto been used to explore and rationalise the theoretical approaches for cross-border insolvencies as it is shown in the discussion that follow below.

Two main groups of theoretical views on the policy basis for insolvency systems are worthy of brief attention. The first theoretical view is from the commentators, who view insolvency law systems from the economic analysis point of view, and is mainly based on and draws from Jackson's 'common pool problem' concept.<sup>23</sup> According to this group, an insolvency law system is more of a collectivised debt collection device created in response to the common pool problems that arise when individual creditors assert rights against a common pool of assets that is not large enough to pay each of them in full.<sup>24</sup> This view posits that the role of insolvency law therefore is to constrain individual creditor action against an insolvent debtor, and make the creditors act in a cooperative manner to maximise the aggregate value of the debtor's assets to the creditors' collective return. The underlying goal is to ensure that creditors do not make a bad situation worse by engaging in a destructive race to the debtor's assets. Thus, the source of bankruptcy law is in the common pool problem and the 'prisoner's dilemma'<sup>25</sup>

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<sup>22</sup> TH Jackson and R Scott. 'On the Nature of Bankruptcy: An Essay on Bankruptcy Sharing and the Creditors' Bargain', (1989) 75 *Va L Rev* 155; and E Warren 'Bankruptcy Policymaking in an Imperfect World' (1993-1994) 92 *Mich L Rev* 336, 337

<sup>23</sup> TH Jackson, 'Of Liquidation, Continuation, and Delay: An Analysis of Bankruptcy Policy and Nonbankruptcy Rules' (1986) 60 *Am Bankr L J* 399; TH Jackson and R Scott (n 22).

<sup>24</sup> TH Jackson (n 23) 401-403; TH Jackson and R Scott (n 22); and V Finch, *Corporate Insolvency Law: Perspectives and Principles* (2<sup>nd</sup> edn Cambridge University Press, Cambridge 2009) 29 arguing that 'creditor wealth maximization vision has been highly influential and has been put into legislative effect in some jurisdictions.'

<sup>25</sup> This is a concept used to explain a situation whereby there is higher incentive for parties to defect than to cooperate for the common good of all while the pursuit of self interest by each leads to a poor outcome for all. In the context of insolvency it is used to show the difficulty in securing co-operation of all creditors in an insolvency situation, as what is best for each creditor individually is more likely to lead to mutual defection, whilst every creditor would have been better off with mutual co-operation.

that it brings about. In this instance, the company's assets are too few to sufficiently cover payment of the company's debts in their entirety. As such, insolvency law attempts to solve the dilemma by pooling all creditors together and submitting them to collective proceedings.

The theoretical basis for insolvency systems as advanced by law and economics commentators has been heavily criticised, mainly for confining itself solely to creditors' maximum returns and ignoring other non-creditors' interests equally affected by insolvency.<sup>26</sup> In the context of SSA countries, this view might be seen to undermine wider national interests inclined to poverty reduction strategies.<sup>27</sup>

The second group of commentators who have advanced opposing views have taken a broader outlook at the underlying basis for insolvency systems. They view attempts to reckon with a debtor's multiple defaults, distributing the consequences among a number of different actors and providing answers to a wide range of questions emerging there from as the policy basis of an insolvency system.<sup>28</sup> This view may be welcomed by the SSA countries given the possible need of addressing the wider interests of society and the concerns for poverty reduction. However, the view is potentially open to problem of indeterminacy because of the breadth of concerns that it seeks to encompass.<sup>29</sup> The magnitude of this problem can be seen in chapter seven where attempt is made to identify and discuss relevant policy concerns in relation to cross-border insolvency.

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For general details of this concept see for instance R Axelrod, *The Evolution of Co-operation* (Penguin, London 1990) 7-24

<sup>26</sup> V Finch (n 24) 28; B Adler 'Financial and Political Theories of American Corporate Bankruptcy' (1992-1993) 45 *Stan L Rev* 311, 313-314; and DG Baird and RK Rasmussen 'End of Bankruptcy' (2002) 55 *Stan L Rev* 751

<sup>27</sup> Poverty reduction in developing countries is a dominant feature envisaged in the Millennium Development Declaration signed by 189 countries, including 147 heads of state and government, in September 2000. See United Nations, 55/2 United Nations Millennium Declarations, Resolution adopted by General Assembly [without ref to main committee(A/55/L.2)] <[www.un.org/millennium/declaration/ares552e.htm](http://www.un.org/millennium/declaration/ares552e.htm)> accessed 23/9/2009. See also text to n 153 in chapter 3; and the discussion in the text to part 7.4.3.3 in chapter 7

<sup>28</sup> E Warren 'Bankruptcy Policy,' (1987) 54 *U Chi L Rev* 775, 777; and D Korobkin, 'Rehabilitating Values: A Jurisprudence of Bankruptcy' (1991) 91 *Colum L Rev* 717

<sup>29</sup>E Warren *ibid* 790. See also V.Finch (n 24) 37

Apart from the foregoing views, there is also a ‘contractualism’ view emerging from law and economic commentators.<sup>30</sup> They mainly argue that in the event of insolvency the recovery process should be governed by contracts between the insolvent debtor and its creditors, with insolvency law only serving as a default option for those who do not enter into insolvency contracts.<sup>31</sup> This view also challenges the argument that the insolvent debtor presents a common pool problem for its creditors and that creditors would voluntarily agree to the enactment of insolvency law.<sup>32</sup> The most radical proposal in this approach advocates for repeal of insolvency law, since private collective action would provide an efficient substitute.<sup>33</sup> This approach has been criticised in a number of respects but mainly for its failure to pay regard to the effects that the contract concluded between the debtor and some creditors might have on the other creditors who are not party to the contract.<sup>34</sup> It has also been argued that this approach labours under a gross mistake in assuming that it is cheaper to agree upon a settlement instead of utilising the legal mechanism available.<sup>35</sup>

Notably, the theoretical attempts to explain the foundations and policy objectives of insolvency systems reveal the following common points. Firstly, insolvency systems characteristically involve collective action whose main preoccupation is to ensure value maximisation to be distributed to designated beneficiaries.<sup>36</sup> Notwithstanding the debate on the choice of beneficiaries, each view would want to maximise value for its favoured beneficiaries. Secondly, that co-operation is necessary in maximising the value for the interested parties’ benefits. Thirdly, there is an apparent emphasis on efficiency and the assumption that the

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<sup>30</sup> S Block-Lieb, ‘The Logic and Limits of Contract Bankruptcy’, (2001) *Ull. L Rev* 503, referring to these scholars’ as neo-libertarian theorists; RK Rasmussen, ‘Debtor’s Choice: A Menu Approach to Corporate Bankruptcy’, (1992) 71 *Tex L Rev* 51; and A Schwartz, ‘A Contract Theory Approach to Business Bankruptcy’, (1998) 107 *Yale L J* 1807

<sup>31</sup> JL Westbrook ‘The Control of Wealth in Bankruptcy’ (2003-2004) 82 *Tex L Rev* 794, 798

<sup>32</sup> BE Adler. ‘Bankruptcy and Risk Allocation’ (1992) 77 *Cornell L Rev* 439, 441-442; BE Adler, ‘A World without Debt’, (1994) 72 *Wash U L Q* 811; and S Block-Lieb ‘The Logic and Limits of Contract Bankruptcy’ (n 30) 512

<sup>33</sup> DG Baird & RK Rasmussen, ‘The End of Bankruptcy’, (n 26); and S Block-Lieb ‘The Politics of Privatizing Business Bankruptcy Law’ (2000) 74 *Am Bankr LJ* 77, 82

<sup>34</sup> S Block-Lieb (n 30); S Block-Lieb (n 33)77

<sup>35</sup> *Ibid*

<sup>36</sup> JL Westbrook, (n 31) 821; and JL Westbrook, ‘A Global Solution to Multinational Default’ (1999-2000) 98 *Mich L Rev* 2276, 2284

protection of entitlements that arose prior to insolvency would maximise the aggregate efficiency.<sup>37</sup> Fourthly, there is an apparent lack of an explicit reference to cross-border insolvency situations, though the views have subsequently been useful in cross-border insolvency discourse.<sup>38</sup> Accordingly, Westbrook, while arguing as to how the so-called ‘grab rule’ would lead to lower returns for creditors as a whole in a cross-border insolvency setting, invokes the common pool problem and the ‘prisoner’s dilemma’ conception. He argues:

Obviously this situation is merely the international version of the problem of collective action- the “Prisoner’s Dilemma”-that has been solved by the adoption of collective insolvency proceedings in almost every country. Universalism internationally would provide the same benefit of maximization of asset values for creditors and other parties across the range of cases.....The larger argument,...rests upon the benefits to local citizens from the increased flow of trade at lower transaction costs...<sup>39</sup>

Likewise, albeit from a different perspective, Tung argues:

When a firm fails, bankruptcy law attempts to maximize the value of the firm’s assets for the benefit of the firm’s creditors. Bankruptcy law also determines how that value should be distributed among those creditors. The failure of a multinational firm typically leaves assets and unpaid creditors in several jurisdictions. However, no overarching international bankruptcy system exists. Instead, the national bankruptcy laws of several states might plausibly apply to govern the firm’s bankruptcy or particular aspects of the case. Conflicting claims of jurisdiction often arise.<sup>40</sup>

Fourthly, the views do not take into account the level of the various countries’ economic development, despite its potential in influencing policy objectives of a country’s insolvency law. Apparently an insolvency system of a well developed

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<sup>37</sup> See I Haviv-Segal ‘Bankruptcy Law and Inefficient Entitlements’, (2005) 2 *Berkeley Bus L J* 355

<sup>38</sup> B Wessels, BA Markell and JJ Kilborn, *International Cooperation in Bankruptcy and Insolvency Matters* (OUP, Oxford 2009 )9; LM LoPucki ‘The Case for Cooperative Territoriality in International Bankruptcy’ (1999-2000) 98 *Mich L Rev* 2216, 2219; LM LoPucki, ‘Cooperation in International Bankruptcy: A Post-Universalist Approach,’(1998-1999) 84 *Cornell L Rev* 696, 703; JL Westbrook ‘Theory and Pragmatism in Global Insolvencies: Choice of Law and Choice of Forum’ (1991) 65 *Am Bankr LJ* 457, 465- 466; JL Westbrook, ‘A Global Solution to Multinational Default,’ (n 36) 2285; and F Tung (n 12) 557

<sup>39</sup> JL Westbrook ‘Theory and Pragmatism in Global Insolvencies: Choice of Law and Choice of Forum’ (n 38) 466

<sup>40</sup> F Tung (n 12) 557

country might not necessarily be the same and appropriate for a lesser developed one. In all, the views help to explain the divergence of insolvency systems that exist in the world because of the emphasis that each system places on particular aspects that parallel the theoretical views, reflected through approaches such as redistribution to favoured groups.<sup>41</sup> This is evident among developed nations whose systems significantly influenced the insolvency systems of developing countries, inclusive of the least developed nations, because of colonisation and regularised relationships.<sup>42</sup>

Among the advanced countries, some have traditionally been known to favour the general interests and public order or recovery of the company and maintenance of employment before satisfaction of creditors' claims,<sup>43</sup> whilst others place priority on the satisfaction of creditors' claims.<sup>44</sup> Certainly, the choices that signify the divergence reflect different, and conflicting, policy decisions.<sup>45</sup> It is noteworthy, however, that there are aspects that are shared by all systems, such as the collective nature of insolvency systems, co-operation and the maximisation of the value of the insolvent debtor's estate. SSA countries would probably need to consider this divergence in the context of their lesser developed economies with a view to developing systems that will not only be workable and appropriate but will also boost their national economies and contribute to poverty eradication as discussed in chapter seven of this work.

Generally speaking, the characteristic features apparent in the various views advanced have, by and large, been reflected in the drive for global convergence of insolvency laws in which the objectives of an effective and efficient insolvency regime have been held to include the provision of certainty in the market to promote economic stability and growth; maximisation of the value of

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<sup>41</sup> E Warren (n 22); RK Rasmussen, 'Resolving Transnational Insolvencies Through Private Ordering' (1999-2000) 98 *Mich L Rev* 2252, 2253; and CG Paulus (n 18) 765

<sup>42</sup> A Davydenko and JR Franks (n 15); D Berkowitz and others (n 16); and TC Halliday, and BG Carruthers (n 21)

<sup>43</sup> The US and France are always cited as examples in this regard. It is emerging from recent experiences that South Africa's system is one that is heavily influenced by labour unions in terms of its political economy.

<sup>44</sup> The UK and Germany are generally referred to as examples of pro-creditor systems.

<sup>45</sup> RK Rasmussen (n 41) 2253

assets; striking a balance between liquidation and reorganisation; ensuring equitable treatment of similarly situated creditors; provision of timely, efficient and impartial resolution of insolvency; preservation of the insolvency estate to allow equitable distribution to creditors; recognition of existing creditor rights and the establishment of clear rules for the ranking of the priority claims; and the establishment of a framework for cross-border insolvency.<sup>46</sup> Indeed, these policy objectives take on board the need of an effective insolvency system to address the intricacies of cross-border insolvencies in a globalised economy which are discussed below.

#### **2.4 Problems and Issues Involved in Cross-Border Insolvencies**

Cross-border insolvencies cause complex problems for not only debtors and creditors but also jurisdictions involved.<sup>47</sup> The more a country's economy is integrated into the world economy, the more susceptible to cross-border insolvency it is. The problems arise when an insolvent company has assets or interests in property and creditors located in multiple jurisdictions. The diversified state of the insolvent entity's activities may be such that conditions for opening insolvency proceedings are simultaneously met with regard to more than one country, giving rise to the possibility of multiple proceedings in different jurisdictions. A jurisdiction in which one of the multiple proceedings is initiated may lay claim to universal recognition and enforcement, although in practice the proceeding is may be confined to the local estate of the insolvent debtor on which effective control can be exercised.<sup>48</sup>

Thus, the collective action problems which the domestic insolvency laws are primarily designed to address are multiplied and exacerbated by cross-border insolvency. This situation consequently raises 'a considerable number of issues,

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<sup>46</sup> See n 4 and 6 above. It is however noteworthy that these norms have been modelled on practices prevailing in developed economies.

<sup>47</sup> IF Fletcher, 'International Insolvency: A Case for Study and Treatment' (1993) 27 *Int'l L* 429, 430; and JL Westbrook and D Trautman 'Conflict of Laws Issues in International Insolvencies' in J Ziegel (ed), *Current Development in International and Comparative Corporate Insolvency Law* (Clarendon Press, Oxford 1994) 657, 658

<sup>48</sup> IF Fletcher, 'The European Convention on Insolvency Proceedings: Choice of Law Provisions', (1998) 33 *Tex Int'l LJ* 119,124

the attempted resolution of which may bring national systems into conflict'.<sup>49</sup> There is often an issue as to whether the court where such proceedings are commenced will have jurisdiction over foreign assets of the insolvent debtor, and, if so, whether it is likely to have easy access in 'marshalling the assets' to the best interest of creditors. It is again uncertain and unpredictable as to whether and to which extent all creditors, irrespective of their location, will be equally treated alongside the local ones. The other apparent issue is the extent to which the local court might recognise foreign proceedings and whether the different courts in different jurisdictions are likely to cooperate in 'marshalling the assets'. These issues, including many others, such as the manner in which assets should be dealt with in the event of concurrent proceedings in multiple jurisdictions; the law applicable in matters of substance and procedure and whether the local courts have jurisdiction over an insolvent foreign company in the first place, are essentially likely to complicate the process.

The diversity that exists between the sovereign legal systems of the world and the lack of a unified framework that is universally enforceable contributes significantly to the existence of the problems that present themselves in a cross-border situation.<sup>50</sup> Equally important in a cross-border insolvency context are issues of efficiency and effectiveness of proceedings. The problems become more complicated when the insolvency laws of the jurisdictions involved are outdated, rigid, formalistic, and above all have a strong bias in favour of particular categories of locally interested parties.<sup>51</sup> It is equally so where there is no law in place; non-enforcement; or a lack of practical experience in administering the law. The additional complexities surrounding cross-border insolvencies necessarily lead to uncertainty, risk, injustice, and ultimately cost to businesses.<sup>52</sup>

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<sup>49</sup> PJ Omar (n 12) 15

<sup>50</sup> See D McKenzie, 'International Solutions to International Insolvency: An Insoluble Problem?' (1997) 26 *U Balt L Rev* 15, 23; and IF Fletcher (n 47) 430

<sup>51</sup> M Rowat (n 15). Developing countries inclusive of the least developed ones, such as those in SSA are generally taken to have weak and less developed insolvency systems.

<sup>52</sup> JL Westbrook 'Theory and Pragmatism in Global Insolvencies: Choice of Law and Choice of Forum' (n 38) 460 and 558

The prevailing consensus<sup>53</sup> is that the globalisation of the world economy has enhanced the growth and involvement of companies in international business, and consequently enhanced the challenges posed by cross-border insolvencies.<sup>54</sup> This situation is assumed to lead to a significant increase in international business failures, and hence potential for multiple insolvency proceedings in multiple jurisdictions as creditors seeking recovery attempt to seize assets in any country in which they are located. Admittedly, this assumption is not based on findings of an empirical global study, but rather on an impression seemingly drawn from instances of international business collapses in recent years in developed countries and the increased pace of the globalisation drive. The assumption seems, however, to include all countries, irrespective of their individual level of development and participation in the global economy.

Despite the increase in prominence of cross-border insolvencies in recent times, instances of cross-border insolvencies have long attracted the attention of creditors and scholars.<sup>55</sup> Notwithstanding the history of cross-border insolvencies and the recent global and regional initiatives, the solution to the numerous issues arising from cross-border insolvency is still a subject of debate.<sup>56</sup> This lack of consensus implies challenges for jurisdictions, particularly the least developed countries, in considering how to approach the crafting of a workable and appropriate cross-border insolvency framework.

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<sup>53</sup> Notably, the consensus is to almost all scholars of insolvency law irrespective of their inclination in the debate on competing theories of cross-border insolvencies.

<sup>54</sup> AT Guzman, 'International Bankruptcy: In Defense of Universalism,' (1999-2000) 98 *Mich L Rev* 2177, 2178. Guzman cites numerous examples of international business failures of recent years and makes reference to a great deal of scholars who share the view that globalization has led to growth of business failures; LM LoPucki, 'Cooperation in International Bankruptcy: A Post-Universalist Approach' (n 38) 699; and PJ Omar (n 12) 15-18

<sup>55</sup> For an account of early cases, and in particular *Solomon v Ross*, 1H. Bl. 131, decided in 1764, see KH Nadelmann, 'Solomon v. Ross' (1946) 9 *MLR* 164; KH Nadelmann, 'Bankruptcy Treaties' (1944) 93 *Univ Penn L Rev* 58, 59; IF Fletcher, *Insolvency in Private International Law* (Clarendon Press, Oxford 2005) 15-19; and J Lowell, 'Conflict of Law as Applied to Assignment of Creditors' (1888) 1 *Harv L Rev* 259

<sup>56</sup> See the UNCITRAL Model Law (n 20); and the various instruments designed by the international organizations with a view to forging an effective global system of insolvency law such as IMF (n 6); and World Bank (n 6)

## 2.5 Competing Theories in Cross-Border Insolvencies

Traditionally, there have been two competing theories of cross-border insolvencies, namely territoriality and universality. The increasing incidences of cross-border insolvency associated with the globalisation of the world economy have, in recent years, drawn attention to, and given rise to a debate over, the theories.<sup>57</sup> However, while the territorial approach has been much favoured in practice by most jurisdictions, the universality approach has enjoyed tremendous appeal to most theorists and academics.<sup>58</sup>

The two competing theories notwithstanding, there is also the notion of unity, which means that one court administers all assets.<sup>59</sup> However, a wider treatment of universalism, in modern times, has tended to include unity as a form of pure universalism. Fletcher contends that:

One form of utilisation of the concept of universality is as an integral aspect of the doctrine of unity of bankruptcy....whereby it mounts to a logical corollary of the idea of unity. Indeed, in this conception the two terms can be treated as virtual synonyms for each other. However, it is important to recognize that the concept of universality is not exclusively dependent upon that of unity.<sup>60</sup>

Accordingly, universalism as envisaged in the current debate is an approach which vests in a single sovereign state, which is the home country of an insolvent debtor, an exclusive right to administer all of the assets and debts of an insolvent debtor wherever located through one central proceeding governed by the court and the law of the home country.<sup>61</sup> The home country's insolvency laws will

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<sup>57</sup> IF Fletcher (n 47)

<sup>58</sup> IF Fletcher (n 47) 433; JAE Pottow (n 13)1904 stating that '[m]any countries' existing bankruptcy laws reflect territorialist conceptions of jurisdictions. The competing paradigm, 'universalism', probably enjoys a privileged academic status inversely proportionate to its current acceptance by policy-makers in countries around the world'; SM Franken, 'Three principles of Transnational Corporate Bankruptcy Law: A Review,' (2005) 11 *Eur LJ* 232, 235, arguing that 'territorialism still is the dominant approach to cross-border insolvency..'. However, JL Westbrook 'Universal Priorities' (1998) 33 *Tex Int'l L J* 27, 28, maintains that territorialist system is what most people assume exists today.

<sup>59</sup> JL Westbrook, *ibid* 28

<sup>60</sup> IF Fletcher (n 48)124

<sup>61</sup> See JL Westbrook (n 36); I Fletcher (n 47) 433. See also LC Ho, 'Navigating the Common Law Approach to Cross-border Insolvency'(2006) 22 *Insolvency Law and Practice* 217

apply to such issues as the conduct of the administration of the assets, the priority ranking, the stay of enforcements, transactions avoidance and whether to liquidate or rescue.<sup>62</sup>

Thus, assets located in countries other than the home country would be repatriated to the home country jurisdiction for administration or subjected to ancillary proceedings conducted under the substantive insolvency law of the home country jurisdiction.<sup>63</sup> The idea is to facilitate global distribution to creditors or approval of a single plan of rescue.<sup>64</sup>

Territorialism<sup>65</sup> is a theory that vests in each sovereign state an exclusive right to administer assets of an insolvent debtor situated within its own borders using its own laws without having regard to the debtor's insolvency proceedings initiated in other sovereign states.<sup>66</sup> The theory denies the extraterritorial effect of an insolvency administration, but caters for assets and persons within the territory of the sovereign state whose jurisdiction is asserted. It is thus only claims that originate within the sovereign state of the relevant jurisdiction that may be

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describing universalism as 'no more than a convenient label' which is only used 'when the court feels inclined to grant the assistance sought.'

<sup>62</sup> See LM LoPucki, 'Cooperation in International Bankruptcy: A Post-Universality Approach' (n 38); JL Westbrook, 'Theory and Pragmatism in Global Insolvencies: Choice of Law and Choice of Forum' (n 38)

<sup>63</sup> UR Bang-Pedersen 'Asset Distribution in Transnational Insolvencies: Combining Predictability and Protection of Local Interests' (1999) 73 *Am Bankr L J* 385, 386, observing that 'it is common to refer to a system as universalist even if all matters are not settled by the law of the state where the proceedings are initiated.' By way of illustration, a good example of this theory being used in practice is Lord Hoffmann's judgment in the *Re HIH Casualty and General Insurance* [2008] UKHL 21,[2008] 1 WLR 852 where he expressly makes reference to universalism as the justification for repatriating English assets to a liquidation of an Australian insurer taking place in the home country. It is not clear from the House of Lords judgments as a whole how far Lord Hoffmann's approach constitutes majority reasoning.

<sup>64</sup> JL Westbrook 'The Duty to Seek Cooperation in Multinational Insolvency Cases' in H Peter, and others (eds) (n 5) 362

<sup>65</sup> Territorialism is also increasingly referred to as a 'grab rule' because of its inherent incentive for each country to use its law to grab insolvent debtor's asset within its jurisdiction for benefit of local creditors.

<sup>66</sup> IF Fletcher (n 47), 431; LM LoPucki, 'Cooperation in International Bankruptcy: A Post-Universality Approach' (n 38) 701 and 743; J Pae, 'The EU Regulation on Insolvency Proceedings: The Need for a Modified Universal Approach' (2003-2004) 27 *Hastings Int'l & Comp L Rev* 555, 563

included on the list of beneficiaries of any resulting distribution.<sup>67</sup> In the context of the insolvency of a multinational corporation, a court has jurisdiction over those portions of the corporation that are within its country's borders.<sup>68</sup>

### **2.5.1 Theoretical Underpinning for Territorialism and Universalism**

The underlying basis of territorialism is the notion of sovereignty.<sup>69</sup> Traditionally, the notion is characterised by the ability of a sovereign state to exercise power to dominate a territory and assets located thereon.<sup>70</sup> It includes the imposition of the law of the sovereign on all within the territorial reach of the sovereign state and the restriction of the application of foreign laws within the borders of the sovereign state. The other theoretical basis for territorialism, which descends from sovereignty, is the desire of a sovereign state to protect its local interests. This justification is related to the claim that insolvency laws often reflect deeply held societal norms, values, interests, policies and priorities of the respective countries.<sup>71</sup>

Conversely, universalism, in the modern parlance, traces its basis from the theory of market symmetry, which requires a legal system to be symmetrical with the market, covering all or nearly all transactions and stakeholders with respect to the legal rights and duties embraced by those systems.<sup>72</sup> The theory requires insolvency law systems to reflect and meet the needs and demands of the global market as opposed to merely focussing on national markets.<sup>73</sup> In this way, the insolvency proceedings can reduce the costs which would arise from multiple

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<sup>67</sup> JJ Kilborn (n 37) citing LM LoPucki, 'Cooperation in International Bankruptcy: A Post-Universalist Approach' (n 37) 744-748

<sup>68</sup> LM LoPucki, 'The Case for Cooperative territoriality in International Bankruptcy' (n 38) 2218

<sup>69</sup> IF Fletcher, 'International Insolvency: A Case for Study and Treatment' (n 47) 431; AJ Berends 'The UNCITRAL Model Law on Cross-Border Insolvency: A Comprehensive Overview' (1998) 6 *Tulane J Int'l L & Comp Law* 309, 314 arguing, 'territoriality ... is more or less based on constitutional grounds....'

<sup>70</sup> JJ Kilborn (n 38) 5 & 6; JL Westbrook, 'Multinational Enterprises in General Default: Chapter 15, The ALI Principles, and The EU Insolvency Regulation' (2002) 76 *Am Bankr LJ* 1, 5

<sup>71</sup> SM Franken (n 58) 233; JJ Chung, 'The New Chapter 15 of the Bankruptcy Code: A Step Towards Erosion of National Sovereignty,' (2006-2007) 27 *Nw J Int'l L & Bus* 89; JAE Pottow (n 13); and N Martin (n 14)

<sup>72</sup> JL Westbrook, 'A Global Solution to Multinational Default' (n 36) 2277 and 2283-2292

<sup>73</sup> *Ibid* 2308

proceedings, maximise the value of a debtor's assets wherever located and realise the desired effect of principles of equality and priorities by a unified approach that treats the assets of the debtor as a part of a common pool in a global market for the benefit of all stakeholders.<sup>74</sup> It is however noteworthy that the traditional basis of universalism was *in rem* jurisdiction whose effect was to render one court as having jurisdiction to decide all matters involving a debtor's assets.<sup>75</sup>

## **2.5.2 A Review of the Debate over Territorialism and Universalism**

The debate on the cross-border insolvency theories essentially reflects issues that have been raised in the past.<sup>76</sup> However, the current manifestation of the debate encapsulates the current globalisation challenges and the corresponding increase in international business failures that characterised the advanced and emerging economies in the recent decades. The main arguments exchanged in the debate mainly focus on local interests protection; predictability; efficiency and value maximisation; and practicality within the broader contexts of addressing the demands arising from the growing operations of multinational corporations.

### **2.5.2.1 Protection of Local Interests**

Territorialism aims to protect local interests in the jurisdiction where the assets of an insolvent debtor are situated.<sup>77</sup> This is achieved by the application of domestic laws, which reflect local policies with regard for instance to priorities of creditors in distribution, security rights, and pre-petition transfers. It is therefore claimed to meet the expectations of the local claimants whose interests in the locally vested assets are accordingly dealt with in insolvency proceedings to satisfy their claims using the local laws to the exclusion of other foreign claimants.

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<sup>74</sup> Ibid 2285. See also KH Nadelmann, 'Revision of Conflicts Provisions in the American Bankruptcy Act', (1952) 1 *Int'l and Comp LQ* 484; JJ Chung (n 71) 94 stating that the underlying theory of universalism posits that the overall value of bankruptcy estate will be maximized because one forum will be able to realize the sum of the parts or the going concern value, as opposed to piecemeal liquidation or treatment.

<sup>75</sup> JL Westbrook, 'Multinational Enterprises in General Default: Chapter 15, The ALI Principles, and The EU Insolvency Regulations' (n 70) 6

<sup>76</sup> J Lowell (n 55)

<sup>77</sup> AM Kipnis, 'Beyond UNCITRAL: Alternatives to Universality in Transnational Insolvency', (2008) 36 *Denv J Int'l L & Policy* 155, 169 &170

On the contrary, universalism is discredited for downplaying national sovereignty and local interests which leads to local claimants losing the protection of their local laws.<sup>78</sup> Consequently, the entire social and commercial stratum would be carved out of the country's sovereignty and subjected to foreign law.<sup>79</sup> This adds costs to local 'non-adjusting creditors'<sup>80</sup> while large international lenders adjust their contractual terms, hence benefiting from the system.<sup>81</sup>

From universalists' standpoint local claimants are less significant than anticipated by territorialists, as their expectation and attitude as to treatment of their claims and potential risk have no connection at all with the location of the debtor's choice.<sup>82</sup> To circumvent any cost, however, they may charge competitive rates of return on their entire portfolio of loans.<sup>83</sup> Thus there would be no good reason for preferential treatment to individual local expectations as in the globalised market the value is to be distributed to creditors beyond national borders.<sup>84</sup> Much as they deal with a multinational enterprise, they should expect that their insolvency claim will be part of the worldwide collection of claims and that the local assets will be collected in a common pool for satisfying all claimants. The weak local claimants are more likely to be protected under universalism than under a territorial system as most jurisdictions seem not to have law in place for their protection in the event of the insolvency of a

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<sup>78</sup> It is worth noting the modifications to choice of law made under the EC Regulation on Insolvency Proceedings 2000 Art 5-15, which are designed to overcome this problem.

<sup>79</sup> F Tung (n 12) 576

<sup>80</sup> The terms adjusting, non-adjusting, weakly non-adjusting and strongly adjusting which frequently feature in the debate originate from LA Bechuk and JM Fried, 'The Uneasy Case for the Priority of Secured Claims in Bankruptcy' (1996) 105 *Yale L J* 857; and were further explained and used by AT Guzman (n 54) 2181-2182. Accordingly, while fully adjusting creditors can charge their debtors a risk-adjusted market rate of return, non-adjusting creditors who are usually further sub-divided into weakly non-adjusting and strongly non-adjusting refer to those creditors who are generally unable or unwilling to adjust their position by changing the terms of their loan.

<sup>81</sup> LM LoPucki, 'Cooperation in International Bankruptcy: A Post- Universalist Approach' (n 38) 709

<sup>82</sup> See S M Franken (n 58) 238

<sup>83</sup> AT Guzman (n 54) 2184, 2187-2191

<sup>84</sup> JL Westbrook (n 36) 2310

multinational corporation.<sup>85</sup> It is argued that universalism is more likely to lead to agreement and enforcement of a limited range of international priorities, which may ensure such protection.<sup>86</sup>

### **2.5.2.2 Predictability**

Predictability has been claimed by each theory as being one of its neutral consequences arising from its implementation. Universalist scholars argue that under universalism, the application of home country law by the single home country court guarantees fairness and equality of distribution among creditors, which also reduces informational costs and hence enables more accurate credit pricing. In contrast, universalist scholars claim that territorialism does not provide predictability and cost efficiency, as creditors have to inform themselves on the insolvency law position of each country in which the debtor has assets whilst also facing the risk of debtors moving assets to another jurisdiction in the interests of the debtors.<sup>87</sup>

On the other hand, proponents of territorialism maintain that the use of the court and application of the laws of the country where the assets of an insolvent debtor are located offers greater predictability to the lenders than universalism.<sup>88</sup> Since lenders are aware of their debtors, the only information they would need to ascertain to predict their treatment in insolvency proceedings is the countries where the debtor's assets are located, the distributional priorities and other insolvency effects such as the impact of any local stay on enforcement by secured creditors. Unlike the territorial approach, universalism does not create the desired predictability, because the home country standard lacks a workable definition and test to determine a jurisdiction where insolvency proceedings can

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<sup>85</sup> See JL Westbrook, 'Multinational Enterprises in General Default: Chapter 15, The ALI Principles, and The EU Insolvency Regulation' (n 70) 9; JL Westbrook (n 36) 2310-2311

<sup>86</sup> JL Westbrook (n 36) 2310

<sup>87</sup> JL Westbrook (n 38) 460

<sup>88</sup> LM LoPucki, 'Cooperation in International Bankruptcy: A Post-Universalist Approach' (n 38) 751

be commenced.<sup>89</sup> As such, the home country standard could mean and refer to more than one jurisdiction where insolvency proceedings can be commenced. This tarnishes the claimed predictability.

Universalists have also criticised the territorial approach, arguing that basing jurisdiction on the mere existence of assets could increase the possibility of forum shopping as debtors can easily move assets to a jurisdiction of their choice to suit their interests.<sup>90</sup> In response to this, territorialists maintain that the potential harm resulting from international forum shopping is greater than any harm resulting from forum shopping in the domestic context, though the latter has never been practically experienced throughout the dominance of territorialism.<sup>91</sup>

Universalists admit the inherent problem of the home country principle, which is the bedrock of universalism.<sup>92</sup> Some scholars have gone as far as attempting to suggest solutions to deter the possibility of forum shopping. Guzman is of the view that a universalist jurisdiction should identify the home country using such criteria as the main location of a company's activity or location of assets which can not be easily changed.<sup>93</sup> While Perkin argues for a treaty or convention

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<sup>89</sup> LM LoPucki, 'The Case for Cooperative Territoriality in International Bankruptcy' (n 38 ) 2223-2234; and LM LoPucki, 'Cooperation in International Bankruptcy: A Post-Universalist Approach' (n 38) 713-725

<sup>90</sup> AT Guzman (n 54) 2212; LM LoPucki, 'The Case for Cooperative Territoriality in International Bankruptcy,' (n 38) 2241-2242 arguing that instances of forum shopping involving shifting of assets do not normally occur nor has it been a serious problem in the existing territorial regime. However he advances means that could be used to restrict the possibility of forum shopping, which are employing contractual restrictions and local legal devices and treaties or conventions that could provide for a return of shifted assets.

<sup>91</sup> JJ Chung (n 71)123

<sup>92</sup> See AT Guzman (54); UR Bang-Pedersen (n 63) 418; JL Westbrook (n 36) 2315-2317; DT Trautman, JL Westbrook, and E Gaillard, 'Four Models for International Bankruptcy,' (1991) 41 *Am Bankr LJ* 573, 624; RK Rasmussen, 'A New Approach to Transnational Insolvencies' (1997) 19 *Mich J Int'l L* 1

<sup>93</sup> AT Guzman (n 54) 2214. For arguments on concerns and problems of COMI principle under the EC Regulation, see for instance, W Ringe, 'Forum Shopping under EU Insolvency Regulation,' (2008) 9 *European Business Organisation Law Review* 579, suggesting changes of the current COMI approach within the EU Insolvency Regulation in favour of company's registered office, arguing that it will render insolvency law applicable predictable and changeable upon fulfillment of prerequisite conditions; and MM Winkle, 'From Whipped Cream to Multibillion Euro Financial Collapse: The European Regulation on Transnational Insolvency in Action' (2008) 26 *Berkeley J Int'l L* 352. See also I Mevorach, 'Jurisdictions in Insolvency: A

making a place of incorporation as a determinant of the home country,<sup>94</sup> Bufford advocates that a company's centre of main interests should be located in a country for six months or a year before that country would be regarded as a home country.<sup>95</sup> Westbrook on his part suggests a multidimensional test citing the UNCITRAL Model Law, which presumes the place of incorporation as the debtor's centre of main interest.<sup>96</sup>

### 2.5.2.3 Efficiency and Value Maximisation

Universalists claim that universalism is the only approach in the globalised economy that would efficiently address the collective action problem discussed above at 2.1 as it provides a unified procedure for administration of all the assets of the insolvent debtor irrespective of their location.<sup>97</sup> The unified procedure reduces the costs of insolvency proceedings by theoretically eliminating multiple proceedings in all the countries where assets happen to be situated, and maximises the value of the assets for distribution to all designated beneficiaries while also offering a workable framework for the rescue of an insolvent debtor. This argument on the reduction of the costs is based on the common pool problem conception, which in the present context is viewed and applied at international level to cater for assets and creditors wherever they are in the global market.

In contrast, territorialism has been criticised for being costly, and inefficient. It is argued that its approach not only limits efficient administration of an insolvent debtor by restricting insolvency proceedings to national borders but it also does

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Study of European Courts' Decision' (2010) 6 *J Priv Int'l Law* 327 for an up to date empirical investigation of cases applying COMI principle under the EC Regulation on Insolvency Proceedings and for arguments against the concerns and criticisms so far raised against the Centre of Main Interest ("COMI") principle.

<sup>94</sup> L Perkins, 'A Defense of Pure Universalism in Cross-border Insolvencies' (2000) 32 *NYU J Int'l L and Pol* 787,815

<sup>95</sup> SM Bufford, 'Global Venue Controls Are Coming: A Reply to Professor LoPucki,' (2005) 79 *Am Bankr LJ* 105, 139

<sup>96</sup> JL Westbrook (n 36) 2317. It is however a noteworthy that this presumption has not necessarily succeeded in assuaging the concerns of territorialists if experience under the EC Regulation on Insolvency Proceedings is anything to go by! Contribution of Professor Adrian Walters on this point is highly acknowledged.

<sup>97</sup> Ibid 2285; JJ Kilborn (n 38 ) 17-18

not work in favour of rescue proceedings for it is difficult to engage in co-operation with many courts having competing interests.<sup>98</sup> This is a serious shortcoming since a majority of insolvencies of large corporations involve rescue.<sup>99</sup>

The claimed efficiency in universalism is questioned by territorialist advocates mainly for its potential in injuring interests of creditors on account of the application of home country law to the adjudication of claims, which will mean invocation of the home country's own notion of due process of law.<sup>100</sup> This would in effect deprive injured parties of active involvement in court proceedings. Additionally, failure of the universalist approach to provide an efficient manner of dealing with corporate groups is regarded as a serious flaw since most multinational corporations are part of corporate groups.<sup>101</sup> On the contrary, it is argued that territorialism offers an optimal solution to problems of corporate groups. According to LoPucki:

[T]he territorial solution to the problem of corporate groups is remarkably elegant. It does not rest....on an assumption that all assets within a country are owned by the same corporation. Rather, it assumes only that each asset is located in some particular country. The solution is that the law of that country governs whether the asset is available to

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<sup>98</sup> JL Westbrook, 'Theory and Pragmatism in Global Insolvencies: Choice of Law and Choice of Forum' (n 38)460; and RK Rasmussen (n 41) 2252, 2257-2258

<sup>99</sup> AT Guzmán (n 54) 2202-2204

<sup>100</sup> LM LoPucki, 'The Case for Cooperative Territoriality in International Bankruptcy' (n 38) 2225.

<sup>101</sup> *Ibid* 2230-2234. On the work that has recently been undertaken by UNCITRAL Working Group V on the topic of enterprise groups (including multinational ones) in insolvency, see text to n 19 in chapter 1. Much has been written on the enterprise group insolvency. See, I Mevorach, 'Towards a Consensus on the Treatment of Multinational Enterprise Groups in Insolvency' (2010) 18 *Cardozo J Int'l & Comp L* 359; Scholars have hitherto attempted to develop and suggest appropriate solutions for enterprise groups in insolvency: J Sarra, 'Oversight and Financing of Cross-Border Business Enterprise Group Insolvency Proceedings' (2008-2009) 44 *Tex Int'l L J* 547; H Rajak, 'Corporate Groups and Cross-Border Bankruptcy' (2008-2009) 44 *Tex Int'l L J* 521; I Mevorach, *Insolvency Within Multinational Enterprise Groups* (OUP, Oxford 2009); I Mevorach 'Appropriate Treatment of Corporate Groups In Insolvency: A Universal Solution' (2007) *Eur Bus Organ L Rev* 179; I Mevorach, 'The Home Country of a Multinational Enterprise Group Facing Insolvency' (2008) *ICLQ* 427; I Mevorach, 'The Road to a Suitable and Comprehensive Global Approach to Insolvencies Within Multinational Corporate Groups' (2006) 15 *J Bankr L & Practice* 455; CG Paulus, 'Group insolvencies: Some Thoughts About New Approaches' (2007) 42 *Tex Int'l LJ* 819; H Peter, 'Insolvency in a Group of Companies, Substantive and Procedural Consolidation: When and How?' in H Peter and others (eds) (n 5) 199; and G Moss 'Group Insolvency-Choice of Forum and Law: The European Experience under the Influence of English Pragmatism' (2006-2007) *Brook J Int'l L* 1005

satisfy any particular debt, regardless of the corporate structure and regardless of whether the applicable body of law is denominated veil piercing, consolidation, agency, sham or voodoo. The application of that law will be by the local court, and will have no extraterritorial effect.<sup>102</sup>

#### 2.5.2.4 Practicality

Territorialism remains a practically dominant approach to cross-border insolvencies as various countries continue to apply their own diverse laws to insolvent debtors and their assets within their borders albeit that the approaches adopted tend not to be in territoriality's purest form.<sup>103</sup> In this context, universalism has thus been challenged for being impractical, largely owing to the prevailing notions of sovereignty, which make it unlikely that there is a single country that will unquestioningly allow enforcement of foreign law within its borders. Yet, operationalisation of this theory is dependant on other countries accepting and applying the theory.<sup>104</sup> Difficulties and prolonged efforts in working out and operationalising an effective framework have been claimed as evidencing the deep rooted territorialist sentiments and reluctance of nations to commit themselves to a universalist approach.<sup>105</sup> Accordingly, initiatives that have been operationalised so far are modest in their aspirations and fall short of the pure universalist ideal.<sup>106</sup> It is generally accepted that universalism will only flourish in a harmonised world that is not in existence yet.<sup>107</sup> The regional initiatives effected to date, such as the EC Regulation on Insolvency Proceedings 2000, have thus not wholesaley adopted the universalism theory. On the other

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<sup>102</sup> LM LoPucki, 'The Case for Cooperative Territoriality in International Bankruptcy' (n 38) 2233

<sup>103</sup> Ibid 2219. LoPucki has named territorialism the international law of bankruptcy. IF Fletcher (n 48) 123; PJ Omar (n 12) 24 observing that 'very few territorial proceedings in modern times explicitly rule out participation by foreign creditors.'

<sup>104</sup> AJ Berends (n 69) 313; J Wade, 'Not So Welcoming? United States Cross-Border Insolvency Assistance' (2009) 30 *The Company Lawyer* 259; G Moss, 'Refusal of Recognition and Bear Stearns: Is the US Denying to Others that which it Expects for Itself?' (2008) 2 *Insol World* 14; G Locke, 'What Are We Achieving through the UNCITRAL Model Law?' (2008) 2 *Insol World* 20; P Kite, 'The Bear Stearns Decision-A Concerned View from BVI' 2 *Insol World* 22; K George, 'Chapter 15 Recognition of Bermuda Proceedings after Bear Stearns' (2008) 2 *Insol World* 24.

<sup>105</sup> F Tung (n 12) 559, 565

<sup>106</sup> Ibid

<sup>107</sup> F Tung *ibid*; and JL Westbrook, 'Duty to Seek Cooperation in Multinational Insolvency Cases' (n 64) 362; JL Westbrook, 'A Global Solution to Multinational Default,' (n 36) 2299 and 2326; and J Pae (n 66) 555-556 & 558-559

hand, universalists admit that a country adopting a territorial approach can benefit economically from protecting its local interests.<sup>108</sup>

### 2.5.3 Alternative Approaches Emerging from the Debate

Amidst the debate there have emerged alternative theoretical approaches signifying a drive towards pragmatic versions and compromise arising from the hitherto competing theories.<sup>109</sup> This development is largely in response to the inherent problems of the two competing theories and ‘the resilient power of sovereignty’.<sup>110</sup> The main alternative theories, that have also not been free from criticisms, are modified universalism, cooperative territorialism and bankruptcy selection clause theory. The latter theory is also called contractualism.<sup>111</sup>

It might be appropriate to argue that the alternative approaches that have emerged fall between the opposite ends of the spectrum, from universalism on the one hand to territorialism on the other.<sup>112</sup> On the part of the universalists, the alternative approaches, save for contractualism, are mere transitional solutions towards universalism, which to them is the only proper long term solution.<sup>113</sup>

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<sup>108</sup> LA Bebchuk and AT Guzman, ‘An Economic Analysis of Transnational Bankruptcies,’ (1999) 42 *JL&Econ* 775,778 and 806

<sup>109</sup> J Pae (n 66) 556 and 561

<sup>110</sup> JL Westbrook (n 58) 43

<sup>111</sup> JL Westbrook (n 36) 2300. Westbrook observes that cooperative territorialism is one form of modified territorialism, but he does not explain what it constitutes and what the other forms are. See also JL Westbrook, ‘Universal Priorities’ (n 58) 43 where Westbrook arrived at this conclusion ‘...It may be that we must shape our reforms in international insolvency to a version of modified territorialism for the present if they are to work efficiently and fairly in the world as it is.....Accommodation with territorialism....may have the additional virtue of increasing the commercial pressures for universalist approaches.’

<sup>112</sup> JL Westbrook (n 36) 2299. There is also a secondary proceedings approach that to a large extent corresponds to modified forms of universalism and territorialism. As provided by R Mason, ‘Cross-Border Insolvency Law: Where Private International Law and Insolvency Law Meet’ in PJ Omar *International Insolvency Law: Themes and Perspectives* (Ashgate, England 2008) 27, 52 ‘scholars have typically described the phenomenon rather than proposed it as a theory and placed it within the theoretical framework of universalism and territoriality’. This approach allows concurrent insolvency proceedings in each country where an insolvent debtor has substantial presence. Local proceedings are taken as ancillary proceedings only limited to dealing with assets exclusively on territorial basis.

<sup>113</sup> JL Westbrook *ibid* 2299-2302. See also JJ Kilborn (n 38)

Despite the differences in the alternative theoretical approaches and the fact that they still characterise the two competing models of cross-border insolvency, they signify compromise in some respects and in particular on the element of cooperation among nations in cross-border insolvency.<sup>114</sup> Thus, the possible difference in outcome between modified universalism and cooperative territoriality is seemingly minute. It would seem that LoPucki had this conclusion in mind when he observed that '[a] cooperative territorial system and a universalist one will differ less in practice than in theory.....one can think of cooperative territoriality as a simplification of universalism in which multinationals conclusively are presumed to do what they usually do — incorporate separately in each country.'<sup>115</sup>

Indeed, the alternative approaches advanced suggest that the territorialists and universalists both agree on the suitability of universalism in the globalised era but they only differ on whether the pre-conditions are yet in place to make universalism practical.<sup>116</sup> While territorialism, as mainly represented by LoPucki, suggests that the best way of progressing towards universalism is building a transitional framework based on the existing territorialist practices of national states, universalism, whose main proponent is Westbrook, suggests a system basing on pure universalism as a starting point.<sup>117</sup>

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<sup>114</sup> JAE Pottow, 'Procedural Incrementalism: A Model for International Bankruptcy', (2004-2005) 45 *Va J Int'l L* 936, 955, observing that the modifications effected '...reveal important concessions of theory.'; C Farley, 'An Overview, Survey, and Critique of Administrating Cross-border Insolvencies', (2004-2005) 27 *Hous J Int'l L* 181, 218 concluding that '...under both cooperative territorialism and modified universalism, courts must consistently reach a level of unprecedented international legal cooperation.'

<sup>115</sup> LM LoPucki, 'Cooperation in International Bankruptcy: A Post- Universalist Approach', (n 38) 750; LM LoPucki, 'The Case for Cooperative Territoriality in International Bankruptcy' (n 38) 2221 arguing that in certain instances, modified universalism is '...virtually indistinguishable from territoriality.');

and K Anderson (n 1) 679, 692

<sup>116</sup> LM LoPucki, 'The Case for Cooperative Territoriality in International Bankruptcy' (n 38) 2217. LoPucki states that 'I agree with Professor Westbrook that it is likely that the globalisation of business eventually will harmonize the now-divergent debt collection and insolvency systems of the countries of the world, making conditions ripe for universalism. That may take decades, however, or even centuries. The issue is what to do while we are waiting for the new world society.....I believe it is to continue to apply principles of sovereignty.....'. See also JL Westbrook, 'A Global Solution to Multinational Default' (n 36) 2276-2277, 2288-2297; JAE Pottow (n 114) 955

<sup>117</sup> LM LoPucki, *ibid*; JL Westbrook *ibid*; JL Westbrook, 'Choice of Avoidance Law in Global Insolvencies' (1991) 17 *Brook J Int'l L* 499

### 2.5.3.1 Cooperative Territorialism

This is a refined form of the territoriality theory of cross-border insolvency law. It accommodates all features of territorialism, in particular the right of a sovereign state to administer assets located within its borders without regard to insolvency proceedings in other jurisdictions. However, it provides room for insolvency courts within jurisdictions engaged in administering assets of the insolvent debtor located within their respective borders to cooperate on a case-by-case basis if and when they deem it fit, in addition to establishing a convention to restrict transfers of assets from one jurisdiction to another.

Co-operation agreements where effected may enable the filing of claims by foreign creditors in local proceedings subject to priorities available to similarly situated domestic creditors and existing restrictions whose effect are to prefer local creditors. This approach also contemplates co-operation in other aspects as may be deemed important, including firstly, the establishment of procedures for replicating claims filed in any one country in any other country where the insolvent debtor has filed; secondly, sharing of distribution lists to restrict double recovery; thirdly, co-operation in joint sales of assets to maximise returns; and lastly, facilitating voluntary investment and reorganisation efforts.<sup>118</sup> The co-operation may also involve deference to a foreign state's laws to control domestic proceedings, if a state determines it to be in its best interests.<sup>119</sup> Although, these areas of co-operation may pave the way to an efficient cross-border insolvency system, the co-operation from other jurisdictions is not guaranteed.

In addition to the advantages that it shares with pure territorialism, cooperative territorialism has the further advantage of being simple and less expensive to undertake as it is based on the current territorialist practices of cross-border

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<sup>118</sup> See LM LoPucki, 'Cooperation in International Bankruptcy: A Post- Universalist Approach' (n 38) 750

<sup>119</sup> JAE Pottow (n 114 ) 954-955

insolvencies.<sup>120</sup> Therefore, unlike universalism, cooperative territoriality confines international co-operation to aspects in which co-operation has been most successful in the past. On the contrary, the approach suffers a risk of multiple and inconsistent jurisdictional and choice of law decisions.<sup>121</sup> The nature of the risk is attributed to assets involved which may not do not necessarily fall within one jurisdiction. This creates a potential for difficulties in choice of law. Like pure territorialism, cooperative territorialism has been criticised, among other things, for being non-symmetrical to global markets, as it is based on individual countries' insolvency laws that do not conform to requirements of the global market.<sup>122</sup>

### **2.5.3.2 Modified Universalism**

As the name suggests, modified universalism is 'a watered down version of universalism'<sup>123</sup> which requires a local court to consider and decide whether to comply with a request from a court or foreign representative emanating from a foreign insolvency proceeding of an insolvent debtor having assets in the local jurisdiction. The whole idea of this approach is to make each court cooperate with others involved in insolvency proceedings of an insolvent debtor in either an ancillary or parallel approach to attain some form of unified result.<sup>124</sup> According to Westbrook, modified universalism '...permits the court to view the default and its resolution...from a worldwide perspective [rather than as a series of rights vested in each territory] and to cooperate with other courts to produce results as close to those that would arise from a single proceeding as local law will permit.'<sup>125</sup> In effect, while this approach creates a framework open for co-operation and extraterritorial effect, it also accommodates territorial elements

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<sup>120</sup> LM LoPucki, 'Cooperation in International Bankruptcy: A Post- Universalist Approach' (n 38) 753

<sup>121</sup> JL Westbrook (n 36) 2320

<sup>122</sup> Ibid 2319

<sup>123</sup> LM LoPucki , 'Cooperation in International Bankruptcy: A Post- Universalist Approach'(n 38) 725; and JAE Pottow (n 114) 952, saying that modified universalism gives a deferring court a choice by replacing the 'must' of universalism with 'may' as to application of one country's insolvency law.

<sup>124</sup> This is also envisaged in IF Fletcher (n 48) 122

<sup>125</sup> JL Westbrook (n 36) 2302

characterised by a local court's power to exercise discretion to deny co-operation.<sup>126</sup>

One advantage of modified universalism is that while it maintains some claimed efficiencies of universalism theory in the era of growing globalisation of business enterprise, it is a flexible and simple approach to adopt. It does not of necessity require a convention or treaty for implementation as it can be achieved by domestic legislation. In addition, it contains the sovereignty sentiments that have apparently rendered territorialism a dominant regime of cross-border insolvency. The other advantage is that in the context of the drive towards universalism, it provides the necessary experience needed for formulation of a convention for universalism.<sup>127</sup> On the contrary, modified universalism, by attempting to strike a balance between universalism and territoriality has lost the claimed certainty and predictability of universalism.<sup>128</sup> It is, as such, uncertain and less reliable, as courts still retain power to scrutinise home country laws and exercise discretion whether or not to cooperate. Similarly, transaction costs that seem to be saved by avoiding duplicative proceedings are offset by costs incurred in petitioning for assistance in local courts. Nevertheless, modified universalism, like universalism, still suffers the difficulty of ascertaining the home country of an insolvent debtor.

### **2.5.3.3 Contractualism or Bankruptcy Selection Clause Approach**

This is a relatively recent alternative theory,<sup>129</sup> tracing its roots from the 'contract bankruptcy movement', which characterises the broader theory of contractualism.<sup>130</sup> It advocates a system whereby each corporation will make a choice regarding the applicable forum and law in the event of its insolvency, which choice has to be made during the incorporation stage and reflected in the corporation's charter. The forum chosen will administer the proceedings in

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<sup>126</sup> See K Anderson (n 1) 679, 690, and 691

<sup>127</sup> JL Westbrook (n 36) 2319

<sup>128</sup> LM LoPucki, 'Cooperation in International Bankruptcy: A Post- Universalist Approach' (n 38) 728-732

<sup>129</sup> See JL Westbrook, 'Control of Wealth in Bankruptcy' (n 31) 27-830; JL Westbrook (n 36) 2304; and K Anderson (n 1) 679, 694

<sup>130</sup> See generally S Block-Lieb (n 30) 503; RK Rasmussen (n 30); A Schwartz (n 30)

accordance with the principle of universality. To deter possible manipulation of the home country of a debtor and restrict room for forum shopping, the proposal provides for change of the choice of the applicable insolvency regime only with the consent of creditors. The courts of every country would consequently be bound to enforce the choice as reflected in the corporation charter unless the result would be unreasonable and unjust.

The underlying justification for this approach is that allowing companies to specify the relevant insolvency system through a clause in the corporation charter is premised on efficiency reasons.<sup>131</sup> It is assumed that some companies are likely to favour a territorial system, while others may favour a universalist approach or other modified forms of dealing with cross-border insolvency.<sup>132</sup> Given this situation, it is the companies that can best choose a regime that suits their situations and interests.<sup>133</sup>

Of significance, this approach claims to overcome the problem of determining an insolvent debtor's home country which is inherent under universalism.<sup>134</sup> More importantly, it is likely to provide an incentive to corporations selecting jurisdictions with the most efficient insolvency system. This could consequently lead to competition among countries in putting in place and enforcing efficient insolvency systems whose ultimate result is improved international insolvency law.<sup>135</sup>

However, critics agree that this approach suffers from theoretical and pragmatic problems.<sup>136</sup> Firstly, it has been condemned for disregarding a number of other interested parties from the contracting process, thereby removing the protection

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<sup>131</sup> See RK Rasmussen (n 41) 2255; and RK Rasmussen (n 92) 22

<sup>132</sup> Ibid

<sup>133</sup> Ibid

<sup>134</sup> LM LoPucki, 'Cooperation in International Bankruptcy: A Post- Universalist Approach' (n 38) 738. See also AM Kipnis (n 77) 178; and K Anderson (n 1) 695

<sup>135</sup> RK Rasmussen (n 41) 2273; K Anderson (n 1); and SM Franken (n 57 ) 242-245

<sup>136</sup> LM LoPucki, 'The Case for Cooperative Territoriality in International Bankruptcy' (n 38) 2216, 2243; LM LoPucki, 'Cooperation in International Bankruptcy: A Post- Universalist Approach' (n 38) 738; S Block-Lieb, 'The Logic and Limits of Contract Bankruptcy' (n 30) 528-529; and JL Westbrook, 'A Global Solution to Multinational Default' (n 36) 2303- 230

provided by the mandatory domestic legislation.<sup>137</sup> Secondly, the approach encourages debtors to select regimes with laws that are favourable to debtors, as opposed to most efficient regime. Thirdly, it would be difficult to obtain enforcement of this approach by countries without a convention, which is also unlikely to be concluded.

## **2.6 Placing the Theoretical Approaches and the Associated Issues in SSA Context**

The theoretical approaches and the resulting debate have emerged and developed from the viewpoint of developed countries which are characterised by highly advanced technology, large and multinational corporations and sophisticated financing systems. This fact therefore necessitates a different debate in order to address the specific needs of the least developed countries such as those in SSA in so far as approaching development of a workable and appropriate cross-border insolvency framework is concerned. However, the current theories on cross-border insolvencies may have potentials to offer what is termed as a ‘comparative vocabulary and framework’ in investigating the optimal approach to cross-border insolvency problems in SSA that take into account the existing global initiatives and the local contexts.<sup>138</sup>

Important issues arise from the debate for SSA.<sup>139</sup> The first issue is whether and to what extent the claimed growth of international business activity makes SSA susceptible to implications of and growth of insolvencies. The second issue is on the theoretical approach that may be envisaged in the existing SSA insolvency systems and whether it is the most appropriate in responding to the implications of the growth of international business, while taking into account their concrete socio-economic conditions and the realities of the global economy.

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<sup>137</sup> LM LoPucki, ‘Cooperation in International Bankruptcy: A Post- Universalist Approach’ (n 38) 738-740; K Anderson (n 1) 697

<sup>138</sup> K Anderson (n 1) 699 and 700

<sup>139</sup> See F Tung (n 12) 577; and IF Fletcher, ‘Maintaining the Momentum: The Continuing Quest for Global Standards and Principles to Govern Cross-border Insolvency’ (2006-2007) 32 *Brook J Int’l L* 767, 774

Since the mid 1980s, SSA countries have been implementing economic reforms and liberalisation programmes as part of the conditions of financial aid administered by the IMF and the World Bank in a bid to restructure and build their economies.<sup>140</sup> The adopted approach entails putting in place conducive policy and legal frameworks for attracting, promoting and protecting foreign investment,<sup>141</sup> and has resulted in the making of bilateral and multilateral agreements on trade and investment. The receipt of disbursements from the international lending agencies and other donor countries, with which SSA maintains bilateral and multilateral arrangements, is at times contingent upon progress in putting such policies and laws into effect.<sup>142</sup>

Given the economic reforms and policy emphasis on the promotion and protection of foreign investments, potential for such countries favouring a universalist stance, including its modified versions, seems to be looming; as is the wholesale adaptation of the prescription of the international bodies with regard to the regulation of cross-border insolvency.<sup>143</sup> Certainly, this endeavour might be pursued by these countries<sup>144</sup> in a bid to further attract foreign investors, for it is now widely acknowledged that an effective and predictable insolvency law is a crucial factor for investors interested in investing in a particular jurisdiction.<sup>145</sup> A universalist argument is such that a universalist insolvency system would effectively enable investors to plan their transactions more effectively while confidently aware that in the event of insolvency, their home country law will apply and govern proceedings, or their home representative will

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<sup>140</sup> It is noteworthy that IMF and World Bank are among regional and global organizations that have also been instrumental in devising and promulgating models, principles, and normative standards and paradigms as prescriptive for good insolvency law.

<sup>141</sup> Many of SSA countries have enacted specific legislation for investment protection and promotion for example Investment Promotion Act 2004 (Kenya) and Tanzania Investment Act 1997 which apply in Kenya and Tanzania respectively.

<sup>142</sup> HS Burman 'Harmonization of International Bankruptcy Law: A United States Perspective' (1995-1996) *Fordham L Rev* 2543, 2547

<sup>143</sup> See ED Flaschen and T B DeSienna, 'The Development of Insolvency Law as Part of the Transition from a Centrally Planned to a Market Economy,' (1992) 26 *Int'l L* 667; PH Brietzke, 'The Politics of Legal Reform' (2004) 3 *Wash U Global Stud L Rev* 1; and HS Burman (n 142) 2547; and JW Salacuse, *The Law of Investment Treaties* (OUP, Oxford 2010)

<sup>144</sup> This may depend on prevailing domestic politics of the government that is in power.

<sup>145</sup> CG Paulus (n 18); and R Parry and H Zhang, 'China's New Corporate Rescue Laws: Perspective and Principles' (2008) *Journal of Corporate Law Studies* 113, 123

be accorded the requisite recognition and co-operation in the resulting proceedings. The assumption is that such law will lower the cost of credit and stimulate foreign investment, as foreign creditors would be more inclined to invest in such a corporation.

The foreign investors, as well as developed countries with which SSA countries maintain bilateral and multilateral agreements in trade and investments, may, depending on their leverage, influence reform in a manner that is seemingly favourable to them.<sup>146</sup> Equally important, since the legal systems and legal profession and training in SSA countries trace their origin from former colonial powers, there is also a strong chance that the direction of reform will be much influenced by the law and the trend of legal reform in the former colonial powers.<sup>147</sup>

Having an effective insolvency system is one thing, but achieving its effective implementation is quite another. Although such countries may effect legal reform of their insolvency systems in a bid to attract investment, they may not possess the requisite institutional capacity, experience and resources necessary in dealing with intricacies arising from cross-border insolvencies.<sup>148</sup> This is particularly so if, for instance, a country assumes a universalist home country status or a territorialist local country jurisdiction which might require judicial co-operation with other territorialist jurisdictions to ensure effective ‘marshalling of the assets’ of the insolvent company to the advantage of creditors.

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<sup>146</sup> TC Halliday, and BC Carruthers (n 21) xxi, stating that ‘...convergence could occur if creditors or investor groups, which possess considerable international mobility push hard for laws that favour their interests.’

<sup>147</sup> See n 3 above; and D Berkowitz, K Pistor, and J Richard (n 16) 165-195. Indeed, the insolvency legal regime designed for (and operational since 1999 under) OHADA - an organization for Harmonisation of Business Law in Africa with member states among Franco-phone countries- is heavily drawn from and influenced by the French insolvency system. See B Wessels, *International Insolvency Law* (Kluwer, Netherlands 2006) 45; and B Martor, N Pilkington, DS Sellers and S Thouvenot, *Business Law in Africa: OHADA and the Harmonisation Process* (Kogan, London 2002) xxi, xxii, and 7

<sup>148</sup> The presence and actually development of effective domestic institutions is crucial for the governance of global markets. See K Pistor ‘Standardization of Law and its Effect on developing Economies’ (2002) 50 *Am J Comp L* 97, 99 noting that ‘absent supranational enforcement system, law enforcement [for global markets] is dependant on local institutions.’

On the contrary, the likelihood of refuting such a universalist stance can also not be underestimated. It is commonplace that countries may be reluctant to commit themselves to a universalist stance but may instead opt to co-operate with foreign courts on an *ad hoc* basis. Apparently, nationalist sentiments manifested in the desire to protect local policies<sup>149</sup> and creditors are still dominant in some of these countries.<sup>150</sup> Similar sentiments were apparent during implementation of the IMF/World Bank reform policies in some of these countries.<sup>151</sup> This may in some instances render these countries to favour territorialism or to opt to remain with an outdated system, as they may not be keen to reform. Likewise, legal reform may ostensibly be undertaken for simply creating a good impression with the international lending organisations and investors.<sup>152</sup> The resulting insolvency system is thus unlikely to be followed by effective implementation and enforcement. Additionally, a universalist stance might not be favoured for it may be seen as less advantageous to a least developed country where few local business enterprises might be holding assets in other countries.<sup>153</sup> Thus a universalist stance might imply rendering a SSA country the target for a claim of extraterritorial insolvency jurisdiction. As aptly observed by Tung:

Given the current pattern of investment flows, less developed countries (LDCs) are far more likely to be the targets for assertion of extraterritorial bankruptcy jurisdiction, rather than their initiators. For most multinational corporations, the home country will be an industrial country. Therefore, under universalism, LDCs would regularly have to defer to industrial country insolvency regimes. In addition to social policy concerns, LDCs creditors would be forced to learn about and function under various foreign systems. But LDCs creditors may be exactly the sorts of creditors most vulnerable to these international

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<sup>149</sup> Unlike in other jurisdictions, especially developed countries, it may be noted that the argument regarding the protection of local policies (upon which insolvency laws were founded) may not have a basis and relevance in most Sub-Saharan Africa where the majority of the existing laws were mainly imposed by, and consequently inherited from, the countries that colonised them e.g. several countries still have laws based on the UK Companies Act 1948.

<sup>150</sup> Interests originating mainly from decolonisation process may influence choice and crafting of a regime that is unfavourable to a unified stance but offers favourable treatment to local interests.

<sup>151</sup> TA Kelley, 'Exporting Western Law to the Developing World: The Troubling Case of Niger' (2007) 7 *Global Jurist Frontiers* < <http://www.bepress.com/gj/vol7/iss3/art8> > accessed 4/5/2009; and PH Brietzke, (n 143)17

<sup>152</sup> According to CG Paulus (n 18) 760, 'many countries have adopted quite modern insolvency legislation that appears on paper as successful approximations of the propositions in the guidebooks. But, upon closer inspection, it becomes apparent that the law in action bears little resemblance to the written law.'

<sup>153</sup> L Hoffmann, 'Cross-Border Insolvency: A British Perspective' (1995-1996) 64 *Fordham L Rev* 2507, 2510

complications. In general, they will be less sophisticated than their industrial country counterparts. They are less likely to be able to adjust appropriately- even on average- to the risks of various foreign insolvency regimes.<sup>154</sup>

The implication of deferring to advanced nations' regimes as home countries of the insolvent multinational corporations is that the least developed countries will failingly develop and build the requisite internal capacity and experience.

The experience that SSA countries might have, if any, in cross-border insolvency and the extent to which they might have been involved in and affected by the massive and high profile cross-border insolvency cases that troubled the advanced nations in the recent past are also likely to influence the approach to be taken to cross-border insolvency regulation. However, the majority of these countries lack such experience, as they have not been directly involved in and affected by such cases.

The varied interests and the potential for global pressure for convergence of insolvency law may render complexities in determining an appropriate approach that will address the needs of SSA while keeping pace with global trends and international best practices. An approach that may be appropriate and work well within a regional grouping framework in Sub-Saharan Africa, may not necessarily work the same in dealing with other key partners in international commerce that fall outside the regional arrangement.<sup>155</sup> Consideration of the key investment and trading partners<sup>156</sup> within and outside regional groupings as well as Sub-Saharan Africa might thus be inescapable in the endeavour of developing an appropriate framework for regulation of cross-border insolvencies, which takes into account the existing global cross-border insolvency frameworks.

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<sup>154</sup> F Tung (n 12) 576-577. See also ES Adams and JK Finkle, 'Coordinating Cross-Border Bankruptcy: How Territorialism Saves Universalism' (2008-2009) 15 *Colum J Eur L* 43, 54 citing F Tung (n 12) in approval.

<sup>155</sup> It is worth noting that at least each and every country in SSA is a member of at least two regional groupings.

<sup>156</sup> This may appropriately involve consideration of the investment and trading partners' legal frameworks for cross-border insolvencies.

Indeed, an approach that is pragmatic and balances the varied interests might be advantageous in many respects, as opposed to ‘dogmatic insistence on the means by which a result is to be achieved’.<sup>157</sup> The question remains how best such a balanced approach could be devised, if it is at all needed.

## **2.7 Some Thoughts and Issues Relating to Reform Strategies**

Some thoughts and issues have evolved over the years and amidst the debate and promulgation of global initiatives with regard to reform strategies of insolvency law systems. The thoughts and issues that have been raised attempt to explain what reform of the insolvency law system should consider and how it should be undertaken.

Firstly, it is increasingly becoming accepted among theorists and academics that there is no ‘one size fits all’ approach to insolvency law.<sup>158</sup> This view is premised on the assumption that each country has its diverse values and norms, which have to be taken into account in the reform process, as they would require different policy choices for its insolvency system that should not necessarily correspond ‘lock stock and barrel’ with other countries’ insolvency systems or global insolvency norms.<sup>159</sup> Such differences are reflected in divergences in priorities and understandings of the goals of insolvency proceedings, such as the protection of creditors, workers, and companies. This thought seemingly warns against the dangers of legal transplantation and it indeed runs counter to the idea of ‘best practices’.<sup>160</sup> However, this view seems to over emphasise the peculiarity of the national values and norms that account for the claimed diversity. The implication

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<sup>157</sup> IF Fletcher (n 48) 124

<sup>158</sup> See R Parry and H Zhang (n 145) 125; CG Paulus (n 18) 765; N Martin (n 14) 5; JJ Chung (n 70) 107 and 108

<sup>159</sup> TC Halliday, ‘Lawmaking and Institution Building in Asian Insolvency Reforms: Between Global Norms and national Circumstances’ (5<sup>th</sup> Forum for Asian Insolvency Reform 27-28 April 2006) <<http://www.oecd.org/DAF/corporate-affairs/>>, accessed 17/07/2009 [33]

<sup>160</sup> See F Dahan and J Dine, ‘Transplantation for Transition- Discussion on Concept Around Russian Reform of the Law on Reorganisation’ (2003) 23 *Legal Studies* 285-310; and H Xanthaki, ‘Legal Transplants in Legislation: Defusing the Trap’ (2008) 57 *ICLQ* 659-673; and TC Halliday, ‘Legitimacy, Technology, and Leverage: The Building Blocks of Insolvency Architecture in the Decade Past and the Decade Ahead’ (2006-2007) 32 *Brook J Int’l L* 1081, 1097-1101

is that the over emphasis on the peculiarity of the national values, if taken without caution, may unnecessarily complicate the approach to insolvency law reform. The complication is that it may not be that easy, in contemporary pluralistic societies, to determine those propositions of values that are not only representative of a national wide consensus but also relevant to cross-border insolvencies.<sup>161</sup> Despite this intricacy, it is necessary to accept the challenge for the purpose of a coherent insolvency policy.

The second theoretical view related to reform of insolvency systems is incrementalism.<sup>162</sup> In relation to insolvency law reform, and in particular the global convergence, this view advocates for modest and gradual reform mechanisms in relation to global insolvency law, allowing for substantial deviation, whilst also reducing the risk of outright rejection.<sup>163</sup> This approach claims to accommodate even the sceptical individuals or states that may not be happy with or ready to carry out a wholesale reform and adaptation as it accords room for gradual and piecemeal reform. This approach is significant in cross-border insolvency by virtue of the absence of theoretical and political consensus of how best to design international insolvency regimes. The benefits of incrementalism in international law making have been summarised thus:

Rather than confront states immediately with a legal regime that couples challenging goals with strong sanctions for failure to meet them, states can be gradually led towards stronger legal rules. This can be accomplished by starting with relatively weak international rules backed by little or sanctions that all states feel comfortable joining, but then gradually pushing states to accept successfully stronger and more challenging requirements.<sup>164</sup>

An incrementalist approach to the development of global law is more relevant where law reformers possess limited authority and the subject is either

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<sup>161</sup> PH Brietze (n 143) 24 and 25; and G Johnson, 'Towards International Standards on Insolvency: The Catalytic Role of The World Bank' (2000) *Law in Transition online* 1. <<http://www.ebrd.com/pubs/legal/lit072.pdf>> accessed 15/6/2009

<sup>162</sup> JAE Pottow (n 114) 936. This is an international law theory, which in connection with cross-border insolvency law reform was first presented by Pottow.

<sup>163</sup> JAE Pottow (n 114) 936; S Block-Lieb and TC Halliday 'Incrementalisms in Global Lawmaking' (2006-2007) 32 *Brook J Int'l L* 851

<sup>164</sup> OA Hathaway, 'Between Power and Principle: An Integrated Theory of International Law' (2005) 72 *Univ Chicago Law Rev* 469, 531 also quoted in S Block-Lieb and TC Halliday, *ibid* 851

controversial or technical.<sup>165</sup> It has been argued that it is this approach that the UNCITRAL Model Law on Cross-border Insolvency adopted, thus making it possible to overcome the theoretical gap between universalism and territorialism whilst also implicitly advancing universalism. According to Block-Lieb and Halliday, incrementalism, in its dynamic form, operates vertically, horizontally and in a pyramidal form, which creates potential for broad, and in depth application involving international organisations and building from prior efforts.<sup>166</sup> Notwithstanding its advantages that include minimising chances for confrontation and resistance, the approach is biased towards a universalist stance and more importantly, it operates in a manner that conceals the ultimate intent of the reform process.

The third thought is based on the assumption that an effective and efficient insolvency law which guarantees certainty, predictability, transparency and efficiency should stimulate efficient market exchange processes and thus strengthen national and global economies.<sup>167</sup> It thus advocates for strategic reform of insolvency laws so as to conform to the global market and in particular to attract investments and support the operations of the credit system. The argument is that such law enables investors and creditors to effectively plan their commercial transactions while assured that, in the event of insolvency, the proceedings will be conducted fairly and efficiently.

Apparently, this view assumes a correlation between the growth of a country's foreign investment and national economy on one hand and the presence of an effective functional insolvency law, though no global comprehensive empirical study has been undertaken in this regard.<sup>168</sup> The inherent difficulty of measuring such a correlation and obtaining reliable evidence thereof has long been

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<sup>165</sup> S Block-Lieb and TC Halliday, *ibid* 852

<sup>166</sup> *Ibid* 854

<sup>167</sup> S Hagan, 'Insolvency Reform and Economic Policy' (2001-2002) 17 *Conn J Int'l L* 63; R Parry and H Zhang (n 145)123; R Sanderson, 'Making Insolvency System Work' (2007) *Law in Transition online* 1. <<http://www.ebrd.com/pubs/legal/lit072.pdf>> accessed 15/6/2009; CG Paulus (n 18) 757-759; M Balz, 'Market Conformity of Insolvency Proceedings: Policy Issues of the German Insolvency Law' (1997) 23 *Brook J Int'l L* 167,170-172

<sup>168</sup> TC Halliday, and BC Carruthers (n 21) 440. Halliday and Carruthers state *inter alia* that "relationship between good law and investment remains open to empirical confirmation."

acknowledged though it is a widely held belief that such a relationship does pertain.<sup>169</sup> This view is seen as particularly relevant for economies in transition, as well as developing countries, where it can play a critical role in addressing economic problems in these countries.<sup>170</sup> However, it has been argued that it is unrealistic to expect such countries to adopt a new insolvency law system for the sake of the supposed economic advantage; as such a move would require a long term approach involving the sharing of skills and expertise.<sup>171</sup> As noted earlier, having an effective insolvency law is one thing, but its effective implementation is quite another thing for the latter is highly dependent on the existence of a strong institutional infrastructure, something that cannot be developed within a time frame necessary to respond to immediate and pressing needs.<sup>172</sup>

Arguably, none of the approaches discussed is sufficient in itself to provide an effective reform strategy for SSA which faces by a number of problems. To be sure, it may be imperative for these approaches to operate collectively and in a holistic manner for want of an efficient output. This is probably the reason why each of them when viewed critically seems to be just an aspect of the other, such that employment of one strategy would necessarily lead to consideration and application of the other. However, the collective and holistic utilisation of all the strategies is highly demanding in terms of human and financial resources which might be lacking in SSA. Indeed, the drive for international convergence undertaken by the global and regional institutions seems at least in theory to have adopted these strategies, though the resulting benchmarks arguably do not reflect the least developed economies' perspectives.<sup>173</sup>

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<sup>169</sup> See M Balz (n 167) 167,169 and 170; and TC Halliday, and BC Carruther (n 21) 440

<sup>170</sup> IMF(n 6); ED Flaschen and TB DeSieno, 'The Development of Insolvency Law as Part of the Transition from a Centrally Planned to a Market Economy' (n 143) 668

<sup>171</sup> IF Fletcher (n 139) 774

<sup>172</sup> S Hagan (n 167) 72 and 73

<sup>173</sup> See n 4 and 6 above; N Onder, 'Global Financial Governance: 'Soft' Law and Neoliberal Domination' (Paper for the Canadian Political Science Association Congress, June 2-4 2005 London) < <http://www.cpsa-acsp.ac/papers-2005/Onder.pdf> > accessed 25/11/2009; and B Schneider, 'Do Global Standards and Codes Prevent Financial Crises? Some Proposals on Modifying the Standards-Based Approach' (UNCTAD Discussion Paper No 177, April 2005)<[http://www.unctad.org/en/docs/osgdp20051\\_en.pdf](http://www.unctad.org/en/docs/osgdp20051_en.pdf) > accessed 17/07/2009 [1]

## **2.8 Conclusion**

It is apparent that every theoretical approach that is being advocated is not free from one disadvantage or another. While one approach might be seen as advantageous from the perspective of globalisation and from the standpoint of multinational corporations, it might not equally be seen as a favourable option to a particular country in view of its domestic policies, level of development and extent of integration to the global economy. While an approach might be theoretically sound, in practical terms it might be unattainable in the near future. The above circumstances seem to justify the emergence of a pragmatic approach, and hence development of the alternative approaches which some scholars have described as transitional strategies to universalism. Nevertheless, the debate serves to expose the benefits and ills of each approach, which then need to be considered in developing a framework for legislation in light of the existing global initiatives and the local contexts. In all, the theoretical models and the resulting debate provide an important benchmark which any reform measure ought to take into account while prioritising the specific needs and values of the SSA countries.

It is however worthwhile to note that the endeavour of exploring the theories for cross-border insolvency has proceeded under the assumption that there is a greater challenge for increasing cases of cross-border insolvency arising from the growing scale of international business. The apparent question is whether this is realistic and equally the same in all countries and in particular SSA countries, bearing in mind that the endeavours to develop coherent theoretical models and the resulting debate over the same have evolved from developed economies which are characterised by multinational corporations, advanced technology and sophisticated financial and credit systems. Certainly, another challenge is on the methodology to be adopted to unveil what would constitute relevant specific needs and values for these developing countries. The next chapter looks at the global convergence of insolvency law in relation to the quest for a cross-border insolvency framework for SSA.

## CHAPTER THREE

### THE GLOBAL CONVERGENCE OF INSOLVENCY LAW AND THE QUEST FOR A SUB-SAHARAN AFRICAN CROSS-BORDER INSOLVENCY FRAMEWORK

#### 3.1 Introduction

The globalisation drive has not only led to an intense debate over the competing cross-border insolvency theories addressed from the perspective of developed countries but also to macroeconomic instabilities. These instabilities have facilitated the development of international insolvency standards under the auspices of the multilateral institutions within the context of the international financial architecture and global convergence of laws. However, the international insolvency standards that have emerged as benchmarks for standardising development of effective domestic insolvency systems are based on the ‘best practices’ prevailing in advanced economies which may not necessarily be directly relevant and appropriate for Sub-Saharan African (“SSA”) countries. There is thus a potential risk for the efforts by these countries to comply with the standards as they approach the crafting of a workable and appropriate cross-border insolvency framework to result in unsuitable legislative reform. Although the international benchmarks seem in some ways to inherently recognise the differences between legal regimes and allow room for innovation to reflect local circumstances, they potentially suggest a ‘one size fits all approach’ to the vulnerable countries of SSA which are taking initiatives to impress the international community as a strategy to attract foreign direct investment, aid and technical assistance as they can hardly withstand the pressures and incentive for reform from international institutions.

This chapter provides an insight into the dilemmas and challenges for cross-border insolvency reform posed by such developments for SSA- a major group of developing countries with a large number of countries adjudged by the United Nations as “least developed” countries.<sup>1</sup> It provides a perspective on the

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<sup>1</sup> Text to n 21 in chapter 1

ramifications of the international insolvency standards for SSA that arises from the multilateral institutions involvement in facilitating the observance of the standards and the nature of the standards themselves. Salient features of the standards, and emerging aspects and issues within the assessments for compliance with the standards will be identified and considered with particular reference to the SSA context. This chapter begins by giving an overview of the globalisation of trade and capital and its implication for convergence of insolvencies before outlining the development of international insolvency standards within the context of the international financial architecture. Attention then turns briefly to the salient features that underpin adoption and observance of the standards in general and this discussion will be used as a basis for a discussion of the relevancy of the standards to SSA and appraisal of the multilateral institutions' assessments of observance of the standards, before a view from SSA is given as to the potential implications of the current crisis for any potential reform process.

### **3.2 Globalisation and the Pressure for Convergence of Insolvency Law Systems**

Globalisation of trade and capital is having a direct impact of opening up and linking together national market economies across the globe.<sup>2</sup> Enterprises are increasingly taking a more global outlook, pursuing strategies which link and coordinate the production and distribution of goods and service on an international basis;<sup>3</sup> and setting up business and undertaking economic expansion

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<sup>2</sup> This is noticeable in the emergence of new patterns of commercial links involving emerging economies and SSA and steady growth of volume of global trade and capital flow. See World Trade Organisation (WTO), *International Trade Statistics 2006* (WTO Publications, Geneva 2006); R Jenkins and C Edwards, 'The Economic Impacts of China and India on Sub-Saharan Africa: Trends and Prospects' (2006) 17 *J Asian Econ* 207–225

<sup>3</sup> Multinational enterprises from developed countries are still dominant, though there is a rapid increase of such enterprises from emerging economies as well. In SSA, such trend is said to be more characterised by the growth and expansion of South Africa industry, though there is evidence of significant outward investment from other countries such as Kenya, Nigeria and Mauritius. See L Thomas, J Leape, N Bhinda, and M Martin, 'Intra-Regional Private Flows in Eastern and Southern Africa: Findings from Mozambique, South Africa, Tanzania, Uganda, Zambia and Zimbabwe' (Research Paper at the LSE Centre for Research into Economics and Finance in Southern Africa & Development Finance International 2003) < <http://www.development-finance.org/en/services/research-a-analysis/publications-and-technical-briefings/private-capital-publications/synthesis-analysis/173-intra-regional-private-capital-flows->

in more than one jurisdiction.<sup>4</sup> These developments have led to growth in transnational activities undertaken by ordinary enterprises having international connections in multiple jurisdictions.<sup>5</sup> This is increasingly leading to interconnectedness and interdependence of national economies which consequently demands for harmonisations of domestic systems to facilitate and sustain trade and investments growth and in particular the operations of multinational enterprises.

To this extent, the emerging global economic order has made it imperative for international regulation of the global markets to ease international commerce by ensuring stability, certainty, and predictability. This is sought to be achieved by forging a harmonised framework for crisis resolution which is expected to reduce transaction costs.<sup>6</sup> Such endeavour is partly reflected in the growing number of arrangements for facilitation of trade and capital that have been concluded across the globe and the emerging trend towards renegotiation and negotiation of such and similar arrangements.<sup>7</sup> It is within this context that attention has greatly been given to cross-border insolvency treatment, standardisation initiatives and indeed, the debate on the competing theoretical approaches for dealing with cross-border insolvencies.<sup>8</sup>

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[in-eastern-and-southern-africa.html](#) > accessed 06/07/2011; and I Mevorach, *Insolvency Within Multinational Enterprise Groups* (OUP, Oxford 2009)

<sup>4</sup> R Mason, 'Implications of the UNCITRAL Model Law for Australian Cross-border Insolvencies' (1999) *Int'l Insolv Rev* 83, 84; PJ Omar, *European Insolvency Law* (Ashgate, England 2006)15; and SO Riain, 'States and Markets in an Era of Globalization' (2000) 26 *Annu Rev Sociol* 187, 189

<sup>5</sup> World Bank, *World Development Indicator*, 2009 (Washington 2009). The World Indicator notes that this also involves establishment of footholds in new markets and shifting production sites to other jurisdictions to take advantage of lower cost or gaining access to supplies of natural resources.

<sup>6</sup> World Bank, *World Development Report 2005: A Better Investment Climate for Everyone* (World Bank, Washington 2004) 181

<sup>7</sup> These are in the nature of international investment treaties and bilateral investment treaties. See, United Nations Conference on Trade and Development ("UNCTAD"), *World Investment Report 2008: Transnational Corporations and Infrastructure Challenge* (United Nations, New York 2008). Chapter 4 of this thesis is devoted to these facilitation arrangements as they implicate cross-border insolvency regulation in SSA.

<sup>8</sup> The theoretical aspects of cross-border insolvencies are thoroughly discussed in chapter two of this thesis.

All these developments reflect pressures for global convergence of corporate insolvency laws involving multilateral institutions and other international organisations. This is in part a reflection of insolvency as a feature of any well-developed market based economy.<sup>9</sup> The pressure for convergence has indeed in the last few decades given way to the rise of global insolvency norms based on practices predominantly found in advanced economies and has focussed attention upon the global dimensions of insolvency law reform. It is noteworthy that more pressure has been greatly felt in developing countries than the developed ones given the involvement of multilateral institutions which have hitherto been responsible for the liberalisation policies that were being implemented as a precondition for eligibility for loans.<sup>10</sup> This pressure is mostly because of the vulnerability of the developing countries and lack of capacity to withstand such forces.<sup>11</sup>

As far as developing countries are concerned the pressure for convergence of insolvency law by using models of best practices from advanced economies started to be experienced long before the promulgation of the global insolvency norms. Indeed, modernisation of the insolvency systems, by the use of foreign models, was at times a condition for qualifying for international lending from such international institutions and advanced countries.<sup>12</sup> The use of foreign models was open to criticisms centred on the suitability of the legal transplantations given that their effectiveness is dependant on among other things 'the recipient country's legal culture and tradition and the degree of similarity of such factors to those of the importer.'<sup>13</sup> In some quarters, the approach of the

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<sup>9</sup> S Hagan, 'Insolvency Reform and Economic Policy' (2001-2002) 17 *Conn J Int'l L* 63

<sup>10</sup> S Hagan (n 9) 63

<sup>11</sup> R Tomasic, 'Insolvency Law Reform in Asia and Emerging Global Insolvency Norms' (2009) *Insolv LJ* 15

<sup>12</sup> G Ajani, 'By Chance and Prestige: Legal Transplants in Russia and Eastern Europe' (1995) *Am J Comp L* 93, 113; and F Dahan and J Dine, 'Transplantation for Transition on Concept around Russian Reform of the Law on Reorganisation' (2003) 23 *Legal Studies* 284; and H Xanthaki, 'Legal Transplants in Legislation: Defusing the Trap' (2008) 57 *ICLQ* 659

<sup>13</sup> F Dahan and J Dine (n 12) 284, 289; G Ajani (n 12); H Xanthaki (n 12) 659; JR Hay and others, 'Privatization in Transition Economies: Toward a Theory of Legal Reform' (1996) 40 *Eur Econ Rev* 559, 565; and TW Waelde and JL Gunderson, 'Legislative Reform in Transition Economies: Western Transplants- A Short-Cut to Social Market Economy Status?' (1994) 43 *Int'l & Comp LQ* 347, 360

international institutions has been criticised for equating modernisation of insolvency law with westernisation of developing countries' laws,<sup>14</sup> which practice was predominant in colonial days and reflects the prevailing inequalities in power structure among nations.<sup>15</sup> While the pressure for convergence of insolvency law was particularly and directly felt in developing economies of Eastern Asia, Latin America and the transition economies in Eastern Europe, it was a different story in SSA where the pressure, during that time, was broadly felt on implementation of the 'one-size-fits all' structural adjustment policies and other development protocols promoted and imposed by the multilateral institutions (i.e the World Bank and the International Monetary Fund) which were also characterised by the importation or imposition of Western legal rules and institutions.<sup>16</sup>

### **3.3 Global Insolvency Norms and the Benchmarking of Insolvency Reform Process**

Consistent with the above discussion, the globalisation of trade and capital and the implications it has had in insolvency law, influenced and inspired multilateral institutions, driven by the collective will of G7 to create global insolvency norms to benchmark development of effective insolvency law systems across the globe.<sup>17</sup> Special regard is given to developing countries, as they are considered to

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<sup>14</sup> S Steele, 'The New Law on Bankruptcy in Indonesia: Towards a Modern Corporate Bankruptcy Regime' [1999] *MULR* 5 < <http://www.austlii.edu.au/au/journals/MULR/1999/5.html> > accessed 11 August 2009; CRP Pouncy, 'Stock Markets in Sub-Saharan Africa: Western Legal Institutions as a Component of Neo-Colonial Project' (2002) 23 *U Pa J Int'l Econ* L 85; TA Kelley, 'Exporting Western Law to the Developing World: The Troubling Case of Niger' (2007) 7 *Global Jurist* (Frontiers) Article 8 < <http://www.bepress.com/gj/vol7/issu3/art8> > accessed 01/06/2010; T Halliday 'Crossing Oceans, Spanning Continents: Exporting Edelman to Global Lawmaking and Market-Building' (2004) 38 *L & Soc'y Rev* 213, 217; and SE Merry, 'From Law and Colonialism to Law and Globalization' (2003) 28 *Law and Social Inquiry* 569, 570

<sup>15</sup> SE Merry (n 14) 570

<sup>16</sup> J Stiglitz, *Globalization and its Discontents* (Penguin Books, London 2000); and CRP Pouncy (n 14) 86

<sup>17</sup> World Bank and UNCITRAL, 'The Unified Creditor Rights and Insolvency Standard Based on World Bank Principles for Effective Creditors Rights and Insolvency Systems and UNCITRAL Legislative Guide on Insolvency Law' <<http://www.worldbank.org/ifa/FINAL-ICRStandard-March2009.pdf>> accessed 22 July 2009. The Unified Global Insolvency Standard is based on and integrates the World Bank Principles for Effective Creditor Rights and Insolvency Systems and the UNCITRAL Legislative Guide on Insolvency Law. Thus, the unified standard essentially incorporates the benchmarks of all the previous efforts. It is noteworthy that the UNCITRAL Legislative Guide itself has had advantages of taking into account all the previous efforts

be responsible for the global crises due to their weak crisis resolution systems which are perceived as a major threat to stability of the entire global financial systems.<sup>18</sup> This inspiration is partly seen as a reflection of the need to address the shortcomings arising from the implementation of the ‘Washington Consensus’<sup>19</sup> policies that contributed to the occurrence of the East Asian financial crisis.<sup>20</sup>

The global norms have hitherto been classified as international insolvency standards, following earmarking of insolvency and creditor rights as among the key elements of international financial architecture which merit international regulation both for sound functioning of domestic real and financial markets and for reduction of the risks and costs of systemic instability.<sup>21</sup> Unlike other international standards, the standardisation initiative for insolvency laws is seen to be more directly linked to financial stability. This link is because of the role that effective insolvency law is deemed to play in containing the effect of

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including the IMF and World Bank’s initiatives documented in IMF, ‘Orderly and Effective Insolvency Procedures –Key Issues (IMF, Washington 1999); and World Bank, *Principles and Guidelines for Effective Insolvency and Creditor Rights Systems* (World Bank, Washington 2005). Insolvency is among the key areas identified as crucial for standardization initiative. Others include corporate governance, monetary and financial policy transparency, accounting, auditing, and banking supervision. See J Stiglitz (n 16) 15, 233 and 234, on some reflections on the backdrop of the international financial architecture initiative within which the international insolvency standards are situated.

<sup>18</sup>N Onder, ‘Global Financial Governance: ‘Soft’ Law and Neoliberal Domination’ (Paper for the Canadian Political Science Association Congress, June 2-4 2005 London) < <http://www.cpsa-acsp.ac/papers-2005/Onder.pdf> > accessed 25/11/2009 [ 2]; R Tomasic (n 11) and J Stiglitz (n 16); UNCTAD, *Trade and Development Report, 2001* (United Nations, New York 2001) 89; IMF and World Bank, ‘Assessing the Implementation of Standards: A Review of Experience and Next Step’ (Report Prepared by Staff of the International Monetary Fund and the World Bank, 11 January 2001) <<http://imf.org/external/np/pdr/sac/2001/eng/review.pdf> > accessed 22/08/2009; UNCTAD, *Trade and Development Report 2008* (UN, New York 2009) . The view that developing countries are the ones responsible for occurrence of crises has since been contradicted by the current global financial crisis which originated in the US in 2008 before initially spreading to other advanced economies such as the UK.

<sup>19</sup> R Tomasic (n 11) and J Stiglitz (n 16) 16, 80-88. The Washington Consensus was a consensus between the IMF, the World Bank and the US Treasury regarding the right policies for developing countries. The policies arising from this consensus signified a radically different approach to economic development and stabilisation.

<sup>20</sup> J Stiglitz (n 16) 80-88 and 233

<sup>21</sup> The standards and codes are designed mainly by the Group of 7 (G7) and other industrialised countries. See B Schneider, ‘Do Global Standards and Codes Prevent Financial Crises? Some Proposals on Modifying the Standards-Based Approach’ (UNCTAD Discussion Paper, No. 177, 2005) < [http://www.unctad.org/en/docs/osgdp20051\\_en.pdf](http://www.unctad.org/en/docs/osgdp20051_en.pdf)> accessed 17/07/2009 [1]; J Stiglitz (n 16) 15, 233 & 234

insolvency problems and preventing contagion effects that result from insolvencies of large corporations with extensive international networks.

The initiative builds incrementally upon the previous efforts that led to promulgation of the UNCITRAL Model Law on Cross-border Insolvency in 1997.<sup>22</sup> The principal trigger for action for standardisation of the international insolvency norms within the context of the global financial architecture was the 1997-1998 East Asian Financial Crisis,<sup>23</sup> and the desire to prevent similar consequences in future.<sup>24</sup>

The idea of standardisation of global insolvency norms hinges on the following assumption: that despite the wide divergence of national insolvency law systems, there are common and uniform aspects of 'best practices' that are shared by different insolvency systems which could be utilised as standards to benchmark development of effective insolvency regimes across the globe.<sup>25</sup> Accordingly, observance of such standards would have a global effect of harmonising substantive aspects of different insolvency law systems which will ensure consistency in application, interpretation and enforcement, worldwide.<sup>26</sup> In

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<sup>22</sup> S Block-Lieb and TC Halliday, 'Incrementalisms in Global Lawmaking' (2006-2007) 32 *Brook J Int'l L* 851; and S Block-Lieb and TC Halliday, 'Harmonization and Modernization in UNCITRAL's Legislative Guide on Insolvency Law' (2006-2007) 42 *Tex Int'l LJ* 475; and HV Morais, 'The Quest for International Standards: Global Governance vs Sovereignty' (2001-2002) 50 *U Kan L Rev* 779, 802 & 803

<sup>23</sup> It is worth noting that the crisis had its subsequent problems in Latin America and Russia.

<sup>24</sup> J Stiglitz (n 16) 233, 234; R Tomasic (n 11) 15; CG Paulus, 'Global Insolvency Law and the Role of Multinational Institutions' (2006-2007) 32 *Brook J Int'l L* 755, 756; B Schneider (n 21 )1 & 2

<sup>25</sup> KW Abbott and D Snidal, 'International "Standards" and International Governance' (2001) 8 *J Eur Pub Pol'y* 345, stating that a standard is a 'guide for behavior and for judging behavior. It assumes to connote some universally or at least generally accepted canons of behavior for states in the conduct of for instance business and financial matters'; A Davydenko and JR Franks, 'Do Bankruptcy Codes Matter? A Study of Defaults in France, Germany, and the UK' (2008) 63 *Journal of Finance* 565; and PR Wood, *Principles of International Insolvency*, (2<sup>nd</sup> edn Maxwell, London 2007)

<sup>26</sup> TC Halliday, 'Legitimacy, Technology, and Leverage: The Building Blocks of Insolvency Architecture in the Decade Past and the Decade Ahead' (2006-2007) 32 *Brook J Int'l L* 1081, 1091

theory, this will potentially lower the transactional costs and hence attract more foreign investments and commercial dealings.<sup>27</sup>

The benchmarks are also meant to help national authorities of developing economies in particular in their efforts to strengthen domestic economic and financial sector policy frameworks. The strengthening of such frameworks is deemed to have potentials to make such economies safer for the global financial system as a whole.<sup>28</sup>

### **3.3.1 The ‘Soft Law’ Approach of the Standardisation Initiatives and the Strategies for Ensuring Observance**

The global insolvency norms from which the insolvency standards emanate reflect the efforts of multilateral institutions particularly, UNCITRAL, the World Bank, and IMF. The norms have now been unified in a single global insolvency standard represented by the integration of UNCITRAL’s Legislative Guide on Insolvency Law with the World Bank’s Principles for Effective Insolvency and Creditor Rights Systems.<sup>29</sup>

The international insolvency standards take on board all the global insolvency norms propounded by multilateral institutions. They have now however been compiled in a unified document in order to facilitate observance and avoidance of any confusion that might have arisen by having different documents from different multilateral institutions. Basically, the standards provide recommendations, guidelines and reference to respective national policy and lawmakers, in the form of the so-called ‘soft law approach’<sup>30</sup> rather than through legally binding treaties.<sup>31</sup>

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<sup>27</sup> K Pistor, ‘The Standardization of Law and Its Effect on Developing Economies’ (2002) 50 *Am J Comp L* 97, 107; and R Cranston, ‘Theorizing Transnational Commercial Law’ (2007) 42 *Texas Int’l LJ* 597, 608

<sup>28</sup> IMF and World Bank (n 18 ); IMF and World Bank, ‘The Standards and Codes Initiative-Is It Effective? How Can It Be Improved’(Report by the Staff of the IMF & and World Bank 1 July 2005) < <http://www.worldbank.org/ifa/ROSC%20review%202005.pdf> > accessed 01/08/2009 [24][27] and [41]

<sup>29</sup> See n 17 above

<sup>30</sup> C Giannini, ‘Promoting Financial Stability in Emerging Market Countries: The Soft Law Approach’ (2002) 44 *Comp Econ Studies* 125, 126. As explained by Giannini, Soft law approach

Although the non-binding and the general nature of the standards seem to have the potential to militate the extent of harmonisation and observance, it is clear that the leverage of the multilateral institutions that monitors observances and the intricacies of globalised economy strongly influence developing countries to adopt the insolvency standards.<sup>32</sup> As it was noted earlier, this is reinforced by the vulnerability of the developing countries, especially those of SSA, to pressure from the multilateral institutions, international institutions and advanced economies.

The pressure arises from the fact that such countries rely heavily on financial aids and technical assistances from such institutions, and the advanced economies. Indeed, SSA countries have hitherto been slavishly implementing the structural adjustment policies imposed and overseen by the multilateral institutions. Consequently, as far as the poor developing countries such as those of SSA are concerned, the soft law approach of the standards may potentially translate into an indirect form of binding requirement.<sup>33</sup>

In view of the above, there is a danger of developing countries in SSA making improper domestic policy choices that do not reflect the local contexts. These countries may not have the confidence to resist pressures for convergence and compliance with the global norms and even to challenge recommendations for reform provided to them by the multilateral institutions; let alone taking a

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constitutes 'standards of good practice and codes of conduct endorsed at international level but lacking legal standing, so that their implementation in the various countries is essentially left to the discretion of national authorities.'

<sup>31</sup>UNCITRAL Legislative Guide on Insolvency Law, <[www.uncitral.org/pdf/english/texts/insolven/05-80722\\_Ebook.pdf](http://www.uncitral.org/pdf/english/texts/insolven/05-80722_Ebook.pdf)> accessed 02/06/2009, 2 para 1. The Legislative Guide for instance, in an explicit and categorical manner, provides that it is 'intended to be used as a reference by national authorities and legislative bodies when preparing new laws and regulations or reviewing the adequacy of existing laws and regulations'; and K Pistor (n 27)

<sup>32</sup> TC Halliday (n 26) 1081, 1086-1087; K Pistor (n 27) 102; and N Onder (n 18)1&2. Onder describes the philosophy behind the non-binding approach to the standardisation initiatives thus '...national governments are not willing to cede authority to a world....authority anytime soon, and as national....systems continue to be diverse, the soft law approach offers an attractive alternative to formal, legally enforceable treaties at international level.'

<sup>33</sup> N Onder (n 18) 2

different course that is ‘fit for purposes’ and commensurate with their circumstances.<sup>34</sup>

Apart from the leverage of the multilateral institutions, the pressure for observance of the standards is bolstered by market induced discipline and official incentives.<sup>35</sup> Whereas the former (i.e market induced discipline) is characterised by investors’ utilisation of information on a country’s adoption and observance of relevant international standards in making investment and lending decisions; the latter (i.e official incentive) involves the use of peer pressure, name and shame, surveillance and financial incentives by the multilateral institutions.<sup>36</sup>

In recent years, multilateral institutions have underlined the importance of market discipline in their strategy to facilitate adoption and observance of standards. This has involved efforts geared at raising market participants’ awareness of standards, dissemination of assessments’ results, encouraging use of the information on countries’ observance with the standards for commercial decisions and undertaking of assessment of observance and compliance with the standards.

The assumption of the above undertaking is that the incentive would inspire developing countries including those of SSA countries to undertake voluntary assessments in a bid to enhance observance with the standards in anticipation of creating good economic and institutional environments; and help build investors’ confidence and improve access to private capital. It is thus not surprising that the number of SSA countries that have undertaken the assessment in relation to insolvency has increased over the years to include Cameroon, Kenya, Mauritius, Morocco, Nigeria, Uganda, Zambia, South Africa, Burkina Faso, while other

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<sup>34</sup> TC Halliday and BG Carruthers, ‘The Recursivity of Law: Global Norm Making and national Lawmaking in the Globalization of Corporate Insolvency Regimes’ (2007) 112 *American Journal of Sociology* 1136, 1150

<sup>35</sup> N Onder (n 18) 3; and C Giannini (n 30)149

<sup>36</sup> N Onder (n 18) 3; and C Giannini (n 30)149

assessments for Tanzania, Ghana, Rwanda, South Africa, Kenya (an update) are reported either to be underway or to have just been concluded.<sup>37</sup>

Thus, according to the World Bank, '[a]n important component of these assessments is the measurement of countr[ies'] laws and systems against principles that reflect best practices, so as to maximize a given country's ability to meaningfully participate as a trusted partner in international trade and commerce, and to assure that a country's laws protect both its citizenry and the capital invested in that country.'<sup>38</sup> The issue is whether or not this contention is reflected in the actual assessment.

It is noteworthy that the report on observance of standards and codes ("ROSC") and other surveillance instruments, such as the Financial Sector Assessment Programme ("FSAP") of the multilateral institutions characterise the peer pressure and name and shame approach.<sup>39</sup> Such characterisation is in regard to their potential effect in promoting compliance with the standards. Although the information contained in such assessments is increasingly being used for commercial decision making, the extent of the impact it might have had is still yet to be established.<sup>40</sup> It seems that the increasing use of information from such assessments for commercial undertakings contribute towards encouraging countries to adopt and implement the standards and undertake assessments conducted by the multilateral institutions.

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<sup>37</sup> See World Bank, 'UNCITRAL Legislative Guide on Insolvency Law on the Treatment of Enterprise Groups: Updating the World Bank Principles' The World Bank Insolvency and Creditor/Debtor Regimes Task Force Meetings, Washington 10/01/2011 < <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTLAWJUSTICE/EXTGILD/0,,contentMDK:22823517~menuPK:7711943~pagePK:4789622~piPK:64873779~theSitePK:5807555,00.html> > accessed 29/06/2011

<sup>38</sup> Ibid

<sup>39</sup> Giannini (n 30) 149. Giannini attributes this to the fact that they are based on an analysis of conditions of individual country and their publication is voluntary.

<sup>40</sup> IMF and World Bank (n 28)19 and 24

In view of the above, the *Doing Business Report*<sup>41</sup> published by the World Bank has for about a decade been consistently including the status of domestic insolvency law and practice as one of indicator sets to rank jurisdictions' regulatory environments for business.<sup>42</sup> The report provides benchmarks on the speed of resolving insolvency, the cost of procedures and the average recovery rate. The recent trend of the rankings in the reports, as shown in the table below, suggests that SSA is one of the regions with the weakest insolvency systems by the standards of time frames spent in finalising proceedings, costs incurred in the proceedings and the proceedings' recovery rate.

**The Efficiency of Insolvency Regimes by Region**

Region	Time (Years)	Cost (% of estate)	Recovery rate (cents on the dollar)
East Asia & Pacific	2.7	23.2	28.4
Eastern Europe & Central Asia	3.1	13.4	28.3
Latin America & Caribbean	3.3	15.9	26.8
Middle East & North Africa	3.5	14.1	29.9
OECD	1.7	8.4	68.6
South Asia	5	6.5	19.9
Sub-Saharan Africa	3.4	20.2	16.9

Source: Doing Business Report 2009

There is therefore potential for rating agencies assigning countries' ratings on the basis of the level of compliance with the standards, based on information presented in the ROSCs and other surveillance instruments while the intentions of the assessment by the multilateral institutions is arguably not ranking participating countries on the basis of 'fail' or 'pass.'<sup>43</sup> Nevertheless, countries,

<sup>41</sup> < <http://www.doingbusiness.org/> >accessed 2/10/2009. Launched more than 8 years ago, the report is published by the International Finance Corporation, a member of the World Bank Group. It purports to provide an objective basis for the regulatory environment for business.

<sup>42</sup> According to World Bank, *Doing Business Report 2009* (Washington, 2009), Sub-Saharan Africa's average time spent to complete insolvency proceedings, average cost of insolvency proceedings, and recovery rate (cents in USD) was 3.4 years, 20.2%, and 16.9, compared to 3.1 years, 13.4%, and 28.3 for Eastern Europe and Central Asia; 2.7 years, 23.2%, and 28.4 for East Asia and Pacific; 3.3 years, 15.9%, 26.8% for Latin America and Caribbean and lastly 1.7 years, 8.4%, and 68.6 for OECD. Notably, similar trend is reflected in the subsequent *Doing Business Report* for 2010 and 2011.

<sup>43</sup>YV Reddy, 'Legal Aspects of International Financial Standards: National Law Perspectives', (International Seminar on Legal and Regulatory Aspects of Financial Stability sponsored by the

as found by multilateral institutions, do not generally see the initiative ‘as having yet had a commensurate impact on actual reform implementation,’<sup>44</sup> which perception may according to the multilateral institutions partly reflect ‘the substantial time needed to introduce reforms...[hence absence] of [h]ard evidence on the impact of the initiative on countries’ adherence of standards.’<sup>45</sup>

It is worth noting that while the inherent nature of the standards seems to leave space for taking account of special circumstances, especially those of developing countries, such as those of SSA,<sup>46</sup> the opportunity to reflect such special circumstances in the law reform process is, in some respects, expressly curtailed by stipulations found in the insolvency norms that create the standards.<sup>47</sup> It is accordingly not surprising that the emerging rankings do not differentiate states and regions based on the levels of development or the welfare of the disadvantaged members of the international community.<sup>48</sup> All states and regions, notwithstanding their different level of development, are subject to the same benchmarks of assessment and ranking.

### **3.3.2 Relevance and Suitability of International Insolvency Standards in SSA Context**

The prevailing consensus is that the globalisation of the world economy has enhanced the involvement of companies in international business, and consequently, enhanced the potential challenges of the occurrence of cross-border insolvencies. This situation has in theory potential pitfalls that may lead to

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World Bank, the International Monetary Fund, the Bank for International Settlements and the Financial Stability Forum at BIS, Basel, Switzerland 2002)

< [http://info.worldbank.org/etools/docs/library/83833/Reddy\\_Legal\\_Aspects.pdf](http://info.worldbank.org/etools/docs/library/83833/Reddy_Legal_Aspects.pdf) >, accessed 2/10/2009 [4]; and IMF and World Bank, ‘The Standards and Codes Initiative-Is It Effective? How Can It Be Improved’ (n 29) 24, 27 and 41

<sup>44</sup> IMF and World Bank (n 28) 5

<sup>45</sup> IMF and World Bank (n 28) 5; and R Harmer, ‘Assessing the Assessment,’ (INSOL International Academics’ Group Meeting, Radisson Blu Royal Hotel Dublin, 11-13 June 2010)

<sup>46</sup> UNCITRAL’s Legislative Guide (n 31) 9 and 10

<sup>47</sup> UNCITRAL’s Legislative Guide (n 31) 13; Guide to Enactment of the UNCITRAL Model Law, para 12. This is also reflected in the imperative nature of most of the recommendations. See S Block-Lieb and TC Halliday, ‘Harmonization and Modernization in UNCITRAL’s Legislative Guide on Insolvency Law’ (2007) 42 *Texas Int’l LJ* 475, 506

<sup>48</sup> P Cullet, ‘Differential Treatment in International Law: Towards a New Paradigm of Inter-state Relations’ (1999) 10 *Eur J Int’l L* 549, 554

creditors seeking recovery by attempting to seize assets in any country in which they are located or insolvent companies manipulating movement of assets across jurisdictions to the detriment of some creditors and stakeholders. The above consensus is seemingly based on impressions drawn from instances of international businesses collapses in recent years, mostly in developed countries and the increased pace of the globalisation drive.

Consistent with such assumptions are the emerging new patterns of increased capital flow, participation in the global trade and new commercial links among nations and regional groupings.<sup>49</sup> While the developing world, most notably China, Brazil and India, is becoming a significant participant in international commerce, there are growing commercial links between the emerging economies and SSA countries.<sup>50</sup> Studies undertaken thus far have revealed that while participation of countries in international commerce has steadily been increasing, the intra-trade among SSA countries, Asia and Latin America has remained relatively lower than is the case in other regions within the developed economies which depict a high level of integrated market place and capital inflow.<sup>51</sup> Nevertheless, the general understanding reflected in most studies is that although the level of intra-trade among African countries is still small, it is rapidly growing.<sup>52</sup> One of the factors behind this trend is said to be the expansion of South African industry into the region, although there is also evidence of significant outward investments from other countries such as Mauritius, Kenya, and Nigeria.<sup>53</sup>

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<sup>49</sup> WTO (n 2) ; WTO, World Trade Developments, 2008 (WTO Publications, Geneva 2008) ; LA Bebchuk and AT Guzman, 'An Economic Analysis of Transnational Bankruptcies' (1999) 42 *JL & Econ* 775, 777; UNCTAD (n 7) 777

<sup>50</sup> Africa's exports to Asia were estimated to have increased by 20 per cent with shipments to China rising by more than one-third. See WTO, World Trade Developments in 2005, <[http://www.wto.org/english/res\\_e/statistics/its2006\\_e/its06\\_general\\_overview\\_e.pdf](http://www.wto.org/english/res_e/statistics/its2006_e/its06_general_overview_e.pdf)> accessed 14/10/2009; R Jenkins and C Edwards (n )207–225

<sup>51</sup>WTO, World Trade Developments, <[http://www.wto.org/english/res\\_e/statistics/its2008\\_e/its08\\_world\\_trade\\_dev\\_e.pdf](http://www.wto.org/english/res_e/statistics/its2008_e/its08_world_trade_dev_e.pdf)> accessed 14/10/2009; and UNCTAD (n 7 )

<sup>52</sup> L Thomas, J Leape, N Bhinda, and M Martin (n 3)

<sup>53</sup> Ibid

The global trend towards growth of trade and investment is reflected in the emerging trend of renegotiation and negotiation of trade and investment treaties and other forms of arrangements in an attempt to balance the rights of foreign investors and respect for legitimate public concerns. This trend reflects the efforts employed in the attempt to ensure predictability, certainty and transparency which are critically important in facilitating economic co-operation and development.<sup>54</sup> The trend also underlies the growing global importance attached to, and the role states play in competitively affording, a reliable legal environment to attract foreign investment and promote other commercial activities.<sup>55</sup> It is in this context that the involvement of SSA in trade and investment requires cross-border insolvency regulation that addresses the new trends and patterns of the cross-border trade and investment.

To be sure as national states in SSA are increasingly becoming interdependent and connected to the global market, they face the challenge of reflecting in their insolvency regimes, the demands of the global market, which consists of various players from different jurisdictions and addressing financial fluctuations that are inherent in market economies.<sup>56</sup> The cross-border trade and investment arrangements involving SSA imply a further challenge to SSA countries.<sup>57</sup> The challenge, among other things, requires SSA countries to align their insolvency regimes with their entire legal environment for facilitation of trade and investment, as well as the standards and principles envisaged in such arrangements to which SSA countries are contracting or member states.<sup>58</sup> This

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<sup>54</sup> Cranston (n 27) 608; and UNCTAD (n 7)

<sup>55</sup> AT Guzman, 'Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties' (1997-1998) 38 *Va J Int'l L* 640, 652

<sup>56</sup> J Stiglitz (n 16) 120

<sup>57</sup> From the early 1980s the rate of bilateral investment treaties ratification in SSA countries has considerably accelerated with European countries, and more recently the US and Asian countries (China and India in particular). The average number of the bilateral investment treaties per country in Africa is 12. See for instance, V Mosoti, 'Bilateral Investment Treaties and Possibility of a Multilateral Framework on Investment at the WTO: Are Poor Economies Caught in Between?' (2005-2006) 26 *Nw J Int'l L & Bus* 95; UNCTAD (n 7) 15 and 34; and JW Salacuse, 'The Treatification of International Investment Law' (2007) 13 *Law & Bus Rev Am* 155, 163

<sup>58</sup> JW Salacuse (n 57) 155, 158 & 163; and M Hallward-Driemeier, 'Do Bilateral Investment Treaties Attract FDI? Only a Bit...and they could Bite' (2003) World Bank, Policy Research Working Paper, WPS No 3121

will perhaps add value in the endeavour of attracting, protecting and promoting cross-border trade and investment in accordance with the agreed standards and principles during financial difficulties of the entities involved in the cross-border trade and investments.<sup>59</sup> This may perhaps also entail adopting best practices common to most of its trade and investment partners' insolvency law systems and cross-border insolvency in particular. The potential need of embracing common practices in dealing with cross-border insolvencies directly links with the idea and the rationale behind the standardisation initiative.

Since insolvency laws can significantly influence investment decisions, in terms of its effects on investment incentives, which can result in additional insolvency costs, a country may have to reconsider maintaining regulatory frameworks that contradict legitimate expectations of investors and trading partners in the global market.<sup>60</sup> Essentially, all the above forces not only tend to pull insolvency law away from its traditional orientation of addressing domestic concerns but also to pull countries away from purely territorialist approaches that are perhaps envisaged in their insolvency legal frameworks. Consistent with the implication arising from such forces, there is a widely held consensus in favour of assistance, co-operation and co-ordination of cross-border insolvencies as a means of preserving rather than destroying going concern value.<sup>61</sup>

The most critical challenge that the SSA region faces is sustaining and accelerating the economic growth that it has been attaining since the 1990s which is reflected in the growth of export trade and foreign direct investment inflow.<sup>62</sup>

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< [http://www-wds.worldbank.org/external/default/WDSContentServer/IW3P/IB/2003/09/23/000094946\\_03091104060047/Rendered/PDF/multi0page.pdf](http://www-wds.worldbank.org/external/default/WDSContentServer/IW3P/IB/2003/09/23/000094946_03091104060047/Rendered/PDF/multi0page.pdf) > accessed 22/02/2010

<sup>59</sup> O Chung, 'The Lopsided International Investment Law Regime and Its Effect on the Future of Investor-State Arbitration' (2006-2007) 47 *Va J Int'l L* 953, 960

<sup>60</sup> RK Rasmussen 'The Ex Ante Effects of Insolvency Reform on Investment Incentives' (1994) 72 *Wash U L Q* 1159, 1163; and E Berkovitch, R Israel and JF Zender, 'An optimal Insolvency Law and firm Specific investments (1997) 41 *Eur Econ Rev* 487, 497

<sup>61</sup> DW Arner, and others, 'Property Rights, Collateral, Creditor Rights, and Insolvency in East Asia' (2007) *Tex Int'l LJ* 515, 543

<sup>62</sup> IMF, *Regional Economic Outlook: sub-Saharan Africa* (Washington 2009)1; DN Abdulai, 'Attracting Foreign Direct Investment for Growth and Development in sub-Saharan Africa: Policy Options and Strategic Alternatives' (2007) 37(2) *Africa Development* 1, 6. The inflation had dropped from a peak of 121.6% in 1994 to 9.9% in 2002; UNCTAD 2008(n 29) xvii, 38-45

Whatever improvement made, it falls short of the level required to achieve the Millennium Development Goal of halving poverty by 2015.<sup>63</sup> The region is characterised by the least developed economies, which are experiencing a great deal of pressing problems such as poor governance, poverty and diseases. In comparison with other developing countries, this region has not attracted much in terms of commercial dealing and foreign investment. This is perhaps one of the reasons why the region has not experienced much activity in terms of cross-border insolvency reform because such undertaking has not been regarded as a priority. The low level of economic growth and development seems to have rendered other aspects, such as efforts to reduce poverty and democratisation to be perceived as more relevant and pressing than others.<sup>64</sup>

Accordingly, it can be said that the presence of an effective insolvency law that comprehensively addresses cross-border issues is, given the growing level of cross-border trade and investment involving and among SSA countries, now more relevant than before. In this context, the international insolvency standards may offer important benchmarks and starting points for amelioration of insolvency systems of SSA. This is notwithstanding concerns raised against the standardisation initiatives as a whole.

Firstly, the standards offer an important base for development of modern insolvency systems which could be tailored to the needs and circumstances of the countries in the region. The development of an effective framework that caters for cross-border insolvency as well will play a role in mitigating the repercussions of financial crisis by virtue of having procedures that takes account of interests of all concerned parties. It is important in this respect to note that most of these countries might have no practical experience of application of insolvency laws that reflects what pertains in the benchmarks. In fact, the

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(indicating that total number of foreign direct inflow to Africa grew to by 16% to \$ 53 Billion in 2007 increasing the region's FDI stock to 393 billion with the 47 countries of SSA attracting 58% of the inflow, up from 49 in 2006. And further that the growth marks the highest level in the three consecutive years of FDI growth in the region, though its share in the global FDI remained at 3%.

<sup>63</sup> Ibid

<sup>64</sup> IMF and World Bank (n 28) 13

existence of an appropriate and effective legal framework for business failure that specifies the rights and duties of debtors and creditors is one of the factors that facilitates crisis resolution and prevention of broader contagion effects which can occur when a large firm with an extensive international network of entities becomes insolvent.

Secondly, since a country's observance of insolvency standards is now increasingly being factored into lending and investment decisions, be it individually or as part of a package, having an efficient insolvency system that observes the international best practices and is tailored to the local needs will help encourage and attract domestic and foreign investors. This will in turn add value to the economies of these countries in general and will contribute to regard as trusted member of international community.<sup>65</sup> It seems that a country that does not comply with the standards is increasingly becoming disadvantaged in attracting international capital, because it is likely to suffer lower credit ratings and higher risk premiums.<sup>66</sup> The observance of the standards could also be seen to complement the on-going initiative by a majority of the SSA countries to create a conducive environment for private sector development which started with the liberalisation drive in the mid 1980s and early 1990s under the auspices of the multilateral institutions.<sup>67</sup> It will also reinforce the efforts towards amelioration of their legal systems inherited from colonial powers and overcome any inherent limitation embedded in the legal systems from which their laws were based.<sup>68</sup>

While it is important to preserve the universal nature of the insolvency standards in the process of aligning SSA's insolvency systems to the benchmarks, it is also

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<sup>65</sup>See n 37 above

<sup>66</sup> PD's Investment, Competition and Business Development Services Team, 'Approaching International Financial Standards and Codes' 10 December 2003 < <http://www.sed.manchester.ac.uk/research/iarc/edais/word-files/HowtoApproachInternationalFinancialStandardsCodes.doc> > accessed 2/10/2009; and N Onder (n 18) 2

<sup>67</sup> WP Oforu-Amaah, *Reforming Business- Related Laws to Promote Private Sector Development: The World Bank Experience in Africa* (World Bank, Washington 2000)

<sup>68</sup> It is to be noted that the foundations of prevailing insolvency law systems in most of SSA are based on the European countries which were their former colonial powers. This is a subject of extensive discussion in chapter five of this thesis.

appropriate to define a number of domestic priorities and frameworks to address issues and concerns raised. The practical question is how compliance with the insolvency standards can be achieved without jeopardising the local contexts and needs. Understandably, local context and needs are critical in insuring relevance and practicality of any crafted cross-border insolvency framework.<sup>69</sup> In the context of cross-border insolvency, the apparent challenge is for SSA to craft frameworks that not only sustain the achievements made thus far and address interests of cross-border trade and investments but also frameworks that seek to contribute towards reducing poverty. It is to be noted that, despite the existence of many factors which may be attributed to the limited growth and development in SSA, many analysts argue that policy choices that restrict competitiveness are among major obstacles while others tend to associate the limited growth to the problems of the 'one-size-fits all' prescriptions of the multilateral institutions which developing countries have pursued since the mid 1980s and early 1990s.<sup>70</sup>

Insofar as cross-border insolvency reform is concerned, the above observations seem to point to the need for SSA countries to make informed policy choices commensurate with local circumstances and the nature of the demand for economic growth and development. Perhaps one of the best ways is to approach the challenge in a broader context of development strategies. And thus, taking strategies that look for policies that 'reduce poverty as they promote growth; that

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<sup>69</sup> N Martin 'The Role of History and Culture in Developing Bankruptcy and Insolvency Systems: The Perils of Legal Transplantation' (2005) 28 *BC Int'l & Comp L Rev* 1, 4; F Tung, 'Fear of Commitment in International Bankruptcy' (2000-2001) 33 *Geo Wash Int'l L Rev* 555, 561; and L Hoffmann, 'Cross-Border Insolvency (The 1996 Denning Lecture)' < [www.filewiz.co.uk/bacfi/1996\\_denning\\_lecture.pdf](http://www.filewiz.co.uk/bacfi/1996_denning_lecture.pdf) > accessed 12/3/2009. Apparently, different policy choices that characterise a given insolvency system are a reflection of such country's norms and inclinations.

<sup>70</sup> A Arieff, MA Weiss, and VC Jones, 'The Global Economic Crisis: Impact on Sub-Saharan Africa and Global Policy Responses', (US Congressional Research Service Report 2009) < [www.crs.gov](http://www.crs.gov) > accessed 23/01/2010; J Stiglitz (n16)16, 80-88. The prescriptions were inherent in the policy reform measures, prescribed by the multilateral institutions. The measures were part of The Washington Consensus (a consensus between the IMF, the World Bank and the US Treasury regarding the right policies for developing countries). They signified a radically different approach to economic development and stabilization.' For the existing theories as to the negative effect of the Multilateral institutions' prescriptions on developing countries see for instances observations made by J Hari, 'There's real hope from Haiti and it's not what you expect' *The Independent* (London 5/02/2010) <<http://www.independent.co.uk/opinion/commentators/johann-hari/johann-hari-theres-real-hope-from-haiti-and-its-not-what-you-expect-1889958.html>> accessed 10/02/2010

shun policies that increase poverty with little if any gain in growth, and that in assessing situations where there are trade-offs, put a heavy weight on impact on the poor.’<sup>71</sup>

### **3.4 Appraising the Nature and Compliance’s Assessments of the International Insolvency Standards from a SSA Perspective**

All criticisms levelled against the development and dissemination of various international standards are equally relevant and valid to the international insolvency standards and the assessments for the extent of compliance with the standards. One such criticism is in relation to the exclusion of developing countries from the legislative processes for developing such standards.<sup>72</sup> Whatever the quality of the standards developed is, the manner in which they are created and directed to developing countries for compliance creates an ‘..unfortunate perception of a new form of Western “imperialism” over developing...countries.’<sup>73</sup>

The prevalent features that cut across the global insolvency norms from which the standards emanate include specific and clearly stated policy objectives and goals of effective insolvency systems; non-discrimination, under a fair and equitable treatment principle; collectivity principle; criteria for commencement of insolvency proceedings; cross-border insolvency aspects; efficiency, transparency, and predictability principles; liquidation versus reorganisation; requirement and regulation of competent and ethical practitioners; and presence of a functional and effective judicial system.<sup>74</sup> Other important features in so far as they relate to cross-border insolvency include, establishment of clear rules for ranking of priority claims based on free market conditions and commercial

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<sup>71</sup> J Stiglitz (n 16) 82 and 83

<sup>72</sup> HV Morais (n 22 ) 779; and CG Paulus (n 24) 761. Paulus notes that there has been a general lack of involvement of these countries in international insolvency law reform initiatives.

<sup>73</sup> HV Morais (n 22) 806

<sup>74</sup> See n 17 above. Indeed, these principles especially efficiency, transparency and predictability elements are the bedrock of the theories on insolvency, cross-border insolvency in particular and are actually the central focus of the debate on competing theories in cross-border insolvency.

bargains, as opposed to political and social concerns;<sup>75</sup> balancing the interests of the debtors' stakeholder against the relevant social, political, and other policy considerations that have an impact on the economic and legal goals of insolvency proceedings;<sup>76</sup> and the use of *lex fori concursus* in determining the applicable law in cross-border insolvencies to control 'all aspects of the commencement, conduct, administration and conclusion,'<sup>77</sup> of the proceeding.

Essentially, the benchmarks are founded on the conventional wisdom arising from the Washington Consensus policies which link the rule of law with economic growth, sustainable development and poverty alleviation.<sup>78</sup> They are based on and influenced by the so-called best practices prevailing mainly in developed countries.<sup>79</sup> Scholars have argued in this connection that the 'pervasive and in-depth' influence of the US in designing and crafting the benchmarks is overwhelming.<sup>80</sup> The dominant consensus as reflected in Professor Fletcher's contention is that the international insolvency standards embody 'the necessary ingredients of a robust and efficient system for regulating debtor-creditor relationships and for administering and distributing the estates of insolvent debtors.'<sup>81</sup> They address a whole range of procedural and substantive aspects of insolvency law in anticipation of ameliorating the harmonisation of and predictability in, the resolution of cross-border insolvency in a manner that supports international commerce and development.<sup>82</sup>

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<sup>75</sup> UNCITRAL Legislative Guide on Insolvency Law (n 31) 10-15

<sup>76</sup> UNCITRAL Legislative Guide on Insolvency (n 31) 9

<sup>77</sup> UNCITRAL Legislative Guide on Insolvency (n 31) 73, recommendation 31

<sup>78</sup> J Stiglitz (n 16 ) 80-88 and 233; TC Halliday and BG Carruthers (n 34)1150; TC Halliday and BG Carruthers, *Bankrupt: Global Lawmaking and Systemic Financial Crisis* (Stanford University Press, California 2009)

<sup>79</sup> UNCTAD (n 18) 89; IMF and World Bank (n 18) 18; TC Halliday and BG Carruthers (n 41) 1185; TC Halliday and BG Carruthers, 'Negotiating Globalization: Global Scripts and Intermediation in the Construction of Asian Insolvency Regimes' (2006) 31 *Law and Social Inquiry* 521, 544-545; and N Onder (n 18); and R Tomasic (n 11)

<sup>80</sup> TC Halliday and BG Carruthers (n 34) 1185; TC Halliday and BG Carruthers (n 79) 544-545. See also N Onder (n 18) and R Tomasic (n 11) 9

<sup>81</sup> IF Fletcher, 'Maintaining the Momentum: The Continuing Quest for Global Standards and Principles to Govern Cross-Border Insolvency' (2006-2007) *Brook J Int'l L* 767,774 and 775

<sup>82</sup> R Tomasic (n 11); and IF Fletcher (n 81) 773 and 775. It is common knowledge that harmonisation of substantive law is critical to adoption and implementation of a universalist approach.

While the standards are meant to promote convergence and improve the quality of insolvency systems especially those of developing and emerging economies, which as earlier discussed, are believed to have weak systems that are potentially threatening the stability of the global financial systems,<sup>83</sup> they are literally not translated to directly reflect or inform the local contexts of these countries.<sup>84</sup> Although they infer that they are not meant to suggest a ‘one-size-fits-all approach’ that is exactly what they seem to practically envision for the vulnerable SSA countries which, given their relation with the multilateral institutions, as that of a donor/lender-and-recipient, are unlikely to challenge any prescription suggested by such institutions.<sup>85</sup>

While the standards seem to allow room for local innovation and adaptation in response to local policies and circumstances,<sup>86</sup> they contain limitations that tend to preclude such freedom particularly in relation to matters which are so central to any insolvency system and cross-border insolvency regime. For example, there are apparent restrictions as to the extent to which local policy aspects can be used in formulation of local priority.<sup>87</sup>

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<sup>83</sup> The laws were said to be too weak to address the demands of the globalised market economy, withstand macroeconomic instabilities that are inescapable in a free market economy and guarantee predictability and transparency. In particular, they lack effective rescue procedures, and a predictable procedure for co-operation and co-ordination in cross-border insolvencies. See DW Arner and others (n 61 ) 549-550

<sup>84</sup> TC Halliday (n 26) 1101, arguing that ‘the concept of “best practices” is fallacious’; see also generally, TC Halliday, and BG Carruthers (n 78)

<sup>85</sup> Ibid. See also D Katona, ‘Challenging the Global Structure Through Self-Determination: An African Perspective’ (1999) 14 *Am U Int’l L Rev* 1459. The rigid implementation conditions that attach to the multilateral institutions’ loans make the recommendations given as a result of assessment and indeed the benchmarks promoted by such institutions mandatory, contrary to the spirit of the assessment programme and the soft law approach that the benchmarks ostensibly characterise.

<sup>86</sup> For example, the introduction and executive summary for the World Bank’s ‘Principles and Guidelines for Effective Insolvency and Creditor Rights Systems’, April 2001 noted clearly that: ‘Adopting international best practices to the realities of developing countries.....requires an understanding of the market environments in which these systems operate. The challenge includes weak or unclear social protection mechanisms, weak financial institutions and capital markets, ineffective corporate governance and uncompetitive business, and ineffective laws and institutions. These obstacles pose enormous challenges to the adoption of systems that address the needs of developing countries while keeping pace with global trends and international best practices. The application of the principles....at the country level will be by domestic policy choices and by the comparative strengths (or weakness) of laws and institutions.’ This however is not reflected in its entirety in the assessment undertaken and examined in this study.

<sup>87</sup> UNCITRAL Legislative Guide on Insolvency Law (n 31) 9, According to the Guide insolvency laws must balance the interests of the debtors’ stakeholder against the relevant social, political,

Arguably, the very foundation and attributes of the standards make any slavish adoption of the standards by SSA countries open to the potential risk of transplantation effect, rejection and consequently an implementation gap.<sup>88</sup> The transplantation effect could be by virtue of a lack of ‘fitness for purpose’ of any legislation purporting to adopt the standards which may potentially result into the implementation gap problem, extensively discussed elsewhere by other scholars.<sup>89</sup> It is common knowledge that a majority of these countries in their endeavour to adopt the standards will have the incentive to transplant foreign legislation, most likely from developed countries, such as the UK or US, which are regarded as having well developed insolvency systems which have long been tested.<sup>90</sup> This poses a high risk of failure to take account of the socio-economic conditions in which the legal structures are situated in SSA countries, which are quite different from those in advanced economies.<sup>91</sup> Thus, instead of improving domestic legal systems of SSA countries, a standardisation initiative may undermine development of effective legal systems in these countries.<sup>92</sup> As aptly elaborated by Pistor:

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and other policy considerations that have an impact on the economic and legal goals of insolvency proceedings. More specifically for local priority system, the Guide states that ‘[t]o the greatest extent possible, those priorities should be based upon commercial bargains and not reflect social and political concerns that have the potential to distort the outcome of insolvency.’ Article 12 of the Guide to Enactment of the UNCITRAL Model Law explicitly states that while countries are free to make any changes they see fit, ‘...in order to achieve a satisfactory degree of harmonization and certainty, it is recommended that States make as few changes as possible in incorporating the Model Law into their legal systems.’

<sup>88</sup> TC Halliday, and BG Carruthers (n 84); TR Tomasic (n 11); D Berkowitz, K Pistor, and J Richard, ‘Economic Development, Legality and the Transplant Effect’ (2003) 47 *Eur Econ Rev* 165-195; and O Kahn Freud, ‘On Uses and Misuses of Comparative Law’ (1974) 37 *M LR* 3, 27

<sup>89</sup> *Ibid*

<sup>90</sup> D Berkowitz, K Pistor and JF Richard (n 88) 192. The authors notes that, ‘... the way in which the law was initially transplanted is a more important determinant of legality.....[A] legal reform strategy should [therefore] aim at improving legality by carefully choosing legal rules whose meaning can be understood and whose purpose is appreciated by domestic law makers, law enforcers, and economic agents, who are the final consumers of these rules. In short, legal reform must ensure that there is a domestic demand for the new law, and that supply can match demand.’

<sup>91</sup> J Stiglitz (n 16); and TC Halliday, and BG Carruthers (n 84). The above situation could occur notwithstanding that the legal systems of the countries under study are based on former colonial powers and that such countries have since the mid 1980s and early 1990s embraced market economy systems.

<sup>92</sup> K Pistor (n 26)

Instead of improving domestic legal systems standardization...may...undermine the development of effective legal systems. The reason for this can be found in two essential features of legal systems. First, the interdependence of legal rules and concepts that comprise a legal system and second, the fact that law is a cognitive institution. The interdependence of legal rules means that there are only a few rules that can be understood and applied without reference to other legal rules or concept. This implies that standardization rules can be realised and enforced only if other bodies of law already exist in the standard receiving legal system otherwise additional law reform efforts must be pursued. Without ensuring complementarities between the new law and pre-existing legal institutions, harmonization may distort rather than improve the domestic legal framework

The notion that law is cognitive institution means that for law to be effective and actually change behaviour, it must be fully understood and embraced not only by law enforcers but also by those using law...The external supply of best practice law...sterilizes the process of lawmaking from political and socio-economic development. It therefore distances it from the process of continuous adaptation and innovation.....

Moreover, the imposition of rules from the outside - not a new experience for most developing countries as the history of colonization exemplifies may also lead to domestic resistance – may also lead to domestic resistance.<sup>93</sup>

Accordingly, an effective legal reform strategy might need to include measures that would avoid the transplant effect.<sup>94</sup> Thus, overcoming this risk would necessarily require an endeavour that takes into account knowledge of not only the foreign law on basis of which the global norms and standards were derived, and its corresponding social and political contexts among others, but also knowledge of the local contexts and the scope of the demands of the countries that contemplate reform by using the standards.<sup>95</sup> The question is whether and to what extent the assessments conducted by the multilateral institutions address such crucial aspects.

The standards' assessments undertaken and published reveal some weaknesses which have the potential of tarnishing any usefulness that the international insolvency standards might have in amelioration of domestic insolvency systems of SSA countries. As discussed above, the international insolvency standards are now among the bases, against which the multilateral institutions' surveillance

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<sup>93</sup> K Pistor (n 26) 98 and 99

<sup>94</sup> D Berkowitz, K Pistor and JF Richard (n 88 ) 186 and 192

<sup>95</sup> O Kahn Freud (n 88) 27; and D Berkowitz, K Pistor and JF Richard (n 88)

programmes assess the extent to which a country complies with the benchmarks and advise how reform should be carried.<sup>96</sup> It is also on the basis of such assessments that technical assistance may be extended to facilitate observance and investors may decide on whether or not to invest in a particular developing country.

Although the above shortcomings could be addressed by the assessment process and the policy recommendations resulting from the process, an examination of a handful of published reports on assessment covering insolvency systems in Africa both ROSCs and FSAP suggest that they do not characteristically provide an insight into and consideration of what is available in such countries in the context of their socio-economic circumstances.<sup>97</sup> The following are among the outstanding weaknesses noted, especially with regard to ROSCs.

Firstly, there is neither adequate treatment of cultural and local contexts, nor a thorough consideration of the level of developments of such countries and their potential impact on the reform process. This weakness contradicts the claim by the multilateral institutions that the assessments do consider the different stages of economic development and different cultural and legal traditions across different countries.<sup>98</sup> It also contradicts the consensus that insolvency laws ‘have to be in harmony with relevant local legal, business and cultural frameworks [among other local contexts], and as such reflect a diversity of functions, national purposes and public policy objectives.’<sup>99</sup> For instance, although the Mauritius insolvency ROSC maintains that the existing legal framework is weak, out-dated

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<sup>96</sup> Surveillances are undertaken by IMF as a part of Article IV consultations, or through joint missions with the World Bank. See IMF and World Bank (n 28); B Schneider (n 21); IMF and World Bank (n 18)

<sup>97</sup> World Bank, Report on Observance of Standard & Codes(ROSC):Mauritius 2004 (Prepared by a Staff Team of the World Bank from information provided by the Mauritian authorities) < <http://www.worldbank.org/ifa/Mauritius-ICR%20ROSC.pdf> > accessed 2/10/2009; World Bank, Report on the Observance of Standards and Codes (ROSC) Insolvency and Credit Rights Systems: Morocco 2006 (Prepared by a World Bank Staff Team based on information provided by the Moroccan authorities ) < [http://www.worldbank.org/ifa/rosc\\_icr\\_mor\\_eng.pdf](http://www.worldbank.org/ifa/rosc_icr_mor_eng.pdf) > accessed 2/10/2009; IMF and World Bank (n 18)

<sup>98</sup> IMF and World Bank (n 18); and IMF and World Bank (n 28)

<sup>99</sup> R Harmer (n 45) 123

and not observed in practice, it does not go as far as revealing and assessing the prevailing practice in relation to the insolvency benchmarks. It is common ground that the local policies reflecting the historical, socio-economic, political and cultural contexts of a given country, among others, tend to have significant influence in shaping the country's insolvency law and practice.<sup>100</sup>

Secondly, the reports seem not to have an explicit regard to the extent to which the laws in such jurisdictions address cross-border insolvencies. And thirdly, not only have the ROSCs not provided an overall view of the extent and degree of observance of the standards, but also they do not provide a principle-by-principle analysis of observance and recommendations against relevant local circumstances. One such recommendation for reform from Mauritius's insolvency ROSC which is worth considering reads:

A global reform of the insolvency procedures should be pursued in order to provide Mauritius with a modern and efficient commercial insolvency law. This should include integrated procedures for insolvency, as well as a procedure for rehabilitation that are consistent with international best practices, as set forth in the World Bank's *Principles and Guidelines for Effective Insolvency and Creditor Rights Systems*. Areas of particular consideration for the new law should take into account, without limitation, the following: necessary amendments to the Bankruptcy Act and Bankruptcy Rules to take care of both traders, non-traders and companies insolvencies; harmonious and uniform recovery procedures for all debts, including amounts due to the state; explicit provisions relating to outstanding claims of the State and private sector claims, e.g VAT, Income Tax, National Pensions Fund etc.; appropriate rankings for creditors; [and] the abolition of the Zero-hour rule in respect of payment system participants.<sup>101</sup>

The implication is that the recommendations to modernise the law will not have the benefit of taking into account existing practices which may reflect cultural and local circumstances, norms and needs. This poses unique challenges, as the global insolvency norms that have emerged might not necessarily be directly relevant to the context of the developing countries in SSA. And where such is the case, it is not likely that any reform that mechanically adhered to the stipulations of the international insolvency benchmarks would result in achieving the

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<sup>100</sup> See n 69 above

<sup>101</sup> World Bank, Report on Observance of Standard & Codes (ROSC): Mauritius (n 97) 14

objective of improving the quality of the law and practice of insolvency and cross-border insolvency in particular.

The role of local experts and stakeholders is undoubtedly critical. This is particularly so in ensuring assessment and compliance processes that reflect the contexts and needs of SSA, as opposed to mechanical acceptance of templates designed by and from advanced economies' models and perspectives for the sake of impressing multilateral institutions and advanced countries in order to attract foreign investments, financial loans, aids and technical assistances.<sup>102</sup> On the contrary, the assessments are merely undertaken by the multilateral institutions' members of staff<sup>103</sup> who are deployed to a country being assessed for a particular period, only involving local government officials and stakeholders just as interviewees and respondents with very little if anything that could have capacity building impact for the local officials in the long run.

In this regard, the local officials and stakeholders do not necessarily have ultimate ownership and control in crafting the reports and charting out the way forward, although the relevant governments' authorities are subsequently asked whether they accept the report, and whether and how much of the report should be published.<sup>104</sup> The chances are that the recommendations given would naturally insinuate the member of staff's way of doing things- reflecting their own foreign experiences and models into local laws. To be sure this endeavour reflects the colonial processes that the laws were superimposed by and which were transplanted from the colonial powers into the colonies without thorough consideration of local circumstances and if at all was through the eyes of the colonial officials who by and large were not that knowledgeable about the local contexts which reflected such countries' cultural, psychological, philosophical, economic, social, political, and institutional aspects. Nevertheless, there are still traces of commendable efforts,<sup>105</sup> in attempting to legislate in a manner that

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<sup>102</sup> J Stiglitz (n 16) 251

<sup>103</sup> The staff includes outsourced consultants

<sup>104</sup> IMF and World Bank (n 18); and IMF and World Bank (n 28)

<sup>105</sup> The dominant criticism is however that such efforts were pursued as long as they were compliant with the interests of the colonisers

conforms to local circumstance, an attempt that was also evident in the immediate post-independence SSA governments.<sup>106</sup> Arguably, the current endeavours of a standardisation initiative however reflect the movement towards neo-economic imperialism led by the US.<sup>107</sup>

It is typical for such assessment reports to have a phrase to the effect that the report was 'Prepared by a staff team of the World Bank/IMF from information provided by the [assessed country's] authorities.' For example, the Mauritius ROSC on Insolvency (2004) reads: the ROSC was '[p]repared by a staff team of the World Bank from information provided by the Mauritian authorities'.<sup>108</sup> It has been argued that it would have been important for the assessment to be conducted by different organs or personnel that are independent from the multilateral institutions for the sake of fairness and independent opinion whilst involving the local people as equal partners in the whole process.<sup>109</sup> Although it is not publicly available, there is probably some evidence that the assessments have potentials to produce significant impacts on developing countries.<sup>110</sup> This appears possible and likely because of the involvement of governments,<sup>111</sup> which as mentioned above are, as far as SSA is concerned, too vulnerable to withstand the indirect pressures arising from such programmes; let alone the courage of challenging any direction for pursuing reform which is seemingly not in harmony with the local contexts.

The basic methods employed are questionnaires, interview, and focus group discussion.<sup>112</sup> However, the analysis, interpretations, inferences and recommendations are entirely made by the staff team. Given the potential for lack

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<sup>106</sup> The efforts to translate or customise insolvency law to reflect the local needs and context have been undertaken in the past as reflected in Ghana's Insolvency report entitled 'Report of the Commissioners appointed to enquire into the insolvency law of Ghana' (Government Printing Department, Accra 1961) 153. Recommendations of the report took account of the inherently peasant agriculture based system which was an important feature of Ghanaian economy. For details on this, see, 'Notes and News- Insolvency Law in Ghana' (1962) 6 *JAL* 2, 3.

<sup>107</sup> D Katona (n 85); and text to n 73 above

<sup>108</sup> World Bank, Report on Observance of Standard & Codes (ROSC):Mauritius (n 97) 1

<sup>109</sup> J Stiglitz (n 16)

<sup>110</sup> R Harmer (n 45)

<sup>111</sup> R Harmer (n 45)

<sup>112</sup> See appendix attached to R Harmer (n 45)

of expertise in SSA countries' problems and the prevalent influence of cultural mores, it is quite unlikely for the staff within a limited time frame to really develop appropriate policy recommendations for the country being assessed. This is because such policy recommendations could only well be made by highly qualified people, 'already in the country, deeply knowledgeable about it and working daily on solving that country's problems.'<sup>113</sup> Furthermore, an examination of the insolvency ROSCs for Mauritius and Morocco suggests some similarities, especially in their executive summaries, almost word for word, sentence for sentence and paragraph for paragraph.<sup>114</sup> This, perhaps, supports the claim that the practice of multilateral institutions is to write a draft report of a country under assessment (based on a report of another country) ahead of the actual visit which would only serve 'to fine-tune the report and its recommendations and to catch any glaring mistakes.'<sup>115</sup>

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<sup>113</sup> J Stiglitz (n 16) 34-36. Furthermore, Stiglitz is of the view that '[t]he outsiders can [only] play a role in sharing the experiences of other countries and in offering alternative interpretations of the..... forces at play.'

<sup>114</sup> A comparison of two paragraphs drawn from the two reports, namely, ROSC: Morocco (n 103) and ROSC: Mauritius (n 103) serves to illustrate the strength of this observation. The last paragraph from the executive summary of the Morocco Insolvency ROSCs which reads:

*'Nearly all corporate lending in Morocco is secured, with unsecured lending accounting for minority of total corporate advances. Large domestic and foreign banks maintain advanced procedures for managing credit defaults, and use a wide-range of techniques for recovery and resolution. While workout procedures have not been formalized, banks and financial institutions routinely employ workout techniques to reach amicable arrangements to reschedule debts and restructure businesses. Still banks complain about low recoveries, slow and inefficient court processes, encumbered by the excessive use of experts whose mission is not always justified and properly handled'*

corresponds almost word for word with

*'Nearly all corporate lending in Mauritius is secured, with unsecured lending accounting for about 2% to 7% of total corporate advances. Large domestic and foreign banks maintain relatively advanced procedures for managing credit defaults, and employ a wide-range of techniques for recovery and resolution. Smaller banks tend to have only a small or no recovery department and outsource most of the recovery work. While workout procedures have not been formalized, banks and financial institutions routinely employ workout techniques to reach amicable arrangements to reschedule debts and restructuring businesses. Banks prefer informal resolutions where possible, but exercise their power to appoint a receiver or liquidator under the floating and fixed charge instruments. Still banks complain of low recoveries and a slow court process;'*

which is the last paragraph of the executive summary of the Mauritius ROSC.

<sup>115</sup> J Stiglitz (n 16) 47

It is generally considered that the region has weak, archaic and outdated insolvency laws. The concern is reflected from what emerges from a cursory assessment of insolvency systems in some SSA countries undertaken within the context of the Financial System Stability Assessment Programmes (“FSAP”)<sup>116</sup> and other assessments conducted as part of periodic consultations with the multilateral institutions’ member countries.<sup>117</sup> The weaknesses are described as ‘symptoms of deeper structural impediments to private lending’. In particular and with reference to East African countries, the 2008 IMF Report for Selected issues in Kenya, Uganda and Tanzania noted:

14. A foremost obstacle in each EAC [East Africa Community] country is a poor legal system that does not adequately protect property and creditor rights. In particular, an inefficient corporate bankruptcy process is detrimental to increased private lending. An efficient bankruptcy process will decrease borrower moral hazard, increase bank willingness to lend, and decrease the interest charged on loans, which currently must be high enough to cover the onerous costs of collection. Bankruptcy bottlenecks in the EAC, particularly Kenya, are associated with a protracted and costly judicial process. It takes on average 4.5 years to resolve a bankruptcy case in the EAC, compared with 1.8 years in high-income countries and 3.5 years in middle-income countries.... It also takes 30 percent of the bankrupt estate to resolve a bankruptcy case, compared with an SSA average of 19.5 percent and a world average of 16.4 percent.<sup>118</sup>

While making reference to findings from other assessments conducted, the report further observed and recommended thus:

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<sup>116</sup> The Financial Sector Assessment Programme (FSAP) was introduced in May 1999 by the multilateral institutions to strengthen the monitoring of financial systems. It is designed to help countries prevent, or increase their resilience to, crises and cross-border contagion and to foster sustainable growth by promoting financial system soundness and financial sector diversity undertaken under FSAP. See IMF, 2005 *Annual Report: Surveillance in Action during Financial Year 2005* (IMF, Washington 2005)

<sup>117</sup> See for instance IMF, ‘Tanzania: Financial System Stability Assessment’ (Report) (August 6, 2003) Country Report No. 03/24; IMF, ‘Uganda: Financial System Stability Assessment’ (Report) (April 2003) Country Report No. 03/97; IMF, ‘Kenya, Uganda and United Republic of Tanzania: Selected Issues’ (Report) (October, 2008) Report No. 08/353; and World Bank, ‘Investment Climate Assessment Kenya: Enhancing the Competitiveness of Kenya’s Manufacturing Sector: The Role of the Investment Climate’ (Report) (November 2004) <[http://www.ifc.org/ifcext/economics.nsf/attachmentsbytitle/ic-kenya.pdf/\\$file/ic-kenya.pdf](http://www.ifc.org/ifcext/economics.nsf/attachmentsbytitle/ic-kenya.pdf/$file/ic-kenya.pdf)> accessed 5/10/2009

<sup>118</sup> IMF, ‘Kenya, Uganda and United Republic of Tanzania: Selected Issues’ (Report) (October, 2008) Country Report No 08/353

25. In Tanzania, in an attempt to create an environment more conducive to lending and financial sector development .....the authorities have introduced reforms in the areas of legal, judicial and information infrastructure, including the Land Act 1999 and the Companies Act 2002. However the reforms have not been comprehensive and their implementation takes time.....Uganda has focussed on similar issues, but the 2005 Financial Sector Assessment found a number of weaknesses..... [including] the corporate insolvency regime. Kenya has seen no major reforms to improve the lending environment recently.

31. All three countries need to continue improving and enforcing creditor rights. The FSAP suggested that Tanzania should give the commercial sector more resources for rapid settlement of cases and undertake to strengthen the judicial system generally. Kenya should modernise the insolvency procedures set out in the Company and Bankruptcy Acts, [and] strengthen the commercial court.....Uganda should overhaul its corporate insolvency regime.....and strengthen the capacity of the commercial court.<sup>119</sup>

Although the report seems to suggest that within East Africa, Tanzania's insolvency system is far better than that found in Uganda and Kenya,<sup>120</sup> a study recently conducted by the USAID observed that the new insolvency regime in Tanzania was still not well known, unclear to its users and not made in accordance to the best practice.<sup>121</sup> Similar assessments for the Central Africa Economic Community and Monetary Community noted pertinent weaknesses of insolvency systems in the respective member countries and the regional insolvency framework under the OHADA Uniform Act, though the latter has long been praised as an effective system worthy to be joined by other SSA countries.<sup>122</sup> The report in part observed the following weaknesses whilst also suggesting what needs to be done:

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<sup>119</sup> Ibid

<sup>120</sup> Uganda has recently been reported to have tabled an Insolvency Bill before the parliament. The bill seeks to enact a law that among other things will provide for cross-border insolvency law and will do away with the current approach which treats individual and companies insolvencies in different and separate legislation. See 'Uganda Tables an Insolvency Bill before the Parliament'

<[http://www.lexisnexis.com/uk/nexis/returnTo.do?returnToKey=20\\_T751837676095&randomNo=0.753109278650188](http://www.lexisnexis.com/uk/nexis/returnTo.do?returnToKey=20_T751837676095&randomNo=0.753109278650188)> accessed 6/10/2006. Kenya has also very recently tabled before the parliament an Insolvency bill. See The Insolvency Bill 2010 <[http://www.kenyalaw.org/klr/fileadmin/pdfdownloads/bills/2010/Insolvency\\_Bill\\_2010.pdf](http://www.kenyalaw.org/klr/fileadmin/pdfdownloads/bills/2010/Insolvency_Bill_2010.pdf)> accessed 02/03/2011; and M Whitehead, 'A New Insolvency Act is Coming.....So Lenders, Borrowers and Insolvency Practitioners Get Ready' (2009) *Financial Focus* 1, 8 <[http://www.pwc.com/en\\_KE/ke/pdf/pwc-financial-focus.pdf](http://www.pwc.com/en_KE/ke/pdf/pwc-financial-focus.pdf)> accessed 17/08/2010

<sup>121</sup> USAID, Tanzania's Agenda for Action Executive Summary, February 2008 <[http://pdf.usaid.gov/pdf\\_docs/PNADQ024.pdf](http://pdf.usaid.gov/pdf_docs/PNADQ024.pdf)> accessed 7/10/2009

<sup>122</sup> IMF, 'Central African Economic and Monetary Community: Financial System Stability Assessment' (Report) (August, 2006) Country Report No. 06/321; and IMF, 'Cameroon:

11.....complex procedures established by OHADA, uncertainties in each country's civil procedure, and weak capacity and problems of governance in the judicial systems. OHADA framework could be enhanced in the areas of secured transactions and collaterals as well as enforcement and insolvency procedures.

51. Debt collection and insolvency proceedings suffer from the complexity of OHADA mechanisms and governance problems in the national judicial systems.....Insolvency procedures are rare and inefficient mostly due to the unreliability of insolvency administrators, who are neither regulated nor properly supervised.

53. Enforcement procedures, especially fast-track measures for debt collection and foreclosure need to be revisited in light of best practices.....the insolvency regime should be reviewed with a view to buttress creditor rights and market discipline.<sup>123</sup>

Other recommendations focus on legal institutions' capacity building and good governance. They accordingly entail specialised training to judges of commercial courts, enforcement of disciplinary measures and introduction of a framework for registration and monitoring of insolvency practitioners. Unlike the ROSCs, it is noteworthy that these reports are not confined to insolvency standards, and their observation and recommendations are therefore broad covering other areas of law relevant to the effective adoption, and observance of insolvency laws. They lack details in a number of respects including a lack of consideration of local contexts which might need to be reflected during reform. They also fail to link the observations and recommendations in a comparative manner with the international insolvency benchmarks. Of significance, the assessments do not provide special treatment to cross-border insolvency. This is notwithstanding the potentials for insolvencies involving multinational enterprise having assets and business interests in more than one SSA country. They therefore do not offer a direct guidance as to reform of cross-border insolvency law in SSA countries.

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Financial System Stability Assessment—Update' (Report) (February 2009) Country Report No. 09/51

<sup>123</sup> IMF, 'Central African Economic and Monetary Community: Financial System Stability Assessment'(n 122) 6 and 21

### **3.5 The Recent Global Crisis and the Continued Influence of Multilateral Institutions for SSA Insolvency Reform Process**

Starting from mid 2007, the world began to experience a financial crisis that led to what has commonly been referred to as the ‘credit crunch’.<sup>124</sup> The 2009 World Development Indicator portrays the crisis, which has its origins in the US, as ‘unlike anything the world has seen since the Great Depression nearly eight decades ago;’<sup>125</sup> as it simultaneously involves housing, equity, and financial market crises which provide a potential basis for world recession. The developing world, SSA in particular, has not been completely isolated from the impact of the crisis whereby international trade and capital flows served as a transmission mechanism.<sup>126</sup> This impact is contrary to the initial expectation that these economies will be isolated from the crisis because of their less developed financial systems which are less integrated into the global financial market.<sup>127</sup> Indeed, the consequent economic slowdown was responsible for the increased credit risk and nonperforming assets, weakening the balance sheets of financial institutions and corporations.

The immediate implication of the crisis for SSA is on the potential loss of financial aid, fallen demand for SSA exports and decline in foreign direct investment. The potential implication of the crisis for the standardisation initiative is on the increased pace of compliance with the standards as SSA countries prioritise measures to contain the impact of the crisis on economic growth and poverty.<sup>128</sup> The incentive to comply with the standards is seemingly based on the desire to enhance their chances of attracting financial aid from the multilateral institutions and as a means of strengthening their competitiveness against others in attracting more foreign direct investments and trade. Furthermore, as the crisis weakens the position of these countries, it strengthens the multilateral institutions power and pressure over them for convergence.

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<sup>124</sup> UNCTAD (n 18)

<sup>125</sup> World Bank (n 5)

<sup>126</sup> IMF (n 62) 1-25

<sup>127</sup> IMF (n 62) 5; C McCarthy, ‘The Global Financial and Economic Crisis and Its Impact on Sub-Saharan Economies’ (2009) Tralac Trade Brief 1 < [www.tralac.org](http://www.tralac.org) > accessed 7/10/2009

<sup>128</sup> IMF (n 62) 1

To be sure, since the 1980s debt crisis, the multilateral institutions' power over developing countries such as those of SSA has been on a significant increase. This has the potential of culminating into wholesale adoption and observance of the standards without thorough consideration of their compatibility and suitability to the local circumstances.<sup>129</sup> Indeed, recent studies show that SSA countries were among a very few countries which did not resort to protectionist measures as a reaction to the impact of the current crisis; but they further increased the liberalisation of trade and investment in a bid to boost trade and capital inflow.<sup>130</sup>

Having its origin in the US, the crisis raises challenges to the underlying policy objectives of the international financial architecture within which the international insolvency standards are situated. One may wonder whether the standards are really better placed to prevent or resolve financial crises given that the recent crisis has its origin from advanced economies (the US in particular) which provided the best practices for the international insolvency standards.<sup>131</sup> Although the crisis potentially helps to, arguably, 'dissolve any notion that prevailing practice[s] in high income countries [are] appropriate standards for emerging markets [and developing economies],'<sup>132</sup> it is unlikely that this may have a significant impact of militating the observance of the standards of the best practices given the vulnerability of the SSA economies and the fact that the crisis has had the effect of worsening their situations even further.

Indeed, any impact that militates compliance with the standards could be a result of the likelihood of the governments of SSA to be more inclined to resolving the immediate consequences of the crisis which may render cross-border insolvency

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<sup>129</sup> D Katona (n 85) 1458

<sup>130</sup> B Eichengreen, 'From the Asian Crisis to the Global Credit Crisis: Reforming the International Financial Architecture Redux' (2009) 6 *Int'l Econ & Econ Policy* 1, 2, 18 & 19

<sup>131</sup> V Finch, 'Corporate Rescue in a World of Debt' [2008] *JBL* 756; H Hu and B Black, 'Equity and Debt Decoupling and Empty Voting 11: Importance and Extensions' (2008) 156 *Univ Penn LR* 625; B Eichengreen (n 130) 2. See also, LC Ho, 'UK Bank Insolvency Reform' (2008) 3 *Capital Market Law Journal* 320; J Harris, 'International Regulation of Hedge Funds: Can the Will find a Way?' (2007) 28 *Company Lawyer* 277

<sup>132</sup> B Eichengreen (n 130) 2, 18 & 19

reform undertaking to be regarded as of less significance than other pressing problems. While it is true that the crisis may have diminished the confidence developing countries have had on such standards, they still lack the capacity to abandon the standardisation initiatives and exercise their policy choices in approaching recommendations given from assessments. This is on account of the countries' weakened economic power as already discussed.<sup>133</sup> In the final analysis, the crisis contributes in leaving SSA governments with little policy choices over reform options for their countries' economies.

### **3.6 Towards Adoption of and Compliance with International Insolvency Standards: Which Approach?**

There are two approaches that are emerging, suggesting how effective adoption and implementation of the standards by low income countries, such as SSA countries, could be effected without jeopardising the interests of such countries, and the potential benefits of economies of scale and poverty reduction effects that may accrue from compliance and observance of the standards.

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<sup>133</sup> B Eichengreen (n 130) 2,18 & 19 states that '[t]he 2008 crisis clearly shattered [the] presumption [of best practices from advanced economies]. It revealed the inadequacy of transparency in the high-income countries. It laid bare the inadequacy of supervision and regulation, failures in the co-ordination of macroeconomic and regulatory policies, the pervasiveness of regulatory arbitrage, and incentive problems associated with compensation practices in the financial-services industry. It dissolved any notion that prevailing practice in the high-income countries is an appropriate standard for emerging markets.' Noting the weaknesses of the multilateral institutions to oversee the standardization drive and compliance Eichengreen writes 'The IMF's inability to say anything critical about its large members is a weakness in the architecture. The Fund was notable for its silence when the U.S. Treasury rolled out a flawed bank rescue plan in September 2008 that emphasized purchases of troubled assets at something resembling market prices rather than capital injections....Meaningful reforms require changing the composition of the [Fund's] Management and Executive Board responsible for priorities and policies.' A wide variety of discriminatory state measures (such as 'bailouts'/state aids) undertaken by developed countries in the midst of the crisis whilst developing countries through the standardization initiative were being pressed to avoid such practices may discourages the developing countries' commitment to standardization initiatives since, as far as they are concerned, they have been faithfully 'lowering tariff on imports.....and [continued] ..liberalization of foreign direct investment...'. See for instance, International Monetary Fund (n 42) 19-21 for such advice given to SSA in a bid to meet the challenges of the crisis which include 'reduction in taxes or additional increases in expenditures...' Perhaps this practice serves as a pointer to how states desire not to be bound by international standards when the stakes for their economies at home are so high. For details on such practices in the midst of the crisis see, SJ Evenett, 'The Role of the WTO During Systemic Economic Crisis' Inaugural Conference of Thinking Ahead on International Trade (TAIT), Centre for Trade and Economic Integration in collaboration with WTO, Geneva, 17-18 September 2009 < [www.wto.org/english/res\\_e/statis\\_e/tait\\_sept09\\_e/evenett\\_e.doc](http://www.wto.org/english/res_e/statis_e/tait_sept09_e/evenett_e.doc) > accessed 23/2/2010

The first approach insists on the importance of ensuring that standards adoption, implementation and assessment give due consideration to the domestic focus, experience, needs, and capabilities of a low income country with the objective of market development and enhancing market efficiency.<sup>134</sup> In realising this, the approach suggests that the prioritisation of the standards should reflect needs and fundamental values of the country. It is emerging from this approach that regard has to be had to regional needs and dimensions of economic development. This is ideally based on the growing phenomena of regionalism which underpins intra-region commerce and raising low income countries' ownership of the standards and assessment of their observance.

In view of this approach, customisation of the insolvency standards to reflect local contexts is important because the standards are essentially modelled on the institutions and practices prevailing in the developed countries which may not be directly relevant to the specific problems and needs of the developing countries in SSA.<sup>135</sup> Customisation therefore emphasises promotion of innovation and accommodation of local contexts that seem to be embedded in the standards, though with some reservation in some respects as identified above.

Regional initiatives such as Africa's Peer Review Mechanism ("APRM") under the New Partnership for Africa's Development ("NEPAD") devised to facilitate the design, implementation and monitoring of standards to complement ROSCs is supposedly one example of such approach, undertaken at regional level.<sup>136</sup>

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<sup>134</sup> YV Reddy (n 43); PD's Investment (n 66); M Cardona and M Farnoux, 'International Codes and Standards: Challenges and Priorities for Financial Stability', (2002) *FSR* 143, 147-149 <[http://www.banque-france.fr/gb/publications/telechar/rsf/2002/et8\\_1102.pdf](http://www.banque-france.fr/gb/publications/telechar/rsf/2002/et8_1102.pdf)> accessed 23/10/2009; TC Halliday, 'Lawmaking and Institution Building in Asian Insolvency Reforms: Between Global Norms and National Circumstances', (5<sup>th</sup> Forum for Asian Insolvency Reform, Beijing, 27-28 April 2006) <<http://www.oecd.org/DAF/corporate-affairs/>> accessed 17 July 2009 [33]

<sup>135</sup> TC Halliday, and BG Carruthers (n 84); TC Halliday (n 26); N Onder (n 18) 2; J Stiglitz (n 16); and D Berkowitz, K Pistor and JF Richard (n 88)

<sup>136</sup> See African Union, 'New Partnership for Africa's Development Declaration on Democracy, Political, Economic, & Corporate Governance', AHG/235 (XXXVIII) Annex I 2002 <<http://www.sarpn.org.za/NEPAD/july2002/declaration/declaration.pdf>> accessed 31/07/2009; PD's Investment (n 73). NEPAD's Declaration reflects African leaders' commitment to adhere to international standards in the conduct of policy. In terms of para 166, NEPAD's Capital Flows Initiative has three objectives on promoting the private sector, namely: 'To ensure a sound and

This is important given the complexity and origins of the issues involved in the standards as well as historical, political, philosophical and socio-cultural policy dimensions attached to insolvency.<sup>137</sup> To ensure ownership and wide public acceptance, the mechanism allows for wide public discussion and citizenry involvement at national levels. It is however a pity that APRM under NEPAD does not presently cover the insolvency standards,<sup>138</sup> although it recognises ‘the need for appropriate insolvency systems [which] became most apparent with the financial crises that hit emerging economies especially in Asia in the mid 1990s’.<sup>139</sup> Nevertheless, NEPAD APRM has been criticised for embracing the Washington Consensus prescriptions of market centred reform approaches and for its failure to engage with the unfairness of standards inimical to Africa.<sup>140</sup> Notwithstanding the NEPAD’s shortcomings, it still serves ‘as a useful model of an African-driven initiative; rather than contorting the African agenda to fit the

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conducive environment for private sector activities, with particular emphasis on domestic entrepreneurs; (b) to promote foreign direct investment and trade, with particular emphasis on exports; (c) to develop micro, small and medium enterprises, including the informal sector.’

<sup>137</sup> Africa’s Peer Review Mechanism (“APRM”) seeks, with the support from the standard setting bodies as well as multilateral donors and African regional institutions, to foster compliance with standards by *inter alia* helping African countries to identify the constraints that they face in implementing the standards and facilitate formulation of credible and action-oriented programmes towards addressing the constraints and implementing the standards. See for instance Africa Development Bank Group, ‘Framework for Implementation of Banking and Financial Standards in Africa’ < <http://www.afdb.org/fileadmin/uploads/afdb/Documents/Project-and-Operations/00473846-EN-PAPER-NEPAD-BANKING-AND-FINANCIAL-STANDARDS-FRAMEWORK.PDF> > accessed 31/07/2009 [6] & [ 7]

<sup>138</sup> See for instance, Article 8 of the NEPAD Declaration (n 142) which provides thus: ‘...the eight prioritized and approved codes and standards set out below [which the African Union believe to] have the potential to promote market efficiency, to control wasteful spending, to consolidate democracy, and to encourage private financial flows - all of which are [regarded to be] critical aspects of the quest to reduce poverty and enhance sustainable development. These codes and standards have been developed by a number of international organizations through consultative processes that involved the active participation of and endorsement by African countries. Thus, the codes and standards are genuinely global as they were agreed by experts from a vast spectrum of economies with different structural characteristics. They are the following: a. ‘Code of Good Practices on Transparency in Monetary and Financial Policies’; b. ‘Code of Good Practices on Fiscal Transparency’; c. ‘Best Practices for Budget Transparency’; d. ‘Guidelines for Public Debt Management’; e. ‘Principles of Corporate Governance’; f. ‘International Accounting Standards’; g. ‘International Standards on Auditing’; and h. ‘Core Principles for Effective Banking Supervision’. Nevertheless, as SSA countries are increasingly reforming their insolvency systems they miss the assistance that they could have obtained if insolvency standards were within the standards covered within the NEPAD APRM.

<sup>139</sup> Africa Development Bank Group (n 137) 37

<sup>140</sup> J Gathii, ‘A Critical Appraisal of the NEPAD Agenda in Light of Africa’s Place in the World Trade Regime in an Era of Market Centered Development’(2003) 13 *Transnat’l L. & Contemp Probs* 179, 180-81; and I Taylor, ‘NEPAD Ignores the Fundamental Politics of Africa’, (2004) *Contemp Rev* 29, 32

needs of developed countries, NEPAD and measures like it can guide both Africa and the West to create technical assistance programs that fulfil the African agenda.’<sup>141</sup>

Perhaps one recent example that comes closer to this approach, is the ‘Declaration on Insolvency and Creditor Rights Systems for the Middle East and North Africa’ (“MENA”) promulgated on 27 May 2009 with the object of forging a reform and harmonisation of insolvency systems of member states in light of the international insolvency standards, whilst adhering to the needs of the countries in the region.<sup>142</sup> The declaration represents commitments to participating and making recommendations to modernise insolvency frameworks tailored to the needs of the countries in the region but one that balances the local context with the global standards. An obvious feature of this declaration is insistence on local and regional needs and circumstances as well as facilitating benchmarking and sharing of best practices that would help elevate and advance the insolvency and creditor rights agenda.

As the emerging consensus recognises the fundamental place of agriculture, natural resources, informal sector and small and medium scale enterprises and the need to fight poverty in SSA, this fact among others will perhaps need to be taken into account in modernising their insolvency systems and cross-border insolvency in particular.<sup>143</sup> However, such needs ought to be balanced by the drive to develop the private sector and in particular trade and foreign investment.

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<sup>141</sup> M Florestal, ‘Technical Assistance Post-Doha: Is There any Hope of Integrating Developing Countries into the Global Trading System?’ (2007) 24 *Arizona J Int’l and Comp Law* 121, 130

<sup>142</sup> See Hawkamah-The Institute for Corporate Governance, ‘Declaration on Insolvency and Creditor Rights Systems for the Middle East and North Africa’, Abu Dhabi, 27 May 2009 <[http://www.hawkamah.org/events/conferences/insolvency\\_declaration/files/hawkamah\\_declaration\\_on\\_insolvency\\_english](http://www.hawkamah.org/events/conferences/insolvency_declaration/files/hawkamah_declaration_on_insolvency_english)> accessed 7/10/2009; and Hawkamah and others, ‘Survey on Insolvency System in the Middle East and North Africa’ <<https://insol.org/Projects/MENA%20Survey%20into%20Insolvency%20and%20Creditor%20Rights.pdf>> accessed 15/07/2011

<sup>143</sup> See World Bank, *World Bank Assistance to Agriculture in Sub-Saharan Africa* (World Bank, Washington 2007); and USAID (n 121)). Indeed, almost all UNCTAD’s reports on foreign direct investment shows that the large percentage of foreign direct investment flow into SSA is in the natural resource sector, although the financial sector and telecommunication industry are also reportedly on the increase.

Another approach insists that countries must adopt a more gradual approach to the implementation of the standards when a substantial amount of reform is required.<sup>144</sup> This boils down to the need of assuring complementarities of the standardised insolvency law with the entire laws of a country's legal system. This view reflects the very nature of insolvency which tends to influence nations to legislate for it in a manner that takes into account and reflects the nations' historical, socio-economic, political and cultural needs.<sup>145</sup> As such, different national policies have to be consulted in making different policy choices that will essentially characterise the insolvency law that is designed. This approach therefore makes it unrealistic to aim at achieving compliance with the standards of best practices and benchmarks within a short period without fixing priorities. Perhaps this approach seems to be preferred by some countries as is the case for Tanzania and more recently Mauritius, which, as will be shown in subsequent chapters, have enacted cross-border insolvency regimes which allow for gradual and perhaps cautious application.

Notably, whereas the former approach reflects the theoretical view against transplants and a 'one-size-fits-all' approach and which encourages consideration of local contexts,<sup>146</sup> the latter reflects the incrementalist theory which advocates for modesty and gradual reform of global insolvency law giving allowance for substantial deviation while also reducing the risk of outright rejection.<sup>147</sup> Nevertheless, both approaches complement one another in so far as their application to a developing country is concerned.<sup>148</sup> It will thus seem that the best result mandates invocation of both approaches. Invocation of both approaches

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<sup>144</sup> YV Reddy (n 43); PD's Investment (n 66); and M Farnoux (n 134). See also TC Halliday (n 134) 28, stating that the implementation process 'can be sharply divided between those approaches that are incremental, piecemeal or gradual versus those that are dramatic, systemic and rapid.' See also IF Fletcher (n 81) 774

<sup>145</sup> See n 69 above

<sup>146</sup> See R Parry and H Zhang, 'China's New Corporate Rescue Laws: Perspective and Principles' (2008) *Journal of Corporate Law Studies* 113, 125; CG Paulus (n 24) 765; N Martin (n 72) 5; JJ Chung, 'The New Chapter 15 of the Bankruptcy Code: A Step Towards Erosion of National Sovereignty,' (2006-2007) 27 *Nw J Int'l L & Bus* 89, 107 and 108

<sup>147</sup> JAE Pottow, 'Procedural Incrementalism: A Model for International Bankruptcy', (2004-2005) 45 *Va J Int'l L* 936. See also S Block-Lieb and TC Halliday, 'Incrementalisms in Global Lawmaking' (2006-2007) 32 *Brook J Int'l L* 851

<sup>148</sup> Text to n 158-178 in chapter 2

will help reflect and complement the theory that the best strategy for legal reform must, in order to avoid transplant effect, aim at improving legality by carefully selecting legal rules whose meaning can be understood and whose purpose is appreciated within the context of domestic circumstances by domestic law makers, law enforcers, and economic agents, who are the final consumers of these rules.<sup>149</sup> And above all, it must ensure that there is a domestic demand for the new law, and that supply can match demand.<sup>150</sup> The latter aspect of the theory closely follows the gradualism and thus incrementalism.

### 3.7 Drivers behind the Emerging Reform Trends in Sub-Saharan Africa

There is a growing trend among SSA countries to reform their insolvency laws including cross-border insolvency frameworks along the lines of the modern trends.<sup>151</sup> It is noteworthy that the reform in these countries has been undertaken with a view to attraction and facilitation of foreign investments as part of activities in the poverty reduction strategy papers (“PRSP”).<sup>152</sup> Indeed, reform of

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<sup>149</sup> D Berkowitz, K Pistor and JF Richard (n 94) 186 and 192

<sup>150</sup> Ibid 192

<sup>151</sup> To this extent, Tanzania, Burundi, Ghana, Mauritius, Rwanda, Uganda, Mozambique and Kenya offer good examples of this trend in SSA. While Uganda and Kenya offer example of such countries which are at various stages of the reform process Mauritius presents an example of countries which have recently enacted and brought into force new insolvency legislation. See ‘Bills proposed to ease business’ in Kenya’s Daily Nations, 2 November , 2009 <<http://www.Nation.co.ke/News/-/1056/471244/-/tk2f1/-/index.html>> accessed 2/11/2009; M Whitehead, ‘A New Insolvency Act is Coming.....So Lenders, Borrowers and Insolvency Practitioners Get Ready’ (2009) *Financial Focus* 1, 8 <[http://www.pwc.com/en\\_KE/ke/pdf/pwc-financial-focus.pdf](http://www.pwc.com/en_KE/ke/pdf/pwc-financial-focus.pdf)> accessed 17/08/2010 . See also Uganda-Bill on Commercial Justice Tabled, August 23, 2009 <[http://www.lexisnexis.com/uk/nexis/returnTo.do?returnToKey=20\\_T751837676095&randomNo=0.753109278650188](http://www.lexisnexis.com/uk/nexis/returnTo.do?returnToKey=20_T751837676095&randomNo=0.753109278650188)> accessed 6/10/2006.; The Mauritius Insolvency Act 2009 was brought into force in 1<sup>st</sup> June 2009. See the Mauritius’s new Insolvency Act 2009 <[www.gov.mu/portal/goc/compdiv/file/insolvact09.pdf](http://www.gov.mu/portal/goc/compdiv/file/insolvact09.pdf)> accessed 3 November 2009; Republic of Rwanda Press Release, ‘Rwanda is Doing Business 2010’s Top Reformer’, Kigali, 9 September 2009 <[http://www.gov.rw/IMG/doc/20090909\\_Press\\_Release\\_Doing\\_Business\\_-\\_FINAL.doc](http://www.gov.rw/IMG/doc/20090909_Press_Release_Doing_Business_-_FINAL.doc)> accessed 6 November 2009. See also, RN Kormo, ‘Review of 2009 Draft Law on Business Insolvency (Mozambique)’ (USAID Support Programme for Economic and Enterprise Development 2011) <<http://www.speed-program.com/library/resources/speed/2011/memoondraftbankruptcylawmozambiquespeed062211.pdf>> accessed 26 October 2011

<sup>152</sup> U Miller and S Ziegler, *Making PRSP Inclusive* (Project Print, Munich 2006) 4, stating that poverty reduction strategy paper (“PRSP”) “is a concept developed by the World Bank and the International Monetary Fund (IMF) in 1999. The idea behind this was that low-income, highly indebted countries should develop and formulate a national plan on how to reduce poverty in their country and improve the living situation of their citizens. Once a country has established a

insolvency law in most of these countries is clearly reflected in and regarded as an aspect within the respective countries' poverty reduction strategy paper.<sup>153</sup>

One important aspect is that as far as SSA countries are concerned, such a route is becoming more attractive to the governments and effective for bringing about reform. One of the reasons is because such poverty reduction strategy papers, funded by the multilateral institutions, encapsulate good governance issues which directly link with the problems at hand which the governments of SSA countries are seeking to prioritise and resolve.<sup>154</sup> But the main reason is that it is now becoming the practice that it is almost only through the poverty reduction strategy papers that such countries can qualify for funding (e.g loans, grants and other subventions) from the multilateral institutions based on the prioritised activities clearly indicated on such strategic plans and clearly linked to the way they contribute to poverty reduction.<sup>155</sup> It is common place to find in such PRSPs long lists of laws and areas earmarked respectively as requiring reform and legislation which is not uncommon now to include insolvency and indeed all areas and aspects that seem to dominate the agenda of the multilateral institutions and the international community.<sup>156</sup> It seems that the trend of commissioning studies by local and foreign consultants with a view of reforming the insolvency laws is mainly being funded by the multilateral institutions or other international institutions based on the prioritised and planned activities.<sup>157</sup>

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national PRSP, it can apply for debt relief from the World Bank, the IMF and donor countries, and may gain access to new credits, loans and grants.”

<sup>153</sup> See for instance Government of Ghana ‘Implementation of Ghana Poverty Reduction Strategy 2005: Annual progress Report 2006 < <http://www.ndpc.gov.gh/GPRS/AnnualProgressReport-2005.pdf> > accessed 2/9/2010. It is however still questionable if this new trend is really consistent with what has been proposed by J Stiglitz (n 16) 82 and 83 and discussed in text to n 71 above.

<sup>154</sup> MS Grindle, ‘Good Enough Governance: Poverty Reduction and Reform in Developing Countries’ (Paper Prepared for the Poverty Reduction Group of the World Bank 2002) < <http://www.gsdrc.org/docs/open/HD32.pdf> > accessed 13 September 2010

<sup>155</sup> U Miller and S Ziegler (n..) 4 arguing that “[t]he PRSP approach is becoming increasingly important, since it is not an isolated tool used just by the World Bank and the IMF, but is also supported by other international development partners...”

<sup>156</sup> U Miller and S Ziegler (n 152) 4, such lists “...provide a roadmap indicating the priority actions to be taken that will lead to poverty reduction.”

<sup>157</sup> n 17 above

Contrary to what has been said, it is very obvious that there is a clear link between funding from multilateral institutions and insolvency related reforms as is the case with other legal reforms. Although governments are deemed to have a leading role in the process, one can see how the multilateral institutions, whose role is to provide technical and financial support to the process,<sup>158</sup> are indeed better placed to ensure that their agenda and recommendations emerging from ROSC on insolvency reform or otherwise are accommodated in the PRSPs.<sup>159</sup> Their role caters for the whole process from formulation and implementation, to monitoring and evaluation. In fact such endeavour can be achieved whether or not there is a ROSC so far undertaken for a particular country.

Indeed, the reforms are, by and large, not pushed by and undertaken as a direct result of, involvement of the countries under study in the growing number of insolvency cases affecting these countries.<sup>160</sup> As such, the emerging reforms are not undertaken as a measured approach to address an immediate and pressing demand arising from the surge in incidences of cross-border insolvency affecting such countries. Rather, it seems that, as far as such countries are concerned, the drive and primary pre-occupation is ‘adopt[ing] a new insolvency law system just for the sake of the supposed economic advantage’<sup>161</sup>

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<sup>158</sup> U Miller and S Ziegler (n 152) 4

<sup>159</sup> In many countries the different donor organisations form groups that meet regularly (e.g. monthly) to discuss the state of progress of the PRSP. On this observation see U Miller and S Ziegler (n 152) 5

<sup>160</sup> See for instance, C Manuel, ‘Consultative Paper on Key Proposals for the Reform of Insolvency Law’ ( Commercial Law Project Report) (1999); Uganda, ‘A Study Report on Insolvency Law’ (Report) (2004) Law Com. Pub. No. 13 of 2004. See also the statement reported to have been made by the Mauritius government in relation to the enactment of the new Insolvency Act 2009 that ‘the.....Act will secure reputation of Mauritius as a well governed business and financial services centre and a trustworthy investment destination.’ See Government Information Service, Prime Minister’s Office, ‘Insolvency Act 2009: Shoring Up Corporate Goodwill and Protecting Stakeholders’ <[www.gov.mu/portal/site/Mainhomepage/menuitem.a42b24128104d9845dabddd](http://www.gov.mu/portal/site/Mainhomepage/menuitem.a42b24128104d9845dabddd)> accessed 3/11/2009

<sup>161</sup> IF Fletcher, ‘Maintaining the Momentum: The Continuing Quest for Global Standards and Principles to Govern Cross-Border Insolvency’ (2006-2007) *Brook J Int’l L* 767, 774. See also HE Hon President M Kibaki, ‘Speech During the Official Opening of Parliament’ (the Fourth Session of the Tenth Kenyan Parliament 23rd February 2010) <

[www.parliament.go.ke/index.php?option=com\\_docman&task](http://www.parliament.go.ke/index.php?option=com_docman&task) > accessed 12/04/2010

President Mwai Kibaki of Kenya in his Speech to the parliament made the following statement with regard to *inter alia* the Insolvency Bill that was to be tabled before the Parliament: the Insolvency Bill will ‘provide an enabling legal environment to make Kenya more competitive for business and investment.’ <

The looming risk is that the desire to attract investments and businesses in order to impress the international community and investors may override or marginalise other local needs and contexts which are equally relevant and important in enabling effective implementation of the law possible. This is critical in two ways. On the one hand, a majority of these countries lack a practical experience of the application of cross-border insolvency law, let alone the domestic insolvency practical experience. On the other hand, whilst it is a generally accepted view that there is no 'one size fits all' approach to insolvency law,<sup>162</sup> as each country has its diverse values and norms, which require different policy choices for its insolvency system and thus cross-border insolvency regime; the trend is that the reforming countries have to a large extent tended to adopt systems that have seemingly worked well elsewhere and preferably from their former colonial powers.

### **3.8 Conclusion**

The development of effective cross-border insolvency systems is now more relevant in SSA countries than it was before. This is particularly so in view of the extent to which SSA countries are increasingly being integrated to the global economy through trade and foreign direct investments. The relevance is underpinned by the efforts that these countries have over the years been making to compete in promoting and attracting cross-border trade and investment through liberalisation of their economies and the creation of conducive legal environments with the support from the multilateral institutions and conclusion of cross-border trade and investment arrangements.

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[http://www.parliament.go.ke/parliament/downloads/tenth\\_forth\\_sess/SPEECH%20BY%20HIS%20EXCELLENCY%20HON.pdf](http://www.parliament.go.ke/parliament/downloads/tenth_forth_sess/SPEECH%20BY%20HIS%20EXCELLENCY%20HON.pdf) > accessed 23/03/2010

<sup>162</sup> See R Parry and H Zhang 'China's New Corporate Rescue Laws: Perspective and Principles' (2008) *Journal of Corporate Law Studies* 113, 125; CG Paulus, 'Global Insolvency Law and the Role of Multinational Institutions' (2006-2007) 32 *Brook J Int'l L* 755,765; N Martin 'The Role of History and Culture in Developing Bankruptcy and Insolvency Systems: The Perils of Legal Transplantation' (2005) 28 *BC Int'l & Comp L Rev* 1, 5; JJ Chung (n 146) 107 and 108

The growing number of cross-border trade and investment arrangements implies a further challenge to the SSA countries to align their insolvency regime with their entire legal environment for facilitation of trade and investment and the international insolvency benchmarks. Despite the relevance as above stated, the approach for reform need not be rapid as incidences of cross-border insolvencies are still if at all very limited, though the pre-conditions for their occurrences are in place and building up. However, the major limitation inherent in this process is the fact that the assessment initiative for the extent of compliance with the international insolvency standards does not seem to delve into the details of the local contexts and needs that may influence the shape and implementation of insolvency law for a particular country. This is critical given that the insolvency standards do not contain a version translated into the contexts of circumstances pertaining to developing countries such as those in SSA, though they ostensibly allow innovations to reflect local circumstances. The other limitation is perhaps in the extent and manner in which local experts are employed in the process, which limits their role in the assessment exercise in terms of ownership and control. The relationship between SSA countries with the multilateral institutions which conduct the assessments is also critical. The risk is that SSA countries seem to face a potential risk of succumbing to prescriptions of the multilateral institutions as to the manner in which they should carry out reform which might not have sufficient regard to the local contexts.

The most critical challenge is to identify the relevant local contexts that reflect SSA countries' historical, cultural, philosophical, psychological, political, economic, political, institutional and social aspects and needs and balance them against the insolvency benchmarks in a manner that will improve and modernise their cross-border insolvency frameworks. The danger is looming that these countries may adopt the benchmarks in their laws to please the international community without necessarily having them complied with in actual practice. The emerging approaches for reform, if integrated with the theories against transplant effect and enhancing effectiveness as above discussed, stand a better chance to allow crafting of an appropriate framework for regulation of cross-

border insolvency in the countries under study. The next chapter explores further the existing cross-border trade and investment arrangements with a view to determining the nature of a possible cross-border insolvency framework to which such arrangements point for SSA countries.

## CHAPTER FOUR

### EXTENT OF FACILITATION OF CROSS-BORDER TRADE AND INVESTMENT AND ITS IMPLICATIONS FOR CROSS-BORDER INSOLVENCY REGULATION IN SUB-SAHARAN AFRICA

#### 4.1 Introduction

There is extensive scholarship acknowledging that globalisation of trade and investment and the consequent increase in international business have enhanced the challenges for cross-border insolvencies in the world. However, there is a dearth of empirical or descriptive scholarship that has delved into the relationship between the two. In the same vein, while it is well known that the growth and expansion of international business in the recent times has largely been enabled by liberalisations of markets and investments, there is no scholarship that has dealt with the linkage between the prevailing arrangements for facilitation of trade and investment and cross-border insolvency; and explored the extent to which such arrangements implicates cross-border insolvency regulation.

This chapter examines various arrangements for facilitation of cross-border trade and investment in which SSA has been involved. It considers the extent to which, and how, they implicate cross-border insolvency regulation in SSA countries. It points to the policy space available to SSA countries in making policy choices commensurate with their situations, before considering a framework for cross-border insolvency regulation to which the implications of the arrangements for cross-border insolvency regulation point.

The chapter invokes theoretical aspects of the cross-border insolvency landscape in considering the nature and type of regulatory approach to which the prevailing situation points and issues for consideration that emerge. It consequently argues that the facilitation of cross-border trade and investment through such arrangements effectively pulls cross-border insolvency frameworks in SSA countries towards a universalist stance and away from territorialist approaches.

The key finding of this study is that, although such arrangements do not explicitly provide for cross-border insolvency, their implications for cross-border insolvency regulation are essentially twofold. Firstly, they embody general principles of law which inform and determine the nature and content of SSA countries' cross-border insolvency frameworks. This implication is reinforced by the requirements explicitly advanced by interregional economic arrangements for undertaking and maintaining liberalisation, rule of law and good governance. And secondly, the arrangements effectively enhance the interactions of SSA countries with the multinational enterprises involved in international business and hence the potential of SSA countries being involved in cross-border insolvencies.

#### **4.2 Overview of the Linkage between Cross-Border Insolvency and Facilitation of Trade and Investment**

Insolvency law has traditionally evolved and developed as a means of facilitating trade and investment.<sup>1</sup> The underlying policies and approaches have seemingly however tended to vary from time to time and from one jurisdiction to another. This historical fact is in itself evident of the link between insolvency and facilitation of trade and investment. The multitude of bilateral treaties concluded in the past to regulate cross-border insolvencies arising between jurisdictions with close cross-border trade and investment relations and the recent international initiatives reflect this fact.<sup>2</sup>

In modern times, the linkage is more pronounced and strengthened by the globalisation of trade and investment such that the role of cross-border insolvency regulation in the facilitation of cross-border trade and investment is considered in the global context. The underlying views are twofold. Firstly, that the absence of an orderly and effective insolvency system can exacerbate crises and render creditors unable to collect on their claims, which will consequently

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<sup>1</sup> See generally, for instance, B Wessels, BA Markell and JJ Kilborn, *International Cooperation in Bankruptcy and Insolvency Matters* (Oxford, OUP 2009)

<sup>2</sup> Ibid

affect the future availability of credit.<sup>3</sup> Where there are cross-border trade and capital flows, the lack of an effective system, applied in a predictable manner, may render foreign creditors inadequately protected as they may be inequitably treated. Secondly, that an effective insolvency law that addresses the interests of all involved notwithstanding their nationality has the potential for fostering growth and competitiveness in cross-border trade and investment.<sup>4</sup> It facilitates free trade and capital movements, and consequently enables allocation of savings and channelling of resources into productive uses.

It is not in dispute that SSA countries would need an effective cross-border insolvency regime to contribute towards facilitation of cross-border trade and investment.<sup>5</sup> Rather, the debate seems to be focused on what is the best and appropriate approach commensurate with the level of development of SSA countries. Linked with the debate is the relatively limited involvement of SSA in cross-border trade and investment.<sup>6</sup> Whilst the argument inherent in such a focus might be valid, the implication arising from market liberalisations and implementation of other trade and investment facilitation arrangements may suggest a different conclusion. Although SSA countries may not be seen to be in favour of universalist approaches to cross-border insolvency regulation, as it is

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<sup>3</sup> See generally S Hagan, 'Insolvency Reform and Economic Policy' (2001-2002) 17 *Conn J Int'l L* 63; and IMF, *Orderly and Effective Insolvency Procedures –Key Issues* (IMF, Washington 1999)

<sup>4</sup> *Ibid*

<sup>5</sup> See J Stiglitz, *Globalisation and its Discontents* (Penguin Books, London 2002) 130-131 and 237, who maintains that 'What is required is bankruptcy reform that recognizes the special nature of bankruptcies that arise out of macroeconomic disturbances....what is needed is a bankruptcy provision that expedites restructuring and gives greater presumption for the continuation of existing management. Such reform will have the further advantage of inducing more due diligence on the part of the creditors, rather than encouraging the kind of reckless lending that has been so common in the past. Trying to impose more creditor friendly bankruptcy reforms, taking no note of special features of macro-induced bankruptcies, is not the answer. Not only does this fail to address the problems of countries in crisis; it is a medicine which likely will not take hold – as we have seen so graphically in East Asia, one cannot simply graft the laws of one country onto the customs and norms of another.' Indeed, this view looks like an attempt to export debtor in possession from the US to the developing economies. It shows the 'one-size-fits all approach' mentality that is found even among those who are ostensibly critical of the approach.

<sup>6</sup> L Hoffmann, 'Cross-Border Insolvency: A British Perspective' (1995-1996) 64 *Fordham L Rev* 2507, 2510; F Tung, 'Fear of Commitment in International Bankruptcy' (2000-2001) 33 *Geo Wash Int'l L Rev* 555, 576-577; JAE Pottow, 'Greed and Pride in International Bankruptcy: The Problems of and Proposed Solutions to Local Interests' (2005-2006) 104 *Mich L Rev* 1899, 1902; and IF Fletcher, 'Maintaining the Momentum: The Continuing Quest for Global Standards and Principles to Govern Cross-border Insolvency' (2006-2007) 32 *Brook J Int'l L* 767, 774

likely they will have no local traders and investors beyond their borders, they have, over the years, been involved in massive liberalisations of their markets and investment, both domestic and foreign, which may be regarded as reaffirmation of their support for a universalist approach.<sup>7</sup> Indeed, this may make it difficult for them to intelligently object to the universalist approach in the regulation of cross-border insolvency, which basically encapsulates standards they have already accepted. The following part looks at the market liberalisation strategies and how they potentially implicate regulation of cross-border insolvency in SSA countries.

### **4.3 Liberalisation and Reform of the Supporting Legal Environment**

The market liberalisation of the SSA countries undertaken since the mid 1980s and early 1990s significantly enhanced integration of the economies of these countries to the global market. The liberalisation was implemented under the structural adjustment programme sponsored by the IMF and World Bank. The debt crisis of 1980s which had its origins in the oil crisis of 1970s facilitated implementation of the liberalisation measures within the broad context of the Washington Consensus policies pioneered by the World Bank and the IMF.

The implementation of the reform prescriptions by the SSA countries, which has since provided policy and legal infrastructure that facilitates a flow of multinational enterprises into SSA resources and forces significant redeployment of regional resources from domestic to specialised foreign uses, was a pre-condition for obtaining loans from the Multilateral institutions.<sup>8</sup> The main aspects of the liberalisation initiatives are privatisation, deregulation in import and export and domestic commodity price, and liberalisation of capital flows. Realisation of such aspects in SSA countries has opened their economies for international trade and foreign investment through multinational enterprises from

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<sup>7</sup> See BS Masoud, 'Transnational Aspects of Tanzania's Corporate Insolvency Law: Challenges and Prospects' (2006) 14 *IIUMLJ* 119; and JW Salacuse, 'From Developing Countries to Emerging Markets: A Changing Role of Law in Third World' (1999) 33 *Int'l L* 875

<sup>8</sup> A Anghie, *Imperialism, Sovereignty, and the Making of International Law* (Cambridge, CUP 2004) 245, 258-262

the developed countries and more recently emerging economies. In this sense, the SSA economies were opened for challenges of potential cross-border insolvencies.

#### 4.3.1 Market Liberalisation

The radical changes resulting from the liberalisation drive meant that SSA countries have to embark on enhancement of the role of the market, especially the participation of, and dependence on, private sector and in particular foreign investment. Accordingly, SSA countries have now to seriously and competitively attract and promote foreign investment which had, prior to the liberalisation, been regarded as a threat to national independence and development.<sup>9</sup> Unsurprisingly, such countries have been involved in putting in place a wide range of measures ranging from institutionalising tax incentives for foreign investment to machinery for property rights protection and enforcement. It would seem that this endeavour also reflected the need for SSA countries to do much to create a good impression and ‘overcome the perceptions that they are “unsafe” destinations for foreign capital.’<sup>10</sup> It is in this context that there has been a proliferation of bilateral investment treaties concluded by SSA countries with mainly developed countries in their attempt partly to remedy local institutional deficiencies and governance.<sup>11</sup> The need for foreign capital was considered significant given the low level of technological and industrial development,

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<sup>9</sup> BS Masoud (n 7) 125; TJ Moss, V Ramachandran and MK Shah, ‘Is Africa’s Skepticism of Foreign Capital Justified? Evidence from East African Firm Survey Data’ (2004) Centre for Global Development Working Paper 41/2004 < <http://ssrn.com/abstract=1112683> > accessed 15 August 2011[12]; and D Himbara, ‘The Failed Africanization of Commerce and Industry in Kenya’ (1994) 22(3) *World Development* 469-482; and B Mihyo, *Non-Market Controls and the Accountability of Public Enterprises in Tanzania* (Macmillan, London 1994) 127 & 128. Notably, concerns of developing countries on foreign investment and their demand that their particular needs and circumstances be taken into account as to the manner in which they would deal with foreign investment was in 1970s incorporated into the United Nations Charter of Economic Rights and Duties of States 1974, Art 2

<sup>10</sup> V Mosoti, ‘Bilateral Investment Treaties and the Possibility of a Multilateral Framework on Investment at the WTO: Are Poor Economies Caught in Between?’ (2005-2006) 26 *Nw J Int’l L & Bus* 95, 114

<sup>11</sup> T Ginsburg, ‘International Substitutes for Domestic Institutions: Bilateral Investment Treaties and Governance’ (2005) 25 *Int’l Rev L & Econ* 107

dependence on primary commodity export, and slow long term growth characterised by price instability.<sup>12</sup>

### 4.3.2 Reform Challenges and Problems

Notably, the creation of the supporting and conducive environment for the liberalised market has largely been characterised by importation of programmes, Western legal rules and standards which in some instances have arguably tended to have adverse impact on the societies that have been required to embrace them, mainly because they are designed and implemented with little, if any, regard for specific needs and context of the countries concerned.<sup>13</sup> Consistent with such adverse effect is the divergent opinions as to whether or not the liberalisation programme as a whole has been beneficial to SSA economies.<sup>14</sup> One view is that the market liberalisation has had its achievements in SSA albeit to a limited extent and accordingly the recent gains have been claimed to be a result of market liberalisations in the region.<sup>15</sup> This view argues that the limited economic growth attained thus far in SSA is however largely due to scepticisms and policy choices that restrict competitiveness.<sup>16</sup>

Other scholars who subscribe to the second view have labelled the market liberalisations in SSA countries as a complete failure. They argue, inter alia, that the limited growth in SSA is due to the problems of the ‘one-size-fits all’ prescriptions of the multilateral institutions which the developing countries have

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<sup>12</sup> KJ Vandeveld, ‘Investment Liberalization and Economic Development: The Role of Bilateral Investment Treaties’ (1998) 36 *Colum J Transnat’l L* 501; and JMM Akech, ‘The African Growth and Opportunity Act: Implications for Kenya’s Trade and Development’ (2001) 33 *International Law and Politics* 651, 656

<sup>13</sup> See text to n 23 in chapter 1. See also, TA Kelley, ‘Exporting Western Law to the Developing World: The Troubling Case of Niger’ (2007) 7 *Global Jurist* (Frontiers) Article 8 < <http://www.bepress.com/gj/vol7/issu3/art8> > accessed 01/06/2010, noting that this trend ‘has the potential to create at least as much social unrest as economic policies’ and that it is wrong to maintain that poor countries must reshape their legal systems to make them compatible with Western conception of law and justice.’

<sup>14</sup> Text to n 23-26 in chapter 1

<sup>15</sup> A Arieff, MA Weiss, and VC Jones, ‘The Global Economic Crisis: Impact on Sub-Saharan Africa and Global Policy Responses’ ( Congressional Research Service Report 24 August 2009) < [www.crs.gov](http://www.crs.gov) > accessed 23/01/2010; J Stiglitz (n 5 ) 16, 80-88

<sup>16</sup> TJ Moss, V Ramachandran and MK Shah (n 9 ); and A Arieff, MA Weiss, and VC Jones (n 15) 5

pursued since the mid 1980s and early 1990s.<sup>17</sup> This view, considers the success of the East Asian countries as a result of effective state intervention during East Asia's early development.<sup>18</sup> It is accordingly argued that 'the state directed policies helped mobilize and effectively allocate resources in the calculated direction of domestic industry, while extracting high performance through incentive schemes.'<sup>19</sup> Insofar as cross-border insolvency reform is concerned, the above observations seem to point to the need for SSA countries to make informed policy choices commensurate with local circumstances and the demand for economic growth and development.

This debate is beyond the scope of this work. Nonetheless, what is crucially relevant here is twofold. First is the fact that the market liberalisation has increased the interaction between the SSA economies and the multinational enterprises through trade and foreign investment. This interaction means potentialities for cross-border insolvency which has grown as a result of globalisation. Clearly, the involvement and operations of multinational enterprises in SSA means that they will potentially have assets and creditors in several countries and in their home countries. Such situation places SSA countries in a fertile environment for the challenges of potential cross-border insolvencies. Additionally, the commercial activities of the multinational enterprises in SSA countries provide a possibility of their interaction with local entrepreneurs and creation of interdependence and possibly debtor-creditor relationships. All these add towards exposing SSA countries to the problems of cross-border insolvencies. The second is the fact that the liberalisation has contributed in constraining the policy space of SSA countries in making choices corresponding with their own needs, priorities, culture, history and political and socio-economic situations.

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<sup>17</sup> J Stiglitz (n 5) 16, 80-88; A Anghie (n 8) 259; Chossudovsky, *The Globalisation of Poverty: Impacts of IMF and World Bank Reforms* (London, Zed Books 1997) and J Hari, 'There's real hope from Haiti and it's not what you expect' *The Independent* 5/02/2010 <<http://www.independent.co.uk/opinion/commentators/johann-hari/johann-hari-theres-real-hope-from-haiti-and-its-not-what-you-expect-1889958.html>> accessed 10 February 2010

<sup>18</sup> D Katona, 'Challenging the Global Structure Through Self-Determination: An African Perspective' (1999) 14 *Am U Int'l L Rev* 1439, 1451

<sup>19</sup> D Katona (n 18) 1451, 1452 & 1453

#### 4.4 Multilateral Institutions' Role in Facilitation of Cross-Border Trade and Investment

Apart from the IMF and the World Bank's involvements in the liberalisation of SSA markets, regulatory activities of the other multilateral institutions such as the World Trade Organisation ("WTO") significantly affect SSA.<sup>20</sup> The WTO, of which a majority of its members are among the developing countries, is responsible for regulation of the multilateral trading arrangements amongst member countries. The main preoccupation is to see to it that multilateral trade is rule-based and ensures equal rights and obligations, non-discrimination and co-operation as equals of many countries regardless of their size or share in the transactions. Such responsibility is attained through negotiation and conclusion amongst members of agreements as regards regulation of particular aspects of the trading system. Since such activities affect trade and investment, they potentially have indirect implications for the policy choices available to SSA countries in cross-border insolvency endeavours.

One obligation of members is that they have to ensure conformity of their policies, laws and regulations with the WTO regime. The implication is that the domestic laws and regulations of a member state, for instance, could only be retained as long as they do not contradict the WTO regime which restricts excessive government intervention and all types of trade barriers such as protectionism policies.

The WTO regime does not provide for or directly deal with cross-border insolvency which is in many instances a direct consequence of engagement in commercial undertakings, but it is arguably presumed to have such potentials.<sup>21</sup>

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<sup>20</sup> The existing multilateral trading system traces its origin from 1947 when the General Agreement on Tariffs and Trade ("GATT") established the GATT/WTO multilateral trading system that exists today, though GATT was meant to be a provisional arrangement.

<sup>21</sup> JL Westbrook, 'A Global Solution to Multinational Default' (1999-2000) 98 *Mich L Rev* 2276, 2296, noting the leverage of WTO regime and contending further that '[i]f insolvency law were to follow intellectual property law in being tied to the GATT, it would have similar international leverage.'; JL Westbrook, 'Universal Priorities' (1998) 33 *Tex Int'l L J* 27, 35, contending that

UNCITRAL's work on insolvency undertaken within its obligation of fostering progressive harmonisation, unification and modernisation of international trade law augur well for the WTO's endeavours of facilitating trade and investment and the reverse is also true.<sup>22</sup> Indeed, UNCITRAL's undertakings aim to facilitate international trade through elimination of such obstacles as divergences arising from the laws of different states in matters relating to international trade. The WTO, as is also for UNCITRAL, is mandated to cooperate and work closely with other multilateral institutions to achieve greater coherence in global economic policy making and implementation.<sup>23</sup> Accordingly, cross-border insolvency implications abound, but only a few merit the attention of this study.

Firstly, the effectiveness of the WTO regime would potentially expect member states to comply with international insolvency standards administered by the other multilateral institutions. The potential is that a WTO member state with obstructionist domestic policies that shun the internationally accepted standards, such as the international insolvency standards, might in future run the risk of corporate flight as the very nature of the multinational enterprises is to be internationally mobile and adaptable. This effectively provides an incentive for states to have most favourable and competitive policies that are compliant with international standards as a means of attracting cross-border trade and investment. Thus, in addition to the incentives from such institutions as the IMF and World Bank, SSA countries may unsurprisingly also experience some kind

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'[b]eyond [BITs'] obligations non-discrimination on basis of citizenship [in insolvency proceedings] is a general principle that has evolved in modern international law, especially in international trade under GATT (now the WTO). Thus, at a minimum...discrimination on the basis of foreignness would be presumptively wrong.'

<sup>22</sup> See General Assembly Resolution 2205(XXI), U.N. Doc. A/RES/2205 (Dec. 17, 1966); and S Block-Lieb and TC Halliday, 'Incrementalism in Global Lawmaking' (2006-2007) 32 *Brook J Int'l L* 851, 856

<sup>23</sup> DK Mbogoro, *Global Trading Arrangements and Their Relevance to Tanzania Economic Development: Challenges and Prospects* (Friedrich Ebert Stiftung, London 1996) 17; and S Block-Lieb and TC Halliday (n 22) 857-859. Two of the eight ways through which UNCITRAL is to further the progressive harmonisation and unification of the law of international trade which is in the Resolution establishing UNCITRAL provides that UNCITRAL may proceed by '(a) Co-ordinating the work of organisations active in this field and encouraging co-operation among them; .....(g) Maintaining liaison with other United Nations organs and specialized agencies concerned with international trade.'

of ingenious pressure from the WTO and its member states for compliance with the international insolvency best practices.

Secondly, the capacity of member states (including SSA member states) to make policy choices commensurate with their circumstances is arguably circumscribed by the WTO obligations.<sup>24</sup> Such obligations could effectively be construed to accommodate insolvency and especially cross-border insolvency regulation as reflected in the existing international insolvency standards.<sup>25</sup> Consistent with this argument is that insolvency laws are known for having discriminatory measures based on protectionism and inward stance which would ordinarily affect foreign commercial interests in a cross-border insolvency scenario.<sup>26</sup> Indeed, the requirement to refrain from resorting to a wide variety of discriminatory state measures -such as bailout/state aids, tariff increases, trade defence measures, and if one were to add 'grab rule'-some of which have been used in SSA to protect local industries or public enterprises, would mean that SSA countries need to have effective insolvency system. Such a system could effectively be used to rescue a viable business in financial difficulties as opposed to protecting it through discriminatory state measures and other politically motivated initiatives.

#### **4.4.1 The Proposed Role of WTO in Financial Crisis Resolution and the Cross-Border Insolvency Implications Involved**

Some considerations that have been given on the role that WTO can play during economic crises suggest a number of measures. The suggested measures seem to have the potential to strengthen the implication of the WTO regime for cross-

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<sup>24</sup> SJ Evenett, 'The Role of the WTO During Systemic Economic Crisis' (A Background paper for Round Table 4: WTO rules at the Inaugural Conference of Thinking Ahead on International Trade (TAIT) organized by the Centre for Trade and Economic Integration 17-18 September 2009) < [www.wto.org/english/res\\_e/statis\\_e/tait\\_sept09\\_e/evenett\\_e.doc](http://www.wto.org/english/res_e/statis_e/tait_sept09_e/evenett_e.doc) > accessed 23/2/2010

<sup>25</sup> Ibid. In line with this reasoning, see also, R Parry and H Zhang, 'China's New Corporate Rescue Laws: Perspectives and Principles' (2008) 8 *JCLS* 113, 123 observing how China's insolvency law reform process 'escalated in recent years, with the requirements associated with accession to the World Trade Organization (WTO)'

<sup>26</sup> SJ Evenett (n 24)

border insolvency regulation.<sup>27</sup> The measures seek to facilitate trade and investment during crises by ensuring that member states do not resort to discriminatory state measures. One such measure proposes negotiation to be held among members and agreement to be concluded as to the best practices when implementing measures that are not directly subject to the WTO accords but have potential implications for foreign commercial interests. Another measure proposes that member states should be compelled to adopt principles of accountability, transparency, and evidence-based policymaking in any regulatory measures taken that may implicate foreign commercial interests. Among the long term measures proposed is negotiation of the WTO disciplines that would limit resort to murky protectionism. Naturally, policies that limit foreign creditors participation in local insolvency proceedings; or deny co-operation and co-ordination in cross-border insolvencies which might preserve rather than destroy going concern value,<sup>28</sup> could all amount to instances of discriminations covered by the proposed measure.

It is arguable that when SSA countries consider how to regulate cross-border insolvencies, they should necessarily take account of their obligations and key principles that characterise the multilateral trade arrangements under the WTO. Although such obligations may help SSA countries to determine their priorities, they effectively limit their scope of policy choices. The least developed countries in SSA are not, under the WTO, expected to reciprocate. Nevertheless, they are necessarily not expected to entertain domestic policies that will not be preferred by the investors from their trading partners in the WTO regime.<sup>29</sup>

#### **4.4.2 An Example of Cross-Border Insolvency Implication Arising from Activities of other Multilateral Institutions**

The UNIDROIT Cape Town Convention on International Interest in Mobile Equipment (the Convention)<sup>30</sup> potentially implicates the international character

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<sup>27</sup> Ibid

<sup>28</sup> Text to n 61 in chapter 3

<sup>29</sup> Notably such countries have already bound themselves in BITs which do not offer them such differential treatments

<sup>30</sup> It came into force on 01 March 2006

of SSA states' insolvency legislation.<sup>31</sup> As SSA countries are increasingly ratifying and implementing the Convention, the move is directly transforming their insolvency law towards the direction of universalism and in particular the priority ranking of creditors in the international context.<sup>32</sup> The Convention offers contracting states the choice of two alternative approaches as to the status of creditor's rights during the insolvency of a debtor that is a subject of a contract of sale of aircraft equipment creating or providing for an international interest.<sup>33</sup> The approaches aim at enabling creditors with interests in aircraft objects to exercise their remedies in insolvency proceedings.<sup>34</sup> This potentially accords super priority to those who engage in financing or leasing aircraft objects during insolvency proceedings compared to persons who finance or lease other types of equipment.

The first approach provides that, upon the debtor's insolvency, the insolvency administrator or the debtor must within a specified time, either cure all defaults and agree to satisfy all future obligations or allow the creditor to take possession of the aircraft. During such period the creditor may seek any interim relief available.<sup>35</sup> The second approach provides that, upon insolvency, the creditor can demand that the insolvency administrator gives notice within a prescribed time, either that it will cure all defaults and agree to satisfy all future obligations or that it will permit the creditor to take the aircraft object. For either of the

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<sup>31</sup> JL Westbrook and others, *A Global View of Business Insolvency Systems* (World Bank, Washington 2010) 264, stating that this convention provides mobile equipment 'industries with a worldwide applicable super-priority under any national insolvency law.'; KV Proskurchnko, 'Chapter 15 Cross-Border Insolvency: Is It True to Its Universalism Aspirations?' (2008) 5 *Rutgers Bus LJ* 96, 109; and SJ Roberts, J Carruth, WD Stuber, and MJ Sundehl, 'International Secured Transactions and Insolvency' (2006) 40 *Int'l L* 381, 388- 392

<sup>32</sup> SSA countries that have implemented the convention are, Angola, Burundi, Cape Verde, Ethiopia, Gabon, Kenya, Nigeria, Rwanda, Seychelles, Republic of South Africa, Togo, Tanzania, and Zimbabwe. See < <http://www.unidroit.org/english/implementation/i-2001-convention.pdf> > accessed 13 October 2010 and also < <http://www.icao.int/icao/en/leb/capetown-conv.pdf> > accessed 13 October 2010.

<sup>33</sup> It is to be noted that the US did not subscribe to any of the two approaches but chose to utilise its insolvency system which has been put to test and widely used as a model in the reform of many of insolvency systems in the world.

<sup>34</sup> DG Mayer and FL Polk, 'A Test of the Cape Town Convention: Useful Tool in Debtor Insolvencies and Defaults or Trap for the Unwary?' (2009) 2.5 *Corporate Rescue and Insolvency* 237

<sup>35</sup> UNIDROIT Cape Town Convention , Art XI (5)

approaches to be applied, it is a requirement that there should be co-operation ‘to the maximum extent possible’<sup>36</sup> between courts of the relevant contracting states.

The international interests involved must have been registered in the international registry created under the Convention and the contracting states should have made and lodged a declaration to the registry as to the alternative approach it has chosen.<sup>37</sup> Additionally, the remedies apply only where a contracting state involved is ‘the primary insolvency jurisdiction.’<sup>38</sup> And what is critically crucial is the priority of interests that the convention establishes which directly affect the contracting state’s priority ranking in insolvency proceedings. This is to the effect that a registered interest has priority over any other interest registered subsequently and over a non-registered interest.

In their respective declarations for implementation of the Convention, Tanzania and Kenya opted to apply the first approach in its entirety to all types of insolvency proceedings.<sup>39</sup> The implication is that it is now imperative to consider the ramification of the Convention and its protocol in any examination of cross-border aspects of insolvency law systems of SSA countries. One significant implication is that one must read such declarations into a SSA country’s cross-border insolvency regime. This again effectively contributes towards pulling the cross-border insolvency regime of contracting states in SSA

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<sup>36</sup> See UNIDROIT Cape Town Convention, Arts X (6) (b) and XII (2)

<sup>37</sup> UNIDROIT Cape Town Convention, Art XXX (3). As to whether or not the Convention is meant to be self –executing, credence has been given to the view that, at a minimum, the remedial provisions of the convention were intended to be self-executing. In support of the view, reference has been given to article 5(2) of the Convention which arguably provides guidance on this aspect, as it points out how the Convention should be interpreted. For details on this see, E Gewirtz, ‘The Cape Town Convention: Similar is not the Same and Says Who’ (2006/2007) *Air Finance Journal* < [www.milbank.com](http://www.milbank.com) > accessed 16/11/2009.

<sup>38</sup> Article I of the Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment defines the primary insolvency jurisdiction as ‘the contracting state in which the centre of the debtor’s main interests is situated, which for this purpose shall be deemed to be the place of the debtor’s statutory seat or, if there is none, the place where the debtor is incorporated or formed, unless proved otherwise.’

<sup>39</sup> For Declarations lodged by Tanzania and Kenya, see < <http://www.unidroit.org/english/conventions/mobile-equipment/depositaryfunction/declarations/bycountry/unitedrepublicoftanzania.htm> > and < <http://www.unidroit.org/english/conventions/mobile-equipment/depositaryfunction/declarations/bycountry/kenya.htm> > respectively accessed 12/4/2009

towards the direction of universalism. But this time, it is through harmonisation of applicable law rather than by a universal application of *lex concursus*. Such implication is at best incremental given that the convention is limited to very specific categories of mobile asset such as aircraft, railway rolling stock and space assets.

Clearly, the implementation of the Convention in SSA countries poses a potential conflict with the whole endeavour of implementing bilateral investment treaties and other international commitments which envisage realisation of the most favoured nation principle, national treatment, and fair and equitable treatment for all investors. It provides a priority ranking in insolvency proceedings to creditors whose interests against debtors in aircraft objects are registered in the international registry. An apparent challenge for SSA countries is to balance such interests with their priorities and needs, and perhaps to have an equally effective and efficient framework for dealing with creditors from all business sectors and industries in the event of insolvency proceedings.

#### **4.5 The Bilateral Investment Arrangements and their Linkage to Cross-Border Insolvency**

There is a clear nexus between the bilateral investment treaties (“BITs”) which provide for cross-border investment arrangements on the one hand and cross-border insolvency regulations on the other.<sup>40</sup> This part takes this point further by examination of principles and standards of the bilateral investment treaties as they link and implicate cross-border insolvency regulation for a host country in SSA. With the liberalisation of markets, there has been a growing number of BITs concluded by developing countries in SSA with developed countries. Quite recently, there has been an emerging pattern of cross-border investment arrangements among developing countries. This new pattern signifies the emergence of emerging economies in East Asia.<sup>41</sup>

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<sup>40</sup> Text to n 57, 58 & 59 in chapter 3

<sup>41</sup> It is interesting that there have emerged a more or less standardised format of bilateral investment treaties. As such, even the treaties concluded between SSA countries and the

Over the last few years African countries had concluded a total of 11 new bilateral investment treaties. They were party to 27% of all BITs in the world by 2007 while in 2006 alone they concluded 21 new agreements.<sup>42</sup> An interesting development is the new interest of the US in SSA as reflected in the conclusion of the bilateral investment agreements between the US and several SSA countries and regional groupings.<sup>43</sup> By the end of 2008 there were treaties covering investment and trade concluded by the US with COMESA, WAEMU, EAC, Mozambique, Rwanda, Ghana, Mauritius, and Nigeria.<sup>44</sup>

While European countries remain the dominant contracting partners in the majority of the BITs concluded by SSA countries, the emergence of China and other countries from Asia such as India, Malaysia and Indonesia is noteworthy.<sup>45</sup> China alone accounts for a large share of the ‘South-South’<sup>46</sup> agreements. In fact, about 60% of the Chinese BITs concluded from 2002 to 2007 were with other developing countries, mainly from SSA. Indeed, 8 of the 16 BITs China signed from 2003 to 2007 were concluded with SSA countries, namely Benin, Djibouti, Equatorial Guinea, Guinea, Madagascar, Namibia, Seychelles, and Uganda.<sup>47</sup> The new trend of ‘treatification’ is one that combines trade, and investment

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emerging markets have tended to be a replica of those concluded with developed countries. See generally, JW Salacuse, *The Law of Investment Treaties* (Oxford, OUP 2010)

<sup>42</sup> M Malik, ‘Recent Developments in Regional and Bilateral Investment Treaties’ (A Background paper for the 2<sup>nd</sup> Annual Forum for Developing Country Investment Negotiators, Marrakech, Morocco 2-4 November 2008)[1]-[5]; UNCTAD, *World Investment Report 2008: Transnational Corporations and Infrastructure Challenge* (United Nations, New York 2008) 15-17 and UNCTAD, *Economic Development in Africa Report 2009: Strengthening Regional Economic Integration for Africa* (United Nations, New York 2009)

<sup>43</sup> See UNCTAD, *Economic development in Africa Report 2009* (n 42) 50

<sup>44</sup> UNCTAD, *Economic Development in Africa Report 2009* (n 42) 50

<sup>45</sup> The leading European countries in concluding such treaties are the UK, Germany, Switzerland, Italy, France, Netherland, Belgium and Luxembourg.

<sup>46</sup> South-South is a phrase coined to describe co-operation between developing countries otherwise known as countries of the global South. See UNCTAD, *South-South Cooperation in International Investment Arrangements* (UN, New York 2005) 1-48; and Marrakech Declaration of South-South Co-operation December 2003 < [www.g77.org/marrakech/Marrakech-Declaration.html](http://www.g77.org/marrakech/Marrakech-Declaration.html) > accessed 5 August 2011

<sup>47</sup> UNCTAD, *World Investment Report 2008* (n 42) 15 and 34; M Malik (n 42)

liberalisation whilst also involving SSA regional groups as contracting partners instead of individual SSA countries.<sup>48</sup>

There are various reasons that have been attributed to the surge in bilateral investment treaties starting from the 1990s. While the growth of the use of such agreements reflects both trade liberalisation and in particular co-operation with preferred partners on 'behind the border policies',<sup>49</sup> the impetus behind the expansion of these agreements rests on the desire of multinational enterprises to invest safely and securely in developing countries and the need to create a stable and predictable international legal framework to facilitate and protect the cross-border trade and investments.<sup>50</sup> Such desire reflects the absence of multilateral investment agreement to regulate foreign investments which meant that international regulation of foreign investment was a subject of great uncertainty and controversy.<sup>51</sup> Accordingly, there was no effective mechanism for investors to pursue their claims against host countries that might have injured or appropriated their investments or refused to respect their contractual obligations. This was particularly important given that SSA countries are not only believed to have weak institutional and legal support for property rights and contract enforcement but also had a record of appropriating and nationalising foreign investments.<sup>52</sup>

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<sup>48</sup> UNCTAD, *World Investment Report 2008*(n 42)17; UNCTAD, *Economic Development in Africa Report 2009* (n 42) 54; M Malik (n 42) 2. The on-going negotiations for investment and trade agreements between Africa's regional trade agreements and the EU undertaken in the context of EPAs are illustrative, so is the Trade and Investment Development and Co-operation Agreement ("TIDCA") between the US and the South Africa Custom Union ("SACU") signed in 16 July 2008 and several Trade and Investment Framework Agreements ("TIFAs") that the US has signed by the end of 2008 with RTAs in SSA such as EAC, COMESA, and WAEMU.

<sup>49</sup> This is a terminology used to refer to facilitation measures regarding trade and investment competitiveness that a country might adopt in guiding its cross-border co-operation in trade and investment. They '...include regulations and institutions overseeing local and foreign investment, capital markets, customs, taxation, labor, private ownership, legal recourse, and so on' See, World Bank, 'Regional Challenges' < <http://go.worldbank.org/E96ILD2Y0> > accessed 17 August 2011

<sup>50</sup> JW Salacuse and NP Sullivan, 'Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain' (2005) 46 *Harv Int'l LJ* 67, 75. It is the same impetus that exerts pressures for convergence of development of effective cross-border law systems across the globe and in developing countries in particular in order to create predictable and efficient machinery that seeks to maximise values of the estates of an insolvent debtor.

<sup>51</sup> V Mosoti (n 10) 95, 113

<sup>52</sup> A Akinsanya, 'International Protection of Direct Foreign Investment in the Third World' (1987) 36 *ICLQ* 58, 58-77; M Sornarajah, 'Protection of Foreign Investment in the Asian Pacific

Therefore individual countries (especially the developed ones) negotiated and concluded BITs with specific developing countries in order to protect their investors in those countries. Such protection is by firstly, subjecting host countries to set international legal rules that they had to observe in dealing with investors; and secondly by providing investors themselves the right to bring a claim in international arbitration against host country governments which violated those rules. In general terms, it is the intention of a BIT to restrain host country action against the interests of investors and thus providing assurance to the investors regarding their property rights. The conventional wisdom is that BITs help to remedy local institutional deficiencies, primarily in developing countries where fear of expropriation, among other things, might otherwise deter foreign investment.<sup>53</sup>

As far as SSA countries are concerned, the argument is that FDI plays an important role in fostering economic growth and development of developing countries. It contributes to a rise in domestic investment as well as skills, technology transfers and capacity. The impetus of SSA countries therefore derives from the desire to overcome the perception that they are an insecure destination for foreign capital.<sup>54</sup>

It has been argued that the desperation of SSA countries ‘for FDI overwhelmingly precludes them from making thorough analysis of economic, political, and social or other gains that may come from such inflows, and the laws and treaty they need to realise such gains.’<sup>55</sup> Such observation owes from the nature of the obligations that the host countries take in relation to protection and treatment of foreign investments which constrain the host countries’

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Economic Co-operation Region’ (2005) 29 *J World Trade* 105, 126; and V Mosoti (n 10) 113-114

<sup>53</sup> See n 11 above

<sup>54</sup> See M Hallward-Driemeier, ‘Do Bilateral Investment Treaties Attract FDI? Only a Bit...and they could Bite’ (2003) World Bank Policy Research Working Paper No 3121 <<http://ssrn.com/abstract=636541>> accessed 15 April 2011 [2]

<sup>55</sup> V Mosoti (n 10) 95, 99

sovereignty and the ability to regulate. In reality the bargain that is reflected in these treaties is such that the host countries are not expected to export capital to the developed country.<sup>56</sup> Rather, they are expected to live up to the promise of protection of the foreign capital in return for the prospect of more capital in future.<sup>57</sup> These agreements therefore seek to establish binding rights and responsibilities for the contracting parties with regard to co-operation, trade access, and admission, promotion and protection of foreign investment.<sup>58</sup>

#### **4.5.1 The Implications of the Bilateral Investment Treaties for Cross-Border Insolvency Regulation**

The surge in the growth of BITs involving SSA countries underlies the growing global importance attached to, and the role states play in competitively affording, a reliable legal environment to attract foreign investment and promote commercial activities in general.<sup>59</sup> It is in this context that it becomes important to consider the involvement of SSA in facilitation of capital flow and how such involvement may require or influence cross-border insolvency regulation in SSA.

As SSA countries are increasingly becoming interdependent and connected to the global market through the facilitation and thus growth of capital flow, they face the challenge of reflecting in their insolvency regimes, the demands of the global market, which consists of various players from different jurisdictions and addressing financial fluctuations that are inherent in market economies.<sup>60</sup> The cross-border investment arrangements involving SSA,<sup>61</sup> thus, imply a challenge

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<sup>56</sup> JW Salacuse, 'The Treatification of International Investment Law' (2007) 13 *Law & Bus Rev Am* 155, 157 & 158; and JW Salacuse and NP Sullivan (n 50) 78

<sup>57</sup> *Ibid*

<sup>58</sup> UNCTAD, *World Investment Report 2008* (n 42) 16

<sup>59</sup> AT Guzman, 'Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties' (1997-1998) 38 *Va J Int'l L* 640, 652

<sup>60</sup> J Stiglitz (n 5) 120; and JW Salacuse and NP Sullivan (n 50) 115; JW Salacuse (n 56) 165 stating that 'as BITs proliferate, more and more countries incorporate BITs into their domestic legal systems. Thus, there is scope for arguing that BITs manifest certain concepts on the treatment of investors and investments that represent general principles of law'; and B Kishoiyian, 'The Utility of Bilateral Investment Treaties in the Formulation of Customary International Law' (1994) 14 *Nw J Int'l L & Bus* 327, 329

<sup>61</sup> V Mosoti (10); M Malik (n 32); UNCTAD, *World Investment Report 2008* (n 42) 15 and 34; JW Salacuse (n 56) 163, discussing the consequences and challenges of treatification of

to the SSA host countries to align their insolvency regimes and in particular cross-border insolvency law system with their entire legal environment for facilitation of investment, as well as standards and principles envisaged in such arrangements of which SSA countries are contracting parties.<sup>62</sup> Addressing such a challenge in a manner that is legitimately expected by the investors is critically important in enabling such countries to honour their treaty obligations even during cross-border insolvencies. This may perhaps also entail adopting ‘best practices’ common to most of its trade and investment partners’ insolvency law systems.<sup>63</sup> In so doing, such countries will avoid any potential arbitration claim for failure to properly regulate cross-border insolvencies.<sup>64</sup> Contemplating the risk a host country may find itself in for failure to meet treaty commitments in the event of an insolvency situation, Salacuse argues that:

The issue.....is an interesting and potentially important one. As financial crisis strike[s] countries, they will seek to deal with [insolvency issues], often without regard to the treaty commitments they have made. One can imagine a variety of situations in which a governmental measure or failure to act adversely affects the rights of an investor or creditor, leading that person to claim that his or her investment was expropriate[d], denied full protection and security, or fair and equitable treatment. Other treaty provisions may also be relevant.<sup>65</sup>

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investment law contends that ‘.....unlike the situation that prevailed thirty years ago, government officials, international executives, lawyers, and financiers increasingly must take investment treaties into account in planning, negotiating, undertaking, and managing international investment transactions.....[T]he process of treatification of international investment law has also resulted in the creation of an emerging global regime for international investment..... [that] ...constrains and regularize the behaviour [of] participants, affect which issues among protagonists move on and off the agendas, determine which activities are legitimized or condemned, and influence whether, when, and how conflict are resolved. Taken together the network of international investment treaties do all of the things.’

<sup>62</sup> Text to n 57-60 in chapter 3. It is to be noted that these arrangements as represented by bilateral investment treaties have been described by analysts and scholars as having the effect of constraining the sovereignty of a host country in its ability to take legislative and administrative action to advance and protect national interests. See JW Salacuse (n 56) 155, 158 & 163. For a comprehensive list of bilateral investment treaties involving SSA countries visit < <http://www.unctadxi.org/templates/docsearch.aspx?id=779> > accessed 22/02/2010

<sup>63</sup> Ibid

<sup>64</sup> This will restrict the ability of an investor to complain against discriminatory treatment in insolvency proceedings involving his investment, his debtors and his creditors. See O Chung, ‘The Lopsided International Investment Law Regime and Its Effect on the Future of Investor-State Arbitration’ (2006-2007) 47 *Va J Int’l L* 953, 960, arguing that the bilateral ‘[i]nvestment treaties have become an open invitation to unhappy investors, tempted to complain that a financial and business failure was due to improper regulation, misguided macroeconomic policy or discriminatory treatment by the host government...’

<sup>65</sup> Statement by Professor JW Salacuse (Personal email correspondence 27 May 2010)

Much as historical, socio-economic, political and cultural norms and needs of a given country have significant influence in shaping the country's insolvency law and practice,<sup>66</sup> the normative nature and breadth of the matters covered in the BITs,<sup>67</sup> effectively circumscribe the policy choice space of the host countries in SSA for cross-border insolvency regulation.

#### **4.5.2 Linking Tools between Bilateral Investment Treaties and Cross-Border Insolvency Regulation**

The linkage between the cross-border investment arrangements and the host country's cross-border insolvency regime is clearly apparent in FDIs expected to flow from the home country to the host country. The capital inflows to a host country may thus require an insolvency legal regime that is in harmony with the policy objectives of the prevailing arrangements.<sup>68</sup> A regime that will take into account the foreign element that is apparent in such investments and the possibility of such investments being one among many operations of the home country entity scattered in SSA countries and the rest of the world, but connected to one another.<sup>69</sup> It is common knowledge that the growth of international business and investment tends to enhance the potential for occurrence of cross-border insolvency and its associated challenges.<sup>70</sup>

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<sup>66</sup> N Martin 'The Role of History and Culture in Developing Bankruptcy and Insolvency Systems: The Perils of Legal Transplantation' (2005) 28 *BC Int'l & Comp L Rev* 1, 4; F Tung (n 6) 561; and L Hoffmann, 'Cross-Border Insolvency- The 1996 Denning Lecture' < [www.filewiz.co.uk/bacfi/1996\\_denning\\_lecture.pdf](http://www.filewiz.co.uk/bacfi/1996_denning_lecture.pdf) > accessed 12 March 2009. Apparently, different policy choices that characterise a given insolvency system are a reflection of such country's norms and inclinations.

<sup>67</sup> Despite the diversity in the nature of the bilateral investment treaties, there is consensus in the existing scholarship that the bilateral investment treaties underline some common features that potentially contribute towards development of international investment law. See JW Salacuse and NP Sullivan (n 50), noting how negotiation of bilateral investment Treaties has progressively resulted into standard BIT, aiming at according higher standard of protection and guarantee for the investments of the capital exporting country, from which countries are reluctant to depart especially with regard to objectives, and major provisions. See also V Mosoti (n 10) 115

<sup>68</sup> See n 60-62 above

<sup>69</sup> I Mevorach, *Insolvency within Multinational Enterprise Groups* (OUP, Oxford 2009)

<sup>70</sup> See R Mason, 'Hotspot and Other Tasty Morsels in International Insolvency' (1995) 3 *Insolv LJ* 149, contending that '[a]s international trade and investment increases, so does the likelihood of there being insolvent corporations with cross-border links. These connections with other jurisdictions often raise problems.....An obvious example is in the repatriation of foreign assets, while another may be in the processing of claims and distribution of assets where local creditors are joined by foreign claimants. What policies and principles should a particular jurisdiction apply in resolving issues [relating to the] foreign elements?'

Studies have been undertaken on whether the strength of the rights enshrined in a BIT would provide adverse incentives to potential investors and whether they have actual impact on enhancing capital inflows to a host country. Divergent opinions and conclusions have so far been given.<sup>71</sup> However, the dominant view is seemingly that the potential impact is high where the BITs are complemented by liberalised foreign investment regime with reasonably strong domestic institutions. Despite the fierce debate among scholars on whether or not the BITs have the impact of attracting foreign investors and FDI into a host country,<sup>72</sup> it seems that the dominant scholarship, including the first rigorous quantitative study undertaken in the recent past,<sup>73</sup> suggests that a higher number of bilateral investment treaties raise the FDI that flows to a developing host country.

The connection between the BITs and cross-border insolvencies is also evident in the standards and principles contained in the treaties and in the entire commitment undertaken by the host countries to ensure favourable environment for foreign investments.<sup>74</sup> As it will be shown in the subsequent discussion, these standards and principles, which include the fair and equitable principle, national treatment, most favoured national treatment and right to repatriation of funds, envision those that characterise the cross-border insolvency landscape. They therefore stand a better chance, in the course of time, to potentially

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<sup>71</sup> M Hallward-Driemeier (n 54) 18-23 (noting that although her findings suggest that BITs do not serve to attract additional FDI, it is possible that this is due to its being obscured by other changes that are occurring between the two signatories’); JW Salacuse and NP Sullivan (n 50) 111, concluding that ‘there is strong evidence to show that [bilateral investment treaties] both protect and promote FDI in developing countries.....although the effect...is...realised slowly.’); and KJ Vandeveld (n 12) 504 noting that BIT have had only a limited impact on economic liberalisation.

<sup>72</sup> KP Sauvart, and LE Sachs (eds), *The Effect of Treaties on Foreign Direct Investment Treaties, Double Taxation Treaties, and Investment Flows* (OUP, Oxford 2009)

<sup>73</sup> E Neumayer and L Spess, ‘Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing countries?’ (2005) 33 *World Development* 1567-1585. For the updated version of this paper see <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=616242](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=616242)> , or <[http://eprints.lse.ac.uk/627/1/World\\_Dev\\_\(BITs\).pdf](http://eprints.lse.ac.uk/627/1/World_Dev_(BITs).pdf)> accessed 22/3/2009

<sup>74</sup> See text to part 4.5.2.1 through 4.5.2.7 below where the standards and principles are discussed.

influence not only policy considerations that would shape cross-border insolvency regulation in the host countries but also their entire legal systems.<sup>75</sup>

The most significant argument is that BITs embody catch-all clauses characterised by general principles of law. They are, arguably, intended to protect foreign investors in any circumstances at the expense of the host countries. It is therefore not surprising that BITs have traditionally not been according explicit and specific reference to insolvency or cross-border insolvency as it is also the case for many other relevant aspects to foreign investors and investments. However, this does not mean that BITs are not meant to cover matters related to regulation of insolvencies as they affect foreign investors.<sup>76</sup> Perhaps the only exception, which is arguably consistent with the surge in the cases of insolvencies in recent years, is the new emergent US treaty practices which, albeit briefly and in general terms, provide explicitly for treatment of insolvency aspects as they relate to transfer of funds and profits and repatriation of capital of an investor from the host country.<sup>77</sup>

The failure to explicitly and comprehensively provide for insolvency involving a foreign investor in a detailed manner could be associated with the recognition of difficulties involved in negotiating such insolvency issues and diversities available across jurisdictions with regard to regulation of insolvency. The other plausible explanation is the consideration that the BITs embody catch-all clauses and general principles of law constituting sources of international insolvency

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<sup>75</sup> JW Salacuse (n 56) 165

<sup>76</sup> JL Westbrook, 'Universal Priorities'(n 21) 35; and JW Salacuse (n 56) 165

<sup>77</sup> An example of such emergent practice can be afforded by Treaty between the Government of the United States of America and the Government of the Republic of Rwanda Concerning the Encouragement and Reciprocal Protection of Investment 2008 accessed < [http://www.bilaterals.org/IMG/pdf/US-Rwanda\\_BIT.pdf](http://www.bilaterals.org/IMG/pdf/US-Rwanda_BIT.pdf) > , also at < <http://www.unctadxi.org/templates/docsearch.aspx?id=779> > accessed 22/02/2010. The relevant provision reads as follow. Art 7 (1) (b) provides that 'Each Party shall permit all transfers relating to a covered investment to be made freely and without delay into and out of its territory. Such transfers include ( a).....(b) .....proceeds from the sale of all or any part of the covered investment or from the partial or complete liquidation of the covered investment...' Art (4) (a) further provides that ' Notwithstanding paragraphs 1 through 3,a party may prevent a transfer through the equitable, non-discriminatory, and good faith application of its laws relating to: (a) bankruptcy, insolvency, or the protection of the rights of creditors...'

regulatory frameworks for contracting parties.<sup>78</sup> The new trend of revisiting and renegotiating the BITs in order to reflect new concerns seem to focus on transparency, environmental and social issues and the host country's right to regulate. It is yet to be seen whether this trend of renegotiating the BIT among contracting states might result in particularity in the way cross-border insolvency is treated.<sup>79</sup>

The examination of the standards and principles contained in the BITs' clauses below demonstrates the extent to which SSA countries have bound themselves in obligations that potentially affect and shape their policy choices as to cross-border insolvency regulation.<sup>80</sup>

#### **4.5.2.1 Scope and Definition of 'Investment' and 'Investor'**

With a view to ensuring comprehensive protection and promoting investment, the BITs that SSA countries have concluded with developed countries have, albeit to a varying degree, adopted a wide and open ended meaning of a foreign investment. A typical scope of what amount to a foreign investment includes foreign direct investment, financial and other portfolio investments. Among the commonly mentioned examples of such investments include movable and immovable property, shares of companies, and 'other kind of interests in

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<sup>78</sup> JW Salacuse (n 56) 165, stating that the 'notion that principles embodied in BITs could represent general principles of law and thus constitute a source of international law has not received extensive consideration by scholars. But as BITs proliferate, more and more countries incorporate BITs into their domestic legal systems. Thus, there is scope for arguing that BITs manifest certain concepts on the treatment of investors and investments [in all aspects including in insolvency] that represent general principles of law.'; JW Salacuse, 'Direct Foreign Investment and the Law in Developing Countries' (2000) 15 *ICSID Rev – Foreign Inv LJ* 382, 382-400; and FA Mann, 'British Treaties for the Promotion and Protection of Investments' (1981) 52 *Brit YB Int'l L* 241, 249

<sup>79</sup> UNCTAD, *World Investment Report 2008* (n 42)15 and 34; and JL Westbrook, 'A Global Solution to Multinational Enterprise Default' (n 21) 2296

<sup>80</sup> See JW Salacuse (n 56) 163 contending that '.....unlike the situation that prevailed thirty years ago, government officials, international executives, lawyers, and financiers increasingly must take investment treaties into account in planning, negotiating, undertaking, and managing international investment transactions.

....the process of treatification of international investment law has also resulted in the creation of [international] regime of international investment [which] ...constrain and regularize the behaviour participants, affect which issues among protagonists move on and off the agendas, determine which activities are legitimized or condemned, and influence whether, when, and how conflicts are resolved.'

companies' and 'claims to money which have been used to create an economic value or claims to any performance having an economic value.'<sup>81</sup> The BIT between Germany and Tanzania includes copyrights, industrial property rights, technical process, trade names and goodwill including 'business concessions under public law, concessions to search for, extract or exploit natural resources'. It provides further that 'any alteration of the form in which assets are invested shall not affect their classification as investment.'<sup>82</sup>

This kind of broad definition and coverage of investment is similarly found in other BITs to which SSA countries are party. The broad definition for a foreign investment has been justified by the nature and character of investment. It is argued that an investment has potentials of taking a wide variety of forms that constantly evolve in response to the creativity of investors and the rapidly changing world of international finance. They include tangible and intangible assets, property, and rights.<sup>83</sup> Indeed, the scope of such definition seems to be broad enough to include, the interests of lenders, such as international financiers to multinational enterprises and other investors' undertaking in a host country. The implication of this is that it not only broadens the scope within which cross-border insolvencies may occur, but also widens the obligations of the host country in insolvency proceedings that involve a foreign investment.<sup>84</sup>

Given that SSA countries are the hosts, hosting such investments exposes themselves to involvement in contentious incidences of cross-border insolvency in either of the following scenarios. Firstly, in the event of insolvency of a foreign investor covered by a BIT, there is potential for having a great deal of claims from foreign countries that would need to be dealt with along with local claimants. Consistent with this is the fact that the investment may be a subsidiary of a multinational enterprise in a home country with other subsidiaries in other

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<sup>81</sup> For instance Bilateral Investment Treaties between SSA countries and Germany available at < <http://www.unctadxi.org/templates/docsearch.aspx?id=779> > accessed 22 February 2010

<sup>82</sup> BIT between Germany and the United Republic of Tanzania, Art 8

<sup>83</sup> JW Salacuse and NP Sullivan (n 50 ) 80

<sup>84</sup> Ibid

countries including in other SSA countries.<sup>85</sup> Thus, issues regarding co-operation and co-ordination which could preserve rather than destroy going concern value abound.<sup>86</sup> Secondly, the foreign investor may have claims in a domestic investment undergoing insolvency proceedings which raise questions of their treatments and ranking of their claims in such proceedings. This scenario raises questions of the fairness and effectiveness of the domestic insolvency law which ought to be dealt with in a manner that is consistent with the relevant BIT.

The broad definition of investment may play a role in exposing SSA to ‘hot money’ and a potential risk for financial crisis and hence insolvency. The risk for the crisis requires a country to have an effective insolvency laws system that is capable of acting as a crisis resolution tool whilst at the same time preventing closure of a business which would otherwise be rescued. It is to be noted that ‘hot money’ played a key role in the occurrence of the East Asia financial crisis of 1990s which led to international attention for reform of insolvency systems in this region.<sup>87</sup>

#### **4.5.2.2 Standards of Treatment of Foreign Investors and Foreign Investments**

The BITs that developing countries in SSA have concluded mostly with developed countries specify standards for treatments of foreign investors and foreign investment from a home country in a host country. These standards are fair and equitable treatment, national treatment, and most-favoured-nation (“MFN”) treatment to be discussed in this section. Some BITs combine such standards in one article as is the case for the treaties concluded between the Netherlands and some of SSA countries.

In addition to the requirement for ensuring fair and equitable treatment of the investment of investors of a contracting party, such article would normally further provide that ‘[e]ach contracting party shall accord to such investments

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<sup>85</sup> I Mevorach (n 69)

<sup>86</sup> See n 28 above

<sup>87</sup> T Ginsburg (n 11) 107. See also text to n 120 below

treatment which in any case shall not be less favourable than that which it accords to investments of its own investors or to investments of investors of any third state, whichever is more favourable to the investor concerned.’<sup>88</sup> The requirement to accord such investments full physical security and protection is an additional aspect that characterises such provisions. Furthermore, other BITs would stipulate that parties must extend fair and equitable treatment ‘in accordance with the principle of international law.’<sup>89</sup> The significance of these standards as well as the obligations they entail to the host country is that an investor is entitled to the best treatment accorded by a host country to its or other countries’ investors, and at a minimum, to be treated fairly and equitably- free from unreasonable demands or actions of a host government.

Arguably, the extension of these standards to insolvency situations would require a host country to deal with an insolvency involving a foreign investor in a manner that is not inconsistent with the provisions of the relevant BIT between the home country of the investor and the host country.<sup>90</sup> That is to say, the treatment of the foreign investor’s investment in the insolvency proceedings would be expected to be fair and equitable, and under no circumstances should the treatments be less favourable than those accorded to the host country’s or third country’s investor.<sup>91</sup>

The import of the national treatment standard is that foreign investors are entitled to enjoy the same rights and privileges as national local investors. This means that domestic business entities and foreign entities (as well as any form of foreign investment) from a home country in a host country should be treated in the same manner in insolvency proceedings.<sup>92</sup>

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<sup>88</sup> Agreement on Encouragement of Investments Between the United Republic of Tanzania and the Kingdom of Netherland 2001, Art 3(1) & (2) < <http://www.unctadxi.org/templates/docsearch.aspx?id=779> > accessed 22 February 2010. Similar provisions are found in the treaties concluded by SSA with other developed countries.

<sup>89</sup> See Agreement on the Reciprocal Protection and Promotion of Investments Between Uganda and France 2002, Art 3 < <http://www.unctadxi.org/templetes/docsearch/asp?id=779> > accessed 22/02/2010.

<sup>90</sup> JL Westbrook, ‘Universal Priorities’(n 21) 35; and JW Salacuse (n 56) 165

<sup>91</sup> Ibid

<sup>92</sup> Ibid

It is noteworthy that an insolvent domestic entity may have a far greater chance of maximisation of the values of its assets and an increased chance for rescue where most, if not all, of its interested parties are within the host jurisdiction. On the contrary, an insolvent foreign entity in a host jurisdiction may not be able to effectively maximise the value of its assets and increase the chance for rescue because of failure of co-ordination and co-operation with other jurisdictions where the entity may have assets and creditors as well. This situation may be construed as running counter to the requirement of according not only fair and equitable treatment but also national treatment.<sup>93</sup>

Implementation of the MFN treatment standard would mean that a host country may not, in a cross-border insolvency context, treat an investor or investment from a home country partner state any less favourably than it treats investors or investment from any third country. Consequently, this principle would allow the foreign investor to take advantage of best treatment provided to another investor from a third country under a different arrangement, such as a cross-border insolvency regime operative within a regional integration framework, to which the host country and the third country are members. However, the BITs concluded between the UK and Tanzania as well as the UK and Kenya exclude the possibility of an investor in a host country claiming advantage that an investor from a third country gets on basis of being a member of a regional arrangement.<sup>94</sup> Unlike the UK-Kenya BIT, the UK-Tanzania BIT also allows Tanzania to temporarily implement special domestic policies designed to provide

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<sup>93</sup> RE Borai, 'Cross-Border Corporate Insolvency: A Modest Proposal for An Enhanced International

Approach' (PhD Thesis, Queen Mary College, University of London 2006) 244 & 255

<sup>94</sup> Agreement between the Government of the UK and the Government of the United Republic of Tanzania for promotion and protection of Investments, Art 7 < <http://www.unctadxi.org/templates/docsearch.aspx?id=779> > accessed 22 February 2010. The article provides that the MFN standard will not apply in relation to the benefit of any treatment, preference or privilege resulting from (a) any existing or future custom union or similar international agreement to which either of the contracting parties is or may become a party, or (b) any international agreement or arrangement relating wholly or mainly to taxation or any domestic legislation relating wholly mainly to taxation.'

incentive for growth of local industries.<sup>95</sup> Although these kinds of stipulations could be argued as providing room to shape SSA countries' policies and law in a manner that would take into account the local needs and developments, the way they are formulated tends in practice to restrict the realisation of the objective of such policies. This is because the host country, in pursuing such policies, is still required to ensure that the application of such policies is temporary and does not affect the foreign investment and companies.<sup>96</sup>

The significance of the requirement of fair and equitable treatment in the regulation of foreign investment from a home country in a host country may also suggest that all parties, whether foreign or domestic, having interests with or in the foreign investor/investment should be treated fairly and equally in local insolvency proceedings.<sup>97</sup> Given the scope of what constitutes an investment, these parties may include international lenders, creditors and a parent company to which the foreign investor or investment is affiliated. As far as foreign investors are concerned, this is critical in inducing greater confidence in creditors when extending credit or rescheduling their claims.

The ability of international financiers to commence or fairly and equitably be involved in insolvency proceedings against the foreign investor in a host country reduces the risk of lending, and thereby increases the availability of credit and making of investment more generally.<sup>98</sup> This is crucially significant in that foreign investors from advanced countries tend to have connections with international financiers from which they obtain credit. The issues that arise in extending the standards to cross-border insolvency regulation show how the bilateral investment treaties challenge and indeed shape the position of SSA

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<sup>95</sup> Ibid, Art 4(3) provides that '[t]emporary special incentives granted by one contracting party only to its nationals and companies in order to stimulate the creation of local industries are considered compatible with this Article [on national treatment and most-favoured- nation] provided they do not significantly affect the investment and activities of nationals and companies of the other contracting party in connection with an investment. Each contracting party shall use its best endeavour to eliminate such incentives.' In fact, it is inconceivable that a developing country may have and implement domestic development policies that are not seen to be at odd with foreign investment.

<sup>96</sup> Ibid

<sup>97</sup> JL Westbrook, 'Universal Priorities' (n 21) 35

<sup>98</sup> IMF (n 3) 5

countries' cross-border insolvency law and practice. Thus, apart from the cross-border insolvency implications of the bilateral investment treaties for the host countries,<sup>99</sup> it seems also true that the complementarities nature of the treaties pull the host countries in SSA towards shaping their insolvency systems in a manner that would foster the objectives of the treaties.<sup>100</sup>

The import of these standards therefore is to restrict a host country in SSA from engaging in a cross-border insolvency regulation and practices which are unfair and discriminatory to foreign investors and the interested parties thereto, and which also counteract the mission of promoting and protecting foreign investments in the host country.<sup>101</sup> In view of the BITs, cross-border insolvency regulation and practice of the host country should necessarily recognise the international nature of the investments from the home country and the possibility of such investments having global interests that need to be taken into account in dealing with it in insolvency proceedings.

Consistent with the scope of application of the fair and equitable treatment standard in insolvency proceedings, is its broad interpretation which renders its applicability not limited to conduct attributable to the host country aimed at undermining the foreign investor.<sup>102</sup> Rather, it extends to placing emphasis on the significance of protecting the investor's legitimate expectations with regard to maintenance of a stable and predictable legal and business framework.<sup>103</sup>

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<sup>99</sup> RE Borai (n 93) 240-250

<sup>100</sup> V Mosoti, (n 10) 121

<sup>101</sup> JL Westbrook, 'Universal Priorities' (n 21) 35; and M Hallward-Driemeier (n 54) 7 stating that 'the rights given to foreign investors [under the BITs] expose policy makers to potentially large scale liabilities and curtail the feasibility of different reform options.'

<sup>102</sup> See UNCTAD, *World Investment Report 2008* (n 42) 166; and, JW Salacuse (n 41) 193-194. In *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, the tribunal concluded that a unilateral lowering of tariffs by the regulator and a prohibition to pursue lawsuits and enforce judgements rendered against debtors constituted an illegitimate campaign against the foreign investor amounting to a violation of the fair and equitable treatment standard, ICSID Case No. ARB/97/3, Award of 20 August 2007 at para. 7.4.39

<sup>103</sup> UNCTAD, *World Investment Report 2008* (n 32) 166 and P Muchlinski, 'Caveat Investor? The Relevance of the Conduct of Investor under the Fair and Equitable Treatment Standard' (2006) 55 *ICLQ* 527, 530-531 ; *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8 (Lithuania/Norway BIT), Award of 11 September 2007; and *PSEG Global et al. v. Republic of Turkey*, ICSID Case No. ARB/02/5 (Turkey/United States BIT), Award of 19 January 2007 at para. 252-253

Indeed, 'the application of the standard is increasingly covering a wider range of governmental administrative actions and judicial or other national dispute settlement process.'<sup>104</sup> Its interpretation weighs heavily against the host states' inherent power to regulate economic conduct within its borders.<sup>105</sup> Notably, as it is the case with fair and equitable treatment, predictability, certainty and transparency are among key principles of an effective insolvency law system.

#### **4.5.2.3 Encouraging and Creating a Favourable Environment for Foreign Investments**

Another important feature of the BITs which SSA countries have concluded thus far, envisages a requirement on the part of SSA countries to 'encourage and create favourable conditions for investors.'<sup>106</sup> Indeed, this is the overriding policy governing the BITs which is clearly reflected in the titling and affirmations of these treaties, though it is not surprising to find an explicit provision in that respect. Equally important in this context, is the requirement to accord full protection and security to such investments. The import of such provision is meant to cover the welfare of investment, even beyond its establishment.<sup>107</sup> The link between this requirement and the host countries' legal environment is reflected in the special policies and laws enacted by most SSA countries to support the promotion and protection of foreign investment. To a significant

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<sup>104</sup> P Muchlinski (n 103)528. See also UNCTAD, *World Investment Report 2008* (n 42) 163. It is worthwhile to note that the standard of fair and equitable treatment, which is a prominent feature of the Washington Consensus policies, has been also clearly spelt out in Goal 8 of the Millennium and Development Goals 2000 and the international insolvency standard benchmarks. Over the years, the standard has attracted a very wide interpretation. In *CMS Gas Transmission Co. v Argentina Republic*, ICSID (World Bank) Case No.ARB/01/8 Award of Tribunal 274 (May 12, 2005) < [www.worldbank.org/icsid/cases/cms\\_Award.pdf](http://www.worldbank.org/icsid/cases/cms_Award.pdf) > cited in O Chung (n 54)960, the standard was interpreted as 'requiring a stable legal and business environment.' It was further held in relation to this standard that: 'The foreign investor expects the host state to act in a consistent manner free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know before hand any and all rules and regulations that will govern its investment, as well as the goals of the relevant policies or directives, to be able to plan its investment...'

<sup>105</sup> See n 104 above

<sup>106</sup> A typical example of this formulation is evident in the BITs between the UK and some of the SSA Countries available at < <http://www.unctadxi.org/templates/docsearch.aspx?id=779> > accessed 22/02/2010. See also JW Salacuse (n 41)193-194

<sup>107</sup> JW Salacuse and NP Sullivan (n 50) 91; and UNCTAD, *World Investment Report 2008*(n 42) 162

extent, such laws have tended to incorporate the standards contained in the treaties. Therefore, by concluding a BIT, a host country is also taken not only to have restricted its ability to change the policies and laws that are favourable to foreign investment, but it is also under an obligation to improve and maintain a conducive environment for foreign investment.<sup>108</sup> However, apart from the responsibility of the host countries to improve the overall framework for investment, there is an apparent lack of clear and specific measures in most of the BITs on improving the overall policy framework for foreign investment.<sup>109</sup>

From a cross-border insolvency perspective, the implication is clear. A host country will be potentially expected to align its cross-border insolvency regime in a manner that is in harmony with the general premise of the BITs which require the host country to promote, protect and create a favourable, stable and predictable legal environment for foreign investment. The underlying assumption upon which the BITs rest is that ‘clear and enforceable rules that protect foreign investors reduce risks, and a reduction of risk promotes investment.’<sup>110</sup> In this context, an effective cross-border insolvency law stands a better chance to protect the interests of an insolvent foreign investor as it may facilitate chances of maximising the values of its assets and rescue.

#### **4.5.2.4 Transfer of Funds and Repatriation of Capital and Profits**

The right of a foreign investor to repatriate capital and funds is one of the specific aspects enshrined in the BITs that haven been concluded between SSA countries and foreign countries especially the developed ones. The inclusion of such right in the treaties marks a radical departure, as historically, this has been one of the contentious and difficult areas to negotiate and agree upon.<sup>111</sup> The way the relevant provision is formulated in most of the treaties presents a wide meaning of what could unrestrictedly be repatriated by a foreign investor from a host country whenever such a need arises. To a foreign investor, the freedom to

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<sup>108</sup> KJ Vandeveldel (n 12) 522-25

<sup>109</sup> UNCTAD, *World Investment Report 2008* (n 42) 17

<sup>110</sup> *Ibid* 95

<sup>111</sup> MI Khalil, ‘Treatment of Foreign Investment in Bilateral Investment Treaties’ (1992) 7 *ICSID Rev Foreign Inv LJ* 339; and JW Salacuse and NP Sullivan (n 50 ) 85-86

repatriate income and capital is crucially important. It not only helps the investor to meet its foreign obligations but also enables operations of an integrated multinational enterprise group which is critical in minimising transactional costs through, for instance, international division of production.<sup>112</sup>

This provision may be employed by the foreign investor to transfer capital and funds abroad for different purposes. The transfer may be made for the purpose of insolvency involving the foreign investor as a subsidiary within a multinational enterprise group, another company affiliated to the multinational enterprise group or multinational enterprise group as a whole. It may therefore be useful in facilitating rescue and restructuring of a multinational enterprise in default without undue delay that could otherwise be occasioned by the host country procedures. It is to be noted however that this freedom, if exercised in relation to insolvency, has the potential of bypassing the host country's authorities. This may result in inconveniences and embarrassments to local creditors and local tax authorities, because they may be taken by surprise as to what is happening to the investment entity involved.<sup>113</sup>

Lack of an efficient control mechanism and an effective cross-border insolvency system reflecting the way multinational enterprises operate and invest in a host country (and above all which is not fit for the purpose of securing efficient co-operation and co-ordination with other jurisdictions) may certainly contribute to subjecting local interests and claimants to losses and the hassle of struggling in vain for repayment as it may be long before they realise that the foreign investor was a subject of insolvency proceedings abroad.<sup>114</sup> Some provisions in the BITs

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<sup>112</sup> I Mevorach (n 69) 13

<sup>113</sup> Text to n 107 and 144 in chapter 7; JL Westbrook and others, *A Global View of Business Insolvency Systems* (World Bank, Washington 2010) 227, showing how inclusion of assets located abroad might be essential for success or failure of a contemplated rescue.

<sup>114</sup> IMF, *Regional Economic Outlook: Sub-Saharan Africa 2009* (IMF, Washington 2009) 40 & 53 noting that during the recent financial crisis SSA was at a risk of capital repatriation which could adversely affect its economy. It was shown that the predominance of foreign owned banks in SSA exposes the region to capital repatriation in that the parent banks abroad might be tempted to repatriate capital from SSA due to balance sheet losses in the home country. It was contended that such transfer could have a contagion effect in the region which could lead to failure to meet the demand for trade finance, thereby affecting commercial activities to a point of stoppage. The stoppage could mean insolvency and cross-border insolvency, especially if it involves enterprises

expressly provide for an unrestricted transfer of funds for settlement of foreign debts as well as capital and income deriving from the total or partial sale or liquidation of an investment without undue delay and in a freely convertible currency.<sup>115</sup> No doubt the import of the provision is intended to include transfers necessitated by insolvency proceedings which may be used to allow a global or separate sale or a global restructuring.<sup>116</sup>

The BITs concluded between the US and Mozambique, and the US and Rwanda allow the host countries to prevent a transfer of capital or fund through equitable, non-discriminatory and good faith application of domestic insolvency law or the protection of the rights of creditors.<sup>117</sup> The implication of such provision for the host countries' insolvency law system is twofold. Firstly, such countries should have a predictable and transparent system of insolvency that does not discriminate against foreign interests in order to qualify for the exceptions stipulated in the provision. This perhaps will be by the standards of the US's insolvency system which not only is acknowledged for influencing the prevailing international insolvency benchmarks but has also been tested in practice for quite a long time.<sup>118</sup> The second implication is that the host developing country ought to have the resources and capabilities to oversee implementation of such system in a manner that is consistent to the existing best practices that are based on the law of developed countries.<sup>119</sup> Short of that, such countries may not enjoy the benefits that the exception presents.

While freedom to repatriate capital and funds is seemingly beneficial to investors, as it may contribute to minimising risk and transaction costs, it may, as mentioned above, potentially disadvantage host developing countries in SSA and

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with international business connections. Even though such situation could merit bailouts by state aid, SSA countries would not have such financial capacity.

<sup>115</sup> For various treaties concluded visit < <http://www.unctadxi.org/templates/docsearch.aspx?id=779> > accessed 22/02/2010. In particular see Italy-Tanzania BIT; Sweden – Tanzania BIT; Germany-Tanzania BIT; Finland-Tanzania BIT; Denmark- Tanzania BIT; Germany-Kenya BIT; and Indonesia-Mozambique BIT.

<sup>116</sup> I Mevorach (n 69) 171

<sup>117</sup> n 77 above

<sup>118</sup> Text to n 80 in chapter 3

<sup>119</sup> Ibid

expose them to financial defaults, especially where the involvement of the so-called ‘hot money’ is at issue. Ginsburg writes that:

....[R]equirements that capital be freely repatriated.... [c]an disadvantage developing countries, who might legitimately wish to avoid the disruption of “hot money” that can leave quickly on herd behaviour, such as occurred during the Asian financial crisis of 1997-1998. While developing countries freely tie their own hands with these restrictions, leading to distributional advantage for the investors, it seems unclear as a theoretical matter why such restrictions on investment contracts ought to be adopted ex ante rather than left to the individual negotiations between host state and foreign investor.<sup>120</sup>

The consequences may lead to a financial crisis within a host country and potential for a chain of insolvencies among domestic enterprises. This situation, which reflects what is termed as macroeconomic disturbance, a common feature of a market economy, requires efficient crisis resolution tools that include a predictable and highly transparent insolvency system, a system that could deal with enterprises facing financial difficulties in a manner that takes account of the following aspects: the possibility of rescue; the international elements arising from the liberalisation and cross-border links involving SSA countries; and the widely held consensus in favour of assistance, co-operation and co-ordination of cross-border insolvencies as a means of preserving rather than destroying going concern value.<sup>121</sup>

#### **4.5.2.5 Reciprocity Principle**

One of the basic principles in the BITs concluded in the recent times is reciprocity in facilitation of cross-border investment between the contracting parties. In theoretical terms, this principle pulls the contracting parties ‘away from aggressive territorialism’.<sup>122</sup> The essence of this principle is that the

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<sup>120</sup> T Ginsburg (n 11) 107

<sup>121</sup> See n 28 above

<sup>122</sup> B Wessels, BA Markell, and JJ Kilborn (n 1) 71. See also JW Salacuse (n 56) 158 and 162 describing the bilateral investment treaty as constraining a host country’s sovereignty by limiting its ‘ability to take what it may judge in the future to be necessary legislative and administrative action to advance and protect national interests.’ And further that ‘since most investor-state arbitrations are judging the legality of governmental actions, they have significant public policy consequences relating to the ability of sovereign governments to regulate enterprises within their territories.’

nationals and companies of either party to a treaty may invest under the same conditions and be treated in the same way in the territory of the other. This principle offers a foundation for assistance, co-operation and co-ordination in resolving cross-border insolvency problems between the contracting parties in a reciprocal manner. This foundation is consistent with the widely held consensus in favour of assistance, co-operation and co-ordination of cross-border insolvencies as a means of preserving rather than destroying going concern value.<sup>123</sup> Notably, the cross-border insolvency legislation practice has to some extent shown that reciprocity of one form or the other is one of measures used to achieve co-operation where no relevant international agreements are in force.<sup>124</sup>

Despite the element of the reciprocity in the BITs, the prevailing asymmetry is such that investments tend only to flow from the home country into the host countries in SSA.<sup>125</sup> In return, SSA countries offer just the promise and commitment to live up to the requirements of the treaties. While SSA countries may practically not be expected to export capital to the developed contracting countries, it is implicit that the prevailing reciprocal bilateral co-operation presents a scope for co-operation in resolving cross-border insolvency problems that could arise between the contracting parties.

SSA countries may consider according an automatic recognition (based on the BITs) of foreign proceedings commenced in the home country of a foreign investor in a host SSA country. However, given the nature of the BITs, it can be argued that the local proceedings in a host country would be governed by the laws of the host jurisdiction subject to the requirement of observing the relevant standards and principles provided in the BITs. Accordingly, the question is whether the host countries in SSA would have effective cross-border insolvency frameworks to deal with complex problems in an efficient, transparent and

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<sup>123</sup> See n 28 above

<sup>124</sup> PJ Omar, 'The Landscape of International Insolvency Law' (2002) 11 *Int'l Insolv Rev* 173; ML Nauta & F Bulletin, 'Introduction to Spanish Cross-border Insolvency Law-An Adequate Connection with Existing International Insolvency Legislation' (2009) 18 *Int'l Insolv Rev* 59, 62, 71&72

<sup>125</sup> M Hallward-Driemeier (n 54) 8

predictable manner in the same way as their investors would have experienced if were to invest and become insolvent in the host developed country. In searching for a permanent solution, probably, consideration may need not to be given to just one BIT due to the implications that are likely to arise from application of the most-favoured nation principle. Rather, a proper permanent solution needs to take account of the increasingly dense network of such reciprocal BITs that SSA countries have entered as they '[represent] an important milestone in the evolution of international economic law' and thus cross-border insolvency system.<sup>126</sup>

#### **4.5.2.6 Expropriation**

Protection against expropriation of foreign investment from a home country in a host country is one significant assurance provided by the BITs that is consistent with the protection of property rights of the foreign investors. According to the treaties, expropriation will be lawful and effective only if it is undertaken for a public purpose, non-discriminatorily and upon payment of prompt, adequate and effective compensation. The trend is for such treaties to also cover measures that are deemed to be 'tantamount' or 'equivalent' to expropriation or actions that would significantly impair the value of the investment.<sup>127</sup>

Interpretation accorded thus far opens the expropriation provisions to indirect forms of expropriations, creeping, and regulatory takings by a host country's actions. Such actions may include regulatory actions that affect the value of an investment or render it economically not viable and hence requiring compensation. It is not necessary that it should be an isolated event or that the host country should try to take ownership of the investment.<sup>128</sup> It is noteworthy that this interpretation creates an indirect link with insolvency aspects. One concern is that multinational enterprises may use the interpretation to protect themselves against many risks they would otherwise have assumed in the course

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<sup>126</sup> JW Salacuse (n 56) 163

<sup>127</sup> See Treaty between Germany and Kenya Concerning the Encouragement and Reciprocal Protection of Investment 1996, Art 4(2) <  
<http://www.unctadxi.org/templates/docsearch.aspx?id=779>> accessed 22 February 2010

<sup>128</sup> M Hallward-Driemeier (n 54) 6

of normal commercial transactions.<sup>129</sup> Critics have argued that the BITs give foreign investors property rights in regulations that seem to affect their going concerns.<sup>130</sup> Accordingly, a refusal or delay by a host country's institutions to assist, cooperate and/or co-ordinate with other institutions abroad in cross-border insolvency proceedings potentially involving reorganisation of the investment of the multinational enterprise could arguably be brought within this interpretation. This is so, if the refusal or delay contributes to failure of the desired reorganisation.<sup>131</sup>

It may equally be the case where insolvency proceedings are commenced against a foreign investor in a host country, by the host country's institutions or nationals despite claims of solvency based on its affiliation to a multinational enterprise group.<sup>132</sup> It may also be the case where the proceedings have been initiated as a result of measures against the foreign investor such as tax claims initiated by the host government.<sup>133</sup> Indeed, these scenarios may arise due to a number of such problems as uncertain and unpredictable cross-border insolvency framework, corruptions, whims and sentiments against foreign investments and invocation of

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<sup>129</sup> Ibid 7

<sup>130</sup> Ibid 6 and 7. The recent decade has witnessed increasing numbers of arbitration cases filed by investors against host developing countries based on expropriation through regulatory taking. By 2003, ICSID was reported to have over 40 cases pending.

<sup>131</sup> See n 28 above

<sup>132</sup> See for instance the famous *Yukos* Case as discussed in MM Winter, 'Arbitration without Privity and Russian Oil: The Yukos Case Before the Houston Court' (2006) 27 *U Pa Int'l Econ L* 115

<sup>133</sup> See n 132 above. The *Yukos* Case is an illustrative of the point discussed above. In this case, Yukos, the then second biggest Russian oil company was burdened by the back tax bill by the Russian government which led to insolvency proceedings being launched by Yukos' principal shareholders and creditors (14 foreign banks that were owed US\$ 482) after refusing assurances from the management that it could remain in business and pay the debts it owes. As a result of the back tax claims and the liquidation, the company's assets were acquired by Rosneft, Russia's state oil company. This was through a series of auctions. This has led to arbitration proceedings instituted by the shareholders of Yukos for compensation claims against the Russian Federation for illegal expropriation of their investment in the company in the pretext of tax claims and wrongful application of insolvency proceedings. See *Hulley Enterprises Limited v the Russian Federation* (PCA Case No AA226), *Yukos Universal Limited v the Russian Federation* (PCA Case No AA227) and *Veteran Petroleum Limited v the Russian Federation* (PCA Case No AA228) as cited in A Marhold, 'Is There Light at the End of the Gas Pipe? On the (Provisional?) Applicability of the Energy Charter Treaty to the 2009 Russia-Ukraine Gas Transit Dispute and the Relevance of the Yukos Interim Awards' (Proceedings of the Greifswald International Summer Academy on Energy and the Environment, 2011) < <http://ssrn.com/abstract=1804323> > accessed 7 August 2011

public policy which may render a host country wishing to transfer investment to a favoured local investor.

#### **4.5.2.7 Dispute Settlement**

In addition to the foregoing, BITs do also provide for dispute settlement mechanisms that essentially require submitting for arbitration in the event of a dispute between an investor and a host country. Most of the treaties provide for International Centre for Settlement of Investment Dispute (“ICSID”) arbitration but ad hoc arbitration under the Arbitration Rules of the UNCITRAL is also common. In recent years, there have been increasing numbers of disputes and a broadening of the character of claims instituted by foreign investors against developing countries on account of alleged breaches of the treaties. It is not surprising that now the mechanism is being employed to resolve disputes arising out of regulatory takings adversely affecting the investment.

While the above is now the trend, the mechanism does not cater for the handling of insolvency proceedings involving a foreign investor, though the investor can use such mechanisms to claim compensation against a host state for allegation of discriminatory treatments in insolvency proceedings or illegal expropriation in the pretence of application of insolvency proceedings.<sup>134</sup> It means that the conclusion of such BITs does not relinquish the need for effective insolvency machinery, with which insolvency proceedings involving foreign investors may be undertaken. On the contrary, it makes it imperative for the potential host countries to have an effective cross-border insolvency system that reflects the standards and principles provided by the BITs. It will seem that the absence of such machinery potentially puts the SSA countries at a risk of finding themselves in arbitral disputes involving the application of insolvency law or failure to put in place an appropriate insolvency framework that does not contradict the treaties they have concluded.

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<sup>134</sup> See *Yukos* case as discussed in A Marhold (n 133) above; and MM Winter (n 132) above

It is in view of the above that Chung notes that ‘developing countries without a stable legal order present the very risks that are of concern to foreign investors, causing them to be disproportionately exposed to BIT-based claims...This...creates a great potential for conflict, especially when the host country’s government is deficient in the necessary characteristics of a sound legal system-“transparency, efficacy, accessibility, and equality.”’<sup>135</sup> Given the trends of the arbitral awards with regard to foreign investment issues, it may perhaps not be surprising in an appropriate case, for it to be held that no effective insolvency law and in particular cross-border insolvency law could reasonably be held to be said to exist in a particular host country.<sup>136</sup>

#### **4.6 Inter-Regional and Regional Economic Arrangements**

The desire for rapid commercial expansion has created incentives for the formation of certain types of preferential alliances between countries from different regions. While each SSA country is on average a member of at least two SSA regional arrangements, SSA countries are also involved in several inter-regional co-operations with other countries and particularly advanced economies in which their main export commodities are predominantly agriculture and natural resource-based products.<sup>137</sup> These alliances, of which SSA countries are member states, complement and reinforce, through the free trade mechanism and liberalisation, the BITs that individual SSA countries have concluded with other countries. Such arrangements potentially generate two effects at most. Firstly, trade creation as the participating countries remove tariffs and other barriers and trade diversion as protection against non-participating countries increases. This is particularly so where, among other things, the member states are already major trading partners. In theory, the resulting effects stand to activate cross-border commercial transactions undertaken by modern commercial enterprises and hence the challenges of potential cross-border insolvencies.

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<sup>135</sup> O Chung (n 54) 956, citing CG Garcia, ‘All the Other Dirty Little Secrets: Investment Treaties, Latin America and the Necessary Evil of Investor-State Arbitration’ (2004) 16 *Fla J Int’l L* 301, 322, 323, and 327

<sup>136</sup> On this line of reasoning see, A Anghie (n 8) 226-235

<sup>137</sup> A Mattoo, D Roy, and A Subramanian, ‘The Africa Growth and Opportunity Act and Its Rules of Origin: Generosity Undermined?’ (2003) 26 *World Econ* 829; F Söderbaum and P Stalgren (eds), *The European Union and the Global South* (Lynne Rienner Publisher, Colorado 2010)

There is a debate on beneficial effects of such economic co-operation and relations to developing countries and the regional economic arrangements between SSA countries.<sup>138</sup> It is however a truism that such arrangements enhance the level of integration of the SSA countries in the global market. This potentially creates pre-conditions for cross-border insolvencies and aligning the respective national insolvency law systems. It is, indeed, in this context that some regional integration arrangements such as EU, NAFTA and OHADA have crafted regimes for cross-border insolvency regulation among member countries based on the recognition of the need to foster free movement of goods and service for trade purposes.<sup>139</sup> Thus, '[i]n the shadow of these collective efforts... individual states have been in the position to introduce provisions related to cross-border insolvency or amend existing legislation in this field.'<sup>140</sup> Such potential for the reform is in a bid to avail a suitable legal environment and further their commercial competitiveness.

Although some of these arrangements, such as the inter-regional economic co-operation, do not carry the true sense of economic integration, the cross-border trade co-operation that they advance requires increasing co-ordination and mutual assistance, if not harmonisation, of commercial laws in order to foster commercial predictability, especially in the event of financial default.<sup>141</sup> Whilst implementation of all arrangements requires internal reform and liberalisation, for example in the tariff and competition policies, they will need legal infrastructure to deal with macroeconomic disturbances that may occur in the due course. Certainly, these arrangements pull insolvency systems of respective member states towards an approach that takes on board the objectives of the arrangements and an approach that recognise the interests of all stakeholders

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<sup>138</sup> See S Cho, 'Breaking the barrier Between Regionalism and Multilateralism: A New Perspective on Trade Regionalism' (2001) 42 *Harv Int'l LJ* 419, 449

<sup>139</sup> B Wessels, BA Markell and JJ Kilborn (n 1) 101

<sup>140</sup> *Ibid* 87

<sup>141</sup> On this line of reasoning, see America Law Institute, *Transnational Insolvency: Cooperation Among the NAFTA Countries- Principles of Cooperation Among the NAFTA Countries* (Juris Pub, New York 2003) 7

within the arrangements. To be sure, some of these arrangements are guided by key standards and principles which also characterise the BITs. They include national treatment, most favoured nation (“MFN”) treatment, and reciprocity principles.<sup>142</sup> They also include the requirements to institutionalise the rule of law and good governance and undertake extensive liberalisation of markets and investment.<sup>143</sup>

#### **4.6.1 Inter-Regional Economic Arrangements and the Cross-Border Insolvency Potential**

There are many inter-regional economic arrangements between SSA and other regional blocs outside SSA or individual countries from regions other than SSA especially among developed countries.<sup>144</sup> Examples of inter-regional arrangements operative in Africa that involve the advanced economies are afforded by the EU’s Everything But Arms (“EBA”), the Economic Partnership Agreement (“EPA”) Between SSA and the EU, the US’s African Growth and Opportunity Act (“AGOA”) and the Trade and Investment Framework Agreements with the US. It is instructive to consider such inter-regional arrangements and determine the nature of the potential problems and opportunities they present to SSA in the event of a general default of multinational enterprises or any other enterprises conducting their commercial operations within the arrangements.<sup>145</sup>

One important feature of the inter-regional arrangements in which SSA is involved is the requirement they impose for SSA countries to undertake extensive economic liberalisation and reform of institutional and legal environments. This requirement entails liberalisation of investment,

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<sup>142</sup> See M Farrell, ‘From Lomé to Economic Partnership Agreements in Africa’ in F Söderbaum and P Stalgren (eds) (n 137) 84

<sup>143</sup> Ibid

<sup>144</sup> UNCTAD, *Economic Development in Africa Report 2009* (n 42) 18, 19 & 20

<sup>145</sup> For benefits achieved under such arrangements see LE Hinkle and M Schiff, ‘Economic Partnership Agreements Between Sub-Saharan Africa and the EU: A Development Perspective’ (2004) 27 *The World Econ* 1321; NA Phelps, JCH Stillwell, and R Wanjiru, ‘Missing the Go in the AGOA? Growth and Constraints of Foreign Direct Investment in the Kenyan Clothing Industry’ (2008) 17 *Transnational Corporations* 66, 79; and UNCTAD, *Economic Development in Africa Report 2009* (n 42) 25 & 42

institutionalisation of rule of law and good governance. Such requirement promotes the use of the contemporary international best practices which are based on the Western legal rules and institutions.<sup>146</sup> The result ensuing from such processes is that ‘international economic relations, as well as economic policies and development strategies in SSA are increasingly determined by the developed countries’ liberalist regimes....[which] ha[ve] become compatible with the policies of the IMF, the WB, and the WTO.’<sup>147</sup> In addition to fostering integration of SSA into the world economy, it is believed that these arrangements are also meant for a series of other purposes such as cross-border problem solving.<sup>148</sup>

Although no specific mention of insolvency or cross-border insolvency related reform is made in any arrangements, clearly any such reform falls within the broad reforms that are meant to support the massive liberalisation. More importantly, the scope, type and manner of the reform are always determined by the other contracting party other than SSA. In a way this requirement presents some form of pressures on the part of SSA and indeed jeopardises the scope for independent policy choice as is the case for the BITs. It is common that liberalisation strategy and the desired legal reform entails key areas for facilitation, promotion and protection of cross-border trade and investment and is also a requirement for enjoying benefits available under the arrangements.<sup>149</sup>

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<sup>146</sup> A Zafar, ‘The Growing Relationship Between China and Sub-Saharan Africa: Macroeconomic, Trade, Investment and Aid Link’ (2007) 22 *WBRO* 103. The exception in this kind of requirement is arrangements that fall under the category of South-South Co-operation such as China with SSA countries. For details on such kind of requirement in respect of EU and the US see generally, F Söderbaum and P Stalgren (eds) (n 137)

<sup>147</sup> M Farrell (n 142) 84

<sup>148</sup> F Söderbaum and P Stalgren, ‘The Limits to Interregional Development Cooperation in Africa’ in F Söderbaum and P Stalgren (eds) (n 137) 143

<sup>149</sup> UNCTAD, *Economic Development in Africa 2009* (n 42) 48; M Farrell (n 142) 70 & 84; D Katona (n 18) 1442; JMM Akech (n 12) 651, 665; RH Edwards Jr, and others, ‘International Investment, Development and Privatization’ (2001) 35 *Int’l L* 383, 384. Under the AGOA, for example, SSA countries have to be proved as making continual progress toward establishing a market based economy that protects private property rights, incorporates an open rules-based trading system, and minimises government interferences, maintains rule of law, and political pluralism. Further, it must be established that a country has established or is making continual progress towards establishing the right to due process, a fair trial, and equal protection under the law. A country must also at least be making progress towards elimination of barriers to the US trade and investment including the provision of national treatment and measures to create an environment conducive to domestic and foreign investment.

For example, the EU (with which SSA is concluding free trade arrangement within the framework of the EPAs) is one of the leading regional integrations with not only effective cross-border insolvency regulation applicable to cross-border insolvencies that occur within member states but it also has a long history of involvement in cross-border insolvency co-operation and high level of awareness of the impact of insolvency and the importance of having effective insolvency systems.<sup>150</sup> In addition to that, the member states, some of which were former colonial powers of SSA countries, have long adopted effective cross-border insolvency systems. It would seem therefore that although the cross-border insolvency regulation agenda is not explicitly mentioned in the strategic areas for liberalisation and reform, it is implicit within the broader terms of the strategy, especially in governance, investment liberalisation and property right protection. One of the most significant aspects of this arrangement is in its development component which entails specifying the main areas of focus of the parties to the agreements in order to meet developmental and regional integration objectives.<sup>151</sup>

Another important feature of this kind of arrangements is the component of finance and funding which is available to respective developing countries or individual enterprises undertaking projects within the frameworks of such arrangements. This is particularly so with AGOA whose implementation is underpinned by equity and infrastructure funding designed to support projects in SSA countries through the Overseas Private Investment Corporation.<sup>152</sup> Indeed, this is an incentive for carrying out extensive liberalisation and legal reforms in a manner that will render such countries to be highly regarded as valued members of the respective arrangements and hence enjoy funding benefits available.

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<sup>150</sup> B Wessels, BA Markell, and JJ Kilborn (n 1) 71. The authors note that ‘[o]n the European continent, one finds a rich history of co-operation through bilateral treaties between city-states, principalities, nation-states for dealing with conflicts in insolvency-related matters. Beginning as early as the thirteenth and fourteenth centuries, this treaty-making process accelerated in the nineteenth century and continued into the twentieth century before multilateral solutions eclipsed the earlier, more limited arrangements.’

<sup>151</sup> F Söderbaum and P Stalgren (n 142)

<sup>152</sup> RH Edwards and others, ‘International Investment, Development and Privatization’ (2001) 35 *Int’l L* 383, 390

Effectively, this translates into pressures for undertaking reform that is either meant to adopt systems that exist in the relevant developed country or in any manner that pleases the developed country or countries in order to meet eligibility criteria for the funding.

Regardless of the debate on the beneficial impact of the inter-regional economic arrangements to SSA, it is apparent that what is crucially relevant in the present instance is the fact that such arrangements increasingly contribute towards integration of the SSA countries into the global trading system. Such integration intensifies the operations of multinational enterprises in cross-border trade and investments involving SSA and the foreign countries, which potentially exposes SSA to the potential cross-border effect of insolvency.<sup>153</sup>

The most significant aspect of these arrangements, especially EBA and AGOA is in the recognition of SSA countries as a legitimate group for special and differential treatment in the context of trade and investment.<sup>154</sup> The implication of such initiatives is twofold. Firstly, they tend to have the potentials of increasing the integration of SSA countries into the global trading systems, thereby exposing local enterprises from these countries to cross-border effects of insolvency occurring in EU member states and even beyond or in the US. Secondly, since such arrangements have the potential of attracting investors to invest in SSA in anticipation of benefiting from the tariff free market access to the respective foreign markets, they open the door for cross-border effect that is not necessarily confined to SSA and the respective foreign markets. The EBA is particularly important given that, unlike other similar arrangements such as AGOA, it is not time limited. The lack of time frame means that it provides greater certainty and predictability for investors, traders and lenders and therefore stimulates greater capacity in the production of existing products and an environment conducive to the export of a wider range of products.

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<sup>153</sup> UNCTAD, *Economic Development in Africa 2009* (n 42) 48; and M Farrell (n 142) 70 & 84

<sup>154</sup> Ibid

Given the lack of capacities by SSA countries to produce and supply the developed economies' markets and therefore gain much from the arrangements, the main beneficiaries from the liberalisation initiative are likely to be the multinational enterprises from other countries.<sup>155</sup> Thus, the multinational enterprises stand a good chance to obtain new business via expanded market access. Nevertheless, SSA countries may, albeit in the short term, benefit particularly through increased foreign capital flows, which can potentially fuel the foreign exchange necessary for development efforts. Again, this means cross-border insolvency challenges to SSA countries.

Studies conducted in Kenya shows that AGOA has had the impact of growth of foreign direct investment in the textile industry.<sup>156</sup> This is notwithstanding the presence of some obstacles that signify the difficulties that SSA countries face in their endeavour to participate in international business. It is worth noting that the foreign direct investment growth is in the nature of foreign enterprise groups mainly from Asia with branches or subsidiaries in Kenya.<sup>157</sup> In most cases, 'the parent companies are directly providing all inputs and materials and managing both the sourcing and marketing ends of the production process.'<sup>158</sup> Arguably, the existence of such companies in Kenya, which have other operations in Asia, is solely dependent upon AGOA. The major weakness noted is that most of such companies have one marketing source in the US.

#### **4.6.2 Regional Economic Arrangements and the Cross-Border Insolvency Potentials**

The SSA region at present has a total of about 16 regional integration arrangements of various forms and in their various stages of developments

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<sup>155</sup> D Katona (n 18) 1442

<sup>156</sup> NA Phelps, JCH Stillwell, and R Wanjiru (n 145) 79; UNCTAD, 'Investment Policy Review: Kenya (United Nations, New York 2005) 8 and 87. Kenya is one of a few countries that qualified for AGOA access in 2001; and JMM Akech (n 12);

<sup>157</sup> UNCTAD (n 156) 8 and 87; and NA Phelps, JCH Stillwell, and R Wanjiru (n 145). Notably, the way such enterprises operate presents potential challenge of group insolvency.

<sup>158</sup> NA Phelps, JCH Stillwell, and R Wanjiru (n 145) 66 and 79

commensurate with their constitutional objectives.<sup>159</sup> Although the economic benefits of these arrangements in developing countries have generally been doubted, other scholars have argued that economic integration is what Africa needs to address its problems of fragmented national economies and have indeed uncovered evidence of trade creation and FDI growth due to such integration.<sup>160</sup> It is noteworthy that the intra-trade and FDI in SSA has gradually been growing since 1990 which is partly associated with the deepening of the regional trade arrangements in the SSA region.<sup>161</sup> Interestingly, the level of intra-regional trade in the SADC region and East Africa Community have been found to be higher than in other SSA regional arrangements, perhaps because of the long and common colonial history in East Africa and also due to the expansion of South African industry into the region.<sup>162</sup>

Inevitably, the regional integrations contribute towards an increase in the number of enterprises with operations, creditors and assets located in more than one of the regional arrangements' member states while having centres of operations in one member state or beyond.<sup>163</sup> The increase in the number of enterprises is partly because 'with liberalization of economies, opportunities for intra-regional

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<sup>159</sup> R Shams, 'The Drive to Economic Integration in Africa' (2005) Hamburgisches Welt-Wirtschafts-Archiv ("HWWA") Discussion Paper No 316 < <http://www.hwwa.de> > accessed 12 March 2009 [3]

<sup>160</sup> See MA McIntyre, 'Trade Integration in the East African Community: An Assessment for Kenya' (2005) IMF Working Paper WP/05/143 < <http://www.imf.org/external/pubs/ft/wp/2005/wp05143.pdf> > accessed 16 March 2010; and C Kirkpatrick and M Watanabe, 'Regional Trade in Sub-Saharan Africa: An Analysis of East African Trade Cooperation, 1970-2001' (2005) 73 *Manchester School* 141

<sup>161</sup> UNCTAD, *Economic Development in Africa Report 2009* (n 42)18, 19&20; and C Kirkpatrick and M Watanabe (n 160) 142-147

<sup>162</sup> C Kirkpatrick and M Watanabe (n 160) 144; L Thomas and others, 'Intra-regional Private Capital Flows in Eastern and Southern Africa: Findings from Mozambique, South Africa, Tanzania, Uganda, Zambia and Zimbabwe' (LSE Centre for Research into Economics and Finance in Southern Africa and Development Finance International, 2003) < [www.lse.ac.uk/depts/crefsa](http://www.lse.ac.uk/depts/crefsa) > accessed 16 March 2010 [4]. L Thomas and others report how the regional arrangements in Southern Africa contribute to cross-border investments in the Southern African region of SSA. They reports that '[although] South Africa is by far the most important source of regional investment...the smaller regional economies also have significant foreign assets in South Africa-these financial flows appear to be driven by trade and financial integration...While the stacks of regional assets and liabilities are a small fraction of the total for South Africa, they represent significant amounts for the smaller economies.' They include Tanzania, Zambia, Uganda, Zimbabwe and Mozambique.

<sup>163</sup> L Thomas and others (n 162) 10 while categorising foreign direct investment in Southern Africa noted a trend of 'transfer of ownership of several large South African conglomerates to London through listings on the London Stock Exchange.'

investment flows have expanded - the promotion of cross-border investment within the region is seen as an important component of integration initiatives such as the SADC Free Trade Area, COMESA and the Cross-Border Initiative. Indeed, evidence from existing data on investment approvals from investment promotion agencies around the region suggest that regional investment may be an important source of capital for many countries in Eastern and Southern Africa.<sup>164</sup>

Accordingly, in the event of financial difficulties leading to the insolvencies of the enterprises operating within SSA in the context of existing regional integrations, there will be problems of how best to deal with such insolvencies given the absence of a framework for that purpose at the regional level and the fact that member states may have quite different procedures. As there is, save for OHADA, no framework within the regional arrangements, recently crafted, to deal with the insolvent undertakings, each member state will seemingly have to apply its law and hence territorialism. This scenario may not only be destructive to the value of the insolvent enterprises, but also may militate against the measures for facilitation of trade and investment, and the poverty reduction strategy. Clearly, not only is the debtor not entitled to petition within the context of regional arrangements for rescue of businesses scattered in all member states or for assistance, co-operation and co-ordination of cross-border insolvencies as a means of preserving rather than destroying going concern value,<sup>165</sup> but also any attempt to salvage the financially struggling enterprise could be blocked or frustrated by proceedings in the respective member states or for mere lack of any precise procedure.<sup>166</sup>

Certainly, effectiveness in dealing with such situations is through co-ordination and a co-operative approach, as the logic of the regional integrations would

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<sup>164</sup> L Thomas and others (n 162) 1

<sup>165</sup> See n 28 above

<sup>166</sup> As far as EAC is concerned, the only law that has been in place since the colonial days was based on reciprocal co-operation in cross-border insolvency matters. Though the law was based on the personal bankruptcy legislation and has long been forgotten in the statute books, there seem to be scope for arguing that the law could still be applicable and that it was meant to apply to corporate insolvencies as well. See text to part 6.5 in chapter 6

suggest.<sup>167</sup> As it was mentioned above, one of the principal purposes of these regional arrangements is to promote trade and investment on a regional basis without regard to national borders. The endeavour to remove regional barriers and harmonisation of law is clearly geared at attaining this purpose through enhancement of commercial predictability, transparency and reduction of transaction costs. Of significance here is the fact that an insolvent undertaking may not necessarily have its home country or its centre of main interests (“COMI”) within the regional arrangement. Rather, it could be a subsidiary, an affiliate or a branch of a multinational enterprise (within a multinational enterprise group set up) that was established to take advantage of the regional arrangements, though it may not have many assets or significant operations within the region.

The situation is even complex if viewed in light of the agreements that are increasingly being concluded between regional groupings in SSA and developed countries.<sup>168</sup> This situation provides new dimensions to be considered if the insolvent undertaking is affiliated to a multinational enterprise group in one of the developed countries. An example in this regard is drawn from the trade and investment framework agreement between the East African Community and the Government of the United States of America signed in Washington on 16 July 2008 and similar agreements concluded between the US and other regional groupings in SSA such as COMESA and WAEMU.<sup>169</sup> Such agreements underlie and in fact oblige the regional arrangements to promote transparency, predictability, rule of law, good governance, and private investment in business. Using the US and EAC agreement as a case study for the present purpose, the

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<sup>167</sup> See n 28 above

<sup>168</sup> While the US is concluding such agreement with SSA regional groupings in the style of ‘Trade and Investment Framework Agreement’, the EU is negotiating to enter into similar agreement under the EPA arrangement. See Office of US Trade Representative, ‘Trade and Investment Framework Agreement (“TIFA”)’ < <http://www.ustr.gov/trade-agreements/trade-investment-framework-agreements> > accessed 14 August 2011; and UNCTAD, *Economic Development in Africa Report 2009* (n 42) 47-52

<sup>169</sup> Trade and Investment Framework Agreement between the East African Community and the Government of the United States of America (“EAC-US TIFA”) < <http://www.ustr.gov/trade-agreements/trade-investment-framework-agreements> .> accessed 14 August 2011. By the end of 2008, similar agreements had already been concluded between the US and COMESA, and the US and WAEMU. See also UNCTAD, *Economic Development in Africa Report 2009* (n 42) 47-52

agreement establishes a council on trade and investment (composed by the US and EAC representatives) to monitor trade and investment and a predictable environment for international trade and investment. The council is given power to consider specific issues of interests to parties in trade and investment between the US and the EAC.<sup>170</sup>

Although the trade linkage among member states in the regional arrangements in SSA is still low, it has been found that deepening co-operation in trade facilitation and behind the border reforms aiming at improving transparency, reducing the cost of doing business and promoting trade can effectively improve efficiency in member countries and expand trade and economic growth as well as private investment.<sup>171</sup> This means that although SSA countries have undertaken trade policy reforms that consisted of trade liberalisation and harmonisation of their trade regimes, as it is the case for EAC, which has gone as far as forming a custom union, much more efforts that go beyond trade liberalisation and which aim to achieve deep integration still need to be taken to create more predictability and confidence to traders and investors.<sup>172</sup> It is within such context that an appropriate framework for regulation of cross-border insolvency must also be considered.

Experience from other jurisdictions has shown that regional arrangements are an important base for co-operation and co-ordination in cross-border insolvencies affecting assets, creditors and other interested parties within a regional arrangement. However, the problem of cross-border insolvency which could potentially arise with the burgeoning of the regional trade arrangements has not been recently addressed within the context of the existing arrangements in SSA. The OHADA is thus an exception.<sup>173</sup>

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<sup>170</sup> See US-EAC TIFA, Art 1 & 2

<sup>171</sup> MA McIntyre (n150) 19&20; and C Kirkpatrick and M Watanabe (n 160)141

<sup>172</sup> C Kirkpatrick and M Watanabe (n 160) 157

<sup>173</sup> OHADA has a regime for cross-border insolvency proceedings which is to a large extent based on the EC Regulation on Insolvency Proceedings and the French Insolvency regime.

There are several possible explanations for the lack of frameworks for dealing with cross-border insolvencies within the existing regional arrangements in SSA. Firstly, lack of awareness on the part of policymakers. Secondly, lack of problems of cross-border insolvency due to less integration of the SSA countries to the world economy and financial system in the individual economies of member states and within the regional groupings. Thirdly, the fact that most of the regional groupings are still in their infancy stage partly on account of the low pace they are making towards the final stage of their integration that reflects their objectives. Fourthly, insolvency is perhaps still regarded as a domestic issue to be addressed by individual member states at their own pace as per their own priority. Fifthly, the fact that the problem of regulation of cross-border insolvency has not been raised as a concern by the investors within the regional arrangements.<sup>174</sup> And lastly but more importantly, the regional arrangements seem to have been addressing a broad range of policy issues while committing member states to undertake appropriate policy and legislative actions commensurate with facilitation of trade and investment.

#### **4.6.3 Critiquing the Inter-Regional and Regional Trade Arrangements Involving SSA with Cross-Border Insolvency in Mind**

It is argued that the conditions attached to the interregional arrangements which SSA countries must comply with to be eligible for duty free and quota free access of their products to the developed countries' markets are stringent and costly to SSA countries.<sup>175</sup> Consequently, it is the multinational enterprises and not local enterprises that potentially stand to benefit from such arrangements (by acquisition of many new resources and much new business via expanded market access) as they do have the resources and technology to comply with the

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<sup>174</sup> The concerns that have been raised include exchange rate instability, inflation and high interest rate. Others include infrastructure, road, water, and power supply. See for instance, L Thomas and others (n 162) 6 and 7. It is however a fact that the problems raised are among the factors that have been reported to contribute to business failure and therefore insolvency in other jurisdictions. See, I Blokerdyke, R Lattimore and A Madge, *Business Failure and Change: An Australian Perspective* (Median and Publication, Melbourne 2000) 49- 53

<sup>175</sup> See for example, D Katona (n 18) 1439-1471; and JM Akech (n 12) 663-701

conditions.<sup>176</sup> There is thus potential for expansion of investment by multinational enterprises in SSA taking advantages of the opportunities available under such arrangements. This potentially enhances interactions of the multinational enterprises with the local enterprises, business competition and the challenge for cross-border insolvencies involving SSA countries which necessarily need to be addressed. Incidentally, the stiff competition that these multinational enterprises are potentially bringing into SSA countries can put the domestic enterprises to financial default and closure which may have cross-border implications given the magnitude of cross-border trading links that they had.<sup>177</sup>

The growing trends of the inter-regional and unilateral trade arrangements to require SSA countries to undertake market reform and institutionalise a conducive environment for private investment in order to qualify for preferential access reinforces the opportunities the multinational enterprises have against domestic ones. The situation is even worse as such requirements- inspired by the carrots of eligibility for funding, access to further benefits and the leverage of the developed countries over SSA countries- have potentials to exert pressure on SSA countries for undertaking legislative reforms, including in cross-border insolvency regulation in order to ensure protection of the multinational enterprises in the event of financial crisis.

The implication of the requirements to establish and institutionalise a market based system that protects private property rights, rule based trading system, the rule of law, right to due process, equal protection under the law, development of private enterprise, and minimisation of government interferences are three fold.

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<sup>176</sup> As trade liberalisation and creation of a stable environment for private enterprise was the goal of the AGOA during the processes leading to its enactment, it was not surprising that the US corporate sector was indeed one of this scheme's largest proponent as evidenced by the backing it received from such corporations as Amoco, Caterpillar, Chevron, Enron, General Electric, K-Mart, Mobil, Occidental Petroleum, and Texaco. For such information see, D Katona (n 18) 1447; and UNCTAD, *Global and Regional Approaches to Trade and Finance* (United Nations, New York 2007) 82

<sup>177</sup>D Katona (n 18) 1448 noting that 'the corporations' profit-maximizing motives...may prove quite destructive to a developing nation's weak domestic industries.'

Firstly, as is the case for the BITs, such requirements in such arrangements potentially circumscribe SSA countries' space in which they could make policy choices and legislative actions commensurate with their development aspirations and context.<sup>178</sup> This may have consequential effect of failure to implement the law. Secondly, such reform requirement pulls any potential cross-border insolvency system of SSA towards a universalist approach in order to address the international elements inherent in the transactions conducted under such interregional arrangements. Lastly, the requirements for market reforms envisaged in such arrangements seem to expose SSA countries to 'one-size-fits-all' prescriptions as to the reform of cross-border insolvency law; which approach has long been criticised.<sup>179</sup> The likelihood is for such prescriptions to be heavily drawn from and influenced by the so called 'best practices' originating from developed economies and which may not be directly relevant to the context of SSA countries.<sup>180</sup> The new trend of the developed countries to conclude agreement with SSA countries under their respective regional arrangements means also that the above implication does also hold true for the regional groupings in SSA.

#### **4.7 The 'Crowding in' and 'Crowding out' Effects of Cross-Border Trade and Investment in the Context of Cross-Border Insolvency**

As was noted above, the growth of cross-border trade and investments in SSA has been associated with the arrangements discussed above for the facilitation of trade and investment, though there are still divergent opinions from other scholars.<sup>181</sup> Such arrangements have also been responsible for the increasing interaction between the local enterprises and entrepreneurs and foreign enterprises, especially multinational enterprises. Remaining questions concern

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<sup>178</sup> It has been said that the above observation runs counter to the International Covenant on Economic, Social, and Cultural Rights ["ICESCR"] and the International Covenant on Civil and Political Rights [ICCPR"]. See D Katona (n 18) 1471

<sup>179</sup> Ibid 1457-1458, & 1471

<sup>180</sup> Ibid 1457-1458, & 1471

<sup>181</sup> It is however generally understood that the effect tends to vary from country to country, partly depending on domestic policy, the types of FDI a country receives and the strength of domestic enterprises. See for instance, M Agosin and R Machado, 'Foreign Investment in Developing Countries: Does it Crowd in Domestic Investment?' (2005) 33 *ODS* 149, 151

the effect the growing trade and investment, and such interaction has on domestic economies of SSA countries and how such effect could be linked to insolvency. Although there is a dearth of scholarship on these issues,<sup>182</sup> it is common knowledge that foreign direct investments lead to complementary or competitive effects which can consequently ‘crowd in’ (as for example, when their presence stimulates new downstream or upstream investments that would not have taken place in their absence) or ‘crowd out’ domestic investments (as for example displacing domestic producers or pre-empting their investment opportunities).<sup>183</sup>

#### 4.7.1 The ‘Crowding In’ and ‘Crowding Out’ and their Related Effects

Agosin and Machado in their econometric assessment of the extent to which foreign direct investment in developing countries ‘crowds in or out’ domestic investment conclude that:

The econometric exercises conducted ...suggest that, over a long period of time (1971-2000), FDI has displaced domestic investment in Latin America. In Africa and Asia, on the other hand, FDI has increased overall investment one-to-one. If the three decades are taken separately, the results show CO [i.e crowd out] in Latin America in the 1970s, and in Africa in the 1990s. In the case of Latin America, if only 80% of FDI is transformed into real investment, then the effects of FDI on total investment are shown to have been neutral.

The main conclusion that emerges from this analysis is that positive impacts of FDI on domestic investment are not assured. In some cases, total investment may increase much less than FDI or may even fail to rise when a country experiences an increase in FDI. Therefore, the assumption that underpins policy towards FDI in most developing countries—that a liberal policy toward MNEs is sufficient to ensure positive effects—fails to be upheld by the data.<sup>184</sup>

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<sup>182</sup> M Agosin and R Machado (n 181) 149. The authors note that ‘[i]n evaluating the impact of FDI on development....a key question is whether MNEs crowd in domestic investment....or whether they have the opposite effect of displacing domestic producers or pre-empting their investment opportunities.’

<sup>183</sup> M Agosin and R Machado (n 181) 149, 151; and R Jenkins and C Edwards, ‘The Economic Impacts of China and India on Sub-Saharan Africa: Trends and Prospects’ (2006) 17 *Journal of Asian Studies* 207, 211 - 223. In a situation where a multinational enterprise brings foreign investments to a developing country in SSA in an area that is new to the domestic economy, the investment is more likely to have a positive effect given that domestic producers do not have knowledge, expertise and technology required to undertake the activities and therefore foreign investments do not displace domestic investment.

<sup>184</sup> M Agosin and R Machado *ibid* 160

Whatever result the FDI of multinational enterprises may have, it serves to suggest strengthening of the potentiality of cross-border insolvencies. The ‘crowding out’ effects may translate into financial difficulties and consequently the insolvency of a domestic enterprise.<sup>185</sup> An enterprise experiencing a crowd out effect may tend to adopt and implement survival plans.<sup>186</sup> Such plans may entail distress borrowing from the financial sector, which may potentially magnify the impact of the ‘crowding out,’ especially when the financial sector engages in riskier lending strategies in anticipation of producing large bank profits.<sup>187</sup> The macroeconomic effects of multinational enterprises’ activities in FDI could also lead to crowding out and consequently insolvency. This is aptly summarised by Agosin and Machado as thus:

...[T]he entry of a MNE [i.e. Multinational Enterprise] into a sector where there exist several domestic firms may lead to investments by incumbent firms in order to become more competitive. However, given the vast technological superiority of MNEs, their investments are more likely to displace domestic firms and even cause their bankruptcy.....

...There are other macroeconomic externalities of MNE activities that could lead to CO. By raising domestic interest rates, the borrowing by MNEs on domestic financial markets may displace investment by domestic firms. Such borrowing may worsen foreign exchange problems during times of balance-of-payments crisis, as borrowing in domestic currency can be converted to foreign exchange and easily sent abroad by companies operating in global markets and having global financial connections. [This]... may be critical in small countries negotiating with

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<sup>185</sup> M Agosin and R Machado (n 171) 152; MJ Fry ‘Saving, Investment, Growth, And Financial Distortions in Pacific Asia and Other Developing Areas’ (1998) 12 *Int’l Econ J* 1; NB Villoria, ‘China and the Manufacturing Terms-of-Trade of African Exporters’ (2009) 18 *J Afr Econ* 781-823; and A Zafar (n 146 ) 103-130

<sup>186</sup> M Agosin and R Machado (n 181) 152; MJ Fry (n 175) 1; NB Villoria (n 185); and A Zafar (n 146) 103 - 130

<sup>187</sup> MJ Fry (n 185) 5. Drawing from the Pacific Asia and developing countries, the author show how distress borrowings are likely to be made by newly liberalised financial sectors, which are subject to inadequate prudential supervision and regulation. And that the effect of this is to compound the problem of insolvency in the real sectors of the economy. Distress borrowing occurs when a distressed borrower, unable to repay its loan, continuing borrowing to finance its losses, which borrowing will continue to increase with an increase in the interest rate. The author further describes the eventual effect of distress borrowing and its consequent effect on increase in interest rates in the following words: ‘Higher real interest rates produce an epidemic effect by dragging down otherwise profitable and solvent firms. Because distress borrowers push real interest rates to levels at which virtually no economic activity can be profitable, solvent businesses start to face liquidity crunches which then force them to borrow at rates that they know are unmanageable. Hence, the accommodation of distress borrowing propagates more insolvency and more distress borrowing.’

large firms.....For a small country, borrowing on domestic markets by MNE affiliates may, under certain circumstances, be problematic.<sup>188</sup>

As far as the ‘crowding in’ effect is concerned, domestic investment will continue to carry business notwithstanding the growth of FDI. Indeed, this has the potential to bolster the commercial interaction between the domestic enterprises, financial sectors, stakeholders, citizens, and government institutions on one hand, and the multinational enterprises’ FDI on the other. In this way, the domestic economy becomes highly integrated and dependent on the multinational enterprises’ FDI as well as their key international financiers. In this situation, the potential for insolvencies that have an international element looms large.

What is clear from the facilitation arrangements for cross-border trade and investment is the opening up of SSA countries for trade and investment that hugely involves multinational enterprises. However, the factors that inhibit rapid growth of FDI in SSA countries include exchange rate instability, inflation and high interest rates. Another factor is poor infrastructure such as roads, water, and power supply.<sup>189</sup> This also reflects the concerns of investors in this region. It is worth noting that such factors are among the common causes reported to contribute to business failure and insolvency in many jurisdictions,<sup>190</sup> though, concerns on effectiveness of the insolvency law systems in these countries is not among the concerns normally raised, especially in Tanzania and Kenya.

#### **4.7.2 The Potential Impact of Effective Cross-Border Insolvency Regulation on Cross-Border Trade and Investments**

Most SSA countries, including Tanzania and Kenya, enjoyed periods of impressive and sustained economic growth, fuelled substantially by foreign investment, before the so-called credit crunch of 2006-2009.<sup>191</sup> Yet it achieved this without the benefit of functional legal rules for cross-border insolvency

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<sup>188</sup> M Agosin and R Machado (n 181) 152 and 153

<sup>189</sup> L Thomas and others (n 162) 6; and I Bickerdyke, R Lattimore, and A Madge (n 174) 49-53

<sup>190</sup> Ibid

<sup>191</sup> IMF (n 114); and A Arief, MA Weiss, and VC Jones (n 15)

corresponding with contemporary neo-liberal standards of efficiency. Investors have apparently been sufficiently enticed by SSA's huge domestic market, integration arrangements with their corresponding effect of enlarging the market and reducing tariffs, abundance of natural resources, low-cost labour force, liberalisation of foreign investment laws, and tariff and taxation incentives in some sectors.

The widely held view is that certainty as to the approach to be taken in insolvencies fosters confidence and may encourage investment. As most SSA countries have not been affected by most of the high profile cross-border insolvency cases, institutionalisation of an effective cross-border insolvency system would probably be seen as having little effect on the SSA economy as a whole. However, with the pace at which SSA economies are increasingly being integrated to the global economy and financial market, such a system is increasingly becoming important.

The implication of the recent crisis evidences that not only the macroeconomic instabilities are there to stay but also that there is a glaring need of systems that may serve to absorb the shocks of similar crises as they occur.<sup>192</sup> Indeed, systems that contribute to sustain the achievements made in terms of economic growth and development are imperative, though they may not necessarily have a direct and immediate effect of attracting cross-border trade and investment. Such systems, undoubtedly, include effective cross-border insolvency systems commensurate with SSA circumstances.

Problems that could arise in the event of insolvency of some local enterprises with investments across SSA illustrate the point well. For example, as a result, partly, of the growing integration in Eastern and Southern Africa, a good number of enterprises especially the South African enterprises, are increasingly investing across the region with the result that, their creditors and assets are spreading

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<sup>192</sup> J Stiglitz (n 5)

beyond their home countries.<sup>193</sup> Any macroeconomic instability resulting into financial distress to these enterprises may potentially lead to insolvencies which have cross-border implications across the whole region. This perhaps may take these countries by surprise as despite the mushrooming of the regional integration arrangements, they are yet to address instances of failures with implications across their respective regions and even beyond.<sup>194</sup> These countries have not experienced cross-border insolvency incidents, the way most of the developed countries had. Of relevance to this point is that it is acknowledged that many enterprises that have large contributions in cross-border investments within the region have actually tended to have their investments implemented through subsidiaries in Europe.<sup>195</sup>

As pointed out earlier, while most of the regional cross-border investment is characterised by investment from South Africa and that the region has relatively few if any, investment beyond SSA, there is still some notable cross-border investment and trade which shows how failures of such investment may potentially affect and cause problems to the stability of the regional economy. Cross-border insolvency regulation ought therefore to be considered in the context of not only protecting interests of foreign investors and trading partners, but also within the context of its capability of protecting interests of domestic investors and traders having interests in other jurisdictions notwithstanding their marginal number.

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<sup>193</sup> L Thomas and others (n 162) 1-15. This study ‘generated data that suggests that regional investment is playing an increasingly important role in Eastern and Southern Africa [which] is in the context of a general increase in private capital flows to the region from the rest of the world.’

<sup>194</sup> The East Africa Community in its recent Investment Conference May 2010 recommended that a corporate insolvency regime was among areas that member states should strive to reform and improve. In particular, it was emphasised that reform in the context of the international financial architecture is desirable given the recent financial crisis. See East Africa Community, The 2<sup>nd</sup> East African Investment Conference, 29<sup>th</sup>-31 July 2009 < <http://www.eac.int/inv/> > accessed 24/05/2010

<sup>195</sup> L Thomas and others (n 162) 10. Noting also emerging trend in recent years of the transfer of ownership of several large South African conglomerates to London through listings on the London Stock Exchange, suggesting that such entities are no longer South African entities for purposes of international investment position.

#### 4.8 A Case for Differential and Contextual Treatments in Cross-Border Insolvency Regulation?

In the course of facilitating cross-border trade and investment, the international community has taken the approach of according special consideration to the circumstances of developing countries given their special situation in the global economy. Although this approach has been more pronounced in multilateral and bilateral trade arrangements, the trend now is to provide such treatments within a particular period of time, based on a certain level of development being reached.<sup>196</sup> The application of the special treatment in the trading system is premised on the need for positive efforts designed to ensure that developing countries 'secure a share in the growth in international trade commensurate with the needs of their economic development.'<sup>197</sup> The underlying justification was based on fostering redistributive values, for example, by fostering industrial capacity in non-traditional manufactures in order to reduce import dependence and to diversify away from traditional commodities.<sup>198</sup> Developing countries' point of view (which has arguably survived to date despite being unsuccessful) centred on protection of their economic interests, positive discrimination and non-reciprocity.<sup>199</sup>

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<sup>196</sup> S Grimm, 'Towards the Global South' in F Söderbaum and P Stalgren (n 137) 47; P Cullet, 'Differential Treatment in International Law: Towards a New Paradigm of Inter-state Relations' (1999) 10 *EJIL* 549,576 stating that 'differential treatment has become a common feature of international law, but it is still disputed whether granting differential treatment has become compulsory and if so, in which situations.' For the earliest form of special treatments, see Article XVIII and XXXVI of the General Agreement on Tariffs and Trade, Geneva, 31 Oct 1947, 55 UNTS(1950) 187 (hereinafter GATT Agreement)

<sup>197</sup> See the preamble to the World Trade Organisation (WTO) Agreement ; GA Bermann, and C Mavroidis, *WTO Law and Developing Countries* (Cambridge, CUP 2007) 1. The essence of according developing countries special treatment traces its significance from the 1950s after many developing countries began to join the GATT and presently the special treatment is 'the cornerstone describing developing countries' participation in the GATT/WTO.'

<sup>198</sup> EA Alexander, 'Taking Account of Reality: Adopting Contextual Standards for developing Countries in International Investment Law' (2007-2008) 48 *Va J Int'l L* 817, 820

<sup>199</sup> DB Margraw, 'Legal Treatment of Developing Countries: Differential, Contextual and Absolute Norms' (1990) 1 *Colo J Int'l L & Pol'cy* 69, 77; and P Cullet (n 186) 576-577. The view was contained in three UN general Assembly resolutions, namely the declaration on the establishment of a New International Economic Order; the programme of Action on the Establishment of a New International Economic Order; and the Charter of Economic Rights and Duties of States (CERDS)

The commonest forms of special treatments are in the nature of differential and contextual standards of treatment. The differential treatment norm ‘provides different, presumably more advantageous, standards for one set of states than for another set.’<sup>200</sup> Conversely, the contextual treatment provides identical treatment to all states affected by the norm but the application of which requires (or at least permits) consideration of characteristics that might vary from country to country.<sup>201</sup> However, they both recognise the vast differences that currently exist between countries and the effect that these differences have on countries’ priorities and capabilities.

The recognition of the special treatment is not uncommon in UNCITRAL’s undertaking of enabling international trade within which the international insolvency benchmarks are also situated. Thus, the international insolvency benchmarks seem to implicitly and to some extent permit states to make adaptations responsive to the particular needs of the state.<sup>202</sup> Indeed, unlike in the trade arrangements, the special treatment in the way a country may craft and adopt its insolvency system, based on the international benchmarks, is not exclusively based on the special situation and needs of developing countries in the global economy. Rather, it applies to all countries. It means that, although the international insolvency benchmarks provide identical treatment on a particular aspect to all states, their observance and application would permit consideration of characteristics that might vary from country to country. This kind of special treatment therefore typically involves balancing multiple interests and characteristics. Of particular importance is that it provides some limits on the characteristics that may be considered in the course of reform.<sup>203</sup> It is however common knowledge that insolvency is influenced by several factors especially

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<sup>200</sup> DB Margraw (n 199)73

<sup>201</sup> Ibid 74

<sup>202</sup> S Block-Lieb and T Halliday, ‘Harmonisation and Modernisation in UNCITRAL’s Legislative Guide on Insolvency Law’ (2006-2007) 42 *Tex Int’l LJ* 475, 479. UNCITRAL has since been described to have ‘historically understood the need for flexibility, diplomacy, and patience in its law reform projects....’

<sup>203</sup> Ibid 512. The authors concludes thus with regard to UNCITRAL Legislative Guide on Insolvency Law ‘[it] is a skilfully crafted set of norms that enabled UNCITRAL concomitantly to push towards an overarching global norm.....while allowing significant flexibility for national lawmakers to modernize their own laws in ways appropriately adapted to variations in legal families, economic circumstances, and policy preferences, among others’.

the historical, cultural, political and socio-economic values of a country to mention but a few.

The use of special treatment based on special situations and needs of developing countries may potentially influence SSA countries to attempt to build on such treatments in crafting their regulatory framework for cross-border insolvency. This is not surprising if it is considered in light of public policy and the prominence of the desire to protect legitimate local interests.<sup>204</sup> Indeed, the desire for protection of local interests has long been one of ‘the principal sticking points’ of the debate on the two competing theories of cross border insolvency.<sup>205</sup> This is as to the manner in which the local interests express serious ‘concern over the perils local [small] creditors and small country-sovereigns face in trying to design a viable [cross-border insolvency system].’<sup>206</sup>

It will be noted that despite the facilitation for cross-border trade and investment which has resulted in growing integration of SSA into the global economy, the developing countries in SSA are still by far less developed than their key trading partners. The issue is whether the special and in particular contextual treatment which characterises implementation of the international insolvency benchmarks is meant to adopt special standards of treatment which grant a favourable position to local interests or is meant to allow consideration of the relative development of a country or other similar factors to define the standards of treatment which a country may invoke.

Even if it is viewed that the treatment is broad enough to cover consideration of the level of a country’s development and its desire to protect its local interests, it is of interest to note that such treatment might not be meant to allow room for discriminatory treatments based on foreignness. Equally important, the prevailing

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<sup>204</sup> JL Westbrook, ‘A Comment on Universal Proceduralism’ (2009-2010) 48 *Colum J Transnat’l L* 503, 515-516, attributing the legitimate local interests to ‘...interests that are truly local so that a person committed to a global approach to multinational insolvency would nonetheless agree that this or that sort of claim or claimant would best be governed by local insolvency law.’

<sup>205</sup> JAE Pottow (n 6) 1900

<sup>206</sup> JAE Pottow (n 6) 1900

arrangements have to a large extent limited the scope of special treatment to developing countries. Indeed, the commitments that SSA countries have undertaken do not recognise their special position which has been the basis of the preferential treatments that they have been enjoying in GATT/WTO.<sup>207</sup> Even where they offer such treatments, they are meant to be on a temporary basis. The implication is that there is perhaps very little basis, if any, upon which a claim for special treatment in cross-border insolvency regulation could be justified, especially, if such treatment is likely to infringe the principles and standards that characterise the cross-border trade and investment arrangements and the global insolvency norms.<sup>208</sup>

#### **4.9 Conclusion**

The foregoing examination and analysis suggest that the various cross-border trade and investment facilitation efforts that are being implemented in SSA dictate the nature of cross-border insolvency regulation to be pursued by SSA countries. While customarily, international initiatives involving SSA countries have tended to take into account the special position of SSA, there seem to be no space left for such undertaking in so far as cross-border insolvency regulation is concerned. Even if such a course is taken it might compromise the endeavour of attracting investment. The commitments envisaged in almost all arrangements for facilitation of trade and investment not only limit SSA countries in making wider policy choices in cross-border insolvency regulation that could not only take into account the desire to promote cross-border trade and investment, but also consideration of their local needs, priorities, history, politics, culture and socio-economic circumstances as it is settled that insolvency systems tend to be seriously influenced by such factors. It would seem that interests promoted by the arrangements for facilitation of trade and investment would prevail over anything in the event of the conflict.

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<sup>207</sup> P Cullet (n 196); and DB Margraw (n 199)

<sup>208</sup> P Cullet (n 196)

The implication is that the implementation of the arrangements effectively pulls any potential SSA cross-border insolvency framework towards a universalist stance and away from territorialist approaches. By virtue of the arrangements, SSA countries have undertaken to recognise and respect interests of foreign actors as long as they fall within the definition of investors protected under the arrangements. It is only a universalist based approach that will allow room for recognition of those interests during insolvencies. It would seem that SSA does not, in view of the implication of the arrangements for facilitation of cross-border trade and investment being implemented need a different framework from those suggested by the theories and the benchmarks.

The question left is how SSA countries can identify their respective broader policy contexts and have them reflected in cross-border insolvency regulation without violating their various international commitments? The increasing number of arbitration claims against developing countries based on the BITs coupled with the emerging trend of renegotiation of such treaties, perhaps point to how these countries have been caught in between. But this is, seemingly, a clear reflection of the desperation and extent of economic weakness of these countries which make them to enter in such arrangements whilst they do not have the political will and capacity for full implementation. In order to set grounds for an examination of the above question in later chapters, the next chapter looks at the nature of legal systems in SSA countries, the continuing influence of the colonial legacy in cross-border insolvency law to such countries and the extent to which such influence is consistent with the commitments relating to facilitation of cross-border trade and investment.

## CHAPTER FIVE

### THE COMMON LAW APPROACH TO CROSS-BORDER INSOLVENCY AND ITS APPLICABILITY IN SUB-SAHARAN AFRICA WITH REFERENCE TO TANZANIA AND KENYA

#### 5.1 Introduction

The legal systems of almost all Sub-Saharan African (“SSA”) countries are to a large extent based on the systems which were first introduced by the colonial administrations during the colonial era.<sup>1</sup> It is the same basis from which the nature and character of insolvency systems and limited cross-border insolvency systems which are found in these countries are traceable. It would follow that a fair assessment of any of such countries’ insolvency systems should necessarily be undertaken and considered in light of the corresponding legal families in which they are situated.

This chapter examines the influence of the colonial legacy in SSA countries’ legal systems and cross-border insolvency systems in particular using mainly the application of the English common law in Tanzania and Kenya as case studies. The English common law is chosen for its pronounced influence in the common law jurisdictions in SSA. The chapter evaluates the common law on cross-border insolvency and the landscape within which it might be applied before consideration of the following two aspects is given. Firstly, the suitability of the common law in helping to address and resolve cross-border insolvency problems as they arise; and secondly, the potential impact of the common law in the positioning of the existing limited cross-border insolvency frameworks within the competing cross-border insolvency theories and the recently developed international insolvency benchmarks.

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<sup>1</sup> S E Merry, ‘From Law and Colonialism to Law and Globalisation’ (2003) 28 *Law & Social Inquiry* 569; and W Menski, *Comparative Law in Global Context: The Legal Systems of Asia and Africa* 2<sup>nd</sup> ed (CUP, England 2006)

The key argument and conclusion in this chapter is that the application of the common law on cross-border insolvency pulls the cross-border insolvency frameworks in SSA countries towards modified universalism. However, the extent to which such common law would be applicable in appropriate cases is arguably unpredictable as it depends on several factors including legislation enacted by a country and the attitude of the judiciary towards the common law generally. In addition, despite the utility that the common law could potentially bring into the cross-border insolvency systems of some SSA countries, it has a number of limitations which affect reliance on it as a primary source of cross-border insolvency law.

## **5.2 A Historical Basis of Cross-Border Insolvency Frameworks in SSA's Legal System**

Insolvency systems and in particular cross-border insolvency frameworks that exist in SSA countries are largely based on legal systems introduced by the colonial power during the colonial era. It is common knowledge that when the colonial powers colonised Africa they brought their law with them. Tanzania and Kenya were no exception, for the law of England was first applied through systematic legislation by the British administration at the onset of and during colonial rule. This was not only the case for the British colonial power alone, but also for the French, the Dutch, the Italians, the Germans, Spanish and the Portuguese.<sup>2</sup> Two dominant legal families, namely, the English common law and civil law, which vary from one another, dominated the process of consolidation and formalisation of formal legal orders in the colonies.<sup>3</sup> However, it is common knowledge that the impact of English law is relatively far reaching given the then leading role of Britain in commerce and industry which determined its relatively large sphere of influence compared to the other European powers.<sup>4</sup>

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<sup>2</sup> S E Merry (n 1) 569

<sup>3</sup> D Berkowitz, K Pistor, and J Richard, 'Economic Development, Legality and the Transplant Effect' (2003) 47 *Eur Econ Rev* 165-195

<sup>4</sup> L Hoffmann, 'Cross-Border Insolvency: A British Perspective' (1996) 64 *Fordham L Rev* 2507

The reception of the law in these countries, as is typical among the former British colonies, comprised English law (in some cases as applied in India), English common law, the doctrine of equity and statutes of general application then in force in England. The imposition of the English law was effected through the so called reception clauses and local ordinances, some of which merely copied corresponding English legislation which applied English law by reference. Although the reception process was described as an involuntary transplant, as such countries received their legal orders as colonies,<sup>5</sup> the entire colonial legal materials were inherited at independence by re-enactment of the reception clauses and the entire colonial legislation.<sup>6</sup> Indeed, almost all countries irrespective of their colonial powers retained the core characteristics of the legal systems that were imposed on them.<sup>7</sup> To this extent, the colonial legal systems survived intact notwithstanding adoption of ‘Africanisation’ and other related policies such as ‘African socialism’ by most of the independent SSA countries.<sup>8</sup>

Within the landscape of Kenya’s legal system, English law is provided by section 3(1)(c) of the Judicature Act 1967 (Kenya) Chapter 8, which reads:

The jurisdiction of the High Court, the Court of Appeal and all subordinate courts shall be exercised in conformity with:

- (a) the Constitution
- (b) subject thereto, all other written laws, including the Acts of Parliament of the United Kingdom cited in Part I of the Schedule to this Act, modified in accordance with PART II of that Schedule;
- (c) subject thereto and so far as those written laws do not extend or apply, the substance of the common law, the doctrine of equity and the statutes of general application in force in England on the 12<sup>th</sup> August, 1897, and the procedure and practice observed in courts of justice in England at that date

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<sup>5</sup> D Berkowitz, K Pistor, and J Richard (n 3)

<sup>6</sup> The reception clauses that were re-enacted at independence were almost similar word for word with the reception clauses during the colonial administration. See for instance, article 4 (2) of Kenya’s East African Order in Council 1897 (later repeated in the Kenya Colony Order in Council 1921) and also article 17 of the Tanganyika Order in Council 1920

<sup>7</sup> D Berkowitz, K Pistor, and J Richard (n 3) 12; RJ Daniels, MJ Trebilcock, and LD Carson, ‘The Legacy of Empire: The Common Law Inheritance and Commitments to Legality in Former British Colonies’ (2011) 56 *Am J Com L* 111; S E Merry (n 1) 578. Merry points out that although at independence the colonial legal system was retained, the imposition of the law during the colonial administration was not a simple process in most of the territories. There were spaces of resistance, struggles among the colonisers, and accommodation by colonised elites and subjects.

<sup>8</sup> E Cotran, ‘The Development and Reform of the Law in Kenya’ (1983) 27 *J Afr L* 42, 47

*but the common law, doctrines of equity and statutes of general application shall apply so far only as the circumstances of Kenya and its inhabitants permit and subject to such qualifications as those circumstances may render necessary.*<sup>9</sup> (emphasis added)

Similarly, within Tanzania's legal system, section 2(3) of the Judicature and Application of Law Act provides that:

Subject to the provisions of this Act, the jurisdiction of the High Court shall be exercised in conformity with the written laws which are in force in Tanzania on the date on which this Act comes into operation (including the laws applied by this Act) or which may hereafter be applied or enacted and, *subject thereto and so far as the same shall not extend or apply, shall be exercised in conformity with the substance of the common law, the doctrines of equity and the statutes of general application in force in England on the twenty-second day of July, 1920, and with the powers vested in and according to the procedure and practice observed by and before Courts of Justice and justices of the Peace in England according to their respective jurisdictions and authorities at that date*, save in so far as the said common law, doctrines of equity and statutes of general application and the said powers, procedure and practice may, at any time before the date on which this Act comes into operation, have been modified, amended or replaced by other provision in lieu thereof by or under the authority of any Order of Her Majesty in Council, or by any Proclamation issued, or any Act or Acts passed in and for Tanzania, or may hereafter be modified, amended or replaced by other provision in lieu thereof by or under any such Act or Acts of the Parliament of Tanzania:

*Provided always that the said common law, doctrines of equity and statutes of general application shall be in force in Tanzania only so far as the circumstances of Tanzania and its inhabitants permit, and subject to such qualifications as local circumstances may render necessary.*<sup>10</sup> (emphasis added)

Clearly, the reception clauses prescribe the hierarchy of the sources of law enforceable in Tanzania and Kenya, as was also the case for the other British colonies in SSA. Accordingly, the imported English law applies subject to written law. And the imported law could only be resorted to where written law does not extend or apply, and finally such imported law has to be applied subject to certain qualifications dictated by local circumstances. It has accordingly been held that the policy of the reception clause is such that 'whenever there is no local enactment governing any matter....the courts are directed to apply the imported law to fill up what is lacking in ...domestic legislation. Therefore, the

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<sup>9</sup> Judicature Act 1967 Chapter 8, s 3(1)(c) (Kenya)

<sup>10</sup> Judicature and Application of Law Act, s 2(3) (Tanzania)

imported English law is to be applied with as much force of law as the local legislation which it has been imported to supplement.’<sup>11</sup>

### **5.2.1 The Reception and Nature of the Cross-Border Insolvency Law Inherited from the Colonial Administration in SSA**

Based on the reception clause, it would seem that insolvency and in particular cross-border insolvency law in SSA countries which were under the British rule, such as Tanzania and Kenya, could be traced from the received law through either introduction of English law through local legislation (i.e Ordinances) or the reception clause, which applied the relevant English common laws, the doctrine of equity and statutes of general application.<sup>12</sup> With perhaps the exception of the bankruptcy legislation,<sup>13</sup> there was neither companies’ legislation with explicit and elaborate provisions addressing cross-border insolvency incidences involving companies nor a distinct and stand-alone cross-border insolvency legislation for companies.<sup>14</sup>

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<sup>11</sup> MN Wabwile, ‘The Place of English Common Law in Kenya’ (2003) 3 *Oxford U Commw LJ* 51, 63. On this point see also, HF Morris, ‘English Law in East Africa: A Hardy Transplant in an Alien Soil’ in HF Morris and JS Read (eds), *Indirect Rule and the Search for Justice: Essays in East African Legal History* (Clarendon Press, Oxford 1972) 147, whose view is such that the wholesale re-enactment of colonial reception clauses demonstrates the policy of Anglophone SSA countries, as is the case for East Africa countries, to perpetuate the inherited English tradition.

<sup>12</sup> Scholars who are critical of the introduction of the colonial powers’ law into the colonised states such as M Wabwile, ‘The Future of Common Law in Kenya’ (2000) 20-27 *EALR* 20, 21, argue that the imposition of such laws was meant primarily to ‘serve the exigencies of colonial administration.’ In that regard, it is said that not much regard was had to the long term future of the imposed legal system.

<sup>13</sup> Bankruptcy statutes modelled on the English Bankruptcy Act 1914 have elaborate provisions on cross-border insolvency that required every jurisdiction in all matters of bankruptcy to act in aid and be auxiliary to every British Court elsewhere having jurisdiction in bankruptcy or insolvency. See Bankruptcy Act [Cap.25 R.E. 2002] (Tanzania) and Bankruptcy Act (Chapter 53 of Laws of Kenya).

<sup>14</sup> In Tanzania insolvent companies were under colonial administration regulated by the Companies Ordinance which was a duplicate of the English Companies Act 1929 while individual insolvency was regulated by the Bankruptcy Ordinance which was largely the same as the English Bankruptcy Act 1914, and the Bankruptcy (Amendments) Act 1926. However, prior to these pieces of legislation, the colonial administration had passed the Tanganyika Order in Council 1920 through which the Application of Laws Ordinance 1920 was enacted. The Act applied the Indian Companies Act 1913, duplicate of the English Companies (Consolidation) Act 1908. However, the Act was not put into force before the promulgation of the Companies Ordinance. See IR Macneil, *Bankruptcy Law in East Africa* (University College, Dar es salaam 1966) xiv.

In this regard, one of the basic principles applicable to supply what seems to be lacking in the legislation were those derived from the common law as imported into these countries through the reception clauses. Indeed, the relevant substances of common law and doctrine of equity were applicable in such matters that were not specifically covered by the written law. And perhaps the other source was the provisions of the bankruptcy legislation which catered for cross-border issues arising in bankruptcy proceedings.<sup>15</sup>

Accordingly, it is arguable that the formulation of the reception clauses, before and after the re-enactment on independence, was such that English common law is to serve as a principal repository of legal norms operating as a reserve set to support and complement Tanzania and Kenya's written law, just as it was the case in the other colonies.<sup>16</sup> Since cross-border insolvency law remained outside of direct legislative regulation, the applied English common law comes in handy and provides the background normative legal rules.<sup>17</sup>

Scholarship on the manner in which the relevant common law principles were applicable in practice in relation to cross-border insolvency matters is lacking, perhaps due to an absence of such cases during such time. A few companies that existed by then were branches and subsidiaries of foreign companies; having colonial powers as their home countries. The existing literature has only documented cases on individual insolvency involving the application of bankruptcy legislation and individuals of Asian descent in East Africa. This is perhaps because of their entrepreneurial culture.<sup>18</sup>

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<sup>15</sup> Ibid. A detailed account of cross-border insolvency provisions under the bankruptcy legislation in Tanzania and Kenya which, it is argued, were meant to apply to corporate insolvency as well, is covered in Chapter 6. See text to part 6.5 in chapter 6

<sup>16</sup> MN Wabwile (n 11) 69. See also *Cooper v Board of Works for Wandsworth District* (1863) 14 CB (NS) 180, 194; 143 ER114, 420, Byles J stated that 'the justice of the common law will supply the omission of the legislature.'

<sup>17</sup> MN Wabwile (n 11) 54

<sup>18</sup> See generally, IR Macneil (n 14). Despite being old, this text seems to be the only piece of work thus far in East Africa and perhaps in the rest of SSA with the exception of South Africa, to document individual insolvency law and practice in the colonial and early post colonial days.

However, it is common knowledge that the attitude of the colonial judges to the administration of justice failed to adapt the English law to the local conditions and circumstances as they were required to do under the proviso to the reception clauses of the Order in Councils.<sup>19</sup> Lord Denning in the Court of Appeal of England in 1955 had to remind them to do so when he said:

The next proviso says, however, that the common law is to apply 'subject to such qualification as local circumstances render necessary.' This wise provision should, I think, be liberally construed. It is recognition that the common law cannot be applied in a foreign land without considerable qualification. Just as with an English oak, so with the English common law. You cannot transplant it to the African continent and expect it to retain the tough character which it has in England. It will flourish indeed but it needs careful tending. So with the common law. It has many principles of manifest justice and good sense which can be applied with advantage to peoples of every race and colour all the world over; but it has also much refinement, subtleties and technicalities which are not suitable to other folk. These off-shoots must be cut away. In these far-off lands the people must have a law which they understand and which they will respect. The common law cannot fulfil this role except with considerable qualifications. The task of making these qualifications is entrusted to the judges of these lands. It is a great task. I trust that they will not fail therein.<sup>20</sup>

The question is whether or not such qualification could well be applied in insolvency related cases to make the law more responsive to the needs of the society which it serves. Writing on bankruptcy law in East Africa way back in 1960, Macneil had it that '...bankruptcy law, given the [then] ...commercial structure, probably requires as little jurisprudential East Africanisation as any field of law.'<sup>21</sup>

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<sup>19</sup> E Cotran (n 8) 44 noting that although there was room for local adaptation in the application of English law, such opportunity was not utilised. As such the standard of justice applicable remained entirely the British standard. Adaptation of English law to local situations was, if any, very minimal.

<sup>20</sup> *Nyali Ltd v Attorney-General* [1955] 1EAR 646, 653 also quoted in E Cotran (n 8) 44. KK Mwenda, ' "Presumption of Innocence" Doctrine: Relevant in Corruption Fight?' *Zambia Post* (Zambia 4 November 2009) < <http://www.scribd.com/KKMwenda-Zambia-Post-Newspaper/d/22286407> > accessed 01 September 2011, reflecting on Lord Denning's dictum in *Nyali's* case in the present contexts of developing countries observes that 'Implicit in Lord Denning's dictum is the notion that developing countries that import or transplant model laws from abroad to their own local environments, should consider not only the wisdom of foreign technical experts from abroad, but also the local insights and peculiarities articulated by some local expertise.' It is important to note that Lord Denning's pronouncement is still valid to date, as courts across Africa have kept on referring and making use of its import.

<sup>21</sup> IR Macneil (n 14) ii

### 5.2.2 A Brief Survey of the State of Cross-Border Insolvency at Common Law

Much has been written and discussed in recent decades on the position of cross-border insolvency at common law.<sup>22</sup> This, partly, follows the surge in cross-border insolvencies in the recent times and the corresponding quest for cooperation and coordination among jurisdictions. It is clear from the scholarship on this area that the English common law has long developed principles governing regulation of cross-border insolvency which are highly inclined to universality of insolvency as opposed to territoriality. The British history and supremacy in the world of trade and commerce as well as in occupation of foreign territories before and during the 19<sup>th</sup> century are among the reasons which attributed to such early development, and indeed necessitated the law to reflect the needs of the then British Empire and in particular the mercantile community.<sup>23</sup>

Despite such early development of the law and its seeming usefulness in a number of commonwealth jurisdictions, the further development of the common law approach to cross-border insolvency has been much curtailed by the intensive legislation efforts undertaken within the UK.<sup>24</sup> It is against this background that the Privy Council's decision in *Cambridge Gas Transport Corp v Official Committee of Unsecured Creditors of Navigator Holdings Plc*<sup>25</sup> has

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<sup>22</sup> For an example of some recent works in this regard, see PJ Omar, 'Developments in Cross-Border Insolvency Practice in the United Kingdom' (2002) 14 *Bond L Rev* 347; LC Ho, 'Navigating the Common Law Approach to Cross-Border Insolvency' (2006) 22 *Insolv L & Practice* 217; P Hayden, 'The Continuing Role of the Common Law in Cross-Border Insolvency- A Cayman Islands Perspective' (2009) 2 *Corporate Rescue and Insolv* 108; E Sjostrand, 'Judicial Assistance in Cross-Border Insolvency- Common Law Implications of Cambridge Gas Transportation and Phoenix and Kapital' (2009) 2 *Corporate Rescue and Insolv* 105; A Walters, 'Judicial Assistance in Cross-Border Insolvency at Common Law' (2007) 28 *Comp Law* 73; G Moss, 'Common Law Judicial Assistance Comes of Age' (2006) 19 *Insolv Int* 123; G Moss, D Bayfield and G Peters, "Recognition and Enforcement" in G Moss, IF Fletcher & S Isaacs (eds), *The EC Regulation on Insolvency Proceedings* (OUP, New York 2009)79; L Hoffmann (n 4)2507; and N Martin, 'Common Law Bankruptcy Systems: Similarities and Differences' (2003) 11 *Am Bankr Inst L Rev* 367. Notably, the discussion on common law approach to cross-border insolvency gained momentum following the landmark decision of the Privy Council in *Cambridge Gas Transport Corp v Official Committee of Unsecured Creditors of Navigator Holdings Plc* [2006] UKPC 26; [2007] 1 AC 508 (PC(IoM)) and later *Re HIH Insurance* [2008] 1 UKHL 21; [2008] 1 WLR 852

<sup>23</sup> L Hoffmann (n 4) 2507

<sup>24</sup> G Moss, D Bayfield and G Peters (n 22) 79

<sup>25</sup> [2006] UKPC 26; [2007] 1 AC 508 (PC(IoM))

attracted attention of many scholars as it demonstrates that there are still cases which will have to be decided on general principles of private international law’, and the significance of the ‘..wide-reaching powers of judicial assistance for foreign insolvency proceedings under common law... particularly ...in English law based offshore jurisdictions’,<sup>26</sup> and if one were to add, other Anglophone countries, such as those of SSA, whose legal systems are still largely dependent on the English common law in certain respects.<sup>27</sup> The decision, viewed as a whole, champions universalism theory as the basis of the common law approach to cross-border insolvency.<sup>28</sup> In this case, the Privy Council, having emphasised the centrality of universality of insolvency, expressed the significance of various measures and principles, as signified by recognition of foreign proceedings and judicial assistance, in attaining universality. While citing *Re African Farms*<sup>29</sup> as per Innes CJ, Lord Hoffmann on behalf of the Privy Council stated:

The English common law has traditionally taken the view that fairness between creditors requires that, ideally, bankruptcy proceedings should have universal application. There should be a single bankruptcy in which all creditors are entitled and required to prove...

[U]niversality of bankruptcy has long been an aspiration, if not always fully achieved, of United Kingdom law...[T]he underlying principle of universality is ... given effect by recognising the person who is empowered under the foreign bankruptcy law to act on behalf of the insolvent company as entitled to do so in England. In addition, as Innes CJ said in the Transvaal case of *Re African Farms* 1906 TS 373, 377, in which an English company with assets in the Transvaal had been voluntarily wound up in England, “recognition carries with it the active

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<sup>26</sup> G Moss (n 22) 1

<sup>27</sup> Indeed, as observed by MN Wabwile (n 11) 69, in most of these jurisdictions ‘the sphere of administrative, commercial and many aspects of procedural law lack comprehensive local legislation. They are governed by scattered pieces of legislation which...also provides for reception of English common law to supply that which seems to be lacking in the local legislation.’

<sup>28</sup> A similar trend was later maintained and reflected in *Re HIH* (n 22) as per the opinion of Lord Hoffmann which relied on the common law to turnover assets from an English ancillary liquidation to an Australian ‘main’ liquidation. This was arguably notwithstanding that the rules of distribution in Australia differed from those in an English liquidation. More importantly, it is not clear whether Lord Hoffmann’s opinion can be regarded as the majority opinion. Equally important to note is the most recent English Court of Appeal decision in *Rubin v Eurofinance* [2010] EWCA Civ 895 ( in which resort was had to *Cambridge Gas*) to recognise and enforce in England and Wales default judgments obtained in the US Bankruptcy court under the US Bankruptcy Code. It has so far been argued that the decision would not otherwise be enforceable under ordinary conflict of laws rules. Being controversial as it is, the decision is on appeal to the English Supreme Court. See LC Ho, ‘Recognition Born of Fiction- *Rubin v Eurofinance*’ (2010) *J Int’l Banking L & Reg* 579

<sup>29</sup> 1906 TS 373

assistance of the court”. He went on to say that active assistance could include: “A declaration, in effect, that the liquidator is entitled to deal with the Transvaal assets in the same way as if they were within the jurisdiction of the English courts, subject only to such conditions as the courts may impose for the protection of local creditors, or in recognition of the requirements of our local laws.”<sup>30</sup>

The common law approach to cross-border insolvency has traditionally provided jurisdiction for the English Court to subject a foreign company in insolvency proceedings, commencing ancillary proceedings, granting recognition of foreign insolvency proceedings, and provision of judicial assistance and co-operation. However, consideration of local interests has always been at the centre of judicial discretion that involves realisation and implementation of the common law in cross-border insolvency aspects. The other point worth noting at the outset is the fact that the development of these principles have much been associated with winding up procedures as by then such procedures were the only avenue through which an insolvent company could be dealt with. The *Cambridge Gas* case marks a very significant development in the common law as it concerned reorganisation and thus explicitly provided for cross-border insolvency at common law in relation to reorganisation.

It is also worth noting at the outset that the principles available at common law with regard to cross-border insolvency are interlinked and reinforce each other in such a way that it is hardly possible to talk of one principle without touching the other principles.<sup>31</sup> While the cross-border insolvency approach at common law has been praised for its inherent flexibility, it has been argued that such flexibility ‘can...lead to unpredictability of results and is neither well-suited to

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<sup>30</sup> [2006] UKPC 26; [2007]1 AC 508(PC(IoM)), para16, 17, & 20

<sup>31</sup> It is perhaps this reason why in analysing the decision in *Cambridge Gas*, G Moss (n 22) 125 – 126, found that ‘The judgment itself is a tremendous achievement which is only slightly diminished by some confusion of analytical terms,..... in failing to differentiate between “recognition”, i.e. giving effect directly to the foreign law, and “judicial assistance”, using local law to assist the foreign insolvency proceedings without giving direct effect to the provisions of the foreign law. ...[D]espite this, the great advance in the scope of common-law judicial assistance is greatly to be welcomed.

the code oriented nature of civil law jurisdiction nor does it provide a basis on which to anticipate recovery risk.<sup>32</sup>

### 5.2.2.1 Jurisdiction for Initiating Insolvency Proceedings Regarding a Foreign Company

The first principle that characterises the English common law approach to cross-border insolvency is that the common law vests jurisdiction to an English court to subject a foreign company to insolvency proceedings.<sup>33</sup> This however is dependent on existence of some preconditions that have historically evolved over time at common law.<sup>34</sup> The historical basis for the development of such preconditions shows how the English court has been exercising its jurisdiction to wind up foreign companies.<sup>35</sup> One such criterion that has over time been employed is the existence of a sufficient connection between the foreign company and the English jurisdiction.<sup>36</sup> Historically, existence of the foreign company's assets in England was one factor that the court would consider when ruling that it had jurisdiction to commence proceedings against the foreign company.<sup>37</sup>

However, it must be pointed out that with further evolution and development it was no longer necessary at common law that there should be assets in England to establish sufficient connection for the purpose of gaining jurisdiction.<sup>38</sup> It would accordingly be sufficient for the court to exercise its discretionary power to subject a foreign company to insolvency proceedings if, notwithstanding an absence of assets known to exist in England, there were persons in England

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<sup>32</sup> HS Burman, 'Harmonisation of International Bankruptcy Law: A United States Perspective' (1995-1996) 64 *Fordham L Rev* 2543, 2552

<sup>33</sup> For a discussion of this principle see, L Hoffmann (n 4)2509-2510.

<sup>34</sup> R Parry, *Corporate Rescue* (Sweet & Maxwell, London 2008) 285-286; IF Fletcher, *Insolvency in Private International Law* (2<sup>nd</sup> edn OUP, Oxford 2005). See also *Re Eloc Electro Optiek and Communicatie BV* [1982] Ch. 43; and *Re A Company (No.00359 of 1987)*; and *International Westminster Bank v Okeanos* [1988] 1 Ch. 210

<sup>35</sup> L Hoffmann (n ) 2510, 2511; PJ Omar (n 22) 349, 357-362. See also cases that arose as a result of the Russian revolution. For example, *Russian and English Bank v Baring Bros & Co* [1936] AC 405; *Re Russian Bank for Foreign Trade* [1933] 1 Ch 647; and *Banque des Marchands de Moscou (Koupetschesky) v Kindersley* [1951] Ch 112

<sup>36</sup> *Stocznia Gdanska SA v Latreefers Inc, Re Latreefers Inc* [2001] 2 B.C.L.C. 116, 140, CA

<sup>37</sup> *Re Matheson Bros Ltd* (1884) 27 Ch D 225; and *Re Real Estate Development Co* [1991] BCLC 210

<sup>38</sup> *Re Real Estate Development Co* [1991] BCLC 210

concerned or interested in the proceedings, or creditors who hoped to benefit from the proceedings and to uncover the company's assets through the use of the court's inquiry procedure.<sup>39</sup> One view is that the court has generally tended to take a more liberal approach in exercising its discretion as to whether or not it has jurisdiction.<sup>40</sup> Describing the approach, Lord Hoffmann is of the view that:

[s]uch wide power [is] useful when the company is incorporated in a foreign tax haven like Liberia or British Virgin Islands and there are no known assets in England, but the creditors hope that some may be unearthed by using the inquiry procedures of the court against officers or directors or bringing proceedings to set aside pre-bankruptcy preferences or fraudulent disposals.<sup>41</sup>

### 5.2.2.2 Recognition of Foreign Proceedings

The second principle is that of recognition of foreign insolvency proceedings commenced in a home country of a company. This is regarded as one of the oldest principles at common law tracing its origin from personal bankruptcy.<sup>42</sup> The principle calls for recognition by the English court of the order of the foreign insolvency proceedings granted by the foreign court in the home jurisdiction, or domicile of the company (i.e the country of incorporation).<sup>43</sup> It is implicit that recognition of the foreign order would mandate recognition of all that is inherent in the order such as the representatives of the foreign proceedings and their

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<sup>39</sup> See for instance, *Re A Company (No 00359 of 1987)* [1988] 1 Ch 210 involving a company incorporated in Liberia but mainly operated from London. The holding of the court was that it was not necessary to show that the company had assets within a jurisdiction but that there was a close link with the jurisdiction; *Banques des Marchands de Moscou (Koupetchesky) v Kindersley* [1951] Ch 112, 125-126 where apart from the English Court of Appeal emphasising on criteria to be considered by the court, concluded that the exercise of the jurisdiction remains discretionary notwithstanding presence of the criteria; and *Stocznia Gdanska SA* (n 36)

<sup>40</sup> See n 24 above. See also for instance in the old case of *Re Matheson Bros Ltd* (1884) 27 Ch D 225, where *inter alia*, it was contended that even though a foreign company had already been placed in liquidation, such process in itself does not take away the right of the English court to make a winding up order in England. It was also contended that commencement of foreign proceedings may however exercise an influence upon the jurisdiction.

<sup>41</sup> L Hoffmann (n 4) 2509

<sup>42</sup> *Solomons v Ross* (1764) 1 H BI 131 where English creditor had to surrender to the Dutch bankruptcy assets realised out of the garnishee proceedings and prove in such proceedings, following recognition by the English court of such proceedings. See also K Nadelmann, 'Solomons v Ross and International Bankruptcy Law' (1947) 9 *MLR* 154

<sup>43</sup> IF Fletcher, *The Law of Insolvency* (2<sup>nd</sup> ed Sweet & Maxwell, London 1996) 760-761; PJ Omar, 'Cross-Border Jurisdiction and Assistance in Insolvency: The Position in Malaysia and Singapore' (2008) 1 *PER* 2/55, 8/55; PJ Omar (n 22)349. See also *Lazard Bros & Co v Midland Bank Ltd* (1933) AC 283

authority in the foreign jurisdiction to manage or administer the insolvency proceedings.<sup>44</sup> This should entail not only granting recognition, but also granting the foreign office holder appointed by the foreign corporation's home country (place of domicile) the remedies to which they would have been entitled if the equivalent proceedings had taken place in the domestic forum.<sup>45</sup> In view of the *Cambridge Gas* case, it seems that it is now possible at common law for the recognition to be achieved even though the proceedings did not emanate from the home country of the foreign company.

As with the previous principle, implementation of this principle underpins the exercise of judicial discretion on whether or not to grant recognition or adopt the foreign orders as those of the local court.<sup>46</sup> Criteria that are said to have long emerged as exceptions to determine whether or not to grant recognition are, according to Wood,<sup>47</sup> and as cited in support by Omar, firstly, whether the foreign proceedings are final in nature; secondly, whether they conform with prevailing conceptions of natural justice; thirdly, whether the jurisdiction has validly been exercised; and lastly, whether recognition will be contrary to public policy.<sup>48</sup> In *Cambridge Gas* case,<sup>49</sup> the Privy Council noted that although it may be that the criteria for recognition should be wider, that question did not arise in the case.<sup>50</sup> It seems therefore that to gain recognition through this principle that creates obligation on the part of the English court to recognise, there should be instituted proceedings for the foreign representative to gain consent of the local court and capacity to act and enforce the foreign order. Moss, Bayfield and Peters note that recognition mainly involves giving direct effect to foreign proceedings, orders and appointments.<sup>51</sup> However, it is to be noted that, although at common law the court is entitled to recognise foreign insolvency proceedings

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<sup>44</sup> PJ Omar (n 43); PJ Omar (22); and *Macaulay v Guaranty Trust Company of New York* (1927) 40 TLR 99

<sup>45</sup> See *Cambridge Gas Transport Corp v Official Committee of Unsecured Creditors of Navigator Holdings Plc* [2006] UKPC 26; [2007]1 AC 508(PC(IoM)); LC Ho (n 22) 217-; and G Moss, IF Fletcher and S Isaacs (n 22) 83

<sup>46</sup> See for instance *Re HIH* case (n 22); LC Ho (n 22)

<sup>47</sup> PR Wood, *Principles of International Insolvency Law* (Sweet & Maxwell, London 1995) 250

<sup>48</sup> PJ Omar (n 43) 8/55; and PJ Omar (n 22) 349

<sup>49</sup> [2006] UKPC 26; [2007]1 AC 508(PC(IoM)), para 19

<sup>50</sup> For commentaries on this case, see LC Ho (n 22) 217

<sup>51</sup> See n 63 below

and allow a foreign representative to act, it still has wide discretionary powers to make an order for insolvency proceeding under its broad jurisdiction.<sup>52</sup> Such proceedings, if so made would be designated as ancillary as discussed below.

### 5.2.2.3 Ancillary Proceedings

Ancillary insolvency proceedings are employed at common law to govern proceedings commenced in a jurisdiction other than one which is the home country or domicile of the insolvent company. This is due to the fact that at common law a foreign company may be placed under insolvency proceedings locally even though it is or it is not a subject of foreign insolvency proceedings elsewhere. Ancillary proceedings refer to proceedings that are secondary to the main proceedings. The general principle at common law is for ancillary proceedings to arise from jurisdiction which is not the home country or domicile of the insolvent company. Its primary function is essentially to assist the main proceeding in collection and protection of local assets for the benefits of the company's creditors wherever they are located.<sup>53</sup> Of significance is that despite the proceeding being ancillary to the main proceedings, the proceedings including the administration of the assets are undertaken by the local laws.<sup>54</sup> Among the most cited early English cases which envisaged the concept of ancillary proceedings at common law are *Re Matheson Brothers*<sup>55</sup> and *Re English Scottish & Australian Chartered Bank*.<sup>56</sup> In the latter case Vaughan William J has been quoted, by different scholars,<sup>57</sup> as saying:

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<sup>52</sup> *Re Matheson Brothers* (1884) 27 Ch D 225, 230 where the court (as per Mr Justice Kay) has been quoted as saying that a foreign order 'does not take away the rights of a court of this country to make a winding-up order here, though it would no doubt exercise an influence upon this court.' See PJ Omar (n 43) 10/55; and PJ Omar (n 35) 351

<sup>53</sup> See *Re Bank of Credit and Commerce International SA (No 10)* [1997] Ch 213, 246 where Scott VC among other things pronounced that: 'Nonetheless, the ancillary character of a local winding up does not relieve the court of the obligation to apply local law, including local insolvency law, to the resolution of any issue arising in the winding up which is brought before the court. It may be, of course that local conflicts of law rules will lead to the application of some foreign law principles in order to resolve a particular issue.'

<sup>54</sup> See *Re Suidair International Airways Ltd* [1951] Ch 165, which was favourably cited in *Re Bank of Credit & Commerce International SA (N 10)* [1997] Ch 213, 241

<sup>55</sup> (1884) 27 Ch D 225, 230

<sup>56</sup> [1893] 3 Ch 385, 394

<sup>57</sup> See A Keay (ed), *McPherson: The Law of Company Liquidation* (4<sup>th</sup> edition Lawbook Co., Australia 2000) 689-690; and PJ Omar (n 22) 352

One must bear in mind the principles upon which liquidations are conducted, in different countries and in different courts, of one concern. One knows that where there is a liquidation of one concern the general principle is-ascertain what is the domicile of the company in liquidation; let the Court of the country of domicile act as the principal court to govern the liquidation, and let other Courts act as ancillary, as far as they can, to the principal liquidation.<sup>58</sup>

Seemingly, the effect of ancillary proceedings is neither to render issues in the proceedings to be determined by rules of the main proceedings nor is it to bind the ancillary jurisdiction by the effects of the main proceedings.<sup>59</sup>

The application of this approach would, subject to the wide discretion of the court, permit representatives in a foreign proceeding to operate in the ancillary jurisdiction following recognition of the foreign proceedings. However, this would depend on existence of such factors as the connection between the company and the jurisdiction in which the representative is appointed,<sup>60</sup> the just merits of creditors' claims and fairness of their position<sup>61</sup> and whether or not there is an appropriate jurisdiction before which the claim might be heard. It is thought that the costs of ancillary proceedings, in terms of the opening of ancillary proceedings and the pursuit of claims within the proceedings, are also a factor that influences courts in deciding whether to permit further litigation in ancillary proceedings.<sup>62</sup>

#### **5.2.2.4 Judicial Assistance and Cooperation**

Judicial assistance and cooperation is another measure that characterises the common law approaches to cross-border insolvencies.<sup>63</sup> It involves the use of local laws to assist a foreign insolvency proceeding without giving direct effect to the provision of the foreign law.<sup>64</sup> Notably, this principle seems to be implicit

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<sup>58</sup> Ibid

<sup>59</sup> Ibid

<sup>60</sup> *Schemmer and Others v Property Resources Ltd and Others* [1975] 1 Ch 273

<sup>61</sup> See *Re Suidair International Airways Ltd* [1951] Ch 165

<sup>62</sup> PJ Omar (n 22) 353

<sup>63</sup> G Moss, IF Fletcher and S Isaacs (n 22) 81, note that judicial assistance is technically not recognition which involves giving direct effect to a foreign office holder. The latter is however loosely used to cover such matters as the former.

<sup>64</sup> See n 31 above quoting G Moss (n 22) 125 – 126

within the other principles discussed above and its operations reinforce the other principles. Given its significance in so far as cross-border insolvency is concerned, as well as the recent developments in cross-border insolvency at common law, it deserves a separate treatment in its own rights.

This principle is based on the wide common law court discretion to act in aid of a foreign court that has jurisdiction in insolvency.<sup>65</sup> When acting in aid of the foreign court, the common law court has discretion to exercise such powers with respect to the matter as it could exercise if the matter had occurred within its own jurisdiction. In the words of the Privy Council in the *Cambridge Gas* case, ‘the domestic court must at least be able to provide assistance by doing whatever it could have done in the case of a domestic insolvency’ in order to avoid the need for parallel proceedings. In this case, the Privy Council ‘agreed to assist the US court by giving effect to the US Chapter 11 plan, reasoning that as a matter of common law the court has power to declare that the chapter 11 plan should be carried into effect.’ While the same results could have been achieved by parallel proceedings under the Isle of Man law on schemes of arrangement, the Privy Council found it unnecessary as the confirmed Chapter 11 plan could be given direct effect and by so doing it would save the creditors the trouble of parallel proceedings.<sup>66</sup> Indeed, this principle reflects ‘a long tradition in the common law of courts extending aid for the collection of assets located in the jurisdiction of the courts and that belong to foreign debtors.’<sup>67</sup>

It is now clear from the *Cambridge Gas* case that as far as the common law is concerned the grant of assistance is not solely dependent on the foreign insolvency proceedings taking place in the insolvent company’s home country.<sup>68</sup>

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<sup>65</sup> In the *Cambridge Gas* case (n 22) for example, the Privy Council held *inter alia* that at common law the Isle of Man court has a broad discretion to assist in the implementation of that Chapter 11 plan, notwithstanding that it involved the transfer of shares in an Isle of Man company.

<sup>66</sup> G Moss (n 22) 126

<sup>67</sup> PJ Omar (n 43) 32/55. See also *Solomons v Ross* (1764) 1 Hy BI 131n; 126 ER 79

<sup>68</sup> A Walters (n 22) 74; G Moss, IF Fletcher and S Isaacs (n 22) 82 noting that ‘[t]he domicile of a corporation has traditionally been regarded as the place of incorporation but it may be time to adopt the approach of the [EC Regulation on Insolvency Proceedings] and regard “domicile” as the “centre of main interests” subject to the assumption in favour of the place of incorporation.’

Indeed, in *Re Phoenix Kapital Dienst GmbH*,<sup>69</sup> the English court having mentioned various aspects that establish the connection between a company that is a subject of insolvency proceedings and the jurisdiction where the foreign representative was appointed, stated that there may exist other grounds for jurisdiction such as, for example, where the office holder was appointed by the courts of the country where the company in question carried on business.<sup>70</sup> Furthermore, in *Re HIH Casualty and General Insurance Ltd*<sup>71</sup> which came to the House of Lords shortly after the *Cambridge Gas* case, Lord Hoffmann, in the midst of the divergent opinions as to the position of common law on remission of English assets to Australian liquidators, noted that the home country of the company may not be the most appropriate jurisdiction and referred to the COMI test applied under the UNCITRAL Model Law on cross-border insolvency.<sup>72</sup>

#### **5.2.2.5 Fair and Equitable Treatment of Local and Foreign Creditors**

At common law foreign creditors are treated the same way as local creditors in insolvency proceedings. Indeed, this is consistent with the fact that traditionally the common law has recognised the universality of insolvency proceedings.<sup>73</sup> With regard to proof of debts and claims, it is generally accepted that in a local winding up for instance, foreign creditors are admitted to proof in the winding up along with local creditors. The proof of debts in a local winding up is regulated by the local winding up laws of the place in which the claim is submitted.<sup>74</sup> That is to say, the general principle applies to the treatment of foreign creditors. They

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<sup>69</sup> [2008] BPIR 1082. This case is significant to English law based offshore jurisdictions', and Anglophone countries, such as those of SSA, whose legal systems are still largely dependant on English common law in certain respects. As in the *Cambridge Gas* case, in the *Phoenix* case, it was only common law principles on cross-border insolvencies that were applicable. It was found that neither the EC Regulation on Insolvency No 1346/2000 nor the UNICITRAL Model Law on Cross-Border Insolvency as reflected in the Cross-border Insolvency Regulations 2006(SI 2006/1030) was applicable.

<sup>70</sup> See E Sjostrand (n 22) 105, 107

<sup>71</sup> [2008] 1 WLR 852

<sup>72</sup> *Cambridge Gas* case (n 22); and P Hayden (n 22) 109. See also n 28 above as to the controversy surrounding Lord Hoffmann's opinion.

<sup>73</sup> See *Cambridge Gas Case* (n 22) citing in support *Solomons v Ross* (1764) 1 H BI 131 where English creditor had to surrender to the Dutch bankruptcy assets realised out of the garnishee proceedings and prove in such proceedings, following recognition by the English court of such proceedings. See also K Nadelmann (n 42) 154

<sup>74</sup> *Re Vocalion (Foreign) Ltd* [1932] 2 Ch 196, 206; *Re Trepca Mines Ltd* [1960] 1 WLR 1273

are given equal status to local creditors in their ability to lodge proofs of debts notwithstanding their home country or location.<sup>75</sup>

Mason argues that this principle is largely inspired by the long standing principle of insolvency law that all creditors are prima facie treated equally.<sup>76</sup> Perhaps the *Cambridge Gas* case has significantly served to clarify the position of the common law in this area. In this decision, the Privy Council stated that ‘the English common law has traditionally taken the view that fairness between creditors requires that, ideally, bankruptcy proceedings should have universal application. There should be single bankruptcy in which all creditors are entitled and required to prove. No one should have advantage because he happens to live in a jurisdiction where more of the assets or fewer of the creditors are situated.’<sup>77</sup>

### **5.3 Considering the Common Law Approach in Light of Cross-Border Insolvency Theories and the International Insolvency Benchmarks**

The common law offers an important framework for dealing with cross-border insolvency especially for countries that lack comprehensive legislation capable of addressing current challenges of cross-border insolvencies. However, the common law approach is not as certain and predictable as required by the international insolvency standards. As such, its position over a particular issue would not be clear if the court has never before had an opportunity to deal with and address it. It is, for instance, in this regard that it has been doubted as to ‘whether assistance could take the form of applying provisions of the foreign insolvency law which form no part of the domestic system.’<sup>78</sup> Despite such

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<sup>75</sup> R Mason, ‘Globalisation of Bankruptcy Practice-An Australian Perspective’ (1997) 5 *Insolv LJ* 12, 22, and R Mason ‘Hotchpot and Other Tasty Morsels in International Insolvency’ (1995) 3 *Insolv LJ* 149, 150, citing in support *Azoff-Don Commercial Bank* [1954] Ch 315 at 333; and *Sedgwick Collins & Co. v. Rossia Insurance Co.* [1926] 1 KB 1 at 13 per Scrutton L.J, and *Re Kloebe* (1884) 28 Ch D 175

<sup>76</sup> R Mason (n 75) 21, and R Mason (n 75)150, citing in support *Phillips v. Hunter* (1795) 2 H BI 402, 405; (1795) 126 ER 6 18, 620 where it was stated that ‘the great principle of bankrupt laws is justice founded on equality.’

<sup>77</sup> [2006] UKPC 26; [2007] 1 AC 508 (PC(IoM)), para 16

<sup>78</sup> See Lord Hoffmann’s dicta in this regard in para 22 of Judgement in *Cambridge Gas Case* (n 22); LC Ho, ‘Applying Foreign Law under the UNCITRAL Model Law on Cross-Border Insolvency’ (2009) 24 *J Int’l Banking and Financial L* 655, Ho’s view is that judicial assistance can take the form of applying foreign insolvency law. In his view in *Cambridge Gas* case the Privy Council did actually apply foreign law, i.e the US Bankruptcy Law.

doubts, other scholars are certain that at common law judicial assistance can take the form of applying foreign insolvency law and as far as they are concerned the *Cambridge Gas* case did actually apply foreign law (i.e the US Bankruptcy Law).<sup>79</sup>

It is nevertheless notable that one aspect that is common to both the common law and the international insolvency benchmarks is the flexibility and adaptability to local circumstances, though such scope is, under the international insolvency benchmarks, only allowed with some restrictions on matters of particular importance to a cross-border insolvency system.<sup>80</sup> This is clearly implicit in the benchmarks and the exercise of discretionary powers at common law. The flexibility is in Anglo-phone SSA countries, bolstered by the fact that the common law is applicable subject to such qualification as local circumstances render necessary.<sup>81</sup>

Although it has been contended that the common law approach to cross-border insolvency aligns with the universalism theory, the element of discretionary power on the part of the court to decide whether or not to grant recognition and assistance render the approach, while retaining territoriality, to be much closer to modified universalism than the pure universalism advocated in the debate.<sup>82</sup> Indeed, what amounts to a modified universalism corresponds to the true nature of the application of the common law approach to cross-border insolvency.<sup>83</sup> Clearly, the criteria which are in place thus far, and the manner in which the court is entitled to exercise its discretion centre on the local interests as opposed to universal ones.<sup>84</sup> Indeed, this is the very feature that brings the common law approach closer to modified universalism for, despite its recognition of the

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<sup>79</sup> LC Ho (n 78) 655

<sup>80</sup> See text to n 86 and 87 in chapter 3; and n 83 and 176 in chapter 7

<sup>81</sup> See text to n 9 and 10 above

<sup>82</sup> See text to part 2.5 and all its sub-parts in chapter 2

<sup>83</sup> Modified universalism allows countries other than the foreign main jurisdiction to evaluate the fairness of the foreign main proceedings and protect the legitimate local interests. See JL Westbrook, 'A Comment on Universal Proceduralism' (2009-2010) 48 *Colum J Transnat'l L* 503, 515-516; and JL Westbrook, 'A Global Solution to Multinational Default' (1999-2000) 98 *Mich L Rev* 2276, 2302 and 2324. See also text to part 7.4.3.5 in chapter 7 and part 2.5.3.2 in chapter 2

<sup>84</sup> *Re African Farms* 1906 TS 373; see also n 28 above and G Moss (n 22) 125

universalist nature of an insolvent debtor's estate and its willingness to cooperate, it still vests the court with a very wide space in which it may decide whether to cooperate or not taking into account different factors that are at its disposal. Apparently, the existence of the criteria which have emerged over time does not guarantee an automatic recognition and cooperation and provision of judicial assistance.<sup>85</sup>

Critics may argue that the predictability element which universalism and territorialism theorists claim to be achieved in their respective theories can hardly be achieved at common law where no one can be certain about the outcome given the unfettered discretion which judges enjoy.<sup>86</sup> While such operational realities of the common law approach may be held to militate against predictability and certainty which, in view of the international insolvency benchmarks, are among the principal indicators of efficiency in any given insolvency system, they are instrumental in assessing a country's interests before according assistance or deferring to a foreign insolvency proceeding. This is critical in ensuring results that conform to the policy objectives of the insolvency system of a given country and which do not violate such country's public policy. For SSA countries could always be deferring to foreign proceedings, such an approach may be necessary and unavoidable.<sup>87</sup> The suitability and relevance is based on the flexibility and adaptability which allow space for conformity to local policies and to respond accordingly to the potential consequences of the huge divergence in the insolvency systems among countries and its potential divergence as to treatment of foreign creditors.<sup>88</sup>

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<sup>85</sup> See *Banques des Marchands de Moscou* case (n 39)

<sup>86</sup> See DA Ailola, 'The UNCITRAL Model Law on Cross-Border Insolvency: Its Efficacy and Suitability as A Basis for A SADC Convention' (2000) 11 *Stell L Rev* 215, 216 where he names 'unfettered discretion as one of problems that bedevil the value of common law as a tool of resolving cross-border insolvency matters.'

<sup>87</sup> F Tung, 'Fear of Commitment in International Bankruptcy' (2000-2001) 33 *Geo Wash Int'l L Rev* 555, 576, & 577; and JAE Pottow, 'Greed and Pride in International Bankruptcy: The Problems of and Proposed Solutions to "Local Interests"' (2005-2006) 104 *Mich L Rev* 1899

<sup>88</sup> JL Westbrook, 'JL Westbrook, 'Priority Conflicts as a Barrier to Cooperation in Multinational Insolvencies' (2008-2009) 27 *Penn St Int'l L Rev* 870; and JL Westbrook, 'A Comment on Universal Proceduralism' (2009-2010) 48 *Colum J Transnat'l L* 503

As in the case of the common law, one of the distinctive features of modified universalism, which makes it different from universalism, is the element of discretionary power in deciding whether and in what form to comply with universality of insolvency proceedings of an insolvent enterprise as the local law would permit.<sup>89</sup> This means that under modified universalism, as it is at common law, cooperation may be refused for a number of reasons, for example, in circumstances where it would, firstly, infringe on the local law and secondly, unfairly prejudice the interests of local creditors.<sup>90</sup>

The other key feature of the modified universalism which is also more or less similar to the common law approach is its reliance and use of local laws to realise the universality of insolvency proceedings.<sup>91</sup> The advocates of modified universalism adopt similar methods as the common law in giving effect to universality. One such method is the use of ancillary proceedings which is under modified universalism commonly referred to as secondary proceeding. Notably, the recent development at common law seems to be greatly inspired by the recent debate on the competing theories of cross-border insolvency.<sup>92</sup> Such inspiration seems to have contributed markedly in a recent modern attempt of clarifying the position of the common law approach within the continuum of the cross-border insolvency theories as characterised by the two dominant theories, namely universalism and territorialism, on the two opposing ends.<sup>93</sup>

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<sup>89</sup> Ibid

<sup>90</sup> See *Cambridge Gas* case (n 22) where the Privy Council held that there was no discretionary reason to withhold assistance as there were no suggestion of prejudice to creditors in the Isle of Man and infringement of local law; and see JL Westbrook, 'Choice of Avoidance Law in Global Insolvencies' (1991) *Brook J Int'l L* 499, 517, stating that under modified universalism 'local courts [have] discretion to evaluate the fairness of the home country procedures and to protect the interests of local creditors.'

<sup>91</sup> It seems that modified universalism was advocated with the common law approach to cross-border insolvency in mind, though the major advocates of this theory tended to a large extent to link it with the then section 304 procedure under the US Bankruptcy Code. See JL Westbrook, 'Choice of Avoidance Law in Global Insolvencies' (1991) 17 *Brook J Int'l L* 499, 517

<sup>92</sup> See *Cambridge Gas* case (n 22) as per Lord Hoffmann on behalf of the Privy Council; L Hoffmann (n 4) 2507; and LC Ho (n 22) 217 describing universalism as 'no more than a convenient label' which is only used 'when the court feels inclined to grant the assistance sought.'

<sup>93</sup> Ibid

#### 5.4 Fitting the Common Law Approach into Cross-Border Trade and Investment Facilitation Arrangements

The initiatives for the promotion and protection of trade and foreign investment manifested by the conclusion of BITs and other regional and interregional arrangements raise important questions regarding the significance of the common law approach to cross-border insolvency in facilitating co-operation in trade and capital flow between countries and in particular to a host developing country such as those in SSA.<sup>94</sup> When viewed in the context of the cross-border trade and investment arrangement to which SSA countries such as Tanzania and Kenya are contracting parties, the approach potentially offers a basis for dealing with cross-border insolvency problems between contracting parties and even beyond as it fills up what is lacking in any relevant domestic legislation.<sup>95</sup> The approach also stands a chance for its application and future course of its development to be shaped and influenced by the standards and principles that characterise the cross-border trade and investment facilitation arrangements.<sup>96</sup> This is particularly the case given that international law, as expressed in treaties and in customary law, is becoming an increasingly significant influence on the development of the common law across commonwealth jurisdictions.<sup>97</sup> It remains to be seen if and when a similar trend is going to be replicated in SSA.<sup>98</sup>

The recent development in cross-border insolvency at common law brought by the decision in the *Cambridge Gas* case effectively means that tools for extending any assistance and co-operation needed in foreign insolvency proceedings involving an investor in a host SSA country will no longer be

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<sup>94</sup> For the in-depth discussion of the cross-border trade and investment facilitation arrangements and how they implicate cross-border insolvency regulation see text to section 4.5 through 4.7 of chapter 4; and M Kirby, 'The Common Law and International Law-A Dynamic Contemporary Dialogue' (2010) 30 *Legal Studies* 30, discussing how the application of common law in the common law jurisdictions takes account of and recognise relevant international law (as expressed in treaties and in customary law) in appropriate cases.

<sup>95</sup> Text to n 11 above

<sup>96</sup> Notably, this is when it involves countries that are partner states in a BIT or any other similar arrangements that tend to impose binding standards and principles to the contracting states.

<sup>97</sup> M Kirby (n 94) 31

<sup>98</sup> RJ Daniels, MJ Trebilcock, and LD Carson (n 7) 125, 173-177 suggesting that the extent of legality and rule of law commitment in former British Colonies is to a considerable extent dependant on the colonial institutional environment. Further that such environment explains existence of significant diversity among commonwealth jurisdiction in regard to such element.

conditional on the foreign proceedings taking place in the insolvent investor's place of incorporation.<sup>99</sup> This is in addition to the possibility of making use of any remedy that could be applied in a domestic insolvency proceeding to avoid the necessity of having parallel proceedings which translate to costs, delays and difficulties in preserving rather than destroying going concern value. There is scope for the court in a host country to consider the existence of arrangements such as BITs as one of the factors when ruling in favour of, for instance, granting recognition to foreign proceedings involving an investor from the home country or granting remedies which could have been extended if equivalent proceedings had been taken in the host forum.<sup>100</sup> In the same vein, the existence of such arrangements could be construed as a firm acceptance by a host country that any proceeding commenced in respect of a foreign investor in the host country must be ancillary to those commenced in a home country which is a partner state to the arrangement if it involves the same investor.<sup>101</sup>

The approach also seems to offer a framework within which a host country could assess its situation and circumstances as a yardstick of deciding whether or not it is appropriate for it to recognise, co-operate and provide assistance to foreign proceedings originating in the home country of an investor having an investment or commercial operation in a host country. The crucial element in this connection is the emphasis which the recent development at the common law places on the importance of the protection of local creditors and compliance with local laws.<sup>102</sup> However, the cross-border trade and investment arrangements, as signified by the BITs, strictly limit the scope for protection of local interests. As such, in relation to countries with which SSA countries maintain cross-border co-operations in trade and investment, as is the case with BITs, there seems to be little space for such endeavour to be invoked in cross-border insolvency matters.

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<sup>99</sup> Text to n 68 -72 above

<sup>100</sup> M Kirby (n 94). The trend is such that among common law jurisdictions international law is becoming an increasingly significant influence on the development of the common law

<sup>101</sup> M Kirby (n 94)

<sup>102</sup> G Moss (n 22) 125

Accordingly, the discretionary powers that characterise the approach to cross-border insolvency at common law would perhaps need to be exercised in a manner that is consistent with the treaty commitments of the contracting states and especially the obligations of promotion and protection of foreign investments and investors. One implication, for instance, of BITs would arguably be to restrict and confine the scope of discretionary powers which the court could exercise at common law within the context of the treaties and indeed, the promotion and protection of foreign investments and investors. Such implication could, for example, be taken to mean that a host country would be expected to co-operate by granting recognition and extending judicial assistance in respect of foreign proceedings that involve an investor in the host country from a foreign country, where such proceedings originate from the foreign country that is a party to a BIT.

It might be considered to be contrary to the host country's treaty commitments for such a court in such a country to exercise its discretion in a manner that refuses co-operation and assistance or destroys rather than preserves going concern value, whilst its treaty commitments require it to ensure and strive to promote and protect foreign investments and investors.<sup>103</sup> This may also be taken to extend even to third countries as long as the foreign investor in a host country, who is a subject of insolvency proceedings, has an interest in such third countries. Furthermore, various tools that characterise the approach to cross-border insolvency at common law may reinforce the commitments of the host countries. For example, the standards of treatment of investors, such as equitable and fair treatment, most favoured nation treatment, national treatment, and right to repatriation of capital and transfer of funds reinforce the common law recognition of universality of insolvency proceedings and all that they entail, such as equality of treatment in the proof of debts, requirement of fairness between creditors irrespective of their nationality or location and turnover of assets in appropriate cases.

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<sup>103</sup> Text to n 58 in chapter 4

However, since the nature of the applicability of the common law approach to cross-border insolvency is, generally speaking, dependent on the way the discretionary power will be exercised by the domestic court in an appropriate case, there is scope for arguing that the application of such an approach in the context of the arrangements for backing up the development of foreign investment and trade may in practice be haunted by unpredictability and uncertainty which such arrangements essentially seek to eliminate in the first place. This is notwithstanding the fact that such arrangements might have been concluded with complete awareness of the entire legal system of a country which allows the application of the common law at which the domestic court must provide assistance by doing whatever it could have done in the case of a domestic insolvency to avoid the need for parallel proceedings and to preserve rather than destroy going concern value. Nevertheless, the status, application and usefulness of the common law, irrespective of its appropriateness, will largely depend on the extent and manner into which it is allowed to apply and function in a host country.<sup>104</sup> This again raises the issue of uncertainty and unpredictability, which is the key aspect in the debate on the competing cross-border insolvency theories and international insolvency standards. It is the very problem which the arrangements, as characterised by the BITs, seek to eliminate.<sup>105</sup>

### **5.5 Utility and Limitations of the Common Law Approach in SSA**

The common law's approach to cross-border insolvency has been described as being potentially useful to 'a number of present and former colonies and commonwealth countries.'<sup>106</sup> This undoubtedly is inclusive of the common law jurisdictions in Anglo-phone SSA.<sup>107</sup> The usefulness of the common law approach is based on two reasons. Firstly, the nature and background of the legal systems in such countries trace their origin from England;<sup>108</sup> and secondly, a large number of these countries are still considered to have less developed legal

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<sup>104</sup> Text to n 9 and 10 above

<sup>105</sup> HS Burman (n 32) 2552

<sup>106</sup> G Moss, D Bayfield and G Peters (n 22) 82

<sup>107</sup> RJ Daniels, MJ Trebilcock, and LD Carson (n 7) 111

<sup>108</sup> S Merry (n 1); and MN Wabwile (n 11)

systems and insolvency systems in particular.<sup>109</sup> Indeed, the way the common law is designed to apply in most of such jurisdictions is that the more a country legislates, the more it reduces gaps which could justify and require adoption and application of the common law.<sup>110</sup> Its contribution is that it fills up the gaps on matters on which relevant local legislation is silent and does not cover matters that would otherwise be the subject of statutory provisions, for example, recognition, assistance, co-operation, enforcement of foreign insolvency orders and fair and equitable treatment of all creditors.<sup>111</sup> This means that SSA countries which have less developed cross-border insolvency systems have a greater space for adoption and application of the common law in appropriate cases.

To be sure, even before the clarification of the common law position on cross-border insolvency afforded by the *Cambridge Gas* case, most common law jurisdictions in the developing world have long been relying on and adopting English common law principles to decide insolvency matters.<sup>112</sup> These have included affording recognition and assistance to foreign office holders in foreign insolvency proceedings. In *Autland Heavy Equipment & Construction v Phillip Holzmann International/Nord France EI JV*,<sup>113</sup> the British Virgin Island (“BVI”) High Court has had an opportunity to consider the issue of the international recognition of foreign insolvency proceedings conducted in Germany.<sup>114</sup> The BVI High Court stated:

“Whether this Court would recognize the insolvency proceedings in Germany is a matter of our law. We have no provisions for the

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<sup>109</sup> IF Fletcher, ‘Maintaining the Momentum: The Continuing Quest for Global Standards and Principles to Govern Cross-Border Insolvency’ (2006-2007) *Brook J Int’l L* 767, 774. See also text to n 42 in chapter 3

<sup>110</sup> MN Wabwile (n 11) 63

<sup>111</sup> Ibid

<sup>112</sup> E Sjostrand (n 22) 107

<sup>113</sup> Claim No. BVIHCV 2002/0111 (16th April 2004) (Rawlins J) Para 14

<sup>114</sup> HA Rawlins, ‘The Enforcement of Foreign Judgements and Arbitral Awards in the Eastern Caribbean’ (Paper Presented at the 5<sup>th</sup> Regional Law Fair of the OECS Bar Association in St Lucia 2008) <

[http://www.eccourts.org/jei\\_doc/2008/managing\\_international\\_commercial/EnforcementofForeignJudgmentsandArbitralAwardsbyChiefJusticeHughRawlins.pdf](http://www.eccourts.org/jei_doc/2008/managing_international_commercial/EnforcementofForeignJudgmentsandArbitralAwardsbyChiefJusticeHughRawlins.pdf) > accessed 21 August 2011

[11]. According to Rawlins ‘The approach of Eastern Caribbean courts in extending comity in insolvency cases tend to be quite facilitating and in keeping with statements which the Privy Council made in [the] *Cambridge Gas* [case].’

reciprocal recognition and/or enforcement of Orders that issue from a German Court.....[nor] .... any relevant [t]reaty provisions ..... This Court recognizes the importance of extending and accepting recognition of Judgments by comity, particularly in commercial cases... I would be willing to extend it, once there was sufficient evidence to satisfy me that, under German law, the assets of Holzmann, including its foreign assets, vested in the insolvency trustee prior to the institution of the claim...”<sup>115</sup>

Although there might be no illustrative case as to the adoption of the relevant common law on cross-border insolvency in SSA countries, such as those of Tanzania and Kenya, examples abound where respect and reliance have been given to the English common law.<sup>116</sup> Indeed, examples of cases where English case law has been used in respect of specific aspects of insolvency, whether or not they are entirely based on English common law are not uncommon.<sup>117</sup>

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<sup>115</sup> *Autland Heavy Equipment & Construction v Phillip Holzmann International/Nord France EI JV* Claim No. BVIHCV 2002/0111 (16th April 2004)(Rawlins J.) as quoted in HA Rawlins (n 120) 11

<sup>116</sup> See *Re Fahari Bottlers Ltd* Misc Civ Case No. 155/1998 (a Tanzanian case) where the court noted that: ‘the concept of hive-down is not expressly provided under our [statutory] law. It however has its feet unto our land under the Judicature and Application of Laws Ordinance (Cap. 453). Thus we have to follow the English common law as applicable in England.....Under common law a hive-down is an exercise by which the business of a company in serious financial problems is transferred to a newly formed company....The exercise can be put into motion by a receiver with the court’s approval or by a company itself in agreement with the creditors. It can not be initiated and executed by the financially distressed company alone because, naturally, being on a death-bed, it would only consider its own interests to the detriment of the creditors.’ Notably, apart from stressing the applicability of the common law, no relevant case law was cited in that regard.

<sup>117</sup> See *Re Muddu Awulira Enterprises Limited Companies Uganda* High Court (Commercial Division) Cause No. 14 of 2004 [2004] UGCommC 5 <

<http://www.ulii.org/ug/cases/UGCommC/2004/5.html>

> accessed 3/8/2010, where there was a heavy reliance on English case law based on English statutory laws. The matter before the court involved the winding up of an insolvent company in accordance with the winding up procedure as contained in the Uganda’s Companies Act Cap 85 Laws. This Act is based on the UK Companies Act 1948; *Credit Africa Bank Ltd (In Liquidation) v Alias Namu Kundiona* Supreme Court of Zambia, Judgment No. 9 of 2003 (Unreported) where the case of *Langey Constructions (Brixham) Limited v Wells, Wells Estate (Dartford) Limited (4)* was used as an authority. In that case the English court stated that: -

‘.... The purpose of Section 231 is to ensure that when a Company goes into liquidation the assets of the company are administered in an orderly fashion for the benefit of all the creditors and that particular creditors should not be able to obtain an advantage by bringing proceedings against the company. What is contemplated is that the Companies Court shall be seized with all these matters and shall see that the affairs are wound up in a dignified and orderly way.’ Per Lord Widgery. In some other cases the courts have been prepared to decline from following English authority where it appears that the domestic law had not been amended in line with the development taking place in the UK. In a Kenyan case, *Jasbir Singh Rai and 3 Others v Tarlochan Singh Rai and 13 Others* Court of Appeal at Nairobi Civil Appeal No. 63 of 2001 (unreported) < [http://www.kenyalaw.org/Articles/show\\_article.php?view=9&cat=7](http://www.kenyalaw.org/Articles/show_article.php?view=9&cat=7) > accessed 31/08/2010, it was held that ‘[i]t would be wrong to think that Kenyan courts could blindly follow English provisions, which had since been amended to revise an earlier position that was

Despite the validity of the historical debate as to the application of post reception clauses concerning English law,<sup>118</sup> it is a fact that among the SSA common law jurisdictions English law is being adopted without consideration of the reception clause as the jurisdictions continue to borrow substantially from English law.<sup>119</sup> It is thus no wonder that, in appropriate cross-border insolvency matters, such countries which still maintain reception clauses that recognise the common law as one of their sources of law, would not hesitate to invoke the common law approach to cross-border insolvency to resolve the outstanding issues of cross-border insolvency in relevant cases.<sup>120</sup> This, as is the practice in other cases, would entail digging and looking for relevant English decisions where relevant common law principles were judicially pronounced.<sup>121</sup> It is thus usual for the courts to even rely on text books written by English authors.<sup>122</sup>

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similar to the present Kenyan law.’ The case concerned joinder of third parties in winding up proceedings and the petitioners sought to argue their case based on sections 459 and 461 of the UK Companies Act 1985 (which re-enacted similar provisions as those of Kenya with some amendments).

<sup>118</sup> For details of this historical debate see MN Wabwile(n 11) 74 citing AN Allot, ‘The Authority of English decisions in Colonial Courts’ in AN Allot, *Assays in African Law* (Butterworths, London 1960); TO Elias, ‘Colonial Courts and the Doctrine of Judicial Precedent’ (1955) 18 *MLR* 356; K Robert-Wray, ‘The Adoption of Imported Law in Africa’ (1960) 1 *J Afr L* 66, 69; and AEW Park, *The Sources of Nigerian Law* (Sweet & Maxwell, London 1963). Notably one theory is that the reception clause is meant to adopt the law as it stood on the reception date. The other theory is that the reception clause is meant to adopt the current English Common Law and that the reception date is only applicable to the statutes of general application because only legislation can bear precise dates of enactment and commencement. The second theory seems to be more plausible and realistic.

<sup>119</sup> See n 115-117 above. In fact, this has been the trend from the colonial and early post-independence days up to the present. What is interesting is that the trend seems to have not been affected by the early ‘Africanisation’ movements and policies that were pursued by many SSA countries. See GEA Sawyerr, ‘Internal Conflict of Laws in East Africa’ in GFE Sawyerr (ed), *East African Law and Social Change* (East African Publishing House, Nairobi 1967) 123

<sup>120</sup> South Africa is perhaps the exceptional case in SSA as it has long been extensively applying the common law on cross-border insolvencies. This is understandable given its significant share of involvement in foreign investments activities. See DA Ailola (n 86) 215-218 citing some South African cases where the common law principles on cross-border insolvency were invoked to resolve cross-border insolvency matters. The common law applicable to South Africa has been described as having Roman-Dutch influence as opposed to the common law applicable in such countries as Tanzania, Kenya, Malawi, Mauritius and Zambia. On the nature of South Africa’s legal System and the common law influences, see also, AN Allott, ‘Towards the Unification of Laws in Africa’ (1965) 14 *ICLQ* 366, 377, describing the South African system as based on Anglo-Roman-Dutch law, being a hybrid of Roman law principles with Germanic customary law of the Dutch and English common law.

<sup>121</sup> It is also not uncommon for common law jurisdictions to look for authorities from other common law jurisdictions. See for instance s. 180 of the Tanzania’s Land Act 1999 which seeks to apply not only the substance of the common law and the doctrines of equity applied in

There are powerful reasons, based on the history and the set-up of the post-independence legal frameworks in the countries under study, why in matters of cross-border insolvency, the courts in these jurisdictions would inevitably default to the English common law. This is a fortiori as there is currently limited experience of cross-border insolvencies. Thus any application of the common law approach to cross-border insolvency will potentially have an impact of rendering the cross-border insolvency legal framework of these countries more of a modified universalism nature than otherwise. This impact is perhaps contrary to what many would have thought. The extent to which such legal frameworks would be categorised as such would very much depend on how the courts in such countries will exercise their judicial discretionary power - a fundamental aspect of the common law on cross-border insolvency - to afford recognition and assistance to foreign insolvency proceedings. This becomes more complex when one takes into account the qualifications which are explicit in the framework within which the said common law is to be adopted; that is 'so far as the circumstances of [such countries] and [their] inhabitants permit, and subject to such qualifications as local circumstances may render necessary.'<sup>123</sup>

The effect of the above mentioned qualification is seemingly to broaden even further the unfettered wide discretionary powers that the courts enjoy and consequently to add to the uncertainty and unpredictability of results that characterise the system.<sup>124</sup> It has been judicially pronounced that there are two

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England, but also the substance of common law and the doctrines of equity as applied from time to time in other countries of the commonwealth which appear to the court to be relevant to the circumstances of Tanzania.

<sup>122</sup> See *Fahari Bottlers Ltd and Southern Highlands Bottlers Ltd v The Registrar of Companies and The national Bank of Commerce (1997) Ltd* Civil Revision (Court of Appeal of Tanzania) No 1 of 1999 [19] and [20] where JJ Charlesworth and G Morse, *Charlesworth and Morse Company Law* (15<sup>th</sup> edn Sweet & Maxwell, London 1995) 752 was used and cited in support of the Court of Appeal's view that '[n]ormally no person resident outside the jurisdiction of the court is qualified for appointment as a liquidator.'; and in *Fahari Bottlers Ltd v The Registrar of Companies and The national Bank of Commerce (1997) Ltd and Others* Miscellaneous Civil Cause No, 155 of 1998 (High Court of Tanzania) where RR Pennington *Pennington's Company Law* (5<sup>th</sup> edn Butterworths, London 1985) 394 was cited in relation to treading on common sense in giving consideration to reasonableness of a scheme of arrangement.

<sup>123</sup> Text to n 9 and 10 above

<sup>124</sup> HS Burman (n 32) 2552

tests which should be applied in determining the application of the substance of common law in relation to local circumstances.<sup>125</sup> Firstly, whether there is an established body of local law with which the application of a relevant common law principle would be inconsistent.<sup>126</sup> And secondly, whether there is anything in the circumstances of the jurisdictions involved and their people which makes the application of that principle undesirable.<sup>127</sup> Arguably, if such tests were to be universally applied in all Anglophone SSA countries, while paying regard to the massive liberalisation of trade and investments that has been taking place since the mid 1980s and early 1990s, the bilateral investment treaties as well as the regional and interregional arrangements concluded thus far, it is unlikely that such jurisdictions would invoke the common law on cross-border insolvency in a manner that would deny recognition and assistance.<sup>128</sup> However, be that as it may, one cannot argue with certainty that application of the relevant common law can always be predictably invoked to the best interest of universality of insolvency proceedings and the foreign investors.

The ‘underdeveloped state of the common law’<sup>129</sup> approach to cross-border insolvency means that even though the common law jurisdictions in SSA might wish to effect a wholesale adoption of the common law, such endeavour could be severely limited by the state of the art of the common law. This is perhaps even worse given that although the law is said to be still in a developing state and progressing in a very positive direction,<sup>130</sup> the speed with which it copes with the demand is likely to jeopardise the much desired predictability and certainty.<sup>131</sup> Its

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<sup>125</sup> See *Obongo v Municipal Council of Kisumu* [1971] EA 91(CA). In this case, the court held that ‘as there were no evidence led to prove existence of qualifying circumstance, it cannot be held that there is an established body of law in Kenya or in East Africa, which precludes our following [the] opinions of [the House of Lords in *Rhodes v Bernard*]

<sup>126</sup> *Obongo’s case* (n 125) 94

<sup>127</sup> *Ibid*

<sup>128</sup> BS Masoud, ‘Transnational Aspects of Tanzania’s corporate Insolvency Law’ (2006) 14 *IJUM LJ* 124, 135

<sup>129</sup> *Cambridge Gas case* (n 22 )para 19 citing G Moss, D Bayfield and G Peters (n 22) 81

<sup>130</sup> G Moss, D Bayfield and G Peters (n 22) 82

<sup>131</sup> This perhaps explains for the emerging trend towards much regards to authorities from other common law jurisdictions. See for instance Land Act 1999, s 180 (Tanzania) which qualifies the application of the common law, the doctrines of equity and statutes of general application. It first receives not only the substance of the common law and the doctrines of equity applied in England, but also the substance of common law and the doctrines of equity as applied from time

speed of development in ‘England as the progenitor of the common law legal family’,<sup>132</sup> is indeed curtailed by the extensive legislation that has been effected in this area to cope with the global demands of cross-border insolvency.<sup>133</sup> Nevertheless, the trends that prevail in English law suggest that the traditional common law itself is at a crossroads as there are centripetal forces both globally and within Europe designed to develop a unified system that would facilitate efficiency in dealing with multinational default.<sup>134</sup> This situation is aggravated by the inherent contradictions, controversies, uncertainties and doubts that pertain in some principles which indeed add to unpredictability and uncertainties in which the law is likely to result.<sup>135</sup> One may wonder, though, if *Re HIH Insurance* and *Rubin v Eurofinance* can well be regarded as a renaissance.<sup>136</sup>

Notwithstanding the ‘underdeveloped state of the common law’ and the development that has taken place recently, the effectiveness of the common law depends on a good flow of and access to information on newly developed

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to time in other countries of the commonwealth which appear to the court to be relevant to the circumstances of Tanzania.

<sup>132</sup> M Wabwile (n 12) 27

<sup>133</sup> *Cambridge Gas* case (n 22) para 18; and IF Fletcher (n 34) 93. For the general concerns raised on the development and future of the common law, as well as the impact of European Union and international legal regimes on the common law and its relevance and suitability for common law jurisdictions, see, J Beatson, ‘Has the Common Law a Future?’ [1997] 56 *Cambridge L J* 291-292; WR Cornish, *Intellectual Property: Patents, Copyrights, Trademarks and Allied Rights* (London, Sweet & Maxwell 1996) vii; M Wabwile (n 12) 21-31; and TC Hartley, ‘The European Union and the Systematic Dismantling of the Common Law of Conflict of Law’ (2005) 54 *ICLQ* 813-828 in which the author painfully stated that ‘...[O]ne enters a new world once an area of private law becomes Europeanised... Other areas of conflict of laws are or soon will be, brought under the control of the European Court... Soon there will be little left to the common law.’

<sup>134</sup> M Wabwile (n 12) 24; IF Fletcher (n 34) 93; and G Moss, D Bayfield and G Peters (n 22) 81 and 82

<sup>135</sup> *Cambridge Gas* case (n 22) para 22 where the privy council said that ‘it is doubtful whether assistance could take the form of applying provisions of the foreign insolvency law which form no part of the domestic system.’; LC Ho (n 78) Ho finds the objection to application of foreign insolvency provisions to be unconvincing. In his considered view where English insolvency proceedings are ancillary to foreign insolvency proceedings, the application of the otherwise mandatory English insolvency provisions seems subject to a choice of law analysis as a matter of common law. As such, if a choice of law analysis may disapply English insolvency law, it may also logically apply foreign insolvency law. Ho’s position is based *inter alia* on *Re HIH* (n 22) 25; and *Banque Indosuez v Ferromet Resources* [1993] BCLC 112. On the contrary, see, G Moss (n 22) 125. While seemingly acknowledging the position as per Hoffmann in *Cambridge Gas* case, Moss states that the approach taken in *Cambridge Gas* case ‘...means in effect that the common law has developed to a stage where everything that can be done under s.426 [of the UK Insolvency Act 1986] can be done pursuant to judge-made law except the application of foreign insolvency law.’ Regarding the controversies surrounding recent developments, see n 28 above.

<sup>136</sup> *Re HIH* case (n 22); and *Rubin* case (n 28)

principles to address new demands.<sup>137</sup> Unfortunately, such information and principles are not only restricted and not always readily available in SSA countries but also their development is entirely based on the legal accidents brought about by the chance and vagaries of litigation.<sup>138</sup> Law reporting is still to date a serious problem in most SSA countries, so is access to and availability of law reports from other common law jurisdictions and especially the United Kingdom where the common law legal family traces its origin.

Nevertheless, the pursuit for certainty and predictability which is at the heart of the competing theories on cross-border insolvencies and the international insolvency benchmarks would suggest that reliance on unlegislated rules or discretion in resolving cross-border insolvency matters is problematic.<sup>139</sup> Indeed, it is the same pursuit that characterises the trend of conclusion of BITs and establishment of interregional economic arrangements mainly between developed and developing countries as a means of facilitating trade and flow of capital. The theory behind this pursuit is that certainty and predictability reduce transaction costs and enhance investment.<sup>140</sup>

## 5.6 Conclusion

The existing insolvency systems which are found in the countries under study are traceable from the historical colonial legacy. A fair assessment of the systems in place must take that fact into account and consider the corresponding legal families in which they are situated. The application of the common law to Anglo-phone SSA countries is the best example of the continuing influence of the colonial legacy which also applies to cross-border insolvency aspects of the common law jurisdictions in SSA. The application of the common law on cross-

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<sup>137</sup> M Akech, 'The Common Law Approach to Liability and Redress: Its Applicability to East Africa' (Paper presented in the Liability and Redress under Cartagena Protocol Workshop organised by International Environmental Law Research, Mombasa 2003) < [http://www.ielrc.org/activities/workshop\\_0309/content/akech.pdf](http://www.ielrc.org/activities/workshop_0309/content/akech.pdf) > accessed 21 August 2011

<sup>138</sup> MN Wabwile (n 12) 28

<sup>139</sup> DA Ailola (n 86) 216. Notably, the much needed flexibility can also compromise certainty and predictability due to the inevitable element of broad discretion to tailor assistance as per the UNCITRAL Model Law on Cross-Border Insolvency, art 22.

<sup>140</sup> Whilst consideration is given to multinational enterprises, perhaps the best approach is to consider also the certainty and predictability from the perspective of developing countries such as SSA countries as discussed in chapter 7.

border insolvency would have the effect of pulling the cross-border insolvency frameworks of the relevant SSA countries towards modified universalism. However, the extent to which such common law would apply is seemingly unpredictable as it depends on several factors. The key factors are the extent to which the reception clauses that apply the common law at least in theory allow the common law to be brought into use; the extent to which existing legislation provides for cross-border insolvency; the judicial attitude towards the common law; the consideration of the extent to which the local circumstances permit and/or qualify its application; and the extent to which the common law has already developed a relevant principle for an existing problem.

From the perspective of countries such as those of SSA, which might always be deferring to foreign jurisdictions in insolvency proceedings, the common law approach to cross-border insolvency could be relevant and appropriate. It offers a flexible framework that could enable such countries to evaluate each situation in relation to local interests before deciding whether and in what manner to cooperate. The element of consideration of the local circumstances is seemingly important in keeping up with local adaptations. However, it is clear that the flexibility inherent in the approach and the wide discretionary powers that the court has at common law are the potential source of unpredictability and uncertainty of outcome. Thus the obvious challenge, if the countries under study were to concretise the application of such an approach, is how to minimise or eliminate such unpredictability and uncertainty.

There is also scope for the flexibility and discretionary powers which the court may exercise under the common law approach to be limited by the operation of the bilateral investment treaties and other similar arrangements for trade and investments to which the countries under study are contracting parties. One argument is that the commitments such countries have under such arrangements may necessitate the discretionary powers under the common law approach to be only exercised in a manner that enforces the commitments of securing promotion and protection of foreign investments and investors. SSA countries have not been

much exposed to cases of cross-border insolvency. There is therefore a clear lack of experience with regard to the way the courts deal with the common law approach to cross-border insolvency. It however remains to be seen when, whether and to what extent the potential application of the common law in appropriate cases will consistently result into such an outcome that is in harmony with the existing treaty commitments. Such an outcome is even unpredictable and uncertain if one considers the limitations inherent in the very nature of the common law itself that seem to militate against its potential application in the countries under study. It is instructive to consider in the next chapter the existing legislative framework for cross-border insolvency in SSA with reference to Tanzania and Kenya and determine whether or not it still has space for the common law and suits the endeavours for protection and promotion of cross-border trade and investment.

## CHAPTER SIX

### A SURVEY OF THE STATE OF CROSS-BORDER INSOLVENCY LEGISLATIVE FRAMEWORKS IN SUB-SAHARAN AFRICA WITH REFERENCE TO TANZANIA AND KENYA

#### 6.1 Introduction

The debate on the competing cross-border insolvency theories, together with the international insolvency benchmarks imply that developing countries have weak insolvency systems and might indeed be reluctant to modernise their systems and commit to universalism.<sup>1</sup> However, there is a lack of comprehensive scholarship assessing the state of art of the existing legislative and policy frameworks for cross-border insolvency in Sub-Saharan African (“SSA”) countries. This chapter seeks therefore to take stock of the prevailing cross-border insolvency legislative frameworks in the light of the applicability of the common law approach to cross-border insolvency and against the backdrop of the competing cross-border insolvency theories, the international insolvency benchmarks, and the international trade and investment commitments.<sup>2</sup> Tanzania and Kenya are used as representative case studies.

Part one of this chapter provides an brief overview of the legal and socio-economic setting of SSA using Tanzania and Kenya as the case studies before examining the international character of the prevailing cross-border insolvency legislative framework and the existing reform initiatives and their potential implications. Part two reflects on the limited extent of the application of the law

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<sup>1</sup> Text to n 153 in chapter 2. See also, F Tung, ‘Fear of Commitment in International Bankruptcy’ (2000-2001) 33 *Geo Wash Int’l L Rev* 555, 556; L Hoffmann, ‘Cross-Border Insolvency: A British Perspective’(1995-1996) 63 *Fordham L Rev* 2507, 2510; and JAE Pottow ‘Greed and Pride in International Bankruptcy: The Problems of and Proposed Solutions to "Local Interests"’ (2005-2006)104 *Mich L Rev* 1899, 1918-1919

<sup>2</sup> CG Paulus, ‘Global Insolvency Law and the Role of Multinational Institutions’ (2006-2007) 32 *Brook J Int’l L* 755,761. Paulus found it to be astonishing that there has been little interest in how African countries deal with insolvencies and lack of representation from such countries in global insolvency forums.

and the occurrence of cross-border insolvencies in the countries under study. Part three discusses the extent of cross-border insolvency treatments in the regional groupings. The chapter concludes that, although there has recently been a growing trend towards reform of insolvency law, there is still space for application of the common law application. However, the prevailing law is still characterised by some unpredictability and uncertainties as to the extent and manner of its application and in particular in relation to the international treaty commitments of the countries under study. The contemplated reforms in Kenya seek however to significantly ameliorate the situation. Despite the growing trend towards regional groupings, it is within SSA only OHADA that has in the recent decades adopted an outstanding regime for cross-border insolvency occurring within its sixteen member states which do not include Tanzania and Kenya. On the other hand, the influence of colonial legacy is seemingly more noticeable than that of the international insolvency benchmarks in relation to the reform of insolvency law.

## **6.2 A Brief Overview of Legal and Socio-Economic Settings in SSA with Reference to Tanzania and Kenya**

### **6.2.1 A Historical and Socio-Economic Backdrop**

When giving a broader consideration in approaching improvement of SSA states' corporate governance, Sarra observed that '[t]he economic and social situation of Sub-Saharan African states is a critical consideration in thinking about domestic corporate activity and governance challenges in global markets, particularly given the serious poverty and the economic imbalance in power for these nations as they seek to strengthen domestic activity.'<sup>3</sup> This is indeed an important context that informs consideration of the state of art of the international character of insolvency systems of SSA countries.

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<sup>3</sup> J Sarra, 'Strengthening Domestic Corporate Activity in Global Capital Markets: A Canadian Perspective on South Africa's Corporate Governance' (2004) GWU Law School Public Law Research Paper No. 118/2004 < <http://ssrn.com/abstract=628702> > accessed 15 September 2011 [11]-[12]. Sarra is of the view that the diversity of SSA situations politically, economically and socially, among others, means that there is no one prescription or strategy for its problems. She notes further that the SSA situation and its associated challenges is made even complex by its history, post-colonial economic controls, and the politics of international developments.

Most of the SSA countries, including Tanzania and Kenya, attained their independence in the 1960s from their colonial powers, mainly the French and British. As observed in chapter five, Tanzania and Kenya inherited not only the legal systems imposed by their British colonial powers but also an economy that reflected the colonial interests.<sup>4</sup> The economy was heavily dependent on the agricultural sector with heavy reliance on imported capital goods, raw materials, and consumer goods.<sup>5</sup> The small manufacturing sector that was largely found in Kenya was meant to save the entire East African region. This unique history informs current trends in the international character of the existing insolvency systems and the reform processes.<sup>6</sup>

Following independence, some governments in SSA countries, such as Tanzania, nationalised all major means of economy and placed them under public ownership and control and established and financed state-owned enterprises (SOEs).<sup>7</sup> Conversely, other countries, such as Kenya, ostensibly allied with a market economy but they in practice followed a statist strategy which led to the implementation of policies seeking to promote local entrepreneurs.<sup>8</sup> Indeed, as it was apparent in Tanzania, most of the governments assumed the monopoly of developing the economic infrastructures, investing, running major businesses and providing social services.

Whilst the post-independence governments in SSA countries sought to bring about significant changes in their economic set-up to speed up economic growth and development, the legal infrastructure that was in force and which was inherited from the colonial powers remained quite substantially unaltered. As a result, most of the commercially related pieces of legislation, inclusive of insolvency legislation inherited from the colonial powers, were rendered

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<sup>4</sup> J Sara (n 3) 11; CRP Poncy, 'Stock Markets in Sub-Saharan Africa: Western Legal Institutions as A Component of the Neo-Colonial' (2002) 23 *U Pa J Int'l Econ L* 85, 95; and text to n 6, 7 and 8

<sup>5</sup> J Loxley, 'Financial Planning and Control in Tanzania' (1972) 3 *Dev and Change* 43

<sup>6</sup> J Sarra (n 3) 11

<sup>7</sup> J Nellis, 'The Evolution of Enterprise Reform in Africa: From State-owned Enterprises to Private Participation in Infrastructure — and Back?' (2005) [FEEM Working Paper No. 117.05](http://ssrn.com/abstract=828764) < <http://ssrn.com/abstract=828764> > accessed 05 September 2011

<sup>8</sup> Ibid

redundant as they were regarded as irrelevant to the then newly independent African countries, especially those which, as was the case for Tanzania and Kenya adopted African socialist ideology and Africanisation policies respectively.<sup>9</sup> There was therefore a lack of opportunity for testing the practicality of the law which could have contributed to its development and greater efficiency. The laws that were enacted only sought to institutionalise very specific aspects geared at implementing specific post-independence policies instead of overhauling the entire system and bringing it in tune with the circumstances, priorities and needs of the countries.

The poor performance of the SSA economies as a result of both internal and external factors culminated in a very heavy foreign debt shouldered by the states as the guarantor of the SOEs' loan. This situation forced the countries to adopt the 'one-size-fits-all' policies championed by the multilateral institutions with the consequent privatisation of the economy and the continued demand for putting in place conducive policy and a legal environment for promotion and protection of private (both domestic and foreign) investment.<sup>10</sup> The resulting private sector is now expected to contribute significantly to poverty reduction in partnership with the government. It is also expected to absorb the employees retrenched from the privatised SOEs and create more jobs for the growing SSA countries' population which is subjected to the limited social welfare system inclined towards protecting only employed individuals.<sup>11</sup> This is crucially

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<sup>9</sup> CM Dickerson, 'Informal-Sector Entrepreneurs, Development and Formal Law: A Functional Understanding of Business Law' (2011) 59 *Am J Comp L* 177, 197, observing that: 'Historically, little practical attention has been paid to bankruptcy and insolvency laws in Sub-Saharan Africa.... [to the extent that]...even the local legal professionals [are] uninformed. This is unfortunate since these laws can be an effective means of putting unproductive assets back to productive use' (footnotes omitted) and X Forneris, 'Harmonising Commercial Law in Africa: The OHADA' (2001) 46 *Juris Périodique* 77

<sup>10</sup> It may strongly be argued that the failure and insolvency of the state owned enterprises could have led to insolvency proceedings against them which (save for state guarantees of and intervention through loans extended to such enterprises and repayable by the state) would have potentially raised cross-border issues. This could have arisen from claims by foreign lenders from which the state obtained the funding for and on behalf of such enterprises. See for instance RW Harmer, 'Insolvency Law and Reform in the People's Republic of China' (1995-1996) 64 *Fordham L Rev* 2563, 2574-2575

<sup>11</sup> J Sarra (n 3). Sarra notes such expectation is notwithstanding that '[SSA] ...receives a disproportionately small share of foreign direct investment as compared with other developing

relevant as unemployment and lack of funding for the same are a threat to the social order.

Although initially it was thought significant policy-wise to define strategic areas which could not be open and available for foreign investment, this idea was short-lived and in fact overridden by the desire to facilitate enhanced productivity and efficiency necessary for competitiveness in trade and capital flows. Indeed, the laws and policies that have been put in place have tended to be more favourable to cross-border trade and investment than before as the countries under study strive to carve their places in the global economy and niches for their products in the international market.<sup>12</sup> Worth noting is the significant changes in, and development of, economic conditions and policy taking place since the mid 1980s and early 1990s to date, although critics maintain that much of the changes effected thus far do not adequately address the realities of SSA countries.<sup>13</sup> Notwithstanding such inclinations, there were initially no significant efforts regarding the reform of cross-border insolvency law, perhaps because of the lack of awareness and the possibility that such undertaking was considered to be less urgent and pressing than others.

One of the challenges that SSA countries face is to strengthen the efforts seeking to attract more capital inflow, which now forms the basic consideration in all reform undertaking that SSA governments pursue. Addressing such challenge increases fundamentally the potential for the occurrence of cross-border

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and transition nations.' The small share received thus far is largely confined in the natural resource sector.

<sup>12</sup> See for instance, Tanzania, *National Trade Policy* (Government Printer, Dar es salaam 2003) < <http://www.tanzania.go.tz/pdf/tradepolicy.pdf> > accessed 18/10/2010; Tanzania, *New Foreign Policy* (Government Printer, Dar es salaam 2001) < [http://www.foreign.go.tz/index.php/foreign/aboutus/category/foreign\\_policy/](http://www.foreign.go.tz/index.php/foreign/aboutus/category/foreign_policy/) > accessed 18/10/2010; Tanzania, *Sustainable Industrial Development Policy -SIDP (1996-2020)* (Government Printer, Dar es salaam 1996) < <http://www.tzonline.org/pdf/sustainableindustrial.pdf> > accessed 18/10/2010. Privatisation Act (Chapter 485 of Laws of Kenya) s 29 provides that both Kenyan and non-Kenyan are eligible to participate in privatisation of state owned enterprises, though the law is not meant to limit restrictions imposed by other legislation.

<sup>13</sup> Text to n 13 and 17 in chapter 4. Despite the reforms, Tanzania still in constitutional terms maintains the desire to build a socialist economy. This is notwithstanding concerns that such aspirations do not match with the realities of most of the government policies and law.

insolvencies which must also be addressed. While a complete analysis of these challenges is beyond the scope of this chapter, one must be cognizant of the connection between effective cross-border insolvency regulation and development concerns which potentially militate against effectiveness and the capacity to develop and implement an otherwise effective system.<sup>14</sup>

### **6.2.2 Application of Law in Cross-Border Insolvencies in SSA Countries: Past, Present and Future**

Most of the SSA countries do not exhibit a history of being affected by and involved in international insolvencies and extensive implementation of measures aiming to assist co-operation in any cross-border insolvencies as is the case for most developed countries.<sup>15</sup> There is a lack of high profile cross-border insolvency cases that involved SSA countries, as is the case for other developing countries.<sup>16</sup> Because of such absence, there has been an alarming dearth of cases and literature covering SSA in relation to cross-border insolvencies, unlike the situation in developed countries, such as the UK and the US, and emerging economies. This is one reason for the persistent lack of legislative activity and the lagging behind of the relevant laws in SSA countries.

There are theories which try to explain the lack of judicial and legislative activities in the area of insolvency and cross-border insolvency, in particular in SSA countries. One such theory associates the limited development of the law, its application and use with firstly, the inherent weaknesses in the manner in which the relevant laws were transplanted in SSA countries.<sup>17</sup> The argument is

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<sup>14</sup> Ndukhire-Owa-Mataze, 'Africa: A Continent Existing and Entering a Century in a "Sick-Bay"' (1999) 3 *Mtaji Mwa frika (African Researcher)* 56, 60-63; and J Sarra (n 3) 13

<sup>15</sup> B Wessels, BA Markell and JJ Kilborn, *International Cooperation in Bankruptcy and Insolvency Matters* (Oxford, OUP 2009) 71

<sup>16</sup> DA Ailola, 'The UNCITRAL Model Law on Cross-Border Insolvency: Its Efficacy and Suitability as A Basis for A SADC Convention' (2000) 11 *Stell L Rev* 215; and D Ailola, 'Recognition of Foreign Proceedings, Orders and Officials in Insolvency in Southern Africa: A Call for a Regional Convention' (1999) 32 *Comp and Int'l L J S Afr* 54

<sup>17</sup> SE Merry, 'From Law and Colonialism to Law and Globalization' (2003) 28 *Law & Social Inquiry* 569; DB, K Pistor, 'Economic Development, Legality, and the Transplant Effect' (2003) 47 *Eur Econ Rev* 165; RJ Daniels, MJ Trebilcock, and LD Carson, 'The Legacy of Empire: The Common Law Inheritance and Commitments to Legality in Former British Colonies' (2011) 56 *Am J Com L* 111; LM Musikali, 'The Law Affecting Corporate Governance in Kenya: A Need for Review' (2008) 19 *ICCLR* 213, 219; AT Nguluma, 'The Court of Appeal of Tanzania and the Development of Insolvency Law in Tanzania: A Historical Perspective' in CM Peter and HK

that the relevant laws were neither made in a scientific way to address specific issues arising from or connected to the economic activity of the day, nor were they a translation of the socio-economic set up in the colonies. Rather, it was a mere super-imposition of legal regimes that seemed to have worked well in other colonies or the colonising country. This made the law in many cases to remain redundant or to be applied in a manner that was different from what had been intended.<sup>18</sup>

The other theory is that the economic forces in SSA countries were not strong enough to stimulate the growth and development of the necessary socio-economic relations or corporate formations, as well as international commercial linkage that could trigger the application of insolvency laws in relation to cross-border insolvency incidences.<sup>19</sup> Accordingly, in SSA countries where the forces were relatively stronger than others, as it was the case, for instance, in South Africa, and to some extent, Nigeria and Kenya, the extent of application and use of the law at least to domestic insolvency was relatively higher than in other countries such as Tanzania.<sup>20</sup>

Yet another theory which correlates with the foregoing theories is to the effect that, with the advent of political independence, the post-independence states in SSA inherited the colonial socio-economic set-up and radically institutionalised policies that had remarkable negative impact on the development of insolvency law, its application and enforceability in appropriate cases.<sup>21</sup> This pursuit was characterised by nationalisation policies, and other radical socialist inclined policies which swept most post-independence SSA countries in the early days of

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Bisimba (eds), *Law and Justice in Tanzania: Quarter of a Century of the Court of Appeal of Tanzania* (Mkuki na Nyota Publishers, Dar es salaam 2007)173, 176; BS Masoud, 'Transnational Aspects of Tanzania's Corporate Insolvency Law: Challenges and Prospects' (2006)14 *IJUM Law Journal* 119, 125

<sup>18</sup> Ibid

<sup>19</sup> AT Nguluma (n 17) 176

<sup>20</sup> There has always been a considerable volume of insolvent winding up cases in Kenya as compared to Tanzania. See < <http://kenyalaw.org/CaseSearch/> > accessed 18 September 2011

<sup>21</sup> AT Nguluma (n 17) 173, 176; BS Masoud (n 17); D Himbara, 'The Failed Africanization of Commerce and Industry in Kenya' (1994) 22 *World Dev* 469-482

their post-independence period.<sup>22</sup> The pursuit effectively frustrated foreign investors and led to SSA not being regarded as an appropriate foreign investment destination and saw most laws becoming redundant as they were considered to have the imperialist agenda and therefore irrelevant to the policies of the day.<sup>23</sup> This is particularly evident in Tanzania which clung to a planned economy and maintained a large public sector economy through SOEs.<sup>24</sup> The lack of significant changes in the laws relating to insolvency inherited from colonial powers in Tanzania and Kenya, as is so for the majority of SSA countries, could as well be looked at and explained in this context. Indeed, whatever developments and changes were effected in the law and practice were indeed targeted at furtherance of the radical post-independence ideologies.

Consequently, there are a handful of old reported cases on personal insolvency having an international element and involving the application of the rules of bankruptcy on co-operation between Kenya, Tanzania and Uganda.<sup>25</sup> It is interesting that most of these cases occurred in the 1950s and 1960s and largely involved immigrants of Asian origin whose migration history into Eastern Africa is traceable from the British colonial power's demand for cheap labourers. Crucial issues in most of such cases concerned jurisdiction and property of debtors situated in another jurisdiction within East Africa. In one of such cases it was clearly pointed out that:

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<sup>22</sup> D Katona, 'Challenging the Global Structure Through Self-Determination: An African Perspective' (1999) 14 *Am U Int'l L Rev* 1459, showing how such trend lead to what was then referred to as the New International Economic Order ("NIEO") movement.

<sup>23</sup> TJ Moss, V Ramachandran and MK Shah, 'Is Africa's Skepticism of Foreign Capital Justified? Evidence from East African Firm Survey Data', (2004) Centre for Global Development Working Paper No. 41/2004 < <http://ssrn.com/abstract=1112683> > accessed 16 September 2010 [12]; and V Mosoti, 'Bilateral Investment Treaties and the Possibility of a Multilateral Framework on Investment at the WTO: Are Poor Economies Caught in Between?' (2005-2006) 26 *Nw J Int'l L & Bus* 95, 114. B Mihyo, *Non-Market Controls and the Accountability of Public Enterprises in Tanzania* (Macmillan, London 1994) 127 & 128

<sup>24</sup> See generally, B Mihyo (n 23). The state owned enterprises were wholly dependent on the states. The financially strapped ones were fully insulated by the states against collapsing through provision of financial subventions, subsidies, shifting of resources, and reorganisations which were motivated by political desires. For implication of state owned enterprises on insolvency law generally in other jurisdictions such as China, see RW Harmer (n 10) 2563; and R Parry and H Zhang, 'China's New Corporate Rescue Laws: Perspectives and Principles' (2008) 8 *JCLS* 113.

<sup>25</sup> IR Macneil, *Bankruptcy Law in East Africa* (University of Dar es salaam, Dar es salaam, 1966) 210-220 citing and discussing *Re Dayalji Laxman* [1959] EA 216 (U); *Official Receiver v Messrs Ukamba Service Store* 20 EACA 19 (1952); *Official Receiver v Messrs Savadia & Co* 18 EACA 119 (1951); and *Re Plataniotis* [1958] EA 217 (K)

...[i]t is plain that the provisions of the [law] to the effect that all property shall be divisible among the creditors is necessary for the “order and good government of the territory [i.e East Africa]”...If the bankruptcy court had no power over property of a bankrupt outside the local limits of his jurisdiction, a bankrupt would be able to transfer his property outside the country and deal with it at will in front of his creditors. Such a situation would stultify the administration of debtors’ estates in bankruptcy.<sup>26</sup>

This is clearly relevant also to cross-border corporate insolvencies that occur in the context of an environment in which a foreign company is unrestrictedly allowed under a bilateral investment arrangement to transfer and repatriate funds and capital as it wishes from a host country.<sup>27</sup>

There had also been an instance of the collapse of Zambia-Tanzania Road Services Ltd, a company incorporated in Zambia and having a branch in Tanzania.<sup>28</sup> The collapse resulted in a members’ voluntary winding up of the company which eventually turned into creditors’ voluntary winding up as the company could not make a declaration of solvency because it was hopelessly insolvent.<sup>29</sup> As there was a glaring lack of cross-border provisions under the respective laws of Tanzania and Zambia which could be employed to deal with the cross-border affairs of the company, the liquidators between Tanzania and Zambia, creatively employed protocols and a scheme of arrangements and ably solved the cross-border problems that had emerged with the collapse of the company.<sup>30</sup> The scheme of arrangement proposed by the joint liquidators was made in accordance with Zambian law, approved by all creditors and sanctioned by the court in Zambia before it was recognised and so sanctioned by the court in Tanzania. The Zambian law under which the scheme of arrangement was made and sanctioned by the court was similar and had the same effect as the law under

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<sup>26</sup> *Re Plataniotis [1958] EA 217 (K)*

<sup>27</sup> Text to n 111, 112 and 113 in chapter 4

<sup>28</sup> This was a company established by the government of Zambia and Tanzania with the primary object of providing haulage services between the two countries and thereby solving the problem of import and export to and from Zambia, a landlocked country. In particular, the company served to transport copper from Zambia to Dar es salaam port in Tanzania for onward export to foreign countries.

<sup>29</sup> EB Mndolwa, MA Kashonda, and CS Binamungu, *Liquidation Law and Practice in Tanzania Mainland* (Mzumbe Book Project, Tanzania 2003) 40-51

<sup>30</sup> *Ibid*

which the arrangement was consequently sanctioned by the court in Tanzania.<sup>31</sup> The use of a protocol to facilitate implementation of the scheme of arrangement in both Zambia and Tanzania is in accord with the current trends world-wide.<sup>32</sup>

With the globalisation of trade and investment, followed by privatisation of SOEs in SSA countries and liberalisation of private investment, there have over the recent years increasingly been signs of potentialities of a new chapter of gradual involvement of SSA countries in incidences of cross-border insolvency. Such incidences could be of local companies and individuals having cross-border commercial links with foreign commercial actors due to their increased participation in international commercial transactions.<sup>33</sup> The incidences could also relate to foreign companies having commercial undertakings and even commercial establishments and property in SSA countries.<sup>34</sup> Indeed, it is now not uncommon for companies to be incorporated elsewhere but carry on business in SSA countries after being assured of a favourable investment environment. It is also not uncommon to find companies incorporated in and carrying on business in SSA countries, as subsidiaries or affiliates of parent companies headquartered abroad. These developments challenge the preparedness of the legislative framework of the countries under study for dealing with cross-border insolvencies in a manner that is in harmony with their pursuit of attracting and promoting trade and capital inflows.

Consistent with the above circumstances, it is now not surprising that SSA countries have quite recently been engaged in the on-going multi-jurisdiction insolvency proceedings of the Nortel Group which, with a parent company in Canada, had operations run through subsidiaries in North America, Europe, the

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<sup>31</sup> Companies Act (Chapter 686 of the Laws of Zambia) ss 205-207; and Companies Ordinance (Chapter 212 of the Laws of Tanzania) ss 154 and 155 (repealed)

<sup>32</sup> JM Farley and EB Leonard, 'Encouraging Signs Emerge in Cross-Border Cooperation Courts, Insolvency Professionals Take the Lead' Journal of Corporate Renewal, February 1, 2002 < <http://www.turnaround.org/Publications/Articles.aspx?objectID=874> > accessed 21 October 2010

<sup>33</sup> Text to n 3, 5 and 52 in chapter 3

<sup>34</sup> Ibid

Middle East and Africa.<sup>35</sup> As the European, the Middle Eastern and African subsidiaries were highly integrated and managed as one region from the branch in the UK, the administration proceedings commenced in the UK were effectively meant to put under administrations all the companies in these region, namely Europe, the Middle East, and Africa.<sup>36</sup> The court in the UK was satisfied that the ‘centre of main interest’ (“COMI”) of the Nortel Group for the subsidiaries in Europe, the Middle East and Africa was in England and as such it had jurisdiction to open main insolvency proceedings, namely administration, in respect of each of such subsidiaries in such geographic regions.<sup>37</sup> Among the orders made was one to authorise the administrators to apply to the relevant judicial authorities in any other country for assistance as they considered relevant for the performance of their functions and to put in place an arrangement in such authorities under which they would be informed of any request or application for the opening of secondary insolvency proceedings in those jurisdictions in relation to any of the companies and provide administrators with an opportunity to be heard on any such application.

While the *Nortel Group* case is purely one such case which would require provision of judicial assistance by the relevant judicial authorities in a manner that would best maximise the values of the insolvent company’s estate for the best interests of all involved, it remains to be seen how the relevant SSA countries will play their part and accord due regard to the interests and expectation of the local creditors who may not know what to do in relation to their debts and what is going on globally with regard to the company. While such proceedings would essentially require judicial assistance and co-operation, the laws in SSA countries may not explicitly provide for such procedures and, if they

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<sup>35</sup> J Sarra, ‘Communications Gone Awry: The Insolvency of Nortel and the Challenge of Multi-Jurisdictional Cross-Border Insolvency Proceedings of Related Business Entities’ (A Paper given at the INSOL International Academics’ Group Meeting Radisson Blu Royal Hotel Dublin 11-13 June 2010)

<sup>36</sup> *Re Nortel Networks SSA and other Companies* [2008] EWHC 206

<sup>37</sup> Although the EC Regulation on Insolvency Proceedings (“ECIR”) may seem not to apply in other jurisdictions outside EU, by virtue of *Re Brac Rent a Car* [2003] 1 WLR 1421, [2003] All ER (D) 98 (Feb), the court of a member state has jurisdiction to open insolvency proceedings in relation to a company incorporated outside the community, if the centre of the company's main interests was in that member state. This is said to be based on the construction given to ECIR art 3. See also *Re Ci4net.com Inc* [2005] BCC 277.

do, such procedure may have never been invoked in the past with regard to insolvency proceedings. Reliance may need to be made on the common law where applicable or ‘...on ad hoc co-operation arrangements, which have not generally proven to be a satisfactory solution.’<sup>38</sup> However, it might be of interest to note that, quite recently, the court in Uganda was reported to have employed its discretion, and offered judicial assistance to a receiver of the First Bank of Grenada to preserve some assets bought from funds defrauded from creditors in Grenada and the United States.<sup>39</sup>

In yet another case that occurred in Tanzania involving the insolvency of Pepsi-Cola Bottling Group Company (consisting of eight subsidiaries), there emerged key issues impliedly touching on cross-border insolvency issues.<sup>40</sup> Firstly, apart from local creditors, the case involved foreign creditors, largely consisting of Pepsi-Cola International and its associates, which claimed a total of USD 12,048,000.00 (consisting of a loan, interest on the loan, and a claim for payment for concentrate). The debt was consequently written off following the foreign creditors’ acquisition of the Pepsi-cola business in Tanzania under a scheme of arrangement proposed by the liquidator and approved by all creditors.

While the creditors, inclusive of the foreign ones as above mentioned, unrestrictedly participated in such proceedings and the resulting scheme of arrangement, the part played by the foreign creditors was crucially significant as they contributed to the conclusion of the arrangement by the undertaking to acquire the insolvent companies under a new company. During the commencement of such proceedings, the Court of Appeal, while reacting to the appointment of one non-national liquidator in such domestic proceedings, stated

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<sup>38</sup> LA Bebchuk and AT Guzman, ‘An Economic Analysis of Transnational Bankruptcies’ (1999) 42 *JL & Econ* 775, 786 and 787

<sup>39</sup> *The First International Bank of Grenada (In Liquidation) vs Theoderous Ten Brink & Others* HCCS 298 of 2003 (Unreported). For a brief discussion on this case, see C Bwanika and KK Kenneth, ‘Insolvency-Uganda Experience’ A paper given for Uganda Law Reform Commission Conference on Business Law and Development: The Way Forward under the Commercial Justice Reform Programme, Nile International Conference Centre 19-21<sup>st</sup> July 2004

<sup>40</sup> *Fahari Bottlers Ltd and Southern Highlands Bottlers Ltd vs The Registrar of Companies and The National Bank of Commerce (1997) Ltd Court of Appeal of Tanzania*, Civil Revision No. 1 of 1999; and *Re Fahari Bottlers Ltd*, High Court of Tanzania Civil Cause No. 155 of 1998

that ‘normally no person resident outside the jurisdiction of the court is qualified for appointment as a liquidator. It is our understanding that the same position prevails in England.’<sup>41</sup> Indeed, this position would affect the recognition of foreign proceedings in Tanzania, which could otherwise allow a foreign office holder to act directly through the competent local court in respect of assets and creditors of an insolvent foreign company having an established place of business in Tanzania.<sup>42</sup>

Instances are also starting to emerge which potentially might encourage SSA countries to consider co-operation with other jurisdictions to secure better protection of the interests of creditors and other legitimate local interests. This is apparent in a recent Nigerian case<sup>43</sup> involving insolvency proceedings against Alan Dick and Company West Africa Ltd, a Nigerian incorporated company, having directors and a parent company in the UK.<sup>44</sup> In these Nigerian proceedings consideration was given to seeking recognition of the Nigerian proceedings and judicial assistance in the UK to pursue the assets of the company in the UK, where the company’s directors are based and the parent company is situated. The merit of such proceedings and the consideration given to seeking recognition in the UK is beyond the scope of this chapter. However, this move was regarded as critically significant in enabling the liquidators to examine the UK based directors and the UK based parent company, obtain vital information from the same and cause the directors to eventually contribute personally to offsetting the liabilities of the company.

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<sup>41</sup> *Fahari Bottlers Ltd and Southern Highlands Bottlers Ltd vs The Registrar of Companies and The National Bank of Commerce (1997) Ltd*, Court of Appeal of Tanzania, Civil Revision No. 1 of 1999 (unreported). In support of such observation the court was guided by and in fact used JJ Charlesworth and G Morse, *Charlesworth and Morse Company Law* (15<sup>th</sup> edn Sweet & Maxwell, London 1995) 752 as its authority

<sup>42</sup> Text to n 66 below

<sup>43</sup> *Re Alan Dick and Company West Africa Ltd*, Nigerian Federal High Court Suit No FHC/L/CP/654/08 discussed in A Idigbe, ‘Bridging Gap Between Nigerian Insolvency and Cross-Border Insolvency Best Practices: Alan Dick Case’, *The Guardian* (Nigeria 08 June 2010) <[http://www.guardiannewsngr.com/index.php?option=com\\_content&view=article&id=12971:bridging-gap-between-nigerian-insolvency-and-cross-border-insolvency-best-practices-alan-dick-case-&catid=42:law&Itemid=600](http://www.guardiannewsngr.com/index.php?option=com_content&view=article&id=12971:bridging-gap-between-nigerian-insolvency-and-cross-border-insolvency-best-practices-alan-dick-case-&catid=42:law&Itemid=600)> accessed 24 August 2010

<sup>44</sup> For another raw example of such instances indicating the potentials for occurrence of cross-border insolvencies involving the countries under study, see text to n 129 in chapter 7

There was a bona fide belief that the substantial part of the funds and assets of the company had been repatriated to the UK and or converted into foreign assets acquired by the directors who had since not submitted to the jurisdiction of the Nigerian court.<sup>45</sup> This was particularly so because, since they filed involuntary winding up proceedings against the company, the directors had allegedly sought to avoid meeting the more tasking statutory conditions for members' voluntary winding up.<sup>46</sup>

Among the creditors to the company are banks, tax authorities, employees, suppliers, and other trading creditors. It is argued that the voluntary proceedings were hurriedly sought by the company when it had become clear that it was unable to settle its commercial commitment, and indeed after meetings held with its bankers, to attempt restructuring.<sup>47</sup> Whether or not such consideration of recognition and judicial assistance in dealing with the insolvency proceedings of the company has merits and potentials to materialise is not a key issue in this study. What is important for the present purpose is how African countries are increasingly becoming aware of the significance of cross-border insolvency law. Obviously, the challenge in the implementation of such consideration by any SSA country is to meet the criteria for being eligible for receiving recognition and judicial assistance in appropriate cases, given the prevalence of an element of reciprocity, albeit in a varied way, within cross-border insolvency systems of different jurisdictions.<sup>48</sup>

All the above developments, and indeed many more to come, challenge the preparedness of the legislative framework of the countries under study for dealing with cross-border insolvencies in a manner that is in harmony with their pursuit of attracting and promoting capital inflows but without being distanced from the local circumstances and the international insolvency standards. The

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<sup>45</sup> A Idigpe (n 43)

<sup>46</sup> Ibid. The conditions, for instance, required a declaration from the directors that the company was solvent, as well as registration of the company's latest statement of assets and liabilities, among others.

<sup>47</sup> A Idigpe (n 43)

<sup>48</sup> JL Westbrook, 'Theory and Pragmatism in Global Insolvencies: Choice of Law and Choice of Forum' (1991) 65 *Am Bankr LJ* 457, 467 and 468

following part therefore takes stock of the state of the law in cross-border insolvencies in SSA countries using Tanzania and Kenya as case studies whilst taking account of the absence or rarity of the application of the law in relation to cross-border insolvencies in the countries under study and the signs of potentialities of a new chapter of gradual involvement of SSA countries in incidences of cross-border insolvency.

### **6.3 The International Character of Tanzania's Insolvency Related Legislation**

#### **6.3.1 Cross-Border Insolvency Aspects in Tanzania's Inherited Colonial Legislation**

Cross-border insolvency aspects of the Tanzanian insolvency law are supplemented by the English common law, which is applicable on the basis that the common law is one of the sources of law in Tanzania. As noted in the previous chapter the basic structure of the law relating to insolvency traces its origin from the law that was inherited from the British colonial administration, which was mainly contained in the Companies Ordinance and the Bankruptcy Act (which was formerly known as the Bankruptcy Ordinance).<sup>49</sup>

The law lacked an explicit provision for dealing with cross-border insolvency, although it is understandable that an insolvent foreign company could, on the discretion of the court, be subjected to winding up insolvency proceedings as an unregistered company '... incorporated outside Tanzania.'<sup>50</sup> There were no legislative criteria on the basis of which the court could exercise its discretion. Perhaps by borrowing from the English common law, the court could potentially invoke, among other things, the criteria of the existence of a sufficient connection between the foreign company and the local jurisdiction in Tanzania and the presence of persons in Tanzania concerned or interested in the

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<sup>49</sup> Text to n 14 in chapter 5

<sup>50</sup> Companies Ordinance (Tanzania), s 314-315. Section 315 is similar to Companies Act 1929 (English), s 338 which in part read: 'Where a company incorporated outside Tanzania which has been carrying on business in Tanzania ceases to carry on business in Tanzania it may be wound up as an unregistered company under this Part of this Act notwithstanding that it has been dissolved or otherwise ceased to exist as a company under or by virtue of the laws of the country under which it was incorporated.'

proceedings over whom it may exercise its jurisdiction.<sup>51</sup> The outcome of the application of such criteria could not necessarily be the same as it would have been in England. The operation of the principle requiring consideration of the local circumstances and that of the local inhabitants could have mandated a different outcome.<sup>52</sup>

The other thing that was not explicit in the legislation was the treatment of cross-border insolvency issues in the local insolvency proceedings. A typical example in this regard is the treatment of foreign creditors along with the local ones in the local proceedings and recognition of foreign insolvency proceedings and office holders appointed in such proceedings. Although it was clear that insolvent winding up proceedings could be commenced by creditors or the company itself, it was not explicit whether foreign creditors could be brought within the ambit of such a provision. It could however be argued that the provision did not have anything to suggest that the intention was to render foreign creditors unable to commence such proceedings. In any case, such gaps were indeed the potential areas where in appropriate cases the common law could be adopted to resolve cross-border insolvency problems that emerge,<sup>53</sup> subject however to due consideration being given to the local circumstances of the countries under study and that of their local inhabitants.

It is interesting that while the Companies Ordinance did not contain provisions on cross-border insolvency issues, the Bankruptcy Act was and still is relatively comprehensive in terms of its approach in handling cross-border issues relating to personal insolvencies, especially co-operation between courts and office holders in respect of the proceedings originating in countries having reciprocal co-operation with Tanzania. The history of the imposition of English law in the colonies shows that such development owed its origin from the early co-operation measures on enforcement of orders given by the English court within

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<sup>51</sup> Text to n 36 and 39 in chapter 5

<sup>52</sup> Text to n 9 and 10 in chapter 5. See also *Obongo v Municipal Council of Kisumu* [1971] EA 91(CA) discussed in text to n 125 in chapter 5

<sup>53</sup> Text to n 76 in chapter 5

the United Kingdom and a requirement of assistance to other British courts in the context of personal insolvency.<sup>54</sup> Such developments were consequently incorporated in the bankruptcy legislation as a reaction to the surge in numbers of personal insolvencies affecting assets located in the Commonwealth jurisdictions.<sup>55</sup> The underlying rationale of the incorporated provisions from which the relevant provision in Tanzania's bankruptcy legislation<sup>56</sup> seems to trace its origin, was 'to co-ordinate proceedings and [enable] the courts to assist in the management of bankruptcy proceedings within their own jurisdictions. The making of an order seeking the aid of another court was deemed sufficient authority to enable the other court to exercise the jurisdiction it would if the matter were before it for consideration.'<sup>57</sup>

In addition, the Bankruptcy Act also devotes a whole part of the legislation and the rules, namely, the Bankruptcy (Reciprocity) Rules ("BRR"),<sup>58</sup> made under section 164 of the Act, to reciprocal co-operation in matters of bankruptcy proceedings. Although the repealed Companies Ordinance had no explicit provision on cross-border insolvencies, as is the bankruptcy legislation did, it could be argued that section 258 of the Companies Ordinance had the effect of importing and applying the relevant parts of the bankruptcy legislation and the BRR to cross-border corporate insolvency proceedings involving any reciprocating jurisdiction.<sup>59</sup>

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<sup>54</sup> PJ Omar, 'Developments in Cross-Border Insolvency Practice in the United Kingdom' (2002) *14 Bond LR* 347, 362-363

<sup>55</sup> PJ Omar (n 54)

<sup>56</sup> Bankruptcy Act (Tanzania) s 115 (Tanzania). The marginal note to this provision reads: 'court to be auxiliary to other reciprocating courts.'

<sup>57</sup> PJ Omar (n 54) 363

<sup>58</sup> Bankruptcy Act (Tanzania) Part IX entitled 'Provisions for Reciprocity with Other Countries' and containing sections 150-163, which is the same as Bankruptcy Act (Kenya) Part IX entitled 'Provisions for reciprocity with Other Territories.' See also Bankruptcy (Reciprocity) Rules G.N. No. 38 of 1932(Tanzania) which is the same as Bankruptcy (Reciprocity) Rules (LN 143/1962) (Kenya)

<sup>59</sup> The marginal note to the repealed Companies Ordinance (Tanzania) s 258 read: 'Application of bankruptcy rules in winding up of insolvent company.' Notably, this provision has now been re-enacted as Companies Act 2002 (Tanzania) s 366 (Tanzania). It is the same as the provision found in Companies Act (Chapter 486 of Laws of Kenya) s 310. Insolvency Bill 2010 (Kenya) clause 420(2) seeks to re-enact the same provision.

The above line of argument appears to have the following implications. One implication is that, not only were the procedures for aiding foreign insolvency proceedings applicable to personal cross-border insolvency, but also to cross-border corporate insolvencies. The application of the rules led to expansion and enlargement of the scope of the law in addressing international elements of corporate insolvencies. Indeed, such co-operation and reciprocal arrangements provisions on cross-border bankruptcy under the bankruptcy legislation and the BRR could be read into the Companies Ordinance although there was no explicit provision requiring reciprocity in matters of aiding or acting auxiliary to foreign insolvency proceedings. Actually, if the BRR were applicable, the implication was to reduce the scope of the common law that would otherwise apply in corporate cross-border insolvency matters involving Tanzania and a reciprocating country. However, the common law will potentially still have wide space in the proceedings involving Tanzania and a non-reciprocating country.

### **6.3.2 Legal Developments in Cross-Border Insolvencies in Tanzania**

The Companies Act 2002 repealed and replaced the Companies Ordinance. This new Act (“CA 2002”) overhauled the insolvency procedures for dealing with an insolvent company, which now refer not only to the inability of a company to pay its overdue debts but also a situation where the value of the company’s assets is less than the amount of its liabilities, taking into account the contingent and prospective liabilities of the company.<sup>60</sup> In effect, the Act institutionalises the modern concept of rescue with regard to corporate insolvency, modelled on the UK’s Insolvency Act 1986.<sup>61</sup> Apart from accommodating the old and common procedure, such as the winding up of an insolvent company, the CA 2002 introduces two new forms of dealing with an insolvent company in a manner that has potentials for the rescue of the business of the company. These are administration and company voluntary arrangements, which can be invoked in the event of impending or actual insolvency of a company.<sup>62</sup>

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<sup>60</sup> Companies Act 2002 (Tanzania) s 280; and S Rajani and F Ringo, ‘Tanzania Updates Corporate Insolvency Legislation’ (2007) 23 *IL and P* 76

<sup>61</sup> Companies Act 2002 Part VII ; and S Rajani and F Ringo (n 60) 76

<sup>62</sup> Companies Act 2002 (Tanzania) s 235

While the CA 2002 has detailed provisions stipulating procedures for the rescue of an insolvent company ‘...which compare well with the existing legislation of more developed countries...’,<sup>63</sup> it is not clear and elaborate in the way that it attempts to address cross-border insolvency issues.<sup>64</sup> Notably, whereas the law was enacted about five years after the promulgation of the UNCITRAL Model Law on Cross-Border Insolvency, no express reference is made by the law to the Model Law and other transnational legal sources in the field of insolvency law generally.<sup>65</sup> The only directly relevant provisions of the CA 2002 read thus:

275. The High Court shall have jurisdiction to wind up any company registered in Tanzania and a body corporate as mentioned in section 279(2).

279(2) A body corporate may also be wound up by the court if incorporated outside Tanzania and carrying on business in Tanzania and winding up proceedings have been commenced in respect of it in the country of its incorporation or in any other country in which it has established a place of business.

281.-(I) An application to the court for the winding up of a company shall be by petition presented, subject to the provisions of this section, either by the company or by any creditor or creditors (including any contingent or prospective creditor or creditors), contributory or contributories, or by an administrator, or by all or any of those parties, together or separately:

Provided that –

(a).....

(b).....

(c).....

(d) a petition for the winding-up of a body corporate on the ground mentioned in section 279(2) may be presented by the official receiver as well as by any other person authorised to do so under the provisions of this subsection, but the court shall not make a winding-up order on a petition presented by the official receiver unless it is satisfied that the

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<sup>63</sup> Ibid

<sup>64</sup> There are apparently only three sections that scantily provide for aspects which could be linked with cross-border insolvency only in respect of winding up of a company. It could be argued that effective application of such provisions may depend heavily upon the quality and experience of judges, or in the absence of that experience, upon the quality of the advice that courts are able to draw upon in making their decisions. For this line of reasoning, see RA Tomasic, ‘The Conceptual Structure of China’s New Corporate Bankruptcy Law’ in R Parry, Y Xu, and H Zhang, *China’s New Enterprise Bankruptcy Law: Context, Interpretation, and Application* (Ashgate, England 2010) 30

<sup>65</sup> S Rajani and FS Ringo (n 60). Interestingly, Companies Act 2002(Tanzania) s 2 makes reference to international accounting and auditing standards and practice with respect to generally acceptable principles of accounting applicable in Tanzania. As discussed in chapter 3, international insolvency standards as is the case for the international accounting standards, among others, are part and parcel of the international financial architecture that was introduced in the aftermath of the East Asia financial crisis.

liquidator or provisional liquidator of the body corporate in the country where winding-up proceedings have been commenced in respect of it has in the manner prescribed required the official receiver to present the petition.<sup>66</sup>

Furthermore, the Company Insolvency Rules 2005 (“CIR 2005”)<sup>67</sup> made under the CA 2002 do not provide for cross-border insolvency issues, though a critical reading of the scant provisions on cross-border insolvency in the Act provides an impression that matters of details in so far as insolvency and especially cross-border insolvency are concerned would have arguably been addressed by the rules.<sup>68</sup> Despite such weaknesses, the insolvency related provisions under the CA 2002 mark a significant development from the previous companies’ legislation. This is regardless of the fact that the provisions have, since they were brought into force in 2005, remained in disuse.

In the absence of a clear and comprehensive law on cross-border insolvency, a number of issues may arise: whether the Tanzanian court may extend, and to what extent it is likely to offer, recognition and co-operation to foreign proceedings in appropriate circumstances; whether the Tanzanian court is prepared to defer to extrajurisdictional insolvency jurisdictions in cross-border insolvency cases involving multinational enterprises having investment in Tanzania; whether foreign creditors can prove in local proceedings and rank equally with the local creditors; and whether the foreign creditors can commence insolvency proceedings against a debtor in a Tanzanian court. These issues

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<sup>66</sup> Companies Act 2002 (Tanzania) s 275, 279(2), and 281(1)(d)

<sup>67</sup> The Companies (Insolvency) Rules 2005 (Government Notice No. 43 of 11/2/2005)

<sup>68</sup> S Rajani and FS Ringo (n 60); and Companies Act 2002 (Tanzania) s 479(I) provides that ‘The Minister may make rules for carrying into effect the objects of this Act and for any matter or thing which by this Act is to be or may be provided for by rules. Any rules made under this section which are in the nature of rules of court shall not be made except after obtaining the advice of the Chief Justice.’

Companies (Insolvency) Rules 2005 rr 89, 90 and 91 which seem to exclude cross-border insolvency elements which are explicit in Companies Act 2002 (Tanzania) ss 275, 279 and 281. It is important to note that other laws relating to foreign investment enterprises are silent on the treatment of cross-border insolvency, though they arguably envision general principles that would need to be taken into account in dealing with cross-border insolvency involving a foreign enterprise. See for instance, Tanzania Investment Act 1997(Tanzania).

pinpoint areas that may need to be filled up by the application of the common law subject to the extent permitted by the local circumstances.<sup>69</sup>

### **6.3.2.1 Treatment of Foreign Companies and Creditors in Domestic Proceedings**

It is not quite clear if the statutory law as it stands allows domestic winding up proceedings to be commenced in respect of a foreign company which is unable to pay its debts - if for instance it is either proved to the satisfaction of the court that the company is unable to pay its debts as they fall due or it is proved to the satisfaction of the court that the value of the company's asset is far less than the amount of its liabilities.<sup>70</sup>

The law has it that winding up proceedings may be commenced by 'the company or by any creditor or creditors (including any contingent or prospective creditor or creditors), contributory or contributories or by an administrator or by all or any of those parties together or separately.'<sup>71</sup> It is however not clear that the meaning of 'any creditor or creditors' in the commencement of the proceedings in Tanzania and the consequent ranking and proof of debts and claims is meant to include both local and foreign creditors.<sup>72</sup> The legal framework is also not explicit that in a single Tanzanian proceeding foreign creditor claims can be admitted to proof and treated the same as equivalent ranking local claims. Conversely, the little experience available thus far suggests that there is no such discrimination between foreign and local creditors whatsoever.<sup>73</sup>

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<sup>69</sup> n 53 above

<sup>70</sup> Companies Act 2002 (Tanzania) ss 275, 279(1)(d), 279(2), and 280

<sup>71</sup> Companies Act 2002 (Tanzania) s 281(1)

<sup>72</sup> It is to be noted that it is not uncommon in other jurisdictions for the law to provide clearly that a non-national or foreign company will be treated in the same way as national or domestic companies. See K Anderson, 'The Cross-Border Insolvency Paradigm: A Defense of the Modified Universal Approach' (2000) 21 *U Pa J Int'l Econ L* 679, 730 quoting a provision from the Japanese Bankruptcy and Composition Acts (art 2 and 11 respectively) which read: 'An alien or foreign corporation shall have the same status as a Japanese national or Japanese corporation in regard to bankruptcy, *provided however*, that this shall apply only when Japanese nationals or Japanese corporations have the same status under the native laws of the alien or the foreign corporation.' As Anderson puts it '[t]he obvious purpose of this section was to protect Japanese citizens (both natural and corporate) from discrimination by foreign countries.'

<sup>73</sup> See rulings by Kalegeya J in *Fahari Bottlers Ltd v The Registrar of Companies and NBC (1997) Ltd. and Others* Misc. Civil Cause No. 155 of 1998 (High Court of Tanzania) (unreported) dated 26 October 2000 and 21 November 2000 respectively. Full and non-discriminatory involvement of foreign creditors (i.e IPBCIL and its associates which included Pepsico

Notwithstanding the above ambiguities, the CA 2002 is explicit that winding up proceedings may be commenced in respect any insolvent foreign company.<sup>74</sup> However, it provides two conditions on the basis of which such proceedings may be commenced. Firstly, winding up proceedings should have been commenced in respect of the company either in its place of incorporation or any other country in which it has established business.<sup>75</sup> And secondly, the company must have been carrying on business in Tanzania.<sup>76</sup> It is not clear that proceedings commenced in a foreign jurisdiction where the company has its “centre of main interest” (“COMI”) other than its place of incorporation will well be within the requirements of this provision. Notably, COMI is now one of the recognised principles characterising the international insolvency benchmarks.

One observation to be made from the relevant provisions is that the commencement of such proceedings against a foreign company in Tanzania requires the foreign company to have an establishment in Tanzania, in the sense of carrying on business therein, not just presence or possession of property situated in Tanzania.<sup>77</sup> The question is whether the court may in an appropriate case in future imply a requirement of presence or possession of property in ‘carrying on business in Tanzania.’<sup>78</sup> It is accordingly not clear if winding up can equally be commenced in respect of the company that has property in Tanzania

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International) in the proceedings made it possible for such creditors to acquire the insolvent companies under a scheme of arrangement.

<sup>74</sup> See n 66 above. This discretionary power of the court to order winding up seems to be in addition to similar powers that the court has by virtue of the provisions for winding up of a foreign company which has ceased to carry on business in Tanzania and has been dissolved or otherwise ceased to exist in its place of incorporation. See Companies Act 2002 (Tanzania) s 427

<sup>75</sup> Companies Act 2002 (Tanzania) s 279(2)

<sup>76</sup> Ibid

<sup>77</sup> Ibid

<sup>78</sup> In other jurisdictions which have incorporated provisions on cross-border insolvency in companies law, such as the Cayman Islands, the law ‘allows the court to make a winding up order providing the company has property located in the Islands; is carrying on business in the Islands,’ among other things. See Companies (Amendment) Law 2007 (Cayman Island) s 91(d). For a succinct discussion of such provision, see S Dickson, ‘Changes to the Cayman Islands Insolvency Regime: A Brief Review’ (2008) 5 *Int’l Corporate Rescue* 269; and A Bolton and T H Wren, ‘Cayman’s New Insolvency Regime’ (2009) 2.3 *Corporate Rescue and Insolv* 122

but which is held not to be carrying on business in Tanzania or having an establishment.<sup>79</sup>

It is also of interest to see if the courts in considering whether or not to recognise foreign winding up proceedings could be guided by section 11 of Tanzania's Civil Procedure Code Act 1966, which provides for principles to be taken into account in recognising and enforcing a foreign judgment.<sup>80</sup> These include, jurisdictional competence of the foreign court involved; merits of the decision involved; whether or not the decision was founded on a correct view of international law; whether it entails a refusal of recognition of Tanzanian law in a case in which the law was applicable; failure of the foreign proceedings to adhere to natural justice; and fraud.

Given the lack of details in a number of respects, it is clear that there is a wide scope for the common law to apply to fill in gaps in appropriate cases. However, the extent to which the relevant common law might be allowed to apply depends on several factors as discussed in chapter five.<sup>81</sup> In the light of what emerges from the debate on the competing theories, and the international insolvency benchmarks this situation can arguably be described as contributing to uncertainty and unpredictability of outcome which may increase transactional costs. It must be stressed however that no approach, as one may gather from the cross-border insolvency theories' debate discussed in chapter two, would necessarily be any more predictable and certain.

Arguably, the key standards and principles of the bilateral investment treaties ought to be reflected in the treatment of foreign companies in insolvency proceedings. This is in particular where a foreign company's home country and Tanzania, as a host country, are contracting parties to the treaty between the two countries. Arguably, on these aspects the law is not clearly and unambiguously

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<sup>79</sup> Cf. UNCITRAL Model Law and the Kenyan Insolvency Bill (n 145- 148) below

<sup>80</sup> Cf. Guide to Enactment of UNCITRAL Model Law para 125, whereby '...the conditions for recognition do not include those that would allow the court...to evaluate the merits of the foreign court's decision...'; and text to n 129 below

<sup>81</sup> See text to n 9-11 in chapter 5 and text to part 5.6 in chapter 5

consistent with the commitments arising from such treaties to which Tanzania is a party. Indeed, if the common law were to apply unrestrictedly, it would have the effect of pulling quite significantly the domestic law towards the direction of modified universalism and enhance the compatibility of the law in Tanzania with its commitments arising from the bilateral investment treaties and other similar arrangements it has concluded thus far. As noted earlier and extensively discussed in chapter five, the application of the common law and its potential outcome in a given cross-border insolvency case cannot be ascertained.

### **6.3.2.2 Co-operation with and Recognition of Foreign Insolvency Proceedings**

The CA 2002 seems to accord recognition to foreign winding up proceedings commenced in the debtor company's place of incorporation or any other country where the company has an established place of business and where there is proof of authorisation of the official receiver or any authorised person under the law to present a petition for the commencement of the proceedings in Tanzania.<sup>82</sup> The effect of this is the grant of a winding up order by the court and thus commencement of the proceedings. Upon such proof, the official receiver may act for and on behalf of a foreign insolvency administrator in the conduct of such proceedings in Tanzania. However, the construction of the relevant provision suggests that it is at the discretion of the court to make an order commencing winding up proceedings against the company in Tanzania.

It therefore means that the CA 2002 enables an officeholder appointed in foreign proceedings to cause commencement of insolvency winding up proceedings of a foreign company in Tanzania as a host country of a foreign investor from a foreign home country. This is achieved by such a foreign office holder requiring the official receiver in Tanzania to present the petition for the winding up of the company on the grounds already stated above. The construction of the relevant provision suggests that evidence of such authority and appointment to present such petition is crucially important for the winding up order not to be refused.<sup>83</sup>

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<sup>82</sup> Companies Act 2002 (Tanzania) s 281(1)(d) reproduced verbatim in text to n 66 above

<sup>83</sup> The law does not provide an indication of instances on the basis of which an application for the commencement of proceedings against a foreign company may be refused other than a lack

The law is silent on the recognised practice which allows a foreign office holder to apply directly to the local court to be appointed to act in the local proceedings, whether or not jointly with a local insolvency administrator in respect of the insolvency proceedings. It remains to be seen how the court will deal with such issues. Perhaps this also is an area where the common law may be employed to provide guidance. It would follow that co-operation may accordingly be effected whether the officeholder was so appointed in the proceedings commenced in a home country of the foreign company or in any other country where the company established a place of business.<sup>84</sup>

There is no express mention of the nature of the winding proceeding to be commenced in Tanzania at the instance of a foreign office holder in relation to the proceedings taking place in the foreign country. It is not clear whether it will be ancillary to the foreign proceedings with a view to dealing with key aspects such as; recognising the right of a foreign representative to act in Tanzania in the name of or on behalf of the company; enjoining the commencement or staying the continuation of proceedings against the company; staying enforcement of any judgement against the company; requiring a person in possession of information relating to the business affairs of the company to be examined by and produce documents to its foreign liquidator; and ordering the turnover to a foreign liquidator of any property belonging to the company.<sup>85</sup> Perhaps these gaps mean opportunities where the court will have to exercise its discretion based on the common law.

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of evidence requiring the official receiver to open proceedings in Tanzania on behalf of a foreign officeholder. Cf. UNCITRAL Model Law art 15-17 and text to n 129 and 142 below

<sup>84</sup> See Companies Act 2002 (Tanzania) s 279(2) as quoted in text to n 66 above. This is a notable development which is similar to the recent developments at common law achieved by the decision of the Privy Council in *Cambridge Gas Transport Corp v Official Committee of Unsecured Creditors of Navigator Holdings Plc* [2006] UKPC 26; [2007] 1 AC 508 (PC(IoM)) which made recognition and judicial assistance not entirely dependent on having foreign proceedings commenced in the home country (i.e place of domicile) of the insolvent company but also in any other jurisdiction where a company has its centre of main interest.

<sup>85</sup> For a discussion of such aspects, see S Dickson (n 78) 272

Notably, the provision in the CA 2002 also does not mention any thing as to extritorial effects of local insolvency proceedings initiated in Tanzania to foreign territories. Contrary to the trend in many jurisdictions, there is no reference to the requirements of reciprocity of any form as an instrument to achieve co-operation in dealing with cross-border insolvencies<sup>86</sup> - whether by singling out 'trusted' jurisdictions which are entitled to automatic co-operation<sup>87</sup> or by requiring conclusion of an appropriate agreement with willing countries or proof of existence of sufficient reciprocity.<sup>88</sup> There is also a lack of explicit requirement as to conformity with other criteria such as public policy.

The ambit of the provision seems to be confined to winding up proceedings whilst also giving discretionary power to the court to determine whether or not, for instance, to co-operate in cross-border insolvency proceedings in respect of a foreign company carrying on business in Tanzania that have been commenced in a foreign jurisdiction.<sup>89</sup> Perhaps local interests and needs which also include the need to attract foreign investment and trade will be taken into account in such determination.

### **6.3.2.3 Co-ordination and Communication**

While realisation of the legislative framework for cross-border insolvency would depend on co-operation with foreign courts, there is barely anything in the CA 2002 which provides for facilitation of communication and co-ordination

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<sup>86</sup> LC Ho, 'Overview', in LC Ho (ed) *Cross-Border Insolvency: A Commentary on the UNCITRAL Model Law* (Globe Business, London 2006) 12

<sup>87</sup> LC Ho (n 86). See in particular, Insolvency Act 1986 (UK) s 426 designating specific countries to which the co-operation under such provision should be extended; K Dawson, 'Assistance under Section 426 of the Insolvency Act 1986' (1999) 8 *Int'l Insolv Rev* 109, 117, explaining that a court requesting assistance must be on the list of countries or territories designated by the Secretary of State. See also Cross-Border Insolvency Act 2000 (South Africa) s 2 (South Africa) requiring the Minister for Justice to designate countries to which the Act will apply. The minister must be satisfied that recognition accorded by a country to South African proceedings justifies application of the Act to such a country.

<sup>88</sup> JL Westbrook, CD Booth, CG Paulus, and H Rajak, *A Global View of Business Insolvency Systems* (World Bank, Washington 2010) 231; LC Ho (n 86). For recent developments in this regard, see Insolvency Act 2009 (Mauritius) ss 366 and 368(2) requiring sufficient reciprocity before the law is brought into force "in dealing with insolvencies with jurisdictions that have trading or financial connections with Mauritius, or that it is otherwise in the public interest to bring it into operation." In this connection, there must be an agreement between Mauritius and a foreign country for mutual recognition of insolvency proceedings and appropriate protection for the interests of debtors and creditors in Mauritius.

<sup>89</sup> Text to n 66 above

between Tanzania and foreign jurisdictions for efficient handling of a cross-border insolvency matter. The only aspect in this regard is in relation to the avenue that enables communication between a foreign office holder of a foreign proceeding and an official receiver in Tanzania whereby the former is entitled to require the latter to initiate proceedings in Tanzania. The law presupposes prescriptions of procedural details and requirements as to realisation of such communication and co-ordination.<sup>90</sup> But, it is very unfortunate that the law does not provide such details nor has the recently enacted regulation.<sup>91</sup>

The foreign office holder mentioned in the relevant provision is none other than a liquidator in respect of foreign winding up proceedings. It remains unclear whether any foreign office holder appointed in any proceedings other than winding up proceedings would equally enjoy the right to seek and require the official receiver to initiate proceedings in Tanzania which would recognise and facilitate co-operation with the foreign proceedings. Accordingly, it may not be surprising to find that an officeholder in respect of rescue proceedings in the nature for instance of administration or reorganisation is refused co-operation. This is one area where the common law might assist.<sup>92</sup>

## **6.4 The International Character of Kenya's Insolvency Related Legislation**

### **6.4.1 Cross-Border Insolvency Aspects in Kenya's Inherited Colonial Legislation**

As is the case for Tanzania, Kenya inherited its legislation that contained provisions on how to deal with insolvencies from the British colonial power.<sup>93</sup> The provisions which are still applicable to date were and are mainly found in Kenya's Companies Act<sup>94</sup> and the Bankruptcy Act.<sup>95</sup> As far as the administration of corporate insolvency is concerned, there is glaringly a lack of appropriate provisions institutionalising a regime for dealing with cross-border insolvency

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<sup>90</sup> The phrase '...in the manner prescribed...' in Companies Act 2002 (Tanzania) s 281(1) (d) quoted in full in text to n 66 above is noteworthy.

<sup>91</sup> n 67 above

<sup>92</sup> *Cambridge Gas* case (n 84)

<sup>93</sup> Text to n 12, 13 and 14 in chapter 5

<sup>94</sup> (Chapter 486 of Laws of Kenya)

<sup>95</sup> (Chapter 53 of Laws of Kenya)

problems. As was the case for the repealed Tanzanian Companies Ordinance, it seems that the only provisions that could be linked with cross-border insolvencies are those which provide for the winding up of a foreign company, by the court in Kenya, as an unregistered company.<sup>96</sup> For such winding up to be effected the company must have ceased to carry on business in Kenya and must have been dissolved or ceased to exist in its place of domicile.

Such limited situations where the legislation could be regarded as acknowledging some international effect of insolvency cannot however mean that the law caters and indeed provides for cross-border insolvency.<sup>97</sup> This means that Kenya, as is the case for Tanzania, is still largely dependent on the English common law in dealing with cross-border insolvency cases, though the extent and manner into which the relevant common law will be invoked in an appropriate case remains uncertain and unpredictable.<sup>98</sup>

The statutory provisions on persons entitled to commence insolvency proceedings, as well as those entitled to claim, prove and receive dividends from the distribution of proceeds of realisation of the assets of the insolvent debtor are silent on national treatment of foreign personalities and institutions involved in the local proceedings.<sup>99</sup> Indeed, the entire law is silent about giving non-discriminatory treatment to foreign creditors.<sup>100</sup> While such treatment might always be assumed to be the case as there is no express provision to the contrary, it is important to stress that in most legal systems local priorities are not always available to foreign creditors.<sup>101</sup>

As observed and argued in relation to Tanzania, there is also in Kenya a scope and merit in favour of the extension and application of the rules of law of

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<sup>96</sup> Companies Act (Kenya) s 359

<sup>97</sup> R Sandoval, 'Chile Legislation and Cross-Border Insolvency' (1998) 33 *Tex Int'l LJ* 575, 578

<sup>98</sup> *Obongo v Municipal Council of Kisumu* [1971] EA 91, 94; and Judicature Act 1967 (Kenya) s 3(1) which provides common law as among the sources of law in Kenya. See also text to n 9-10 in chapter 5

<sup>99</sup> Sections 221 and 311 of the Companies Act (Chapter 486 of Laws of Kenya); and JL Westbrook, 'Universal Priorities' (1998) 33 *Tex Int'l LJ* 27, 31

<sup>100</sup> JL Westbrook (n 99) 31

<sup>101</sup> *Ibid* 30 and 31

personal bankruptcy to govern cross-border co-operation in the winding up of an insolvent company having an international dimension.<sup>102</sup> In fact, the provision under Kenya's company law which extends the rules of bankruptcy law to the winding up of an insolvent company is the same as the one that is found in Tanzania.<sup>103</sup> This is also true for the co-operation procedure in cross-border insolvencies under the respective countries' bankruptcy legislation which is a subject of extensive discussion in a subsequent part below.<sup>104</sup> The scope for the application of such co-operation procedures to cross-border corporate insolvency is a subject of extensive discussion below.

#### **6.4.2 Legislative Reform Initiative and Cross-Border Insolvency Regulation in Kenya**

The law relating to insolvency which is operative in Kenya has remained in force without any substantive reform for about five decades. The changing economic climate coupled with the drive by multilateral institutions for institutionalisation of the rule of law and good governance in developing countries have created a pressing need for amelioration of insolvency law and cross-border insolvency law in Kenya.<sup>105</sup> The initiative is undertaken within the broad context of facilitating growth of trade and investment and foreign direct investment in particular with a view to reducing poverty.<sup>106</sup> While the research for this study was in progress, the Kenyan government had already approved and published the

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<sup>102</sup> Section 310 of the Companies Act (Chapter 486 of Laws of Kenya)

<sup>103</sup> n 59 above

<sup>104</sup> Bankruptcy Act (Chapter 53 of Laws of Kenya) ss 115, 151-164 and Bankruptcy (Reciprocity) Rules (LN 143/1962) (Kenya); and Cf n 58 above. See also text to part 6.5 below for an extensive discussion of such co-operation procedures and their applicability to cross-border corporate insolvency.

<sup>105</sup> C Agimba, 'Global Trends in the Four Doing Business Indicators-Closing a Business: Kenya's Reform Experiences' (Paper Given at Doing Business 2011 in Africa: Sharing Reform Experiences 2011) <

<https://www.wbginvestmentclimate.org/loader.cfm?csModule=security/getfile&pageid=16717> > accessed 06 September 2011. It is reported that there has also been "[c]ontinuous pressure for reform of business laws from business community and proactive response to [the] need for reform from highest political leadership, key government ministries and agencies. Close collaboration and synergies between government ministries and agencies (State Law Office, Kenya Law Reform Commission, Ministry of Finance) and private sector and other stakeholders.'

<sup>106</sup> M Whitehead, 'A New Insolvency Act is Coming.....So Lenders, Borrowers and Insolvency Practitioners Get Ready' [2009] *Financial Focus* 1, 8 < [http://www.pwc.com/en\\_KE/ke/pdf/pwc-financial-focus.pdf](http://www.pwc.com/en_KE/ke/pdf/pwc-financial-focus.pdf) > accessed 17 August 2010; and C Agimba (n 105)

Insolvency Bill 2010.<sup>107</sup> The Insolvency Bill was prepared by the Law Reform Commission and presented to the Attorney General's office for review and drafting into a Bill. One source is to the effect that the Bill was drafted with the assistance of a German academic,<sup>108</sup> and technical assistance from multilateral institutions such as the World Bank.<sup>109</sup>

The Bill is designed to replace the Bankruptcy Act, streamline procedures in bankruptcy and insolvency law and effectively remove insolvency related provisions from the companies' legislation. The Bill is set also to provide for the rehabilitation of the insolvent debtor, unlike the present situation where insolvency almost always results in liquidation.<sup>110</sup> The reform has been justified as crucially relevant to Kenya's "vision twenty thirty"<sup>111</sup> which seeks to transform Kenya into a competitive and prosperous middle income economy.<sup>112</sup> The Bill is thus intended to add to the efforts towards creating an enabling environment for making Kenya more competitive for business and investment. It is thus implicit that the proposed law has as its inherent object the reinforcement of the poverty reduction strategies through a rehabilitation and rescue procedure whose effective implementation would save jobs and revenue in the long term.<sup>113</sup> The Kenyan poverty reduction strategy seeks among other things to ensure that

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<sup>107</sup> Insolvency Bill 2010 (Kenya) < [http://www.kenyalaw.org/klr/fileadmin/pdfdownloads/bills/2010/Insolvency\\_Bill\\_2010.pdf](http://www.kenyalaw.org/klr/fileadmin/pdfdownloads/bills/2010/Insolvency_Bill_2010.pdf) > accessed 06 September 2011; O Kimani, 'Cabinet Hailed for Approving Bills' Kenya Broadcasting Corporation (Kenya 12 November 2010) < <http://www.kbc.co.ke/news.asp?nid=67544> > accessed 06 September 2011; and M Whitehead (n 106) 8

<sup>108</sup> USAID, 'Kenya's Agenda for Action: Commercial Legal and Institutional Reform- Diagnostic of Kenya's Business Environment' (Business Climate Legal and Institutional Reform June 2009) <<http://www.bizclir.com/galleries/country-assessments/Kenya.pdf> > accessed 17/08/2010 [70]

<sup>109</sup> O Kimani (n 107)

<sup>110</sup> See the long title to Insolvency Bill 2010 (Kenya) which in part reads . '...to provide for corporate and individual insolvency, to provide for the rehabilitation of the insolvent debtor and for connected purposes.'; and Part X (clauses 315 - 443) which provides for administration orders; and K Owino, 'Shifting Receivership Process to Business Recovery' (2001) *The Point: Bulletin of Institute of Economic Affairs* 1

<sup>111</sup> Kenya, *Kenya Vision 2030* (Government of United republic of Kenya, Kenya 2007). See also text to n 54 in chapter 7

<sup>112</sup> HE Hon President M Kibaki, 'Speech During the Official Opening of Parliament' (the Fourth Session of the Tenth Kenyan Parliament 23rd February 2010) < [www.parliament.go.ke/index.php?option=com\\_docman&task](http://www.parliament.go.ke/index.php?option=com_docman&task) > accessed 12/04/2010

<sup>113</sup> Kenya, 'Investment Programme for the Economic Recovery Strategy for Wealth and Employment Creation 2003-2007' (Poverty Reduction Papers IMF Country Report No. 05/11, 2005) < <http://www.imf.org/external/pubs/ft/scr/2005/cr0511.pdf> > accessed 01/09/2010

Kenya domesticates international Standards and Conventions which it is party to.<sup>114</sup> One view given in relation to the potential areas for reform of Kenyan insolvency law, which also reflects domestic concerns on local creditors interests, is to the effect that:

There should ... be a policy review of the issue of preferential debtors especially in favour of the government. Many bona fide creditors of insolvent companies do lose the opportunity to recover their money because of the consideration of the government as a preferential creditor. This policy is detrimental to the growth of other businesses that are not classified as secured creditors. Where they are unable to recover the money owed to them, they may also experience financial difficulties and eventually suffer liquidation as well with the effect that a series of receiverships occur and the momentum continues to build for more business failures. Government loss in the short term will certainly be compensated when the businesses have recovered and begin to pay taxes.<sup>115</sup>

The Bill is, at least in theory, set to establish a key framework for cross-border insolvency regulation.<sup>116</sup> Arguably, the proposed radical reforms establish key features that are critical in regulation of and co-operation in cross-border insolvencies. Firstly, the reforms seek to introduce two new legal procedures, namely, Company Voluntary Arrangements (“CVAs”) and Administration. And secondly, the reforms propose to introduce a requirement for any “insolvency practitioner” to be qualified. This proposed requirement closely, as is the case for most parts of the Bill, follows the UK Model. The Bill provides for the law to adopt the two tests of insolvency, namely cash flow test and the balance sheet test, either of which may be invoked to establish insolvency.<sup>117</sup>

Commentators are of the view that if this Bill ‘ends up as legislation substantially unaltered it could result in some radical changes to the existing insolvency regime.’<sup>118</sup> Nevertheless, implementation concerns have also been raised.<sup>119</sup> The USAID report has it that:

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<sup>114</sup> Ibid

<sup>115</sup> K Owino (n 110) 1, 7& 8; Cf. text to n 98 in chapter 7

<sup>116</sup> Insolvency Bill 2010 (Kenya) Part XIII (clauses 462-466) contains general provisions. It provides *inter alia* for the power of the Minister to make regulations and domesticates the UNCITRAL Model Law on Insolvency under a schedule to the Bill. Indeed, this method parallels the approach taken by the Great Britain in adopting the Model Law on Cross-Border Insolvency as a regulation made under the Insolvency Act 1986.

<sup>117</sup> Cf. text to n 3 in chapter 2

<sup>118</sup> M Whitehead (n 106) 8

Major legislation for a complete revamping of the bankruptcy process, including the adoption of a reorganization statute [which] has been pending for several years.....would be a complete revision of bankruptcy law in Kenya.....*although a less ambitious revision (with a simple provision for the rehabilitation of a business) would be very likely to be easier for the overworked Kenyan court system to implement.*<sup>120</sup> (emphasis added)

Notably, concerns on the need for simplified form of insolvency legislation for developing countries such as those in SSA were also raised in connection with the overhaul of Tanzania's insolvency legal framework in 2002 which became operational in 2005.<sup>121</sup> It was contended that:

Perhaps a word of warning will not be out of place here. In their zeal to continually improve their business rescue and insolvency regimes, [they] should *avoid the pitfall of making them so over-regulated and complex* as to become unwieldy and prohibitively costly. Any trend in this direction must be quickly identified and nipped in its bud.<sup>122</sup> (emphasis added)

### **6.4.3 Cross-Border Insolvency Features Emerging From the Kenyan Reform Initiative**

#### **6.4.3.1 Towards Adoption of the UNCITRAL Model Law on Cross-Border Insolvency**

Although cross-border insolvency regulation is not explicitly singled out as one of the primary objectives of the Bill, as is for rehabilitation of an insolvent debtor, reading through the Bill reveals that cross-border insolvency regulation is indeed one of the major and significant reforms and updates that the Bill seeks to achieve for Kenya.<sup>123</sup> Apart from the traditional procedure of winding up of a foreign company as an unregistered company, which the Bill has incorporated, it seeks also to give effect to the adoption of the UNCITRAL Model Law on Cross-border Insolvency as a schedule to the proposed Insolvency Act 2010.<sup>124</sup> One of the relevant clauses under the Kenyan Insolvency Bill 2010 reads thus:

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<sup>119</sup> M Whitehead (n 106) 9; and USAID (n 87) 70

<sup>120</sup> USAID (n 108) 70

<sup>121</sup> See Editorial entitled 'The Band Wagon of Insolvency Law Reform Globally Rolls on' (2006) 22 *IL & P* 97

<sup>122</sup> *Ibid*

<sup>123</sup> This is particularly so given the express commitment to adopt the UNCITRAL Model Law on Cross-Border Insolvency

<sup>124</sup> n 116 above

The United Nations Commission on International Trade Law (Model Law on Cross-Border Insolvency) shall have the force of law in Kenya in the form set out in the Fifth Schedule.<sup>125</sup>

It is of interest to consider this development in Kenya in light of some of the prevailing features characterising adoption of the Model law as a domestic legislation. Firstly, it is common knowledge that the Model Law has been adopted differently in different countries which suggests the potential influence of local policies, priorities and culture, to mention but a few. Secondly, the test of reciprocity has proved to be one of the more common features of the adoption of the Model Law, and it is increasingly becoming also true for SSA countries that have to date adopted the Model Law.<sup>126</sup> And thirdly, despite some variations as to how the Model Law has been adopted thus far, a public policy element is a prominent feature that has hardly been omitted in the adopted versions of the Model Law. The question is whether or not the proposed law to be adopted in Kenya is going to fit within this trend.

#### **6.4.3.2 Key Aspects of the Proposed Kenyan Model Law on Cross-Border Insolvency**

The Kenyan Insolvency Bill 2010 that has been published thus far incorporates a proposed set of Cross-Border Insolvency Regulations as the 5<sup>th</sup> schedule to the Bill (herein after referred as the Bill). Clearly, the Bill is significantly in line with the UNCITRAL Model Law on Cross-Border Insolvency. The following are some highlights of the fundamental aspects of the Bill as it proposes to address cross-border insolvency.

##### **6.4.3.2.1 Application of the Proposed Law to Foreign Jurisdictions and Proceedings**

The Insolvency Bill 2010 does not restrict its application to foreign jurisdiction and proceedings on a basis of a requirement for reciprocity.<sup>127</sup> It appears that the intention is to welcome any application from any jurisdiction whether or not it is from a jurisdiction that has adopted the Model Law or one that has any reciprocal

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<sup>125</sup> Insolvency Bill 2010 (Kenya) clause 463

<sup>126</sup> Text to n 87 and 88 above. South Africa's Cross-Border Insolvency Law and more recently Mauritius Cross-Border Insolvency Law are all based on some forms of reciprocity requirement.

<sup>127</sup> Insolvency Bill 2010 (Kenya) 5<sup>th</sup> Schedule para 8

co-operation with Kenya. This is a point of significant contrast to the adoption of the UNCITRAL Model Law on Cross-Border Insolvency in other SSA countries.<sup>128</sup> Assistance may be refused on grounds of contravention of Kenyan public policy. The Bill proposes that if a refusal on grounds of public policy is sought, the court must consider appearance of the Kenyan Attorney General to be heard in relation to the public policy issue raised.<sup>129</sup> This requirement is a positive development which is non-existent in the UNCITRAL Model Law.<sup>130</sup> More importantly, the extent of application of the proposed law may also be constrained by the existence of international obligations arising from international treaties to which Kenya is a party.<sup>131</sup> It might be argued that this may include specific effects of bilateral investment treaties and such other treaties like the UNIDROIT Cape Town Convention where there is sufficient linkage with issues governed by the provision of the relevant national insolvency or cross-border insolvency law.<sup>132</sup> This brings in such aspects as requirements for extending national treatment, most favoured national treatment, fair and equitable treatment and the right of a foreign investor to repatriate capital and funds from a host country as well as super-priority treatment to some of the claimants.<sup>133</sup>

#### **6.4.3.2 Treatment of Foreign Creditors and Foreign Representatives**

As a general rule, the Bill seeks to require “national treatment” of foreign creditors in addition to providing direct access for foreign representatives to the court in Kenya. It is to the effect that foreign creditors are to be treated in the

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<sup>128</sup> Text to n 87 and 88 above

<sup>129</sup> Insolvency Bill 2010 (Kenya) 5<sup>th</sup> Schedule para 8(1) & (2); and Guide to Enactment of UNCITRAL Model Law para 124 and 25

<sup>130</sup> UNCITRAL Model Law art 2; see also Law Commission of New Zealand, *Report 52: Cross-Border Insolvency: Should New Zealand Adopt the UNCITRAL Model Law on Cross-Border Insolvency?* (Report/Law Commission, Wellington 1999) xiii and xiv, from which such development in relation to public policy seem to have originated; and R Mason, ‘Implications of the UNCITRAL Model Law for Australian Cross-Border Insolvencies’ (1999) 8 *Int’l Insolv Rev* 83, 88

<sup>131</sup> Insolvency Bill 2010 (Kenya) 5<sup>th</sup> Schedule para 5; UNCITRAL Model Law art 3; and Guide to Enactment of UNCITRAL Model Law para 76 and 77

<sup>132</sup> *Ibid*; and text to n 30-32 in chapter 4

<sup>133</sup> *Ibid*; and text to n 30-32 in chapter 4. Based on the stipulations of the Guide to Enactment of UNCITRAL Model Law, it is important to note that there is nothing in the Bill that suggests that “...in order for article [5] to displace a provision of the national law, a *sufficient link* must exist between the international treaty concerned and the issue governed by the provision of the national law in question.” (emphasis added)

same way that local creditors are treated, including the right to commence and participate in a local insolvency proceeding.<sup>134</sup> While the proposed law seeks to provide for exception to the application of non-discrimination principle in relation to application of priorities in distribution, it is silent on the establishment of a minimum level of fair treatment.<sup>135</sup> The minimum requirement recommended in the Model Law is one that may provide that a foreign creditor must be treated in a distribution at least as well as a general, unsecured creditor, if a similarly situated local creditor would receive at least that treatment.<sup>136</sup> Rather, the Bill only provides that access of foreign creditors to a proceeding relating to insolvency ‘...does not affect the ranking of claims in a proceeding under [the proposed law] or the exclusion of foreign tax and social security claims from such a proceeding.’<sup>137</sup> The rule governing ranking of claims proposed under the Bill is such that the priority of payment is first granted to a specified category of unsecured creditors, which includes administration claims, employment related claims, and tax claims, before it applies to other creditors starting with the secured ones.<sup>138</sup>

The equality of treatment is reflected in the proposed requirement of having foreign creditors notified whenever notification to local creditors is required.<sup>139</sup> This is on an individual basis to known foreign creditors unless otherwise ordered by the court. The proposed law, as is the case for the Model Law, prescribes the specific information to be included in the notice. This includes information about the time and place for filing of claims and whether secured creditors need file claims as well as any other information required for local creditors or by order of the court.<sup>140</sup> Such prescription as to notification is ideally

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<sup>134</sup> Insolvency Bill 2010 (Kenya) para 15

<sup>135</sup> UNCITRAL Model Law art 13(2)

<sup>136</sup> UNCITRAL Model Law art 13 (2); and JL Westbrook, ‘Multinational Enterprises in General Default: Chapter 15, the ALI Principles and the EU Insolvency Regulations’ (2002) 76 *Am Bank LJ* 1, 16

<sup>137</sup> UNCITRAL Model Law, art 13(2)

<sup>138</sup> Insolvency Bill clause 421, 1<sup>st</sup> Schedule para 1

<sup>139</sup> UNCITRAL Model Law, art 14; and Insolvency Bill 2010, Schedule 5 para 16

<sup>140</sup> Insolvency Bill 2010 (Kenya), Schedule 5, para16(4); and UNCITRAL Model Law art 14

intended to facilitate the participation of foreign creditors in the local proceedings.<sup>141</sup>

#### **6.4.3.2.3 Recognition**

The Insolvency Bill adopts the procedure for recognition of foreign proceedings provided in the UNCITRAL Model Law.<sup>142</sup> This procedure entails an application for obtaining local recognition filed locally by a foreign representative with relevant supporting documentation as a proof for existence of such a proceeding and appointment of the representative. The proposed presumption is that such documentation, if submitted in accordance with the law, must be deemed to be authentic. Of particular importance is that the application must identify all proceedings in respect of a debtor that are known to the foreign representative. Consistent with the Model Law, the proposed law seeks to make it mandatory for an application for recognition to be determined expeditiously.<sup>143</sup> This is crucially critical in enabling ‘effective protection of the debtor’s local assets from dissipation and concealment.’<sup>144</sup> The recognition and assistance that follow depend upon whether the foreign proceeding is the main proceeding, if it has commenced in the state where the debtor has its “centre of main interests”, or a foreign non-main proceeding, if it is based on the place where the debtor has an establishment.<sup>145</sup> It is noteworthy that the proposed law seeks to allow and mandate international co-operation between courts to the maximum extent possible in cases involving proceedings based on the presence of assets.<sup>146</sup> According to the Bill such proceedings may still be commenced in Kenya after the recognition of foreign main proceedings if the debtor has assets in such

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<sup>141</sup> UNCITRAL Model Law art 14; and Insolvency Bill 2010 (Kenya) 5<sup>th</sup> Schedule para 16(4); and see also J Clift, ‘The UNCITRAL Model Law on Cross-Border Insolvency- A Legislative Framework to facilitate Coordination and Cooperation in Cross-Border Insolvency’ (2004) 12 *Tul J Int’l & Comp L* 307, 322 & 323

<sup>142</sup> Insolvency Bill 2010 (Kenya) Schedule 5 para 17; and UNCITRAL Model Law art 19

<sup>143</sup> Insolvency Bill 2010 5<sup>th</sup> Schedule para 19(3); UNCITRAL Model Law art 17(3)

<sup>144</sup> See Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency para 125

<sup>145</sup> Insolvency Bill 2010 5<sup>th</sup> Schedule, paras 4 & 19(2); UNCITRAL Model Law arts 2(f), 17(2), and 20(1)(a) (b) & (c) and (2); and Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency paras 31, 72, 73 and 126

<sup>146</sup> Insolvency Bill 2010 (Kenya), 5<sup>th</sup> Schedule, paras 27-29; and UNCITRAL Model Law art 25-27; J Clift (n 141) 323-324

jurisdiction.<sup>147</sup> It should be noted, however, that the effects of an insolvency proceeding commenced on the basis of the presence of assets only are normally restricted to the assets located in Kenya.<sup>148</sup>

The basic principle that characterises the Bill with regard to relief (which is consistent with the Model Law) is that the recognition of foreign proceedings by the Kenyan court grants effects that are considered necessary for the conduct of cross-border insolvency subject to protection of interests of local creditors and other interested parties and conformity to public policy.

#### **6.4.3.2.4 Protection of Creditors**

The Bill explicitly provides for protection of creditors in a manner that is consistent with the provisions of the Model Law.<sup>149</sup> As such, the court is required to satisfy itself that the interests of creditors, among others, are adequately protected, when granting or denying relief under the proposed law or modifying or terminating it.<sup>150</sup> It has been contended that such provisions leave it to the discretion of the court whether to grant temporary relief upon an application for recognition or upon a decision to recognise a foreign proceeding.<sup>151</sup>

Indeed, the protection of the creditors focuses, though not exclusively, on the local creditors.<sup>152</sup> Local creditors concerns that may arise in cross-border insolvency cases, such as on issues related to turnover of assets to foreign representatives or other designated persons, may be addressed to the court which is required to be assured that the creditors' interests as well as those of debtors and other stakeholders are adequately protected. For example, as is the case for the Model Law, the proposed law in Kenya is such that the court is entitled to ensure that interests of creditors in Kenya are protected when deciding whether or not to entrust the distribution of all or part of the debtor's assets located in

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<sup>147</sup> Insolvency Bill 2010 5<sup>th</sup> Schedule para 30; and UNCITRAL Model Law art 28; and Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency para 73

<sup>148</sup> Ibid

<sup>149</sup> Insolvency Bill 2010 (Kenya) 5<sup>th</sup> Schedule para 22; and UNCITRAL Model Law on Cross-Border Insolvency art 22

<sup>150</sup> Insolvency Bill 2010 (Kenya) 5<sup>th</sup> Schedule paras 21, 23 and 24

<sup>151</sup> J Clift (n 141)326

<sup>152</sup> Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency para 35

Kenya to the foreign representative or another person designated by the Court.<sup>153</sup> Generally speaking, the proposed law seeks to empower the court to subject relief granted to conditions that it considers appropriate.<sup>154</sup>

#### **6.4.3.2.5 Communication, Co-ordination and Co-operation**

The Bill seeks to authorise and in fact make co-operation by any appropriate means and direct communication between the Kenyan court and foreign courts or foreign representatives mandatory. Such a requirement also applies at various levels between local insolvency administrators and foreign courts or foreign representatives.<sup>155</sup> Of particular importance is the adoption of the express provision that the Kenyan court ‘...is entitled to communicate directly with, or to request information or assistance directly from, foreign Courts or foreign representatives.’<sup>156</sup> This is seemingly a core element of the Bill with the object of enabling courts and insolvency administrators from Kenya and foreign jurisdictions to be efficient and achieve optimal results. The Bill suggests ways to co-operate which include communication of information; approval of agreements concerning the co-ordination of proceedings; and co-ordination of concurrent proceedings with respect to the same debtor.<sup>157</sup>

#### **6.4.3.2.6 Application of other Relevant Laws**

The Bill seeks to permit application of other laws in facilitating co-ordination and co-operation in cross-border insolvencies.<sup>158</sup> Arguably, this provision will have the effect of enabling the Kenyan court to look beyond the Kenyan Model Law in the pursuit of providing assistance to foreign proceedings in respect of an insolvent company. The approaches to cross-border insolvency at common law may be applied to complement the proposed law as long as such application aims

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<sup>153</sup> Insolvency Bill 2010 (Kenya) 5<sup>th</sup> Schedule para 23(2); UNCITRAL Model Law art 21(2) and Guide to enactment of the UNCITRAL Model Law para 157

<sup>154</sup> Insolvency Bill 2010 (Kenya) 5<sup>th</sup> Schedule para 24(2); UNCITRAL Model Law 21(2), 22(1), and 22(2); and Guide to enactment of the UNCITRAL Model Law para 157

<sup>155</sup> Insolvency Bill 2010 5<sup>th</sup> Schedule Para 28; UNCITRAL Model Law arts 25-27; Guide to Enactment paras 173-177

<sup>156</sup> Insolvency Bill 2010 (Kenya) 5<sup>th</sup> Schedule Para 28(1)

<sup>157</sup> Insolvency Bill 2010(Kenya) 5<sup>th</sup> Schedule para 29; and UNCITRAL Model Law art 27

<sup>158</sup> Insolvency Bill 2010 (Kenya) 5<sup>th</sup> Schedule para 9; and UNCITRAL Model Law art 7

‘...to provide additional assistance to a foreign representative...’<sup>159</sup> or a ‘...different... type of assistance’<sup>160</sup> and not otherwise.

Although the adoption of the Model Law is intended not to displace the laws that were already in place, it seems that the refusal of assistance or provision of any limited form of assistance might not be justified under this provision but perhaps other grounds that may be permitted by different provisions under the proposed law. As discussed below, it is this very provision that the application of relevant personal bankruptcy laws on cross-border insolvency co-operation could be based on.

### **6.5 Applying the Relevant Bankruptcy Rules into Cross-Border Corporate Insolvency Proceedings**

As noted in the preceding parts of this chapter, the repealed company legislation in Tanzania had a provision that sought to apply bankruptcy rules in insolvency proceedings in respect of an insolvent company.<sup>161</sup> The provision has been re-enacted and reproduced verbatim as section 366 of the CA 2002 and in the same vein the Kenyan Insolvency Bill 2010 proposes to re-enact the provision under clause 420(2) &(2). As mentioned earlier in this chapter, similar provision is found in the Kenyan Companies Act,<sup>162</sup> which is currently in the process of being repealed and replaced by a new Companies legislation. Essentially, such provisions read thus:

In the winding up of an insolvent company, the same rules shall prevail and be observed with regard to the respective rights of secured and unsecured creditors and to debts provable and to the valuation of annuities and future and contingent liabilities as are in force for the time being under the law of bankruptcy with respect to the estates of persons adjudged bankrupt, and all persons who in any such case would be entitled to prove for and receive dividends out of the assets of the company may come in under the winding up and make such claims against the company as they respectively are entitled to by virtue of this section.<sup>163</sup>

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<sup>159</sup> Ibid; and Guide to Enactment of UNCITRAL Model Law para 90

<sup>160</sup> Guide to Enactment of UNCITRA Model Law para 90

<sup>161</sup> Text to n 59 above

<sup>162</sup> Text to n 59 above

<sup>163</sup> Companies Act 2002 (Tanzania) s 366, whose marginal note is styled as ‘[a]pplication of bankruptcy law.’ Companies Act (Chapter 486 of Laws of Kenya) s 310; and Insolvency Bill 2010 (Kenya) clause 420(2) & (3). The marginal note to such provisions reads as ‘application of bankruptcy rules in winding up of insolvent companies.’

The argument that is advanced here is that the application of this provision requires an expansive and wide construction in determining the relevant rules in bankruptcy law and the extent to which they may be brought into use in insolvency proceedings in respect of an insolvent company. The underlying consideration is both historical and theoretical. It has been contended that the rules of personal bankruptcy have long had relatively more developed and clearer procedures for dealing with the insolvency of an individual than corporate insolvency.<sup>164</sup> This was seemingly in response to the growing numbers of insolvencies of persons and partnerships affecting assets located in a number of commonwealth jurisdictions.<sup>165</sup>

The origin and essence of the provision therefore was, it seems, to enable extension of such procedures as far as they were relevant to the circumstances pertaining to winding up proceedings in respect of an insolvent company under the provisions of the companies' legislation. This would thus enable the insolvent company and the interested parties to benefit from the more developed and much clearer procedures as in force in the law of personal bankruptcy.

As was judicially noted in the *Cambridge Gas* case,<sup>166</sup> the rules of personal bankruptcy as developed in Britain and adopted in its colonial territories had long envisioned the universalist theory of personal bankruptcy and co-operation among courts in dealing with an insolvent person and rights of all persons interested in the process. Thus, principles and procedures had long been in place as regards co-operation of courts and fairness of treatment of creditors situated in different jurisdictions.<sup>167</sup> Clearly, realisation of rights of secured and unsecured creditors, among other things, involves a judicial process dealing with the insolvent company. This would require the same treatment as accorded to individual insolvency.

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<sup>164</sup> L Hoffmann (n 1) 2510; and PJ Omar, 'Cross-Border Jurisdiction and Assistance in Insolvency: The Position in Malaysia and Singapore' (2008) 1 *PER* 2, 33

<sup>165</sup> L Hoffmann (n 1) 2510; and PJ Omar (n 164) 33

<sup>166</sup> *Cambridge Gas* case (n 84) para 17; and L Hoffmann (n 1) 2511

<sup>167</sup> See *Solomons v Ross* (1764) 1 HB1 131n

Indeed, the provisions governing the application of rules of bankruptcy to corporate insolvency proceedings are explicit that they are only applicable to winding up of an insolvent company. It would therefore seem that the stipulation that ‘...the same rules shall prevail.... as are in force for the time being under the law of bankruptcy...’<sup>168</sup> includes the procedural rules on the cross-border co-operation among countries (for example aiding of a reciprocating country and court in insolvency proceedings).<sup>169</sup> This seems to have merit since one could read into the co-operation provisions an implicit desire to assist in ensuring proceedings were carried out efficiently with a view to seeing the greatest return to creditors.<sup>170</sup> This argument is strongly reinforced by the fact that the co-operation provisions descended from the bankruptcy procedural concerns.<sup>171</sup>

### **6.5.1 A Glimpse at the Cross-Border Bankruptcy Rules**

Apart from the common law conflict rules by which foreign insolvency proceedings are recognised, assisted and managed; the law of personal bankruptcy in Tanzania and Kenya provides in detail the manner in which co-operation in cross-border insolvency involving either of these countries with a reciprocating country or countries may be undertaken to help and not to hinder the administration of the insolvent debtor.<sup>172</sup>

The respective Tanzanian and Kenyan laws provide the court that has jurisdiction in insolvency or bankruptcy matters a duty, upon request from another court, to provide assistance and make any order which could be made in bankruptcy proceedings in its own jurisdiction or in the jurisdiction of the requesting country. One of the key provisions under such bankruptcy legislation is to the effect that:

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<sup>168</sup> Companies Act 2002 (Tanzania) s 366

<sup>169</sup> Bankruptcy Act (Tanzania) ss 115, 150-163 and Bankruptcy (Reciprocity) Rules G.N. No. 38 of 1932(Tanzania); and Bankruptcy Act (Kenya) ss 115, 151-164 and Bankruptcy (Reciprocity) Rules Cap 30 (1948), Sub Leg LN 141/1962 (Kenya)

<sup>170</sup> Statement by PJ Omar (Personal email correspondence 16 September 2010). Views and contributions of PJ Omar on this aspect and his opinion that extending such provision to the co-operation procedure might amount to reading the provision too far, although the issue seems to be open, is highly acknowledged.

<sup>171</sup> Ibid

<sup>172</sup> *Official Receiver v Messrs. Savadia & Co* 18 EACA 119 (1951)

The court...and all the officers thereof shall in all matters of bankruptcy, act in aid of every reciprocating court elsewhere having jurisdiction in bankruptcy or insolvency, and an order of the court seeking aid, with a request to this court shall be deemed sufficient to enable this court to exercise, in regard to the matters directed by the order, such jurisdiction as either the court which made the request, or this court could exercise in regard to similar matters within their respective jurisdiction, save that to enable the official receiver of the United Republic to act as the agent of an officer of a reciprocating court or to enable an officer of this court to seek the aid of an official receiver of a reciprocating court in the manner provided in part IX of this Act it shall not be necessary for this court or any reciprocating court to make any order or send any request under this section.<sup>173</sup>

Notably, the application of the relevant statutory provision of the Bankruptcy legislation along with the relevant Bankruptcy (Reciprocity) Rules (“BRR”)<sup>174</sup> is hinged on reciprocity. One key criterion for the grant of reciprocity in accordance with the respective laws for Tanzania and Kenya is the similarity of the relevant laws in terms of their effect in the reciprocating countries.<sup>175</sup> In the legislation for both Tanzania and Kenya, the determination of such similarity is the exclusive province of the Minister responsible for justice.<sup>176</sup> This marks a departure from the original provision contained in the English Bankruptcy Act 1914 (on which the Tanzanian and Kenyan provisions are based) which sought to ‘co-ordinate proceedings and enable the courts within the Commonwealth to request other courts to assist in the management of bankruptcy proceedings within their own jurisdictions.’<sup>177</sup>

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<sup>173</sup> Bankruptcy Act (Tanzania) s 115. The marginal note to this provision reads: ‘court to be auxiliary to other reciprocating courts.’ Similar provision is found in Bankruptcy Act (Kenya) s 115 whose marginal note reads: ‘court to be auxiliary to other Commonwealth courts.’ Notably, the Kenyan provision instead of reading “...act in aid of every reciprocating court elsewhere having jurisdiction in bankruptcy or insolvency...”, it reads that “...act in aid of and be auxiliary to every Commonwealth court elsewhere having jurisdiction in bankruptcy or insolvency....”

<sup>174</sup> Bankruptcy (Reciprocity) Rules G.N. No. 38 of 1932 (Tanzania); and Bankruptcy (Reciprocity) Rules Cap 30 (1948), Sub Leg LN 141/1962 (Kenya)

<sup>175</sup> See Bankruptcy Act (Tanzania) s 150; and Bankruptcy Act (Kenya) s 151

<sup>176</sup> Ibid

<sup>177</sup> PJ Omar (n 164) 35. Section 122 of the Bankruptcy Act 1914 provided that: ‘The High Court, the county courts, the courts having jurisdiction in bankruptcy in Scotland and Ireland, and every British court elsewhere having jurisdiction in bankruptcy or insolvency, and the officers of those courts respectively, shall severally act in aid of and be auxiliary to each other in all matters of bankruptcy, and an order of the court seeking aid, with a request to another of the said courts, shall be deemed sufficient to enable the latter court to exercise, in regard to the matters directed by the order, such jurisdiction as either the court which made the request or the court to which the request is made, could exercise in regard to similar matters within their respective jurisdictions.’

The implication of the reciprocity requirement is that it provides mandatory obligations to the relevant courts of Tanzania and Kenya to render assistance within the framework of the statutory provisions only to reciprocating jurisdictions that are party to such reciprocal co-operation arrangement. One condition is that a debtor must have a property situated in a reciprocating jurisdiction in order that such an arrangement can be invoked.<sup>178</sup>

According to the respective laws for Tanzania or Kenya, an office holder for the bankruptcy proceedings against a debtor having property in a reciprocating country is empowered to appoint an agent from the reciprocating country utilising the relevant law and procedure obtaining in such reciprocating country.<sup>179</sup> The agent may carry out such duties as the office holder may determine and delegate.<sup>180</sup> The duties may include the power to admit or reject all proofs of debts filed with him in accordance with the relevant laws. The office-holder may alternatively choose not to appoint an agent and instead proceed directly, after making requisite publication of relevant orders, to exercise his powers in the reciprocating country over the administration of the property of the debtor situate in such reciprocating country.<sup>181</sup> In view of rule 17 of the BRR in both Tanzania and Kenya the office holder ‘shall not take any steps to seize, recover or realise any property of the debtor or bankrupt situate in such reciprocating country until he has caused a notice of the interim or receiving order or order of adjudication, as the case may be, made by the court to be published in the reciprocating country in the manner prescribed for the publication of notices in bankruptcy by the law of that country and in addition

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<sup>178</sup> Bankruptcy Act (Tanzania) s 151 and Bankruptcy (Reciprocity) Rules GN No. 38 of 1932, r 7; and Bankruptcy Act (Kenya) s 152 and Bankruptcy (Reciprocity) Rules Cap 30 (1948), Sub Leg LN 141/1962 (Kenya) r 7

<sup>179</sup> Bankruptcy Act (Tanzania) s 162 and Bankruptcy (Reciprocity) Rules G.N. No. 38 of 1932 rr 12-18; and Bankruptcy Act (Kenya) s 163 and Bankruptcy (Reciprocity) Rules Cap 30 (1948), Sub Leg LN 141/1962 (Kenya) rr 12-18

<sup>180</sup> Bankruptcy Act (Tanzania) s 162 and Bankruptcy (Reciprocity) Rules 1932 (Tanzania) rr 12-15; bankruptcy Act (Kenya) s 163 and Bankruptcy (Reciprocity) Rules Cap 30 (1948), Sub Leg LN 141/1962 (Kenya) rr 12-15

<sup>181</sup> Rule 17 of the Bankruptcy (Reciprocity) Rules G.N. No. 38 of 1932

has filed with the Registrar of the court in the reciprocating country a sealed copy of such order.’<sup>182</sup>

In addition to the above, it has judicially been held that the office holder has discretion to determine the appropriate procedure to follow when it appears to him that the debtor has property in other reciprocating countries.<sup>183</sup> However, the law in both Tanzania and Kenya mandates the respective courts to act on their own initiative if it appears that bankruptcy proceedings against a debtor having property in the local jurisdiction, have been commenced in a reciprocating country; and an appropriate office-holder in respect of such proceedings and administration of the debtor’s estate has been duly appointed. In this respect, the court is empowered to make such orders as may be seen to be appropriate to protect the debtor’s property situated in a local jurisdiction, the interests of creditors and other interested parties.<sup>184</sup> Undoubtedly, this provision creates a basis and need for the court –to-court communication which may consequently expose the court to proceedings opened in one country against a debtor that has property in a local court’s jurisdiction.

Conversely, the law in both Tanzania and Kenya provides for an appointment of a local official receiver as an agent of the foreign office-holder in foreign insolvency proceedings commenced in a reciprocating country against a debtor who has property in the local jurisdiction of the court.<sup>185</sup> This entails having the agent served with the proceedings’ documents, including a list of known creditors and the nature and value of the debtor’s property in the local jurisdiction.<sup>186</sup> It also involves publication of the appointment in a government

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<sup>182</sup> Rule 17 of Bankruptcy (Reciprocity) Rules G.N. No. 38 of 1932. The gist of the publication is seemingly to afford transparency and openness.

<sup>183</sup> IR Macneil (n 25) ; and *Official Receiver v Messrs. Savadia & Co* 18 EACA 119 (1951) where the then East Africa Court of Appeal stated: ‘The purpose of these reciprocal provisions is to help and not to hinder the administration of the bankrupt’s estate and it is clearly within the discretion of the official receiver or trustee to bring his action in such territory as he thinks most convenient and most likely to be productive of benefit to the administration.’

<sup>184</sup> Section 158 of the Bankruptcy Act (Tanzania) s 158 read together with ss 11 and 26; Bankruptcy Act (Kenya) s 159 read together with ss 11 and 26

<sup>185</sup> Bankruptcy Act (Tanzania) s 154; and Bankruptcy Act (Kenya) s 155

<sup>186</sup> Bankruptcy Act (Tanzania) s 155; and Bankruptcy Act (Kenya) s 156

gazette and filing of the requisite documents with the high court.<sup>187</sup> While the appointment of the agent is in accordance with relevant local law, the administration of the bankruptcy estate in the local jurisdiction of Tanzania and Kenya is effected in accordance with the laws of the reciprocating country. This includes proof of debts and distribution of dividends.<sup>188</sup> The agent is among other things duty bound to facilitate a local inspection by creditors and proof of debts. The proceeds realised from the local property of the debtor have to be remitted to the officeholder in the foreign proceedings having jurisdiction in the bankruptcy estate. In fact, insolvency proceedings commenced in a foreign reciprocating country are deemed to have the same effect as if they were commenced in a competent local court. Similarly, the debtor and his creditors are deemed to be in the same position and have the same rights and privileges, and are subject to the same disqualifications, restrictions, obligations and liabilities in every respect as if the proceedings had been commenced in the local jurisdiction.<sup>189</sup>

The law anticipates the occurrence of concurrent insolvency proceedings which are defined as ‘...proceedings instituted concurrently against the same debtor in any two or more reciprocating countries, one of which may or may not be [the local jurisdiction].’<sup>190</sup> The procedure for dealing with the concurrent proceedings is as follows.<sup>191</sup> Firstly, the country where the proceedings were first commenced, in terms of having issued the adjudication order earlier than any other country, is regarded as having jurisdiction in managing the proceedings over the estate of the debtor and administering the property of the debtor wherever situated.<sup>192</sup> Secondly, where there is no adjudication order made or in the event of same dates on which such orders were issued, the jurisdiction and as such the property of the debtor will vest in the reciprocating country which first issued the receiving order.<sup>193</sup>

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<sup>187</sup> Ibid

<sup>188</sup> Bankruptcy Act (Tanzania) ss 156 and 157; and Bankruptcy Act (Kenya) ss 157 and 158

<sup>189</sup> Bankruptcy Act (Tanzania) s 151; and Bankruptcy Act (Kenya) s 152

<sup>190</sup> Bankruptcy Act (Tanzania) s 161(1); and Bankruptcy Act (Kenya) s 162 (1)

<sup>191</sup> See the entire provisions in Bankruptcy Act (Tanzania) s 161; and Bankruptcy Act (Kenya) s 162 for the relevant procedure for dealing with concurrent proceedings.

<sup>192</sup> Bankruptcy Act (Tanzania) s 161(2) ; and Bankruptcy Act (Kenya) s 162(2)

<sup>193</sup> Ibid

Thirdly, the proceedings commenced against the debtor in the local jurisdiction will, if the jurisdiction vests in a reciprocating court have to be rescinded, annulled or dismissed as the court may deem appropriate.<sup>194</sup> This is done in order to give way for the proceedings in the reciprocating country to administer the estate in all the reciprocating countries. And fourthly, in exceptional circumstances, the proceedings in a local jurisdiction may, upon proper application by creditors and upon the court's inquiry, be continued and a special receiver or trustee in the local jurisdiction or other reciprocating country administers the debtor's property situated in the local jurisdiction.<sup>195</sup> This is particularly so where it has been shown that a majority of the creditors in number and value are resident in the respective local jurisdiction or another reciprocating country and the circumstances pertaining to the property suggest that it is more convenient to have the administration pursued in the local jurisdiction or another reciprocating country. The relevant provision reads thus:

Notwithstanding the other provisions of this section in any case where concurrent bankruptcy proceedings have been instituted in [the local jurisdiction] the court may, after such inquiry and reference to such reciprocating courts as it deems fit, order that the property of the debtor situated in the [local jurisdiction] shall vest in or be administered by a trustee or receiver in the local jurisdiction or in some reciprocating country other than that [of the jurisdiction where the proceedings were first commenced as ]determined under the provisions of subsection (2) hereof if, upon an application by the official receiver or any creditor or other person interested, it appears that a majority of the creditors in number and value are resident in the [local jurisdiction] or such other reciprocating country, and that from the situation of the property of the debtor or bankrupt or other causes his estate and effects may be more conveniently administered, managed and distributed in [the local jurisdiction] or such other reciprocating country.<sup>196</sup>

However, it seems that notwithstanding continuance of the proceedings in respect of the property situated in the local jurisdiction, such proceedings, which could be described as secondary,<sup>197</sup> still have to be undertaken in a manner that recognises the interests of other creditors and interested parties in the other

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<sup>194</sup> Bankruptcy Act (Tanzania) s 161(3) ; and Bankruptcy Act (Kenya) s 162(3)

<sup>195</sup> Bankruptcy Act (Tanzania) s 161(4); and Bankruptcy Act (Kenya) s 162 (4)

<sup>196</sup> Bankruptcy Act (Tanzania) s 161(4); and Bankruptcy Act (Kenya) s 162(4)

<sup>197</sup> It could perhaps be argued that this is to some extent analogous to secondary proceedings opened where the debtor has an establishment under the EC Regulation on Insolvency Proceedings.

reciprocating countries.<sup>198</sup> To be sure, this procedure is mandated by the quest for efficiency and effectiveness in administering, managing and distributing the property of the debtor.

With the above account in mind, it is notable that the cross-border insolvency regime that is founded in the bankruptcy legislation and the BRR made under it, is characterised by the following key features which in a way bring it very close to the universality theory of cross-border insolvency. This is notwithstanding that it is not applicable to all cases of cross-border insolvency of a debtor that involve Tanzania and Kenya. Firstly, the regime as far as is applicable to reciprocating countries is controlled by the law of the country that is deemed to have jurisdiction over the insolvency proceedings of the debtor. It provides for automatic recognition and enforcement of proceedings commenced in a foreign country which is a reciprocating jurisdiction under the law. Notably, this is one principal element of the pure universalism which requires the law of the home country to control all administration of the assets of the debtor irrespective of their location. Secondly, the regime provides for remittance of the proceeds realised from the administration of the property in other jurisdictions (other than one having overall jurisdiction over the estate of the debtor) to the reciprocating jurisdiction having the overall and controlling jurisdiction over administration of the property of the debtor. Indeed, this is exactly what the advocates of universalism argue for. Thirdly, the regime vests controlling jurisdiction in one of the reciprocating countries in which the proceedings were first commenced. It will be noted that under universalism the principle is that one country must have overall and controlling jurisdiction over the other countries. And fourthly, the regime provides a framework for communication between official receivers in a bid to facilitate efficiency in the administration of the insolvency estate. The only notable difference is that while universalism advocates for the ‘home country’<sup>199</sup> of the debtor as a country having jurisdiction in insolvency proceedings against

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<sup>198</sup> *Official Receiver v Messrs. Savadia & Co* 18 EACA 119 (1951)

<sup>199</sup> According to the existing international insolvency benchmarks, the home country of an insolvent company could be its ‘centre of main interests’ (“COMI”) and not necessarily its place of domicile.

the debtor, this law as applies in Tanzania and Kenya vests jurisdiction in the country where the proceedings were first commenced. The other possible difference, which may render the regime to be a sort of modified universalism, is the fact that it provides for the possibility of concurrent proceedings which are not categorised as main and secondary proceedings though such categorisation seems to be envisaged in the regime.

So far, it is only Kenya, Uganda and Malawi that are reciprocating countries for Tanzania,<sup>200</sup> and only Tanzania and Uganda that are reciprocating countries for Kenya. This has been the status since the colonial days when the law was originally enacted and brought into force before being inherited at independence and recently renamed in Tanzania as the Bankruptcy Act (as opposed to Bankruptcy Ordinance). It must also be stressed that the extension of the application of the cross-border insolvency rules under the bankruptcy legislation to apply to the whole of East Africa was an integral part of the overall early British colonial initiative (dating back to early 20<sup>th</sup> century) aiming at establishing or improving the overall commercial legal framework in East Africa. The initiative laid the basis for the East African co-operation, firstly as a customs union between Kenya and Uganda in 1917, which the then Tanganyika (now Mainland Tanzania) joined in 1927, the East African High Commission (1948–1961), the East African Common Services Organisation (1961–1967) and the East African Community (1967–1977).

### **6.5.2 Impact of the Cross-Border Bankruptcy Rules for Cross-Border Corporate Insolvency Regulation**

A notable general impact of the application of rules of personal bankruptcy law to cross-border corporate insolvency and in particular the cross-border co-operation procedure is to pull even further the existing law in Tanzania and Kenya towards a universalist approach. This is particularly the case if the

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<sup>200</sup> The existence of the reciprocal arrangements in bankruptcy proceedings between Tanzania, Kenya and Uganda can be questioned given the collapse of the East Africa Community in 1977. However, this argument is weak unless it is established that such arrangement had repealed in the respective countries. It is to be noted that Tanzania recently changed the legislation from Bankruptcy ordinance to Bankruptcy Act. In so doing, it did not repeal rules and regulations that were made under the legislation.

countries under study use the opportunity and conclude as many reciprocal co-operation arrangements with other countries as possible, which is not likely on account of the following. Firstly, the law has long been forgotten, if not abandoned in the statute book, to the extent that in some circles it is being argued that the co-operation arrangements concluded thus far had long ceased to function. And secondly, as is shown subsequently, the current drive for reform has the potential of phasing this law out of operation and existence.

Using the corporate insolvency provisions under the CA 2002 as an illustration of the potential impact, it is important at the outset to reiterate that the law has it that an insolvent company incorporated outside Tanzania may be wound up in Tanzania if it has been carrying on business in Tanzania and it is being wound up in its place of incorporation or in any other country where it has established a place of business.<sup>201</sup> Proceedings for the winding up of such a company may be commenced by the official receiver or any of the authorised persons under the provisions of section 281(d) of the CA 2002. It is not however clear if such authorised persons include creditors, administrators and the company itself which as a general rule they are entitled to petition for winding up.

The implication of extending the rules of the law of personal bankruptcy as above discussed would have the following effect whose scope would largely rest on the extent of implementation of the reciprocity requirement. Accordingly, the Bankruptcy Act and BRR will only apply where there is existing reciprocal arrangement between Tanzania and a foreign jurisdiction;<sup>202</sup> otherwise the procedure available under the CA 2002 will prevail and govern the proceeding. Thus a foreign office-holder may make an application to require a locally appointed office-holder or official receiver to act as his agent in Tanzania for the purposes of dealing with the affairs of the company in Tanzania as well as its assets. It appears that since the law empowers any authorised person to institute proceedings against such a company, an office-holder appointed in such proceedings would be competent, upon proper application and compliance with

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<sup>201</sup> Text to n 66 above

<sup>202</sup> Text to n 196 above

the rules as detailed in the law of personal bankruptcy to act as an agent of the office-holder appointed in a foreign proceeding in the company's home country or in any other country where the company has established place of business.

The effect of this is that the office-holder in Tanzania will have to cooperate with the foreign office-holder to administer the property of the company in Tanzania. In terms of the bankruptcy legislation and rules made thereunder, this will include to administer proof of debts for onward transmission to the foreign office holder, facilitate creditors' inspections by *inter alia* ensuring ease access of relevant information to creditors in Tanzania, such as debtors' statements of affairs and participation in creditors' committees meetings, remittances of the proceeds from property situated in Tanzania to the foreign office-holder, and the consequent distribution of dividends to creditors. Such roles will be undertaken using the law of the country where the proceedings were commenced.

The criterion that will be used to determine which foreign proceedings should prevail over the others is the first proceeding to be commenced.<sup>203</sup> This seems to be particularly critical given that the CA 2002 recognises proceedings commenced not only in the home country of the company but also in any other country where the foreign company has established a place of business. This has in fact potentially opened the door for controversy including forum shopping, though it has done away with the problem of determining the centre of main interests of the company.

According to the rules governing concurrent proceedings as contained in the bankruptcy legislation and the BRR, the court in Tanzania may, upon an application by creditors, official receiver or other interested parties, make an inquiry as to the convenience of deferring to the foreign proceedings in the foreign jurisdiction.<sup>204</sup> The court will have to consider the creditors in terms of their number and value, nature of the property of the company within Tanzania and other factors to determine whether to continue the concurrent proceedings in

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<sup>203</sup> Bankruptcy Act (Tanzania) s 161(2) &(3)

<sup>204</sup> Bankruptcy Act (Tanzania) s 161(4) ; and Bankruptcy Act (Kenya) s 162(4)

Tanzania. As it will be recalled from the preceding discussion, this creates a very wide discretion for the court. It is to be noted that in the relevant provision the list of the factors that the court may have regard to is not exhaustive.

More or less similar impact will happen in Kenya as a result of the application of such co-operation procedures which are based on reciprocity. For example, a domestic company being wound up in Kenya on grounds of insolvency may have property in another jurisdiction. Accordingly, it might be in the interests of creditors and other interested parties to have such property administered along with those which are situated in Kenya by the same officeholder appointed by the Kenyan court. Thus, if the other country in which the company has property is a reciprocating country to Kenya, for example Tanzania or Uganda, it will mean that, by virtue of the rules of the law of personal bankruptcy in Kenya, the officeholder will have the right to appoint an agent in the reciprocating country to assist in administering the property situated in such jurisdiction or the officeholder appointed in Kenya may apply directly to the courts of the reciprocating jurisdictions. The reverse of this scenario is also true.<sup>205</sup>

The dependence on reciprocity may be viewed as placing significant limitation on the application of these rules to cross-border corporate insolvency proceedings. Since it is only Kenya, Uganda and Malawi that are reciprocating countries to Tanzania and only Uganda and Tanzania are reciprocating countries to Kenya, it means that the regime established by the Bankruptcy legislation and the BRR may have potentially a very limited operation and effect. It means that the common law will continue to apply in proceedings involving Tanzania and non-reciprocating countries. Nevertheless, the application of these rules effectively pulls the legal framework in Tanzania and Kenya for dealing with cross-border insolvency towards universalism and away from a territorialism stance. Indeed, it offers an important basis from which any reform measure may be considered and pursued.

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<sup>205</sup> Bankruptcy Act (Kenya) s 115; and Bankruptcy Act (Tanzania) s 115

### **6.5.3 Effect of the Contemplated Kenyan Reform on the Future of Cross-Border Insolvency Regulation**

It is notable that although the Insolvency Bill 2010 seeks to repeal and replace Kenya's Bankruptcy Act and insolvency provisions under the current Kenyan Companies Act (which is also in the process for repeal), it provides that any regulation or other instrument made or issued and given effect under such laws will continue to have effect as if such regulation or other instrument were made or issued under the proposed insolvency law.<sup>206</sup> This means that the BRR, made under the Bankruptcy Act (proposed for repeal by the Insolvency Bill 2010), which regulates the reciprocal cross-border co-operation in matters of insolvency would under transition provisions continue to be operational notwithstanding the repeal of the principal legislation.

The phrase 'other instrument' used in the draft Bill is seemingly intended to accommodate things like declarations and forms.<sup>207</sup> It is doubtful if such 'rules and other instrument' can be applied as such without inconsistencies and tensions given that the basis, namely the Bankruptcy Act, upon which they were founded would no longer be in existence.<sup>208</sup> It would have, perhaps, been appropriate for the Bill to provide that such regulations and instrument would apply in so far as is practical and in so far as they are not inconsistent with the Insolvency Bill 2010. There is room for arguing that the adoption of the Model Law would have the effect of rendering the reciprocal arrangement reflected under the BRR as an exception to the adopted Model Law.<sup>209</sup> This would mean that the adopted version of the Model Law will apply to the countries that are parties to the arrangement (which include Tanzania and Uganda) only to the extent that does not affect the additional assistance available under the reciprocal co-operation arrangement.

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<sup>206</sup> Insolvency Bill 2010 (Kenya) clause 466(1)

<sup>207</sup> The Bankruptcy legislation in Tanzania, Kenya and Uganda is rich in statutory documents designed for use in facilitating reciprocal co-operation among contracting member states.

<sup>208</sup> Notably, the Insolvency Bill 2010(Kenya) does not seek to re-enact the provisions of Bankruptcy Act (Kenya) ss 115,151-164) on the basis of which the BRR was made. However Insolvency Bill 2010 (Kenya) clause 420(2) seeks to re-enact the provisions that apply relevant rules of personal bankruptcy to corporate insolvency.

<sup>209</sup> Text to n 138 above

## 6.6 State Owned Enterprises and the Treatment of Cross-Border Insolvency Aspects with Reference to Tanzania

Notably, the law that has been discussed so far, especially so in Tanzania, has hardly been applicable to SOEs. Indeed, until recently, most SSA countries had maintained large and dominant public sector characterised by SOEs.<sup>210</sup> Indeed, Tanzania was among such countries and could accordingly be discussed as a representative case to take stock of what was, and is, the implication in SSA of the maintenance of SOEs for cross-border insolvency regulation.

While the Tanzanian government had established many SOEs, which used to obtain loans from *inter alia* international organisations through bilateral arrangement with the government as the main party and guarantor, the legislation lacked a tailor made provision stipulating how insolvency proceedings involving a SOE could be commenced and conducted.<sup>211</sup> Conversely, the executive, through the president and in certain cases responsible Ministers, was and still is empowered to establish, dissolve or reorganise a SOE as it deemed fit and proper.<sup>212</sup> This meant that it was and is still not clear in terms of procedure as to how a foreign creditor could proceed against a SOE that failed to settle its outstanding debts.

Likewise, there were glaringly no provisions in other pieces of legislation under which other SOEs were established which were explicitly intended to provide procedures for dealing with insolvent state owned enterprises and their attendant cross-border insolvency aspects.<sup>213</sup> It is indeed not surprising that, even the corporate insolvency provisions under the companies legislation that could appropriately be applied in the event of the insolvency of a SOE incorporated under such legislation were not brought into force to deal with affairs of the insolvent public enterprises. Ideally, this experience seems to reflect what has hitherto been described by Harmer as:

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<sup>210</sup> See generally, J Nellis (n 7); and B Mihyo (n 23)

<sup>211</sup> BS Masoud, 'Corporate Insolvency Law and Public Enterprises: A Historical Perspective' [2005] *Tanzania Lawyer* 23-36

<sup>212</sup> See for instance Public Corporations Act 1992 (Tanzania) s 4, 50 and 57A

<sup>213</sup> BS Masoud (n 211)

.....a strongly held view that a state enterprise, no matter how constructed or administered, is but an agency or branch of the state. Therefore, under this view, the state would be obligated to ensure that all the debts and liabilities of a state enterprise are met in full. Hence, a state enterprise could not, and should not, become bankrupt. Its existence might be terminated by the state, for whatever reason, but the state must meet its outstanding obligations. Accordingly, the possibility of bankruptcy for a state enterprise should not even be remotely suggested.<sup>214</sup>

The legal framework which was put in place to deal with insolvent SOEs during the privatisation of such enterprises clearly reflected the theory that such enterprises were regarded as agencies or branches of the state and therefore entitled to enjoy the guarantee of the state as far as loans repayment was concerned.<sup>215</sup> The clearly set procedures for privatisation of financially distressed state owned enterprises which included liquidation and restructuring did not clearly envisage cross-border issues.<sup>216</sup> The procedures allowed the body (i.e the Presidential Parastatal Sector Reform Commission (“PSRC”)) entrusted with such functions and designated as an official receiver for such enterprises pursuant to the Bankruptcy Act,<sup>217</sup> to unilaterally write off, reschedule the payment of and suspend the accumulation of interest on any debt of a private creditor, another state owned enterprise or the government.<sup>218</sup>

Similarly, co-operation in resolving cross-border insolvency issues was and still is not envisaged under the Tanzanian SOE legal regime.<sup>219</sup> While the executive has all along been vested with powers to make orders and rules for regulation of the affairs of such enterprise, no such orders or rules have ever been made for regulation of either domestic or cross-border insolvency related issues involving SOEs.<sup>220</sup> However, statutory guidelines regarding transfers of employees and

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<sup>214</sup> RW Harmer (n 10) 2574-2575

<sup>215</sup> See Public Corporation Act 1992 (Tanzania) s 51(6) as amended severally and in particular by Public Corporation (Amendment) Act 1993 (Tanzania)

<sup>216</sup> Public Corporations (Amendment) Act 1993 (Tanzania) s 43

<sup>217</sup> The effect of making the PSRC an official receiver in accordance with the Bankruptcy Act (Tanzania) was to make the provisions of the Bankruptcy Act pertaining to official receivership part of the Laws regulating privatisation in Tanzania.

<sup>218</sup> Public Corporation (Amendment) Act 1993 (Tanzania) s 43

<sup>219</sup> Public Corporation Act 1992(Tanzania) ss 41and 43

<sup>220</sup> BS Masoud (n 211); AT Nguluma (n 17) 177

liabilities to another enterprise in the event of one enterprise ceasing to exist or a reorganisation have to some extent been provided.<sup>221</sup>

There were no direct mentions of foreign creditors and the manner in which their interests were to be addressed and treated. It is safe to say that any cross-border issues concerning the insolvency of such state owned enterprises would necessarily ensure direct involvement of the state in so far as settlement of claims is concerned. In light of the fact that the commission responsible for the restructuring and privatisation of the enterprises was the official receiver of the financially distressed enterprises pursuant to the bankruptcy legislation, it might be argued that the provisions of such legislation and the powers, duties and responsibility of such an official receiver would necessarily include the roles that the receiver is entitled to play in relation to cross-border bankruptcy issues.

This obscure state of affairs with regard to the handling of cross-border insolvency problems involving SOEs still persists at least in theory, though in practical terms the problem has hardly been felt. This is true in view of the fact that the existing legislation still lacks clear provisions on the treatment of cross-border insolvency issues as they relate to the existing SOEs in the event of becoming insolvent. It is also not clear as to whether the relevant provisions under the CA 2002 could equally apply. Perhaps it is now high time that this vacuum was addressed given that privatisation of most of the SOEs has not only enlarged the private sector but also given way to a situation where a SOE can be owned by the government as the majority or minority shareholder and the private foreign investor as a joint shareholder.<sup>222</sup> This corresponds with what has been happening in many jurisdictions in the developing world, as is the case with China, which had an equally huge sector of SOEs.<sup>223</sup>

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<sup>221</sup> Public Corporations Act 1992 (Tanzania) ss 50 and 59

<sup>222</sup> Public Corporation Act 1992(Tanzania) ss 3 and 5. In relation to the position in Kenya, see n 12 above, where it is noted that Privatisation Act (Kenya) s 29 provides that both Kenyan and non-Kenyan are eligible to participate in privatisation of SOEs.

<sup>223</sup> RW Harmer (n 10); and R Parry and H Zhang (n 24) 113

## **6.7 Cross-Border Insolvency Treatment in SSA Regional Groupings with Special Reference to Tanzania and Kenya**

A predictable and certain arrangement for dealing with instances of cross-border insolvency has traditionally been used as one of the means of enhancing or addressing the consequences that would arise from economic co-operation among different countries. The regional groupings arrangements in SSA lack an institutionalised framework for resolution of cross-border insolvency within the context of the respective regional groupings. The OHADA, as noted in the previous chapter, is perhaps the exception.<sup>224</sup> Notably, the presence of many regional groupings for which SSA countries are members and which overlap one another presents a potential challenge in addressing cross-border insolvency and crafting a workable and appropriate framework within the context of the regional arrangements.

### **6.7.1 The East African Community as an Example of the General State of Cross-Border Insolvency Treatment in SSA Regional Groupings**

Apart from the arrangement for reciprocal co-operation in cross-border bankruptcy between Tanzania, Kenya and Uganda (“BRR”), which traces its existence from the colonial period, the revived East Africa community<sup>225</sup> lacks a common arrangement explicitly set for securing co-operation and co-ordination in cross-border insolvency matters, just as it unambiguously provides for co-operation in statistics, intellectual property rights, industrial development and agriculture and food security.<sup>226</sup> Whereas the BRR arrangements do not cover

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<sup>224</sup> Text to n 173 in chapter 4

<sup>225</sup> Treaty for Establishment of the East African Community (“EAC”) 1999. EAC consists of Tanzania, Kenya, Uganda, Rwanda and Burundi. The history of co-operation in East Africa dates back to the early 20th century, including the customs union between Kenya and Uganda in 1917, which the then Tanganyika (now Tanzania Mainland) joined in 1927, the East African High Commission (1948–1961), the East African Common Services Organisation (1961–1967) and the East African Community (1967–1977).

<sup>226</sup> See Protocol on Establishment of the East African Community Common Market arts 41-45. Notably, art 29 of the Protocol provides that: “1. The Partner States undertake to protect cross border investments and returns of investors of other Partner States within their territories.  
2. For the purposes of paragraph 1, the Partner States shall ensure:  
(a) protection and security of cross border investments of investors of other Partner States;  
(b) non- discrimination of the investors of the other Partner States, by according, to these investors treatment no less favourable than that accorded in like circumstances to the nationals of that Partner State or to third parties;  
(c) that in case of expropriation, any measures taken are for a public purpose, non-discriminatory, and in accordance with due process of law, accompanied by prompt payment of reasonable and effective compensation.

Rwanda and Burundi, the on-going insolvency law reform trend is potentially phasing such a reciprocal co-operation arrangement out.

Member countries have within the context of the East Africa community harmonisation of commercial law strategy been urged to reform their respective insolvency law systems which have recently been identified as among ‘such commercial laws that require harmonisation for purposes of supporting the [East Africa] common market.’<sup>227</sup> Other laws include, company laws, partnerships laws, and business registration laws. Indeed, harmonised insolvency systems have long been seen as one way towards attaining universalism in cross-border insolvency law.<sup>228</sup> Apart from the obvious emphasis on the harmonisation of commercial law, there are no common best practices and priorities set forth or agreed to inform and guide the harmonisation process. This situation is likely to affect the manner in which the reform to achieve harmonisation is undertaken. It is perhaps not surprising that the undertaking has been effected without consistency in form, emphasis, thrust and substance.<sup>229</sup> While Kenya was

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3. The Partner States shall within two years after coming into force of this Protocol take measures to secure the protection of cross border investments within the Community.”

<sup>227</sup> The commencement of the common market in East Africa Community in which Tanzania and Kenya are member states means that both natural and legal persons have the right to establish themselves in any part of the community. This effectively means that since not all persons will be or are always successful in their business undertakings, the question of such persons becoming insolvents and subjected to insolvency proceedings cannot be underestimated. This is also true for foreign investments that are encouraged and attracted to take advantage of investment opportunities within the East Africa community context. EAC, ‘Council Chairperson Assures Community on Ratification of Common Market Protocol’ Press Release April 2010 < [http://www.eac.int/news/index.php?option=com\\_content&view=article&id=226:ratification-of-common-market-protocol&catid=48:eac-latest&Itemid=69](http://www.eac.int/news/index.php?option=com_content&view=article&id=226:ratification-of-common-market-protocol&catid=48:eac-latest&Itemid=69) > accessed 1 September 2010

<sup>228</sup> JL Westbrook (n 48) 468, contending that one of ‘[t]he...prerequisite to obtaining the benefits of universalism is general similarity of laws. Similar laws about distributions, avoidance, and the like are not in principle necessary to the acceptance of universalism, but in practice similarity is very important.’

<sup>229</sup> The Consultancy project on Harmonisation of the Partner States’ Commercial Laws undertaken by Eversheds and reported to have commenced in October 2009 is seemingly centred at addressing such concerns and facilitating the harmonisation process. See East Africa Community Secretariat, ‘Approximation of National Laws in the EAC Context: Harmonisation of Commercial Laws in Progress in the Region’ Press Prelease (Nairobi 18 February 2010) < <http://www.eac.int/about-eac/eacnews/377-meeting-on-approximation-of-national-laws-nairobi.html> > accessed 19 September 2011; and Eversheds, ‘Eversheds Wins East Africa Community Institutional Reform Appointment’ < [https://www.eversheds.com/uk/home/articles/index1.page?ArticleID=templatedata%5CEversheds%5Carticles%5Cdata%5Cen%5CFrench+newsletter%5Cen\\_Eversheds\\_wins\\_EAC\\_BM\\_031209](https://www.eversheds.com/uk/home/articles/index1.page?ArticleID=templatedata%5CEversheds%5Carticles%5Cdata%5Cen%5CFrench+newsletter%5Cen_Eversheds_wins_EAC_BM_031209) > accessed 01 September 2010. According to the Co-Head of the Eversheds’ Africa group, their

working towards reform of its law relating to companies, insolvency, partnerships, marriage, matrimonial property, domestic violence, elections and reviewing laws on succession, evidence and land disputes; Tanzania was reported to be pursuing projects seeking to review a number of laws relating to civil procedure, agriculture, pastoralism, and a law establishing the Law Reform Commission.<sup>230</sup>

In spite of the establishment of the East Africa Court of Justice (“EACJ”), the court does not have jurisdiction to entertain matters of insolvency cutting across member states and Tanzania and Kenya in particular. This is mainly attributable to the fact that the EACJ is vested with jurisdiction to interpret the provisions of the treaty and ensure that the treaty provisions are observed.<sup>231</sup> The East Africa community has not yet enacted a modern law to govern matters of insolvency and cross-border insolvency in particular which would otherwise be eligible for application and interpretation in the EACJ in appropriate cases involving cross-border issues among member states and beyond. This is notwithstanding the fact that it has long been acknowledged that ‘...this option is more cost effective than having to wait for [member states] to enact similar laws and then ... begin the process of harmonization.’<sup>232</sup> It follows that even though the reciprocal provisions under the respective countries’ bankruptcy laws could apply in appropriate cases, no appeal in such cases can presently lie in the EACJ. This marks a significant difference from the former East Africa Court of Appeal (“EACA”) which had, to a very large extent, jurisdiction to hear appeals from national courts of the member states in both criminal and civil matters.<sup>233</sup>

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appointment is partly due to their experience of harmonising laws with respect to the "Organization for the Harmonisation of Business Law in Africa" (OHADA)

<sup>230</sup> East Africa Community Secretariat (n 229)

<sup>231</sup> Treaty for the Establishment of the East Africa Community 1999 (as amended) art 27

<sup>232</sup> AO Kinana, ‘The Role of the East African Legislative Assembly in Enhancing Popular Participation and Harmonisation of Laws in East Africa.’ (Annual Conference of the East Africa Law Society, Dar es salaam, 25 November 2005) [3]. The author was the first Speaker of the East African Legislative Assembly. He notes that the current practice leaves the responsibility of implementation of the harmonised law with each partner state. Notably, a parallel can well be drawn on this point with the EC Regulation on Insolvency.

<sup>233</sup> See n 25 above, listing a few cross-border bankruptcy cases in East Africa that involved Tanzania and Kenya and which reached the former East Africa Court of Appeal.

Arguably, the need for extending the jurisdiction of the EACJ to cater also for cross-border insolvency issues may indeed be accommodated by article 27(2) of the EAC Treaty which provides room for extension of the jurisdiction of the EACJ as the council of the EAC may determine and through the enactment of community law to regulate co-operation in cross-border insolvency matters.<sup>234</sup> Notably, the conclusion of a multilateral memorandum of understanding (“MoU”) on co-operation in regulation and supervision of the insurance industry between insurance regulators of the EAC partner states on 11 August 2010 could be looked at as suggesting a step in the right direction towards the conclusion of a similar arrangement between judicial authorities of the partner member states.<sup>235</sup>

### **6.7.2 SADC and the Inspiration for Adopting a Regional Cross-Border Insolvency Regime**

Unlike Kenya, Tanzania is one of member states of SADC,<sup>236</sup> a regional grouping for Southern Africa whose thrust is on the promotion of sustainable and equitable economic growth and socio-economic development through deeper co-operation and integration. Its key objectives are not different from other similar groupings. While SADC is yet to have a regional arrangement for dealing with cross-border insolvencies, consideration has long been given in this regard. Within academic circles, proposals have been made to use the UNCITRAL Model Law on Cross-Border Insolvency as a stepping stone for negotiation of transnational insolvency regime for member states.<sup>237</sup> On the other hand the EC

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<sup>234</sup> SB Bossa, ‘Towards a Protocol Extending the Jurisdiction of the East Africa Court of Justice’ (2006) 4 *EAJHRD* 31-38; See also Treaty for the Establishment of the East Africa Community 1999 arts 14(1)-(3)(b) and (d) and art 8(4). It is noteworthy that the Treaty under Article 8(4) grants sovereignty to community institutions and organs and elevates community law above national laws.

<sup>235</sup> The purpose of the MoU is to protect policy holders and potential policy holders of insurance companies and to promote the integrity, stability and efficiency of the insurance industry by providing a framework for cooperation, increased mutual understanding, the exchange of information and assistance to the extent permitted by laws, regulations and requirements. See EAC, ‘EAC Insurance Regulators Sign MoU’ (2010) 37 *e-EAC Newsletter* 3 < [http://www.eac.int/news/index.php?option=com\\_docman&Itemid=70](http://www.eac.int/news/index.php?option=com_docman&Itemid=70) > accessed 02 September 2010

<sup>236</sup> SADC is an acronym for Southern Africa Development Community.

<sup>237</sup> See generally n 16 above; and JL Westbrook and others (n 88) 247

Regulation on Cross-Border Insolvency has also been given academic consideration.<sup>238</sup>

Nevertheless, serious attempts to formulate and discuss proposals for such arrangements have not materialised within the SADC forums yet. This is contrasted by the increasing trend towards cross-border insolvency reform in a number of Southern African countries. An outlier is South Africa, which is unrepresentatively advanced in this regard. Notably, despite the persistent increase in cross-border trade and investment within the Southern Africa region, cross-border insolvency cases which would have inspired the need to speed up enactment of a regional cross-border insolvency framework are still not rampant. Accordingly, the perception towards the urgency and need for such a framework seems to differ markedly across the region depending on a particular country's level of development and integration.

### **6.7.3 OHADA as an Exceptional Case in Cross-Border Insolvency Regulation in SSA**

While OHADA remains exceptional and the leading regional arrangement in SSA for making and implementing the uniform international insolvency regime in recent times, Tanzania and Kenya are neither among its 16 member states nor have they been reported, unlike Ghana and Nigeria, as considering joining the organisation.<sup>239</sup> Its members consist of mainly Francophone SSA states.<sup>240</sup> The procedures governing cross-border insolvency, as reflected in the Uniform Act Organising Collective Proceedings, is based on the ECIR. The regime was made in response to the upsurge of the unavoidable effects of globalisation and the

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<sup>238</sup> Ibid

<sup>239</sup> The OHADA Treaty was signed and became operational in 1995. See P Agboyibor, 'OHADA: Business Law in Africa' [1999] *Int'l Bus LJ* 228

<sup>240</sup> See text to n 16 and 17 in chapter 1 for details on the member countries and their colonial heritage. See also, CM Dickerson, 'Harmonising Business Law in Africa: OHADA Calls the Tune' (2005-2006) 44 *Colum J Transnat'l L* 17, 19 describing the arrangement as reflecting an agreement by member states 'to give up some national sovereignty in order to establish a single, cross-border regime of uniform business laws, immediately applicable as domestic laws of each country.' Elsewhere CM Dickerson, 'A Comparative Analysis of OHADA's Uniform Business Laws in West Africa: A French Civilian Structure's Impact on Economic Development' < <http://ssrn.com/abstract=630623> accessed 12 July 2010, described the initiative as 'a novel approach to self-determination though [its] articulated purpose is to attract foreign investment which in its turn is favourable to economic development.'

concomitant quest for investment opportunities by ensuring security among investors and the wellbeing of trade undertakings as a whole and through the existence of a harmonised system of business laws in the region.<sup>241</sup>

The regime establishes an international framework for collective insolvency proceedings.<sup>242</sup> It is founded on one of the fundamental principles of the treaty establishing the OHADA which makes Uniform Acts directly applicable and binding in all member states notwithstanding any conflicting provision of national law.<sup>243</sup> The framework provides for automatic recognition of proceedings commenced in a contracting state. Accordingly, where a decision commencing or closing collective proceedings in a contracting state has become irrevocable it is rendered to be *res judicata* in other contracting states.<sup>244</sup> This is effectively intended to make recognition mandatory among the contracting states.

However, despite the automatic recognition of the collective proceedings initiated in one contracting state, competent courts in other contracting states are not constrained from commencing other collective proceedings.<sup>245</sup> Whereas the proceedings commenced in the principal place of business of the debtor are according to this framework the principal proceedings, any other proceeding in any other contracting state becomes a secondary collective proceeding. The framework provides for appointment of officeholders in relation to the collective proceedings and accords them authority to exercise their powers under the Uniform Act in the other contracting states within the OHADA region as long as

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<sup>241</sup> Ibid

<sup>242</sup> This framework is found in OHADA Uniform Act Organising Collective Proceedings Part VI, art 247-256. For a discussion on this framework see B Martor and others, *Business Law in Africa: OHADA and the Harmonisation Process* (Kogan, London 2002) 159

<sup>243</sup> OHADA Treaty art 10. The article incorporates a policy of supranationality. It has the effect of abrogating national laws, contrary or identical to those of the Uniform Acts, and precludes the Contracting States from legislating contrary to the Uniform Acts. See B Martor and others (n 242)20; and RF Oppong 'Re-Imagining International Law: An Examination of Recent Trends in the Reception of International Law into National Legal Systems in Africa' (2007) 30 *Fordham Int'l LJ* 296, 307 and 308 quoting in support M Kone, *Le Nouveau Droit Commercial Des Pays De La Zone Ohada: Comparaisons Avec Le Droit Francais* 5 (2003)

<sup>244</sup> OHADA Uniform Act Organising Collective proceedings art 247

<sup>245</sup> Ibid art 251

there are no proceedings that have been opened in any other member state.<sup>246</sup> The decision appointing the receiver may also where necessary be published to other member states where such publication is necessary for security and the interests of creditors.<sup>247</sup>

The regime provides for *pari passu* treatment of all creditors.<sup>248</sup> Accordingly, a creditor who obtains payment of their claims from the property of the debtor located in another contracting state is required to return such payment to the office holder without necessarily affecting his recovery entitlements.<sup>249</sup> What is crucially relevant in relation to co-operation and co-ordination in cross-border insolvency is that the regime makes it a requirement for the officeholders of the principal collective proceedings and secondary collective proceedings to co-operate and co-ordinate with one another, and communicate, without delay, information relevant to the proceedings.<sup>250</sup> In this connection, the framework mandates office holders to produce all claims of creditors that have been lodged in their respective proceedings. Consequent to settlement of the claims, the office holders are required to return any surplus asset to other proceedings in other states. In the event of the existence of many proceedings, the return shall be distributed equally among them.<sup>251</sup>

Notably, despite the niceties of the OHADA regime, it is only applicable where the cross-border insolvency matter involves contracting states.<sup>252</sup>

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<sup>246</sup> Ibid art 249

<sup>247</sup> Ibid art 248

<sup>248</sup> Ibid arts 253 and 255

<sup>249</sup> Ibid art 250

<sup>250</sup> Ibid art 252

<sup>251</sup> Ibid art 256; and JA Owusu-Ansah, 'The OHADA Treaty in the Context of International Insolvency Law Developments' (LL.M Paper, University of Frankfurt 2004) < <http://www.iiiglobal.org/component/jdownloads/finish/398/1555.html> > accessed 19 September /2011; B Wessels, *International Insolvency Law* (Kluwer, Netherland 2006) 47. The only case discussed in existing literature where the mechanism was applied thus far is the liquidation of *Air Afrique*, established in 1961 and owned by eleven francophone African countries, the French Development Agency and some private stakeholders.

<sup>252</sup> This is the same as the Bankruptcy cooperative arrangements applicable (or was applicable) in Tanzania, Kenya and Uganda. Indeed, this regime is similar to the OHADA framework in that both provide for automatic recognition and enforcement; publication in other contracting states; possibility of concurrent proceedings; communication and co-ordination; and equality in treatment of creditors; and uniform law. However, the scope of concurrent proceedings is very

Notwithstanding the uniform legislation in the regulation of insolvency proceedings, there is glaringly a lack of provision stipulating guidelines on court-to-court communication and co-ordination on insolvency proceedings with a non-contracting state where also an insolvent debtor may have had an establishment or assets.<sup>253</sup> It is thus uncertain how other jurisdictions can cooperate in proceedings undertaken in the context of the OHADA Uniform Act Organising Collective Proceedings. It has in this regard been argued that this anomaly is one that exactly points to the significance of the UNCITRAL Model Law which, if implemented, could come into play when a debtor happens to have establishments in non-contracting states and provision of recognition, co-operation and assistance between courts is desirable.<sup>254</sup> It has similarly been argued that it would also be possible to apply the Uniform Act to the case subject to any contrary mandatory provision in the laws of the third party state.<sup>255</sup>

The substantive law that characterises this framework is based on the French civil law system allegedly adopted with modification to suit the needs of the developing countries.<sup>256</sup> It has long been contended by law and finance theorists that countries that inherit or adopt civil law systems, and in particular the French civil law system, tend to be less economically successful than the countries that inherited or adopted the common law system. However, the modern analysis suggests that the French civil system only correlates negatively with development, but does not impede development.<sup>257</sup>

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restricted compared to the position in the cross-border bankruptcy co-operation arrangement under the bankruptcy legislation and BRR in Tanzania and Kenya. On this point See text to n 192 above

<sup>253</sup> JL Westbrook and others (n 88) 263

<sup>254</sup> JL Westbrook and others (n 88) 263-264; and JA Owusu-Ansah (n 251) 7

<sup>255</sup> DN Ngaundje, 'The OHADA Bankruptcy Law: An Important Step for Regulatory Reforms in Africa' (INSOL International Academics' Conference, Radisson Blu Royal Hotel Dublin 11-13 June 2010)

<sup>256</sup> B Wessels, *International Insolvency Law* (Kluwer, Netherlands 2006) 45, indicating that the implication of the OHADA Uniform Act organising Collective proceedings in most of the OHADA member states was the replacement of an ancient French colonial law, the Code de Commerce (Commercial Code) of 1808

<sup>257</sup> CM Dickerson, 'Harmonising Business Law in Africa' (n 240) 31; R La Porta and others, 'Law and Finance' (1998) 106 *J Pol Econ* 1113, 1118; R La Porta and others, 'Legal Determinants of External Finance' (1997) 52 *J Fin* 1131; and PG Mahogany, 'The Common Law and Economic Growth: Hayek Might Be Right' (2001) 30 *J Legal Stud* 503; N Thompson,

Although the debate on suitability of either the common law over the civil system or civil law over the common law in attracting development is not relevant in the present context, it is instructive that the theories that characterise the debate have the potential of leading the Anglophone SSA countries, especially Nigeria and Ghana, which have long been described as contemplating membership not to accomplish such aspiration.<sup>258</sup> It has been argued that ‘the supremacy and direct application clause may be one of the reasons why there is currently no common law member of OHADA.’<sup>259</sup> Additionally, the fact that OHADA’s official language is French could also be seen as posing critical challenge to the integration of Anglophone African countries.

To be sure, while French is the official language, OHADA still has three member states whose official languages are not entirely French.<sup>260</sup> This could thus be a potential for making OHADA multilingual (as is the case with the EU). In addition, since a majority of regional groupings in SSA have, as their core agenda, harmonisation of commercial laws, integration with OHADA might not be as difficult as one might have thought. Since the supremacy clause is seemingly becoming not uncommon in regional integrations, there are also chances for it not to be a crucial factor for consideration in deciding to join the OHADA. There could be more advantages than otherwise for the countries under study to integrate with OHADA. Firstly, this regime is now well known and highly commended among multilateral institutions and insolvency scholars as

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‘Common Denominator’ (2005) *Legal Aff* 46; and FA Hayek, *The Constitution of Liberty* (CUP, Chicago, 1960) 54-70

<sup>258</sup> RF Oppong (n 243) 309; CM Dickerson, ‘Harmonising Business Law in Africa’ (n 240) 67; JA Owusu-Ansah (n 251) 7; B Martor and others (n 242) xxi, xxii, and 7. However, B Martor and others argue that: ‘[although [t]he Uniform Acts...[are] based on civil law and ha[ve], to a certain extent, borrowed from modern French business law.....they are far from being a simple transposition of French law.....numerous aspects of the legislation [are] quite familiar to common law jurists and in certain areas it should also be possible for contracting parties, should they so wish, to apply common law concepts within the framework laid down by the Uniform Acts.’

<sup>259</sup> RF Oppong (n 243)

<sup>260</sup> CM Dickerson (n 240) 19. Such countries with their respective languages in brackets are Equatorial Guinea (Spanish and French); Guinea-Bissau (Portuguese) and Cameroon (French and English).

setting an important benchmark for SSA countries and other developing countries.<sup>261</sup> Secondly, the integration of the other members such as Anglo-phone countries might present opportunities for improvement of the regime given the experiences and lessons that have been learnt over the years within OHADA and from other arrangements whose membership is not strictly confined to states of a particular legal family.<sup>262</sup>

## **6.8 Conclusion**

There is a growing awareness of the importance of effective insolvency systems incorporating cross-border insolvency aspects in SSA countries. This is partly reflected in the emerging reform trends that address cross-border insolvency issues. Hitherto insolvency related laws recorded not only low awareness among the various stakeholders and general public but also remained largely in disuse. This emerging trend seems to have been significantly influenced by the desire and thrust of competing in attracting trade and capital inflows into SSA countries as host countries of foreign direct investments in the international economic co-operation as opposed to increasing incidences of insolvency with international character.

The survey of the state of the law in SSA countries, as represented by Tanzania and Kenya, revealed that the laws and their respective developmental trends in these countries still reflect the prevailing colonial legacies and are greatly influenced by the legislative developments in the former colonial powers, and partly by the international insolvency benchmarks. What is clear from the insolvency reform trends is that there is a marked contrast among the countries under study as to the extent to which reform has been effected, and the manner in which they seek to approach cross-border insolvency. Such a contrast is notwithstanding that these countries are subjected to the same reform drivers, share the same legal history and socio-economic circumstances. Despite the general thrust on facilitation of flow of investment and trade, such a drive is yet to be clearly and unambiguously reflected within the laws. It remains to be seen

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<sup>261</sup> JL Westbrook and others (n 253) 247, 262-264, observing inter alia that OHADA ‘shares the main features of modern trans-border insolvency legislation...’

<sup>262</sup> JL Westbrook and others (n 253) 262-264

whether the current reform initiative and the implementation of the resulting law will eliminate the uncertainties and unpredictability that are in place as to the manner in which the relevant authorities, courts in particular, in these countries may approach and deal with various issues that relate to cross-border insolvency.

The emerging reform initiative and the reformed law that is in place or being proposed seem to suggest that the common law approach to cross-border insolvency is still relevant and indeed applicable to supplement the international character of the law by filling up what might be seen to be lacking in the enacted law. One critical implication arising from the consideration of international commitments, such as the bilateral investment treaty commitments, means that such commitments may need to be read into the laws and taken into account during the reform and implementation of the law. Clearly, such implications may potentially mandate the application of the law to be done in a manner that will make such commitments prevail. For examples, the commitments as to extending national treatments, most favoured national treatments, fair and equitable treatment, right to repatriation and transfer of funds and capital, and protection and promotion of foreign investment may limit, reduce or prescribe the scope and manner in which the law must be invoked. It must be reiterated that the commitments reflect the obligation on the part of the host countries to provide a favourable legal environment within which foreign investors operate. It seems that, save for the contemplated reform in Kenya, the current law in both Tanzania and Kenya does not guarantee such an outcome that is in line with the commitments.

While in SSA it is only OHADA that has widely been acknowledged for institutionalising a regional cross-border insolvency regime based on uniform law, there has long been in existence a harmonised legal regime for Tanzania, Kenya (including Uganda) for reciprocal co-operation in cross-border insolvency. Despite being forgotten in statute books and based on the personal bankruptcy legislation, there is scope for arguing that such a regime is still in force, and that it is also meant to apply to cross-border insolvencies. While the

arrangement still seems to have the potentials for making an effective cross-border insolvency regime within the East African regional context and providing an important historical context for crafting a modern regional framework for EAC, there are also many benefits that could be achieved by integrating with the OHADA regime. There is a possibility of overcoming the factors that may present difficulties for Anglophone countries integrating with the OHADA given the inspiration that is in place for regional co-operation among SSA countries. Considering the existing legislative frameworks as whole and the direction of the reform initiatives it is clear that there is a strong pull away from territorialist approach.

## CHAPTER SEVEN

### ISSUES AND PERSPECTIVES FOR CONSIDERATION IN DEVELOPING A FRAMEWORK FOR ADDRESSING THE CHALLENGES OF CROSS-BORDER INSOLVENCIES

#### 7.1 Introduction

The challenge that Sub-Saharan African (“SSA”) countries face is developing an appropriate and workable cross-border insolvency law system. This means the development of a system that is sensitive to the local context and takes account of international benchmarks, such as the UNCITRAL Model Law on Cross-Border Insolvency (“the Model Law”). The looming danger in the countries under study is that the forces presented by the challenges discussed in the previous chapters are likely to lead to unsuitable legislative reform which rigidly adheres to international benchmarks and/or the theoretical models at the expense of the local contexts. Despite the international insolvency benchmarks and the theoretical models that countries may have regard to in reforming their laws, it is, as shown in chapter two, settled that local policies tend to have significant influence in informing and shaping the insolvency system of a country and its cross-border insolvency regime.<sup>1</sup> The influence informs and shapes both the ingredients and the overall theoretical framework of the law to be adopted.

However, the challenge is in identifying the local policies, which reflect such aspects as the historical, social, political, cultural, economic, and philosophical contexts of SSA countries, using Tanzania and Kenya as case studies. The other challenge is in identifying the policy implications of specific cross-border insolvency issues and making appropriate choices around those implications in relation to theoretical aspects of cross-border insolvency and the international insolvency benchmarks such as those provided by the Model Law. This chapter

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<sup>1</sup> Text to n 14-15 in chapter 2; and text to n 2 - 4 below. See also, JL Westbrook, CD Booth, CG Paulus and H Rajak, *A Global View of Business Insolvency Systems* (World Bank, Washington 2010) 228 and 229

seeks to do just that, by employing selected national policies of the countries under study which bear the most relevant local policy perspectives.

The primary concern of the chapter is twofold. The first is to demonstrate how the relevant local context of the countries under study can be identified from national policies and used to inform and shape the cross-border insolvency reform process. And the second is to demonstrate how the local policy perspectives may be employed to determine the appropriate theoretical approach and the extent to which the existing international initiative, such as the Model Law, might be relevant. The discussions that ensue proceed from the perspective of the countries that would be expected to defer to foreign proceedings in a cross-border insolvency setting.

The chapter shows that the local policy perspectives emerging from the analysis of the national policies provide an important insight into the local interests that are essential for a deep reflection and understanding of the context within which a cross-border insolvency framework in SSA countries and its requisite ingredients can be made. The potential challenges presented by negotiating the place of the local perspectives in the development of a suitable cross-border insolvency law system are also considered in the discussions. The chapter argues that the policy perspectives that emerged point to modified universalism as the appropriate theoretical approach relevant to the SSA context. The chapter, among other things, maintains that the UNCITRAL Model Law on Cross-Border Insolvency (“the Model Law”) is relevant and suitable for cross-border insolvency law reform in the countries under study as, given its nature and attributes, it can be customised and adapted to reflect the relevant theoretical approach. The special policy emphasis placed in strengthening of existing regional co-operations and traditional and long standing relations with some foreign countries suggest that a rather special arrangement might be needed for such countries. Among the issues raised in the discussion, which might need to be further considered in future research is in relation to adoption of the Model Law as a regional instrument (i.e East Africa Community (“EAC”) law) to help

realise even further the whole idea of regional market enlargement for facilitation of trade and foreign investment.

## **7.2 Context for Consideration in Developing a Cross-Border Insolvency Framework**

The challenges exposed by various forces to which SSA countries are subject, as identified in the preceding chapters, present key elements which must arguably be taken into account in a consideration and crafting of a framework for cross-border insolvencies in these countries. While there is no need to repeat the relevant challenges from the previous chapters, it is important to point out three issues which provide important scope and context for the present chapter.

The first is the view that the challenges expose SSA countries to the risk of undertaking unsuitable legislative reform which may only take account of the current global wave and international standards, while ignoring the local policies which are necessary for making the law relevant and enforceable. The second is the perspective of a country that might always be deferring to foreign proceeding which the countries under study must adopt when giving consideration to policy choices to be made in crafting a suitable framework. The perspective derives from, and account must therefore be taken of, the fact that the countries under study are merely the hosts of the much needed foreign direct investments. The argument here is that the above two issues set an important context for considering the local policies that must be served by a cross-border insolvency law system to be developed. The third and last issue regards a theoretical framework that would enable development of a regime that reflects local values of the countries under study. It is argued in this chapter that modified universalism adopted in the form of the Model Law could be an appropriate approach in enabling the countries under study to take account of the characteristics emerging from their local policy perspectives.

## 7.3 Policy Choices in the Development and Implementation of Cross-Border Insolvency Law

### 7.3.1 Local Policy Sensitive-Aspects of Cross-Border Insolvency

It is a widely held view that insolvency law is particularly sensitive and responsive to societal values.<sup>2</sup> Such sensitivity and responsiveness explain the basis of the existing divergence of insolvency systems of different countries. Cross-border insolvency systems are without exception as they ‘take into account multiplicity of considerations resulting from the economic system of the respective country, the overall purpose of its insolvency law, the whole legislative body relating to the pre-insolvency situation...., its relationship with particular other countries, or the hoped-for treatment of its business abroad.’<sup>3</sup> A cross-border insolvency law must therefore be largely based on and reflect the domestic insolvency law of the respective country and the multiplicity of considerations which relate to the country’s societal values to mention but a few.<sup>4</sup> Thus, consideration of any potential framework for cross-border insolvency legislation must identify and consider aspects of cross-border insolvencies which are sensitive to deeply held local policies that reflect historical, social, political, economic, philosophical and cultural contexts of a society.<sup>5</sup> As pointed out in chapter two, it is however, not that easy to determine the local contexts that are not only truly representative of a nation-wide consensus of a country but also relevant to cross-border insolvencies.<sup>6</sup> The multiplicity of problems that SSA countries experience, the lack of practical application of the law relating to insolvency and involvement in the high profile cross-border insolvency cases that

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<sup>2</sup> TC Halliday, ‘Lawmaking and Institution Building in Asian Insolvency Reforms: Between Global Norms and National Circumstances’ (5<sup>th</sup> Forum for Asian Insolvency Reform, Beijing, 27-28 April 2006) <<http://www.oecd.org/DAF/corporate-affairs/>> accessed 17 July 2009 [3]; and N Martin ‘The Role of History and Culture in Developing Bankruptcy and Insolvency Systems: The Perils of Legal Transplantation’ (2005) 28 *BC Int’l & Comp L Rev* 1, 4; JL Westbrook and others (n 1) 228 and 229. See also, W Menski, *Comparative Law in Global Context: The Legal Systems of Asia and Africa* 2<sup>nd</sup> ed (CUP, England 2006) 26-37 and text to n 14-15 in chapter 2.

<sup>3</sup> JL Westbrook and others (n 1) 228 and 229

<sup>4</sup> JL Westbrook and others (n 1) 228, noting that “the common understanding is that the treatment of foreign creditors is an issue purely for domestic regulation-recommended rule being that of equal treatment”; and JL Westbrook, ‘Priority Conflicts as a Barrier to Cooperation in Multinational Insolvencies’ (2008-2009) 27 *Penn St Int’l L Rev* 870

<sup>5</sup> See for instance, P Legrand, ‘How to Compare Now’ (1996) 16 *Legal Stud* 232,236; and JL Westbrook and others (n 1) 228 and 229

<sup>6</sup> Text to n 161 in chapter 2. See also JL Westbrook, ‘A Comment on Universal Proceduralism’ (2009-2010) 48 *Colum J Transnat’l L* 503, 515-516

occurred recently and in the recent past means that it is even complex to identify the most relevant aspects for SSA circumstances and perhaps also to have them, once identified, reflected in the framework being developed.<sup>7</sup> Extensive application of the law and involvement in high profile cross-border insolvencies would have enabled the countries under study to gain enough experience to better understand and identify relevant policies and policy issues.<sup>8</sup>

One key area which is prone to and informed by the local policies is the overall policy objective of the entire insolvency system including cross-border insolvency.<sup>9</sup> The debate on the policy objective of a given insolvency law system reveals that theorising of an insolvency system should not remove the policy analysis too far from reality of the societal values, as doing that exposes the exercise to the risks of becoming meaningless in helping to inform the system.<sup>10</sup> This is an important starting point as it is this general objective of the insolvency system that determines the inclination of other aspects within the system. Thus, the choices made or which should be made as to a particular aspect of insolvency and its implication depend on the local circumstances, needs, priorities, culture and legal tradition, its relation or contemplated relation with particular other countries and the likes that characterise the relevant country's local policies.<sup>11</sup>

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<sup>7</sup> TC Halliday (n 2); and TC Halliday, and BG Carruthers, *Bankrupt: Global Lawmaking and Systemic Financial Crisis* (Stanford University Press, California 2009). These works are the only ones out of the reviewed works for this study that at least discuss this issue and attempt to propose a model for negotiating reform using international insolvency benchmarks in a manner that is sensitive to the local context. The work reveals the policy hurdles that are likely to be encountered in the process.

<sup>8</sup> See JL Westbrook (n 4) 870, 877, noting, for example, the importance of having enough litigation on matters relating to treatment of tort claims in international insolvency co-operation as a key aspect in finding a solution for the existing concern on treatment of tort claimants under universalism.

<sup>9</sup> E Warren, 'Bankruptcy Policymaking in an Imperfect World' (1993-1994) 92 *Mich L Rev* 336; and S Davydenko and J Franks 'Do Bankruptcy Codes Matter? A Study of Defaults in France, Germany, and the UK' (2008) 63 *Journal of Finance* 565

<sup>10</sup> E Warren (n 9) 377-378; JL Westbrook, 'A Global Solution to Multinational Default' (1999-2000) 98 *Mich L Rev* 2276, 2277, starting that '[insolvency law ] is one of those laws that cannot perform its function unless it is symmetrical to the market in which it operates. Virtually all theorists share this view and it is reflected in the nearly unanimous practice of nations....'

<sup>11</sup> TC Halliday (n 2) 2; JL Westbrook and others (n 1) 228 and 229; and ED Flaschen and TB DeSieno, 'The Development of Insolvency as Part of the Transition from a Centrally Planned to a Market Economy' (1992) 26 *Int'l L* 667, 694

It follows that one step that the governments of SSA countries must take is to consider and articulate clearly broad policy objectives that the cross-border insolvency law system must serve. Since the wider national interests of SSA countries are inclined towards economic growth as it relates to achieving poverty reduction, it can be argued that the overall policy objective should take that into account.<sup>12</sup> This raises an issue as to whether and to what extent such a unique aspect can be so reflected and form the policy basis of the law without affecting other interests which are equally important.<sup>13</sup>

Local policy influences are also more pronounced in some specific aspects of the insolvency law system and especially those related to domestic priority rules, avoidance rules, the choice between liquidation and rehabilitation, and recognition of, and co-operation with foreign insolvency proceedings. These are the very aspects that have notable implications which facilitate or impede co-operation in a cross-border insolvency situation.<sup>14</sup> It is common ground that these aspects differ markedly from one system to another notwithstanding some important commonalities.<sup>15</sup> Westbrook and LoPucki respectively characterise such aspects as ‘the big four’ and the ‘core bankruptcy issues’ of any given insolvency system and its cross-border insolvency regime.<sup>16</sup>

Rules of priority are the most controversial and important in cross-border insolvencies as they ‘impact...larger decisions beyond turnover or allocation of proceeds, including decisions about the scope and nature of asset sales and the choice of liquidation versus reorganization.’<sup>17</sup> In the context of the competing theories for cross-border insolvencies discussed extensively in chapter two, each of such elements would, under universalism, be governed by the law of the

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<sup>12</sup> Text to n 27 in chapter 2; and text to n 71, 143 and 153 in chapter 3. See also, ED Flaschen and TB DeSieno (n 11) 694

<sup>13</sup> See JL Westbrook, ‘Locating the Eye of Financial Storm’ (2006-2007) 32 *Brook J Int'l L* 1019, 1021, stating that ‘[e]very aspect of any national bankruptcy law is part of an integrated set of decisions about the policies to be benefited.’

<sup>14</sup> JL Westbrook and others (n 1) 227 and 228

<sup>15</sup> LM LoPucki, ‘Cooperation in International Bankruptcy: A Post-Universalist Approach’ (1998-1999) 84 *Cornell L Rev* 696,709; and JL Westbrook, ‘Universal Priorities’ (1998) 33 *Tex Int'l LJ* 27, 30

<sup>16</sup> JL Westbrook (n 13) 1021-1022; and LoPucki (n 15) 709

<sup>17</sup> JL Westbrook (n 15) 27

foreign main proceedings whilst under territorialism they are virtually governed by the law of the country in which the assets are located.<sup>18</sup> Under modified universalism, which is arguably the appropriate theoretical framework for cross-border insolvency regulation for the countries under study, the objective is to govern the elements by the law of the foreign main proceeding. However, such is not always the case, given the flexibility that the modified universalism accord to countries other than the foreign main jurisdiction to evaluate the fairness of the foreign proceeding when determining the extent and manner in which they have to cooperate.

Despite the wide acceptance of universalism at least in literature, one policy argument against its full implementation is in its potential for marginalising the national policies that an insolvency system is supposed to serve.<sup>19</sup> Indeed, this is evident in the conflict of priority systems which represents a serious obstacle to implementation of universalism theory.<sup>20</sup> Difference in priority systems in a cross-border insolvency co-operation setting reflects and explains two things. The first is the fear on the part of creditors of having their claims subjected to a different and unfavourable priority system. And the second is the resistance of local proceedings to cooperate with a foreign proceeding.<sup>21</sup> The difference in priority systems explains further why modified universalism has been preferred in practice to universalism despite the latter's wide academic approval. Such practical preference of modified universalism lies in its ability to accommodate and respect some legitimate local interests reflected in the local policies (served by the domestic systems) in a cross-border insolvency setting.<sup>22</sup>

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<sup>18</sup> Text to Part 2.5.2 in chapter 2

<sup>19</sup> JL Westbrook (n 13) 1021-1022; JL Westbrook (n 10) 2298, arguing that the experience of the US points to the fact that 'most of the law applied to an international insolvency case will to a large extent continue to be national law.'

<sup>20</sup> JL Westbrook (n 4) 870

<sup>21</sup> JL Westbrook, 'Choice of Avoidance Law in Global Insolvencies' (1999) 17 *Brook J Int'l L* 499; JL Westbrook (n 15) 34; and EJ Janger, 'Virtual Territoriality' (2009-2010) 48 *Colum J Transnat'l L* 401, 415, Janger illustrates this point by making reference to *In re Treco* 240 F 3d 148 (2d Cir. 2000) arguing that 'US Court declined to send assets to the Bahamas because a secured creditor's claims were subordinate to the...costs of administration of the estate.'

<sup>22</sup> JL Westbrook (n 6) 515-516, attributing the legitimate local interests to '...interests that are truly local so that a person committed to a global approach to multinational insolvency would nonetheless agree that this or that sort of claim or claimant would best be governed by local insolvency law.'

Coming back to the aspects that are sensitive to insolvency law system and its cross-border insolvency regime, it is doubtful that such aspects as are found in insolvency systems of the countries under study match the local policies of such countries. This doubt relates to the fact that insolvency systems existing in these countries were mainly imposed from the systems existing in former colonial powers and have ever since received very low usage.<sup>23</sup> The lack of practice has accordingly meant that their usefulness has neither been tested nor have there been opportunities of benefiting from practical policy issues which would have served to establish whether they really do reflect the local policies.<sup>24</sup> The existing rules of priority in the countries under study do not go beyond favouring only a limited number of the common claims. These are claims on wage and salary earned within a specified limited period prior to insolvency proceedings (normally capped at a certain amount), employment indemnification, government taxes, and secured credit. They fail even to mention the administrative claims as one of the favoured claims.<sup>25</sup>

To this extent, drafting of the law needs to be done with utmost care to reflect those values as well as economic needs, as opposed to having the law emerge randomly or in a vacuum.<sup>26</sup> On the one hand, this enables the insolvency systems to be in harmony with other national laws and government actions that are

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<sup>23</sup> See text to n 16 in chapter 2. Apparently, even the emerging trend for reform draws much from the systems that have been implemented elsewhere. The most dominant practice is to reform the law in tune with what exists in former colonial powers or in sister countries which were also under the same colonial power, or in advanced countries with systems that are believed to have been tested and worked well. See R Parry, 'Introduction' in K Gromek-Broc, and R Parry (eds), *Corporate Rescue in Europe: An overview of Recent Developments from Selected Countries in Europe* (Kluwer, Netherlands 2004) 1-18

<sup>24</sup> Arguably, the practice that has been in place runs counter to one envisaged in the insolvency systems. It reflected general rejection of the insolvency system. It impliedly rendered the system as unsuitable to the countries under study given the then existing circumstances. This was particularly so in Tanzania which explicitly advocated for "*ujamaa*" ideology (some form of socialism adapted to the African or Tanzanian situation). The rejection to some extent reflected the nature of socio-economic conditions that existed which sustained this thinking and belief and rendered the law impractical and redundant.

<sup>25</sup> Companies Act (Chapter 486 of Laws of Kenya) s 311; Companies Act 2002 (Tanzania) s 367; and Insolvency Bill 2010 (Kenya) clause 421 which is far more elaborate than the existing legislation in Kenya and Tanzania seeks also to define administration claims as among the favoured claims.

<sup>26</sup> N Martin (n 2) 5 and 35

founded on the very local policies.<sup>27</sup> On the other hand, it reflects the challenges that SSA countries such as Tanzania and Kenya face in their consideration for reform process as ‘... [t]he more that national lawmakers draw on international norms or foreign experiences, the more susceptible they are to legal transplants that do not work—the so-called “transplant effect.”’<sup>28</sup> Indeed, ‘the trade-offs in this choice determine not only the degree of harmonisation or convergence with insolvency regimes in other countries, including major trading partners and sources of investment, but also the probability of effective implementation in a particular domestic situation.’<sup>29</sup> Certainly, the key to this endeavour in the countries under study is in identifying the relevant and ‘truly local interests’<sup>30</sup> that must be served in and by the insolvency law and proceedings and thus considering a theoretical approach that could best serve such interests.

### **7.3.2 Examples of Local Policy Influence on Priority System and Cross-Border Insolvencies Regulation**

The priority treatment differences prevail notwithstanding the overwhelming inclination towards universalist based approaches and the drive towards global convergence of insolvency laws.<sup>31</sup> Since every country has its special

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<sup>27</sup> JM Weiss, ‘Tax Claims in Transnational Insolvencies: A — “Revenue Rule” Approach’ (2010) 30 *Va Tax Rev* 261

<sup>28</sup> TC Halliday (n 2)

<sup>29</sup> TC Halliday (n 2)

<sup>30</sup> JL Westbrook (n 6) 515-516

<sup>31</sup> JL Westbrook and others (n 1) 13, 187-201; and CF Symes, *Statutory Priorities in Corporate Insolvency Law: An Analysis of Preferred Creditor Status* (Ashgate, England 2008); AR Keay, A Boraine, D Burdette, ‘Preferential Debts in Corporate Insolvency: A Comparative Study’ (2001) 10 *Int’l Insolv Rev* 167-194. There is an increasing trend towards abolishing the tax claim priorities. Accordingly, some countries, such as the UK and Australia, have been reported to have completely abolished it, though such abolition, as it is in the UK, according to Davis ‘does not affect the super-priority which HMRC enjoy in respect of post-liquidation (and post-administration) tax liabilities....’ The seminal authority from which this assertion flows is *Re Toshoku Finance UK plc, Khan v IRC* [2002] UKHL 6; [2002] 1 WLR 671. Associated with tax claim priority is the dominant traditional approach of non-enforcement of foreign tax claims which has long been recognised as a major barrier to cross-border co-operation. See for instance, JM Weiss (n 27) 288; BK Morgan, ‘Should the Sovereign Be Paid First? A Comparative International Analysis of the Priority for Tax Claims in Bankruptcy’ (2000) *Am Bankr LJ* 461, 500; A Davis, ‘“Compromise or Fudge?” Reflections on the Law of the UK as it Affects the Taxation of Insolvent Companies’ (2010) *BTR* 148, 150; and Uganda Law Reform Commission, *A Study Report on Insolvency* (Uganda 2000) Recommendation 20; Westbrook (n 15) 37, & 38; and JL Westbrook (n 6) 877 stating that the problem of non-enforcement of foreign tax claims ‘...requires special attention [as]...many insolvency laws refuse to enforce such claims in favour

characteristics of its local policies, each country has its peculiarity as to the most favoured creditors, whose recoveries get priority over the general body of creditors.<sup>32</sup> While there are commonalities in favoured creditors, the extent to which they are treated and enjoy the protection varies from one jurisdiction to another depending on a given country's local circumstances and policies.<sup>33</sup>

The types of creditors that are generally favoured in most jurisdictions and which reflect the respective local circumstances of such jurisdictions include secured claims, administrative expenses, government tax and other public claims,<sup>34</sup> and employment related claims.<sup>35</sup> Pension benefits' claims that take the form of post-petition super-priority,<sup>36</sup> and insurance policy claims,<sup>37</sup> have also recently been included as among the favoured and protected creditors in some jurisdictions. However, the pension related priority as it is the case in the UK and Canada is in addition to the common employment related claims preference which characterise most insolvency law systems.<sup>38</sup> Interestingly, the US is perhaps the only country so far which grants special priority protection over general creditors to, grain producers; fishermen; ex-spouses and children; and consumers who have made deposits with retail stores and landlords, in certain cases.<sup>39</sup> Perhaps

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of foreign tax authorities. It is probably [now] essential to international cooperation to pay such claims locally before transferring property to a main jurisdiction that has such law.'

<sup>32</sup> JG Canedo, 'Comparative Analysis of Bankruptcy Legal Provisions from Mexico and United States: Which Legal System is More Attractive' (2007-2008) 6 *DePaul Bus & Comm LJ* 19, 24

<sup>33</sup> For some thoughts on the policies underlying local priorities see generally, JL Westbrook (n 15) and CF Symes (n 31)

<sup>34</sup> See n 31 above

<sup>35</sup> J Sarra, 'An Investigation into Employee Wage and Pension Claims in Insolvency Proceedings Across Multiple Jurisdictions: Preliminary Observations' (2007) 16 *Norton J Bankr L & Prac* 835; JL and others (n 31) 187-201; and CF Symes (n 31) 107-156

<sup>36</sup> C Clayton and A Nackan, 'The Vexed Issue of Pension Priorities- a UK and Canadian Perspective' (2011) 1 *INSOL World* 17-20

<sup>37</sup> This is the case in the US (though regulated at state level), Australia and recently the UK. See for instance JL Westbrook (n 4) 872, noting that '[b]y the time of the decision in the House of Lords the English system had been altered to give a similar priority to insurance claimants,' adding that though 'the change did not apply to the *HIH* case, [it] naturally made it easier to conclude that England had no great policy antagonism to the Australian system.'

<sup>38</sup> In the UK, such pension benefit claim priority was introduced through amendment to the UK Pensions Act 2004. The treatment of claims relating to defined benefit pension schemes is still live in the UK at the moment following the recent decisions regarding the priority status of such claims. See for example the recent Court of Appeal decision in *Bloom v The Pensions Regulator* [2011] EWCA Civ 1124. For a brief concise account on this kind of priority, its future and implication for cross-border insolvencies, see C Clayton and A Nackan (n 36) 17-20.

<sup>39</sup> JL Westbrook (n 15) 30, 34; F Tung, 'Fear of Commitment in International Bankruptcy' (2000-2001) 33 *Geo Wash Int'l L Rev* 555, 573 starting that the 'favoured industries are peculiar to the

such categories of creditors can be equated with an example of small creditors, and justification for their protection is based on such status, particularly, their inability to diversify risk or absorb loss.

It must be stressed, however, that there is a significant variation as to the extent and manner in which the priorities are invoked in particular cases in different jurisdictions.<sup>40</sup> The variation ranges from broad to limited priorities.<sup>41</sup> All such forms of priority protection and the way they are exercised underlie specific local policies and interests that are sought to be served by the respective insolvency systems and which may be based on values that are not shared by other jurisdictions.<sup>42</sup> Clearly, the peculiarities and emerging trends within the local priority systems with their concomitant implications for cross-border insolvencies are worth noting and indeed, highly instructive to the countries under study in two respects. The first is due to their expected deferring status to extraterritorial jurisdiction in the cross-border insolvency scenario<sup>43</sup> and thus the expected rules of priority in distribution of value they might be subjected to.<sup>44</sup> And the second is due to the need for having a workable framework that is sensitive to local policies and the global insolvency norms that incorporates international insolvency benchmarks. Modified universalism, which is a common feature of most of the existing international initiatives, seems to be fit for the purpose because of its inherent flexibility that allows evaluation of fairness of foreign proceedings in relation to local policies before deciding the manner in which co-operation should be effected.

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United States...there is no widespread international norm that suggests grain producers and United States fishermen deserve special protections in the face of corporate financial distress.’; 11 USC S 507(a)(2006)

<sup>40</sup> See for instance CF Symes (n 31 ); and JM Weiss (n 27) 288

<sup>41</sup> Mexico is well known for the extent to which its system places employees in a dominant position. It gives priority to wages for the last two working years prior to the commencement of insolvency proceedings. This is in addition to claims for employees’ indemnifications which also have priority over any other category of creditors’ claims. See, JG Canedo (n 32) 24; and J Sarra (n 35) 835

<sup>42</sup> JL Westbrook (n 15) 30 and 34; and F Tung (n 39) 555 and 573

<sup>43</sup> F Tung (n 39) 576-577.

<sup>44</sup> JL Westbrook (n 21); JL Westbrook (n 15) 27 and 34; and EJ Janger (n 21) 415; and JL Westbrook (n 4) 869, 870

#### **7.4 Identifying Relevant Local Policies for Cross-Border Insolvency Law: The Potential Role of National Policies**

In view of the above discussion, this part demonstrates how various national policies for the countries under study are useful in resolving the inadequately addressed problem and challenge of identifying the local policies and interests that arguably ought to underpin and be served by the cross-border insolvency regime in the countries under study. Informed by the competing theories on cross-border insolvency and the insight from the previous chapters, the chapter considers the potential implications of the identified local national policies and interests for the policy-sensitive aspects of a cross-border insolvency system (such as rules of priority treatment) and identifies modified universalism as a theoretical framework that is appropriate in serving and promoting the local policies and interests whilst having regard to the international insolvency benchmarks.

##### **7.4.1 An Overview of the National Policies as They Relate to the Cross-Border Insolvency Reform Process**

Over the recent decades, Tanzania and Kenya, and several other SSA countries, have made and developed a number of national policies on different key sector-specific areas of national interests. This is partly a result of the liberalisation drive and the efforts put in place to institutionalise transparency by, among other things, clearly and broadly defining the governments' positions, aspirations and values, based on, for example, their historical, social, economic, political, cultural, philosophical and psychological context, in various aspects considered to be of national interest.<sup>45</sup> These policies are intended to provide the context within which legal reform needs can be made and chart out the direction of government actions for national development purposes.<sup>46</sup> They identify problems and needs that Tanzania and Kenya may have and prioritise them as they provide

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<sup>45</sup> See for example, Tanzania, *New Foreign Policy* (Dar es salaam, Government Printer 2002) 2, stating that '...the redefined foreign policy shall target areas of critical interest to the country.'; and Kenya, 'Foreign Policy' < [http://www.kenyamission-un.ch/?About Kenya:Kenya Foreign Policy](http://www.kenyamission-un.ch/?About%20Kenya:Kenya%20Foreign%20Policy) > accessed 20/03/2011, stating that 'Kenya's foreign policy has since independence been guided and shaped by its own national interest. This self-interest could be grouped into three main categories [which include] security/political, economic advancement or development, geo-political factor and regional integration.

<sup>46</sup> KB Smith, 'Typologies, Taxonomies, and the Benefits of Policy Classification' (2002) 30 *Policy Studies Journal* 379–395

strategies in resolving and addressing the problems and needs identified. They also seem to envision and present local interests that should be served in the law and which may give rise to legitimate expectations for investors as to the course of governments' action.

These policies, arguably, provide an invaluable basis for determining some of the local interests that should inform, and be sufficiently addressed in, the development of a workable and appropriate cross-border insolvency framework for these countries. They provide a solution to a problem of determining the relevant local contexts that should inform the development of a cross-border insolvency law system. The importance of these policies is not only in the local perspectives that they provide on different aspects that are relevant for a cross-border insolvency law system but also on the fact that they are expected to have evolved from participation and consultation of different stakeholders and people from all walks of life, in these countries.<sup>47</sup> This means that they, expectedly, reflect interests that are truly local and representative of a nation-wide consensus.<sup>48</sup>

An examination of selected national policies for Tanzania and Kenya reveals fundamental perspectives that any reform measure for a workable framework for a cross-border insolvency law should consider and address. Admittedly, some of the policy aspects of such perspectives cannot be addressed in a cross-border insolvency law, but in other laws that are integral to the effective operation of the cross-border insolvency law.<sup>49</sup>

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<sup>47</sup> See for instance, Tanzania, *National Trade Policy* (Ministry of Industry and Trade, Dar es salaam 2003) (ii), in which Dr JA Ngasongwa (then Minister for Industry and Trade) in his foreword to the policy states that 'The policy is the output of an extensive consultative process of involved stakeholders from different walks of life in the public and private sectors, civil society and the academia.'

<sup>48</sup> See text to n 236 below for the concerns raised on the national policies and how to deal with them in cross-border insolvency law reform process.

<sup>49</sup> ED Flaschen and TB Desieno (n 11) 674. An understanding of the policies that should underlie such other laws is regarded as important to the formulation of an effective insolvency law; and UNCITRAL Legislative Guide, paras 13[pg 13 and 68[pg 60]

Among the selected policies that this chapter considers are national trade policies,<sup>50</sup> investment promotion policies,<sup>51</sup> employment related policies,<sup>52</sup> foreign policies,<sup>53</sup> the respective documents for Tanzanian and Kenyan development visions,<sup>54</sup> national environmental policies,<sup>55</sup> and poverty reduction strategy documents for the two countries.<sup>56</sup> The crucial issue that needs to be considered in the cross-border insolvency examination of the policies is whether one can discern ingredients and a theoretical approach the policies are inclined to and how they implicate and shape cross-border insolvency regimes of the countries under study.

#### **7.4.2 ‘Particularities’ Emerging From a Review of the Selected National Policies: A Pointer to Modified Universalism**

A review of the above mentioned selected national policies reveals a number of common perspectives, which provide relevant local contexts for cross-border insolvency regulation in the countries under study. It is such perspectives that point to a modified universalism as a relevant theoretical option which can be adopted by customisation of the Model Law as discussed later in this chapter.

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<sup>50</sup> Kenya, *National Trade Policy* (Office of the Deputy Prime Minister and Ministry of Trade, Nairobi 2009) < [http://www.eac.int/trade/index.php?option=com\\_docman&task=doc\\_details&gid=12&Itemid=124](http://www.eac.int/trade/index.php?option=com_docman&task=doc_details&gid=12&Itemid=124) >, and at < [http://www.trade.go.ke/images/stories/pdf/draft\\_trade\\_policy.pdf](http://www.trade.go.ke/images/stories/pdf/draft_trade_policy.pdf) >, accessed 23 March 2011; and Tanzania (n 47)

<sup>51</sup> Tanzania, *The National Investment Promotion Policy* 1996 (Presidency office, Planning Commission, Dar es salaam) 21, < <http://www.tzonline.org/pdf/nationalinvestmentpromotionpolicy.pdf> >, accessed 23 March 2011; UNCTAD, *Investment Policy Review Kenya* (United Nations, Geneva 2005) < [http://www.unctad.org/en/docs/iteipc20058\\_en.pdf](http://www.unctad.org/en/docs/iteipc20058_en.pdf) > accessed 24 March 2011.

<sup>52</sup> Kenya, ‘National Youth Policy’ (Ministry of Home Affairs, Heritage and Sports 2002); Tanzania, *National Employment Policy* (Minister of Labour, Youth and Employment, United Republic of Tanzania 1996) < <http://www.tanzania.go.tz/pdf/thenationalemploymentpolicy.pdf> > accessed 23 March 2011.

<sup>53</sup> See n 45 above

<sup>54</sup> Kenya, *Kenya Vision 2030* (Government of United Republic of Kenya, Kenya 2007); and Tanzania, *The Tanzania Development Vision 2025* < <http://www.tanzania.go.tz/vision.htm#FOREWORD> >

<sup>55</sup> Tanzania, *National Environmental Policy* (Vice President’s Office, Dar es salaam 1997); and Kenya, ‘The Sessional Paper No. 6 of 1999 on Environment and Development’ (Ministry of Environmental Conservation, Nairobi 1999) < <http://www.fankenya.org/downloads/Kenya'sDraftEnvironmentPolicy.pdf> > accessed 26/3/2011

<sup>56</sup> Tanzania, *National Strategy for Growth and Poverty Reduction II* (Ministry of Finance and Economic Affairs, Dar es salaam July 2010) < [www.povertymonitoring.go.tz](http://www.povertymonitoring.go.tz) ; [www.mof.go.tz](http://www.mof.go.tz) ; [www.tanzania.go.tz](http://www.tanzania.go.tz) > accessed 27/03/2011 [2]; Kenya, *Poverty Reduction paper: First Medium Term Plan 2008-2012* (Office of the Prime Minister, Nairobi 2008) < [www.planning.go.ke](http://www.planning.go.ke) > accessed 27 March 2011[10]

The first perspective is the endeavour to promote and facilitate equitable and sustained economic growth which focuses on poverty reduction, promotion of justice and equity, trade and investment.<sup>57</sup> The strategies that the policies provide take cognisance of the following key aspects; rapid and sustainable growth as a fundamental factor for poverty reduction; capacity improvement of the poor to participate in growth and take advantage of the opportunities that growth generates; the role and contribution of private sector in sustainable growth and fighting poverty; and the provision of accessible, affordable and quality social services; and maintenance of rule of law and good governance.<sup>58</sup>

The second perspective regards the transformation of Tanzanian and Kenyan economies to strong and competitive economies.<sup>59</sup> This perspective emphasises the significance of diversification, private enterprises and building of excellent economic ties with the outside world and indeed, co-operation in addressing problems emerging from the challenges of the global economy and putting in place a conducive legal environment.

The third perspective acknowledges the special position of local enterprises, which are mostly engaged in informal sectors in small and medium scale business activities. This perspective notes that such enterprises use domestic resources, create employment and generate income chiefly for the local population.<sup>60</sup> Transformation of these businesses to enable them to *inter alia*

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<sup>57</sup> See for instance Kenya Institute for Public Policy Research and Analysis, Overseas development Institute, and Institute of Development Studies, University of Nairobi, 'Trade Policy and Poverty Linkages in Kenya' (A study prepared for Ministry of Trade and Industry in the Government of Kenya, under the DFID-funded Africa Trade and Poverty Programme ) < <http://www.odi.org.uk/resources/download/1186.pdf> > accessed 23 March 2011 [7]; and Tanzania (n 44) 12

<sup>58</sup> Kenya (n 50); and Kenya, Institute for Public Policy Research and Analysis and others (n 57) 7

<sup>59</sup> See Kenya (n 50); Kenya (54); Tanzania (47); Tanzania (54) 10; Tanzania (50) 21; and Kenya (n 50). See also n 50 above; Tanzania (n 45) 27; and Kenya (n 45) above

<sup>60</sup> Tanzania, *Small and Medium Enterprise Development Policy* (Ministry of Industry and Trade, Dar es salaam 2002) < <http://www.tanzania.go.tz/pdf/smepolicy.pdf> > accessed 29 May 2011. For policy issues regarding small and medium scale enterprises in SSA countries, see CM Dickerson 'Informal-Sector Entrepreneurs, Development and Formal Law: A Functional Understanding of Business Law' (2011) 59 *Am J Comp L* 179; and Economic Commission for Africa, 'Enhancing the Competitiveness of Small and Medium Enterprises in Africa: A Strategic Framework for Institutional Support' ( February 2001 ) < <http://www.uneca.org/gpad/SME%20Strategic%20Framework.pdf> > accessed 29 May 2011

participate in the global market is regarded as critical for the long term sustainability of the economies of the countries under study.<sup>61</sup> The underlying policy strategies envisage measures to support and promote domestic enterprises whilst addressing the consequences of market distortion and disturbances.<sup>62</sup> For example, to strengthen the ability of the domestic enterprises to transact on a mutual basis with foreign enterprises in anticipation that the domestic enterprises may eventually benefit from transfer of technology, joint economic ventures, and accessing international finance.<sup>63</sup> Emphasis is seemingly placed in creating an appropriate institutional framework that forges and encourages international co-operation with multinational enterprises.<sup>64</sup> Notably, the policy pre-conditions for such international co-operation are that there must be mutual and beneficial commercial advantage to be gained; and the relationship should be one that preserves options a country may have as ‘an independent and sovereign nation.’<sup>65</sup>

The fourth perspective regards recognition of the importance and need for a conducive environment for actors to effectively utilise resources and contribute in economic growth. The aim is to ensure maximisation of values, stability, continuity, and predictability of the environment in which businesses are conducted and economic decisions are made. In a broader context, the spirit is to improve every regulatory regime relating to aspects affecting both foreign and domestic investment activities which include insolvencies.<sup>66</sup> Kenya’s national trade policy explicitly mentions insolvency law as among the instruments for serving the policy and bringing it into operation.<sup>67</sup> One of the consequences of unsuitable environments that the policies seek to address and eliminate is high

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<sup>61</sup> Tanzania (n 51) 21; Tanzania (n 47) 10

<sup>62</sup> Kenya (n 50) 25; Economic Commission for Africa (n 60) 5; MR Agosin and R Machado, ‘Foreign Investment in Developing Countries: Does it Crowd in Domestic Investment’ (2005) 33 *Oxford Dev Stud* 149, 152; and CM Calcopietro and D Massawe, ‘Tanzania Small And Medium Scale Enterprise Policy Proposals’ (UNIDO 1999) < <http://www.tzonline.org/pdf/smallandmediumscaleenterprises.pdf> > accessed 29/05/2011

<sup>63</sup> Tanzania (n 45) 27

<sup>64</sup> Tanzania (n 45) 14

<sup>65</sup> Tanzania (45) 27

<sup>66</sup> See for example, Tanzania (n 50) 11; Tanzania (n 47) 52; and Kenya (n 50)

<sup>67</sup> Kenya (n 50)

transaction costs which the policies recognise have potentials of discouraging inflow of foreign investment and expansion of domestic investments.<sup>68</sup>

The fifth perspective regards maximisation of opportunities available in regional and international co-operation.<sup>69</sup> Significant importance is accorded to regional integrations of which Tanzania and Kenya are members and to countries with which the countries under study have traditional long standing relationships and other countries that are willing to cooperate mutually with them.<sup>70</sup> This underscores the issues and concerns given to trust of another country's systems in co-operation with other nations.<sup>71</sup> There are several principles reflected in the Kenyan and Tanzanian foreign policies that govern their conducts and decision making.<sup>72</sup> They include the following. The first is to maximise opportunities from such co-operation which should focus on economic gains.<sup>73</sup> The second is to ensure that co-operation and participation do not compromise their territorial integrity, independence and sovereignty.<sup>74</sup> The third is to consolidate and prioritise the long standing historical relationship and co-operation and their membership in regional groupings. And the fourth is to ensure active and result oriented participation in a selected international arrangements where the political and economic interests of the nation can be secured and promoted.<sup>75</sup>

The sixth perspective of the policies relates to conservation and protection of the environment and promotion of domestic and international environmentally friendly trade and investment activities.<sup>76</sup> Strategies that are inherent in the policies include strengthening of the institutional and legal framework for the implementation and enforcement; and mainstreaming environmental issues in business and investment regulation and related aspects given the cross-cutting

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<sup>68</sup> Tanzania (n 47) 21

<sup>69</sup> See Kenya (n 54) 14

<sup>70</sup> Kenya (n 49) 16 and 17; Tanzania (n 45) 18-23

<sup>71</sup> JL Westbrook and others (n 1) 240 and 241

<sup>72</sup> See Tanzania (n 45) 2 and 3; and Kenya (n 45)

<sup>73</sup> See for example, Tanzania (n 45) 3, stating that Tanzania seeks to open up its co-operation with other countries 'where potential for national gain exists.'

<sup>74</sup> Tanzania (n 45) 2

<sup>75</sup> Tanzania (n 45) 3

<sup>76</sup> Kenya (n 49) 64 and 65; and see n 55 above

nature of environmental issues.<sup>77</sup> This is not only relevant to SSA countries because of environmental issues that arise in the undertaking of business activities, but also because the economies of SSA countries and the investments that are made are largely natural resource-dependent.<sup>78</sup> Understandably, this perspective takes account of economic and social costs involved in environmental damage and its adverse impact on the quality of human life and health.<sup>79</sup> Other critical issues and challenges addressed under the various policies and governments' documents include unemployment and job creation as they relate to poverty reduction.<sup>80</sup>

### **7.4.3 Significance and Implication of the Local Policy Perspectives for Cross-Border Insolvencies**

The perspectives emerging from the above analysis of the policies have, albeit indirectly, the potential implication for the formulation of cross-border insolvency regimes for Kenya and Tanzania which, according to Westbrook and others, require a multiplicity of considerations resulting from, for example, 'the economic system of the respective country, its relationship with particular other countries and the hoped for treatment of its business abroad.'<sup>81</sup> Thus, the perspectives provide a useful insight in identifying policy choices that must be made in the legislative process to fit and serve the aspirations of these countries.

Arguably, such perspectives, viewed as a whole, point to the relevance of modified universalism (adopted in the form of a customised and adapted version of the Model Law) as the most appropriate approach. However such perspectives appear to suggest that a special arrangement might be needed to regulate cross-border insolvency involving firstly, member states within a regional integration and secondly, foreign countries that are in a special relationship with the countries under study.

One challenge that emerges is balancing the global insolvency norms with the distinctive national path dictated by the characteristics of the policy perspectives

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<sup>77</sup> Kenya (n 50) 64 and 65

<sup>78</sup> Tanzania (n 55) 8

<sup>79</sup> Tanzania (n 47) 7

<sup>80</sup> Kenya (n 52)

<sup>81</sup> JL Westbrook and others (n 1) 228 and 229

which are indicative of the local interests and priorities.<sup>82</sup> While negotiating the place of such perspectives during the processes of developing a cross-border insolvency legal framework, the countries under study must take cognisance of the position of the international insolvency benchmarks that discourage construction of insolvency systems based exclusively on social and political concerns, as opposed to commercial bargains.<sup>83</sup> This is in addition to the limitations implied by the existing international treaty commitments to the SSA host countries as to, for instance, standards of treatments to be accorded to foreign investors and investments.<sup>84</sup>

#### **7.4.3.1 Private Investments and Economic Growth**

Private enterprise and its role in economic growth is a fundamental feature in almost all policy perspectives drawn from the selected national policies.<sup>85</sup> The nature of the private sector that is envisaged reflects both domestic and foreign firms. One legitimate expectation of the policy makers is that the facilitation of the private sector leads to a strong and competitive export led private sector which will contribute to the economic growth. The underlying rationale is to reduce poverty and contribute to social equality among the people.

To address this policy objective consideration will have to be had to ‘institutionalising mechanisms that enable a risk-taking enterprise to reap the benefits of any success it is able to achieve.’<sup>86</sup> In the event of financial difficulties leading to insolvency of such an enterprise, there should be means which might preserve rather than destroy going concern value of the enterprise. This could be achieved by rescue mechanisms for dealing with enterprises that fail, equitable treatment of all players irrespective of their nationalities and protection of the debtor’s establishment, assets and other interests of creditors. The latter is achievable through granting of a relief that is meant to protect the insolvent estate of the debtor which includes the local assets and interests of

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<sup>82</sup> TC Halliday (n 2) 2; EJ Janger (n 21) 401-44; and TA Sullivan, E Warren and JL Westbrook, ‘The Persistence of Local Legal Culture: Twenty Years of Experience From the Federal Bankruptcy Courts’ (1994) 17 *Harv J L & Pol’y* 801, 804

<sup>83</sup> UNCITRAL Legislative Guide on Insolvency Law paras 13 [pg 13] and 68 [pg 60]

<sup>84</sup> Text to part 4.4, 4.5.1, and 4.6.1 in chapter 4

<sup>85</sup> See for example text to n 57, 59 and 60

<sup>86</sup> ED Flaschen and TB Desieno (n 11) 667

creditors. This may include a stay and restriction on the right to transfer or dispose of any asset. Such a protection is fundamental to a successful rescue and augurs well for the commitments arising from the bilateral investment treaties concluded thus far.<sup>87</sup>

Since these policy aspects also envision the aspiration of encouraging foreign investments, any rescue mechanism to be formulated must take that policy consideration into account together with other relevant legislation for promotion and protection of investment that is already in place.<sup>88</sup> This means that the law should clearly articulate the scope of its approach in cross-border insolvency cooperation from the perspective of a country that would ordinarily face the challenge of deferring to foreign proceedings, given the current pattern of global trade and flow of investments.<sup>89</sup> Alongside, the formulation of such a law must be mindful of achieving a high degree of efficiency, predictability, and certainty to reduce transaction costs and enhance availability of credits to investors. The implication of the implementation of rescue procedures in respect of a multinational enterprise is that the business of such an enterprise can be rescued with the possibility of continuing its operation in the countries under study and providing jobs to the people.

In support of the rescue mechanism, consideration could be given to the suitability of and the scope to be accorded to prioritisation of governments' tax claims which is one of the thorny issues in cross-border insolvency.<sup>90</sup> Such a consideration has to be taken in light of the theory that advocates against prioritisation of tax claims as it runs counter to the policy underlying business rescue. The underlying rescue policy seeks, wherever possible, to preserve the debtors' continued existence as a viable entity, protecting jobs and reducing damages to the economy.<sup>91</sup> Consistent with this theory is the view that the

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<sup>87</sup> Text to part 4.5.2.4 in chapter 4

<sup>88</sup> It is to be noted that most of the investment promotion and protection legislation enacted by SSA countries guarantees fair and equitable treatment, national treatment and most favoured nation treatment to foreign investments.

<sup>89</sup> F Tung (n 39) 576 and 577

<sup>90</sup> JL Westbrook (n 4) 877; and JM Weiss (n 27) 295 and 299-303; and UNCITRAL Legislative Guide on Insolvency Law para 71[pg 271]

<sup>91</sup> A Davis (n 31) 149; and JM Weiss (n 27) 295

potential harm to other creditors of having government tax priority and thereby failing to recover their claims may cause substantial hardship and precipitate additional insolvencies.<sup>92</sup> In fact, the loss to the government of one company not paying taxes could be minimal, while the potential harm to other creditors of the company of having a tax priority is often large.<sup>93</sup> Above all, it is understandable that government normally has other means of enforcing its claims, such as imposing penalties and high interest rates, or using statutory liens.<sup>94</sup> A successful business rescue means continued existence of a business as a viable undertaking, which leads to protecting jobs and avoiding unemployment related cost being incurred by the government while ensuring continued payment of the government taxes.<sup>95</sup> However, any decision as to the treatment of tax claims need to take account of the local circumstances.<sup>96</sup> Uganda is one of the countries in SSA that has given consideration to the abolition of tax claim priority.<sup>97</sup> However, taking account of the local circumstances, the Ugandan Law Reform Commission recommended that:

‘[Foreign experiences] cannot be adopted without caution being taken. Government and public stand the risk of being cheated by unscrupulous directors who will collect the government tax and pocket it well knowing that in the event of insolvency, the company will be absolved from passing on tax collected to Government. For example a company that has been collecting PAYE from its employees for a long time before insolvency sets in is left to go away with it. The primary victim shall be the employees whose wages were deducted. [It is thus recommended that only] taxes collected by the insolvent as a quasi-agent of the state should be recovered as preferential debts while taxes directly payable by the insolvent should be treated as ordinary debts.’<sup>98</sup>

Notably, no consideration has so far been given on cross-border implications of tax claim priority.<sup>99</sup>

Further consideration may need to be given as to whether some actors within the private sectors can be accorded special protection under the priority systems and

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<sup>92</sup> A Davis (n 31 ) 149; and JM Weiss (n 27) 295

<sup>93</sup> BK Morgan (n 31) 466 & 467; and JM Weiss (n 27) 295

<sup>94</sup> Ibid

<sup>95</sup> A Davis (n 31) 149

<sup>96</sup> See n 31 above

<sup>97</sup> Similar consideration seems to have recently been made in literature in respect of the Kenyan reform initiative. For this consideration see text to n 115 in chapter 6

<sup>98</sup> Uganda Law Reform Commission (n 26) Para. 2.2.15; Cf text to n 115 in chapter 6

<sup>99</sup> UNCITRAL Legislative Guide, para 71[pg 271-272]

how such protection may influence cross-border insolvency approaches. One way of doing this is allowing the foreign creditors to enjoy the protection accorded by the local priority system. This may help foreign companies having investment in the countries under study to get finances from international lenders in anticipation that in the event of insolvency they will be able to claim locally and benefit from the existing priority system.<sup>100</sup> It is important that this strategy be considered and weighed against the stipulation of the existing international insolvency benchmarks. Accordingly, as far as the Model Law is concerned the minimum protection that a country may accord to foreign creditors is to treat them in a distribution at least as well as a general, unsecured creditor.<sup>101</sup> Indeed, the treatment in relation to the distribution can be even 'lower than the general non-preference claims if an equivalent local claim (e.g. claim for a penalty or deferred-payment claim) has a rank lower than the general non-preference claims.'<sup>102</sup> This is particularly important as the policy perspectives envisage that protection of local interests should not be pursued in a manner that affects foreign enterprises, although there is a clear intention of nurturing the locally owned small scale business enterprises.<sup>103</sup> Understandably, the treatment of foreign creditors in a local distribution is different from the equality of treatment of creditors regarding commencement of proceedings in the local court.<sup>104</sup>

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<sup>100</sup> Notably, the majority of foreign companies that operate in Tanzania and Kenya for example are not run as branches of their foreign parent countries abroad but as separate entities incorporated under the laws of the respective countries in which they have operations. However, a company will still be categorised as foreign by virtue of majority foreign shareholding. In Tanzania the law is explicit that a foreign company can also access credit in local financial institutions. See Tanzania Investment Act 1997 (Tanzania) s 25

<sup>101</sup> JL Westbrook, 'Multinational Enterprises in General Default: Chapter 15, The ALI Principles, and the EU Insolvency Regulation' (2002) 76 *Am Bankr LJ* 1, 16; Model Law art 13(2); Guide to Enactment of UNCITRAL Model Law on Cross-Border Insolvency Para 104 [pg 331]

<sup>102</sup> An alternative provision which a country may consider incorporating to replace art 13(2) is to the effect that: 'Paragraph 1 of this article does not affect the ranking of claims in a proceeding under [*identify laws of the enacting State relating to insolvency*] or the exclusion of foreign tax and social security claims from such a proceeding. Nevertheless, the claims of foreign creditors other than those concerning tax and social security obligations shall not be ranked lower than [*identify the class of general non-preference claims, while providing that a foreign claim is to be ranked lower than the general non-preference claims if an equivalent local claim (e.g. claim for a penalty or deferred-payment claim) has a rank lower than the general non-preference claims*.'

<sup>103</sup> See text to n 60-65 above

<sup>104</sup> UNCITRAL Model Law on Cross-Border Insolvency art 13(1); and Guide to Enactment of UNCITRAL Model Law paras 103-105

The rescue mechanism discussed above is one form of providing the contemplated protection to small local enterprises during insolvencies or financial difficulties and it could certainly help viable yet insolvent local small businesses to be nursed back to business in appropriate cases. As some of these local businesses are increasingly engaged in international business transactions, they are likely also to have foreign liabilities arising from their meagre international trade operations. Consideration of participation of foreign creditors in the local insolvency proceedings as above stated is thus inescapable.

As already discussed, such small local enterprises could be potential claimants in insolvency proceedings including cross-border insolvency proceedings. It would appear that some form of protection can be achieved by accommodation of some local industries, small and medium scale enterprises that represent legitimate local interests in the systems of priority of distribution of the countries under study. Such favourable treatment will protect them against any potential harm that might result from failure of claims recovery. However, this should, if at all necessary, be confined to sectors considered exceptionally important to the economy. As it has rightly been pointed out in the policies, as far as Tanzania is concerned, this pursuit may involve making decisions on types of the local enterprises to be protected, together with the rationale and costs of protection.<sup>105</sup> A lesson could be learnt from the special protection accorded in the US to grain producers and fishermen, who, alongside consumers, ex-spouses and children, enjoy priority over general creditors in special cases.<sup>106</sup> However, care must be taken since such policy choices may put the whole system at risk of being regarded as inefficient and unfriendly to foreign investors.

Indeed, some of these local creditors could be small suppliers to some foreign businesses that may have operations in the countries under study. In the context of a cross-border insolvency involving a business having operations and assets in the countries under study, there could be legitimate concerns about small, local creditors which undoubtedly include suppliers and employees. It is common knowledge that 'these creditors cannot be expected to be sophisticated in

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<sup>105</sup> See for example Tanzania (n 47) 10

<sup>106</sup> Text to n 39 above

planning for insolvency risks or able to protect themselves in distant proceedings.’<sup>107</sup> As such, one policy option available, especially where deference to foreign main proceedings is preferred, is providing for local processing of the local claims.<sup>108</sup> Such claims or specific category of such claims could thus be paid locally ‘... in full from local assets before the assets are transferred to the main proceedings.’<sup>109</sup> The local processing for the benefit of the local creditors can well be achieved by having provisions for protection of creditors, avoiding acts detrimental to creditors as well as through concurrent proceedings as provided for under the Model Law.<sup>110</sup> Understandably, the relevant provisions of the Model Law could be adapted in the manner that suits the local circumstances as reflected in the policy perspectives. Indeed, this kind of protection of certain category of local creditors will potentially add towards poverty reduction efforts as discussed subsequently because it will help minimise the potential harm to, for instance, small local supplier creditors which could otherwise have led to substantial hardship and possibly insolvency.

#### **7.4.3.2 Increasing Participation of Local Enterprises in the Global Market and Access to International Finance**

As mentioned above, in a bid to ensure the countries under study attain sustainable economic development, the policies endeavour to facilitate transformation of identified sectors that characterise local enterprises. The transformation is with a view to making them more competitive and enabling them to participate in the global market; access global commercial capital; benefit from transfers of technology; and engage in joint economic venture arrangements in order to benefit from the operations of the multinational enterprises. As far as Kenya is concerned, this pursuit is regarded as the most important strategic priority for the future of local enterprises.<sup>111</sup> On the part of Tanzania, this involves strategic identification of the local enterprises to be

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<sup>107</sup> JL Westbrook (n 4) 876-877. See also PJ Omar, ‘The Landscape of International Insolvency Law’ (2002) 11 *Int’l Insolv Rev* 173, 177. Notably, participation by creditors in foreign proceedings depends on the availability of knowledge and information, their ability to be diligent and to overcome procedural obstacles.

<sup>108</sup> JL Westbrook (n 4) 876-877; and JL Westbrook (n 6) 515

<sup>109</sup> JL Westbrook (n 4) 876-877; see also UNCITRAL Model Law on Cross-Border Insolvency, arts 28-32

<sup>110</sup> UNCITRAL Model Law on Cross-Border Insolvency, arts 22-23 and arts 28 - 32

<sup>111</sup> Kenya (n 50) 25

protected, the rationale and costs of protection, and the maximum duration for the protection.<sup>112</sup> This policy strategy reinforces the participation of the small local enterprises in the global market and hence the potential for being exposed to cross-border insolvencies in either of the following two ways.

Firstly, it could be by virtue of the local enterprises themselves being insolvent while indebted to foreign creditors. This brings in policy choices to be made as to participation of foreign creditors in local proceedings and in particular their treatment in the local priority system as above discussed. It must however be added that enabling local enterprises to access international capital requires predictability and certainty in the treatment of foreign creditors in the local insolvency proceedings. Indeed, efficiency of insolvency systems and their cross-border insolvency regime is one of the factors that international finance considers in funding projects, especially those being executed in developing economies, such as those of the countries under study.

And secondly, it is by virtue of having claims against an insolvent foreign enterprise that does not necessarily have assets or an establishment locally. This brings in the trouble that such local enterprises may encounter in their attempt to enforce their claims at a distance. Much as the provision for local processing of local claims is ideal, its effectiveness largely depends on the presence of local assets and the ability of local jurisdictions to restrict transfers of assets at least for a while which could also be achieved under articles 22 and 23 of the Model Law as above discussed or any adapted version of the measures stipulated in such provisions of the Model Law. The possibility of lack of local assets raises an issue that requires the countries under study to consider if they really require adopting a system that strictly favours local processing of assets for it is not always that an insolvent foreign debtor will have sufficient amounts of assets, if any, in the local jurisdiction. The issue also links to a consideration of having an arrangement with a foreign country that provides for mutual treatment of debtors and creditors from each country and one that provides appropriate protection for the interests of debtors and creditors from either of the jurisdictions within the

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<sup>112</sup> Tanzania (n 47) 10

arrangement. Such arrangements could, in appropriate cases, save time, cost and inconvenience associated with litigations involving determinations of several issues that may arise, such as, whether interests of creditors and other interested parties are adequately protected in the relevant foreign proceedings. The challenge is that it is not all countries that may have incentive to conclude such an arrangement based on the reciprocity.

#### **7.4.3.3 Poverty Reduction through Continuation and Protection of Businesses and Employment**

Fighting poverty is central to the reviewed policies. Job creation and ensuring that those who are in employment continue to keep their jobs are considered as strategically important in reducing poverty. Adoption of a rescue system, as above noted would contribute to poverty reduction in a number of ways. Firstly, a successful business rescue prevents or at least limits the job losses caused by a business failure. Thus, it will enable some people who would otherwise lose their jobs in liquidation to keep their jobs. Secondly, continuation of the business through implementation of the business rescue system will also contribute to economic growth and the potential for further creation of more jobs. And thirdly, encouraging risk taking and further creation of businesses from both local and foreign entrepreneurs. This will add towards facilitation and promotion of private investments which under the policies are an engine of economic growth and the consequent creation and saving of jobs.

It is well known that '[w]here insolvency strikes an employer, there will almost invariably be employees to whom money is owed by way of unpaid salary or other obligations arising under the employer/employee contract that have not yet been paid by the employer.'<sup>113</sup> And perhaps the most drastic consequence is that such employees stand to lose their jobs which can have a devastating effect on them and their families.<sup>114</sup> Special protection of employment claims in distribution of the proceeds of an insolvent estate is therefore another obvious option to ensure that such claims are met before those of some other creditors to

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<sup>113</sup> JL Westbrook and others (n 1) 183

<sup>114</sup> R Goode, *Principles of Corporate Insolvency Law* (4th edn Sweet & Maxwell, London 2011) 250

reduce poverty.<sup>115</sup> Although such protection is to a certain extent provided in the existing laws,<sup>116</sup> it is very limited and perhaps inadequate compared to the position in other countries, inclusive of the developed ones.<sup>117</sup> Consideration of improving the nature and scope of such special protection might be worthwhile to pursue. This is critical on account of the peculiar socio-economic circumstances of the countries under study that mandate different standards at least for a short run. In the context of cross-border insolvency, it will be absurd that a poor employee of a SSA country whose salary and other dues remain unpaid should have to wait and pursue his claims with the general body of creditors of a foreign jurisdiction in a foreign proceedings of a company that had assets or an establishment in the local jurisdictions of the countries under study.<sup>118</sup> However, while care must be taken not to render an insolvency system to serve the functions of other laws such as social security legislation, the position of the countries under study could (in light of the international insolvency benchmarks) be treated as exceptional until such time as when these countries have comprehensive welfare systems.<sup>119</sup>

Indeed, failure to address the above issue, which is directly linked to the lack of an adequate social welfare system, would mean that there might be potential threats for social order as a result of unemployment and a lack of funding for the same.<sup>120</sup> This could potentially thwart successful rescues and prevent the

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<sup>115</sup> JL Westbrook and others (n 1) 184 stating *inter alia* that '[t]here can be little doubt that the overall effect on employees and their families is qualitatively far worse than it is on other creditors. ...[U]nlike other creditors [they] are severely undiversified.' Undoubtedly the situation is even worse in SSA where in most instances the wages are low and there are no welfare states.

<sup>116</sup> See text to n 25 above

<sup>117</sup> JL Westbrook and others (n 1) 188-190. This is particularly the case if for instance one takes account of indirect forms of employees' related priorities like pension claims. More so if considered in the context of the requirement of protection of employees' rights in the event of a transfer of undertaking which enacts a principle of automatic transfer of contract of employment.

<sup>118</sup> JL Westbrook (n 4)

<sup>119</sup> For a more or less similar reasoning, though with respect to China, see, RW Harmer, 'Insolvency Law and Reform in the People's Republic of China' ( 1995-1996) 64 *Fordham L Rev* 2563, 2565 and 2566; R Parry and H Zhang, 'China's New Corporate Rescue Laws: Perspectives and Principles' (2008) 8 *J Corporate L Stud.* 113, 132; R Parry, 'Underlying Factors and Legal Cultures Influencing the New Chinese Bankruptcy Law' in B Wessels and PJ Omar (eds), *Insolvency Law in the United Kingdom: The Cork Report at 30 Years* (INSOL Europe, Nottingham 2010) 103

<sup>120</sup> RW Harmer (n 119) 2565 and 2566; R Parry and H Zhang (n 119) 132; R Parry (n 119) 103

development of much needed stability for continued investment by multinational enterprises. On the contrary, in giving consideration to implementation of the policies that seek to ensure employment to the people, protecting them from losing income and being stricken by poverty, the policymakers must take cognisance of the effect such implementation may have on any rescue attempt. Such a consideration is relevant since such an attempt might have a much better beneficial effect on the economy on longer terms.<sup>121</sup>

#### **7.4.3.4 Environmental Protection Aspects**

The policy perspectives examined above also point to the significant place of environmental issues and obligations in the description of local interests that cut across all sectors and which have increasingly been receiving constitutional status in SSA.<sup>122</sup> These issues might accordingly need to be considered in so far as their treatment in a cross-border insolvency setting is concerned.<sup>123</sup> This is rather exceptional in Tanzania and Kenya, as it is for the rest of SSA countries, given the potentials for environmental damages caused by businesses and their consequent implications for lowering the standard of living and increasing poverty.<sup>124</sup> While most commercial operations taking place in these countries entail, whether directly or indirectly, exploitation of natural resources and hence the potential danger to the environment, there is an emerging trend of according fundamental constitutional status to environmental related rights, duties and compensation under the constitutions although this trend is yet to be reflected in rules of priority in insolvency legislation.<sup>125</sup>

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<sup>121</sup> See for example, A Loubser, 'The Interaction Between Corporate Rescue and Labour Legislation: Lessons to be Drawn from the South African Experience' (2005) 14 *Int'l Insolv Rev* 57, 67- 69

<sup>122</sup> See Constitution of Republic of Kenya 2010 arts 42 and 70, which provides, among other things, for the peoples right for a clean and healthy environment and the right for compensation to victims of failure to carry out environmental obligations. See also, F Okomo-Okello, 'The Role of the Private Sector (Banks) in Promoting Compliance with Environmental Law (The Kenyan Experience)' (2007) 1 *Kenya Law Review* 30, 40-41; and sections 101, 151, 198 of the Environment Management Council Act 2004 (Tanzania) ss 101, 151 and 198

<sup>123</sup> Ibid

<sup>124</sup> See generally, DB Magraw, 'Legal Treatment of Developing Countries: Differential, Contextual and Absolute Norms' (1999) 1 *Colo J Int'l J Env't'l L & Pol'y* 69

<sup>125</sup> Q Dongmei & J Qu 'Research on the Priority of Environmental Tort Obligation in Bankrupt Enterprises Under the Background of Low Carbon Economy' (2011) 4 *J Sust'ble Dev* 150; Q

The question is whether and to what extent environmental policy issues can be reflected in a cross-border insolvency context in SSA countries, for reasons explained above. A majority of multinational enterprises investing in SSA are in one way or the other involved in the exploitation of the natural resources, as are small and local enterprises in most SSA countries engaged in export of primary produce. Despite the divergence in the local policies and interests which are mostly reflected in the rules of priority as to treatment of creditors and the importance of environment issues in recent decades, environmental claims are yet to universally receive a separate preferential treatment in existing insolvency law systems across the globe.<sup>126</sup> In the US, this has been a subject of intensive debate among scholars and it has long received different judicial treatment in different states.<sup>127</sup>

It can be argued that environmental claims concern people's lives and health, properties, security and social benefit which means that giving a priority claim to the environmental liability is not only consistent with the inherent need to realise the fair distribution of the insolvent estate, but also the inevitable choice to develop an environment sustainable economy.<sup>128</sup> To be sure, it is not surprising that cross-border insolvency proceedings involving local environmental obligations claims are very likely given the increasing awareness on environmental issues, environmental legal enforcement and the underlying

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Dongmei, 'Low Carbon Economy and the Priority of Environmental Tort liability in Bankrupt Enterprises' (2011) 5 *Energy Procedia* 1814, < [www.sciencedirect.com](http://www.sciencedirect.com) > accessed 29/05/2011; SP Chitre 'Cleaning Up Bankruptcy: Limiting the Dischargeability of Environmental Clean up Costs' July 2010 < [http://works.bepress.com/sonali\\_chitre/2](http://works.bepress.com/sonali_chitre/2) > accessed 29/05/2011; JV Stitt, 'Dischargeability of Environmental Claims in Bankruptcy: Resolution to Diametrically Opposed Goals' (2002) 17 *J Nat Resources & Envi'l L* 27; and LT Manolopoulos, 'A Congressional Choice: The Question of Environmental Priority in Bankrupt Estates' (1990-1991) 9 *UCLA J Envtl L & Pol'y* 73

<sup>126</sup> PR Wood, *Principle of International Insolvency Law* 2<sup>nd</sup> Edition (Sweet & Maxwell, London 2007); and CF Symes (n 31 ) 189 - 224

<sup>127</sup> SP Chitre (n 125); J Stitt (n 125); and LT Manolopoulos (n 125); KR Heidt, 'Automatic Stay in Environmental Bankruptcies' (1993) 67 *Am Bankr LJ* 69-130; SP Chitre, 'Cleaning up Bankruptcy: Limiting the Dischargeability of Environmental Cleanup Costs' July 2010, < [http://works.bepress.com/sonali\\_chitre/2](http://works.bepress.com/sonali_chitre/2) > accessed 05 May2011. There are signs for emergence of debate in China as to the need of prioritising environmental claims in insolvency legislation. See Q Dongmei & J Qu (n 113) 150; and Q Dongmei (n 113) 1814

<sup>128</sup> Q Dongmei & J Qu (n 125) 150; and Q Dongmei (n 125) 1814

commitment for compliance with international environmental obligations which provide for the principles of environment responsibility.<sup>129</sup> In light of the Guide to Enactment of UNCITRAL Model Law on Cross-Border Insolvency, it may not be surprising to find environmental issues taking the form of public policy exception given the growing trend of providing constitutional guarantees to matters related to environmental protection and compensation for environmental damages.<sup>130</sup> While it is important that public policy is understood more restrictively reflecting the realisation that international co-operation would be unduly hampered if public policy would be understood in an extensive manner, environmental issues at present are at the heart of international co-operation given their fundamental importance in the international and domestic arena that relates to health and safety.

While the experience elsewhere shows that environmental claims tend to be so huge that they may, especially so if accorded priority, scoop all proceeds from the insolvent estate and leave other creditors unable to recover anything, the environmental effect giving rise to such claims contributes to massive poverty in affected localities.<sup>131</sup> It must be added that the danger is that such claims can also have the effect of spoiling any potential rescue, which if it were concluded could contribute to poverty reduction efforts in different ways including continued

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<sup>129</sup> For an example of the nature of claims arising from environmental obligation, see KR Heidt (n 127) 69-130; and P Kameri-Mbote and C Odote, 'Courts as Champions of Sustainable Development: Lessons from East Africa' (2009) *Sustainable Development Law & Policy* 31 < [www.ielrc.org](http://www.ielrc.org) > accessed 5 April 2011. In fact, it has quite recently been alleged that Bioshape, a clean energy company based in Neer, The Netherlands, is going through insolvency proceedings after spending \$9.6 million on a failed biofuel project in Tanzania. It is claimed that the ambitious project to produce clean energy for the Netherlands and Belgium has degenerated into a controversial abuse of natural resources. It is unclear whether the environmental damages resulting from the uncompleted project will be presented as a claim in the insolvency proceedings of the company and what status they are likely to be accorded. For details on this issue that indicates the crisis on the intersection between environmental concerns and insolvency see, Inter Press Service, 'Biofuel project stalls as foreign investors go into bankruptcy' Business Daily, 30 March 2011 < <http://www.businessdailyafrica.com/Biofuel+project+stalls+as+foreign+investors+go+into+bankruptcy/-/539546/1135174/-/te135wz/-/> > accessed 9 March 2011

<sup>130</sup> Guide to Enactment of UNCITRAL Model Law on Cross-Border Insolvency paras 87-89

<sup>131</sup> KR Heidt (n 127)

employment to those already employed and potential for further job creations, and revenues to the government through taxes.<sup>132</sup>

However, it has been argued that some of the major creditors have a share of responsibility as they are the very ones who provide funding against major criteria of technical and economic feasibility of the projects.<sup>133</sup> Whilst most of the large creditors will be secured and sophisticated in planning for insolvency risks or able to protect themselves in distant proceedings, the environmental damage claimants are not. In view of the above, it is safe to say that the presence of operations and assets that pose a danger to the environment and sufferance of the victims, which could translate into recourse to public funds to remedy the situation,<sup>134</sup> is a relevant factor in deciding what preference certain local environmental claims might receive. Even if there are no assets in a local jurisdiction, local environmental interests may be so universally considered as important and deserving as to receive special treatment in SSA countries.<sup>135</sup>

#### **7.4.3.5 Sovereign, National Interests, International Co-operation and Regional Integrations**

In so far as international co-operation is concerned, the policy perspectives provide for promotion of good relations with other countries and economic diplomacy in particular. This is a positive gesture in the handling of cross-border insolvency cases. However, the policies may be applied to identify criteria that may need to be incorporated in the law to determine the nature and scope of granting recognition and co-operation to other countries. The choices that the criteria implicit in the policies point to are that in a cross-border insolvency context the manner of extending recognition and scope of co-operation to be

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<sup>132</sup> KR Heidt (n 127) 69-130

<sup>133</sup> F Okomo-Okello (n 122) 40-41. This is understandable if looked at in the context of corporate social responsibility which is a complex issue, the consideration of which is well beyond the scope of this work.

<sup>134</sup> See A Keay and P de Prez, 'Insolvency and Environmental Principles: A Case Study in a Conflict of Public Interests' (2001) *Env LR* 90, 107; and CF Symes (n 31) 198

<sup>135</sup> See JL Westbrook (n 6) 516, arguing that there are local interests that are universally recognised as deserving protection irrespective of whether or not there are local assets; and DB Magraw (n 124) 69, discussing differential treatment to developing countries in undertaking international environmental obligations.

extended might vary depending on existence or non-existence of any of the said criteria.

Arguably, the criteria imply flexibility in the manner in which the countries under study will determine recognition and the scope of co-operation to be committed to which directly correlate with modified universalism. It can thus be said that the implication of the policy criteria suggests that the countries under study will not prefer to automatically and directly recognise and cooperate in foreign proceedings or allow the foreign proceedings to have universal scope and effect in their jurisdictions, unless it is so mandated by the criteria. The underlying rationale of the implied criteria is the requirement of trust of the foreign country's legal system, such as its adherence to the rule of law and/or the comparability of its insolvency policy objectives.<sup>136</sup> It must be stressed that the implication of the importance accorded to regional integration and international co-operation and the characteristics attached to the nature of such co-operation would potentially mandate special arrangements informed by the objectives of such co-operation and regional integrations and the principles of trust among the contracting member states. This could also be true for other countries such as those with which they maintain bilateral co-operations and historic, common and long standing traditional plus a legal or economic interrelationship.<sup>137</sup> As the countries under study seem to extend or willing to extend general trust of the countries that fall within this category, they may therefore consider either unilaterally adopting a regime that will extend automatic recognition and co-operation to such countries or adopting with them a cross-border insolvency co-operation arrangement that grants automatic recognition and co-operation, as is the case with the general rule underlying, for example, the ECIR to member states' proceedings. As already explained above, a major drawback seems to be that such arrangement could not be a priority for a country with which the countries under study would wish to enter in mutual arrangements. The other option is negotiating and concluding such arrangements when negotiating / renegotiating the bilateral investment treaties with the contracting states.

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<sup>136</sup> JL Westbrook and others (n 1) 240

<sup>137</sup> Ibid

The emphasis on sovereignty and national interest protection potentially underlines the concerns about the subordination of their national interests and institutions to foreign influence, which is one of the common objections against the adoption of a universalist approach in a cross-border insolvency regime.<sup>138</sup> This can influence policy choices to be made in formulation of the law in many respects including a total refusal to recognise foreign proceedings. However, a total refusal is unlikely to be envisioned in the present context given the emphasis placed on attraction of foreign capital through the creation of a conducive legal environment, and participation in global markets and international co-operation generally.

It may be argued that the policy perspectives point to cautiousness that the countries under study would wish to exercise in cross-border insolvency co-operation as opposed to blindly and automatically recognising, cooperating and deferring in all foreign proceedings. The cautiousness is arguably in relation to the quest for fairness to the local interests on a case-by-case basis and avoiding any detrimental effect the foreign proceedings might have to the local interests. The perspective might thus be said to envisage different safeguard measures that may be put in place by any local jurisdiction. Indeed, such safeguard measures could reflect those stipulated under articles 22 and 23 of the Model Law. Clearly, the ability to refuse co-operation that would prejudice local interests, and invoking some measures designed to safeguard the local interests against prejudice as the countries under study co-operate in the proceedings, could be among such measures. With the exception of some foreign countries that may have the benefit of enjoying automatic recognition and co-operation, consideration of cooperating with other countries may be subject to a determination as to whether or not recognition should be granted and determining an appropriate mode of co-operation that could retain some kind of control for the local jurisdiction. Determining an appropriate mode of co-operation may thus warrant offering co-operation through ancillary or parallel

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<sup>138</sup> See text to n 72, 74 and 75 above. See also JAE Pottow, 'Greed and Pride in International Bankruptcy: The Problems of and Proposed Solutions to "Local Interests"' (2005-2006) 104 *Mich L Rev* 1899

proceedings.<sup>139</sup> A further consideration in this regard is to be had in ensuring clarity as to the conditions of recognition, and methods and effects of recognition and co-operation that ensue. This may include, for example, the conviction that the relevant foreign proceeding meets the domestic functions and requirements of an insolvency proceeding.<sup>140</sup> This consideration may help address issues of efficiency, transparency, predictability and certainty in some ways.

Enforceability of government tax and other public claims is another aspect that is implicit in the above mentioned policy perspective that relates to national interests.<sup>141</sup> There might be need of considering the best way to enforce the tax liabilities from insolvent foreign enterprises. This is the case because the proceedings may be taking place in a foreign jurisdiction which does not enforce foreign tax claims in favour of foreign tax authorities. One option available is cooperating in proceedings whilst undertaking to pay such claims locally before transferring the insolvent enterprise's property to the foreign jurisdiction.<sup>142</sup> This option is only possible if the enterprise has assets in the local jurisdictions. Indeed, most of the multinational enterprises that could be involved in insolvency proceedings in the countries under study may have in one way or the other benefited from extended periods of tax holiday and other forms of incentives before becoming insolvent with huge back tax liabilities after operating for a while.<sup>143</sup>

Certainly, the existing bilateral investment commitments that provide for a right to repatriation of capital may easily facilitate the transfer of everything belonging to such enterprises (in anticipation of insolvency proceedings or upon opening of insolvency proceedings in respect of them in foreign jurisdictions) leaving behind the local tax authorities and other claimants struggling to press for their

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<sup>139</sup> JL Westbrook and others (n 1) 241

<sup>140</sup> Ibid 241 and 242

<sup>141</sup> See Tanzania (n 45) 2 and 3; Kenya (n 45)

<sup>142</sup> UNCITRAL Model Law on Insolvency art 13(2); and JL Westbrook (n 4) 877. According to Westbrook, '[n]either fairness nor public reaction could abide permitting a foreign corporation to hoodwink local taxing authorities or otherwise milk the local public purse and then whisk away the local assets without payment of these public claims.'

<sup>143</sup> Almost all investment promotion and protection related legislation in SSA to some extent guarantees generous tax holidays to foreign investors. See for example Tanzania Investment Act 1997s s 3 and 19 and Investment Promotion Act 2004 (Kenya) s 15

payment in a distant forum.<sup>144</sup> In this regard, even if the local processing of the local claims could be practical, nothing will have been left in the insolvency estate. Besides, such countries may have potentially been left with a mess of environmental damage to clear and compensate the victims. In relation to this challenge, one possible policy decision is to provide for a disclosure requirement of information concerning insolvency of the company or its parent company or any sister company within a group.<sup>145</sup> The other option worthy of considering its practicality is in according such kind of transfers that are motivated by anticipation of insolvencies, some voidable status in the nature of, or similar to, pre-bankruptcy preference or fraudulent disposals or transfers.

The other instance emerging from the emphasis on sovereignty and national interest protection is on the theoretical framework on which the law should be situated. It is noteworthy that one of the arguments levelled against universalism by the territorialists is that universalism intolerably compromises sovereignty and national interests.<sup>146</sup> Accordingly, the policy choices that might be considered and made in relation to this instance point to modified universalism as an appropriate theoretical framework and are a subject of discussion in the following part.

### **7.5 Modified Universalism As an Appropriate Theoretical Approach for SSA Situations**

In the context of the cross-border insolvency theories, the question could be which theory corresponds with and is therefore relevant to the local policies of

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<sup>144</sup> Such practices are not novel in the world of cross-border insolvencies and practice. See JL Westbrook (n 6) 511 and 512, discussing how funds were transferred from England to the US after Lehman Bros filed for bankruptcy in the US and noting also that there is a further problem of a debtor transferring assets to the advantage of insiders at a time of financial distress. The right to repatriate is also incorporated in most of the SSA countries foreign protection and promotion legislation; and see also text to n 113, 114 and 115, 116 in chapter four; and Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency para 14, which notes that '[f]raud by insolvent debtors, in particular by concealing assets or transferring them to foreign jurisdictions, is an increasing problem, in terms of both its frequency and its magnitude. The modern, interconnected world makes such fraud easier to conceive and carry out. The cross-border cooperation mechanisms established by the Model Law are designed to confront such international fraud.'

<sup>145</sup> UNCITRAL Model Law art 18 is an example of such requirement. For the purpose of the present argument, it is proposed that there is need for having a requirement which would apply to a foreign investor whenever transfer of funds is sought. Adoption of an effective law will minimise chances of such detrimental acts.

<sup>146</sup> JAE Pottow (n 138) 1915-1921

the countries under study. Arguably, a system that these countries might wish to formulate has to be developed from the standpoint of a country that, in the increasingly globalised economy, will regularly have to consider recognition of foreign proceedings and possibly to defer to other jurisdictions. Based on such perspectives, a responsible jurisdiction will have an incentive to safeguard its legitimate local interests against potential prejudices of a foreign jurisdiction and proceeding while endeavouring to compete in promoting foreign capital inflow and increasing its participation in global trade generally.

On the one hand, much as the countries under study may wish to pursue a territorial approach in a bid to protect their legitimate local interests and provide special protection for some creditors, such endeavour is no longer realistic because of the policies and pragmatic reasons. The countries under study still heavily depend on, and actually attract and protect, foreign capital whilst their exports are predominantly characterised by primary commodities. Such dependence on the foreign capital and export trade of predominantly natural products effectively connects the countries under study to the operations of multinational enterprises and other foreign entities not necessarily of a multinational nature. This international commercial connection, as discussed in chapter four, increases the potential for the countries under study being involved in cross-border insolvency. Consistent with such dependence is the fact that even the national policies have been developed with consideration and cognisance of the international commerce and co-operation.<sup>147</sup> For example, the policies take note of the growth of multinational corporations in both size and scope of involvement in pioneering economic globalisation and strategise to develop creative and active economic partnerships with the corporate world while presenting options as independent and sovereign countries.<sup>148</sup> Arguably, it is contrary to the local policies, and the prevailing international commitments of the countries under study for the development of a cross-border insolvency

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<sup>147</sup> See n 56 above

<sup>148</sup> See n 45 above

framework to have just an inward focus without taking account of circumstances happening elsewhere and at global level.<sup>149</sup>

On the other hand, even if such states were willing to commit to a pure universalist approach, it might be difficult, if not impossible, to implement it. Understandably, the nature of such countries' economies may, in particular situations, have to adopt protective development measures for the local institutions and industries in order that they benefit through for instance "crowd in" effects from the inflows of foreign capital and trade.<sup>150</sup> In some other situations, they may also be justified to institutionalise measures to protect small local creditors who are not sophisticated enough to pursue their claims remotely.<sup>151</sup> Although extending special protection to legitimate local interests could be regarded as a 'poor approach',<sup>152</sup> it might be a justified option at present for SSA countries rather than rapidly taking wholesale universalist reforms which are potentially open to resistance and risk of outright rejection. As shown above, almost all insolvency systems, including those that have long been tested, seem to accord some kind of protection to certain local interests that correlate with their local circumstances and values that are not shared by other jurisdictions.<sup>153</sup>

Given the special significance of foreign investment and trade to the economic growth and poverty reduction strategies, and the bilateral commitments that the countries under study might have, it is unlikely that the protection of local claimants can be expected to entail discriminating against foreign stakeholders beyond the limit stipulated in the existing international insolvency benchmarks.<sup>154</sup> Rather, states, in the protection of local interests, may only undertake to provide adequate protection against prejudice and inconvenience that local interests (e.g local creditors) may be exposed to or be subjected to in a

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<sup>149</sup> JL Westbrook (n 1) 227 and 228

<sup>150</sup> Text to part 4.7 in chapter 4. See also M Agosin and R Machado (n 62) 152

<sup>151</sup> See for example, Tanzania (n 47) 27 which recognise that one of the critical issues...[is] [a]dopting an appropriate framework of measures for...safeguarding domestic industry and economic activity threatened by liberalisation including identification of sectors to be protected, the rationale and costs of protection....'

<sup>152</sup> JL Westbrook (n 6) 514

<sup>153</sup> See for example, JL Westbrook (n 4) 869; and text to n 31 above

<sup>154</sup> See text to n 101 and 102 above

foreign proceeding or enforcement of a foreign law. This perhaps includes having the distribution of proceeds being effected in accordance with, or the same as undertaken by, the laws of the countries under study. The importance of this consideration reflects an observation made with regard to the protection of local interests under the US Chapter 15 which is the US version of the Model Law:

The requirement of sufficient protection of domestic creditors before turning the assets over to a foreign representative allows the state to safeguard the interests of its constituents, thus letting it fulfil its duty while submitting to the foreign law. This mixed approach seems to provide the best of both worlds: protecting the interests of local creditors in cases where the value of assets located in a particular jurisdiction is greater than the debt owed to local creditors and, at the same time, allowing foreign recovery in cases where the debt owed to local creditors is greater than the assets located in that jurisdiction. The success of such system, however, hinges upon just the right balance between universalism and territorialism. There is a fine line that the courts need not cross in order to preserve the integrity of the system: providing local creditors some protection while maintaining deference to the foreign law.<sup>155</sup>

An appropriate choice that is commensurate with the local circumstances of the countries under study is adopting a regime that is based on a strictly modified universalist approach which provides the flexibility needed by such countries.<sup>156</sup> The flexibility has the potential of allowing such countries to recognise foreign proceedings and cooperate accordingly to the extent permitted by the local policies while viewing the entire proceedings from a global perspective.<sup>157</sup> If the local jurisdiction determines that local interests would be treated fairly in the foreign main proceedings, they can then condition the protection of assets within their jurisdiction from local creditors' claims on the main proceedings' assurance

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<sup>155</sup> KV Proskurchenko 'Chapter 15 Cross-Border Insolvency: Is it True to Its Universalism Aspirations?' (2008) 5 *Rutgers Bus LJ* 96, 112-113. Notably, the US enactment of the Model Law is largely faithful to the text of the Model Law which is not surprising given the US' lead role in the drafting of the Model Law.

<sup>156</sup> JL Westbrook (n 10) 2302 and 2324, stating that 'Modified universalism is "modified" precisely because it permits local courts to evaluate foreign law and foreign courts before deferring to a main proceeding.'; See also, JAE Pottow (n 138 ) 1915-1919, stating that 'Modified universalism replaces the "must" of deference to the home country's bankruptcy laws.....with a "may."'

<sup>157</sup> JL Westbrook (n 10) 2301. Notably, national interests, sovereignty, independence issues and selective co-operation which potentially link with the proposition for a flexible approach are central aspects emerging from the national policies discussed above.

that there will be a special distribution of those assets in a way that protects the local interests.<sup>158</sup> This might be viewed as a weaker form of modified universalism. However, it appears to be the most appropriate approach for any cross-border insolvency law reform initiative in the countries under study, based on the incremental grounds discussed in chapter two and three of this thesis and the prevailing historical, political and socio-economic aspects in these countries.

If the reverse is true, the local jurisdictions will be entitled to refuse to submit to the extraterritorial effect of the foreign proceedings and will instead open parallel proceedings and administer the assets themselves.<sup>159</sup> The suitability of this approach is in its flexibility which provides room for consideration of the extent to which the proceedings affect local interests as determined by the local policies. Perhaps the most suitable formulation of modified universalism on the basis of which a theoretical framework for any cross-border insolvency regime for the countries under study should be based is one that ‘...accepts the central premise of universalism, that assets should be collected and distributed on a worldwide basis, but reserves to local courts discretion to evaluate the fairness of the home country procedures and to protect the interests of local creditors.’<sup>160</sup> The exception, as above discussed, could be where there is separate and special co-operation arrangement that is based on the well-established trust derived from a ‘long-lasting common tradition plus a legal or economic interrelationship.’<sup>161</sup>

Indeed, the modified universalism approach reflects the broad theoretical sense of legal systems and heritage of most SSA countries that have a common law background as has already been discussed.<sup>162</sup> However, while this could be seen as supporting the argument for embracing the modified universalist approach, construction of such a framework must be mindful of the fact that the existing laws, including the relevant common law, have generally been in disuse. The

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<sup>158</sup> J Pae , ‘EU Regulation on Insolvency Proceedings: The Need for a Modified Universal Approach’ (2004)27 *Hastings Int’l & Comp L Rev* 555, 578

<sup>159</sup> JL Westbrook (n 10) 2301

<sup>160</sup> JL Westbrook (n 21) 517; and JL Westbrook (n 10) 2301

<sup>161</sup> JL Westbrook and others (n 1) 240. See also Tanzania (n 45) 3, which provides for placing due priority on consolidation of the traditional relations [Tanzania has] had with [other countries such as] her trading and development partners.’

<sup>162</sup> Text to n 9-10 and 82-85 in chapter 5

other consideration is on the application of the common law which is subject to being compatible to local circumstances. All these seem to dictate and reiterate the need of crafting a simple, practical and realistic regime that is not only free from complexities but is also responsive to the characteristics of the developing economies and the limits beyond which they are unlikely to embrace.<sup>163</sup>

Because of over dependence on foreign capital and the existence of long standing traditional and established relationship with some foreign countries including those emanating from such arrangements as the bilateral investment treaties, it seems that the countries under study must be careful in having such a flexibility in the law of deciding whether or not to cooperate and to whom such a law should apply.<sup>164</sup> Apparently, any such decision may have far reaching implications for the inflow of the foreign capitals and trade co-operation with foreign countries. However, as it became clear in chapter four and chapter five, the bilateral investment commitments could be a hindrance in applying modified universalism, as it is likely to undermine the predictability and certainties and fair and equal treatment that the treaties seek to achieve.<sup>165</sup> As discussed above, this is the very reason why the countries under study may need to consider having a different arrangement for contracting states under bilateral investment treaties, regional integration and with those that they may have outstanding relationship.

## **7.6 A Critique of the Relevance and Suitability of Existing Initiatives**

In the foregoing discussions, it has been argued that modified universalism could be the most appropriate theoretical approach on the basis of which the countries under study should develop their respective cross-border insolvency frameworks. In the recent past, there have been significant achievements in the development of initiatives for dealing with cross-border insolvencies. These initiatives have

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<sup>163</sup> IF Fletcher, 'Maintaining the Momentum: The Continuing Quest for Global Standards and Principles to Govern Cross-Border Insolvency' (2006-2007) *Brook J Int'l L* 767, 774; and IF Fletcher, 'European Union Convention on Insolvency proceedings: Choice of Law Provisions' (1998) 33 *Tex Int'l LJ* 119, 124, and 139

<sup>164</sup> F Tung, 'Is International Bankruptcy Bankruptcy Possible?' (2001-2002) 23 *Mich J Int'l L* 31, 67

<sup>165</sup> See text to n 66 and 67 in chapter 4 and text to part 5.3 and 5.4 in chapter 5

elsewhere been subjects of extensive scholarship thus far. The cross-border insolvency theories have been employed to explain these initiatives.<sup>166</sup> It is common ground that most, if not all, such models are inclined towards universalism, although they represent examples more of a modified universalism than pure universalism. As discussed above, this is a clear reflection of the persistence of tension in the attempt to strike a balance between globalisation of trade and investment on one hand and containing local interests. As such, one dominant outcome of this tension is having regimes that reflect modified universalism which advocates of universalism describe as a transition towards universalism.<sup>167</sup>

For the present purposes, the outstanding initiatives thus far are the Model Law, the EC Regulation on Insolvency Proceedings (“ECIR”) and for the SSA region, the OHADA Uniform Organising Collective Proceedings (“OHADA Law”).<sup>168</sup> The question is whether and to what extent such initiatives are relevant to the circumstances of the countries under study in so far as development of an appropriate framework for their cross-border insolvency is concerned. To the extent that the initiatives considerably reflect a modified universalism, they are relevant. However, the question remains how and to what extent. The relevance of such initiatives is explored below based on the policy perspectives that emerged from the analysis of the selected national policies of the countries under study and the relevant historical context that is characterised by what has hitherto and at least in theory been in place in dealing with cross-border insolvencies. It is in this discussion that the relevance and suitability of the Model Law as an appropriate initiative in adopting the modified universalism and the local interests is made. It is also under this part whereby a consideration is made as to how crafting a regional cross-border regime using East Africa Community (“EAC”) as a case study can be done based on the existing regional initiatives and the relevant historical contexts.

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<sup>166</sup> See for example, JL Westbrook (n 10) 2276 - 2277; LM LoPucki, ‘The Case for Cooperative Territoriality in International Bankruptcy’ (2002) 98 *Mich L Rev* 2216, 2218; and Pae (n 158)

<sup>167</sup> JL Westbrook (n 101) 9; and RK. Rasmussen, ‘Where Are All the Transnational Bankruptcies? The Puzzling Case for Universalism’, (2007) 32 *Brook J Int'l L* 983, 983

<sup>168</sup> JL Westbrook and others (n 1) 246 - 265

### **7.6.1 Customising the UNCITRAL Model Law on Cross-Border Insolvency for Respective SSA Countries: Is it Possible and Suitable?**

The relevance of the Model Law on Cross-Border Insolvency as it relates to specific concerns that arise from the policy perspectives has already been addressed in the respective sections above and which need not to be repeated. What is important in the present context is to consider how the Model Law as a governing framework can well be adapted to reflect such concerns among others which mainly reflect protection of local interests.

To be sure the Model Law is ‘designed to assist states to equip their insolvency laws with a modern, harmonised and fair framework to address more effectively instances of cross-border insolvency.’<sup>169</sup> It is designed to operate by allowing a foreign representative to apply for recognition,<sup>170</sup> determining whether the foreign proceeding is main or non-main, and granting the appropriate relief and circumstances on basis of which different measures may be invoked to protect creditors, debtors and other interested persons. It provides that the court must decide whether or not to recognise the foreign proceeding and, if recognised, how to recognise the proceeding, including the nature of the proceeding on whether it is main or non-main proceeding. Accordingly, when a proceeding is recognised as a foreign main proceeding, all the local legal actions are stayed, the debtor’s insolvency is accordingly proved and consequent proceeding is pursued if the debtor has assets in the state.<sup>171</sup> One notable assumption of the Model Law is that recognition of a foreign proceeding does not restrict the right to initiate a domestic proceeding which can accordingly be given local priority as against the foreign proceeding.<sup>172</sup> However, whenever there are two or more proceedings pending, the Model Law provides for their co-ordination by means of co-operation. Such co-operation may entail and be reflected in the support for the

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<sup>169</sup> Guide to Enactment, para 1; BM Devling, ‘The Continuing Vitality of the Territorial Approach to Cross-Border Insolvency’ (2001-2002) 70 *UMKC L Rev* 435, 444

<sup>170</sup> UNCITRAL Model Law, art 15

<sup>171</sup> Text to n 144 above. There is a risk that a multinational enterprise will not apply for recognition in a local country where it is capable of marshalling the assets without involvement of the local court and local law. This seems to be potentially possible for most SSA countries given the implementation of bilateral investment treaties that provide right for transfer and expropriation of funds and capital. A proper and effective regulation as above suggested will ensure transparency. For a discussion on the right to transfer capital and funds see text to Part 4.5.2.4 in chapter 4

<sup>172</sup> JL Westbrook (n 1) 248 & 249

foreign representative, recognition of dividend in respective proceedings, and turnover of local assets for distribution in the main proceedings and handing over of surplus in a non-main proceedings to the main proceeding.<sup>173</sup>

The question is whether the Model Law is well positioned to accommodate the local policy perspectives of the countries under study without marginalising its basic features, ideas and affecting its utility. This is arguably possible given its ‘partial and rather abstract provisions’<sup>174</sup> and the fact that it is ideally meant to be used as templates for adaptation. One element of the preamble to the Model Law directly correlates to the national policy endeavours for poverty reduction through job creation and ensuring that those that are already in employment do not lose their jobs, stipulating that the Model Law seeks to ‘provide effective mechanisms for dealing with cases of cross-border insolvency so as to promote the objective of facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment.’<sup>175</sup> It appears that a well customised version of the Model Law has the ability to protect local interests whilst also signing to recognition of international insolvency interests. However, paragraph 12 of the Guide to Enactment of the Model Law explicitly states that while countries are free to make any changes they see fit, ‘...in order to achieve a satisfactory degree of harmonization and certainty, it is recommended that States make as few changes as possible in incorporating the Model Law into their legal systems.’<sup>176</sup> Such recommendation is reinforced by article 8 of the Model Law which requires courts to have regard to the international origins of domestic implementing legislation – which does entail some degree of commitment to participating in an international interpretive community dominated by the leading common law countries and economies,

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<sup>173</sup> See for example UNCITRAL Model Law art 32

<sup>174</sup> JL Westbrook and another (n 1) 250, contending that as the Model Law does not ‘go too deeply into details and that important features are ...left aside....it leaves the interested countries much space to fill the gaps individually.’

<sup>175</sup> UNCITRAL Model Law art 68

<sup>176</sup> See also the UNCITRAL Legislative Guide para 13 [pg 13] and para 66 [pg 271]. The Guide recognises that insolvency laws must balance the interests of the debtors’ stakeholders against the relevant social, political, and other policy considerations that have an impact on the economic and legal goals of insolvency proceedings.

especially, the UK, US, Australia, and Canada which are generating Model Law jurisprudence.

Accordingly, states seem to have space, with some restriction as above noted, to decide for themselves which part(s) of the Model Law they incorporate into their legislation and to what extent. It is thus not surprising that the Model Law has been adopted differently by different jurisdictions.<sup>177</sup> It is therefore safe to say that customisation of the Model law is reasonably possible as far as it is seen fit to reflect national peculiarities and does not affect the certainty and predictability that are sought to be achieved by its adoption.<sup>178</sup> Besides, the adaptation of the Model Law is not meant to displace local laws or to limit the court's power to provide additional assistance in a cross-border insolvency setting. This is particularly so if an action would be manifestly contrary to the public policy of the countries under study.<sup>179</sup>

From the perspectives of the countries under study, the Model Law offers a useful framework in the following respect.<sup>180</sup> Firstly, it offers the opportunity to make decisions as to whether or not to recognise and, if recognising, the nature of co-operation that should be provided. This means space and maximum flexibility for these countries to consider the extent to which co-operation through deference, or any other relief available, could prejudice the countries' local interests. It seems that making the most of this flexibility requires expertise

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<sup>177</sup> See generally, LC Ho (ed), *Cross-Border Insolvency: A Commentary on the UNCITRAL Model Laws* 2<sup>nd</sup> edn (Globe Business, London 2009)

<sup>178</sup> BM Devling (n 169) 447 while referring to Guide to Enactment states that '...if a nation chooses to adopt the Model Law, that nation is free to amend or delete provisions. The scope of the Model Law is limited to the procedural aspects of cross-border insolvencies. The law is not intended to alter the enacting nation's substantive insolvency laws.'

<sup>179</sup> Notably, the UNCITRAL Model Law has been criticised in this context in that it '...leaves open the possibility of discrimination in the application of priorities when distributing assets to creditors.' See, C Farley, 'An Overview, Survey, and Critique of Adminstrating Cross-Border Insolvencies' (2004-2005) 27 *Hous J Int'l L* 181, 216 citing in support JM Goffman and EA Michael, 'Navigating Through a Multinational Restructuring: Cross-Border Insolvencies, Proceedings and Workouts, Cross-Border Insolvencies: A Comparative Examination of Insolvency Laws of Industrialised Countries (American Bankruptcy Institute 5<sup>th</sup> Ann, New York 2003)

<sup>180</sup> JL Westbrook and others (n 1) 250, noting that the very nature of the Model Law '...add some attractiveness to it since it leaves the interested countries much space to fill the gaps [left by it] individually'

and practical experience in dealing with cross-border insolvency matters which is hugely lacking in these countries.

Second, it seems possible for the Model Law to be adopted to also deal with cross-border insolvencies that concern proceedings from foreign countries that maintain bilateral co-operation arrangements with the countries under study and perhaps other countries that have close ties with the countries under study. The underlying basis is the mutual relationship and trust that exists between the countries and which makes it possible, under the Model Law, to extend automatic recognition and co-operation to such countries in cross-border insolvencies and, as appropriate, according treatments to foreign creditors and debtors from contracting states that correspond with the standards stipulated in the respective bilateral investment treaties and such other international co-operation arrangements. There is scope for arguing that alongside this approach, such general provisions for recognition (subject to fulfilment of certain conditions) of proceedings originating from other countries can be maintained.

It would follow that all other countries that are not subject to the automatic recognition may only enjoy recognition and co-operation on a case-by case basis if there is sufficient fulfilment of the conditions set forth (e.g the conviction that the foreign proceeding fulfils the domestic functions and desirable features of an insolvency proceeding) or that it is otherwise in the public interest to extend such co-operation.<sup>181</sup> Mauritius's law that has recently adopted the Model Law seems to be based on this reasoning, though it requires the existence of an agreement for the mutual recognition of insolvency proceedings with any foreign jurisdiction (notwithstanding any prevailing long standing relationship) that provides appropriate protection for the interests of debtors and creditors in

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<sup>181</sup> It has been argued that full and willing co-operation is only achievable through the existence of an appropriate international agreement. See for instance PJ Omar (n 107) 173; and ML Nauta and F Bulten, 'Introduction to Spanish Cross-Border Insolvency Law-An Adequate Connection with Existing International Insolvency Legislation' (2009) 18 *Int'l Insolv Rev* 59, 71 and 72; and K Yamauchi, 'Should Reciprocity Be a Part of the UNCITRAL Model Law on Cross-Border Insolvency?' (2007) 16 *Int'l Insolv Rev* 145; and LC Ho (n 177) 11 and 12

Mauritius.<sup>182</sup> Much as this corresponds with the perspectives that emerge from the policies, consideration must be had to the pros and cons of various forms of reciprocity in cross-border insolvencies, and as mentioned earlier, the extent to which foreign jurisdictions might have incentive to strike agreements for the mutual recognition of insolvency proceedings with the countries under study. Incentive for concluding such agreements cannot be guaranteed as it largely depends on the extent of the capital flow and trade between the countries. Indeed, failure to conclude such agreements will have a direct consequence of making the law inapplicable.

The Legislative Guide, which recommends that states enact the Model Law, encourages the use of *lex fori concursus* in determining the applicable law in cross-border insolvencies and advocates that the forum state's laws should control "all aspects of the commencement, conduct, administration and conclusion"<sup>183</sup> of the proceeding. Given the significance of requirement of trust which is also reflected in the policy perspectives, this could be made to have direct effect only to countries that have traditional and long established relationships; concluded bilateral investment treaties with the countries under study; or those that are member states in the same regional integration groupings. It might also be applied within the context of an agreement for mutual co-operation among contracting parties, as above discussed. A potential problem is in relation to the ability of the countries under study to exercise independent views and wishes as to how best they should enact the Model Law in to a domestic law.<sup>184</sup>

### **7.6.2 Searching for a Framework for a Regional Cross-Border Insolvency Regulation**

One of the striking features of the national policies of the countries under study is the emphasis placed on regional co-operation and integration matters. Indeed, Tanzania and Kenya are among SSA countries that are member states of several

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<sup>182</sup> See Insolvency Act 2009 (Mauritius) ss 366 and 368. It is not clear whether the existing bilateral investment treaties may be held to fall within the scope of the envisioned agreement for mutual co-operation.

<sup>183</sup> UNCITRAL Legislative Guide (Recommendation 31)

<sup>184</sup> See for example text to n 85 in chapter 3

regional integration arrangements.<sup>185</sup> The policies reflect the aspiration and the need to strengthen and cooperate in regional integrations. As trade and investment expand and grow due to the enlargement of the market in a regional integration, competitiveness increases and thus also the potentialities for cross-border insolvencies affecting the member states. While addressing the challenge of cross-border insolvencies at a national level is a step in the right direction, cross-border insolvencies with a regional and global flavour would necessarily require a regime that reflects the objectives of the regional integration and one that will encourage trading and investing across the regional integration.<sup>186</sup> These objectives point to a regional approach to cross-border insolvency that might arguably influence the manner of adoption of a framework such as the UNCITRAL Model Law. As discussed in the previous section, the Model Law can well be customised and adapted in a manner that is commensurate with the local policy perspectives.

#### **7.6.2.1 Benefiting from Selected Regional Cross-Border Insolvency Regimes**

In considering a framework on the basis of which regional cross-border insolvency for SSA countries can be developed, one must have regard to the existing cross-border insolvency regimes crafted for regional integration purposes. The first is the ECIR which provides a coordinating measure for cooperation in cross-border insolvency matters among EU member states.<sup>187</sup> The ECIR has potentials of having possible influence in SSA owing to the following facts. On the one hand is the historical influence that Europe has had on SSA for centuries, which is clearly apparent in the legal systems of all SSA states.<sup>188</sup> And

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<sup>185</sup> Text to n 137 in chapter 4. On average each SSA country is a member of at least two regional integrations

<sup>186</sup> JL Westbrook (n 101) 38 and 39. Westbrook underscores the importance of having regional integration being also ‘part of the continuing expansion of economic ties among all nations around the world.’ And that they should ‘avoid the reality, or even the appearance of creating a “club” that looks only inward.’

<sup>187</sup> A Walters and A Smith, ““Bankruptcy Tourism” under the EC Regulation on Insolvency Proceedings: A View from England and Wales” (2010) 19 *Int’l Insolv Rev* 181

<sup>188</sup> These ties also explain why much of the bilateral investment treaties that SSA countries have concluded thus far were with developed countries from Europe. Notably, it is clear from the existing literature that the OHADA cross-border insolvency regime was also heavily influenced by the ECIR. However, OHADA was in fact implemented earlier than the ECIR because of the time spent in negotiating the EU regime.

on the other hand is the economic influence that Europe has through the EPA and similar arrangements discussed in chapter four which entail a requirement for African countries to undertake reform, implement the rule of law, good governance, and undertake further liberalisation of trade and investments.<sup>189</sup> The second is the OHADA Law discussed in chapter six of this thesis and which is highly regarded as the only SSA regional based cross-border insolvency regime.<sup>190</sup> The other is the little known historical East African arrangement discussed in chapter six of this thesis and which is in this thesis referred in brief as BRR.<sup>191</sup> As is the case for the OHADA Law, BRR is based on uniform law and practice among member states. While these regimes offer some lessons for crafting a regional based cross-border insolvency regime for regional integrations that do not have one, it is not necessarily the case that they all present workable models for wholesale transplantation by SSA regional arrangements without adaptation to reflect local situations, traditions and values.

Clearly, uniformity and divergence of domestic insolvency systems in member states in the respective regional arrangements are the crucial factors that shaped the nature of such regimes. The divergence or uniformity reflects the extent to which the concerned member states differ or share similar history, culture, and other aspects of the local circumstances. This means that because of the widely differing substantive insolvency laws based on territorial sentiments and protection of local interests, it is in many instances difficult to have a regional system that provides for commencement of proceedings having universal scope and effect under its applicable law throughout the member states of the relevant

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<sup>189</sup> Notably, the approach of the EU towards SSA countries especially within the context of the Economic Partnership Agreement (“EPA”) is mainly through the SSA regional groupings rather than individual countries. This is also the case with the current US approach. See text to n 48, 144, 145, 150, 168 and 169 in chapter 4

<sup>190</sup> See text to n 16-18 in chapter 1; and text to part 6.7.3 in chapter 6. See also B Martor, N Pilkington, DS Sellers and S Thouvenot, *Business Law in Africa: OHADA and the Harmonization Process* (Kogan Page, London 2002) 191 and 192; and JL Westbrook and others (n 1) 247

<sup>191</sup> See text to part 6.5.1, 6.5.2 and 6.7.1 in chapter 6. For a historical application of the BRR see, IR MacNeil, *Bankruptcy Law in East Africa* (Dar es salaam University College, Dar es salaam 1966). One theory that explains the non-application of this legal regime is the socio-economic condition that prevailed after independence following policies that were pursued by most SSA countries including Tanzania and Kenya.

regional grouping.<sup>192</sup> The implication is that the process leading to conclusion of a workable regime may be protracted and tedious. A practical solution is to attempt to balance the different interests in order that the proposed system becomes relevant and practical.<sup>193</sup>

The ECIR offers a good example of how universal jurisdiction may be limited in some ways on account of, or in order to, protect the divergent legitimate local interests whilst guaranteeing legal certainty in proceedings.<sup>194</sup> The treatment of security interests, the right to set-off, reservation of title, contracts relating to immovable property, payment systems, and financial markets, employment contracts, rights subject to registration and detrimental acts offer an example of how compromise was struck between the conflicting interests and yet at the expense of having a universal jurisdiction.<sup>195</sup> Accordingly, it is such inherent differences in such policy aspects among the EU member states that determined and shaped the regime's approach,<sup>196</sup> notwithstanding the fact that the region in which the ECIR operates is leading the world in having a highly integrated market.<sup>197</sup>

Notably, most countries and regional integrations in SSA have more or less similar history, culture, socio-economic circumstances and legal background. It must also be added that with the liberalisation drive, it is also a fact that national policies that have hitherto been adopted for these countries share similar objectives, aspirations, needs, and priorities while the preoccupation of fighting poverty through economic growth and sustainable development is their central premise. Indeed, one reason for such similarities in the policies is the influence of the Washington Consensus policies which have been reflected in the IMF and World Bank reform prescriptions for developing economies. This kind of uniformity is a crucial factor insofar as harmonisation within some, if not all,

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<sup>192</sup> A Walters and A Smith (n187) 186

<sup>193</sup> B Wessels, 'The European Union Insolvency Regulation: An Overview with Trans-Atlantic Elaborations' (2003) *Ann Surv Bankr* L 481, 491

<sup>194</sup> See ECIR arts 6, 7, 8, 11 and 10. For a discussion of this issue, and in particular how certain aspects were carved from the general choice of law rule, see SM Franken, 'Three Principles of Transnational Corporate Bankruptcy Law: A Review' (2005) 11 *Eur L J* 232, 254

<sup>195</sup> See ECIR art 6, 7, 8, 10, 11 and 13; and SM Franken (n 194) 254

<sup>196</sup> A Walters (n 187) 9; and S Davydenko and J Franks (n 9) 565; and J Pae (n 158) 568

<sup>197</sup> See text to n 51 in chapter 3

SSA regional integrations is concerned. The EAC which traditionally consisted of Tanzania, Kenya and Uganda and more recently, Rwanda and Burundi, as its new members, is an example in this regard. While Tanzania, Kenya and Uganda have an English common law background, Rwanda and Burundi have a civil law background.

Given that the majority of EAC member states are of the English common law background, there is merit to consider whether there is still potential for harmonisation of the insolvency laws of member states and the possibility of having a regime that provides for proceedings having universal scope and effect across member states. One point discussed in chapter six of this work that must be raised in this connection is the fact that the EAC, as it is for all other regional integrations in SSA, implements the policy of harmonisation of all laws, especially those related to trade and investment with a view to creating a sustainable environment for cross-border trade and investment across the region through *inter alia* the enlargement of the regional market.<sup>198</sup>

Despite some inherent weaknesses, there are positive developments in other sectors which in fact add to the need for having a uniform cross-border insolvency regime for the entire community.<sup>199</sup> This would mean taking a different approach from one taken by the EU in some respects for reasons that will become clear in the discussion below. The foundation for such endeavour is in the BRR regime that, though forgotten, is still potentially in force between member states of the traditional East African region that includes Tanzania and Kenya. If harmonisation of cross-border insolvency law is pursued, it means that the region will have made one step towards eradication of the potential problems

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<sup>198</sup> See Treaty for the Establishment of East Africa Community, art 8(4) and (5). It is on the basis of such provision that the EAC established the Task Force on Approximation of National Laws in EAC context and a Project on harmonisation of commercial law which is still under implementation. It is also worth noting that East Africa Community is in the process of finalising its Industrialisation Policy and Strategy which will provide a detailed regional framework for co-operation in the field of industrial and SME development. The goal of co-operation in industrial development is to enable Partner States to collectively and individually attain accelerated, harmonious, and balanced development, as outlined in Article 5 of the Treaty of the Establishment. See < <http://www.eac.int/about-eac/events.html> > accessed 13 Novwem2011

<sup>199</sup> See text to n 226 and 227 in Chapter 6

of forum shopping,<sup>200</sup> which is not uncommon in other regional communities, such as the EU and the North America Free Trade Agreement countries (“NAFTA”) mostly between the US and Mexico.<sup>201</sup>

Since harmonisation of insolvency laws is the basis of the OHADA, there seem to be two opposing options to be considered. The first is the feasibility and practicality of other SSA countries, such as Tanzania and Kenya joining the regime. The second is to craft a cross-border insolvency regime that is based on the OHADA model; but one that is mindful of the EAC circumstances, including the BRR that has been in place from the colonial administration era. The first option could be desirable for the interests of the whole of SSA and one that could be pursued within the context of the African Union (“AU”) in the longer term.<sup>202</sup> On the contrary, the second option is more feasible and if pursued will provide a foundation towards the adoption and implementation of an African-wide cross-border insolvency regime in the longer term.<sup>203</sup>

In the context of formulating a modern regime for EAC, as it might be the case for other regional integrations in SSA, consideration and resolution will need to be made in three aspects. The first is on the issue of whether or not the centre of main interest (“COMI”) test should be used as the only jurisdiction test. This is contrasted by the presence of the debtor’s assets cum the ‘first proceedings to be commenced’<sup>204</sup> test which is applicable in the BRR that has hitherto been in place between Tanzania, Kenya and Uganda.<sup>205</sup> In the event of concurrent proceedings being opened in more than one member state under the BRR, the jurisdiction to continue and administer the proceeding having universal scope

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<sup>200</sup> JAE Pottow, ‘The Myth (and Realities) of Forum Shopping in Transnational Insolvency’, (2007) 32 *Brook J Int’L L* 785, 787, and 792

<sup>201</sup> See for instance, A Walters and A Smith (n 187); G McCormack, ‘Reconstructing European Insolvency Law - Putting in Place a New Paradigm’ (2010) 30 *Legal Stud* 126 ; WG Ringe, ‘Forum Shopping under the EU Insolvency Regulation’ (2008) 9 *Eur Bus Organisation LR* 579 ; and JG Canedo (n 32) 25 & 28

<sup>202</sup> For further views in relation to this point see text to n 261 and 262 in Chapter 6

<sup>203</sup> JL Westbrook and others (n 1) 247 and 248

<sup>204</sup> See text to n 191-194 in chapter 6 for a detailed treatment of this test along with its corresponding provisions of law in Tanzania and Kenya.

<sup>205</sup> This test can be compared with the test that applies in the ECIR when two or more proceedings in two or more member states are opened as main proceedings.

and effect throughout the member states will vest in a member state that, apart from having the presence of some of the debtor's assets, was the first to commence the proceedings.<sup>206</sup> This effectively leads to rescission and/or dismissal of the other proceedings and/or any order issued under it.<sup>207</sup> The second aspect concerns whether or not there should be secondary proceedings in other member states other than one that has controlling jurisdiction with universal scope and effect and, if so, under what circumstances and how they should relate to the main proceedings.<sup>208</sup> And the third aspect is in relation to making the regime 'part of the continuing expansion of economic ties among all nations around the world.'<sup>209</sup>

While the COMI test applicable in the ECIR and in the OHADA Law (as the principal place of business of the debtor) is in accord with the international insolvency benchmarks, it has proved to have practical complications.<sup>210</sup> The most notable one is its potential problems of forum shopping and difficulty of ascertainability by third parties. In the EAC context, for example, the implication that the COMI approach may have, is having the COMI often located in a few specific countries, and more particularly in Kenya. Although, this is not that bad, it has potentials of having far reaching and negative implications for the future of the community. This is understandable from the historical, political and socio-economic points of view which are worth noting herein below.

Most businesses are likely to have their administration headquartering in Kenya, which is considered as being relatively more advanced than the other member states. This means that most of the businesses are likely to have their COMI in Kenya.<sup>211</sup> Indeed, Kenya has had a far more liberalised economy than any of the

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<sup>206</sup> Text to n 192 in Chapter 6

<sup>207</sup> Text to n 194 in Chapter 6. See also JL Westbrook (n 4) 873-875, describing how dismissal solution could be effective in resolving the problem of local rules constraining co-operation in cross-border insolvency.

<sup>208</sup> See text to n 195-198 in Chapter 6

<sup>209</sup> JL Westbrook (n 101) 38 and 39

<sup>210</sup> G McCormack (n 201) 126. McCormack describes the COMI as a fatal flaw at the heart of the ECIR.

<sup>211</sup> Indeed, the Treaty establishing the EAC recognises asymmetry as a core principle underpinning the formation of the EAC custom union. It is justified on the basis of the understanding that the three countries are at different levels of economic development.

other member states within the EAC. Above all, Kenya has all along been regarded as the most advantaged of all other member states because of reasons which trace their origin from the British administration in the East African region.<sup>212</sup> In fact, the British administration made Kenya, which was the only settler colony in East Africa, the central headquarter of the whole of the East Africa High Commission. To be sure, this is one of the common features in most regional integrations in SSA which should be given thought in any attempt to develop a regional cross-border insolvency regime.<sup>213</sup>

A reflection from a few of the old cases in which the test of location of assets cum the first proceeding to be commenced was invoked shows that it did not pose any difficulty whatsoever.<sup>214</sup> However, there is scope for arguing that the domestic courts of member states may potentially have incentive to expedite the opening of the proceedings. The incentive is in respect of anticipation of becoming the first to commence such proceedings, which could not only render subsequent proceedings in other member states rescinded or dismissed but also have universal scope and effect throughout the member states' jurisdictions.

The role of the former East African Court of Appeal in this regard could well be taken by the East Africa Court of Justice headquartered in Tanzania, as discussed in chapter six of this thesis.<sup>215</sup> There could be some merits in integrating the COMI test within the test applicable in the BRR. For example, the COMI test can be made to apply only if it happens that two proceedings in two or more jurisdictions were commenced at the same time and filing of the respective petitions for the proceedings were made at the same time as well. It can also apply where it appears that 'the estate and effects may be more conveniently

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<sup>212</sup> This was in fact one reason for the collapse of the former EAC in 1977. Notably, the revived EAC has made efforts to reflect and address that fact in most of its policies.

<sup>213</sup> The same seems to be the case for South Africa in SADC, Cameroon in OHADA, and Nigeria in ECOWAS.

<sup>214</sup> IR MacNeil (n 191), discussing cases that entailed application of the BRR. Notably, since this regime is based on location of assets, there could still be potentials for litigation over the legal location of assets instead of litigation over the COMI.

<sup>215</sup> Text to n 231- 234 in Chapter 6

administered, managed and [perhaps even] distributed<sup>216</sup> in the country where the COMI of the debtor is located.

The implication of harmonisation of cross-border insolvency law makes it necessary to consider whether and, if so, to what extent, secondary proceedings should be allowed to co-exist with the main and controlling proceedings. The general approach taken by the BRR is such that the controlling proceedings have direct effect and force in other states where a debtor has assets in the same manner in all respects as if commenced and made in such states.<sup>217</sup>

The insolvency administrator appointed in the main proceedings under the BRR in another member state may either act directly or opt to require the official receiver of the another country where the debtor has assets to act as his agent either in regard to any specific matter, or generally to take all such steps as may be lawful for the discovery, seizure, protection, disclaimer or realisation of any property of the bankrupt situated within such other country.<sup>218</sup> Any such proceedings opened against a debtor in other states whilst similar proceeding had already been first opened in another member state (where the debtor has assets) must be rescinded, annulled or dismissed (as the case may be) in deference to the proceeding that was the first to be opened.<sup>219</sup> Although this approach is based on uniformity of laws, the termination of the other proceedings in deference to the first opened proceeding in another member state would ideally solve any potential problem of local rules constraining co-operation.<sup>220</sup> This approach is contrasted from one that characterises the ECIR and OHADA which allow competent courts in other member states to open secondary proceedings and provide for a co-operation requirement between the main proceedings and secondary proceedings. Indeed, an absence of secondary proceedings has

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<sup>216</sup> See for example Bankruptcy Act (Tanzania) s 161(4); and Bankruptcy Act (Kenya) s 162(4)

<sup>217</sup> See for instance Bankruptcy Act (Tanzania) s 159 and Bankruptcy Act (Kenya) s 160 which both read '[a]ny order, warrant or search made or issued by a reciprocating court shall be enforced by the court [ in Tanzania/ of Kenya] in the same manner in all respects as if such order, warrant or search warrant had been made or issued by itself.'

<sup>218</sup> In *Re Plataniotis* [1958] EA217 (Kenya) ; and IR Macneil (n 191) 215-219

<sup>219</sup> See for instance, Bankruptcy Act (Tanzania) s 161(4). For a discussion of a more or less similar approach which involve dismissal of one proceeding in deference to one that was first to be opened and its advantages and obstacles see, JL Westbrook (n 4) 874-877

<sup>220</sup> JL Westbrook (n 4) 874

potentials to enhance any business's chance of rescue, at least if key assets are situated in member states which would otherwise constitute secondary proceedings jurisdictions.<sup>221</sup> It also adds towards speed and efficiency of the proceedings which is always of utmost importance in cross-border cases.<sup>222</sup> However, since the BRR provides a very limited space within which concurrent proceedings may occur,<sup>223</sup> if such a regime were to be developed and modernised, it could be important to include in it in an explicit manner the duty to cooperate between such proceedings as such a requirement at the moment is not clearly stated.

The approach reflected in the BRR seems to be relevant for Tanzania and Kenya in the context of the present EAC. This is on account of its historical and cultural basis, let alone the fact that it had albeit for some decades ago, been tested and proved to have worked well. It is also justified by the extent of harmonisation, which to a great extent dates from the colonial period; and the small number of countries involved in the arrangement.

The joining of the civil jurisdictions of Rwanda and Burundi in the East Africa Community is likely not to impede the level and extent of harmonisation and adoption of the regime based on the BRR for the EAC, which now comprises Tanzania, Kenya, Uganda, Rwanda and Burundi. Although these countries seem to have different legal systems and culture, they share much of their historical, geo-political, economic, philosophical, dialect and other cultural backgrounds, which are more deeply rooted to the societies than the legal system and legal culture. More importantly, Rwanda and Burundi have so far been undertaking reforms which signify transformation of their civil law based legal systems and

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<sup>221</sup> A parallel can be drawn from the lessons that can be drawn and learnt from the case of *Re Collins & Aikman Corp. Group* [2006] EWHC 1343 (Ch) whereby avoiding opening of secondary proceedings enabled the administrators to achieve the purpose of administration on group-wide basis. See G Moss, 'Group Insolvency-Choice of Forum and Law: The European Experience under the Force of English Pragmatism' (2007) 32 *Brook J Int'l L* 1005, 1017-18

<sup>222</sup> JL Westbrook (n 1) 241

<sup>223</sup> Text to n 195 and 196 in chapter 6

culture towards the common law traditions.<sup>224</sup> Such transformation is indeed part of the implications arising from the joining of the EAC.

#### **7.6.2.2 Adopting the Model Law by and for a Regional Integration**

As discussed above under part 7.6 in relation to the relevance and suitability of existing cross-border insolvency initiatives, it is arguably practical for the countries under study to customise the UNCITRAL Model Law to suit their circumstances. Using the EAC as a case study this part takes this point further by considering the adoption of the Model Law as a regional community instrument.

Consideration of adoption of the Model Law as a regional community instrument is novel and raise questions of its practicality.<sup>225</sup> Clearly, the Model Law does not envision its adoption as a regional community instrument. This is notwithstanding that the Model Law was significantly influenced by the development of the EU regional based cross-border insolvency regime<sup>226</sup> and it was developed when the global phenomenon of countries to organise themselves in regional groupings was already common all over the world.

The adoption of the Model Law as a regional instrument and as part of the regional harmonisation and unification of laws policy requirement would be a very significant development that is commensurate with the need for enlargement of the markets that the regional communities, such as the EAC, seek to achieve.<sup>227</sup> The implication of this endeavour, if pursued, would enable standardisation, harmonisation and unification of the procedures for dealing with

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<sup>224</sup> R Mugabe, EAC wants Rwanda, Burundi to adopt Common Law System < <http://www.newtimes.co.rw/index.php?issue=13914&article=16230> > accessed 25 May 2011; International Legal Assistance Consortium, *Justice in Rwanda: An Assessment*, 2007 < [http://www.ilac.se/sites/default/files/Rwanda\\_Report\\_2007.pdf](http://www.ilac.se/sites/default/files/Rwanda_Report_2007.pdf) > accessed 25 May 2011; Business Climate Legal and Institutional Reform, Overhauling Contract Enforcement: Lessons From Rwanda, March 2007 < [http://www.bizclir.com/galleries/bestpractices/01.128.08BP17\\_Rwanda.pdf](http://www.bizclir.com/galleries/bestpractices/01.128.08BP17_Rwanda.pdf) > accessed 25 May 2011; USAID, Report on Rwanda Library Needs Assessment, < [http://pdf.usaid.gov/pdf\\_docs/PNADU580.pdf](http://pdf.usaid.gov/pdf_docs/PNADU580.pdf) > accessed 25 May 2011

<sup>225</sup> For practicality and advantages of taking this approach within the context of a regional integration and issues that may arise in adopting and implementing the UNCITRAL Model Law, see JL Westbrook (n 101) 38 and 39; and JL Westbrook and others (n 1) 248 and 264

<sup>226</sup> JL Westbrook and others (n 1) 255

<sup>227</sup> Text to n 201 above. See also SL Sempasa, 'Obstacles to International Commercial Arbitration in African Countries' (1992) 41 *Int'l & Com L Q* 387, 412 for this line of reasoning, and its socio-economic advantages.

cross-border insolvency involving non-member states in the same way as it has already been or is being effected in other aspects relating to trade and investment with non-member states. This will potentially encourage more intra and inter-regional economies of scale and developing wider markets and large economic affiliations which are essential in producing infrastructure conducive for international business.<sup>228</sup> The challenge is reflected in several questions that might need to be resolved when pursuing this approach. Westbrook captures the challenge when briefly considering the possibility of the adoption of the Model Law as a regulation under EU with respect to non-EU proceedings in the following words:

...[T]here would obviously be some additional provision to consider. Perhaps one court could be given international jurisdiction to recognize foreign main proceedings under article 7. If so there could be questions like these: Could that court also grant interim relief effective throughout the community? Which law would apply under article 20? Could that court release assets found in all EU countries?

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Notably, if the approach for regional regulation of cross-border insolvencies within the EAC which this thesis made a case for were adopted, it would provide a foundation for the adoption and implementation of a customised Model Law for the regional integration's co-operation with foreign proceedings having connections in more than one member state. This would be consistent with the policy aspects seeking to promote co-operation in the context of regional integrations and beyond. Notably, adopting a regional cross-border insolvency framework entirely based on BRR, or any other existing regional frameworks, alone will not save the relevant policy perspectives that seek to promote co-operation beyond the regional integration. Understandably, the common feature of the existing regional cross-border insolvency initiatives is that they focus on the relations among nations in the region.<sup>230</sup> As a result, they almost completely 'neglect...the world outside [their] member states...[and this]...creates,

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<sup>228</sup> SL Sempasa (n 227) 412. As discussed in chapter 4, there is a trend now for the advanced economies such as the US and EU to deal with SSA countries in matters regarding economic co-operations and reforms through the SSA regional groupings. The US has so far concluded several agreements with some regional groupings including EAC. On this trend, see text to n 48, 168 and 169 in chapter 4. See also n 189 above.

<sup>229</sup> JL Westbrook (n 101) 40

<sup>230</sup> JL Westbrook and others (n 1) 248

irrespective of [their] internationality, something like a territoriality principle on a larger...scale.<sup>231</sup> This characteristic feature of the regional cross-border insolvency regime, arguably, defies the very essence of the enlargement of markets and its resulting consequences.

This idea arguably merits research in its own right. However, there are some key considerations that deserve brief attention. Firstly, in pursuing this idea, it might be a practical approach to consider enabling the Model Law adopted as a regional instrument to apply in certain respects within the context of the regional cross-border insolvency that operates among member states. As far as EAC is concerned, one possibility is to enable proceedings commenced under the adopted Model Law in one member state to have effect in all other member states in the nature of the universal effect of the proceedings commenced in a regional framework such as BRR.<sup>232</sup> In this regard, it is the law of the member state in which such proceedings have been commenced that would apply to the other member states. Indeed, there should be no problem in this approach given that the law of member states will be a harmonised law and therefore similar in all respects. The competent courts in the other member states may only, if need be, have a very limited power in such proceedings as it is the case under the BRR.<sup>233</sup> Again the East Africa Court of Justice could very well serve as an appellate court in matters originating from the competent court of respective member state jurisdictions.

The second and probably less complicated approach is providing for customisation and adoption of the Model Law by member states of the EAC as part of the harmonisation policy requirement without having the Model Law enforced and applied at a regional level but unilaterally by individual member states in matters involving a non-member state. Despite the simplicity of this approach, it does not augur well for the policy perspective of strengthening of regional integration and enlargement of markets in a regional context for development of trade and investment. Additionally, it does not necessarily

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<sup>231</sup> Ibid 259

<sup>232</sup> Text to n 220 above

<sup>233</sup> Text to n 226 above; and text to n 195 and 196 in chapter 6

provide any clear link with a regional cross-border insolvency regime.<sup>234</sup> The last possible option would be to incorporate third countries or regions by means of treaties into the applicable scope of the regional initiative.<sup>235</sup>

### **7.7 Thinking Outside the Box: Resolving Indeterminacy of Local Policies**

As noted above, despite the potential utility of the national policies, they could be indeterminate in many respects including the fact that they might not necessarily encapsulate truly relevant local interests. In particular, there are concerns as to the degree of community participation in social policy formulation in both countries and the extent to which they truly represent the local contexts. The concerns are such that the participation is limited and the masses are not empowered, politically and economically to take an effective role in formulating and implementing the policies.<sup>236</sup>

These concerns may mandate the need to resort to extraneous means beyond the national policies and having regard to realities of the societies to gain an understanding of what is truly representative of a national-wide consensus of a country.<sup>237</sup> A consensus from which local interests relevant to cross-border insolvencies can be derived ‘...so that a person committed to a global approach to multinational insolvency would nonetheless agree that this or that sort of claim or claimant would best be governed by local insolvency law.’<sup>238</sup> Clearly, such undertaking requires full involvement of highly qualified peoples ‘...already in the countr[ies] deeply knowledgeable about [them] and working daily on solving

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<sup>234</sup> JL Westbrook and others (n 1) 248, 263 and 264

<sup>235</sup> Ibid 264

<sup>236</sup> AST Mchomvu, TFK Ngalula, GS Nchahaga, FSK Tungaraza, and S Maghimbi, ‘Social Policy and Research Practice in Tanzania’ (1998) 13 *J Soc Dev in Afr* 45, 48. Some policies stipulations seem to be based on the Washington Consensus or neo-liberalism which could mean that their prescription could not necessarily reflect the local contexts. Some policies could also be too old to reflect the present needs and priority. And thirdly and lastly, although in many cases, these policies raise elements which pose a danger for contradiction in implementation, it is not always clear how a balance should be struck. This is particularly with regard to protection of local enterprises and promotion of investment both foreign and local. It seems that one must be aware of these concerns while making use of the policies.

<sup>237</sup> PH Brietze, ‘The Politics of Legal Reform’ (2004) 3 *Wash U Global Stud L Rev* 1, 24 and 25; and G Johnson, ‘Towards International Standards on Insolvency: The Catalytic Role of The World Bank’ (2000) *Law in Transition online* 1. <<http://www.ebrd.com/pubs/legal/lit072.pdf>> accessed 15 June 2009

<sup>238</sup> JL Westbrook (n 6) 515-516.

those countr[ies'] problems.'<sup>239</sup> It is these very people that may help interpret better the policies, venture beyond the national policies and draw attention of insolvency experts to the relevant local aspects which, if reflected in the law, could facilitate its smooth implementation, usage and achievement of its objectives. This consideration also informs the nature of the reform process.<sup>240</sup> It follows that reform undertaking should not be an overnight or dramatic process which would increase the chances of missing the local contexts. Rather, what is required is an incremental, gradual and less complex process aiming at a less complicated output which is not wholly alienated from the local concerns and policies. Accordingly, there is also merit in having the propositions made in this chapter, which are less complex than they may seem to be, approached in a piece meal basis rather than rapidly.

## **7.8 Conclusion**

This chapter addressed the challenge of identifying local contexts that have to inform and be served by a cross-border insolvency law system. It has demonstrated that official national policies of the countries under study potentially offer an insight into the local contexts within which reform and implementation of cross-border insolvency law can be effected in SSA using Tanzania and Kenya as case studies. The examination of selected official national policies of the countries under study identified relevant policy perspectives that should inform any cross-border insolvency law reform effort and help determine the extent to which these countries may '...assimilate [the international benchmarks] as they deem to be compatible with their social goal and priority.'<sup>241</sup> Clearly, the policy perspectives appear to inform both the ingredients of the cross-border insolvency law systems, such as the nature of the priority system in the cross-border insolvency setting, and the theoretical approach appropriate in serving and promoting the identified local policies and interests whilst having regard to the existing international insolvency benchmarks. The theoretical approach of modified universalism was found to be

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<sup>239</sup> J Stiglitz, *Globalization and Its Discontent* (Penguin Books, London 2000) 34-36. See also text to n 113 in chapter 3

<sup>240</sup> See text to part 2.7 in chapter 2; and text to part 3.6 in chapter 3

<sup>241</sup> IF Fletcher (n 163) 774

the most appropriate as it enables a country to evaluate the fairness of a foreign system before cooperating and/or deferring. This approach is significant in enabling the countries under study to address policy aspects, for example, those related to national interests and protection of small local creditors. Given the nature of the Model Law, this chapter found that it has the capacity of being customised and adapted in a manner that is commensurate with the local interests using modified universalism as the overall organising theoretical approach. Throughout the discussion of the characteristics of the local policy perspectives, it became clear and it was vividly shown how the Model Law, customised and adapted for its fitness for purpose, is relevant and suitable to the circumstances of the countries under study. However, a slightly different approach is arguably needed to deal with co-operation in cross-border insolvencies involving member states in a regional community whereby the EAC was used as a case study and other countries with which the countries under study have, for example, long standing relationships and bilateral co-operation.

Indeed, the significance of using the official governments' policies is essentially crucial as it helps create harmony and predictability in the entire legal systems of the countries under study, since it is from such policies that most of the on-going reforms and governments' actions are based. Clearly what is needed for these countries is to overcome their socio-economic vulnerability that could lead them to succumb to international pressure and end up making improper policy choices as discussed in chapter four.

In view of the foregoing, the overall recommendations in this chapter can be outlined as thus. First, modified universalism is the appropriate theoretical approach for crafting a cross-border insolvency law system for the countries under study, given the special circumstances of the countries under study as discussed above. Second, the Model Law is relevant and indeed well suited to accommodate the local contexts using modified universalism as the organising theoretical framework. Third, the existing bilateral co-operations and long standing traditional relationships between the countries under study and foreign countries appear to dictate a different approach that is based on existing trust. On

this point, it is argued that such special arrangement can still be well accommodated within the adopted version of the Model Law or through conclusion of a separate mutual agreement. And fourth, given the importance accorded to regional integration in SSA, it is important to have a regional cross-border insolvency regime that is based on the relevant historical, cultural, and socio-economic values. However, the Model Law should also be adapted within the context of the relevant regional integration to facilitate co-operation with foreign countries that do not fall within the regional integration.

## CHAPTER EIGHT

### CONCLUSION AND RECOMMENDATIONS

#### 8.1 Introduction

This chapter concludes the study. It is divided into four main parts. The first part summarises the main insights that emerged from different chapters of this study. The contribution to knowledge which was made by this study is outlined in part two. In part three, legal and policy implications of the contributions made are highlighted before pointing out the limitations of the study and possible avenues for further direction of research.

#### 8.2 Main Insights of the Study

This study has carried out an in-depth examination and discussion of the challenges that SSA countries face in reform and application of cross-border insolvency law.<sup>1</sup> The study sought to address the potential challenges of cross-border insolvencies emerging from the globalisation of trade and capital. Tanzania and Kenya were used as case studies for SSA countries, though occasionally and where appropriate reference was made to other countries or regions within SSA. The focus of the study was on the risk of failure of SSA legislative processes to properly address the potential challenges of cross-border insolvencies in a manner that is sensitive to the local contexts and which provides a balance with international insolvency benchmarks. The traditional doctrinal legal scholarship was the main approach used in pursuing the study. The following are the major insights of the study.

The context for the study was provided in chapter one, which also served to justify the need for undertaking a study of this nature from the perspective of SSA. It was argued in this chapter, and consistently proved in subsequent

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<sup>1</sup> See text n 21 in chapter 1 whereby South Africa is excluded from the scope of this study on account of the fact that it has *inter alia* received a relatively more attention in insolvency discourse than any other SSA country or region in SSA.

chapters in the course of reviewing the literature, that although a substantial body of literature has developed in recent years in the area of cross-border insolvency, this scholarship has been lacking in a perspective from developing countries in SSA. The preoccupation of the thesis therefore was to provide this perspective.

Chapter two of this study made a theoretical and conceptual analysis of the cross-border insolvency landscape from the perspectives of SSA whilst clearly bringing out the issues that emerge in the quest for crafting a workable and appropriate cross-border insolvency framework for SSA countries. It was argued that the theories and the debate that ensued have exclusively been developed and addressed from the viewpoints of developed economies, which might not necessarily be relevant to SSA. Since examination of this area in relation to SSA (except South Africa) has almost been overlooked by existing literature, the argument posed in chapter one in the course of setting the context of this study became much clearer and was indeed further established. It was accordingly maintained that the position of developing countries, in particular the least developed economies such as those in SSA, deserves to be considered, given the pressures towards globalisation and the potential for this pressure to result in unsuitable legislative reforms. While it could be argued that the theoretical models emerging from the scholarship may help provide and perhaps develop an important benchmark for any reform measure in SSA, it still presents challenges of convincingly translating such models to the local circumstances and contexts of SSA. It further became clear that the endeavour of exploring the relevant local contexts does also present challenges in the reform process. Nevertheless, it was clear that the theoretical debate serves to expose the benefits and ills of each theoretical approach and a theoretical model which any reform measure ought to take into account, though from the perspectives and local contexts of SSA countries.

Examination of the global drivers for convergence of insolvency law systems including cross-border insolvency regimes was undertaken in chapter three in the context of the quest for an appropriate and workable framework for cross-border

insolvency regulation in SSA countries. It was observed that in view of the globalisation of trade and capital and the extent to which SSA is increasingly integrated into the global economy, the development of effective cross-border insolvency systems is now more relevant in SSA countries than ever before. The international insolvency standards therefore have, arguably, the potential of facilitating the reform of cross-border insolvency law.

However, an important challenge presented by the international insolvency standards that emerged and was discussed in chapter three is that although these benchmarks envisage local innovations and adaptation, in reality they still seem to envisage that ‘one-size-fits-all’, especially in relation to the vulnerable SSA countries which do not have the capacity to challenge the prescriptions of the responsible multilateral institutions. The other major limitation inherent in these international insolvency standards is that their compliance and assessment process conducted by the multilateral institutions does not seem to delve into the details of the local contexts that may influence the shape and implementation of the insolvency laws, and correspondingly cross-border insolvency law of a country. This is critical because the international insolvency standards do not contain a version translated into the contexts of circumstances specifically pertaining to SSA, though they appear to allow, with some inherent restrictions, innovations to reflect local circumstances. The other limitation is perhaps in the extent and manner in which local experts are employed in the process, which limits their role and influence in the assessment exercise and compliance process. Nevertheless, the key challenge is to balance the local contexts against the international insolvency benchmarks in a manner that will improve and modernise their cross-border insolvency frameworks. The danger is looming that these countries may adopt the benchmarks in their laws to please the international community and the responsible multilateral institutions in anticipation of attracting financing without necessarily having them complied with in the actual practice.

Two theoretical approaches for complying with the standards were noted in chapter three as offering frameworks on how effective adoption and implementation of the standards by low income countries such as SSA countries could be effected without jeopardising the interests of such countries. The first approach insists on the importance of ensuring that standards adoption, implementation and assessment give due consideration to the domestic focus, experience, needs, and capabilities of a low income country with the objective of market development and enhancing market efficiency. The other approach insists that countries must adopt a more gradual approach to the implementation of the standards when a substantial amount of reform is required. Notably, whereas the former approach was seen to reflect the theoretical view against transplants and a 'one-size-fits-all' approach and to encourage consideration of local contexts, the latter reflects the incrementalist theory which advocates for modesty and gradual reform of global insolvency law giving allowance for substantial deviation while also reducing the risk of outright rejection. Nevertheless, both approaches complement one another in so far as their application to a developing country is concerned. The emerging practice of reforming insolvency laws and their cross-border insolvency regimes as part of the poverty reduction strategy is welcome. However, the close involvement of the multilateral institutions in the formulation, implementation, monitoring and evaluation of such strategies including provision of technical and financial support for the whole process may present some form of indirect pressure which could again lead to legislation being adopted just for the sake of pleasing such institutions without having due regard to the local contexts.

Chapter four examined various arrangements for facilitation of cross-border trade and investment in which SSA countries have been involved and considered the extent to which, and how, the arrangements implicate cross-border insolvency regulation in such countries. The arrangements were considered in the context of: (i) the SSA market liberalisation and reform strategies undertaken under the auspices of the multilateral institutions (mainly the IMF, and the World Bank); (ii) international trading systems as they affect developing countries in SSA; (iii)

the bilateral investment treaties concluded between SSA countries and, mainly, developed countries; and (iv) regional and interregional economic co-operation among SSA countries and between SSA countries and developed and emerging economies respectively. It was found that while such arrangements, especially the bilateral investment treaties that SSA countries have been concluding, mainly, with developed countries, provide an important base for determining the needs of SSA countries and shaping their respective cross-border insolvency frameworks, they significantly limit the space in which SSA countries as host countries of foreign investors could regulate the foreign investments and deal with them in insolvency proceedings in a manner that does not compromise local circumstances.

It further became clear in chapter four that the growing body of these treaties and other arrangements restrict the ability of these countries to customise the international insolvency standards to suit their local circumstances and interests, as in doing so they have necessarily to take into account their obligations and promises under such treaties. This, for instance, means that the ability of the host countries in SSA to adopt a policy within the framework of a cross-border insolvency system that may seem to treat domestic interests more favourably than foreign ones, or treat investors from a certain country more favourably than others, is significantly restricted. An interesting feature that emerged from the chapter with regard to the bilateral investment treaties is that they are based on reciprocity and do not generally recognise the special circumstances of SSA countries in the world of finance, trade, investment and technological advancement which could have necessitated giving prominence to protection of local interests, such as the promotion of local industries, protection of natural resources, and poverty reduction.

It was pointed out further in chapter four that the implication of the arrangements for facilitation of trade and investment suggests that SSA countries would not need an entirely different framework from those suggested by the consensus emerging from the debate on the theories and the international insolvency

benchmarks which again link to the question of how SSA can have its broader local contexts reflected in cross-border insolvency regulation without violating its various international treaty commitments. It was in that respect noted that the arrangements effectively pull potential cross-border insolvency frameworks of SSA countries towards a universalist stance and away from territorialist approaches. The key finding of this study was that such arrangements, as characterised mainly by the bilateral investment treaties, embody general principles of law which inform and determine the nature and content of SSA host countries' cross-border insolvency frameworks. This is reinforced by the requirements explicitly advanced by interregional economic arrangements for undertaking and maintaining liberalisation, the rule of law and good governance and the consequent enhancement of the interaction of SSA countries with multinational enterprises involved in international business and hence the potential of SSA countries being involved in a cross-border insolvency situation. It was argued that the increasing number of arbitration claims against developing countries based on the alleged violation of bilateral investment treaties coupled with the emerging trend of renegotiation of such treaties, show how these countries have been caught in between.

An examination of the influence of the colonial legacy on SSA countries' legal systems as it relates to cross-border insolvencies was undertaken in chapter five, using the application of the English common law in Tanzania and Kenya as a case study. The English common law was chosen for its pronounced influence in the common law jurisdictions in SSA. The chapter evaluated the common law approach to cross-border insolvency and the landscape within which it is applied, before considering the following issues. The first is the suitability of the English common law in helping to address and resolve cross-border insolvency problems as they arise. And the second is the impact of the application of the English common law in the positioning of the existing cross-border insolvency frameworks in SSA countries within the competing cross-border insolvency theories and the international insolvency benchmarks.

It was found that the application of the English common law approach to cross-border insolvency would have the effect of pulling the cross-border insolvency frameworks of the relevant SSA countries towards modified universalism. However, the extent to which the English common law might apply is, arguably, unpredictable and uncertain as it depends on several factors that cannot be ascertained by any interested party upfront. The key factors are: the extent to which the reception clauses that apply the English common law at least in theory allow the common law to be brought into use; the extent to which existing legislation provides for cross-border insolvency; the judicial attitude towards the common law; the consideration of the extent to which the local circumstances permit and/or qualify its application; the extent to which the common law has already developed a relevant principle for an existing cross-border insolvency problem; and the extent to which judges in the relevant SSA jurisdictions are well facilitated and equipped to access recent developments in the English common law.

From the perspective of countries such as those of SSA which might always be deferring to foreign jurisdictions in insolvency proceedings, the common law approach to cross-border insolvency could be relevant. It offers a framework that could enable such countries to evaluate the fairness of foreign proceedings in relation to local interests before deciding whether and in what manner to cooperate. However, the scope of discretionary powers which the court could exercise under the common law would be limited by the existence of bilateral investment treaty commitments. Such commitments would require the common law to be applied in a manner that is consistent with the stipulations of the relevant bilateral investment treaty. One argument is that the discretionary powers could only be exercised in a manner that promotes and protects foreign investments and investors or is in accord with the legitimate expectation of the investors. Thus, the implication of the cross-border trade and investment arrangements is to restrict the scope of discretionary powers which the court in the countries under study could otherwise exercise under the English common law.

A critique of the existing legislative frameworks for cross-border insolvency in SSA undertaken in chapter six with reference to Tanzania and Kenya made it clear that the limited extent to which they cover cross-border insolvencies means that they provide a potentially wider scope for the application of the common law approach to cross-border insolvency. However, the actual application of the common law would remain unpredictable on account of the factors outlined above which were discussed in chapter five. The unpredictability as to the application of the common law is arguably inconsistent with the underlying reasons for the conclusion of the cross-border trade and investment arrangements.

The survey of the state of the cross-border insolvency legislative frameworks in respect of the countries under study revealed that the laws and their respective developmental trends still reflect the prevailing colonial legacies and are greatly influenced by the legislative developments in the former colonial powers. While the general thrust of the governments of SSA countries is on facilitation of the flow of investment and trade (as is reflected in the bilateral investment treaties concluded thus far), the drive is yet to be widely reflected within the existing insolvency legal frameworks. Lack of clarity in such frameworks is also evidently reflected in the lack of clear adherence to the local contexts in some important respects. The current reform initiative in Kenya seeks to address the situation by benchmarking the cross-border insolvency reform process using the UNCITRAL Model Law on Cross-Border Insolvency. A critical look at the Bill seeking to adopt the Model Law made it clear that Kenya is contemplating to make such adoption with indeed very little adaptation if any, the main intention being to improve its ranking in the *Doing Business Reports* and contributing in attracting investments. The extent to which such a move seeks to serve the Kenyan local policies as a whole is not that clear. It remains to be seen if the Bill will, once it turns into law, and if the law really happens to be fully implemented, address the uncertainties and unpredictability in the application of the law and

provide an appropriate balance between the international benchmarks and the local contexts.

The other insight from chapter six is that while within SSA it is only OHADA that has widely been acknowledged for institutionalising a regional cross-border insolvency regime based on uniform law, there has long been in existence a harmonised legal regime for Tanzania and Kenya (in addition to Uganda) for co-operation in cross-border insolvency, referred in this thesis as BRR. Despite being forgotten in the statute books, there is scope for arguing that such a regime is still in force, and that it is also meant to apply to both personal and corporate insolvencies as it is so stipulated in the relevant laws of the relevant countries. It was thus argued that any attempt for development of a modern regional cross-border insolvency regime for the East Africa Community (“EAC”) in which Tanzania and Kenya are member states should start from and be based on, such a historical framework which is already in place and had to some extent been tested. The EAC was used as a representative case study for other SSA regional integrations.

The primary concern of chapter seven was to demonstrate how the relevant local context of the countries under study can be identified from official national policies and used to inform and shape the cross-border insolvency reform process and eliminate the potential risk of ‘too rigid an adherence to global norms which will contribute to a transplant effect of incomplete implementation.’<sup>2</sup> While it is certain that local policies inform and shape insolvency systems of different countries, there is limited scholarship on how such policies can be identified, integrated and reconciled with the global insolvency norms in the process of development of a cross-border insolvency law system for a given country. The chapter argued that the perspectives that emerge from the analysis of the selected national policies are twofold. Firstly, they point to modified universalism as the

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<sup>2</sup> TC Halliday, ‘Lawmaking and Institution Building in Asian Insolvency Reforms: Between Global Norms and National Circumstances’ (5<sup>th</sup> Forum for Asian Insolvency Reform, Beijing, 27-28 April 2006) < <http://www.oecd.org/DAF/corporate-affairs/> > accessed 17 July 2009 [33]

appropriate theoretical framework in SSA context. This theoretical approach could be implemented by the adoption of a customised version of the UNCITRAL Model Law that reflects the local policy perspectives emerging from the relevant official national policies of the countries under study. And secondly, they provide an important insight into the local policy perspectives that are essential for a deep reflection and understanding of the context within which a cross-border insolvency framework in SSA countries would be crafted and operate using the Model Law as a template. Such adaptation can, among other things, be done in a manner that also reflects and recognises the need for a special arrangement based on long established trust with countries with which the countries under study have bilateral co-operations and long standing relationships.

It was noted that some of the local interests emerging from the local policy perspectives may not fall directly within the ambit of the insolvency law system but in other laws which must be considered as they might be integral to the effective operation of the cross-border insolvency law. It was shown that the policy perspectives also inform the ingredients of the cross-border insolvency law systems, such as the nature and scope of priority system in the cross-border insolvency setting. The significance of using the official policies was noted to be important because they help create harmony in the entire legal systems of the countries under study since it is from such policies that any reform in any area of law in such countries must be based, as is the case also for most of the actions of the governments.

Given the policy emphasis placed on regional co-operations, it was argued that a special arrangement might be needed for dealing with co-operation in insolvencies involving member states in a regional integration such as the EAC. While the BRR, OHADA Law and ECIR were found to have relevance in the EAC which was used as a case study, it was argued that any reform measure for the EAC cross-border insolvency regime should take account of the BRR which offers an important historical context. Consideration was also given to the

significance of adoption and implementation of the Model Law as a regional integration instrument in the EAC as part of its harmonisation policy requirement. This would be a very significant development that is commensurate with the need for enlargement of the market that the EAC seeks to achieve. Despite the novelty of such idea, which may require further research as to its practicality, its implementation would help to create a clear link with the outside world in matters of cross-border insolvency.

The merits of the EAC (as an example of SSA regional integrations), integrating with OHADA were noted as a step towards achieving an African-wide cross-border insolvency framework in the longer term. In addition, the chapter also considered the practicality of Tanzania and Kenya (i.e as it is for the rest of the SSA countries) joining OHADA, despite the existence of a number of factors hindering such a move.

### **8.3 Original Contribution of the Study to Knowledge**

This study contributes to the existing scholarship on cross-border insolvency in different respects. Firstly, it contributes to the literature by tackling cross-border insolvency from the perspective of SSA countries, using Tanzania and Kenya as case studies. As pointed out above, such perspective has been lacking in the literature, although a substantial body of literature has developed in recent years. One possible reason is owing to the fact that this scholarship has been dominated by scholars from the United States and Europe writing from the viewpoints of advanced economies which might not necessarily be relevant to SSA. Nevertheless, the literature was immensely beneficial in providing general theoretical backgrounds necessary in considering and developing the SSA perspective based on Tanzania and Kenya as representative case studies.

Secondly, the study contributes to knowledge by generation of an in-depth theoretical insight and understanding of the dynamics of the challenges that SSA countries face in the endeavour of crafting a workable and appropriate framework for cross-border insolvency legislation. The challenges are multifaceted as discussed above.

A few instances of the challenges include the following: the challenge presented by the theoretical frameworks for the cross-border insolvency landscape, reflecting the perspectives of developed economies, on the basis of which the laws in the studied countries could be based and the strong push towards and in favour of universalism. Another instance is in respect of the pressures emanating from the global convergence for insolvency systems as against the inability of the countries to withstand the pressures and avoid unsuitable legislative reforms that rigidly adhere to the global norms at the expense of the local contexts which are known to inform and make the law practical and relevant. Another challenge which is equally important to exemplify here is in relation to the bilateral and multilateral commitments that the countries maintain which restrict the ability of the countries under study to regulate cross-border insolvencies in accordance with their local policy choices unless such choices reinforce the objectives of such bilateral and multilateral arrangements for cross-border trade and investment.

Thirdly, the study contributes to knowledge by generation of an original doctrinal legal scholarship understanding of the cross-border insolvency legal frameworks of the studied countries within the broader context of the following aspects. Firstly, the existing cross-border insolvency theories, and the international insolvency benchmarks; and secondly, the increasing cross-border co-operation in trade and investment arising from globalisation and regionalism. Using the English common law as a case study for the influence of the continuing colonial legacy in the legal systems and culture of most SSA countries, it was shown that the existing legislative framework (as it is the case for the contemplated reform) still has a space for the application of the English common law approach for cross-border insolvency which would effectively pull the law towards modified universalism and away from territorialism. This position is however not in harmony with the cross-border trade and investment arrangements, for example, the bilateral investment treaties which restrict the scope for a country to decide whether or not to recognise, defer and cooperate and, if doing so, how to do so

and to what extent. The implication of such arrangements is to render the flexibility to be only exercised in a manner that promotes the objectives of the arrangements.

Fourthly, the study also contributes to knowledge by providing an insight into the link between the increasing cross-border trade and investment and the growing challenge of cross-border insolvencies. Although the international insolvency benchmarks could be useful in helping reforms that would address the challenges, such contribution might not be achieved given the inherent weaknesses of the initiative for assessment of the observance of the standards.

Last but not least, the study contributes to knowledge by providing a framework for determining the local policy context that might be considered for use as guidance in crafting a workable and appropriate legislation for cross-border insolvency which is sensitive to local interests and international insolvency benchmarks. Most studies underscore the crucial role played by the local policies but they do not address the challenge of identifying the same and negotiating them against and in relation to the existing international benchmarks in crafting a suitable framework for legislation. This study addressed this gap by employing official national policies of the studied countries to demonstrate how they can be used to provide the local contexts and the challenges that may arise in the process. The local policy perspectives that emerge from the national policy analysis, strongly suggest the following key reform measures. Firstly, modified universalism is the appropriate theoretical approach for crafting a cross-border insolvency law system for the countries under study, given their special circumstances. Secondly, the Model Law is relevant and indeed well suited to be customised and adapted to accommodate the local contexts using modified universalism as the organising theoretical framework. Thirdly, the existing bilateral co-operations and long standing traditional relationships between the countries under study and foreign countries appear to dictate a different approach that is based on the existing trust. On this point, it is argued that such special arrangement can still be well accommodated within the adopted version of the

Model Law or through conclusion of a separate mutual agreement. And fourthly, given the importance accorded to regional integration in SSA using the EAC as a case study, it is important to have a regional cross-border insolvency regime that is based on the relevant historical, cultural, and socio-economic values. However, the Model Law should also be adapted within the context of the regional integration to facilitate co-operation in cross-border insolvencies with foreign countries that do not fall within the regional integration.

#### **8.4 Recommendations and Implications for Policies and Legislation**

The insights from the findings of this study have significant implications for policies and legislation in the studied countries and in the discourse regarding cross-border insolvency and law reform in developing economies. Firstly, this study underscores that development of effective cross-border insolvency systems is now more relevant in SSA countries than it was before. The increasing involvement and integration of SSA countries into the global economy through cross-border trade and investment is the main contributing factor. This factor is underpinned by the efforts that these countries have over the years been making to compete in promoting and attracting cross-border trade and investment through liberalisation of their economies and the creation of a conducive legal environment with support from the multilateral institutions. This calls for an informed intervention which is conscious of both local circumstances and the existing international insolvency standards. Such an intervention will eliminate the risk of falling into unsuitable legislation that rigidly adheres to the global norms at the expense of the local contexts.

Secondly, consideration should be given to official national policy documents to help in setting the local contexts that the law should serve or be based upon. To avoid any potential problem of indeterminacy of the local policies it is important that any reform undertaking should also resort to extraneous means that go beyond the official national policies. Such undertaking must involve local experts knowledgeable in the local circumstances. Thirdly, the existence of bilateral investment treaties and other similar arrangements means that such countries must pay close regard to such arrangements when considering and

undertaking the actual reform. In addition, such countries must be prepared to renegotiate such arrangements, such as the bilateral investment treaties, with a view to clearly addressing the approach that has to govern cross-border insolvencies involving the contracting states. Renegotiation of bilateral investment treaties can validly be pursued within the on-going trend of renegotiation of the treaties which is supported by the UNCTAD through its capacity building programmes. Fourthly, lack of experience and cases in these regards means that these countries should avoid complexities and adopt a gradual approach to the reform. The recommendation offered in this study as to how reform could be approached is unlikely to result in a complicated legislative framework. The reform in that regard could also be undertaken gradually in a piece meal manner.

### **8.5 Limitations and Areas for Further Research**

There are several limitations in this study. Firstly, materials relevant to the study for SSA countries were not readily available and accessible. This was aggravated by the lack of scholarship on this area undertaken from the perspective of SSA countries. Analysis of the situation of these countries relied much on the primary sources of law though it was not that easy to lay hands on a significant amount of the few cases that could be relevant to the discussed issues. As case law reporting is inadequate and in some instances non-existent, it was rather difficult to establish the existence of relevant cases. Analysis of the reports by the IMF and World Bank, especially ROSCs was conducted on only a handful of such reports covering African countries that were published and available from the websites of such institutions during the research period for this study. Further reliance had to be made on secondary sources addressing matters related to such reports. These included text books, papers and journal articles, some of them from disciplines other than law.

Furthermore, the scope of the study meant that matters that were relevant and topical but too peripheral to the study were not pursued in detail. Additionally, although cursory and random regard was given to a few of the other SSA countries in specific aspects, it was only two countries that received in depth

consideration as case studies for SSA countries, especially those which do not yet have an effective cross-border insolvency system. Further research may entail consideration of the following areas:

Firstly, conducting similar research with a specific focus in other countries in SSA. Secondly, as SSA countries' insolvency laws (no matter how archaic they are/were) have not been in use due to various theories considered in this thesis, further research could look at the practices that have, or had, been in use as an alternative to formal insolvency law. This could provide a deep insight into additional aspects that need to be considered in undertaking reform. Thirdly, as the effectiveness of insolvency laws depends on the institutional framework in which it is being used and enforced, the emerging trend of reform in SSA can be considered in future research in light of the suitability of the existing institutional framework in which the reformed law is to operate. Fourthly, as most of banks that operate in SSA countries are affiliated to foreign banks in the UK and France, there could be some merits in future research to look at the SSA legislative approaches to bank insolvencies in relation to the existing international practices and the experiences in the countries from which such banks have connections. Such line of research is critical given the recent bank crisis and as bank insolvency was not within the scope of this study. Fifthly, research can also be conducted on cross-border insolvency challenges involved in the emerging cross-border co-operation in trade and investment between SSA countries and emerging markets such as China, India and others. Such research may help bring into light issues involved and how they can be addressed. This is particularly important given the fact that statistically the cross-border co-operation between SSA countries and emerging economies has for decades now been on a sharp rise to the extent of threatening the future well-being of the traditional commercial links that have been in place between SSA and developed economies. The last area for further research is on the adoption and use of the Model Law as a regional instrument as discussed and recommended in this study. This area can be looked at alongside the issue as to whether or not the Model

Law or other international insolvency benchmarks might need to be amended to clearly reflect this idea.

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