INSOL GIPC Short Paper (3580 words)

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9 July 2023

**THE USE OF THE UNCITRAL MODEL LAW ON**

**CROSS-BORDER INSOLVENCY IN ENGLAND & WALES**

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**Introduction**

1. This paper analyses the use of the UNCITRAL[[1]](#footnote-1) Model Law on Cross-Border Insolvency (the "**Model Law**") in Great Britain.
2. The paper will focus on how the courts of England & Wales have construed the provisions of the regulations that give effect to the Model Law in Great Britain that contain what may be regarded as the core of the substance of the Model Law, i.e., the recognition of a foreign proceeding.

**The Model Law**

1. What is the Model Law? It was adopted by UNCITRAL in 1997 and is designed to assist jurisdictions to equip their insolvency laws with a modern, harmonised and fair framework to address more effectively instances of cross-border proceedings concerning debtors experiencing severe financial distress or insolvency.
2. Historically, substantive laws and rules of insolvency have been jurisdiction specific. Practitioners and businesses were faced with diversity and inconsistency in the legal approaches applied to cross-border insolvencies and judges in different jurisdictions were unclear about the degree of discretion that was available to them in the context of cross-border insolvencies. This diversity and inconsistency only increased with the continued expansion of international trade that occurred with the development of global businesses, technology and the internet.
3. This combination of the insolvency of a debtor with assets and liabilities spread over more than one legal jurisdiction and the absence of common international insolvency laws gave (and continues to give) rise to uncertainties such as:
4. What insolvency proceedings can be commenced, by whom and in which jurisdiction;
5. What the consequences of the insolvency are in the various jurisdictions in which the debtor operates;
6. What co-operation and co-ordination can or should apply across the various jurisdictions; and
7. How creditors are treated.
8. The Model Law was borne out of the desire to reduce and minimise these uncertainties.
9. The preamble to the Model Law expressly sets out its objectives as follows[[2]](#footnote-2):

"*The purpose of this Law is to provide effective mechanisms for dealing with cases of cross-border insolvency so as to promote the objectives of:*

1. *Co-operation between the courts and other competent authorities of this State and foreign States involved in case of cross-border insolvency;*
2. *Greater legal certainty for trade and investment;*
3. *Fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested persons, including the debtor;*
4. *Protection and maximisation of the value of the debtor's assets; and*
5. *Facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment.*"
6. The Model Law provides a framework for cooperation between jurisdictions, offering solutions that help in several modest but significant ways and facilitate and promote a uniform approach to cross-border insolvency and is premised on the following four key concepts:
7. Access – providing access of foreign representatives and creditors to courts[[3]](#footnote-3);
8. Recognition – recognition of foreign proceedings[[4]](#footnote-4);
9. Relief – providing appropriate relief[[5]](#footnote-5); and
10. Co-operation – facilitating co-operation with foreign courts and foreign representatives[[6]](#footnote-6).
11. The Model Law (a) respects the differences among national procedural laws and does not attempt a substantive unification of insolvency law; (b) is not a treaty and contains no requirement of reciprocity[[7]](#footnote-7); (c) is only a recommendation, not a convention; (d) can therefore be considered an example of "soft law"; (e) has no legal or binding status; and (e) serves as a model which can be adopted, in whole or in part and with or without modification, into the domestic legislation of a State.
12. The Model Law reflects best practices in cross-border insolvency matters that are characteristic of modern, efficient insolvency systems. Enacting the Model Law therefore provides useful additions and improvements to a national insolvency regime so as to resolve more readily problems arising in cross-border insolvency cases.
13. As of March 2023, the Model Law had been adopted in 53 States and 56 jurisdictions, including Great Britain and the United States of America.

**Key Model Law concepts and definitions relevant to recognition**

1. Article 2 of the Model Law contains a number of definitions. Key definitions (and for the purposes of this paper, the definitions that will be analysed) are that of "foreign proceeding"[[8]](#footnote-8), "foreign main proceeding"[[9]](#footnote-9) and "foreign non-main proceeding"[[10]](#footnote-10).
2. Article 2(a) defines "foreign proceeding" as having the following elements:
3. a proceeding (including an interim proceeding);
4. that is either judicial or administrative;
5. that is collective in nature;
6. that is in a foreign State;
7. that is authorised or conducted under a law relating to insolvency;
8. in which the assets and affairs of the debtor are subject to control or supervision by a foreign court; and
9. which proceeding is for the purpose of reorganisation or liquidation.
10. Article 2(b) defines "foreign main proceeding" as follows:

"a foreign proceeding taking place in the State where the debtor has the centre of its main interests."

1. The definition of "foreign main proceeding" uses the term "centre of main interest" ("**COMI**") of the debtor without defining what it means.

1. Article 2(c) defines "foreign non-main proceeding" as follows:

"a foreign proceeding, other than a foreign main proceeding, taking place in a State where the debtor has an establishment within the meaning of subparagraph (f) of this article."

1. Article 2(f) defines "establishment" as:

"any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services".

1. In summary, therefore:
2. Foreign main proceedings are insolvency proceedings commenced in the jurisdiction where the debtor has its COMI. The Model Law does not attempt to define COMI, but provides a rebuttable presumption that the debtor's COMI is where its registered office is;
3. Foreign non-main proceedings are insolvency proceedings commenced in a jurisdiction other than where the debtor has its COMI, but where it has an establishment;
4. An establishment is any place of operations where the debtor carries out economic activity with human means and goods or services, which is not of a temporary nature.

1. Recognition of insolvency proceedings as foreign main proceedings brings into effect what is commonly referred to as the "automatic stay". That stay prohibits, in the jurisdiction where the debtor's insolvency proceedings have been recognised:
2. the commencement of proceedings concerning the debtor's assets, rights, obligations or liabilities;
3. execution against the debtor's assets; and
4. the transfer or disposal of the debtor's assets.
5. A court which recognises a foreign insolvency proceeding as non-main proceedings has the discretion to impose a stay or other "appropriate relief", but the prohibitions contained within the automatic stay do not apply unless the court specifically so orders.

**The enactment of the Model Law in Great Britain**

1. The Model Law was enacted in Great Britain by the Cross-Border Insolvency Regulations 2006 (SI 2006/1030) (the "**CBIR**").
2. The CBIR replicate, in large part verbatim, the provisions of the Model Law in full.
3. In an Explanatory Memorandum to the CBIR prepared by the UK Government's Insolvency Service, the authors describe the attitude of the British Government as follows:

"*7.2 The British Government has a commitment to the promotion of a rescue culture and supports the Model Law as an appropriate legislative tool to support this objective on the wider international stage. In addition, implementation of the Model Law will be beneficial in serving the cause of fairness to towards creditors who may be located anywhere in the world. We hope that it may also provide an example to other countries of our readiness to engage in a genuine process of co-operation in international insolvency matters and that our actions will encourage other countries to implement the Model Law. In this way, insolvency officeholders in Great Britain should be able to enjoy, progressively, the same benefits abroad as their international counterparts, and be able to reduce administrative costs incurred in recovering assets from overseas. As a result, funds available for distribution to creditors, wherever they are located, should increase."*

*"7.18 The Model Law is a legislative text that is recommended to countries for incorporation into their national law. In Great Britain, we have tried to follow UNCITRAL's exhortation to stay as close as possible to the original drafting in order to ensure consistency, certainty and harmonisation with other countries enacting the Model Law.*"

**The English and Welsh courts' interpretation of the CIBR with regard to recognition**

1. In addition to the relevant definitions in the Model Law cited above, which were replicated verbatim in Article 2 of the CIBR, the relevant provision of the CIBR is Article 17(1) which provides that unless a "foreign proceeding" is contrary to the public policy of the English courts, it must be recognised by the English court if:
2. the proceedings are "foreign proceedings";
3. the representative is a foreign representative; and
4. certain formal and procedural requirements have been complied with.
5. Where these conditions are satisfied, the court must recognise the proceeding either as a foreign main proceeding or as a foreign non-main proceeding.
6. The CBIR only apply to collective proceedings, i.e., proceedings undertaken for the benefit of all creditors. The English court will review the legislation of the relevant foreign jurisdiction to consider the purpose and characteristics of the proceeding in question in order to determine whether the proceeding contains the essential elements of a collective proceeding under English law.
7. The English and Welsh courts have wrestled with the concept of foreign proceedings in a number of judgments. The judgment in *In the matter of Agrokor DD* [2017] EWHC 2791 (Ch) addressed a number of the elements required for proceedings to constitute a "foreign proceeding" under the CBIR.
8. The facts were as follows. Agrokor was incorporated in Croatia and was the holding company of a group of companies. Agrokor had entered an Extraordinary Administration Proceeding ("**EAP**") in Croatia. Agrokor's insolvency or pending insolvency was irrebuttably presumed on submission by it of an excerpt from its accounting records, proving the existence of claims due and outstanding.
9. Although the EAP was a single group proceeding against the company and all its affiliated and controlled companies, there was no requirement for the other companies in the group to prove their insolvency. A number of the debt obligations owed by Agrokor were governed by English law and subject to English jurisdiction.
10. Agrokor's foreign representative applied for recognition of the Croatian EAP as a "foreign proceeding". The application was made solely in respect of Agrokor and did not extend to the other companies in the group. It was opposed by Sberbank, a creditor with a claim in excess of EUR 1 billion.
11. In determining whether the EAP was a "foreign proceeding", the following questions were considered:
12. Does it matter that the EAP is a single group proceeding in respect of Agrokor and affiliates, while the CBIR only provides for recognition of a single company proceeding?
13. Is the EAP a proceeding made under a "law relating to insolvency"?
14. Is the EAP "subject to control or supervision by a foreign court"?
15. Does the EAP qualify as a "collective proceeding"? and
16. Does it matter that the law under which the EAP was made was not passed "for the purpose of reorganisation"?
17. The court granted the application for recognition as a foreign main proceeding and answered the above questions as follows (adopting the same sequence as above):
18. There is nothing in the CBIR that states that it is impossible to recognise a single group proceeding, such as the EAP, as a foreign proceeding in respect of a single debtor (in this case, Agrokor)[[11]](#footnote-11);
19. The Model Law does not require "insolvency law" as a label. It is sufficient if the law deals with or addresses insolvency or severe financial distress, which the Croatian law did. The "law relating to insolvency" requirement is satisfied if insolvency is one of the grounds on which the proceeding could be commenced, even if insolvency could not actually be demonstrated and there was another basis for commencing the proceeding. At the commencement of the proceeding, it was unchallenged that Agrokor and its affiliates were in a state of serious financial distress[[12]](#footnote-12);
20. The level of court supervision required by the Model Law is relatively low. Under the CBIR it can not only be potential rather than actual, but can also be indirect rather than direct.The fact that the Croatian law also gave some control to the Croatian government did not negate the supervision of the Court[[13]](#footnote-13);
21. Sberbank argued that "collective" should mean "relating to the debtor and its own creditors", not "to the debtor and creditors of others". However, the English court considered that the consolidated nature of the EAP made it more collective rather than not collective enough[[14]](#footnote-14); and
22. The purpose of the Croatian law was to protect the stability of the economic system against systemic shocks by enabling the restructuring of companies of systemic importance that get into financial difficulty and, if a restructuring failed, by transforming it into a bankruptcy proceeding. This could be described as a law for the purposes of reorganisation or liquidation within the meaning of the CBIR[[15]](#footnote-15).
23. In *Leite v Amicorp (UK) Ltd* [2020] EWHC 3560 (Ch), the English court had to consider whether Brazilian "extension proceedings" qualified as "foreign proceedings" in the context of a recognition application under the CBIR. "Extension applications" allow an insolvency granted to one debtor to be extended to another debtor. There is no direct parallel of "Extension Proceedings" under English law.
24. The key issue was whether the "Extension Proceedings" were "collective proceedings" for the purposes of the CBIR. The applicant company's assets were administered for the benefit of its own creditors and not for another entity's creditors.
25. In allowing the application and recognising the Extension Proceedings as foreign main proceedings, Burton J. held[[16]](#footnote-16):

"*By:*

1. *adopting the rationale applied by HH Judge Matthews in Agrokor, that it would create a significant hole in the range of possible options for international recognition if the English courts were not prepared to recognise proceedings affecting a distinct company within a form of "group proceedings" that is unfamiliar to this jurisdiction; and*
2. *taking into account the court's willingness, in extreme and unusual circumstances, to permit a liquidator to pool the assets of two or more insolvent entities, I am satisfied that the likely pooling of Buglin and Endipa's assets to meet the claims of Nilza's creditors does not preclude the extension proceedings from being "collective proceedings" for the purposes of the CBIR.*"

1. The demise of the business empire of Sir Allen Stanford due to his alleged involvement in a fraudulent Ponzi scheme resulted in an important decision in England & Wales concerning COMI and collective proceedings.
2. The first decision is the first instance decision of Lewison J in *Re Stanford International Bank Ltd* [2009] EWHC 1441 (Ch). Standard International Bank ("**SIB**") was incorporated in Antigua and regulated by the Antiguan authorities. Its registered office was in Antigua. Its contracts were governed by Antiguan law and were subject to the jurisdiction of the Antiguan courts. The majority of its staff were based in Antigua.
3. SIB was part of a group companies based in the US. The key strategic decisions in relation to SIB were taken in the US by US citizens. More than half of the financial advisers involved in the sale of SIB's products were based in the US.
4. After an SEC investigation implicating SIB in the fraud, the SEC obtained an order from the District Court in Northern Texas appointing a receiver to SIB and its wider group (the "**Receiver**"). The actions of the SEC prompted an investigation in Antigua, which resulted in the Antiguan authorities appointing a liquidator to SIB (the "**Liquidator**").
5. Amongst the assets of SIB was a bank account in London. The Receiver and the Liquidator both sought recognition of their respective appointments in the English and Welsh High Court under the CBIR and asked the court to determine whether the US receivership or the Antiguan liquidation of SIB were "main proceedings" for the purpose of the CBIR.
6. The Receiver argued that the COMI of SIB was in the US, as it was from there that strategic control over SIB was exercised. The Liquidator argued that there was no evidence to displace the presumption that SIB's COMI was with its registered office in Antigua and that, in fact, the evidence that there was supported the view that the COMI of SIB was in Antigua.
7. In addition, the Liquidator argued that the Receiver was incapable of being recognised under the CBIR, as it was not a "collective proceeding" in that the purpose of the US receivership was to protect the interests of the investors in SIB, rather than the reorganisation or liquidation of SIB on behalf of SIB's creditors as a whole.
8. Lewison J. held that the COMI of SIB was in Antigua. The Receiver had not shown sufficient evidence to rebut the presumption that SIB's COMI was at its registered office. in fact, the balance of the evidence supported the view that SIB's COMI was in Antigua. As a consequence, Lewison J. held that the Liquidator was entitled to recognition as a foreign representative of a foreign main proceeding.[[17]](#footnote-17)
9. The court considered the proper test to apply when identifying the COMI of a company. It held that, in order to rebut the presumption that a company's COMI was at its registered office, there must be objective factors that indicate the company's head office function was carried out elsewhere. Those facts must be ascertainable to third parties. What is ascertainable to third parties is what is in the public domain and what a typical third party would learn from its dealings with company.[[18]](#footnote-18)
10. It was found that whilst clients of SIB might have initial contact with SIB's financial advisers in the US, the materials provided to those investors strongly tied SIB to Antigua. The court noted that when news of the SEC investigation broke, many investors travelled to SIB's premises in Antigua to demand their money back.
11. The court approved the approach to determining COMI as set out in In *Re Eurofood IFCS Ltd* [2006] Ch 508[[19]](#footnote-19) and held that any authority on COMI that pre-dated the *Eurofood* decision was bad law.
12. The court also held that the Receiver of SIB was not capable of recognition under the CBIR. The purpose of the receivership was to protect the investors in SIB from the risk of misappropriation of assets whilst the SEC investigation took place. The receiver had no power to distribute assets to creditors of SIB, nor any duties to the creditors of SIB as a whole. This meant that the receivership was not a "collective process", a pre-requisite of recognition under the CBIR.[[20]](#footnote-20)
13. On appeal from Lewison J's judgment[[21]](#footnote-21), the Court of Appeal upheld the first instance findings that the US receivership was not a foreign proceeding for the purposes of the CBIR, but that the Antiguan liquidation was such a foreign proceeding. The Court of Appeal further emphasised that a company's COMI had to be identified by reference to factors which are both "objective and ascertainable". Therefore, the so-called "head-office function" test applied only to the extent that the relevant factors were so ascertainable.

**Conclusion**

1. Consistent with the attitude of the UK Government's Insolvency Service as set out in the Explanatory Memorandum to the CBIR, the English & Welsh courts have applied a facilitative and purposive interpretation of the provisions of the CBIR (and, in so doing, to the Model Law) to achieve the aims stated therein.
2. This approach of the English & Welsh courts complements the purpose of the Model Law, i.e., to deal with the increasing problem that insolvencies in one country created in other countries in an increasingly globalised world.
3. The effect of this co-operative and harmonious approach serves to reduce administrative costs in recovering assets from overseas and, in the end, to increase the quantum of funds available for distribution to creditors.
4. To this end, the interpretation of the CIBR deployed by the courts of England & Wales promote the ethos embodied in the Model Law.

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*In the matter of Agrokor DD* [2017] EWHC 2791 (Ch)

*Leite v Amicorp (UK) Ltd* [2020] EWHC 3560 (Ch)

1. UNCITRAL is the acronym for the United Nations Commission on International Trade Law. UNCITRAL was established by the United Nations General Assembly in 1966 to reduce or remove the obstacles to trade created by the disparities between different national laws governing international trade. [↑](#footnote-ref-1)
2. The Preamble to the Model Law [↑](#footnote-ref-2)
3. Chapter 2 of the Model Law [↑](#footnote-ref-3)
4. Chapter 3 of the Model Law [↑](#footnote-ref-4)
5. Chapter 3 of the Model Law [↑](#footnote-ref-5)
6. Chapter 4 of the Model Law [↑](#footnote-ref-6)
7. The lack of requirement of reciprocity means that the courts of an enacting jurisdiction may recognise foreign insolvency proceedings regardless of whether the home jurisdiction of those proceedings has also implemented legislation based on the Model Law. [↑](#footnote-ref-7)
8. Article 2(a) of the Model Law [↑](#footnote-ref-8)
9. Article 2(b) of the Model Law [↑](#footnote-ref-9)
10. Article 2(c) of the Model Law [↑](#footnote-ref-10)
11. Paragraph 54 [↑](#footnote-ref-11)
12. Paragraphs 63 - 77 [↑](#footnote-ref-12)
13. Paragraphs, 79, 92 and 93 [↑](#footnote-ref-13)
14. Paragraph 99 [↑](#footnote-ref-14)
15. Paragraphs 15, 106 [↑](#footnote-ref-15)
16. Paragraph 46 [↑](#footnote-ref-16)
17. Paragraphs 97-99 [↑](#footnote-ref-17)
18. Paragraph 70 [↑](#footnote-ref-18)
19. Eurofood was an Irish company which was a subsidiary of Parmalat, an Italian company. Eurofood's registered office was in Dublin. Its principal objective was the provision of financing facilities for companies in the Parmalat group. Its day-to-day administration was managed by Bank of America. Insolvency proceedings were opened in both Italy and Ireland, and the courts of both decided that they had jurisdiction. The Italian administrator appealed to the Irish Supreme Court which referred a number of questions to the ECJ including the question of how to determine a company's COMI. [↑](#footnote-ref-19)
20. Paragraphs 84, 85. [↑](#footnote-ref-20)
21. See [2010] EWCA 137 (CA) [↑](#footnote-ref-21)