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Is COMI a Problem? A Discussion of the Recent Proposal to UNCITRAL

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I. Origins of COMI

a. The concept of "center of main interests" or "COMI" is likely the most important undefined concept that is central to international insolvency law. Its origins can be traced to the 1980 Draft Convention on Bankruptcy, Winding-Up, Arrangements, Compositions and Similar Proceedings (the "1980 Convention"), which used the term "center of administration" (instead of "COMI").[1]

b. The 1980 Convention was never adopted; however, the idea of having a connecting jurisdictional link in international insolvency cases survived and the term "center of main interests" was then used in the 1990 Istanbul Convention on Certain Aspects of Bankruptcy (the "Istanbul Convention").[2]

c. After the Istanbul Convention, the concept was used again in the 1995 European Convention on Insolvency Proceeding (the "1995 Convention"), which has strongly influenced the UNCITRAL Model Law on Cross-Border Insolvency ("MLCBI").[3]

d. The Virgos-Schmit Report, which provides an authoritative interpretation of the 1995 Convention, offers a rationale for COMI and states that "[t]he concept of 'centre of main interests' must be interpreted as the place where the debtor conducts the administration of his interest on a regular basis and is therefore ascertainable by third parties."[4]

   i. Pursuant to the Virgos-Schmit Report, insolvency is a foreseeable risk, so it is important that a debtor's current and potential creditors can calculate or assess their rights and exposure in case of insolvency.

II. COMI Under the MLCBI

a. Under the MLCBI, COMI is key to determining the type of foreign proceeding (main or non-main) and the respective relief available prior to or upon recognition.[5]

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[1] Draft Convention on bankruptcy, winding-up, arrangements, compositions, and similar proceedings, Report on the draft Convention on bankruptcy, winding-up, arrangements, compositions, and similar proceedings. Bulletin of the European Communities, Supplement 2/82, art. 3(1), 1982.

[2] European Convention on Certain International Aspects of Bankruptcy, art. 4, Jun. 5, 1990, 5.VI.1990. The Istanbul Convention was drafted by a committee of experts subordinate to the European Committee on Legal Co-operation, but never entered into force, as it was not ratified by the requisite number of countries.

[3] Convention on Insolvency Proceedings, art. 3, Nov. 23, 1995, 1995 J.O. (C 279) 1, 5.

[4] *See* Miguel Virgos & Etienne Schmit, *Report on the Convention on Insolvency Proceedings 8* (1996).

[5] *See* U.N. Comm'n on Int'l Trade L., UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation (2013), art. 20-21 [hereinafter, "MLCBI"].

b. Article 17(2) of the MLCBI provides that a foreign proceeding shall be recognized as (a) a foreign main proceeding, if it takes place in a state of debtor's COMI, or (b) a foreign non-main proceeding, if the debtor has an establishment in the originating foreign state.[6]
c. Various factors have been deemed relevant by courts in determining a debtor's COMI, including the location of the debtor's headquarters, managers, employees, investors, primary assets, or creditors, as well as the jurisdiction the law of which would apply to most of the debtor's disputes.[7]
d. In determining the debtor's COMI, courts have also considered any relevant activities, including liquidation activities and administrative functions, as well as the situs of the debtor's "nerve center" from which the debtor's activities are directed and controlled.[8]
e. *The Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency* (the "Guide") makes clear that "[p]roceedings commenced on a different basis, such as presence of assets without a center of main interests or establishment, would not qualify for recognition under the Model Law scheme."[9]
    i. A number of jurisdictions have followed this interpretation, including the U.S.
        1. For example, in *Bear Sterns*, the United States Bankruptcy Court denied recognition of the Cayman Islands insolvency proceedings under Chapter 15 on the basis that the foreign proceedings were not pending where the debtors had their "COMI" or where they had an establishment.[10]
        2. A more recent example of a similar ruling is in *Comfort Jet Aviation*, in which the United States Bankruptcy Court held that the debtor did not have either its COMI or an establishment in the Isle of Man (the debtor's jurisdiction of incorporation and of its liquidation) and found that the liquidation was not a foreign main proceeding or a foreign non-main proceeding capable of recognition.[11]
        3. This contrasts with the ruling in *Modern Land*, where the United States Bankruptcy Court expressed concerns regarding the debtor's COMI in the Cayman Islands, but ultimately found the debtor's COMI there, and therefore, ruled that the Cayman scheme was capable of recognition as a foreign main proceeding.[12]

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[6] *See* MLCBI, art. 17(2). The MLCBI does not define COMI, but states that "[i]n the absence of proof to the contrary, the debtor's registered office […] is presumed to be the centre of the debtor's main interests." MLCBI, art. 16(3). This presumption can be rebutted.

[7] *See In re SPhinX, Ltd.*, 351 B.R. 103 (Bankr. S.D.N.Y. 2006), ***aff'd***, 371 B.R. 10 (S.D.N.Y. 2007).

[8] *See Morning Mist Holdings Ltd. v. Krys (In re Fairfield Sentry Ltd.)*, 714 F.3d 127, 138 (2d Cir. 2013).

[9] Guide to MLCBI, para. 30.

[10] *See In re* Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd. (Bear Stearns I), 374 B.R. 122 (Bankr. S.D.N.Y. 2007), ***aff'd***, 389 B.R. 325 (Bankr. S.D.N.Y. 2008).

[11] *See In re Paul Shimmin, as Liquidator of Comfort Jet Aviation Ltd*., No. 22-10039, 2022 WL 9575491 (Bankr. W.D. Okla. Oct. 14, 2022).

[12] *See In re Modern Land (China) Co., Ltd.*, 641 B.R. 768 (Bankr. S.D.N.Y. Jul. 18, 2022).

f. The debtor's COMI may be legitimately migrated or shifted for purposes of recognition of a bankruptcy proceeding as a foreign main proceeding under versions of the MLCBI enacted in the United States and other jurisdictions.[13]

III. Potential Limitations of COMI Under the MLCBI

a. Because the concept of COMI emerged during the time when the insolvency of groups of companies was not widely debated, the MLCBI did not address the issue of group insolvency and did not envision a notion of "group COMI." Instead, the MLCBI (just like the EIR (2000)) has a single-entity debtor in mind. The MLCBI is thus less readily applicable to group structures where entities have separate COMIs in different countries rather than a common COMI, making recognition of all proceedings less straightforward.[14] Although the "new generation" of model laws, such as the Model Law on Enterprise Group Insolvency ("MLEGI"), provide additional mechanisms to address these concerns and complement the provisions of the MLCBI, no jurisdiction has adopted MLEGI to date (with the UK being the first country to possibly adopt the MLEGI in the near term).
b. Other issues have been raised concerning the interpretation of the concept of COMI in the civil law legal systems where, generally, the judges would not depart from the text of the law.[15]

IV. A Call to Reconsider the Concept of COMI

a. In an open letter to UNCITRAL dated September 14, 2023, a number of scholars (and several practitioners who have signed on to the letter) have urged UNCITRAL to reconsider the concept of COMI as the basis for determining whether a foreign proceeding qualifies as a "foreign main proceeding" under the MLCBI.
    i. In the letter, the authors point out that under the MCLBI, a proceeding qualifies as a foreign main proceeding if takes place in the jurisdiction where the debtor has its COMI, but according to the authors, such policy option presents various flaws that can undermine the ability of insolvency law to facilitate the maximization of the returns to creditors or an effective reorganization of a viable but financially distressed businesses, among other things.
    ii. Specifically, the authors argue that:
        1. First, the MLCBI encourages debtors to initiate insolvency proceedings in the place where they have their COMI even if their local jurisdictions have an inefficient insolvency system.
        2. Second, the concept of COMI is far from clear in the globalized world where assets, creditors, subsidiaries, employees, and clients may be located in many jurisdictions. The authors state

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[13] *See e.g.*, *In re Ocean Rig UDW Inc.*, 570 B.R. 687 (Bankr. S.D.N.Y. 2017) (ruling that scheme of adjustment proceedings pending in the Cayman Islands should be recognized as "foreign main proceedings" under Chapter 15 of the Bankruptcy Code even though the debtor's COMI had been shifted to the Cayman Islands less than a year before the proceedings were commenced, as the country in which the debtors' COMI was previously located did not have a law permitting corporate restructurings).

[14] For a full discussion of this issue, please *see* Ilya Kokorin, Stephan Madaus, Irit Mevorach, *Global Competition in Cross-Border Restructuring and Recognition of Centralized Group Solutions*, 56(2) Tex. Int'l L.J. 109-154 (2022).

[15] *See* Rosa M. Rojas Vertiz, *The MLCBI, the COMI and Emerging Markets: Is It Time for Amendments?* (Jul. 13, 2022), available at https://ssrn.com/abstract=4190677.

that COMI is even less clear for certain businesses such as cryptoexchanges.
3. Third, the concept of COMI can lead to opportunistic behaviors by debtors, as COMI can be moved without obtaining prior consent from the creditors.

iii. The letter calls for alternative approaches to determine the insolvency forum, including:
1. Choosing the insolvency forum in the company's constitution *ex ante* (the preferred approach per the authors, who also suggest that UNCITRAL adopt a series of safeguards to protect against debtor's opportunistic behavior); or
2. Choosing the insolvency forum *ex post* (second best approach) and allowing the debtor to choose a more efficient insolvency forum that may not be the debtor's COMI.

V. A Way Forward?

a. To date, there have been several responses to the open letter, including a response published in the Global Restructuring Review, in which several practitioners emphasize that changing the eligibility requirement for recognition is unlikely to eliminate the possibility of litigation by opportunistic opponents, and that COMI is not an issue in most cases.
b. In their response to the open letter published in Credit Slips, Professors Janger and Pottow additionally add that given the consensus driven model of UNCITRAL, scrapping of COMI is fanciful, as well as ill-advised given the benefits of COMI and that of the broader regime of model laws, coupled with the operational constraints of UNCITRAL.
c. Although the letter may lead to further academic debate, it is unlikely that COMI would be abandoned by the EU, UNCITRAL and jurisdictions that adopted the MLCBI.