ADDIS ABABA UNIVERSITY
SCHOOL OF GRADUATE STUDIES
Faculty of Law

CROSS BORDER INSOLVENCY LAW IN ETHIOPIA: THE PRESENT STATUS AND FUTURE PROSPECTS

BY:

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Addis Ababa, Ethiopia

SIGNED APPROVAL SHEET BY THE BOARD OF EXAMINERS

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DECLARATION

I, Alemayehu Tilahun, herby declare that the thesis is my original work and has not been presented for Degree in any university. I also declare that all sources of the materials used for the thesis have been duly acknowledged.

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INTRODUCTION

World trade and international investments have expanded rapidly over the past twenty-five years[1]. The number of insolvencies that cross national borders continues apace as the globalization of the world's economies. Not surprisingly, there has been a corresponding increase in the number of cross-border insolvencies[2] involving multinational enterprises, large and small[3], which has fueled the drive for greater harmonization among the many different national rules governing the treatment of cross-border insolvencies[4].

In the contemporary global economy, in which corporations engage in transnational investments and contracts to an extent that is unprecedented in human history, the way in which those involved in insolvency conduct their affairs is of critical economic significance. The task of all of us, whether lawyers, judges, administrators, accountants or other independent professionals, is to ensure the orderly, efficient and cost effective reorganization or winding-up of a corporation, in a manner which reverses improper disposition of assets or preferences and avoids wasteful litigation, unnecessary expense and excessive delay.

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[1] See Carl A. Nelson, Let Business Reduce World Poverty, SAN DIEGO UNION-TRIB., Feb. 1, 2002 (stating that since 1963, there has been a seventeen-fold rise in world trade); see also Jeff Donn, America Responds: Border Control, Attacks Bring Tightened Security at Checkpoint, HOUSTON CHRON., Sept. 24, 2001 ("The cross-border business between the United States and its largest trading partner, Canada, has expanded to $1.4 billion a day."); Ross P. Buckley, Globalization Good? Bad? Both, CHINA DAILY, Aug. 31, 2001 ("The cross-border flow of capital into the largest economies increased 60 times between 1970 and 2000"); Vernon Ellis, Can Global Business Be a Force for Good?, NEW STATESMAN, July 16, 2001 ("Since 1950, world trade has increased fourteen fold . . . . more and more productive assets are acquired across borders, with global foreign direct investment flows of $1.1 [trillion] in 2000.").

[2] Cross-border insolvency is a term used to describe circumstances in which an insolvent debtor has assets and/or creditors in more than one country.

[3] See E. Bruce Leonard, The International Year in Review, 2001 AM. BANKR. INST. J. 34 ("[This past year, 2001] has seen a number of major developments in cross-border insolvency cases and in the development of international and domestic cooperation in cross-border insolvency cases."); see also Jay Lawrence Westbrook, The Transnational Insolvency Project of the American Law Institute, 17 CONN. J. INT'L L. 99, 99 (2001) ("Global enterprises operating in global markets must inevitably produce global bankruptcies. Their number and importance rose in the last decade, despite the general prosperity, and is likely to grow even greater during the downturn that is now underway.").

[4] Peter Schlosser, Recent Developments in Transit-border Insolvency, Roma 1999, Available at www. Worldcat.org/oclc/45478537

If a debtor becomes incapable to pay his debts as they become due, most legal systems provide a legal mechanism to handle the arising interests in the assets. This mechanism must strike a balance between the different interests of the stakeholders and the relevant social, political and other policy considerations that has impact upon the economic and legal goals of insolvency. A domestic insolvency proceeding needs to be dealt with efficiently and effectively or else the enterprise and its value will rapidly erode. When it comes to cross-border international cases, the problem becomes worldwide and even more important to deal with in an effective way.

In brief, this study has attempted to explore the present Ethiopia's cross border insolvency legal framework and its future prospects. In so doing, the study has aimed to approach the subject in the following sequence. The work has been divided into Three Chapters each of which has its own Sections and Subsections. Chapter One gives a brief explanation of the terms and concepts used in the study. It introduces the issues which arise in cross-border insolvency and examines factors which influence a state's approach to the determination of such issues. Initially, for a broader perspective and desirable knowledge on the subject a background is given. The thesis then carries on with a description of questions and conflicts frequently arising in cross-border insolvency. Final the brief survey of the present status of transnational insolvency law is presented.

Henceforward focus is put on describing Ethiopian cross-border insolvency legal framework and policies. Chapter Two considers current Ethiopian domestic law in the context of cross-border insolvency issues. Then it mulls over factors that favors cross-border insolvency law reform with a view to promote international trade and investment.

The future prospects of Ethiopian cross border insolvency legal framework will be discussed under Chapter Three. Particularly this chapter focuses on UNCITRAL Model Law on Cross border insolvency. The purpose is to get a key for the question: "***Is the UNCITRAL Model Law on cross-border insolvency an answer for Ethiopia?***" This Chapter also answers the important question of how the Model Law would fit into the Ethiopian system. If any, what kind of difficulties might arise? Moreover, it considers the provisions of the Model Law both in the context of legislative and trading environment in

which Ethiopia operates. Finally, the thesis ends with a Conclusion and Recommendation.

CHAPTER ONE

GENERAL OVERVIEW OF CROSS BORDER INSOLVENNCY

The number of insolvencies that cross national borders continues apace as the globalization of the world's economies. The increase in transnational bankruptcies has presented a unique and challenging dilemma, namely, to what extent should foreign bankruptcy proceedings be recognized locally? Unfortunately, this quandary has not been answered by the formation of a body of international bankruptcy law[1]. *"One must wonder why the goals of economic efficiency and creditor protection have not driven more nations to reach a workable bankruptcy treaty or convention"*[2].

Instead, domestic law determines how local courts will administer the claims of local creditors in connection with insolvency proceedings pending in foreign jurisdictions. Only a limited number of countries have a legislative framework for dealing with cross-border insolvency that is well suited to the needs of international trade and investment. Various techniques and notions are employed in the absence of a specific legislative or treaty framework for dealing with crossborder insolvency. These include the following: application of the doctrine of comity[3] by courts in common-law jurisdictions; issuance for equivalent purposes of enabling orders (*exequatur*[4]) in civil-law jurisdictions; enforcement of foreign insolvency orders relying on legislation for enforcement of

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[1] Bankruptcy Beyond Borders: Recognizing Foreign Proceedings in Cross-Border Insolvencies, available at htt:// www. brookla.edu/students/journals/bjil/bjil30ii-greene.pdf

[2] David C. Cook, prospects for north American Agreement; les prospects pour une Convention de la Faillite en Americque due Nord; Los Prospectos para un convenio de Quiebra de Norte America, 2 sw.J.OF.L & TRADE AM. 81, 81 (1995)

[3] A formal communication in writing, sent by a court in which an action is pending to a court or judge of a foreign country, requesting that the testimony of a witness resident within the jurisdiction of the latter court may be there formally taken under its direction and transmitted to the first court for use in the pending action. See Black's Dictionary of Law, Fifth edition, at 815

[4] An "exequatur" is a written official recognition and authorization of consular officer, issued by the government to which he is accredited. In French practice, this term is subscribed by judicial authority upon the transcript of a judgment from a foreign country, or from another part of France, and authorizes the execution of the judgment within the jurisdiction where it is so indorsed. See Ibid, at 513

foreign judgments; and techniques such as letters rogatory[5] for transmitting requests for judicial assistance[6]. This frequently results in inadequate and inharmonious legal approaches, which hamper the rescue of financially troubled businesses, are not conducive to a fair and efficient administration of cross-border insolvencies, impede the protection of the assets of the insolvent debtor against dissipation and hinder maximization of the value of those assets. Moreover, the absence of predictability in the handling of cross-border insolvency cases impedes capital flow and is a disincentive to cross-border investment[7].

1.1 WHAT IS CROSS-BORDER INSOLVENCY LAW

Many businesses have interests stretching beyond their home jurisdictions. Firms are increasingly organizing their activities on a global scale, forming production chains including inputs that cross national boundaries. Cross-border insolvency is a term used to describe circumstances in which an insolvent debtor has assets and/or creditors in more than one country[8]. It arises when an insolvent entity is placed in a form of insolvency administration in one state[9] but has assets or debts in other states[10]. Nevertheless, the administrator of the formal insolvency regime has a duty to realize assets of the insolvent entity for the benefit of all creditors of that entity, subject to any applicable domestic insolvency laws to the contrary.

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[5] In general, principle of "Comity" is that courts of one state or jurisdiction will give effect to laws and judicial decisions of another state or jurisdiction, not as a matter of obligation but out of deference and mutual respect. See Id, at 242

[6] UNCITRAL, Legislative Guide on Insolvency Law, U.N. Sales No. E.05.V.10 (2005) [hereinafter UNCITRAL Legislative Guide], available at www.un.or.at/UNCITRAL/english/ sessions/index.htm or www.un.or.at/UNCITRAL/english/ bibliography/ consolid.htm.

[7] Ibid

[8] Corporate Law Economic Reform Program, Cross-Border Insolvency: Promoting International Cooperation and Coordination, Proposals for Reform: Paper No. 8, Printed by Canprint Communications Pty Ltd, Commonwealth of Australia 2002, available at htt:// www. Treasury.gov.au/documents/448/PDF/CLERP8.pdf ; See also http://www.treasury.gov.au/documents/448/HTML/docshell.asp?URL=4CrossBorder.asp

[9] I utilize the word "state" as it is the terminology used by the UNCITRAL Model Law on Cross-Border Insolvency and because cross-border insolvency issues may arise not only between different countries but also between different states within a federal system.

[10] Law Commission, Cross - Border Insolvency: Should New Zealand adopt the UNCITRAL Model Law on Cross - Border Insolvency?, February 1999, Wellington, New Zealand, Available at law commission website of New Zealand: lawcom.govt.nz

When a cross border insolvency involving Ethiopia, there are two possibilities: First, Ethiopian court may seek assistance from a foreign court for enabling an insolvency administrator in Ethiopia to fulfill duties under Ethiopian law; Second, a foreign court might seek assistance from Ethiopian court for similar purposes. In both situations there are three distinct aspects: First, the procedure by which assistance is sought; Second, the substantive law which will apply in determining whether assistance will be given; and Third, if the court decides to give assistance, the substantive law which will be applied in determining the nature and extent of the assistance.

When Ethiopian business enterprise is put into a formal insolvency regime the administrator of the regime may need assistance from a foreign court to realize assets in the foreign jurisdiction for the benefit of Ethiopian creditors[11]. In doing so, it will be necessary for the insolvency administrator to consider the law of the state from which aid is sought: the substantive insolvency law of that state is likely to affect the extent to which specified creditors are entitled to obtain priority payment out of assets situated in their country.

When the administrator of an insolvent business enterprise situated in another state seeks assistance from Ethiopian court to gain the benefit of assets situated in Ethiopia, similar considerations apply[12]. Such considerations will affect the question of whether, and if so to what extent, assistance should be given by Ethiopian court[13].

1.2 APPROACHES TO CROSS-BORDER INSOLVENCY

It is necessary to consider insolvency law in an international context and to describe the competing theories which have influenced the approach of particular laws enacted in various states to cross-border insolvency issues[14]. Universalism, modified universalism[15], contractualism, territoriality and cooperative territoriality are the prevailing concepts

[11] Although I use the term "business enterprise", corporation is subject to the same considerations; I restrict consideration to trading entities for practical reasons only.
[12] See Corporate Law Economic Reform Program, supra Note 8, to have a clear picture on the risk of cross border insolvency law.
[13] Ibid
[14] Id
[15] Law Commission, Supra Note 10.

within the universal and territorial models. They represent a spectrum of approaches to deal with cross-border insolvency cases. Universalism is at one end of the spectrum and territoriality is at the other. Commentators have had difficulty agreeing on the best approach. The cooperation of domestic courts in insolvency matters is based on these five theoretical principles.[16]

1.2.1 PRINCIPLE OF UNIVERSALITY

> *Universality is based on recognizing the full international effect of local insolvency adjudications and is supported by the principles of the unity of the debto'sr estate, equality among creditors, and the efficiency of the local insolvency proceeding. The concept of universality envisions a single proceeding to administer the assets of the debtor*[17].

In this approach, insolvency proceedings are seen as a unique proceeding reflecting the unity of the estate of the debtor. The proceeding should contain all of the debtor's assets, wherever in the world these assets are located. The whole estate will be administered and reorganized or liquidated based on the law of the country where the debtor has its "centre of main interests" and in which country the proceedings have been opened[18].

There is one primary court, which administers the insolvency case with the assistance of courts in other jurisdictions. The court having jurisdiction in cross border bankruptcy proceedings is the court of the place where the principal business is situate[19]. The insolvency law of that (primary) jurisdiction governs the case whose reach extends to all of the assets of the debtor, wherever located. In its pure form, a universal approach

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[16] See generally L. Unt, International Relations and International Insolvency Cooperation: Liberalism, Institutionalism and Transnational Legal Dialogue, 28 Law and Policy in International Business (1997), at 1037 & 1040; J. Westbrook, Choice of Avoidance Laws in Global Insolvencies, 17 BROOKLYN J. INT'L. L. (1991) at 499, 512-515; R. Gitlin and E. Flaschen, International Void in the Law of Multinational Bankruptcies, 42 The Business Lawyer (1987), at 307 & 310; M. Knecht, The "Drapery of Illusion" of Section 304--What Lurks Beneath: Territoriality in the Judicial Application of Section 304 of the Bankruptcy Code, 13 U. PA. J. INT'L. BUS. L. (1992), at 287; and B. Unger, United States Recognition of Foreign Bankruptcies, 19 INT'L LAW (1985), at 1153.

[17] Corporate Law Economic Reform Program, Supra Note 8.

[18] Knecht, Supra Note 16, at 288-289; Unger, Supra Note 16, at 1154-1155.

[19] Ibid

dictates that other jurisdictions recognize the orders of the court overseeing the main jurisdictional proceedings. This means that each time a jurisdiction embracing universalism is (a) implicated in a case and (b) is not the main jurisdiction, that jurisdiction must recognize the world-wide reach of the proceeding on foot in the main jurisdiction[20]. This extends to orders made and other official acts taken to accomplish, for example, the following: (1) commencing the insolvency proceedings in the main jurisdiction, (2) appointing office-holders (if any), (3) establishing any plan or scheme of arrangement or reorganization, (4) assessing creditor claims, where applicable, (5) selecting local or foreign law to be applied where an issue does not fall under local insolvency law, (6) setting priorities between secured creditors, preferred creditors, ordinary creditors, and subordinated creditors, and (7) dissolving the debtor[21].

Therefore, *universal approach* assumes that one insolvency proceeding will be universally recognized by the jurisdictions in which the entity has assets or carries on business. All creditors seeking to claim in the winding up submit claims to that court or administrator. When assets of the insolvent company are located in foreign countries, the court can request assistance from the courts of those countries[22].

Concerning the advantages of this approach, a commentator in the Harvard Law Review stated the following:

> *It is obvious that, in the present state of commerce and of communication, it would be better in nine cases out of ten that all settlements of insolvent debtors with their creditors should be made in a single place, better for the creditors, who would thus share alike and*

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[20] Fernando Locatelli, International Trade and Insolvency Law: Is the UNCITRAL Model Law on Cross-Border Insolvency an answer for Brazil? (An Economic Analysis Of Its Benefits On International Trade), available at www.lawschool.westlaw.com

[21] Nigel John Howcroft Universal Vs. Territorial Models for Cross-Border Insolvency: The Theory, the Practice, and the Reality that Universalism Prevails, Spring 2008, available at www.lawschool.westlaw.com

[22] Corporate Law Economic Reform Program, Supra Note 8.

better for the debtor because all his creditors would be equally bound by his discharge[23].

1.2.2 PRINCIPLE OF TERRITORIAL SOVEREIGNTY

The U.S National Bankruptcy Review Commission released a report in October 1997 entitled *Bankruptcy: The Next Twenty Years*[24]. The Commission opened its discussion on cross-border insolvency with the following observations:

> *Although there is widespread agreement that the globalization of trade and enterprise requires a coordinated approach to international bankruptcy, the field of bankruptcy law (or, as most of the world calls it, "insolvency law") has remained steadfastly parochial. "Territorialism" or the "grab rule" has prevailed since time immemorial. When a person or a company with international operations falls into serious financial trouble, each country employs its insolvency laws to grab local assets and administer them locally according to the procedures and priorities of that country's laws. Even where no local proceeding is opened, the delay and expense of obtaining local judicial cooperation with a foreign insolvency proceeding encourages debtors to conceal assets in foreign caches and prevents realization of full value for assets that are recovered*[25].

As stated by commission, Territoriality does not recognize the foreign insolvency proceeding and requires administration of the assets in each jurisdiction where the assets are located[26]. It assumes that each country will have exclusive jurisdiction over the insolvency of a particular debtor and that separate proceedings for each country under that country's laws will be undertaken[27]. In other word, separate insolvency proceedings may be undertaken in each jurisdiction where the debtor's assets are located with the cost of such proceedings being borne ultimately by creditors. Hence, the territoriality model

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[23] J. Lowell, Conflict of Laws as Applied to Assignments for Creditors, 1 Harvard Law Rev. 258, 264 (1888).
[24] Generally, see the Report of the National Bankruptcy Review Commission, Bankruptcy: The Next Twenty Years (Washington DC, 1997).
[25] Ibid, at 353
[26] Corporate Law Economic Reform Program, Supra Note 8.
[27] Ibid

takes as a basic idea that the respective insolvency measure only will have legal effects within the jurisdiction of the state within the territory of which a court has opened the insolvency proceedings. The legal effects of these proceedings therefore will abruptly stop at this state's borders. The limitations these proceedings will bring to a debtor's legal authority to administer his assets are not applicable abroad. Assets in other countries will not be affected by these proceedings and the administrator who is appointed will not have any powers abroad.

In territoriality model the cost and time involved in numerous proceedings encourages inefficiencies and duplication. Debtors and creditors can take advantage of time delays and differing laws concerning voidable transactions and preferred creditors to minimize any loss resulting from the debtor's inability to pay all debts. In this approach, no recognition is given to proceedings in course or completed in other jurisdictions[28].

The *territorial approach* has been characterized as the "Grab Rule."[29] Under the territoriality approach, the court will focus almost exclusively on the effect of the foreign laws on the domestic creditor or debtor. The court will refuse to recognize the foreign proceeding to the extent such proceeding prejudices the domestic creditor or debtor[30]. In effect, the local court will grab as much for local creditors as possible.

In general, the major disadvantages of the *territorial approach* to cross-border insolvency are: -

- Reorganisation of an enterprise is difficult or impossible because each uncoordinated local proceeding focuses on maximizing returns for local creditors rather than the total pool of creditors[31].

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[28] Id. See also Article 974 (2) of the Commercial Code of Empire of Ethiopia, Proclamation No. 166 of 1960, Negarit Gazeta, 19th Year No.3, Addis Ababa, 15th May 1960.
[29] Westbrook, Supra Note 16, at 513.
[30] Alastair Smith and André Boraine, Crossing Borders into South African Insolvency Law: From the Roman-Dutch Jurists to the UNCITRAL Model Law, available at www.lawschool.westlaw.com
[31] Xianchu Zhang and Charles D. Booth, Beijing's Initiative on Cross-Border Insolvency: Reflections on a Recent Visit of Hong Kong Professionals to Beijing, available at www.lawschool.westlaw.com

- Even in liquidation, realizations of greater value can be achieved if national borders are ignored. For example, a division of a company may have manufacturing and distribution facilities in several countries with each division being saleable for a higher price as a unit than would be received for each bundle of assets in each state. Nevertheless, existing laws make it very difficult to sell assets in multinational packages[32].
- While virtually all national insolvency laws endorse the principle of equality of distribution to creditors, territorialism produces highly unequal results. Apart from differing priority rules in different countries, distributions depend on assets seizable *in* each state at the time of bankruptcy. Thus, there is an element of luck as to the quantum of dividend that is recovered in any particular jurisdiction. Because a few, very sophisticated, international creditors may collect in several proceedings and do very well, while smaller creditors cannot afford to "play that game", the results are arbitrary and unpredictable. Such unpredictability creates increased transaction costs in international financing[33].
- Shrewd debtors can exploit modern technology to move assets rapidly from one jurisdiction to another and to transfer assets to insiders or preferred creditors in other countries. Because recognition of foreign insolvency proceedings and co-operation with those proceedings is so cumbersome in most countries, it becomes very difficult for administrators or liquidators to pursue and capture the assets for the benefit of all creditors[34].
- Although overt discrimination against foreign creditors is relatively rare, they often receive little or no real notice of insolvency proceedings in another jurisdiction and too often suffer de facto discrimination in those proceedings[35].

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[32] Janis Sarra Oversight and Financing of Cross-Border Business Enterprise Group Insolvency Proceedings, available at www.lawschool.westlaw.com

[33] Evelyn H. Biery, Jason L. Boland and John D. Cornwell, A Look at Transnational Insolvencies and Chapter 15 of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, available at www.lawschool.westlaw.com

[34] Susan Block-Lieb and Terence C. Halliday, Incrementalisms in Global Lawmaking, available at www.lawschool.westlaw.com

[35] Kent Anderson, The Cross-Border Insolvency Paradigm: A Defense of the Modified Universal Approach Considering the Japanese Experience, available at www.lawschool.westlaw.com

Bebchuk and Guzman pointed out in the National Bureau of Economic Research working paper, "An Economic Analysis of Transnational Bankruptcies" that a state could benefit from a territorial approach but the benefits of that approach were limited to domestic creditors:

> *Our results show . . . that a territorialist country can benefit from territorialism if we assume that investment carries with it positive spillovers such as employment, technology, taxes, and so on. The losers – the ones who pay for the benefits gained by the territoralist country and the dead weight loss that is generated – are foreign firms.*
>
> *In light of the above finding, we are able to draw certain conclusions about [this] "political economy" .... Territoralism is inefficient and reduces global welfare .... This highlights the need for a reciprocity requirement or, ideally, international treaties on the subject*[36]*"*

On the other hand, a universalist approach will provide more incentive for foreign firms to invest as investment decisions can be made safely on the assumption that all creditors will be treated equally in insolvency[37]. The territoriality approach ignores the interests of the foreign proceeding. Quite the opposite, universal approach recognizes the principles of international comity.[38]

1.2.3 MODIFIED UNIVERSALITY

Countries have insolvency laws which fall between the two extreme descriptions of "pro-debtor" or "pro-creditor".[39] Any uniform procedural law which deals with cross-border

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[36] Bebchuk and Guzman, An Economic Analysis of Transnational Bankruptcy (National Bureau of Economic Research, Working Paper 6521 Cambridge, 1998), at 4

[37] Ibid, at 18

[38] Ibid

[39] See Wood, Law and Practice of International Finance: Principle of International Insolvency (Sweet and Maxwell, London 1995), pp. 4–7, for an interesting ranking of some specific jurisdictions based on "pro-debtor" or "pro-creditor" approach. Note that Wood's rankings bear no correlation to the nature of the legal system under consideration nor the degree of industrialization of a particular state.

insolvency issues needs to respect these differences while, at the same time, putting in place a process that enables practical problems to be resolved.

The "pragmatic English judiciary" rejected theoretical extremes for international insolvency laws[40]. This meant that neither a strict territorial approach nor an approach based on the universal application of the law was fully accepted as a matter of English law. Indeed, for any insolvency law to function, a healthy mix of principle and pragmatism is required. The degree of pragmatism required to provide solutions to a clash between insolvency laws based on different values is even greater than the degree of pragmatism required to make domestic insolvency law work[41].

The economic benefits of effective and efficient transnational bankruptcy laws are realizable only through a formalized system of mutual administration that is attentive to the distinct interests of the effective administration of foreign-located assets and the maintenance of state sovereignty that compete in cross-border insolvencies[42]. A reconciliation of the competing interests of bankruptcy and sovereignty in unified insolvency proceedings is available in the concept of "modified universality."[43]

A modified form of Universal approach is adopted when there is a primary proceeding in the place of incorporation with secondary or ancillary proceedings occurring in other jurisdictions where assets of the insolvent enterprise are located. The secondary administrator assists the primary administrator collecting assets and, after satisfying preferred creditors and other approved payments, remits the surplus to the primary administrators[44]. A tangible application of the principle of modified universality would

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[40] Smart, Cross-Border Insolvency (Butterworths, 1991), at iv

[41] Ibid

[42] Mikey Pery, Lining-Up at the Border: Renewing the Call for a Canada-U.S. Insolvency Convention in the 21st Century, Duke Journal of Comparative & International Law, at 477

[43] For a well-developed thesis on the competition between universal bankruptcy law and sovereignty, culminating in the concept of modified universality, see Mike Sigal et al., The Law and Practice of International Insolvencies, Including a Draft Cross-Boarder Insolvency Concordat, ANN. SURV. BANKR. L. (1994-95), at 1

[44] Corporate Law Economic Reform Program, Supra note 8. See also UNCITRAL Model Law on Cross-Border insolvency and EU Insolvency regulation, which adopt the principle of Modified universality.

include the establishment of a single and central determinative forum for the administration and adjudication of cross-border insolvency proceedings[45].

The modified universality approach to a harmonized insolvency regime "*represents a realistic solution to the conflict inherent in the principles of universality and territoriality. [The concept]. . .combines both principles, maximizing the advantages and minimizing the disadvantages of both.*"[46] The compromise between universality in bankruptcy law and national sovereignty inherent in the concept of modified universality recently provided the basis for the conclusion of an international bankruptcy concordat.

1.2.4 COOPERATIVE TERRITORIALITY

Cooperative territoriality seeks coordination between proceedings and estates in different jurisdictions on a case-by-case basis and for discrete purposes. Parties accomplish this through negotiations between estate representatives for each jurisdiction and, in effect, between the courts in each jurisdiction[47].

1.2.5 CONTRACTUALISM

This novel approach enables each debtor to select--in advance--which approach to take depending on the circumstances. This theory does not offer an entirely independent conceptual theory, but rather an alternative method of selecting the application of one of the other concepts[48].

1.3 BRIEF SURVEY OF THE PRESENT STATUS OF TRANSNATIONAL INSOLVENCY LAW

A truly international or transnational law of insolvency does not exist. Just as private "international" law, cross border bankruptcy law is national law in its nature. Therefore,

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[45] Mikey Pery, Supra Note 42, at 478
[46] Anne Neilson et al., The Cross Border Insolvency Concordat: Principles to Facilitate the Resolution of International Insolvencies, 7A.M, BANKER. LJ. (1996), at 534.
[47] Nigel John Howcroft, Supra Note 21
[48] Ibid

some divergences among the legal systems also exist in this respect. Nevertheless, a high degree of approximation has already been achieved[49]. The present status of transnational insolvency law may thus be summarized, for the purpose of this study, in five points.

1.3.1 LACK OF SPECIAL PROVISION REGARDING REORGANIZATION

The classical procedure following insolvency was liquidation[50]. The aim of this proceeding is the distribution of the proceeds of the bankrupt's assets to the creditors[51]. The essence of this proceeding was to deprive the bankrupt person or company of the capacity to administer his or its property and to appoint a representative in his or its place. Nowadays, in all countries, legal provisions exist which establish proceedings aimed at the reorganization of insolvent business entities. Very often, under such proceedings, the management remains in office and will only be supervised to some degree by an administrator appointed by the court[52].

1.3.2 THE LACK OF CONVENTION OR TREATIES

There is no international convention on insolvency proceedings and hardly any bilateral treaties[53]. Therefore, it is possible that two or even more legal systems claim jurisdiction for worldwide operating insolvency proceedings. Many legal systems claim jurisdiction if the principal place of business administration is within the territory of that legal system[54]. For others, the place of registration is crucial[55]. Also not infrequently, even the place of operation of a branch or the presence of assets may provide a basis for a claim to

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[49] Peter Schlosser; Recent Developments in Transit-border Insolvency, Roma May 1999, Available at www. Worldcat.org/oclc/45478537

[50] Ibid

[51] Id

[52] Id

[53] Exception: Franco-Belgian Treaty of 8 July 1899 on Jurisdiction and the Validity and Enforcement of Judgments, Arbitration Awards and Authentic Instruments, Art. 8; German-Austrian Treaty of 25 May 1979.

[54] Peter Schlosser, Supra Note 49.

[55] For details, see Jan F. Fletcher, Cross-Boarder Insolvency: The National Reports delivered at the XIII International Congress of Comparative Law, Tübingen 1992.

jurisdiction in insolvency proceedings. With all of these variations, the need for coordination of steps taken or to be taken in various jurisdictions thus becomes evident.

1.3.3 THE ALMOST UNIVERSAL RECOGNITION OF UNIVERSALISM

As we have seen, Territorialism meant (and means to the extent that a legal order still adheres to this doctrine) that the effect of insolvency is restricted to the political territory to which the insolvency court belongs, the debtor remaining vested in all his assets abroad. This principle is nowadays widely replaced by the principle of universalism, which means that the placement of the debtor under collective proceedings is recognized worldwide, though it is only a modified principle of universalism[56]. This recognition may be automatic[57] or subject to a formal order of recognition ("exequatur") [58].

1.3.4 SHORTCOMINGS IN ACCESS TO INFORMATION SITUATE ABROAD

The obtaining of information on the creditors and on the amounts owed to them must be distinguished from the obtaining of evidence on the assets of the insolvent person or company. At least in theory no discrimination of foreign creditors[59] is allowed anywhere. Foreign creditors are permitted to participate and prove their claims just as domestic creditors.

Under a strict territoriality doctrine, the debtor's assets abroad would be of no concern for the insolvent person's or company's representative. Hence, he would not be permitted

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[56] Peter Schlosser; Supra Note 49.

[57] Automatic recognition means that the foreign insolvency decree has all the effects, in the state of recognition, it has under the law in which it was issued.

[58] Recognition subject to a formal court order may mean either that subsequent to such an order, the foreign insolvency decree would be then assimilated to a domestic bankruptcy decree, or that ancillary insolvency proceedings have to be commenced in the state of recognition.

[59] See Ian F. Fletcher, Cross Border Cooperation in case of International Insolvency: Some Recent Trends Compared, 6-7 TUL CIV. L.F. 272 (1991-1992).

to make investigations in this respect, including questioning the debtor on the whereabouts of his assets abroad. Few legal systems ever went so far. In modern times virtually all bankruptcy laws in the world purport reaching assets abroad, subject only to obtaining recognition and/or assistance available in the respective foreign country. Consequently the debtor, including the management of the company to be wound up or administrated, must disclose the existence and the whereabouts of his assets abroad[60].

Under the universality doctrine, one could expect that a foreign representative would equally be entitled to obtain the necessary information from the debtor who may have become a resident of another State, or the former management of the insolvent company who may have become a resident of another State. Against an unwilling person, such an obtaining of evidence can only be achieved by means of coercion. Domestic law in civil law countries is also, in this respect, ready to have done enough by simply "recognizing" the foreign insolvency decree[61]. After recognition, the foreign court order and judgment will be considered as the order and judgment of the recognizing court. Therefore, the latter court can use all available legal means to enforce it decision.

1.3.5 THE LIMITED POWERS OF THE ADMINISTRATOR TO COLLECT ASSETS LOCATED ABROAD

The powers of the representative (trustee, administrator) to collect assets located abroad are very easily described when the foreign legal system adheres to the principle of automatic recognition. In this case, the foreign decree is assimilated to a domestic decree. Further judicial cooperation is normally not needed[62].

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[60] Ibid

[61] Peter Schlosser; Supra Note 49.

[62] Ibid. By showing the decree to a bank, the foreign representative can dispose of the debtor's bank accounts. By showing the decree to the land registry office, he can obtain an entry into the land register, even if the legal order of the bankruptcy does not have anything comparable to the domestic land register and, hence, does not provide for the representative's authority to make an application to that end. The representative would be personally entitled to travel to the foreign country and take over movables (for example a car left on a parking lot) and inspect or order work to be done to immovable's as long as no physical power is needed.

In countries such as France[63], for example, and Italy up to 1995[64] the foreign decree alone does not automatically deploy any effects. It must previously be declared enforceable by local court. Once this is done, it has all of the effects as in its country of origin. Therefore, in this group of countries, cooperation is in reality underdeveloped, though in theory the utmost of cooperation has been achieved. What more can one do other than treating the foreign representative as if he were a domestic one!

1.4 DEVELOPMENT OF CROSS-BORDER INSOLVENCY LAW AT GLOBAL LEVEL

The increased rate of economic integration throughout the world has raised the question of how to find a proper approach to cooperation in cross-border insolvency. The growth of the international economy raises the problem of the diversity in the insolvency laws of different states[65]. The improvements in the international economy are likely to have an important impact on this debate as changing international relations result in more problems and complexity between countries, such as, for example, in cross-border insolvency instances. Moreover, the situation of the potential application of the laws of more than one jurisdiction also results in a variety of difficulties in the international insolvency field[66].

Therefore, there have been attempts to resolve the problems in cross-border insolvency in different ways, such as through projects and treaties related to jurisdiction over debtors and access for foreign interest[67]. There have been formal bankruptcy treaties and attempts dating back almost one hundred years.[68] International endeavors at bankruptcy treaty

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[63] See Michel Moreau in Jan F. Fletcher (editor) cited above at 59, pp. 100, indicating however important exceptions.
[64] Alberto Jorio in Fletcher (editor) cited above at 59, PP. 173.
[65] Bugem Galip; A Proper Approach to Cooperation in Cross-border Insolvency, available at www.chasecambria.com/site/journal/article.php?id:226
[66] Peter Schlosser, Supra Note 49.
[67] Prof. Heinz Vallender, Judicial Cooperation within the EC Insolvency Regulation, Cologne (Germany), available at www.justiz.nrw.de/webportal/projects/ieei/documents/puplic-papers/judicial-cooperation pdf
[68] See David C. Cook, Supra Note, 2.

making over the past few decades, however, offer the most valuable lessons and bear the most significant consequences for the evolution of standardized insolvency relations[69].

Starting as early as the end of the 19th century, some Latin American countries entered into treaties dealing with cross border issues. The first was the Montevideo Treaty, which was developed further some decades later by the second Montevideo Treaty. In between these dates, a number of other Latin American and Caribbean countries developed still another treaty, commonly known as the Bustamante Code[70].

Other regions followed, admittedly, a considerable time later. Thus, the member states of the European Union developed the European Insolvency Regulation in the late nineties[71]. At about the same time, some 16 states in central Africa formed a group of common law jurisdictions called OHADA and, finally, the members of NAFTA developed the ALI project which brings both common law and civil law jurisdictions under one roof[72].

Additionally, a number of practitioner associations have focused on and studied cross-border insolvency, for instance, the American Law Institute ('ALI') and the International Bar Association ('IBA'), and have produced model laws, rules and guidelines for use in

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[69] Mikey Pery, Supra Note 42, at 479

[70] Christoph G. Paulus, Future Developments in Cross-Border Insolvency Law, Meeting held on 27-28 April 2006.

[71] See Treaty Establishing the European Community, Mar. 25, 1957; Muir Hunter, The Draft Bankruptcy Convention of the European Economic Communities, 21 INT'L & COMP. L.Q. (1972), at 682 & 693; J John H. Farrar, The EEC Draft Convention on Bankruptcy and Winding Up, J. BUS. L. (1977), at 320; Chin Kim & Jimmy C. Smith, International Insolvencies: An English-American Comparison with an Analysis of Proposed Solutions, 26 GEO.WASH. J. INT'L L & ECON. (1992), at 1 & 25; Ian F. Fletcher, International Insolvency: A Case Study and Treatment 27 Int'l Law (1993), at 429 & 437; European Convention on Certain International Aspects of Bankruptcy, June 5, 1990 ("Istanbul Convention") reprinted in Ian F. Fletcher, Cross-Border Insolvency: Comparative Dimensions (1990), from 297-308; "Member States Initial Bankruptcy Convention" Reuter's News Reports (1 November 1995); see also B Wessels, Cross Border Insolvency Law in Europe: Present Status and Future Prospects, Volume 1, 2008, available at http://www.bobwessels.nl

[72] Christoph G. Paulus, Supra Note 70.

this area through analyzing the practical problems in this field[73].

[73] See In re Olympia & York Realty Corp., Nos. 92-B-42698, 92-42702 (Bankr. S.D.N.Y. 1992), cited in Anne Neilson, Supra Note 46, at 536-37; Model International Insolvency Cooperation Act, reprinted in John A. Barrett & Timothy E. Powers, Proposal for Consultative Draft of Model International Insolvency Co-operation Act for Adoption by Domestic Legislation With or Without Modification, 17 INT'L BUS. LAW. (1989), at 323; Jay L. Westbrook, Theory and Pragmatism in Global Insolvencies: Choice of Law and Choice of Forum, 65 AM. BANKR. L.J. (1991), at 457 & 485; Elizabeth K. Somers, The Model International Insolvency Cooperation Act: An International Proposal for Domestic Legislation, 6 AM. U.J. INT'L L. & POL'Y (1991), at 677 & 688; Timothy E. Powers, The Model International Insolvency Cooperation Act: A 21st Century Proposal for International Insolvency Cooperation, reprinted in Current Developments in International and Comparative Corporate Insolvency Law 687-700 (Jacob S. Ziegel ed., 1994) ;The Resolution of the Council of the International Bar Association, adopted in the occasion of its meeting in Madrid, June 1, 1996, cited in Neilson et al., Supra Note 46, at 537 & 538; See also John K. Londot, Notes & Comment: Handling Priority Rules Conflicts in International Bankruptcy: Assessing the International Bar Association's Concordat, 13 BANK. DEV. J. (1996), at 163 & 165.

CHAPTER TWO

THE EXISTING CURRENT ETHIOPIAN CROSS BORDER INSOLVENCY LEGAL FRAMEWORK

Under Chapter one of this research paper, we have seen the present status of transnational insolvency law and the issues which arise in cross-border insolvency and examines factors which influence a state's approach to the determination of such issues. In this Chapter, the writer focus is put on describing Ethiopian cross-border insolvency legal framework and policies. The Chapter considers current Ethiopian law in the context of cross-border insolvency issues. Then it mulls over factors that favors cross-border insolvency law reform with a view to promote international trade and investment.

2.1 TRANSNATIONAL BANKRUPTCY LEGAL FRAMEWORK

Book V Title II Chapter One Sub-Article 2 of Article 974 of the Commercial Code of Ethiopia clearly contends with the scheme of cross-border insolvency issues. The whole Article reads as follows:

> Art. 974. - Court Having Jurisdiction
>
> (1) The Ethiopian court having jurisdiction in bankruptcy proceedings shall be the court of the place where the business of the trader who is a person is situate or, where there is more than one business, the place where the principal business is situate
>
> ***(2) Subject to the provision of international conventions, the Ethiopian court shall have jurisdiction notwithstanding that the principal place of business is abroad and a foreign court has exercised bankruptcy jurisdiction***

Is Sub article 2 of Article 974 of the Commercial Code of Ethiopia deals with the concepts of cross-border insolvency law? Why? Or Why not? There is a hot debate among scholars whether this sub article contends with the issue of transnational

bankruptcy law or not. The first group, including Assistant Professor Zecharias Kena[1], said that this sub article entirely deals with the issues of conflict of laws. The second group, including the writer of this study, rejected the first group understanding and arguing that this sub article focuses on the concepts of transnational bankruptcy law[2]. This is because of the following five reasons.

First, this Sub article is found under Chapter One Title II Book V of the Commercial Code which fully contends with an insolvent person. Since Article 974(2) is found under this part of the law, this sub article deals with an insolvent entity which place in a form of insolvency administration in one state but has assets or debtors in other states. Second, the objective of this sub Article. The objective of this sub article is to govern the circumstances in which an insolvent debtor has assets and/or creditors in more than one country. Third, the background document itself. The document says "*One will note that in Article .... 974(2) there is an important provision on international law*" that deals with cross border insolvency matter[3]. Fourth, cross border insolvency law is a special type of conflict of laws. In other words, it is a part and parcel of conflict of law. Mathematically speaking, the former is a proper subset of the latter. The last but not the least reason is conflict of law is a wider concept than cross border insolvency law. Article 974(2) only applies on circumstances in which an insolvent debtor has assets and/or creditors in more than one country. Therefore, this Sub article wholly deals with the idea of cross border insolvency law even if transnational bankruptcy law is a part and parcel of conflict of law.

Notwithstanding the existence of this provision in Commercial Code to tackle cross-border insolvency matters, the concept of transnational bankruptcy is quite skeletal. This provision contains only elements of territorial approach and recognized concurrent insolvency proceedings with no exception. Concurrent bankruptcies occur when the same

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[1] At the time I Presented this Study to the Member of the Board of Examiner, Assistant Professor Zecarias Kena, one of he member of the Board, clearly said that "This Sub Article deals with the concepts of conflict of laws. However, by analogy, we can apply it on cross border insolvency matter"

[2] Addis Ababa chamber of commerce and Sectoral Association, Recommendations and Position Paper on the Business Community on the Revision of the Commercial Code of Ethiopia, July 2008, Unpublished, pp.123

[3] Background Document of the Commercial Code of 1960, Edited and translated by Peter Winiship, 1972, page 108

person is adjudged bankrupt in two or more states and those bankruptcies run concurrently. Difficult issues are involved in determining the extent to which courts in one jurisdiction should yield to the domestic law of another jurisdiction to enable international disputes to be resolved. Three possible ways[4] of dealing with concurrent bankruptcies were considered by the English Court of Appeal in *Artola Hermanos, ex parte Chale* (1890) 24 QBD 640 (CA) 648–649:

- First, each forum could administer assets situated locally on the basis that each forum would allow all creditors to prove wherever they were located. The doctrine of hotchpot[5] would then be applied to produce equality between proofs of local and foreign creditors with the distribution being made under the law of the state of domicile of the debtor.[6]
- Second, each forum could yield to the forum of domicile and act only in aid of and auxiliary to the forum of domicile. As such, the forum of domicile would be the only forum to which persons with claims against the estate may have recourse.
- Third, it was suggested that the forum in which the debtor had assets and in which the debtor was first adjudicated bankrupt was entitled to claim assets in all other countries in which the debtor had assets[7].

To summarize, this article does not deal with cross border insolvency issue in comprehensive manner. Therefore, Ethiopian creditors and Ethiopian insolvency administrators may face considerable difficulties '*because of the inadequacy and lack of clarity*' in the provision.[8]

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[4] None of these approaches has attracted universal approval; See Law Commission, Cross - Border Insolvency: Should New Zealand adopt the UNCITRAL Model Law on Cross - Border Insolvency?, February 1999, Wellington, New Zealand, available at www.Lawcom.govt.nz/upload Files/publications/publication-51-97-R52.pdf

[5] A creditor who not only obtains payment in respect of a debt in a foreign court but also claims in a domestic bankruptcy or liquidation must, in general, bring into the common fund any sum recovered abroad (Smart 1991, 173, quoted in Law Commission, Supra Note 1)

[6] Note that as a matter of Ethiopian domestic law the issue of domicile would be resolved by reference to the Provisions of the Civil Code of Ethiopia. See from Article 183-191 of Civil Code of Empire of Ethiopia, Proclamation No. 165 of 1960, Negarit Gazeta, 19th Year No.2, Addis Ababa, 5th May 1960.

[7] Law Commission, Supra Note 4.

[8] Alemayehu Tilahun, Issues in Cross-Border Insolvency Law in Ethiopia - A discussion paper, Hawassa University, Faculty of Law, June 1998 7, 11.

As to non-statutory mechanisms, such as conventions, Ethiopia is not a party to any conventions along those lines, and is highly unlikely to be in a position to deal with its cross-border insolvency issues in that way since only an international agreements ratified by Ethiopia are an integral part of the law of the land and courts are directed solely by the law[9].

Concerning recognition of foreign insolvency judgment, Book VI Chapter Two of the Civil Procedure Code has a message. Book VI Chapter Two of the Civil Procedure Code, from Article 456-461, applies on all foreign judgment without any discrimination whether the judgment involves cross-border insolvency matters. Therefore, by giving due caution, we can extend the application of these provisions to the execution of foreign Cross-border insolvency judgment.

An insolvency judgment rendered by a foreign court may only be executed after an application to execute such a judgment has been made granted[10]. Once the application is granted, however, the judgment will be executed as though it had been given by an Ethiopian court[11], i.e in accordance with the provisions of the Code governing execution.

The conditions under which a foreign insolvency judgment may be executed are set forth in Art. 458 of the Civil Procedure Code. First, there must be reciprocity in the sense that execution of Ethiopian judgments is permitted in the country in which the judgment sought to be executed was rendered[12]. If the courts of that country refuse to execute Ethiopian judgments, the Ethiopian court must, in return, refuse to execute their judgment. Inasmuch as most countries will execute the judgment of other countries, it should be presumed that any country would execute an Ethiopian judgment unless the contrary is proved[13].

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[9] Ibid. See also Articles 9(4) and 79(3) of The Constitution of the federal Democratic Republic of Ethiopia Proclamation No. 1/199s, Federal Negarit Gazeta of the Federal Democratic Republic of Ethiopia, 1st Year No.1, Addis Ababa, 21st August 1995.

[10] Article 131 of the Civil Procedure Code Decree, Decree No.52 of 1965, Negarit Gazeta, 25th Year No.3, Addis Ababa, 8th October 1965.See also Ibid, Arts. 123-126,127(4)

[11] An excellent discussion with reference to the English rules will be found in D.H.C. Morris, Dicey's Conflict of law (7th ed.,1958), pp.981-1075.

[12] The Civil. Procedure Code Decree, Supra Note 10 Article 458(a)

[13] Robert Allen Sedler, Ethiopian Civil Procedure, 1968, Addis Ababa, Ethiopia, at 394

Secondly, the insolvency judgment must have been rendered by a court duly established and constituted[14]. This means a court as the law defined the term- a tribunal established by law to adjudicate the cases in accordance with the law. It also means that the court must have had judicial jurisdiction over the defendant, that is, its contacts with his person or the transaction were such that it was reasonable for that court to subject him to its processes[15].

Thirdly, the insolvency judgment-debtor must have also been given the opportunity to appear and present his defense[16]. Note that there is no requirement that he actually appeared. So long as he was given reasonable notice[17], and the opportunity to defense, the judgment will be recognized.

Fourthly, the judgment must be final and enforceable[18]. If the judgment is only reflected in a preliminary decree and more remains to be done, it obviously cannot be executed. Finally, the execution of the judgment must not be contrary to public order or morals[19].

Since the entire area of recognition of foreign insolvency judgment and award is a very complex one, a body of law has developed with respect to each of these conditions in many countries. As more foreign insolvency judgment are sought to be executed in Ethiopia, recognition of foreign insolvency judgment and award requires detailed regulations.

2.2 FACTORS FOR REFORM

This part of the paper considers in general terms the nine factors that favour cross border insolvency law reform. The factors are:- (1) fairness and efficiency, (2) international approaches, (3) unstable world economy, (4) countries foreign aid policies, (5) deficit balance of payments, (6) stimulating the economy, (7) foreign trade and investment

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[14] The Civil. Procedure Code Decree, Supra Note 10 Article 458(b)
[15] Judicial for these purposes is not necessarily co-extensive with judicial jurisdiction for internal purposes. The Ethiopian court may recognize a foreign judgment, even though it would have not exercised jurisdiction on those facts, so long as it was not the foreign court to have exercised jurisdiction in the particular case.
[16] The Civil. Procedure Code Decree, Supra Note10, Article 458(c)
[17] Ibid, Art. 456(3)
[18] Id, 458(d)
[19] Id, 458(e)

policy, (8) inadequate legal framework and (9) it is a time for reform. Let us see each of them in detail.

2.2.1 FAIRNESS AND EFFICIENCY

Predictability of outcome on any given factual base is an important policy objective in commercial law. With predictability of outcome there is less need for legal argument and, in that way, the overall costs of litigation are reduced. At present, when cross-border insolvency issues arise, the insolvency administrator's advisors assess both the ease with which an application for assistance may be made and the way in which courts in particular states are likely to respond to requests for aid[20].

Predictability of outcome and consistency of decision-making contribute to the provision of effective and fair procedures for individual litigants. Uniformity of procedure is a solid foundation for fairness of treatment of creditors and debtors alike. Adoption of a law that is likely to result in different states treating like cases alike, notwithstanding the fact that each state may have a different substantive insolvency law, is another indicator of fairness[21].

2.2.2 UNSTABLE WORLD ECONOMY

The world economy is unstable. Since the first "post modern financial crises"[22] in 1994, there have been financial crises throughout the world that affected other economies in various ways. As a result, particularly, many international institutions involved in foreign direct investment became bankrupt[23]. Therefore, it is better to adopt comprehensive cross-national insolvency law in advance for enabling the court to handle the case if a financial crisis occurs in the future.

2.2.3 INTERNATIONAL APPROACHES

The ability to transact business globally and to move large amounts of money from state to state has created an economic borderless world which must, nevertheless, operate

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[20] Law Commission, Supra Note 4.
[21] Ibid
[22] Arner, "Centre point: An Analysis of International Support Packages in the Mexican and Asian Financial Crises" [1998] Jurnal of Business Law 380 (July 1998), at 381
[23] Ibid

within the boundaries of sovereign nations. Many nations, although not yet having adopted the Model Law, have laws relating to cross-border insolvency which allow for recognition of insolvency regimes commenced in other states and for assistance to be given to foreign insolvency administrators[24].

States in regular trade with Ethiopia merchants include Japan, South Africa, the United States, Great Britain, New Zealand, South Korea, and Australia are adopted the Model Law. India[25] has specific legislative provision for the rendering of assistance.

Other major trading partners of Ethiopia, while having statutory provisions enabling a court to render assistance to a foreign insolvency administrator on an application for aid, make the obligation to give aid conditional upon reciprocity. Reciprocity means that the court petitioned for assistance must consider whether the court of the state requesting assistance would, had the positions been reversed, render assistance on the subject matter of the request. Malaysia and Singapore are examples of states with such provision[26].

A further category exists in which either there is no express statutory provision facilitating the giving of assistance to the foreign insolvency administrator; or there is provision for the giving of assistance but the state seeking aid is not a state stipulated in the statute as a state to which aid can be extended. Malaysia and Singapore are examples of states where there is provision for giving assistance but the statutes do not stipulate states to which aid can be extended; both utilize the doctrine of comity to render assistance. France is an example of a state which will render assistance based on *exequatur* (the civil law equivalent of comity).[27]

Finally, some major trading partner of Ethiopia domestic law on cross-border insolvency is based firmly on the principle of territoriality so that foreign courts are unable to gain

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[24] Id

[25] Paul J. Omar, (2000, May). 'International Insolvency Co-Operation: The UNCITRAL Model Law', Malayan Law Journal, retrieved August 16, 2008 from http://www.mlj.com.my/articles/default.htm.

[26] Ibid

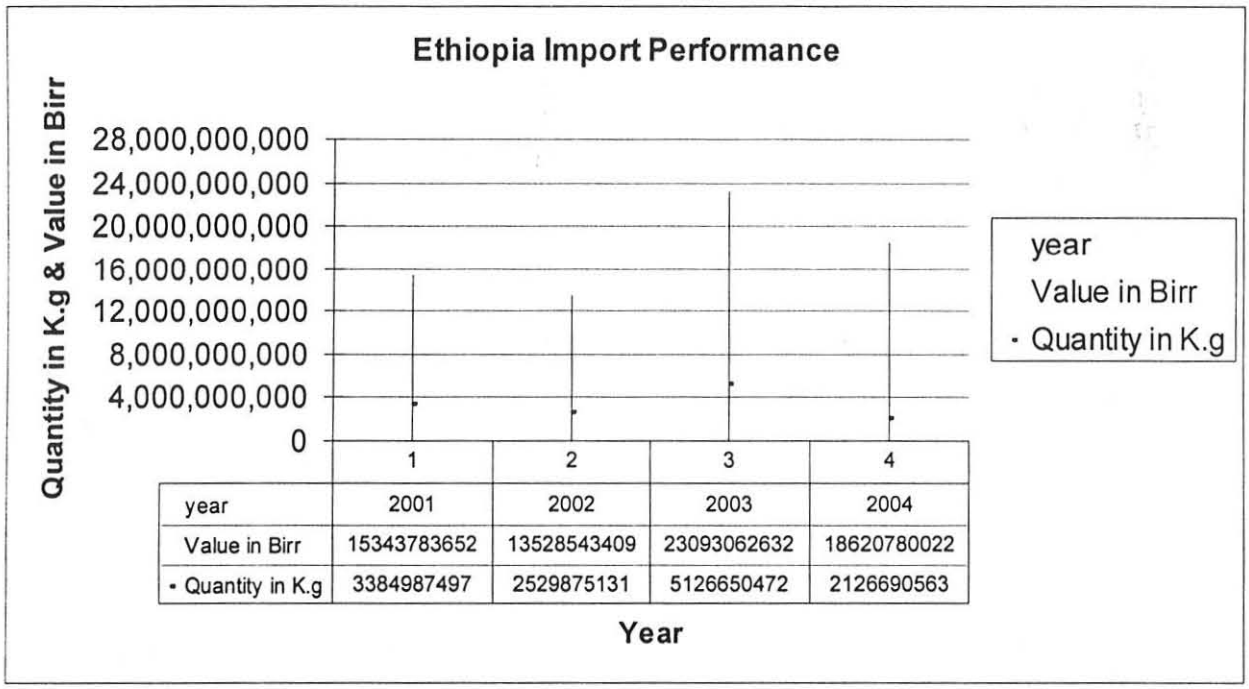
[27] Of course, many states will have specific legislative provision for the rendering of assistance as well as the ability to render assistance based upon the doctrine of comity.

any assistance. Chinese Taipei (Taiwan), Iran, Saudi Arabia, and the People's Republic of China are examples of states which adopt the territorial approach[28].

2.2.4 DEFICIT BALANCE OF PAYMENTS

The level of Ethiopian import performance far outweighs the level of export performance[29]. As a result, deficit in balance of payment occurs each year[30]. One of the objectives of the IMF is to finance a severe balance of payments deficit.[31] One of the criteria for eligibility to receive assistance is the existence of bankruptcy laws that treat foreign creditors fairly. If the domestic law of the state seeking assistance does not treat foreign creditors fairly, the IMF requires, as part of its loan conditions that modern bankruptcy laws remedying the position are on the agenda of proposed reforms[32].

Diagram 1: Ethiopia Import Performance from 2001-2004

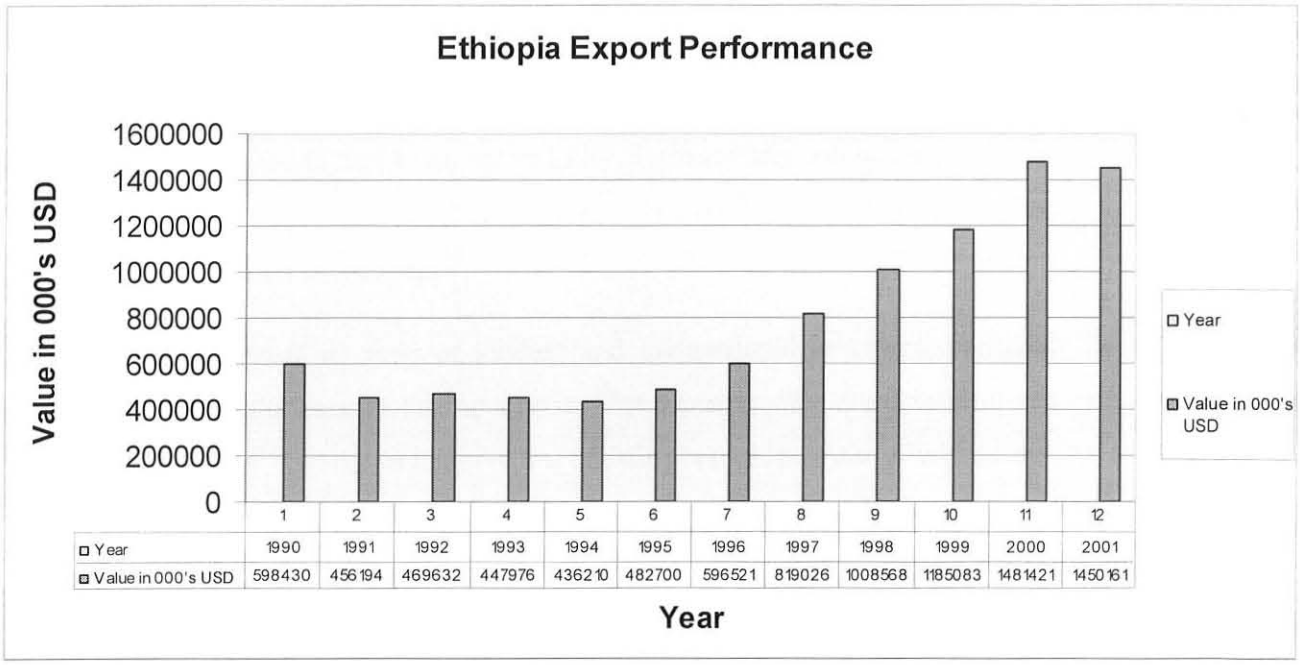


year	2001	2002	2003	2004
Value in Birr	15343783652	13528543409	23093062632	18620780022
Quantity in K.g	3384987497	2529875131	5126650472	2126690563

Source: Ministry of Trade and Industry

[28] Paul J. Omar, (2000, May), Supra Note 25.
[29] See Diagram One and Two
[30] Ibid
[31] At present 82 countries have "voluntarily joined the IMF because they see the advantage of consulting with one another in this forum to maintain a stable system of buying and selling their currencies so that payments in foreign currencies can take place between countries smoothly and without delay". See Camdessus, "Concluding Remarks by Micheal Camdessus, Chairman of the Executive Board and Managing Director of the International Monetary Fund, at the Closing Joint Session of the Annual Meetings, Washington DC, October 8 1998", at 3 (available at www.imf.org)
[32] Armey, "IMF Reforms", 1998, available at http://freedom.house.gov/library/imf/ reforms.asp)

Diagram 2: Ethiopia Export Performance from 1990-2001



Source: Ministry of Trade and Industry

2.2.5 COUNTRIES FOREIGN AID POLICIES

Since the transitional period, Ethiopia has gotten the lion share of foreign aid from United States of America. The United States House of Representatives passed a Bill (HR 3579) entitled "An Act making emergency supplemental appropriations for the fiscal year ending September 30, 1998, and for other purposes" on March 31 1998[33]. Amongst other things, that Act introduced bankruptcy law reform[34]. Therefore, action to adopt, as soon as possible, modern Insolvency laws is part of aid conditions[35].

2.2.6 STIMULATING THE ECONOMY

The global economic system is based on a principal-agent relationship between entrepreneurs[36] (who need investment funds) and investors (who provide the investment funds). Such a correlation produces economic inefficiencies (first, inefficient liquidation

[33] The Act available at http://thomas.loc.gov/
[34] Paul J. Omar, (2000, May)., Supra Note 25.
[35] Ibid
[36] Elazar Berkovitch & Ronen Israel, Optimal Bankruptcy Laws across Different Economic Systems, 12 Rev. Fin. Stud. 347, 348 (1999).