
**INTERNATIONAL RESPONSE TO THE UNCITRAL MODEL LAW ON
CROSS-BORDER INSOLVENCY**

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Preface

The history and evolution of the UNCITRAL Model Law on Cross-Border Insolvency is one of the most interesting aspects of International Insolvency Law. When time came for me to write a research paper for my LL.M course in International Business Law, I saw this as an opportunity to make a modest but meaningful contribution to the study of this subject. I hope this is how this paper will be viewed.

This paper is written for those people who are already familiar with the text of the Model Law and for that reason, does not go deep into the contents of the text itself.

Due to the short period within which I had to complete this paper, the sources used herein are limited to those available at Vrije University and the University of Amsterdam during the period of June 2004. I am also grateful to the authors who have made material available through the Internet, in particular, through the website of the International Insolvency Institute.

The main sources of this paper are the legislation of those countries that have adopted the Model Law. Due to the fact that some of these sources are only available in languages that are foreign to me, I have had to rely in some cases on non-official translations of these sources provided by Lawyers and Academics from the respective countries. Where I have used those sources, I cannot vouch for the correctness of the translations provided even though I have utmost confidence in the ability of the people who contributed those translations.

The observations and conclusions in this paper are mine and mine alone, and no other person should be held responsible for any flaws or inaccuracies that may surface.

I would like to express my sincere gratitude to Professor Bob Wessels for supervising this paper and for pointing me in the right direction when I seemed to have been lost. I wish to stress that he is only responsible for the positive aspects of this paper and that the negative aspects are the result of my own doing.

Finally, I would also like to thank Professor H.J de Ru for his support, and all the members of staff at Vrije University for making the writing of this paper possible.

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1. Introduction

It is not unusual for a debtor to own assets in more than one country. It is also common for a debtor to have creditors in more than one country. When that debtor becomes insolvent, foreign creditors have an interest in knowing if they have a right to take part in insolvency proceedings taking place in those countries (that have jurisdiction over the debtor or his assets) as well as the scope of such rights. Foreign courts, domestic courts and other interested parties have an even greater interest in knowing how to deal with challenges posed by cross border insolvency, in particular, the recognition of foreign proceedings, how to deal with foreign authorities, foreign creditors and foreign insolvency proceedings regarding the same debtor.

According to UNCITRAL, national insolvency laws were for the most part either lagging behind or ill-equipped to deal with the cases of cross-border insolvency.¹ Some have even suggested that deficient insolvency laws was one of the factors that contributed to the financial crises that hit the East-Asian countries in the latter part of the 1990's.²

The problem has always been that each country has its own way of dealing with the issue of cross border insolvency and the various national insolvency laws and practices are simply too diverse.³ Some countries have signed treaties with each other but there has never been an international instrument applicable to all countries.⁴ The result as one can imagine, was a lot of uncertainty and confusion. This created a fear that this uncertainty would ultimately hamper cross-border investment. It is against this backdrop that the UNCITRAL Model Law on Cross-Border Insolvency came into being.⁵

Recognizing the need for certainty and clarity on these issues, UNCITRAL, a legal body within the United Nations system in the field of international trade law, adopted the text of the Model Law on Cross-Border Insolvency ('The Model Law') on 30 May 1997.⁶ The Model Law was approved by resolution of the United Nations General Assembly ('UN') on 15 December 1997.

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¹ For more detail, see the Guide to Enactment of the UNCITRAL Model Law "main features of the Model Law" available at <<<http://www.uncitral.org>>> (visited on 18 May 2004).

² See Il Chong Nam and Soogeun Oh, 'Asian Insolvency Regimes from a comparative perspectives: problems and issues of reform' *Insolvency Systems in Asia*, Paris: OECD Publications, 2001, pp. 19.

³ For a comprehensive survey of laws of various countries, see Cooper and Jarvis, *Recognition and enforcement of cross-border insolvency*, London: John Wiley & Sons, 1996. This survey was conducted at the time when the Model Law was still being discussed and it paints a clear picture of how different countries dealt with the issue of cross border insolvency.

⁴ Bob Wessels, "Cross-Border Insolvency: Do Judges break new ground?", *Business and Bankruptcy law in the Netherlands, Selected Essays*, The Hague, London and Boston: Kluwer Law International, p. 207.

⁵ For the history and background of the Model Law, see Andre T. Berends, *The UNCITRAL Model Law on Cross-Border Insolvency, 'A comprehensive review'*, *Tulane Journal of International Comparative Law*, Spring 1998.

⁶ *Ibid.*

The UN resolution approving the Model Law recommended that states review their legislation on cross-border insolvency and in that review, give favorable consideration to the Model Law.⁷

Response to the UNCITRAL Model Law means two things. The first is the response to the UN resolution calling on countries to give favorable consideration to the Model Law. The second is the response to UNCITRAL's call on countries that adopt the Model Law to limit deviations from the text of the Model Law to the minimum. It is these two issues that will be the focus of this paper. The aim is to look at who has adopted the Model Law and how they have adopted the Model Law. The primary sources of this paper will be the cross-border insolvency legislation of the Model Law countries.

Before dealing with the Model Law countries, a brief overview of the specific issues that the Model Law addresses will follow.

2. The scope of application of the Model Law

The Model Law addresses specific issues set out in the body of its text. These issues are the rights of foreign creditors, the rights and duties of foreign representatives, recognition of foreign proceedings, coordination of proceedings and cooperation between authorities in different states. It does not address nor does it seek to unify the substantive and procedural law on insolvency of the enacting states. Issues not dealt with in the Model Law are left to the enacting states. The text of the Model Law is a very thin document consisting of only 32 articles, and accompanied by an explanatory Guide to Enactment.⁸

The Model Law applies only where there is an incident of cross border insolvency and assistance is sought in the enacting state by a foreign court or a foreign representative in connection with a foreign proceeding. This implies that a proceeding would have been opened somewhere else and the insolvent in those proceedings has assets or legal interests in the enacting state. The Model Law also applies where insolvency proceedings have been opened in the enacting state and the authorities in the enacting state require the assistance of a foreign court or foreign authorities. Another case where the Model Law would be applicable is a case where insolvency proceedings concerning the same debtor are taking place in the enacting state and in the foreign state at the same time.

Last but certainly not least, the Model Law would apply where creditors and other interested persons from a foreign state are interested in requesting the commencement of, or are eager to participate in insolvency proceedings taking place in the enacting state.

It is these specific issues that the Model Law addresses and it is the first widely inclusive international instrument of its scale to address these issues.⁹

⁷ Resolution 52/158 of 15 December 1997.

⁸ The Guide to Enactment was published in 1999. Its modest aims are to provide a background to the Model Law and to serve as a tool to guide countries during the process of adopting the model law.

⁹ Fletcher points out that the Model International Insolvency Cooperation Act (MIICA), which is the first example of a Model law approach, was not as inclusive as the Model Law and for that reason, never received wide acceptance. See Ian F. Fletcher, *Insolvency in Private International law: National and International approaches*, New York: Clarendon Press. Oxford, 1999, p. 325.

An interesting aspect of the Model Law is the option presented to enacting states to exempt certain types of entities/debtors from the scope of application of the Model Law. The entities the drafters had in mind are banks and insurance companies. This is in recognition of the fact that these entities may be subject to separate or special insolvency rules in respective countries.¹⁰ It would be interesting to see if and how the Model Law countries have exercised this option.

3. Relevance of the Model Law

3.1 Challenges posed by cross-border insolvency

Most countries recognize the right of foreign creditors to recover debts through civil claims. Better yet, a number of countries recognize the right of foreign creditors to initiate or take part in local insolvency proceedings. Uncertainty about the extent to which their claims will be recognized, the ranking of their claims and the unfamiliar rules and procedures are some of the problems faced by foreign creditors. A major challenge posed by cross-border insolvency is the recognition of foreign insolvency proceedings. It is only if foreign insolvency proceedings are recognized (or likely to be recognized) that one can start talking about judicial cooperation and access of foreign representatives to local courts. This challenge has traditionally been approached (mainly) in two ways.¹¹ A distinction can be made between countries that favor the territoriality approach and those that favor the universality approach. These different approaches to the issue of cross-border insolvency have inevitably led to a number of problems.

According to the territoriality approach, effects of insolvency proceedings do not extend further than the territory where the insolvency proceeding is opened.¹² The basis for this approach is the principle of sovereignty according to which a judgment of courts in one country has no effect in the second country unless there is consent from the second country.¹³ The problem with this approach is that it favors local creditors to the detriment of foreign creditors. Another problem it creates is that since a proceeding from the first country has no effect in the second country, there will have to be multiple proceedings undertaken in each country where the debtor possesses assets. It also makes it difficult to rescue companies that have assets in more than one country because assets that could otherwise be sold in one country to help the company as a whole may not be easily accessible.

Under the universality approach, developed in some cases into the unity approach, insolvency proceedings commenced in one country have universal effect and assets can be administered in a single insolvency proceeding, wherever they are located. An insolvency proceeding commenced in one country will have full effect in other countries.¹⁴

¹⁰ Article 1(2) of the Model Law.

¹¹ Fletcher lists four approaches, namely Unity, Plurality, Universality and Territoriality. See Fletcher Op. cit., n 9, p.13.

¹² Japan is one of the Countries that favored this approach prior to its adoption of the Model Law. The Netherlands still favors this approach.

¹³ See Ray August, *International Business Law, 'Text, Cases and Readings'*, Fourth Edition, New Jersey: Pearson, 2003, p. 184.

¹⁴ For an example of a statute embodying this approach, see section 304 of the United States Bankruptcy Reform Act of 1978.

The universality approach is not without problems. According to Berends,¹⁵ a foreign representative may assume control of assets and move them to his home country. This would mean that assets that could have been distributed among local creditors could end up being moved to another country and into foreign hands.

Berends is quick to point out that few countries strictly adhere to one of the two approaches and that an approach incorporating the two systems is quite common.¹⁶ Still, it has to be said that the universality approach is by far the best approach of the two. International law and practice has over the past few years tilted towards this approach. One need only look at the Model Law, US law, Japan and within the EU for evidence of this. There are many reasons to support the submission that universality is the best approach of the two. For one thing, the universality approach can prevent a fraudulent debtor from moving his assets to other jurisdictions in an effort to evade the effects of the opening of insolvency proceedings. It also guarantees in principle, the equal treatment of creditors. Assets can be collected by the designated liquidator (foreign representative) and distributed equally between various creditors. It also reduces the need for multiple proceedings in different countries and could save costs for creditors.¹⁷

The problem however, is that applying the universality approach is only possible if other countries recognize the principle of universality. Cooperation of other countries is essential in order for it to work and only an international instrument (like the Model Law) could guarantee such cooperation.

3.2 Lack of uniformity

Between the two extremes of universality and territoriality, some countries had found a way of dealing with cross-border insolvency through entering into cross-border insolvency treaties.¹⁸ The problem was that these treaties were few and far between and for the most part, largely unsuccessful.¹⁹

Another method of tackling the challenges posed by cross border insolvency was provided through cooperation of foreign courts and practitioners based on the principle of comity. In the absence of treaties and statutes, some courts and practitioners have developed cross-border insolvency protocols to govern parallel insolvency proceedings commenced in different countries.²⁰ These protocols are not binding on other courts and jurisdictions, and are subject to approval of the courts that have jurisdiction over the insolvent debtor.

All this resulted in even more diversity in practices of different countries and left the practice of dealing with cross-border insolvency without any uniformity and by implication, a lot of uncertainty.

¹⁵ Berends, *Op. cit.*, n 5, p. 314.

¹⁶ *Ibid.*

¹⁷ For further arguments in favor of the universality approach see Paul Torremans, *Cross-Border Insolvency in EU, English and Belgian Law*, The Hague, London & New York: Kluwer Law International, 2002, p. 3.

¹⁸ *Op. cit.*, n 4, p. 207.

¹⁹ *Ibid.*

²⁰ The proceedings concerning Maxwell Communications Corporation Plc (MCC) in 1991 were one of the first cases in which a court-approved protocol was used.

3.3 Globalization

It is an undisputed fact that globalization will naturally lead to an increase in the number of cross-border insolvency cases. More and more companies (and to a small degree natural persons) are either investing abroad or outsourcing some of their activities to foreign countries. This means that those companies and individuals will have assets in more than one country and be subject to various diverse insolvency regimes.

In light of the fact that there was hitherto no single uniform system of dealing with the problems of cross-border insolvency, there is a real possibility that this could hamper global investment and the rescue of financially troubled companies. It is easy to see why the Model Law is so relevant. This much is acknowledged in the preamble to the Model Law.²¹

4. Key provisions of the Model Law

In order to fully appreciate the approach individual countries have adopted towards the Model Law, it is necessary to briefly examine its key provisions. What follows is a summary of what I regard as the key provisions of the Model Law.

4.1 Rights and duties of foreign representatives

The Model Law gives a designated foreign representative the right to direct access to the (competent) courts of the enacting state.²² The fact that the foreign representative has direct access to the courts of the enacting state does not however mean that the foreign representative and the foreign assets and affairs of the insolvent become subject to the jurisdiction of that court for any purpose other than the application for recognition of a foreign proceedings.²³ A foreign representative is entitled to start insolvency proceedings under the laws of the enacting state if the conditions for the commencement of such proceedings are met.²⁴ From the moment of recognition of foreign proceedings, a foreign representative is entitled to take part in local insolvency proceedings regarding the same debtor commenced in the enacting state and may also intervene in any proceeding in which that debtor is a party²⁵

A foreign representative may also apply to the competent court of the enacting state for the recognition of foreign proceeding in which he has been appointed. Such an application must comply with the provisions of Article 15 in order to benefit from the favorable presumptions in Article 16.²⁶

Upon application for recognition of foreign proceedings, the foreign representative has standing to request urgent relief of a provisional nature from the competent courts of the enacting state in order to protect the assets of the debtor and interests of creditors.²⁷ Only if the relief sought

²¹ See paragraph (e) of the Preamble to the Model Law.

²² Article 9 of the Model law.

²³ Article 10.

²⁴ Article 11.

²⁵ Article 12 and 24.

²⁶ Article 15 and 16.

²⁷ Article 19.

would interfere with the interests of main proceedings elsewhere may the court refuse to grant such relief. This relief will unless extended by the court, terminate at the application hearing. Upon recognition of foreign proceedings, the foreign representative can request any appropriate relief under similar circumstances.²⁸ A distinction worth mentioning under this subject is that a representative of a foreign non-main proceeding is only entitled to the appropriate relief contemplated in Article 21 with regard to assets that under the laws of the enacting state should be administered in the foreign non-main proceeding.

Upon recognition of a foreign proceeding, a foreign representative acquires legal standing to initiate legal action to set aside any disposition that is available to liquidators in the enacting state.²⁹ The foreign representative is entitled in general, to cooperation from the courts and authorities of the enacting state.

A foreign representative has a responsibility to inform the competent court where recognition is sought of any substantial change in the status of his appointment, the foreign proceeding and any other foreign proceeding that he is aware of regarding the same debtor.³⁰

4.2 Rights of foreign creditors

The Model Law embraces the concept of equal treatment of creditors. In principle, foreign creditors have the same rights regarding the commencement of, and participation in local insolvency proceedings as local creditors. This principle does not affect the manner in which their claims will be ranked. The ranking of claims will be determined by the law of the enacting state, with the condition that claims of foreign creditors are not to be ranked lower than a defined class of non-preference claims.³¹

Where notification is to be given to local creditors, known foreign creditors are entitled to similar (preferably individual) notification.³² The notification must include information relevant to enable the foreign creditors to file their claims in a timely and appropriate manner.

4.3 Recognition of foreign proceedings

Chapter III of the Model Law deals with the recognition of foreign proceedings. It is clear from reading this chapter that the purpose is to expedite the process of recognition of foreign proceedings. As already indicated, only a foreign representative may apply for the recognition of foreign proceedings.³³ All that is required for the recognition of a foreign proceeding is a certified copy of the (court) decision commencing the foreign proceeding and appointing the said foreign representative, as well as a certificate from the foreign court affirming the existence of the foreign proceeding and of the appointment of the foreign representative. Absence of the above documents should not be an impediment to the recognition of foreign proceedings as the

²⁸ Article 21.

²⁹ Article 23.

³⁰ Article 18.

³¹ Article 13 (1) and (2). The class of non-preference claims has to be determined by the enacting State in its legislation.

³² Article 14.

³³ Op. cit., n. 18.

competent court of the enacting state has the discretion to accept any evidence that can prove the existence of the foreign proceeding, and the appointment of the foreign representative.³⁴

The domestic court is authorized or rather entitled to presume that the documents referred to above are what they purport to be and that documents submitted in support of the application for recognition are genuine and authentic. In the absence of proof to the contrary, the debtor's registered office or a natural person's habitual residence are regarded as the centre of the debtor's main interests.³⁵

The basic idea of the Model Law is that the application for recognition should be dealt with and decided upon at the earliest time possible and with as little formality as possible.

I have already dealt with the relief that may be granted upon application for and subsequent recognition of foreign proceedings in a summary of the rights of foreign representatives and I shall not deal with that subject here.³⁶

Recognition of foreign main proceedings produces certain automatic effects regarding the rights of third parties, such as a stay of individual actions and execution of a judgment already obtained against the debtor. The right to transfer, encumber and dispose of the assets of the debtor is also suspended.³⁷

4.4 Cooperation, and coordination of proceedings

Chapters IV and V of the Model Law address the issue of cooperation with foreign courts and representatives and provides the framework within which concurrent insolvency proceedings can be coordinated. The Model Law encourages maximum cooperation and communication between local courts and foreign courts and representatives, as well as between local liquidators and foreign courts and representatives on matters falling within the scope of the Model Law. The forms of cooperation are set out in the Model Law but they do not constitute a closed list. The enacting state is free to add to the list the forms of cooperation that may assist the authorities to make their work a little easier.³⁸

Recognition of foreign main proceedings does not prevent the commencement of local proceedings under the laws of the enacting state. Local proceedings may be commenced after such recognition only if the debtor has assets in the enacting state, and the effects of those proceedings will be limited to the assets located in that state.

The Model Law calls for maximum cooperation between the courts in cases where a foreign proceeding and a local proceeding are taking place at the same time regarding the same debtor. Relief granted to the foreign representative under Article 19 and 21 must always be consistent with the existing or pending local proceedings.³⁹

³⁴ Article 15.

³⁵ Article 16.

³⁶ Op. cit., n 19, 20 and 21.

³⁷ Article 20.

³⁸ Article 28.

³⁹ Article 29.

It also calls for coordination where there is recognition of more than one foreign proceeding to ensure that relief granted to the representative of a foreign non-main proceeding is consistent with the foreign main proceeding.

Under the Model Law, the recognition of a foreign main proceeding creates for the purposes of commencing local proceedings a rebuttable presumption that the debtor is indeed insolvent.⁴⁰ This presumption does not apply where the recognized proceeding is a foreign non-main proceeding.

The last article of the Model Law contains another provision that guarantees equal treatment for creditors. The aim is to prevent creditors from receiving more than one dividend for the same claim and in so doing prejudice other creditors. A creditor who has received a dividend in one proceeding regarding the same claim against a debtor's estate can only receive a dividend in the second proceeding if all the other creditors of the same rank have received the same percentage as he did in the first proceeding.

It should be noted that this is without prejudice to secured claims or rights *in rem*.

5. Legal Status of the Model Law

5.1 Nature of a Model Law

The response to the Model Law has a lot to do with its status as nothing more than “UNCITRAL’s impression” of what an ideal national cross-border insolvency law should cover. The Model Law is a legislative text that is recommended to states for incorporation into their national law. It is not a legally binding instrument such as a treaty or a convention, and cannot stand on its own. There is also no time frame on when countries should adopt it. What all this means in a nutshell is that nobody can go to a foreign court and seek (or demand) cooperation based on the Model Law.

A Model Law has no legal force of its own. Its provisions will have legal force only if they are enacted into national law. Upon the adoption by (UNCITRAL) of the Model Law, the UN only recommended that countries should adopt the Model Law.⁴¹ That is all it can do. It has no authority to enforce this recommendation.

One of the consequences of the status of the Model Law is that countries that choose to adopt it can modify by adding to or leaving out some of its provisions. Countries are free to add further safeguards to suit respective national interests and legal system.

UNCITRAL has been quick to acknowledge that the flexible nature of the Model Law may affect the legal certainty that it strives for, as well as the attempt to harmonize the specific areas of cross-border insolvency. For that reason, UNCITRAL has recommended that countries make as few changes as possible when incorporating the Model Law into their legal system.⁴²

⁴⁰ Article 30.

⁴¹ Op. cit., n. 7.

⁴² See the Guide to Enactment. Available at <www.uncitral.org>> (last visited on 30 June 2004).

5.2 Reasons for a Model Law

Considering all the problems associated with a Model Law, one feels justified in asking why UNCITRAL chose a Model Law instead of a convention. According to Berends,⁴³ there are many convincing reasons for this. He points out that this question was discussed at the sessions of UNCITRAL's working group as well as at the May 1997 meeting.⁴⁴

Apparently, the prevailing view was that a Model Law should be a first step towards eventually drawing up a convention. There was a fear that a convention may be too ambitious and ahead of its time. It was accepted that a binding status of a convention might scare off many countries that would otherwise have been willing to adopt a Model Law. As Berends asserts, a Model Law is better than an unratified convention.

Another concern raised was that a convention would take too much time and effort to draft because it would require the consensus of a lot of countries. The formal process of preparing the Model Law took only two years.⁴⁵

In hindsight, the view that a lot more countries would be more willing to adopt a Model Law seems to have been far removed from reality. Seven years after the Model Law was adopted, there is no indication that more countries are willing to adopt the Model Law than they would have been willing to ratify a convention. The hope that many countries would adopt the Model Law has simply not materialized.

5.3 Problems posed by a Model Law

Before dealing with the Model Law countries, it is important to give a short summary of the problems posed by a Model Law. These problems are the result of its status as a non-binding instrument.

Firstly, because of its nature, some countries may simply ignore the Model Law and continue to use the different approaches that were used prior to the adoption (by UNCITRAL) of the Model Law. They might not show any interest at all in the Model Law. According to Wessels, the new German International Insolvency Law has paid little if any attention to the existence of the Model Law.⁴⁶

Secondly, and it will become apparent when one looks at the Model Law countries, some countries may adopt the Model Law, but change it so much that in the end it fails to achieve the aims for which it was adopted.⁴⁷

Thirdly, some countries might show an interest in adopting the Model Law but show no sense of urgency. Under this category falls those countries whose authorities and practitioners have displayed a positive attitude towards the Model Law but have simply not taken any serious steps

⁴³ Berends, Op. cit., n. 5, p. 319.

⁴⁴ Ibid.

⁴⁵ The first meeting of the UNCITRAL working group is said to have taken place in Vienna in 1995, and it took only four sessions to produce the text which was eventually adopted in 1997.

⁴⁶ See Bob Wessels, Current Developments towards International Insolvencies in Europe; in *International Insolvency Review*, volume 13, Issue 1, Spring 2004, pp. 43-75.

⁴⁷ I will demonstrate below that South Africa falls into this category.

to adopt it. In some of these countries, the adoption of the Model Law does not even face any serious objections or impediments.⁴⁸ They are simply adopting a “wait and see” approach.

6. Model Law Countries: A Comparative Analysis

“The proof of the Model Law will be in the enactment. The crucial question is not only the number of States which take a conscious decision to enact the Law, but the extent to which they do so, both individually and collectively. The fact that it is open to a State to enact as much, or as little, of the Model Law as it pleases is likely to be viewed by some as the Achilles’ heel of this form of international harmonization”⁴⁹

So far, only eight countries have adopted the Model Law. Those countries are Eritrea, Japan, South Africa, Mexico, Montenegro, Poland, Romania and Spain.⁵⁰

What follows now is a comparative analysis of legislation of the countries that have adopted the Model Law. The objective is to examine how they have responded to the call by UNCITRAL to keep deviations from the Model Law to a minimum. In order to avoid making this paper unduly long, I will focus only on those provisions that appear to deviate from the Model Law.

6.1 Eritrea

Eritrea was the first and for a few years the only country to adopt the Model Law. This should not come as a surprise as Eritrea only became an independent country on 24 May 1993. The fact that Eritrea is a fairly “young” country means that it is unlikely to have faced any difficulties in adopting the Model Law, as it could not have had an existing cross-order insolvency law or practice. Unfortunately, and despite my best efforts, I have not been able to come across Eritrea’s version of the Model Law. Due to Eritrea’s lack of tradition on this subject, it is unlikely, although I cannot vouch for this, that Eritrea’s version will be different from the Model Law.

6.2 Japan

In Japan, the law on recognition and assistance of a foreign insolvency proceeding (‘the Law’) was adopted in November 2000 and came into effect on 1 April 2001. The text of the Law is only available in Japanese, so a debt of gratitude is owed to Professor Junichi Matsushita for providing an English translation of the Law.⁵¹ Even though one cannot vouch for the veracity of the translation, I trust that it has been done correctly.

While it deals with the same issues addressed in the Model Law, the Law differs in many respects from the Model Law and in some cases addresses issues that are not even dealt with in the Model Law. A large number of the provisions of the Model Law have been left out and others, like the ones on coordination of multiple proceedings have been completely ignored in favor of a different approach.⁵²

⁴⁸ New Zealand serves as a classic example.

⁴⁹ Fletcher, *Op. cit.*, n 9, p. 361.

⁵⁰ The information on the status of texts is available on the UNCITRAL website at <<<http://www.uncitral.org>>> (visited on 30 June 2004). The information on the status of texts does not list Spain as one of the countries that have adopted the Model Law. However, there are indications that Spain has, albeit in an unusual way, done so.

⁵¹ The copy of the English translation of the law is available at <<<http://www.iiiglobal.org/country/japan.html#legislation>>> (visited on 6 June 2004).

⁵² See commentary on Section 16 and 17 of Japan’s Law below.

The Tokyo District Court has the exclusive jurisdiction to deal with the recognition of foreign proceedings. This court also has the authority to transfer the case to other district courts that have jurisdiction over the debtor.⁵³

One of the major differences between the Law and the Model Law is that it is not only a foreign representative who has the right to apply for recognition of foreign proceedings. The debtor also has the same right,⁵⁴ and the court can order both applicants to appoint a representative when necessary.

The Law also addresses procedural issues such as costs of the recognition or assistance proceedings, which must be borne by the person applying for recognition or assistance. It also contains a number of grounds for dismissal of the application for recognition. Failure to pay the deposit or costs referred to above is one of the grounds for refusal of recognition. Another important ground is the public policy ground.⁵⁵

There is a requirement in section 5 that the decision to recognize the foreign proceedings must be publicized. Notice must be given to tax authorities, debtor's employees and the labor unions.

The Law also provides grounds for appeal⁵⁶ as well as conditions for revocation⁵⁷ of the decision to recognize the foreign proceedings.

The Law makes no mention of the automatic effects of recognition of a foreign main proceeding as contemplated in Article 20 of the Model Law. It does however provide that the competent court may make a ruling providing for similar effects either on its own motion or upon application by an interested party.⁵⁸

As for the relief contemplated in Articles 19 and 21 of the Model Law, the Law differs from the Model Law in that the court may on its own motion, and in the absence of an application, or at the request of an interested party who is not necessarily a foreign representative, grant the relief referred to in the relevant parts of the Model law.⁵⁹ When a court has ordered a stay of every individual execution against the debtor's assets in Japan, the creditors will not lose their claims through prescription until two months after the expiry of the order staying the individual executions. The court may also lift the stay if it is detrimental to creditors. The court also has the power to annul the individual executions stayed in terms of section 7 and 8 (especially) when necessary to accomplish the purpose of the recognition and assistance proceeding.⁶⁰

The Law also deals with the powers of the court in relation to the divestment of the debtor of his assets. For example, upon application and recognition of foreign proceedings, it can place the assets of the debtor in the hands of the administration trustee in the case where an administration

⁵³ Section 2 of the Law.

⁵⁴ Section 3.

⁵⁵ Section 4.

⁵⁶ Section 6.

⁵⁷ Section 15.

⁵⁸ Section 7 and 8.

⁵⁹ Section 7 and 8.

⁶⁰ Section 9.

order is made. Permission of the court is necessary for dealing with the assets of the debtor and the court has the power to designate how the assets in Japan should be dealt with.⁶¹

Section 16 deals with the coordination of simultaneous local and foreign proceedings and it is markedly different from the Model Law. It provides that where there is an already commenced domestic insolvency proceeding, an application for recognition of a foreign proceeding shall be dismissed, except if it is a foreign main proceeding or, there is no likelihood that it would be detrimental to the interest of local creditors and meets the general interest of creditors. This does not bode well for a foreign proceeding that is not a foreign main proceeding.

When recognition of a foreign main proceeding is sought or granted, the court must stay local proceedings that has already commenced. The court may also stay already commenced local proceedings in the case where an application for recognition of a foreign main proceeding is filed but not yet decided upon. The court may only do so if it is satisfied that the recognition meets the general interests of creditors. Where necessary, the court also has the power to stay the recognition and assistance proceedings where local proceedings regarding the same debtor are filed.

Section 17 deals with the coordination of multiple foreign proceedings. It provides that where another foreign insolvency proceeding is already recognized, an application for recognition of a foreign proceeding will be dismissed if the already recognized foreign proceeding is a foreign main proceeding or if a petition is filed for the recognition of a foreign non-main proceeding and the court finds that the recognition of the same does not meet the general interests of creditors. If a foreign non-main proceeding is already recognized, it will be stayed if a petition for recognition of foreign main proceeding is filed. In the case where another foreign non-main proceeding is already recognized, a petition for the recognition of another foreign non-main proceeding may be stayed at the court's own motion or at the request of interested parties.⁶²

What is clear from this short summary is that while Japan has adopted the Model Law, it has done so with numerous modifications. The rules on coordination of multiple proceedings are different from the Model Law and may likely cause confusion. This however, is still better than the status quo, in terms of which insolvency proceedings commenced in other countries were not recognized in Japan.⁶³

6.3 South Africa

South Africa adopted the Model Law in 2000.⁶⁴ The Cross-Border Insolvency Act 42 of 2000 ('the Act') came into effect on 28 November 2003.⁶⁵ In reality, the Act will only apply once the South African Minister of Justice and Constitutional Development has designated the states to which it will apply.

The reason for the above scenario is that South Africa has adopted the reciprocity approach. The Act contains a condition which provides as follows:

⁶¹ Section 11.

⁶² Section 17 (3).

⁶³ The old Insolvency Act of 1922 specifically provided that foreign insolvency proceedings will not be recognized and will have no effect on assets in Japan.

⁶⁴ See << <http://www.aipsa.co.za/docs/insolvencylawupdates/>>> (visited on 3 June 2004).

⁶⁵ This is the date fixed by the President in government gazette no. 25768 of 27 November 2003.

“Section 2. Scope of Application.

...

(2) (a) Subject to paragraph (b), this Act applies in respect of any State designated by the Minister of Justice and Constitutional Development by notice in the *Gazette*.

(2) (b) The Minister may only designate a State contemplated in paragraph (a) if he or she is satisfied that the recognition accorded by the law of such a state to the proceedings under the insolvency laws of South Africa justifies the application of this Act to the foreign proceedings in such a state.

...”

The Act allows the Minister to withdraw the designation at any stage by notice in the *Gazette*.⁶⁶

At the time of writing of this paper, no state had as yet been designated. The South African approach raises a lot of questions. For a start, even if some states are designated, the Act will only apply to those states and the rest of the world would still have to rely on the old common law system. This means that South Africa now has two systems dealing with the issue of cross-border insolvency, hardly a vote of confidence for UNCITRAL’s attempts at coordination and uniformity.

The form of reciprocity adopted by South Africa differs from the usual approach to reciprocity. The usual form of reciprocity entails that a state will apply its legislation to those countries that have adopted the Model Law. This however does not seem to be the approach favored by the South African authorities. For a start, the Minister has discretion to designate states. The words “may designate” instead of “shall designate” do not inspire confidence.

The language of the Act suggests that the adoption of the Model Law is not a guarantee that a state will be designated. It will still be up to the Minister to designate such a state. This submission is supported by the failure so far of the South African authorities to designate those countries that have adopted the Model Law. The issue of reciprocity merits further discussion and will be dealt with in the latter parts of this paper.

The issue of reciprocity is the most controversial aspect of the Act. South Africa has adopted all the provisions of the Model Law. When states are eventually designated, the Act will apply equally to both natural and juristic persons. No business entity has been exempted from the scope of the Act. This means that banks and insurance companies will also fall under the scope of this Act. This is a good development and eliminates the problem of having a separate system for banks and insurance companies.⁶⁷

The Act has designated the High Court as the only competent court that can perform functions referred to in the Model Law relating to the recognition of foreign proceedings and cooperation with foreign courts. This should be understood to mean any division of the High Court. Trustees, liquidators, judicial managers, curators of institutions and receivers are the persons who are authorized to act in a foreign state as foreign representatives for insolvency proceedings commenced in South Africa. These are the persons whose task it is to administer a reorganization and liquidation during insolvency proceedings.⁶⁸

⁶⁶ See section 2 (3) of Act 42 of 2000.

⁶⁷ *Ibid*.

⁶⁸ *Ibid*, section 4 and 5.

Foreign creditors are given the same rights of access to South African insolvency proceedings as creditors in South Africa. They have a right to commence on their own and participate in insolvency proceedings in South Africa. Foreign creditors would still have to comply with substantive and procedural requirements associated with insolvency proceedings in South Africa.⁶⁹ The right of foreign creditors to take part in South African proceedings does not affect the ranking of claims in an insolvency proceeding in South Africa, provided that the claims of foreign creditors may not be ranked lower than non-preferent claims. In respect of the assets in South Africa, the law and practice of South Africa relating to the ranking of claims will determine the ranking of claims.

South Africa, like Poland, demands more from foreign representatives than is normally the case. Whereas the Model Law imposes an obligation on foreign representatives to inform the court of the enacting state of substantial changes in the status of the recognized foreign proceedings or the status of the foreign representative's appointment, South Africa and Poland demand that the foreign representative inform the court of any such change, not only a substantial change.⁷⁰

By reference, parts of the South African Companies Act 61 of 1973 and the Insolvency Act 24 of 1936 form part of the Cross-Border Insolvency Act.

For example, notice of the urgent interim relief issued under Article 19 of the Model Law will have to be dealt with as contemplated in section 17 of the said Insolvency Act in the case of natural persons, and sections 357 (1) - (4) of the Companies Act in the case of companies.⁷¹

As for the effects of recognition of foreign main proceedings, section 21 of the Insolvency Act will apply with regard to the assets situated in South Africa. The scope, modification and termination of the stay or suspension of actions referred to in article 20 of the Model Law are subject to sections 20, 23 and 75 of the Insolvency Act and sections 341 and 359 of the Companies Act.⁷²

6.4 Mexico

Mexico adopted the Model Law in May 2000 as part of the overhaul of its commercial bankruptcy law. Mexico's adopted version of the Model Law can be found in Title XII of the Business Reorganization legislation. It is not a separate piece of legislation but forms part of the Business Reorganization Act. Articles 278 to 310 of the said Business Reorganization Act contain the relevant provisions of the Model Law.⁷³

The biggest problem with Mexico's version of the Model Law ('hereinafter the Act') is the fact that it is enacted in the Spanish language. This results in a problem that some of the provisions become extremely vague when translated into English. The first thing one notices from the

⁶⁹ Section 13.

⁷⁰ Section 18. In the case of Poland see Article 389 of the Law on Insolvency and Restructuring, Act of 28 February 2003.

⁷¹ Section 19.

⁷² Section 20.

⁷³ On Mexico's adoption of the Model Law, See a report by Josefina Fernandez McEvoy available at <<<http://www.iiiglobal.org/international/cross-border/mexico-Josefina-Fernandez-McEvoy.pdf>>> (visited on 03 June 2004).

English translation is that most of the words in the Model Law have been completely changed even though the substance of the provision is the same.⁷⁴ The style of drafting is also different from the Model Law, but this should not really pose a major problem, as each country is fully entitled to adopt a style suitable to its legal system.

As for the Act itself, there is no indication that entities such as banks and insurance companies are exempted from the scope of the Act.

The most ambiguous provision of the Act is article 280. This is problematic because there seems to be different English translations of this provision. According to one translation of the entire legislation,⁷⁵ this Article should read as follows:

“ The provisions of this title shall apply if no other means is available in the international treaties to which Mexico may be a party, unless there is no international reciprocity”

It is not clear whether this means that Mexico has adopted the reciprocity approach to the application of the Act and this seems to have created a lot of confusion.⁷⁶ It is not immediately clear whether the reciprocity referred to is related to the treaty or the Model Law. If the international reciprocity referred to be related to the Model Law, then this would suggest that Mexico requires reciprocity in order to apply the Model Law.

According McEvoy, this article should read as follows:

“ The provisions of this title shall apply when no treaties to which Mexico is a party apply, unless there is no international reciprocity”⁷⁷

She is of the opinion that Mexico does not require reciprocity for the application of the Act. According to her, the provision should be understood to mean that if Mexico does not have reciprocity with another state under a treaty, then, in that situation, this Act should be applied notwithstanding that the treaty addresses this situation. This implies that the reciprocity referred to is reciprocity under a treaty.

Under the Act, a Judge or the Federal Institute of Business Reorganizations or its appointee are designated as competent authorities to perform the functions referred to in the Model Law. These functions are the recognition of foreign proceedings and cooperation with the foreign authorities.⁷⁸

The inspector, the conciliator or the receiver are authorized to act in a foreign state as foreign representatives on behalf of a Mexican proceeding.⁷⁹

Article 290 of the Act is the equivalent of Article 13 of the Model Law and deals with access of foreign creditors to proceedings under Mexican Law. Article 13 (2) of the Act provides that even

⁷⁴ A copy of this translation is available at << www.iiiglobal.org/country/MEXLAW.pdf>> (visited on 3 June 2004).

⁷⁵ Ibid, Art 280.

⁷⁶ Wessels has suggested that Mexico has taken the reciprocity route. However, there are conflicting views on this issue. See Polak-Wessels, *Internationaal insolventierecht*, Kluwer, Deventer, 2003, p. 174.

⁷⁷ Op. cit., n. 52.

⁷⁸ Article 281 of the Business Reorganization. Act.

⁷⁹ Ibid, Article 282.

though foreign creditors will have the same rights as Mexican creditors to commence and participate in insolvency proceedings, this will not affect the ranking of claims under Mexican law, except that the claims of foreign creditors may not be ranked lower than those of regular creditors.⁸⁰

Under Mexican Law, once foreign creditors have been notified of the commencement of proceedings under the Act, they have forty-five calendar days to file their claims.⁸¹

Articles 293 and 294 are additions which do not appear in the Model Law. According to Article 293, whenever the recognition of a foreign proceeding is applied for in respect of a debtor having an establishment in Mexico, the provisions of chapter IV of Title I of the Act must be observed, including the provisions regarding the ordering of preventative remedies. Chapter IV (articles 29 to 41) deals with and provides for the appointment of an inspector by the Federal Institute of Business Reorganizations after a petition for liquidation has been made. This means that if the debtor has an establishment in Mexico, the procedure in Chapter IV of the Act will have to be followed. According to Article 294, if the debtor does not have an establishment in Mexico, the proceeding will involve only the debtor and the foreign representative.

One of the most interesting things about the Mexican Act is the omission of Article 17 (3) and (4) of the Model Law. The basic premise in the Model Law is that an application for recognition of foreign proceedings shall be decided upon at the earliest possible time.⁸² The Mexican Act makes no such commitment.

Article 299 deals with the effects of recognition of a foreign main proceeding. One of the effects is that enforcement actions against the debtor's property will be suspended. The scope, and modification or termination of the suspension are subject to the provisions of Title III, Chapter I of the Act. These provisions are found in articles 65 to 69, which deal with the rules on the stay of enforcement proceedings.⁸³ The same article has omitted to clarify if and how the suspension will affect the right to commence individual actions against the debtor. According to Article 20 (3) and (4) of the Model Law, the suspension does not affect the right to commence individual actions or proceedings necessary to preserve the claim of the debtor.

In Mexico, the foreign representative's right to direct access to the courts is limited and is subject to the provisions of the Act. For example, if the foreign representative is seeking urgent interim relief or ordinary relief as contemplated in Articles 19 and 21 of the Model Law, he will have to go through the inspector, conciliator or receiver in order to request this remedy from the judge. It is not clear why the foreign representative cannot approach the judge directly. Apparently, these people act on behalf of the foreign representative.⁸⁴ It is also not clear whether they have any say in this regard and whether they are obliged to adhere to the foreign representative's request. This could pose a serious obstacle to the tasks of the foreign representative.

Beyond this, the Act generally reflects the Model Law.

⁸⁰ See Article 13 of the Model Law.

⁸¹ Art 14 (3) (a) of the Model Law.

⁸² Article 17 (3) of the Model Law.

⁸³ Article 20 of the Model Law.

⁸⁴ See Articles 298 and 300 of the Business Reorganization Act.

6.5 Montenegro

Montenegro adopted the Model Law in 2000. It forms part of the Law on Business Organization Insolvency. Montenegro's version of the Model Law can be found in Chapter XI starting from Article 100 to Article 132 of the Law on Business Organization Insolvency ('the Law').⁸⁵

No entity has been exempted from the scope of application of the Law, suggesting that it applies to banks as well as insurance companies.

The Law gives the Commercial Court of Podgorica the competence to recognize foreign proceedings as well to cooperate with foreign courts.⁸⁶ The Commercial Court of Podgorica is one of the two courts in Montenegro (the other being Bijelo Polje) that operate as courts of first instance in civil commercial matters and commercial offences.⁸⁷ The Law does provide that other courts designated in accordance with the law may also perform the same functions. However, it does not seem that the court in Bijelo Polje has been designated as such. The Law further authorizes the administrator appointed under the provisions of the Enterprise Insolvency Law as the person who can act in a foreign state as a representative on behalf of proceedings commenced in Montenegro.⁸⁸

The most interesting provision of the Law is Article 113, which is a counterpart of Article 13 of the Model Law. Paragraph 1 of the Model Law provides that subject to the exception in paragraph 2 of Article 13, foreign creditors have the same rights regarding the commencement of and participation in local proceedings as local creditors. The exception in paragraph 2 of Montenegro's Law provides that:

"Paragraph 1 does not affect the ranking of claims in a proceeding commenced under this law, except that claims of foreign creditors shall not be ranked lower than unsecured claims, provided that a foreign claim is to be ranked lower than an unsecured claim if equivalent claims arising under applicable law in the Republic may be ranked lower also have a lower rank"

This means that in general, foreign claims may not be ranked lower than unsecured local claims. The foreign claim may be ranked lower than unsecured local claims if local claims equivalent to that particular foreign claim also have the lower rank under the law of Montenegro.

The only omission in the law can be found in Article 119 (2), which is Article 19 (2) of the Model Law. This Article deals with the type of relief that may be granted upon application for recognition of a foreign proceeding. Montenegro has remained silent on how the urgent interim relief granted under Article 19 is to be dealt with. One can only assume that it has been left to the competent court to indicate the laws or conditions that will apply to that notice.

Article 120 paragraph 1⁸⁹ deals with the effects of recognition of a foreign main proceeding. One of the effects of recognition of a foreign main proceeding is that upon recognition, execution

⁸⁵ This information is available at << <http://www.iiiglobal.org/country/montenegro.htm>.>> Jenny Clift contributed it. (visited on 26 May 2004).

⁸⁶ Article 104 of the Law.

⁸⁷ This information is available at <<<http://www.abanet.org/cecli/countries/montenegro/legalinfo.htm>>> (visited on 26 May 2004).

⁸⁸ Article 105 of the Law.

⁸⁹ Article 20 of the Model Law.

against the debtor's assets is stayed. In paragraph 2, the Model Law leaves it to the enacting state to determine the scope, modification or termination of the stay and suspension referred to in paragraph 1.

The Law provides in paragraph 2 that the scope, modification or termination of the stay and suspension are subject to the provisions of Article 37, 38, and 39 of the Law. Article 37 deals with the moratorium and suspension of all actions upon submission of a petition commencing insolvency proceedings, Article 38 deals with the adequate protection of secured property for the benefit of secured creditors and Article 39 deals with the conditions for suspension of the moratorium by the court.

Montenegro's Law on Business Organization Insolvency incorporates the Model Law virtually verbatim. The authorities have only inserted the relevant provisions where the Model Law calls on them to do so, i.e., in the case where it has been left to the enacting state to insert the relevant provisions that exist in the laws of the enacting states.

6.6 Poland

Poland became a member of the European Union ('EU') on 1 May 2004. In order to bring its insolvency law in line with the EU Regulation on Insolvency Proceedings,⁹⁰ and in an effort to regulate its relationship with non-EU countries on issues pertaining to cross-border insolvency, Poland undertook a major overhaul of its insolvency laws, culminating in the Law on Insolvency and Restructuring, Act of 28 February 2003 ('the Act'). The Act incorporates the Model Law into the Polish legal system.⁹¹ Part Two of the rather voluminous statute, starting from Article 378, deals with provisions concerning international insolvency proceedings. It is this part of the statute that is of interest for the purposes of this paper.

The Act has not followed the structure or sequence of the Model Law and for that reason, may seem rather confusing at first. Be that as it may, the Act incorporates in one way or another, and in no particular order, the following Articles of the Model Law:

Articles 2 (379), 3 (378), 4 (382), 6 (392), 12 (402), 13 (380), 14 (393), 15 (386) 16 (391), 17 & 18 (389), 20 (397), 23 (400), 24 (400), 25 (413 & 415), 26 (414), 27 (416), 28 (405), 29 (406), 31 (408).⁹²

Article 378 (2) provides that the Act applies to proceedings conducted for banks and insurance companies and their branches with their seat in the EU member states, unless special provisions stipulate otherwise. This provision sounds somewhat vague to me. It is not clear whether these would be incoming (i.e. where recognition is sought in Poland) or outgoing (where Poland seeks recognition) proceedings or both. In the case of non-EU states, it would seem that the Act will not apply to banks and insurance companies.

The Act guarantees equal treatment of creditors. At the same time, it also makes it clear that foreign debts that are not civil debts will not be recognized. Debts that will not be recognized are tax dues, public levies, social insurance dues and property penalties adjudicated by foreign

⁹⁰ For more on the EU insolvency Regulation, see Paragraph 7.2 below.

⁹¹ This legislation is available at <<www.iiiglobal.org>> (visited on 18 June 2004).

⁹² Numbers in brackets indicate the relevant article in the Polish legislation.

tribunals. It is specifically provided that a foreign creditor seeking a commencement of, or participation in insolvency proceedings in Poland must enlist services of a Polish attorney.⁹³ It is not clear from the language whether this is only for the purposes of service of documents or if it is for representation in court. It is safe to assume that it is for both purposes.

Article 384 also makes it clear that the appointment of a foreign representative by a foreign court to act as such in Poland does not replace or override the jurisdiction of the Polish courts. If the debtor's centre of main interests is in Poland, Polish courts will have exclusive jurisdiction. They will also have jurisdiction where the debtor conducts business, resides or possesses assets in Poland.

Article 392 provides in general terms that foreign insolvency proceedings will be recognized if the case is not within the sole jurisdiction of the Polish courts and the recognition is not contrary to the basic principles of the legal order in Poland. As is the case with most countries, the decision to recognize the foreign proceedings may also be set aside if it turns out that the grounds for recognition were lacking or have ceased to exist.⁹⁴

The requirements a petition for application for recognition of foreign proceedings must comply with are substantially the same as those in article 15 of the Model Law. The relevant documents have to be translated into the Polish language.

From the moment of filing an application for recognition of foreign proceedings, the foreign representative has the right to request the court to grant an order for security or to secure evidence necessary to vindicate claims against the debtor. The court has the discretion to grant or refuse the order if it would interfere with the administration of the main proceedings.⁹⁵ The type of relief contemplated here, although different from the relief in article 19 and 21 of the Model Law, seems to have been inspired by relevant Articles of the Model Law.

Where a foreign court has granted orders (such as the execution against the debtor) in respect of foreign proceedings recognized in Poland, those orders may be carried out in Poland only after the competent Polish court has made a determination of their enforceability. An enforceability clause can be given by the competent court at the request of the creditor.

One of the effects of the recognition of a foreign proceeding is that the debtor is divested of his assets and they are placed in the hands of the bankruptcy trustee. For all intents and purposes, the bankruptcy trustee takes the place of the debtor as either a plaintiff or defendant as the case may be.⁹⁶

Polish Law is very protective of local creditors. Where foreign proceedings are recognized, the effects of declaration of bankruptcy with regard to assets located in Poland and obligations which occurred or are to be performed in Poland are to be determined by Polish Law.⁹⁷ This provision is very much like Section 13 (3) of the South African cross-border insolvency Act and its sole purpose is to protect the interests of local creditors. Liabilities secured by limited material rights

⁹³ Article 380 (2) of the Act.

⁹⁴ Article 395 of the Law.

⁹⁵ Article 390.

⁹⁶ Article 397. See also articles 144 to 146.

⁹⁷ Article 403 and 404.

on property located in Poland or entered in land or mortgage registers in Poland are also to be satisfied in accordance with Polish Law.

In order to further protect the interests of Polish creditors from employment relationships, and creditors such as children entitled to child support and spouses entitled to alimony, local (secondary) insolvency proceedings may be instituted by the court *ex-officio*.⁹⁸ When secondary insolvency proceedings have been instituted after the recognition of foreign proceedings, management of the debtor's assets situated in Poland which had up to that point been performed by the foreign representative, are taken over by the trustee appointed in those secondary proceedings. By virtue of his appointment, the said trustee becomes a party to the cases conducted by the foreign representative.

The Law does not provide for rules on the coordination of multiple proceedings and in this respect, takes a different approach from the Model Law. Where multiple proceedings have been recognized, the law essentially leaves it to the court to determine how the debtor's assets will be dealt with.⁹⁹

In many respects, the Act is addressed to the courts and the foreign representative acting in Poland. It goes further than the Model Law in that it explains in detail what the foreign representative must do after the foreign proceedings have been recognized. This is what is normally done by an administrator in an ordinary insolvency proceeding. For example, it provides details on the plan of liquidation that the foreign representative must draw up.¹⁰⁰

The influence of the EU Regulation on Insolvency Proceedings is also evident in this legislation. Article 35 of the EU regulation about assets remaining in the secondary insolvency proceedings provides that if by the liquidation of the assets in the secondary proceedings it is possible to meet all claims allowed under those proceedings, the liquidator appointed in those proceedings shall immediately transfer any assets remaining to the liquidator in the main proceedings. Article 412 of the Act contains a provision to the same effect.

6.7 Romania

Romanian Law number 637 of 7 December 2002 on regulating private international law relations in the field of insolvency ('the Law') incorporates the Model Law into Romanian Law. Title I of the law deals with the Model law while Title II deals with the relationship with the EU member states.¹⁰¹ It is Title I that is relevant for the purposes of this paper.

Title I runs from article 1 to 33 and most of the Articles incorporate law no. 64 of 1995, which is the local insolvency law by reference. A large number of entities have been excluded from the scope of the Law.¹⁰² They are:

- i. Banks, Cooperative banks, Credit institutions, Insurance undertakings;
- ii. Financial service and investment institutions;

⁹⁸ Article 407.

⁹⁹ Article 417.

¹⁰⁰ Article 401.

¹⁰¹ It would seem that Title II has been adopted in anticipation of Romania joining the EU on 1 January 2007.

¹⁰² Article 2 (2) of the Law.

- iii. Collective investment undertakings holding funds or securities for third parties;
- iv. Exchange companies;
- v. Members of the commodities exchange;
- vi. Clearing houses;
- vii. Clearing members of the commodity exchange;
- viii. Brokerage companies; and
- ix. Traders

No single court or tribunal has been entrusted with the competence to deal with foreign insolvency proceedings. A number of tribunals will have the competence through judges depending on the nature and object of the request for recognition and assistance. For example, a tribunal in the jurisdiction of which a debtor has establishment will have jurisdiction. Where the debtor has no establishment, in the case of immovable assets, it is the tribunal in whose jurisdiction the assets are located that will have the necessary competence.

A foreign representative already had a right to request the opening of insolvency proceedings in Romania in terms of law no. 64 of 1995 ('64/95'). The Law merely confirms the status quo. A foreign representative must still comply with the requirements set out in law 64/95.

The rights of foreign creditors to open and participate in Romanian proceedings are similar to those of Romanian creditors. This however does not affect the order of payment of claims, except that claims of foreign creditors cannot be ranked lower than simple contract debts, unless the claims of foreign creditors fall into the category of claims that are ranked below simple contract debts under Romanian law. In simple terms, this means that if similar local claims are ranked below simple contract debts, then the equivalent claims of foreign creditors will also be ranked lower than simple contract debts.¹⁰³

Article 14 (3) and (4) further provide that in the case of non-due debts, conditional debts, non-guaranteed debts, as well as non-guaranteed parts of the guaranteed debts which are not due at the date when their request for admission was recorded, law 64/95 shall apply accordingly. This is another example of a case where domestic insolvency law becomes part of this Law by reference. This is why it is important for foreigners dealing with the Law to familiarize themselves with the domestic insolvency law provisions.

Chapter 3 deals with the request for recognition of foreign insolvency proceedings and it is perhaps the most important chapter of the Law because it contains the requirement of reciprocity. This requirement has been 'cleverly hidden' in chapter 18 of the Law. It is unfortunate that this requirement appears so far into the Law instead of in the introductory chapters dealing with the scope of the Law. This might cause unnecessary confusion.

The said Article 18 (e) provides that a foreign proceeding will be recognized if there is reciprocity concerning the effects of foreign judgments between Romania and the state of the court that pronounced the judgment. Thus, Romania has followed in the footsteps of South Africa by adopting the reciprocity approach, albeit with the ordinary form of reciprocity different from that taken by South Africa.

¹⁰³ Article 14.

The rest of the law incorporates the Model Law virtually verbatim, with the exception perhaps of Article 21 dealing with the effects of recognition of foreign main proceedings. It is necessary due to its importance, to quote the rest of the article. It provides that:

“1) Upon recognition of a foreign main proceeding, the initiation and continuation of requests or actions of an individual nature, concerning assets, rights and obligations of the debtor, and acts, operations and any other measures of individual executions over the debtor’s assets shall be suspended *de jure*.

2) On a request of a creditor holding a claim guaranteed with a mortgage, pledge or another real movable or possessory lien of any kind, the court can remove the stay provided in paragraph (1), within conditions provided in law 64/95.

3) Upon recognition, the exercise of the right to alienate, encumber or dispose in any other manner of the debtor’s assets shall be suspended and acts carried out in violation of these provisions shall be null *de jure*.

4) The exception to the application of paragraph (3) shall be the exercise of a trader’s right to carry out acts, operations and payments that meet the ordinary conditions of exercise of the current activity, for which the court may decide stay within the conditions provided in Article 22.

5) Recognition of foreign main proceedings shall preclude the initiation of the flow of the prescription period of requests and actions provided in paragraph 1, and if they have already begun, recognition of foreign main proceedings shall represent a cause for interruption of the prescription period of requests and actions concerned”.

6.8 Spain

Spain’s new Act 22/2003 on Insolvency (‘The Insolvency Act’) will come into effect on 1 September 2004.¹⁰⁴ So far, a copy of this legislation is only available in the Spanish and, due to my lack of comprehension of the Spanish language; I am not in a position to offer a proper analysis of the legislation. However according to Wessels, and I hope I understand him correctly, the Insolvency Act has been influenced by among others the UNCITRAL Model Law, The EU Regulation on Insolvency Proceedings and existing Spanish insolvency laws and practices.¹⁰⁵

This would indicate that Spain has opted for a hybrid approach. It has chosen to take parts of the Model Law and fused them with parts of the EU Regulation in order to create a law that will regulate its relationship with non-EU member states on the issues pertaining to cross-border insolvency.

In my view, adoption of the Model Law should entail incorporating substantial provisions of the Model Law into the enacting state’s legislation. I am not sure that what Spain has done really amounts to the adoption of the Model Law.¹⁰⁶ Piecemeal adoption does not promote uniformity and creates more diversity, which defeats the objects of the Model Law.

¹⁰⁴ See Sergi Gimenez, ‘The Spanish Insolvency Act 2003 and its Impact on International Business’, International Company and Commercial Law review, July 2003. Available at <www.iiiglobal.org>> (visited on 30 June 2004)

¹⁰⁵ See Bob Wessels, Reform of the Spanish Insolvency Law: Proposal No 101-1 of 2003, Dated 25 April 2003. A copy of this paper is available through <<www.iiiglobal.org>> (visited on 20 June 2004). See also Bob Wessels, Current Developments Towards International insolvencies in Europe; in International Insolvency Review, Volume 13, Issue 1, Spring 2004, pp. 43-75.

¹⁰⁶ Critics of this submission would probably point out that the flexible nature of the Model law allows or rather entitles Spain to do what it has done.

According to Wessels, provisions in the Insolvency Act dealing with private international law have been inspired by the Regulation while those dealing with recognition of foreign proceedings have been inspired by the Model law, as far as compatible with the Regulation.¹⁰⁷

7. Developments in the EU and US

7.1 The US position on the Model Law

The United States of America ('US') is very keen on the Model Law. In fact, the process of adopting the Model Law in the US has already progressed beyond the drafting stage but now seems to have stalled. The proposed Chapter 15 of the US Bankruptcy Code contains the US version of the Model Law.¹⁰⁸ Chapter 15 was already drafted as long ago as 2001, but the process of enacting it has been delayed for reasons that it would seem, are totally unrelated to the Model Law.¹⁰⁹

It seems that the delay will most likely be temporary and it is inevitable that the US will adopt the Model Law. It is not a question of if, but rather, when.

The most comforting news is that the pending Chapter 15 of the US Bankruptcy Code substantially reflects the Model Law. The only changes of substance are those inserted to reflect the US system and US attitude towards cross-border insolvency issues.¹¹⁰

7.2 Relationship between EU regulation 1346/2000 and the Model Law

The EU Regulation on Insolvency Proceedings ('the Regulation'), which came into effect on 31 May 2002, is not and should not be seen as the EU's response to the Model Law. It is part of the 'grand plan' to create an EU-wide single market, free from obstacles to trade.¹¹¹ It is almost an exact replica of the ill-fated European Convention on Insolvency Proceedings¹¹², which preceded the Model law.¹¹³ While it addresses the pertinent aspects of cross-border insolvency such as the recognition of foreign proceedings, the Regulation has a limited scope in that it only applies to proceedings where the debtor has a centre of his main interests in the EU, and commenced within one of the EU member states.¹¹⁴ The scope of the Regulation is but one of the many differences that exist between the regulation and the Model Law. For example, under the Regulation, any judgment opening insolvency proceedings in one member state pursuant to

¹⁰⁷ For further details on the Spanish approach, See Wessels, supra n. 102.

¹⁰⁸ A copy of the proposed Chapter 15 of the US Bankruptcy Code is available through <<www.iiiglobal.org>> (visited on 15 June 2004).

¹⁰⁹ See the discussion on the reasons for the delay in R.W Harmer, Uncitral Projects: Insol International, in: I.F. Fletcher, L. Mistelis and M. Cremona (eds), Foundations and Perspectives of International Trade Law, London, Sweet & Maxwell, 2001, pp. 480-495.

¹¹⁰ For more on the US approach and Chapter 15 of the US Bankruptcy Code, see Polak-Wessels, *Internationaal insolventierecht*, Kluwer, Deventer, 2003, p. 99. See also a report by Daniel M. Glosband, P.C., on the adoption of the Model Law into the US legislation at <<<http://www.iiiglobal.org/country/usa.htm>>> (visited on 30 June 2004).

¹¹¹ See Recital (2) of Regulation 1346/2000.

¹¹² For details on the fate of the Convention, see Paul J. Omar, Genesis of the European Initiative on Insolvency; in *International Insolvency Review*, volume 12, Issue 3, Winter 2003, pp. 133-145.

¹¹³ See Bob Wessels, *European Union Regulation On Insolvency Proceedings: An Introductory Analysis*, Published by the American Bankruptcy Institute, 2003, p. 5.

¹¹⁴ Ibid.

article 3 of the Regulation has to be automatically recognized in other member states.¹¹⁵ There is no need for a recognition application as is the case under the Model law. As it is not the aim of this paper to sink deep into the Regulation, it suffices to state that there is a mechanism in the EU dealing with cross-border insolvency.

It is not the task of the EU nor is it within its powers, to adopt the Model Law. It is up to the individual member states to decide if and when they wish to adopt the Model Law. This is in line with the principle of subsidiarity, which is one of the founding principles of the EU. According to this principle, the powers of the EU are limited to those areas that fall within its competence, and objectives that can best be achieved by the member states are left to the individual member states.¹¹⁶

It is worth noting that the Model Law respects international commitments or agreements concluded by countries. This means that an EU member state need not fear that by adopting the Model Law, it will be compromising its position as an EU member state. The Regulation will continue to have precedence even when the Model Law is adopted.¹¹⁷

Within the EU, only Poland and reluctantly Spain have so far adopted the Model Law.

Another member of the EU that has taken positive steps towards adopting the Model Law is the UK. Its Insolvency Act of 2000 contains a provision to the effect that the Secretary of State can adopt the provisions of the Model Law by way of regulations into the UK domestic Law and make appropriate amendments to the existing system.¹¹⁸ The effect of this is that the UK can adopt the Model Law without a need for legislation from parliament. It is anticipated that the UK will finally adopt the Model Law in March 2005.¹¹⁹

8. Perspectives on Reciprocity

8.1 A threat to uniformity

Reciprocity entails the mutual exchange of privileges.¹²⁰ In the case of a country that has adopted the Model Law, it means that the privilege of benefit from the Model Law will only be given to those countries that offer a similar privilege in their legal system that is offered in the Model Law country. This means that the country has to adopt the Model Law in order to benefit from the laws of the countries that have adopted it.

Parisi and Ghei describe reciprocity as an effective tool in a world where there is no external authority to enforce agreements.¹²¹ In the case of the Model Law, no one has the authority to force countries to adopt it. Its adoption is voluntary.

¹¹⁵ See Article 3 and 16 of the Regulation.

¹¹⁶ Craig & De Burca, *EU Law, 'Text, Cases & Materials'*, Third edition, Oxford University Press, 2002, p. 135.

¹¹⁷ See Article 3 of the Model law.

¹¹⁸ See section 14 of the Insolvency Act of 2000.

¹¹⁹ See << <http://www.practicallaw.com/jsp/article.jsp?item=3637072>>> (Visited on 22 June 2004). See also << www.southsquare.com>> (Digest Volume 10, number 5 of May 2004, visited on 30 June 2004).

¹²⁰ See <http://www.thesaurus.com/reciprocity>.

¹²¹ See Parisi Francesco and Ghei Nita, "The Role of Reciprocity in International Law", *Cornell International Law Journal*, 2003. Also available through << <http://ssm.com/abstract-id=307141>>>(visited 30 June 2004).

The Model Law is silent on the issue of reciprocity and some have suggested that it is because the delegates who adopted the Model Law expressly rejected it as being contradictory to the key object of the Model law, which is judicial cooperation.¹²²

It is true that this approach complicates the objectives of the Model Law because it does not promote uniformity. It creates the same uncertainty that the Model Law is trying to eliminate and leaves the international law on cross-border insolvency with considerable disparities.

Countries that cannot benefit from the Model Law are left in the same position as they were prior to the adoption of the Model Law, with foreign and unfamiliar rules and procedures which are for the most part inappropriate or outdated.

8.2 An incentive to adopt the Model Law

Another argument that can be made in favor of reciprocity is that it can serve as an incentive for other countries to adopt the Model Law. Countries that regularly do business with each other will know that in order to benefit from the provisions of the Model Law, they will have to offer similar benefits. It creates what is commonly known as induced cooperation and puts pressure on those countries to adopt the Model Law if their leading partner has done the same. The wait and see approach of countries such as New Zealand give credence to this view. It is clear that some countries have no objection towards adopting the Model Law but are simply waiting to see if others will do the same. I am convinced that a lot more countries would adopt the Model Law if they see that the US and the UK have done the same.

8.3 Protection of national interests

The reason given by South Africa for the approach it has taken is that it is important to protect local interests. The South African authorities and practitioners were uncomfortable with the fact that as one of the first countries to adopt the Model Law, foreigners will get the immediate benefit from the Model Law while South Africans will not obtain similar benefits from the countries that have not adopted the Model Law.¹²³

This is a valid argument. It is not acceptable that foreign representatives from a country that does not recognize foreign proceedings should benefit from the provisions of the Model Law while that country has shown no interest or urgency to adopting the Model Law. Like Parisi and Ghei say, reciprocity can also be used to prevent opportunistic behavior.¹²⁴ It would be rather opportunistic of non-Model Law countries to benefit from the laws of a Model Law country while they do not offer the same privilege.

My personal view on the matter is that reciprocity is a necessary evil.

¹²² See R.W Harmer, *Uncitral Projects: Insol International*, in: I.F. Fletcher, L. Mistelis and M. Cremona (eds), *Foundations and Perspectives of International Trade Law*, London, Sweet & Maxwell, 2001, pp.480-495.

¹²³ See a report by Mr. Justice R.H Zulman on the adoption by South Africa of the Model Law, dated 23 August 2003, at <<http://www.iiiglobal.org/international/cross-border/sa-cross-note.pdf>> (visited 15 May 2004).

¹²⁴ For a detailed discussion of reciprocity, see Parisi and Ghei, *op. cit.*, n. 113.

9. Conclusion

The Model Law has the potential to become the most successful attempt so far to provide a mechanism for dealing with cases of cross-border insolvency. Thus far, it has been unsuccessful and the reason for this is the slow response it has received from the international community.

The Model Law has not advanced beyond being considered by a number of countries, and adopted by as few as eight countries. The majority of the countries that have adopted the Model Law have done so with alterations and qualifications. In all fairness, it was not expected of the Model Law countries to incorporate the Model Law verbatim. Another problem that I doubt was ever anticipated is the language problem. Something written in one or in the case of the Model Law six languages sounds totally different when translated into different languages, resulting in legislation that is in some cases, vague and confusing.

The developments in the UK and the US are encouraging. I am of the view that once the US and the UK adopt the Model Law, it will put pressure on the others to do the same. I am going to be so bold as to suggest that the US should adopt the reciprocity approach (which it has not done). This could produce positive results in the case of the US because then anyone who seeks cooperation from the US courts will have to adopt the Model Law or risk the possibility of not getting any cooperation at all.

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