Theoretical and practical consequences of the deviations from the UNCITRAL's Model Law on Cross-border Insolvency: a view from the Latin American experience

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*I.C.C.L.R. 93 Abstract

This article examines the challenges posed by deviations from the UNCITRAL Model Law on Cross-Border Insolvency *(MLCBI). It emphasises the tension between the goals of harmonisation and local adaptations made by Latin American countries. While the* MLCBI *aims to promote global cooperation and legal certainty, national deviations often undermine these objectives by introducing homeward trends for enhancing the protection of local interests. Even flexibility inherent to the* MLCBI *allows states to tailor its rules, significant adaptations can hinder predictability in cross-border insolvency cases. Specific examples from Mexico, Chile, Colombia, and other Latin American jurisdictions illustrate how these deviations complicate judicial interpretation and reduce the use and effectiveness of the model law, as evidenced in some regional airline insolvency proceedings during the Covid-19 pandemic.*

Introduction

Unlike the classic dynamics of private international law, where the divergence and plurality of legal systems are resolved by formulating conflict rules that allow identifying the applicable legal framework, the response of uniform laws is structured from a different perspective. The attempt is now to develop substantive rules that are incorporated into all (or a large number of) legal systems. This approach aims to provide an optimal guarantee of the continuity of legal relationships across supranational spaces, enhancing certainty and facilitating operators' predictability. This aim is particularly evident in various areas of commercial law, a field traditionally marked by cross-border transactions. Even though this topic may be analysed very broadly, I will focus on cross-border insolvency issues, where this alternative has taken the form of the Model Law on Cross Border Insolvency of 1997 (MLCBI), proposed by UNCITRAL. ***I.C.C.L.R. 94***

Heidemann explains that the foundations of this trend toward harmonisation of substantive law lie in the powerful forces of globalisation, the mounting evidence of the increasing costs associated with legal differences, and a broader acceptance of uniform law as a solution that presents benefits over the conflict of law approach. [1] Simultaneously, the objectives of said form of harmonisation focus on uniformity of outcomes (then, considering certainty and predictability standards), even further than the mere identity of the relevant texts. [2] Therefore, international uniform law is predominantly defined by its purposes and resources rather than the technically uniform nature of its wording. [3] In the case of MLCBI, such purposes have been carefully drafted in its preamble, which are to be considered for proper interpretation and application of its rules.

In the face of resistance that certain states have encountered in adopting rigid norms, such as those arising from international treaties or conventions, more flexible mechanisms have also become relevant choices, characteristic of a soft law approach. In this sense, a model law is a form of unification consisting of

"a text intended to replace the existing conflict rules in each of the interested states, but it is not integrated into or annexed to an international convention; rather, it is simply recommended as a bill by the organization that has developed it …". [4]

Viñas Ferré explains that it is a method of unification without the rigidity of international solid commitment, as the one characterising treaties or conventions. [5] Consequently, states can modify their rules at the time of their enactment or even introduce changes after their adoption. There is no need to either negotiate a deviation or explain the reasons for such modifications. With these features, model laws are works of simple persuasion. States will adopt them independently, in a fashion that is fully compatible with their interests, allowing this method to be regarded as "democratic" as the parliaments (or other legislative bodies) may discuss their terms to adjust them according to internal values or other economic, political, or cultural considerations. [6]

Despite these advantages, model laws present significant drawbacks. For instance, some of its features undermine the desired uniformity of solutions pursued by codification efforts, potentially thwarting the intentions of project drafters and reducing the benefits conducting to greater degrees of uncertainty. [7] This result may appear due to different circumstances, which have been summarised below.

First, and more obviously, lack of uniformity may arise from a conscious decision of the drafter of the model law, mainly when some of the general terms included in the text are not defined. For example, in the context of the MLCBI, concepts ***I.C.C.L.R. 95*** like "public policy" in art.6, [8] and "protection of creditors" under art.22, intentionally lack precise definitions. This responds to the necessary flexibility suggested by UNCITRAL to encourage greater adherence from potential receiving states. Hence, even without adjustments by local legislators and strictly incorporating the text indicated by said agency, these concepts may easily lead to a homeward trend. Rules become part of domestic laws through a legislative discussion that shall be considered at the time of interpretation, and because some of the concepts used by MLCBI have strong roots in the local scenario, the latter will be hardly dismissible by national courts.

Second, as model laws undergo a revision by local legislative bodies, internal discussions and adjustments must be considered if they divert from the terms or the spirit of the model law. Even though flexibility is an inherent characteristic of this kind of harmonisation instrument, its drafters will always intend for the states to adopt them as close as possible to the original text. However, this result may only be achieved if the states are persuaded of the benefits of the model as a complete and coherent system. Then, if the states believe that local procedural or substantial standards are not adequately reflected in the text, an adaptation will most probably be included in the law, thus creating another homeward trend that may impair the aim for harmonisation, or even the fundamental basis of the proposal.

I will focus on this matter later, but it shall be preliminarily pointed out that these diversions are not either always conveniently justified or explained by the national lawmakers, hence complicating the judicial interpretation process, as there is no apparent reason for the newly created rule. Nevertheless, it is easy to argue that when this kind of deviation is found, the courts shall disregard the text and intention proposed by the model law and try to find the proper application of the domestically created provision, considering the context and more national-guided standards.

Third, local courts will likely struggle with interpreting this kind of regulation as, although it is now part of domestic law, its language may differ from the usual standards of the jurisdiction or, even more troublesome, use terms that have a different meaning in the internal legislation. As Walters aptly says, "[d]omestic legislatures plant international seeds in domestic soil". [9] According to Reinold, culture and local practices influence these internationally sourced rules. Consequently, interpretation becomes an exercise of "translation": judges are not mere transmitters but must carefully prune the norm to incorporate it into domestic law. [10] Even at the risk of compromising uniformity, this approach seems more likely in the context of the MLCBI, which lacks clarity regarding conflict rules, and it is supposedly based on the general standard of the *lex fori concursus*. [11] This means that the court will most probably intend to mingle these rules with the ***I.C.C.L.R. 96*** general procedural and substantive rules most familiar to the court to reach a solution with which a local judge would feel more comfortable.

Although the local understanding of model laws may be influenced by international principles, rules, and construction criteria, efforts have been made to generate uniform standards by including harmonisation and uniformity rules, like those incorporated into international conventions. [12] In particular, although the MLCBI can be characterised as soft law, once it is incorporated into local legislation, its text also encourages considering the international origin of the rules for uniform and good-faith application (art.8 MLCBI). [13] For this purpose, UNCITRAL provides legal operators with a guide to enactment and interpretation, explanatory texts, and communication of the reasoning used in paradigmatic decisions through case law repositories (CLOUT), hoping that the local courts will consider this battery of resources to achieve judicial uniformity and increase certainty for the relevant actors.

Therefore, art.8 of the MLCBI seems to provide a good solution for the abovementioned dilemmas. While *uniformity* expects the rule to have the same meaning regardless of geographical location, *autonomy* implies that the text should not be interpreted according to domestic criteria but within the context of the model law. As Frishman and Benvenisti argue, local judges should resist domestic pressures to favour *parochial interests* and act as agents of the global community, applying the rule as if they were an international tribunal. [14] This means that, as there is no international court to set the correct and accurate meaning of the rules, national courts shall step in in an emulative fashion mimicking its work and way of approaching cross-border conflicts. Nevertheless, these efforts may have diverse results considering that many jurisdictions lack specialised courts for this kind of matter, a fact that has already been pointed out concerning insolvency issues. [15]

The key issue is developing a methodology for interpreting the rules that takes into account their purposes and objectives, while avoiding reliance on local interpretive criteria. Even though they are not necessarily part of model laws, in the case of the MLCBI such aims can be found in its preamble, encompassing: (a) cooperation between the courts and other competent authorities of the State and foreign States involved in cases of cross-border insolvency; (b) greater legal certainty for trade and investment; (c) fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other ***I.C.C.L.R. 97*** interested persons, including the debtor; (d) protection and maximisation of the value of the debtor's assets; and (e) facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment.

However, this general objective is strained precisely by incorporating the MLCBI through local laws. Consequently, it comes into play within the theory of legal sources, local interpretation rules, and complementation or integration with other procedural or substantive norms. Nevertheless, I believe that art.8 should not lead to an internal disorder of the domestic legal system, acting like a sort of Trojan horse. [16] Courts may not understand nor follow legal reasonings or structures that appear to them as unfamiliar or even contrary to the general principles of domestic law. Instead, it should involve careful consideration of the regulation's general objectives. According to Westbrook, [17] since the MLCBI aims to establish a system and not mere standards, interpreters should construct arguments that fulfil its ultimate objectives—a purpose that may seem more relevant than mere uniformity. Soft law instruments are then evaluated considering their results, rather than just a formal and shallow approximation to the text that only looks at similar wording in the judicial resolutions granting recognition, cooperation, or coordination of insolvency proceedings.

I now turn to the specific topic of this paper. Even though MLCBI seeks global cooperation and uniformity to increase certainty for all stakeholders, its implementation across countries significantly differs from the original goals. Such deviations may lead to opportunistic behaviour and to lesser use of the tools it provides to solve cross-border insolvency problems.

Even though the impact of deviations in model laws is not particularly new, in this article I intend to show how they have impacted the landscape of cross-border insolvencies in Latin America. Such a comparative survey has not been addressed in previous research and may prove relevant to assess the not-so-predominant motives that lawmakers have for adapting the text proposed by UNCITRAL. Also, due to the creation of uncertainties for all stakeholders, in practice, these deviations may imply that the cooperative and coordination purposes of the MLCBI may vanish even if the states include it in their regulations.

This article is structured as follows: First, I will present the Latin American jurisdictions that have enacted this model law through a general survey, pointing out the main—not all—deviations. If applicable, I will explain the most probable reasons for such deviations or, at least, their general consequences. Secondly, I will show how these adaptations have resulted in significant difficulties in some of the more remarkable cases in the area in the last years, all related to distressed airlines and the complex scenario created by Covid-19 at the beginning of this decade. Finally, I will offer conclusions and final thoughts on the importance of this topic. ***I.C.C.L.R. 98***

Relevant deviations of the MLCBI in Latin America

At the time of writing (June 2024), 63 countries have adopted the MLCBI. [18] However, despite being Mexico one of the first countries to do so worldwide, this initial enthusiasm has not been swiftly followed by other countries in the area. After that, only Colombia (2006), Chile (2014), Dominican Republic (2015), Panama (2016), Brazil (2020) and Costa Rica (2021) have done so, generally at a time when the local insolvency acts were subject to significant reforms or, at least, adaptations to comply with international standards.

Despite generally integrating its interpretation rule (art.8 MLCBI), these countries' adaptations of the model law have introduced essential complexities. Before reviewing them, it shall be noted that Costa Rica has even altered the terms of said provision, including at the heart of the harmonisation and uniformity clause, a reference to the need to interpret the rules according to the principles provided in the national insolvency law. [19] As it is foreseeable, given the comments above, such an inclusion deviates significantly from the intention of the model law drafters to avoid any homeward trend when applying the cross-border insolvency rules. On the contrary, it is a call to strictly adhere to this trend, thereby undermining efforts to achieve uniformity and certainty in its application. In other words, Costa Rican courts have not been invited to act as an international venue, and, therefore, their resolutions may not be followed by any other judge as it is possible that the principles and rules of the local law greatly influence their reasoning.

Although evident adaptations follow the idea that the judicial proceedings for recognition, cooperation, and coordination shall fulfil the general procedural rules, some of the abovementioned deviations go much deeper than mere formal adaptations and pretend the resignification of some fundamental topics. On some occasions, the aim is to broaden *lex limitatis* provisions, such as the public policy exception, and in others, to admit a greater use of secondary proceedings or to ensure the opening of a local one at the time of the recognition. As it will be assessed, in many of these deviations, there is a sense that the commitment to modified universalisms is not as strong as the one purported by the MLCBI. As a result, the language of territorialism and the aim to protect stakeholders and assets located within the physical boundaries of the State resurge in consideration of the fears related to loss of sovereignty. As model laws are an exercise of persuasion, many of the differences we will analyse in the following paragraphs show that, even though many Latin American countries have been expressing their willingness to join the MLCBI's club, parliamentary discussions have envisioned some doubts about the matter, using the flexibility of this soft law solution to create additional safe harbours to the local interests.

In this sense, a significant topic comes from the amendments to the so-called public policy exception (art.6 MLCBI). This rule aims to provide sufficient defence tools for the foundational values of the receiving legal system, even if it is an indeterminate concept that complicates the judiciary's task in evidencing a more concrete form of protection. [20] The variability and mutation of the concept, very ***I.C.C.L.R. 99*** dependent on the place and time of application, stems from the fluctuating and elusive nature of the notions on which it rests. This matter has raised doubts in the insolvency field, for example, regarding the rights of shareholders, the rules of credit priority, or the discharge of obligations, such as the seminal *Gibbs* case in the United Kingdom. [21]

Since this exception constitutes a way to disapply the MLCBI, its extensive use would even lead to the disregard of recognition. Consequently, it must be applied in a limited manner, as highlighted using the adverb *manifestly* to qualify the contravention of public policy. [22] Given this context, comparative experience has often highlighted more extreme cases involving issues such as due process violations, breaches of communication confidentiality, or, more controversially, obstacles to technological development and the protection of rights against third-party guarantors. [23]

Looking at different approaches to this limitation, it could be striking to find that the Dominican Republic eliminated any reference to public policy. [24] However, this difference from the MLCBI may not be seen to eliminate any defence tool of the national foundational values, but only to avoid repetition. The Dominican Private International Law Act (Act No.544 of 2014) refers to "Dominican public policy", defining it as the mandatory provisions or principles that are not waivable by private autonomy, while "international public policy" relates to the principles that inspire the Dominican legal system, reflecting the social values at the time they must be considered. Article 86 of said Act provides that foreign law does not apply if its effects are incompatible with international public policy, where such incompatibility shall be assessed taking into account the connection of the situation with the Dominican legal system and the severity of the effect that the application of the law would produce.

Mexico also extensively reviewed the text, replacing the "public policy exception" with a reference to the breach of specific internal bankruptcy regulations and the fundamental principles of its legal system.[25] Therefore, the standard set by the legislation is much stricter, as a Mexican court shall compare any measure taken in a foreign proceeding with the principles set not only at a constitutional level—mainly referred to fundamental rights—but also in the national insolvency law. This exercise may prove to be highly complex as insolvency laws have been characterised as "meta-laws", reshaping the legal framework through a collective lens from many different perspectives based on the state's social, political, and economic values.[26] Then, even if it would be hard to understand that this deviation aims at a complete coincidence of the foreign and the local rule, as this would be a utopian standard that would be impossible to suffice, the test requires comparing *I.C.C.L.R. 100 the foreign measure to the pillars of the insolvency regulation. This is akin to a doctor assessing whether another person's organs can be seamlessly transplanted into the recipient's body, even if the organs are somewhat unfamiliar, ensuring minimal risk of rejection.

In the Chilean context, Congress did not only eliminate the word "manifestly",[27] but the Insolvency Law also refers to any measure issued by a foreign court and not to a specific one regulated in the context of the model law.[28] This may suggest the Chilean lawmaker's intention to broaden the scope of the application of the exception, so that the local court shall consider any violation of the Chilean public policy upon the request of recognition or cooperation. This includes, for example, matters such as the approval of a plan, the delivery of assets to the foreign representative for subsequent distributions following foreign legislation, or the recognition of the discharge of debt at the end of a liquidation proceeding.

Another difference stems from the reference to the purposes of regulating cross-border insolvency as provided in the preamble of the MLCBI. Mexico, the Dominican Republic, and Panama[29] omitted any reference to such objectives, probably because they are not part of the proposed articles of the model law. Colombia incorporated the list of purposes transcribed above but excluded the idea of facilitating the rescue of businesses.[30] This omission may be explained by the fact that its act provides, as a general objective of the insolvency regime, the rescue and conservation of enterprises as a going concern and a source of employment.[31] Finally, Brazil added one aim tied to promoting an efficient and optimal liquidation of the company´s assets in an economic-financial crisis, preserving and optimising the productive use of said assets and productive resources, including intangible ones.[32]

I emphasise that these objectives inspire the uniform interpretation of the rules, so any amendment to them will influence the work of the courts. This means that judges shall only consider the specific reasons for these deviations and, under their findings, construe all the rules related to recognition, cooperation, and coordination. Hence, in the case of Mexico, the Dominican Republic, and Panama, this exercise will mean that the court shall decide if the objectives indicated in the MLCBI are or are not binding or if they shall be or not be considered for interpreting the relevant rules. If not, the courts will likely refer to other general principles and aims of their national insolvency regulations, which differ from those considered in the model law. In the case of Colombia, the reference to the rescue of business will have a different sense than in the MLCBI. Consequently, the interpretation will not be autonomous but will be highly influenced by the understanding of the local concepts and reasonings referred to the reorganisation of enterprises under the terms of the general regime. Finally, in Brazil's case, the court shall find a balance between the aims considered in the MLCBI and the one provided by the *I.C.C.L.R. 101 local lawmaker, which, as in the Colombian case, will introduce a homeward trend that will distract the court from the autonomous standard set out in art.8 of the MLCBI.

Concerning some competence issues, the amendments set by the examined jurisdictions follow very different paths. For instance, Colombia changed the definition of "establishment" without referencing "human means and goods or services".[33] This change may extend the scope for opening secondary proceedings in a manner that contradicts the MLCBI's idea of ensuring a limited use of such a tool. It may work as a way to obtain better treatment when the foreign main proceeding does not fully cover the expectations of the local claimants.

On other issues, Brazil addressed fraudulent COMI-shifting based on art.3 of the European Regulation 2015/858 (EIR).[34] Hence, the identification of the main proceeding shall be exposed to deeper scrutiny of the local courts, where the general rule related to the debtor's registered office and the rebuttable presumption contained in art.16(3) of the MLCBI may be subject to a more significant probability of litigation.

Also, the Dominican Republic has proposed a definition of COMI as the "place where the debtor manages its interests on a regular basis and in a manner accepted by third parties".[35] Although such a definition is very close to the ones offered in

a comparative survey—primarily based on the European approach provided by the *Eurofood* [36] and *Interedil* [37] cases, and finally drafted in the EIR —the codification of the definition grants less space for the discussion of the meaning of a highly controversial concept.

Chile and Colombia have also dropped the presumption of insolvency upon recognising a foreign main proceeding (art.31 MLCBI) so that a local one may only be initiated if the conditions set in their relevant acts are duly fulfilled. As said, the rule is intended to facilitate coordination, especially when internal regulations require proof of insolvency when initiating a proceeding. The lack of such a provision limits the opening of a local secondary proceeding. As previously observed, this consequence seems to go in the opposite direction from other measures taken by the abovementioned jurisdictions and may reflect a lack of understanding of its purpose.

Finally, a crucial issue refers to some restrictions for recognising foreign proceedings. Mexico introduced a very controversial reciprocity standard and the requirement to initiate a local insolvency proceeding upon recognition of a foreign one. [38] Colombia did similarly for agencies of foreign companies, [39] and some Chilean case law has required the indication of the local proceeding that would be initiated afterwards by the foreign representative, as has been suggested by the Superintendency of Insolvency when courts have required its opinion at the time the request has been submitted before them. [40] The opening of new local proceedings, ***I.C.C.L.R. 102*** even if it is a possible scenario under the MLCBI, is not encouraged by it if a global solution may be found in a universal venue, but the abovementioned deviations change the focus, so parallel proceedings seem like a default rule.

All these amendments challenge the modified universalism endorsed by the MLCBI, requiring a closer examination of its interpretative rule and a reviewed consideration of the application of its substantive and procedural principles.

Practical consequences

As seen in the previous section, when countries adopt these model laws, they often grapple with complex decisions on implementing them within their national legal system. Divergences can arise due to cultural, economic, and political differences, as well as practical considerations. I now turn to the question of the consequences of such deviations, intending to show that such decisions, in some cases barely thought out, may have considerable implications in the real world.

In practical terms, deviations can impact the effectiveness of cross-border insolvency proceedings. The decisions in the three most significant Latin American airline insolvency cases can vividly illustrate this observation. Latam Airlines, Avianca, and Aeromexico opted to request bankruptcy protection under Ch.11 of the US Bankruptcy Code, [41] showing that the national insolvency regimes were unprepared to cope with companies in financial distress as large and complex as said airlines. [42] Many reasons explain such a choice, not only from a legal standpoint but also from a financial perspective, primarily related to the urgency to obtain enormous amounts of DIP financing during the Covid-19 pandemic, [43] and the possibility of rejecting aircraft lease contracts deemed unnecessary or too expensive given the downturn in the companies' operations.

Although it is not my intention to review all the structural differences between Ch.11 proceedings and the ones provided in Chile, Brazil, Colombia, and Mexico, the latter were deemed as not prepared to grant an efficient solution for the airlines' business reorganisation, even if all of them went through extensive reviews of their insolvency systems since the beginning of the century. Except for Brazil, which did it by the end of 2020 during the Latam Airlines case, a common feature of all such jurisdictions is that they all enacted the MLCBI before the Covid-19 pandemic.

Nevertheless, this did not imply that the regulation was applied, as in the cases of Avianca and Aeromexico, nor that any requests were made beyond those stemming from the recognition of the foreign proceedings, as seen in the Latam Airlines case. A reason may be found in the intricate controversies related to COMI, as all such cases needed the proceeding conducted in the United States (US) to be recognised as a main proceeding under the terms of the model law. Locating the COMI abroad would have required rebutting the presumption related to the company's registered office. This endeavour was only intended successfully with ***I.C.C.L.R. 103*** regards to Latam Airlines in Chile and Colombia, but not in Brazil, even after the enactment of the MLCBI in such country.

Although such a reason may seem powerful enough to explain the companies' election of venue for its restructuring process, other issues directly connected to the diversions announced in the previous chapter should also be observed.

For example, Latam Airlines refrained from seeking plan approval in Chile and Colombia, among other motives, possibly due to uncertainties on the operation of the public policy exception.[44] As indicated above, the different language of art.305 of the Chilean Insolvency Act in this matter was undoubtedly a cause of concern. The discussion was mainly related to potential effects on shareholders' rights, as part of the plan diluted them due to the loss of value of the initial equity. The question was whether there was an illegal expropriation of rights, as, in the same scenario, Chilean law would have required the shareholders' consent for a capital increase.

Due to the limited material explaining this deviation from the MLCBI, various arguments could have led to protracted litigation in the Chilean courts, where insolvency cases require swift resolutions to provide certainty for all involved parties. Also, Chilean courts do not specialise in bankruptcy issues, and mainly, cross-border insolvency cases have not been common in the first decade after the enactment of the MLCBI. Therefore, it would have been difficult to gamble on the results of any request for cooperating in implementing the plan in Chile through the review of its terms by the local court, especially considering that such an analysis is not usually part of the judges' duties in general insolvency proceedings under the Chilean law.

As indicated, the heart of the discussion would have been focused on the concept of public policy and the extent of the exception. The MLCBI intentionally left the first issue undefined to adapt to the national understanding of this sort of *lex limitatis*, and the second one was subject to redrafting by the lawmakers. Both problems would probably have intensified the much-feared homeward trend, setting the terms of the debate in Chilean standards and values. However, avoiding this discussion comes with a price, meaning that the full implementation of the plan—without any cooperation by the local authorities—requires complex negotiations among the parties to obtain a similar outcome, if possible.

A second example refers to Avianca. Its decision not to seek recognition in Colombia had far-reaching consequences. It resulted in creditors enforcing their claims outside the United States, despite having filed their claims in the American proceeding and submitting them to the jurisdiction of their court. In response, Avianca filed a motion seeking an order to impose sanctions on the foreign creditors due to the risk of "double recovery" and the contempt of the court's order.

The US court ruled that:

"Here, the harm, as the Reorganized Debtors point out, is that the Foreign Plaintiffs may be able to obtain double recovery for their pre-petition claims, under the Plan and through the Foreign Actions, if they do not discontinue the Foreign Actions. (Motion [para.]19.) The proposed sanctions are likely ***I.C.C.L.R. 104*** to be effective in abating this harm (at least to the extent of avoiding a double recovery). If the Foreign Plaintiffs discontinue the Foreign Actions as required by this order, they can pursue their claims in the bankruptcy court, subject to any further objections of the Reorganized Debtors. If they do not comply with the court's order, their claims will be disallowed, as any double recovery will be obtained at the expense of Avianca's other unsecured creditors whose recoveries would be unfairly diluted. Finally, because all the Foreign Plaintiffs need to do for the proposed sanctions to abate is discontinue the Foreign Actions, there is no financial burden on the Foreign Plaintiffs to come into compliance with this court's order. Accordingly, the court finds that the Debtors' proposed sanction is reasonable in relation to the facts. See *Terry, 886 F.2d* at 1351."[45]

This situation could have been avoided if the respective jurisdictions had recognised the proceeding plan, including debt discharge. Nevertheless, other than the COMI issue discussed above, different elements come into play, including the need for reference to the purpose of the rescue of the financially distressed business regarding cross-border insolvencies. As explained above, this does not imply that Colombian regulation disregards the "rescue culture"; however, it does not necessarily extend to interpreting relevant provisions in a way that would override the COMI presumption or mandate the recognition of a plan approved abroad. Such actions would only be considered if they align with the need to ensure the effective continuation of the company's business.

Aeromexico chose not to seek recognition in Mexico either, as its national insolvency laws required a time-consuming local proceeding, and the company needed quick access to DIP financing in the US. It should be remembered that Mexican insolvency law includes not only reciprocity rules, a test that a proceeding in the US should have passed, but also the requirement to initiate a local proceeding upon recognising the foreign one. Even though since the creation of specialised bankruptcy courts, the statistics have shown an increase in the use of insolvency regulation, Mexican proceedings have not been extensively used to solve debtor-creditors problems,[46] mainly due to their costs and duration (including an extremely lengthy initiation phase), the lack of discharge rules and preventive schemes, among others.[47]

However, the company's approach was not flawless as it did not address all cooperation and coordination issues, a particularly relevant deficiency when local creditors exerted pressure before national courts. As no stay could be imposed regarding claimants not part of the American Ch.11 proceeding, especially those strongly protected by Mexican regulation, the chance to limit their rights through the measures set in the MLCBI was not at hand due to the lack of request for recognition. In the case of Aeromexico, labour claims and union benefits posed a significant challenge, as the US court linked the case's progression to their approval, not referring to s.365 of the US Code, generally regulating the situation of executory contracts and unexpired leases, and to s.1113 of the US Code, which sets the possibility for the rejection of collective bargaining agreements.[48] In this case, the company was required to negotiate in Mexico with its four unions (STIA, ASSA, ASPA, and Independencia), amending their collective bargaining agreements to access a second tranche of a much-needed DIP financing committed by Apollo Global Management for US $625 million, and therefore granting the said unions much more leverage for negotiation, probably considering the more protective character of labour law in Mexico vis-à-vis the US.

Conclusions

As crucial as the theoretical problems related to deviations from the MLCBI by the receiving states, especially concerning achieving uniformity and certainty for all stakeholders, the practical consequences of such decisions shall not be disregarded. All such diversions allow local courts to follow homeward trends when interpreting and applying the rules created by the national lawmakers, so the results may not be aligned with the purposes set in the model law.

The variations in adopting the MLCBI among Latin American jurisdictions have introduced complexities that challenge the model law's envisioned harmonisation. However, they do not only thwart the modified universalism approach but also create practical issues in cross-border cases. Achieving consistency in applying international insolvency principles in this diverse landscape requires a deeper exploration of the interpretative rules and the conscience of the effects of these variations by local legislators and courts, mainly when the latter are not specialised in insolvency issues.

As evidenced in s.3 of this article, these uncertainties may lead to lesser use of the MLCBI solutions, especially when COMI may be challenged or if mandatory local proceedings shall be initiated upon recognition. This is especially complex where the local proceedings are lengthy or may introduce complexities when inexperienced courts shall deal with parallel proceedings. Also, partial use of said regulation can be foreseen, where distressed companies are satisfied with the measures taken due to the recognition of the foreign proceeding, without looking for further assistance through judicial cooperation or coordination, as such aids would need to pass harder *lex limitatis* tests than the ones crafted by the model law.

These conclusions do not mean that alternatives may not be found. Still, they require very complex contractual structures, distributing negotiation powers in an odd fashion (mainly regarding local stakeholders), thus creating a risk of diminishing the efficiency of the outcome.

Reviewing these conclusions, I do not intend to advocate for countries not to scrutinise the terms of the MLCBI and to adapt its rules to their domestic interests and values but to understand the practical consequences that such deviations may entail. However, the motives for taking that road shall be expressly included in the parliamentary debate, so local judges, knowing they cannot refer to international origins or to a comparative understanding of the MLCBI, may still effectively address the deviated rule. Also, expressing the reasons for the deviation may have other advantages, such as helping the legislative body to review the model law as a coherent set of rules, so any amendment to one of them may impair reaching its objectives, or even point out deficiencies of the MLCBI that may be considered in future amendments. Having that idea in mind may help lawmakers calibrate the effects of any deviation and consider their potential benefits and drawbacks, also in view of its practical consequences.

Juan Luis Goldenberg Serrano

Footnotes

1 *M. Heidemann, Methodology of Uniform Contract Law (Berlin/Heidelberg: Springer, 2007), pp.36–39.*
2 *Heidemann, Methodology of Uniform Contract Law (2007), pp.40–55.*
3 *Heidemann, Methodology of Uniform Contract Law (2007), p.53.*
4 *R. Viñas Farre, Unificación del Derecho internacional privado (Barcelona: Bosch, 1978), p.136.*
5 *Viñas Farre, Unificación del Derecho internacional privado (1978), p.137.*
6 A. Gurrea-Martínez, "The Implementation of the Model Law on Cross-Border Insolvency: International Divergencies and Challenges Ahead" (2024) 21(3) International Corporate Rescue 145, 149.
7 *A.M. Ballesteros Barros, "Derecho internacional de la insolvencia en UNCITRAL: perspectiva metodológica", in El Derecho de la insolvencia en UNCITRAL. Instrumentos y comentarios (Cizur Menor: Aranzadi, 2023), p.470.*
8 *UNCITRAL, Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation (Vienna, 2014), p.28*, expresses that no definition of what constitutes public policy was attempted as notions vary from State to State.
9 A. Walters, "Modified Universalism and the Role of Local Legal Culture in the Making of Cross-Border Insolvency Law" (2019) 93(1) American Bankruptcy Law Journal 47, 73.
10 *T. Reinold, "Diffusion Theories and the Interpretative Approaches of Domestic Courts" in The Interpretation of International Law by Domestic Courts (Oxford: Oxford University Press, 2016), p.286.*
11 B. Wessels, "Will UNCITRAL Bring Changes to Insolvency Proceedings Outside the USA and Great Britain? It Certainly Will!" (2006) 3(4) International Corporate Rescue 200, 205. Reference shall be made to Recommendation 31 of the UNCITRAL Legislative Guide on Insolvency Law.
12 For example, art.7 of the Convention on the limitation period for international sale of goods (New York, 1974), art.3 of the UN Convention on the carriage of goods by sea (Hamburg, 1978), art.7 of the UN Convention on contracts for the International Sale of Goods (Vienna, 1980), art.4 of the UN Convention of international bills of exchange and international promissory notes (New York, 1988), art.5 of the UN Convention on independent guarantees and stand-by letters of credit (New York, 1995), art.7 of UN Convention on the assignment of receivables in international trade (New York, 2001), art.5 of the UN Convention on the use of electronic communications in international contracts (New York, 2005) and art.2 of the UN Convention on contracts for the international carriage of goods wholly or partly by sea (New York, 2008).
13 Other examples of model laws with similar rules are art.2 of the UNCITRAL Model Law on electronic commerce (1996), art.5 of the UNCITRAL Model Law on electronic signatures (2001), art.5 of the UNCITRAL Model law on secured transactions, art.3 of the UNCITRAL Model law on electronic transferable records (2017), art.2 of the UNCITRAL Model law on international commercial mediation and international settlement agreements resulting from mediation (2018) and art.8 of the UNCITRAL Model Law on recognition and enforcement of insolvency-related judgments (2018).
14 *O. Frishman and E. Benvenisti, "National courts and interpretative approaches to international law" in The Interpretation of International Law by Domestic Courts (2016), p.318.*
15 M. Rowat and J. Astigarraga, "Latin American Insolvency Systems. A Comparative Assessment" World Bank Technical Paper No.433 (Washington D.C.: The World Bank, 1999).
16 *I. Fletcher, Insolvency in Private International Law (Oxford: Oxford University Press, 2007), p.447*, from whom we borrow this image referring to the fears created by some initial unification attempts, having a dominant participation of American lawyers.
17 J. Westbrook, "Interpretation internationale" (2015) 84(4) Temple Law Review 739, 751.
18 United Nations, "Status: UNCITRAL Model Law on Cross-Border Insolvency (1997)", https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency/status.
19 Article 65.8 of the Costa Rican Insolvency Act (No.9957 of 2021).
20 E. Adams and J. Finche, "Coordinating Cross-border Bankruptcy: How Territorialism Saves Universalism" (2023) 15 Columbia Journal of European Law 43, 69.
21 *Antony Gibbs and Sons v La Société Industrielle et Commerciale des Métaux (1890) LR 25 QBD 399.*
22 *UNCITRAL, Guide of Enactment and Interpretation, p.26.* ("The Model Law preserves the possibility of excluding or limiting any action in favor of the foreign proceeding, including recognition of the proceeding, based on overriding public policy considerations, although it is expected that the public policy exception will be rarely used (article 6)").
23 E. Buckel, "Curbing Comity: The Increasingly Expansive Public Policy Exception of Chapter 15" (2013) 44(3) Georgetown Journal of International Law 1281, 1292; M. Garza, "When is Cross-Border Insolvency Recognition Manifestly Contrary to Public Policy" (2015) 38(5) Fordham International Law Journal 1587, 1612–1621.

24 Dominican Insolvency Act (No.141-15 of 2015).
25 Article 283 of the Mexican Insolvency Act 2000.
26 J. Clift, "Choice of Law and the UNCITRAL Harmonization Process" (2014) 9(1) Brooklyn Journal of Corporate, Financial and Commercial Law 29, 31; and *R. Bork, Advanced introduction to cross-border insolvency law (Cheltenham/Northampton: Edward Elgar Publishing, 2023) p.2*.
27 The same elimination was considered in Canada, Japan, Korea, and Singapore. With this revision in view, Gurrea-Martínez states, "countries that have omitted the word manifestly are expected to require a lower threshold for refusing recognition," although this has not always been the case, as Singaporean cases demonstrate. Gurrea-Martínez, "The Implementation of the Model Law on Cross-Border Insolvency: International Divergencies and Challenges Ahead" (2024) 21(3) International Corporate Rescue 145, 147.
28 Article 305 of the Chilean Insolvency Act (No.20.720 of 2013).
29 Panamanian Insolvency Act (No.12 of 2016).
30 Section 1–010.
31 Article 1 of the Colombian Insolvency Act (No.1116 of 2006).
32 Article 167-A of the Brazilian Insolvency Act (No.11.101 of 2025, included by Act No.14.112 of 2020).
33 Article 87.6 of the Colombian Insolvency Act (No.1116 of 2006).
34 Article 167-I of the Brazilian Insolvency Act (No.11.101 of 2025, included by Act No.14.112 of 2020).
35 Article 206 of the Dominican Insolvency Act (No.141-15 of 2015).
36 *Re Eurofood IFSC Ltd (C-341/04) EU:C:2006:281; [2006] B.C.C. 397*.
37 *Ineredil Srl (In Liquidation) v Fallimento Interedil Srl (C-396/09) EU:C:2011:671; [2012] B.C.C. 851*.
38 Article 293 of the Mexican Insolvency Act 2000.
39 Article 105 of the Colombian Insolvency Act (No.1116 of 2006).
40 A review of this case law can be found in *J. Alcalde and J.L. Goldenberg, La agencia de Sociedad extranjera (Valencia: Tirant lo blanch, 2020), pp.217–219*.
41 *In re Latam Airlines Grp. S.A., 20-11254 (JLG), US Bankr. S.D.N.Y., D.K. 3*; *In re Avianca Holdings S.A., et al., 20-11133 (MG) 23 Civ. 1211 (KPF)*; *In re Grupo Aeromexico, S.A.B. de C.V., 20-11563 (SCC)*.
42 R.M. Rojas-Vértiz, "The MLCBI, the COMI, and Emerging Markets: Is it Time for Amendments?" (2023) 98(2) Chicago-Kent Law Review 509, 515–517.
43 On this general issue, P. Hodecq, "At the Crossroads Between Bankruptcy and Aviation: The Proposed Bankruptcy Venue Reform and the Imperilment of Foreign Airlines' Availment of U.S. Bankruptcy Courts under Chapter 11" (2022) 87(3) Journal of Air Law and Commerce 595, with respect to DIP Financing, 604–605.
44 See A. Yrarrázaval, A. Fermandois and R. Delaveau's expert declarations before the US Bankruptcy Court, all concerning the shareholder's position in an insolvency scenario in Chile and the logic of corporate law and shareholders' economic and political rights.
45 Resolution dated 27 January 2023.
46 Statistics provided by Instituto Federal de Especialistas en Concursos Mercantiles (Ifecom) are available at: http://www.ifecom.cjf.gob.mx.
47 R.M. Rojas-Vertiz, "Cómo Aumentar el uso de los Procesos de Concurso Mercantil en México" (2021) Abogado Corporativo September–October 2021 24–30.
48 P. Hodecq, "At the Crossroads Between Bankruptcy and Aviation: The Proposed Bankruptcy Venue Reform and the Imperilment of Foreign Airlines' Availment of U.S. Bankruptcy Courts under Chapter 11" (2022) 87(3) Journal of Air Law and Commerce 595, 604.

