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Between Efficiency and Sovereignty: Transnational Actors, the European Union, and the Regulation of Bankruptcy[1]

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The regulation of regional markets has traditionally challenged the sovereignty of the member states. The increasing presence of transnational actors has intensified this challenge. Those actors can benefit from single regulatory regimes that streamline their operations and activities. No country, however, is inclined to renounce its domestic approach. Can the tension between efficiency and sovereignty be resolved? The recent adoption of a transnational bankruptcy regulation in the European Union (EU) offers instructive insights. The intense struggle lasted from 1960 to 2000. The solution involves a clever compromise: elevating from the national to the regional level the law of the member state most implicated by a given bankruptcy. The approach merits careful consideration, for it departs both from parallel efforts at bankruptcy regulation by the United Nations, NAFTA, and the Scandinavian countries, and from the EU's own efforts in areas other than bankruptcy. Avoiding harmonization improves member states' acceptance, while reliance on established national regimes guarantees oversight over much of the bankruptcy process. The absence of a fixed legislative framework, however, limits the number of issue areas that this type of approach can effectively target.
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Introduction

The regulation of regional markets has traditionally challenged the sovereignty of nation states. The strongest examples come from the European Union (EU), where qualified majority voting, an entrepreneurial Commission, an activist European Court of Justice, and bureaucratic mechanisms have deprived the member states of their historical control over the production and direction of law (Ross, 1995; Pierson, 1996; Jabko, 1999; Alter, 2001; Pollack, 2003). Other noteworthy examples come from the North American Free Trade Agreement (NAFTA), South America's Mercosur, and other regions. There, too, observers have noted a weakening of control on the part of some states,

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despite the primarily intergovernmental nature of those projects (MacDonald, 1998; Walker, 2001; Kaltenthaler and Mora, 2002; Waren, 2002).

The increasing number of transnational actors — an inevitable outcome of closer integration (Murray and Trudeau, 2004, 17) — is bound to pose fresh challenges to the member states. The International Labor Organization's World Commission on the Social Dimension of Globalization estimates the presence of 65,000 transnational firms in the world (Rondinelli 2002, 393; Murray and Trudeau 2004, 15). As Figure 1 shows, the number of those companies has risen sharply in the last few decades.

At times, transnational actors are regulated by traditional regional law: law that, though not explicitly aimed at transnational actors, contains principles of relevance to all actors (whether national or transnational) in a given set of states. In many other cases, however, transnational actors remain subject to multiple jurisdictions. Such a situation is problematic, for compliance with numerous and often very different national regimes is quite costly. The promulgation of regional principles directly targeted at transnational actors can thus provide much needed relief. It can streamline internal processes, strategies, communication, research and development efforts,

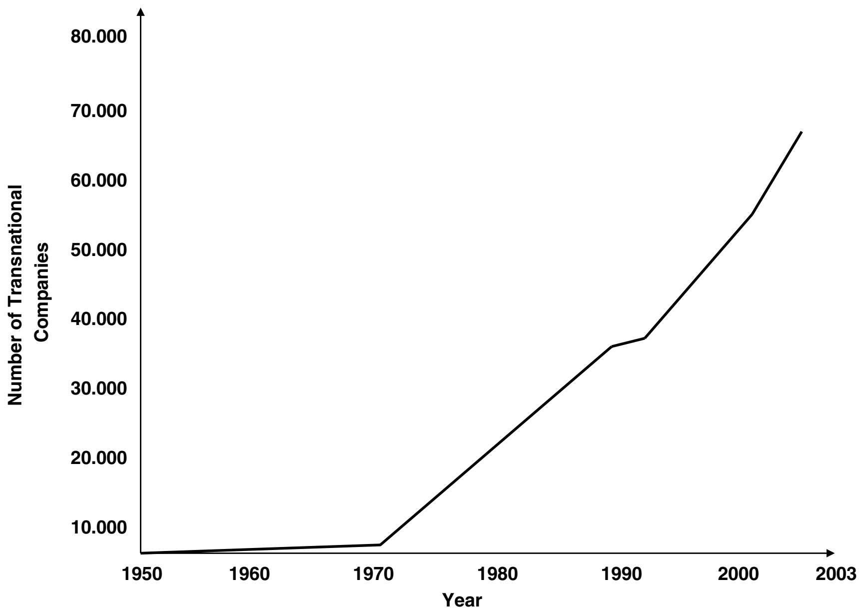

Figure 1 The growth of transnational companies.

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human resource management, and much more, yielding considerable financial benefits (Barnabé, 2003).[2]

If beneficial for organizations, however, regulatory regimes for transnational actors often impose on the member states challenging departures from existing legal practices. Those member states have obviously hesitated to engage in regional lawmaking on the particular subject matter at hand. They are now asked to treat certain actors — those that are transnational — differently from purely national actors. The member states are therefore likely to counter initiatives for regional law in two distinct ways. First, each member state will strive to shape the content of regional law to its liking.[3] Second, in the likely event that it fails to assert its will, each member state will seek to retain control over the portion of the transnational actors that happens to be in its territory. Organizational efficiency and national sovereignty thus meet head to head (Hedley, 1999). Can the tension be resolved?

The recent adoption by the EU of a regulation on transnational bankruptcies represents one of the first attempts at regulating transnational actors. Outside of the EU, there are very few bodies capable of articulating laws for transnational companies, and their efforts have in any case been quite limited. The Organization for Economic and Cooperative Development produced in 1976 the Guidelines for Multinational Enterprises; these guidelines, however, were made voluntary. The United Nations (UN), in turn, worked on a Code of Conduct on Transnational Corporations, but the initiative was abandoned in 1992 for lack of consensus (Hedley, 1999, 221).

Inside the EU, company law in general is fairly limited, with the most important initiatives focused in selected areas of corporate governance, workers' participation, shareholder rights, and accounting (Cernat, 2004; McLauchlin, 2004). Within that body of law, very few pieces of legislation target transnational actors explicitly — with, as we shall see later in this article, the most noteworthy cases being related to workers' rights, taxation, and the setting up of European companies.

The EU regulation is thus an important milestone and, as such, offers instructive insights into the difficulties and possible solutions related to the challenges of regulating transnational actors. EU officials began pushing for harmonization starting in 1960, eventually producing 20 years later the 1980 Bankruptcy Convention. Unyielding member states defeated that measure. A second initiative — much more in favor of national sovereignty — was crafted a few years later but failed as well: the member states found the 1989 Insolvency Convention too impractical to be effective. The answer came in 2000, with the Insolvency Regulation (EC/1346/2000). The regulation is a moderately revised version of a 1995 Insolvency Convention that had fallen victim to an unexpected British veto. Made possible by the 1997 Amsterdam Treaty's requirement that qualified majority voting, rather than unanimity, be

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used for policymaking in transnational jurisdiction matters, the regulation features much compromising between efficiency and sovereignty.

The regulation does not offer elements of a regional bankruptcy process. Instead, it states that the regulatory regime of the member state where the company has its main center of interest *will function as regional law*. This elevation of national law is meant to ensure efficiency while, at the same time, safeguarding the integrity of the country most implicated by the company's failure. The regulation challenges directly, as a result, all other member states. To compensate for this, the regulation specifies that creditors in any given member state have the right to initiate *local proceedings* against assets of the company found in that member state. The result is a delicate balancing between efficiency (a single regulatory framework handling each case) and sovereignty (the single regulatory framework is that of a member state, plus secondary proceedings in other member states are allowed).

The EU could have, in principle at least, taken a different approach. In the specific area of bankruptcy, the Nordic Convention of Scandinavian countries, the agreement reached by private actors from the three NAFTA countries, and the UN all show that some form of transnational principles can be devised, albeit with consequences for national sovereignty — though only the Scandinavian agreement constitutes mandatory law. The EU itself, in other initiatives explicitly targeting transnational actors such as the Works Council and Posted Workers directives, has also shown a tendency towards harmonization. The EU bankruptcy regulation is therefore quite novel in its approach. As such, it prompts us to wonder about its advantages and limitations and whether it can, in fact, serve as a model for the regulation of transnational actors more generally.

The first section of this article analyzes the early efforts on the part of EU officials to tackle transnational bankruptcies: their attempt to promote efficiency via harmonization with the 1980 Bankruptcy Convention and their shift towards the preservation of sovereignty with the 1989 Insolvency Convention. The second section examines the adoption and novel nature of the 2000 Insolvency Regulation. The third situates the regulation in comparative context by examining the harmonizing initiatives from NAFTA, the Nordic countries, and the UN, as well as EU's initiatives in areas other than bankruptcy. The last section reflects on the merits and limits of the Insolvency Regulation. It concludes that officials will need a variety of tools for the regulation of transnational actors, of which the rotating elevation of national law will be one.

From Efficiency to Sovereignty: The 1980 and 1989 Failed Conventions

Officials from the European Commission recognized early on that an EU-level bankruptcy regime for regional companies was needed. The six founding

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members of the EU — France, West Germany, Italy, and the Benelux countries — had rather diverse national approaches to bankruptcy, a situation that would only worsen when the United Kingdom (UK), Ireland, and Denmark joined in 1973, and later as more and more countries were accepted into the EU (Lechner, 2002). In 1960 the Commission hence set out to devise a regional regulation by giving that mandate to a drafting committee led by two prominent French judges.

At the start, committee officials contemplated the possibility of *fully harmonizing* the laws of the member states by crafting a single regulatory framework that would guide the bankruptcy of transnational companies in Europe. Yet, they desisted quickly. Differences in national approaches were simply too significant to overcome fully:

> Even in the original Community of Six, there were fundamental differences in legal culture and in the basics of insolvency law and adjacent branches, especially the areas of real estate law, the law of secured credit, labor law, and tax law … obviously, harmonization of bankruptcy and all the branches that intertwine with bankruptcy appeared impossible for quite some time if, indeed, it would ever be possible. (Balz, 1996, 491)

Differences in bankruptcy law alone were plenty. In France, for instance, existing approaches valued the preservation of jobs, even to the detriment of creditors and their rights. This position was almost opposite that of Germany, which favored the recovery of creditors over the failing company. Definitions of key terms — such as 'bankrupt',[4] 'estate property', and 'validity of security interests' — also differed (Burton, 1998, 207–209).

Having abandoned the idea of full harmonization, the committee members began working on a bankruptcy convention that promoted *partial harmonization* (Omar, 2003, 2004). The EU would impose a number of common definitions for basic legal terms related to bankruptcy and some procedural concepts. Besides that, the EU would ask that member states recognize the bankruptcy laws of the member state where the company held its center of operations as the laws that would drive the bankruptcy process for that company throughout all the member states. To that end, the EU would ask that no additional proceedings be opened in the other member states and that, instead, judges and administrators in those member states work to fulfill the mandate of the law of the driving member state. This second feature of the convention — the use of one country's laws to handle the entire bankruptcy of a transnational company — was described as 'radical' by some observers and critics (Burton, 1998, 211), since it required local courts and regulators to forego their domestic practices and to function as extensions of another jurisdiction.

The efforts of the committee were articulated with the publication of the 1970 Preliminary Draft Bankruptcy Convention. The convention offered a

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harmonizing model law of six articles, a set of harmonizing protocols, and 82 articles affirming the supremacy of the legislative system of the most implicated member state over the other member states (Omar, 2004). Upon release, the draft became the 'subject of exhaustive analysis by the national governments of many member states' (Omar, 2003, 152). Those governments had 'adverse comments' regarding the harmonizing dimensions of the framework (Burton, 1998, 211), arguing that the convention was too invasive in principle and too impractical in real life. When the UK, Ireland, and Denmark joined the EU, the complaints multiplied. The UK, for instance, produced the Cork Report, a document of '180 pages that meticulously analyzed the impact of the convention on domestic law' (Omar, 2003, 152). Of special concern to the British was the use of definitions of key terms that the convention asked the member states to adopt. With a tradition of common law, the British naturally hesitated to commit themselves *a priori* to legal definitions and concepts — a practice quite common among the founding countries with their civil law traditions.

These severe criticisms sent the committee back to the drawing board for another 10 years. The committee came back with the 1980 EEC Draft Bankruptcy Convention. That draft did away with most, though not all, of the harmonizing concepts of the 1970 version (Omar, 2003, 153). Still, in the name of efficiency, no member state other than the main member state could open its own proceeding, though activities in the various member states would have to take into consideration local customs and frameworks. Local creditors would also have priority over local assets.

Despite these modifications, the efforts of the committee ultimately failed. The changes were simply not enough to convince the skeptical member states. As one observer noted:

> The 1980 EEC Draft Bankruptcy Convention remained unpopular. Although it was revised again in 1982, and again in 1984, the Convention never gained enough support to be opened for signature. Criticism revolved largely around concerns that it would be unworkable for one forum to administer one centralized insolvency estate, given the enormous range of differences in countries' insolvency laws. Some called the Convention an 'overambitious model', requiring an 'overly rigid centralization … unacceptable for most' European countries. (Burton, 1998, 212)

Joining government officials in their concerns about renouncing legislative (as well as administrative and judicial) control were legal practitioners, who emphasized the impractical nature of the regulation (Balz, 1996, 492). The convention was finally abandoned in 1985.

As the convention was sliding towards failure, the member states of the EU began searching for a solution to transnational bankruptcy in a different forum. Various reforms to domestic bankruptcy laws had increased, rather

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than decreased, differences among national regimes. In 1989, officials convened in Strasbourg as members of the Council of Europe, an intergovernmental organization independent of the EU comprising all of the EU member states and Norway, Switzerland, Turkey, and other non-EU nations. There they produced a multilateral treaty known as the European Convention on Certain International Aspects of Bankruptcy, or, for the purpose of this article, the 1989 Insolvency Convention.[5] This seemed like a promising departure from the failed EU efforts: the initiative came from the member states themselves, rather than the supranational European Commission.

If the EU efforts from the 1970s and early 1980s aimed for too much harmonization and centralization, the 1989 Insolvency Convention pushed for too much recognition of sovereignty. The latter still recognized that a centralized administrative forum should be established where the organization in question had its center of operations. Yet, a number of key provisions constrained the liquidator (Burton, 1998, 213–215). First, the liquidator had to ask for permission prior to taking any action in any member state (other than the primary one), advertise his/her appointment, and then wait for 2 months (Article 4). Then, secondary and independent proceedings could be opened in any of the member states (other than the primary one) and be executed under local law. Local creditors involved in those proceedings were given priority over creditors from the central proceeding. Most importantly, the 1989 Insolvency Convention granted an 'opt-out' to countries regarding certain key provisions. The most significant opt-out concerned the right not to recognize the liquidator's cross-border powers. A second allowed member states to open competing 'primary' proceedings on their territory, despite the presence of an existing primary proceeding.

The weakness of the 1989 Insolvency Convention was ultimately its failure. If the EU 1980 Convention was 'too strong, the [1989] Convention was too weak' (Burton, 1998, 216). A number of member states found it excessively concerned with sovereignty at the cost of a minimum level of efficiency. As a result of the opt-outs, some called it a 'convention a la carte', a faint effort that would have little practical impact (Burton, 1998, 216). The convention was nonetheless opened for signature in Istanbul in June 1990. However, as many feared, only six nations signed it, and 'none [of the EU member states] went so far as to ratify or otherwise adopt it' (Burton, 1998, 216). Transnational bankruptcies in the EU remained subject to an uncoordinated and chaotic legislative environment.

Mad Cows, Institutions, and a Novel Compromise: The 2000 Insolvency Regulation

In May of 1989, after an informal meeting of Law and Order Ministers, fresh energy was found for a new convention. Leading the effort were the French:

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> Over recent months, the French Presidency has worked hard to achieve some common ground, and is to present a draft to the Council in the hope of crowning its period in office by securing a political agreement. The essence of the conflict that has made agreement so elusive for so long is that some Member States have insisted on maintaining a territorial approach to limit bankruptcy actions to national borders, and others, with what is technically termed a 'universalist' approach, have wanted bankruptcy actions to have international effect. (European Report, 1995a)

The French addressed the historical tension between territory and universality — or, in the language of this article, sovereignty and efficiency — by devising a compromise. Their effort materialized in 1995 with a proposal that at once advanced efficiency while it preserved, to some extent, the integrity of the member states.

The proposal had a crucial feature. Unlike the approach of the 1980 Convention, there would be no attempt at harmonizing any aspect of national legal systems. Instead, like the 1980 Convention, the proposal asked that the law of the member state where the company in question had its center of operations *become — without any 'opt outs' as found in the 1989 Convention — the law guiding the bankruptcy process in the region*. This approach would advance efficiency while safeguarding the integrity of the member state most implicated by the bankruptcy. In an original effort to further protect sovereignty, the convention also specified that 'secondary proceedings' could be opened in all other member states: these could be carried out by creditors based in a second country interested in redeeming their credit only from assets found in that country. The regulation demanded that judges and all other actors involved in the primary and secondary proceedings cooperate and coordinate their efforts to the greatest extent possible.

Observers praised the 1995 formulation. A prominent bankruptcy law expert noted:

> It is both *pragmatic* — in that it recognizes the limits beyond which sovereign states are unlikely to go at the present stage of European integration, even for the sake of procuring a more structured approach to handling cross-border insolvencies in an EU context — and *practical* — in that it offers solutions that are likely to prove workable and defensible when applied to real-life cases … the resulting mix of principles may draw the ire of purists … [yet] the Convention represents the 'art of the possible' in the delicate field of international treaty negotiation. (Fletcher, 1999a, 124, italics added)

Others wrote that the approach managed 'to reconcile' two very different schools of thought by emphasizing some degree of 'hierarchy' while seeking to respect national sovereignty (World Accounting Report, 1995).

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Not all participants, of course, were pleased. Belgium for instance, wishing for a more uniform EU law approach, resisted (European Report, 1995a, b), agreeing to the proposal 'only in extremi' after enormous pressure from the other member states (European Report, 1996). Denmark, in turn, feared that it would almost always be subject to other member states' legislation and seldom find itself in a position to project its own laws abroad. Most of the member states were, however, prepared to accept the compromise. By the end of February 1996 — with a May 23 deadline fast approaching — the UK, Ireland, and the Netherlands had yet to sign the convention (Business Law Europe, 1996). As the weeks passed, it became increasingly clear that the UK would not sign (Helm, 1996). Why were the British stalling?

In the spring of 1996, the EU reacted to the spread of mad cow disease in the UK by banning all beef exports from that country. Ignoring pleas from the French government, the UK government decided to retaliate by blocking the Insolvency Convention, despite the lack of any connection between the two issues. Observers noted:

> The first casualty of the UK-EU stand-off over mad cow disease was — improbably — one of the most arcane and complex pieces of EU work of the last thirty years: the Insolvency Convention. By sheer chance, the deadline for signature of this instrument fell on May 23 … as part of the campaign to pressurise the EU into relaxing the total beef export ban imposed by the European Commission on March 27, the UK government decided not to sign it … the decision was purely political, a spokesman for the UK Department of Trade and Industry confirmed … this was an act of deliberate obstruction. (European Report, 1996).

A number of member states voiced their strong disappointments in the UK and their determination not to change their stance on the ban, thus ensuring the death of the convention. 'Helmut Kohl, the German Chancellor,' wrote one observer, 'has refused to make any concessions on easing the ban so far. Austria has followed the German lead, as did Belgium and Luxembourg … Spain, which also opposed the easing, along with the Netherlands, looks unlikely to change its mind.' The French, in turn, denounced Britain's 'violent political reaction' as unhelpful and counterproductive (Helm, 1996). None of these efforts was sufficient to salvage the convention. The European single market would continue to operate without a framework for handling transnational business failures.[6]

Institutional changes allowed for a fourth, and this time successful, effort. The 1997 Treaty of Amsterdam (Title IV, Article 61, 65, and 67) transferred questions of judicial cooperation from the third to the first pillar, thus ensuring that a number of policy matters would fall within the competency of the Union. This meant that qualified majority voting would be used to adopt laws

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pertaining to judicial cooperation (Lueke, 2001, 371). EU regulators made use of the new situation to propose three regulations that had previously been deadlocked as conventions. Emerging ‘phoenix-like from the ashes,’ one of those regulations would be a slightly revised version of the 1989 Insolvency Convention: the 2000 Insolvency Regulation (Burbidge, 2002, 591).[7] Once proposed, the regulation met little resistance. As per the Treaty of Amsterdam, three countries — the UK, Ireland, and Denmark — could have opted out of any legislation that would have traditionally been subject to unanimity. Ultimately, only Denmark chose to do so. The regulation was adopted in May of 2000 and entered into force in 2002.

The regulation builds directly from the 1995 Insolvency Convention: all of its key components come from that convention. ‘Not designed to create a uniform set of substantive bankruptcy laws among the Member States,’ the regulation elevated the law of the member states most implicated by the bankruptcy to regional level while allowing for secondary proceedings (Lechner, 2002, 1016). Table 1 reproduces the critical articles.

The regulation proposed a clever compromise that protects the integrity of national law while advancing the cause of efficiency. With its adoption, the EU’s efforts to find a solution to the management of transnational business failures finally came to fruition, though of course its effectiveness in practice still remains to be seen.[8]

As the next section shows, however, EU officials ultimately followed one of several paths to the regulation of failing transnational companies. These alternative paths merit attention: they offer competing frameworks for the regulation of the continuously growing number of transnational companies and highlight the particular nature of the Insolvency Regulation.

The Insolvency Regulation in Comparative Perspective

As the tortuous history of the 2002 EU Insolvency Regulation itself shows, there exist several potential approaches to the regulation of transnational bankruptcy and, indeed, transnational actors in any given issue area. One option consists of relying solely on each member state’s legislative regime. A second consists of elevating to the regional level the law of the member state most implicated by the bankruptcy (or the issue at hand) while allowing for some local regulation in the other member states. A third option still relies on the elevation of one member state’s law but does not allow for any local regulation. A fourth and final option entails the harmonization of different national regimes. As we move from the first to the fourth, sovereignty is further eroded while organizations benefit from an increasingly coherent approach. Figure 2 identifies those approaches.

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Table 1 Major principles of the 2000 EU Insolvency Regulation

Principles	*Relevant passages*
Elevation of national law to regional law	This Regulation enables the main insolvency proceedings to be opened in the Member State where the debtor has the centre of his main interests. These proceedings have universal scope and aim at encompassing all the debtor's assets (Preamble 12) The courts of the Member State within the territory of which the centre of the debtor's main interests is situated shall have jurisdiction to open insolvency proceedings (Article 3) The law applicable to insolvency proceedings and their effects shall be that of the Member State within the territory of which such proceedings are opened (Article 4)
Supremacy of regional law over national law	The liquidator appointed by a court [in the key Member State] may exercise all the powers conferred to him by the law of the State of the opening of proceedings in another Member State (Article 18) Any judgment opening insolvency proceedings handed down by a court of a Member States which has jurisdiction pursuant to Article 3 shall be recognized in all other Member States (Article 16)
Protection of all member states	Secondary insolvency proceedings [may be opened in] another Member State … their effects shall be restricted to the assets of the debtor situated within the territory of that other Member State (Article 27) The law applicable to secondary proceedings shall be that of the Member States within the territory of which the secondary proceedings are opened (Article 28)

The EU Insolvency Regulation conforms squarely with the mixed spirit of approach #2. EU officials pursued approaches # 3 and 4 with the failed 1980 Convention and moved towards approach #1 with the failed 1989 Convention. The EU ultimately settled for a rather interesting compromise. Matters could have gone differently. Efforts from NAFTA, the Nordic countries, and the UN in the area of transnational bankruptcy all show elements of harmonization. The same applies to the few EU efforts targeting transnational actors in areas other than bankruptcy. We consider each of these efforts in turn.

NAFTA, the Nordic Convention, and the UN

With increasing economic integration in the NAFTA space, business actors, lawyers, and politicians in North America began contemplating a regional-level

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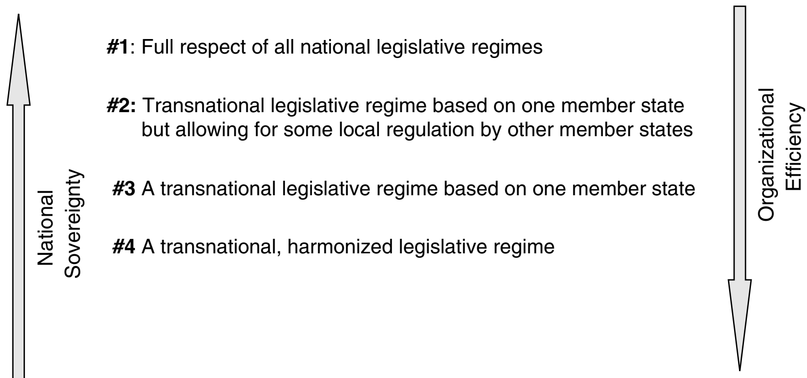

Figure 2 Approaches to the regulation of transnational actors.

approach to managing insolvency cases. Realizing that a public-sector initiative was unlikely for years to come, a group convened under the auspices of the venerable American Law Institute (ALI) to work on a Transnational Insolvency Project. The initiative was in keeping with North American tradition of private parties coming to agreements that guide, in practical terms, national and transnational commercial affairs.

The initiative produced the Principles of Cooperation of May 2000. Voluntary rather than mandatory, these principles contain elements of approaches #2 and #4. In line with #2, they elevate the legislative regime of one member to regional level while recognizing the possibility of secondary proceedings (Westbrook, 2002, 33). Yet, they also specify certain parameters and guidelines that such a regime should follow: in doing so, they assume a transnational quality that departs from any given member state.[9]

Consider, for instance, Principle V, on how assets should be distributed across the three member states. The principle asks the courts of the member state where the main proceeding is taking place to prioritize the recovery of the company in question. With the speedy rescue of the organization in mind, the ALI Principles also state that a claim awarded in any given member state must be recognized (and cannot be renegotiated) in the other two member states. Again with the recovery of the company in mind, the ALI Principles make an approved rescue plan binding on all creditors throughout NAFTA (those creditors cannot open suits inconsistent with the plan).

In the case of liquidation, too, the ALI Principles set out important priorities and processes for cross-border sales. They suggest that any part of the company (such as a manufacturing division in Canada, for instance)

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'should be sold to realize the greatest value for all creditors,' even if this means that creditors from a particular country (Canada, in our example) receive less (Westbrook, 2002, 37). In another example of transnational activism, the ALI Principles set out communications guidelines for the entire NAFTA area, so as to ensure that lawyers, judges, and other professionals are kept abreast of developments.

If the NAFTA approach contains elements of harmonization, the Nordic approach amounts to a universal model based formally on the elevation of one member state's law (without the possibility of secondary proceedings) and *de facto* harmonization — a combination of approaches #3 and #4. As such, the Nordic Convention clearly takes on a more aggressive approach than the EU. Signed in Copenhagen in 1933 by Denmark, Finland, Iceland, Norway, and Sweden, the convention is mandatory, has only 17 articles, and is written in very direct language.

The uncompromising universality principle is spelled out with clarity at the opening of the convention. Article 1 states that 'the law of the country in which the bankruptcy takes place shall determine the effects of such bankruptcy' with regard to the management of property, the definition of assets, the bankrupt's rights and obligations, the rights of creditors, the allocation of assets, and various settlement techniques. Later requirements concern advertising and communication and court responsibilities. None of the 17 articles contains any provision to protect the legislative integrity of the non-driving countries.[10]

The Nordic Convention has, at the same time, a *de facto* harmonizing character: because the legislative regimes of the participating countries are so similar to each other, the member states find themselves using the same set of bankruptcy principles over and over again. Legal experts thus write about a 'close alignment of philosophy and approach' in law in general across the signatory countries and 'towards insolvency law and practice in particular' (Fletcher, 1999b, 237). They describe an 'exceptional regional homogeneity within these five Nordic countries' (Fletcher, 1999b, 245). They then point to the absence of any disputes among the participants as evidence of how similar their respective legal systems are (Fletcher, 1999b, 44).

The UN Commission on International Trade law (UNICTRAL)[11] began pondering the creation of a model law (i.e., a law that is available, but not mandatory, for adoption) on transnational bankruptcies in 1992. Between 1992 and 1994, UNICTRAL and the International Association of Restructuring, Insolvency & Bankruptcy Professionals conducted studies, research, and meetings to explore the matter in great detail. An intergovernmental Working Group was created to negotiate a Model Law between 1995 and 1997. The group consisted of the 36 member states of the Commission, representatives of interested non-member states, and international organizations (both governmental and non-governmental) — including the European Insolvency

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Practitioners Associations (Clift, 2004). The group crafted its Model Law in 1997 as a law which, when widely adopted, would regulate a large number of transnational bankruptcy cases in a uniform manner.

The UN Model Law does not elevate any given member state's legislative regime to the regional level (Fletcher, 1999b, 333). Instead, recognizing that different countries will have different regimes (and in this sense conforming to approach #1), the law seeks to harmonize those regimes to the maximum extent given practical considerations and questions of sovereignty. Thus, the law conforms above all with approach #4: it spells out a number of principles that transcend any given national legislative regime.[12]

Among the most important principles of the Model Law are those found in the articles of Chapter II related to access, on the part of foreign actors, to a country. Articles 9–12 grant 'foreign representatives' (persons or bodies authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs) the right to appear in local courts — a right that is otherwise denied or subject to elaborate diplomatic requirements in many states (Westbrook, 2002, 13). Articles 15–17 make that recognition simple, fast, and inexpensive.

The law also has important stipulations regarding the treatment of foreign creditors. Article 13 directly states that 'foreign creditors have the same rights regarding the commencement of, and participation in, a proceeding under [a given state's law] as creditors in this State.' In case of liquidation and distribution of assets, Article 13 makes clear that no differentiation shall be made between local and foreign creditors. This is a powerful and important principle.

The Model Law specifies important principles in a third area: cooperation and communication. Article 25 requires local courts to cooperate and engage in direct communication with foreign courts and representatives 'to the maximum extent possible.' To enable this communication, and 'realizing that this notion is in many countries a new and somewhat strange idea for courts and court-appointed officials', Article 27 authorizes explicitly certain types of exchanges (Westbrook, 2002, 16).[13]

The UN approach is thus similar to the NAFTA and Nordic approaches in its tendency to erode national sovereignty. When taken together, the three approaches highlight the original nature of the EU approach to the regulation of transnational bankruptcies.

The EU efforts

The Insolvency Regulation is one of a handful of EU initiatives explicitly targeted at transnational actors. Most of the activity began in the 1990s and concerned workers' rights (Directive 94/45/EEC on works councils and

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Directive 96/71/EEC on posted workers), taxation (Directive 90/435/EEC), the organization of a European company (Regulation 2157/2001 and Directive 2001/86), and the establishment of European cooperative societies (Regulation 1435/2003 and Directive 2003/72). For the most part, these initiatives conform to approach #4 of Figure 2: they articulate a set of regional-level principles. However, they are *very limited* in what exactly they subject to regulation, mostly due to member states' resistance. The two directives on workers' rights — which are like the Insolvency Regulation in their efforts to deal with the market and its shortcomings — are in this sense typical.

The Works Council Directive was originally envisioned as a measure that would grant workers of transnational companies strong representation with management. The making of the directive took long and was difficult, with management and the British government seeking, from the 1970s on, to limit its provisions (Hogler, 1996). Indeed, the Preamble of the directive acknowledges past failures. Desire for broad-reaching harmonization eventually gave way to the recognition that agreement could only be reached over a few key principles.

Article 2 states the major requirement. It asserts that workers have rights to information and consultation on matters related to the financial health of the enterprise, future developments, and the structure of the organization: 'a European Works Council or a procedure for informing and consulting employees shall be established in every Community-scale undertaking and every Community-scale group of undertakings.' While workers are given the right to such councils, however, the composition, operating procedures, frequency of meetings, and financial matters of the councils are left unspecified. Article 6 simply asks that the interested parties come to an agreement over those matters though, importantly, if they cannot do so after a period of three years the directive sets out a series of operating principles that must then be followed (Article 7). The directive was accordingly described as providing only a 'minimum of participation rights to workforces,' and as being highly respectful of 'national and cultural differences' among the member states (Streeck, 1997, 651, 1998, 445).[14]

The Posted Workers Directive also aspires for some harmonization but leaves much outside of its scope. Member states must ensure that posted workers (foreigners working in the country as part of a multinational corporation headquartered in another member state) enjoy working conditions (minimum pay, hygiene, vacation periods, etc.) identical to those enjoyed by domestic workers (Article 3). Member states are also prohibited from imposing minimum wage requirements on foreign firms when domestic ones are exempted from those requirements. These are important steps that provide workers with some degree of protection and ensure some basis for fair competition in a given country.

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At the same time, the directive leaves much unspecified. First, 'how a binding minimum wage is set and enforced … is for countries themselves to decide, and so is the level of that wage' (Streeck 1998, 450). Second, the directive does not state whether a country should have a minimum wage in the first place. If they do not, wage differentials can certainly exist between domestic and foreign firms. Similar observations apply to the other topics covered by the directive, such as vacation periods, hygiene, and so on, though here other EU legislation provides some guidance.

The approach of the Insolvency Regulation departs, then, from initiatives within and outside the EU aimed at regulating transnational actors in the area of bankruptcy and beyond. We are bound to wonder about its merits and limitations, and the conditions under which its principles might be used for the regulation of those actors in areas beyond bankruptcy. The next section considers these questions.

Reflecting on the EU Insolvency Regulation

The 2000 Insolvency Regulation represents an important achievement. Legal scholars described its adoption as the 'dawn of a new era' (Burbidge, 2002, 589). Journalists wrote that the regulation would fill 'a black hole … bringing greater order and certainty to bankruptcy' and would thus 'boost legal security for business' with 'assets in several EU countries' (The Economist Intelligence Unit, 2002, 6). After 40 years of efforts, the euphoria is certainly understandable, especially for those concerned with managing bankruptcies. At the same time, however, we must wonder whether the regulation, with its novel approach, can serve as a model for other initiatives related to transnational actors. As it turns out, the regulation has both serious advantages and limitations. Officials in the EU and elsewhere will ultimately need a variety of approaches — including that of the regulation — to regulate the increasing number of transnational actors in the world.

The most obvious advantage of the regulation's approach is the lack of harmonizing principles. Such absence decreases the chances of opposition by the member states and thus avoids protracted and unfruitful bargaining that can last decades. EU officials needed 40 years to overcome such resistance; the Works Council and Posted Workers directives, as well as several other EU measures targeting transnational companies, experienced similar delays (Hogler, 1996; Streeck 1997, 651, 1998; Cernat, 2004, 139). Avoiding harmonization may be especially advantageous in the case of laws that target transnational actors: as noted earlier, the need for such laws in a given issue area generally arises when there is no EU-level legislation on that topic more generally — when, in other words, EU officials have often already encountered resistance.

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The second advantage concerns the reach and comprehensiveness of the approach. Initiatives that rely on harmonization are typically very limited in scope: disagreement among the member states limits what can be subject to regional regulation. The UN and NAFTA's bankruptcy frameworks are for this reason voluntary; for the same reason, EU laws in areas other than bankruptcy articulate very few principles. As Streeck noted in the case of the Works Council Directive, what made the directive 'possible' was its refrain 'from attempting to 'harmonize' national systems of workplace representation' (1998, 445). Existing national regimes, by contrast, typically target most, if not all, key topics with coherent and time-tested principles. Relying on those regimes will make it possible to subject much more of an issue area to regional regulation, even if the nature of such regulation will vary from case to case. Although certainly not equivalent to having a permanent regional framework, this solution is certainly superior, from the perspective of integration, to having little or nothing regulated regionally. The euphoria about the Insolvency Regulation serves as an illustration.

There are, at the same time, important limitations to the approach. The first concerns the frequency of the event in question. Recall the Insolvency Regulation's main feature: reliance on a rotating set of national laws, and hence a carefully orchestrated balance between organizational efficiency and national sovereignty. Such an approach is a realistic option only when rare events in the life of the transnational entity are the subject of regulation. Other than bankruptcy, these events might include mergers and acquisitions, initial public offerings, and divestments. In these cases, those affected by the event can, with some learning and flexibility, adapt and learn the legislative approach of a given member state: the effort, if occasional, is less costly than embarking on a major process of harmonization.

When we turn to more regular events, such as the hiring of personnel, the marketing of products, international communications, taxation, governance structures, and workers' rights, matters become more complicated. In those situations, transnational companies cannot be asked to rely on an ever changing set of laws to operate. On the contrary, they need a stable and predictable regulatory environment. Indeed, EU officials themselves seem to be aware of the difference between occasional and routine events. We saw earlier in the article how they pursued some degree of harmonization in the area of workers' rights with the Works Council and Posted Workers directives. A good, additional example is Directive 90/435 and its effort to tackle taxation for a parent company and its subsidiaries. The directive, while falling short of providing a single system of taxation, offers a simple formula that eliminates the possibility of excessive taxation arising from having operations in multiple member states. Another example is Regulation 2157/2001 on the governance structures for European companies. Among other

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things, the regulation specifies the composition and duties of management and supervisory organs.

The second limitation concerns the location, within the organization, of the activity or issue to be regulated. In some cases, such as with research and development, these take place in one or a few locations of an organization at any given time. In those cases, relying on the laws of one member state to regulate that activity or issue wherever it may take place in the organization may seem like a reasonable option: adjustments within the organization are likely to be minimal while the member states are spared the costs of trying to devise a single regulatory framework. The vast majority of functions, however, take place throughout the organization and, thus, in many member states: accounting, human resource management, finance, training, and many other activities — including bankruptcy itself. In those cases, only a harmonized set of principles can provide organizations and the member states with a realistic and acceptable regulatory environment. In light of this, it is not surprising that the EU Insolvency Regulation itself has already encountered serious implementation issues in several countries, such as the Netherlands, France, and Germany (Wessels, 2003b, 2004).

The third shortcoming of the EU approach concerns its exclusive interest in transnational organizations that have their center of interest in one of the EU's member states. This focus was, of course, inevitable: no member state or EU official would have agreed to subject itself to the laws of a country outside the EU. The regulation also does not apply to those parts of an EU-based transnational organization that are found in non-EU countries. Thus, the regulation applies only to organizations that have their center of interest in the EU and no operations outside of the EU. This limitation was recognized by the Chairman of the committee that prepared the regulation, Dr Manfred Balz, who openly acknowledged that a great number of transnational companies in the EU could not benefit from the new framework (Wessels, 2003a, 62).

The fourth and final limitation has less to do with the nature of transnational organizations and more with the legislative and administrative differences among existing national regimes. The practical implementation of any regional law — whether addressed to transnational companies or not — depends on the 'fit' between the law and the legislative and administrative regimes of the member states (Duina, 1999; Risse *et al.*, 2001; Börzel and Risse, 2003). When those regimes are fairly similar, the elevation of a member state's law to regional level is at once more likely to be accepted by the other member states and to be practically manageable by those most directly affected by it. Compliance with a foreign legal and administrative approach is relatively low cost and hence practically feasible. Matters become more complicated when the legislative and administrative realities in the member states diverge. Then,

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national officials (legislators, administrators, courts) are likely to resist the intrusion of a foreign jurisdiction and to find it practically difficult to comply with its demands. At the same time, the cost of compliance for transnational actors accustomed to one set of laws and administrative requirements is high. They too will resist foreign law and encounter practical difficulties.

Ironically, when the legislative and administrative regimes of the member states are fairly similar, the need for an explicit regulation of transnational actors is likely to be low: it is precisely in these situations, in fact, that the member states typically find common ground for the regulation of all types of actors in a given sphere of social life (Duina, forthcoming). The need to target transnational actors is instead higher when the national regimes are very disparate and, as a result, the member states have found it difficult to reach consensus over a shared regulatory regime. Reliance on the elevation of national law is then bound to be problematic: the gap between the resulting regional framework and the reality in all the member states (but the one from which the regional law hails) is likely to be significant, and implementation is likely to suffer.

The EU approach to bankruptcy, then, has significant advantages but also suffers from limitations that cannot make it widely applicable to the regulation of transnational companies. This ultimately means that EU officials, along with officials from other regional blocks and other entities, will have to devise multiple tools to meet the growing challenge of regulating transnational actors in a practically reasonable manner (Hedley, 1999). In some cases, the elevation of national law to the regional level will work. In other, likely fewer, cases limited harmonization may work. In yet other cases, deeper harmonization may be required. Importantly, this last option may only be possible with some erosion of national sovereignty in the decision-making structures and processes (e.g., a move from qualified majority voting to simple majority voting) that produce regional law.

Notes

1 I am grateful to Paul J. Omar of the University of Sussex Law School for insights into the nature of the European Union's (EU) early efforts at crafting a bankruptcy regime for transnational actors. Jette Steen Knudsen from the Copenhagen Business School, John K. Glenn from the German Marshall Fund, Jason Buxbaum from Bates College, and three anonymous reviewers for the journal also provided me with useful comments.

2 Of course, a single regulatory regime can also impose more intense oversight onto those organizations and thus limit their freedom. This is a well-documented and researched topic, especially when it comes to business organizations (see, for instance, Rondinelli, 2002).

3 Here, the member states' efforts will be similar to those made with regard to regional lawmaking in general: in a classic struggle to retain control over its legislative future, each member state tries to assert its will at the expense of others.

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4 Throughout this article, the term bankruptcy is used in place of insolvency (but for formal document titles where insolvency appears). The former is commonly used in the United States, the latter in Europe.
5 The convention became known as the Istanbul Convention.
6 The UK's behavior was motivated by a second concern: a bout with Spain and the EU regarding sovereignty over Gibraltar (Wessels, 2003a, 6).
7 The other two were the Regulation on Jurisdiction and Enforcement of Judgments in Matrimonial Matters and in Matters of Parental Responsibility for Joint Children (1347/2000) and the Regulation on Service in the Member States of Judicial and Extrajudicial Documents in Civil and Commercial Matters (1348/2000) (Lueke, 2001, 370).
8 Recent court cases suggest that an especially weak point in the regulation concerns the determination of a company's center of interest. In the wake of dairy giant Parmalat's recent failure, courts in Italy and Ireland have disagreed over where Eurofood, a subsidiary of Parmalat in Ireland, has its center. The matter is before the European Court of Justice. Similar problems have arisen in the handling of Daisytek, an English company, and its subsidiary in France. Unclear language in the regulation is partly to be blamed, as is the readiness of corporations to take advantage of such ambiguity by searching for the most sympathetic jurisdiction. See The Irish Times (2005, 2004) and The Lawyer (2005).
9 Although, by and large, these notions do not depart dramatically from existing legislation in any of three NAFTA countries, but build upon them. As one of the principles' core authors noted, 'a central idea of the Project from the start was to discover principles that could be applied under *existing* law in each NAFTA country. For the most part, this result has been achieved' (Westbrook, 2002, 32). The principles put forth ideas that do depart from existing traditions: these, however, are expressed in the form of Legislative Recommendations that the member states need to formally adopt for them to become applicable.
10 Article 7 provides the one exception, but it concerns a minor matter that is unlikely to apply to most cases (pre-existing preferential claims on property, which shall be governed by the law of the country where the property is located).
11 UNICTRAL is an organ of the UN founded in 1966 whose official mission is 'the promotion of the progressive harmonization and unification of the law of international trade' (as quoted in Fletcher, 1999b, 326).
12 Most are formally presented as procedural rather than substantive, but they are in practice substantive.
13 Yet another important principle of the UN Model Law concerns the order in which payments should be made. Article 32 sates that a creditor that receives a distribution in a foreign bankruptcy case 'must stand aside in a local distribution until creditors of the same class (under local law) have gotten as much from the local proceeding as the first creditor got from the foreign one' (Westbrook, 2002, 18).
14 Interestingly, the directive's reliance on the interested parties reaching their own agreements over the works council effectively ensure that workers and management from the home country are in a position, given their larger numbers, to shape the councils in line with domestic arrangements (Streeck, 1997, 654; 1998, 445). This, however, does not translate into an explicit elevation of national law or regulation to the regional level, as was the case of bankruptcy. It is rather a likely implication of the directive.

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