

International Insolvency Law

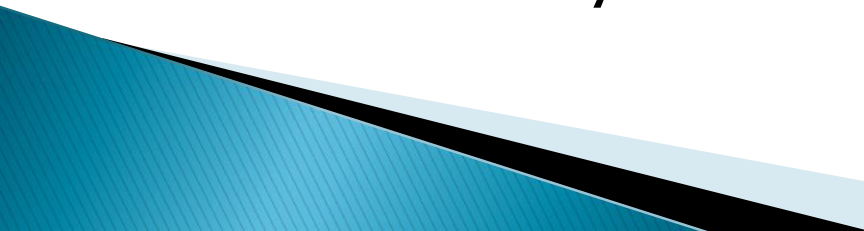
2. Cross-border insolvency – main issues

Dr Marek Porzycki
Chair for Business Regulation and Economic Policy
Jagiellonian University

Substantive and international insolvency law

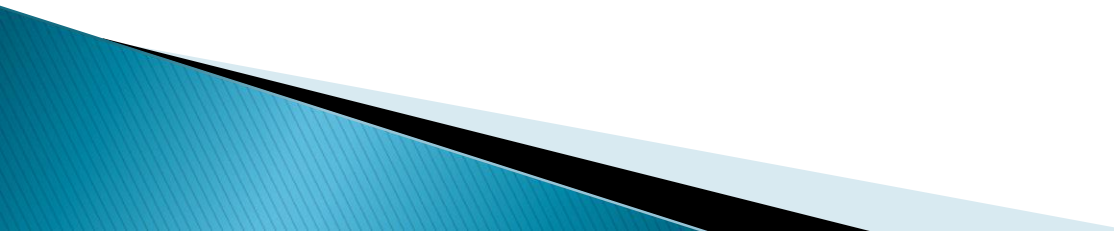
- ▶ **Substantive insolvency law:**
 - insolvency proceedings under national law;
 - dealing with insolvency of a debtor (e.g. liquidation or restructuring) within a specific jurisdiction.
- ▶ **International (cross-border) insolvency law:**
 - dealing with cross-border elements of insolvency cases;
 - applies in addition to substantive insolvency law

Scope of application – a cross-border element to a case

- ▶ the debtor has some assets abroad
 - ▶ the debtor has creditors abroad
 - ▶ the debtor carries out his activities on a cross-border basis
 - ▶ the debtor is a multinational entity, with establishments in several countries
 - ▶ the debtor is a multinational entity, carrying out business in several countries under legal form of local subsidiaries and in other countries by establishments
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Conflicting approaches

UNIVERSALISM vs. TERRITORIALITY

- ▶ Territoriality – traditional approach, based on state sovereignty
 - ▶ Universalism – modern approach, based on cross-border effects of insolvency proceedings
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Territoriality

- ▶ state's sovereignty → insolvency decisions issued by foreign authorities are neither effective nor enforceable within our jurisdiction
- ▶ decisions issued by our state's authorities are neither effective nor enforceable abroad
- ▶ insolvency proceedings are strictly limited to assets of the debtor situated within one jurisdiction

Weak point:

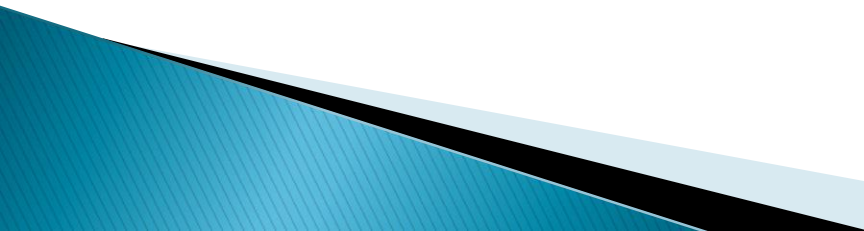
Isolated country-based efforts are not able to solve complex cross-border cases.

Universalism

- ▶ insolvency proceedings opened in relation to a debtor affect his/her entire estate (including assets located abroad)
- ▶ foreign insolvency proceedings are recognized and their effectiveness is guaranteed

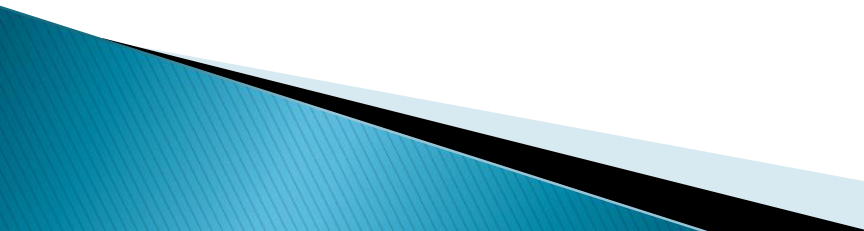
Advantage: possible coordination of liquidation or restructuring efforts in all relevant jurisdictions

Main problems under universalism

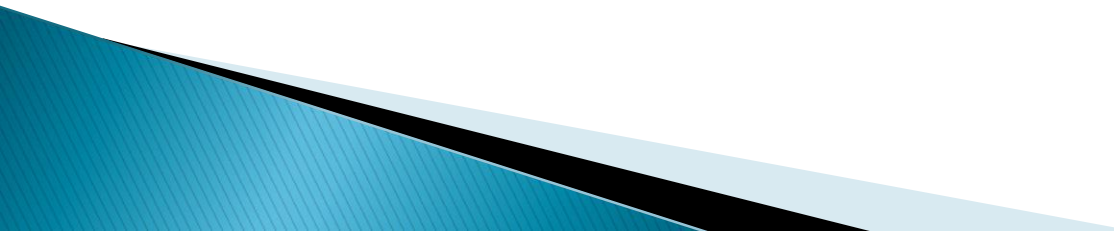
- ▶ possibility of conflicts over jurisdiction between courts of various states
 - ▶ taking into account local interests in other jurisdictions, e.g.
 - employees in a debtor's foreign establishment
 - creditors with collateral rights on the debtor's assets situated abroad
 - ▶ highly divergent solutions adopted by substantive insolvency laws
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Solution: limited universalism

Limitations by measures to safeguard local interests, e.g.

- ▶ requirement of a formal recognition of foreign insolvency proceedings by a local court (not applicable under the EIR)
 - ▶ additional territorial (or secondary) proceedings over the debtor's local assets
 - ▶ modification to effects of foreign insolvency proceedings in order to take into account local interests
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Varying degree of limitations to universalism

- ▶ European Insolvency Regulation (EIR) – more universalism – automatic recognition of foreign insolvency proceedings, with safeguards for local interests
 - ▶ UNCITRAL Model Law – more limited version – formal recognition by local court required
 - ▶ some national laws – narrower grounds for recognition or even territoriality
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Main questions to be regulated under universalism

▶ Jurisdiction

– which country's courts are authorized to open insolvency proceedings against a debtor?

Possible grounds for jurisdiction: registered office, center of main interests (COMI), possessing assets in the country, possessing establishment in the country, domicile, habitual residence (natural persons)

Avoiding overlapping jurisdictions – is a country's jurisdiction exclusive? How are proceedings in various countries coordinated?

Main questions to be regulated under universalism

- ▶ **Applicable law**

which material law is applicable to the effects of foreign bankruptcy proceedings? Extent of the application of the law of the state of the opening of the proceedings (*lex fori concursus*). Exceptions – application of local law in some cases.

Additional reading

- ▶ I. Fletcher, *Insolvency in Private International Law*, 2nd edition, OUP 2005 – Chapter 1: Theory and Principle in Cross–Border Insolvency, parts 1.1 and 1.2 (pp. 3–17)
- ▶ S.M. Franken, *Three Principles of Transnational Corporate Bankruptcy Law: A Review*, *European Law Journal* Vol. 1, No. 2, March 2005, pp. 3–9

optional reading in Polish:

- ▶ T. Chilarski, *Upadłość transgraniczna w prawie Unii Europejskiej*, C.H. Beck, Warszawa 2008, p. 41–60
- ▶ W. Klyta, *Uznanie zagranicznych postępowań upadłościowych*, WoltersKluwer 2008, p. 19–39