INSOL Fellowship Program – Short Paper

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Analyse the use of the UNICTRAL Model Law on Cross-Border Insolvency, using at least one jurisdiction that is not your home jurisdiction. Include an examination of the deviations or particular differences from the Model Law. US and UK

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1.1 **Introduction**

The Model Law on Cross-Border Insolvency (the **Model Law**) was an initiative created by UNICTRAL in 1997 which was intended to bring consistency and certainty to cross-border insolvency through the implementation of a harmonized framework by member states.

This paper explores whether it has achieved those goals by reference to a comparative analysis of the regimes adopted by the United States and the United Kingdom. In particular, it examines the key issues of recognition and enforcement (including the application of the *Gibbs* rule and common law developments in enforcement and assistance), the determination of a company's COMI, the treatment of foreign creditors and the circumstances in which foreign law can be applied to relief sought locally.

It then goes on to consider whether the current position is satisfactory for facilitating efficient and predictable outcomes in cross-border insolvencies or whether further reforms are needed.

2.1 **Discussion**

The United States has, for a long time, been viewed as the world's premier insolvency and restructuring hub. This has primarily been due to a number of substantive advantages which are offered under US Bankruptcy law as well as the low threshold required to seize the jurisdiction of the US Courts.[1]

For example, debtors filing in the US are able to enjoy the benefits of (1) a worldwide stay of any claims against them (2) remaining in control of the company through the debtor-in-possession model (3) the availability of super-priority for any new financing; and (4) the various options which exist for statutory "cramdowns".[2]

Access to these entitlements is relatively straightforward given the ease in which a party is able to demonstrate a sufficient nexus to the US Courts. The US Bankruptcy Code states that any person who "*resides or has a domicile, a place of business, or property in the United States*" may be a debtor under the Code.[3] It is the last limb of this test that has proven the easiest to satisfy as the threshold for what constitutes "property in the US" is extraordinarily low. It has been held that the presence of a "*dollar, a dime or a pepper-corn*" or the holding of a share in a US company is sufficient.[4] This is, of course,

[1] See McCormack, G. (2023) "Conflicts in insolvency jurisdiction", *Journal of Private International Law*, 19(2) at pp. 186-207.
[2] McCormack, G. (2023) "Conflicts in insolvency jurisdiction", *Journal of Private International Law*, 19(2) at p. 195. McCormack asserts there is a fifth reasons which is "the procedural consolidation possibilities".
[3] Section 109(a) of the US Bankruptcy Code
[4] See *In re Globo Communicacoes E Participacoes SA* (2004) 317 BR 235 at 249 where it is made clear that only a nominal amount of property is required. [cited McCormack, G. (2023) "Conflicts in insolvency jurisdiction", *Journal of Private International Law*, 19(2) at p. 195]

subject to the Court's right to decline jurisdiction on discretionary grounds if, for example, it considers that a debtor is attempting to evade jurisdiction clauses in its contracts with creditors.[5]

By comparison, the UK has not been quite so generous in its attitude towards cross-border insolvency. It has shown that it is less willing to recognize or enforce a foreign process and it doesn't offer the same advantages as the US in relation to worldwide stays and debtor-in-possession regimes. This is discussed in more detail below.

2.2 Recognition and Enforcement – Chapter III

The Model Law was introduced in the UK via the *Insolvency Act 2000*, with the power to modify it by regulation. It was then enacted in an amended form in the *Cross-Border Insolvency Regulations 2006*. In the US, its passage was facilitated by the *Bankruptcy Abuse Prevention and Consumer Protection Act 2005* which created Chapter 15 of the *United States Bankruptcy Code*. The principles of Chapter 15 in relation to international insolvency were based on the Model Law.[6]

One of the areas in the Model Law in which there has been the most divergence (in respect of the approaches taken between the US and the UK) is in relation to recognition and enforcement. That disparity arises in a number of ways due to differences in the private international laws of both jurisdictions, when applied to the paradigm prescribed in the Model Law.

Turning briefly to the principles which the Model Law was designed to address, Chapter III created a uniform approach to the recognition of foreign insolvency proceedings through the introduction of concepts like "Foreign Main Proceedings" and "Foreign Non-Main Proceedings." However, for the reasons set out below, it hasn't been implemented in a consistent manner around the world. For instance, on the issue of comity, US Courts are regarded as being more likely to give greater weight to the law of the foreign insolvency proceedings whereas the English Courts have demonstrated a preference to offer assistance through the application of their equivalent domestic rules. This is particularly the case where English creditors have not submitted to the jurisdiction of the foreign court (as discussed later in this paper).[7]

2.2.1 *UK*

[5] McCormack, G. (2023) "Conflicts in insolvency jurisdiction", *Journal of Private International Law*, 19(2) at p. 195

[6] For a further discussion see Fernandes, D. L. & Pathak, D. (2018) "Harmonizing UNCITRAL Model Law: A TWAIL Analysis of Cross Border Insolvency Law", *Asian Yearbook of International Law*, Volume 24, at pp.80-105. Hannan, N. F. (2015) "A Comparative Analysis of the UNICTRAL Model Law on cross-border insolvency in Australia, Canada, New Zealand, United Kingdom and the United States of America" *University of Western Australia, School of Law*, 2015

[7] Walters, A. "Modified Universalism & The Role of Local Legal Culture in the Making of Cross-Border Insolvency Law" (2019) 93(1) *Am. Banker. L.J.* 47

The universalism ideals of the Model Law are restricted by English common law in respect of the recognition and enforcement of foreign judgments due the longstanding operation of the rule in *Gibbs*.[8] This common law principle, which has been in existence for over 130 years, provides that the discharge of a debt under foreign insolvency law will not be given effect in the UK in circumstances where the contract under which the debt has arisen, is governed by UK law. The rationale for that principle is that it would otherwise enable the laws of a foreign jurisdiction to determine the rights and obligations of the parties, to which they had not agreed to be bound. Unfortunately, that rule promotes a territorialist approach to cross-border insolvency which is contrary to what is intended under the Model Law. This is because it prioritises the rights of local contracting parties above those of a collective body of creditors which is inconsistent with the global aspiration of a single system of adjudication and distribution.

Proponents of the *Gibbs* principle advocate that it provides certainty on the jurisdiction and governing law for insolvency and prevents opportunistic creditors from engaging in forum shopping.[9] It was also observed by the English Court of Appeal in *Bakhshiyeva*[10] that the rule prevents a party from unilaterally amending the terms of the agreement insofar as it relates to any restructuring process which might be undertaken. In that case, the Court expressly rejected the use of the Model law in a manner which was designed to circumvent the rule in *Gibbs*.

The law on recognition and assistance in the UK then evolved somewhat with the leading Privy Council decision of *Cambridge Gas*.[11] In that case, Lord Hoffman developed a new rule for the recognition of insolvency related judgments and its application even extended to the recognition of US judgments on Chapter 11 plans of reorganisation, thus taking a step forward for the promotion of universalism ideals.

In short, it was Lord Hoffman's view that common law assistance must at least be able to extend to giving provision for whatever could have already been done had it been a domestic insolvency meaning that local remedies under English law were then suddenly available. This was a significant development in English common law and had the benefit of avoiding the need to commence parallel proceedings in the UK Courts in relation to foreign insolvency proceedings.[12] The other important feature of the decision is that it provides for judicial assistance for creditors who did not participate in, or submit to, the foreign proceedings.

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[8] *Antony Gibbs & Sons v La Societe Industrielle team Commerciale des Metaux* [1890] LR 25 QBD 399

[9] See for example, Elliot, P. "Cambridge Gas – so much hot air?" (2012) 6 *C.R. & I.* 217 and Baird, K. "No more crystal ball glazing" (2013) *Spr. Recovery* 8

[10] *Bakhshiyeva v Sberbank of Russia* [2019] B.C.C. 452 at [93].

[11] *Cambridge Gas Transport Corp v Official Committee of Unsecured Creditors of Navigator Holdings Plc* [2006] *B.C.C* 962

[12] For a discussion on the pros and cons of parallel proceedings, see Vaccari, E. (2022) "WHOA, Brexit! What future for London as Europe's (largest) insolvency forum?" *Journal of International Banking Law and Regulation*, 2022, 37(2), 46-68

However, that all changed in 2012 with the UK Supreme Court's ruling in *Rubin*.[13] In that case, it was held that the English court would not enforce a judgment made by a New York court in insolvency proceedings to which the defendant did not submit. The justification for that decision was to prevent English parties from being subject to proceedings of a foreign jurisdiction to which they did not agree to be bound. Be that as it may, *Rubin* is contrary to the principle of universalism and to the objectives of the Model Law which strive to facilitate a single main insolvency proceeding for all creditors.

For those who has hoped that Rubin may have been an isolated ruling, it was unfortunately followed with support in the decisions in *Saad Investments*[14] and *Singularis*.[15]

2.2.2 *US*

The position in the US is quite different in relation to recognition and enforcement. The US has implemented the Model Law (and its universalism ideals) in a much more effective way by ensuring that the definition of "Foreign Proceeding" in s.101(23) of the US Bankruptcy Code includes proceedings in a foreign country "*under a law relating to insolvency* <u>*or adjustment of debt*</u>". These last four words do not feature in the UK legislation and therefore the Courts have adopted a more restrictive interpretation of what constitutes a foreign proceeding.[16]

The far more expansive definition in the Bankruptcy Code has meant that US Courts have been willing to recognise as foreign proceedings, UK schemes of arrangement which restructure US law governed debts, assuming of course that the Model Law's jurisdictional requirements have been met in relation to COMI or an establishment in the UK.[17]

Indeed, the US has even been prepared to recognise and enforce a settlement agreement arising from Croatian proceedings where part of the agreement involved the restructuring of English law debt, notwithstanding the fact that an English Court, in applying the *Gibbs* rule, would itself be unlikely to do so.[18]

In *Agrokor*, the US Court undertook an analysis of Croatian insolvency law and procedure in order to assess whether its process was sufficiently fair so as to satisfy the factors set out in *Finanz AG Zurich*.[19]

[13] *Rubin v Eurofinance* SA [2012] UKSC 46.
[14] *PricewaterhouseCoopers v Saad Investments Ltd* [2015] *B.C.C.* 53
[15] *Singularis Holdings Ltd v PricewaterhouseCoopers* [2015] *B.C.C.* 66
[16] See the Cross-Border Insolvency Regulations 2006 (CBIR) (SI 2006/1030), Sch. 1 reg 2(i)
[17] McCormack, G. (2023) "UK contracts and modification under foreign law: time to consign the Gibbs rule to legal history?" *Journal of Business Law,* 2023, 4, 289-308. For a further discussion of recognition and enforcement in the US and the UK, see Warner, G. R. (2022) "Comparative Collectivity – EU and US Approaches", *International Insolvency Review* (forthcoming); Available at SSRN: https://ssrn.com/abstract=4250421 or http://dx.doi.org/10.2139/ssrn.4250421
[18] Re Agrokor dd, 591 BR 163 (Bankr SDNY 2018). See also Matthews, J. (2017) "Chapter 15 and the English Cross Border Insolvency Regulations: the great divergence?." *Journal of International Banking & Finance Law*, 2017, Volume 32, Issue 5
[19] Finanz AG Zurich v Branco Economico SA, 192 F.3D 240, 249 (2D CIR 1999)

Having reached the conclusion that the law "*tracks closely to the structure*" of the US Bankruptcy Code and many other foreign insolvency laws, the US Court concluded that the procedure was fair and subject to the proper jurisdiction of the Croation Court.

It then considered whether there were any reasons as to why it should not recognise and enforce the settlement agreement. It was of the view that there weren't any, despite the fact that several other courts had refused to do so and the English Courts would also likely struggle with that on account of *Gibbs*.

In fact, the US Court went on to say that as a matter of comity, just because the UK Courts apply Gibbs, it does not mean that it should follow the rule in "*deciding whether to recognise and enforce the decision of a court of another jurisdiction.*"[20]

As a further example of the lengths to which a US Court is prepared to go to assist a foreign Court with the enforcement of an insolvency proceeding, s. 1521(a) of the Bankruptcy Code allows the Court to award a wide variety of relief for the purpose of preserving the assets of the foreign debtor or for otherwise providing assistance in respect of the foreign proceedings.[21] That relief is "*largely discretionary and turns on subjective factors that embody principles of comity*".[22]

In addition, section 1507 of the Bankruptcy Code enables the Court to offer "additional assistance" under US law based on considerations such as whether that assistance is "consistent with the principles of comity", will reasonable ensure, among other things: (i) the just treatment of all creditors and interest holders; (ii) protection of US creditors 'against prejudice and inconvenience in the processing of claims in such foreign proceeding'; and (iii) "distribution of proceeds of the debtors property substantially in accordance with the order prescribed" in the legislation.[23]

US caselaw has made it clear that the discretionary relief available under s 1507 and 1521 extends to the recognition and enforcement of a restructuring plan or scheme of arrangement approved by a foreign court.[24]

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[20] Re Agrokor dd, 591 BR 163 (Bankr SDNY 2018). See also McCormack, G. (2023) "UK contracts and modification under foreign law: time to consign the Gibbs rule to legal history?" *Journal of Business Law,* 2023, 4, 289-308.

[21] Moss, D. T. & Douglas, M. G. (2019) "A US perspective on Agrokor: bankruptcy court in chapter 15 case refuses to extend comity to the rule in Gibbs" Corporate Rescue and Insolvency Journal, 2019, 3 CRI 90

[22] Re Bear Stearns High-Grade Structured Credit Strategies Master Fund Ltd, 329 BR 325, 333 (SDNY) [cited Moss, D. T. & Douglas, M. G. (2019) "A US perspective on Agrokor: bankruptcy court in chapter 15 case refuses to extend comity to the rule in Gibbs" Corporate Rescue and Insolvency Journal, 2019, 3 CRI 90. For a further discussion on judicial developments in the US in relation to assistance, see Warner, G. R. (2015) "Cross-Border Cooperation in the United States: A Retreat or Merely a Pause?" *Nottingham Insolvency and Business Law eJournal*, 2015, 21

[23] See Moss, D. T. & Douglas, M. G. (2019) "A US perspective on Agrokor: bankruptcy court in chapter 15 case refuses to extend comity to the rule in Gibbs" Corporate Rescue and Insolvency Journal, 2019, 3 CRI 90

[24] See In Avanti Comm'ns Grp plc, 582 BR 603 (Bankr SDNY 2018); In re Rede Energia SA 515 BR 69 (Bankr SDNY 2014); In re Metcalfe & Mansfield Alternative Investments, 421 BR 685 (Bankr SDNY 2010). [cited Moss, D. T. & Douglas, M. G. (2019) "A

Although there are still circumstances in which the Court may decline to grant relief – such is if isn't in the interests of the creditors and the debt's interests are also not sufficiently protected (section 1522) or if the relief would be contrary to the public policy of the US (section 1506) – recognition and enforcement of foreign insolvency proceedings in the US is clearly much easier than it is in the UK.[25]

2.3 COMI – Article 16

A central feature of the system created by the Model Law is to ensure a single set of main proceedings for the adjudication and distribution of assets is the COMI of the relevant company. The determination of the COMI will decide which proceedings (assuming more than one are commenced) are classified as the Foreign Main Proceedings, which then has significant implications on the rights and remedies available to creditors, the recognition of foreign proceedings and the overall efficiency of the insolvency process.

The Model Law provides the starting point for the determination of the COMI in paragraph 3 of Article 16 which states that "*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 centre of the debtor's main interests.*"

However the UK and the US have taken different approaches as to how the COMI is determined which has had a significant effect on the identification of the Foreign Main Proceedings.

2.3.1 *US*

Beginning with the position in the US, in enacting the Model Law into Chapter 15 of the Bankruptcy Code, US Congress elected to substitute the word "evidence" for "proof" to make it clear that the burden is on the foreign representative to demonstrate where the COMI lies.[26] This intention was confirmed by the Court in *Tri-Continental Exchange Ltd* where it was held that:

"[i]n effect, the registered office (or place of incorporation) is evidence that is probative of, and that may in the absence of other evidence be accepted as a proxy for, 'centre of main interests.' However, '[t]he registered office … does not otherwise have special evidentiary value and does not shift the risk

US perspective on Agrokor: bankruptcy court in chapter 15 case refuses to extend comity to the rule in Gibbs" Corporate Rescue and Insolvency Journal, 2019, 3 CRI 90]

[25] Assuming of course that the foreign insolvency proceedings are not taking place in the European Union where legislative assistance is much greater.

[26] See the House of Representatives Committee on the Judiciary, United States Congress, *Bankruptcy Abuse Prevention and Consumer Protection Act* (8 April 2005), HR Report Pub L No 109-31, 112-3 [cited Hannan, N. F. (2015) "A Comparative Analysis of the UNICTRAL Model Law on cross-border insolvency in Australia, Canada, New Zealand, United Kingdom and the United States of America" *University of Western Australia, School of Law*, 2015]

of non persuasion, ie the burden of proof, away from the foreign representative seeking recognition as a main proceeding."[27]

The Courts have also adopted two lines of authorities for how to determine the COMI: (1) the "nerve centre" or "principal place of business" test; and (2) the objective third party approach.[28]

The first of these tests emerged in *Tri-Continental Exchange Ltd*[29] where the Court held that the principal place of business concept was essentially the same as the COMI. There were further judicial refinements of what the principle place of business meant in non-insolvency related cases such as *Hertz v Friend*[30] where the Court held that it amounted to the "*nerve centre*" or "*headquarters*" of the company and was the place where the company's officers "*direct, control and coordinate the corporation's activities*".

In the insolvency context, other US courts have since adopted the terminology used in *Hertz.*[31]

2.3.2 *UK*

By comparison, the UK Courts have interpreted the concept of COMI less from a common law based approach, but more by reference to the *European Union Regulation on Insolvency Proceedings* (the EC Regulation), which applies to all EU member states (except Denmark) and which contains a codified definition of the term COMI.[32] Whilst there is still a rebuttable presumption that it's the place of the company's registered office, if that is overcome, then it's the location that a third party would perceive as being the centre of the debtor's operations.[33]

The leading authority in this regard is the decision from the European Court of Justice in *Eurofood*.[34] In that case, the Court was of the opinion that COMI "*must be identified by reference to criteria that are both objective and ascertainable by third parties*" and that "*objectivity and that possibility of ascertainment by third parties are necessary in order to ensure legal certainty and foreseeability concerning the determination of the court with jurisdiction to open main insolvency proceedings."*

[27] *In re Tri-Continental Exchange Exchange Ltd* 349 *B.R.* 627 [cited Rochelle, B. (2017) "Cross-Border Insolvency in the U.S. and U.K.: Conflicting Approaches to Defining the Locus of a Debtor's Center of Main Interests" *International Lawyer*, 2017, Volume 50, Number 2 at p.394-395]

[28] Rochelle, B. (2017) "Cross-Border Insolvency in the U.S. and U.K.: Conflicting Approaches to Defining the Locus of a Debtor's Center of Main Interests" *International Lawyer*, 2017, Volume 50, Number 2 at p.395.

[29] *In re Tri-Continental Exchange Exchange Ltd* 349 *B.R.* 627

[30] *Hertz Corp. v Friend 559 U.S. 77, 130 S. Ct. 1181, 175L. Ed. 2d 1029 (2009)*. For a further discussion, see Moller, C., McGovern E., Schaffer, E. & Venditto, M. (2015) "COMI and get it: international approaches to cross-border insolvencies" *Corporate Rescue and Insolvency Journal*, 2015, Volume 8

[31] See for example *In re Fairfield Sentry Ltd* 440 *B.R.* 60 Bankr. S.D.N.Y. 2010)

[32] See EC Regulation Article 3(1) Preamble at paragraph 13

[33] EC Regulation Article 3(1) Preamble at paragraph 13

[34] *In re Eurofood IFSC Ltd* 2006 ECR I-3813

There is an obvious logic to framing the test for COMI in this way as explained by the Court in *Re Stanford Int'l Bank Ltd* where it said that this test would "*provide certainty and foreseeability for creditors of the company at the time they enter into a transaction.*"[35]

Further caselaw has clarified that the test should be by reference to factors in the public domain and should exclude "*such matters as might only be ascertained on inquiry.*"[36]

2.3.3 *Additional uncertainty*

Some US Courts have diverged from the principal place of business test. In *Sphinx Ltd,*[37] the Court held that there were a number of factors which could rebut the presumption of the place of the registered office including the location of those who manage the debtor, the location of its primary assets, the location of the majority of its creditors, the place of the law of the most application jurisdiction and the perception of third parties.[38]

Subsequent cases have attempted to follow this analysis which mirrors the approach contained in the EC Regulation, in *Eurofood* and its subsequent line of authorities. For example in *British American Isle of Venice (BVI) Ltd*[39] and *Millenium Global Emerging Credit Master Fund Limited*,[40] the Court looked at a variety of these factors to determine that the COMI was somewhere other than the place of the registered office as would be readily identifiable by a third party.

That analysis has created uncertainty as to how a US Court will determine COMI. The disparity between the approaches of the US and UK Courts on the critical issue of COMI (which then decides where the Foreign Main Proceedings should take place, the consequences of which are substantial) is in contravention of the aspirations of uniformity and certainty prescribed by the Model Law. It is for precisely this reason that some commentators have suggested that the concept of COMI should be abandoned altogether.[41] They have contended that this uncertainty adds an unnecessary (and built in) cost to financiers of a company because they don't have the comfort of knowing where restructuring or insolvency proceedings will be filed. Aside from the different local laws applied around the world in determining the COMI of a company, another problem is that the COMI concept enables a debtor to shift its COMI overnight when it suits it by amongst other things, changing the location of the

[35] *In re Stanford Int'l Bank Ltd* [2010] EWCA (Civ) 137
[36] *In re Kaupthing Capital Partners II Master LP, Inc.* [2011] *B.C.C.* 338
[37] *In re Sphinx Ltd* 351 B.R. 103, 117-118 (S.D.N.Y. 2006)
[38] For a discussion on the interplay between comity and COMI in US jurisprudence, see Warner, G. R. (2019) "Conflicting Norms: Impact of the Model Law on Chapter 11's Global Restructuring Role" *St. John's University School of Law, Faculty Publications*, 2019
[39] *In re British American Isle of Venice (BVI) Ltd* 441 *B.R.* 713 (S.D. Fla. 2010)
[40] *In re Millennium Global Emerging Credit Master Fund Limited* 458 *B.R.* 63 (S.D.N.Y 2011)
[41] See Martinez, A. G., Casey, A.J. And Rasmussen, R. K. (2024) "Towards a New Approach for the Choice of Insolvency Forum" Episode 43 *INSOL Talks*

headquarters and the place of residence of its directors. This gives a debtor too much power and control over the process at the expense of the stakeholders and encourages undesirable forum shopping.

It is argued that COMI should be replaced with a provision in a company's constitutional documents which states where proceedings must be filed in the event of any restructuring or insolvency so as to give certainty to creditors of the relevant forum.[42] Such an approach would then allow financiers to assess upfront, whether that is a jurisdiction with which they would be comfortable.

2.4 Treatment of Foreign Creditors – Article 13

Article 13 of the Model Law provides that foreign creditors should have the same rights as local creditors to commence and participate in insolvency proceedings. Further, Article 13(2) expressly states that foreign creditors should not be ranked lower than non-preferential domestic creditors.

Notwithstanding that position, UNCITRAL allowed States to ability to exclude foreign tax claims in their implementation of Article 13 into their local law.[43] As a result, the UK and the US have taken different approaches on this issue.

2.4.1 *US*

In the US, foreign tax claims are not enforceable as that would have required the US to amend its domestic law (which it chose not to do).[44]

2.4.2 *UK*

By contrast, the UK seized on this opportunity to amend its legislation to allow for foreign tax claims and thereby overturn the decision in *Government of India v Taylor*[45] where it was held that a tax claim by a foreign state was unenforceable in the English Courts.

2.5 Application of Foreign Law to Available Relief – Article 21

One of the more contentious aspects of the Model Law is whether Article 21 allows a state to apply foreign law in relation to any relief which it grants. In other words, can there be an extra-territorial

[42] See Martinez, A. G., Casey, A.J. And Rasmussen, R. K. (2024) "Towards a New Approach for the Choice of Insolvency Forum" Episode 43 *INSOL Talks*

[43] See the Original Guide to Enactment at paragraphs 103-105.

[44] For a further discussion, see McCormack, G. & Wan, W. Y. (2019) "Model Law on cross-border insolvency comes of age: New times or new paradigms" *Singapore Management University, Research Collection Yong Pung How School of Law*, 2019

[45] [1955] AC 491

application of the foreign law to the recognizing state.[46] It has been noted by commentators that the provisions of Article 21(g) are rather ambiguous in this respect.[47]

In incorporating Article 21 into its legislation, the UK used the term "appropriate relief"[48] whilst Chapter 15 refers to additional relief that may be available to a US bankruptcy trustee subject to certain limitations.[49] Those limitations exclude the right of the foreign representative to rely on the US transaction avoidance provisions.

2.5.1 *US*

The US position is in contrast with Article 21 of the Model Law which provides a foreign office holder with standing to rely upon the domestic law in transaction avoidance claims. Accordingly, due to the Bankruptcy Code's departure from the Model Law, the US Courts have been more flexible in the relief which they are prepared to grant to the foreign representative.

For example, in *Re Condor Insurance Ltd*[50] a foreign office holder from a company in liquidation in Nevis, applied, in reliance on Article 21, for relief from a US Court that was available under Nevis law – namely the Nevis fraudulent transfer law – given that it wasn't able to avail itself of the US transaction avoidance provisions because of the limitations in Chapter 15.

The Fifth Circuit Court of Appeals held that this was permissible for reasons of comity as well as the fact that to do otherwise, would encourage foreign debtors to hide assets in the US which then be out of reach to the foreign office holders.

In reaching its decision, the Court noted that the statute did not preclude the bringing of foreign avoidance claims.

2.5.2 *UK*

By comparison, the UK Court held in *Re Pan Ocean Co Ltd*[51] that the UK's implementation of Article 21 did not allow the application of foreign law and that a foreign representative could only avail themselves of the relief that was available under English domestic law. In particular, the Court clarified

[46] see McCormack, G. & Wan, W. Y. (2019) "Model Law on cross-border insolvency comes of age: New times or new paradigms" *Singapore Management University, Research Collection Yong Pung How School of Law*, 2019
[47] see McCormack, G. & Wan, W. Y. (2019) "Model Law on cross-border insolvency comes of age: New times or new paradigms" *Singapore Management University, Research Collection Yong Pung How School of Law*, 2019
[48] *Cross-Border Insolvency Regulations 2006 (UK) SI 2006/1030, Sch 1, Art 21(1)(g)*
[49] Section 1521(a)(7) of the US Bankruptcy Code
[50] (2010) 601 F 3d 319
[51] [2014] EWHC 2124 (Ch)

the scope of the term "appropriate relief" and was of the view that it did not extend to the application of foreign insolvency law.[52]

This position was confirmed in the case of *Bakhshiyeva v Sberbank of Russia*[53] in which it was held that relief granted under the Model Law should not interfere with the principle in *Gibbs* – namely that the modification of English law governed obligations was a matter for English law rather than foreign law. Therefore, any attempts by that foreign insolvency or restructuring law to modify those English law governed rights in circumstances where the creditors had not consented or participated in the proceedings, would result in the English Courts not granting the requisite relief.

3.1 **Conclusion**

UNCITRAL's aspirations behind the creation of the Model Law are to be applauded as it is a concept that promotes the ideals of universalism which can only serve to benefit international commerce. However due to differences in the approach with its implementation and variations in the national laws of Member States (in this case the US and the UK), this has caused disparate and inconsistent outcomes between the jurisdictions.

For example, the UK is far less likely to recognize or enforce foreign schemes or foreign judgments where English parties have not submitted to the jurisdiction of the foreign court. The English Courts have also adopted a different test for determining COMI to that of their US counterparts which can result in conflicting rulings between the jurisdictions as to the identification of the Foreign Main Proceedings. It is no wonder that many have advocated for the COMI concept to be scrapped all together and for it to be replaced with a contractual provision in the company's charter which clarifies the location of where any insolvency proceedings will take place.[54]

These substantive disparities are all contrary to the aims of the Model Law and will encourage opportunistic forum shopping by debtors and creditors alike. It is therefore recommended that reforms are made to the Model Law to address these issues which can then be implemented by national legislatures.

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[52] See above
[53] [2018] EWHC 59 (Ch)
[54] Martinez, A. G., Casey, A.J. And Rasmussen, R. K. (2024) "Towards a New Approach for the Choice of Insolvency Forum" Episode 43 *INSOL Talks*

4.1 **Bibliography**

Baird, K. "No more crystal ball glazing" (2013) *Spr. Recovery* 8

Elliot, P. "Cambridge Gas – so much hot air?" (2012) 6 *C.R. & I.* 217

Fernandes, D. L. & Pathak, D. (2018) "Harmonizing UNCITRAL Model Law: A TWAIL Analysis of Cross Border Insolvency Law", *Asian Yearbook of International Law*, Volume 24, at pp.80-105.

Hannan, N. F. (2015) "A Comparative Analysis of the UNICTRAL Model Law on cross-border insolvency in Australia, Canada, New Zealand, United Kingdom and the United States of America" *University of Western Australia, School of Law*, 2015

Martinez, A. G., Casey, A.J. And Rasmussen, R. K. (2024) “Towards a New Approach for the Choice of Insolvency Forum” Episode 43 *INSOL Talks*

Matthews, J. (2017) "Chapter 15 and the English Cross Border Insolvency Regulations: the great divergence?." *Journal of International Banking & Finance Law*, 2017, Volume 32, Issue 5

McCormack, G. & Wan, W. Y. (2019) "Model Law on cross-border insolvency comes of age: New times or new paradigms" *Singapore Management University, Research Collection Yong Pung How School of Law*, 2019

McCormack, G. (2023) "Conflicts in insolvency jurisdiction", *Journal of Private International Law*, 19(2) at pp. 186-207.

McCormack, G. (2023) "UK contracts and modification under foreign law: time to consign the Gibbs rule to legal history?" *Journal of Business Law*, 2023, 4, 289-308

Moller, C., McGovern E., Schaffer, E. & Venditto, M. (2015) "COMI and get it: international approaches to cross-border insolvencies" *Corporate Rescue and Insolvency Journal*, 2015, Volume 8

Moss, D. T. & Douglas, M. G. (2019) "A US perspective on Agrokor: bankruptcy court in chapter 15 case refuses to extend comity to the rule in Gibbs" *Corporate Rescue and Insolvency Journal*, 2019, 3 CRI 90

Rochelle, B. (2017) "Cross-Border Insolvency in the U.S. and U.K.: Conflicting Approaches to Defining the Locus of a Debtor's Center of Main Interests" *International Lawyer*, 2017, Volume 50, Number 2

Vaccari, E. (2022) "WHOA, Brexit! What future for London as Europe's (largest) insolvency forum?" *Journal of International Banking Law and Regulation*, 2022, 37(2), 46-68

Walters, A. "Modified Universalism & The Role of Local Legal Culture in the Making of Cross-Border Insolvency Law" (2019) 93(1) *Am. Banker. L.J.* 47

Warner, G. R. (2022) "Comparative Collectivity – EU and US Approaches", *International Insolvency Review* (forthcoming); Available at SSRN: https://ssrn.com/abstract=4250421 or http://dx.doi.org/10.2139/ssrn.4250421

Warner, G. R. (2015) "Cross-Border Cooperation in the United States: A Retreat or Merely a Pause?" *Nottingham Insolvency and Business Law eJournal*, 2015, 21

Warner, G. R. (2019) "Conflicting Norms: Impact of the Model Law on Chapter 11's Global Restructuring Role" *St. John's University School of Law, Faculty Publications*, 2019