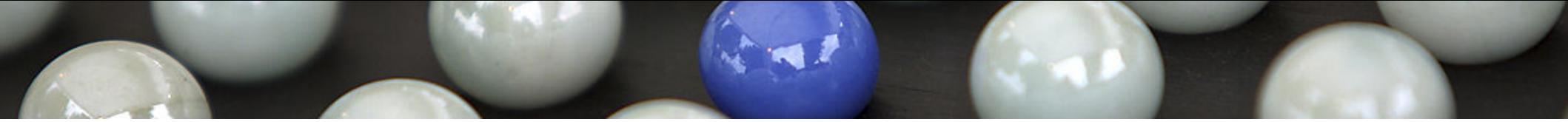


TvOB Conference:
Zelfregulering, codes & soft law in het ondernemingsrecht

Soft law instruments in restructuring and insolvency law: exploring its rise and impact

Utrecht – 9 May 2019

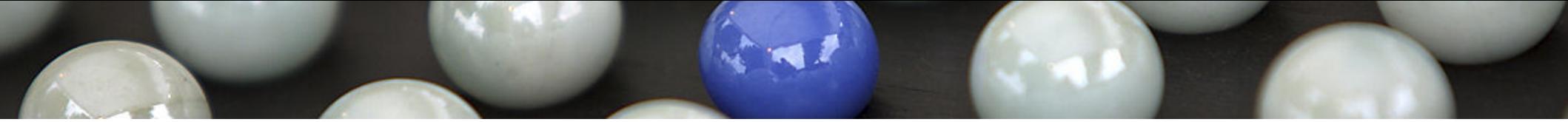
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Agenda

In the field of restructuring and insolvency law:

- 1. Soft law instrument, what is it?
- 2. Reviewing the ‘standard-setting’ organisations
- 3. A sneak preview to the realm of soft law instruments
- 4. Why bother about soft law instruments?
- 5. Impact on restructuring and insolvency law
- 6. Conclusion



1. Soft law instruments, what is it?

Soft law instruments are often described as:

1. Vague
 2. Hard to find
 3. Difficult to interpret
 4. Not binding, simply not relevant
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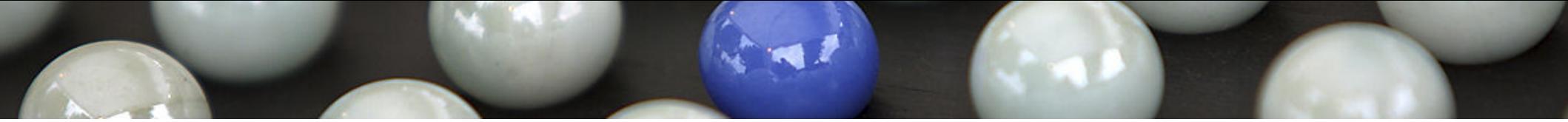
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Various approaches exist; soft law is:

1. A concept on a continuum of law in the making
2. Situated between *hard law* and *political arrangements*
3. Hard law requires:
 - (i) referring to binding obligations;
 - (ii) providing for precise obligations; and
 - (iii) delegating authority for interpreting and implementation
4. For soft law - one or more hard law dimensions are weakened



2. ‘Standard-setting’ organisations

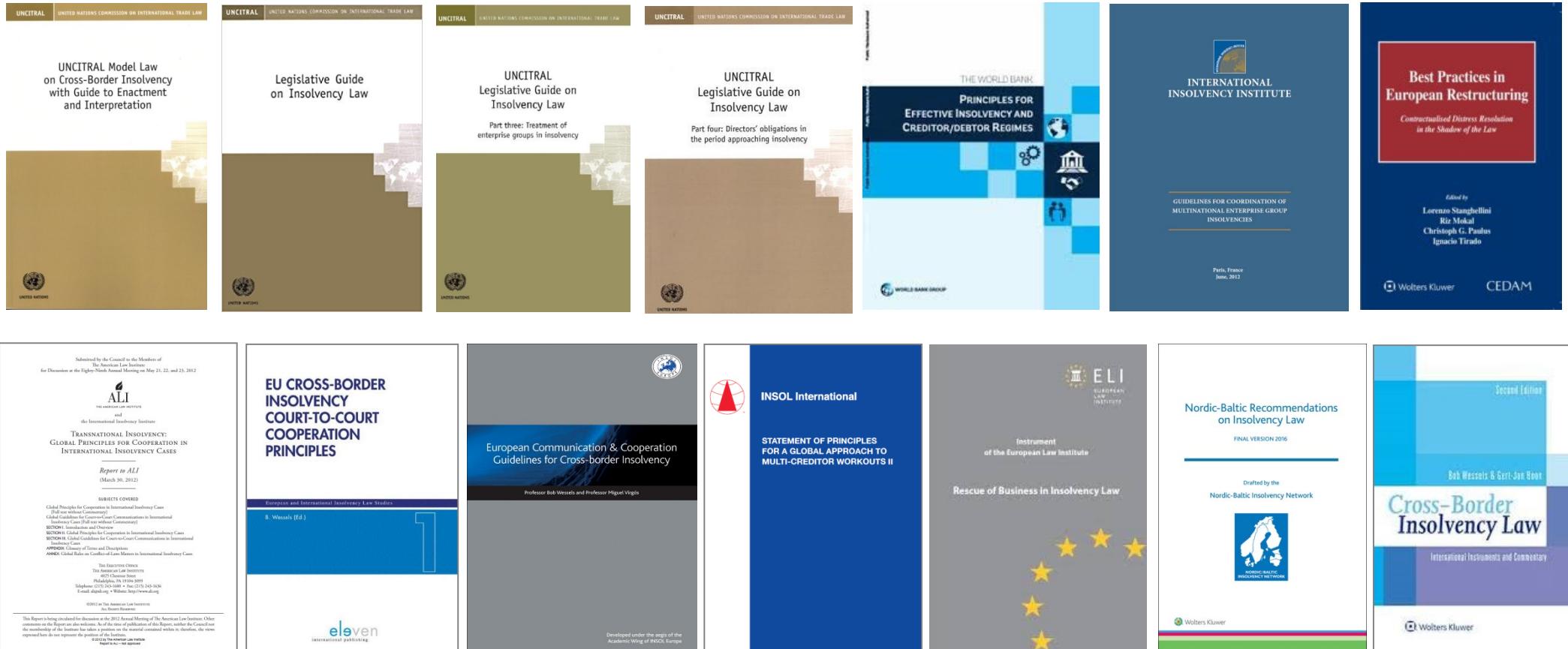
Standard-setting organisations:

- Formulating agencies
- Of good repute
- Known for expertise and/or experience
- Outcome of their work is (usually) legally non-binding

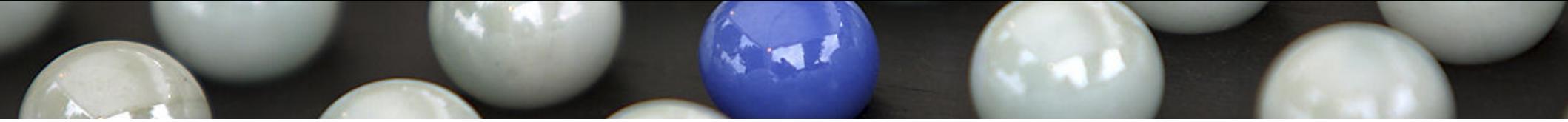
Different categories:

1. International intergovernmental standard-setting organization
(UNCITRAL/World Bank)
2. Other global, regional and local standard-setting organisations
(INSOL International, International Insolvency Institute (III), American Law Institute, INSOL Europe, European Law Institute (ELI), CERIL, INSOLAD)
3. Informal standard-setters
(Working groups for CoCo Guidelines, EU JudgeCo Principles, Nordic-Baltic Recommendations, CoDiRe Project)

3. A sneak preview ...



And there are many more ...



3. A sneak preview ... cont'd

Rise of international soft law instruments*

- 2000: **12** soft law instruments
- 2010: **28** soft law instruments
- 2015: **41** soft law instruments
- 2018: **55** soft law instruments

Observations

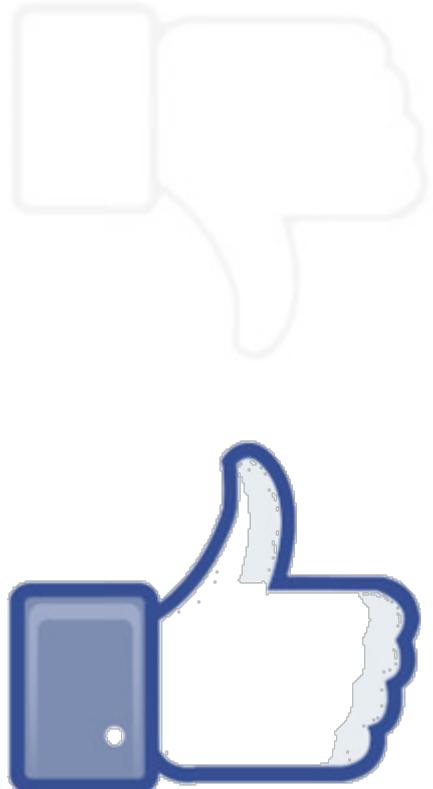
- **Substantive focus:**
 - Cross-border judicial and insolvency practitioner cooperation and communication
 - (Preventive) restructuring (relatively new)
- Standard-setting organisations active on **nearly all continents**, mainly Europe and North America / www.abli.asia
- In ‘slipstream’ of UNCITRAL and World Bank, there is a **rise of regional standard-setting organisations and informal standard-setters**

* Excluding bilateral instruments.

4. Pros of using soft law instruments

Compared to hard law, soft law instruments on restructuring and insolvency law are:

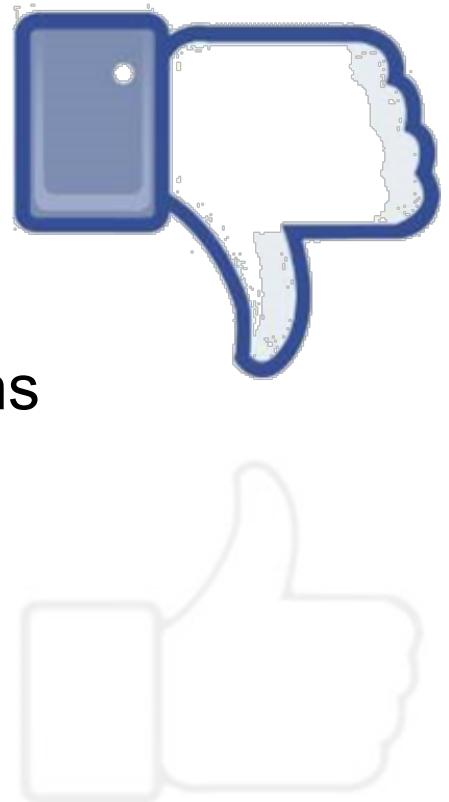
1. More flexible
2. Drafted and adopted quicker and at lower cost
3. A less politicized compromise
4. Providing for better coordinated action
5. Not diminishing sovereignty
6. Allow for ethical and professional standard-setting

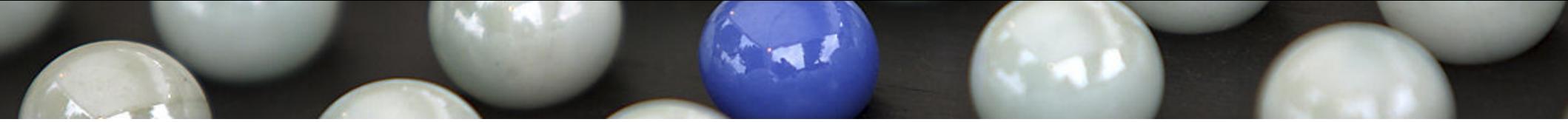


4. Cons of using soft law instruments

Compared to hard law, soft law instruments on restructuring and insolvency law are:

1. More difficult to find
2. More difficult to interpret
3. Ignoring procedural aspects of drafting and revisions
4. Non-binding nature
5. Risking to lack a due process
6. Risking issue of 'incomplete contracts'





5. Impact of soft law instruments

Soft law instruments on restructuring and insolvency law have proven to have impact:

1. Use in int'l insolvency practice

2. Case law

3. Transforming into hard law

4. Extending existing hard law

5.1 Impact: use in int'l practice

BenQ Holding (NL court – German court; 2007)

- Order of judicial decisions

Automold (German court – UK IP)

- Scheduling creditors meeting in Germany

Lehman Brothers Holdings Inc. (LBHI)

- CoCo Guidelines referred to in draft-global protocol

PIN AG

- German & Lux court share info re “main proceedings”

<http://www.bobwessels.nl/blog/2009-02-doc7-co-co-guidelines-draft-lehman-brothers-protocol/>

Nortel Networks

- CoCo Guidelines referred to in set of documents (intra-group Master R&D Agreement, a ‘coordinating protocol’ and a ‘memorandum settling the action’ between the involved IPs)

<http://www.bobwessels.nl/blog/2015-05-doc5-coco-guidelines-apply-to-nortel-networks-coordination-protocol/>



5.2 Impact: case law

Examples of UK and US case law:

1. Supreme Court of The United Kingdom, in the Conjoined Appeals in (1) Rubin & Anor v Eurofinance SA & Ors and (2) New Cap Reinsurance Corp Ltd & Anor v Grant and others [2012] UKSC 46 (24):

- The Court's position was also based on '*(...) the modern approach (...) which is that the jurisdiction with international competence is that of the country of the centre of main interests of the debtor (an expression not without its own difficulties) (...)*' while referring to **ALI-III Global Principle 13**.

2. United States Court of Appeals for the Third Circuit (in Re ABC Learning Centres) on 23 August 2013

- **The Court referred to the ALI-III Global Principle 1**, and cited that '*(...) the overriding objective [is to] enable courts and insolvency administrators to operate effectively and efficiently in international insolvency cases with the goals of maximizing the value of the debtor's global assets, preserving where appropriate the debtors' business, and furthering the just administration of the proceeding.*'
- **The Court also referred to the commentary to Global Principle 24**: '*[T]he emphasis must be on ensuring that the insolvency administrator, appointed in that proceeding, is accorded every possible assistance to take control of all assets of the debtor that are located in other jurisdictions. Id. at cmt. To Global Principle 24.*'



5.2 Impact: case law (cont'd)

Examples of NL case law:

1. **Advocate-General**: refers to international soft law instruments in its opinions

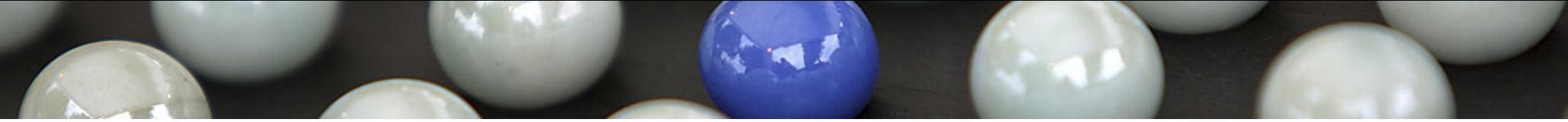
2. **Dutch Courts**: no references to [international soft law instruments](#)

Dutch Courts: make references to [national soft law instruments](#), such as

1. INSOLAD praktijk regels
2. Recofa richtlijnen

Mostly in cases where:

1. **creditors or debtors commenced proceedings** against an insolvency practitioner, or
2. **disciplinary measures** sought against insolvency practitioner in capacity of lawyer, and
3. where parties' submissions **referred to soft law instruments**.



5.3 Impact: transforming into hard law

Soft law assists in policy making:

1. UK Chancery Guide:

Refers to soft law instruments on cooperation and communication:

- (i) ALI-III Global Principles (2012);
- (ii) EU JudgeCo Principles (2014); and
- (iii) JIN Guidelines (2016)

2. UK legislative initiative on insolvency and governance (government response):

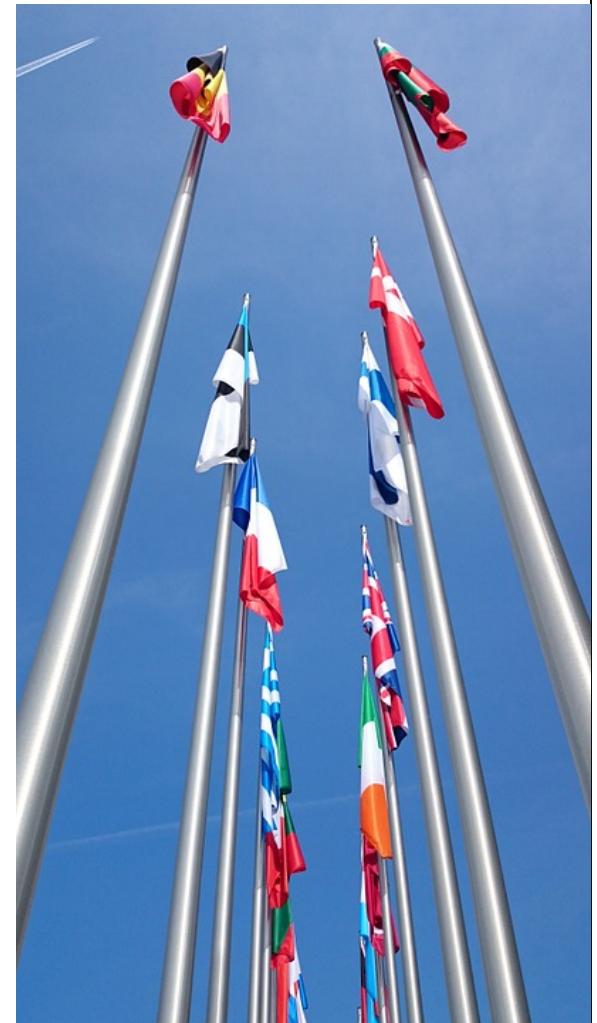
Refers to e.g.

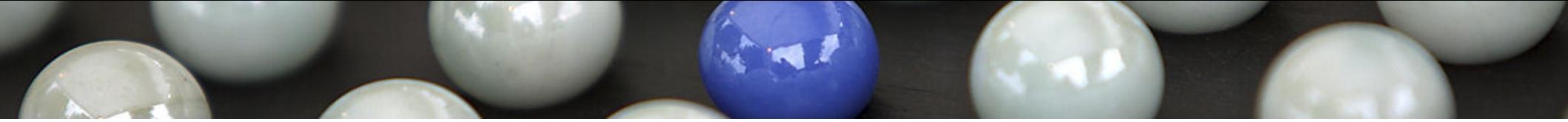
- (i) UNCITRAL Legislative Guide (2004); and
- (ii) ELI Instrument on Business Rescue (2017)

5.3 Impact: transforming into hard law (c'd)

Soft law is implemented as hard law:

- UNCITRAL Model Law on Cross-Border Insolvency
 1. Matters of recognition and enforcement
 2. Adopted in 48 jurisdictions
 3. Adoption shows divergences:
 1. Some implemented Model Law close to original (USA, Great Britain)
 2. Some excluded certain provisions (Japan, Mexico)
 3. Some included new provisions (e.g. on reciprocity) (BVI, Mexico, Romania, South Africa)





5.4 Impact: extending hard law

Soft law instruments are used to extend existing hard law:

1. European Insolvency Regulation (Recast, 2015):

When cooperating, insolvency practitioners and courts should take into account best practices for cooperation in cross-border insolvency cases, as set out in principles and guidelines on communication and cooperation adopted by European and international organisations active in the area of insolvency law, and in particular the relevant guidelines prepared by the United Nations Commission on International Trade Law (Uncitral).

2. Proposal for a Preventive Restructuring Directive

Art. 26(2) promotes sharing of best practices in the training of practitioners

3. Australia

Several States and Territories refer to soft law instruments for cooperation and communication activities under the Cross-Border Insolvency Act (act implementing the Model Law).

Australian Capital Territory included explicit reference to the ALI-III Global Guidelines (2012) in its Court Procedures Rules.



6. Conclusion

In the field of restructuring and insolvency law:

Soft law instruments are:

- 1.On the rise globally
- 2.Adding a layer to current international insolvency law
- 3.Making a shift from cross-border insolvency (conflict-of-law rules; PIL) to substantive rules re (preventive) restructuring
- 4.Increasingly driven by regional standard-setting organisations and informal standard-setters

Further research:

- 1.*Practice*: measuring practical implications of soft law remains challenging
- 2.*Legal theory*: growth of soft law instruments to ‘customary international law’, see Irit Mevorach: <http://www.bobwessels.nl/blog/2019-01-doc1-the-future-of-cross-border-insolvency/>

Please, share your experience: j.m.g.j.boon@law.leidenuniv.nl

Thank you for your attention!



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