

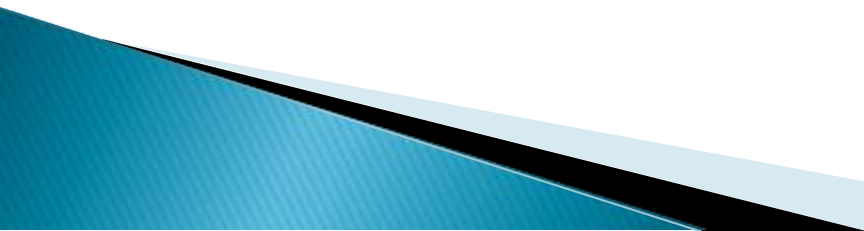
International Insolvency Law

17. International initiatives for the harmonisation of insolvency law

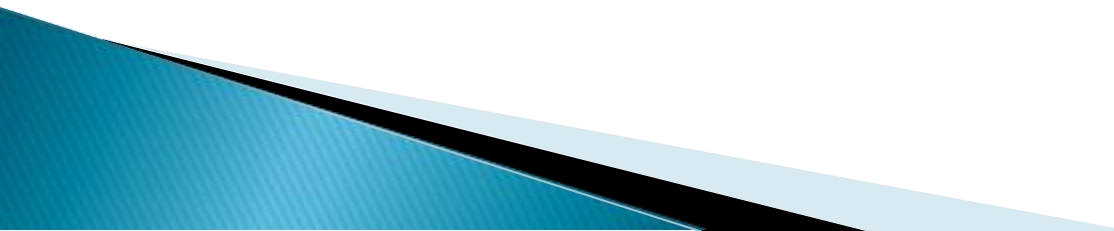
Dr Marek Porzycki



Why harmonise?

- ▶ similarity of economic mechanisms related to insolvency, winding-up, "recycling" of assets, restructuring and corporate rescue --> usefulness of comparative approach in insolvency law (copying efficient solutions from other jurisdictions) --> harmonisation as a logical next step
 - ▶ more legal certainty in cross-border business relations if insolvency laws operate according to similar principles
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Obstacles to harmonisation

- ▶ divergent private law systems, in particular regarding security interest and rights in rem
 - ▶ divergent organisational and procedural cultures in the court system (insolvency proceedings are usually court proceedings)
 - ▶ divergency of existing substantive insolvency laws --> unwillingness of some jurisdictions to accept models from other jurisdictions, rivalry between jurisdictions
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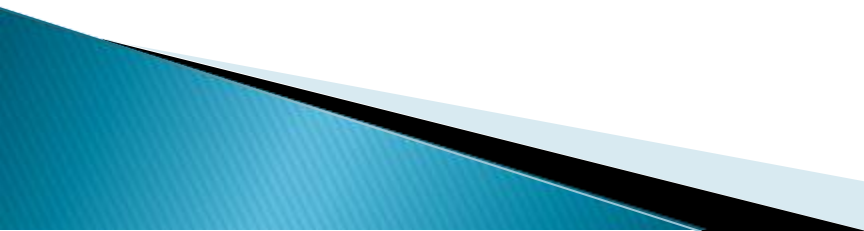
UNCITRAL Legislative Guide on Insolvency Law

- ▶ Ongoing work by the Working Group V – http://www.uncitral.org/uncitral/en/commission/working_groups/5Insolvency.html
- ▶ Parts one and two published in 2004, part three (treatment of enterprise groups) in 2012, part four (director's obligation in pre-insolvency period) in 2013
- ▶ Texts available on <https://uncitral.un.org/texts/insolvency>
- ▶ Intended as a handbook for national legislators reforming insolvency laws in their jurisdictions.
- ▶ Includes many alternative options, suggests issues to be covered but does not usually propose specific solutions.

International associations

- ▶ The International Insolvency Institute, <https://www.iiiglobal.org/> (global)
 - ▶ INSOL International, <https://www.insol.org/> (global)
 - ▶ INSOL Europe, <https://www.insol-europe.org/> (European)
 - ▶ The Conference of European Restructuring and Insolvency Law (CERIL), <http://www.ceril.eu/> (EU only)
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Principles of European Insolvency Law

- ▶ An early European initiative, published in 2003
 - ▶ Authored by a team of academics coordinated by the University of Nijmegen, Holland
 - ▶ Objective: to identify core principles of insolvency law common to all European jurisdictions
 - ▶ Only selected Western European jurisdictions represented
 - ▶ Results published as W.W. McBryde, A. Flessner, S.C.J.J. Kortmann, Principles of European Insolvency Law, Kluwer 2003
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European Parliament resolution of 2011

- ▶ European Parliament resolution of 15 November 2011 with recommendations to the Commission on insolvency proceedings in the context of EU company law (2011/2006(INI)), <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2011-0484+0+DOC+XML+V0//EN>
- ▶ Included specific recommendations to the Commission on harmonising some aspects of insolvency laws.
- ▶ Served as a starting point in a discussion rather than a ready proposal, some recommendations lacked a deep comparative background.

Communication of the Commission of 2012

- ▶ Communication from the Commission to the Institutions "A new European approach to business failure and insolvency", COM(2012) 742 final, 12.12.2012
- ▶ <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52012DC0742&from=en>
- ▶ A call for approximation of some aspects of national insolvency laws in order to create a more business-friendly environment:
 - "second chance"
 - restructuring
 - discharge of honest entrepreneurs

Harmonisation as by-effect of the EIR

- ▶ Provisions on insolvency registers (Art. 24–27 EIR) – minimum requirements for Member States' national insolvency registers, in order to allow for their interconnection
- ▶ Requirement to provide grounds for jurisdiction to open proceedings and to allow judicial review of the opening decision on grounds of jurisdiction (Art. 4–5 EIR)
- ▶ Indirectly: the definition and concept of COMI, including presumptions (Art. 3 EIR), used also for jurisdiction of a specific court within national territory (cf. Art. 19 Polish BL)
- ▶ Indirectly: proceedings against members of a group of companies (Art. 56–77 EIR)

Draft restructuring directive of 2016

- ▶ Proposal for a Directive of the European Parliament and of the Council on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU, COM/2016/0723 final, 22.11.2016
- ▶ To be adopted in 2019, for current stand of the procedure see <https://eur-lex.europa.eu/legal-content/EN/HIS/?uri=CELEX:52016PC0723&qid=1559520401072>
- ▶ See next presentation