A Celebration of Twenty-Five Years of the Model Law on Cross-Border Insolvency
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Reflections on Where We Were and Where We Should Go From Here[1]

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The Model Law has been far more successful than we had any reason to expect at its promulgation in 1997.[3] Most important, it has played a large part in creating an international insolvency community that did not exist when we first convened at UNCITRAL. Yet today it disappoints the rising expectations of a new generation and has given rise to number of difficulties and dangers. We will try in 65 minutes to articulate and analyze the past and the future of the Model Law.

In 1995, when we gathered in Vienna for the first meeting of UNCITRAL Group V, domestic insolvency reform was a hot topic in many capitals, but international insolvency cooperation was in its infancy. Much good work had been done on a draft EU Convention on Insolvency, but it was hopelessly stalled by disputes about Gibraltar, among other things. The United Kingdom had an international recognition process, but only for certain Commonwealth countries. In the United States, the American Law Institute was in the process of adopting recommended procedures for recognition of insolvency proceedings. That project first proposed the standard of "modified universalism" for recognition, a standard now adopted in many court cases around the world, but the project was limited to the three NAFTA nations.[4] The International Bar Association had suggested helpful procedures for cross-border cases, but they were nowhere adopted.[5] There were also a few older efforts to be found in various jurisdictions, mostly small or rarely used.

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[1] I deliberately avoid extensive citations in this brief paper. I would be delighted to furnish cites to some of this background to anyone interested. *See, e.g.,* Symposium, *International Bankruptcy Law: Comparative and Transnational Approaches*, 33 TEX. INT'L L.J. 1 (1998) (history); Symposium, *The Global Competition for Large Insolvency Cases: Theoretical and Practical Implications*, 56 TEX. INT'L L.J. 1 (2021).

[2] Twenty-seven years ago, I was the American Law Institute Reporter for a project that was its first foray into cross-border coordination of any kind (as opposed to traditional treaties, choice of law, etc.) as well as its first venture into the exotic world of bankruptcy. From there, I had the honor of serving as the co-chair of the US delegation to the first UNCITRAL insolvency project, the Model Law on Cross-Border Insolvency, promulgated in 1997. I am really pleased at being asked to work with a terrific panel to reflect about twenty-five years of the Model Law and to consider where we go from here.

[3] UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation. https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/1997-model-law-insol-2013-guide-enactment-e.pdf [hereinafter Model Law]

[4] American Law Institute, Transnational Insolvency Project, Principles of Cooperation (2003).

[5] However, Dan Glosband, representing the IBA, was a highly important actor in the UNCITRAL negotiations.

There were many predictions that the project we were beginning was a waste of time—the insolvency laws of the world were far too varied and territorial to hope for an international approach in any realistic timeframe. The first two sessions, two weeks each in Vienna and New York, consisted largely of each of the delegates educating all of us about our respective laws and, even more important, about our attitudes and concerns about insolvency and debtor-creditor law generally. But step by step, as much at lunch and over drinks as in the formal sessions, we began to find commonalities and to address what first steps might move in a helpful direction. Over two years of two-week-long meetings we agreed on three basic goals:

1. Recognition should be based upon a simple set of facts easily shown to a foreign court.[6]
2. Recognition should result in worldwide court control of assets very quickly.[7]
3. Any other local effects of recognition should be determined by the local court according to some stated guidelines.[8]

Toward the end of the negotiations, we were able to add 4. authorization for the courts to pursue cooperation and coordination as goals; and 5. authorization of direct communication among courts and among administrators promoting real-time cooperation. [9]

Points on which we almost foundered: 1. Should we propose a convention or a model law? 2. Should recognition turn on reciprocity? Because the political challenge was so great, we chose a Model Law and because insolvency law was so parochial, we rejected a requirement of reciprocity.

By way of introduction to our panel's discussion, here is my list of the most important outstanding issues under the Model Law. We will not have time to discuss them all, but our distinguished panelists will touch on many of them.

History
    Recent UNCITRAL Additions
        Guide, Judgement Enforcement, Corporate Groups

Avoiding Powers
    Enforcement of foreign avoiding powers
    Conceptual and Policy Issues

Center of Main Interest—the problem of a Central Court
    COMI (Centre of Main Interests)

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[6] Model Law §§15-17.
[7] Model Law §§20-21.
[8] Model Law §§21-22. There, as elsewhere in the negotiations, a central tension was the preference for judicial discretion among the common law delegates, while the civil lawyers pressed for explicit rules for the courts to apply.
[9] Model Law §25-27.

Based upon mere incorporation?
Choice of law
Forum shopping
Tiered or regional recognition

Glass half full or half empty for adoptions
Not adopted by some commercially important nations
Including China, India, others

Setbacks and Negatives
United Kingdom: narrow reading, *Gibbs*
Nortel case captures good and bad
Joint International Trial
Incredible litigation expense

Relationship to EU Regulation
Possible pan-EU recognition of non-EU proceedings

Challenges: Jurisdictional Competition (risk of favoring insiders)
Determining Central (coordinating) Court—COMI+
Theory: Is Reorganization (Scheme) purely a private bargain?
Global Freeze
Discharge of Debt
Limiting recognition to one-purpose statutes protecting creditors

Standards for recognition—Vitro US (gross differences),
Rubin UK (personal jurisdiction)
JIN rules impact—grounds for denial?

If I were forced to choose one of these issues as the most important it would be the use of artificial standards for COMI, especially place of incorporation where there are no real business operations in the court that renders the insolvency judgment.[10]

From my perspective, the greatest deficiency in implementing the Model Law lies in disuse of the provisions for communication and cooperation. For the most part, recognition has been granted to foreign proceedings, but the model of a worldwide cooperative effort has been weakly realized. Instead, one court or another approves a scheme or a plan and it is left to the other courts to approve or disapprove the result, take it or leave it. That model is too close to the traditional system of recognition of judgments and too far from a modern "operation on a living

[10] *See, e.g.*, Jay Lawrence Westbrook, *Locating The Eye Of The Financial Storm*, 32 BROOK. J. INT'L L. 1019 (2007).

patient"[11] with a resolution that takes into full account the policies and concerns of all the relevant jurisdictions. It also lacks transparency and, in many cases, leaves the result in the hands of a small number of powerful players.

I am very proud of having been a founding director of the International Insolvency Institute. Among its many societal benefits, the most important is that it brings together practitioners, judges, and administrators to create personal relationships and to sustain an on-going dialogue. We can thus move closer to the day when an application for recognition under the Model Law leads immediately to a "zoom" among participants, using modern tools of translation and communication to arrive at a truly universalist result that also allows for the special policies and concerns of each jurisdiction—to wit, modified universalism.

[11] A great Canadian judge, James Farley, taught us that "civil proceedings generally are autopsy law, but insolvency proceedings are operations on a living patient."