Discuss the advantages and disadvantages of using a debtor's center of main interest ("COMI") to determine where a foreign main proceeding should take place under the UNICTRAL Model Law.

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1. Introduction

Insolvency is a foreseeable risk, so it is therefore important that a debtor's current and potential creditors can calculate or assess their rights and exposure in cases of insolvency[1].

The UNCITRAL Model Law on Cross-Border Insolvency (the "Model Law") provides a framework for dealing with cross-border insolvency cases with the aim of promoting fair, efficient and effective insolvency processes which align with its core objectives. A key concept of the Model Law is that the center of main interest ("COMI"), being the place where the debtor conducts the administration of its interests on a regular basis, should determine the primary foreign proceeding (the "main" proceeding). This allows at least in theory, a debtor's creditors to calculate or assess their legal rights and exposure in cases of cross-border insolvency with a reasonable degree of predictability and certainty[2].

This paper examines the advantages and disadvantages of COMI in determining where main proceedings under the Model Law should take place, with reference to how some of the principal enacting judiciaries have approached COMI in what is now well-established case law in jurisdictions

[1] M. Virgos and E.Schmit, Report on the Convention on Insolvency Proceedings, Brussels, May 1996. p51
[2] UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation, 2014, p3

including the United States, England and Singapore. It also draws upon recent criticism of COMI in this context from a number of leading academics in this field, in a September 2023 letter to the UNCITRAL Working Group V. The letter sets out a critic of COMI and proposals for alternative solutions to the determination of where a foreign main proceeding should take place[3].

2. COMI as a concept under the Model Law

The Model Law, alongside the EU Regulation on Insolvency Proceedings, is the primary tool for the co-ordination and recognition of cross-border insolvencies across the globe. The Model Law seeks to provide an effective mechanism for dealing with cross-border insolvency cases promoting the objectives of a) co-operation between courts, b) greater legal certainty for trade and investment, c) fair and efficient administration of cross-border insolvencies which protect stakeholders interests d) protection and maximization of the debtor's assets and f) facilitating rescue of troubled businesses[4].

One of the key objectives of the Model Law is to establish simplified procedures for recognition of qualifying foreign proceedings which would avoid time-consuming court proceedings or other processes and provide certainty with respect to the decision to recognise foreign proceedings in the enacting jurisdiction[5]. In principle, a main proceeding is expected to have primacy in regards to the management of the insolvency of the debtor.

A foreign proceeding is recognised as a foreign main proceeding if it takes place in the state where the debtor has its center of main interest pursuant to Article 17 2(a) of the Model Law[6]. COMI therefore determines the issue of whether a foreign proceeding will be recognised, and its effects. In particular, a foreign proceeding will only be recognised as a foreign main proceeding under the Model Law, if it is taking place in the same state as its COMI. The proceeding pending in the debtor's COMI is expected to have principal responsibility for managing the insolvency of the debtor regardless of the number of states in which the debtor has assets and creditors[7]. The aim being to establish with predictability where the

[3] Anthony J Casey, Aurelio Gurrea-Martinez and Robert Rasmussen, Letter to UNCITROL Working Group V, 14 September 2023.
[4] UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation, 2014, p3
[5] UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation, 2014, p28
[6] UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation, 2014, p28
[7] UNCITRAL Digest on Caselaw under the MLCBI – February 2021, pvii

primary seat of the insolvency proceedings will occur, reducing the value destroying effects of competing jurisdictions in which the debtor may have assets, operations or liabilities.

COMI is therefore fundamental to the operation of the Model Law and critical in terms of the initiation of proceedings and the relief available to foreign proceedings, across the 60 jurisdictions which to date have adopted the Model Law in whole or in part[8]. However, the Model Law does not define COMI in the definition of a foreign main proceeding providing only, at Article 16(3) *in the absence of proof to the contrary, the debtor's registered office, or habitual residence in the case of an individual, is presumed to be the center of the debtor's main interests*.

The key factors in most cases for determining COMI under the Model Law are the location where the central administration of the debtor takes place and which is readily ascertainable as such by the creditors[9]. The Model Law Guide to Enactment and Interpretation, further provide that a number of additional factors may be considered by the subject court, where the principal factors do not yield a ready answer as to COMI, noting that the endeavor is a holistic one[10].

The subjectivity in the Model Law and its Guide to Enactment and Interpretation has resulted in case law in each jurisdiction applying the concept of COMI slightly differently, leading to a lack of uniformity in application. For example, the United States, English and Singapore Courts have each taken a slightly different approach to COMI and the presumptions within the Model Law:

> Under its Chapter 15 Bankruptcy Code, the US courts treat the Article 16(3) rebuttal presumption as merely indicative "*for speed and convenience in instances in which the COMI is obvious and undisputed"*[11] and only marginal evidence of a "*connection*" is required to shift the burden of proof to the foreign representative seeking recognition[12].

[8] UNCITRAL Digest on Caselaw under the MLCBI – February 2021, p38
[9] UNCITRAL Guide to Enactment and Interpretation, p70-72 para 144-149
[10] UNCITRAL Guide to Enactment and Interpretation, p70-72 para 146
11 See Creative Fin. Ltd. (In Liquidation), 543 B.R. 514-15 (Bankr. S.D.N.Y. 2016)
[12] See Tri Continental Exchange Ltd, 349 B.R 627 (Bankr. E.D.Cal. 2006)

In the England, foreign companies can initiate insolvency proceedings if they show a "*sufficient connection*" that can be found if, for example, the debtor has assets or creditors in the country or debt contracts subject to English law[13].

Similar provisions exist in Singapore whereby foreign companies can initiate insolvency proceedings if they show a "*substantial connection*", which may include situations in which the debtor: (i) has its centre of main interest in Singapore; (ii) is carrying on business in Singapore or has a place of business in Singapore; (iii) has substantial assets in Singapore; (iv) has chosen Singapore law as the law governing a loan or other transactions; or (iv) has submitted to the jurisdiction of the Singapore Courts in the resolution of one or more disputes relating to a loan or other transactions. See Section 63(3), 246(1)(d) and 246(3) of the Insolvency, Restructuring and Dissolution Act 2018[14].

In comparison and despite originating from the same concept of COMI, under the European Insolvency Regulation (EIR Recast) legislation, the European Courts have interpreted the concept of COMI more rigidly setting a higher bar for the rebuttal of the presumption that COMI does not coincide with the debtor's registered office[15].

Against this backdrop, the concept of COMI as the determining factor for recognition under the Model Law is seen by an increasingly vocal group of professionals and academics as a policy option which presents various flaws that undermine some of the Model Laws objectives, being to maximise returns to creditors within a cross-border insolvency scenario, encourage effective reorganisation of viable but financially distressed businesses and promote entrepreneurship, access to finance and economic growth[16].

[13] See Van Gansewinkel Groep B.V. 2015 EWHC 2151 (Ch)
14 PT MNC Investama TBK 2020 SGHC 149
[15] Bob Wessels and Iiya Korin, COMI under European and American Insolvency Law. https://blogs.law.ox.ac.uk/business-law-blog/blog/2019/02/comi-under-european-and-american-insolvency-law (visited 8 February 2023)
[16] Anthony J Casey, Aurelio Gurrea-Martinez and Robert Rasmussen, Letter to UNCITROL Working Group V, 14 September 2023.

On the other hand, proponents of COMI point to the now well established case law in many jurisdictions concerning COMI, resulting in legal systems and processes under the Model Law that ensure the legitimacy of foreign proceedings as an eligibility requirement[17].

3. Unclear and Costly Concept?

As detailed above, by design COMI is not a defined concept within the Model Law and case law has developed tangentially across the various jurisdictions in which it has been enacted. Consequently, the predictability which the draftsmen aspired to achieve is far from the reality at the start of 2024.

This lack of clarity has led to conflicts of jurisdiction and law in the determination of a debtor's COMI. For example, *Oi Brasil* involved four entities of a Brazilian group, one of which (a financing vehicle) was incorporated in the Netherlands. The US court found the COMI of the Dutch company to be Brazil. The Dutch court found the COMI of the Dutch company to be the Netherlands[18.] The idea that the COMI of the same entity can be assessed differently by two courts, highlights the serious difficulties caused by the differing approaches taken by enacting courts.

There has also been a diversion in determining precisely when the COMI determination should be made[19]. In the US, the courts have held that COMI should be determined at or around the time that the Chapter 15 application has been filed, the Filing Approach, without enquiry into the debtor's entire operational history[20]. In contrast, the position in England is less clear between the Filing Approach and Commencement Approach[21] (determined by reference to the commencement of the underlying insolvency proceedings of the debtor) whilst the EIR follows the Commencement Approach to the determination of COMI[22].

[17] Model Law Draftsman Responds to COMI Proposals – Global Restructuring Review 15 September 2023.
[18] Oi Brasil Holdings Coopratief U.A, December 2017, 17-11888 (SHL) 16-11794 (SHL) 16-11791 (SHL)
[19] UNCITRAL Digest on Caselaw under the MLCBI – February 2021, p1
[20] Morning Mist Holdings Ltd v Krys (In re Fairfield Sentry Ltd), 714 F.3d 127 (2d Cir.Apr.16, 2013)
[21] See Leech J, Trustees in bankruptcy of li Shu Chung v Li Shu Chung [2021] EWHC 3346 (Ch) and Lexis Nexis Update "Clarity on cross-border conundrum (Re Toisa Limited). C Moller and H Rudkin. https://www.lexology.com/library/detail.aspx?g=66c18dff-087c-40a6-972d-de0517ec6c2f (visited 7 February 2024)
[22] Susanne Staubitz-Schreiber Case C-1/04 [2006] ECR 1-701 and Interedil Srl Case C-369/09, [2011] ECR I-9939.

It is clear, therefore, that the COMI determination can result in jurisdictional conflicts, despite the intention of the Model Law being to prevent such inconsistency between jurisdictions. As a result of this unpredictability, it is argued that market participants generally price debt on a worst case basis, assuming that any restructuring would be undertaken in the least effective available insolvency jurisdiction. This results in an increase in the cost of credit as well as deterring economic activity, even if a debtor never becomes insolvent[23].

It is also argued that in addition to the macro economic impacts caused by COMI's unpredictability, that the concept also exposes stakeholders to disputes over COMI determination, resulting in expensive and value-destroying multijurisdictional litigation[24.]

In response, supporters of COMI point to the fact that COMI in the real world is neither disputed nor difficult to determine in the vast majority of cases[25]. There is now established case law in many of the principal jurisdictions which would support this observation, providing a reasonable degree of predictability and certainty with regards to the determination of the COMI of a debtor in many cross-border situations. This perhaps mitigates some of the pricing implications and limits to economic activities that have been averred.

Furthermore, changing the eligibility requirement under the Model Law for recognition away from COMI is unlikely to eliminate the risk of possible litigation by a sufficiently sophisticated and motivated party[26]. Litigation in such scenarios is likely to be fairly predictable whatever the forum determination factors are.

The world is becoming increasingly decentralised with companies having assets, liabilities, employees and offices across multiple jurisdictions. In this context, litigation risk from self-interested parties is likely to be an unavoidable cost of any cross-border process irrespective of how the primary proceeding is

[23] Anthony J Casey, Aurelio Gurrea-Martinez and Robert Rasmussen, Letter to UNCITROL Working Group V, 14 September 2023.
[24] Anthony J Casey, Aurelio Gurrea-Martinez and Robert Rasmussen, Letter to UNCITROL Working Group V, 14 September 2023
[25] Model Law Draftsman Responds to COMI Proposals – Global Restructuring Review 15 September 2023
[26] Model Law Draftsman Responds to COMI Proposals – Global Restructuring Review 15 September 2023

determined[27], be it COMI or via another eligibility test, like say the choice of insolvency forum from the company's constitution which is a proposal that has been made by some of the critics of COMI[28].

4. Forum Shopping – a real or theoretical risk in most cases?

Perhaps the strongest arguments against the use of COMI in relation to the Model Law are the potential disadvantages caused by opportunistic behavior by debtors who instigate a COMI shift as a precursor to commencing a restructuring in a forum which is disadvantageous to a creditors' interests.

In their recent letter to UNCITRAL Working Group V, Anthony J Casey, Aurelio Gurrea-Martinez and Robert Rasmussen, suggest that this opportunistic ability to shift COMI once a debtor obtains credit, is priced accordingly by the lenders, in the form of higher interest rates, collateral and not extending credit at all. Thus, they make the point that COMI reduces access to finance and stunts the promotion of economic growth[29].

Hypothetically, whilst COMI and its flexible application in jurisdictions such as the US, England and Singapore provide potential scope for opportunistic behaviors by debtors (to the detriment of creditors interests or at least without their prior consent), in reality courts are alive to such manipulation that is motivated by disadvantaging certain stakeholders or overly favoring the debtor's interests.

The Model Law does not contain provisions on abuse of process, but this does not mean there are no protections in the enacting jurisdictions to discourage and prevent COMI manipulation as part of the recognition of foreign insolvency proceedings. For example, in *Ivan Cherkasov, William Browder, Paul Wrench vs Nogotkov Kirill Olegovich*, the English High Court affirmed the obligations for full and frank disclosure in relation to applications without notice for recognition orders[30].

[27] Model Law Draftsman Responds to COMI Proposals – Global Restructuring Review 15 September 2023
28 Anthony J Casey, Aurelio Gurrea-Martinez and Robert Rasmussen, Letter to UNCITROL Working Group V, 14 September 2023
29 Anthony J Casey, Aurelio Gurrea-Martinez and Robert Rasmussen, Letter to UNCITROL Working Group V, 14 September 2023
[30] Ivan Cherkasov, William Browder, Paul Wrench vs Nogotkov Kirill Olegovich, The Official Receiver of Dalnyaya Step LLC (in Liquidation), 2017, EWHC 3153 (CH). UNCITRAL Digest on Caselaw under the MLCBI, Feb 2021.

COMI-shifting in the majority of cases will be found to be an abuse of process and will therefore be unsuccessful, in particular, in circumstances where it is not in the best interests of the creditors or where a clear attempt has been made to manipulate COMI in bad faith. In *Creative Finance*, the US Bankruptcy Court denied recognition of a BVI liquidation, which was commenced as part of a scheme to avoid paying an English judgment debt[31].

The weakness of COMI argued by Anthony J Casey, Aurelio Gurrea-Martinez and Robert Rasmussen and its susceptibility to manipulation may therefore be overplayed. In reality, the courts in the enacting states (in particular in the US and England) are alive to such manipulation and are more than adapt at preventing abuses of process.

5. Accessibility and Flexibility

The broad approach taken to COMI and in particular the rebuttal presumption under the Model Law in many enacting jurisdictions, provides a vital gateway to modern and sophisticated insolvency legislation and infrastructure, which might otherwise be denied. There have been a number of notable high profile cases involving cross-border restructurings of enterprise groups, often involving offshore jurisdictions, where COMI shifts have taken place and are in all stakeholders' best interests. These cases are far removed from the detrimental forum shopping, which critics highlight as a key weakness to the current concept of COMI within the Model Law. On the contrary, these cases portray the strength of the concept as currently developed.

For example, in *Ocean Rig* the US court held that the Cayman Islands restructuring proceedings should be recognised as foreign main proceedings under Chapter 15, even though the debtors' COMI had been shifted to the Cayman Islands less than a year before the proceedings were commenced. The reason for this was because the debtor's place of incorporation, the Marshall Islands, had no restructuring regime and the court found that the shift of COMI to the Cayman Islands was undertaken for proper purposes, including to facilitate a value-maximising restructuring of the companies' debt[32].

[31] Julie Engwirda and Jayson Wood, The Developments of COMI in the US Recognition Proceedings – the Model Law Approach, January 2023 https://www.hk-lawyer.org/content/development-comi-us-recognition-proceedings-%E2%80%93-model-law-approach (visited 31 January 2024)

[32] Ocean Rig UDW Inc 570 BR 687 (Bankr SDNY 2017)

This examination by the courts of a COMI-shift also arose in *Modern Land (China) Co Ltd* where the insolvent company did not have an "establishment" in the Cayman Islands, because it conducted its business in Mainland China. The US Court considered the period between the commencement of the foreign proceeding and the filing of the Chapter 15 petition and held that the company had its COMI in the Cayman Islands, as the restructuring and approval of the scheme of arrangement all substantively took place in the Cayman Islands. Cayman Islands law also governed most of the disputes among scheme creditors. The Court found there was no bad faith in this COMI-shifting behavior, determining that the Cayman Islands restructuring proceedings would result in the best outcome for creditors, consistent with the objectives of Chapter 15[33].

This flexibility in the interpretation of COMI arguably represents a great strength in the current adaptation of the Model Law allowing better consideration of the economic reality particularly in relation to corporate groups[34] than would perhaps be possible under a more rigid interpretation or alternative forum determination methodology.

Notwithstanding this, there are limitations to the eligibility criteria under COMI even with the broad approach adopted by many jurisdictions. It is true that the COMI approach may have the implication of forcing debtors into insolvency proceedings in a local jurisdiction which has ineffective or inefficient processes simply because this is where the undisputed COMI of the company sits[35].

In particular, the case has been made that COMI is detrimental in emerging markets where there are particularly unattractive insolvency frameworks and debtors may be forced to bear the costs and value destruction of the COMI determined insolvency system which will take primacy under the Model Law[36].

[33] Modern Land (China) Co Ltd (2022) Bankr LEXIS 1972 (Bankr SDNY),
[34] Bob Wessels and Llya Kohorin, COMI under European and American Insolvency Law, 5 February 2019 ttps://blogs.law.ox.ac.uk/business-law-blog/blog/2019/02/comi-under-european-and-american-insolvency-law (visited 8 February 2024)
[35] Anthony J Casey, Aurelio Gurrea-Martinez and Robert Rasmussen, Letter to UNCITROL Working Group V, 14 September 2023
[36] Aurelio Gurrea-Martinez, Insolvency Law in Emerging Markets, Ibero-American Institute for Law and Finance, Working Paper 3/2020 p31

6. Conclusions

COMI is certainly under the spotlight and it is right that the current re-appraisal of this important concept within the Model Law is debated and reconsidered by academics and practitioners alike. This paper has not sought to appraise the alternatives to COMI with regard to the determination of where main proceedings under the Model Law should take place, but seeks to highlight some of the pros and cons of the current COMI landscape.

The current system is far from perfect and there are some merits to the arguments made as to its disadvantages. In particular, the issues in emerging markets are problematic, albeit part of the answer may be in the development of local insolvency legislation as opposed to removing COMI from the Model Law.

Abuse of process is an important consideration and to an extent sadly inevitable under any regime. COMI is not immune to this as a risk. Courts in enacting countries are nevertheless alive to the issue of forum shopping and have shown a clear willingness to protect stakeholder's interests. Using an alternative determination factor may provide more comfort in such circumstances, but in practice this does not seem to be a significant risk which warrants the complete reversal of 26 years of jurisprudence which has proved to be largely effective in deterring at least the most serious cases of malpractice.

COMI's flexibility is one of its great strengths and allows access to sophisticated insolvency venues which might have been unavailable to the debtor and/or its creditors. It has allowed for successful restructurings to occur following a COMI shift which might otherwise have proved impossible or at least far less predictable, more complex and inevitably costly. This is overlooked by critics, despite being a key strength of the existing Model Law.

Whilst debate is important and further discussion will inevitably follow regarding the potential alternatives to COMI, the current system would not appear to be quite as inherently flawed as has been suggested. There are weaknesses, however, these to my mind at least are largely outweighed by its strengths and current functionality in the majority of circumstance.

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