

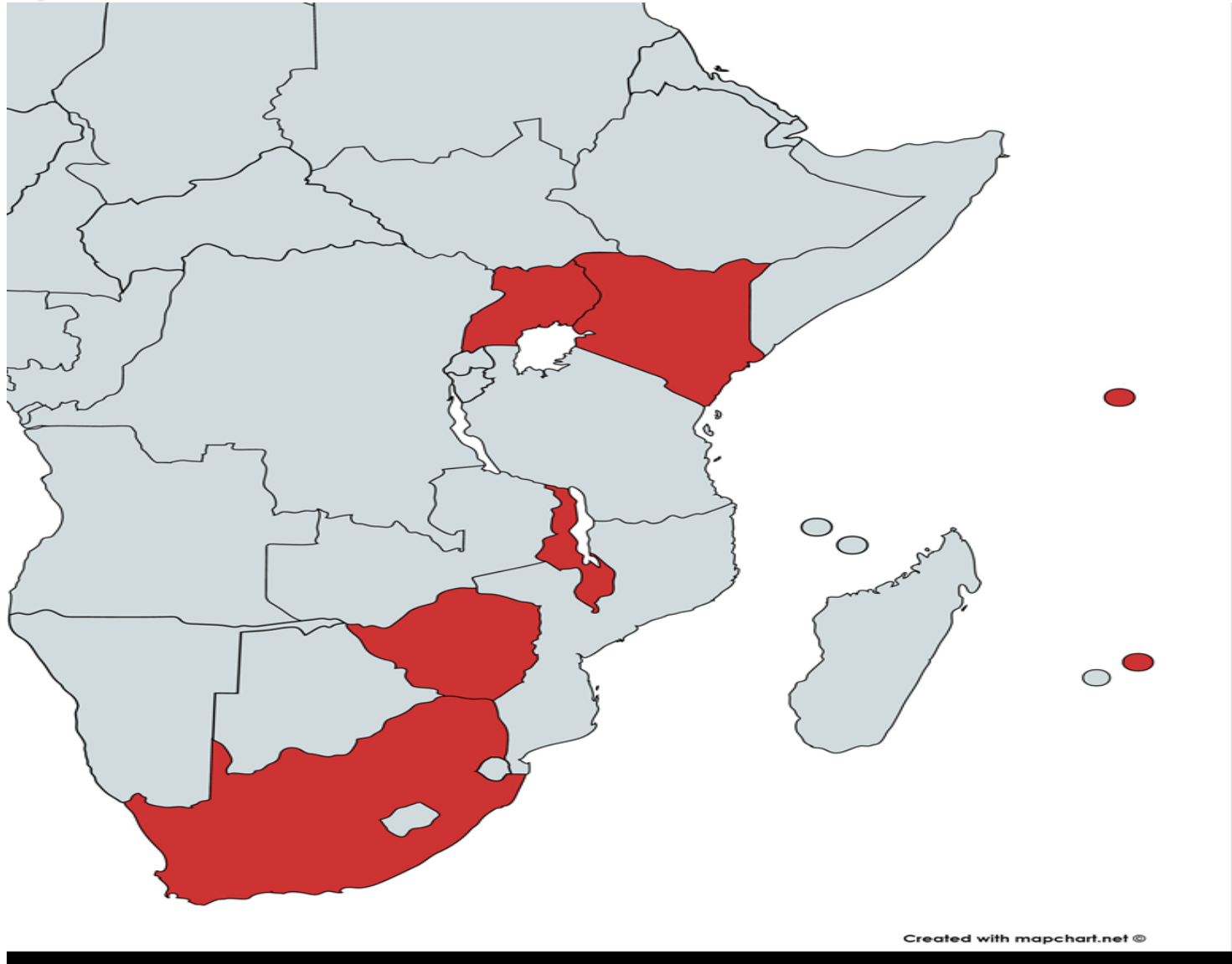
Applicable Law in Cross Border Insolvency Proceedings: Africa Region Perspectives

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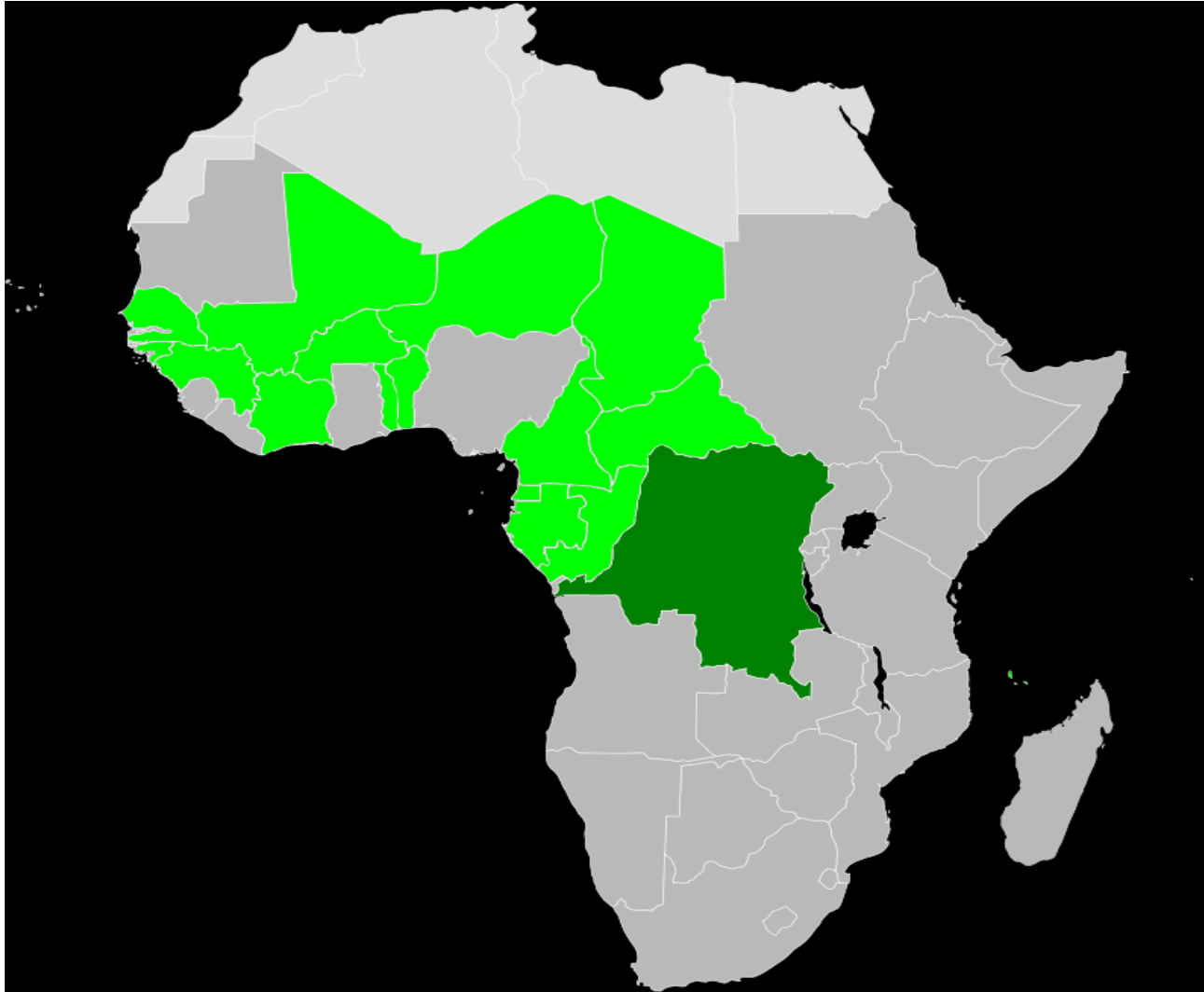
Cross Border Insolvency in Africa

- Common Law
 - Prior to enactment of Model Law
 - Jurisdictions without Model Law
- UNCITRAL Model Law
 - 24 years now
 - Adopted in 24 jurisdictions in Africa

Adoption in East & Southern Africa



Adoption in OHADA



Cross Border Insolvency in Africa

- Except for South Africa, part of insolvency legislation
 - *Substantive & procedural elements*
- Cross border insolvency & insolvency reforms
 - *comprehensive reform process*
- From narrow to broader perspective
 - *for resolving distress/failure*
- Cross border insolvency aligned with broader perspectives –
efficiency, preservation of value, commercial realities/global nature of businesses

Cross Border Insolvency in Africa

- Model Law- Principles & Process

- Access
- Recognition
- Relief
- Cooperation & Coordination

“The Model Law..., whose goal is to facilitate the administration of unified international bankruptcy proceedings, It does not, however, set forth a complete framework for the resolution of cross-border bankruptcies; instead, it creates a set of procedural rules to be integrated into the substantive bankruptcy law of each state that adopts the Model Law.... the Model Law seeks merely to make the process by which foreign bankruptcy representatives gain recognition in and assistance of courts in other jurisdictions simpler and less discretionary” (BUXBAUM, 2000).

Cross Border Insolvency in Africa

- Jurisdictional differences in adoption & Implications for resolution of cross border insolvencies
 - Without modification – 2 countries (*Kenya, Malawi*)
 - With modification (reciprocity) – 5 countries (*Uganda, S. Africa, Mauritius, Seychelles, Zimbabwe*)
 - Model Law Principles- OHADA (*17 member countries*)
- Capacity challenges
 - *Insolvency profession*
 - *Judiciary*

Cross Border Insolvency in Africa

- Logistical & structural problems
 - *Infrastructure*
 - *Case backlog*
- The problem of Reciprocity
 - *Reciprocity clauses in 5/7 jurisdictions*
 - *Set back to full implementation of cross border insolvency provisions*
 - *Multiple regimes for cross border insolvency*
 - *Differences in nature & scope of reciprocity clauses*

Applicable Law

- Cross border insolvency legislation
 - *Substantive aspects for local insolvencies*
 - *Cross border provisions- procedural*
- Issues of concern
 - Creditor priority & preferential status
 - Avoidance claims
 - The treatment of securities
 - Labour relations
 - The treatment of intra-group financing arrangements

Applicable Law

- Issues of concern
 - The priority status of new finance
 - Other substantive law challenges- *tax claims, contractual obligations*

Thank you