

ADVANCES IN CROSS-BORDER INSOLVENCY COOPERATION: THE UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY

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International insolvencies have proliferated in the past decade, but the law of international insolvency has not kept pace. The United States does not have a single treaty with another country dealing with cross-border insolvencies¹ and many other countries have made relatively little progress in providing for a comprehensive legal framework for dealing with cross-border insolvencies.¹¹ Recently, however, significant strides have been taken to fill this void. In 1997, the United Nations Commission on International Trade Law (UNCITRAL) adopted a Model Law on Cross-Border Insolvency (Model Law). The Model Law provides a mechanism to coordinate cross-border insolvencies and is designed to be adopted by nations; it is not a treaty. The United States National Bankruptcy Review Commission unanimously recommended the Model Law's

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1. Section 304 of the Bankruptcy Code does address the issue of international insolvency. Section 304 permits the United States to act in an ancillary role to insolvency proceedings pending in the debtor's home country. See 11 U.S.C. Sec. 304 (1999).

2. The Nordic Convention (Scandinavia) and the Bustamante Convention (South America) are systems that have been adopted by segments of the international community, but have been of limited application.

adoption. The Model Law is now pending before Congress, and if accepted, would be enacted as a new Chapter 15 of the Bankruptcy Code.

This article summarizes the Model Law and illuminates its most significant aspects. Section (I) recounts the problems facing international insolvency and discusses the goals and achievements the Model Law is designed to accomplish. This section also defines the scope of the Model Law, an understanding of which is essential to a comfortable grasp of the Model Law's application. Section (II) describes a main component of the Model Law: providing access for a foreign representative or foreign creditor to the courts of an enacting state and providing for equality of treatment for such foreign creditors with their domestic counterparts. Section (III) details another major element of the Model Law, the concept of recognition of a foreign representative and a foreign proceeding, and discusses the types of relief that follow recognition. Section (IV) highlights the backbone of the Model Law, cooperation among all parties to an international insolvency proceeding. Section (V) addresses the issue of concurrent and multiple proceedings and discusses the Model Law's treatment of such situations. Finally, Section (VI) concludes that adoption of the Model Law would provide a useful framework for addressing many of the problems that currently plague international insolvencies.

I. THE PURPOSE AND APPROACH OF THE MODEL LAW

A. *Goals of the Model Law*

International insolvency has been subject to countless problems which are due, in no small measure, to the absence of a comprehensive cross-border insolvency framework. Conflicts between legal systems exist, resulting in the wasting of valuable resources. Considerable legal obstacles exist which constrain foreign representatives' and creditors' access to domestic courts and result in disparate treatment being accorded foreign and domestic creditors. The Model Law seeks to alleviate these recurrent problems by providing a simple and pragmatic legal framework that guides parties through many of the issues that arise in the international insolvency context.

The Model Law essentially has two main objectives. The first is to implement a more coherent and efficient international insolvency legal system. In pursuing this goal, the Model Law requires cooperation between the courts, provides for fair and efficient proceedings, and protects the interests of all parties including foreign and domestic creditors. The second goal of the Model Law is derivative of the first. Through the creation of a more structured international insolvency legal framework, the Model Law seeks to further the interests of the economic community. For example, a reliable international insolvency legal system will facilitate the maximization of a debtor's estate,

preserve investment and employment through the resuscitation of financially distressed companies, and improve upon trade through greater legal certainty.

The Model Law's goals are to be accomplished in three basic ways. First, the Model Law permits and requires courts and administrators to cooperate with one another to the maximum extent possible. Second, the Model Law enables a foreign insolvency administrator or representative to have standing in a local proceeding and to obtain relief in an efficient manner. Third, the Model Law requires a base level of equal treatment of foreign and local claims.

Despite the desire to create a cohesive international insolvency legal framework, it was recognized that the Model Law's force is only as good as its acceptance. In light of this concern, the drafters created the Model Law to be flexible and user-friendly, and therefore, encourage acceptance by the states.

To begin with, the Model Law is a succinct, ten page, 32 Article text, that is procedurally focused. This defining characteristic enables accepting countries to graft the Model Law to meet the substantive needs of their legal regime. Furthermore, the Model Law is considerably flexible, in that it is not designed to pre-empt the entire field of international insolvency. For example, it permits a court to deviate from the specific provisions of the Model Law if such would otherwise violate domestic public policy. Further, it recognizes that the assistance provided for in the Model Law is not exclusive, so that other existing legal forms of cooperation, such as the doctrine of comity, are not displaced.

B. *Scope of the Model Law*

The Model Law has well-defined parameters and covers situations that to date have generated conflict and confusion. First, the Model Law applies to insolvency proceedings where a foreign representative or foreign creditor requests assistance, or otherwise wishes to commence or participate in a proceeding, in a local court. Second, the Model Law applies when a local court requests assistance from a foreign representative or foreign court. Third, the Model Law governs concurrent, domestic, and foreign insolvency proceedings pending simultaneously.

The Model Law provides clear definitions for key terms used through its text. The Model Law defines a foreign proceeding as a collective proceeding conducted pursuant to the insolvency laws of a foreign state in which the debtor's assets are under the control of a foreign judicial body for the purposes of reorganization or liquidation. A foreign representative is defined under the Model Law as a person or body authorized to administer the foreign proceeding or to act as a representative of the foreign proceeding. This effectively incorporates the United States concept of a "debtor-in-possession." The Model Law does not apply to certain types of debtors, such as railroads and certain regulated financial institutions.

II. ACCESS

The provisions of the Model Law are simple and direct. The drafters wanted to create a model legal framework that was clear and concise so as to prevent interpretive disputes. Chapter II of the Model Law exemplifies this point in the context of providing foreign representatives and foreign creditors access to, and equal treatment under, local insolvency proceedings. The Model Law permits a foreign representative to apply “directly” to a court within the enacting State (Article 9). The Model Law also entitles a foreign representative to initiate a proceeding under the insolvency laws of the State if the conditions for commencing such an action are otherwise present (Article 11). After recognition of a foreign proceeding, the Model Law allows a foreign representative to participate in an insolvency proceeding of the debtor (Article 12). Furthermore, the Model Law mandates that foreign creditors be accorded the same base level of treatment as domestic general unsecured creditors under a local insolvency proceeding (Article 13). In other words, under the Model Law foreign creditors cannot be relegated to worse treatment solely on the basis of their foreign status.

III. RECOGNITION OF A FOREIGN PROCEEDING AND FOREIGN REPRESENTATIVE

A. *Process of Recognition*

Recognition is a prerequisite to cooperation under the Model Law. A foreign representative or foreign proceeding must first be recognized before relief can be granted. Traditionally, recognition of foreign insolvency representatives has been a cumbersome and costly process. By contrast, the Model Law provides a simple and easy standard for recognition and is designed to eliminate obstacles that can impede the process.

Under the Model Law, a foreign representative and foreign proceeding can be recognized in one of three ways (Article 15). First, recognition can be accomplished by submitting a “certified copy of the decision commencing the foreign proceeding and appointing the foreign representative.” Second, the foreign representative can submit a certificate from a foreign court affirming the validity of the foreign proceeding and that the applicant is a duly approved foreign representative. Finally, there is a third alternative that serves as a “catch-all” method. The court may grant recognition, despite the absence of proof called for in the first two methods, if it finds acceptable evidence that establishes the legitimacy of the foreign representative or foreign proceeding.

Consistent with the Model Law's theme of cooperation and efficiency, the drafters provided simple mechanisms to avoid disputes regarding the validity of documents submitted on behalf of a foreign representative or proceeding during recognition. The Model Law entitles a court to presume the authenticity of any document submitted in conjunction with the recognition of a foreign representative or foreign proceeding regardless of the legalization of those documents (*i.e.* apostille not required) (Article 16). Furthermore, the Model Law also mandates that a foreign proceeding shall be recognized once a showing under Article 15 has been made. The local court is obliged to determine the recognition application in a prompt fashion (Article 17).

B. *Pre-Recognition*

Although recognition under the Model Law is designed to be a speedy and efficient process, the Model Law permits temporary relief pending the application. It allows the court, at the applicant's request, to provide relief in order to protect the debtor's assets or the creditor's interests (Article 19). The Model Law provides a non-exclusive list of the types of temporary relief available, including "staying execution against the debtor's assets" and "entrusting the administration or realization of all or a part of the debtor's assets . . . to the foreign representative or another . . ." It should be noted, however, that the relief created pursuant to this section is only temporary. Once recognition is achieved, this relief will typically cease, although frequently it will be superseded by further, post-recognition relief.

C. *Effect of Recognition*

A foreign proceeding can be recognized as a "foreign main proceeding" (FMP) or a "foreign non-main proceeding" (FNMP). The classification of the foreign proceeding determines what type of relief the court may grant.

A FMP is defined by the Model Law as a foreign proceeding that takes place in the debtor's home country, or the location of the debtor's "centre of its main interest." The Model Law creates a rebuttable presumption that the debtor's registered office is the "centre of its main interests" (Article 16(3)). A FNMP is a foreign proceeding other than a FMP and will only be recognized if it occurs in a State where the debtor maintains an establishment. An establishment is a place of operations where the debtor undertakes "non-transitory economic activity with human means and goods or services." Thus, an establishment means more than simply an asset within the jurisdiction.

The classification of a foreign proceeding dictates the type of relief a court shall or may, as the case may be, grant in respect of the foreign proceeding. Upon the court's determination that a proceeding is a FMP, there is a mandatory, automatic stay (subject to local exceptions, such as sections 362(b)

and 363 of the Bankruptcy Code) of all proceedings against the debtor and transfers of the debtor's assets. Such mandatory relief is accorded in the context of a FMP. A FNMP is entitled only to permissive relief. Once a court recognizes a foreign proceeding as a FNMP or FMP, it may grant permissive relief, but the court must first satisfy itself that all creditors will be protected under the relief to be granted (Article 22). Permissive relief includes, but is not limited to, a further stay, an examination of witnesses and taking of evidence, and the entrustment of the debtor's assets to the foreign representative provided expressly that local creditors are protected in the event of such entrustment. In a FNMP, if the court grants permissive relief, the relief must relate to assets that, under local law, should be subject to the FNMP.

The distinction between a FMP and a FNMP is equally applicable to the right to commence avoidance actions (Article 23). The Model Law permits a foreign representative to initiate an avoidance action under the local insolvency laws of the State. A foreign representative in a FNMP, however, can only bring an avoidance action if it relates to assets that, under local law, should be subject to the FNMP.

IV. COOPERATION AMONG THE COURTS

Cooperation among the various parties to an international insolvency proceeding is indispensable to the Model Law's effectiveness. The goals of the Model Law can only be achieved so long as the parties communicate and cooperate with one another to the maximum extent possible. In light of this paramount concern, the Model Law's provisions addressing cooperation employ strict, non-precatory language.

The Model Law mandates that the courts and domestic representatives, "shall cooperate to the maximum extent possible with foreign courts or foreign representatives, either directly or through [an official]." (Articles 25 and 26). Additionally, in the interests of efficiency, the court or domestic representative is authorized to communicate directly, or through an official, with the foreign representative or foreign court. Such requirement and authorization is particularly important in the civil law context, where a court may find it difficult to act absent specific statutory direction.

The Model Law provides a non-exclusive list of methods that may be employed to facilitate cooperation (Article 27). The means of cooperation include: the appointment of a mediator or other go-between, coordination of the proceedings, communication of information, or any other measure the court deems appropriate. The courts are given a wide degree of latitude in deciding how to implement these measures and how to achieve the goal of cooperation.

V. CONCURRENT AND MULTIPLE PROCEEDINGS

Chapter V of the Model Law addresses the confusing issue of commencing and coordinating simultaneous local and foreign insolvency proceedings. To no surprise, the Model Law provides clear definitive guidelines on how to handle such situations. Chapter V is broken down into five articles, three of which directly address the problems involved in concurrent and multiple proceedings.

The first of these articles focuses on the situation where a domestic insolvency proceeding is sought to be commenced subsequent to a recognized FMP (Article 28). Such a commencement is permitted only if the debtor has assets in the State. Further, the effect of the local proceeding shall be limited to the local assets, and to the extent necessary, to cooperate with the FMP in providing relief that relates to assets that under local law should be administered in the FMP.

The second article addresses two different cases where concurrent domestic and foreign proceedings are pending (Article 29). In both situations the court is required to cooperate with the foreign proceeding to the maximum extent possible pursuant to Articles 25, 26, and 27. The first situation involves an application for recognition of a foreign proceeding while a domestic proceeding is in progress. In such a case, the court can only grant relief to the foreign proceeding that is consistent with the local proceeding. Furthermore, if the foreign proceeding is recognized as a FMP, the mandatory stay provision of Article 20 is inapplicable.

The other situation occurs when a domestic proceeding is commenced after recognition of the foreign proceeding or after an application has been filed for recognition (Article 29). In such a case, the court will review and modify, if necessary, any relief that it had previously granted under Articles 19 or 21. If the foreign proceeding was recognized as a FMP and therefore, accorded a mandatory stay, the court is required to modify or terminate the stay if it is inconsistent with the domestic proceeding. The Model Law also provides that when continuing any relief granted to a foreign representative of a FNMP, the court must find that the relief relates to assets that, under local law, should be administered in the FNMP "or concerns information required in that proceeding."

The final relevant article under Chapter V addresses the circumstances of multiple simultaneously pending foreign proceedings (Article 30). When more than one foreign proceeding regarding the same debtor is pending, the domestic court is required to seek cooperation and coordination among the proceedings to the maximum extent possible. Multiple foreign proceedings will generally fall into one of three categories. In the first, the court will be faced with the task of formulating relief for the representative of a FNMP after the court has

already recognized a FMP. In such a case, any relief the court grants to the FNMP must be consistent with the FMP. The second situation is the direct opposite of the first: when a FMP is recognized subsequent to recognition of a FNMP or the filing of an application for recognition of a FNMP. Under these circumstances, the court must modify or terminate any relief it had previously accorded the FNMP if it is inconsistent with the FMP. Finally, where a FNMP is recognized after recognition of another FNMP, the court shall modify or terminate the relief granted to the earlier FNMP to facilitate coordination between the two proceedings.

VI. CONCLUSION

The benefits to be gained by a uniform, coherent framework for the coordination of international insolvencies cannot be understated. The Model Law presents a pragmatic solution for achieving this goal. The Model Law strives to promote cooperation. The Model Law is fair and equitable in that it generally requires equal treatment of all domestic and foreign creditors. It provides clear, intelligible guidelines for determining what type of relief can be expected and granted. It adopts simple and efficient procedures. Of most significance, the Model Law will help lift the cloud of legal uncertainty that surrounds international insolvency issues. By enhancing predictability, the Model Law will promote economic efficiency and, in the end, the entire international community will benefit.