FROM DEVIATION TO FRAGMENTATION

An analysis of inconsistent outcomes arising from deviations in the use of the Model Law by its adoptees and how it affects Singapore's goal of becoming an Asian debt-restructuring hub

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A. Introduction

1. Singapore has made no secret of its desire to establish itself as Asia's premier debt restructuring hub[1]. In 2017, as part of its multi-prong strategy to achieve international acceptance and convergence, Singapore adopted the UNCITRAL Model Law on Cross-Border Insolvency ("**Model Law**") into its domestic legislation via the Third Schedule of the Insolvency, Restructuring and Dissolution Act 2018. The Model Law was conceived with the aim of providing the international community with a standardized framework so as to obtain consistency in the recognition of foreign insolvency proceedings and granting relief in aid of foreign courts[2].

2. However, adoptees of the Model Law, including Singapore, have enacted local versions of the Model Law with significant variations from each other. This has spawned conflicting judicial decisions relating to the how the Model Law should be applied and used. As a result, while there may be some convergence in international restructuring practice today, there is also greater uncertainty and unpredictability in certain aspects of cross-border insolvencies. In my view, this will have a long-term effect on Singapore's ambitions to be Asia's debt restructuring hub.

3. In this Short Paper, I will discuss the inconsistent outcomes arising from the way in which adoptees have deviated from the Model Law and show how we are no closer to convergence in certain respects of cross-border insolvency practice than when the Model Law was first promulgated 20 years ago in 1997.

B. Inconsistent Outcomes

4. The Model Law is "*soft law*" and adoptees are free to adopt the Model Law in the way that they think fit. This has resulted in at least four significant deviations in the use of the Model Law.

[1] Committee to Strengthen Singapore as an International Centre for Debt Restructuring, Ministry of Law, Report of the Committee (April 20, 2016)
[2] UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation (Guide), at [1], [3].

(i) Article 2(a): Foreign Proceedings

5. First, adoptees differ on the types of "*foreign proceedings*" which qualify for relief under the Model Law.

6. Article 2(a) of the Model Law defines "*foreign proceeding*" broadly. It refers to a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation.

7. Countries such as the USA and Singapore adopt this broad definitional approach. In *In Re Gold & Honey, Ltd*[3] ("**G&H**"), the US Bankruptcy Court declined to recognise an Israeli receivership proceeding as a foreign proceeding under Chapter 15 of the US Bankruptcy Code since it did not require the receivers to consider the rights and obligations of all creditors. Instead, it was primarily designed to allow the creditor to collect its debts, even if it did concern all of the debtor's assets presently in Israel. Similarly, in *United Securities Sdn Bhd (in receivership and liquidation) v United Overseas Bank Ltd*[4] ("**United Securities**"), the Singapore Court of Appeal declined to acknowledge that a Malaysian court application as to whether the liquidators of a Malaysian company should be paying a liquidation surplus to a secured creditor was a collective action. While the said application concerned an insolvent company and surplus funds arising out of a liquidation, the court held that the law on which the action was based was civil and not insolvency law. The only question of law was one of entitlement to a single creditor; and this was not an issue that affects the entire corpus of creditors.

8. In fact, some countries such as South Korea appear go even further by including schemes of arrangement as falling under the definition of "*foreign proceeding*", even if such schemes are technically corporate law procedures and do not necessarily carry any insolvency stigma.

9. However, there are other countries that take a narrower definition. For example, in Japan, Article 2(i) of the Japanese Law on Recognition of and Assistance for Foreign Insolvency Proceedings ("**JP Model Law**") requires that a "*foreign proceeding*" must correspond to one of five types of Japanese local insolvency proceedings (i.e. a bankruptcy proceeding,

[3] 410 BR 357 at 370 - 371
[4] [2021] SGCA 78

a civil rehabilitation proceeding, a corporate reorganization proceeding, a corporate arrangement proceeding and a special liquidation proceeding)[5]. Furthermore, Japanese legislation does not explain the specific characteristics of foreign insolvency law and thus what a Japanese court is likely to decide as to whether a foreign proceeding amounts to an equivalent proceeding under Japanese insolvency law[6].

10. As a result of the definitional differences, foreign representatives cannot assume with certainty that they even pass the threshold jurisdictional test under the domestic version of the Model Law.

(ii) Article 6: Public Policy Exception

11. Second, adoptees differ on the breadth of the public policy exception.

12. Article 6 of the Model Law provides that a local court may refuse assistance in relation to foreign insolvency proceedings where assistance would be "*manifestly"* contrary to public policy. The word "*manifestly*" was inserted so that adoptees would recognise that the public policy exception should only be invoked in exceptional circumstances of fundamental importance, such as constitutional guarantees[7].

13. Countries such as England and Australia have maintained the word "*manifestly*" in their domestic versions of the Model Law. As a result, the English and Australian Courts have applied the public policy exception restrictively.

14. To illustrate: in *Re Agrokor*[8], the English Companies Court refused to let the petitioner invoke English public policy simply because the priorities of foreign law in liquidating the competitor were different from English law. In other words, the fact that the application of foreign law leads to a different result is not sufficient to invoke the public policy protection. Similarly, in *Re Legend International Holdings*[9], the Supreme Court of Victoria, Australia held that the mere use of the US Chapter 11 proceedings for the purpose of circumventing

[5] Article 2(i), Tentative Translation of the Japanese Model Law by Junichi Matsushita & Stacy Steele, < https://www.iiiglobal.org/sites/default/files/12- Japanese insolvency law 129 of 2000.pdf> (last accessed 30 December 2021)
[6] Wan Wai Yee & Gerard McCormack, "*Implementing Strategies for the Model Law on Cross-Border Insolvency: The Divergence in Asia-Pacific and Lessons for UNCITRAL*", (2000) Emory Bankruptcy Developments Journal, Vol 36(1) at 120.
[7] UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation (Guide), at [102] – [104].
[8] [2018] EWHC 2791 (Ch) at [131]
[9] [2016] VSC 308 at [31] – [61].

winding up proceedings in Australia and the difference in creditor priorities under US and Australian law are not sufficient for the public policy exception to be invoked.

15. It was thereafter clarified in *Ivan Cherkasov & Ors v Nogotkov Kirill Olegovich, the Official Receiver of Danyaya Step LLC (in liquidation)*[10] ("**Cherkasov**") that the public policy exception could only be invoked in exceptional cases when there was breach of natural justice. In *Cherkasov*, this exceptional threshold was met because the English Companies Court found that Russian foreign insolvency proceedings were part of an asset-stripping exercise by instrumentalities of the Russian State to sideline political opponents.

16. However, other countries such as Singapore have dropped the word "*manifestly*" altogether. In *Re Zetta Jets Pte Ltd*[11], the Singapore High Court interpreted this in to mean that the standard of exclusion on public policy grounds in Singapore is lower than that in jurisdictions where the Model Law has been enacted unmodified. It then held that a foreign insolvency proceeding instituted in breach of an injunction order in Singapore could not be recognized in Singapore on the ground that it was contrary to public policy. The dropping of the word "*manifestly*" appears to give the local courts more room to avoid giving effect to foreign insolvency proceedings.

17. That said, there are countries like the USA who retain the word "*manifestly*" yet, like Singapore, treat the breach of a local court order as being contrary to public policy. In *G&H*, the US Court held that it could not grant recognition of a foreign order sought as it was in direct violation of the same US court's order in granting an automatic stay. It would effectively reward the wrongdoer in damages for his wrongdoing, and thus contravene basic notions of justice.

18. The US Courts have also permitted the public policy exception to be invoked in the discharge of third-party guarantees (*In re Vitro*[12]) and in the protection of US patent licenses (*In re Qimonda*[13]) – which do not appear at face value to be issues of fundamental importance.

[10] [2017] EWHC 756 (Ch)
[11] [2018] SGHC 16 at [21] – [23]
[12] 701 F.3d at 1070
[13] 737 F.3d at 31

19. Hence, there is no consistency in when the public policy exception can be invoked, regardless of whether the word "*manifestly*" is included or not. Public policy is, at the end of the day, an "*unruly horse*"[14].

(iii) Articles 13, 21(2) and 22(1): Treatment of Foreign & Local Creditors

20. Third, adoptees do not necessarily equalize the treatment of foreign and local creditors in the domestic courts. There is a range of views that straddle between a completely universalist view of cross-border insolvency and a partially territorial view of the same.

21. Article 13 of the Model Law provides that foreign creditors should not be treated worse than local creditors, subject to the caveat in Articles 21(2) and 22(1) that the interests of creditors in the home country must be "*adequately protected*" when a foreign representative seeks to obtain court approval to dispose of or repatriate domestically-sited assets overseas.

22. On the one hand, there are countries like the UK which subscribe to a more universalist view. In *McGrath v Ridell*[15], the UK House of Lords agreed to transfer UK-sited assets to the foreign insolvency representative for distribution in the Australian insolvency proceedings in spite of the differences in distribution schemes. The assets in question were mainly reinsurance claims corresponding to reinsurance policies taken out in the London market. The existence of a priority in Australian legislation in favour of insurance creditors, and the lack of a similar provision under English law, meant that the differences in outcome for unsecured creditors would be substantial. However, Lord Hoffman held that the application of Australian law to the distribution of all assets is more likely to give effect to the expectations of creditors as a whole than the distribution of some assets in according to English law[16].

23. On the other hand, countries like Japan and Australia take a more protectionist stance towards local creditors. In Japan, the local courts may take into account the relative positions of Japanese creditors in foreign proceedings and not allow locally-sited assets to be brought overseas because Japanese creditors would fare better in local proceedings[17]. In fact, Article 26(1) of the JP Model Law gives the Japanese Courts the

[14] Per Burrough J in *Richardson v Mellish* (1824) 2 Bing 229.
[15] [2008] UKHL 21
[16] At [33].
[17] Kent Anderson, *Testing the Model Soft Law Approach to International Harmonization: A Case Study Examining the UNCITRAL Model Law on Cross-Border Insolvency,* 23 AUST. YBIL. 1, 12 (2004) at 328.

power to order a "*prohibition on disposition regarding the debtor's business and assets in Japan"* if the Courts find that it is "*necessary*" to do so in order to "*fulfill the purpose of the recognition and assistance proceeding*"[18]. The word "*necessary*" likely requires that a prohibition on disposition be limited to what is permitted under Japanese civil code.

24. In a similar vein, in Australia, the Federal Court in *Akers v Deputy Commissioner of Taxation*[19] held that local assets could not be handed over for distribution in the foreign main proceeding until the Australian tax authority was able to recover the amount equal to the pari passu claim of the taxation debt as an unsecured creditor in the foreign main proceeding. Under the said foreign law, the Australian foreign revenue debt could not be proved in the main proceedings.

25. In the circumstances, a foreign representative cannot assume that there will be equality of treatment between foreign and local creditors. Ultimately, local advice needs to be taken as to whether and how certain local creditors may be preferred over foreign creditors.

(iv) Article 20: Effects of Recognition and Automatic Stay

26. Finally, adoptees differ in the reliefs that a foreign representative can avail of upon obtaining recognition of the foreign proceedings in the domestic courts.

27. Article 20 of the Model Law provides for automatic effects upon recognition of a foreign main proceeding. The Guide explains that this is necessary to allow steps to be taken to organize an orderly and fair cross-border insolvency proceeding, rather than importing the consequences of the foreign law in to the insolvency system of the enacting State[20].

28. However, Japan and South Korea have not enacted Article 20. In Japan, there is no distinction between foreign main and foreign non-main proceedings[21]. Article 25 of the JP Model Law gives the Japanese Courts the discretion to grant relief upon or after issuing a

[18] Article 26, Tentative Translation of the Japanese Model Law by Junichi Matsushita & Stacy Steele
[19] (2014) 223 FCR 8
[20] At [178]
[21] Wan Wai Yee & Gerard McCormack, "*Implementing Strategies for the Model Law on Cross-Border Insolvency: The Divergence in Asia-Pacific and Lessons for UNCITRAL*", (2000) Emory Bankruptcy Developments Journal, Vol 36(1) at 125.

recognition order[22]. Similarly, in South Korea, for relief to be obtained in connection with a foreign insolvency proceeding, the foreign representative must file a petition for relief[23].

29. Further, even though countries like Singapore and New Zealand have implemented Article 20, the local courts have permitted exceptions to the automatic reliefs even if a foreign proceeding has been recognized as a main proceeding.

30. In *United Securities,* the Singapore High Court held that an automatic stay did not apply to secured creditors' claims because they could proceed to enforce their security notwithstanding any stay of proceedings that arises upon the winding up of the company[24]. A secured debtor needs only to show a *prima facie* case that it is entitled to enforce the security to avoid the stay[25]. Further, a secured creditor's security is regarded as standing apart from the pool of assets available for distribution to unsecured creditors[26].

31. Similarly, in *Kim and Yu v STX Pan Ocean Co Ltd*[27], the New Zealand High Court granted creditors leave to continue their statutory claims *in rem* against a ship that had been demise chartered by the insolvent company, despite earlier recognising administration proceedings in Korea as a foreign main proceeding. This was because the court found that the creditors had obtained security against the ship upon issue of admiralty proceedings which took place prior to the commencement of the Korean administration proceeding.

32. In the premises, foreign representatives cannot assume that they can avail of the automatic reliefs across the board even if they have obtained a recognition order that the foreign proceeding is a main proceeding.

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[22] Article 25, Tentative Translation of the Japanese Model Law by Junichi Matsushita & Stacy Steele
[23] Wan Wai Yee & Gerard McCormack, "*Implementing Strategies for the Model Law on Cross-Border Insolvency: The Divergence in Asia-Pacific and Lessons for UNCITRAL*", (2000) Emory Bankruptcy Developments Journal, Vol 36(1) at 125.
[24] At [39]
[25] At [40]
[26] At [47]
[27] [2014] NZHC 845 at [40]

C. Reasons for Inconsistent Outcomes

33. There is a simple reason for why there exist local deviations from the Model Law across its adoptees. Many countries have simply proceeded on what is best in their own national interest[28].

34. As Sir Peter Millet said, no branch of law is moulded more by considerations of national economic policy and commercial philosophy[29]. The need to protect local parties and economic interests is fundamental, despite the temptation to articulate a seemingly enlightened universalist approach. Ultimately, countries do not want to relinquish their sovereignty in granting foreign representatives full access to their courts and assets situated in their states to satisfy debts from all around the world.

35. By all accounts, the Model Law is a good procedural framework for the efficient administration of cross-border insolvencies. One might even go as far as to say that, as in the biblical account of the Tower of Babel, a common insolvency vocabulary allows parties in different States to communicate with each other effectively and meaningfully in the event of a cross-border insolvency, towards a common goal of reducing unnecessary transaction costs.

36. However, the fact is that insolvency requires the management of a lot more complex substantive issues in many areas of the law and policy in different jurisdictions. As such, it is unsurprising that only 4 out of 48 countries in Asia have adopted the Model Law in their domestic legislations i.e. Japan (2000), South Korea (2006), Philippines (2010) and Singapore (2017). This represents less than 10% of Asian countries. Further, significant Asian countries such as China are unlikely to join the band as it has already enacted a new Enterprise Law 2007 which makes no mention of the Model Law but which permits the recognition and enforcement of foreign insolvency proceedings only on the basis of reciprocity.

D. Conclusion

37. In conclusion, I have a dim view of Singapore's goal in becoming Asia's premier debt restructuring hub via the use and adoption of the Model Law. The adoption rate is too slow,

[28] Chandra Mohan, *Cross-Border Insolvency Problems: Is the UNCITRAL Model Law the Answer?* (2012) International Insolvency Review 21, (3), 199-223.
[29] Sir Peter Millett, "Cross Border Insolvency: The Judicial Approach" (1997) 6 International Insolvency Review 99 at 109.

and the deviations between those who have adopted the Model law are simply too great. Territorialist elements still remain as strong today as it did 20 years ago. Singapore will need to focus on the initiatives other than the enactment of the Model Law to attain its goal.

(2,986 words)

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17. *Re Legend International Holdings* [2016] VSC 308
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