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Representing the Interests of Unsecured Creditors: A Comparative Look at UNCITRAL'S Legislative Guide on Insolvency Law

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FORTHCOMING
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Representing the Interests of Unsecured Creditors: A Comparative Look at UNCITRAL's Legislative Guide on Insolvency Law

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Abstract

After outlining the collective action issues that the unsecured creditors face in bankruptcy and the conventional notion that creditors' committees or creditors' representatives assist in resolving these obstacles, we compare the recommendations of the UNCITRAL's Legislative Guide on Insolvency Law to the laws on the representation of unsecured creditors in bankruptcy proceedings in eight countries: United States, United Kingdom, France, Germany, Russia, South Korea, Singapore and China..

Our findings reveal the presence of insolvency laws governing creditor representation in all the reviewed jurisdictions, whether or not the debtor remains in possession. The jurisdictions vary in the structure of the representative bodies, in the criteria for eligibility for a committee, and in the powers given to the committees. Further research will be necessary to ascertain whether these differences affect the dynamics of bankruptcy proceedings, especially reorganization proceedings. Nonetheless, our research clearly shows that there is a widespread acceptance of the notion that unsecured creditors need a specific structure for the representation of their interests and that the structures selected by different legislators tend to share certain characteristics.

Introduction

Conventional wisdom holds that unsecured creditors' participation in an insolvency proceeding is important and yet unlikely to occur because creditors face collective action problems and financial hurdles that are likely to discourage this participation.[1] This same conventional thinking views creditors' committees as a solution to the problem of creditor participation, leaving unexamined questions as to why a creditors' committee is any more likely than a general body of unsecured creditors to overcome inherent disincentives.

The United Nations Commission on International Trade Law ("UNCITRAL") recently promulgated a Legislative Guide on Insolvency Law,[2] in which it recommends the appointment of a creditors' committee or other creditor representative in all liquidation and reorganization proceedings. The presence of these recommendations in UNCITRAL's Legislative Guide on Insolvency Law suggests global consensus on at least the need to promote creditor representation in insolvency proceedings, but the content of these recommendations does not evince agreement as to the form of representation that works best or even the goals that creditor representatives should pursue.[3] In other words, the open-endedness of these recommendations invites deeper comparative analysis.

In this essay, we examine the insolvency laws of eight countries, comparing their provisions on creditors' meetings, creditors' committees and creditor representation with the UNCITRAL recommendations on the same topics. Our choice of countries was not intended to focus on creditors' committees alone. Nonetheless, we found that all eight countries' insolvency laws provide for the appointment of creditors' committees. We also found considerable dissensus regarding both the details of these provisions and the purposes and practices associated with creditor representation. This dissensus in practice surprised us, since we also found that many of these country's provisions on creditors' committees were consistent with UNCITRAL's recommendations in this area. [Moreover, although UNCITRAL views effective creditors' committees as important to the success of a reorganization-friendly insolvency regime, we find that a tight fit with UNCITRAL's recommendations in this area does not necessarily predict a strong culture of rescue.] We conclude by questioning whether our findings are the result of UNCITRAL's open-ended recommendations in this area, whether UNCITRAL neglects issues important to the success of creditor representatives in a reorganization proceeding, or whether creditors' committees are less important to the creation of a rescue culture than UNCITRAL and others think.

Part I of this essay discusses the conventional rationale for creditor representation in an insolvency proceeding, whether through creditors' committees or some other means. Part II lays

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[1] Portions of this paper were published in Spanish in Block-Lieb, S., 'Representaticíon de los intereses de los acreedores no garantizado en la Guía de UNCITRAL sobre el Régiman de la Insolvencia (Recomendaciones 126 a 138)',Chapter 8 in Morán Bovio, D. (ed) *Guía Legislativa de UNCITRAL sobre el Régimen de la Insolvencia* (2006, Wolters Kluwer, Madrid) at 137-147.

[2] UNCITRAL Legislative Guide on Insolvency Law (2004), available at: <http://www.uncitral.org/pdf/English/texts/insolv/05-80722_Ebook.pdf> (last viewed 12 December 2008) [hereafter "the Legislative Guide on Insolvency Law," the "Legislative Guide," or simply the "Guide"]. This lengthy document, comprising more than 350 pages of commentary and other provisions, including nearly 200 specific recommendations, looks to assist legislatures around to the globe in raising the level of their insolvency laws with the eventual goal of convergence around effective and efficient standards.

[3] Of course, the Legislative Guide contains recommendations on more than simply creditors' participation in insolvency proceedings.

out UNCITRAL's recommendations on creditor participation, while Part III compares these recommendations to the treatment of these same issues in eight different countries' insolvency laws, namely the laws of the United States, United Kingdom, France, Germany, China, Singapore, the Russian Federation and South Korea. Because we cover such broad comparative ground, our discussion of each insolvency law is intentionally brief; our discussions are not, however, focused exclusively on provisions regarding creditor participation. While creditor participation is our primary focus, we understand context and culture as critical to fleshing out an understanding of the question of creditor participation and its connections to reorganization practices within an insolvency regime. Part IV concludes by generalizing about different types of creditor participation (including different types of creditors' committees) and the relationship between theories of creditor participation and the sort of reorganization sought to be accomplished in an insolvency proceeding.

I.

When a debtor's financial distress raises the specter of its insolvency, whether in the sense that its liabilities exceed the value of its assets or its current assets (especially its cash) are (or soon will be) insufficient to cover current liabilities, then unsecured creditors are (or soon will be) the true "parties in interest" in any resolution of the debtor's financial affairs, particularly where the debtor looks to reorganize its business and continue operations after restructuring its finances. As a result, creditors' input and involvement in any insolvency proceeding can provide unique information about the debtor's past and opinions on the debtor's future. Their involvement is especially important in a reorganization proceeding, since unsecured creditors' interests in a debtor emerging rehabilitated from such a proceeding may amount to ownership interests in the new entity, at least in a practical sense.[4]

And yet the collective action problems facing a general body of creditors suggest that unsecured creditors' interests in an insolvency proceeding may go unrepresented.[5] Any single unsecured creditor may determine that the size of its claim against the debtor is too small to justify the expenditure of the effort – indeed, the cash – necessary to promote and litigate its interests in the proceeding. Unsecured creditors may determine that inattention is the best course of action in an insolvency case on the expectation that other similarly situated unsecured creditors will enforce claims and pursue interests that will benefit all unsecured creditors. Unfortunately, if every unsecured creditor similarly hopes to free ride on the efforts of others then no one, in the end, will do anything and unsecured creditors' interests will remain unarticulated and unenforced. There are also financial disincentives for participation. When pooled together, the interests of unsecured creditors might well justify the expense needed, but considered separately, one creditor at a time, the decision might readily be made that the cost of investigation or dispute is simply not worth the potential benefit. These collective action problems and financial disincentives for participation may be exacerbated by the small size of a

[4] See, e.g., Klee, K. and Shaffer, K.J., 'Creditors' Committees Under Chapter 11 of the Bankruptcy Code' (1993) 44 *South Carolina Law Review* 995.

[5] See, e.g., Eklund, C.A. and Roberts, L.W., 'The Problem with Creditors' Committees in Chapter 11: How to Manage the Inherent Conflicts with Loss of Function' (1997) 5 *American Bankruptcy Institute Law Review* 129; Zipes, G.M. and Lambert, L.L., 'Creditors' Committee Formation Dynamics: Issues in the Real World' (2003) 77 *American Bankruptcy Law Journal* 229.

creditor's claim (or the expected return on such a claim in an insolvency context) as compared to the high cost of monitoring and other involvement.

Unsecured creditors' difficulties in representing their own interests might be tolerated institutionally if it could be assumed that these interests would be protected by others. But the interests of secured and unsecured creditors may diverge. Secured creditors, particularly those whose collateral is sufficiently valuable so that the proceeds of its sale could be relied upon to satisfy the outstanding secured debt in full, may promote the need for a quick liquidation of the debtor's assets and pay out to creditors; unsecured creditors, who may stand to recover nothing in this sort of break up and sale, might well prefer to see the debtor's business and financial affairs rehabilitated, even at the risk of non-payment of a substantial portion of arrears owed to them, on the grounds that the benefit of revenue from future business with the reorganized debtor exceeds the cost of such a charge off. This divergence can grow larger in the case of a reorganization proceeding, where unsecured creditors may take a long-term view of the viability of the debtor's business operations and secured creditors may prefer the short-term returns from an immediate sale.

What of an estate representative, such as a trustee or administrator whose statutory obligation is to replace or supplement the debtor's management with supervisory authority during the course of an insolvency proceeding? Can an insolvency representative be relied on to represent the interests of unsecured creditors?

In large part, the answer to this question depends upon the scope of duties and obligations imposed on insolvency representative in the law, as well as the professionalism, honesty and accountability of the insolvency representatives in practice. Where such a representative is appointed in a liquidation proceeding to investigate the financial affairs of the debtor and sell the debtor's unencumbered assets, the interests of the insolvency representative and of the general body of unsecured creditors may be perfectly aligned: both are interested in maximizing the size of the distributions to unsecured creditors and little else.

Where there is the hope that the debtor can be reorganized, however, an insolvency representative's interests will be less clear. Modern insolvency statutes often also provide for the possibility of rehabilitating a viable commercial enterprise in the context of an insolvency proceeding; in this case, the insolvency representative, if there is one, may have expansive duties ranging from negotiation of a plan of reorganization and a global settlement of all the debtor's claims and interests, to responsibility for running the debtor's day to day operations, no matter how far ranging these may be. Where an insolvency representative's responsibilities include more than the disposition of unencumbered assets, it no longer is clear that the representative can be relied on to pursue steadfastly the interests of the general body of unsecured creditors. The interests of secured and unsecured creditors and of equity holders may diverge on the wisdom of continued operations, on the sale of some but not all of the debtor's establishments, or on the terms of settlement with various stakeholders, especially on the treatment of unsecured creditors in a plan of reorganization.

While conventional wisdom in clear on the need for creditor representation, it is less clear on why creditor representatives, whether organized as a committee of creditors or through some other mechanism, resolve the collective action problems and financial disincentives that may impede creditor involvement.[6] If collective action problems undermine an individual creditor's involvement in insolvency proceedings, why would the appointment of a committee necessarily

[6] Eklund and Roberts, above note 5 at 129.

resolve this disincentive? Why wouldn't some members of the committee presume that other members of the committee will prosecute the committee's duties for the benefit of the committee as a whole, creating on a small scale the same collective action problem that plagues a general body of creditors? Imposing fiduciary obligations on the members of this committee is unlikely on its own to resolve disincentives, especially where members of a creditors' committee are insulated from liability except in the most egregious cases.[7] While fiduciary obligations are likely to create the proper incentives in professionals, the imposition of such obligations is likely to alter the culture of a creditor body, which is culturally unused to the bridle of an obligation to act in the best interests of others. Promises of reimbursed expenses and fees may help ameliorate creditors' reluctance to join in a committee,[8] but may be insufficient to guarantee that committee members will pursue aggressively the interests of the group since this sort of involvement is, not just expensive, but time-consuming. How should the interests of unsecured creditors be heard in an insolvency proceeding? Their interests may be especially divergent from the interests of secured creditors in the context of a reorganization proceeding, but who should speak for the interests of unsecured creditors and through what medium?

II.

UNCITRAL's Legislative Guide makes ten recommendations regarding unsecured creditors' participation in insolvency proceedings.[9] Some of these recommendations are intended to provide broadly-phrased guidance to domestic legislatures on the desirability of creditors' participation in an insolvency proceeding,[10] including the need to specify the occasions and issues on which unsecured creditors should be allowed to meet as a general body[11] and to

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[7] See Bussel, D.J., 'Coalition-Building Through Bankruptcy Creditors' Committees' (YEAR) 43 *UCLA Law Review* 1547, 1562-1566 (critiquing fiduciary model of creditors' committees as empty and unworkable). Indeed, commentators argue that a fear of liability as a result of these new fiduciary obligations may dissuade creditors from accepting a place on a creditors' committee. Zipes and Lambert, above note at 241-242.

[8] But see Zipes and Lambert, above note at 240 (noting that fear of costs involved in serving on a committee may dissuade creditors from serving, especially in small to medium sized cases).

[9] The Guide explains the "purpose of provisions on participation of creditors in insolvency proceedings" as intended:

> (a) To facilitate participation of creditors in insolvency proceedings;
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> (b) To provide a mechanism for the appointment of a creditors committee or other creditor representative where to do so would facilitate the participation of creditors in the insolvency proceedings;
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> (c) To ensure the right of creditors to access information on the insolvency proceedings; and
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> (d) To specify the functions and responsibilities of the creditor committee or other representative.

Legislative Guide, above note at 202.

[10] Ibid. at Rec. 126 (indicating that an "insolvency law should specify that creditors, both secured and unsecured, are entitled to participate in insolvency proceedings and identify what that participation may involve in terms of the functions that may be performed"). See also ibid. at Rec. 137 (providing that an insolvency law "should specify that a party in interest has a right to be heard on any issue in the insolvency proceedings that affects its rights, obligations or interests").

[11] Ibid. at Rec. 128 (stating that an "insolvency law may require a first meeting of creditors to be convened within a specified time after commencement to discuss matter specified in the insolvency law" and that the law "may also permit the court, the insolvency representative or creditors holding a specific percentage of the total value of

vote on specified issues.[12] Recognizing the collective action problems that may impede unsecured creditors' to enforce their rights of participation where the size of the claim may not justify the expense of travel costs or counsel, the Legislative Guide also opines that an insolvency law "should facilitate the active participation of creditors in insolvency proceedings,"[13] but does not take a position on the method through which participation is best facilitated. Instead, it speaks approvingly of "a creditor committee, a special representative or other mechanism for representation,"[14] although it does note that "[w]here the debtor remains in possession of the business, a creditor committee or other creditor representative will have an important role to play in overseeing and, where necessary, reporting on the activities of the debtor."[15] If a domestic legislature permits the appointment of a creditors' committee or creditors' representative, the Guide suggests that the "relationship between the creditors and the creditors' committee or representative should be clearly specified."[16] It also notes that a law permitting the appointment of a creditors' committee should clarify the creditors eligible[17] (or ineligible[18]) for appointment to the committee,[19] the mechanism for appointment of a committee,[20] and the rights and functions of a creditors' committee.[21] Finally, the Guide

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unsecured claims to request the convening of any other meeting of creditors and specify the circumstances in which such a meeting may be convened").

[12] Ibid. at Rec. 127 (providing that an "insolvency law should specify the matters on which a vote of creditors is required and establish the relevant eligibility and voting requirements" and that, in particular, the law "should required creditors to vote on approval or rejection of a reorganization plan").

[13] Ibid. at Rec. 129.

[14] Ibid. Rec. 129 goes on to provide that an "insolvency law should specify whether a committee or other representative is required in all insolvency proceedings" and that "[w]here the interests and categories of creditors involved in insolvency proceedings are diverse and participation will not be facilitated by the appointment of a single committee or representative, the insolvency law may provide for the appointment of different creditor committees or representatives." Ibid.

[15] Ibid. at note 11.

[16] Ibid. at Rec. 130. Further, note 12 to Rec. 130 provides that "[i]n particular, the insolvency law should specify the distribution of functions and powers between the creditors and the creditor committee and the mechanism for resolution of disputes between the creditors and the creditor committee." Ibid. at note 12. Presumably, the same sort of specificity as to the division of responsibilities and means for dispute resolution involving a creditors' representative.

[17] Ibid. at Rec. 131 (stating that an "insolvency law should specify the creditors that are eligible to be appointed to a committee").

[18] Ibid. (providing that "[c]reditors who may not be appointed to a creditor committee would include related persons and others who for any reason might not be impartial").

[19] Ibid. (indicating that an "insolvency law should specify whether or not a creditor's claim must be admitted before the creditor is entitled to be appointed to a committee").

[20] Ibid. at Rec. 132 (noting that "different approaches may include selection of the creditor committee by creditors or appointment by the court or other administrative body").

[21] Ibid. at Red. 133 (and noting that these "rights and functions" "may include" the following:

> "(a) Providing advice and assistance to the insolvency representative or the debtor in possession;
>
> "(b) Participating in development of the reorganization plan;
>
> "(c) Receiving notice of and being consulted on matters in which their class has an interest, including the sale of assets outside the ordinary course of business;

indicates that, if a law permits the appointment of a creditors' committee, it should permit the committee "to select, employ and remunerate professionals that may be needed to assist the creditor committee to perform its functions" and "should specify how the costs and remuneration of those professionals would be paid."[22] It also states that the law should "specify that members of a creditor committee are exempt from liability for their actions in their capacity as members of the committee unless they are found to have acted fraudulently or to be guilty of willful misconduct,"[23] and that the law "should specify the grounds for removal of members of a creditor committee and provide for their replacement."[24] The specificity of the Guide's recommendations regarding creditors' committees, and the Guide's relative silence as to other methods of creditors' representation, suggests that it views creditors' committees as the favored mechanism for creditor participation.

III.

Our comparative research suggests that countries often look to encourage creditor participation in insolvency proceedings through the use of creditors' committees and that the treatment of creditors' committees often satisfies the recommendations offered in UNCITRAL's Legislative Guide. Still, each of the eight countries we examined had very different provisions on creditors' committees.

A. United States. US bankruptcy law provides both for creditors' meetings and creditors' committees. Section 341 of the US Bankruptcy Code provides simply that the United States trustee[25] shall "convene and preside at a meeting of creditors;" bankruptcy courts generally are not involved or even present in this process.[26] The Code also provides for the appointment of "official" creditors' committees in both chapter 7 liquidation and chapter 11 reorganization cases (and not in chapter 13 debt repayment cases). "Official committees have diverse duties,"[27] depending upon the nature of the case in which they are created.

In a chapter 7 liquidation case, creditors may elect a committee "of not fewer than three, and not more than eleven, creditors,"[28] but the appointment of a creditors' committee is not mandatory in these cases. A creditors' committee in a chapter 7 case has important but discrete authorities: it can (i) "consult with" the trustee in bankruptcy or the US trustee, (ii) "make a

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"(d) The right to hear the insolvency representative at any time; and

"(e) The right to be heard in the proceedings."

Ibid.

[22] Ibid. at Rec. 134.

[23] Ibid. at Rec. 135.

[24] Ibid. at Rec. 136.

[25] The United States Trustee's office is entrusted with the administration of most bankruptcy cases in the US, although not all regions of the country participate in this program. The Executive Office of the United State Trustee is a department of the US Department of Justice.

[26] Title 11 United States Code, Section 341.

[27] In re Refco, 336 BR 187, 195 (Bankr SDNY 2006).

[28] Title 11 United States Code, Section 705(a).

recommendation" to the trustee in bankruptcy or US trustee, or (iii) "submit questions" relating to the administration of the estate to the bankruptcy court or to the U.S. trustee. Creditors' committees in chapter 7 liquidation cases may not be appointed in every case, and hold fewer responsibilities and privileges as committees in chapter 11 reorganization cases. For example, committees in liquidation cases are not charged with the authority to hire professionals and are not reimbursed for their expenses.[29] But the interests of unsecured creditors should be represented by a chapter 7 trustee in bankruptcy; although an interim trustee in bankruptcy is appointed by the US trustee in all chapter 7 cases, creditors are entitled to elect a different trustee at the first meeting of creditors.[30]

By contrast, creditors' committees are more common in chapter 11 reorganization cases, in that section 1102(a)(1) provides that "as soon as practicable after the order for relief" is entered, the "United States trustee *shall* appoint a committee of creditors holding unsecured claims. . . ."[31] "[O]rdinarily" a committee appointed under this provision will "consist of the persons, willing to serve, that hold the seven largest claims against the debtor."[32] In some instances, a bankruptcy court will appoint additional members to the committee in order to ensure its representativeness.[33] Section 1103 of the US Bankruptcy Code details the powers and duties of a committee as including the ability to:

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[29] See Title 11 United States Code, Sections 1103(a)(authorizing a committee appointed in a chapter 11 case to employ professionals) and 328 (setting forth limitations on compensation of professionals appointed to represent creditors' committees in chapter 11 cases).

[30] Title 11 United States Code, Sections 701 and 702.

[31] Title 11 United States Code, Section 1102(a)(1). In addition, section 1102(a)(2) provides that "the court may order the appointment of additional committees of creditors or of equity security holders if necessary to assure adequate representation of creditors or of equity security holders." Title 11 United States Code, Section 1102(a)(2). Courts generally have held that the appointment of additional committees should be "the rare exception," Williams Communications Group, Inc. v CG Austria, Inc., 281 BR 216, 223 (Bankr SDNY 2002), in part because the statute requires the court to find that the appointment of an additional committee is "'necessary,' a standard that is far more onerous than if the statute merely provided that a committee be 'useful.'" In re Oneida Ltd, __ BR __, 2006 WL 1288576 (Bankr SDNY 2006). See also In re Winn-Dixie Stores, Inc, 326 BR 853, 857 (Bankr MD Fla 2005)(indicating that appointment of additional committee of unsecured creditors constitutes an "extraordinary remedy"); In re Enron Corp, 279 BR 671, 685 (Bankr SDNY 2002), aff'd sub nom Mirant Americas Energy Marketing, LP v Official Committee of Unsecured Creditors of Enron Corp., 2003 WL 22327118 (SDNY 2003)(same).

[32] Title 11 United States Code, Section 1102(b)(1).

[33] In some instances, bankruptcy courts are asked to alter membership in a committee by adding or removing members, rather than to create an additional committee. Among those who find the statutory or equitable authority to take this action, courts uniformly review the U.SECTION trustee's committee appointments under an "abuse of discretion" standard. See, eg, In re Value Merchants, Inc., 202 BR 280 (ED Wis 1996)(upholding bankruptcy court determination that U.SECTION trustee acted arbitrarily and capriciously in refusing to appoint indenture trustees as members of creditors' committee); In re Fas Mart Convenience Stores, Inc., 265 BR 427 (Bankr ED Va 2001)(concluding that it was an abuse of discretion for U.SECTION trustee to appoint as an additional member to committee a creditor actively involved in disputes with committee and who consistently asserted that it constituted secured creditor entitled to turnover of substantial "trust funds"); In re Pierce, 237 BR 748 (Bankr ED Cal 1999)(upholding US trustee's appointment of four additional members to three-person creditors' committee as not an abuse of its discretion); In re Barney's, Inc, 197 BR 431 (Bankr SDNY 1996)(concluding that appointment of union employee benefits fund to creditors' committee was not abuse of U.SECTION trustee's discretion). Some courts question whether this power includes the ability to direct the U.SECTION trustee to appoint specific creditors to the committee. In re Doehler-Jarvis, Inc, 1997 WL 827396 (DDel 1997)(declining to order appointment of

(1) consult with the trustee or debtor in possession concerning the administration of the case;

(2) investigate the acts, conduct, assets, liabilities, and financial condition of the debtor, the operation of the debtor's business and the desirability of the continuance of such business, and any other matter relevant to the case or to the formulation of a plan;

(3) participate in the formulation of a plan, advise those represented by such committee of such committee's determinations as to any plan formulated, and collect and file with the court acceptances or rejections of a plan;

(4) request the appointment of a trustee or examiner under section 1104 of this title; and

(5) perform such other services as are in the interest of those represented.[34]

Moreover, a creditors' committee "may select and authorize the employment by such committee of one or more attorneys, accountants, or other agents, to represent or perform services for such committee."[35] These professionals will then be paid out of estate funds, provided they satisfy statutory standards requiring their "disinterestedness" to the estate.[36] Members of the committee also are entitled to reimbursement for the "actual, necessary expenses" incurred "in the performance of the duties of such committee."[37]

Creditors' committees in chapter 11 reorganization cases should be understood in the context of the "debtor in possession" system in which they are situated.[38] Typically, there is no trustee appointed in a chapter 11 reorganization proceeding under US law.[39] Instead, the

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Chrysler Corp to Official Committee of Unsecured Creditors of Doehler-Jarvis); In re Mission Health, Inc, 242 BR 527 (Bankr MD Fla 1999)(declining motions by Columbia Healthcare Management, Inc and Prudential Healthcare seeking appointment to creditors' committee); In re Drexel Burnham Lambert Group, Inc, 118 BR 209 (Bankr SDNY 1990)(rejecting motion by joint liquidators for appointment to creditors' committee). Others question whether such a motion can be brought sua sponte by the court. In re Dow Corning Corp., 212 BR 258 (ED Mich 1997). Standing to appeal from the denial of such a request is also questionable. In re Victory Markets, Inc, 195 BR 9 (NDNY 1996).

[34] Title 11 United States Code, Section 1103(c). See also ibid section 1109(b) (stating that an official committee "may raise and may appear and be heard on any issue" in a chapter 11 case); In re Refco, 336 BR 187, 195 (Bankr SDNY 2006)("Because any transaction not in the ordinary course of the debtor's business requires notice and the opportunity for a hearing. . . an official committee may consider and challenge everything important that a debtor undertakes. Under section 1109(b), official committees also have the right to intervene in adversary proceedings.")(citations omitted).

[35] Title 11 United States Code, Section 1103(a)(indicating that such hiring decisions should occur "[a]t a scheduled meeting. . . at which a majority of the members of such committee are present," and are subject to "the court's approval").

[36] Title 11 United States Code, Sections 1103(a)(authorizing a committee to employ professionals) and 328 (setting forth limitations on compensation of such professionals).

[37] Title 11 United States Code, Section 503(b)(3)(F).

[38] For a definition of "debtor in possession," see Title 11 United States Code, Section 1101 (indicating that "debtor in possession" means "debtor except when a person . . . is serving as trustee in the case").

[39] Courts rarely appoint a trustee in a chapter 11 case, in part, because the standard for appointment is so high. See Title 11 United States Code, Section 1104(a) (providing for the appointment of a trustee in a chapter 11 case only "for cause, including fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor by current management, either before or after the commencement of the case, or similar case," or "is such appointment is in the interests of creditors, any equity security holders, and other interests of the estate," or "if grounds exist to convert or dismiss the case. . . ."). In part, courts are reluctant to appoint a trustee because the consequences of

debtor's management and board remain "in possession," meaning that the debtor remains in charge of day to day operations and assumes the statutory duties of a chapter 11 trustee.[40] But leaving the debtor in possession of these rights and responsibilities works under the US system in part because the fiduciary duties of a DIP are enforced by a system of checks and balances – including the appointment of an official committee of creditors vested, similarly, with fiduciary duties to unsecured creditors and powers of investigation, negotiation and litigation as noted above.

B. United Kingdom. Insolvency law in the United Kingdom permits both the liquidation (winding-up) and "administration" of insolvent, or nearly insolvent, debtors. The purpose of a winding-up proceeding is to sell the debtor's assets and repay debts as far as possible. Administration, on the other hand, aims to rescue the debtor as a going concern, or at least achieve a better result than a winding-up proceeding could.[41]

UK law permits a debtor or the holder of a floating charge with priority to initiate an administration proceeding[42] by appointing an administrator. With such appointment, the debtor must declare that the debtor "*is unable or likely to become unable to pay its debts as they fall due*",[43] a notion including a cash flow or a balance sheet test of insolvency, [44] but no such requirement applies to the holder of a floating charge.[45] The administrator, an officer of the court, displaces (or may displace) the debtor's management[46] and "*must perform his functions in the interests of the company's creditors as a whole*",[47] but owes no general direct duty of care to unsecured creditors unless a special relationship with a particular creditor is established.[48] Only a qualified insolvency practitioner may act as an administrator;[49] accountants (or firms of accountants) are generally appointed in these positions. At the first meeting of creditors, the

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appointment are so dire. See, eg, Title 11 United States Code, Section 1121(c)(1)(indicated that a debtor's exclusive period to negotiate and file a plan of reorganization expires if "a trustee has been appointed under this chapter").

[40] See Title 11 United States Code, Section 1107(a)(providing that "a debtor in possession shall have all the rights, other than the right to compensation . . . , and powers, and shall perform all the functions and duties, except the duties [pertaining to an investigation of the debtor's "acts, conduct, assets, liabilities, and financial condition" and the preparation of a report on these topics], of a trustee serving in a case under this chapter").

[41] Insolvency Act 1986, Schedule B1, Paragraph 3(1)

[42] Administration is a general insolvency procedure that seeks (a) to rescue the company on a going-concern basis, or, if this is not possible (b) to achieve a better result for the creditors as in a winding-up. See Insolvency Act, Schedule B1, Paragraph 3. A special procedure (moratorium) is available to companies with less than £2 million of turnover, £975,000 in assets and/or less than 50 employees.

[43] Insolvency Act 1986, Schedule B1, Paragraph 27(2)(a)

[44] Insolvency Act 1986, Section 123. Courts generally do not look behind the petition and do not require a hearing on the debtor's financial status before appointing an administrator. Goode, R. M., *Principles of Corporate Insolvency Law* (2005, Sweet & Maxwell Ltd, London) at 324. An unsecured creditor also can apply to the court to put a debtor into administration if it is insolvent, but generally will apply instead for winding-up procedure. See ibid at 100.

[45] Insolvency Act 1986, Schedule B1, Paragraph 18

[46] Insolvency Act 1986, Schedule B1, Paragraph 60, Schedule 1

[47] Insolvency Act 1986, Schedule B1, Paragraph 3(2), Paragraph 5

[48] Goode, above note 44 at 375, citing Kyrris v Oldham [2004] 1 B.C.L.C. 305, the decision relating, however, to the previous statute. A creditor may, however, apply to the court to compel an administrator who breached a fiduciary duty owed to the company to contribute to the estate. Insolvency Act, Schedule B1, Paragraph 75.

[49] Insolvency Act 1986, Section 388, 390

creditors' meeting may replace an administrator appointed by the debtor, but must seek court involvement in such a replacement.

As soon as possible, but not later than ten weeks after the commencement of administration,[50] the administrator convenes a creditors' meeting, giving notice to all creditors[51], and presents proposals for achieving the purpose of administration,[52] which may include a creditors' voluntary arrangement (*CVA*), a compromise, or an arrangement, each of which involve different forms of debt restructuring. Creditors' meetings make decisions by majority vote, with votes weighted according to the value of a creditor's claim.[53] Secured creditors are entitled to vote in a creditors' meeting only to the extent that they are undersecured.[54]

The creditors' meeting may decide to establish a creditors' committee,[55] consisting of three to five creditors elected by the meeting,[56] with the first committee meeting convened by the administrator no later than six weeks after it is established and subsequently at any time within fourteen days of a request by any committee member.[57] It appears from an examination of case law that additional creditors may participate "informally" in the meetings of a creditors' committee as "observers."[58] In large cases involving a corporate group, separate committees have been appointed to represent the interests of creditors of individual members of the group;[59] in other cases, creditors may organize themselves in additional "informal" creditors' committees.[60] A creditors' committee has a quorum if at least two members are present and decides by a majority of the present members.[61]

The function of the committee is to assist the administrator with the discharge of its function; the committee may require the administrator to supply to them information about the exercise of its functions an administrator. Each individual creditor has the right to object to an administrator's actions, [62] but the committee does not have the right to appoint advisors at the costs of the estate,[63] or a right to sue. Committee members' travel expenses are subject to reimbursement, but not other expenses, and members are not otherwise paid for their time or entitled to hire professional advice at the estate's expense. The committee has the power to release the administrator from liability for the performance of his function,[64] to approve the

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[50] Insolvency Act 1986, Schedule B1, Paragraph 51(2)(b).

[51] Insolvency Rules, Section 2.35(4)

[52] Insolvency Act 1986, Schedule B1, Paragraph 49

[53] Insolvency Rules, Section 243.

[54] Insolvency Rules, Section 2.40(1)

[55] Insolvency Act 1986, Schedule B1, 57(1)

[56] Insolvency Rules, Section 2.50

[57] Insolvency Rules, Section 2.52

[58] SISU Capital Fund Ltd v Tucker [2005] EWHC 2170 (Ch), [2006] BPIR 154 (referred to further as the TXU Group Case), Paragraph 11

[59] TXU Group Case, above note .

[60] Appendix 2, Paragraph 3.9, to the judgment *Re UIC Insurance Company Ltd (In Provisional Liquidation) (No 2)*, [2007] BPIR 589 (mentioning informal creditors' committee); *TXU Group Case*, above note , Paragraph 16 (same)

[61] Insolvency Rules, Section 2.54, Section 2.60

[62] Insolvency Act 1986, Schedule B1, Paragraph 74

[63] Cf. Insolvency Rules, Section 2.63 on reimbursement of travel expenses,

[64] Act, Schedule B1, Paragraph 98(2)(b)

distribution of unsold assets among the creditors,[65] and to determine administrator's remuneration.[66]

While only an administrator may propose a CVA or a scheme of arrangement during an administration,[67] a CVA or a scheme must be approved by creditors holding at least three quarters of the total amount of unsecured claims[68] and by the shareholders.[69] Thus, it would be sensible for an administrator to involve creditors' committees in discussions before proposing a CVA or scheme. Case law suggests that creditors, through their formal and informal creditors' committees, are heavily involved in the negotiation of CVAs in major insolvencies.[70] In several reported cases, creditors' committees were reported to have been requested by the administrator to approve major transactions during administration.[71] Other cases report that a creditors' committee had been established by a CVA (or a scheme) to supervise its implementation.[72] However, most of the case law relating to creditors' committees most directly involves their role in setting the liquidators' or administrators' remuneration. This power of remuneration is clearly the most significant power of any creditors' committee under U.K. law. The courts also seem to take into account the position of a creditors' committee when asked by an administrator to give directions on a decision of commercial nature.[73]

A winding-up can be initiated in particular by creditors in case of debtor's insolvency or by the debtor for any reason or by the court following an unsuccessful administration.[74] In a winding-up, a liquidator is appointed and, if the creditors so decide, supervised by a liquidation committee comprised of three to five of the debtor's creditors.[75] The committee reviews and sanctions important actions of the liquidator and fixes the liquidator's remuneration.[76] An administration may be converted into winding-up if the creditors do not approve administrator's initial proposal on achieving the objectives of the administration or upon administrator's request, if a distribution to unsecured creditors is likely.[77] In such case, the creditors' committee that was

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[65] Insolvency Rules, Section 2.71

[66] Insolvency Rules, Section 2.106(2)

[67] Insolvency Act 1986, Section 1, 3(a)

[68] Insolvency Rules, Section 1.19(1), Companies Act 2006, Section 899(1) – Companies Act 2006 shall replace as from October 1, 2009 the Companies Act 1985

[69] The court can override shareholders' refusal of a CVA approved by creditors. Insolvency Act, Section 4A

[70] See e.g. *GP Noble Trustees Ltd v Directors of Berkeley Berry Birch Plc*, [2006] EWHC 982 (Ch), [2007] BPIR 1271, where the creditors' committee was said to "direct any scheme of arrangement", although the case related to the selection of the administrator.

[71] *Rolph and another v AY Bank Ltd*, Chancery Division, [2002] BPIR 1231

[72] *Re N T Gallagher & Son Ltd (in liquidation); Shierson and another v Tomlinson and another*, [2002] EWCA Civ 404, [2002] 3 All ER 474, [2002] 1 WLR 2380, *Re Kudos Glass Ltd (in liquidation)*, [2001] 1 BCLC 390.

[73] E.g. *Re Powerstore (Trading) Ltd; Re Homepower Stores Ltd, [1998] 1 All ER 121, [1997] 1 WLR 1280, [1998] 1 BCLC 90, [1998] BCC 305*

[74] Insolvency Act 1986, Sections 122-124,

[75] Insolvency Act 1986, Sections 101, 141, Insolvency Rules, Sections 4.152 and 4.175

[76] Insolvency Act 1986, Sections 165 – 167, Insolvency Rules, Sections 4.127, 4.155

[77] Insolvency Act 1986, Schedule B1, Paragraphs 55 and 83

appointed in the administration will remain in office and act as the liquidation committee and the person, who served as administrator, becomes, unless removed, the liquidator[78].

C. France. The French commercial code sets out two types of insolvency procedures aimed at rescuing a business enterprise: a safeguard procedure (*procédure de sauvegarde*)[79] and judicial administration (*redressement judiciare*).[80] Both procedures seem to require intense court involvement and permit other public officials to insert their influence on proceedings.[81] However, the quality and training of the commercial judges, most of whom are not trained lawyers, and or the administrators and liquidators, seems to be a major concern.82

The safeguard procedure can be opened only upon a debtor's request (L621-1), the judicial administration also upon a petition by a creditor (L631-5). A safeguard procedure requires debtors to prove "difficulties, that it is unable to overcome, which may lead to a cessation of payments," (L620-1), whereas a judicial administration is commenced where a debtor has stopped payments (L631-1).[83] Safeguard procedures can be converted into a judicial administration (L621-12). The primary objective of both procedures is to enable conservation of employment and the employees' interests are strongly protected (L620-1, L625-9 and L631-1). The opening of each procedure is followed by a six-month period of observation, which can be extended for another six months (L621-3, L631-7).

Either procedure is opened by a judgment, in which the court appoints (1) a supervising judge (*juge-commissaire*), who is to supervise the entire procedure (L621-9, L631-9) and make certain decisions, such as the acceptance of claims (L624-2, L631-18), (2) a creditor representative (*mandataire judiciaire*), who is the legal representative of the common interest of the creditors (L622-20, L631-14), (3) a judicial administrator (*administrateur judiciaire*), whose duty is to supervise the debtor, and (4) an employee representative (L621-4, L631-9). The supervisory judge then appoints (5) up to five creditors, upon their request, to the function of controllers (*contrôleurs*), choosing, if possible, at least one secured and one unsecured (*chirographaire*) creditor. The controllers assist the officials in the exercise of their duties and are entitled to inspect all the documents delivered to the administrator or the creditor representative. The controllers are not remunerated, but are not liable for the exercise of their function, except in case of grave fault (L621-10, L631-9). A controller has the power to sue in the collective interest of creditors, if the creditor representative does not do so upon request (L622-20), to apply to the court for various orders, and to be heard on a number of issues.

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[78] Insolvency Act 1986, Schedule B1, Paragraph 83, Insolvency Act, Section 140

[79] See Title II of Book VI of the Commercial Code, available at: <http://www.legifrance.gouv.fr> (last viewed on 23 September 2008) [hereafter 'Code de Commerce']. References in parens in the text are to the statutory provisions of the Code de Commerce.

[80] Title III, Book VI, Code de Commerce.

[81] See Road Testing the New French Safeguard Procedure, Allen & Overy Bulleting, October 2006, available at: <http://www.insol.org/emailer/december2006_downloads/AllenOveryRoadTesting.pdf>.

[82] See Didier, I., The Reform of Insolvency Proceedings in France--A Professional's Point of View, 15 J. Bankr. L. & Prac. 5 Art. 4 (2006)

[83] Dorleac, T., La procédure de sauvegarde : un "Chapter 11" à la française ?, available at: <http://www.village-justice.com/articles/procedure-sauvegarde-Chapter,1544.html> (last viewed on 16 October 2008)

In the safeguard procedure, the debtor remains in possession (L622-1, L622-3), albeit subject to control by all the appointed bodies;[84] in a judicial administration, the court may assign management powers to an administrator (L631-12). The opening of the procedure invokes a stay on all judicial collection actions, including by secured creditors (L622-21, L631-14) and against guarantors (L622-18), and voids *ipso facto* clauses, which view the commencement of a procedure as an event of default (L622-13, L631-14).

In both types of procedures, if the debtor has more than 150 employees or more than €20 million of turnover (L626-29, R626-52), two creditors' committees (*comités de créanciers*) are formed within thirty days of the opening judgment: one for bank creditors and one for the main trade creditors.[85] For smaller debtors, the supervisory judge has discretion to authorize the creation of additional committees (L626-29, al. 2). The trade creditors' committee includes all trade creditors with claims exceeding 5 per cent of all trade receivables, with the administrator able to invite additional creditors to the committee (L626-30). The bank creditors' committee should comprise all creditors that are banks licensed in the EU (R626-55).[86] Although the statutory text does not include other financial creditors, in practice the administrators seem to invite all financial creditors (except bondholders) to sit on the bank committee.[87] Bondholders are consulted on the plan separately or in a bondholders' meeting, depending on the governing law of the bonds (L626-30, L626-33, L626-5).[88] Given their size and limited powers under French law, creditors' committees correspond more to creditors' meetings under U.S. or U.K. insolvency law, whereas the controllers more closely correspond to the concept of a creditors' committee.

The administrator (or, in large cases, the debtor – L626-30) proposes a safeguard plan (*plan de sauvegarde*) (L623-1) or a plan of rehabilitation (*plan de redressement*), which should address the perspective of rehabilitation of the enterprise and settle liabilities (L626-2). If the plan modifies the debtor's capital by issuing new shares in the reorganized debtor to creditors, it must be approved at a shareholders' meeting by a two thirds of the shareholders in attendance at the meeting (L626-3, L225-96).[89]

The plan is submitted for a vote by the creditors' committees and approved if a majority of creditors holding at least two thirds of the value of the claims in each committee vote for it (L626-30). The claims of members of the committees can be impaired by the plan, including

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[84] Feugère, B., Survey of the ¨Safeguard¨ Law of July 26, 2005, Applicable as of January 1, 2006, available at: <http://www.avrio.net/1619.0.html?&no_cache=1&tx_ttnews%5Btt_news%5D=47&tx_ttnews%5BbackPid%5D=5&cHash=793c061729> (last viewed on 16 October 2008).

[85] Allen&Overy, above note

[86] With respect to exclusion of overseas banks, this might amount to a violation of the EC Treaty provisions on free movement of capital.

[87] Allen&Overy, above note . With respect to the *Eurotunnel* case, see also the reference to "members of the committee" in the Proposed Safeguard Plan for the *Eurotunnel* Group Companies dated 31 October 2006, available at: <http://www.eurotunnel.com> (last viewed on 16 October 2008) at 21.

[88] Allen&Overy, above note at 2006 and Monford, R. and Jourdan, L.: French Chapter: preventive measures in a cross-border context, in Global Insolvency & Restructuring Yearbook 2006/2007, available at: <http://www.iln.com/articles/pub_251.doc> (last viewed on 16 October 2006)

[89] In the *Eurotunnel* case, this was avoided by establishing a new holding company (it is not clear that this was the reason of the transaction structure), which launched a takeover bid for the old company's shares with lower acceptance level. See the Proposed Safeguard Plan, supra note . Shareholders were able to recover options for acquisition of shares in the new holding company.

secured claims, but the court will "ensure that interests of all creditors are sufficiently protected" (L626-31). A creditor cannot appeal a decision approving a plan, however (L661-1).

Claims of creditors who are not members of a committee (e.g., bondholders) cannot be reduced by the plan without their individual consent (L626-5), unless the terms of the bonds permit all bondholders to be bound by the vote held at a bondholders' meeting, but in any event a court may extend the maturity of bondholders' claims up to a maximum of ten years from the confirmation of the plan (L626-18, L626-12). The first payment on a claim must always occur within a year and at least 5% of the debts must be repaid within two years of the plan approval. Also, discharge vis-a-vis each creditor is not final until after the due completion of the payments due to him under the plan (L626-19). A safeguard plan also discharges guarantors' claims (L626-11), whereas a plan adopted in judicial administration does not (L631-20).

If reorganization is clearly impossible and the debtor is in "cessation of payments", the debtor or a creditor can apply for opening of a liquidation proceeding or, if a safeguard or judicial administration proceeding is pending, it can be converted into a liquidation (L640-1, L631-15). Supervising judge, creditor controllers and employee representative are appointed also in liquidation (L641-1). The controllers may in particular be heard on the content of the plan of liquidation (L642-5). In the case of conversion from safeguard proceeding or judicial administration, the creditor representative becomes a liquidator (L641-1).

D. Germany. The German insolvency code[90] sets forth a single, unified insolvency proceeding for any debtor facing financial difficulty. This procedure can result in the liquidation of the debtor's assets or the adoption of a reorganization plan (*Insolvenzplan*). There are no different types of procedures and, if no reorganization plan is adopted, the proceeding automatically results in liquidation (§ 233). The insolvency proceeding is opened by a court decision upon a debtor's or creditor's request (§ 13(1)), if the debtor is insolvent on a balance-sheet (§ 19) or cash-flow basis (i.e., unable to meet its due obligations - § 17). A debtor can request the opening of an insolvency proceeding also if its cash-flow insolvency is impending (§ 18). A fully secured creditor is not entitled to petition for the opening of its debtor's insolvency proceeding, as such creditor has no interest in the insolvency proceedings.[91]

The decision opening an insolvency proceeding stays all creditors' judicial collection efforts to enforce a debtor's personal liability (*Insolvenzgläubiger*) (§§ 38, 52 and 87). Creditors holding liens over a debtor's real property can proceed with execution, as long as the administrator does not apply for an injunction; an injunction would be available if the asset is necessary for preservation of the estate and the creditor is paid interest on his claim.[92] Enforcement of liens over movable assets is stayed only with respect to assets in the possession of the debtor (§ 166); assets in the possession of third parties are subject to execution. The effects of the stay on security interests in receivables vary depending on the form of the security interest – if it is in the form of an assignment, enforcement is stay; if it is in the form of a lien, the creditor may proceed with enforcement on the theory that a lien is subject to publicity requirements.[93] Liens over other assets are not impaired by the stay.[94] Security interests created

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[90] *Insolvenzordnung*, dated October 5, 1994 (BGBl. I pg. 2866), last time modified by the act dated December 12, 2007 (BGBl. I pg. 2840), available at: <http://www.bmj.bund.de> (last viewed on 16 October 2008). All the references in parentheses in the text are to statutory sections in the Insolvenzordnung.

[91] Pape, G. and Uhlenbruck, W., Insolvenzrecht, (2002, C.H. Beck, Munich) at 274

[92] Pape, above note 90 at 406

[93] Kischhof, H. et al., Munchener Kommentar zur Insolvenzordnung, Vol. 2 (2001, C.H. Beck, Munich) at 1014

in judicial execution less than one month prior to the insolvency filing are ineffective in the proceeding (§ 88). The administrator (or the debtor-in-possession – § 282) may sell or have sold in execution assets encumbered by a security interest (§§ 165ff).[95]

The decision opening the proceeding generally divests the debtor of the right to manage its assets and transfers this right to an administrator (*Insolvenzverwalter* – §80(1)), unless the debtor requests that it remain in possession (*Eigenverwaltung*) and the court approves such request as not being likely to harm creditors. In the latter case, a supervisor (*Sachwalter*) is appointed to supervise the debtor and fulfill an administrator's duties other than management of the estate, such as the registration of claims (§ 270). An administrator is liable to all the parties for damage caused by breach of its duties by fault (§ 60(1)).

In the decision opening the proceeding, the court determines the date of the first creditors' meeting (*Gläbigerversammlung*) between six and twelve weeks from the decision (§ 29(1)). The decision is to be delivered to all the (known) creditors and debtors of the debtor (§ 30(2)). The creditors' meeting can vote to replace the administrator; it can decide to stop operating the business or request the debtor/trustee to prepare a reorganization plan (§ 157, § 284). Certain material actions of the administrator, such as a sale of the debtor's business to an affiliate or for a price below the highest bid, are subject to creditors' approval at a creditors' meeting (§§ 160-164).

Before the first creditors' meeting, the court may appoint a creditors' committee (*Gläubigerausschuß*) consisting of representatives of unsecured creditors, secured creditors, creditors with small claims, and employees, if these have any material claims (§ 67). The number of members is not set forth by the law,[96] and the members of a creditors' committee need not themselves be creditors. Alternatively, the creditors' meeting can appoint a creditors' committee, if none is in place; it might also replace some committee members or decide to cancel the committee (§ 68). The members of the committee shall assist and supervise the administrator in its function, and are obliged to keep themselves informed of the proceeding and of the relevant books and records of the administrator (§ 69). Members of a creditors' committee are entitled to remuneration and reimbursement of their costs (§ 73). The members of the committee are liable for damage caused to the creditors (secured or unsecured) by faulty breach of their duties (§ 71). If no committee is appointed, most of its prerogatives may be exercised by the creditors' meeting, although the administrator generally can proceed without first receiving a decision from the meeting, where it would have to wait for approval by the committee (§ 158(2), 160(1), 164).

The creditors' committee represents what German jurisprudence calls "creditor autonomy," and was first introduced by the Liquidation Code (*Konkursordnung*) in 1876.[97] A creditors' committee has broad express powers: (i) to apply to the court for the replacement of the administrator (§ 59(1)); (ii) to decide how the administrator shall deposit cash or securities belonging to the estate (§ 149); (iii) to comment on the administrator's report regarding the debtor's prospects (§ 156), to cooperate with the administrator in preparation of a reorganization plan (§218(3)), and to comment on any proposed reorganization plan (§ 232(1)); (iv) the

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[94] Kischhof, above note 92 at 1013

[95] Pape, above note 90 at 406

[96] Kind, T.: Der "vorläufig" vorläufige GläubigerausschusSection Oder: Kann auch im Insolvenzeröffnungsverfahren ein Gläuberauschuss bestellt werden? in Unternehmenskrisen, Der Jurist als Notartzt, Festschrift fur Eberhard Braun zum 60. Geburtstag, (2007, C.H.Beck, Munich) at 35

[97] Kind, above note 95 at 33

administrator (or the debtor in possession – § 276) cannot, without the committee's approval, take an act likely to have a material impact on the proceeding (such as a sale of real property or shares, a loan, commence, terminate or settle litigation) (§ 160), terminate operation of the business (§ 158), distribute dividends to creditors (§ 187(3)), reject a second plan proposed by the debtor (§ 231(2)) or request the court to proceed with liquidation despite a plan being proposed by the debtor (§ 233); (v) the committee is to be heard by the court before making major decisions, such as the (premature) termination of a proceeding (§ 214(2)) or approval of a reorganization plan (§ 248(2)); (vi) if the performance of the plan is to be supervised by an administrator, the committee has the right to hear reports thereon from the administrator (§ 261(2)).

The debtor and the administrator are both entitled to propose a plan (§ 218(1)); if the debtor is in possession, the supervisor may propose a plan only if the creditors' meeting requests him to do so (§ 284). The plan shall divide the creditors into classes (*Gruppen*) with similar economic position (§§ 222, 234). A class approves the plan if a majority of its members holding a majority of the value of claims votes for the plan (§ 244). The court verifies feasibility of a plan before submission of the plan for vote (§ 231(1)) and, if it is approved by each class of creditors (no shareholder vote is required), does not further scrutinize the plan (§ 248). A cram-down can occur if a majority of classes approves the plan, if the dissenting class would not be better off without the plan, and if neither any creditor ranking behind the dissenting class nor the debtor or its shareholders receive any value (§ 245).

E. Singapore. The Insolvency Law in Singapore is governed by the Companies Act of 1967[98] and the Companies Regulations.[99] There are three types of procedures recognized under the statute: winding-up, receivership and judicial management.

The purpose of a judicial management proceeding is to rehabilitate the company and to achieve a more advantageous realization of the company's assets than would be effected should the company be wound up (Section 227A). A petition for judicial management may be made by the company (pursuant to a members' resolution), its directors (pursuant to a board resolution), or its creditors (including contingent and prospective creditors) (Section 227B).[100] During the judicial management process, no resolution may be passed or order made for winding up of the company and no steps may be taken to enforce any security over the company's property except with the leave of the court (Section 227C).

Once the court enters an order authorizing a judicial management proceeding, the affairs, business and property of the company are placed under the management of the judicial manager (Section 227B(2)). The applicant for an order of judicial management must nominate a person who is a public accountant, but not the auditor of the company, to be the judicial manager

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[98] Singapore Companies Act of 1967, available at: <http://agcvldb4.agc.gov.sg/non_version/cgi_retrieve.pl?actno=REVED-50%doctitle=COMPANIES%20ACT>. Its provisions on judicial management proceedings constitute Part VIIIA, Section 227A of the Companies Act. Textual references to the Act appear within parens in the text, by section number.

[99] Singapore Companies Regulation, available at: <http://www.acra.gov.sg/NR/rdonlyres/3FC69938-195C=4841-8449-7FE899C3B740/2866/01CompaniesRegulations.pdf>. Textual references to the Regulations appear within parens in the text, by regulation number.

[100] A petition for judicial management must allege that "the company is or will be unable to pay its debts," and either that "there is a reasonable probably of rehabilitating the company or preserving all or part of its business as a going concern" or "that otherwise the interests of creditors would be better served by resorting to a winding up" (Section 227A).

(Section 227B(3)(a)). If the company has made the nomination, the creditors (who decide based on a majority in number of the creditors and value of the claims) may oppose the nomination through a court application (Section 227B(3)(c)). And, in any event, the court may reject a petitioner's nomination for judicial manager and appoint another person instead (Section 227B(3)(b)). The judicial manager takes over the duties and powers conferred on the directors of the company (Section 227G(2)), including "all such things as may be necessary for the management of the affairs, business and property of the debtor" (Section 227G(3)(a)).[101] For example, judicial managers have the power to dispose of secured assets, including assets secured by a floating charge. The floating charge holder must be given the same priority in the proceeds of the sale as the disposed property itself (Section 227(H)(1) and (4)). Similarly, the net proceeds of the disposal are to be first applied towards discharging the sums secured by the security (Section 227(H)(2) and (5)).

After the judicial manager puts forth his proposal for achieving the purposes of a judicial management proceeding (Section 227(M), the creditors' meeting is convened to consider the proposal (Section 227N). The notices to creditors shall state a time within which the creditors must lodge their proofs in order to entitle them to vote at the first meeting. The judicial manager or a person nominated by him will be the chairman at the meeting (Regulation 66). A resolution is passed by the creditors' meeting when a majority in number and value of the creditors present and voting on the resolution has voted in favor of the resolution (Section 227N). Only creditors whose claims have been accepted by the judicial manager may vote (Regulation 72), and secured creditors can exercise their voting rights only in relation to the unsecured balance of the debt owing unless they surrender their security (Regulation 74).

Creditors can establish a committee of creditors to supervise the functions and powers of the judicial manager (Section 227O). The committee shall consist of not less than five and not more than seven members, one of whom shall be an employee of the company (other than a director or former director). In a case in which the employees belong to a trade union, the trade union shall represent employees' interests on the creditors' committee (Regulation 86(1)). In addition, a shareholder of the company is entitled to sit on the creditors' committee to represent the interests of shareholders (Regulation 86(1)). The employee and shareholder representatives are entitled to attend all meetings of the creditors' committee, but are not entitled to vote (Regulation 86(2)). The creditors' committee is empowered to require the judicial manager to appear before it and provide information reasonably required by them; moreover, the judicial manager is required, "whenever practicable," to inform the committee of "any important action which he proposes to take" (Regulation 86(2)). If the committee is dissatisfied with the information provided to it by this means, it is entitled to complain to the court who "may give such directions to the judicial manager as it considers appropriate (Regulation 86(3)).

Some debtors may instead be wound-up (that is, dissolved or liquidated) under the law of Singapore. A winding-up can be initiated either voluntarily by a debtor or involuntarily by the court (Section 247).

A court-ordered winding-up can occur on the application of the company, a creditor of the company, a liquidator or judicial manager of the company, or a government official (Section 253). While there are several grounds for ordering the winding up of a company, the fact that the debtor is unable to pay its debts is among these grounds (Section 254(1)(e)).[102] A winding-up

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[101] More specifically, the powers are enumerated in Schedule 11 of the Companies Act (Section 227G(4)).

[102] The debtor's inability to pay its debts is a defined term under the Companies Act, section 254(2).

order commences the proceeding and also appoints a liquidator, if one has not already been appointed, and summon meetings of creditors and contributors of the company (Section 263). While the powers of the liquidator are broad in a court-ordered winding up (Section 272), the liquidator is required to exercise these powers consistent with any directions provided in a creditors' resolution adopted at a creditors' meeting or otherwise (Section 273(1)); the liquidator has the power to call a meeting of creditors in order to solicit their directions (Section 273(2)). While creditors' committees cannot be formed in the context of a court-ordered winding-up proceeding, a liquidator may (and must if requested by any creditor or contributory) call meetings to determine whether a committee of inspections should be appointed to assist the liquidator (Section 277). The powers of a committee of inspection are left undefined by the statute, other than to specify procedural matters regarding membership, quorum, voting and replacement (Section 278). Courts retain substantial powers in court-order winding-up proceedings (Sections 279 – 289), but can delegate specified powers to the liquidator, although the power to make a call and readjust the rights of contributories is subject to special leave of the court or the approval of the committee of inspection (Section 288).

The procedures followed in a voluntary winding-up are similar to those in a court-ordered proceeding. A liquidator is appointed (Section 294) and a meeting of creditors called if the liquidator believes that the company is or may be unable to pay its debts in full (Sections 295 and 296). Creditors' meetings are empowered to appoint a committee of inspection consisting of not more than 5 persons. Liquidators' express powers are broad in voluntary winding-up proceedings (Section 305), but the liquidator cannot exercise these powers without the approval of the committee of inspection (Section 306(6)). In voluntary proceedings, "[a]ll proper costs, charges and expenses of and incidental to the winding up including the remuneration of the liquidator shall be payable out of the assets of the company in priority to all other claims" (Section 311).

F. China. The Enterprise Insolvency Law of the People's Republic of China,[103] recently adopted in 2006, encompasses three types of insolvency procedures: 1) liquidation; 2) restructure; and 3) composition. A debtor or creditor can apply to the People's Court for liquidation or restructuring, but only a debtor can apply for composition (Articles 7, 95). Regardless of the type of insolvency procedure, the People's Court appoints an administrator who takes custody of the debtor's property and administers the business and estate of the debtor (Articles 13 and 22).

An application for liquidation or reorganization may be brought by either a debtor or its creditors (Article 7). A debtor can file an application for either reorganization or liquidation if it is unable to pay its debts as they come due and its assets are insufficient to meet its debt obligations (Articles 2, 7), while creditors' petitions need only allege cash-flow insolvency (Articles 7, 70);[104] a debtor or its stockholders can rebut creditors' application for an involuntary

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[103] Adopted at the 23rd Session of the Standing Committee of the 10th National People's Congress on August 27, 2006, and went into effect on June 1, 2007. A translation of the law by the Bankruptcy Law and Restructuring Research Center of China University of Politics and Law is available at: <http://www.insol.org/pdf/EnterpriseInsolvChina.doc> (last viewed 24 December 2008). References to specific articles of the Enterprise Law appear in parens in the text and in the footnotes.

[104] See Shi, J., 'Twelve Years to Sharpen One Sword: The 2006 Enterprise Bankruptcy Law and China's Transition to a Market Economy' (2007) 16 *Norton Journal of Bankruptcy Law & Practice* 645, 661.

liquidation by seeking court permission to reorganize the debtor (Article 70).[105] Insolvency applications are not self-executing and require the People's Court to "take cognizance" of the application in order for it to become effective and for the case to proceed (Articles 11, 71).

At the time the court accepts an insolvency application, it will designate an Administrator[106] to convene creditors' meetings, take control of the debtor's property, and manage the debtor's business, including legal proceedings involving the debtor (Articles 22, 25). The creation of the position of an "admistrator" amounts to a "major innovation" of the 2006 Enterprise Bankruptcy Law.[107] While the Administrator receives supervision from creditors' meetings and meetings of the creditors' committee (Article 23),[108] the Administrator is vested with a "wide range of important responsibilities, including taking over the assets of the debtor, deciding the internal management of the debtor, and managing the disposing of the debtor's assets."[109] Prior to the first meeting of creditors, the Administrator must decide whether to continue the debtor's business or close its doors Article 25(5)). In a liquidation case, the Administrator is responsible for marshaling and liquidating estate property and paying claims (Articles 111-115). Generally, an Administrator may engage "necessary work staff" (Article 28); in a reorganization proceeding, the Administrator may employ managerial and business personnel of the debtor to manage the debtor's business affairs. Indeed, in a reorganization

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[105] Reorganization proceedings are subject to termination if the debtor's financial condition continues to deteriorate and there little prospect for rescue or the debtor has engaged in misconduct that prevents the administrator from carrying out its duties or results in a depletion of the value of the estate (Article 78).

[106] Administrators can be a member of a law firm, accounting firm or insolvency liquidating firm (Article 24).

[107] Shi, above note at 662.

[108] On the topic of the Administrator's independence, see Parry, R. and Zhang, H., 'China's New Corporate Rescue Laws: Perspectives and Principles' (2008) 8 Journal of Corporate Law Studies 113, 129. They remark as follows:

> The court has a monopoly over the appointment of an administrator to manage the debtor's affairs, reflecting the view that the administrator has an independent function and is not merely a representative of the creditors. However, a creditors' meeting will also be established, and this body is entitled to apply to the court for a change of administrator if it can argue that the administrator is not capable of discharging his duties legally and impartially or that he is incompetent at his work, but the court has the final say.

Id. By contrast, Prof. Jingxia Shi views the creditors' committee's supervision of the administrator as the key to a successful reorganization proceeding. See Shi, above note 104 at 664-65 ("In lieu of the 'supervisor' designed in the previous drafts [of Chinese insolvency law], the 2006 EBL empower the creditors' committee with the supervision of the administrator. The administrator shall be responsible for, and report to, the court and also be supervised by the creditors' meeting and creditors' committee."). Prof. Shi also argues that administrators, supervised by creditors' meetings and creditors' committees and with the occasional involvement of the People's Court, means that "government agencies will no longer play a prominent role in a bankruptcy case." Ibid. at 664.

[109] Kargman, S.T., 'Solving the Insolvency Puzzle' (2007) September-October China Business Review 44 at 45, available at: http://www.chinabusinessreview.com/public/0709/ and http:///kargmanassociates.com/Kargman-CBR_SO07.pdf> (last viewed on 12 December 2008). Kargman continues in this way:

> Some observers have noted that by providing for a strong administrator, the new law may create an important counterweight to the role of the People's Court judge in the insolvency proceeding. Yet despite the important role given the administrator, the new law also allows for the debtor to apply to the court in order to remain in charge of its own assets and business operations as long as the debtor remains under the supervision of the administrator, i.e., a modified 'debtor-in-possession' concept.

Ibid. at 46.

proceeding, the debtor's management may have received permission from the People's Court to continue in their operational and managerial roles under the Administrator's supervision (Article 73), similar to the "debtor-in-possession" under U.S. bankruptcy law.[110]

Regardless of the type of proceeding that is commenced, the People's Court is required, within 25 days of its acceptance of the application, to notify creditors of its decision, set a date by which creditors must declare their debts and, 15 days thereafter, convene the first meeting of creditors (Article 14, 62). Creditors' meetings, presided over by a Chairman designated by the People's Court (Article 60), are the forum for creditor involvement in an insolvency proceeding. At these meetings, creditors supervise the Administrator (Article 61(3)); they have the power to reconsider the Administrator's determination to continue or close the debtor's business and may replace the Administrator first appointed with another of their choosing (Article 61(2) and (5)).[111] In a liquidation proceeding, creditors' meetings also examine and verify claims and adopt plans for the realization and distribution of insolvent property (Article 61(1)). In a reorganization proceeding, creditors' meetings adopt the plan of reorganization or composition agreement (Article 61(6)-(8)).

Any creditor who has "declared his debt according to the law" may attend and vote at creditors' meeting; workers and union representatives are also entitled to attend and participate (Article 60). Secured creditors may attend and participate in creditors' meetings, but may not vote on settlement agreements or plans for the distribution of the debtor's assets unless they waive their right to priority (Article 59). A resolution of the creditors' meeting is adopted if favorable votes are cast by half the creditors present and having voting rights whose claims represent half or more of the aggregate amount of unsecured creditors' claims (Article 64).

The creditors' meeting can establish a creditors' committee, consisting of no more than 9 persons, and must include creditor representatives as selected at the creditors' meeting as well as an employee representative of the debtor or a representative of the work union (Article 67). Creditors' committees are charged with supervising the management and disposition of the debtor's property, including the distribution of the insolvent property in the case of liquidation; they also convene creditors' meetings and perform other functions delegated to them at creditors' meetings (Article 68).[112] One commentator argues that, "[a]mong the function to be exercised by the creditors' committee, the most significant one is to supervise the Administrator, including supervision of the management and handling of the debtor's property, and requesting that the Administration make necessary explanation or provide relevant documents."[113] Administrators are required to report to the creditors' committee regarding a broad range of activities, including transfers, loans, assignments, disclaimers, determinations regarding unperformed contracts and

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[110] Kargman, above note , at 46; Arner, D.A., et al, 'Property Rights, Collateral, Creditor Rights, and Insolvency in East Asia' (2007) 42 *Texas International Law Journal* 515, 553.

[111] See Kargman, above note 109 at 46; Parry and Zhang, above note 108 at 129; Shi, above note 100 at 652.

[112] Kargman, above note , at 46 (describing power of creditors' committees under new Chinese law as "broad").

[113] Shi, above note at 665.

other matters "having a material effect on creditors' interests" (Article 69).[114]

While the administrator or the debtor is alone authorized to propose a plan of reorganization (Article 79), the plan must garner the support of two-thirds of the members of each of four classes: secured claims; labor claims; tax claims and general claims (Sections 84 and 82). If a class of claims rejects the plan of reorganization, the debtor or the administrator are authorized to negotiate with the dissenting class of claims; so long as the compromise does not impair the interests of other classes who have already approved the plan, the dissenting class is entitled to vote on the plan as modified by the negotiation (Article 87). If the dissenting class also rejects the modified plan, the debtor or administrator nonetheless can seek court approval of the plan (cram down), provided the economic interests of the dissenting class are protected and receive no less than what they would receive in a liquidation proceeding, the plan is deemed feasible and other statutory requirements are met (Article 87).

G. ***South Korea.*** Korean insolvency law was revised in 2006 to combine all insolvency law in a single legislative system and to reform this legislation.[115] The new integrated law, the Debtor Rehabilitation and Bankruptcy Act, was passed in 2005, and became effective March 1, 2006; this DRBA replaces the former Corporate Reorganization Act, the Composition Act, the Bankruptcy Act and the Individual Debtor Rehabilitation Act.[116]

Under DRBA, a rehabilitation proceeding can be sought against any legal person, partnership, association, or natural person by the filing of a petition alleging that (i) the debtor is incapable of paying its debts without jeopardizing its business operations or (ii) there exist circumstances likely to cause the debtor's bankruptcy. A petition for rehabilitation proceedings can be filed by a debtor, as well as by creditors, shareholders and even directors of the debtor's corporate board.[117] Commencement is not automatic. Except when a foreign representative seeks recognition of a foreign proceeding, the applicant must provide prima facie evidence of justification for commencement and a hearing must be held.[118]

In a commencement order, the court may appoint a receiver, establish a Council of Creditors, determine the date for the first meeting of creditors and the first assembly of interested parties, and set the date by which creditors must complete their filing of claims and the receiver must examine claims and submit a schedule of claims and interest.[119] A Council of Creditors mediates the interests among the creditors and presents an opinion on the plan of reorganization

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[114] But see Parry and Zhang, above note at 131 ("The administrator can exercise managerial powers without having to report to the court and, although he must report to the creditors' committee, the committee has no powers to annul the actions of the administrator. It is unable to remove the administrator, that power being exercisable only by the court.").

[115] Oh, S., 'An Overview of the New Korean Insolvency Law' (2007) 16 Norton Journal Bankruprtcy Law & Practice 751.

[116] Ibid. at 753.

[117] Ibid. at 757.

[118] Ibid. at 757-58 (a hearing also need not be held where it is impossible to determine the whereabouts of the debtor or debtor's representatives). Nonetheless, DRBA enables a court to provide protective measures between the time a petition is filed and a commencement order is entered in form of an injunction, the appointment of a preservative order administrator or otherwise. Ibid. at 758.

[119] Ibid. at 759.

to the court.[120] It is composed of up to ten of the debtor's major unsecured creditors.[121] Minority creditors may participate if the court or Administrative Committee deems it necessary.[122] A Council of Creditors has broad rights to present its opinions to the court, the receiver, examiner or temporary receiver.[123] It can also require these entities to report to it regarding the progress of the rehabilitation proceeding, "statements of decision, audit reports and other major materials determined by the Supreme Court Regulations."[124] Moreover, "the court may decide to make the debtor bear the expenses necessary for activities of the Council of Creditors."[125]

The appointment of a receiver in all rehabilitation proceedings became a hot political issue in deliberations over DRBA, with some arguing that a third-party receiver should always be appointed and others arguing that Korea should follow the lead of U.S. reorganization law and allow the debtor to "remain in possession" in at least some rehabilitation proceedings. In the end, the DRBA "struck a balance between the two opposites." It provides lip-service to the concept that a receiver is appointed in every case, by requiring the court to appoint debtor's current management as the "receiver," unless (i) the debtor's financial distress was the result "misappropriation, concealment, or mismanagement of property" by debtor's management, (ii) "the Council of Creditors requests" the appointment of a third-party receiver, or (iii) the appointment of a third-party receiver is "necessary for the rehabilitation of the debtor."[126] The court may also appoint an examiner, unusually an accounting firm, to evaluate corporate assets, prepare financial statements (including statements of the liquidation and going concern value of the debtor) and assess the likelihood of any rehabilitation of the debtor's business.[127] In addition, DRBA provides that the "receiver" should examine the business and property of the debtor and report to the court on the assets, liabilities and operations; the "receiver" also prepares a plan of reorganization, that is, a plan for the repayment of the debtor's liabilities over time.[128]

A plan of reorganization is voted on by the debtor's creditors and shareholders at the Interested Parties' Meeting. Only creditors who have filed their claims in the bankruptcy proceeding have voting rights in the Meeting of Interested Parties.[129] Creditors are classified into three categories under the corporate reorganization plan as per their priority: (i) common benefit claims; (ii) secured claims; and (iii) general claims. Common benefit claims have priority over secured and general claims and have to be satisfied in every confirmed plan of reorganization. Secured claims are claims with liens and special priorities. They have priority over common benefit claims with respect to the encumbered property. General claims are

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[120] Ibid. at 756.

[121] Ibid.

[122] Email from Sooguen Oh, dated October 26, 2008, on file with the author.

[123] DRBA, Article 21 (translation received in email from Sooguen Oh, dated October 26, 2008, on file with the author.

[124] DRBA, Article 22, ibid.

[125] Ibid. at Article 21.

[126] Oh, above note , at 763. A third-party receiver might be a legal person, although in this event the receiver should identify a member of its board of directors as responsible to report to the court.

[127] Ibid. at 759-60.

[128] For a discussion of the contents of a plan of reorganization under DRBA, see ibid. at 765-67.

[129] Ibid. at 770.

unsecured claims that arose prior to commencement of the process. A plan is approved if consented to by over two-thirds of the general creditors, three-quarters of secured creditors, and a majority of shareholders.[130] Employees' consent to the terms of a plan of reorganization is not required.[131] While secured creditors' claims generally are treated in a single class of claims under the plan, regardless of their collateral, unsecured general claims are often separately classified depending upon whether they involve the claims of financial institutions, trade claims or claims held by guarantors or sureties.[132] Once approved at the Interested Parties Meeting, a court must confirm the plan of reorganization as compliant with the requirements of Article 243 of DRBA, including a "best interest of creditor's test" that requires proof that payment under a plan of reorganization is no less favorable than repayment in a liquidation proceeding (unless all creditors agree to the plan).[133]

DRBA also contains provisions permitting the liquidation of a legal entity, including both legal persons and individuals.[134] Liquidation, referred to as a bankruptcy proceeding in DRBA, is occurs when debtors are both cash-flow and balance-sheet insolvent: under DRBA a "debtor is declared bankrupt when the debtor is unable to make payments after mobilizing all of its available assets and funds."[135] A debtor is presumed to be unable to make payments when it ceases making such payments.[136] An adjudication of bankruptcy generally also is accompanied by court orders appointing a bankruptcy trustee, setting the period for the filing and examination of claims, and setting the date of the first meeting of creditors.[137]

Claims are divided into three types in bankruptcy proceedings: claims with the power of separation, which need not participate in the bankruptcy; estate claims, which are entitled to be paid by the trustee at any time in the proceeding; and bankruptcy claims, which are further subdivided to include claims with priority, general bankruptcy claims and subordinated bankruptcy claims.[138] All bankruptcy claims must be filed with the court within the bar date; creditors whose claims timely have been filed are entitled to vote in the creditors' meeting, to appeal the date for claims examination, to consent to the discontinuation of bankruptcy and to receive distributions from the bankruptcy estate.[139]

H. Russian Federation. Although there is more than one statute governing insolvency law and procedure in the Russian Federation, the essential procedures and regulations can be found in the Federal Statute On Insolvency (Bankruptcy) Law, dated October 26, 2002, and

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[130] Ibid. at 766.

[131] Ibid. at 767.

[132] Ibid. at 766.

[133] Ibid. at 767.

[134] Ibid. at 768.

[135] Ibid.

[136] Ibid., citing DRBA, Article 305.

[137] Ibid. at 769.

[138] Ibid. at 770.

[139] Ibid. at 771.

amended most recently in July 23, 2008.[140] The primary purposes of Russia's insolvency laws are to promote creditors' recoveries and the rehabilitation of the debtor's business.[141]

The debtor,[142] a "bankruptcy creditor,"[143] or an "authorized body"[144] can file an application to open a unitary insolvency proceeding with the Arbitration Court,[145] although the standard for commencement differs depending upon what sort of entity files. Debtors can file a voluntary application if insolvency is anticipated, that is, when circumstances exist that provide evidence of the debtor's inability to pay its monetary obligations or mandatory payments when due (Article 8), and debtors who are legal persons or individual entrepreneurs must file if payment of monetary obligations of mandatory payments in full is or is likely to be impossible, or if execution upon the debtor's assets renders its business activities impossible or substantially difficult (Article 9). Bankruptcy creditors and authorized bodies who file such an application are required to show "evidence of insolvency," defined as a debtor's inability to satisfy creditors' monetary claims, or fulfill mandatory payments[146] owed to authorized bodies, for a period of three months after such claims and obligations came due (Article 3),[147] and which, in the case of corporate debtors, are not less than 100,000 Rubles (Article 3).[148]

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[140] About Insolvency (Bankruptcy) Law, Federal Statute No. 127-FZ (enacted Oct. 26, 2002; revised July 23, 2008) [hereafter the "RF Statute"]. References to specific provisions of the RF Statute appear in parens in the text and in the footnotes. For other statutes regulating insolvency proceedings and their procedure, see Civil Code of the Russian Federation; About peculiarities of insolvency entities of natural monopolies for the fuel and energy sector, Federal Statute No. 122-FZ (June 24, 1999); About insolvency of financial institutions, Federal Statute No. 40-FZ (Feb. 25, 1999).

[141] Tkachenko, T.V., 'National and International Aspects of Russian Insolvency Law: Problems and Possible Solutions' (2007), 17 *Norton Journal. Bankruptcy Law & Practice* 5 (Art. 9).

[142] Under the RF Statute, both individuals and legal persons are eligible for insolvency relief. (Articles 3, 8)

[143] "Bankruptcy creditors" are defined as creditors with monetary claims; the term excludes authorized bodies, individuals claiming recovery for bodily harm or harm inflicted to life, mental suffering duties to pay remuneration to an author for the use of intellectual property or the results of intellectual activity, and shareholders' claims. (Article 2)

[144] "Authorized bodies" are defined as federal executive agencies of the government of the Russian Federation that have been authorized to submit in bankruptcy and bankruptcy proceedings claims of mandatory, monetary payments and claims of the RF, as well as municipal entities authorized to claim payments on behalf of the constituent entities or municipalities. (Article 2)

[145] Tkachenko, above note at __ ("In Russia, there are specialized bodies known as arbitrage courts that specifically decide financial and economic disputes between enterprises and entrepreneurs. Their position, functions, and procedures are covered by the . . . Law on Courts' System in Russia, the Law on Arbitrage Courts in Russia, and the Arbitrations Process Code. An extremely important function of these courts is that they are responsible for disputes involving foreign enterprises. The court chamber, which consists of three judges, makes judgments on insolvency disputes.").

[146] "Mandatory payments" is defined to include taxes, duties and other legal obligations to "authorized bodies" as required by the terms and procedures stipulated under the laws of the Russian Federation.

[147] There are different tests regarding the "evidence of insolvency" of individuals and legal persons. Individual debtors are eligible for insolvency if they are unable to satisfy creditors' monetary claims or fulfill mandatory payment obligations owed to authorized bodies for a period of three months after they first came due, and such individual's obligations exceed the value of his assets (Article 3).

[148] There are roughly 27.5 Rubles to the US Dollar. As to individual debtors, creditors and authorized bodies must show "evidence of insolvency" as to claims not less than 10,000 Rubles (Article 3).

Between the filing of an application and a determination of insolvency by an Arbitration Court of the Russian Federation, the debtor's shareholders, the parent corporation of the debtor, the debtor's creditors or other persons with contractual arrangements with the debtor are entitled to take measures aimed at restoring the debtor's solvency (Article 30). Through these arrangements, these parties in interest may provide financial assistance to the debtor in an amount sufficient to repay the debtor's monetary obligations and mandatory payments and for restoration of the debtor's solvency. If restorative assistance fails, an Arbitration Court of the Russian Federation enters a decision regarding a corporate debtor's insolvency, and may enter one of the following orders: determination of the validity of claims and opening of a receivership; rejection of the application for receivership, leaving the case without deliberation; rejection of the application for receivership and termination of the case (Article 48). Thus once claims are determined to be valid, the opening of a receivership is almost automatic.

In a receivership, which is also referred to as an observation proceeding, the creditors' meeting elects a committee of creditors and makes a recommendation as to the form of the remainder of the debtor's insolvency proceeding (Article 73). By the conclusion of the receivership, the Arbitration Court considers the recommendation of the creditors' meeting (if any) and of the interim receiver and enters an order authorizing one of four possible remedies: financial rehabilitation; external administration; liquidation; or voluntary arrangement (Article 75); alternatively, the court may enter an order denying the debtor's bankruptcy, terminating the case, or leaving the case without deliberation (Article 52).

Thus, an observation proceeding is a temporary situation while the Arbitration Court decides on whether the debtor should be placed in financial rehabilitation or external administration, or declared bankrupt and winding-up proceedings commenced.[149] The debtor's management remains "in possession" and in power, but with substantial limitations (Article 63). To guide its determination and to oversee the debtor's management, the Arbitration Court appoints an insolvency administrator,[150] referred to as an interim receiver or a temporary manager at this stage of the proceeding, with powers to preserve the debtor's property, avoid specified transfers, analyze the financial state of the debtor, including claims asserted against the debtor, and object to creditors' claims. The debtor's management is required to seek the consent of the interim receiver as to sales, loans and other transactions that exceed five percent of the balance sheet value of the debtor's assets as of the date of the institution of the receivership. The interim receiver is required to hold a first meeting of creditors, at least 10 days before the receivership is terminated. This first meeting of creditors is attended by bankruptcy creditors

[149] Tkachenko, above note at __ ("A main goal of the observation [proceedings] is a financial analysis of the enterprise and a determination of which kind of the following procedures: financial rehabilitation, external administration, or liquidation (auction) is appropriate for the debtor enterprise.").

[150] The 2002 revisions to the Insolvency Law substantially reformed who might be appointed as an insolvency administrator. Article 20 of the RF Statute provides that only a citizen of the Russian Federation can be an arbitration insolvency administrator, and only if he or she: is registered as an individual entrepreneur; has a higher education background; has a work record as an executive of at least two years; has passed a theoretical examination under the arbitration insolvency practitioners training curriculum; has undergone probation for at least a 6-month term in the position of an assistant arbitration insolvency practitioner; has no conviction for an economic crime or medium-gravity, grave or especially grave crime; is a member of a self-regulating organization.

and authorized bodies, which are entitled to vote at the creditors' meeting,[151] and other stakeholders such as representatives of the debtor's employees, of the debtor's "incorporators" (that is, its shareholders) and of the owner of the debtor-corporation, which are not entitled to vote (Article 12). Voting is weighted according to the relative value of claims held by bankruptcy creditors and authorized bodies.[152]

Under Russian insolvency law, the creditors' meeting holds broad powers. At the first meeting of creditors, creditors should consider whether to recommend to the Arbitration Court whether financial rehabilitation or external administration should be instituted for the debtor,[153] or instead the debtor declared bankrupt and liquidated in winding-up proceedings (Article 73). The creditors' meeting has an exclusive competence that cannot be transferred or delegated, even to the creditors' committee (Article 12).This competence includes, for example, the decisions to institute or change the terms of a financial rehabilitation or external administration and to file a relevant petition with the Arbitration Court; approval of a financial rehabilitation plan and debt repayment schedule; approval of the standards applicable to nominees for the position of insolvency administrator; selection of a self-regulating organization to present nominees to the Arbitration Court for the position of insolvency administrator;[154] selection of a holder of register from among the members of accredited self-regulating organization; approval of a voluntary arrangement. Powers other than these can be delegated to a creditors' committee and have to be defined by the creditors' meeting at which the creditors' committee is established. In addition, the first creditors' meeting should establish a creditors' committee by determining the number and identity of the committee's members and the powers of the committee.[155] In addition, the creditors' committee is empowered to demand that the debtor and the insolvency administrator provide it with information regarding the debtor's financial state and the progress of the insolvency proceedings (Article 17). In addition to any other powers explicitly conferred on the committee by the creditors' meeting, the committee is also empowered to convene a creditors' meeting,[156] to recommend to the creditors' meeting that the insolvency administrator (whether receiver, administrative receiver, external administrator or termination administrator) be removed, and to appeal the actions of a insolvency administrator to the Arbitration Court (Article 17).

In a receivership, the interim receiver must submit to the Arbitration Court a report on its activities, including information on the debtor's financial state and the possibility of restoring the

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[151] To attend the first creditors' meeting, creditors must present their claims to the debtor within 30 days after the date of publication of advertisement of the institution of receivership. The claims should be sent to the court, the debtor and the interim receiver, together with the court decision or other documents confirming their claims.

[152] Cumulative voting is exercised only when electing the creditors' committee; once constituted, each voting member of the committee holds one vote.

[153] For an extensive discussion of the distinction between a financial rehabilitation and an external administration, see Vitrayansky, V.V., *Research and Practice Comment to Federal Statute On Insolvency (Bankruptcy)* (2005).

[154] Since 2002, self-regulated nongovernmental organizations license the activity of insolvency administrators, rather than the Russian Federation. Tkachenko, above note 141 at __. ("These organizations have the power to apply disciplinary action to their members and even to divest them from membership.").

[155] If the debtor has fewer than 50 creditors, the creditors' meeting may not elect a creditors' committee.

[156] A creditors' meeting might also be convened by bankruptcy creditors or authorized bodies whose claims make up at least 10 per cent of the aggregate value of creditors' claims and/or one third of the aggregate number of bankruptcy creditors and authorized bodies.

debtor's solvency and the minutes of the first creditors' meeting (Article 67). The debtor is entitled to address a petition for the institution of financial rehabilitation to the first creditors' meeting and, in some cases, to the court (Article 64). If the first meeting of creditors does not petition the court to declare the debtor bankrupt and commence winding-up proceedings, the court postpones the case hearing and instructs the creditors' meeting to determine within a period not exceeding seven months from the submission of the application (Article 75).[157] The receivership is terminated as of the date financial rehabilitation, external administration or winding-up proceedings are instituted.

If an order of financial rehabilitation is entered, the debtor remains in possession to perform the terms of a creditor-approved financial rehabilitation plan and debt repayment schedule (Article 82). An administrative receiver is appointed by the Arbitration Court,[158] who is required during the financial rehabilitation proceedings to keep a register of creditors' claims, hold meetings of creditors, provide information to the creditors' meetings and creditors' committee, and monitor the debtor's progress regarding the formulation and implementation of its debt repayment schedule and financial rehabilitation plan (Article 83). The term of a financial rehabilitation is set in the financial rehabilitation plan, but cannot exceed two years.[159]

If external administration is instead ordered, the powers of the debtor's management are terminated and vested in an external administrator; the external administrator is empowered either to dismiss debtor's management or propose that they hold alternative positions within the debtor (Article 94). Within one month after the appointment of the external administration, the external insolvency administrator, also referred to as the external receiver, must formulate and present to the creditors' meeting an external administration plan for their approval (Article 99).[160] The external receiver may dispose of the debtor's property, conclude a voluntary arrangement on behalf of the debtor, waive the debtor's performance under contracts, and pursue avoidance actions. Large-scale transactions require creditor approval, either by a creditors' meeting or creditors' committee (Article 101).

Finally, the court may declare the debtor bankrupt and commence winding-up proceedings for the liquidation of the debtor. A termination administrator is appointed. The termination administrator takes control of the debtor's property for valuation, examination and

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[157] If the case hearing cannot be postponed, the court should issue a ruling on the institution of financial rehabilitation based on a motion of the debtor's shareholders, an authorized body or other parties in interest, on condition that security is provided for the performance of 20 per cent of the debtor's obligations included in the register of creditor's claims as of the date of the court hearing. The court does not have to approve any decision of the creditors' meeting (Article 75).

[158] The debtor's management remains in possession of the debtor's assets and retains some powers, but the debtor cannot dispose of more than 5 per cent of its assets without the permission of the creditors' meeting or creditors' committee and cannot enter into loans, grant suretyships or guarantees, settle trusts, or reconstruct its corporate form by means of merger, acquisition, accession, division, separation or transformation. Without the consent of the administrative manager, the debtor also cannot enter into transactions that would cause an increase in its accounts payable of more than five per cent of its aggregate claims or dispose of any property other than inventory in the ordinary course of business.

[159] If the debtor discharges all the creditors' claims set forth in the debt repayment schedule before expiration of the term of the financial rehabilitation set by the Arbitration Court, the debtor shall file a report seeking early termination of the financial rehabilitation proceeding.

[160] An external administration plan should propose measure for restoring the debtor's solvency, set the terms and procedures for implementing such measures and identify the costs of implementation of the plan and other expenses of the debtor.

disposal; he also notifies employees that they will be dismissed within one month's time, examines claims, brings avoidance actions, rescinds contracts and takes other measures aimed at recovering the debtor's property (Article 126).

Moreover, at any point in time during a debtor's insolvency proceedings, the debtor and the debtor's bankruptcy creditors and authorized bodies are entitled to conclude a voluntary arrangement, subject to approval by a majority in the number of the bankruptcy creditors and authorized bodies in attendance and authorized to vote at a creditors' meeting (and considered approved if all of the secured creditors vote for the voluntary arrangement) and subject to confirmation by the Court of Arbitration.

IV.

Our research demonstrates the breadth of reliance on creditors' committees across a range of insolvency law regimes, especially in reorganization proceedings.[161] Although UNCITRAL's Legislative Guide on Insolvency Law suggests that creditors' committees should hold heightened importance in statutory regimes that allow a debtor to remain in possession of the business (as compared to those which remove the debtor and place an insolvency representative in charge of an estate),[162] we found little variation between creditors' committees in countries that allow for a debtor-in-possession regime and those that don't, and no consistent pattern among the several countries that do provide this option.[163] Despite some variation in terminology, each of the insolvency regimes we examined provided for creditors' committees in an effort to increase creditor participation.[164] Moreover, many of these statutory provisions fulfilled all, or most, of UNCITRAL's recommendations regarding creditor representation.

There are several important areas in which divergence from UNCITRAL's recommendations are clustered, however. We consider these issues in the same order as they appear in the Legislative Guide on Insolvency Law.

First, UNCITRAL provides that an insolvency law "may" provide for the appointment of additional committees or additional representatives.[165] Many countries did not expressly allow for the expansion of creditors' committees, but several did. The US rule permits the appointment

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[161] Further research would consider additional regions, such as Latin America, Africa and other areas that our research did not cover. It would also cover the practices followed in these insolvency regimes, regardless of the statutory language adopted in these insolvency laws.

[162] Text associated with note 15 above.

[163] The US is the only country among the eight we studied to leave a debtor in possession with no trustee, examiner or other insolvency representative appointed for oversight, administration or other purposes. France, Korea, Germany and perhaps Russia provide for a limited debtor in possession model in which they leave the debtor in possession but subject management to the supervision of an estate representatives with fewer powers than a full insolvency representative.

[164] One (France) referred to creditors' committees what many countries refer to a creditors' meetings, it also incorporated into its reorganization process a creditor representative, an employee representative and five controllers (who, together, act as what many would refer to as a creditors' committee). Another (South Korea) referred to its creditor representatives as a "creditors' council," but there was nothing other than this terminology to distinguish Korea's creditors' councils from others' creditors' committees.

[165] Legislative Guide at Rec. 129.

of additional committees or members to committees, but it is not alone in this regard. France provides for the appointment of several tiers of creditor representation: a creditor representative, an employee representative, five controllers (who are charged with representing unsecured creditors' interests), as well as a committee of bank creditors and of trade creditors. Each representative holds distinct functions. While the UK statute does not expressly provide for the creation of additional committees, case laws suggests that the practice occurs with some regularity. And the primary insolvency statute for the Russian Federation provides creditors' meetings almost unfettered discretion to create a creditors' committee according to rules established at the meeting; further research should determine whether, in practice, creditors'meetings in the Russian Federation use the discretion the statute grants to it by creating additional committees or by adding members to an existing committee if necessary for more complete representation of creditors interests in a case. Because this UNCITRAL recommendation is permissive, however, suggesting only that the appointment of additional committees or representatives is consistent with modern insolvency practice, deviation from the recommendation is not especially meaningful.

Similarly, the Guide provides that an insolvency law should specify whether creditors' claims must be admitted before they are eligible for appointment to a creditors' committee or similar representative entity.[166] Some laws do not seem to require the process for administrative consideration of claims to be completed before membership in creditors' committees is decided upon because they require appointment of the committee early in a proceeding, out of sync with the procedural requirements associated with claims recognition. Other statutes seem to place some sort of limit on creditor participation in creditors' committees because they limit attendance to creditors' meetings to those who first have "lodged" their claim (Singapore) or hold debts that are "declared" "according to the law" (China) or similar statements (Russian Federation). Both rules satisfy the UNCITRAL recommendation, however, which requires only that the law should specify what the requirement is.

Expenses are another area on which countries diverge, and perhaps more significantly. Because the Legislative Guide recommends only that insolvency laws should specify how the costs of a committee will be paid,[167] however, our finding that some countries (like the US, UK and Germany) reimburse committee members' expenses and that others expressly do not (like France) does not identify a deviation from the recommendation, which requires only specificity in a statutory rule. Others' silence on the topic (such as Singapore) arguably fails to satisfy the requirement that the rule on expenses be specified, although the failure to grant reimbursement generally implies that no right of reimbursement exists. The issue of expenses arises a second time within the Legislative Guide when UNCITRAL recommends both that an insolvency law should permit a creditors' committee to seek the assistance of its own set of professionals (lawyers, accountants or the like) and that the law should specify how such professionals' fees would be paid.[168] Here we find significant deviation between country practice and UNCITRAL's recommendation: Only the US expressly permits committees to hire professionals and specifies how such costs are to be paid (out of estate funds); while South Korea permits a court to require a debtor to bear the expenses necessary the activities of a creditors' council,

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[166] Ibid. at Rec. 130.

[167] Ibid.

[168] Ibid. at Rec. 134.

further research is required to elucidate whether this empowers a Korean court to permit a council to hire counsel at the estate's expense.

Finally, we found the greatest divergence in the list of powers granted to creditors' committees, which varied substantially from country to country. Several countries' insolvency laws describe the responsibility of creditors' committees as involving the supervision of the insolvency representative. China's new insolvency statute, for example, clearly identifies the creditors' committee as supervising the insolvency administrator and his handling of the debtor's property. The insolvency laws of the Russian Federation similarly grant the creditors' meeting a virtual blank check in its ability to define the powers of a creditors' committee. Others describe the powers of a creditors' committee more narrowly. UK law, for example, describes creditors' committees as assisting the administrator in the discharge of its functions (rather than the committee as supervising the administrator).[169]

Another area on which countries differ regarding creditor committee responsibility is the extent to which committees are involved in negotiating a plan of reorganization. UNCITRAL's Legislative Guide suggests that committees might appropriately participate in the development of a plan of reorganization[170] and yet none of the countries we examined provided explicitly for committee participation in plan negotiation or plan development. All countries provide that the insolvency representative (or debtor in possession, if there is one) should propose a plan of reorganization. Some (like France, China and Singapore) leave creditors' committees out of the process altogether, providing instead that the drafter of the plan should bring it to a vote at a creditors' meeting or similar groupings of creditors. The Russian insolvency statute takes this approach as well, although it also empowers the creditors' meeting to seek the assistance of the creditors' committee on this and other issues. Others (such as South Korea) specify that their creditors' committee (which they refer to as a creditors' council) should mediate the interests of the creditors (both generally and in the plan preparation process) and should present its opinion on the plan to the court; German insolvency law similarly requires the administrator (or debtor-in-possession, if there is one) to cooperate with the creditors' committee in the preparation of a plan of reorganization and the committee to "take a position" on any plan proposes by the administrator (or debtor-in-possession). The US, UK and France reach the same result as the countries who direct creditors' committees to comment on plan contents, but only in practice. Although nothing in their insolvency statutes require plan proponents to consult creditors' committee regarding the substance of a plan of reorganization before submitting it to a vote of the general body of creditors, nonetheless administrators (or debtors-in-possession, if they exist) nearly invariably seek the opinion of the creditors' committee on the terms of a plan. Indeed, creditors' committees more than opine on the terms of a plan; often, they openly negotiate with plan proponents as to the plan contents necessary for creditors' committee approval, but not because the statutory regime requires the insolvency representative or debtor-in-possession to engage in this practice. Negotiations involve creditors' committees because, as a practical matter, creditors' votes on the plan and cooperation in plan implementation may be difficult to coordinate in any other way.

In addition, we notice that few countries empower creditors' committees with investigatory powers as does the US in its bankruptcy code. UNCITRAL's Legislative Guide

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[169] Case law suggests that some committees may exercise broader practical authority than the statute suggests since they are empower to set the administrator's fee in many cases.

[170] Legislative Guide at Rec. 133(b).

does not recommend that creditors' committees or other creditors' representatives possess powers of investigation, and we find this absence somewhat odd, although not because our comparative research indicates that creditors' committees regularly investigate debtor's financial affairs. Few countries explicitly grant committees the power to investigate their debtors, although nearly all empower creditors' committees to require an insolvency representative to appear before it and provide both access to documents and records and answer to questions. Implicitly, then, it is the job of the insolvency representative to investigate the debtor's affairs; where a debtor remains in possession, such as under the South Korean insolvency law, another entity (called an examiner) may be appointed to investigate the debtor. We do not question the wisdom of any country practice in this regard. We make a more limited point to note the global consensus regarding the placement of investigatory authority outside the scope of a creditors' committee only as a possible explanation for many countries' failure to comply with UNCITRAL's recommendation that an insolvency law should permit a committee to employ professionals. If a committee is not empowered to investigate the debtor, then the appointment of forensic accountants may be unnecessary; if a committee is not empowered to investigate the debtor or to sue on behalf o the estate, then the appointment of committee counsel may be viewed as unnecessary.

Finally, we note that few countries differentiate committees' powers based upon whether the committee is acting in the context of a liquidation or a reorganization proceeding. For example, the US narrows substantially the powers of a creditors' committee appointed in the context of a chapter 7 liquidation case as compared to the powers of a committee appointed in a chapter 11 reorganization proceeding. Similarly, Singapore does not provide for a creditors' committee in winding-up proceedings, although it does provide for the appointment of a committee of inspection. On this topic, UNCITRAL's Legislative Guide says only that the insolvency law should specify whether creditors' committees or other forms of creditor representation are required in all forms of insolvency proceedings.[171] This sort of differentiation seems important given that there may be less need for measures to ensure the representation of the interests of unsecured creditors in a liquidation case.

V.

Representation of the interests of unsecured creditors may be critical to the success of an effort to reorganize a debtor in an insolvency proceeding. Often, unsecured creditors constitute the real parties in interest in a reorganization proceeding; still, collective action problems, transaction size and financial costs may impede individual creditors from becoming involved. Creditors' committees and other sorts of representatives can help ameliorate these problems. Although there exists no universal agreement on the details of the insolvency law provisions needed to create a working creditors' committee, there is agreement on the need for a committee of unsecured creditors or other method for the representation of creditors' interests and on the broad contours of the format of these representative bodies. It remains to be seen whether convergence on the topic of creditors' committees will lead to convergent practices in reorganization proceedings and practices.

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[171] Ibid. at Rec. 129.