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Short Paper in the INSOL Global Insolvency Practice Course 2021/2022

Adopting the UNCITRAL Model Law on Cross-Border Insolvency as the only solution? Four different approaches in tackling pressing issues of insolvency law

by

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Author Statement

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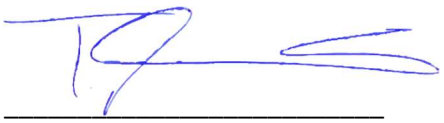
I declare that the paper `Adopting the UNCITRAL Model Law on Cross-Border Insolvency as the only solution? Four different approaches in tackling pressing issues of insolvency law' is my own work, that it has been prepared independently and that all references to, or quotations from, the work of others are fully and correctly cited.



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Signed

Date 09.02.2022
Place Stuttgart, Germany

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I. Introduction

If one would take a look at the increase of international trade between 2005 and 2021 he would see, that the trade volume in US$ has more than doubled[1], despite one global financial crisis in 2008/09 and the still ongoing COVID-19 pandemic. Therefore, it is quite fair to assume, that we can expect a further increase in global trade in the coming years. Even if international trade would remain on the same level as 2021, the fact remains, that some of these international relationships will be cause for legal disputes. Thus, legislators all over the world face the task to find solutions for legal problems that are most likely to occur. One of these problems is the reconciliation of insolvency proceedings in different countries.

In general, there are two approaches to tackle this problem. The first, and for a long time most usual, approach was that of `Territorialism', that is „*dealing with local assets for the general satisfaction of the claims of local creditors.*"[2] The second approach is that of `Universalism´. It can be described in wider sense as „*the extension of jurisdiction to cover all of the assets of the debtor wherever situated.*" And in a narrower sense as the „*coordination of what happens to the debtor's universal assets in a single procedure.*"[3] This second understanding of the `Universal Approach' is the basis of the creation of `The UNCITRAL Model Law on Cross-Border Insolvency' (Model Law).

The thesis of this paper is, that the Model Law provides solutions for cross-border insolvency issues. But, while it isn't the only approach taken, it provides reliable solutions to which there are few substantial alternatives.

This paper tries to answer this question by taking a look at how Australia, Germany, India, and Singapore have adopted the Model Law if at all, or what different solutions they have found. This is illustrated by focusing on the to the problems of `ordre public' and `COMI' that Articles 6., and 16. para. 3 of the Model Law try to tackle. On the one hand side Article 16. para. 3 regulates the local jurisdiction, while Article 6. tries to accommodate the local characteristics of the respective jurisdiction.

II. Analysis

To approach this subject, first the aforementioned articles of the Model Law will be discussed. Afterwards it will be analysed, if these approaches have been adopted in the respective countries or what alternatives have been found.

[1] WTO – World Trade Report 2021, p. 6
[2] Omar pp. 176
[3] Omar pp. 178

1. Model Law

a. Article 6. `Ordre Public‘

In Article 6. the Model Law stats, that the court using the provisions of the adopted law may refuse to do so if the action would be manifestly contrary to the public policy of the state. According to the Guide to Enactment and Interpretation of the UNCITRAL Model Law on cross-border Insolvency (guide) this tries accommodating mandatory rule of national law. If the action taken based on Article 6. would be against the mandatory law of the specific state the court could ignore the provision of the law that is based on the Model Law. The Guide acknowledges that public policy could be interpreted in a rather wide sense. Therefore, this provision should be restricted to fundamental principles, e.g. constitutional rights, and should be applied restrictively especially in regard to the dichotomy in the application of public policy (ordre public) in domestic and international matters.[4] The concept of the ordre public is generally speaking the reservation of the legal order on the basis of the rules that constitute the consensus of the legal comrades of the respective legal order.[5] It can be distinguished into a substantive and a procedural aspect. The substantive aspect "*applies whenever a foreign authority […] is obliged to apply foreign law*". The procedural aspect applies when "*the recognition and/or enforcement is sought of a foreign judicial decision and/or any other decision of a public authority or a similar instrument*".[6] In the context of an insolvency proceeding both aspects can be of relevance. It can be applied in the recognition of the order of commencement of a foreign court (procedural) or of a secured right, e.g. right in rem (substantive).

The goal of this provision is to guarantee a maximum consensus in the adoption and application of the provisions of the Model Law, while reducing the ability to deviate from these only in those cases that threaten the most important rules of the jurisdiction.

b. Article 16. para. 3 `Centre of Main Interest‘

According to Article 16. para. 3 of the Model Law the debtor's registered office in case of a company shall be presumed to be his centre of main interests (COMI) in absence of proof of the contrary. The examination of the COMI is therefore based on two steps. First it must be checked if the COMI can be located by indicators outside of the description of the Article. If that isn't possible, it is in the second step assumed that the COMI is the place of the registered office. The importance of this provision can't be understated. For example, Article 17. para. 2 of the Model Law determines that a foreign

[4] Guide paras. 101-104
[5] Tamblé p. 277
[6] Belohlavek pp. 2

proceeding shall be recognized as the main proceeding if it is taking place in the state where the debtor has its COMI. Furthermore Article 20. para. 1 stipulates that following the recognition of a foreign proceeding as the main proceeding (a.) all individual actions or individual proceedings in regard to the debtor's estate are stayed, (b.) as well as the execution against the debtor's assets, (c) and the right of the debtor to dispose or encumber of his assets is prohibited.

The concept of COMI has been adopted from EC regulation. Therefore the COMI should be viewed „as the place where the debtor conducts the administration of his interests on a regular basis."[7] The COMI therefore is essential in determining the local jurisdiction of a court to commence insolvency proceedings.

2. Australia

Australia has adopted the Model Law in the Cross-Border Insolvency Act 2008. According to Article 6. the Model Law has been adopted into Australian law as far as the provisions of the Cross-Border Insolvency Act 2008 don't contradict. There are very few deviations in the Cross-Border Insolvency Act 2008 from the Model Law. Therefore, it is more fruitful to look at how the law is applied by the Australian courts. In regard to the COMI the Federal Court of Australia has ruled, that indicators for the COMI of a company in a specific country are that (1.) all its strategic business decisions are made there, (2.) all its books and records were held at ist registered office in this country, (3) and the majority of its creditors are situated in it.[8]

Therefore, Australia has wholeheartedly adopted Articles 6. and 16 para. 3 of the Model Law, especially because the exception of Article 6. hasn't been applied in this regard.

3. Germany

Germany hasn't adopted the Model Law. Rather its cross-border insolvency regulations are based on its national cross-border insolvency law in its Insolvency Statute (InsO) Section 335 to 358. But it is also the addressee in matters of international insolvencies of the European Regulation 2015/848 (EU-InsVO). This legal act determines in its Article 3. para. 1 that it governs all insolvency proceedings in the member states in the EU. Because of this division EUInsVO regulates all cross-border insolvency disputes in Germany which effects more than one EU member state, and the Insolvency Statute regulates all other cases (basically all those, where only Germany and only non-EU member states are affected).

[7] Guide para. 84

[8] Frege in his Capacity as Foreign Representative of Greensill Bank AG v Greensill Bank AG [2021] FCA 330

The legal competence to accept the application for an insolvency proceeding depends according to Section 343 para. 1 Nr. 1 InsO on the competence of the court according to German law and according to Nr. 2 on its compliance with the ordre public. According to Section 3 para. 1 InsO the court is responsible for those proceedings in which district the company has its general place of jurisdiction. This is superseded if the centre of independent economic activity of the company is located in the district of the court which has jurisdiction over this place. It is important to note that this is not the same as the COMI. Rather this centre has to be determined independently from EU law. Indicators for this locality are (a.) the business address of the company on its letters and website, (b.) the reception and processing of mail, (c.) the location of the central server, as the main infrastructure of the company, or (d.) the location of the office of the CEO and where the company is assessed by the tax authority.[9]
In context of the EU the local jurisdiction according to Article 3. para. 1 EUInsVO depends on the COMI of the company. The COMI is defined as „*the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties*." In case of a company it is presumed that the COMI is at the place of the registered office. Indicators for the COMI have to be objective and ascertainable by third parties.[10] This can be (a.) the places where the company pursues economic activities, (b.) places that hold the assets of the company, (c.) the existence of contracts for the exploitation of those assets, (d.) place of its central administration, and (e.) where the management decisions are taken.[11]
Germany hasn't adopted any of the provisions of the Model Law, rather having found other solutions for the addressed problems.

4. India

As well as Germany, India hasn't adopted the Model Law into national law. But it should be noted that it hasn't done so „yet". The current Insolvency and Bankruptcy Code, 2016 (IBC/Code) has two provisions that aim at regulation cross-border insolvencies in India. Section 234. allows the Indian Central Government to enter agreements with foreign countries in this regard. So, this norm stipulates an approach based on contractual reciprocity were India and the other country agree on such procedures. Section 235. further states that a party situated in a country which has entered into an agreement in the sense of Section 234. may apply for recognition and those actions have to be taken in regards of the assets situated in India. Because this regulation is viewed as complicated and impractical, it has been recommended to amend the relative new IBC/Code and to adopt the Model Law.[12] The National

[9] BeckOK InsR/Madaus, 25. Ed. 15.10.2021, InsO § 3 Rn. 14-16
[10] Eurofood IFSC Decision, ECoJ, 02.05.2006, Rs. C-341/04
[11] Interedil Srl Deciosion, ECoJ, 20.10.2011, Rs. C-396/09
[12] File No. 30/27/2018-Insolvency Section of the Government of India Ministry of Corporate Affairs, 24.11.2021

Company Law Tribunal (NCLT) of India stated, that it was not able to recognize a Dutch insolvency proceeding because the there was no agreement between India and the Netherlands according to Section 234. IBC/Code.[13] Because of the uncertainties this can cause, it has strongly been argued to remedy this situation by incorporating rules along the line of the Model Law into the IBC/Code.[14] This problem was solved by the ruling of the National Company Law Appellate Tribunal, New Delhi. The tribunal ordered the parties to sign a cross border insolvency protocol. Essentially this agreement bound the parties to coordinate their efforts regarding the proceedings of the company.[15]
As well as Germany, India hasn't adopted any of the provisions of the Model Law.

5. Singapore

Singapore adopted the Model Law in 2017 into national law.[16] The Model Law has been incorporated into the Insolvency, Restructuring and Dissolution Act 2018 in its Sections 251 to 253. Essentially taking the same approach as Australia by stating in Section 252. para. 1 that the Model Law has the force of law in Singapore with certain modifications. The High Court of Singapore determines the following seven factors as decisive in determining the COMI for a company: (a.) the location from which control and direction was administered, (b.) the location of clients, (c.) the location of creditors, (d.) the location of employees, (e.) the location of operations, (f.) dealings with third parties and (g.) the governing law.[17]
Singapore has adopted the Model Law and all its provisions into its own legal system.

III. Conclusion

The countries examined can be put into two groups. There are those comprehensively adopted its regulations (Australia, Singapore), and those, that haven't adopted it at all (Germany, India).
But that would be too concise a view on the matter. Australia and Singapore have adopted the Model Law simply by "copy-and-paste". They adopted its whole text and merely refer to exceptions from its provisions as far as these have been fixed in the encompassing law or other laws. Therefore, they also adopted the principle of COMI, and allow for deviating from the provisions of the Model Law in regard to the ordre public.

[13] State Bank of India v. Jet Airways (India) Ltd., CP 2205 (IB), CP 1968 (IB), CP, 1938, June, 20, 2019 (Mumbai Bench)
[14] Misra/Feibelman pp. 333
[15] Jet Airways (India) Ltd. (Offshore Regional Hub/Offices) v. State Bank of India Company, Appeal (AT) (Insolvency) No. 707 of 2019
[16] Spuling p. 93
[17] Re: Zetta jet Pte Ltd. & others (asia aviation holding pte ltd, intervener) [2019] SGHC 53

Germany has taken or better had to take an inconsistent approach to cross-border regulations. On the one hand it still has its own local laws governing these matters (InsO). On the other hand, as soon as the case involves an additional EU member state besides Germany, the application of the InsO takes a back seat to that of the rules of the EUInsVO. And as soon as the EUInsVO is applicable German courts have to use the principle of COMI in determining local jurisdiction. Nevertheless, the criteria that have been developed for determining the connecting factor for the local jurisdiction in regard to the InsO appear pretty similar to the ones developed for determining the COMI. Also, Germany has incorporated the principle of ordre public independently from the Model Law in this regard.

Finally, courts in India don't have to take the ordre public into account when determining the local jurisdiction. Neither have these provisions of the Model Law been adopted, nor have other solutions been embedded. The legal system of India doesn't allow for an inclusion of a foreign insolvency proceeding into its own. This is regardless of the fact, that a coordination between these proceedings is dictated by the factual situation on the ground. Therefore, the courts had to remedy this situation by applying, basically a contractual solution to accommodate this problem.[18]

The problems that arise because of the increase in international trade and its connection with insolvency proceedings can't be negated. Rather, it is to be expected, that their numbers are going to inflate. They are not going to go away any time soon. This makes it imperative that the legal systems of countries all over the world implement provisions to accommodate these problems. As has been shown, the solutions provided by the Model Law aren't the only ones to tackle these problems. But these alternatives (Germany) appear pretty similar to them. It is no solution to ignore these problems and hope that the courts will find creative answers to approach them. A reliable legal system should strive for more.

As has been shown, the Model Law offers a reliable solution in tackling the requirements of incorporating the ordre public and the principle of COMI. And although there are other solutions, these are so matching (Germany), that it seems rather superfluous for a country like India, which hasn't this kind of regulation, to take another approach than to adopt the Model Law.

[18] Mannan pp. 13

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