Cross-border Insolvency Problems: Is the UNCITRAL Model Law the Answer?

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Abstract

This paper examines the impact that the UNCITRAL Model Law on Cross-border Insolvency has had on States in the light of the central problems often associated with transnational insolvencies. Despite the accolades that it has received, the Model Law has been adopted in only 19 countries in the last 15 years and that too in many different ways. If the number of adoptees and the rather conditional acceptance of the Model Law’s provisions represent a lack of international enthusiasm for adopting the Model Law, what are the reasons for this? The paper concludes by asking whether the UNCITRAL Model Law presently has a future in dealing with cross-border insolvencies.

I. Introduction

The phenomenal growth in international trade and investments has increased the incidence of corporate entities having businesses, assets, debtors and creditors in more than one country.¹ One disadvantage of such a global marketplace is that it brings about a corresponding risk of cross-border insolvencies since businesses risk failure.² Many businessmen and lawyers involved with international trade and investments seem to accept that, with the increasing

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¹ Due, for example, to various initiatives to remove trade barriers and the increasing number of financial conglomerates and multinational enterprises. This has also been partly attributed to the relaxation in exchange controls laws and other foreign investment regulations: R.W.Harmer, “The UNCITRAL Model Law on Cross-Border Insolvency”, (1997) 6 International Insolvency Review 145 at 146. Businesses may fail due to a variety of reasons including poor management and inefficient production of goods and services or changes in laws and regulations: Rosalind Mason, “Cross-Border Insolvency Law: Where Private International Law and Insolvency Law Meet”, in Paul J Omar (ed), International Insolvency Law (Ashgate Publishing 2008) 28.

globalization of businesses with assets in several countries, there is a need for a common set of insolvency rules across nations. Very often these issues become apparent in the insolvency of a large single corporation with assets located in several jurisdictions as happened in the well known Maxwell Communications Corporation,\(^3\) the Bank of Credit and Commerce International\(^4\) and the Lehman Brothers\(^5\) cases.

In such situations, as the World Bank has recognised, the cooperation of courts and administrators in international insolvency proceedings only helps to support the “goal of maximizing the value of the debtor’s worldwide assets, protecting the rights of the debtors and creditors and furthering of the just administration of the proceedings”.\(^6\) The real challenge to administrators, policy makers and insolvency practitioners is in finding and accepting universal solutions in bringing this about. Why has this been so difficult if there is an obvious need to do so? Are there indeed common answers to the many problems said to be associated with cross-border insolvencies?

II. Cross-Border Insolvency Problems

There are a number of possible cross-border insolvency problems that have been articulated in the now abundant literature on the topic in recent years. The concern often is whether these problems are recognized in all countries and whether their court systems and insolvency administrators are able to deal with them expeditiously.

A. Varied jurisdictional interests

Cross-border insolvency proceedings can be inefficient, prolonged and costly. This is largely because insolvency rules in different languages, in different countries, under different legal systems and traditions are not always uniform or consistent. Where insolvency proceedings are governed by the laws of several jurisdictions, various conflicts of laws issues are bound to arise\(^7\) especially as regards the recognition of court decisions and regulations of foreign jurisdictions, judicial recognition and enforcement of foreign judicial proceedings, recognition of the claims of foreign creditors and the differences in the applicable laws in the disposable of assets. Insolvency orders are mostly a method of enforcing monetary court judgments and it is unrealistic to expect courts not to be particular about the enforcement of insolvency orders from many countries with different laws and legal systems.

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\(^3\) [1992] BCC 757.


\(^7\) Ian F. Fletcher, \textit{The Law of Insolvency} (4th edn., Sweet & Maxwell 2009).
Then there is the problem of different insolvency administrators requiring assistance of national courts and authorities to principally bring about benefits to foreign creditors. Territoriality or the upholding of domestic laws over the laws of other states is a sensitive issue as it is so much part of the concept of state sovereignty. There is in this area an ongoing debate on the advantages and disadvantages of various approaches to insolvency resolution including universalism, modified universalism, territorialism and contractualism.8

III. Attempts at Global Agreements

Despite the expansion of trade across borders, the need for some uniformity in dealing with insolvency issues arising between States and even a call for an international insolvency convention by some British judges,9 there were few attempts to have any global agreement on cross-border insolvency legislation before the UNCITRAL Model Law in 1997. Earlier efforts by such institutions as the International Bar Association10 have been largely “best practices” guidelines and it remains to be seen whether the Model Law will be seen any differently.

IV. The UNCITRAL Model Law on Cross-border Insolvency

Following a discussion11 on the growing significance of cross-border insolvency issues in 1992, the United Nations Commission on International Trade Law (UNCITRAL)12 and the International Association of Restructuring, Insolvency and Bankruptcy Practitioners (INSOL) examined the need to have international co-operation on cross border insolvency issues. Two

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12 UNCITRAL was established by General Assembly Resolution in 1966 and consists of 36 member states. In addition a number of observer states and governmental and private international bodies were present at its meetings.
joint international colloquia\textsuperscript{13} were subsequently held in 1994 and 1995 to explore issues on which there appeared to be sufficient consensus.

The Colloquia were attended by judges, governmental officials, insolvency practitioners, lenders, and other interested groups. There was broad agreement that judicial cooperation could do well with a legislative framework for the resolution of cross border insolvencies\textsuperscript{14} on a number of issues, including co-operation between the courts of the states where debtors’ assets were located, granting access to local courts by foreign insolvency representatives, granting recognition to certain orders by foreign courts and granting relief to assist foreign insolvency proceedings.\textsuperscript{15}

Encouraged by these developments, UNCITRAL initiated a project to draft a model law on cross-border insolvency. Seventy-two states, seven inter-governmental organisations and ten non-governmental organisations took part in the working group that discussed a draft model law between 1995 and 1997.\textsuperscript{16} The Model Law was adopted by UNCITRAL at its 30\textsuperscript{th} session on May 30, 1997, despite the Working Group not having completed its review of the draft of the Model Law and noting in its January 1997 session report that “it would have wished to have some more time available for completing its review of the draft”.\textsuperscript{17} The Model Law was endorsed by the UN General Assembly in December 1997.

V. Why the Model Law Should be Widely Adopted by States


\textsuperscript{15}Jenny Clift, in the Forward to the 1\textsuperscript{st} edition of Look Chan Ho (Ed.), Cross-Border Insolvency : A Commentary on the UNCITRAL Model Law, (Global Business Publishing Ltd : 2006, UK). This book is now in its 3\textsuperscript{rd} edition (2012). Mention should also be made of the efforts of the International Bar Association which had in place by 1995 a Cross-Border Insolvency Concordant which spelt out an insolvency process which had received some international recognition as being consistent, fair and convenient. See Harold S. Burman, footnote 26.

\textsuperscript{16}Jenny Clift, in the Forward to the 1\textsuperscript{st} edition of Look Chan Ho (Ed.), Cross-Border Insolvency : A Commentary on the UNCITRAL Model Law, (Global Business Publishing Ltd : 2006, UK). The writer was a member of the working group and participated in its deliberations on behalf of Singapore.

\textsuperscript{17}Report of the Working Group on its work at its 21\textsuperscript{st} Session (New York, 20-31 January 1997) A/CN.9/435, paragraph 16. The Working Group’s report noted at paragraph 14 that it “did not have time to review the draft articles that had been prepared pursuant to its consideration”. It had expected to return for a final session in October 1997 to complete its report, but that was not to be as the incomplete draft was adopted by UNCITRAL in May 1997. The recollection of Berends, the Netherlands representative on the Working Group, appears to be different from mine. According to him the Working Group decided to present its incomplete report to UNCITRAL “hoping the draft would be finished by the time the Commission met” : Andre J. Berends, “The UNCITRAL Model Law on Cross Border Insolvency: A comprehensive review”, 6 Tulane Journal of International Comparative Law (1998) 309 at 318. This is not supported by the Report of the Working Group as indicated above. However, it seemed to have been accepted by delegates at the UNCITRAL’s 30th Session in May 1997 that the US was the prime mover in getting the incomplete model law speedily adopted by UNCITRAL. However, the US itself did not adopt the model law until 2005, some eight years later.
A. Nature of the Model Law\(^{18}\)

As modestly described by UNCITRAL, the Model Law was designed to “assist States to equip their insolvency laws with a modern, harmonized and fair framework to address more effectively instances of cross-border insolvency”.\(^{19}\) Accordingly, the UN Resolution in December 1997 recommended that, in reviewing their legislation, States give “favourable consideration” to the Model Law.\(^{20}\) The Model Law is a short document consisting of only 32 articles and accompanied by an explanatory Guide to Enactment. These have been said to be built on four principles of “access” by a foreign representative to the courts of the enacting State, “recognition” by the state of the foreign proceedings, “relief” which ensures the granting of interim reliefs pending recognition and “co-operation” and “co-ordination” which require courts and insolvency administrators in various states to communicate and co-operate for maximization of assets for the benefit of all creditors.\(^{21}\) That it contains rather partial and general provisions permitting States to develop the four principles has been said to add to its appeal.\(^{22}\)

The Model Law, unlike a multilateral convention, merely provides a legislative guide for States to modify their laws to ensure consistency of insolvency laws and practices between different countries. The UN Working Group that drafted the Model Law was quite content to deal with a Model Law rather than a convention.\(^{23}\) The Model Law thus confers the freedom on a State to decide how it wishes to incorporate the Model Law into its domestic legislation. This alone, according to some commentators, should ensure support for its adoption.\(^{24}\)

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\(^{18}\) Published in the UN official languages of Arabic, Chinese, English, French, Russian and Spanish. There is abundant literature on the Model Law. See for example Andre J Brends, (n 17); Look Chan Ho (ed.), Cross-Border Insolvency : A Commentary on the UNCITRAL Model Law, (Global Business Publishing Ltd : 4th edn., 2012); John A.E.Pottow, (n 8); Jenny Clift (n 28).


\(^{23}\) See Andre J. Berends, “The UNCITRAL Model Law on Cross Border Insolvency: A comprehensive review”, (1998) 6 Tulane Journal of International Comparative Law 309. Berends, the Netherlands representative on the Working Group, remembers our discussions at the Working Group’s sessions on whether a convention should be recommended instead of a Model Law. In my own recollection, these discussions seemed to be ongoing at every session. The majority of the delegates did not think they had a mandate to discuss a convention and felt they were present to consider only a model law draft that had been prepared and circulated by the UNCITRAL secretariat before the sessions. They also had modest expectations of the outcome of the discussions which would have been a lot more drawn out and inconclusive if a draft convention had been suddenly thrust before them.

\(^{24}\) Bob Wessels, Bruce A Markell and Jason J. Kilborn, International Cooperation in Bankruptcy and Insolvency Matters (Oxford University Press 2009) 202, citing Pottow, (n 8 ). According to Professor Fletcher, however, the fact that a Model Law is only a legislative guide enabling a State to decide how much or how little of the Model Law it wishes to accept “is likely to be viewed by some as the Achilles’ heel of this form of international harmonization” : Ian F. Fletcher, Insolvency in Private International Law ( 2nd edn., OUP 2005) 486.
B. The Model Law’s accommodation or concessions

To encourage the adoption of its provisions, the Model Law contains a number of provisions that can best be described as ‘concessions’. Some of these too, as will be considered elsewhere in this paper, may also militate against the adoption of the Model Law.

Article 1(2) of the Modern Law permits a State to exclude from the operation of the Model Law, any special entity, such as a bank or insurance company, that may be subject to a “special insolvency regime”. The reason for the exclusion of such entities is that their insolvency may require the protection of the interests of a large number of individuals.

Article 3 preserves the right of a State to honour its treaty or other agreement obligations should there be a conflict between the treaty and the Modern Law. It expresses the principle of the supremacy of international treaty obligations of a state.

Article 6 further enshrines the public policy exception in that it provides that a state court may refuse to “take an action governed by this Law if the action would be manifestly contrary to the public policy” of the State. The Article does not define “public policy” as “the notion of public policy is grounded in national law and may differ from State to State”.

C. UNCITRAL’s efforts towards its enactment and implementation

It is to UNCITRAL’S credit that its efforts, both before and after the Model Law came into being, to ensure its success have been spectacular. In the years leading to the working Group’s deliberations there were a large number of workshops, colloquia and consultations involving judges, government officials and insolvency experts and practitioners.

Since the adoption of the Model Law in May 1997, UNCITRAL has also vigorously pushed for the adoption of the Model Law by States. It has done this in several ways.

25 Paragraphs 60-61, UNCITRAL’s Guide to the Enactment of the Model Law 1997 available at http://www.uncitral.org/pdf/english/texts/insolven/insolvency-e.pdf (accessed on 16 May 2012). UNCITRAL accepted that for these reasons, “the insolvency of such types of entities is in many States administered under a special regulatory regime” which the Model Law should respect.


27 Para 86, ibid. Para 87 of the Guide gives a more detailed explanation: “In some States the expression “public policy” may be given a broad meaning in that it might relate in principle to any mandatory rule of national law. In many States, however, the public policy exception is construed as being restricted to fundamental principles of law, in particular constitutional guarantees; in those States, public policy would only be used to refuse the application of foreign law, or the recognition of a foreign judicial decision or arbitral award, when that would contravene those fundamental principles.

First, from the beginning, UNCITRAL provided a useful Guide to the Enactment of the Model Law 1997. It apparently considered that the Model Law would be more effectively used by legislators if the Guide could give “background and explanatory information”\(^{29}\) aimed at directors and other government officials having the duty to make legislative changes. It was also meant to provide other users of the Model Law such as judges, practitioners and academics with information about the Model Law for wider use and dissemination.

In addition, in 2004, UNCITRAL produced a Legislative Guide on Insolvency Law for the use of States when enacting new or reviewing existing insolvency laws. This may well have been partly due to UNCITRAL’s realisation that it was not possible to promote the adoption of procedural laws alone, as originally intended with the Model Law, without advising on necessary changes to substantial law. Another novel attempt perhaps to win new converts. The Legislative Guide on Insolvency Law, therefore, makes frequent references to the Model Law and rather cleverly also includes the text of the Model Law and the Guide to the Enactment of the Model Law “to facilitate consideration of cross-border insolvency issues”.

In 2009, UNCITRAL published the Practice Guide on Cross-Border Insolvency Cooperation. This document provides information for insolvency practitioners and judges on “practical aspects of cooperation and communication in cross-border insolvency cases”\(^{30}\). The Commission’s further work on “coordination and cooperation in cross border insolvency cases”,\(^{31}\) was needed particularly with regard to cross-border agreements as this was viewed as closely related to the promotion of the Model Law. UNCITRAL had again taken the opportunity to create further awareness of the Model Law and to demonstrate its importance in order to encourage adoption by more States.

Secondly, UNCITRAL provides technical assistance to promote its work and “the use and adoption of the legislative and non-legislative texts it has developed to further the progressive harmonization and unification of private law”.\(^{32}\) UNCITRAL’s technical assistance is readily available to States considering adopting the Model Law as part of their domestic insolvency legislation.

Thirdly, UNCITRAL maintains a data base of court decisions and model law texts (“CLOUT”). This promotes continuous international awareness of its legislative texts and


\(^{31}\) Preface to the Guide, ibid., page iii.

\(^{32}\) See the explanations given by UNCITRAL at [http://www.uncitral.org/uncitral/en/technical_assistance_coordination.html](http://www.uncitral.org/uncitral/en/technical_assistance_coordination.html) (accessed on 16 May 2012). This is pursuant to a general mandate given by the General Assembly to further the “progressive harmonization and unification of the law of international trade”.

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assists in maintaining consistency in their interpretation and application. This again will be an encouragement to legislators to recommend adoption of the Model Law.33

Finally, UNCITRAL has been involved with other institutions including the World Bank, the Asian Development Bank, the International Bar Association and INSOL in actively promoting the Model Law at various meetings, conferences, symposia and colloquia.

D. Institutional support for the Model Law

Several global institutions have recommended the adoption of the Model Law. The Group of G22, comprising Finance Ministers and Central Bank Governors of the twenty-two most significant economies, following its meeting in the wake of the Asian financial crisis in 1997,34 encouraged “the wider use of the UNCITRAL Model Law on Cross-Border Insolvency or the adoption of similar mechanisms to facilitate the efficient resolution of cross-border insolvencies”. The International Monetary Fund35 too in 1999 recommended the adoption of the Model Law as an “effective means” of facilitating “the recognition of foreign proceedings and the cooperation and coordination among courts and administrators of different countries”. The Asian Development Bank did the same in 2000 with its “Good Practice Standards”.36 The World Bank’s draft Principles for Effective Insolvency and Creditor/Debtor Regimes of 2005 was “reviewed and revised to incorporate updates to UNCITRAL’s Legislative Guide on Insolvency Law”.37 Having worked closely with UNCITRAL in the drafting of the Model Law, INSOL has often used its meetings and conferences to promote the Model Law.


36 According to ADB’s Good Practice Standard 16 , an insolvency law regime should include provisions relating to recognition, relief and co-operation in cases of cross-border insolvency,” preferably by the adoption of the UNCITRAL Model on cross-border insolvency.” The ADB Good Practice Standards are reproduced in Bob Wessels, Cross-Border Insolvency Law (Kluwer Law International BV 2007) Annex 31.

E. Accolades for the Model Law

Finally, there has been much praise for the Model Law and hardly any substantive criticisms of its provisions from both insolvency practitioners and leading academics.38

VI. Measuring the Success of the Model Law

If the success of a Model Law is to be measured either by the number of countries that have adopted it or “in terms of the quantity of the Law’s provisions that are adopted or the technical quality of the implementation provisions as an accurate embodiment of their intended substance”,39 then it may not be possible to regard the Model Law on Cross-Border Insolvency as a success.

A. The number of adoptees

As of September 2012, more than 15 years after UNCITRAL formally adopted the Model Law, only 18 countries and 1 British overseas territory have adopted it.40 Despite the haste to approve the Model Law at the UNCITRAL meeting in May 1997 41, only 7 states adopted the model law between 1997 and 2003. In December 2004, the UN General Assembly further encouraged all States to “continue to consider implementation of the Model Law on Cross-Border Insolvency.”42 This and UNCITRAL’s continuing efforts may have partly encouraged another 12 converts including the United States of America, the United Kingdom, South Korea, New Zealand and Australia to adopt the Model Law between 2005 and 2008. The numbers certainly appear to have dwindled since 2006. How many states like Greece have felt compelled to do so, as part of their debt-restructuring process, is a moot question.43 Some


41 The Working Group had indicated that its work was incomplete and that it needed more time to finalise its report : Report of the Working Group on its work at its 21st Session (New York,20-31 January 1997) A/CN.9/435. See also comment in footnote 17, ibid.

42 Resolution of the General Assembly at its 65th Plenary Meeting.

43 Greece appears to have adopted the Model Law almost verbatim. According to a Greek commentator, the adoption of the Model Law is unlikely to have significant practical consequences as there have been few international insolvency proceedings affecting Greece, with only two published decisions on the EU Insolvency Regulations. Therefore, in his view, Greece’s adoption of the Model Law in 2010 “may be more of a signal to the world that Greece is diligent in improving the means at its disposal for dealing with economic crises, given the recent adverse publicity produced by its debt problems”. See Ioannis Kontoulas, “Adoption of the UNCITRAL Model Law on Cross-Border Insolvency by Greece”, available on
Asian countries like Japan and South Korea may have been influenced by the IMF funding assistance which was tied to corporate restructuring and adoption of cross-border insolvency laws.\textsuperscript{44} At the time of writing in September 2012, no country has adopted the Model Law after Greece did so in 2010.

The belief that the adoption by the US and Great Britain in 2005 and 2006 “might encourage adoption by a wider circle of countries”\textsuperscript{45} has simply not materialised. Hopes that states may be influenced “into overcoming their scepticism of the Law’s value” if a number of commercially important countries adopted the Model Law were also not realised.\textsuperscript{46} More significantly, Germany, Brazil and the Asian economic giants of China\textsuperscript{47} and India have not come aboard.

On the other hand, the 19 states that have adopted the Model Law also include some with insignificant economies such as Eritrea, Montenegro, Slovenia, Serbia, Greece and Mauritius and are unlikely to be involved in multiple cross-border insolvencies or to inspire others to follow suit. The numbers are disappointing when one considers the herculean efforts that have been mounted, which have described above, to persuade States to adopt the Model Law and the accolades that the Model Law has received.

A closer scrutiny of the countries that have not adopted the Model Law is even more revealing: 175 of the 193 members of the United Nations (91%), 49 of the 60 UNCITRAL member states (82%), 22 of the 27 European Union countries (81%), 11 of the 19 G20 countries (representing 20 major economies including the EU) (58%), 23 of the 34 Organisation for Economic Development (OECD) countries (68%) and 5 of the 8 G8 countries (forming 8 of the world’s largest economies) (66%). Even among the 38 countries regularly represented on the Working Group that drafted the Model Law, 31(82%) have not adopted the Model Law.

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\textsuperscript{46} Professor Fletcher had hoped that an early example set by a critical mass of commercially important states might provide some sort of “moral leadership in setting global standards” in cross border assistance : Ian Fletcher (n38) 486-487.

\textsuperscript{47} China is unlikely to join the band as it has already enacted a new Enterprise Law 2007 which makes no mention of the Model Law. Article 5 permits the recognition and enforcement of foreign insolvency proceedings but on the basis of reciprocity.

A comparison with the adoption rates of a number of other Model Laws was also made. If nothing else, it may be an indication of the importance that States attach to a model law on cross-border insolvency. Indeed, most of the other Model Laws seem to have a higher take up rate than the Cross-Border Insolvency Law, despite the latter’s purported importance to international trade. For example, the Model Law on International Commercial Arbitration (1985) has 67 adoptees (excluding many individual states in Canada, Australia and the US), Electronic Commerce (1996) 44 (excluding many individual states in Canada, Australia and the US) and Procurement of Goods, Construction and Services (1994) 29 and Electronic Signatures (2001) 21.

B. Quantity and Quality of the adoption of the Model Law

Professor Fletcher was rather insightful when he wrote in 1999:48

The proof of the Model Law will be in the enactment. The crucial question is not 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.

Despite writing in a rather optimistic mood in 2006, Professor Wessels too opined that the success of the Model Law “is heavily dependent upon whether, and in what manner, countries choose to enact it”.49 It is, however, rather difficult to share any optimism for the future of the Model Law if we consider the manner and extent in which many of the 19 States have indeed enacted and implemented the Model Law.

In its Guide to the Enactment of the Model Law issued in 1997 UNCITRAL had advised States to “make as few changes as possible in incorporating the model law into their legal systems” in order “to achieve a satisfactory degree of harmonization and certainty”.50 Obviously, the more changes that are made to the text of the Model Law, the less the harmonizing effect of the resulting domestic legislation.51 However, a number of the adopting countries have ignored this advice and have made significant changes to the model law or have introduced amendments which are quite inconsistent with the character and content of the model law.


49 Bob Wessels, “Will UNCITRAL Bring Changes to Insolvency Proceedings Outside the USA and Great Britain? It Certainly Will”, (2006) 3 International Corporate Rescue 200. Based on the number of countries (10 countries in 9 years), support by global institutions such as IMF and the World Bank and the Model Law’s reception even from authors outside the “English language comfort zone”, Wessels appeared be fairly confident in regarding the Model Law then as a “fait accompli”.


51 An obvious caution given by Jenny Clift in a video conference address in 2008.
1. The Reciprocity requirement

More than a third of the countries that have presently opted to adopt the Model Law in some form or the other have introduced a reciprocity requirement. South Africa, Mexico, the British Virgin Islands, Romania and Mauritius have all legislated on the basis of reciprocity.

The South African approach to reciprocity appears to be the most restrictive as its Insolvency Act applies only to countries that are designated by the Minister. Mere adoption of the Model Law by a State therefore is no guarantee of reciprocity under South African law. Although South Africa was one of the first few countries to adopt the Model Law, its 2000 Cross-Border Insolvency Act that introduced the Model Law appears to be dormant because of its reciprocity requirement. Even in early 2012 it was reported that no State had been so designated, thus leaving the Cross-Border Insolvency Act “in effect without practical application in South Africa”.

The British Virgin Islands too, using a “designated country” approach to ensure reciprocity, is yet to bring into operation the Model Law provisions it adopted in its 2003 Insolvency Act and has apparently still “no plans to bring it into force”.

52 Section 2 of the Cross-Border Insolvency Act of 2000, brought into force on 28 November 2003, which enacted the Model Law, however, restricts the application to only states designated by the Minister of Justice in the Government Gazette. Section 2(2) (b) of the Act further makes it clear that the Minister may only do so if he is satisfied “that the recognition accorded by law of such a State … justifies the application of this act to a foreign proceeding in such a State”.


54 The Insolvency Act 2003, Part XVIII. Article 437(1) of the Act defines a foreign proceeding as a collective judicial or administrative proceeding in, as in the case of South Africa, “a designated country” which means a country designated by the Governor by notice published in the Gazette.


56 Part VI of the Mauritius Insolvency Act of 2009, which sets out the cross-border insolvency provisions based on the Model Law. For more detailed information, see Malcolm Muller’s commentary in Look Chan Ho, (n 54), 289-314.

57 On the other hand countries like Spain whilst not formally adopting the Model Law has made sure it supports the principle of reciprocity in its legislation introduced after the Model Law: Spanish Insolvency Act 2003 (Ley Concursal 22/2003), Title IX which was brought into force in September 2004. Chapter 1, Article 199 provides that “In the absence of reciprocity or due to a systematic failure of cooperation by the authorities of a foreign state, chapters III and IV of this title shall not be applicable with regard to the proceedings followed in that state”. For a comment on the Spanish law, see Marie-Louise and Frederick Bulten, “Introduction to Spanish Cross-Border Insolvency Law - An Adequate Connection with Existing International Insolvency Legislation”, Int. Insolv. Rev., vol 18 (2009) 59-76; Bob Wessels, Bruce A Markell and Jason J. Kilborn, International Cooperation in Bankruptcy and Insolvency Matters, (Oxford University Press 2009) 90-93; M. Virgo, “Cross-border Insolvency Beyond the European Insolvency Regulation; The Spanish Solution”, paper presented at the Academic Meeting, Insol Europe, Amsterdam, 29 September 2006.


59 Rachel Kelly and Claire van Zuylen, comment on South Africa in Look Chan Ho, (n 55) 401-402.

60 See (n 54) and the comment by Phillip Kite in Look Chan Ho (n 54) 55. Yet Great Britain, which the British Virgin Islands is a territory of, enacted the Model Law provisions in the Cross-Border Insolvency Regulations in 2006 without any
Similarly, the cross-border provisions in the Mauritius Insolvency Act of 2009 based on the Model Law, are not operative as they are still awaiting “such time as there is sufficient reciprocity in dealing with jurisdictions that have trading or financial connections with Mauritius or that are otherwise in the public interest”. 61 Article 280 of the Mexican Insolvency Law of 2000, which incorporates the Model Law, has also introduced a reciprocity requirement. 62

In Romania the requirement for reciprocity has been “cleverly hidden” in Article 18 of the Romanian Law instead of being stated upfront in the introductory chapters of the Law. 63 Thus foreign proceedings will be recognised only if there is a reciprocal arrangement for the recognition of judgments of the country concerned.

It was at first thought that New Zealand law too would require the mutual recognition of insolvency proceedings by other States but this requirement was later abandoned. 64 Certainly one of the factors for the New Zealand Law Commission’s recommendation that New Zealand adopt the Model Law was the likelihood that its major trading partners, especially in Asia, would adopt the Model Law. The Commission therefore recommended that the Model Law provisions should not be implemented “until such time as the Government is satisfied that other States with which we have major trading relations have enacted the Model Law or will shortly enact the Model Law”. 65

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61 Malcolm Muller, on the law in Mauritius, in Look Chan Ho, (n 55) 289. The rest of the Act came into operation on 1 June 2009.

62 Pablo Perezalonso in Look Chan Ho (n 55) 317. See also Sandile Khumalo, “International Response to the UNCITRAL Model Law on Cross-Border Insolvency”, research paper presented to the Vrije University in Amsterdam available on the website of the International Insolvency Institute – www.iiiglobal.org. (last accessed on 25 May 2012); Bob Wessels, et.al.(n 56) 241. The first case believed to have been decided under the enacted Model Law in Mexico is the Federal District Court Mexico City, 19 December 2002, case of Xacur Eljure, which recognises a foreign proceeding (US Bankruptcy Court SD of Texas (Houston Division) of 22 April 1997) as a main foreign proceeding. The Court assumed the reciprocity provision to mean:

(i) that an international treaty on commercial insolvency must exist;
(ii) that Title XII will be applied only when the existing treaty on insolvency does not provide an alternative; and
(iii) that international reciprocity must exist due to this treaty.

See Wessels et.al. (n 55) 242; see a summary of case in www.iiiglobal.org and UNCITRAL’s CLOUT (case 639).


64 Sean Gollin on “New Zealand” in Look Choon Ho (n 55) 331-332.

65 New Zealand Law Commission Report on Cross-Border Insolvency, Report 52 (February 1999): Should New Zealand adopt the UNCITRAL Model Law on Cross-Border Insolvency?, paras 98 and 113, available at www.nzlii.org/nz/other/nzlc/report/R52/R52-Select.html. The trading partners identified by the Commission included the European Union, China, Malaysia, Singapore, Taiwan, Thailand, Hong Kong and Indonesia (in addition to Australia, the US, Japan and Korea). New Zealand adopted the Model Law in 2006, two years before Australia did so in 2008. However, as of
2. Exclusion of certain entities

Article 1(2) of the Model Law contemplates the exclusion of proceedings concerning certain entities that are subject to a special insolvency regime in the State. States have taken advantage of this proposal to exclude a whole variety of different entities. New Zealand has excluded banks from the operation of the model law provisions. In addition, Romania has excluded all financial institutions that provide credit or investment services, stock exchanges, brokers and insurance companies and agents. Great Britain has done the same not only with UK insurance companies and credit institutions but also with EEA (European Economic Area) and third country credit institutions and insurers. This has created inconsistencies in the law. The US in turn has excluded investment institutions, stock exchanges, insurance undertakings, clearing houses, brokers and traders, banks, railroads, stockbrokers and commodity brokers but not foreign insurance companies. In Mexico, insurance companies, surety companies and “unincorporated government enterprises” have similarly been excluded.

These exceptions are a lot wider than what the Model Law contemplates. If the objective in having the Model Law is to cater for cross-border problems that may arise in dealing with assets in many jurisdictions and to avoid multiple proceedings, it is unclear how excluding such a variety of institutions that have a potential to involve assets in multiple countries really serve the Model Law’s purpose. The New Zealand Law Commission expressed a more rational view in stating that “considerable justification” is required to exclude any entity from the operation of the Model Law. Therefore, its “starting point” was that banks should be included in the Model Law “unless there are strong reasons which justify exclusion or modification”. The South African Law Commission too was persuaded not to recommend any exclusions.

14 September 2012, 22 of the 27 European Union countries and none of the others listed above, other than the four indicated in parenthesis, have adopted the Model Law.


67 Cross-Border Insolvency Regulations 2006, Schedule1, Article 1(2). See commentary in Look Chan Ho, (n 63) at 144-146. Look regards the exclusions “as driven not by any well-reasoned principles”.

68 Section 1501, chapter 15 of the US Bankruptcy Code, effective from 15 October 2005.


70 This hardly supports the objective of “harmonising” insolvency procedures in different countries and can create confusion. For example, Glitnir banks Icelandic insolvency proceedings were recognized as a foreign main proceeding under chapter 15 of the US Bankruptcy Code but would not be eligible for recognition under the British Model Law provisions as it is an EEA credit institution. Similarly, the Icelandic insolvency provisions of Landsbanki Islands hf have been recognized under chapter 15 of the US law and the Canadian and Australian enactments of the Model Law but not under the British Model Law. See Look Chan Ho (n 63) 144-145 for details of these and other examples.

71 New Zealand Law Commission Report on Cross-Border Insolvency: Should New Zealand Adopt the UNCITRAL Model Law on Cross-Border Insolvency?”, Report 52 (February 1999), para 190. Nevertheless, the Commission concluded, after
3. The “Public Policy” exclusion

Article 283 of the Mexican Commercial Insolvency Law of 2000 is much broader than Article 6 of the Model Law regarding the public policy exception. It prohibits the recognition of any foreign judgment or the application of foreign law which violates “the fundamental principles of Mexican law”. Similarly, Article 392(2) of the Polish Bankruptcy Recovery Act of 2003 makes clear that “the recognition of a foreign proceeding may not be contrary to the basic principles of the legal order in Poland” although Article 7, the Model Law’s public policy provision, states that this should be invoked only if the foreign order in question was “manifestly contrary to public policy”. There are other countries which have dropped the qualification of “manifestly” in adopting Article 6. These include the British Virgin Islands, Serbia and Canada. Again, in a departure from the Model Law’s public policy exception, Article 6 of the Romanian Cross-Border Insolvency Law permits a Romanian court to refuse to recognise a foreign insolvency proceeding if it violates “Romanian principles of public order”. China wanted the word “manifestly” to be removed from Article 6 but it was not able to persuade the Working Group to agree.

Section 1506 of the US Bankruptcy Code reproduces Article 6 of the Model Law in providing a public policy exception where it would be “manifestly” contrary to the public policy exception. Further deliberations, that banks, which are subject to statutory management, should be excluded from the operation of the Model Law as New Zealand regulators ought to retain control of assets in New Zealand so that systemic financial difficulties can be minimised: see paragraphs 213-218 of the Report.


74 See generally, note on Polish insolvency law by Michal Barlowski in Look Chan Ho, (n 73) 349-372.

75 See Section 439 of the Insolvency Act 2003, part XVIII, of the British Virgin Islands has excluded the qualifying words “manifestly contrary”. See the note on the British Virgin Islands by Phillip Kite in Look Chan Ho (n 73) 55 at 58.

76 Article 179 of the Bankruptcy Law of Serbia (104/2009): the Serbian courts may refuse to take any action under this law “if the action would be contrary to the public policy of Serbia”. The public policy exceptions are thus not to be interpreted in a restrictive manner contrary to the Model Law. See the comment by Tamara Bubalo and Bojan Vuckovic on ‘Serbia and Montenegro’ in Look Chan Ho (n 72) 393 at 395-396.

policy of the US. It has been suggested that as neither the House Report nor section 1506 provides any guidelines on the definition of “fundamental policies” and as the procedural safeguards for creditors in the foreign proceedings vary significantly from those of the US creditors, there could be a constitutional challenge to the recognition of foreign proceedings or relief sought by foreign representatives in the US courts.79

Article 21(3) of the Japanese Law on Recognition of and Assistance in Foreign Insolvency Proceedings (2001) allows a court to refuse recognition of a foreign proceeding considered to be contrary “to the public order or good public morals in Japan”80. Again there is no mention of “manifestly” in the Japanese legislation adopting the Model Law.

4. The Foreign Representative

The Model Law’s draft provisions in respect of the role and powers of the foreign representative and the protection of local creditors proved the most controversial and were subject to various changes during the Working Group’s sessions. There were animated discussions during the Working Group’s sessions on the role and powers of the foreign representative particularly in jurisdictions where there are official bankruptcy administrators. Some delegates urged others to consider whether these provisions would be acceptable to their government legislators and policy makers despite amendments being made to the original draft provisions. The discomfort amongst many of the Working Group members was as to the extent of the rights of a foreign representative following his application for recognition of a foreign proceeding under Article 19 and subsequently upon recognition under Article 21.81 Article 21(2) requiring the court to be satisfied that the interests of local creditors are “adequately protected” before the Foreign Representative is entrusted with the distribution of the debtor’s assets within the State was inserted in the Model Law after much debate.

It is hardly surprising that the Foreign Representative’s right of access to the courts under Mexican legislation, for example, is subject to various restrictions. If a Foreign Representative has to make urgent applications for interim relief he can do so only through the local Inspector or Receiver and cannot make the application directly to the State courts.82

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80 For a commentary on the relevant Japanese law see note by Shin Abe in Look Chan Ho (n78) 277-288.

81 These include having access to the State courts, obtaining a stay of execution against the debtor’s assets, being entrusted with the administration or realization of all the debtor’s assets in the State, staying all proceedings against the debtor’s assets and liabilities and being able to suspend all rights of transfer of assets of the debtor and to examine witnesses.

82 Articles 298 and 300 of the Mexican Commercial Insolvency Law (2000). For sources and commentary on the Mexican legislation, see (n 73).
Presumably, the local receiver must first be satisfied as to the necessity for the foreign representative to make such applications. In a departure from Article 10 of the Model Law, which protects a foreign representative and the debtor’s estate from being subject to the local courts only because of an application for recognition, Canadian legislation permits the court to make an order for costs in the proceedings and to also subject the foreign representative to all orders of the court.  

Polish law too has sought to deny the Foreign Representative any pre-eminent role in insolvency matters in Poland. Article 384 makes it clear that the appointment of a Foreign Representative by a foreign court has no effect on the jurisdiction of the Polish courts. It is the Polish courts that will have jurisdiction if the debtor conducts business, resides or possesses assets in Poland.

Articles 9 and 11 of the Model Law entitle a foreign representative to apply directly to a local court and to commence proceedings under local insolvency laws. In the US, however, these rights of the foreign representative are conditional upon the foreign proceeding being recognised by US law. Section 1512(b) further provides that upon recognition of a foreign proceeding the court may entrust the distribution of the debtor’s assets in the US to the foreign representative “provided that the court is satisfied that the interests of the creditors in the United States are sufficiently protected”. The preferred application by the courts of territorialism has affected the proclamation of universalism. This demonstrates that even if a State crosses the hurdle of adoption, the implementation of its laws that purport to give effect to the Model Law might not always meet the spirit of the Model Law. There may also be other countries even in the list of 19 that may be unable or unwilling to cope with the intent of the Model Law.

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83 Companies’ Creditors Arrangement Act (2009), Part IV, section 57.

84 See generally note on Polish insolvency law by Michal Barlowski in Look Chan Ho (n78)349-372; Sandile Khumalo, “International Response to the UNCITRAL Model Law on Cross-Border Insolvency”, research paper presented to the Vrije University in Amsterdam available on the website of the International Insolvency Institute – www.iiiglobal.org, at 21-22.

85 Sections 1509 and 1511 of the US Bankruptcy Code.


87 An empirical study of relief granted under chapter 15 showed that the US courts were entrusting assets in such cases in only 45.5 % of the cases and of those entrusted 31.8% were accompanied by qualifying factors including those that favoured US creditors: Jeremy Leong, “Is Chapter 15 Universalist or Territorialist? Empirical Evidence from the United States Bankruptcy Court Cases”, (2011) 29 Wisconsin International Law Journal 110.

88 For example, it has been suggested that while Greek courts are now legally empowered to participate in cross-border coordination, there may still be some resistance due to the local legal culture, unwillingness of judges to surrender control over proceedings, an inadequate infrastructure that would impede local judges from participating in teleconferences and the lack of proper understanding of the various possible forms of cross-border cooperation among the members of Greek bar associations: Ioannis Kontoulas on the “Adoption of the UNCITRAL Model Law on Cross-Border Insolvency” by Greece, available at
South Korean legislation too, in a departure from Article 11 of the Model Law, requires a foreign proceeding to be recognised first in order for the Foreign Representative in order to commence local bankruptcy proceedings.\(^8^9\)

It is also significant to note that in a significant departure from Article 21(2) of the Model Law, Articles 25 and 31 of the Japanese Law on Recognition of Foreign Proceedings provides that a foreign representative must specifically seek the approval of the court before turning over the assets to a foreign country and the court must be satisfied that local creditors are not unfairly prejudiced before sanctioning such a move.\(^9^0\)

Additional Assistance to a foreign representative under Article 7 of the Model Law by the court and bankruptcy administrator appears to be obligatory generally. But under Article 180 of the Serbia Bankruptcy Law 2005 this is discretionary.\(^9^1\) Even if a foreign proceeding is recognised relief in support of the foreign proceeding is discretionary under chapter 15 of the US Bankruptcy Code.

5. Other Deviations from the Model Law

There are a number of other significant deviations from the Model Law including the recognition of foreign proceedings and the granting of interim reliefs, both key provisions of the Modern Law, the coordination of multiple proceedings and the ranking of claims of foreign creditors in a number of countries including Mexico,\(^9^2\) Japan,\(^9^3\) Montenegro,\(^9^4\)

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\(^8^9\) See Article 634 of the debtor Rehabilitation and Bankruptcy Act which was passed in 2005. See the commentary by Chiyong Kim in Look Chan Ho (n 76) 421 at 429.

\(^9^0\) Shin Abe in Look Chan Ho (n 76) 284.


\(^9^2\) Mexican Law, for example, omits the requirement in Article 17 (3) of the Model Law that an application for recognition of a foreign proceeding “shall be decided at the earliest possible time”.

\(^9^3\) Japan has adopted the Model Law with a large number of modifications in its Law on Recognition of Foreign Proceedings. The Law has no provision for the automatic effect of recognition of a foreign main proceeding as Article 20 of the Model Law requires, although a court has the powers to grant such relief upon the application of an interested party. More significantly, the provisions on coordination of multiple proceedings, an important objective of the Model Law, are confusing. In addition not all the reliefs contemplated in Article 19 of the Model Law upon the application for recognition of a foreign proceeding needed to protect the assets of the debtor or the interests of creditors are available under Japanese Law.\(^9^3\) These differences from the Model Law have been described as “striking”: Wessels et.al. (n55) 241. For a commentary on the relevant Japanese law, see also note by Shin Abe in Look Chan Ho (n 91) 97-114; Sandile Khumalo (n 77)14-15.

\(^9^4\) Montenegro adopted the Model Law in 2000. It forms part of the Law on Business Organization Insolvency. Montenegro has also not provided for any of the interim reliefs that are provided under Article 21 of the Model Law. These include the important reliefs as to the stay of commencement of proceedings regarding debtors’ assets, stay of execution against debtors’ assets and suspending the right to transfer debtors’ assets which are fundamental to insolvency proceedings.
Greece, Poland, Colombia and South Korea. These significant caveats, the number of the countries yet to bring the Model Law provisions in their domestic laws into operation and the absence of large numbers of States failing to adopt the Model Law supports the view that at least in the area of insolvency, perceived global problems do not necessarily call for universal legislative answers or for “harmonisation” of laws and procedures.

VII. Suggested reasons for the Model Law’s limited success

There are various reasons which may be suggested for the apparent reluctance of countries not to adopt the Model Law even in part. For a start, it is not a treaty or convention but a recommended legislative text which does not compel adoption or implementation. Countries always have a choice. Conversely, flexibility to adapt the Model Law to the legal system may well have encouraged deviance form its provisions despite UNCITRAL’s pleas not to do so. Again, if the making of changes were not possible, many of the 19 countries that have adopted the Model Law with various changes may well not even have done so. A common argument against adoption is the need to preserve the sovereignty of a country to

95 Law 3858/2010, the Bankruptcy Code. See comment by Ioannis Kontoulas on the “Adoption of the UNCITRAL Model Law on Cross-Border Insolvency” by Greece, available on http://www.potamitisvekris.com/_control/admin/_files/binaries/publications/fil_publications583362558.pdf (accessed on 24 May 2012). There are some major departures from the text of the model law in the definitions sections which have been noted in the Greek law which, according to Kontoulas, “could seriously minimize the benefit to be derived from the introduction of the new provisions.” For example, the definition of 'foreign proceeding', in a stark departure from the Model Law, rests on the debtor’s insolvency and appointment of a liquidator although a debtor need not be insolvent to rely on insolvency-related laws as in the Greek conciliation proceedings or in a judicial management without the appointment of a liquidator which will fall under a “foreign proceeding” under Article 2 (a) of the Model Law. Similarly the definition of “foreign administrator” omits that part of the corresponding model law definition that includes a person or body authorized to act as an administrator or representative of the foreign proceeding.

96 Article 392(1) of the Polish Insolvency Law further provides that a foreign insolvency proceeding will not be recognised if the Polish courts have sole jurisdiction. This means that where the Polish courts consider that the centre of main interests is located in Poland, a concurrent main proceeding cannot be opened or recognised in another state. This may well result in concurrent main proceedings being opened in two states against the same debtor, contrary to the objectives of the Model Law: Michal Barlowsky (n 74) 135.Further, foreign debts which are not civil debts are not recognised. What is also a departure from the Model Law is that Polish Law does not provide for rules on the coordination of multiple proceedings and, where these are recognised, leaves it to the courts to determine the disposal of these assets.: Article 417 of the Polish Bankruptcy Recovery Act of 2003.

97 Article 98 of Law 1116, enacted by the Congress of Columbia in 2006, has not incorporated Article 13(2) of the Model Law which provides that the claims of foreign creditors are not to be ranked below that of local creditors.

98 South Korea has not adopted a number of the Model Law provisions including Articles 3, 7, 8 and 23 and has adopted others, such as Article 15,11, and 13(2), only in part. See Chiyong Rim’s comment on “South Korea” in Look Chan Ho (n 78) 421-435.

99 These include South Africa, the British Virgin Islands and Mauritius as noted elsewhere in this paper.

100 The fact that a State may chose to enact as much or as little as it wants to, might be viewed as an “Archilles’ heel” of this attempt at international harmonization: Ian Fletcher, Insolvency in Private International Law, (2nd ed., OUP 2005), paragraph 8.73,486.

enact its own laws, particularly in respect of assets within its own territory and to deal with these in accordance with its own laws.\textsuperscript{102}

\textbf{A. National Interest}

There are lessons to be learnt from the numerous amendments that many of the 19 States and territories have made to the Modern Law. Many of these have simply proceeded on what is best in their own national interests. There are thus considerable difficulties in trying to arrive at similar insolvency laws and practices.

In the words of Sir Peter Millet, no branch of the law “is moulded more by considerations of national economic policy and commercial philosophy”.\textsuperscript{103} The need to protect local parties and economic interests is immensely important to most states, despite the temptation to articulate a seemingly enlightened universalist approach. For example, hardly any country has difficulty in accepting that foreign and local creditors ought to be treated equally, but the lurking fear is that it could lead to a sort of reverse inequality. If a foreign court or visiting foreign representative is to ultimately have control of and determine the disposal of assets, what really are the remedies of an aggrieved local creditor?\textsuperscript{104} States may thus be reluctant to enact legislation that would compel them to generally recognise all foreign bankruptcy judgments and orders and grant access to foreign insolvency representatives to their courts and to the assets situated within the state from all parts of the world. In the circumstances, reciprocity may be more important than merely protecting against what has been termed as “opportunistic behaviour”.\textsuperscript{105}

Despite the apparent similarity of general insolvency principles, national insolvency laws do differ from each other for many reasons including their relationship with State policy and societal norms.\textsuperscript{106} This highlights the main problem with international cooperation as there may not always be identical commercial interests in insolvency especially in the larger cross-border cases which are subject to greater local media and public scrutiny.

\textsuperscript{102} Considered but rejected by the New Zealand Law Commission on the ground that this would act as a disincentive to foreign investment: The New Zealand Law Commission Report (n 71) para 104-105. See also Bob Wessels, Bruce A Markell and Jason J. Kilborn, \textit{International Cooperation in Bankruptcy Matters}, (OUP 2009) 250.


\textsuperscript{104} Wessels, et.al., (n 103) 43-45.

\textsuperscript{105} Francesco Parisi and Nita Ghei, ”The Role of Reciprocity in International Law”, (2003-2004) 36 Cornell International Law Journal 93. On the other hand there is no evidence that states which have not adopted the Model Law are presently disadvantaged in dealing with countries that do not demand reciprocity. The US courts, for example, appear to have granted chapter 15 orders to foreign representatives from countries that have not adopted the Model Law: K.D. Yamauchi (n56 ).

These concerns may not disappear despite the emphasis on the Model Law’s scope being limited to some procedural aspects operating as part of the existing national insolvency law.\textsuperscript{107} The reality is that many of the insolvency issues as regards disposal of assets and adjudication of creditors’ claims are determined by state laws which represent certain cardinal values that the State regards as important and which courts may feel bound to uphold.\textsuperscript{108} With only seven countries adopting the Model Law before 2004, UNCITRAL may well have been conscious that countries may not be able to have common procedural laws without attempting to “harmonize” the substantial insolvency laws. The resulting Legislative Guide on Insolvency Law in 2004 thus included the text and Guide to the Enactment of the Model Law “to facilitate consideration of cross-border issues”.\textsuperscript{109}

\textbf{B. Problems and Solutions}

\textit{1. How real is the problem?}

It is pertinent to ask whether the problems said to be associated with cross-border insolvencies in recent years are more apparent than real, at least from the point of view of State policy makers and legislators. There certainly are some well known cases of insolvencies which have had transnational interests but States must be convinced that the numbers of the cases and the issues raised in those cases require immediate, long term legislative solutions of the nature envisaged by the Model Law.

The recent global financial crisis has also been said to have brought about a greater realization of the need for an international resolution framework,\textsuperscript{110} but then cross-border insolvency is not new. Problems associated with such cases appear to have existed for more than 700 years.\textsuperscript{111} As seen earlier, Model Laws dealing with subjects other than insolvency

\textsuperscript{107} \textit{Guide to the Enactment of the Model Law}, paragraph 20; Wessels, et.al., (n 103) 200.

\textsuperscript{108} Ian F Fletcher, \textit{Insolvency in Private International Law} (OUP 2005) 89. Asian Development Bank’s comparative studies have shown considerable differences in the understanding of universal concepts. This has been attributed to the influences of such factors as the operative legal system tradition, the inheritance of insolvency laws from different systems, the influence of cultural attitudes, customs or traditions, differences in political and economic policies, extent of the development of the court systems and skilled insolvency administrators. See Insolvency Reform Laws in the Asian and Pacific Region : Law and Policy Reform at the Asian Development Bank (Volume 1) available at http://www.iiiglobal.org/component/jdownloads/viewcategory/341.html

\textsuperscript{109} UNCITRAL Legislative Guide on Insolvency Law 2004, Para 3. In taking a cautious approach UNCITRAL’s aim is not to provide a single set of model solutions for an efficient insolvency regime but to assist “to evaluate different approaches and to choose the one most suitable in the national or local context”, which again may not be a good recipe for harmonization of laws.

\textsuperscript{110} Sean Hagan in the \textit{Foreword} to Rosa M Lastra, \textit{Cross-Border Bank Insolvency}, (Oxford University Press 2011).

seem to have a higher acceptance rate than the Model Law on Cross-Border Insolvency despite all its purported importance to international trade.

Professor Rasmussen has thus raised interesting questions112 on the assumptions on which documents like the Model Law rest, namely, that a transnational enterprise which fails will inevitably result in multiple insolvency proceedings in multiple jurisdictions. He attributes this to a universalist alarmist scenario of creditors rushing to seize assets in multiple countries in which these are located with the companies being forced into liquidation as a result. He argues that this assumption “rests uneasily with the realities of modern bankruptcy practice”113 as there are fewer cases than one would expect of multiple proceedings, even with financially distressed multinational enterprises. The reason for this is that debtors and their major creditors or lenders largely determine the number of countries where the financial problems of a company would be resolved. Professor Rasmussen disputes the “traditional account of transnational insolvencies”. He argues that the empirical reality is that multiple proceedings are less frequent than is believed to justify a universalist approach for fear of a territoriality grab of corporate assets lying in many jurisdictions.114 The vast majority of countries which are yet to adopt the Model Law may well be of the view that the problems of transnational insolvencies are more apparent than real.

C. Other Solutions : Pre-Model Law 1997

Since the problem is not new we must first consider the necessity for States to amend their legislation in accordance with the Model Law. Most States may already be content with their existing laws or with regional conventions or agreements in respect of cross-border matters which have provided adequate solutions even if there are problems raised by cross-border insolvencies. Many of these have existed prior to the Model Law in 1997.

1. National Statutory Provisions115


113 Ibid., at 984.

114 He points out that in the ten years before 2007, few of the 1448 US cases of public companies which filed for bankruptcy were involved in multiple proceedings. He assumes that a vast majority of these companies would have had assets in other countries although he concedes that this is an area which requires research. His examples of multinational companies include United Airlines, Sea Containers, Excide and Calpine where there were single bankruptcy proceedings in the US courts despite vast assets in many countries.

115 Information in this part was obtained from an exhaustive survey that was done of cross-frontier recognition of foreign proceedings and practitioners in a large number of countries ; Neil Cooper and Rebecca Jarvis, Recognition and Enforcement of Cross-Border Insolvency : A Guide to International Practice (John Wiley & Sons Ltd 1996). Since the survey, the law in some of the countries referred to above may have been changed because of new statutes, regulations and conventions.
Foreign bankruptcy orders and court appointed administrators are generally recognized in many States provided the foreign orders satisfy certain requirements. In others, foreign bankruptcy orders are recognized only on the basis of reciprocity. In most states, before any form of recognition can be accorded to a foreign bankruptcy order, it must be established that the recognizing state does not have exclusive jurisdiction in the matter and the foreign judgment is not against public policy. There are also countries where aid or assistance to be provided to a foreign court in specified countries is expressly stated in the law. Finally, many countries permit commencement of local bankruptcy proceedings on the basis of a foreign court order.

2. International Treaties and Conventions

In addition, a series of regional insolvency agreements and treaties and conventions have provided consenting States a basis to deal with cross-border issues that may arise between them. Some of these have been in existence for decades. These include the Montevideo Treaty (1889) and the Bustamante Code (1928) involving fifteen Latin American Countries, the Nordic Convention (1933) signed by Denmark, Finland, Iceland, Norway and Sweden, and OHADA (1995), the French acronym for "Organisation pour l'Harmonisation en Afrique du Droit des Affaires", being a system of business laws and implementing institutions adopted by sixteen West and Central African states which were former French colonies.


116 For example, that there was a final order made by a court of competent jurisdiction and the order is applicable to assets in the State: India, South Africa.

117 Such as Israel, Nigeria, South Africa and Spain.

118 Example, France, Germany, Canada, Argentina, Denmark, Egypt, Italy, South Africa.

119 As in Australia, Singapore, Malaysia, Jersey, Ireland, Channel Islands, England, Isle of Man, Northern Ireland, Scotland.

120 Canada, Denmark, Ireland.

121 As early as 1889, the Montevideo Treaty on Commercial International Law was concluded between Argentina, Paraguay, Bolivia, Colombia, Peru and Uruguay. Title X of the treaty was devoted to bankruptcies. In 1940 Argentina, Paraguay and Uruguay adopted a revision of the 1889 Treaty. This was followed by the Bustamante Code in 1928 which saw some 15 Latin American countries agreeing on liquidation proceedings which included protection for local creditors. For details see Bob Wessels, Cross-Border Insolvency Law, (Kluwer Law International BV 2007) 27-29; Jay Lawrence Westbrook, Charles D. Booth, Christoph G.Paulus and Harry Rajak, A Global View of Business Insolvency Systems (The World Bank 2010) 253.

122 Jay Lawrence Westbrook, et.al., ibid., 253.

123 Also known as the Organisation for the Harmonization of Business Law in Africa (OHBLA), The 16 signatories are Benin, Burkina Faso, Cameroon, the Central African Republic, the Comoros, Congo-Brazzaville, Cote d'Ivoire, Gabon, Guinea, Guinea Bissau, Equatorial Guinea, Mali, Niger, Senegal, Chad and Togo. It came into force in 1995. Under the treaty several Uniform Acts have been enacted in respect of general commercial law, debt collection, bankruptcy (which came into effect in 1999), and secured transactions. OHADA thus seeks to provide for the development of a rational and
D. Other Solutions : Post Model Law 1997

1. Rules, Regulations, Principles and Guidelines

There has been a growing volume of regional cross-border or transnational rules and regulations, directives, conventions, treaties, practice standards and guidelines on best practices since the Model Law came into being. Such initiatives are often based on regional or political and trade groupings. These have the advantage of reducing conflict of laws issues and are able to focus on laws and practices that have a common understanding. In recent years, a number of financial and professional bodies have also embarked upon various projects and studies relating to insolvency matters. As a result, there has emerged a proliferation of insolvency “principles”, “guidelines”, “good practice standards” and “recommendations”.

These no doubt emphasise globalisation of commercial trade and raise international awareness of cross-border insolvency problems amongst trading partners. The unintended consequence of the availability of these different instruments is that the Model Law may have become less relevant as helping to provide solutions to cross-border problems than at first envisaged. Indeed, some of these guidelines may prove more relevant and less intrusive, given the Model Law’s legislative prescriptions particularly in respect of foreign proceedings and foreign representative intervention.

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124 A useful compilation of some 35 of these can be found in Bob Wessels, Cross-Border Insolvency Law : International Instruments and Commentary, (Kluwer Law International BV 2007).

125 Organisations such as the Asian Development Bank, the World Bank, the IMF, the European Bank for Reconstruction and Development, UNCITRAL, UNIDROIT, the American Law Institute and IBA. The appearance of such bodies as UNCITRAL, INSOL, ALI, IBA and IMF has made it a global effort.


There may also be additional problems for countries already bound by convention or treaty to follow certain insolvency regulations. For example, members of the European Union are directly bound by the EC Regulations on Insolvency Proceedings 2002 which contain provisions in respect of jurisdiction, recognition of judgments and the insolvency law. As the Model Law does not comply entirely with the EC Regulations, adopting the Model Law would lead to an EU member applying two different systems just to cater also for non-EU members, thus resulting in uncertainty and confusion. This has been suggested as a difficulty that Spain would face if she were to adopt the Model Law. In the UK it has been noted that there are differences in the rules pertaining to the exclusion of banks and other financial institutions and rules pertaining to jurisdiction and choice of law and the determination of the Centre of Main Interest between the Model Law provisions and the EC Regulations. At any rate it appears that EU courts are likely to apply the EU Regulations even where it involves non-EU countries.

Similar concerns also explain the reluctance expressed by some Canadian insolvency practitioners to Canada adopting the Model Law. They believed that the Canadian and US insolvency courts had already established a good working relationship to resolve cross-border problems. Hence, the Model Law with its own concepts and terminology would only complicate this rapport resulting in a “new era of uncertainty”. The Polish and Romanian legislative texts are said to have “some traces of the difficulties a legislator may face in this regard”. In addition, Berends opines that the EC Regulations were written for States who

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129 The option of implementing the entire Model Law would therefore not serve the purpose of increasing transparency and legal certainty at least in Spain: Marie-Louise and Frederick Bulten (n 57).


134 See Andre J. Berends, “The UNCITRAL Model Law on Cross Border Insolvency: A comprehensive review”, (1998) 6 Tulane Journal of International Comparative Law 309. That was not always apparent in the drafting of the EC Regulations, judging by the history of the EC Regulation on Insolvency Proceedings which was a rather “protracted process” over several decades: G Moss, IF Fletcher and S Isaacs (n 128), chapter 1.
share a certain culture with each other and have a relationship of trust suggesting perhaps that adopting the Model Law embracing the rest of the world may present difficulties.

2. Protocols

Meanwhile, what has gradually emerged as a new viable solution to specific cross-border concerns is the use of protocols. If cross-border insolvency concerns can continue to be resolved by multi-lateral agreements between courts and administrators, the appeal for a general, less flexible, international insolvency legislative procedure, with all the attendant problems of jurisdicational interests and choice of law questions, may well diminish.

A protocol is “nothing less than a tailor-made law for the individual case”\textsuperscript{135}. Being essentially a private agreement between the parties in an international bankruptcy, it offers a specific set of solutions to cross-border cases on a case by case basis. They represent a “tool with the sharpest edge in any given case”\textsuperscript{136} as they address specific problems arising in a particular case which need to be resolved quickly. This ought to be welcomed by governments as bankruptcy is principally a private dispute between parties. As one writer commenting on a protocol entered into by American and Canadian parties in \textit{Matlack} has pointed out the advantages of a protocol as the court “outlines its purposes, including harmonization, coordination, the promotion of efficiency and fairness, cooperation and transparency”\textsuperscript{137}.

Discovered in the wake of the \textit{Maxwell case}, protocols have become important instruments for harmonizing the proceedings through a framework of “communication and coordination” between courts and parties\textsuperscript{138}. As a result, many protocols have since been signed and these include the Lehman Brothers (2009), Bernard Madoff (2009) and Nortel Networks (2009).\textsuperscript{139} The Lehman case\textsuperscript{140} involved the bank’s operations in over forty countries with seventy-five


\textsuperscript{136} Anthony V. Sexton (n 131) at 817-818. Others have thus regarded protocols as being “essentially case-specific, private international insolvency treaties” : Evan D Flaschen and Ronald J Silverman, Cross-Border Insolvency Cooperation Protocols, 33 Tex Int’l L J 587 at 589.

\textsuperscript{137} Keith D. Yamauchi, “Should Reciprocity be a Part of the UNCITRAL Model Cross-Border Insolvency Law”, (2003) 16 Int Insol Rev 145 at 166.


\textsuperscript{139} As listed by the International Insolvency Institute on its website at \url{http://www.iiiglobal.org/gsearch.html}. UNCITRAL has also provided a list of 36 protocols : \textit{Draft UNCITRAL Notes on cooperation, communication and coordination in cross-border insolvency proceedings}, 2009, A/CN.9/WG.V/WP.86.

\textsuperscript{140} For a detailed examination of the Lehman protocol, see Jamie Altman, “A Test Case in International Bankruptcy Protocols : The Lehman Brothers Insolvency”, (2011) 12 San Diego Int’l L.J. 463.
bankruptcy filings in nine countries six of which have not adopted the Model Law. It was
resolved with a cross-border insolvency protocol based on the Model Law. Many other
protocols have been based on the Concordat\textsuperscript{141} and the ALI Court-to-Court Communication
principles\textsuperscript{142} and the more recent European Communication and Cooperation Guidelines.\textsuperscript{143}
Despite the availability of such international initiatives as the Model Law and the EC
Insolvency Regulations, there appears to be a growing preference for utilising cross-border
agreements when faced with “the complexities inherent in the liquidation of a Lehman
Brothers financial services firm or the restructuring of a Nortel telecommunications
business”.\textsuperscript{144} If acceptable global solutions can thus be found in such \textit{ad hoc} agreements and
informal workouts and restructuring of businesses, there may be no pressing need for States
to adopt such binding legislative texts as the Model Law.\textsuperscript{145}

\textbf{VIII. Conclusion}

By all accounts, the Model Law is a good procedural framework for the efficient
administration of cross-border insolvencies. Insolvency, however, requires the management
of a lot more complex substantive issues in many areas of the law and policy in different
jurisdictions. These seem to present some inherent problems with the acceptance of the
Model Law, judging by the small number of countries that have adopted the Model Law and
the diverse manner in and the extent to which they have done so. This does not augur well for
its future as a compelling legislative text for States to incorporate into their national laws.
What the future presently holds for the Model Law, in the light of many other statutes,
conventions, agreements, guidelines and the successful development of \textit{ad hoc} protocols, is
to remain as yet another valuable guide in resolving cross-border insolvencies without having
to become a binding \textit{legislative} text. In other words, the Model Law does not appear to be
able to provide States with what they need or do not presently have or cannot otherwise
negotiate for themselves.

\textsuperscript{141} Jamie Altman, \textit{ibid.}, 477-478.

\textsuperscript{142} Cases are listed in the International Insolvency Institute website at \url{http://www.iiiglobal.org/gsearch.html}.

\textsuperscript{143} Developed by Professors Bob Wessels and Miguel Virgos in July 2007) available online at
\url{http://www.insol.org/INSOLfaculty/pdfs/BasicReading/Session%2005/European%20Communication%20and%20Cooperatio
n%20Guidelines%20for%20Cross-border%20Insolvency%20.pdf} (accessed on 14 September 2012). For a discussion see
Wessels, Markwell and Kilborn (n 133 ) 39-71.

\textsuperscript{144} Rosalind Mason, “Cross-Border Insolvency and Legal Transnationalisation”, (2012) 21 International Insolvency Review
85 at 107.

\textsuperscript{145} UNCITRAL in fact recommends the use of protocols (Model Law, Article 27). For more information on workouts and
restructuring, see, for example, Jay Lawrence Westbrook, Charles D.Booth, Christoph G.Paulus & Harry Rajak, \textit{A Global