INSOL GIPC - Short Paper
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Short Paper Question: #17 *Should the rules of the COMI jurisdiction that permit avoidance or claw back of transactions detrimental to creditors be applied in an ancillary or secondary proceeding instituted in a different jurisdiction? Include in your discussion an analysis of the approaches taken by the UNCITRAL Model Law on Cross-Border Insolvency, US law and the EU Insolvency Regulation.*

Title: Should the rules of the COMI jurisdiction that permit avoidance or claw back of transactions detrimental to creditors be applied in an ancillary or secondary proceeding instituted in a different jurisdiction? A comparative study of the approaches under the EU Insolvency Regulation, US law and UNCITRAL Model Law.

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INTRODUCTION

1. In the context of modern insolvency, regimes or mechanisms that allow for the avoidance or claw-back of transactions that are harmful to the general body of creditors (so called "avoidance regimes") are well recognised throughout the global system.

2. Properly functioning avoidance laws are a necessary and important element of any insolvency regime. While avoidance regimes are common, their characteristics and form diverge between countries as they attempt to achieve a balance that is appropriate for their specific circumstances.

3. Accordingly, the utilisation of avoidance regimes in cross-border insolvency is complex and problematic in circumstances where the substantive law may differ materially between nation-states.

4. The purpose of this paper is to consider the approaches taken by the EU Regulation, the Model Law and Chapter 15 of the Bankruptcy Code US (as defined below), with respect to the implementation of avoidance regimes in cross-border insolvency. In particular, with a view to considering whether the rules of the jurisdiction of the centre of main interest (**COMI**) ought to prevail in secondary or ancillary proceedings where there are concurrent foreign proceedings on foot.

AVOIDANCE REGIMES

5. Before turning to this question, it is necessary to first explore the principles and characteristics of avoidance regimes.

6. It is unsurprising that most jurisdictions provide for an avoidance regime to challenge, avoid or claw-back certain transactions entered into prior to the commencement of the insolvency procedure for the benefit of the general body of creditors.[1] These claw-back actions enable the appointee to retrospectively avoid certain transactions which may ordinarily be valid and not vulnerable to challenge under the general law of the relevant jurisdiction. [2]

7. While there is a degree of commonality in avoidance regimes, it is unsurprising that these regimes have developed in different ways and with diverging elements. For example, many civil law countries (e.g. France) adopt a single avoidance

[1] A. Gurrea-Martinez, "The Avoidance of Pre-Bankruptcy Transactions: An Economic and Comparative Approach", *Chicago-Kent Law Review*, 93:3, Art 5, 711-750, p712.
[2] A, Keay, p83.

action that is broad enough to capture any harmful transaction to the body of creditors. This can be compared with a number of common law jurisdictions (e.g. Australia) that implement a double set of avoiding powers designed to avoid: (i) undervalue or fraudulent transactions; and (ii) unlawful preferences.[3] Similarly, there may also be divergence in the period under which a transaction is subject to claw-back.[4]

8. Importantly, avoidance regimes represent a departure from the general commercial law in that valid transactions may be unwound in the 'zone of insolvency'. This represents a marked divergence from principles of legal and commercial certainty that underpin the global economy. An avoidance regime that has excessively low barriers to effective utilisation (i.e. making it too easy to avoid a transaction) may act as a detriment to economic growth.

9. While this is a possibility, it is argued that the negative aspects are outweighed by an effective and well-balanced avoidance regime that supports collectivism and which: (i) prevents or avoids opportunistic value destroying actions of debtors; (ii) prevents a race to secure assets; (ii) protects from participants taking advantage in instances of financial distress; and (iv) promotes early detection of financial distress.[5]

10. Inherent within all avoidance regimes is a balancing exercise that has been undertaken by legislators to ensure that the avoidance regime is fit for the particular characteristics and circumstances of the relevant state. This requires careful consideration of the respective benefits and detriments to ensure that the regime "*does not do more harm than good*".[6] This is an important consideration weighing against the imposition of COMI jurisdiction in a secondary proceeding.

EU REGULATION

11. The European Regulation on Insolvency Proceedings was introduced and became law across the European Union (**EU**), with the exception of Denmark, on 31 May 2002 and was recast in 2015 (**EU Regulation**).[7]

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[3] A. Gurrea-Martinez, p715.
[4] "Extraterritorial Avoidance Actions Under the US Bankruptcy Code", *Harvard Law Review*, 135(8), 2173-2194 at 2177. For example, Germany's lookback period in respect of the equivalent of intentional fraudulent transfers is ten years compared to two years under US law whereas the Cayman Islands does not have such a provision.
[5] Ibid at p714. Also see A. Keay at 81 and 84.
[6] A. Gurrea-Martinez, p750.
[7] European Union Regulation on Insolvency Proceedings, Council Regulation of 29 May 2000 on Insolvency Proceedings (EC) No 1346/2000 published in Official Journal L160

12. The focus of the EU Regulation is on the efficient and effective administration of cross-border insolvency proceedings, that concern a debtor with a COMI within the EU, to support the operation of the internal market. While the EU Regulation deals with problems of jurisdiction, applicable law, recognition and enforcement, it does not seek to harmonize the underlying insolvency procedures or practices of participating countries.[8]

13. The framework provided by the EU Regulation is split between 'main' and 'secondary' proceedings. The main proceedings will open in the member state in which the COMI of the debtor company is situated, as assessed at the time of the opening of the proceedings.[9]

14. Under the EU Regulation, the opening of main proceedings has wide ranging impact provided that no secondary proceedings are opened. Indeed, the office holder is able to rely on and enforce the powers obtained from the COMI jurisdiction in all other member states.[10] In other words, the member state of the COMI 'exports' the powers of the office holder under that state to every other member state.[11]

15. As confirmed in *CeDe Group v Kan*, jurisdiction is obtained pursuant to Article 6 with applicable law to naturally follow pursuant to Article 7.[12] Accordingly, the law applicable to the insolvency proceedings and the effect of the proceedings is that of the member state where the proceedings are opened (i.e. the *lex concursus* rule).[13]

16. The *lex concursus* also applies to avoidance actions.[14] This is made expressly clear pursuant to Article 7(m) of the EU Regulation that confirms the law of the COMI jurisdiction (being where the main proceedings are opened) govern "*the*

(30 June 2000). See Insolvency Regulation (EU) No 2015/848, which entered into force on 26 June 2015.

[8] R. Parry, J. Ayliffe QC and S. Shivji, *Transaction Avoidance in Insolvencies*, 3rd edition, Oxford University Press, London (2018), [21.81]. Also see A Keay at 80.

[9] R. Parry, [21.83]. See Article 3(1) of the EU Regulation.

[10] R. Parry, [21.84]-[21.85]. Also refer to Article 7 of the EU Regulation.

[11] R.J. van Galen Deventer, *An Introduction to European Insolvency Law*, Wolters Kluwer, (2021), at [74].

[12] Judgment of 21 November 2019, C-198/18 ECLI:EU:C:2019:1001 (*CeDe Group v KAN*). The Judgment confirmed that the EU Regulation intended to "*reach a correspondence between courts which have international jurisdiction and the law applicable to insolvency proceedings. Other than in situations in respect of which that regulation expressly provides for provisions to the contrary, the law applicable … follows the international jurisdiction determined in accordance with Article 6 of that regulation*".

[13] See Article 7 of the EU Regulation.

[14] A. Keay at 82.

rules relating to the voidness, voidability or unenforceability of legal acts detrimental to the general body of creditors".

17. Importantly, the serious and extensive ramifications of adopting the *lex concursus* in respect of avoidance actions are tempered by Article 16, which provides that the effect of Article 7(m) does not apply if: (i) the legal act concerned is governed by the law of another member state; and (ii) the law of that member state does not allow any means of challenging/avoiding that act.

18. The judgments of the European Court of Justice (**ECJ**) in *Nike v Sportland* and *IVinyls Italia v Mediterranea di Navigazione* are authority for the proposition that an office holder is required under the EU Regulation to establish that a transaction can be avoided under the laws of the state of the insolvency proceeding. If successful under the *lex concusus*, the defendant can then raise a defence that either the act is not voidable under the *lex casae* or the relevant conditions to avoid the transaction under the *lex casae* have not been fulfilled.[15]

19. However, it is also possible for secondary proceedings to be opened in any jurisdiction in which the debtor company possesses an 'establishment'.[16]

20. While it is the general rule that the law of the COMI jurisdiction will apply in all other member states, in the event of secondary proceedings, the applicable law will be the law of the country where these secondary proceedings are opened.[17] Further, Article 35 of the EU Regulation confirms that Article 7 also applies to such proceedings albeit that such secondary proceedings are limited to the assets of the debtor in that state.

21. By way of example, if a company that is to be wound up had its COMI in France, but was also established in the Netherlands, the main jurisdiction would be France. Secondary proceedings could be opened in the Netherlands which would apply Dutch law. If no secondary proceedings were opened, then the office holder

[15] R.J. van Galen Deventer, [137]. See ECJ 15 October 2015, C-310/14 ECLI:EU:C:2015:690 (*Nike European Operations Netherlands BV v Sportland Oy*); ECJ 8 June 2017, C-54/16, ECLI:EU:C:2017:433 (*IVinyls Italia v Mediterranea di Navigazione*).
[16] See Article 3(2) of the EU Regulation. Establishment is defined under the EU Regulation to mean: "*a place of operations where the debtor carries out a non-transitory economic activity with human means and assets or has carried out such an activity in the three months prior to the request to open main proceedings*".
[17] See Article 35 of the EU Regulation.

would be entitled to apply French law in the Netherlands and any other member state.[18]

22. In this respect, the EU Regulation is a form of modified universalism in that the general position is that the law of the COMI jurisdiction applies to the insolvency proceeding and all matters that relate to the proceeding, however, the primacy of the COMI jurisdiction is subject to both Article 16 and Article 35 in the case of secondary proceedings.[19]

MODEL LAW

23. In 1997, the United Nations Commission on International Trade Law (**UNCITRAL**) presented its model law on cross-border insolvency (**Model Law**). Since then, it has been adopted in 59 states in a total of 62 jurisdictions albeit that enacting states may have made modifications, in some cases substantial modifications, to the text of the Model Law.[20]

24. The Model Law, like the EU Regulation, is based on the concept of modified universalism but has much more modest objectives than the EU Regulation. Indeed, the principle underlying the Model Law, in contrast to the EU Regulation, is that the recognition of a foreign proceeding does not mean extending the effects of the foreign proceeding as they may be prescribed by the law of the foreign State.[21]

25. Under the Model Law, foreign proceedings may either be recognised as a "foreign main proceeding" (a proceeding taking place in a State where the debtor has its COMI) or a "foreign non-main proceeding" (a proceeding, other than a foreign main proceeding, where the debtor has an establishment).[22]

26. Pursuant to Articles 25 and 26 of the Model Law, where there are both main and non-main proceedings on foot then the office holders and courts are required to cooperate to the maximum extent possible.[23]

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[18] R. Parry, [21.88]. Also, see R.J. van Galen Deventer, [109].
[19] A. Keay at 80.
[20] Model Law status is available at https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency/status (accessed on 3 March 2024).
[21] Enactment Guide to the Model Law at [159].
[22] See Article 2 of the Model Law. Establishment in turn is defined to mean any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services.
[23] R. Parry at [21.119].

27. A proceeding that is recognised as a "foreign main proceeding" will automatically be provided with certain relief under the Model Law, whereas a "foreign non-main proceeding" will need to rely on the discretion of the court.

28. Pursuant to Article 21(1), and whether a main or non-main proceeding, the recognising court may grant any additional relief that it considers to be appropriate and necessary to protect the assets of the debtor or the interests of creditors. This is said to include, pursuant to sub-section (g), any relief that may be available under the laws of the receiving state.

29. Generally speaking, the interests of the office holder of a non-main proceeding in seeking relief will be considered to be narrower than the interests of the office holder of a main proceeding such that any grant of relief should not interfere with the administration of the main proceeding.[24]

30. In respect of avoidance mechanisms, Article 23 of the Model Law provides that the office holder has "*standing*" to initiate those avoidance actions specified by the enacting state in sub-section (1). However, where the proceeding is a non-main proceeding, the court would need to be satisfied there are assets that should be administered by the foreign non-main proceeding. Accordingly, under the Model Law, the office holder is provided with standing to initiate local law avoidance actions regardless of the substantive law of the COMI.

31. The Model Law provision is drafted narrowly in that it does not create any substantive right regarding such actions and also does not provide any solution involving conflict of laws.[25] The standing itself only extends to actions available to the local insolvency practitioner. Further, the Model Law does not address the right of a foreign main proceeding office holder to bring such an action in the enacting State seeking to rely on the substantive law of the foreign main proceeding.

32. While there is conflicting authority from courts of enacting states as to the scope of relief that can be ordered pursuant to Article 21(1), outside of the US (which is

[24] Enactment Guide to the Model Law at [158].
[25] Enactment Guide to the Model Law at [166].

discussed further below), a narrow interpretation is generally preferred by the courts[26] and leading international academics. [27]

33. In addition, Article 29 of the Model Law maintains the pre-eminence of local proceeding over the foreign proceeding, notwithstanding whether it is a main or non-main proceeding. In particular, it provides that any relief provided to the foreign proceeding must be consistent with the local proceeding thereby giving priority to local law over the COMI jurisdiction.

34. Further, Article 30 of the Model Law concerns where there are two or more foreign proceedings concerning the same creditor. While it promotes the objective to "*foster coordinated decisions that would best achieve the objectives of both proceedings*", the secondary proceeding must ultimately defer to the main proceeding by requiring relief to be consistent with the main proceeding.[28]

POSITION IN THE US

35. The Model Law was adopted in the Unites States in 2005 as Chapter 15 of the Bankruptcy Code. While there is obvious commonality between the Model Law and Chapter 15, there are a number of important differences.

36. Once recognised, a foreign representative may seek additional relief from the bankruptcy court or from other state and federal courts. Further, the office holder is authorised to bring a full (as opposed to ancillary) bankruptcy case under either Chapter 7 or Chapter 11.[29] If this occurs, the jurisdiction of the Bankruptcy court

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[26] See UNCITRAL Case Digest at p66 which states that "*in some States, it has been suggested, the recognising court can give effect to the position in the foreign main proceeding, which might mean the relief that can be ordered in the recognising State is not limited to the relief that would be available in a hypothetical domestic insolvency proceeding … However, some Courts have held that only relief available to local practitioners is available*". Also see *Sino–Forest Corporation*, 501 B.R. 655, 665–666 (Bankr. S.D.N.Y. 2013) – following the approach in *Metcalfe & Mansfield Alternative Invs.*, 421 B.R. 685, 697–699 (Bankr. S.D.N.Y. 2010), CLOUT 1007, on third-party releases; Vitro S.A.B. de C.V., 701 F.3d 1031, 1044 n. 42, 1053–1054 (5th Cir. 2013), CLOUT 1310; *Fogerty v Petroquest Resources, Inc. (In re Condor Ins. Ltd.)*, 601 F.3d 319; *Fibria Cellulose S/A v Pan Ocean Co. Ltd* [2014] EWHC 2124 [paras. 107–108] (30 June 2014), CLOUT 1482. 322–329 (5th Cir. 2010), CLOUT 1006.

[27] I Fletcher, *Insolvency in Private International Law*, 2nd ed, Oxford University Press, USA at [8.38] and R Sheldon, *Cross Border Insolvency*, 3rd ed, Bloomsbury Professional, United Kingdom, at [3.91]–[3.100]. Also see Morgan J in Fibria Celulose SA v Pan Ocean Co Ltd [2014] EWHC 2124 (Ch)

[28] Enactment Guide to the Model Law at [44].

[29] See s 1511 of the Bankruptcy Code.

will generally be limited to the debtor's assets located in the United States so as not to interfere with the foreign main proceeding.

37. A foreign representative's power to avoid transfers is governed by section 1521(a)(7) of the Bankruptcy Code, which provides that a court may "*grant any additional relief that may be available to a trustee, except for relief under sections 522, 544, 545, 547, 548, 550 and 724(a)*".[30] Accordingly, the position under Chapter 15 is that the foreign office holder is expressly excluded from relying on the US avoidance regime. This represents a fundamental difference from the Model Law.

38. This exclusion falls away in the event an office holder commences proceedings under Chapter 7 or Chapter 11 of the Bankruptcy Code. In other words, Chapter 15 excludes reliance on US avoidance laws in order to corral all such requests into local proceedings.[31]

39. Importantly, these provisions are silent as to whether or not a foreign office holder who obtains recognition is entitled to rely on foreign avoidance laws.

40. In *In re Condor Ins. Ltd*.[32], the court considered the position noting that "*if Congress wished to bar all avoidance actions whatever their source, it could have stated so, it did not*". The court went on to state that:

> "*The application of foreign avoidance law in a Chapter 15 ancillary proceeding raises fewer choice of law concerns as the court is not required to create a separate bankruptcy estate.*".

41. Further, in *Banco Cruzeiro*[33], the Court held that these provisions do not "*prohibit a foreign representative from bringing avoidance claims that are available to the foreign representative generally under non-bankruptcy law*". Similarly, the court held there was nothing to restrict reliance on "*an avoidance action that arises under the laws of the country governing the main proceeding*".

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[30] The Bankruptcy Code contains three principal avoidance provisions: section 548(a)(1)(A), which governs "actually fraudulent" transfers; section 548(a)(1)(B), which governs "constructively fraudulent" transfers; and section 547, which governs "preferences." See Harvard Law Review at 2177.
[31] Maiden at 72.
[32] Fogerty v Petroquest Resources, Inc. (In re Condor Ins. Ltd.), 601 F.3d 319, 325 (5th Cir. 2010), CLOUT 1006 at 327.
[33] Laspro Consultores LTDA v. Alinia Corp. (In re Massa Falida do Banco Cruzerio do Sul S.A.), No. :14-22974-BKC-LMI, 2017 WL 1102814 (Bankr. S.D. Fla. Mar. 23, 2017).

42. Accordingly, under Chapter 15, reliance on the avoidance laws of the COMI jurisdiction is allowed, however, the court will carefully consider the characteristics and limitations of any such claim to ensure compliance.

DIFFERENCES IN APPROACH

43. Given the importance attached to the COMI jurisdiction in determining the applicable law in the EU Regulation, and notwithstanding the mitigation impacted by Articles 16 and 35, it is unsurprising that the determination of the COMI is potentially more important under the EU Regulation than under the Model Law.[34]

44. This is particularly the case in circumstances where: (i) under the EU Regulation the decision of the court opening the foreign main proceedings is binding on all member states; (ii) while the Model Law only provides for limited recognition, the EU Regulation confers on the office holder the ability to exercise the power and laws provided by the COMI jurisdiction in all member states unless secondary proceedings are commenced. [35]

45. Further, under the Model Law, discretionary relief under articles 19 or 21 of the Model Law will often only be available if the law of the receiving state provides for that relief rather than as a matter of the law of the COMI jurisdiction. The position in the US under Chapter 15, however, is different, in particular with respect to avoidance mechanisms in light of section 1521(a)(7) of the Bankruptcy Code.

46. While there are certainly differences in approach, it remains the case that the EU Regulation, the Model Law and US law all to a degree promote the principle of modified universalism in cross-border insolvency. In so doing, they all involve the selection of one particular connected jurisdiction, generally the COMI, as the 'controlling' law subject to exceptions and special protections that are accorded in specific instances.[36]

47. The justification and rationale for modified universalism being to avoid "*a free-for-all in which the distribution of assets depends on the adventitious location of*

[34] Van Gaven at [118].
[35] Van Gaven at [119].
[36] L. Aitken, "Modified universalism: Confined or confirmed?", *Australian Bar Review*, 41 (2015), 27-43, p27.

assets and the race to grab them is to the swiftest, and the best informed, best resourced or best lawyered".[37]

COMI FORUM SHOPPING

48. In considering whether primacy is to be afforded to the COMI jurisdiction in determining the applicable avoidance regime in a secondary proceeding, it is also necessary to analyse the predictability and certainty that is provided by the provisions concerning the determination of the COMI jurisdiction.

49. Each of the EU Regulation, the Model Law and Chapter 15 proceed on the basis that there is a presumption that the registered office of the debtor company is the COMI.[38] Unlike the Model Law and Chapter 15, the EU Regulation, as a result of the 2015 recast, provides that this presumption does not apply if the recognition application is made within 3 months of a change in the registered office.[39]

50. In each of the EU Regulation, Model Law and Chapter 15, the registered office presumption may be rebutted. Pursuant to *Re Eurofood IFSC Ltd*, the ECJ held that this may be done only if "*factors which are both objective and ascertainable by third parties enable it to be established that an actual situation exists which is different from that which locating it at that registered office is deemed to reflect*".[40] The approach in the *Eurofood* case (i.e. an autonomous meaning of COMI that is readily ascertainable) has been influential in the interpretation of the Model Law and Chapter 15.[41]

51. In *Interedil v Intesa[42],* the ECJ was concerned with a case in which the registered office had been transferred from Monopoli (Italy) to London (UK). The ECJ held that the registered office may not be determinative if the company's central administration and actual centre of management is located elsewhere.[43]

52. The requirement for COMI to be determined by objective and ascertainable factors is intended to promote legal certainty and foreseeability concerning the

[37] *Stichting Shell Pensionefonds v Krys* [2015] AC 616; [2014] All ER (D) 280 (Nov); [2015] 2 WLR 289; [2014] UKPC 41 at [24].
[38] See Article 16(3) of the Model Law and s 1516(c) of the Bankruptcy Code.
[39] R. Parry, [21.84]-[21.85]. Also refer to Article 7 of the EU Regulation.
[40] 2 May 2006, C-341/04, ECLI/281. See R Parry at [21.83].
[41] R. Parry at 21.114.
[42] ECJ 20 October 2011 C-396/09, ECLI/671
[43] Van Galen at [72].

determination of the court with jurisdiction to open main insolvency proceedings with the potential for this to then impact substantive law considerations.[44]

53. Notwithstanding this, it remains the case that uncertainty as to the COMI of a debtor company continues and debtor companies may seek to alter their COMI status in advance of an insolvency event. While the transfer of an operating company's COMI prior to the opening of insolvency proceedings may not be feasible, it remains the case that holding or finance companies are able to alter their COMI status with relative ease.[45]

54. In some ways, such a change of COMI itself resembles an avoidable transaction in the sense that the debtor company has potentially taken steps to gain access to a more favourable regime to the detriment of the general body of creditors in circumstances when the relative positions of the creditors ought to be frozen and well understood.[46] The ability to manipulate the COMI jurisdiction is a further basis while it may not be appropriate for the COMI jurisdiction to apply in respect of avoidance laws in a secondary proceeding.

ADDITIONAL RELEVANT FACTORS

55. The promotion of legal and commercial certainty is generally considered to be supportive of economic growth and an important element of an efficient and successful insolvency regime.

56. It is clear from each of the EU Regulation, the Model Law and Chapter 15 that in certain circumstances it is preferable for the imposition of the law of the COMI jurisdiction to be subject to necessary exceptions to protect the interests of creditors and promote certainty. For example, Article 16 of the EU Regulation appears to have been included due to a desire to protect the legitimate expectations of parties and to provide for certainty of transactions in other member states. [47] In such circumstances, it is preferable that the expectations of the relevant stakeholders should not be prejudiced by different rules applicable to the *lex concursus*.

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[44] Van Galen at [64] and citing *Eurofoods*.
[45] Van Galen at [76]
[46] Van Galen at [75]. In *Fogerty v Petroquest Resources, Inc*, the US court held that concern about forum-shopping to the US for the use of more powerful avoidance powers motivated the drafting of Chapter 15 to limit their use to only those cases in which local proceedings were commenced.
[47] A Keay at 86. See Recital 67 of the EU Regulation.

57. Further, the extension of the law of the COMI jurisdiction has the potential to undermine the legitimate policy prerogatives determined by the insolvency legislators of the relevant jurisdiction as explained in further detail above.

58. In circumstances where secondary proceedings under the Model Law, EU Regulation and Chapter 15 are concerned solely with the assets in that jurisdiction and the courts are likely to take a narrow interpretation of any relief sought by the non-main office holder, the retention of local substantive avoidance laws is consistent with and likely to promote efficiency within the secondary proceeding. In particular, it is likely to promote public confidence in the cross-border insolvency regime.

CONCLUSION

59. Transaction avoidance, and the diverge between national regimes, remains an area of complexity in cross-border law. While the EU Regulation, Model Law and Chapter 15 all promote a form of modified universalism, there are marked differences in the approach under these regimes in respect of the primacy of the COMI jurisdiction. In particular, with respect to the substantive law of avoidance in secondary proceedings.

60. While it is arguable that all countries would benefit from avoidance recoveries in cross-border insolvencies being subject to uniformity, reciprocity and cooperation, until there is convergence and harmonisation of avoidance regimes, there will necessarily be conflict as to the substantive law to be applied albeit that this conflict will be moderated by the continued development of the EU Regulation and the adoption of the Model Law.[48]

61. In any event, there are legitimate reasons as to why the substantive avoidance law of the COMI jurisdiction should not be applied in secondary proceedings in a different jurisdiction. In particular, in light of: (i) the continued ability for debtors to undertake COMI forum shopping, which in itself could be a form of avoidance; (ii) the desire for legal and commercial certainty; (iii) the potential for the extension of the law of the COMI to undermine legitimate policy prerogatives in the state of the secondary proceedings; (iv) the maintenance of public confidence in the cross-border system; and (v) the ability of the parties to determine the relevant applicable law to their commercial transactions.

[48] R. Parry at [21.130].

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