Insolvency Law in the Global South: Lessons for the Global North

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For valuable comments and discussions, I would like to thank Mariana Pargendler, Akshaya Kamalnath, Nydia Remolina, Rebecca Parry and the participants of the Asian Corporate Law Forum held in Bangkok on 24-26 March 2025. For excellent research assistance, I am grateful to Samantha Loh and Xingyu Li.

Abstract

Despite the influence of the Global North in many insolvency laws and practices in the Global South, this article shows that the Global South has innovated in many aspects of insolvency law. In some cases, these innovations consist of solutions that, with certain adjustments, have been imported from the Global North. In others, they are really 'autochthonous innovations' from the Global South. This article identifies both types of innovations, providing examples from jurisdictions such as Brazil, Chile, China, Colombia, Dominican Republic, India, Malaysia, Mexico, Myanmar, Peru, Philippines, Thailand and Uruguay. More importantly, it will be shown how those innovations from the Global South can help mitigate certain problems existing in many insolvency systems in the Global North, such as the excessive power of DIP lenders often observed in the United States, the lengthy and inefficient insolvency proceedings found in many European countries, the unattractive insolvency regime for debtors existing in countries like Australia and New Zealand, and the stigma of insolvency still observed in most jurisdictions around the world, including advanced economies with sophisticated insolvency frameworks such as Singapore. Therefore, whether it is for the much-needed purpose of improving the design of insolvency law in the Global South, or at least for expanding the universe of ideas that can help improve many insolvency systems in the Global North, the Global South – and the Global South beyond India and China – needs to be more actively included in the study of insolvency law. Otherwise, we will be missing the opportunity to learn from many ideas and innovative solutions that can contribute to the improvement and understanding of insolvency systems around the world.

Keywords: insolvency law, global south, global north, insolvency reform, innovation, emerging markets

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Insolvency Law in the Global South: Lessons for the Global North

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Despite the influence of the Global North in many insolvency laws and practices in the Global South, this article shows that the Global South has innovated in many aspects of insolvency law. In some cases, these innovations consist of solutions that, with certain adjustments, have been imported from the Global North. In others, they are really 'autochthonous innovations' from the Global South. This article identifies both types of innovations, providing examples from jurisdictions such as Brazil, Chile, China, Colombia, Dominican Republic, India, Malaysia, Mexico, Myanmar, Peru, Philippines, Thailand and Uruguay. More importantly, it will be shown how those innovations from the Global South can help mitigate certain problems existing in many insolvency systems in the Global North, such as the excessive power of DIP lenders often observed in the United States, the lengthy and inefficient insolvency proceedings found in many European countries, the unattractive insolvency regime for debtors existing in countries like Australia and New Zealand, and the stigma of insolvency still observed in most jurisdictions around the world, including advanced economies with sophisticated insolvency frameworks such as Singapore. Therefore, whether it is for the much-needed purpose of improving the design of insolvency law in the Global South, or at least for expanding the universe of ideas that can help improve many insolvency systems in the Global North, the Global South – and the Global South beyond India and China – needs to be more actively included in the study of insolvency law. Otherwise, we will be missing the opportunity to learn from many ideas and innovative solutions that can contribute to the improvement and understanding of insolvency systems around the world.

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1. Introduction

The academic and policy debate in insolvency has been heavily influenced by the Global North.[1] Such influence can be observed in many aspects that range from the theories influencing the academic thinking in insolvency,[2] to the jurisdictions typically covered in the literature on corporate insolvency law.[3] More importantly, it can be observed in the design of insolvency law in many jurisdictions in the Global South. For instance, the insolvency regime existing in the United Kingdom has influenced the design of insolvency law in several jurisdictions in the Global South, particularly in those with common law origins such as Ghana, Kenya and Nigeria.[4] The Brazilian Insolvency Act, especially after the amendments introduced in 2020, includes elements from both

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[1] By Global North, this article refers to the group of countries generally classified as advanced economies. By Global South, this article refers to the group of countries generally classified as emerging markets and developing economies. The terms "bankruptcy law" and "bankruptcy proceedings" (generally used in the United States) and the terms "insolvency law" and "insolvency proceedings" (more commonly used internationally) will be used interchangeably. Moreover, even though the article will mainly refer to insolvency law, it will focus on *corporate* insolvency law. Therefore, unless otherwise is stated, the terms "insolvency" and "bankruptcy" do not refer to the insolvency of individuals.

[2] While a theory, to a certain extent, can be universal, the different arguments to embrace or rebut a theory should be understood in a particular context. Unfortunately, such local adjustments to the primary theories of insolvency law are often missed in the academic debate. For a review of the primary theories of insolvency law, and particularly those distinguishing between "proceduralists" (who view an insolvency proceeding as a mechanism to maximize the returns to creditors by solving a collective action problem) and "traditionalists" (who view an insolvency proceeding as a mechanism to benefit a variety of stakeholders by dealing with a problem that not only concerns debtors and creditors), see Douglas G. Baird*, Bankruptcy's Uncontested Axioms*, 108 YALE LAW JOURNAL 573 (1998). More generally, for an analysis of different theories supporting the view that insolvency law is a mechanism to maximize the returns to creditors and, by doing so, achieving other socially desirable purposes such as the reorganization of viable firms, the liquidation of nonviable firms, the promotion of firms' access to finance, and the efficient reallocation of resources in the economy, see Thomas H. Jackson, *Bankruptcy, non-bankruptcy entitlement, and the creditors' bargain*, 91 YALE LAW JOURNAL 857 (1982); Robert K. Rasmussen, *Debtor's Choice: A Menu Approach to Corporate Reorganization*, 72 TEXAS LAW REVIEW 51 (1992); Alan Schwartz, *A Contract Theory Approach to Business Bankruptcy*, 101 YALE LAW JOURNAL 1807 (1998); Anthony J. Casey, *Chapter 11's Renegotiation Framework and the Purpose of Corporate Bankruptcy*, 120 COLUMBIA LAW REVIEW 1709 (2020). For an analysis of different theories arguing that insolvency law should take into account a variety of stakeholders, see Elizabeth Warren, *Bankruptcy policy*, 54 THE UNIVERSITY OF CHICAGO LAW REVIEW 775 (1987); Donald R. Korobkin, *Contractarianism and the Normative Foundation of Bankruptcy Law*, 71 TEXAS LAW REVIEW 541 (1993); Karen Gross, *Taking Community Interests into Account in Bankruptcy: An Essay*, 72 WASHINGTON UNIVERSITY LAW REVIEW 1031 (1994); Elizabeth Warren and Jay L. Westbrook, *Contracting out of Bankruptcy: An Empirical Intervention*, 118(4) HARVARD LAW REVIEW 1197 (2005). Criticizing the use of foreign theories for the understanding of a local insolvency system, see Christopher Symes, *Theory and Influences found in Australian Insolvency Law*, 45(1) ADELAIDE LAW REVIEW 64 (2024). Emphasizing the importance of theories for the understanding of a country's insolvency system, see Medha Shekar and Anuradha Guru, *Theoretical Framework of Insolvency Law*, in INSOLVENCY AND BANKRUPTCY REGIME IN INDIA: A NARRATIVE (Insolvency and Bankruptcy Board of India 2020) 45. Suggesting that insolvency law should pursue similar goals across jurisdictions (mainly, minimizing the destruction of value experienced by financially distressed debtors and favoring the efficient allocation of the debtor's assets) but the optimal design of insolvency law depends on a variety of country-specific and firm-specific factors, see Aurelio Gurrea-Martínez, REINVENTING INSOLVENCY LAW IN EMERGING ECONOMIES (Cambridge University Press 2024) 3-18.

[3] Most of the academic literature on insolvency law focuses on jurisdictions from the Global North. In fact, even the literature on comparative insolvency law focuses on the Global North and typically on the same jurisdictions from the Global North (usually the United States, the United Kingdom and some European countries that often include Germany and France), unless the author is from another jurisdiction.

[4] All these jurisdictions have a scheme of arrangement and an administration procedure, similarly to what is observed in the United Kingdom. Some of these jurisdictions also have a company voluntary arrangement and wrongful trading provisions, as also happens in the United Kingdom. See Gurrea-Martínez, REINVENTING INSOLVENCY LAW IN EMERGING ECONOMIES (n 2) 69-78, 111-112.

the US Chapter 11 and Europe (particularly France).[5] Thailand and China have adopted reorganization procedures that include various features from the US Chapter 11.[6] Uruguay has an insolvency legislation partially inspired by the Spanish Insolvency Act,[7] and Malaysia has an insolvency regime that, to a significant extent, replicates the insolvency framework existing in Singapore.[8]

In her pioneering and inspiring work on corporate law and governance in the Global South, Professor Mariana Pargendler shows how the Global South has innovated in certain aspects of corporate law – such as the existence of stakeholder-oriented provisions – and how those innovations are motivated by the need to tackle social and institutional problems existing in the Global South.[9] In fact, given that many of those problems, including inequality and insufficient state capacity, are currently being observed in some jurisdictions in the Global North, Professor

[5] See, *e.g.,* Paulo Fernando Campana Filho, *The Legal Framework for Cross-Border Insolvency in Brazil* 32(1) Houston Journal of International Law 97, 114-117 (2010); Daniel Carnio Costa, *The New Theories of Business Judicial Reorganization in the Brazilian System*, 1 INTERNATIONAL JOURNAL OF INSOLVENCY LAW 9 (2017); Joao Guilherme Thiesi da Silva, *Changes and Convergence of Bankruptcy Law: Recent Experience in Brazil,* COLUMBIA LAW SCHOOL LL.M. ESSAYS & THESE (2022) (available at https://scholarship.law.columbia.edu/llm_essays_theses/8/).

[6] In China, those similarities include the adoption of an exclusivity period for the submission of a reorganization plan, the possibility of approving a reorganization plan even if it has been rejected by some classes of creditors, and the possibility of adopting a debtor-in-possession ("DIP") model for the management of the insolvency process. This latter feature – DIP – is also something that is allowed in Thailand. For an overview of the similarities and divergences existing in the design of insolvency law in Asian countries, including China and Thailand, see Gurrea-Martínez, REINVENTING INSOLVENCY LAW IN EMERGING ECONOMIES (n 2) 54-69. Emphasizing the influence of the US Chapter 11 in China, see Simin Gao and Qianyu Wang, *The U.S. Reorganization Regime in the Chinese Mirror: Legal Transplantation and Obstructed Efficiency*, 91(1) AMERICAN BANKRUPTCY LAW JOURNAL 137 (2017); Zhang Zinian, *Resolving Corporate Insolvencies in China: the Gap Between Law and Reality*, 27(2) UNIVERSITY OF MIAMI INTERNATIONAL AND COMPARATIVE LAW REVIEW 370 (2020). For an analysis of the general features of insolvency law in Thailand and how the insolvency regime adopted in Thailand has embraced the DIP model pioneeringly implemented in the United States, see Kanok Jullamon, *Thailand*, in CORPORATE RESTRUCTURING AND INSOLVENCY IN ASIA (Asian Business Law Institute, 2020) 736.

[7] This inspiration can be observed in many aspects of the insolvency proceeding adopted in Uruguay, such as the existence of a single-entry insolvency process that may end up in reorganization or liquidation and a special system for the punishment of debtors and corporate directors that requires an assessment on whether the insolvency process has been guilty or not. Despite the similarities with the Spanish Insolvency Act, the insolvency regime in Uruguay has been more heavily influenced by a pre-legislative bill that was debated in Spain in the 90s. See, *e.g*., Ricardo Olivera García, *Cuatro bases fundamentales de la nueva Ley de Concursos y Reorganización Empresarial*, 29 REVISTA DE LA FACULTAD DE DERECHO URUGUAY 207 (2010).

[8] Prior to the 2024 insolvency reforms observed in Malaysia, these similarities could be found in aspects such as the existence of a judicial management procedure that resembles the procedure existing in Singapore. In 2024, Malaysia adopted a comprehensive insolvency reform that, among other aspects, has led to the adoption of rescue financing provisions, a cross-class cramdown, restrictions on the enforcement of ipso facto clauses and an automatic moratorium in the scheme of arrangement. Therefore, the current insolvency regime existing in Malaysia is very similar to the insolvency and restructuring framework existing in Singapore. One of the primary differences is that, in addition to the scheme of arrangement and judicial management, Malaysia has another restructuring procedure that does not exist in Singapore: a company voluntary arrangement ("CVA"). This procedure has been mainly inspired by the UK CVA. See Gurrea-Martínez, REINVENTING INSOLVENCY LAW IN EMERGING ECONOMIES (n 2) 57-59, 112. For an analysis of the new reforms adopted in Malaysia, see Shih Lee, *Malaysia's Companies Amendment Act 2024 Strengthens Its Restructuring and Corporate Rescue Landscape*, 22(2) INTERNATIONAL CORPORATE RESCUE 41 (2024).

[9] Mariana Pargendler, *Corporate Law in the Global South: Heterodox Stakeholderism*, 47 SEATTLE UNIVERSITY LAW REVIEW 525 (2024); Mariana Pargendler, *The Global South in Comparative Corporate Governance*, EUROPEAN CORPORATE GOVERNANCE INSTITUTE - LAW WORKING PAPER NO. 751/2024 (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4699188).

Pargendler argues that there seems to a surprising form of "reverse convergence" in comparative corporate governance where institutions and policy discussions in the Global North are coming to resemble their counterparts in the Global South.[10] Therefore, she argues that we need to pay greater attention to the Global South in the study of comparative corporate governance.[11] By doing so, Professor Pargendler concludes that, in addition to expanding our "institutional imagination", the study of the Global South can help us enrich our knowledge and understanding of corporate law around the world.[12]

This article shows how Professor Pargendler's thesis also applies in the context of corporate insolvency law.[13] Namely, it will be shown that, despite the influence of the Global North in many insolvency laws and practices in the Global South, several jurisdictions in the Global South have adopted some innovative aspects in their insolvency regime. Interestingly, it will be shown that many of those innovative solutions adopted in the Global South can mitigate certain problems observed in many insolvency systems in the Global North. Therefore, whether it is for the much-needed purpose of improving the design of insolvency law in the Global South, or at least for expanding the universe of ideas that can help improve many insolvency regimes in the Global North, the Global South needs to be more actively included in the study of insolvency law.

[10] *Id.*
[11] *Id.*
[12] *Id*.
[13] In fact, the Global South seems to innovate in many areas of law. See Kavin E. Davis and Mariana Pargendler (eds), LEGAL HETERODOXY IN THE GLOBAL SOUTH (Cambridge University Press, Forthcoming 2025) (presenting case studies of private law and showcasing how countries in the Global South have embraced legal doctrines that diverge from traditional approaches in the Global North). This pioneering work led by Professors Davis and Pargendler includes an article that shows how the Global South has also innovated in the treatment of employees vis-à-vis secured creditors in insolvency proceedings. Whether that innovation should inspire the Global North, however, is a separate discussion. In a study comparing insolvency regimes and lending practices in the United Kingdom, Germany and France, it was shown that, as a response to the unattractive regime for secured creditors existing in France, banks respond by requiring more collateral and by relying on collateral forms that minimize the statutory dilution of their claims in bankruptcy. See Sergei A Davydenko and Julian R Franks, *Do Bankruptcy Codes Matter? A Study of Default in France, Germany and the UK*, 53 THE JOURNAL OF FINANCE 565 (2008). As a result, as the priority of employees over secured creditors may reduce firms' access to finance and ultimately hamper entrepreneurship and the creation of jobs, this article does not include such insolvency innovation among those that should inspire legal reforms in the Global North, analyzed in Section 3. For a detailed analysis of the origins and underlying reasons that may have led to the adoption of the priority of employees over secured creditors in various insolvency systems in the Global South, see Kavin E. Davis, Mariana Pargendler and Maria Eduarda Lessa, *Priority of Workers versus Secured Creditors in Insolvency: A Comparative Analysis of the Global North and South*, in Kavin E. Davis and Mariana Pargendler (eds), LEGAL HETERODOXY IN THE GLOBAL SOUTH (Cambridge University Press, Forthcoming 2025).

2. Global Convergence in Corporate Insolvency Law: The Influence of the Global North

Insolvency law seeks to solve similar economic problems across jurisdictions.[14] Therefore, a minimum level of harmonization in the design of insolvency law is somehow expected.[15] Yet, there are many other similarities probably explained by other factors. One of them is legal origins.[16] For example, many Commonwealth jurisdictions share many similarities, such as the existence of a scheme of arrangement, administration-style proceedings and wrongful trading or insolvent trading provisions.[17] Other common features of insolvency law can be explained by geographical proximity and the exposure to similar economic challenges.[18] For instance, the 1997 Asian Financial Crisis and the effects of the 2008 Global Financial Crisis in Europe led to similar insolvency responses in these regions – namely, the rise of enhanced workouts in Asia and the adoption of various pre-insolvency frameworks in Europe.[19]

In regions with supranational institutions and high levels of economic and political integration, such as the European Union, the greater level of convergence in the design of insolvency law can be more easily observed, especially after the enactment of the European Directive on Preventive Restructuring Frameworks and the Proposed Directive harmonizing certain aspects of insolvency law.[20] In fact, those harmonization efforts are part of a comprehensive strategy to facilitate the capital market union and the competitiveness of the European Union.[21]

International organizations have also played a key role in the greater level of harmonization in insolvency laws.[22] For example, the United Nations Commission on International Trade Law ("UNCITRAL") has heavily influenced the design of insolvency law through the enactment of various instruments such as guides, model laws and legislative recommendations. The clearest

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[14] Gurrea-Martínez, REINVENTING INSOLVENCY LAW IN EMERGING ECONOMIES (n 2) 3-22, 111-112.
[15] *Id.* at 112-114.
[16] *Id.*
[17] *Id*.
[18] *Id*.
[19] *Id*.
[20] *Id.*
[21] Issam Hallak, *Harmonisation of insolvency laws: Economic perspectives*, EUROPEAN PARLIAMENTARY RESEARCH SERVICE (January, 2025) (available at https://www.europarl.europa.eu/RegData/etudes/BRIE/2025/767197/EPRS_BRI(2025)767197_EN.pdf).
[22] Gerard McCormack, *International organisations and the search for global insolvency standards*, in Paul Omar and Jennifer Gant (eds), RESEARCH HANDBOOK ON CORPORATE RESTRUCTURING (Edward Elgar, 2021) 17-39. See also Gurrea-Martínez, REINVENTING INSOLVENCY LAW IN EMERGING ECONOMIES (n 2) 113-114. Explaining how international organizations have also played a key role in promoting legal reforms that have led to a greater level of convergence in the design of corporate law, see Mariana Pargendler, *The Rise of International Corporate Law*, 98 WASHINGTON UNIVERSITY LAW REVIEW 1765 (2021).

example is the Model Law on Cross-Border Insolvency ("MLCBI"), adopted in more than 60 jurisdictions around the world.[23] Through the enactment of the MLCBI, UNCITRAL has been instrumental in promoting a greater level of convergence in the treatment of cross-border insolvency.[24] Yet, the role of UNCITRAL is not limited to cross-border insolvency. It covers virtually all areas of insolvency law.[25]

Another international organization that has contributed to this process of global convergence is the World Bank. As an international standard setter in insolvency (along with UNCITRAL), the World Bank publishes and regularly updates a set of Principles for Effective Insolvency and Creditor/Debtor Regimes.[26] Moreover, it assesses the effectiveness of insolvency regimes, initially through the Doing Business index (suspended in 2021),[27] and more recently with the Business Ready ("B-ready") report.[28]

Finally, regulatory competition and the international influence of various insolvency regimes from the Global North (mainly from the United States and Europe) seem to be leading to a certain level of harmonization in the design of insolvency law.[29] For example, the insolvency reforms adopted in Singapore were mainly motivated by the desire to strengthen Singapore as an international hub for debt restructuring.[30] In the United Kingdom, one of the reasons behind the 2020 insolvency reforms was the importance of keeping the UK as a leader in the international insolvency space.[31] In Europe, the lack of an attractive insolvency and restructuring framework has traditionally encouraged many European companies to conduct a debt restructuring in the United Kingdom.[32]

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[23] UNCITRAL, *Status: UNCITRAL Model Law on Cross-Border Insolvency* (1997) (available at http://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency/status).

[24] Despite the general level of convergence achieved through the adoption of the MLCBI, countries around the world have implemented the MLCBI differently. See Aurelio Gurrea-Martínez, *The Implementation of the Model Law on Cross-Border Insolvency: International Divergences and Challenges Ahead,* 21(3) INTERNATIONAL CORPORATE RESCUE 145 (2024).

[25] The different guides, model laws and legislative recommendations on insolvency law published by UNCITRAL can be found at https://uncitral.un.org/en/texts/insolvency/legislativeguides/insolvency_law.

[26] World Bank, *Principles for Effective Insolvency and Creditor and Debtor Regimes* (2021) (available at https://documents.worldbank.org/en/publication/documents-reports/documentdetail/391341619072648570/principles-for-effective-insolvency-and-creditor-and-debtor-regimes).

[27] World Bank, *Doing Business* (available at https://archive.doingbusiness.org/en/doingbusiness).

[28] World Bank, *Business Ready* (available at https://www.worldbank.org/en/businessready).

[29] Aurelio Gurrea-Martínez, *The Future of Reorganization Procedures in the Era of Pre-Insolvency Law*, 21(4) EUROPEAN BUSINESS ORGANIZATION LAW REVIEW 829 (2020). See also Thiesi da Silva (n 5).

[30] Ministry of Law, *Committee to Strengthen Singapore as an International Hub for Debt Restructuring*, Report (2016) (available at https://www.mlaw.gov.sg/files/news/press-releases/2016/04/Final%20DR%20Report.pdf). See also Aurelio Gurrea-Martínez, *Building a Restructuring Hub: Lessons from Singapore*, SINGAPORE MANAGEMENT UNIVERSITY SCHOOL OF LAW RESEARCH PAPER 16/2021 (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3940512)

[31] Gerard McCormack, *Permanent changes to the UK's corporate restructuring and insolvency laws in the wake of Covid-19* (INSOL International, Special Report, 2020) 1.

[32] Gurrea-Martínez, *Building a Restructuring Hub: Lessons from Singapore* (n 30).

Therefore, apart facilitating the capital market union, the modernization of insolvency law in Europe also seems to be motivated by the need to offer local companies a more competitive insolvency framework that can avoid the flight of companies to the United Kingdom. [33] Interestingly, a common feature of those reforms in the United Kingdom, Europe and Singapore is that they all have adopted provisions from the US Chapter 11. Therefore, in addition to influencing insolvency laws in many jurisdictions in the Global South such as China, Thailand, Brazil, Colombia and Malaysia, the US Chapter 11 has inspired various insolvency reforms in the Global North.

The United States is not the only jurisdiction from the Global North influencing insolvency reforms, though. In the past few years, many countries around the world, such as Brazil, Colombia, Ethiopia and United Arab Emirates, have adopted some forms of preventive restructuring frameworks or "pre-insolvency proceedings" initially popularized in Europe. These procedures embrace certain features of a formal reorganization procedure. [34] However, they can be used by companies that are not factually insolvent yet.[35] Actually, some of these procedures, such as the safeguard procedure existing in France, cannot even be used by insolvent firms. The financial conditions required for the initiation of the procedure and the existence of more limited restructuring tools are two of the aspects that often distinguish these European-style pre-insolvency proceedings from a Chapter 11 reorganization procedure.[36]

A common feature of this process of global convergence in the design of insolvency law is that many of the trends and practices inspiring insolvency reforms around the world generally move from the Global North to the Global South. In fact, even when those trends emerge from international organizations where the Global South is properly represented, they often consist of features and practices traditionally existing in the Global North. For example, in the context of cross-border insolvency, many of the ideas embraced by the MLCBI such as the principle of "modified universalism" and the controversial concept of centre of main interest ("COMI") were

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[33] Gurrea-Martínez, REINVENTING INSOLVENCY LAW IN EMERGING ECONOMIES (n 2) 114.
[34] Gurrea-Martínez, *The Future of Reorganization Procedures in the Era of Pre-Insolvency Law* (n 29).
[35] While many formal insolvency proceedings, such as the US Chapter 11, can be used by companies that are not factually insolvent yet, many countries have traditionally required "insolvency", "cessation of payments" or "default" as a condition for the initiation of a formal insolvency proceedings. In the past decades, however, those requirements have been relaxed, and many insolvency proceedings can be initiated even in situations of "imminent insolvency" or "likelihood of insolvency". See Gurrea-Martínez, REINVENTING INSOLVENCY LAW IN EMERGING ECONOMIES (n 2) 53-103.
[36] For an analysis of the features of pre-insolvency proceedings adopted in many countries around the world and how they differ from the US Chapter 11, see Gurrea-Martínez, *The Future of Reorganization Procedures in the Era of Pre-Insolvency Law* (n 29). See also Nicolaes Tollenaar, PRE-INSOLVENCY PROCEEDINGS: A NORMATIVE FOUNDATION AND FRAMEWORK (Oxford University Press, 2019).

mainly developed in the Global North.[37] Many emerging markets were initially reluctant to adopt the MLCBI.[38] However, that trend seems to be changing, as shown by the adoption of the MLCBI in countries like Brazil, and the interest that other emerging markets, such as India and Malaysia, have expressed in implementing the MLCBI.[39]

When examining international indicators that have influenced insolvency reforms, such as the abolished Doing Business index, it can also be observed that some of the "best practices" reflected in those indexes often replicate features from the Global North and particularly from the US Chapter 11.[40] Moreover, while instruments such as the UNCITRAL Legislative Guide on Insolvency Law and the World Bank Principles for Effective Insolvency and Creditor/Debtor Regimes provide countries with high-level recommendations and different policy options that can be tailored to local environments, indicators such as the Doing Business index embrace a one-size-fits-all approach.[41] Therefore, they can influence insolvency reforms in a direction that is not necessarily desirable for a country.[42]

Apart from the indirect influence that the Global North may have had in the adoption of "international best practices" often implemented in the Global South, many jurisdictions in the Global South can be tempted to adopt insolvency solutions from the Global North for other reasons that may include replicating the level of economic development existing in the Global North or emulating the success of a particular insolvency regime from the Global North by adopting similar insolvency practices. Unfortunately, such reasons for importing solutions from

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[37] Emphasizing that modified universalism has been a "golden thread" in England since the 18th century, see *Re HIH Casualty and General Insurance Ltd* [2008] UKHL 21, [2008] 1 WLR 852 at [30]. For the concept of COMI, while many of the supporters of its implementation in the MLCBI were from the United States, the terminology was adopted from the then-pending European Union Convention on Insolvency Proceedings. See Daniel M. Glosband and Meredith Mitnick, *A Brief Defense of COMI* (16 February 2024) (available at https://www.goodwinlaw.com/en/insights/publications/2024/02/insights-otherindustries-a-brief-defense-of-comi). Expressing several concerns about the concept of COMI, especially in the context of emerging economies, see Gurrea-Martínez, REINVENTING INSOLVENCY LAW IN EMERGING ECONOMIES (n 2) 248-272; Anthony J. Casey, Aurelio Gurrea-Martínez and Robert K. Rasmussen, *A Commitment Rule for Insolvency Forum* 4(1) UNIVERSITY OF CHICAGO BUSINESS LAW REVIEW 51 (2025).

[38] Steven Kargman, *Emerging economies and cross-border insolvency regimes: missing BRICs in the international insolvency architecture* (Part I), 6(2) INTERNATIONAL AND RESTRUCTURING INTERNATIONAL 8 (2012).

[39] Malaysia has clearly expressed its intention to adopt the MLCBI. See Freya Gilbert, *Malaysia announces plans to adopt UNCITRAL Model Law* (GLOBAL RESTRUCTURING REVIEW, 11 February 2025) (available at https://globalrestructuringreview.com/article/malaysia-sets-out-plans-adopt-uncitral-model-law). India is considering the adoption of a framework for cross-border insolvency that, to a certain extent, replicates the MLCBI. Yet, that are some divergences with the MLCBI. For an analysis of these divergences, see Debaranjan Goswami and Andrew Godwin, *India's Journey towards Cross-Border Insolvency Law Reform,* 19(2) ASIAN JOURNAL OF COMPARATIVE LAW 197 (2024).

[40] Gerard McCormack, *International organisations and the search for global insolvency standards* (n 22) 26-28, 38-29.

[41] *Id*. at 17-18.

[42] *Id*.

the Global North are equally flawed. The former seems to ignore the difference between causation and correlation, and even the direction of the causation. Indeed, it can perfectly be the case that the existence of a well-functioning insolvency is the result of the level of economic development in a country and not the other way around. It could also be that a country has been able to become an advanced economy *despite* the existence of an inefficient and value-destroying insolvency system. The second reason to replicate the Global North simply ignores the fact that, when it comes to legal reforms, context *matters*.[43] Therefore, what works in a country does not necessarily work in jurisdictions with totally different legal, economic, cultural and institutional environments.[44] Moreover, as will be discussed in Section 3, insolvency law in the Global North is not the "paradise" often envisioned by the Global South. Therefore, jurisdictions in the Global South should be cautious when importing laws from the Global North.

To be clear, importing practices from the Global North is not necessarily undesirable. In fact, mutual learning is always enriching, and the study of the Global North can be very beneficial for the Global South. However, the opposite is also true. Unfortunately, the academic literature on insolvency law primarily focuses on the Global North. In fact, it often examines the same jurisdictions from the Global North. In recent years, more academic studies in insolvency have included analyses of, or comparisons with, some jurisdictions from the Global South. Those studies, however, are still limited. Moreover, they focus on a small number of jurisdictions from the Global South, such as India and China. Unless the author is from another jurisdiction, other countries from the Global South are not typically examined.

Therefore, even if the Global South represents about 85% of the world's population,[45] the academic and policy debate in insolvency law is mainly led by, and generally focused on, the Global North. Such Global North bias can be particularly harmful for the study and improvement of insolvency law. On the one hand, it may induce countries in the Global South to adopt practices from the Global North that might not work in their local environments. If so, those undesirable legal transplants may contribute to the failure of an insolvency system, ultimately hampering the

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[43] This observation is probably one of the primary lessons learnt in the study of comparative law. See, *e.g.,* Mathias Siems, COMPARATIVE LAW (Cambridge University Press, 3rd Edition, 2022) 1-50. For a variety of firm-specific and country-specific factors that may affect the optimal design of insolvency law, see Gurrea-Martínez, REINVENTING INSOLVENCY LAW IN EMERGING ECONOMIES (n 2) 10-18.

[44] In fact, part of the failure of many insolvency systems in the Global South can be due to the adoption of practices and procedures from countries with totally different market and institutional environments. See Gurrea-Martínez, REINVENTING INSOLVENCY LAW IN EMERGING ECONOMIES (n 2).

[45] 'How to locate the global south' THE ECONOMIST (12 April 2024) (available at https://www.economist.com/leaders/2024/04/12/how-to-locate-the-global-south).

ability of insolvency law to serve as a catalyst for growth.[46] On the other hand, the exclusive focus on the Global North can prevent the international insolvency community from having access to many interesting ideas and innovative solutions that can contribute to the improvement and understanding of insolvency systems around the world.

3. Insolvency Law in the Global North: The Paradise Envisioned by the Global South?

Despite the international divergences existing in the design of insolvency law, a common feature of insolvency proceedings in most jurisdictions around the world – including those in the Global North – is the fact that insolvency proceedings are generally costly and lengthy processes.[47] In fact, in countries with sophisticated insolvency systems, such as the United States, the significant costs of reorganization procedures have led to many academic debates questioning the desirability of Chapter 11,[48] even arguing that it should be abolished,[49] or at least revisited.[50] Those concerns are not surprising given that the direct costs of a reorganization procedure in the United States represent about 7.5% of the value of the insolvent firm,[51] and Chapter 11 seems to have become even more expensive in the past decade.[52] Therefore, even if the US Chapter 11 has proved to be a useful tool to reorganize viable but financially distressed companies, the question is whether the goals of Chapter 11 can be achieved in a more cost-effective manner.

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[46] Gurrea-Martínez, REINVENTING INSOLVENCY LAW IN EMERGING ECONOMIES (n 2).

[47] Aurelio Gurrea-Martínez, *The Digitalization of Insolvency Proceedings*, SINGAPORE MANAGEMENT UNIVERSITY YONG PUNG HOW SCHOOL OF LAW RESEARCH PAPER 9/2025 (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5147008).

[48] Frank H. Easterbrook, *Is corporate bankruptcy efficient?* (1990) 27(2) JOURNAL OF FINANCIAL ECONOMICS 411 (1990). For an overview of the critics of Chapter 11 and the different solutions that have been suggested to fix it, see David A. Skeel Jr., *Markets, Courts, and the Brave New World of Bankruptcy Theory*, WISCONSIN LAW REVIEW 465 (1993).

[49] Michael Bradley and Michael Rosenzweig, *The Untenable Case for Chapter 11,* 101 YALE LAW JOURNAL 1043 (1992).

[50] See, *e.g.*, Mark Roe, *Bankruptcy and Debt: A New Model for Corporate Reorganization*, 83(3) COLUMBIA LAW REVIEW (1983) 527; Lucian A. Bebchuk, *A New Approach to Corporate Reorganizations*, 101(4) HARVARD LAW REVIEW 775 (1988); Douglas G. Baird, *The Uneasy Case for Corporate Reorganizations*, 15 THE JOURNAL OF LEGAL STUDIES 127 (1986); *Financial and Political Theories of American Corporate Bankruptcy*, 45(2) STANFORD LAW REVIEW 311 (1991); Rasmussen, *Debtor's Choice: A Menu Approach To Corporate Bankruptcy* (n 2); Schwartz, *A Contract Theory Approach to Business Insolvency* (n 2).

[51] Edward Altman, *A further empirical investigation of the bankruptcy cost question*, 39 JOURNAL OF FINANCE 1067 (1984). Showing that the direct costs of bankruptcy proceedings in the United States can be even higher, see also Arturo Bris, Ivo Welch and Ning Zhu, *The Costs of Bankruptcy,* 61 JOURNAL OF FINANCE 1253 (2006). For an analysis of the significant costs of insolvency proceedings in other jurisdictions from the Global North, see *e.g.,* Julian Franks and Oren Sussman, *Financial Distress and Bank Restructuring of Small to Medium Size UK Companies,* 9(1) REVIEW OF FINANCE 65 (2005); John Armour, Audrey Hsu and Adrian Walters, *Corporate Insolvency in the United Kingdom*, 5(2) EUROPEAN COMPANY AND FINANCIAL LAW REVIEW 148 (2008).

[52] See Jared A. Ellias, *Has Chapter 11 Become More Expensive?* YALE JOURNAL ON REGULATION (Forthcoming) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5128371).

In terms of length of insolvency proceedings, the situation is not much better. While many companies in countries with developed insolvency regimes such as the United States and the United Kingdom have been able to quickly emerge from bankruptcy through a pre-pack,[53] an ordinary insolvency process is still a very lengthy process in both jurisdictions. This problem is exacerbated in jurisdictions with inefficient judicial systems. That certainly includes many jurisdictions from the Global South. However, it also includes several jurisdictions from the Global North, such as Italy and Greece.[54] Therefore, while the existence of lengthy insolvency proceedings is a problem often associated with countries in the Global South, the truth is that an insolvency process takes time in any jurisdiction, including those with efficient judicial systems.

Another common problem that exists, to a certain extent, in most jurisdictions around the world is the stigma of insolvency.[55] Indeed, while insolvency law might be more stigmatized in some jurisdictions than others, the level of economic development of a country probably has little or no relevance in explaining the stigma of insolvency.[56] In fact, the stigma of insolvency is a problem often highlighted in many advanced economies such as Australia, the United Kingdom, Singapore, Europe and, to a lesser extent, the United States.[57] Therefore, the Global North is not exempted from this problem.

The low involvement of creditors in insolvency proceedings is another weakness generally found in many insolvency systems in the Global North, especially in Europe. Indeed, even though several authors and international organizations have emphasized the importance of empowering

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[53] For an analysis of the features and types of pre-packs existing around the world, see Aurelio Gurrea-Martínez, *The Rise of Pre-Packs as a Restructuring Tool: Theory, Evidence and Policy*, 24(1) EUROPEAN BUSINESS ORGANIZATION LAW REVIEW, 93 (2023).

[54] For example, in the variables of the WJP Rule of Law Index that measures whether civil justice proceedings are conducted and judgments are produced in a timely manner without unreasonable delay (variable 7.5), Greece and Italy are ranked 115th and 107th, respectively, out of 142 countries from both the Global North and the Global South. See World Justice Project, *Rule of Law Index* (2024) (available at https://worldjusticeproject.org/rule-of-law-index/factors/2024/Civil%20Justice/).

[55] Emilie Ghio and Donald Thomson, *Is insolvency stigmatised?* 32(3) INTERNATIONAL INSOLVENCY REVIEW 397 (2023).

[56] The reasons that may create or exacerbate the stigma of insolvency and the potential solutions that countries can adopt to tackle the stigma of insolvency are discussed in Section 4.9.

[57] *Id*. See also Teresa A. Sullivan, Elizabeth Warren and Jay L. Westbrook, *Less Stigma or More Financial Distress: An Empirical Analysis of the Extraordinary Increase in Bankruptcy Filings*, 59(2) STANFORD LAW REVIEW 213 (2006); Tibor Tajti, *Bankruptcy stigma and the second chance policy: the impact of bankruptcy stigma on business restructurings in China, Europe and the United States*, 6 CHINA-EU LAW JOURNAL 1 (2018); Aurelio Gurrea-Martínez, *The Low Usage of Bankruptcy Procedure: A Cultural Problem? Lessons from Spain,* 27(2) UNIVERSITY OF MIAMI INTERNATIONAL AND COMPARATIVE LAW REVIEW 272 (2020); Jason J. Kilborn, *Tightening Up Loose Credit and Loosening Up Tight Bankruptcy in Singapore: An Asian Paradigm For Personal Debt and Insolvency Reform*, 58(2) TEXAS INTERNATIONAL LAW JOURNAL 135 (2023).

creditors in insolvency proceedings,[58] many European countries still prevent creditors from being actively involved in the procedure. In fact, as a response to this concern, the Proposed EU Directive that harmonizes certain aspects of insolvency released in 2022 included several provisions that seek to empower creditors in insolvency proceedings.[59]

Another problem often observed in many jurisdictions in the Global North is the lack of an attractive reorganization procedure for debtors. Some of these jurisdictions include common law countries with administration-style proceedings, such as Australia and New Zealand, where the debtor's management team is replaced by an external administrator. Moreover, even if, as happens in other jurisdictions in the Global North, the debtor remains in possession – with or without the supervision of an insolvency practitioner –, the reorganization procedure might not be very appealing for debtors due to the lack of certain tools that can facilitate a successful restructuring. For example, the possibility of imposing a plan on dissenting classes of creditors ("cross-class cramdown") has not been allowed in most European countries until very recently,[60] and it is not yet available in various advanced economies such as Australia and New Zealand. In these latter jurisdictions, an additional problem that undermines the attractiveness of reorganization procedures is the existence of a relatively weak moratorium given that secured creditors with a security over the whole, or substantially the whole, of the company's property can enforce their security interest even if the value of the collateral exceeds the value of their debt and the secured creditors were hypothetically protected.[61] Moreover, secured creditors cannot be bound by a plan unless they consent. Therefore, those significant powers enjoyed by secured creditors in administration procedures in Australia and New Zealand can hamper the effective reorganization of viable but financially distressed firms. Moreover, the loss of going concern value

[58] Institutions such as the World Bank, the Asian Development Bank and UNCITRAL have traditionally emphasized the importance of empowering creditors in insolvency proceeding. See, *e.g.,* Roman Tomasic, *Creditor Participation in Insolvency Proceedings*, ASIAN INSOLVENCY SYSTEMS: CLOSING THE IMPLEMENTATION GAP (OECD 2007) 209-222; Klaus Koch-Saldarriaga, Raman Maroz and Nina Dannaoui, *Giving creditors a voice for a better insolvency process* (World Bank Blog, 19 June 2019) (available at https://blogs.worldbank.org/en/opendata/giving-creditors-voice-better-insolvency-process)
[59] See Proposal for a Directive of the European Parliament and of the Council harmonizing certain aspects of insolvency law (2022), Art. 58-67.
[60] The cross-class cramdown was recognized in the EU Directive on Preventive Restructuring Framework enacted in 2019. Since then, it has been adopted in the restructuring procedures that EU Member States have been required to adopt (or reform) to comply with the Directive.
[61] The value of the collateral and the possibility of offering adequate protection is irrelevant under Australian insolvency law. Secured creditors holding a security interest over the whole or substantially the whole of the company's property may take enforcement action during the "decision period." If no enforcement action is taken during such period, then the secured creditors may be bound by the moratorium. See Corporations Act 2001, s 441A. In New Zealand, a similar regime applies. See Companies Act 1993, s 239 ABK-ABL.

potentially experienced if a viable firm ends up in a piecemeal liquidation can also reduce the returns to unsecured creditors.

Another aspect that reduces the attractiveness of reorganization procedures in many jurisdictions in the Global North is the inability of debtors to obtain new financing once they initiate a formal insolvency proceeding. Creating a vibrant system for rescue financing is not an easy task. It requires reviewing many aspects of the legal and institutional environment.[62] Yet, many jurisdictions in the Global North, including Australia, New Zealand and most European countries, fail in the most basic aspect: adopting some rules that, by providing certain forms of priority to those facilitating new financing, can encourage lenders to extend credit to financially distressed firms.[63] This problem might not exist in the United States, where filing for bankruptcy can actually increase the likelihood of obtaining new financing.[64] Yet, the United States has its own problems with its system of debtor-in-possession ("DIP") financing, such as the fact that the increasing power of DIP lenders seems to be leading to inefficient outcomes and distortions of priorities in bankruptcy.[65] Therefore, whether it is due to the lack of a suitable framework that can facilitate new financing or to certain problems existing with their current system of DIP financing, many jurisdictions in the Global North can improve their DIP financing regimes.

Finally, many insolvency systems in the Global North subject corporate directors to a very tough liability regime. For example, in Germany, corporate directors can face criminal and tort liability if they fail to file for bankruptcy within three weeks after the company becomes cash flow insolvent or six weeks after becoming balance sheet insolvent.[66] Australia has one of world's toughest regimes for corporate directors due to the rigidness and severity of its insolvent trading provisions.[67] In Singapore, corporate directors can also be subject to a tough liability regime that

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[62] See, *e.g.,* Kyriaki Karadelis, 'INSOL International, London: Developing a rescue finance market' (Global Restructuring Review, 10 August 2022) (available at https://globalrestructuringreview.com/article/insol-international-london-developing-rescue-finance-market).

[63] For an overview of the system of DIP financing existing in several jurisdictions from the Global North and the Global South, see Aurelio Gurrea-Martínez, *Debtor-in-Possession Financing in Reorganization Procedures: Regulatory Models and Proposals for Reform*, 24(3) EUROPEAN BUSINESS ORGANIZATION LAW REVIEW 555 (2023).

[64] Kenneth Ayotte and David A. Skeel Jr., *Bankruptcy Law as a Liquidity Provider*, 80(4) UNIVERSITY OF CHICAGO LAW REVIEW 1557 (2013).

[65] Kenneth Ayotte and Jared A. Ellias, *Bankruptcy Process for Sale*, 39(1) YALE JOURNAL ON REGULATION 1 (2021); Kenneth Ayotte and Alex Huang, *Standardizing and Unbundling the Sub Rosa DIP Loan*, 39(3) EMORY BANKRUPTCY DEVELOPMENTS JOURNAL 523 (2023).

[66] Horst Eidenmüller, *Comparative Corporate Insolvency Law*, EUROPEAN CORPORATE GOVERNANCE INSTITUTE LAW WORKING PAPER N° 738/2023, 30 (available at https://www.ecgi.global/sites/default/files/working_papers/documents/comparativecorporateinsolvencylaw_0.pdf).

[67] Emphasizing this aspect, see Wayne Martin, 'Official Opening Address', Insolvency Practitioners' Association of Australia Conference (2009) (available at https://www.supremecourt.wa.gov.au/_files/Insolvency_Practitioners_Assoc_National_Conference_28May09.pdf).

applies in both liquidation and judicial management.[68] In Spain and France, the directors of insolvent companies that end up in liquidation can be liable for the company's unpaid debts under certain scenarios.[69] Thus, given the tough liability regime for corporate directors existing in many countries in the Global North, it is not surprising that insolvency proceedings are not generally seen as an attractive option for many companies, or at least for those usually deciding whether, and if so when, an insolvency proceeding should be initiated.

Therefore, insolvency law in the Global North is not the "paradise" often envisioned by the Global South. In some cases, it exhibits problems observed in the Global South, such as the stigma of insolvency or the existence of costly and lengthy proceedings. In other situations, it has unique problems – such as those generated by the increasing power of DIP lenders often observed in the United States. To be clear, insolvency law in the Global South typically faces greater challenges and weaknesses than their counterparts in the Global North.[70] Probably motivated by those additional challenges, however, the Global South has adopted many innovative solutions. In some cases, these innovations consist of solutions that, with certain adjustments, have been imported from the Global North. In others, they are really 'autochthonous innovations' from the Global South. In both scenarios, it will be shown how those innovative solutions from the Global South can mitigate certain problems existing in many insolvency systems in the Global North.

4. Insolvency Law in the Global South: Lessons for the Global North

4.1 Promoting workouts: Lessons from Malaysia, the Philippines and Thailand

An out-of-court restructuring ("workouts") can save significant costs and delays associated with the initiation of a formal insolvency proceeding. Therefore, the promotion of workouts can be a desirable policy for any jurisdiction from both the Global North and the Global South, and particularly for countries with inefficient judicial systems. In some jurisdictions in the Global North,

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[68] The liability for wrongful trading does not apply in the context of a scheme of arrangement, which is Singapore's main restructuring procedure. For an analysis of the Singapore wrongful trading regime and how it differs from the wrongful trading provisions existing in the United Kingdom and the liability for insolvent trading and 'reckless behaviour' existing in Australia and New Zealand, respectively, see Aurelio Gurrea-Martínez, *Towards an Optimal Model of Directors' Duties in the Zone of Insolvency: An Economic and Comparative Approach* (2021) 21 (2) JOURNAL OF CORPORATE LAW STUDIES 365, 375-384 (2021).
[69] In France, see Commercial Code, Art. L.651-2 (1). In Spain, see Insolvency Act, Art. 456.
[70] For an overview of the features and challenges of insolvency law in the Global South and explaining why and how insolvency law in the Global South needs to be reinvented, see Gurrea-Martínez, REINVENTING INSOLVENCY LAW IN EMERGING ECONOMIES (n 2).

such as the United Kingdom and the United States, workouts have traditionally been used as a mechanism for debt restructuring. In the United Kingdom, part of the popularity and success of workouts is due to the fact that they have been incentivized by the Bank of England through the promotion of the so-called "London approach".[71] Moreover, the relatively concentrated debt structure of most UK companies also facilitates an out-of-court restructuring.[72] In the United States, the existence of more fragmented debt structures creates more collective action problems that often justify the initiation of a formal insolvency proceedings.[73] Still, workouts are often used as a method for debt restructuring. This is probably due to several factors, including the predictability of the bankruptcy system and the significant costs of Chapter 11 – ultimately borne by both debtors and creditors. Moreover, as debtors have significant powers in Chapter 11, the threat of initiating an insolvency proceeding increases the bargaining power of debtors when negotiating a workout.[74]

In other countries in the Global North such as Australia and most European countries, however, workouts are still underutilized. In Australia, the legal regime (particularly the insolvent trading provisions) has traditionally discouraged workouts,[75] even if the 2018 reform that provided a "safe harbor" to directors of factually insolvent firms that engage in a value-enhancing restructuring has partially addressed that problem.[76] In many European countries, corporate directors are required to file for bankruptcy within a period that usually ranges from three weeks to two months since the company becomes insolvent. Such a duty to file for bankruptcy can discourage workouts, especially if, as happens in Germany, the period given to file the insolvency petition is very short and the consequences associated with a failure to file for bankruptcy within that period can be very severe.

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[71] See, *e.g.,* John Armour and Simon Deakin, *Norms in Private Bankruptcy: The 'London Approach' to the Resolution of Financial Distress* (2001) UNIVERSITY OF CAMBRIDGE ESRC WORKING PAPER NO. 173 (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=258615).

[72] John Armour, Brian R. Cheffins and David A. Skeel Jr., *Corporate Ownership Structure and the Evolution of Bankruptcy Law: Lessons from the United Kingdom*, 55 VANDERBILT LAW REVIEW 1699 *(2002)*.

[73] *Id.*

[74] Analyzing the relationship between workouts and bankruptcy proceedings and how they complement each other, see Jason R. Donaldson, Edward R. Morrison, Giorgia Piacentino and Xiaobo Yu*, Restructuring vs. Bankruptcy*, COLUMBIA LAW AND ECONOMICS WORKING PAPER NO. 630 (2020) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3698161).

[75] Andrew Keay and Michael Murray, *Making Company Directors Liable: A Comparative Analysis of Wrongful Trading in the United Kingdom and Insolvency Trading in Australia* (2005) 14 INTERNATIONAL INSOLVENCY REVIEW 27; Jason Harris, *Director Liability for Insolvent Trading: Is the Cure Worse than the Disease?* 23(3) AUSTRALIAN JOURNAL OF CORPORATE LAW 266 (2009).

[76] For an overview of this reform, see Ian Ramsay and Stacey Steele, The *"Safe Harbour" Reforms of Directors' Insolvent Trading Liability in Australia: Insolvency Professionals' Views*, 48 AUSTRALIAN BUSINESS LAW REVIEW 7 (2020).

Therefore, countries seeking to promote workouts need to ensure that the insolvency system favors, or at least it does not discourage, an out-of-court restructuring. Additionally, they can adopt a variety of strategies to actively promote workouts. Given the type of concentrated debt structures prevailing in most companies in the Global North,[77] as well as the costs that insolvency proceedings may impose on debtors and creditors,[78] any minor policies to promote workouts is expected to significantly facilitate this outcome.

One of the policies that can be adopted to promote workouts may consist of the enactment of certain norms that may range from intercreditor agreements supported by central banks to actual provisions included in the insolvency legislation.[79] Unlike hybrid procedures such as pre-packs, schemes of arrangements, preventive restructuring frameworks and the new restructuring procedures adopted in the United Kingdom and the European Union, those *enhanced workouts* facilitated by different types of norms do not require the involvement of courts for the initiation of the process or the approval of a reorganization plan. Therefore, they are entirely conducted out-of-court. As a result, they preserve all the advantages associated with informal workouts, such as low stigma, speed, confidentiality, greater flexibility and relatively low costs compared to formal insolvency or restructuring procedures.[80]

These forms of enhanced workouts were implemented in Asia as a response to the 1997 Asian Financial Crisis and the need to quickly handle a high level of insolvency cases in countries that did not have a strong legal and institutional environment to deal with financial distress.[81] Some of the Asian countries that adopted enhanced workouts included various jurisdictions from the Global

[77] The existence of companies with concentrated debt structure is actually the norm in most jurisdictions around the world. The exception is generally the United States, where large companies typically have very complex and fragmented debt structures. See, *e.g.,* Kenneth Ayotte, *Disagreement and Capital Structure Complexity,* 49(1) JOURNAL OF LEGAL STUDIES 1 (2020). See also Armour, Cheffins, and Skeel, *Corporate Ownership Structure and the Evolution of Bankruptcy Law: Lessons from the United Kingdom* (n 72).
[78] While the hybrid procedures adopted in many European countries can provide a solution to deal with financial distress in a less costly manner, the involvement of courts and the complexity of many of these procedures make these mechanisms more expensive than a workout. Therefore, the promotion of workouts can be seen as a desirable policy even in countries with hybrid procedures.
[79] See, *e.g.,* World Bank, 'A Toolkit for Corporate Workouts' World Bank Group (2022) 4.
[80] *Id*. at 29.
[81] Antonia Menezes and Akvile Gropper, *Overview of Insolvency and Debt Restructuring Reforms in Response to the COVID-19 Pandemic and Past Financial Crises: Lessons for Emerging Markets* (2021) World Bank Group Working Paper (2021) (available at https://openknowledge.worldbank.org/handle/10986/35425); Andreas Bauer et al, *Flattening the Insolvency Curve: Promoting Corporate Restructuring in Asia and the Pacific in the Post-C19 Recovery* (2021) IMF Working Paper No. 2021/016 (2021) (available at https://www.imf.org/en/Publications/WP/Issues/2021/01/29/Flattening-the-Insolvency-Curve-Promoting-Corporate-Restructuring-in-Asia-and-the-Pacific-in-49997).

South such as Indonesia,[82] Thailand,[83] India,[84] and Malaysia.[85] In some of these countries, the enhanced workouts have been abolished or significantly transformed.[86] In others, they still remain in place. While all of them can provide valuable lessons to countries interested in promoting workouts, this section focuses on the enhanced workout implemented in Malaysia, not only because it is still in effect but also – and more importantly – because it represents a very innovative effort to promote workouts that has proved to be very successful. In fact, it has placed Malaysia as one of the world's leading jurisdictions for workouts in the indicator of crisis preparedness published by the International Monetary Fund.[87]

In 1998, Bank Negara Malaysia – Malaysia's Central Bank – established the Corporate Debt Restructuring Committee ("CDRC"). The CDRC has been used to successfully resolve 57 cases with a total debt outstanding of RM45.8 billion (that is, almost USD 11 billion approx.).[88] The CDRC provides debtors and creditors subject to the supervision of the central bank with a platform to work out feasible debt resolutions without having to resort to legal proceedings.[89] The role of the CDRC is to mediate between companies and financial creditors with the purpose of reaching a viable debt restructuring arrangement.[90] Such mediation starts with an application from a company that needs to meet certain requirements. Namely, the debtor must have an aggregate indebtedness of at least RM10 million (that is, around USD 2.24 million) and 2 or more financial creditors.[91] Additionally, the debtor company cannot generally be in receivership or liquidation.[92] More importantly, the company experiencing financial difficulties should not have defaulted yet.[93] This restructuring framework can also be used by listed companies.[94] Regardless of the type of

[82] World Bank Group, *A Toolkit for Corporate Workouts* (n 79) 40.
[83] *Id*. at 41.
[84] *Id*. at 43.
[85] Bauer et al, *Flattening the Insolvency Curve: Promoting Corporate Restructuring in Asia and the Pacific in the Post-C19 Recovery* (n 81) 21.
[86] In Indonesia, the so-called "Jakarta Initiative" adopted to facilitate workouts was abolished. In India and Thailand, the strategy to promote workouts has been transformed. For an analysis of these frameworks, as well as other innovative approaches to workouts adopted in other Asian jurisdictions such as South Korea, see World Bank Group, *A Toolkit for Corporate Workouts* (n 79) 40-45.
[87] See Bruno Albuquerque et al, *Corporate Sector Vulnerabilities and High Levels of Interest Rates*, International Monetary Fund Departmental Paper No 2025/001 (2025) 49-60 (available at https://www.imf.org/en/Publications/Departmental-Papers-Policy-Papers/Issues/2025/01/08/Corporate-Sector-Vulnerabilities-and-High-Levels-of-Interest-Rates-556372).
[88] See Corporate Debt Restructuring Committee (https://www.cdrc.my/).
[89] *Id*.
[90] *Id*.
[91] *Id*.
[92] *Id*.
[93] *Id*.
[94] *Id*.

firm using the CDRC, companies are expected to be viable as a going concern post-restructuring.[95]

Once the debtor files an application to initiate the workout, the CDRC conducts a preliminary assessment to determine if there is a basis for a viable restructuring.[96] The decision to accept or reject the application is made within a month from the date of application.[97] Once an application to the process is accepted, a standstill period is triggered.[98] This period initially lasts up to six months. Subject to certain conditions, including obtaining creditor support, the standstill period can be extended for six additional months and even further.[99] During this period, the debtor and the creditors participating in the workout are subject to various obligations established in the Code of Conduct ("the Code") that governs the CDRC.[100] Among others, creditors are unable to initiate legal actions against the debtor, accelerate payments, exercise set-off rights or impose any type of liability for delayed payments.[101] Debtors, on the other hand, are required to manage the business in the ordinary and usual course, and cannot carry on any other business without the approval of the participating institutions.[102] Such approval is also required when the debtor seeks to engage in certain transactions that may materially affect creditors, such as declaring dividends, incurring new debts, creating security interests upon any of the debtor's property, or acquiring, disposing or transferring any material assets.[103] Other aspects regulated in the Code include the allocation of fees and expenses incurred during the procedure, the creation and operation of the committee of creditors, the consequences associated with failure to comply with the Code, and the confidentiality that should govern the procedure.[104]

If 75% of each class of creditors approves the plan, the proposed agreement will be binding on all parties.[105] Therefore, in addition to obtaining a moratorium while the restructuring is negotiated, debtors enjoy another tool traditionally existing in formal reorganization procedures: a majority rule. Unlike formal reorganization procedures or even hybrid procedures, however, this innovative

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[95] *Id*.
[96] The Corporate Debt Restructuring Committee Participants Code of Conduct (2020) (available at https://www.cdrc.my/pdf/Code_of_Conduct.pdf) 7-8.
[97] *Id*.
[98] *Id*. at 9.
[99] *Id.*
[100] *Id*.
[101] *Id*. at 9-10.
[102] *Id*. at 10.
[103] *Id*.
[104] *Id*. at 11-12.
[105] *Id*. at 8.

enhanced workout adopted in Malaysia does not require the involvement of courts. Moreover, the involvement and support of the central bank creates an environment of trust that ultimately favors negotiations and a constructive solution for both debtors and creditors.

Other types of norms that can be adopted to promote workouts consist of actual provisions in the insolvency legislation. One of the jurisdictions that have innovatively adopted this approach is the Philippines.[106] Unlike the CDRC implemented in Malaysia, there are no data publicly available that can facilitate the assessment and performance of the out-of-court procedure adopted in the Philippines. Still, the particular features of the procedure and the way it has been designed (an out-of-court procedure regulated in the insolvency legislation) can provide some valuable lessons for jurisdictions seeking to promote workouts.

Under the out-of-court procedure existing in the Philippines, debtors and creditors may agree upon a standstill period that serves as a moratorium contractually provided by creditors.[107] While a standstill agreement can exist in any informal workout, the innovative part of the out-of-court procedure adopted in the Philippines is that the standstill period will be effective and enforceable not only against the contracting parties but also against the remaining creditors. In order to do so, however, the debtor needs to get support from creditors representing more than 50% of the total liabilities and the standstill period cannot exceed 120 days.[108]

Other differences between an informal workout and the out-of-court procedure found in the Philippines include the fact that, provided that the agreement is approved by certain majorities (namely, 67 % of secured creditors, 75 % of unsecured creditors, and 85 % of the total liabilities), the plan can be imposed on dissenting creditors and will have the same legal effect as a plan approved under a court-supervised reorganization procedure.[109] Despite the availability of certain tools traditionally existing in formal reorganization procedures, this innovative process adopted in the Philippines does not require any type of court involvement. Nonetheless, the parties preserve their rights to initiate any legal actions arising from, or relating to, the agreement. Even in those cases, however, the implementation of the agreement will not be stayed unless the relevant party is able to secure a temporary restraining order or injunctive relief.[110]

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[106] Gurrea-Martínez, REINVENTING INSOLVENCY LAW IN EMERGING ECONOMIES (n 2) 137-138.
[107] *Id*. at 138.
[108] *Id*. See also Financial Rehabilitation and Insolvency Act of 2010 (Republic Act No 10142), s 85.
[109] *Id*. See also Financial Rehabilitation and Insolvency Act of 2010 (Republic Act No 10142), s 86.
[110] *Id*. See also Financial Rehabilitation and Insolvency Act of 2010 (Republic Act No 10142), s 87.

Due to the potential ex post involvement of courts, the out-of-court procedure regulated in the insolvency legislation in the Philippines can be classified as a "hybrid procedure" instead of an "enhanced workout" and it can even lead to the recognition of the procedure as a foreign proceeding under the MLCBI.[111] Unlike a traditional hybrid procedure, however, it is entirely managed out-of-court. In fact, unless there are some procedural irregularities or any violation of creditors' rights, courts are not supposed to be involved in this procedure. Still, subject to various conditions (including obtaining support from the relevant majorities of creditors), debtors can enjoy certain tools traditionally existing in formal reorganization procedures such as a moratorium and a majority rule. Therefore, this procedure can become particularly attractive for jurisdictions with inefficient judicial systems that, as mentioned in Section 3, includes many jurisdictions in the Global South but also some countries in the Global North.

Finally, jurisdictions interested in actively promoting workouts need to make sure that other aspects of the regulatory environment beyond the insolvency legislation do not discourage workouts.[112] In that regard, the tax regime may play a key role. In many countries, a debt forgiveness eventually agreed in a workout is considered taxable income for debtors.[113] The same rule, however, does not exist in the context of formal reorganization procedures in many jurisdictions.[114] Therefore, the law often penalizes workouts compared to formal reorganization procedures. As a result, countries seeking to incentivize workouts should consider the possibility of providing a similar tax benefit to haircuts agreed in an out-of-court restructuring.[115] From the perspective of creditors, something similar occurs. Namely, a debt forgiveness implies a loss for the creditor. Thus, the tax treatment of this loss may affect the behaviour of creditors in a workout. In some jurisdictions, creditors can only deduct losses if they show some collection efforts – and that condition is unlikely met if a creditor voluntarily accepts a haircut.[116] Therefore, unless such rules for the deductibility of losses are abolished or significantly softened, creditors might not be willing to support a workout.[117]

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[111] Gurrea-Martínez, REINVENTING INSOLVENCY LAW IN EMERGING ECONOMIES (n 2) 138, 146-147.
[112] Emphasizing the importance of having an enabling environment for workouts, see World Bank Group, *A Toolkit for Corporate Workouts* (n 79) 23-27.
[113] *Id*. at 25.
[114] Aurelio Gurrea-Martínez and Vincent Ooi, *The Tax Treatment of Haircuts in Financial Reorganizations* 26 (1) REVENUE LAW JOURNAL 1 (2020).
[115] World Bank Group, *A Toolkit for Corporate Workouts* (n 79) 25.
[116] *Id*.
[117] *Id*.

Thailand is one of the countries that first identified this problem and adopted some innovative tax solutions to incentivize workouts. This was part of a package of reforms adopted as response to the 1997 Asian Financial Crisis and the need to provide companies with an alternative mechanism to deal with financial distress.[118]As happened in Malaysia with the CDRC, the Bank of Thailand established the Corporate Debt Restructuring Advisory Committee ("CDRAC") to facilitate workouts.[119] Until the enactment of the CDRAC framework, Thailand only had the so-called "Bangkok Rules", which were general principles modelled on the London Approach.[120] Through the enactment of the CDRAC, the Bank of Thailand made clear that the agreement reached between debtors and creditors was binding on dissenting parties. Additionally, the CDRAC established a standstill period that provided debtors with breathing space while negotiating an out-of-court restructuring.[121] Therefore, the CDRAC adopted in Thailand shares many similarities with the Malaysian CDRC. As its counterpart in Malaysia, the Thai CDRAC was also a successful mechanism to deal with financial distress. By April 2002, 10,109 cases with debt of THB 1.3 trillion (that is, almost USD 39 billion approx.) concluded with a restructuring plan under the CDRAC framework.[122]

Apart from providing debtors with certain tools existing in formal reorganization procedures such as a moratorium and a majority rule, one of interesting feature of the comprehensive strategy to promote workouts adopted in Thailand was that the debt restructurings achieved as part of the CDRAC framework qualified for prearranged tax benefits.[123] While the CDRAC no longer exists, it contributed to the creation of a negotiating culture for debt restructurings in Thailand.[124] Moreover, it influenced the policy recommendations for workouts published by the Bank of Thailand.[125] Interestingly, even though Thailand has currently embraced a softer approach to workouts that mainly relies on principles and recommendations,[126] the tax exemptions on gains received from informal workout have been preserved.[127] Therefore, many jurisdictions in the

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118 *Id*. at 41.
119 *Id*. at 41.
120 *Id*.
121 *Id*.
122 *Id*.
123 *Id*.
124 Jose Garrido and Mouhamadou Sy, *Private Debt Restructurings—Lessons from International Experiences*, INTERNATIONAL MONETARY FUND (2022) 35 (available at https://www.elibrary.imf.org/view/journals/002/2022/301/article-A004-en.xml).
125 For an overview of the current framework for workouts existing in Thailand, see Jullamon, *Thailand* (n 6) 738-739.
126 *Id*.
127 *Id*.

Global North seeking to promote workouts can learn from the Thai experience dealing with the tax treatment of haircuts.

4.2 Facilitating the initiation of insolvency proceedings: Lessons from Uruguay

In many countries around the world, including jurisdictions from both the Global North and the Global South, the initiation of insolvency proceedings can be a costly and delayed exercise.[128] Namely, debtors seeking to obtain bankruptcy protection often need to fulfil certain conditions that must be verified ex ante by a court. One of these conditions is typically being, or being likely to become, insolvent. While this financial condition is assessed by the court, debtors are not usually subject to the special rules and safeguards provided by the insolvency legislation such as a moratorium that can protect the debtor's assets. Therefore, value can be destroyed during that interim period between the petition and the commencement of the insolvency process.

A potential solution to deal with this problem may consist of allowing debtors to automatically initiate the process upon the filing, as happens in the United States. After all, the costs of bankruptcy proceedings already act as a deterrence for debtors seeking to initiate an insolvency proceeding opportunistically. Moreover, if the purpose of requiring such ex ante assessment is to prevent opportunistic behavior by debtors, there are more efficient mechanisms to tackle this problem. For example, courts might be allowed to terminate the procedure ex post,[129] even imposing some form of sanctions or liability for damages to those using the insolvency system opportunistically.[130] Alternatively, creditors can also be allowed to terminate a reorganization procedure if certain requirements are met.[131]

[128] This problem is generally exacerbated in countries with inefficient judicial systems. For instance, in India, even though the court should decide on the admission of the insolvency case within 14 days, the average number of days generally taken for the admission of a petition filed by a corporate debtor is 133 days. See Neeti Shikha and Urvashi Shahi, *Assessment of Corporate Insolvency and Resolution Timeline* (2021) INSOLVENCY AND BANKRUPTCY BOARD OF INDIA RP-01/2021 (2021) 13 (available at https://ibbi.gov.in/uploads/publication/2021-02-12-154823-p3xwo-8b78d9548a60a756e4c71d49368def03.pdf). In involuntary petitions, the average time taken to decide whether the company is admitted into a formal insolvency process was 468 days in the period 2020-2021, and 650 days in 2021–2022. See Insolvency and Bankruptcy Board of India, *Consultation Paper on Issues Related to Reducing Delays in the Corporate Insolvency Resolution Process* (April 13, 2022) Insolvency and Bankruptcy Board of India, 1 (available at https://ibbi.gov.in/uploads/whatsnew/72a560ce5697bbaeef62ce5893a3f1ad.pdf).

[129] This solution, for example, has been adopted in the United States. See Title 11 of the United States Code ("Bankruptcy Code"), s 1112(b).

[130] For example, in India, courts can impose monetary penalties to any person that initiates insolvency proceedings fraudulently or with malicious intent for any purpose other than promoting the reorganization or liquidation of the company. See Insolvency and Bankruptcy Code 2016, s 65(1).

[131] See Gurrea-Martínez, REINVENTING INSOLVENCY LAW IN EMERGING ECONOMIES (n 2) 209-212.

Consistently with the US approach, Uruguay has adopted another approach that facilitates the quick initiation of the insolvency process. Under the 2008 Insolvency Act, an insolvency proceeding is supposed to be available only to insolvent debtors.[132] However, the debtor's petition serves as a non-rebuttable presumption of insolvency.[133] Therefore, in practice, Uruguay has abolished the insolvency test when the proceeding is initiated by the debtor. Moreover, given that a majority of the company's unsecured creditors can terminate the reorganization procedure at any time and ultimately put the company in liquidation,[134] the approach adopted in Uruguay can reduce the costs and length associated with the initiation of insolvency proceedings while simultaneously protecting creditors.

Therefore, the Uruguayan approach can serve as an inspiration for many countries in the Global North, including the United States. Indeed, as has been mentioned, companies filing for Chapter 11 in the United States do not need to prove any financial condition. However, the fact that the United States does not require the proof of any financial condition at the moment of filing for Chapter 11 does not mean that the debtor's financial situation is irrelevant. In fact, some courts have held that the lack of financial distress can be a reason for the dismissal of the case on the basis that it is not filed in good faith.[135] Whether this view is shared or not, it creates uncertainty. Moreover, it can lead to litigation costs. As a result, the regime existing in the United States should be revisited.[136] To that end, the solution adopted in Uruguay can provide some valuable lessons for the academic and policy debate in the United States.

4.3 Improving the governance of insolvency proceedings: Lessons from Colombia and beyond

There are three primary models for the governance of insolvency proceedings.[137] The first model consists of appointing an insolvency practitioner ("IP") for the purpose of leading the procedure. Under this model ("IP model"), an external administrator is appointed to replace the directors in

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[132] Insolvency Act 2008 (Law No 18.387), Art. 1.
[133] Insolvency Act 2008 (Law No 18.387), Art. 5 (1).
[134] 2008 Insolvency Act (Law 18387), s 168(5).
[135] See, *e.g.*, *In re Integrated Telecom Express, Inc., 384 F.3d 108; Fields Station LLC v Capitol Food Corp. 490 F.3d 21*. More recently, in the Johnson & Johnson case, see *In re: LTL MANAGEMENT, LLC*, decided by the United States Court of Appeals for the Third Circuit.
[136] For a critical analysis of the approach currently existing in the United States and suggesting that courts should replace the good-faith-filing requirement with an objective-futility test, see Anthony J. Casey, *Good-Faith Filing in Chapter 11*, WHARTON INITIATIVE ON FINANCIAL POLICY AND REGULATION WHITE PAPER (22 August 2024) (available at https://wifpr.wharton.upenn.edu/wp-content/uploads/2024/09/WIFPR-Chapter-11-Casey.pdf).
[137] Gurrea-Martínez, REINVENTING INSOLVENCY LAW IN EMERGING ECONOMIES (n 2) 213.

the management of the company's property and business affairs.[138] The second model consists of allowing the existing managers to continue running the firm without the supervision of an IP.[139] This model ("DIP model") is the general rule existing in the US Chapter 11 reorganization procedure. However, it is very rare outside of the United States, at least in the context of formal reorganization procedures.[140] The third model allows the debtor's management team to keep running the firm.[141] However, an IP is appointed with the purpose of monitoring the debtor and conducting a variety of tasks that may range from formulating a reorganization plan to conducting valuations or supervising the proof of claims. Therefore, under this model ("DIP-SIP model"), the debtor remains in possession under the supervision of an IP.

Many jurisdictions in the Global North, at least in the context of the administration-style proceedings existing in countries like the United Kingdom, Australia, New Zealand and Singapore, have embraced an IP model.[142] Therefore, given that the directors are replaced by an external administrator, this model makes an insolvency proceeding less appealing to the actors generally deciding whether an insolvency process should be initiated and when. As a result, it may delay the initiation of insolvency proceedings. Moreover, while IPs may have expertise in insolvency, they will unlikely possess the knowledge, experience and skills needed for the successful management of a particular business. Additionally, due to the greater involvement of IPs and therefore the number of hours spent in the insolvency process, an IP model can increase the direct costs of insolvency proceedings.

[138] *Id*.
[139] *Id*.
[140] This model is more common, however, in certain hybrid procedures such as a scheme of arrangement.
[141] Gurrea-Martínez, REINVENTING INSOLVENCY LAW IN EMERGING ECONOMIES (n 2) 213.
[142] The IP model is required in the administration procedure existing in Australia, the United Kingdom and New Zealand, as well as in the judicial management procedure available in Singapore. In the scheme of arrangement existing in these jurisdictions, the governance model of the procedure is the DIP model. In the United Kingdom, companies using the standalone moratorium adopted in 2020 are subject to the supervision of a monitor. Therefore, companies embarking on a restructuring effort using the standalone moratorium would be subject to a DIP-SIP model. As such, it can be argued that the UK has adopted the three models for the governance of insolvency proceedings. The type of model depends on the type of insolvency or restructuring procedure potentially used, though. In other jurisdictions in the Global North, such as the United States, those three models can also coexist even under the same reorganization procedure. Indeed, even if the general rule in a Chapter 11 reorganization procedure is the DIP model, an examiner monitoring the debtor and a trustee replacing the debtor's management team can be appointed in exceptional cases. Therefore, depending on the circumstances, the US would also embrace a DIP model (general rule), a DIP-SIP model (if an examiner is exceptionally appointed) or an IP model (if a trustee is exceptionally appointed). For an overview of the governance model of insolvency proceedings around the world, see Gurrea-Martínez, REINVENTING INSOLVENCY LAW IN EMERGING ECONOMIES (n 2) 54-103, 213-225.

Therefore, the appointment of an IP replacing the debtor's management team only seems to be justified in limited cases. For example, it might be justified in liquidation procedures.[143] In those scenarios, the expertise of the management is generally not that relevant. Moreover, as the insolvent entity will no longer exist after selling the firm's assets, distributing the proceeds and dissolving the company, the directors may be tempted to divert assets towards related parties. Finally, many companies in insolvent liquidations require the investigation of the managers' conduct in the zone of insolvency. Therefore, all these factors may justify the appointment of an external IP in liquidation procedures.[144]

Another example where an IP can be justified, even in reorganization procedures, is in cases involving fraud or mismanagement.[145] Nonetheless, a situation of insolvency does not necessarily imply, or is the result of, those types of conducts. In fact, preserving the assumption only perpetuates the stigma of insolvency. Many companies often become insolvent for market conditions, or simply because they are no longer competitive in the marketplace. Even when companies become insolvent due to poor business or financial decisions, the managers have not generally committed fraud. Even if they have, the law could facilitate the replacement of the management team in those limited cases. Therefore, imposing an IP model in *every* procedure, as happens in the administration-style proceeding existing in many jurisdictions from the Global North such as the United Kingdom, Australia, Singapore and New Zealand, does not seem to be justified. In fact, as a response to such unattractive model for the governance of insolvency proceedings potentially leading to the reorganization of insolvent firms, the use of "light-touch" administration has become more popular in the United Kingdom.[146] Under that regime, the IP only acts as a monitor rather than an IP replacing the debtor's management team. This is a more

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[143] That helps explain why countries adopting a DIP model for the governance of reorganization procedures, such as the United States, embrace an IP model for the governance of liquidation procedures.
[144] Gurrea-Martínez, Reinventing Insolvency Law in Emerging Economies (n 2) 214-216.
[145] For that reason, it is not surprising that even the country that popularized the DIP model, such as the United States, can adopt an IP model or a DIP-SIP model in a formal reorganization procedure. See Bankruptcy Code, s 1104.
[146] This trend was popularized during the COVID-19 pandemic. See James Mead, *COVID-19: Light-Touch Administration – What Is It and How Does It Work?* (24 April 2022) (https://www.morganlewis.com/pubs/2020/04/covid-19-light-touch-administration-what-is-it-and-how-does-it-work-cv19-lf). In a light-touch administration, the administrators consent to the company's management continuing to exercise certain management powers. See Kate Stephenson, Kon Asimacopoulos and Zoe Stembridge, *Insolvency 2024: United Kingdom* (14 November 2024) (https://practiceguides.chambers.com/practice-guides/comparison/909/14696/23017-23018-23019-23020-23021-23022-23023-23024). Such light-touch approaches have also been observed in jurisdictions where, due to the lack of a formal reorganization procedure, companies often conduct a scheme of arrangement in provisional liquidation. These "light-tough provisional liquidations" have been used in jurisdictions such as Bermuda and the Cayman Islands. See, *e.g.,* Kyle Masters, *Bermuda's 'light touch' provisional liquidation regime* (18 July 2019) (https://www.careyolsen.com/insights/articles/bermudas-light-touch-provisional-liquidation-regime); Marc Kish and Gemma Bellfield, *Recent trends: provisional liquidation in the Cayman Islands* (3 July, 2021) (https://www.ogier.com/news-and-insights/insights/recent-trends-provisional-liquidation-in-the-cayman-islands).

desirable solution. However, that solution is not new in the international insolvency landscape. It implies embracing, to a certain extent, the DIP-SIP model that has been implemented in many jurisdictions in the Global South.[147]

For example, in the formal reorganization procedures existing in Brazil and Chile, the general rule for the governance of reorganization procedures is the DIP-SIP model. Therefore, the IP does not replace the debtor's management team as typically happens in many jurisdictions in the Global North, especially in the context of administration-style proceedings. In other jurisdictions in the Global South, such China and Thailand, the directors are often allowed to keep running the company in reorganization, sometimes under the supervision of an IP.[148] While any of those solutions from the Global South can provide valuable lessons for the Global North,[149] perhaps the most interesting solution for the governance of reorganization procedures can be found in Colombia.

In Colombia, an external IP is only appointed in reorganization procedures if it is requested by at least 30 percent of the company's (non-related) creditors or by the debtor itself, or if the Superintendence of Companies finds that the appointment of an external IP is justified given certain factors such as the size of the company, the number of creditors, the international component of the procedure, or the existence of accounting irregularities.[150] Therefore, instead of adopting a one-size-fits-all approach, the governance of reorganization procedures in Colombia can be tailored to the specific circumstances of the case. Moreover, unlike other regimes where the choice or change of the governance model of insolvency proceedings is decided by a court on a case-by-case basis, the Colombian regime clearly specifies the cases in which an IP can be appointed.[151] Additionally, it allows creditors to appoint an IP, which is also a desirable policy given that the decisions adopted in the insolvency process may ultimately affect the welfare of creditors.

[147] This solution is also observed in some jurisdictions in the Global North, such as Canada and Spain. In Canada, a monitor is appointed under the reorganization procedure established under the Companies' Creditors Arrangement Act. In Spain, an IP monitoring the debtor is also the general rule when a formal insolvency proceeding is initiated by the debtor.
[148] In China, see Enterprise Bankruptcy Law 2006, Art. 73. In Thailand, the managers of the company can perform some of the functions that would be otherwise assigned to an external administrator. See Jullamon, *Thailand* (n 6) 747.
[149] Not all jurisdictions in the Global North replace the debtor's management team with an external administration, though. See *supra* note 147 (mentioning how an IP supervising rather than replacing the debtor's management team exists in Canada and Spain).
[150] Law 1429 of 2010, Art. 35.
[151] The Superintendence of Companies still has some discretion for the appointment of IPs. Yet, the existence of a defined group of cases that justify the appointment of an external IP reduces such discretion.

By adopting a DIP model as a default rule, Colombia adopts a governance model of reorganization procedures that can make the procedure more appealing to managers while saving the costs associated with the mandatory appointment of an IP in every insolvency proceeding. Moreover, such model can reduce the stigma of insolvency by signaling that the managers have not necessarily done something wrong. Yet, the default rule can be changed in certain cases where the appointment of an IP can indeed be needed or desirable. That may occur in situations of fraud or mismanagement, or simply because the creditors do not trust the debtor's management team. In those cases, as well as in cases in which the complexity of the procedure may require the involvement of a third party acting as a monitor, the Colombia system facilitates the appointment of an external IP.

These experiences from the Global South, and particularly the innovative solution adopted in Colombia, can provide many valuable lessons for jurisdictions in the Global North. Namely, there are two important takeaways that can be particularly helpful for advances economies seeking to improve the attractiveness of their governance model of reorganization procedures. First, the replacement of the debtor's management team by an external IP is justified only in very limited cases. Therefore, jurisdictions in the Global North embracing an IP model in reorganization procedures may want to revisit the need to preserve this model as a general rule. Second, and perhaps more importantly, an external IP might not always be needed. Therefore, in the context of reorganization procedures, a more sensible approach may consist of adopting a DIP model with the possibility of appointing a monitor or even an administrator replacing the debtor's management team depending on the particular circumstances of the case.[152] Moreover, the creditors should always be allowed to change the default rule.[153]

4.4 Facilitating new financing in insolvency proceedings: Lessons from Brazil, Colombia, Malaysia and beyond

Viable but financially distressed firms need to obtain financing to keep operating and pursuing value-creating projects.[154] Unfortunately, when a company becomes insolvent, lenders are rationally reluctant to extend credit. To mitigate this problem, the United States pioneeringly adopted a system, known DIP financing, that seeks to encourage lenders to extend credit to

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[152] Gurrea-Martínez, REINVENTING INSOLVENCY LAW IN EMERGING ECONOMIES (n 2) 216.
[153] *Id*.
[154] Kenneth Ayotte and Aurelio Gurrea-Martínez, *The Promise and Perils of Debtor-in-Possession Financing: Lessons from the United States*, 21 (5) INTERNATIONAL CORPORATE RESCUE 309 (2024).

companies subject to a formal insolvency proceeding.[155] This is done by providing DIP lenders with different forms of priority that may include a new lien, a junior lien, a senior lien, an administrative expense priority, or an administrative expense priority to be paid ahead of other administrative expenses.[156] Thus, a bankruptcy procedure can end up serving as a liquidity provider for insolvent firms.[157]

Unfortunately, that is not the situation in most insolvency systems. Many countries around the world, including most jurisdictions in the Global North, still have a weak DIP financing system. Under such weak DIP financing regimes, observed in jurisdictions such as Australia, New Zealand, the United Kingdom, and most European countries,[158] new loans and expenses incurred during the procedure can obtain an administrative expense priority. However, apart from this basic priority, certain protections against future avoidance actions,[159] and sometimes the possibility of offering a security interest over the debtor's unencumbered assets (if any), most jurisdictions in the Global North do not have any other rules to facilitate new financing.

To create a more attractive system of DIP financing, the Global North can certainly learn from the first mover in this space – the United States. However, it can also learn from the experience and innovative approaches adopted in many jurisdictions in the Global South. For instance, in the Philippines, DIP lenders can obtain various forms of priority, including an administrative expense priority, a new lien and a junior lien.[160] In the Dominican Republic, DIP lenders can also obtain a senior lien if the affected secured creditor consents.[161] More recently, Brazil, Colombia and Malaysia have adopted more comprehensive systems of DIP financing. Under the new Brazilian regime, DIP lenders can get various forms of priority, including an administrative expense priority, a lien over unencumbered assets, a junior lien, and a "fiduciary lien" consisting of a temporary

155 *Id*.
156 *Id*.
157 See Kenneth Ayotte and David A. Skeel Jr., *Bankruptcy Law as a Liquidity Provider* (n 64).
158 It is often assumed that these jurisdictions do not have a system of DIP financing. However, in most of these jurisdictions, at least in the context of formal reorganization procedures (including administration-style proceedings), new debts and expenses can enjoy an administrative expense priority. Therefore, even if it is in a relatively weak form, those countries have some DIP financing provisions. For an analysis of the system of DIP financing existing in many countries around the world and classifying those DIP financing regimes as "strong", "semi-strong" or "weak", see Gurrea-Martínez, *Debtor-in-Possession Financing in Reorganization Procedures: Regulatory Models and Proposals for Reform* (n 63).
159 This latter mechanism has been mainly adopted in Europe.
160 Gurrea-Martínez, *Debtor-in-Possession Financing in Reorganization Procedures: Regulatory Models and Proposals for Reform* (n 63) 565-566.
161 *Id*.

transfer of property.[162] Colombia and Malaysia have gone even further by essentially replicating the system of DIP financing existing in the United States and Singapore, respectively.[163]

Importing laws and practices from jurisdictions with totally different market and institutional environments is generally a bad idea. And this also applies in the context of DIP financing. When considering a new system of DIP financing, it is important to bear in mind the overall effects of the DIP loan. An aspect often missed in this assessment is the fact that, by approving a DIP loan, the company's pre-existing creditors can end up worse off if the new financing does not create or preserve value. However, assessing this aspect is no easy task. It requires expertise in financial and commercial matters as well as experience handling complex insolvency cases. Moreover, the decision often needs to be made very quickly. In countries with efficient and sophisticated courts, such as the United States and Singapore, allowing judges to make those decisions can be justified.[164] However, many jurisdictions around the world do not have efficient, competent and well-equipped courts. Therefore, in those cases, a greater involvement of creditors in the approval of DIP financing can be a desirable policy.[165]

The experience of various jurisdictions in the Global South, and particularly Brazil, Colombia and Malaysia, can provide valuable examples for many jurisdictions in the Global North seeking to improve the attractiveness of their DIP financing regimes. Nonetheless, those regimes from the Global South fail to recognize the fact that judges might not be the most suitable actors to approve a DIP loan, especially in countries without efficient and experienced bankruptcy courts. Such institutional weaknesses, however, also exist in many jurisdictions in the Global North. For example, in many European countries, bankruptcy judges are not even required to have professional experience before becoming judges. Even if some judges have professional experience, they might not have a strong background in finance. Therefore, they might not be well-positioned to make complex financial decisions such as the approval of a DIP loan.

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[162] *Id*.

[163] In Colombia, see Law 2437 of 2024, Art. 4. In Malaysia, see Companies Act, 368B. Despite the similarities between the system of DIP financing existing in the United States and Singapore, there are also some divergences. See Gurrea-Martínez, *Debtor-in-Possession Financing in Reorganization Procedures: Regulatory Models and Proposals for Reform* (n 63) 567-571.

[164] Even in these cases, allowing creditors to veto the approval of DIP financing can be considered a desirable policy. See Gurrea-Martínez, *Debtor-in-Possession Financing in Reorganization Procedures: Regulatory Models and Proposals for Reform* (n 63) 575-577.

[165] See Ayotte and Gurrea-Martínez, *The Promise and Perils of Debtor-in-Possession Financing: Lessons from the United States* (n 154).

As a result, while many jurisdictions in the Global North may be tempted to adopt the system of DIP financing pioneeringly adopted in the United States, they should be prevented from doing so unless they have a similar judiciary. In the absence of efficient, experienced and well-equipped courts, jurisdictions in the Global North should ideally combine the US DIP financing regime (especially for the types of priorities potentially offered to DIP lenders) with some of the innovative solutions for the approval of DIP loans observed in the Global South. For example, in India, DIP loans are approved by the committee of creditors.[166] In Chile, DIP loans exceeding 20% of the debtor's assets need to be approved by the creditors.[167] In Dominican Republic, creditors can veto the judicial approval of new financing.[168] While the adoption of DIP financing provisions can be an innovation imported from the Global North, those creditor-led solutions for the approval of DIP financing are really 'autochthonous innovations' from the Global South.

Once again, the Global South can provide many valuable lessons to the Global North. In fact, some of those innovative approaches empowering creditors in the approval of DIP loans can even inspire the leader in this space – the United States – when tackling the problems associated with the increasing power of DIP lenders.[169] Indeed, having a sophisticated and well-equipped court to quickly decide whether a DIP loan should be approved has many advantages, especially in terms of speed and lower asymmetries of information and coordination costs. However, it should be kept in mind that the company's pre-existing creditors ultimately bear the costs associated with the approval of a DIP loan that may contain relatively abusive terms, such as those observed in many DIP loans in the United States.[170] Therefore, even in countries with sophisticated insolvency judges such the United States and Singapore, solutions such as the one existing in the Dominican Republic are worth exploring. Thus, debtors and creditors could benefit from having a competent and efficient court deciding whether a DIP loan should be approved. Yet, creditors (or certain creditors) should be allowed to veto the decision adopted by the court if they believe that the new financing will not lead to the creation or preservation of value.[171]

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[166] *Id*.
[167] *Id*.
[168] *Id*.
[169] Ayotte and Ellias, *Bankruptcy Process for Sale* (n 65); Ayotte and Huang, *Standardizing and Unbundling the Sub Rosa DIP Loan* (n 65).
[170] See, *e.g.,* Ayotte and Huang, *Standardizing and Unbundling the Sub Rosa DIP Loan* (n 66).
[171] See Ayotte and Gurrea-Martínez, *The Promise and Perils of Debtor-in-Possession Financing: Lessons from the United States* (n 154).

4.5 Embracing technology in insolvency proceedings: Lessons from Colombia, India and China

While the costs and delays of insolvency proceedings are generally problems emphasized in the Global South, these challenges of insolvency law can be also found, to a greater or lesser extent, in the Global North. Unlike many jurisdictions in the Global North, however, many countries in the Global South have taken significant steps to mitigate those problems by, for example, embracing technology-enabled solutions that can significantly reduce the length and costs of insolvency proceedings while promoting the efficient allocation of the debtor's assets.

One of those technology-enabled solutions has been implemented for the purpose of facilitating the initiation of insolvency proceedings. As has been mentioned, one way to deal with this problem may consist of allowing the automatic initiation of the procedure upon the filing by the debtor, as happens in the United States. Nonetheless, many jurisdictions embrace a system that requires an ex ante assessment of the petition before a company can formally obtain the bankruptcy protection. Even if countries are reluctant to abandon such system of ex ante control, there are ways to reduce the costs and delays associated with the initiation of the procedure. In that context, technology can be a powerful ally, as shown by the successful experience of Colombia.

In Colombia, the entity in charge of managing insolvency proceedings – the Superintendence of Companies – decided to adopt an electronic platform empowered by AI that facilitates the automated submission and preliminary assessment of insolvency petitions submitted by the debtor.[172] Under the so-called Insolvency Module or "MI" (for its acronym in Spanish), the AI-powered system adopted in Colombia allows the authentication of user through biometric tools and facilitates the electronic submission of documents.[173] Once submissions are made through the system, the submissions are reviewed by an AI that ultimately decides whether the information is complete and whether the petition should be accepted.[174] If the system determines that the information submitted is incomplete, it can also generate drafts to request further information that can then be verified and signed by judges before they are sent out to the parties.[175]

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[172] Nicolas Polania, *Colombia is Using AI to Improve Insolvency Proceedings* (2022) (available at https://www.lexology.com/library/detail.aspx?g=833800ef-65d9-42e0-89ab-d4436d0468d8)
[173] *Id*.
[174] Akshaya Kamalnath, *The Future of Corporate Insolvency Law: A Review of Technology and AI-powered Changes* 33(1) INTERNATIONAL INSOLVENCY REVIEW 40, 46-48 (2024).
[175] *Id*.

In 2021, the average time taken for the assessment and admission of an insolvency petition in Colombia was 5 months.[176] After the implementation of this innovative AI-powered system, that period was reduced to 10 days or 45 days, depending on whether the information submitted by the debtor was complete or not.[177] Therefore, the Colombian experience with MI clearly shows how technology can reduce the time associated with the initiation of insolvency proceedings, at least in countries where debtors cannot immediately initiate the procedure upon the filing.[178]

Yet, there are other ways in which technology can contribute to the efficiency of insolvency proceedings. For instance, technology can be used to facilitate the sale of assets through an electronic auction platform. If an auction is conducted through a public, transparent and international platform, it may expand the number of potential bidders interested in the company's assets and therefore increase the price obtained for those assets.[179] Thus, it can ultimately increase the proceeds generated by the sale of assets and therefore the returns received by creditors.[180] Interestingly, many of the countries that have embraced such electronic systems of auctions for the sale of assets are jurisdictions in the Global South.

For example, in China, unless the creditors' meeting decides otherwise, the debtor's property shall be sold off by means of a network auction.[181] In India, the use of auctions for the sale of assets was already recognized since 2016.[182] More recently, the Insolvency and Bankruptcy Board of India ("IBBI") launched a centralized e-auction site: eBKray.[183] Under that system, IPs need to list all assets of companies undergoing liquidation on the centralized listing platform.[184] This centralized platform offers detailed information about the debtor's assets.[185] Starting in April 2025, all IPs handling liquidation processes have been directed to exclusively use the eBKray auction platform for conducting auctions for the sale of assets.[186]

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[176] Aurelio Gurrea-Martínez, Susana Hidvegi-Arango, and Paúl Noboa-Velasco, *El impacto de las nuevas tecnologías en el Derecho concursal* in Aurelio Gurrea-Martínez and Adolfo Rouillon (eds), *Derecho de la insolvencia: Un enfoque comparado y funcional* (Bosch 2022) 392.
[177] *Id*.
[178] Gurrea-Martínez, *The Digitalization of Insolvency Proceedings* (n 47).
[179] *Id*.
[180] *Id*.
[181] *Id*.
[182] *Id*.
[183] *Id*.
[184] *Id*.
[185] *Id*.
[186] *Id*.

Reducing the costs and length of insolvency proceedings is a desirable goal in any jurisdiction, including those in the Global North. To achieve that goal, technology can become a powerful ally. Therefore, given that many jurisdictions in the Global South have been pioneers in the implementation of technology in insolvency proceedings, the experience of these jurisdictions can again provide many valuable lessons for the Global North.

4.6 Empowering creditors in insolvency proceedings: Lessons from India and Latin America

Any relevant decision made during an insolvency process may affect the recoveries ultimately received by creditors. Despite this situation, the role of creditors is generally limited in insolvency proceedings. In many jurisdictions, the primary role of creditors is simply deciding whether a reorganization plan should be approved. Some countries go beyond and allow creditors to have a more active role in insolvency proceedings, for example, by allowing them to be part of a committee of creditors with monitoring functions, or by playing a more decisive role in the appointment and removal of IPs. Not many jurisdictions, however, grant greater powers to creditors. Interestingly, those jurisdictions that have given additional powers to creditors in insolvency proceedings are found in the Global South.

The most remarkable example is India. As a response to the delays, destruction of value and reorganization bias that resulted from the insolvency regime existing prior to the enactment of the Insolvency and Bankruptcy Code of 2016 ("IBC"), India adopted an insolvency process that, while it is mainly managed by an IP, is ultimately controlled by a committee of creditors formed by financial creditors.[187] This committee of creditors is in charge of making most of the relevant decisions during the insolvency process, including the ratification or removal of the IP initially appointed to manage the insolvency process,[188] the approval of new financing,[189] and the approval of a reorganization plan.[190] Moreover, even though certain decisions are made by the courts, Indian courts have generally relied on the "commercial wisdom" of the committee of

[187] For an analysis of the Indian journey in insolvency and how it can provide various lessons for other jurisdictions in the Global South, see Amol Baxi, *India's Experience in Insolvency Laws: Learnings for the Global South*, RIS Discussion Paper Series, Discussion Paper # 294 (2024) (available at https://www.ris.org.in/sites/default/files/Publication/DP%20294_Amol%20Baxi.pdf).
[188] Insolvency and Bankruptcy Code *2016,* s 22.
[189] *Id*. at s 25I.
[190] *Id*. at s 30(4).

creditors.[191] Therefore, it can be argued that India has adopted an IP-led but creditor-in-control insolvency process.

Other insolvency regimes where creditors play a significant role in insolvency proceedings or at least in certain aspects of the procedure can be found in the Global South and particularly in Latin America. For instance, in Chile, even if a reorganization procedure is initiated by the debtor, the IP appointed to monitor the debtor is selected from a list of candidates suggested by the debtor's major creditors.[192] Moreover, DIP loans exceeding 20% of the debtor's assets need to be approved by the creditors.[193] In the Dominican Republic, creditors can veto the approval of new financing.[194] In Mexico, creditors can replace IPs.[195] Moreover, a percentage of the company's creditors is entitled to initiate avoidance actions.[196] In Uruguay, a majority of the company's unsecured creditors can terminate the reorganization procedure at any time, leading to the automatic initiation of a liquidation procedure.[197] In Peru, creditors decide whether they want to keep or replace the directors in formal reorganization procedures.[198] They also replace the shareholders' meeting in all its functions, including the approval of mergers, fundamental changes and the debtor's financial statements.[199] Moreover, the viability of the company is decided by the creditors.[200]

There are powerful reasons to avoid the involvement of creditors in every aspect of an insolvency proceeding. Among others, coordination costs, asymmetries of information and the rationally apathetic behaviour of many creditors may justify the centralization of the decision-making process in the hands of another actor (e.g., debtor or IP) or a combination of actors (e.g., debtor, IP, courts, committee of creditors) depending on the type of decision.[201] Nonetheless, many of

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[191] See, e.g., *K. Sashidhar v. Indian Overseas Bank* (2019); *Ashish Saraf v. Bhuvan Madan* (2021); *Vallal RCK v M/s Siva Industries & Anr* (2022). See also Insolvency and Bankruptcy Board of India, Guidelines for Committee of Creditors (available at https://ibbi.gov.in/uploads/legalframwork/db3d7327523500331bd793bed7835ff2.pdf (emphasizing the that under the IBC, the commercial wisdom of the committee of creditors drives the procedures to attain the objective of value maximization of the distressed assets).
[192] Insolvency Act 2014 (Law No. 20720), Art. 22.
[193] *Id*. at Art 74.
[194] Law 114-15 on Restructuring and Liquidation of Companies of 2015, Art 87.
[195] Commercial Bankruptcy Law (*Ley de Concursos Mercantiles*), Art 147.
[196] *Id*. at Art 112.
[197] 2008 Insolvency Act (Law 18387), s 168(5).
[198] 2002 Insolvency Act, Art 61.
[199] *Id*. at Art 63.
[200] *Id*. at Preliminary Title, Article III.
[201] Something similar occurs in the context of solvent corporations: the shareholders do not generally decide the day-to-day business affairs of a corporation and such approach would not be desirable. See, *e.g.,* Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NORTHWESTERN UNIVERSITY LAW REVIEW 547 (2003).

those costs and problems can be reduced if, for example, technology is used to facilitate communication and voting,[202] or if the decisions are made by a committee of creditors.[203] Hence, the traditional arguments justifying the lack of creditor involvement in insolvency proceedings are not entirely convincing, at least in the context of key decisions that affect the fate of the procedure and therefore the returns ultimately received by creditors.

Another argument that can be mentioned to empower debtors, courts and IPs at the expense of creditors is that the latter may have less knowledge and experience in insolvency proceedings. However, that certainly depends on the type of creditors. Many creditors (particularly financial creditors) will probably have more information, experience, and resources than many IPs and courts. For that reason, countries like India heavily relies on the commercial wisdom of the committee of creditors, which is mainly formed by financial creditors. Moreover, creditors have something that debtors, courts and IPs may not have, or at least not that significantly: skin in the game. Therefore, given that the welfare of creditors will be affected by the decisions made in the insolvency process, creditors will be incentivized to reduce any asymmetries of information and collective actions problems that could potentially hamper a value-maximizing decision. And these are problems that can also be reduced with the use of technology and the delegation of the creditors' decision to a committee of creditors.

As a result, there are no compelling reasons for keeping creditors relatively powerless in insolvency proceedings, at least when it comes to key decisions in the insolvency process such as the sale of essential assets, the approval of DIP financing, the appointment and removal of IPs, and the ability to terminate a reorganization procedure, apart from the approval of a reorganization plan – which is the only aspect of the procedure where creditors have been traditionally involved in many countries. In some cases, and particularly in jurisdictions without competent and efficient courts and IPs, the empowerment of creditors can consist of directly allowing the company's pre-existing creditors to make the decision without the involvement of other parties. In other circumstances, such empowerment can consist of allowing creditors to veto the decision potentially made by debtors, IPs or courts. Regardless of the approach, creditors should be entitled to more than just information and voice in key decisions of the insolvency process. In the process of empowering creditors in insolvency proceedings, the Global North can again learn many valuable lessons from the Global South.

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[202] Gurrea-Martínez, REINVENTING INSOLVENCY LAW IN EMERGING ECONOMIES (n 2) 246.
[203] *Id*.

4.7 Favoring cooperation in cross-border insolvency: Lessons from India and China

Facilitating cooperation in cross-border insolvency is key to promote the preservation value for the benefit of debtors, creditors and society at large. Moreover, it can be an important driver of cross-border investments and the growth of multinational firms.[204] One way to facilitate such cooperation in cross-border insolvency is adopting the MLCBI enacted by UNCITRAL. Interestingly, some jurisdictions from the Global South, including two of the world's largest economies, China and India, have not adopted the MLCBI. Yet, they have used other mechanisms to promote cooperation in cross-border insolvency. In the case of India, this cooperation is assessed on a case-by-case basis, sometimes facilitated by the use of cross-border insolvency protocols.[205] In Mainland China, such cooperation in cross-border insolvency cases is also assessed on a case-by-case basis.[206] Nonetheless, given that many Chinese companies conduct a debt restructuring in Hong Kong and many companies with an economic interest in China are often listed or incorporated in Hong Kong, Mainland China and Hong Kong decided to reach a bilateral agreement to facilitate cooperation in cross-border insolvency cases.[207]

Therefore, jurisdictions in the Global South have shown that there are alternative mechanisms to facilitate cooperation in cross-border insolvency. Some of these mechanisms, such as the use of cross-border insolvency protocols, are certainly common in countries like the United States and Canada.[208] Yet, they remain underutilized in many other jurisdictions from the Global North. The use of bilateral agreements, however, has been a tool mainly used in jurisdictions in the Global

[204] Yeejin Jang, Jenny Jihyun Tak and Wei Wang, *Global Insolvency and Cross-border Capital Flows*, UNSW BUSINESS SCHOOL RESEARCH PAPER (2024) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4936763).

[205] Gausia Shaikh, *The Jet Airways' Cross Border Insolvency Protocol: A Success Story* (SINGAPORE MANAGEMENT UNIVERSITY CENTRE FOR COMMERCIAL LAW IN ASIA, 26 January 2021) (available at https://ccla.smu.edu.sg/sgri/blog/2021/01/26/jet-airways-cross-border-insolvency-protocol-success-story).

[206] For an analysis of the general principles followed for the recognition of foreign insolvency proceedings and foreign insolvency orders in China, see *e.g.,* Shuai Guo and Jieche Su, CHINESE CROSS-BORDER INSOLVENCY LAWS: RECENT DEVELOPMENTS AND INTERNATIONAL IMPLICATIONS, 32(1) *International Insolvency Review* 41 (2023); Joel Chng, Shi Mei Chia and Kai Sheng Kwong, *Obtaining Recognition of Foreign Insolvency Orders in the People's Republic of China*, 11 SINGAPORE ACADEMY OF LAW JOURNAL 1 (2024).

[207] Shuai Guo and Bob Wessels, *Cross-Border Insolvency between Mainland China and Hong Kong: A First Glance from a Global Perspective*, 18(4) INTERNATIONAL CORPORATE RESCUE 247 (2021); Jingxia Shi, *Cross-Border Insolvency Cooperation Between Mainland China and Hong Kong SAR: The 2021 Arrangement and Its Improvement*, 19(3) UNIVERSITY OF PENNSYLVANIA ASIAN LAW REVIEW 372 (2024).

[208] For a database of cross-border insolvency protocols, see International Insolvency Institute, *III: Insolvency Protocols* (available at https://www.iiiglobal.org/initiatives/iii-insolvency-protocols/). For a comprehensive analysis of insolvency protocols as a mechanism to facilitate cooperation in cross-border insolvency cases, see Ilya Kokorin and Bob Wessels, CROSS-BORDER PROTOCOLS IN INSOLVENCIES OF MULTINATIONAL ENTERPRISE GROUPS (Edward Elgar, 2021).

South, sometimes to facilitate cooperation with a neighboring jurisdiction from the Global North.[209] Any of these potential solutions can contribute to foster cooperation in cross-border insolvency in the Global North, especially among jurisdictions that have not adopted the MLCBI.

4.8 Improving the insolvency framework for micro and small enterprises: Lessons from Myanmar, Chile and Colombia

Most countries around the world still have a one-size-fits-all insolvency process, that is, an insolvency proceeding that applies equally to both large companies and small businesses. The need to adopt simplified insolvency proceedings for micro and small enterprises ("MSEs") became a priority for regulators and policymakers relatively recently, and it was accelerated by the COVD-19 pandemic.[210] While various jurisdictions from the Global North were pioneers in the adoption of simplified insolvency proceedings for MSEs,[211] several jurisdictions in the Global South were also some of the first movers in this space. For example, Myanmar adopted a comprehensive insolvency regime for micro, small and medium-sized enterprises in 2020.[212] Other jurisdictions from the Global South that have been early adopters of simplified insolvency frameworks for MSEs include Colombia, Thailand, India and Chile.

The simplified insolvency frameworks for MSEs adopted in several jurisdictions from the Global South can provide many valuable lessons for the Global North. For example, in Myanmar, the simplified insolvency framework for MSEs focuses on business debts rather than debts of small companies.[213] Therefore, it allows the initiation of the procedure by any type of small business, whether it is incorporated or not.[214] Given that MSEs in most countries around the world (including the Global North) often operate as sole proprietorships, [215] the approach adopted in Myanmar can

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[209] For example, in Mainland China, it was used to facilitate cooperation with Hong Kong. See *supra* note 207. In Malaysia, it has been used to facilitate cooperation with Singapore. See Shih Lee and Ashok Kumar, *Cross-Border Restructuring and Insolvency Between Singapore and Malaysia*, 3 SINGAPORE ACADEMY OF LAW PRACTITIONER 1 (2024).
[210] Gurrea-Martínez, REINVENTING INSOLVENCY LAW IN EMERGING ECONOMIES (n 2) 181.
[211] Those jurisdictions include South Korea, Japan, the United States. As a response to the pandemic, other jurisdictions in the Global North that quickly adopted simplified insolvency regimes for MSEs included Australia and Singapore. See Aurelio Gurrea-Martínez, GUIDE ON THE TREATMENT OF INSOLVENT MICRO AND SMALL ENTERPRISES IN ASIA (International Insolvency Institute and Asian Business Law Institute, 2022) 11-13.
[212] For an analysis of the insolvency framework existing in Myanmar, including the new regime for micro, small and medium-sized enterprises, see Scott Atkins, *Myanmar,* in CORPORATE RESTRUCTURING AND INSOLVENCY IN ASIA (Asian Business Law Institute 2020) 489-532.
[213] *Id*. at 522-523.
[214] *Id.*
[215] For instance, in India, 94.5% of MSEs operate as sole proprietors. See International Finance Corporation, *Micro, Small and Medium Enterprise Finance in India: A Research Study on Needs, Gaps and Way Forward* (2021) pp. 20-33 (available at https://openknowledge.worldbank.org/handle/10986/26553).

serve as an inspiration for countries seeking to provide a simplified insolvency framework for all types of small businesses.

In Chile and Colombia, MSEs have access to both simplified reorganization procedures and simplified liquidation procedures. By contrast, in some jurisdictions in the Global North, such as the United States, small businesses only have access to a simplified reorganization procedure.[216] When designing simplified regimes for MSEs, it should be kept in mind that MSEs do not often have a significant going concern surplus that may need to be preserved.[217] Therefore, many MSEs should simply be liquidated. As a result, a simplified procedure for the liquidation of insolvent MSEs is probably more important than a simplified reorganization procedure. Once again, the Global North can learn some valuable lessons from the Global South.

4.9 Reducing the stigma of insolvency proceedings: Lessons from Chile

The stigma of insolvency is a problem that, to a greater or lesser extent, exist in most (if not all) jurisdictions. One of the factors that explain the stigma of insolvency is the treatment that insolvent debtors have historically received under different laws. For example, under Roman law, insolvent debtors could be sentenced to death or to be sold as slaves.[218] In the Middle East in Italy, debtors were subject to a variety of shaming practices.[219] In fact, the word "bankruptcy" itself derives from the Latin expression '*banca rupta'* (broken bench) that was used to refer to the act of kicking insolvent merchants out of the marketplace.[220] Therefore, the *law* has historically stigmatized debtors.[221]

Countries seeking to tackle the stigma of insolvency need to embark on a comprehensive strategy that should comprise several pillars. The first pillar to reduce the stigma of insolvency consists of improving the attractiveness of the restructuring framework. Some studies have shown how insolvency proceedings are less stigmatized in countries like France and the United States.[222] However, this is not surprising given that both jurisdictions have very debtor-friendly insolvency

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[216] See US Bankruptcy Code, Chapter 11, Subchapter V, created by the Small Business Reorganization Act of 2019.
[217] Douglas G. Baird and Edward R. Morrison, *Series Entrepreneurs and Small Business Bankruptcies*, 105 COLUMBIA LAW REVIEW 2310, 2341 (2020).
[218] William W. Buckland, A TEXTBOOK OF ROMAN LAW: FROM AUGUSTUS TO JUSTINIAN (Cambridge University Press, 3rd Edition, 1963) 618–620.
[219] Umberto Santarelli, PER LA STORIA FALLIMENTO NELLE LEGISLAZIONE ITALIANE DELL'ETÀ INTERMEDIA (Cedam 1964).
[220] Gurrea-Martínez, REINVENTING INSOLVENCY LAW IN EMERGING ECONOMIES (n 2) 286-287.
[221] *Id*.
[222] Ghio and Thomson, *Is insolvency stigmatised?* (n 55).

regimes.[223] The adoption of an attractive restructuring framework for debtors, however, does not mean that the insolvency regime needs to be unattractive to creditors. Such debtor-friendly and creditor-unfriendly regime is certainty observed in some jurisdictions, such as France.[224] However, the experience of the United States, and more recently Singapore and the United Kingdom, show that countries can design a restructuring system that can be attractive to both debtors and creditors.[225]

In the Global South, some jurisdictions have also managed to implement insolvency regimes that are attractive to debtors and creditors.[226] Perhaps the clearest example is Chile. In 2014, Chile implemented a major insolvency reform that led to the abolition of its single-entry, liquidation-oriented bankruptcy process.[227] Instead, it adopted a regime that distinguishes between individuals and companies, and between reorganization and liquidation. Thus, companies have access to various insolvency proceedings (reorganization, extrajudicial reorganization, voluntary liquidation, and compulsory liquidation), and individuals are also provided with various options to deal with financial distress (renegotiation, voluntary liquidation and compulsory liquidation).[228] Then, the Chilean Insolvency Act was modified in 2023 with the purpose of adopting a simplified insolvency regime for MSEs and introducing various amendments to the ordinary insolvency framework.[229]

Under the reorganization procedure regulated in the 2014 Chilean Insolvency Act, the debtor remains in possession under the supervision of an IP. Therefore, unlike what is observed in many

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[223] Aurelio Gurrea-Martínez, *The Myth of Debtor-Friendly or Creditor-Friendly Insolvency Systems: Evidence from a New Global Insolvency Index*, SINGAPORE MANAGEMENT UNIVERSITY YONG PUNG HOW SCHOOL OF LAW RESEARCH PAPER 4/2023 (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4557414).
[224] *Id*.
[225] *Id*. See also Aurelio Gurrea-Martínez, *Building a Restructuring Hub: Lessons from Singapore,* SINGAPORE MANAGEMENT UNIVERSITY SCHOOL OF LAW RESEARCH PAPER 16/2021 (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3940512).
[226] Analyzing the attractiveness of reorganization procedures from the perspective of debtors, secured creditors and general unsecured creditors in many jurisdictions around the world, see Gurrea-Martínez, *The Myth of Debtor-Friendly or Creditor-Friendly Insolvency Systems: Evidence from a New Global Insolvency Index* (n 223).
[227] In 2005, Chile introduced an insolvency reform that sought to favor the reorganization of companies. However, due to the limitations of that reform, companies did not have many chances to be reorganized. See Pedro A. Jimenez, Rodolfo Pittaluga Jr. and Pablo Herrera, *Nueva Ley de Quiebras en Chile: Reestructurada para la Reestructuración Corporativa* (INSOL International Special Report 2014) 1-6.
[228] For an overview of the primary features of the insolvency regime introduced in Chile in 2014, see Juan Luis Goldenberg, *La reforma de la legislación concursal chilena*, INSTITUTO IBEROAMERICANO DE DERECHO Y FINANZAS NOTA INFORMATIVA 1/2015 (available at https://derechoyfinanzas.org/wp-content/uploads/2016/02/Nota-informativa-1.2015.-La-reforma-concursal-chilena.-Juan-Luis-Goldenberg.pdf); Nicolás Jofré Caro and Diego Rodríguez Gutiérrez, *Ley Nº 20.720 Sobre Reorganización y Liquidación de Activos de Empresas y Personas* (Academia Judicial de Chile, 2021)
[229] For an analysis of the reforms introduced in 2023, see Ricardo Reveco, *Nueva Ley de Insolvencia y Reorganización Judicial*, 85 REVISTA DEL ABOGADO 13 (2023).

jurisdictions in the Global North, especially in the context of administration-style proceedings, Chile has adopted a DIP-SIP model. Additionally, debtors are provided with several tools and protections that seek to favor the effective reorganization of companies, such as a moratorium and the possibility of obtaining new financing. Therefore, the procedure includes various debtor-friendly provisions. Yet, it is also a very creditor-friendly procedure. To start with, the process is subject to stringent statutory timelines that minimize the opportunistic use of the moratorium. Moreover, creditors play an active role in the insolvency process. From influencing the appointment of the IP to deciding whether a reorganization plan, an extension of the moratorium or certain major transactions (such as a sale of assets or a DIP loan exceeding 20% of the company's assets) should be approved, the insolvency process heavily relies on the involvement and commercial wisdom of creditors. Therefore, it could be argued that, to a certain extent, Chile has adopted a debtor-driven but creditor-in-control insolvency process.

One of the reasons for the stigma and bad reputation of insolvency proceedings is the unattractiveness of insolvency proceedings for debtors, creditors, or both.[230] From the perspective of creditors, insolvency proceedings do not often deliver their expected outcome – that is, maximizing their recoveries. Moreover, many insolvency systems reflect a reorganization bias that, combined with the lack of power of creditors in insolvency proceedings, usually lead to the opportunism of debtors vis-à-vis creditors. For debtors, insolvency proceedings in many countries are not typically very appealing either: apart from not contributing to the effective reorganization of viable but financially distressed firms, insolvency proceedings are generally costly and lengthy processes and corporate directors can be subject to a liability regime that might not exist outside of bankruptcy. Additionally, in many jurisdictions, honest but unfortunate individual debtors do not have access to a discharge of debts. In such unattractive scenarios for debtors and creditors, the stigma and bad reputation of insolvency proceedings is probably well deserved. As a result, improving the attractiveness of insolvency proceedings is the first step to effectively tackle the stigma of insolvency.

The second pillar requires reviewing and getting rid of any laws or regulations that may stigmatize a situation of insolvency. For example, in some countries, such as Ecuador, insolvent debtors are not eligible for a position in the public sector.[231] In other jurisdictions, including various jurisdictions from the Global North such as Australia and Singapore, insolvent debtors are not allowed to leave

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[230] Gurrea-Martínez, REINVENTING INSOLVENCY LAW IN EMERGING ECONOMIES (n 2) 205, 285-288.
[231] See Public Service Act (*Ley Orgánica del Servicio Público*), Art. 5(b).

the country without obtaining prior consent from the court or the relevant authority managing the process.[232] If the law penalizes insolvent debtors even in the absence of fraud or misbehavior, such law will be contributing to perpetuate the stigma of insolvency.

Additionally, in many countries around the world, including several jurisdictions from the Global North such as the United Kingdom, Australia, Spain and Singapore, the directors of insolvent firms are subject to certain sanctions and levels of scrutiny that do not exist for the directors of companies that do not initiate a formal insolvency process.[233] For example, the liability for wrongful trading existing in the United Kingdom and Singapore can only be imposed in the context of formal insolvency proceedings.[234] The tough liability regime for corporate directors existing in Australia only applies in liquidation. Similarly, Spanish insolvency law imposes a tough liability regime for corporate directors that commit various forms of misbehavior. Interestingly, many of the conducts that lead to such liability regime are not punished if a debtor never ends up in a formal insolvency proceeding.[235] Therefore, getting rid of that "insolvency bias" for the punishment of wrongdoers is also an essential pillar for countries seeking to tackle the stigma of insolvency. That bias also exists in countries that have taken significant steps to reduce the stigma of insolvency such as Chile. In Chile, however, some of the sanctions traditionally imposed to insolvent debtors have been removed from the insolvency legislation and are currently regulated in the Penal Code.[236] Therefore, that strategy can also be considered a positive step to reduce the stigma of insolvency. Still, the most desirable approach would consist of punishing fraud, and more generally any type of misconduct, regardless of whether a company ends up in a formal insolvency proceeding.

The third pillar consists of introducing certain terms and policies that can contribute to reducing the stigma of insolvency such as the use of the term "debtor" instead of "bankrupt".[237] Unfortunately, many countries around the world, including many jurisdictions in the Global North, such as Australia, the United Kingdom and Singapore, still use the term "bankrupt". That pejorative term to refer to insolvent debtors has been abolished in many jurisdictions in the Global

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[232] In Australia, such approval needs to be granted by the Official Trustee. In Singapore, it is granted by the Official Assignee.

[233] Gurrea-Martínez, REINVENTING INSOLVENCY LAW IN EMERGING ECONOMIES (n 2) 285-288.

[234] In the United Kingdom, the liability for wrongful trading can only be imposed in administration and liquidation. In Singapore, it can be imposed in judicial management and liquidation.

[235] See Aurelio Gurrea-Martínez, *Hacia la supresión de la calificación del concurso*, 28 REVISTA DE DERECHO CONCURSAL Y PARACONCURSAL 107 (2018).

[236] See Penal Code, Book II, section VII.

[237] Gurrea-Martínez, REINVENTING INSOLVENCY LAW IN EMERGING ECONOMIES (n 2) 205-206.

South, such as Colombia, Chile and Uruguay. Chile went even further and, in the package of reforms adopted in 2014, also changed the name of the institution in charge of overseeing insolvency proceedings in Chile. Thus, the "Superintendence of Bankruptcy" became the "Superintendence of Insolvency and Reentrepreneurship".[238] By choosing a name that indirectly implies that a debtor simply transitions from an entrepreneurial activity to another, such strategy not only reduces the stigma of insolvency but it also emphasizes what an insolvency proceeding ultimately does from an ex post perspective: contributing to the competitiveness of the economy by facilitating the efficient reallocation of resources in the economy.

Finally, reducing the stigma of insolvency proceedings requires the promotion of education and awareness in insolvency.[239] These educational efforts may range from information disseminated by public authorities to training programmes targeting entrepreneurs, directors, and other stakeholders.[240] Additionally, it is important to change the way insolvency law has been traditionally taught and understood.[241] In many countries (and for many scholars), insolvency law still seems to be area exclusively dealing with insolvent firms.[242] That view of insolvency law, however, ignores the fact that the design of insolvency law affects the behaviour of debtors and creditors *even* in the absence of financial distress.[243] In other words, even if borrowers do not eventually become insolvent, the insolvency system will affect how debtors and creditors make decisions.[244] Therefore, apart from performing other valuable economic functions from an ex post perspective, insolvency law may affect the levels of entrepreneurship, innovation, and access to finance in a country.[245] As a result, changing the way insolvency law is taught and understood can be another important strategy to reduce the stigma of insolvency.[246]

Many of these efforts and strategies to promote education and awareness in insolvency can again be observed in Chile through a variety of initiatives promoted by the Superintendence of Insolvency and Reentrepeneurship, such as collaboration with universities,[247] engagement in

[238] *Id*.
[239] *Id.*
[240] *Id.*
[241] *Id.*
[242] *Id.*
[243] *Id.* at 3-4.
[244] *Id.*
[245] *Id.*
[246] *Id.* at 205-206.
[247] Some of these collaborations seek to promote education and awareness in insolvency. See, *e.g., Superintendencia de Insolvencia y Universidad Diego Portales firmaron convenio de colaboración* (available at https://www.superir.gob.cl/superintendencia-de-insolvencia-y-universidad-diego-portales-firmaron-convenio-de-colaboracion/). In other cases, those collaborations seek to provide pro-bono advice on insolvency-related matters to

academic and research activities,[248] and a close interaction with stakeholders and the general public.[249] Additionally, the website of the Superintendence of Insolvency and Reentrepreneurship provides very valuable information about the primary features of each insolvency process available to both individuals and companies.[250] Therefore, it serves as an additional mechanism to facilitate information and awareness in insolvency.

Due to its comprehensive strategy to tackle the stigma of insolvency, it is not surprising that the number of insolvency proceedings in Chile has increased exponentially in the past decade. Prior to the 2014 Insolvency Act, Chile had a number of insolvency proceedings that usually ranged between 55 procedures in 1992 to 209 procedures in 2004.[251] In 2013, that is, the year before the enactment of the current insolvency legislation, the number of insolvency proceedings was 135.[252] After the 2014 insolvency reform, Chile registered 351 insolvency proceedings for companies in 2015, and this figure increased to 722 insolvency proceedings in 2024.[253] For individuals, the number of insolvency proceedings increased from 1176 proceedings in 2015 to 6672 insolvency proceedings registered in 2024.[254] Moreover, it should be noted that the new insolvency regime abolished the duty to file for bankruptcy traditionally existing in Chile.[255] Therefore, initiating an

individuals and MSEs. See *Convenio entre Universidad de Antofagasta y Superintendencia de Insolvencia beneficiará a personas naturales y pequeños empresarios* (available at https://www.uantof.cl/prensa/convenio-entre-universidad-de-antofagasta-y-superintendencia-de-insolvencia-beneficiara-a-personas-naturales-y-pequenos-empresarios/).

[248] This engagement can be observed through the participation of the Superintendence of Insolvency and Reentrepreneurship in many academic and research events, such as insolvency conferences and studies. See, *e.g., Los diez años de la Ley 20.720 fue el tema central de las IV Jornadas de Derecho Concursal* (available at https://www.superir.gob.cl/los-diez-anos-de-la-ley-20-720-fue-el-tema-central-de-las-iv-jornadas-de-derecho-concursal/); *Estudio enfocado en mejorar la experiencia de las MIPEs* (available at https://www.superir.gob.cl/estudio-enfocado-en-mejorar-la-experiencia-de-las-mipes/).

[249] For several interviews where the Superintendent of Insolvency and Reentrepreneurship shares his views about the Chilean insolvency system and how it can help individuals and companies, see *e.g.,* https://www.youtube.com/watch?v=mG9-ozK1h6c, https://www.youtube.com/watch?v=TsFa3_c04CU and https://www.youtube.com/watch?v=IPt1SGRpCR0.

[250] See, *e.g.*, *Superintendencia de Insolvencia y Reemprendimiento: Preguntas frecuentes* (available at https://www.superir.gob.cl/preguntas-frecuentes/preguntas-frecuentes-ley-n20-720/)

[251] See Pamela Arellano y Camila Carrasco, *Insolvencia y quiebra en Chile Principales estadísticas desde 1982 a la fecha*, Ministerio de Economía, Fomento y Turismo (2015) 12. When interpreting the figures of insolvency proceedings existing prior to the 2014 insolvency reform, it is important to bear in mind two considerations. First, under the pre-2014 insolvency regime, there was a single-entry insolvency process applicable to both companies and individual entrepreneurs. Therefore, those figures include the number of insolvency proceedings for both types of debtors. Second, prior to the 2014 reform, there was a single-entry insolvency procedure. Therefore, the figures of insolvency proceedings include those ending up in reorganization as well as those concluding in liquidation.

[252] See Arellano and Carrasco (n 251).

[253] See Superintendencia de Insolvencia y Reemprendimiento, *Observatorio Estadístico Superir* (available at https://www.superir.gob.cl/informacion-y-estadisticas/). It should be noted that those figures include both reorganization and liquidation procedures.

[254] *Id.*

[255] Under the previous regime, debtors were required to file for bankruptcy within 15 days once the debtor becomes insolvent.

insolvency proceeding has become an option rather than an obligation, but an option available to all types of debtors, and not only to companies and individual entrepreneurs.

As a result, while many reasons may affect the number of insolvency proceedings in a country,[256] the fact that the total number of insolvency proceedings increased more than 5,377% from 2013 to 2024 (comparing figures under different insolvency regimes) and more than 384% from 2015 to 2024 (comparing figures under the same insolvency regime), seems to confirm that insolvency proceedings are less stigmatized in Chile. Moreover, against the view that the stigma of insolvency is a cultural problem existing or exacerbated in certain countries,[257] the Chilean experience seems to support the view that, with the right policies, regulators and reforms, a country can effectively tackle the stigma of insolvency, and to do so in a short period of time.[258] Therefore, the Chilean experience can provide many valuable lessons for jurisdictions in the Global North seeking to reduce the stigma of insolvency.

4.10 Improving the quality and availability of insolvency data: Lessons from Chile and India

Finally, another aspect where many jurisdictions in the Global North can learn from some of their counterparts in the Global South is in the collection and publication of data on insolvency proceedings. Understanding the features and outcomes of insolvency proceedings is essential for the assessment and improvement of insolvency systems.[259] Unfortunately, not many countries

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[256] These factors may include the macroeconomic conditions of the country, the number of business entries, or the greater or lower usage of alternative mechanisms to deal with financial distress.

[257] The view that the stigma of insolvency is a cultural problem existing or exacerbated in certain countries seems to be very extended. In fact, it seems to be mentioned in most regions. For example, in Asia, see Meiyen Tan and Keith Han, *It's time to change the Asian mindset about corporate restructuring* (BUSINESS TIMES, 26 October 2020) (available at https://www.businesstimes.com.sg/opinion-features/columns/its-time-change-asian-mindset-about-corporate-restructuring). In Europe, see Business Europe, *EU should fight insolvency stigma: helping businesses to bounce back* (available at https://www.businesseurope.eu/publications/eu-should-fight-insolvency-stigma-helping-businesses-bounce-back). In Latin America, see Andrés Solimano, *Overview and Policy Implications*, in Eduardo Lora and Francesca Castellani (eds), ENTREPRENEURSHIP IN LATIN AMERICA: A STEP UP THE SOCIAL LADDER? (Inter-American Development Bank, 2014) 10. In Africa, see Ignatius Ekanem, *African Entrepreneurs, Financial Literacy, Debt and Bankruptc*y, in Sonny Nwankwo and Kevin Ibeh (eds), THE ROUTLEDGE COMPANION TO BUSINESS IN AFRICA (Routledge 2014) 218-233.

[258] Explaining why the stigma and bad reputation of insolvency proceedings is a problem created or at least exacerbated by legal and institutional factors, see Gurrea-Martínez, REINVENTING INSOLVENCY LAW IN EMERGING ECONOMIES (n 2) 285-290.

[259] Jose Garrido et al, *The Use of Data in Assessing and Designing Insolvency Systems,* IMF WORKING PAPER NO 2019/027 (2019) (available at https://www.imf.org/en/Publications/WP/Issues/2019/02/04/The-Use-of-Data-in-Assessing-and-Designing-Insolvency-Systems-46549).

gather, or at least publish, detailed information about insolvency proceedings.[260] In fact, many countries do not even publish the most basic information on insolvency proceedings, such as the number of liquidation and reorganization procedures. Interestingly, some of the countries that provide more comprehensive information on insolvency proceedings are from the Global South.

For example, in its annual report, the Insolvency and Bankruptcy Board of India ("IBBI") publishes very useful and granular information about the performance of the IBC, including data about the number of insolvency proceedings and outcomes of the procedure.[261] In some of its annual reports, the IBBI has also published detailed information about other interesting aspects of insolvency proceedings not easily found in many countries, such as the number of employees that insolvent firms had at the moment of initiating and exiting the procedure.[262]

In Chile, the Superintendence of Insolvency and Reentrepreneurship also publishes very detailed information about insolvency proceedings.[263] Among other aspects, that information includes the number of insolvency proceedings for individuals and companies, as well as the number of reorganization and liquidation procedures for each type of debtor. Additionally, it provides information about the profile of each debtor initiating insolvency proceedings, as well as the regions where those insolvency proceedings have been initiated.

Therefore, the experience of India and Chile can provide valuable lessons to some jurisdictions in the Global North that do not collect, or at least do not publish, comprehensive information about the number, type and outcomes of insolvency proceedings.

5. Innovations in the Global South: Necessity Fosters Creativity?

Insolvency systems in the Global South generally presents more weaknesses and problems than their counterparts in the Global North. Those additional challenges, however, can often be transformed into opportunities. Namely, they can serve as the engine for a more creative thinking

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[260] Exceptions include countries like Australia, Canada, Chile, France, India, Spain, the United Kingdom and the United States. With higher or lower level of details, those jurisdictions publish relatively comprehensive insolvency statistics.

[261] The annual reports published by the Insolvency and Bankruptcy Board of India can be found at https://ibbi.gov.in//en/publication/reports.

[262] See, *e.g., Annual Report 2019-2020* (Insolvency and Bankruptcy Board of India, 2020) (available at https://ibbi.gov.in/uploads/publication/7e9b78bf6eba5254d788c8323055224f.pdf).

[263] Those statistics ca be found at https://www.superir.gob.cl/informacion-y-estadisticas/.

that can ultimately lead to innovative solutions.[264] In fact, in the context of corporate law, it has been argued that the adoption of "heterodox stakeholderism" can be seen as an innovative response to promote social welfare in environments of high inequality and insufficient state capacity.[265]

In insolvency law, many innovative solutions adopted in both the Global North and the Global South were developed in times of crisis. Examples include the enhanced workouts implemented in many countries in Asia and the Pacific as a response to the 1997 Asian Financial Crisis, the pre-insolvency proceedings implemented in various European countries after the 2008 Global Financial Crisis, and the increasing adoption of simplified insolvency proceedings that took place after the outbreak of the COVID-19 pandemic.[266]

A similar trend can be observed when examining the innovative insolvency responses adopted in the Global South. For instance, Colombia was a first mover in the adoption of technology in insolvency proceedings because of the need to reduce the delays associated with the initiation of insolvency proceedings. Malaysia and Thailand implemented innovative strategies to promote workouts due to lack of an efficient insolvency regime to handle the wave of insolvency cases generated by the 1997 Asian Financial Crisis. India adopted a creditor-in-control insolvency process because of the need to avoid some of the problems observed under the previous regime, such as excessive delays and opportunistic behaviour of debtors. These examples, and more generally those examined in Section 3, were motivated by the *need* to come up with innovative solutions to handle problems that are often exacerbated in the Global South.[267] Therefore, the idea that necessity fosters creativity seems to apply in the insolvency context and can probably explain many of the innovative insolvency solutions adopted in the Global South.

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[264] Developing the idea that innovation can be fostered in times of crisis, see, *e.g.,* Larry Clark, *Innovation in a Time of Crisis* (Harvard Business Publishing Blog, 26 March 2020) (available at https://www.harvardbusiness.org/innovation-in-a-time-of-crisis/).
[265] Mariana Pargendler, *Corporate Law in the Global South: Heterodox Stakeholderism* (n 9).
[266] Menezes and Gropper, *Overview of Insolvency and Debt Restructuring Reforms in Response to the COVID-19 Pandemic and Past Financial Crises: Lessons for Emerging Markets* (n 81); Bauer et al, *Flattening the Insolvency Curve: Promoting Corporate Restructuring in Asia and the Pacific in the Post-C19 Recovery* (n 81). Emphasizing how the COVID-19 pandemic accelerated the adoption of simplified insolvency frameworks for MSEs, see Aurelio Gurrea-Martínez, *The Future of Insolvency Law in a Post-Pandemic World* 31(3) INTERNATIONAL INSOLVENCY REVIEW 385 (2020).
[267] In fact, many of the legal innovations found in the Global South seem to be explained by the need to tackle social and institutional concerns that have not traditionally existed in the Global North. See Davis and Pargendler, LEGAL HETERODOXY IN THE GLOBAL SOUTH (n 13).

6. The Need to Integrate the Global South in the Study of Insolvency Law

Many of the challenges of insolvency law in the Global North, such as the costs, length and stigma of insolvency proceedings, can also be found in the Global South. For that reason, ignoring the solutions that have been discussed or even adopted in jurisdictions that have experienced similar – and typically more exacerbated – problems limit the universe of ideas that can potentially be used to tackle some of the challenges faced by many insolvency systems in the Global North. Unfortunately, the Global South has not been traditionally included in the study of insolvency law, even in the field of comparative insolvency law. With a few exceptions, most comparative studies in insolvency have focused on the Global North and typically on the same jurisdictions from the Global North. Moreover, when a jurisdiction from the Global South is examined, it generally consists of one of the largest emerging markets, such as India or China, unless the author is from another jurisdiction. Therefore, the rest of the countries that comprise the Global South remain largely unexplored in the academic literature on insolvency law.

In addition to the common problems existing in both the Global North and the Global South, local insolvency systems often face unique challenges. For example, in the United States, it has been mentioned that the increasing power of DIP lenders often leads to an undesirable outcome and a distortion of priorities in bankruptcy.[268] Even if that problem does not exist in the Global South, some of the innovative approaches adopted in the Global South to deal with other challenges of the insolvency system can inspire some solutions potentially explored in the United States to mitigate the conflicts among creditors arising in the context of DIP financing. For instance, many jurisdictions in the Global South have significantly empowered creditors in the approval of DIP financing. Some of these solutions, and particularly the veto right existing in the Dominican Republic, could help address part of the problem existing in the United States.[269] Of course, such legal transplant would need to be adjusted, as many jurisdictions of the Global South often do with solutions from the Global North.

For example, if the United States considers the adoption of such veto rights, it should carefully assess the type of creditors that should be entitled to vote, which is something that may depend

[268] Ayotte and Ellias, *Bankruptcy Process for Sale* (n 65); Ayotte and Huang, *Standardizing and Unbundling the Sub Rosa DIP Loan* (n 65).
[269] Gurrea-Martínez, *Debtor-in-Possession Financing in Reorganization Procedures: Regulatory Models and Proposals for Reform* (n 63) 275-277.

on the type of priority given to the DIP lender.[270] It should also examine whether some of the creditors should be prevented from voting due to a conflict of interest, as it may happen if one of the pre-existing creditors entitled to vote is the DIP lender. Additionally, another important aspect is making sure that the decision to veto the DIP loan can be made quickly and overcoming the collective action problems potentially faced by the creditors. To address these latter problems, the decision can be delegated to a small group of creditors that may consist of a committee of creditors or the largest creditors from the class of creditors most directly affected by the DIP loan.[271] In cases of DIP loans providing lenders with a new lien, a junior lien or administrative expense priority, the class most directly affected by the DIP loan is the group of unsecured creditors.[272] Therefore, they should be the group of creditors ultimately deciding whether the DIP loan should be approved. In the case of DIP loans involving a senior lien or an administrative expense priority to be paid ahead of other administrative expenses, unsecured creditors can certainly be affected. However, the most directly affected classes are the pre-existing senior creditors and pre-existing administrative expense claimants, respectively. In those scenarios, the United States could consider two potential solutions. One may consist of requiring the vote of the most directly affected classes, that is, the affected secured creditors or the affected administrative expense claimants, respectively.[273] Alternatively, it may require the vote from two classes of creditors: unsecured creditors (given that they are indirectly affected) and the class most directly affected by the decision (e.g., pre-existing secured creditors or pre-existing administrative expense claimants, respectively). Finally, the law should facilitate the use of technology for the purpose of communication and voting, and it should provide creditors with a short period of time (e.g., 7-10 days) to decide whether they want to veto the DIP loan approved by the court. If those veto rights are not exercised within that period, the DIP loan approved by the bankruptcy court would be considered automatically blessed by the creditors.

Whether such solution or any other is adopted in the United States, this example just confirms what Professor Mariana Pargendler anticipated: the study of the Global South can enlarge our "institutional imagination" and ultimately enrich the academic and policy debate in the Global North.[274] And who knows, as Professor Pargendler observed in the context of corporate law and governance,[275] we might even obverse a "reverse convergence" in comparative insolvency law

[270] *Id*. at 277-278.
[271] *Id*.
[272] *Id*.
[273] *Id*.
[274] Pargendler, *The Global South in Comparative Corporate Governance* (n 9).
[275] *Id*.

and institutions from the Global South may end up inspiring solutions and insolvency reforms in the Global North. Regardless of whether this reverse convergence occurs, including the Global South in the study of insolvency law not only makes the academic and policy debate in insolvency more inclusive but also more enriching.

7. Conclusion

This article has shown that many jurisdictions in the Global South have incorporated many innovative aspects in their insolvency regime. In some cases, those innovations consist of solutions that, with certain adjustments, have been imported from the Global North. In others, they are really 'autochthonous innovations' from the Global South. Therefore, the study of the Global South can significantly enrich the academic and policy debate in insolvency in both the Global North and the Global South. Unfortunately, the Global South – particularly the Global South beyond India and China – has been largely ignored in the academic literature on insolvency law. Therefore, whether it is for the much-needed purpose of improving the design of insolvency law in the Global South, or at least for expanding the universe of ideas that can help mitigate some of the problems existing in many insolvency systems in the Global North, the Global South needs to be more actively integrated in the study of insolvency law. Otherwise, we will be missing the opportunity to learn from many ideas and innovative solutions that can contribute to the improvement and understanding of insolvency systems around the world.

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