Institution: University College London		
Unit of Assessment: UoA 18 – Law		
Title of case study: Developing global norms for improved resolution of cross-border insolvencies		
Period when the underpinning research was undertaken: 2001–2012		
Details of staff conducting the underpinning research from the submitting unit:		
Name(s):	**Role(s) (e.g. job title):**	**Period(s) employed by submitting HEI:**
Ian Fletcher	Professor	2001–2018 (when Professor Fletcher passed away)
Period when the claimed impact occurred: 2013–2020		
Is this case study continued from a case study submitted in 2014? No		

1. Summary of the impact (indicative maximum 100 words)

Professor Fletcher's research has underpinned initiatives to develop globally applicable non-binding 'soft law' principles on cross-border insolvency, and guidelines on cooperation and communication between courts, which have:

(i) Informed judicial support for a 'universalist' approach to cross-border insolvency proceedings; and

(ii) Spurred further soft-law initiatives for global court-to-court cooperation, leading to the guidelines and their offshoots supporting EU law reform and being listed as references for courts and practitioners in practice directions and court procedure in countries including the UK, US, Singapore, the Netherlands, Australia, Korea, the Cayman Islands and Bermuda.

These developments have facilitated more coordinated and expeditious resolution of cross-border insolvencies, benefiting debtors, creditors, judges, practitioners and the stability of global commerce and investment.

2. Underpinning research (indicative maximum 500 words)

Professor Ian Fletcher was a world-renowned expert on the law of international insolvency and specifically cross-jurisdictional resolution of transnational insolvencies. He joined UCL in 2001, and was Professor of International Commercial Law until he sadly died in July 2018.

Insolvency law has only developed as a field of academic study in recent decades, despite its importance in international commercial life. Fletcher's 2002 article, '*The Quest for Global Insolvency Law*' **(R1)** set the scene for much of his later work, identifying key challenges for any 'global' law on insolvency: not only did states have highly variable insolvency laws, tied closely to economic and cultural attitudes to debt; but also differing approaches to conflicts of laws, i.e. when their courts would adjudicate in a given case with transnational dimensions and what law they would apply. All of this stood in the way of a 'universalist' or 'internationalist' resolution of insolvency proceedings in which creditors in disparate territorial jurisdictions might have their interests effectively addressed, and the debtor obtain a discharge of debts with effect beyond a single territory.

In **R1**, Fletcher assessed then-dominant efforts to address difficulties arising from this legal multiplicity, including a UN Commission on International Trade Law (UNCITRAL) Model Law on cross-border insolvency (1997; open to all states to adopt into their national legislation), and a European Community (EC) Regulation (2000; applying to then EC member states from 2002). The UNCITRAL Model Law outlined rules that might be adopted by any state, providing rules for practical assistance in cross-border insolvency cases, premised on a distinction between 'main proceedings' (instigated in the debtor's 'centre of main interests') and 'non-main proceedings'; whereas the EC Regulation imposed more direct control of jurisdiction as between EC (now EU) member states, and codified choice of law rules. In both cases, states could maintain and apply

their own insolvency law, but under the EC Regulation commercial actors had much greater certainty as to *which* national law might be applied to particular insolvency proceedings. Fletcher concluded that this approach of unifying conflicts of laws rules might be promising, but was ambitious and potentially impracticable globally, and he sounded a note of caution about the proliferation of 'soft law' initiatives seeking to palliate various aspects of states' diversity of approaches to resolving corporate insolvencies with global dimensions.

The second edition (2005; supplement 2007) of Professor Fletcher's leading *Insolvency in Private International Law: National and International Approaches* **(R2)** offered detailed analysis of the position in the UK (including rapidly evolving case law implementing the EC Regulation, and the UK adoption of the UNCITRAL Model Law on cross-border insolvency in 2006), and a comparative picture of Australian, Canadian, American and French approaches. His co-authorship of the comprehensive 2009 commentary on *The EC Regulation on Insolvency Proceedings* (2nd edition) **(R3)** also charted key EU-wide developments in the operation of the EC Regulation since its coming into force (before the later reform of the Regulation in 2015), focusing on the crucial issues of scope and jurisdiction, and choice of law rules.

Fletcher's deep and authoritative research on cross-border insolvency law led to his appointment, between 2006 and 2012, as an EU expert and as Co-Reporter (with Professor Bob Wessels (University of Leiden)), on the Transnational Insolvency project instigated by the American Law Institute (**ALI**) and the International Insolvency Institute (**III**). Their core research question was whether the ALI's earlier *Principles of Cooperation among the NAFTA Countries* and accompanying *Court-to-Court Guidelines* ('***NAFTA Principles***' and '***NAFTA Court-to-Court Guidelines'***) (2003)—designed to facilitate cooperation in insolvency proceedings spanning the North American Free Trade Area states of US, Canada and Mexico—might be extended as an embodiment of global best practice.

Fletcher and Wessels conducted a five-year long investigation, convening discussions with experts from 30 jurisdictions, using questionnaires to capture feedback on insolvency principles and choice of law questions, testing preliminary drafts with consultees, and presenting aspects at academic, practitioner and judicial conferences in 10 countries outside North America. Through this extensive research and consultation, Fletcher and Wessels established that, with key modifications, essential provisions of the *NAFTA Principles* were capable of being accepted across the world. They then developed from the *NAFTA Principles* and *Court-to-Court Guidelines* a set of 37 *Global Principles for Cooperation in International Insolvency Cases* and 18 *Global Guidelines for Court-to-Court Communications* ('***Global Principles'*** and ***'Global Guidelines'*** respectively) capable of being used in all jurisdictions, both civil and common law.

The *Global Principles* address issues such as: courts' management of insolvency cases with international dimensions; due process rules; equal treatment of creditors; and communication and coordination between proceedings or in transnational reorganisation. In some cases, as in principles concerning choice of language and use of intermediaries, they go beyond the *NAFTA Principles*, drawing on other soft law instruments to forge widely supported, globally applicable solutions to crucial practical issues. The *Global Guidelines* build on, for example, a provision in the UNCITRAL Model Law requiring courts to 'cooperate to the maximum extent possible' with foreign courts engaged in related proceedings, by offering concrete guidance on how this inter-curial communication should be conducted. Informed by a deep understanding of the profusion of existing and possible future initiatives in the field, and the confusion to which this might lead (envisaged in **R1**), the *Global Principles* also include an annotated list of terms and definitions, promoting a coherent global legal *conversation,* even where differences of legal substance remain.

The project's output, titled *Transnational Insolvency: Global Principles for Cooperation in International Insolvency Cases* (including extensive commentary) **(R4)**, was published in 2012, after the ALI and III had formally adopted the text of the *Global Principles* and *Global Guidelines*.

3. References to the research (indicative maximum of six references)

R1. Ian Fletcher, 'The Quest for Global Insolvency Law: A Challenge for our Time' (2002) 55 *Current Legal Problems* 427–445. https://doi.org/10.1093/clp/55.1.427.

R2. Ian Fletcher, *Insolvency in Private International Law: National and International Approaches* (OUP, 2nd ed 2005 and supplement 2007).

R3. Gabriel Moss QC, Ian Fletcher QC and Stuart Isaacs QC (eds.), *The EC Regulation on Insolvency Proceedings: A Commentary and Annotated Guide* (OUP, 2nd ed 2009) (chapters 3 and 4, authored by Ian Fletcher).

R4. Ian Fletcher and Bob Wessels, *Transnational Insolvency: Global Principles for Cooperation in International Insolvency Cases.* Report to American Law Institute, 2012, https://www.iiiglobal.org/sites/default/files/alireportmarch_0.pdf.

4. Details of the impact (indicative maximum 750 words)

As Professor Fletcher's own work **(R1)** had envisaged, any global convergence on substantive insolvency law, or on conflict of laws rules regarding which state's law would be applied in a given national insolvency proceeding, is a distant and perhaps unfeasible prospect. Navigating these constraints, Fletcher found paths for profound impact on practitioners' and judges' approaches to cross-border insolvency cases, particularly through the *Global Principles* and *Guidelines*:

(i) Informing judicial embrace of a 'universalist' approach to cross-border insolvencies

The *Global Principles* have been seen by judges as an important point of reference in cross-border insolvency cases. The **US Court of Appeals for the Third Circuit** (the appellate court for the crucial insolvency jurisdiction of Delaware) referred to the *Global Principles* in its first substantive ruling in a 'Chapter 15' (bankruptcy) case, in August 2013, citing an academic expert's view that the *Global Principles* '*provide authority for resolution of a number of issues not fully addressed by Chapter 15* [covering provision of relief under US bankruptcy law to non-US individuals] *or addressed only in part*' **(S1)**. Taking the 'universalist' approach espoused inter alia in the *Global Principles*, the Third Circuit read Chapter 15 as reflecting a US policy that courts should, in general, maximise assistance to foreign courts conducting the main proceedings in a bankruptcy:

> '*The … Global Principles for Cooperation in International Insolvency Cases elaborates "the overriding objective [is to] enable … courts and insolvency administrators to operate effectively and efficiently in international insolvency cases with the goals of maximizing the value of the debtor's global assets, preserving where appropriate the debtors' business, and furthering the just administration of the proceeding."*.' **(S1)**

In an expression of this approach, the Court held that a foreign liquidation (in Australia) could be recognized as the main insolvency proceeding, with US courts cooperating in this proceeding, with no duplication of process or dissipation of assets in the US through a parallel US bankruptcy.

(ii) Catalysing transnational soft law-making in cross-border insolvency proceedings

Since their adoption, the *Global Principles* and especially *Global Guidelines* have spurred the development of other soft law instruments aimed at greater global cooperation. The *Global Guidelines* **provided the foundation for the EU Cross-Border Insolvency Court-to-Court Cooperation Principles** (also known as the ***JudgeCo*** texts), published in 2015 and tailored for use under the EU Insolvency Regulation (Recast) (Regulation 848/2015). Professor Fletcher served as Chair of the Review and Advisory Group that oversaw drafting of the final *JudgeCo* texts (with Professor Bob Wessels as joint project leader), and these texts were informed by responses to questionnaires founded on a selection of the *Global Principles* **(S2)**.

The *Global Principles* and *Guidelines* also **catalysed work by the international Judicial Insolvency Network (JIN)**, formed in 2016 with the objective of avoiding inconsistent judicial findings and improving coordination in jurisdictional approaches. In October 2016, Judge Kannan (Supreme Court of Singapore) referred to the ALI-III project conducted by Fletcher and Wessels **(R4)** as having '*led efforts to work out guidelines … for communication and cooperation which courts could adopt or modify to suit the needs of a particular case*', and the *Global Guidelines* as '*the fruits of this effort*' **(S3)**. The JIN drew directly upon the *Global Principles* and *Guidelines*, and the JudgeCo Principles and Guidelines of 2015, to develop Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters (***JIN Guidelines***) **(S4)**.

In recognition of the value of the *Global Guidelines* as a model for court-to-court cooperation, there has been **rapid uptake of the *Guidelines* and other instruments drawing on them**. In the **UK,** a 2017 amendment to the Chancery Guide (the official guide to conduct of litigation in the Chancery Division of the High Court of Justice) requires practitioners to consider whether a court should be invited to adopt one of three sets of guidelines at the outset of proceedings: the *Global Guidelines*, the *JudgeCo* texts, and the *JIN Guidelines* **(S5)**. As the media release relating to the 2017 amendments states:

> '*The JIN Guidelines build on earlier guidelines, including* [the *Global Guidelines*]*, and provide a modern framework for the efficient conduct of insolvency proceedings which involve the courts of more than one country.*' **(S6)**

The *JIN Guidelines* have also since been approved by **eleven other courts around the world**, including: US Bankruptcy Courts for the District of Delaware, Southern District of New York, and Southern District of Florida; the Supreme Court of Singapore; the Supreme Court of New South Wales; and the District Court Midden-Nederland. **(S7)**

In the **EU**, the *Global Guidelines* informed legislative reform of its cross-border insolvency regime. The final version of the EU Recast Insolvency Regulation (2015/848 of 20 May 2015, OJ L141/19) puts much greater emphasis than its predecessor on communication, coordination and cooperation, reinforced by guidance contained in recital (48):

> '*When cooperating, insolvency practitioners and courts should take into account best practices for cooperation in cross-border insolvency cases, as set out in principles and guidelines on communication and cooperation adopted by European and international organisations active in the area of insolvency law* [including the *Global Guidelines* and their offshoot, the *JudgeCo* texts]'*.*

Following a presentation by Professor Fletcher in Sydney in 2013, the Australian Academy of Law launched a project to investigate the possibility of the **Australian Federal, State and Territory courts** adopting the *Global Principles* and *Guidelines*. The resulting report (2014) recommended their adoption, calling them '*a valuable reference point*' that '*provides Australian courts with a comprehensive approach to cross-border insolvency cases that … has been reviewed by experts from a range of jurisdictions … For practitioners, … a credible resource with which to approach the administration of insolvent global businesses …*'. The Federal Court and several state and territory jurisdictions in Australia (including its two largest, New South Wales and Victoria) have now adopted practice notes akin to the Chancery Guide, directing courts to the *Global Guidelines* and/or *JIN Guidelines* that grew from them **(S8)**.

Some major cases, like Lehman Bros (2009), had taken the *NAFTA Court-to-Court Guidelines*, predecessor to the *Global Guidelines*, as a basis for court-to-court communication, but the protocol securing this had required extensive negotiation. Adoption of the *Global Guidelines* and other guidelines developed from them, in a growing list of jurisdictions, establishes a **routine, streamlined foundation for global court-to-court communication** in insolvency cases.

Judges have recognised the **magnitude and speed of changes ushered in by the *Guidelines* and their offshoots**. In 2019, Justice Gleeson of the Federal Court of Australia recalled a colleague's wariness in 2005 about the prospect of direct court-to-court communication as contrary to '*[d]eeply rooted [legal] principle*', and added: '*Fast forward to 2016: … The JIN Guidelines have now been adopted by 10 courts internationally …* [and] *recognise that cooperative action need not offend either national sovereignty or the legitimate interests of parties to a proceeding*'. In 2018, the Chief Justice of the Supreme Court of Singapore celebrated adoption of a protocol based on the *JIN Guidelines* (for proceedings in the Singapore High Court and US Bankruptcy Court for the Southern District of New York) as '*ground-breaking changes which were unimaginable a few years ago*' **(S9)**. In 2020, the Grand Court of the Cayman Islands, relying inter alia on a 2018 practice direction referring to the *Global Guidelines* and *JIN Guidelines*, was able to approve a court-to-court protocol with courts in New York, Chile and Colombia in the restructuring of a Chilean airline, something which had still been in question in a 2017 case **(S10)**.

Adoption of the *Global Guidelines* and offshoot instruments is widely believed by practitioners and courts to entail significant benefits. Practitioner updates welcome the *JIN*

Guidelines in light of the '*number of examples in recent times where closer cooperation between courts could have resulted in a simpler and less costly result for all estates*' **(S11)**. Aside from being of concrete assistance to parties, judges and practitioners in specific proceedings—maximizing the value of global assets, limiting costs, and furthering fair and equitable administration of proceedings—this increased coherence of cross-border insolvency practice advances larger systemic interests: helping investors manage risk, reducing the cost of capital, and preserving viable businesses in periods of precarity.

5. Sources to corroborate the impact (indicative maximum of 10 references)

S1. *In re ABC Learning Centres Ltd.*, 728 F.3d 301, 305 (3rd. Cir. 2013).

S2. Wessels, 'A Glimpse into the Future: Cross-border Judicial Cooperation in Insolvency Cases in the European Union' (2015) 24 *INSOL International Insolvency Review* 96–121, p. 98.

S3. Kannan, Supreme Court of Singapore, 'Cross Border Insolvencies: A New Paradigm', Oct 2016, [34] https://www.supremecourt.gov.sg/Data/Editor/Documents/IAIR%202016%20Speech_%206%20September%202016.pdf

S4. *Guidelines for Communication and Cooperation between Courts in Cross-border Insolvency Matters* ('*JIN Guidelines*'), Oct 2016, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/612376/JIN_Guidelines.pdf.

S5. Chancery Guide 2016 (as amended), paras 25.46–25.48.

S6. Media release, 5 May 2017, https://www.judiciary.gov.uk/announcements/guidelines-on-court-to-court-communication-and-co-operation-in-cross-border-insolvency-cases-endorsed-by-the-chancellor-media-release/.

S7. Judicial Insolvency Network website, http://jin-global.org/jin-guidelines.html.

S8. Australian developments: **Federal Court of Australia**: *Cross-Border Insolvency Practice Note: Cooperation with Foreign Courts or Foreign Representatives (GPN-XBDR)* (25 Oct 2016, updated 31 Jan 2020), [2.5]; **Supreme Court of New South Wales**: *Practice Note SC EQ 6 – Cross Border Insolvency: Cooperation with Foreign Courts or Foreign Representatives* (15 Sep 2017); **Supreme Court of Victoria**: *Practice Note SC CC 6* (30 Jan 2017), [8]ff; Rosalind Mason, Sheryl Jackson and Mark Norman Wellard, '*What further benefit, if any, might Australia get from the ALI-III Transnational Insolvency: Global Principles for Cooperation in International Insolvency Cases?* (Report for Australian Academy of Law, 2014), p. 6.

S9. Chief Justice Sundaresh Menon, 'Change and Constancy', address of 30 Aug 2018, https://www.supremecourt.gov.sg/Data/Editor/Documents/Mass%20Call%202018%20-%20Address%20by%20the%20Chief%20Justice.pdf.

S10. Mourant, 'Update: Cayman court approves first court-to-court communications protocol in cross-border restructuring', 1 Oct 2020 (describing unreported decision), https://www.mourant.com/news-and-views/updates-2020/cayman-court-approves-first-court-to-court-communications-protocol-in-cross-border-restructuring.aspx.

S11. Mayer Brown, 'New Guidelines for Communication and Co-operation between Courts in Cross-Border Insolvency Matters', June 2017.