Reducing the Risks of International Insolvency
A Compendium of Work in Progress
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A Reference Guide

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Group of Thirty
1990 M Street, N.W., Suite 450
Washington, DC 20036
Tel: (202) 331-2472 • Fax: (202) 785-9423

E-mail – info@group30.org • WWW – http://www.group30.org
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Introduction

Since 1996 the Group of Thirty (G30) has studied cross-border insolvency with a view toward understanding and reducing the risk exposure to global financial institutions and the potential for systemic risk to the international financial sector. In response to the failure of Barings in 1995, a study group was formed to look into the supervisory, legal and financial problems that could arise in the context of a cross-border insolvency of a globally active financial institution. The 1998 Study Group Report, “International Insolvencies in the Financial Sector” recommended a range of actions that could be taken by supervisors in the area of legal and regulatory reform and by financial firms in the area of risk management.

The Report observed that while the Asian crisis and the collapse of Barings had wide-ranging effects on financial institutions and investors, there was no “knock-on” effect through the financial system that caused a globally active firm to fail. Fortunately, the international financial services community is enjoying a period of growth and appears to have its financial house in order. However, there is growing concern by policymakers, the multilateral lending agencies and some global financial firms that when the next economic crisis hits, as inevitably it will, supervisory authorities and international investors and lenders may be no more prepared to deal with the legal risks of emerging markets finance or the cross-border dimensions of insolvency than they were at the time of the Barings or Asian crisis. Financial institutions, multinational companies and international investors pursuing global investment strategies must understand better the practical implications of business failures in various jurisdictions and the insolvency risk of operating in these markets.
Reflecting these concerns and picking up where the 1998 international insolvency report left off, the Group of Thirty has commissioned a further examination of the extent to which globally active financial institutions take cross-border insolvency-related risks into account in their private risk management calculations.

The 1998 report recommended improved risk management practices in this area for firms whose investment, operational and lending activities take place in developed markets and emerging economies. Recent experience in Asia, Latin America and Eastern Europe suggests that the risks associated with weak contract enforceability, ineffective netting, clearance and settlement obstacles, imperfect collateral and security interests, conflicts of law and outright insolvency may be poorly understood and inadequately factored into private risk calculations.

In addition to the stresses it placed on the financial sector, the Asian crisis also placed tremendous demand on the resources and technical expertise of international financial institutions, and underscored the need for a global dialogue on how to manage and prevent future systemic failures. The World Bank, the International Monetary Fund (IMF), the Asian Development Bank (ADB), the Organisation for Economic Co-operation and Development (OECD), the European Bank for Reconstruction and Development (EBRD) and other organizations have responded to this concern by undertaking a series of initiatives aimed at encouraging and assisting emerging market economies to build effective insolvency systems. Other international organizations, including the United Nations Commission on International Trade Law (UNCITRAL), the European Union (EU) and the Bank of England, are involved in serious efforts to reform formal and informal insolvency laws and systems.

The private sector has also been active on these issues. The International Federation of Insolvency Practitioners (INSOL), the International Bar Association Committee on Insolvency & Creditors' Rights (Committee J) and the American Law Institute (ALI) have also been instrumental in drawing attention to the need for more transparent and accessible insolvency regimes. Other important work on strengthening risk management and improving legal documentation has been undertaken by the Counterparty Risk Management Policy Group and the International Swaps and Derivatives Association (ISDA). While not directly focused on insolvency systems or laws, improvements in these areas will also serve to reduce the financial risks arising from insolvency.

As a starting point for this study and in recognition of all of the work being done in the area of insolvency reform, this Compendium of Work in Progress on insolvency reform describes ongoing efforts by major international institutions and organizations, both public and private. The objective of this Compendium is to serve as a reference tool, and provide a synopsis of ongoing efforts by multilateral agencies, international organizations, global supervisory authorities and the private sector. No attempts have been made to comment on or review the specif-
ic recommendations. Rather, we have strived to incorporate and report on the activities of these international organizations, to serve as a starting point for anyone interested in this area of study. Many of these projects have not been completed and others are intended to evolve over time as countries and insolvency systems change.

The Compendium is intended to be a complete and accurate portrait of "who is doing what" in the area of insolvency reform. Each of the organizations described below has reviewed and approved the description of their activities and efforts. Because so much is occurring so rapidly in the realm of formal insolvency reform and informal rehabilitation procedures (in emerging economies as well as developed nations), it is possible that something has been missed and it is likely that some of the initiatives discussed in this Compendium have been completed or revised since this report went to press. Much of the work discussed below, as well as other activities that impact on insolvency reform, can be accessed on the Web sites of the organizations whose work we have reviewed in this document. To assist those who wish to further research a particular organization's insolvency reform activities, we have included the Web site addresses of the respective organizations.

The Group of Thirty would like to thank all of the organizations whose work is described below for their contribution to this effort. In particular, special appreciation goes to Gordon Johnson, Senior Counsel, Finance and Private Sector Development, Legal Department, World Bank; Sean Hagan, Associate General Counsel, IMF; Clare Wee, Senior Counsel, ADB; Jenny Cliff, Senior Counsel, UNCITRAL; Neil Cooper, President, INSOL; Selinda A. Melnik, Incoming President of IBA (Committee J); Simon Wong, Legal Advisor, OECD; David Bernstein, Chief Counsel, EBRD; Professor Jay L. Westbrook, Benno C. Schmidt Chair of Business Law, University of Texas at Austin; Marc Verhooven, Legal Advisor, European Union; Dr. Chryssa Papathanasiou, Legal Counsel, European Central Bank; Anne Salladin, Legal Advisor, United States Treasury Department; Commissioner Paul Heath QC, New Zealand Law Commission; and Bob Pickel, General Counsel of ISDA.
OVERVIEW

The financial crises of the mid-1990s that plagued emerging markets in Asia, Latin America and Eastern Europe have underscored the need for a global dialogue on the financial stakes presented by cross-border insolvencies. The multilateral bank community, including the World Bank, the International Monetary Fund, the Asian Development Bank and other organizations, responded to this concern by undertaking a series of initiatives aimed at encouraging and assisting emerging market economies to build effective insolvency systems.

Much of the ongoing work of the multilateral bank community has its genesis in the actions of the Group of 22 (G22) — a group of Finance Ministers and Central Bank Governors from 22 countries who met in April 1998 to examine the issues related to the stability of the international financial system.

In their recommendations, the G22 stressed three key areas that they viewed as critical to strengthening the international financial architecture:  

1. enhancing transparency and accountability; 
2. fortifying domestic financial systems; and 
3. managing international financial crises.

It is in this last area, managing international financial crises, that a G22 working group pointed to a number of initiatives that could serve as a cornerstone for limiting future financial crises. They included the need to:

- strengthen insolvency and debtor-creditor regimes;
- develop innovative debt contracts;
- promote creditor coordination;
- enhance mechanisms to facilitate orderly debt workouts; and
- encourage better risk management by the private sector.
Present Climate for Reform

One outgrowth of the G22 work is the present climate of heightened interest by the global multilateral bank community and international financial organizations in the role of insolvency systems in both emerging and developed economies, the development of fair and orderly rules for cross-border insolvencies and the facilitation of orderly and efficient debt workouts. While the organizations looking into the insolvency area differ in scope and methodology as a consequence of their respective mandates and membership, their overall objective is the same: to modernize insolvency practices and laws. At first impression it may seem that some of their initiatives overlap. In actuality, however, each of the organizations involved in the various aspects of insolvency reform is, in its own way, seeking to bring attention to the problems and risks of weak, inconsistent and/or uncertain treatment under differing international insolvency laws and to the principles and features of effective insolvency regimes, while providing a guide to recommended practices and policies that take into account the cultural, political and social norms of a particular region.

Most international groups and insolvency practitioners agree that it is not possible, nor is it recommended, to attempt to devise a single model law or approach to an insolvency regime. Rather, by providing information, education, training and a range of guidelines and principles from which a country can select as it develops or fine tunes its insolvency system within its existing legal regime, these groups attempt to assist with the development of predictable, transparent, and efficient insolvency systems in developed as well as emerging economies.

It should be noted at the outset that the many efforts to reform the insolvency systems in emerging markets and to bring some consistency and predictability to rehabilitations and out-of-court workouts are interdependent. Moreover, if there is a unifying theme throughout all of the reports and initiatives, it is that a single or uniform insolvency law is neither practical nor feasible. Instead, concerned international organizations and insolvency practitioners and experts will exert substantial effort to provide the tools, technical assistance and training needed to achieve comprehensive reform of the insolvency systems in emerging and developed nations.
CHAPTER ONE
INTERNATIONAL FORUMS

1. Group of 22 (G22)
The G22 “Report of the Working Group on International Financial Crises,” completed in October 1998, identifies a range of policies and institutional innovations believed helpful in facilitating the orderly resolution of international financial crises and preventing future crises. In particular, the Report identifies policies to reduce the frequency and limit the scope of future crises, improve creditor coordination and promote the orderly, cooperative and equitable resolution of international financial crises. The Report endorses eight key insolvency regime principles and features which were formulated in consultation with the International Federation of Insolvency Professionals (INSOL International).

The Report made no specific recommendations regarding the means of obtaining adoption of insolvency laws and systems consistent with the endorsed principles and features. Rather, the Working Group envisaged that an enhanced international surveillance process (which was then under consideration by a number of forums) would review national insolvency regimes, and that technical assistance from the International Monetary Fund and the World Bank, together with scrutiny from capital markets, would help encourage improvements. The G22 Working Group urged that consideration be given in the relevant forums to the development of additional means and incentives for encouraging the adoption of effective insolvency regimes.
The Working Group reports were sent to the Managing Director of the IMF and the President of the World Bank, with the request that they be forwarded through Executive Directors to Finance Ministers and Central Bank Governors in the context of the Annual Meetings. They were intended to complement ongoing discussions in the IMF and other international institutions on strengthening the architecture of the international financial system. These recommendations are the foundation upon which all other efforts in this area have been based.

www.imf.org/external/np/g22/comments/index.htm
CHAPTER TWO
DEVELOPMENT BANKS

1. World Bank

Overview
In 1999, following the G22 study and at the request of the G-7 nations, the World Bank undertook an initiative to identify key principles and guidelines in the design of effective insolvency systems' and debtor-creditor regimes in emerging market economies. To some extent, the Bank's initiative has been defined by its developmental experience in emerging markets. Moreover, a vast amount of statistical and anecdotal information and input has been collected from an advisory panel composed of globally active financial institutions, the international lending and investment community (IMF, ADB, AfDB, IDB, EBRD, IPC and OECD), the leading international insolvency professional associations (INSOL and Committee J) and insolvency practitioners (public and private). A Task Force and various working groups' comprised of numerous insolvency experts from around the world helped to define and inform the Bank's work.

The Bank's goal is not to develop a "one-size-fits-all" approach. Rather, it intends to develop an "integrated matrix" of components and criteria for designing and building effective insolvency systems, highlighting international best practices where appropriate. The Bank's objective is to design an insolvency law that complements a country's legal and commercial systems, demonstrating how
the insolvency law would interact with and affect the overall performance of the system.

The insolvency matrix of principles and policies, guidelines and best practices will be used by the Bank as a tool in conducting a series of assessments of insolvency and debtor-creditor systems in member countries, and as a road map for their advisory services in this area. The Bank hopes that a strong international consensus on the principles and guidelines will increase the potential for their wider endorsement and use by other members of the multilateral development community and countries around the world. As part of the international feedback process, the Bank intends to make available a Consultation Draft for public review and comment, which will be included on the Bank's legal database Web site.

www1.worldbank.org/legal/leggs_bank/insolvency.html

Background
The Bank launched its insolvency project in September 1999 in partnership with multilateral banks, legal and accounting insolvency practitioners and international organizations interested in reforming the insolvency systems in emerging economies, and those in transition. At its first insolvency symposium, “Building Effective Insolvency Systems,” insolvency experts from around the globe gathered to discuss the findings and recommendations of the World Bank Task Force and Working Groups. These Working Group reports contain the key concepts that form the basis for the Bank's report “Principles and Guidelines for Effective Insolvency Systems.”

Draft guidelines and working group recommendations on insolvency reform are being presented to member country representatives and insolvency specialists at a series of regional symposia in Asia, Eastern and Central Europe, Latin America, Africa and the Middle East. It is the aim of these conferences to allow participants to explore the legal, cultural and institutional issues that have an impact upon the design of insolvency regimes in those particular regions of the world, and to refine the principles and guidelines to reflect these differences.

The World Bank insolvency initiative and symposia, combined with feedback from the Web site, are intended to promote a genuinely international dialogue on the issues that are relevant to the development of principles and guidelines for effective insolvency systems in target markets. To that end, the Bank is partnering with other members of the multilateral community, bilateral donor organizations and leading insolvency practitioners to host the regional meetings. The first regional workshop, attended by 16 countries, was held in November 1999 in Sydney, Australia, and was co-sponsored by the Bank, the OECD, the Australian Treasury, and the Australian Agency for International Development (a discussion of the Australian conference is included in a later section on the OECD). The second regional workshop, attended by 15, mostly transition economy countries in the Eastern European and Baltic region, was held in March 2000 in Bratislava,
Slovakia, and was co-sponsored by the EBRD (the discussion of the Central Europe/Baltics conference is included in the section on the EBRD). Additional workshops are planned in the Latin American region, Africa and the Middle East for later this summer.

**The World Bank’s Consultation Report**

The following is a summary of the key points made in an early version of the Consultation Draft, which incorporates recommendations and portions of the Working Group Reports. The Consultation Draft identifies the members of the World Bank Task Force and Working Groups. References herein are generally to the preliminary version of the Bank’s Consultation Report (the “Consultation Draft”), unless specifically noted.

The Consultation Draft is organized into three parts:

- **Part I** contains the chapters on building blocks of effective insolvency systems (legal, institutional, regulatory, commercial continuum and corporate rescue culture).
- **Part II** addresses specialized insolvency conditions within an economy (systemic insolvency, SOE insolvency and bank insolvencies).
- **Part III** focuses on the international dimension, consistent with one of the Bank’s objectives, which is to encourage emerging markets to take international best practices and issues of international significance into account, in order to be players in the global market.

The following is a summary of the key points made in an early version of the Consultation Draft.

**Legal Framework for Insolvency**

This section of the report explores in considerable detail the principles and policies necessary for the development of a comprehensive insolvency law. These guidelines have much in common with the recommendations of the International Monetary Fund, incorporated in the Fund’s report, “Orderly and Effective Insolvency Procedures: Key Issues.” (See the section on the IMF, later in this chapter.) However, there are distinctions in the approaches taken by the two organizations. For example, the Fund’s report is aimed broadly at defining key features of insolvency systems for developed and developing countries, while the Bank’s emphasis is on emerging or developing countries. The Bank report takes a broader view of systems design, as opposed to the Fund’s principal focus on the design of the insolvency law itself.

**Interface with Broader Legal Framework**

A principal theme repeated throughout the report is that an effective insolvency law will interface with a nation’s broader legal framework and will be complementary to and compatible with the legal system of the society in which it is rooted.
The report notes that many policy considerations go into the decision of what an insolvency law will look like. For example, will the insolvency law be geared to promote financial discipline and seek to eliminate the inefficient and incompetent? Will it promote business enterprise and competitiveness, and should it be “pro-creditor” or “pro-debtor” (labels which admittedly are often applied with imprecision)? An insolvency system should also reflect the “cultural fundamentals” that characterize that society. The report notes that, while a harmonized or uniform insolvency law may be noble, the divergence in cultural attitudes and beliefs will necessarily dictate the direction of a particular insolvency system, thereby increasing the difficulty in achieving internationally harmonized standards — at least for the foreseeable future. That said, the report emphasizes that in order to participate in the global marketplace, countries should continue to strive to comply with international best practices and should undergo a process of “regular appraisal” of the goals and priorities of their systems.

**Design Features and Issues**

Throughout the detailed discussion of the various policy choices and features of an effective insolvency system, the authors present a series of principles and guidelines they believe should be incorporated into insolvency systems. In the discussion of the design features of insolvency systems, the need to balance certain policy choices is addressed in detail, such as:

- the extent of officers’ and directors’ liability for “wrongful trading”;
- the criteria to determine when insolvency can be commenced — the “balance sheet” test or the more common “illiquidity” test; and
- the consequences of commencement, and whether to utilize:
  a) a “unitary” approach where the ultimate process of rehabilitation or liquidation is determined after the commencement of proceedings (e.g. Germany and Australia),
  b) a system where one can easily move from one type of proceeding to another (e.g. the United States), or
  c) the multiple law approach, which does not allow for conversion (e.g. Japan and Korea).

**Setoff and Netting**

Of particular interest to the present Group of Thirty project is the discussion of netting, setoff and carve-outs for financial contracts. The report notes the diversity of approaches taken by different countries and acknowledges that the differences are so complex that it is almost beyond the ability of experts, let alone market participants, to master the requirements of these laws. Setoff and netting also raise an issue which is becoming a feature of insolvency laws — the carve-out or exemption from insolvency law in favor of a particular class of creditors or transactions. For example, about 20 jurisdictions have carve-outs in favor of netting of prescribed eligible financial contracts, for security interests, repos and securitizations.
While acknowledging the merits of carve-outs in reducing systemic financial risk, the Working Group Paper on Legal Framework suggests that carve-outs also raise larger policy issues:

“These, frequently busy, exemptions accumulate internationally into a web of extraordinary complexity… carve-outs themselves individually are often very detailed, but they also can quickly get out of date… and can create undesirable extra risks… and lead to high transaction costs.”

*Legal Framework Working Group (p. 16)*

As such, the authors apparently question whether financial contract carve-outs create an unfair advantage to one class of creditors to the detriment of others, and recommend that those systems not hampered by political considerations consider a different approach.

A similar observation is made in the section of the report dealing with Bank Insolvencies, where it is suggested that the laws that allow for setoff and netting of financial obligations of banks to other financial institutions be “strictly limited” to what is necessary for the protection against systemic risks. (See discussion of “Bank Control Under General Insolvency Procedures,” below.)

**Institutional Framework**

A country’s institutional framework — in the vast majority of countries this consists of the judicial process — was the focus of a separate working group comprised of judges from developed and developing countries around the world, approximately half of whom are justices on the highest courts in their respective countries. This section of the report addresses the design elements of the institutional framework, including the role of the bankruptcy court or governing authority, the significance of separate bankruptcy courts or specialized bankruptcy judges, the proper balance in judicial discretion, the specific types and workings of appellate procedures, and the need for comprehensive and well-funded training and qualification programs for judges.

**Role of Governing Institutions**

It is common in most countries for the judiciary to administer the insolvency process, through commercial courts, general jurisdiction courts, or specialized bankruptcy courts. However, in some jurisdictions (particularly in emerging economies), a non-judicial or quasi-judicial institution, such as the Philippines Securities Exchange Commission, will fulfill this role with respect to publicly traded companies. In other jurisdictions, arbitration courts will be used in insolvency proceedings. In developed jurisdictions, specialized judges are the norm, whether sitting in courts of general jurisdiction (as in most of the world) or in specialized bankruptcy courts (as in the U.S.). And in still other countries, judges have wider jurisdictional responsibility.
No one approach is correct. Rather, the role and workings of the judiciary as it relates to insolvency matters should be consistent with the overall legal framework of a particular country.

Specialized Courts, Judges and Tribunals, and the Organization of the Bankruptcy Court

Whatever the particular attributes and responsibilities of a country’s court system and judiciary with respect to bankruptcy matters, it will be necessary to establish certain standards, limits, and operating and administrative rules. To that end, the Institutional Framework Working Group made a series of recommendations, including the following:

- Given the specialized nature of bankruptcy proceedings and the issues that arise in them, significant benefit can be gained by having independent, specialized bankruptcy courts or specialized insolvency judges within the courts of general jurisdiction.
- Court organization should take stock of resources available to the court, including sufficiency and composition of judicial officers and staff, and adequacy of court facilities. Affected parties must have maximum and convenient access to all court proceedings, records and files.
- Courts should be structured so as to operate autonomously and in such a way as to reduce the potential for inappropriate external control or influence over court decisions.
- To the extent possible, uniform operating rules and practice regulations should be established governing the role, responsibilities and activities of the court and other participants in the process.

Court Operations (Efficiency, Transparency, Accountability)

In this section, the working group made a series of recommendations regarding the specific features and operations of the bankruptcy court. A theme throughout this chapter is that transparency and accountability are vital to establishing public trust and confidence in the system.

- An insolvency system should establish practices that assure transparency of and access to the court, court decisions and records, hearings and trials, public information, debtor/financial data and accountability by all participants in the process. Transparency requires adequate notice through dissemination of information, and to facilitate disclosure and publication of court decisions, adequate notice to creditors and interested parties, filing claims and pleadings, and other important information related to cases and court activities.
- Predictability in outcomes can be a key factor in court efficiency and the expectations of parties. A written record of decisions should be maintained and the reasons for the disposition of a matter should be clearly identified in the decision. To increase predictability, court decisions at every level should
be publicly available. Decisions must be made on a timely basis and the court should determine when a judge's decision is official and binding.

- By the nature of the cultural and legal underpinnings of some systems, they are less prone to litigation than others. Because the process of insolvency is by nature a process of dispute resolution, all types of formal and informal procedures should exist for resolving disputes. These include mediation and arbitration techniques, and formal litigation procedures. Summary proceedings should also be established to expedite the dispute resolution process.

_Judicial Decision-Making_

Predictability in outcomes is a key factor in court efficiency and the expectations of parties. Where possible, the judicial decision-making process should encourage consensual resolution and efficient and timely adjudication. This should be accomplished through consistent and uniform interpretation and application of the law. To this end, published written opinions reflecting the court's analysis on issues of importance or unique significance should be encouraged.

_Treatment of Appeals_

The discussion of the statutory appeals process and appellate court (whether or not it is specialized in bankruptcy) states that it is critical that the judiciary be independent and objective, and operate in a timely and effective manner. The authors also recommend that there be clear criteria and minimum standards for the qualification and selection of judges, the process of judicial appointment and oversight of judicial conduct.

_Institutional Integrity_

The training and continuing education of bankruptcy judges should be a priority. There should also be adequate funding for these activities and a well-planned design for educational training programs. Because they are of paramount importance to the workings of and respect accorded to the judiciary, courts and judges must be free of conflicts of interest, undue influence, favoritism or bias and lapses in judicial ethics, objectivity and impartiality.

_The Insolvency Regulatory Framework_

This section of the report was developed by senior international insolvency regulators and supervisors. It focuses on the need for and design of an independent regulatory function (including qualification standards for participants in the bankruptcy process; for example, court-appointed representatives and insolvency practitioners) and the development of the regulatory body entrusted with responsibility for the insolvency system. Significantly, the regulatory framework is one of the key building blocks of an effective insolvency system, yet is often ignored and overlooked in emerging markets. Because this facet of the system addresses skills and qualifications, it often takes more time to implement effectively.
The Role of the Regulatory System

Insolvency regulation consists of two principal components. The first is the need for independent qualification standards and training for office holders who are appointed to administer particular cases (e.g., trustees, liquidators, administrators, supervisors, receivers, etc.), their agents and other participants. What is essential, through a legal, accountancy or other qualification, degree or experience, is that the office holder is able to demonstrate that he or she has a knowledge and understanding of insolvency and other legal and business issues likely to arise in the context of the proceedings.

The second component of insolvency regulation is the design and development of the regulatory bodies themselves, the techniques and methods they employ and the establishment of criteria used to measure the benefits to be obtained from regulated procedures. Where there is a system of licensing or authorization of office holders, the process of identifying a suitable person to administer a particular case is simplified for creditors and the court. Whatever the competence of the office holder, there will be circumstances arising in an insolvency on which outside expertise or advice should be obtained. Criteria also need to be established and applied that determine the competence and probity of agents that are used in relation to such advice or assistance.

The Regulatory Body

A regulatory body with responsibility for the insolvency system may be a government department or agency, a separately constituted body or a professional body. In Australia, Canada and the U.S., registration and regulation are functions of the government. The U.K. has a statutory framework requiring the authorization and licensing of office holders, with the power to grant and remove authorizations and licenses delegated to specific legal and accountancy bodies. Finland does not have an authorization or licensing system; an independent regulator is appointed to oversee the administration of bankruptcy cases. The Netherlands has no formal systems of government authorization, licensing or regulation, but office holders are overseen by the courts and the applicable professional body.

No particular approach is recommended. Rather, how a regulatory body is established depends in large part on what systems already exist for the recognition and regulation of lawyers, accountants and other professionals, for setting standards, for monitoring performance and for taking action. Just as an insolvency system should interrelate with the country’s legal framework, so too should the design of its regulatory body be consistent with other regulatory bodies.

The Continuum of Corporate Relationships

Various lending and financial institution market participants contributed to the Business and Financial Sectors Working Group paper, which addresses the specific concerns that affect lenders and investors in distressed and bankrupt enterprises. The discussion that follows addresses the different treatment accorded to foreign investors in various jurisdictions, and addresses some of the issues related to
attracting capital to distressed markets.

In addition, the Creditor Rights Working Group paper, the content of which is discussed in this section as well as in the section on Legal Framework in the Consultative Draft, discusses issues of importance to the interplay of sound credit and insolvency systems. The Creditor Rights Working Group paper cites recent surveys of developing economies, showing that in many cases the ability of financial institutions to make loans is severely restricted by legislation or government policy. Even where the provision of credit is allowed, the underdeveloped nature of security law, the absence of adequate credit reporting facilities and the lack of suitable debt enforcement machinery seriously inhibit the granting of credit.

**Securitization and Collateral**
The importance and use of securitization in developing economies is increasing dramatically. Even in countries whose laws were initially opposed to securitization, such as those in Latin America, legislation has been introduced and restrictions eased to allow securitizations. The authors note that security devices have now become more important with the transition of central and eastern European countries from planned to market economies, with the drive to privatization and a shift from sovereign risk to enterprise risk.

"The lack of proper legal support for security and quasi-security devices not only inhibits the extension of credit and in consequence economic growth, it can also pose the threat of systemic risk for the capital markets themselves where there is a failure of a major player, such as a large bank."

*Business and Financial Sectors Working Group Report (p. 48)*

As noted in footnote 15 of the Consultation Draft, this is also a concern with developed systems. The European Commission Directive on settlement finality requires Member States of the European Union to ensure that under their laws transfer orders and netting are legally enforceable even in insolvency, provided that the transfer orders were entered into a system before the opening of the insolvency proceedings. (For a more detailed discussion of EC Directive 98/26, see the section on the European Union, Chapter 4, below.)

**Foreign Capital and Credit**
One manifestation of the accelerating globalization of commerce and capital markets is that businesses in developing countries increasingly seek capital from "foreign" lenders. Whether capital takes the form of private loans, commercial paper, publicly traded bonds, trade credits or derivative instruments, and whether the borrowings are secured or unsecured, what is of paramount importance to these lenders is to understand the underlying environment in which credit will be extended. Currently, insolvency systems and related laws and practices affecting debtor-creditor rights vary considerably from country to country (and even with-
in borders), making it costly (and risky) for creditors to develop expertise in investing in a particular region.

Developing countries typically have fewer adequate legal, institutional and regulatory safeguards to give foreign lenders confidence that investments can be monitored or that creditors' bargained-for rights will be enforced, particularly with respect to debt collection. Generally, a borrower's operational, financial and investment activities are not transparent to creditors; substantial uncertainty exists with respect to the substance and practical application of contract law, insolvency law and corporate governance rules. Creditors correctly perceive that they lack sufficient information and control over the process used to enforce obligations and debt collection.

In the absence of predictable laws and procedures, foreign creditors will extend funds only in return for unnecessarily high risk premiums. In times of crisis, they may entirely withdraw financial support. Developing countries would therefore benefit if creditors' rights and insolvency systems were clarified and applied in a consistent and more fully disclosed manner.

Security Devices
The discussion of security interests points out that all civil law systems, and all common law systems outside North America, draw a sharp distinction between what is perceived to be security in the strict sense — security that is given by a debtor in an asset which it owns or in which it has an interest — and quasi-security in the form of title-retention, as where goods are agreed to be sold on terms that ownership is not passed to the buyer until the price of the goods in question has been paid in full. A considerable problem is that the legal regimes for security and title retention in developed and emerging economies are quite different. Moreover, in many countries legal rules requiring registration of a security interest do not normally apply to title-retention agreements. The report notes that the security/title retention dichotomy is so deeply imbedded in legal systems outside North America that it is unrealistic to expect this to change any time in the foreseeable future.

Types of Collateral Available as Security
New forms of collateral are emerging as the drive to reduce the risk, expense and inconvenience of issuing and transferring paper has led to the abandonment of paper-based securities in favor of electronic recording, or alternatively depositing paper-based securities with global custodians and other depository institutions. The rights in the underlying securities having been replaced by security "entitlements" recorded in accounts with a securities intermediary, such entitlements constitute distinct property rights which themselves are capable of being given in security.

While the litmus test of the strength of a security interest is its efficacy in the debtors' bankruptcy, it is also an important collection tool outside of bankruptcy.
The report recommends that a legal regime governing security interests include the following concepts if it is to meet the needs of modern business:

- classification of collateral;
- the ability of a creditor to take security over a debtor's future property through a "floating charge" or "floating lien";
- identification of collateral by class or description (e.g. all the debtor's present and future property/receivables);
- ease and cost-effectiveness of creation (e.g. with respect to the use of electronic transfer systems to effect security transactions, legislation is often needed to remove obstacles created by requirements for documents, writings and signatures);
- prompt and efficient means of enforcing a security;
- registration machinery (e.g. perfection by registration);
- priority rules; and
- sound and effective enforcement mechanisms.

**Commercial Confidence**

The report notes that investment in emerging markets is severely discouraged by the lack of well-defined and predictable risk allocation rules, and by the inconsistent application of laws as written. In times of systemic crisis, stakeholders often demand uncertainty risk premiums too onerous to permit markets to clear. They may also avoid investing in emerging markets entirely, despite expected returns that, in their opinion, far outweigh known risks. A key recommendation is that there is a need for greater certainty in risk allocation rules. Both dedicated and non-dedicated emerging market creditors would feel more comfortable injecting fresh capital in times of stress, and sellers would feel more comfortable that they were not leaving money on the table by selling.

**Creating Active Secondary Markets**

Noting that distressed securities investors are a necessary part of the financial system, the report highlights the "conflict" between the holders and the potential buyers of distressed securities based on the price of the distressed obligations. However, it observes that a clear, efficient and non-political restructuring process can create higher prices for sellers, higher returns for buyers and often a better environment for employees and management.

**Cross-Border Financing, Security and Insolvency**

This segment of the report discusses an area of critical interest to foreign investors and lenders in the area of cross-border financing. A major challenge in this type of secured financing is to be able to ensure that a security interest validly created in one jurisdiction will be recognized in another. Increasingly, international conventions are being entered into in relation to security interests and quasi-security interests which attempt to "harmonize" the substantive laws of contracting states.
or alternatively to set down uniform conflicts rules. The 1988 UNIDROIT Conventions on International Factoring and International Finance Leasing and the UNCITRAL Draft Convention on Assignment of Receivables Financing are two examples. However, it is not yet certain to what extent emerging economies will adopt all or part of these conventions.

**Creating a Corporate Rescue Culture**

In the discussion of formal insolvency “rescue” procedures, the authors note that while there is much agreement that modern rehabilitation procedures are useful, particularly with the introduction in most developed economies of “low entry” rehabilitation, most insolvency practitioners would agree that the best way to save a business is through the private workout. In their view, the workout is the real alternative to liquidation.

Experience has taught, however, that the private workout cannot succeed if, for example, there are bondholders and the law prevents a dissenting minority from being overridden by the majority; or if there is a holdout creditor who refuses to agree until it is too late, or if there is a real emergency and no time to get agreement or to find out exactly what the situation is (as was the case with Baring); or if the insolvency is so bad that an agreed stay by creditor banks is not enough.

This situation continues to be of concern to financial institutions and other lenders and was addressed at UNCITRAL’s 22nd Session of the Working Group on Insolvency Reform (discussed under the UNCITRAL heading in Chapter Four).

**Formal Insolvency Rescue**

The report devotes considerable attention to the key design features and guidelines of an effective formal rescue law and its procedures. Included in this discussion are “essential” design elements of the formal rescue process, including provisions that address:

- eligibility and applicability (with special rules for courts for the insolvency of regulated institutions, such as banks and insurance companies);
- access criteria;
- commencement effects (on incumbent management and creditors);
- stabilization of business operations (including financing of operations);
- administration process;
- access to information by creditors and the opportunity to have a voice;
- protection of stakeholders, including secured and unsecured creditors as well as employees (“committee of creditors” should play an active role); and
- plan formulation and implementation (“de minimus” with analysis by an independent advisor, classes of creditors, majority vote).

Many of these design features are common to the discussion on design of the
law contained in the legal framework, but emphasize deviations and features essential to the promotion of rescue.

**Informal Restructuring and Workouts**

The report spends considerable time addressing the principles for informal restructuring and workouts, including "institutional" informal workouts, such as the London Approach (see the discussion of the Bank of England in Chapter Five) and the "less institutional" approach utilized in the U.S., primarily by the banking, financial and insurance sectors.

There are a variety of reasons for the increasing use of informal workout techniques. They are more flexible than the process available under formal insolvency rescue regimes, and they allow for greater and earlier responses from key bank and financial institution creditors. Because they are less confrontational, they provide a better environment for "marketplace" negotiation. However, an informal workout would probably not be attempted unless certain conditions existed, including:

- a significant size of debt was owed to a number of financial institution creditors;
- sophisticated refinancing, security and other commercial techniques were available;
- the "sanction" that if negotiation failed there would be swift and effective resort to the formal insolvency law; and
- the prospect that there would be greater benefits for all through the negotiation process.

Of these, the authors point to the presence of the sanction — the "shadow" of the insolvency law — as the most relevant to the World Bank initiative.

An informal process is far more likely to originate and be sustained if there are adequate creditor remedies and insolvency law regimes. The report discusses the principles and practical aspects of a workout, including: commencing the process; engaging independent advisors; coordinating participants (including the appointment of a lead creditor and a creditor's steering committee); taking steps to stabilize the business, generally reflected by a "standstill" agreement that endures for a defined, usually short, period of time; and addressing the challenges associated with outside and dissenting creditors, particularly because there are no rules of enforcement by which creditors can be compelled to accept or be bound by the decision of a majority of their number.

The authors also address the problems associated with cash flow and liquidity, and note that they may be more acute to the informal process because legal provisions available under a rescue law for "super-priority" and ongoing funding to the debtor will not extend under the informal process. One option frequently used by creditors is "inter-creditor" agreements among the major creditors, providing for emergency funding by one or more that will rank for repayment in advance of
their other respective entitlements in the event of a formal insolvency administra-
tion of the debtor. Access to complete, reliable and accurate information on the
business, including business activities, current trading position, general financial
position and assets and liabilities, is also essential to reaching a consensual
agreement.

A principal recommendation is that a country’s banking sector (with the pos-
sible informal endorsement of the Central Bank) should promote the develop-
ment of an informal set of rules (or code of conduct) for the use of an informal
out-of-court process for dealing with a corporation in financial difficulty in which
banks and other financial institutions have significant exposure. The informal
process may actually produce a formal rescue, which should be able to accommo-
date a packaged plan which has been produced by the informal rescue process.

**Structured Informal Processes**

A number of countries, particularly in Asia, have responded to the absence of an
informal workout commercial culture by promoting, at the government level, vari-
ous types of structured initiatives to encourage formal and informal workouts to
deal with problems in the banking industry. The authors point to the experience
in Malaysia as an example. In Malaysia, special legislation was enacted that
created an assets acquisition and management agency — Danaharta — which is
empowered to acquire non-performing loans (NPLs) from distressed banks. By
virtue of the extra judicial powers granted to it, Danaharta can appoint “special
administrators” to manage a debtor company, with a one-year moratorium auto-
matically going into effect. According to the authors, a number of successful
informal and formal reorganizations have been attributed to Danaharta.

**Recent Asian Experience with Institutional Debt Restructuring**

In the discussion of developing economies, the report identifies a number of fac-
tors that lead to the breakdown of the informal workout process: ineffective
restructuring negotiations, lack of restructuring experience, cultural differences
and poor coordination between real and financial sector restructuring. At the
same time there is a need for alternatives to formal insolvency proceedings in
emerging markets because the law may not be advanced enough to deal with dif-
ficult restructuring issues, the judiciary may not be sufficiently specialized or
experienced, and individual corporate insolvency matters may occur as part of a
larger, systemic financial crisis that overwhelms the legal system.

In a detailed discussion of why the informal workout process fails in emerging
economies, the report addressed recent experiences in Indonesia, Thailand and
Korea, in which international lenders became frustrated when dealing with dif-
ferent business cultures, particularly during periods of crisis and when faced with
different attitudes and expectations toward corporate restructuring.

In addition, the rescue cultures or attitudes at financial institutions vary. Some
lenders prefer to maximize long-term recovery through balance-sheet structur-
ings of the debtors (frequently converting from equity to debt). Others are con-
cerned about capital adequacy and prefer to carry distressed loans on their books as performing assets. Still others may have purchased their positions at a deep discount in the secondary market (so called “vulture” investors) and may be looking for a rapid settlement. And government asset management units may take positions that diverge from other creditors.

In light of these problems and frictions, the working group contends that an institutional restructuring program may present the best opportunity to overcome these differences. It suggests that the architects of a country’s institutional debt restructuring program should make relevant policy choices prior to putting a program into operation. Such policy choices include:

- the principles under which the program will operate (e.g. generally accepted corporate restructuring);
- the circumstances under which an institutional decision-maker will substitute his/her judgement for that of the private parties;
- the use of a mediation mechanism;
- the availability and severity of sanctions imposed on those who refuse to cooperate;
- whether to opt for a rigid (predictable) or flexible (adaptable) procedural system; and
- choosing a balance between real and financial sector restructuring.

**Systemic Crisis in Emerging Markets**

This section of the World Bank report, prepared in cooperation with the Bank’s Office of Chief Economist, examines the conditions and implications of systemic crises and the principles and conditions for systemic restructuring.

The authors of this section note that recent experience with systemic restructuring demonstrates that not only is it difficult to design, but it often leads to moral hazard. According to the authors, there have been more than 112 episodes of systemic crises in which much or all of bank capital has been exhausted in 93 countries since the late 1970s. The fiscal costs of these events have been enormous. The authors also point to the fact that countries with systemic bank crises often have huge holes in their regulatory, supervisory, accounting, auditing and disclosure frameworks and practices. The quality and disclosure of information and financial statements is unreliable or out of date, and enforcement of laws and regulations can be extremely weak. Moreover, weak financial systems often implicitly protect poorly performing firms by continuing to provide loans. These and other underlying factors make the resolution of the crises and the restructuring of the financial and corporate sectors more difficult.

**Systemic Restructuring**

The report provides a detailed and comprehensive discussion of the principles and conditions for systemic restructuring, including:

- altering lending practices;
• imposing rational constraints such as prompt corrective action and limiting depositor guarantees;
• the need for a coherent strategy (including establishment and empowerment of a single restructuring agency and third-party input); and
• prompt, comprehensive and credible action (which, according to the authors, does not include increased lending margins, an inflation tax or forbearance on capital adequacy).

Where a government is facing a systemic crisis, arguably the government should aim to allocate the losses transparently and minimize costs to taxpayers, while preserving incentives for the infusion of new capital.

While some countries opt not to rely on infusions of private-sector capital, the authors observe that most bank recapitalizations in developing countries that used public resources failed, with one recapitalization following another. Moreover, repeated recapitalizations led to moral hazard, as was the experience in Hungary, Venezuela, Mexico and Chile.

The authors recommend that restructuring can strengthen financial discipline by allocating losses not only to existing shareholders, but also by allocating at least some losses to creditors and depositors who, it is argued, should have been monitoring the bank in question.

In discussing whether the government or the private sector should be the lead agent in a corporate restructuring brought on during a systemic crisis, the authors observe that, in general, private-sector solutions are preferable. They note that both Norway and Spain have adopted variations on an internal workout, while the United States has opted for a government agency (the Resolution Trust Corporation). In noting that assets that are privately managed will likely yield higher returns (or smaller losses) than those managed by the government, they also observe that this may be especially true in emerging markets, given the historically large part the state has played in allocating resources.

**Asset Management Companies**

With respect to asset management companies (AMCs), the report reviews the experiences of seven countries and concludes that in most cases the AMCs did not expedite bank and/or corporate restructuring. In the case of Mexico and the Philippines, the report asserts that the establishment of AMCs actually delayed problem resolution. However, the successful use of AMCs in the U.S. and Spain indicates that they can be effective, but only for narrowly defined purposes of resolving insolvent and nonviable financial institutions.

**State-Owned Enterprise Insolvency**

Developed and prepared by the Legal Department of the World Bank, this section of the report focuses on the issues that arise in the context of state-owned enterprise (SOE) restructuring and insolvency.
**SOEs and Transition Economies**

There is a tendency to associate the phenomenon of insolvency among SOEs with transition economies. While the report notes that transition economies may have a higher concentration of SOEs and, consequently, insolvent SOEs, the problems faced by the existence of such enterprises and the potential solutions are not different in non-transition economies. However, there are certain unique aspects to the phenomenon of SOE insolvencies, especially in the transition economies this report addresses.

Dealing with SOE insolvency in developing countries has a number of macro-economic implications. For example, many financially distressed SOEs can be made viable if they undergo financial restructuring through debt forgiveness, reschedulings or debt-equity conversions. However, when the state sits in the seat of the owner, lender and largest creditor, normal incentives and compromise solutions may be distorted. If, as a lender, the SOE forgives debt to forgive liquidation of its equity holdings, it may expose the financial system to prudential risk. This is the case in many developing economies where state-owned banks are frequently underprovisioned on their abnormally high levels of NPLs. The report stresses that debt forgiveness in this context serves as a recipe for bailout.

**Macro-implications and Obstacles to Restructuring**

The report identifies a second macroeconomic implication of SOE insolvency — the potential for moral hazard. A policy of debt-forgiveness on state loans and taxes, an essential ingredient to successful financial restructuring or divestiture, could potentially encourage borrowers capable of repaying their debts to willfully default. Yet without debt forgiveness, reschedulings or other forms of debt relief, financially distressed enterprises may continue to operate at unproductive or loss-making levels.

In the discussion of the common obstacles to SOE restructuring, the report looks at recent experiences with SOE insolvency in Central and Eastern Europe and some of the common obstacles faced by SOEs in transition and non-transition economies, including political obstacles and conflicts of interest, weak financial systems, weak and underdeveloped capital markets, ineffective corporate governance, ineffective legal and institutional frameworks and insufficient social safety nets.

**Privatizing**

With respect to the process of privatizing SOEs, the report notes that many SOEs are inefficient, non-competitive, loss-making enterprises. It therefore recommends that privatization laws take account of and deal with the issues of insolvency in advance and make provision for addressing the particular problems that arise with SOEs.
Recommendations
The authors suggest a number of basic guidelines and principles on the subject of treating insolvent SOEs, including in the areas of out-of-court restructuring, rescue proceedings and liquidation proceedings. Many of these conclusions overlap with other areas discussed in the World Bank study.

Bank Insolvencies
The regulatory treatment of banks that are insolvent or about to become insolvent is explored in this section of the report. Written by the Legal Department of the World Bank, and in coordination with the Legal Department of the IMF, this in-depth review addresses the issues that arise in stabilizing financial markets in economies in transition and in countries facing systemic banking and corporate sector insolvency. Throughout this section, the report makes a series of recommendations on the design and features of effective bank insolvency procedures.

Systemic Banking Problems
In many countries, bank rehabilitation or bank restructuring is part of the continuum ranging from regulatory enforcement of prudential law to receivership. Systemic banking crises, such as those recently encountered in Asia and Russia, require exceptionally strong corrective action by regulatory authorities designed to quickly restore confidence in financial markets. These measures may include the establishment of a bank restructuring corporation with unusual powers to act decisively and expeditiously in taking over banking institutions and selling their assets without consideration of shareholder rights and without court review.

Lender of Last Resort
In their discussion of the application of “lender of last resort” policies, the authors assert that the possibility (or probability) that banks deemed too big to fail will be rescued exposes society to the moral hazard that bank owners and managers may actually be encouraged to engage in unsound banking practices.

Corrective Actions
The many features and policies underlying corrective action intended to return a bank to regulatory health are discussed at length, as are the forms of corrective action in different jurisdictions. Among the administrative actions that may be ordered are: special audits (of financial condition as well as operations and risk management policies), written warnings, measures affecting the rights of management and owners (including resignation, suspension of dividends, suspension of shareholder voting rights and an increase in bank capital), measures affecting bank operations (including cease and desist orders, disposition on certain investments, restrictions on business) and the appointment of observers and inspectors (as is the case in Germany, Belgium and Argentina).
Special Moratorium on Debt Serviced by Banks
To reduce the risk that the liquidity problems of one bank could result in a systemic crisis, the law of some countries authorizes the regulator or the judiciary to impose a temporary or special payment moratorium for some or all of the bank's debt. The authors question the wisdom of a moratorium covering only part of a bank's obligations because it raises questions of unequal treatment between creditors whose claims are suspended under the moratorium and creditors whose claims continue to be serviced by the bank.

Special Bank Administration Procedures
The authors recommend that provisional administrators (who, unlike receivers, do not have the same powers as bank owners) should be limited to those cases where it is anticipated that a distressed bank will be returned to regulatory compliance. In addition, the banking law should include a special receivership procedure for banks, that provides a system of restructuring and/or transferring an insolvent bank, and should be applied under judicial administration by the bank regulator or a trustee supervised by the bank regulator or deposit insurance fund.

In a comprehensive discussion of the application of special bank administrative procedures, the authors address the three criteria used to determine a bank's insolvency:

1. "liquidity insolvency," which is utilized in the United Kingdom, and is based on general insolvency law standards;
2. "balance sheet insolvency," as is applied in Germany; and
3. "regulatory insolvency," in which a bank is deemed insolvent when its capital is no longer adequate to comply with prudential capital adequacy standards. This approach is used in the United States.

The specific features and application of the special bank administration procedures of provisional administration and receivership are also discussed, with particular attention given to the practices in many developed economies. For example, in Canada, France, Italy, the Netherlands and the United States, the law makes both procedures available to banks. In Austria and Portugal, only provisional administration is allowed, and in Denmark and Norway, the only recourse is receivership. The authors pay considerable attention to the treatment of ownership rights and the powers of receivers in many developed economies, and go on to discuss bank restructuring procedures in many of these countries, including the sale of a banking corporation, purchase and assumption transactions and the use of bridge banks in the United States.

Revocation of the Banking License
In considering the appropriateness of this procedure the authors recommend that a country's law should grant the bank regulator the exclusive authority to issue and to revoke the operating license of a bank. Such authority should be discre-
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tionary, but with transparent criteria.

Bank Control Under General Insolvency Procedures
In many countries (including Austria, England, France, Germany and the Netherlands), banks are subject to court-administered bankruptcy proceedings governed by the general insolvency law. The authors recommend that, if banks are under the jurisdiction of general insolvency procedures, the special interests of the banking system be considered in the form of special provisions requiring, among other things, the consent of the banking regulator before a court decides on a petition for the bankruptcy of a bank.

The bankruptcy laws of Austria, Belgium, Canada, France, Germany, Luxembourg, Switzerland and the U.S. exclude from bankruptcy decrees the financial obligations of banks to other financial institutions under financial netting agreements, to the extent that such obligations are set off against the claims of the bankrupt bank on these institutions. These agreements cover existing obligations that are payable in the future as well as corresponding obligations that are already due. Although these features are designed to protect payment and banking systems, the authors assert that they do so at the price of creating a special class of preference for the claims of creditor banks and other financial institutions over the claims of other types of creditors. (A similar observation is noted in the section on the Legal Framework of Insolvency Regimes.)

The authors suggest that laws that allow for setoff and netting be strictly limited to what is necessary to afford the required degree of protection against systemic risks.

Systemic Bank Restructuring
In this section it is recommended that, where existing regulatory and judicial resources are not equipped for a systemic failure of the banking system, this responsibility should be carried out by a legally independent bank restructuring corporation (BRC) with operational autonomy and sufficient financial resources. The specific criteria for transferring failing banks to the BRC and for terminating the rights of existing bank owners should be spelled out and the BRC law should also include exit criteria for restructured banks as well as a sunset provision for the BRC.

The goal of a BRC should be to consolidate the banking system, to recapitalize viable banks and to improve bank balance sheets by removing non-performing assets. Countries may take one of two approaches to consolidation.

In the first approach, two or more insolvent banks under the BRC's jurisdiction are merged into a new institution, which is then recapitalized with government funds. A larger, more viable institution is created (at least in theory) that can later be reprivatized.

In the second approach, an insolvent bank is merged with a solvent bank that may be undercapitalized and in turn will receive a capital infusion of government
funds from the BRC.

An important policy issue that arises with either approach is whether and how a BRC will provide financial assistance to acquirers of insolvent banks. The authors note that while the use of guarantees and indemnities may be necessary, they also create contingent liabilities on the BRC’s balance sheet that may linger well beyond the agency’s role in the bank’s acquisition.

**Crisis Containment**

In this final chapter on bank insolvency systems, it is recommended that banking authorities should have emergency plans that provide the maximum legal flexibility to contain a crisis at its earliest stage. The authors point to three important lessons that emerged from the different ways in which crisis containment was treated in Thailand, Indonesia, Korea and Malaysia.

1. **Prompt action is of the essence but a coherent plan is even more important.**
   - It is critical that the government of an affected economy quickly establish the agency or institution with overall responsibility for formulating a program that covers the entire financial system (not just visible failures).

2. **Public fears must be minimized before they lead to social unrest.** The Indonesian program as outlined in 1997 advocated immediate closure of non-viable banks. In the absence of an explicit guarantee, this caused a run on the banking system which contributed to a climate of political uncertainty. The policy was reversed two months later and a temporary blanket guarantee introduced. In contrast, the Malaysian experience was that the quick implementation of a temporary deposit guarantee was credited with preventing massive bank runs.

3. **The government must have clear legal authority to take actions to contain a crisis at the earliest possible stage.** The legal powers that appear to be essential are the authority of supervisors to issue a desist and stop operation order, dispatch examiners, physically take control of the bank and branches, seize records and prevent the looting and destruction of accounts and books, replace bank management if necessary, appoint third parties to conduct an audit of the troubled institution and carry out all other necessary assignments; the authority for the government entity to implement the program with limited legal challenges; and the authority of courts to expedite a review of legal challenges to government action. A special court should be established for the sole purpose of accepting cases related to the banking crisis.

**Future and Ongoing Efforts**

In cooperation with the IMF and other external partners, the World Bank is continuing to focus on countries experiencing financial crisis. In the area of insolvency reform, the World Bank is assisting with the design of new systems for dealing with insolvency in Eastern Europe and East Asia.

The World Bank will likely host a regional insolvency conference for Latin
American countries, to be held in Mexico in June 2000, which will be attended by insolvency practitioners, judges and other participants concerned with regional insolvency reform. Experiential information and country-specific feedback will be gathered and will further inform the Bank's insolvency matrix. The Bank also anticipates that regional insolvency seminars or workshops will be conducted in Africa and the Middle East later in the summer of 2000.

The World Bank is in the process of revising its draft guidelines on building effective insolvency systems to reflect the findings presented at the regional insolvency seminars and workshops, conducted with the Bank's partners in Central and Eastern Europe, Africa, Latin America and Asia. The World Bank's final report and matrix will be available on its Web site, along with a database of international insolvency laws, which is intended to be a repository of information on the insolvency laws and regimes in various developed and emerging economies.


2. International Monetary Fund (IMF)

Overview

The International Monetary Fund is a key partner with the World Bank in the broad effort to design and build effective insolvency systems. The Fund and the Bank have many of the same member countries, and are drawn to study many of the same economic conditions and events. As a result of the Asian financial crisis and its impact on many of the Fund's member countries, the Fund undertook its own initiative to encourage and assist member countries to design orderly and effective insolvency systems. Applying many of the recommendations in the 1999 report discussed below, the Fund is currently providing technical assistance for the reform of member countries' insolvency systems and laws.

"Orderly and Effective Insolvency Procedures" — 1999 IMF Report

In a 1999 legal department staff report, "Orderly and Effective Insolvency Procedures," the Fund identifies what it considers to be the key components of orderly and effective insolvency laws and procedures. The report also discusses the major policy choices that countries should address when designing an insolvency system. Whereas the World Bank initiative is focused on a system-wide approach to insolvency reform, the Fund's efforts are aimed at developing specific laws and procedures that can be applied by member countries as they undertake a modernization of their insolvency regimes. As noted in the introduction to this Compendium, these efforts are interdependent and highlight the benefits that can be obtained by cooperation among members of the international community.

The Fund's recommendations on what constitutes effective insolvency systems
and procedures draw on a comparative analysis of selected insolvency laws in different developed economies. While the report identifies the key legal components and policy choices that need to be made in the design of an insolvency framework, the Fund echoes the World Bank's finding that the approaches adopted by countries will vary based on divergent legal traditions and differing policy choices (e.g. "pro-creditor" or "pro-debtor" attitudes).

Moreover, because of the myriad of legal, social and cultural differences, international standards do not exist. Therefore, the report attempts to balance the advantages and disadvantages of various recommendations. In their comprehensive discussion of the policies, objectives and principal features of rehabilitation and liquidation procedures, the authors offer a range of conclusions as to what should be included in the design of these procedures. Similarly, several conclusions in the areas of the courts and designated officials and cross-border insolvencies are offered.

In its analysis of the legal and policy issues that arise in the design and implementation of insolvency procedures, the report focuses on several key areas:

1. the overall objectives of an effective insolvency regime;
2. the specific features of effective insolvency procedures;
3. the principal features of the two main types of insolvency procedures — liquidation and rehabilitation;
4. the critical nature of the judiciary and the liquidator or administrator in the implementation of orderly and effective insolvency procedures; and
5. the major issues that arise in the context of cross-border insolvencies.

The particular issues that arise in the context of the insolvency of financial institutions are not discussed in this paper. Rather, issues such as whether banks, insurance companies and other financial institutions should be exempt from general insolvency law or subject to a special insolvency regime (and the design of that regime) will be the subject of a separate IMF study that is expected to be issued in late 2000.

Objectives of Insolvency Laws
In their general discussion of the common features of insolvency systems, the authors of the report identify two overall objectives.

Objective no. 1: predictability, equitability, transparency
The first objective provides that the insolvency laws should allocate risk among market participants in a predictable, equitable and transparent manner.

Predictability requires that a country's risk allocation rules be clearly defined and consistently applied. While different countries will have differing policies regarding how they will allocate risk, investors and market participants can better manage these risks if the rules and their application are predictable in nature and scope.
Equitable treatment of all creditors does not necessarily mean equal treatment. An insolvency law may provide for differential treatment of creditors who have different relationships with a debtor. At the same time, the insolvency law should clearly address the potential for fraud and favoritism, as well as provide for mechanisms that attempt to block potential discrimination against foreign creditors.

Transparency requires that the system of law and procedures be clearly spelled out to all interested parties. Needed information must be provided to creditors in a timely fashion, courts and administrators must provide guidance, judicial proceedings must be open and available to the public and the law should otherwise be perceived by creditors as unbiased and accessible.

Objective no. 2: protection and maximization of value
The second objective of a country's insolvency law should be the protection and maximization of value for all parties to the insolvency proceedings as well as the economy as a whole. The objective of protecting and maximizing value reappears throughout the report as a key feature of any insolvency system. The authors also specifically point out that the maximization of value applies to both the rehabilitation of a viable enterprise and liquidation where it can no longer be rehabilitated.

Throughout the report the authors highlight a recurring dilemma that countries face when designing or re-evaluating their insolvency laws — what happens when there is a conflict between a particular objective and other policy choices. For example, in some countries an administrator can nullify a contract previously entered into between a debtor and a counterparty. While the administrator takes this action in an effort to maximize the value of an ongoing enterprise, this decision will also have the effect of undercutting the predictability of the contractual relations.

The authors stress that how a country balances these differing objectives will likely be determined by the broader policies adopted. To illustrate this point, the following policy options are noted:

- Who are the beneficiaries of the maximized values?
- Are rehabilitation proceedings seen as a way to enhance the value of claims, or as a means of providing management and shareholders with a second chance?
- What value is placed on the employees?

Specific Features of Insolvency Procedures
The authors identify two primary features of effective and orderly insolvency procedures: the design of a legal framework and the development of an institutional framework. The legal framework establishes the substantive and procedural rights and obligations of participants. The institutional framework implements these rights and responsibilities.
Legal Framework
In discussing the design of an insolvency system's legal framework, the authors highlight the need to make a series of critical policy determinations. By answering a series of questions, policy choices will become more apparent. Some of the questions posed are:

- Will a general insolvency law apply to all debtors or will certain debtors (e.g. banks and other financial firms) be subject to special insolvency regimes?
- At what point can insolvency proceedings be commenced — illiquidity or insolvency — and who can commence the proceedings?
- Can a debtor be replaced and lose control of the enterprise?
- Who will have control over it during rehabilitation proceedings?
- Will a “stay” of enforcement remedies by creditors also apply to secured creditors?
- If so, what kind of protections will be afforded to secured creditors?
- Will liquidators and administrators have the authority to interfere with contractual agreements entered into by the debtor prior to insolvency proceedings?
- What is the extent to which setoff and netting rights can be suspended by the commencement of proceedings?
- What is the extent of an administrator’s powers to nullify transactions and protect creditors?
- How should creditors be ranked for the purposes of distributing the proceeds of a liquidation sale?
- What weight, if any, should be given to the interests of the current owner and management during reorganization?

Institutional Framework
In their discussion of the institutional framework, the authors point to the role of an independent professional judiciary as the cornerstone of an insolvency regime. This includes an ethical court system complemented by the assignment of professional liquidators and administrators who will be responsible for recording, collecting and evaluating assets and liabilities, management of the enterprise, etc. The authors of the report note that this, in turn, requires the imposition of safeguards to protect against conflicts of interest between these professionals and those with a financial interest in the proceedings.

In this context, the authors raise the potential for conflict between the overall objectives of an orderly insolvency law (e.g. predictability) and specific features of the system (e.g. judicial discretion). It is not always possible to anticipate every situation that may arise in the course of an insolvency proceeding, so to what extent should the judiciary and its officials be given the authority to make economic or business decisions, particularly if they are at odds with creditors? Because creditors are faced with less predictability and certainty of the law, the authors suggest that the greater the amount of discretion given to the judiciary, the greater the need for an adequate institutional framework such as a specialized court system
or professional judges with special training or experience.

**Liquidation and Rehabilitation Procedures**

The IMF Report devotes considerable attention to the subject of orderly and effective liquidation and rehabilitation procedures. Early in their discussion of the general features of these procedures, the authors note that while the insolvency laws of countries differ in a number of respects, almost all countries incorporate in their laws both liquidation procedures and rehabilitation procedures. The authors again caution that when countries evaluate and reform their insolvency laws, they must balance a variety of social, political and economic interests that will ultimately determine whether all participants in the economy will participate in the system. With respect to foreign debtors, the authors recognize that international insolvencies raise complex jurisdictional issues. However, they note that whether a debtor is owned by foreign creditors should not be a factor in determining jurisdiction over insolvency proceedings.

**Liquidation**

Early in the discussion of effective and orderly liquidation procedures, the authors demonstrate how the overall objectives of insolvency law apply to the design of liquidation procedures. The ideal insolvency procedure will set in motion a "collective proceeding" that aims to provide equitable treatment among creditors as a debtor's enterprise is dismantled and assets are distributed, and to maximize the assets to be distributed to creditors. This approach not only benefits creditors as a class by providing for an orderly dismantling or dissolution of a failed enterprise, it also promotes the interests of all participants in an economy by creating greater confidence in the financial and legal infrastructure.

**Rehabilitation**

Whereas liquidation procedures are designed to provide for an orderly dissolution of a failed enterprise and the distribution of all of the debtor's assets, rehabilitation procedures seek to allow an enterprise the time and flexibility to try to recover from liquidity problems, over-indebtedness or other obstacles to its continuation as an ongoing enterprise. The authors note that where rehabilitation is in fact possible, creditors prefer this approach if the value of the ongoing enterprise will enhance the value of their claims. According to the authors, even in economies with sophisticated rehabilitation procedures, most rehabilitations take place in the "shadow" of insolvency proceedings.

It is also pointed out that the degree to which formal rehabilitation procedures are relied on varies considerably among countries. A number of developed and emerging countries alike have adopted a variation rehabilitation procedure referred to by the authors as "pre-insolvency." In the United States, pre-packaged insolvency regulations, known as Chapter 11, minimize the cost and delay associated with formal rehabilitation through the use of court-approved reorganization
plans absent prior creditor approval.

The report notes that under French law, debtors may request the appointment of a conciliator who may request court imposition of a stay to encourage a settlement between the parties. During the stay the debtor can only pay salaries or dispose of assets in the regular course of business. The procedure ends when agreement is reached with all creditors or, subject to court approval, with the main creditors. The stay can be continued against the non-participating creditors for up to two years.

In the United Kingdom, the Bank of England has been instrumental in the development of an informal restructuring approach, known as the “London Approach,” which provides for non-binding guidelines intended to encourage out-of-court restructuring of enterprises through negotiations with domestic and foreign creditors (the London Approach is discussed in detail in the section on the Bank of England). The London Approach has been copied by a number of countries that have recently experienced international financial crises (e.g., Indonesia). Banks are urged to take a supportive posture towards financially strapped debtors by making decisions about the future of a debtor based on comprehensive information that is shared with all banks and creditors. Just as important are the incentives provided to creditors to encourage them to offer interim financing through standstill or subordination agreements.

In their discussion of the relationship between liquidation and rehabilitation procedures, the authors address the overlap and linkages between the two varying approaches by different countries (e.g., Germany) and the trend toward “unitary” proceedings.

**Institutions and Participants**

The authors devote attention to the role of creditors in the insolvency process, pointing out that because they are the main beneficiaries, they should be key decision-makers. To illustrate this point, they suggest that during liquidation creditors be given the authority to dismiss the liquidator, approve a temporary continuation of the business by the liquidator and approve a private sale.

During rehabilitation procedures, creditors should have the authority to dismiss an administrator and propose and approve a rehabilitation plan. Particularly in the case of underdeveloped institutions where officials may have limited expertise or independence, the insolvency law should provide for an active creditor role in the process. The transparency of proceedings and the availability of timely information to all creditors are of equal importance.

**Creditor’s Committee**

A principal conclusion by the authors is that an insolvency law should provide for the creation of a creditor’s committee with the costs of that committee treated as an administrative expense. Where there are a large number of creditors with varying interests, it is recommended that a creditor’s committee engage a financial
adviser whose principal role may be to form creditor agreements on the features of the plan. Moreover, the authors note that debtors may be more willing to share confidential information with a small committee, particularly if the members are subject to confidentiality agreements.

**Independence/Integrity**

To ensure that designated officials have the requisite integrity and expertise to perform their roles, the authors recommend the establishment of some form of self-regulatory licensing system and provisions in the law that establish conditions under which these officials can be removed by either the court or a majority of unsecured creditors. The authors conclude, among other things, that countries consider the establishment of specialized bankruptcy or commercial courts.

**Cross-Border Insolvency**

In their discussion of the issues that arise in the context of cross-border insolvencies, the authors address the diversity of approaches in national insolvency laws.

**Territorialist Principle**

Insolvency laws in countries that have adopted what is referred to as the "territorialist principle" allow for proceedings in multiple jurisdictions. In such jurisdictions the following issues must be addressed: If a branch of an enterprise located in one country becomes insolvent, should creditors in that country be allowed to initiate insolvency proceedings while the enterprise as a whole is solvent? Should there be separate proceedings in the various countries where its branches are located?

**Universalist Principle**

Where countries have adopted the "universalist principle," the preferred approach is a single procedure based in the country where the head office or place of incorporation is situated. Questions that arise include: Should there be a single liquidator/administrator, or one for each country where the enterprise has a place of business or assets? Should the liquidator/administrator appointed in one country be able to recapture assets fraudulently transferred to another country by the debtor?

Because cross-border activity has become such an integral part of the global economy, the authors note that this diversity of approach creates confusion and undermines the effective application of national insolvency laws. In advocating greater cooperation in multi-jurisdictional insolvencies, the authors refer to *The European Union’s Convention on Insolvency Procedures* and the *International Bar Association’s Insolvency and Creditor’s Rights Committee J* (both of which are discussed in separate chapters of this Compendium).

**Future and Ongoing Efforts**

In the wake of the recent financial crises in Asia and Russia, and in light of the IMF’s importance in efforts to stabilize and restructure banking systems and to lay a sound basis for a resumption of sustainable economic growth, corporate sector restructuring has become an increasingly significant component of IMF-financed
economic programs. One of the lessons gleaned from the Asian financial crisis was that reform of a country’s financial sector must be accompanied by an effective corporate rescue and recovery architecture. While corporate rescues only work if there is defined and enforced leverage against debtors and creditors vis-à-vis formal and transparent insolvency procedures, an economy plagued by a systemic financial crisis cannot survive without an infrastructure that supports the continuation of viable businesses.

Corporate restructuring reforms in recent IMF-supported programs have focused on the importance of efficient and predictable workout mechanisms, and have attempted to improve the functioning and effectiveness of both in-court insolvency systems and out-of-court workout frameworks. In addition, the IMF is also actively supporting efforts to develop widely accepted guidelines and principles to drive restructuring negotiations, including the efforts of the International Federation of Insolvency Practitioners (INSOL) to develop a global workout protocol in this area.

www.imf.org/external/pubind.htm

3. Asian Development Bank (ADB)

Overview
In the view of the ADB, the Asian financial crisis brought needed attention to the many inadequacies of the legal regimes in the area, and in particular, the shortcomings of the insolvency regimes in many of the Bank’s 57 developing member countries (DMCs). Also highlighted by the financial crisis were the inadequate court systems and weak enforcement and implementation of existing insolvency laws in many of these countries. As such, and in response to the movements in many of these economies to implement insolvency reform, the Bank undertook a range of insolvency law reform activities in the Asian region.

ADB Program Loans to Crisis-Hit Economies
During the earliest stages of the crisis, the Bank’s assistance to DMCs affected by the financial crisis focused on reforming the legal and policy framework for regulating the DMCs’ financial institutions and financial and capital markets. For example, the Financial Markets Reform Program for Thailand provided a $300 million loan and required enactment of an amended Bankruptcy Law, autonomy of the securities regulator, increased accountability of the Thailand Stock Exchange and other improvements to the legal framework for debt recovery. The Financial Sector Program for Korea provided a $4 billion loan and technical assistance to the government to guarantee the independence of the Bank of Korea (the central bank), the consolidated supervision of commercial and specialized banks, and guidelines to reform the insurance industry. The Bank’s 1998 Financial Governance Reform Program in Indonesia provided a $1.5 billion loan together
with requirements to reform the bankruptcy and secured transaction law, and improve accountability and transparency in annual reports of commercial banks.

Regional Technical Assistance on Insolvency Law Reform

In 1998 the Bank approved a program to provide Regional Technical Assistance on Insolvency Law Reform (RETA) as part of its law and development activities. The countries covered by RETA include Korea; Japan; Taipei, China; Hong Kong; Singapore; Indonesia; Malaysia; Thailand; India; Pakistan; and the Philippines. The initiative presented a consolidated picture of the types of problems faced by these countries and the types of reforms introduced by the respective countries. In the course of two insolvency symposiums, the program examined:

1. the relationship between corporate debt and the insolvency or financial difficulty of corporate debtors in the region;
2. the progress made by member economies in reforming their insolvency laws and infrastructures;
3. proposals for change adapted to a specific region or economy to effectively deal with a problem of corporate insolvency and recovery of debt; and
4. the insolvency and other related legislation of RETA economies and the studies and reports produced as a result of the project and made available through the Internet.

Insolvency Reform Initiatives

In January and October 1999, the Bank held its Symposiums on Insolvency Law Reforms, attended by representatives of the RETA economies as well as by observers from other multilateral institutions. At these Symposia, local experts prepared studies of the RETA economies and presented comparative reports, based on these local studies, that sought to develop key areas for discussion and evaluation with the eventual issuance of recommendations that could be applied to some RETA economies.

The RETA symposiums brought together government officials responsible for bankruptcy administration, bankers, leading insolvency practitioners from the legal and accounting professions and academic experts. The sessions were designed to consider recent experiences with insolvency reform in Asia and the Pacific region, to provide a forum to discuss common problems in insolvency law reform and administration and to explore regional and international best practices.

The First Comparative Report

The first Comparative Report was presented at a symposium held in Manila on January 25–26, 1999, and was attended by official receivers, policymakers involved in insolvency law reform, leading insolvency practitioners, bankers, academics and donor agency representatives from the 11 RETA economies.

This first symposium provided a forum for delegates to compare applications
of insolvency guidelines and discuss ways of facilitating reforms. The first report identified a number of issues for discussion and made tentative recommendations, including those related to corporate management, banking sector and lending practices, property rights and secured transactions, level of insolvency case activity, provision of statistics and information, operation of and reforms to insolvency laws, operation of the courts, informal insolvency processes, insolvency case administration, and cross-border insolvency considerations such as the adoption of the UNCITRAL Model Law on Cross-Border Insolvency. (The UNCITRAL initiatives are discussed later in this Compendium, under the heading UNCITRAL.)

The Second Comparative Report
The second phase of the project was concentrated on a more detailed examination of particular issues in five economies: Indonesia, Thailand, Korea, Malaysia and the Philippines ("the five economies"). The local consultants in the five economies were provided with supplementary local studies based on a work guide that identified several areas for research and response, some of which included their recent insolvency reforms, corporate management, lending and credit control practices, secured lending transactions, problems in corporate insolvency laws and their application, operation of the judicial system and efficiency of the operation of informal workouts. In addition, field visits were made to each of the five economies for discussions with the local consultants, government officials, judges, policymakers, legal and accounting professionals, and representatives of banks and financial institutions, among others.

The results of the second Comparative Report were presented at the second Symposium held in Manila on October 24–27, 1999. In this second report, it was highlighted that in the short time since the first symposium, considerable changes had been made to actual and proposed legislative reform to insolvency and related laws. Use of informal insolvency workout processes had also increased significantly. In some of the economies, the court system for administration of insolvency cases had also been reformed. Attempts to improve corporate management standards and practices were also noticeable. Lastly, the banking and financial sectors of all the economies had been the subject of extensive legislation, review and change.

Report Findings
The following is a brief discussion of some of the major issues that emerged from the Comparative Reports and the Insolvency Law Reform Symposia.

Statistics, Knowledge and Information
There is an alarming absence of knowledge and information concerning insolvency in many of the RETA economies. This includes a lack of information about the causes of insolvency, insolvency processes, informal workout situations and the formal rescue process.
Insolvency Laws
Although all of the RETA countries have laws that deal with both liquidation and rescue of corporate debtors, many of the laws are either outdated or inadequate. In particular, the symposium participants noted that the economies of Pakistan, India, the Philippines, and Taipei, China, would benefit from a comprehensive reform of their respective insolvency regimes.

In addition, symposium participants from Indonesia were concerned that, despite the recent reforms to their laws, the changes were insufficient and stopped short of a needed general overhaul of the insolvency and related laws, procedures and processes. The Thai participants noted that their new reforms had had some effect but that complementary reforms such as the enforcement of security rights were still outstanding.

Court System
In at least some RETA economies there is an aversion to formal insolvency procedures, particularly those that involve the judiciary process. In many of these countries, the processes are slow, judges are not necessarily qualified or experienced, and the judicial process is unpredictable and unreliable. Studies have indicated that in Indonesia, Thailand, Pakistan and the Philippines, the court system is not sufficiently structured to deal properly with insolvency cases. RETA country symposium participants identified the organization of the courts, and the status and general accountability of judges and court officials, as areas requiring considerable improvement. According to the Bank, the highest priority should be given to the education and training of judges, court officials and insolvency administrators in many RETA economies.

The need for stronger contacts and cooperation between the judiciaries of the region has led to proposals for Bank-sponsored judicial colloquia and education and training programs. The ADB, in concert with INSOL, is also developing a series of training seminars to be presented to members of the judiciary and ancillary insolvency professionals in mid-2000.

Informal Workouts
The informal workout initiatives adopted in certain RETA economies, including the “Jakarta initiative,” the “Bangkok rules,” and programs undertaken in Korea, Hong Kong and Malaysia have been studied by the Bank. While the Bank and the RETA economies generally agreed that alternative informal workout procedures should be encouraged, the Bank has noted that once the systemic debt of the banking sectors in many of the RETA economies is abated, all creditors (not only the banking sector) will benefit. At the first Symposium in September, certain international organizations, including the OECD and the International Law
Institute, expressed concern that at present the informal workout processes did not take proper account of a number of important collective features.

**Individual Creditor Rights and Collective Insolvency Processes**

Of continuing concern is the clash of values between the enforcement of individual creditor rights and the imposition of collective creditor procedures. There is a need for restraint in balancing individual enforcement rights, particularly those involving the enforcement of securities and lease property rights and guarantees, with the effective operation of a collective rescue regime. If a creditor cannot, in a practical and effective sense, seek either individual or insolvency remedies against a debtor, a considerable bias is created for the benefit of the debtor. It was accepted that many of the RETA economies need to revisit this area and consider the balancing of individual rights against the application of collective insolvency processes.

**Corporate Governance**

Standards of corporate governance and accountability of managers and owners need to be considerably improved in a number of RETA economies. It was also generally accepted that it is of fundamental importance that the insolvency laws of the region contain adequate sanctions to penalize managers and owners of insolvent corporations for fraudulent behavior and behavior that falls short of proper standards. RETA symposium participants generally agreed that sanctions are appropriate in a liquidation context. However, opinions varied as to whether sanctions are appropriate to the rescue process since the process often involves negotiations and bargaining designed to compensate for breaches of corporate governance standards.

**Cultural Influence**

The “stigma” of insolvency in many RETA economies is a potentially destructive cultural influence. The majority of local studies demonstrated that the financial difficulty of a corporation is, more often than not, accompanied by an attitude of concealment and denial on the part of owners and managers. The attitudes in RETA economies to legal processes and the “stigma” of insolvency is compounded by a fear of loss of control which creates a barrier to the application and operation of both formal and informal corporate insolvency laws. In addition, the strong cultural bias against bankruptcy is complemented by the view, in RETA economies, that informal, non-confrontational negotiation is better suited to commercial disputes.

**Globalization**

It was generally accepted by the RETA participants at both Insolvency Law Reform Symposia that globalization should be considered an advantage rather than a disadvantage, although some questioned the pace of introducing new laws and
commercial practices to these economies. There was general agreement that not too many difficulties had been experienced as a result of the imposition or adoption of foreign-based insolvency laws, although this appeared more confined to common law countries. In Indonesia, for example, there was strong support for repealing the existing base of Dutch colonial insolvency laws and replacing it with a new scheme.

**Essential Reforms**

At the two Insolvency Symposiums, the participants from the RETA economies proposed the following ideas and reforms to their respective insolvency law systems:

**Cross-Border Considerations**

During the discussion of this issue it became apparent that there is a lack of knowledge of problems of, and different approaches to, issues of cross-border insolvency. In particular, the ADB noted a general lack of knowledge of the UNCITRAL Model Law on Cross-Border Insolvency of May 1997.

The ADB also observed that as the growth of both regional and international trade and commerce increases, so too do the problems associated with cross-border insolvency. If, for example, a globally active corporation becomes insolvent and subject to an insolvency administration, it would be beneficial to other jurisdictions if the insolvency regimes provided for cooperation in the overall administration of the corporation. This is a particularly important factor in relation to a corporation that is proposing a rescue.

According to the ADB, while it might be ideal if RETA economies were to adopt uniform cross-border insolvency legislation with similar reciprocal provisions regarding recognition, relief and cooperation, it is doubtful that this will occur. In fact, symposium discussions highlighted the absence of such cross-border provisions in RETA economies.

**Super Priority and New Money**

Another essential need identified is the availability of ongoing funding for an insolvent corporation as part of a rescue package. Most insolvency regimes can ameliorate this problem by recognizing the need for such funding and by creating a “super priority” for its repayment. Many insolvency laws in RETA economies do not provide for the concept of the “super priority.” It is not provided for because of the desire to safeguard and protect, for example, a bank that is willing to advance further funding to ensure the survival of the insolvent corporation at the commencement of or during a rescue process.

**Corruption and Fraud**

The third essential need is the need to have comprehensive reform of the insolvency law system, including judicial reforms to ensure that judges are independent and immune from influence. Also stressed was the need to impose stricter
sanctions to enable the proceeds of fraud to be recovered under an insolvency regime.

**Ongoing and Future Work**
The Bank's final RETA report sets out specific recommendations for each of the economies covered by the RETA initiative for reform, as measured against best practice benchmarks. As identified by RETA, training needs are paramount in RETA economies. For this reason, in 2000, the ADB's Office of the General Counsel (OGC) will provide technical assistance to Thailand to support the provision of training for the Central Bankruptcy Court and Business Reorganization Office. OGC will also support regional technical assistance to promote regional cooperation in developing insolvency laws and practices and to develop the understanding of cross-border insolvency provisions. Among the activities to be supported by this regional technical assistance are judicial workshops and meetings.

For more information on RETA and for copies of RETA reports and materials, contact Clare Wee, Senior Counsel, email: cwee@adb.org.

[www.adb.org/publications/online/](http://www.adb.org/publications/online/)
CHAPTER THREE
OTHER REGIONAL DEVELOPMENT BANKS

Overview
The Inter-American Development Bank (IDB) and the African Development Bank (AfDB) are official partners in the World Bank Insolvency reform initiative. In preparation for the regional World Bank Insolvency Symposia scheduled to be held in respective Member States in 2000, it is expected that both the IDB and the AfDB will prepare comparative reports of the insolvency systems in the Latin American and African regions and that these findings and recommendations will be incorporated into the larger World Bank matrix of principles and guidelines of effective insolvency systems.

1. Inter-American Development Bank (IDB)

Special Projects — Financial Crisis
The IDB Office of the Chief Economist has prepared a series of research papers on Financial Crisis contagion, particularly as it affects member countries in Latin America. It addresses, among other things, the relative weight of workouts to rescue packages in the context of insolvency crisis in the region.13

Insolvency Reform
The IDB was represented at the first World Bank Insolvency Symposium in
Other Regional Development Banks

Washington, D.C. in September 1999 and is scheduled to co-sponsor with the World Bank a regional insolvency symposium in the Latin American region, probably in Mexico, in July 2000.

At the time this report went to press, the specifics of the conference had not been determined. However, it is expected that the Bank will play a critical role in the World Bank's formulation of design features and policies specifically applicable to member countries in the Caribbean and Latin American region.

www.iadb.org

2. African Development Bank (AfDB)

Insolvency Reform

Many countries in the African region, while not plagued by a financial crisis on par with Asia, are still grappling with the lack of formal and informal insolvency systems. As they confront the challenge of trying to modernize their insolvency regimes, they must incorporate into these laws and practices the particular social, cultural and legal traditions of the region. Efforts are under way to bring attention to the need to reform the area of insolvency systems.

Toward that end, the AfDB, in partnership with the World Bank, is tentatively scheduled to host an Insolvency Workshop during the summer of 2000, at which the World Bank's Consultative Draft, along with specific papers by regional experts, will be discussed. Moreover, several AfDB Member States are actively participating in the efforts of UNCITRAL to develop a model insolvency law or guidelines.

CHAPTER FOUR
OFFICIAL INTERNATIONAL ORGANIZATIONS

1. Organisation for Economic Co-operation and Development (OECD)

Overview
Since 1992, the Corporate Affairs Unit (formerly the Privatization and Enterprise Reform Unit) of the OECD has been involved in the process of developing rules and policies for transition and emerging market governments in the area of legal reform, focusing on privatization, insolvency and corporate law. The work on insolvency law has centered on the transition economies, examining the relationship between insolvency procedures and enterprise restructuring, providing comparative overviews of different legal and policy frameworks for insolvency and exploring the policy implications of the use of insolvency or similar procedures in privatizing state-owned assets. In recent years, the OECD has been actively reviewing and assisting in the discussion of current insolvency reforms in some of its member countries.

In September 1994, the OECD undertook a project to:

• examine the relationship between corporate insolvency procedures and emerging economy enterprise restructuring and privatization;
• provide a comparative overview of different legal and policy frameworks for
bankruptcy and reorganization in Central and Eastern Europe and OECD countries; and

- explore the policy implications of the use of insolvency or similar procedures in privatizing state-owned assets.

A report of its conclusions and recommendations can be found under the OECD Web site listed at the end of this section.

Financial Institution Insolvency in Russia

The OECD has also been involved with bankruptcy law reform efforts in Russia. Recently, many of the banks regulated by the Central Bank of Russia faced problems of liquidity or even insolvency. Some investment funds also found themselves in financial difficulty. According to the findings of the OECD, Russian legislative provisions for institutional insolvency were either limited or at times counterproductive.

From 1995 to 1997, the OECD put together a team of member-country experts to advise the Russian government in drafting the new insolvency law — a law that was finally adopted by the parliament in December 1997. In addition, the OECD advised the Central Bank of Russia on needed insolvency infrastructure reforms, including the separation of the regulatory/creditor and receiver function, the need to promptly institute insolvency proceedings, the provision of out-of-court settlements and the importance of deposit insurance protection. In January 1997, the OECD convened a meeting of Russian experts to review the systemic aspects of financial institution insolvency, the required regulatory and institutional framework and their application to the Russian situation.¹⁴

Insolvency Systems in Asia — OECD/World Bank Insolvency Symposium

The OECD has also entered into a partnership with the World Bank and the Asian Development Bank to develop a dialogue among Asian emerging economies on the design and implementation of insolvency systems. With the input and expertise of member country experts and officials, policymakers and experts from emerging market economies, this effort aims to review the progress on insolvency reform in the Asian economies and explore ongoing efforts to develop a framework for international insolvency proceedings.

Toward that end, the OECD, in cooperation with the World Bank, the Australian Treasury/AusAID and the Asia Pacific Economic Cooperation forum (APEC), hosted a conference on Insolvency Systems in Asia¹⁵ in November 1999. This conference was the first of the World Bank's series of regional insolvency gatherings undertaken by the Bank to address the need for effective and more efficient insolvency regimes.

The primary objectives of the meeting were to:

- bring together government officials responsible for insolvency reform and its
implementation, private sector practitioners and academics from non-OECD member economies and a team of OECD member country experts to discuss specially prepared reports, review progress in insolvency reform in the non-member Asian countries and offer recommendations for the future;  
- present and discuss the World Bank-led initiative to develop a set of Principles and Guidelines for Effective Insolvency Systems;  
- serve as a platform for launching a multi-disciplinary, multi-faceted dialogue forum to enhance communication and coordinate future activities in the area of insolvency reform in the region; and  
- discuss possibilities for follow-up work and the monitoring of progress.

Many of the organizations whose work is recorded in this Compendium were represented at this conference.

**Symposium Agenda**

Similar to the first World Bank Symposium in Washington, D.C. in September 1999, the key issues that arise in the context of designing an insolvency system were discussed at the Symposium, including: informal workouts and restructurings, formal insolvency mechanisms, continuing firm operations, creditor rights, systemic distress and insolvency institutions.

The general role and evolution of Asian economies' insolvency systems was a continuing theme of the conference. The OECD presented a set of country studies drawn from the OECD insolvency reviews of Asian economies — including Korea (an OECD member), India, Indonesia, Malaysia, Singapore, Thailand and the Philippines. These highlighted a discussion of the extent to which each country was affected by the recent Asian financial crisis, the characteristics of debtor-creditor relationships in that country, formal and informal insolvency mechanisms and procedures, the efficiency of these procedures and the problems and areas in need of reform.

**Symposium Findings**

The regional financial crisis that began in 1997 shook the economies of many countries in Asia and caused tremendous social, political and economic dislocation. It also exposed numerous weaknesses in the region's insolvency regimes. In response, governments in the region exerted substantial efforts to implement reforms to expedite restructuring of financial institutions and businesses.

However, despite the sweeping changes undertaken by governments in the region, symposium participants expressed concern regarding three interrelated areas:

- Many measures introduced to-date have been intended to deal primarily with the systemic crisis facing these economies. Yet in many countries the necessary basic insolvency rules still do not exist and the institutional infrastructure remains underdeveloped.
• Many of the corporate restructuring efforts undertaken by governments in the region have been “Band-Aid reconstruction” — merely rescheduling debts without attempting real restructuring. Certain participants also questioned whether the newly created asset management companies promote or impede long-term restructuring.

• Participants feared that the rapid recovery of certain affected economies could weaken the political resolve for a deeper, sustained insolvency reform effort. To ensure that insolvency reform remains a priority, the conference participants urged international organizations such as the OECD, the World Bank, APEC and the ADB to continue to be active in this area.

Conclusions and Recommendations
A key finding of symposium participants was that there is no “one-size-fits-all” insolvency system. While an insolvency system must be designed to address specific country and cultural idiosyncrasies, weaknesses and lack of resources, all insolvency systems must contain certain fundamental features. However, according to the OECD symposium participants, a country’s special characteristics (particularly cultural concerns) should not be emphasized to such an extent that the effectiveness of the insolvency system is sacrificed.

Symposium participants also recommended that all insolvency systems must contain certain core characteristics, including efficiency, predictability and the recognition of both liquidation and rehabilitation proceedings. Conference participants stressed that an insolvency system should provide not only well-functioning formal mechanisms but should also allow and facilitate out-of-court restructuring.

Meeting participants all agreed that a moratorium, or stay of proceedings against the debtor, should be provided for in all insolvency systems. While some participants argued that a moratorium should be automatic upon submission of an insolvency petition, others contended that a moratorium should only be granted upon application to a court.

They also noted that the Asian financial crisis revealed serious shortcomings in the institutional infrastructure of crisis countries. It was noted that until proper institutions are developed to implement and interpret the laws and ensure that the systems function smoothly, formal insolvency mechanisms will only play a secondary role in most countries.

More specifically, participants recommended the following remedies to address the corruption and political influence plaguing many judicial systems:

• enact a self-executing law, to the extent possible, to leave a modest, clearly defined role to judges;
• impose bright line rules to leave little discretion to judges;
• require opinions to be published to enhance transparency and accountability; and/or
• institute an independent body to establish, monitor and enforce ethical standards in the judiciary.

During the discussion of informal mechanisms, participants stressed that insolvency systems should not be too "court-centered." It was argued that most restructurings should occur out of court, leaving the courts to intervene only when there is a genuine dispute. However, participants also noted that in certain countries informal and formal mechanisms compete with each other, leading to underdevelopment of formal procedures.

Meeting participants also recommended that insolvency reform needs to be accompanied by a broader set of reforms in related areas, including strengthened accounting and auditing standards, improved corporate governance structures in corporations and financial institutions and more effective regulatory oversight.

Future and Ongoing Work
In the concluding session, a consensus emerged among conference participants on the need for continuing dialogue in the area of insolvency reform. The participants stressed that it is imperative that the momentum for reform be maintained and that the sponsoring organizations continue to be active in this area. In addition, all future endeavors should attempt to integrate the work completed by other international organizations such as the IMF, ADB and UNCITRAL.

The OECD is considering the creation of an "Asian Insolvency Reform Forum," upon completion of the World Bank principles and guidelines on building effective insolvency systems, to produce an agenda for reform from a regional perspective and to evaluate current reform efforts. The primary objectives of the Forum would be to:

• further develop policy dialogues in the area of insolvency reform among Asian policymakers and senior private sector participants;
• review the progress in the implementation of reforms;
• identify the main topical subjects upon which further in-depth dialogue is needed under the auspices of the Forum;
• initiate the drafting of a "white paper" on insolvency reform that could be submitted to governments and international financial institutions as a regional assessment and further agenda for reform; and
• function as a key facilitator in identifying country-specific technical assistance needs, which could then be picked up by the bilateral donors or multilateral institutions.

For additional information on these reports, see the OECD Web site.

www.oecd.org//daf/corporate-affairs/
2. European Bank for Reconstruction and Development (EBRD)

Overview
The EBRD was established in response to the unprecedented changes arising from the transition of central and eastern European countries from centrally planned economies to market economies. The EBRD accomplishes its mandate primarily by the financing of specific projects that foster this transition. In addition to providing loans, investing in equity capital, underwriting equity and debt issues and providing technical assistance for infrastructure development, the Bank provides legal reform assistance to government agencies.

The promotion of legal reform in transition economies has become an important element of the EBRD’s work, with particular emphasis on bankruptcy, corporate governance, financial markets, secured transactions and legal reform. The EBRD Legal Transition Team’s initial focus on secured transactions reform expanded to other areas of the law that are considered important to the development of market-oriented economies, including bankruptcy and corporate governance.

Model Law on Secured Transactions
Secured transactions play a vital role in financing in emerging and transitional market economies. As such, a legal framework for secured transactions was considered by the Bank to be a key requirement in creating an investor-friendly climate in these economies.

At the first annual meeting of the EBRD it was determined that most central and eastern European countries either did not have any rules on secured transactions at all or they had to rely on outdated rules from pre-communist eras. The Bank decided that it would be more efficient and of greater assistance to those seeking to develop their own laws if the Bank developed a “guide” in the form of a model law.

“Model Law on Secured Transactions,”16 published by the EBRD in 1994, is not intended as detailed legislation for direct incorporation into local legal systems. Rather, it is intended to form the basis for national legislation that will be adapted to interface with local law, in the areas of contract law, land law, company law, court procedures and insolvency rules.

The main features of the model law are:

• a single security right — for all types of things and rights — a “charge.”
  Traditional types of security rights, such as pledge of moveables, pledge of rights and mortgages are merged into this one right;
• a right in property — this is not merely an obligation, but gives a security holder preference over unsecured creditors in enforcement and insolvency proceedings;
• limited to securing business credits — though it could be extended to cover personal and consumer transactions where adequate rules and
protections exist;
• minimum restrictions — providing for maximum flexibility to arrange relationships as parties see fit;
• flexible definitions for secured debt and charged property — providing for identification at the outset is the key, with allowance for flexibility in the way debts are defined or secured by the parties;
• public registration — where public knowledge is achieved through registration of charges at a designated registry;
• broad rights of enforcement — providing for broad but clearly defined rights of the holder to dispose of charged property, and the right of an interested party to apply for court protection and damages;
• sales of enterprise — where a charge covers all of the assets of an enterprise, there is an additional remedy of selling as a going concern. This requires attention to a country’s particular insolvency laws; and
• practical application.

The law itself is divided into five parts and is designed to provide a balance between competing legitimate interests of the debtor, secured creditor and other parties. The EBRD Model Law on Secured Transactions has led to projects on secured transactions in Azerbaijan, Bulgaria, Hungary, Kyrgyzstan, Moldova, Slovakia and Russia.

The EBRD has also completed a regional survey on the secured transactions laws of its countries of operations, and created a tabular analysis of the legislative situation in each country (see www.ebrd.com/english/st.htm).

Insolvency Law Reform Efforts
Legal reform in the area of insolvency has become an important focus of the EBRD and, as in previous years, the EBRD’s Office of the General Counsel has analyzed insolvency laws within the context of its annual Legal Indicator Survey\(^\text{17}\) of commercial law and financial market regulation.

The EBRD has periodically provided a forum for the discussion of insolvency issues and articles through its legal journal, *Law in Transition*.\(^\text{18}\) The Spring 2000 issue contains a focus section on insolvency. Specifically, the issue has a series of articles\(^\text{19}\) encompassing a wide range of perspectives on insolvency law and practice. The EBRD believes the articles will encourage dialogue and foster the development of fair, effective and efficient laws in the transition countries serviced by the EBRD. For example, the EBRD survey article addresses the need for effective bankruptcy reform in transition economies. It was noted that an essential precondition for an effective system of regulation is the existence of a functioning bankruptcy code. Transition economies often have a bankruptcy law, but lack the skilled professionals and/or legal institutions to implement and enforce this law effectively. This makes it very difficult and time-consuming for bankers to recover the collateral behind delinquent loans. As a result, efforts to reschedule private debt are more disorderly than
otherwise would be the case, adding significantly to banks’ credit losses.

Through its role as a prominent investor and lender, the EBRD will also continue to reinforce the need to have insolvency systems in the EBRD’s countries of operations that apply “fair” laws in a consistent, predictable and uncorrupted manner. Through systematic assessments, the EBRD will evaluate and monitor the progress of insolvency systems in its countries of operations.

In addition, the EBRD has undertaken specific technical assistance projects in several of its countries of operations to help the authorities develop effective insolvency systems. Such projects in Azerbaijan, Kyrgyzstan and the Russian Federation resulted in the enactment of new laws and regulations in each of these countries. Advice related to insolvency regimes has also been provided to the authorities of Romania and Uzbekistan and has led to the introduction of amendments to existing laws.

Ongoing and Future Developments
The EBRD’s secured transactions project and its interest in bankruptcy reform in transition countries is supported by its partnership with the World Bank. In March 2000 the EBRD co-sponsored with the World Bank a regional Insolvency Workshop in Bratislava, Slovakia, which examined comparative country studies of insolvency practices and regimes in central Europe and the Baltic States. As well, the workshop explored the particular legal, judicial, infrastructural and cultural issues that must be addressed in the course of reforming insolvency and related laws in these transition countries. These findings will be incorporated into the World Bank’s draft international principles and guidelines for insolvency systems. The EBRD believes that the achievement of a broad consensus on principles will lead to improvements in the capacity and reliability of insolvency systems, contribute to improved efficiency of banking systems and help to facilitate capital flows to transition countries as market economies develop.

The EBRD is also continuing to provide specific legal and technical assistance to Member States on developing secured transaction laws and reforming their insolvency regimes.

www.ebrd.com/eng/region/legtran/index.htm


Overview
UNCITRAL is the core legal body of the United Nations’ system in the field of international trade law. In recent years, UNCITRAL has become an active participant in promoting dialogue on insolvency law reform. In April 1994 UNCITRAL sponsored a colloquium in cooperation with the International Federation of Insolvency Professionals (INSOL). The colloquium considered the problems that
occur in the context of cross-border insolvency situations, specifically the significant obstacles to the fair and orderly resolution of cross-border insolvencies. In 1995, UNCITRAL and INSOL held another colloquium, to which judges and judicial administrators from 36 countries were invited to consider the issues of cooperation, access to courts of other nations by insolvency appointment holders and recognition of their appointments by a foreign court.

Following this second colloquium, UNCITRAL undertook a project to develop a model law to deal with the problems of judicial cooperation, access and recognition. In 1997, after four meetings of the Working Group on Insolvency Law, UNCITRAL adopted the Model Law on Cross-Border Insolvency.

In 1999, following a proposal from Australia, UNCITRAL considered the possibility of undertaking further work in insolvency law. The proposal cited the recent global financial crises and referred to the work undertaken by various international organizations (including the G22, the World Bank, the IMF and the ADB) in response to these crises.

The Australian proposal pointed out that the Commission was in a unique position to make a meaningful contribution given its universal membership and its previous successful track record in this area, citing the UNCITRAL work on cross-border insolvency. In addition, it was noted that not only did the Commission have strong working relationships with international forums that have expertise in the area of insolvency law, but also that it was viewed by many as the appropriate forum for a discussion of these issues.

Working Group on Insolvency Law
In its discussion of the various efforts underway by other organizations in the area of insolvency reform, the Commission noted that the initiatives taken by these forums is evidence of the necessity of assisting countries to reassess their insolvency laws and practices. It also noted that these various efforts are in need of strengthened coordination so as to avoid duplication of work and to achieve consistent results. The Commission observed, in agreement with other international forums, that a universally accepted model law was in all likelihood not feasible, and that there was a need for a flexible approach that would leave options and policy choices open to countries.

To facilitate further study of this area, considered by the Commission to be a “front-line” factor in international credit ratings, the Commission convened an exploratory session of a Working Group on Insolvency Law. Its goal was to determine what, in the current landscape of efforts, would be the appropriate approach (such as a model law, model provisions, a guide, a set of principles or other text) and to define the scope of the issues to be addressed.

The exploratory session, held in Vienna, Austria, from December 6–17, 1999, was attended by representatives from 38 states, as well as by observers from the IMF, the World Bank, the ADB, the EBRD, the ECB, the OECD, the European
Insolvency Practitioners Association, the IBA, INSOL, the International Women's Insolvency and Restructuring Confederation and the Group of Thirty.

**Working Group Observations**

Discussions by the Working Group centered on a desire to enhance and augment the work of other international organizations, such as the World Bank, the ADB and the IMF, and to broaden the perspective of the work to include the views and requirements of its members and observers.

In addition, it was noted that the Commission could disseminate broadly the work already done by organizations whose efforts and studies had influenced the Working Group's deliberations, expose it to further consideration and produce a final product which reflected the views of the Commission's broad group of members and observers from developed and emerging market economies. This proposal was generally welcomed by the Working Group, although some concerns were raised regarding duplication of effort and whether the Working Group possessed all of the needed expertise to engage in such an exercise.

**Informal Insolvency Procedures**

Much discussion was devoted to the subject of informal insolvency procedures, also referred to as out-of-court workouts. The Working Group agreed, albeit with some controversy, that procedures for out-of-court arrangements between financial creditors and the debtor (that included the possibility of binding dissenting creditors) should be included in the agenda of core features of insolvency systems. According to some participants, the out-of-court negotiation mechanism should include a non-judicial forum that would be empowered, by agreement of the parties, to evaluate whether the arrangement negotiated between the debtor and the majority of creditors was fair and, if it was found to be fair, whether it should bind the minority of non-consenting creditors.

It was suggested by some representatives that the debtor and creditors would join out-of-court negotiations out of their own interest or pursuant to contractual obligations, and that legislation on this point should not establish a statutory duty for either party to participate in the process. This process would be limited to financial creditors and would not include creditors who supplied goods or services.

In recognition of concerns that were raised during the deliberations on out-of-court workout procedures, the Working Group agreed that much of the experience and expertise regarding these negotiations and arrangements rested in organizations such as the IMF, the World Bank, the Group of Thirty, INSOL and the IBA, and that any work by the Commission should be carried out in close cooperation with these organizations and the financial sector.

**Working Group Recommendations**

The Working Group adopted the recommendation (which will be presented at the next meeting of the Commission) that the Commission give the Working
Group the mandate to prepare:

- a comprehensive statement of key objectives and core features for a strong insolvency, debtor-creditor regime, including out-of-court restructuring; and
- a legislative guide detailing flexible approaches to the implementation of such objectives and features, including a discussion of the alternative approaches possible and the perceived benefits and detriments of those approaches.

Because of the unique expertise required in the area of insolvency of banks, insurance companies, broker/dealers and other types of financial firms, the Working Group agreed that issues relating to this special category of institution should not be included in the Commission’s insolvency initiative.

In addition, it was agreed by the Working Group that, in undertaking this project, there was a need to be mindful of the work already under way or completed by other organizations including the IMF, the World Bank, the ADB, the IBA and INSOL.

Finally, the Working Group was urged to collaborate with these organizations so as to benefit from their expertise and build upon their efforts, and commence its work after receipt of the reports currently being prepared by the World Bank and the ADB.

At its thirty-third session\(^{23}\) to be held in June 2000, the Commission will consider whether the Working Group on Insolvency should be given the task of implementing the recommendation.

www.uncitral.org/english/texts/insolven/ml+guide.htm

4. European Union (EU) and the European Central Bank (ECB)

Overview
Under the treaties and laws that created the EU and the ECB, various bodies, including the European Commission, the Council of Ministers and the European Parliament, enact EU legislation. Legislation takes various forms, including “regulations” which are binding in their wording and are directly applicable throughout the EU, and “directives” which are binding only as to the intended objective and have to be implemented by the Member States as part of their national or community laws. The European Central Bank carries out an advisory function in the area of community and national legislation. In this regard, the ECB advises national and community legislative authorities of the EU Member States on legislative proposals in areas such as the payment systems, the stability of financial markets and insolvency laws, particularly as they impact on these areas.

There are three initiatives pending in the field of insolvency at the EU level:
• the insolvency regulation;
• the directive on settlement finality in payment and securities settlement systems; and
• proposals for directives on the reorganization and winding-up of credit institutions and of insurance undertakings.

In addition, the European Commission is currently studying the legal problems related to provision of collateral across borders within the EU, with a view of possibly proposing a directive. According to the EU, it is probable that the provisions of this proposal will have an impact on the insolvency regimes in the EU Member States. Given the early stage of the project, additional details were not available at the time of printing of this Compendium.

The Insolvency Regulation
After many years of debate, the proposal for a regulation on insolvency proceedings is now close to adoption. The regulation provides for the coordination of the cross-border insolvency of commercial undertakings. Excluded from the scope of this regulation are credit institutions, insurance undertakings, investment firms and collective investment undertakings. Contrary to the proposals for directives on reorganization and winding-up, the convention allows for secondary proceedings to be opened in the Member State where the failed company has an establishment (no unity of procedure). It should be noted that Denmark is not subject to this regulation.

The Settlement Finality Directive
The directive on settlement finality in payment and securities settlement systems is the only piece of insolvency-related legislation which has already been adopted and implemented in Member State legislation (Directive 98/26, May 1998). Its principal objective is to reduce systemic risk in payment and securities settlement systems. The Settlement Finality Directive was promulgated by the EC Council, and in its advisory capacity the ECB was consulted by Member States and assisted them in the implementation of this directive.

The directive provides that:
• bilateral and multilateral netting shall be enforceable;
• transfer orders shall not be revoked once they have entered into a payment of a securities settlement system;
• insolvency proceedings shall not be applied retroactively (the abolition of the so-called “zero-hour rule”);
• the applicable insolvency law is the law of the Member State of the system;
• the rights of the system to the collateral security are insulated from the effects of the insolvency proceedings against a participant (collateral provided to Member State Central Banks or to the future European Central Bank falls under the proposal’s scope); and
a clear rule should be developed to determine the lex situs for collateral in the form of securities that are held in book-entry format through multiple tiers of intermediaries.

Proposals for a Directive on the Reorganisation and Winding-up of Credit Institutions and Insurance Undertakings

The enactment of the European Commission directives on Reorganisation and on Winding-up of Credit Institutions and Insurance Undertakings have been held up due to unrelated political disagreements. According to the EU the outlook may now be changing and a real chance exists that the directives will be adopted soon. The aim of both proposals is to introduce the principle of unity and universality of insolvency proceedings, so that a credit institution’s/insurance company’s branches in another Member State are governed by the proceedings opened in the Member State where the head office is located (home Member State) as well as under the law of that Member State. The EC contends that only in this manner can the equal treatment of creditors be guaranteed throughout the EU. It also guarantees consistency throughout the EU in the event reorganization proceedings are commenced.

Ongoing and Future Work

The ECB is also contributing to various international efforts aimed at harmonizing contractual provisions which minimize insolvency-related risks. In this context it is noted that the ECB has developed various master agreements, such as a master repurchase agreement, a master netting agreement and a master foreign exchange swap agreement, for use by itself and the NCBs. Further initiatives are being developed in the ECB’s Legal Committee (with NCB representatives) and the ECB’s European Financial Market Lawyers Group (with market representatives).

The ECB is an official observer at the many international insolvency reform efforts presently under way, including the UNCITRAL Working Group on Insolvency Reform, and is represented at the IMF, the OECD and the Bank of International Settlements (BIS) committees.

For additional information on EU initiatives, visit http://ue.eu.int or contact Marc Vereecken, marc.vereeken@cec.eu.int.

For additional information on the ECB visit www.ecb.int.
CHAPTER FIVE
GLOBAL SUPERVISORY COMMUNITY

Overview
Though somewhat less visible, the international community of regulators and supervisors is also a participant in the debate on effective, orderly and transparent insolvency systems. During and subsequent to the Asian financial crisis, the G22 convened a study group (discussed earlier in this Compendium) to examine the global financial architecture. The United States, the European Community, the United Kingdom, Japan and many other nations contributed to this effort and the ensuing efforts to create a more transparent, accountable and cohesive system. One result has been the individual country efforts to help design effective insolvency regimes, particularly those in emerging economies.

In the United States, the Federal Reserve Board, the Federal Deposit Insurance Corporation (FDIC), the Department of the Treasury, the Department of State and the N.Y. Federal Reserve Bank are all, to some degree or another, participating in efforts to assist emerging market economies to design formal insolvency and informal restructuring systems.

In the United Kingdom, both the Bank of England and the Financial Services Authority are actively assisting with the development of corporate rescue processes that can be adapted by lenders and creditors in emerging market restructurings.

In Germany, Australia, Finland, Spain, Canada, Japan and elsewhere there are efforts to continually reform and fine-tune existing bankruptcy procedures and to find new and more efficient ways to rescue and restructure viable businesses and return value to creditors.
Considerable attention is focused on the Bank of England’s initiatives in the area of corporate rescues and workouts. This is because of the growing consensus among governments, supervisors, lenders and investors that where possible, a solution should be found for the continuation of a viable economic enterprise that finds itself in financial difficulty.

1. Bank of England

Overview
The Bank of England, the central bank in the United Kingdom, has a long-established role in the organization of corporate workouts and rehabilitations which has come to be known as the “London Approach.” An alternative to the statutory insolvency process in the U.K., the London Approach is a series of guidelines that are in essence an informal codification of a set of practices which have come to be widely accepted in the vast majority of multi-lender corporate workouts undertaken in the U.K. Most recently, the London Approach has been adapted by emerging market economies to their corporate rehabilitation regimes, including those in Indonesia (the Jakarta Initiative), South Korea and Thailand. Consideration is also being given by the World Bank, the IMF and these emerging markets to whether principles underlying cross-border corporate workouts could be applied to sovereign debt workouts in emerging markets.

Evolution of the London Approach
The London Approach has its roots in the U.K. recession of the 1970s, when banks, faced with financially strapped corporate clients, had little experience with negotiating the terms of financial rescues and had no common framework for organizing them. The Bank of England took on an unofficial role coordinating, and at times, orchestrating discussions among banks and other lenders with significant exposures to borrowers in financial difficulty. In this intermediary role, the Bank of England, with significant input from U.K. financial institutions, other lenders and insolvency practitioners, developed a set of informal guidelines for banks to use rather than subject companies in financial difficulty to the formal insolvency process. The London Approach has changed over the years; however, the underlying rationale continues:

- to minimize losses to banks and other participants from corporate failures that could benefit from coordinated workouts;
- to avoid companies being put unnecessarily into receivership or liquidation, and to create a means to support companies whose problems are generally thought to be curable through financial rehabilitation; and
- to prevent failure of attempts to provide financial support because of perceived or real conflicts of interest and/or because bankers and other lenders could not agree on terms on which the support would be provided.
Recent Developments
The continued role of the Bank in corporate workouts has been readdressed over time, as has been the applicability and usefulness of these guidelines in an increasingly global financial economy. Over the years, the Bank has substantially reduced its direct contact with borrowers in financial difficulty and placed the responsibility for designing restructuring strategies entirely onto the private sector. In addition, the Bank no longer provides hands-on financial or legal expertise. While much debate has ensued in the U.K. over whether to formalize these guidelines, the Bank has continued to have only a consultative, informal role. At the core of this decision is the view that whatever the Bank's involvement, it needs to be flexible, adaptable and resting entirely on voluntary acceptance by the banking community.

Elements of the London Approach
The London Approach is not grounded in statutory authority but consists of general guidance on how banks and other creditors should respond when an economically viable company to which they are exposed faces serious financial difficulty. This guidance does not have any formal status, and the Bank of England does not have powers of enforcement. The Bank of England promulgates its views on developments concerning the conduct of corporate workouts through speeches, rather than through formal policy decisions. And being voluntary, the London Approach can only be effective as long as it commands general support within the banking community, domestic and foreign. While the Bank has been directly involved in many corporate workouts, many more have been resolved using the principles of the London Approach but without input or involvement by the Bank.

The main elements of the London Approach are that:

- banks should remain supportive upon learning that a company to which they have an exposure is in financial difficulty — in practice this means that they keep their facilities in place and do not appoint a receiver;
- decisions about a company's longer-term future should be made only on the basis of comprehensive information, which is shared among all banks and other parties to a workout;
- the seniority of claims continues to be recognized, but there has to be an element of “shared pain” — i.e. equal treatment for all creditors in a single category.

International Approach to Informal Workouts
According to the Bank of England, cooperation is considered a key element when dealing with complex restructurings, and has always been a key feature of the London Approach. The Bank of England has previously endorsed some form of international “understanding” on the conduct of corporate workouts, and princi-
The key principles which underlie the recommendations in the Report — speed, cooperation, information, standardization and size of potential losses — are just as applicable to large international corporate workouts.

Ongoing and Future Developments
The Bank of England has acknowledged over the years that while it is a highly effective component of U.K. insolvency practice, the London Approach has not always been able to keep pace with the changes in business and finance, and its effectiveness is sometimes put in doubt in light of this shortcoming. For example, according to the Bank, an inherent weakness of workouts is the requirement of unanimity for major changes in loan terms that were built into the original loan contracts. Also, the lack of a formal moratorium on creditor demands can strain the process while a decision is made on the viability of the company. Moreover, large companies frequently have operations in a number of countries and raise finances from a diversity of resources (not always banks). Globalization of financial markets has enabled them to borrow from bondholders, insurance companies, leasing companies and other specialist investors. This is compounded by debt trading and credit derivatives, which can be both helpful and a tremendous hindrance in a workout situation. Lenders may be more willing to participate in a restructuring if they know that they can sell their exposures, but this means a change in the composition of the syndicate and possible reopening of terms already negotiated.

At present, the government is reviewing the Bank of England’s role in non-statutory pre-insolvency corporate restructuring as well as the entire U.K. statutory insolvency regime. Various proposals are pending and initiatives are under way to update the London Approach to make it more reflective of international financial practices and to accommodate the changing nature of workouts.

Coordination with the INSOL Lenders Group
The Bank of England is also assisting, in a consultative capacity, with the efforts of the INSOL Lenders Group to develop an acceptable set of international principles on the conduct of corporate workouts. These efforts are aimed at obtaining greater judicial cooperation among the judiciary, governments and practitioners, and to enhance the way national insolvency systems can work together. One pos-
sible approach would be a set of principles or protocols based on existing corporate rescue practices in different countries, which could be used when dealing with international workouts. (See discussion of INSOL). The Bank of England is also contributing to similar efforts by UNCITRAL in its consideration of Model Corporate Insolvency Guidelines that may include consideration of workout and rescue situations.

www.bankofengland.org
Chapter Six
Private Sector Participants

1. International Federation of Insolvency Professionals (INSOL)

Overview
INSOL is a worldwide federation of accountants and lawyers who specialize in insolvency and rehabilitation proceedings. An active participant in the efforts to study and evaluate global insolvency trends and reform insolvency laws, INSOL is a key partner in the World Bank’s efforts to design principles and guidelines for effective insolvency systems (see earlier discussion of the World Bank Reform Initiative, under the heading World Bank).

Cross-Border Insolvency
INSOL has historically advocated a dialogue on insolvency law reform. In 1994 INSOL, together with UNCITRAL, sponsored a colloquium to explore the problems that occur in the context of cross-border insolvency situations. INSOL’s membership had experience with the problems encountered by insolvency practitioners and receivers in foreign jurisdictions. In 1995, UNCITRAL and INSOL held a second colloquium to which they invited judges, judicial administrators and insolvency practitioners (lawyers and accountants) from 36 countries, where they considered the issues of cooperation, access to courts of other nations by insolvency appointment holders and recognition of their appointment by a foreign court.

As a result of these gatherings, an initiative was undertaken by UNCITRAL and
INSOL to develop a model law to deal with the problems of judicial cooperation, access and recognition. In 1997, after only four meetings of the Working Group on Insolvency Law (composed of many members of INSOL), a Model Law on Cross-Border Insolvency was adopted by UNCITRAL. This Model Law on Cross-Border Insolvency has already been adopted by many developed countries, and is under review by many emerging economies where INSOL members are working to get it adopted.

**Out-of-Court Workouts**

Of particular interest to INSOL is the area of informal insolvency procedures — workouts. According to a recent speech by the President of INSOL, Neil Cooper, it has been the experience of many international insolvency practitioners that in many emerging market economies, particularly those where the insolvency laws and mechanisms are poorly developed, informal procedures are of equal, if not greater, importance than formal procedures. Moreover, even in countries with well-developed insolvency regimes, many debtors and creditors prefer to use informal procedures because of their speed, flexibility and reduced costs.

According to INSOL, during the recent financial crisis in Asia, a number of countries formulated guidelines to encourage local creditors' use of informal insolvency mechanisms, including the London Approach (developed by the Bank of England), the Jakarta Initiative (applied during the Indonesia financial crisis), the Framework for Corporate Debt Restructuring in Thailand and a variant of the London Approach adopted by Korea.

In the context of private creditor and debtor negotiations where more than one creditor has provided financing, efforts to return a company to profitability through an informal workout — the preferred approach to putting a company through formal insolvency — may be stymied where a "minority" of creditors try to hold out for a better deal from the debtor to the detriment of a speedy, orderly workout that benefits the "majority."

**Global Framework for Out-of-Court Workouts**

The INSOL Lenders' Group (ILG) is trying to address this problem with a proposed mechanism for formalizing the informal out-of-court workout process. In its ongoing effort to bring some consistency to this area, the ILG is developing principles of and guidelines for out-of-court workouts, that would be adopted by creditors and debtors and could form the basis of a code of conduct that could be incorporated in national insolvency systems.

The ILG is in the process of finalizing the principles and specific recommendations that will form the basis for a Global Framework for Out of Court Workouts. Included in these discussions is the Bank of England, whose London Approach formed the basis for the informal restructuring of financial institutions during the Asian financial crisis.

While a final framework has not yet been adopted by the ILG, the following
is an outline of some the major points that were raised in an early draft of the protocol.

**Global Approach to Workouts**

**General Concept**

A global approach to workouts is intended to standardize a number of issues that financial creditors commonly experience, such as where a sizeable borrower encounters difficulties necessitating action or intervention by the creditors, either under the terms of their documentation or at the direct request of the debtor. The document is a code of best practice derived from experience and voluntarily adhered to by the debtors and creditors with the full support of local government bodies.

Because a number of factors recur on a consistent basis in informal workouts, the use of such guidelines allows for the resolution of a number of issues in standard and known terms at the outset of a workout, saving time and expense and enabling a focus on more important issues. The ILG recommendations enunciate the necessary conditions for creditors, having all received the same information, to assess properly the longer-term future of a debtor. It is primarily concerned with the actions of creditors during the period between the discovery of a problem and the restructuring of facilities for a longer term.

**"Standstill or Moratorium"**

The basic concept underlying workouts is a moratorium or standstill outside any statutory process, whereby creditors agree neither to take any individual action nor to improve their positions relative to each other in terms of repayment or by way of security. Loss-sharing agreements are to be included in the standstill documentation where necessary in order to achieve this balance between the parties. An informal standstill will be arranged between the creditors, covering the period from the initial meeting to the formal agreement of standstill documentation.

The ILG proposal stresses that the agreement by creditors to a standstill is a concession to the debtor and not a right. The debtor must be clearly informed that the agreement to a standstill will not prejudice the rights of creditors. Moreover, the responsibility to ask for a standstill rests with the debtor, although it is advised that a financial creditor should suggest this course to a debtor who has not initiated appropriate action.

The ILG proposal recommends that the creditors obtain, among other things, an independent accountants' detailed review of the debtor to establish the viability of the debtor, the options available and provide for suitable monitoring arrangements of the debtor's business. A Coordinator and Steering Group should also be formally appointed by the creditors with the support of the debtor.

More specifically, the ILG proposal makes the following recommendations regarding standstill agreements:
• The standstill should initially be for as short a period as is practical, with a maximum period of 60 days. Extensions beyond this should be by majority agreement of creditors unless initially agreed as within the discretionary powers of the Steering Group. All extensions to the initial period should be appropriate to the condition of the debtor and the state of the process and be for periods of not more than 60 days at a time.
• The standstill is a moratorium applying to all the creditors with effect from a specific date ("standstill date"). Unless specifically agreed otherwise, this date should be the close of business on the day before the first all-creditors meeting is convened, unless it is clear that unusual movements have occurred in exposures in the period prior to that date.

**Creditor Responsibilities**
During the period of the standstill, each creditor should contractually agree not to:

• change the terms of existing facilities unless otherwise agreed;
• commence or continue any legal proceedings or other enforcement or recovery activity against the debtor other than perfecting security already granted;
• withdraw or reduce any outstanding facilities;
• take any additional individual security or guarantee;
• declare an event of default, make demands or accelerate facilities;
• charge any default interest; or
• reduce facilities below current utilization — i.e. overdrafts, foreign exchange facilities, etc., should continue to be permitted to revolve up to the amounts on the standstill date.

In addition, creditors may agree collectively to:

• extend new facilities either on a secured or unsecured basis (as priority new money);
• call for security for all creditors;
• negotiate increased pricing with the debtors; and
• roll up interest charges and fees.

If a financial creditor is omitted in error from the standstill, and was not notified about the creditor meetings, it should still be invited to accept the standstill and become a participant. If its exposure has increased since the standstill date, this increase should be provided priority status.
**Debtor Responsibilities**

As a term of the standstill, the debtor is expected to commit itself, except where the specific consent of the creditors has been obtained:

- not to sell, transfer, charge or dispose of any of its assets except in the normal course of trade;
- to manage and conduct its business in accordance with law and the concepts of good corporate stewardship;
- not to incur further financial indebtedness other than trade credit received in the normal course of business;
- not to grant any additional security, guarantee, indemnity or cash collateral in respect of any of its liabilities;
- not to make any material change to its constitution or any shareholding within its group; and
- not to alter inter-company debt positions except by changes occurring through normal day-to-day trading.

In addition, the directors of the debtor cannot give personal guarantees in respect of the debtor nor dispose of assets.

**Participants**

The ILG envisions that all significant financial creditors will be involved as participants in the process. The initial identification of creditors is expected to be by the debtor or his advisers and the likely Coordinator.

The ILG proposal addresses the difficulties that can occur with the inclusion of public bond debt in the process. However, it is noted that where an agent exists for bond issues it should be included in meetings where possible. It is important to recognize that the agent will often be unable to obtain a mandate without formal advertisement and publicity.

Because debt trading can be a resort for a creditor who wishes to withdraw, a seller should ensure that the replacement party is fully aware of the informal protocol process and the point reached within the restructuring process. Debt buyers should be made aware that it may not be possible to renegotiate restructuring proposals that are already largely agreed.

**Information and Professional Advisers**

This section of the ILG recommendations addresses the role and responsibilities of professional advisers who report to the creditors and are paid for by the debtor, including accountants, lawyers, coordinators and steering committees.

**“Reporting Accountants”**

In the process of accessing information regarding a debtor’s business, financial and non-financial affairs, the protocol recommends the commission of “reporting accountants” to provide an independent estimate of each creditor’s relative position at the standstill date.
The role of the reporting accountant will normally fall into three general areas:

- undertaking a preliminary review that will focus on the short-term liquidity, including whether the debtor will need new sources of funding during this initial period;
- preparing a full written report and presentation to creditors which will include a comprehensive review of the debtor's financial and non-financial affairs and longer-term viability; and
- providing an ongoing monitoring role once the refinancing is successfully concluded.

The initial standstill will often occur at a time of inaccurate and/or incomplete information. To structure the longer-term refinancing, it is necessary to establish with accuracy the actual and relative positions of each of the participants at the standstill date.

**Legal Advisers**

The creditors as a group will need to be advised by legal counsel. While coordinating with the steering group in the first instance, the legal advisers will be acting on behalf of the creditors as a whole. It is advised that the legal advisers be chosen by the coordinator, subject to confirmation by the steering group.

The legal advisers' role will fall into five broad areas:

- legal advice to the coordinator and the participants as a whole;
- review of existing documentation and security arrangements;
- drafting of the standstill agreement and confidentiality letters;
- drafting of new facility agreements based on the negotiations; and
- preparation of new security documentation (if applicable).

While this does not preclude an individual creditor from seeking its own legal advice from a separate firm, any costs incurred for separate advice will, in the absence of any overriding factors, be for that creditor's own account, despite any pre-existing contractual right to the contrary.

**Coordinator/Lead Creditor**

A coordinator (also known as a lead creditor) will need to be identified who shall be appointed by the creditors. It is advised that the coordinator be chosen from among the financial creditors with the greatest exposure to the borrower and therefore having the largest economic interest in the workout.

The choice of coordinator will depend on the circumstances but it will in most likelihood be one or more of the following:

- main relationship bank, approached by the debtor in the first instance;
- largest creditor, i.e. with the greatest economic interest; and/or
- lender with a recognized track record of acting in the capacity of coordinator.
There may be circumstances where joint coordination by two or more creditors is appropriate. Such a case is more likely to arise where there is a clear division of responsibilities or a natural division in the indebtedness structure (possibly with conflicting interests). However, it is pointed out that a single coordinator is preferable, in that it provides a clear focal point for all parties and can facilitate better overall control without the risk of any misunderstanding with regard to individual responsibilities.

The role of the coordinator is to lead the negotiations with the debtor on behalf of the creditor. Once the refinancing agreement has been signed, and any security taken, the coordinator will often retain a continuing role in three principal areas:

- Coordinator for the ongoing relationship between the debtor and creditors;
- Agent under the refinancing agreement — this will involve the operational functions of an agent under a syndicated credit; and
- Security Trustee — holding the security and agreeing to (partial) releases as required.

In addition, the security trustee is responsible for holding and distributing the proceeds of any security realizations or enforcing security if so instructed by the creditors.

**Steering Group of Creditors**

A Steering Group should be established comprising a small number of creditors whose primary function is to represent the creditor group as a whole. To the extent possible, the protocol recommends that the members be seen to represent each different class of creditors, e.g. secured, unsecured, lessors, etc., as well as creditors in locations other than the main place of business. The Coordinator should be the Chairman of the Steering Group.

Steering Group members will have access to non-public information which will usually preclude them from selling or trading debt, except in areas of the creditor's business. This will require the imposition of "Chinese walls" to meet local legal requirements and avoid any appearance of conflict during the period of membership. A specific confidentiality agreement, which will include a restriction on debt trading by Steering Group members, may also be necessary.

**Liquidity and New Money**

During the standstill process new money will often be necessary to meet the urgent liquidity requirements of the debtor. The ILG recommends that new funding should be provided by all creditors pro rata to their exposure at the standstill date. However, it is noted that this is often impracticable, and that it is not unusual for a small number of creditors to provide new facilities, with the agreement of all creditors. Such funds will have repayment priority, by contractual agreement among all creditors, ahead of existing unsecured debt and facilities, but still ranking behind existing secured positions unless otherwise agreed. First priority
would be given to these new funds in any new security taken in the standstill for the benefit of all creditors.

Some forms of lending, such as overdrafts and trade facilities, fluctuate over time, and a creditor's position could vary significantly during the standstill period. The formal standstill agreement will usually include equalization/loss sharing clauses where all parties agree to reconcile and adjust such exposures at appropriate times.

Where the standstill date exposures are denominated in more than one currency, it will be necessary to provide for the effect of subsequent exchange rate movements. The limit in the standstill and refinancing agreements should be set in the currency of the utilization at the standstill date. There will be instances where this is not practical, such as multi-currency overdrafts and foreign exchange facilities. In these limited cases, utilization should continue in the various currencies against the currency limit (as reduced to reflect standstill date utilization) specified in that creditor's facility documentation.

The conversion of borrowings from one currency to another should only be permitted by joint agreement of the debtor and the creditor. In situations involving larger sums, agreement of the Steering Group or all creditors should also be required. This is to ensure that the company's hedging strategy is not affected.

**Voting**

As the standstill agreement is a voluntary agreement between the debtor and the creditor, all decisions require the agreement of all parties, except to the extent that this is waived within the standstill agreement or other documentation. Ideally, creditors should agree to some form of majority voting to bind all participants for some non-fundamental and administrative issues. However, no participant should be compelled to provide new money without its consent and this should continue to be a matter requiring unanimous agreement.

**Ongoing and Future Work**

INSOL will be an official participant at the upcoming regional World Bank Insolvency Symposia during the remainder of 2000 and is expected to contribute to the design of the Bank's matrix of principles of effective insolvency systems. Moreover, INSOL has been asked by the Asian Development Bank to conduct training sessions for local judiciary and insolvency agents from the RETA countries as part of the ADB's insolvency reform initiative.

[www.insol.org](http://www.insol.org)
2. International Bar Association (IBA), Committee J on Insolvency & Creditors’ Rights, Section on Business Law

Committee J on Insolvency & Creditors’ Rights
Founded in 1970, Committee J is composed of more than 1,100 lawyers from 90 countries. Committee J members participate in the development of mechanisms for resolving the challenges presented by multinational insolvencies, through greater harmonization of existing domestic insolvency laws, and protocols for cooperation in cross-border insolvency situations. Committee J is a participant in the World Bank’s “Effective Insolvency Systems” project and serves as an Official Observer to the UNCITRAL Working Group on Insolvency Law.

Insolvency Law Reform
Committee J began its efforts by first exploring the pivotal issues in domestic insolvency law. At a series of sessions held at each of Committee J’s annual meetings, members from a variety of jurisdictions presented papers detailing how their countries dealt with umbrella issues such as liquidation and reorganizations, and particular issues such as commencement of insolvency proceedings, powers and duties of insolvency office holders and priorities of distribution amongst creditors and stakeholders. Many of the papers presented at these early meetings are available on Committee J’s Web site.

In the mid-1980s, Committee J began to consider how domestic insolvency regimes dealt with foreign insolvency proceedings which impacted their country. Committee J sessions also began to explore in greater detail such issues as recognition of foreign insolvency proceedings, recognition of foreign insolvency representatives and the scope of authority granted to local bankruptcy courts to grant relief to foreign representatives and creditors.

“Model International Insolvency Cooperation Act” (MIICA)
As a result of the Committee J review, a subcommittee was formed to explore the development of a Model International Insolvency Cooperation Act (MIICA), which was formally adopted by the IBA in the late 1980s. Thereafter, Committee members drafted proposed reforms to their domestic insolvency laws necessary to incorporate MIICA.

The adoption of MIICA was considered by many as prescient. Soon after its adoption, a series of groundbreaking cross-border insolvencies occurred. With such multinational filings as BCCI, Maxwell and Olympia & York, the principles considered in developing MIICA were put to the test.

International Insolvency “Concordat”
Global harmonization, however, of domestic insolvency laws was still at the hypothetical stage. Accordingly, in its absence Committee J suggested that some mechanism was required to foster cooperation between insolvency courts in multiple countries dealing essentially with the same set of assets and liabilities. In response,
Committee J embarked upon the creation of what has become known as the International Insolvency “Concordat” — a protocol for the conduct of cross-border insolvencies designed to ensure greater cooperation and equity. The Concordat was officially adopted by the IBA Council in 1995.

MIICA and the Concordat are intended to provide internationally accepted principles sourced through practitioners experienced in the difficulties arising in the administration of a cross-border insolvency. Although as a matter of law they have no force or effect, MIICA and the Concordat have been used to resolve a series of cross-border international problems and have been cited by numerous bankruptcy courts.

**Model Insolvency Law Project**

These models developed by Committee J and its members formed the ultimate development of the UNCITRAL Model Cross-Border Insolvency Law (discussed elsewhere in this Compendium), which was drafted with significant input from members of Committee J and adopted by UNCITRAL in 1997.

Over the last few years, Committee J has been engaged in its own Model Insolvency Law Project whose purpose is to develop suggested principles and model provisions which might be included in domestic insolvency laws by countries undergoing insolvency law reform and those embarking on the development of insolvency laws for the first time. Its goal is to facilitate both domestic financial stability and greater certainty in international transactions. As with its development of MIICA and the Concordat, Committee J’s Model Insolvency Law Project is the result of direct involvement by Committee J members from many nations. Committee J has planned a Working Session to further the development of this project as part of its upcoming “Insolvency 2000” seminar to be held in Milan, Italy on June 11–13, 2000. In addition, through the learning gained in pursuing the Model Insolvency Law Project, Committee J contributed to the ongoing and proposed efforts of such organizations as the World Bank and the UNCITRAL Working Group on Insolvency Law.

**“Out-of-Court Workout” Principles and UNCITRAL Model Law on Insolvency**

Voluntary restructurings prior to official insolvency proceedings present particular challenges which are addressed differently in the various countries in which Committee J members operate. Committee J has dedicated significant time to the issue of out-of-court workouts both in the context of its educational programs as well as in its law reform efforts.

At the December 1999 session of the UNCITRAL Working Group on Insolvency Law, Committee J members proposed that the issues involved in out-of-court workouts be considered as an integral component of a comprehensive insolvency system in any effort UNCITRAL might undertake to develop guidelines, principles or model provisions for inclusion in domestic insolvency laws.
Committee J proposed that adoption of a uniform approach to large, cross-border restructurings of borrowed-money debt would be useful and perhaps more readily achievable than comprehensive law reform.

Committee J noted that while creditors have great interest in participating in restructurings (as they typically will suffer even greater losses if the enterprise fails), voluntary restructurings are often impeded by the ability of individual creditors to take enforcement action and by the need for unanimous creditor consent to alter the repayment terms of existing classes of debt. These problems are magnified in the context of complex multinational businesses, where it is especially difficult to obtain consent from all relevant parties. For this reason, it has proven useful to have a legal mechanism to bind dissenting creditors, so long as a threshold standard of fairness to dissenting creditors is achieved by a restructuring.

Committee J suggested to the UNCITRAL Working Group on Insolvency Law that it might consider the development of a model voluntary cross-border restructuring procedure intended to provide for an expedited, non-judicial process for the voluntary restructuring of borrowed money indebtedness (institutional debt and bonds) of insolvent business enterprises. The model procedure might consider, among other things:

- approval of the restructuring by a requisite majority of each affected class; and
- an independent non-judicial determination of the fairness of the restructuring proposal.

This proposal stimulated considerable discussion at the meeting of the UNCITRAL Working Group on Insolvency Law. Ultimately, the UNCITRAL Working Group included in its proposal to the full UNCITRAL for consideration in June 2000 that out-of-court workouts be included for consideration in any UNCITRAL efforts in the insolvency reform area going forward. However, it was clear from the debate generated by Committee J's proposal that certain countries and organizations were against inclusion of any mechanism to bind minority creditors, which was seen as antithetical to a more desirable informality of out-of-court proceedings. There appeared to be consensus, however, that out-of-court restructurings work best "in the shadow" of a strong insolvency system — so that it may not be possible to conduct successful out-of-court restructurings absent an effective system for formal insolvency proceedings.

**IBA Insolvency Law Conferences**

In addition to its law reform efforts, Committee J presents educational seminars at its twice-yearly meetings as well as through the work of its various subcommittees.

[www.ibanet.org](http://www.ibanet.org)
3. American Law Institute (ALI)

Overview
ALI is a private, non-profit organization of experienced members of the judiciary, academia and the bar, founded in 1923 to improve the law and its administration. The Institute’s work includes the Restatements of the Law, which are often cited as authoritative in U.S. courts, and the Uniform Commercial Code, the basic commercial law of the United States, adopted in all 50 states and several territories.

The Institute’s interest in insolvency law reform is reflected in its project on the harmonization of Canadian, Mexican and U.S. bankruptcy laws, in light of the passage of the North American Free Trade Agreement (NAFTA).

International Statements of Canadian, Mexican and U.S. Bankruptcy Law
The objective of this project, ALI’s first in private international law, is to develop cooperative procedures for use in business insolvency cases involving companies with assets or creditors in more than one of the three NAFTA countries. Its scope may eventually be enlarged to include other countries as well.

The project has three fundamental premises. The first is that neither harmonization of the insolvency laws of the three countries nor adoption of a comprehensive treaty concerning insolvency is likely to be achievable in the near future. The second is that the project should be limited to commercial matters and to legal entities (like corporations and partnerships). The third is that the primary emphasis should be on approaches that can be implemented by private parties and by the courts without need for legislation, to the extent possible.

The project has been structured in two phases. Phase I will produce an authoritative summary international statement of the insolvency laws and practices of each country. Phase II will produce a set of cooperative procedures for use in both the public and private sectors.

Each NAFTA country is represented in the project by leading experts (judges, lawyers and academics). Reporters and Advisory Committees from the three countries met separately in Phase I to develop the summary statements of each country’s bankruptcy laws, but each statement was reviewed by the other committees to ensure that it would be understood clearly by an international audience. Those statements have been approved and are in the process of translation into Spanish. The statements permit lawyers in each country to understand the basics of the bankruptcy laws of other countries. That understanding is crucial to meaningful cooperation in transnational cases.

Phase II of the project is nearing completion. The Advisory Committees met together in Phase II to consider procedures for cooperation developed by the whole team of Reporters from the three countries. The Phase II text has been
approved by the ALI Council and will be presented to the Institute's membership for final approval at its Annual Meeting in Washington, D.C. in May 2000.

Transnational Insolvency Reporters

United States: Jay L. Westbrook, The University of Texas School of Law, Austin, Texas.

Mexico: Miguel Ángel Hernández Romo and Carlos Sanchez-Mejorada, Mexico, D.F., Mexico.

Canada: Domestic Aspects of Canadian Insolvency Law: E. Bruce Leonard, Toronto, Ontario; Transnational Aspects of Canadian Insolvency Law: Jacob S. Ziegel, University of Toronto, Faculty of Law, Toronto, Ontario.

www.ali.org

4. International Law Institute (ILI)

Overview
The ILI, a private not-for-profit organization active in the area of legal and financial reform, has recently played an important role in the area of international insolvency law reform through training, technical assistance and conferences in the U.S., Eastern Europe and Asia conducted by U.S. bankruptcy judges, practitioners and academics. Over 7,500 lawyers and other officials from 175 countries have participated in ILI courses.

In 1998, supported by the World Bank, the ILI conducted a training program for judges, trustees and others on bankruptcy law and practice. The ILI has scheduled for April 2000 a Bankruptcy Law Seminar which will address how bankruptcy fits into the broader commercial and international context. Included will be case studies and presentations on bankruptcy concepts applicable to all systems, sources of bankruptcy law and drafting a bankruptcy law in the context of legal reform.

www.ili.org

5. International Swaps and Derivatives Association (ISDA)

Overview
ISDA is the global trade association representing leading participants in the privately negotiated derivatives industry. While ISDA is not pursuing any broad-based reform of insolvency laws, it has focused on two important related issues: netting and collateral. On the netting front, ISDA is seeking greater recognition of the enforceability of contractual arrangements and has worked with other organizations to amend statutory law to achieve greater recognition of close-out netting. The Association's work in this area has resulted in a series of laws being passed in various countries that seek to ensure legal certainty in those nations.
Since its original request for opinions from the G-10 countries in 1987 that only addressed the enforceability of certain provisions of the 1987 ISDA Master Agreement, ISDA has expanded the number of countries solicited to 34. In the area of collateral, ISDA has formed the Collateral Law Reform Group to provide information and guidance to European bodies and national authorities with responsibility for financial activity. It has made specific recommendations to reform the existing legal structure in European Union member states which create obstacles to the effective use of collateral.

www.isda.org

6. The Counterparty Risk Management Policy Group

Overview
The Counterparty Risk Management Policy Group was formed in January 1999, following the market disruptions experienced in the late summer and early fall of 1998, by a group of 12 major, internationally active commercial and investment banks. The Policy Group’s objective has been to promote better practices in counterparty credit and market risk management by building on the self-improvement efforts undertaken by individual firms in the aftermath of the Asian crisis. In its report, “Improving Counterparty Risk Management Practices,” the Group made the following recommendations:

• implementation of enhancements to information sharing between counterparties;
• application of an integrated analytical framework to the evaluation of market risk, liquidity risk and leverage;
• evaluation of the integrated elements of market, liquidity and credit risk factors;
• enhancements in the quality of risk information; and
• improvements to and harmonization of standard industry documentation.


www.crmpolicygroup.org/
REFERENCES

5 World Bank International Insolvency Task Force members: Co-Chair — Harvey Miller (Weil, Gotshal & Manges, New York); Co-Chair — Philip Wood (Allen & Overy, London); Manfred Balz (General Counsel, Deutsche Telekom, Munich); Hon. Sid Brooks (Bankruptcy Judge, Dist. of Colorado); Prof. Ian E. Fletcher (Director, CCLS, Queen Mary & Westfield College, University of London); Ronald Harmer (Counsel, Blake, Dawson & Waldron, London); Carlos Sanchez-Mejorada (Sanchez-Mejorada, Velasco y Valencia, Mexico City); Koji Takeuchi (Sakura Kyodo Law Offices, Tokyo); and Prof. Jay Westbrook (University of Texas, School of Law). Gordon Johnson (The World Bank) served as Secretariat to the Task Force. Douglas Webb (The World Bank) served as Initiative Coordinator.
6 The modules for the initiative are: Module 1: Legal Framework for Insolvency; Module 2: Institutional Framework (Working Group); Module 3: The Economics of Insolvency; Module 4: Insolvency Regulatory Framework (Working Group); Module 5: Business & Financial Sector Working Group; Module 6: Rehabilitation and Insolvency Alternatives; Module 7: Systemic Crisis Working Group; Module 8: State-Owned Enterprise Insolvencies; Module 9: Bank Insolvencies; Module 10: Debtor-Creditor Regimes.
7 The source of the information in the section on the World Bank includes both the Working Group papers from the September, 1999 World Bank Insolvency Symposium and the Consultation Draft from the Asia Insolvency Symposium held in Australia in November 1999. This information was supplemented by comments provided by the Legal Department of the World Bank.
8 "Orderly and Effective Insolvency Procedures: Key Issues," Legal Department, International Monetary Fund 1999.
9 The section on Bank Insolvency included in the World Bank's Consultative draft is a distilled version of a Bank paper prepared by Margery Waxman, Legal Department, and an IMF paper, prepared by Tobias Asser, IMF Legal Department.
10 Within the IMF's Legal Department, Sean Hagan, Associate Legal Counsel, drafted the report and coordinated the work of the research team, made up of Boyko Dimitrachkov, Seng Chee Ho, Nadim Kyriakos-Saad and Rhoda Weeks.
11 See also Summary of Second Comparative Report (and addendum), Asian Development Bank, Regional Technical Assistance Insolvency Law Reforms, TA NO: 5795; Integrating the Legal Regimes for Secured Transactions and Bankruptcy: Economic Issues; Secured Transactions in Asia; Overview of Key Legal and Economic Issues in Five Asian Countries; and Law and Development at the Asian Development Bank 1999 Edition; Special Report: Insolvency Law Reform in the Asian and Pacific Region.
12 For an excellent discussion of specific RETA economy findings, see "CCH, Asia Pacific Insolvency & Restructuring News," Issue No. 4, December 31, 1999.
14 See also "Corporate Insolvency Procedures as a Tool for Privatization and Enterprise Restructuring," OECD, September 1994.
18 Produced by the EBRD's Office of the General Counsel, Law in Transition provides coverage on legal developments in transition economies, with each issue focusing on a particular aspect of legal reform. Law in Transition is published three times a year in both English and Russian and is available on the Bank's Web site.
References

19 See the following articles from the Spring 1999 issues of Law in Transition: "Corporate governance as a foundation of capital flows," Charles Frank, First Vice President, EBRD; "International financial standards and the transition economies," Michael Taylor, Senior Economist, Systemic Banking Division, Monetary and Exchange Affairs Department, IMF; "Restructuring of financial institution debts in Russia," Mira Davidovski, Salans Hertzfeld & Heilbronn.


24 The insolvency regulation would be directly applicable to EU Member States, whereas the other text of law discussed hereunder are directives and would have to be adopted as national or community legislation by individual Member States.


26 See European Monetary Institute, "Annual Report 1999."


30 Commentary by members of the INSL Lenders Group on a draft "INSOL Lenders Protocol for Global Approach to Workouts."
APPENDIX

The World Bank
Founded in 1944, the World Bank Group consists of five closely associated institutions: the International Bank for Reconstruction and Development (IBRD); International Development Association (IDA); the International Finance Corporation (IFC); the Multilateral Investment Guarantee Agency (MIGA); and the International Center for Settlement of Investment Disputes (ICSID). Each of these multilateral institutions provides direct financial assistance or services to their respective member countries, including the IBRD (referred to here as “the World Bank”).

Among its other missions, the Bank assists countries to strengthen and sustain the fundamental conditions they need to attract and retain private investment. With Bank support — both lending and advice — governments are urged to reform their overall economies and strengthen banking systems. Through World Bank guarantees, MIGA’s political risk insurance, and in partnership with IFC’s equity investments, investors are encouraged to invest in developing countries and countries undergoing transition to market-based economies.


International Monetary Fund
The International Monetary Fund is a multilateral institution founded in 1946 and presently comprised of 182 member countries. Its mission, unchanged since its inception, is to promote international monetary cooperation, exchange stability and orderly exchange arrangement, and to provide temporary financial assistance to countries “under adequate safeguards.” However, its operations — which include surveillance, financial assistance and technical assistance — have evolved significantly. Its current involvement in the efforts to build effective insolvency regimes in member countries is an example of the Fund’s efforts to accommodate a changing international financial environment.

www.imf.org/external/pubind.htm

Asian Development Bank
The Asian Development Bank (ADB) is a multilateral, regional development finance institution based in Manila, the Philippines and is composed of 57 developing member countries in the Asian and Pacific region. The ADB is working in close cooperation with its member countries to address legal and regulatory reforms considered necessary to foster development in these countries.

www.adb.org/publications/online/
Inter-American Development Bank
The Inter-American Development Bank, established in 1959, is the oldest and largest regional multilateral development institution. The Bank was created in response to Latin American nations’ longstanding desire for a development institution that would focus on the pressing problems of the region. The Bank’s original membership included 19 Latin American and Caribbean countries and the United States. Subsequently, eight other Western Hemisphere nations, including Canada, have joined the Bank. The Bank has developed links with many industrialized countries on other continents, and in 1974 the Declaration of Madrid was signed to formalize their entry into the Bank. Eighteen non-regional countries joined the Bank between 1976 and 1993. Today Bank membership totals 46 nations. In addition to the Bank, the IDB Group consists of the Inter-American Investment Corporation (IIC) and the Multilateral Investment Fund (MIF).

www.iadb.org

African Development Bank
The African Development Bank (AfDB), the African Development Fund (ADF) and the Nigeria Trust Fund (NTF) are components of the African Development Bank Group. Headquartered in Abidjan, Côte d’Ivoire, the Bank Group is a multinational development bank supported by 77 nations from Africa, North and South America, Europe and Asia. Established in 1964, its mission is to promote economic and social development through loans, equity investments and technical assistance.


Organisation for Economic Co-operation and Development
The Organisation for European Economic Co-operation (OEEC), the forerunner of the Organisation for Economic Co-operation and Development (OECD) until 1961, was established after the Second World War to administer American and Canadian aid under the Marshall Plan for the reconstruction of Europe. The primary mission of the OECD, to build strong economies in its member countries, improve efficiency, hone market systems and expand free trade, has not changed; however, the OECD’s efforts are now also focused on developing economies and those in transition from centrally-planned to market systems.

www.oecd.org//daf/corporate-affairs/
European Bank for Reconstruction and Development
The European Bank for Reconstruction and Development, headquartered in London, was established in 1991 in response to the unprecedented changes and challenges arising from the central and eastern European countries' move from centrally planned economies to market economies. The Bank was given the mandate to support this transformation through the promotion of private and entrepreneurial initiatives in its member countries of operation. It seeks to help its 26 countries of operation in central and eastern Europe and the Commonwealth of Independent States (CIS) to implement structural and sectoral economic reforms, by promoting competition, privatization and entrepreneurship, taking into account the particular needs of countries at different stages of transition.

The EBRD accomplishes its mandate primarily by the financing of specific projects that foster this transition, with particular emphasis on investment in infrastructure. In addition to providing loans, investing in equity capital, underwriting equity and debt issues and providing technical assistance for infrastructure development, the Bank provides legal reform assistance to government agencies.

www.ebrd.com/english/region/legtran/modlaw0a.htm

United Nations Commission on International Trade Law
Established by the UN General Assembly in 1966, and composed of 36 Member States, the United Nations Commission on International Trade Law (UNCITRAL) has the general mandate to further the elimination of disparities in national laws governing international trade which have created obstacles to the flow of trade. The International Trade Law Branch of the United Nations Office of Legal Affairs is located in Vienna, and functions as the Secretariat of UNCITRAL.

www.uncitral.org/english/texts/insolven/ml+guide.htm

European Union
The European Union (EU) is composed of 15 Member States between which the trade of goods, the provision of services, the circulation of capital and the circulation of people is without restriction. This single economic market totals 370 million consumers.

There are three institutions involved in adopting EU legislation – the European Commission, the Council of Ministers and the European Parliament. The European Commission is the executive body of the EU. Although it does not have the monopoly to propose legislation, the huge majority of proposals for legislation are made by it.

In most fields, the Council of Ministers and the European Parliament share the decision-making power. Both have to agree on a legislative text before it becomes
enforceable. Several types of EU legislative acts can be distinguished, of which the most important ones are regulations and directives. Regulations are binding in their wording and are directly applicable throughout the EU, whereas directives are binding only as to the intended objective. They have to be implemented by Member States in national law. The Insolvency Regulation belongs to the first category and must therefore be adopted by individual national legislatures, whereas the other texts of law mentioned hereunder are directives.

**European Central Bank**
The European Central Bank (ECB) was established in June 1998 by the Member States of the European Union (EU) after the EU Council concluded that 11 member states — Belgium, Germany, Spain, France, Ireland, Italy, Luxembourg, Austria, Portugal, Finland and the Netherlands — fulfilled the necessary conditions for the adoption of the single currency known as the “Euro.” On January 1, 1999 the third stage of the conversion to this single currency commenced with the irrevocable fixing of the exchange rates of the currencies of the 11 Member States participating in the Euro and with the conduct of a single monetary policy under the ECB.

The achievement of price stability is the primary objective of the single monetary policy of the Eurosystem, which is composed of the ECB and the national central banks (NCBs). Under the treaties and laws that created the European Community and the ECB, the ECB also carries out an advisory function in the area of community and national legislation on monetary policy, payment systems, foreign exchange policy, banking supervision and financial stability. In this regard, the ECB advises national and community legislative authorities of the EU Member States on legislative proposals in areas such as the payment systems, the stability of financial markets and insolvency laws, particularly as they impact these areas. Over the past few years the ECB and its predecessor institution, the European Monetary Institute (EMI), have delivered approximately 160 opinions on consultation procedures, part of which dealt with insolvency issues.

http://ue.eu.int
www.ecb.int

**Bank of England**
The Bank of England, the central bank of the United Kingdom, has a long-established role in the organization of corporate workouts and rehabilitations which has come to be known as the “London Approach.” It also offers specialist training and technical assistance for other central banks.

The Bank has many roles: through its Monetary Policy Committee it sets interest rates in order to meet the government’s inflation target; it manages the government’s stock register and prints the country’s banknotes. The Bank has close links with the markets and operates a payments system, the Real Time Gross
Settlement System, together with the Central Gilts Office (on behalf of its owner CRESTCo Limited). Also, it collects and publishes (via MFSD — Monetary and Financial Statistics Division) money and banking data.

www.bankofengland.org

International Federation of Insolvency Professionals (INSOL)
The International Federation of Insolvency Professionals (INSOL) is a worldwide federation of accountants and lawyers who specialize in insolvency and rehabilitation proceedings. An active participant in the efforts to study and evaluate global insolvency trends and reform insolvency laws, INSOL is a key partner in the World Bank’s efforts to design principles and guidelines for effective insolvency.

There are currently 28 Member Associations with over 6,000 professionals participating as Members of INSOL.

These member professionals:
• conduct formal insolvency proceedings;
• advise businesses and individuals in financial difficulty, creditors and other professionals; and
• reconstruct troubled businesses.

www.insol.org

International Bar Association, Committee J on Insolvency & Creditors’ Rights
The International Bar Association (IBA) is an international organization of Law Societies, Bar Associations and individual lawyers engaged in international practice. Founded in 1947, it is composed of over 18,000 individual lawyer members from 183 countries and 178 Law Societies and Bar Associations which together represent more than 2.5 million lawyers. The Association’s overriding aim is to provide a forum in which lawyers can interact with, and exchange ideas with, other lawyers. The IBA also serves in a consultative or official observer capacity with international law-making and law-reforming bodies.

www.ibanet.org

American Law Institute
The American Law Institute is a private, non-profit organization founded in 1923 following a study conducted by a group of prominent American judges, lawyers and teachers who believed that there were two chief defects in American law — its uncertainty and its complexity — which had produced a “general dissatisfaction with the administration of justice.” They recommended that a lawyers’ organiza-
tion be formed to improve the law and its administration, a recommendation which led to the creation of the American Law Institute.

The ALI undertakes a project only upon the careful consideration and prior approval of its Officers and Council.

The Institute's work includes the Restatements of the Law, which are often cited as authoritative in U.S. courts, and the Uniform Commercial Code, the basic commercial law of the United States, adopted in all 50 states and several territories.

www.ali.org

**International Law Institute**
The International Law Institute is a private, not-for-profit organization headquartered in Washington, D.C. Established in 1955 at Georgetown University, it has been independent since 1983. The ILI's objective is to develop practical solutions to the legal, economic and financial problems of the international community.

www.ili.org

**The International Swaps and Derivatives Association**
The International Swaps and Derivatives Association (ISDA) is a global trade association representing leading participants in the privately negotiated derivatives industry. ISDA was chartered in 1985, and today numbers over 450 members from 37 countries on five continents. Ensuring the enforceability of the netting provisions of the ISDA Master Agreement has been a key initiative, because of its importance in reducing the credit risks arising from the business.

www.isda.org

**The Counterparty Risk Management Policy Group**
The Counterparty Risk Management Policy Group was formed in January 1999 by a group of 12 major, internationally active commercial and investment banks. The Policy Group's objective has been to promote better practices in counterparty credit and market risk management by building on the self-improvement efforts undertaken by individual firms in the aftermath of the Asian crisis.

www.crrmpolicygroup.org
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