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ARTICLE

Effective Handling of Cross-Border Insolvency: Is There an Effective Approach Already?

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1. Introduction

A consequence of the current tendency towards globalisation is that more and more cross-border insolvencies occur.[1] In view of this trend, there is a need for a solution on the issue of cross-border insolvency. This might explain why in the past decades there has not been such a large change in insolvency law in general, and cross-border insolvency in particular, as there has been recently.[2] Two developments concerning that matter are the European Insolvency Regulation ('the Regulation') and the UNCITRAL Model Law on Cross-Border Insolvency ('the Model Law').[3] The Model Law offers a way to adapt national insolvency law into one legal framework. The Regulation introduces a legal framework for EU Member States.[4]

The Regulation can be seen as the accepted version of the European Convention on Insolvency Proceedings that was out for adoption in 1995 and is a product of EU cooperation.[5] The Model Law is a product of UNCITRAL and INSOL International.[6] UNCITRAL promulgated the Model Law on Cross-Border Insolvency in 1997; the Regulation is from 29 May 2000 and came into effect on 31 May 2002.

Interesting for this article is that both the Regulation and the Model Law have the same objective. They both try to provide a resolution for cross-border insolvencies and at the same time offer legal certainty for citizens. A certainty that is wanted by their States.[7] In this article we will investigate the way the Regulation and the Model Law handle that objective to determine if the following statement is true: 'In the goal of handling cross-border insolvency, the UNCITRAL Model Law is more effective than the European Insolvency Regulation.' We will do this by addressing the following questions:

- What makes handling cross-border insolvency effective?
- How effective is the European Insolvency Regulation on the issues of scope, efficiency and level of unification?
- How effective is the UNCITRAL Model Law on the issues of scope, efficiency and level of unification?
- Is the UNCITRAL Model Law more effective than the European Insolvency Regulation in the goal of handling cross-border insolvency and what is the relevance of the outcome of that question?

Notes

1 In this article we shall use the English word 'insolvency', in America the word 'bankruptcy' is more common.

2 J.L. Westbrook, 'Multinational Enterprises in General Default: Chapter 15, The Ali Principles, and The EU Insolvency Regulation', (2002) 76 *American Bankruptcy Law Journal* p. 1. According to Westbrook we have to go back to the late nineteenth century to find a comparable period of activity in reform of insolvency laws.

3 General Assembly resolution 52/158 of 30 January 1998, Model Law on Cross-Border Insolvency of the United Nations Commission on International Trade Law, pp. 1-16 and Council Regulation (EC) No. 1346/2000 of 29 May 2000 on Insolvency Proceedings, OJ L 160, 30 June 2000 pp. 1-18.

4 B. Wessels, 'Germany and Spain Lead Changes Towards International Insolvency Law in Europe', (2003) Institute for Law and Finance, Frankfurt, Working Paper Series No. 15, pp. 1 and 3.

5 Established on the legal basis that is given by articles 65 and 67 of the EC treaty. On this basis the Commission and the Council have the right to improve the internal market by unifying rules for jurisdiction of the Member States, T.M. Bos, 'The European Insolvency Regulation and the Harmonization of Private International Law', (2003) *NILR* L 48.

6 UNCITRAL is a commission of the United Nations that has been set up to reduce obstacles in the field of international trade; INSOL International is the international association of insolvency practitioners. See R. Goode, *Principles of Corporate Insolvency Law* (Thomson/Sweet & Maxwell, London, 2005), p. 644.

7 S.M. Franken, 'Three Principles of Transnational Corporate Bankruptcy Law: A Review', (2005) 11 *European Law Journal* 235: 'The protection of local creditors and local policies is the most common justification for denying the effects of foreign bankruptcy proceedings'; and T.M. Bos, note 5, p. 52.

2. Effective handling of cross-border insolvency

To determine what effective handling of cross-border insolvency is, one should first determine what the purpose of insolvency itself is. Westbrook poses the following purpose:

> 'Despite a lack of general agreement about bankruptcy theory, there is a consensus that bankruptcy is a collective legal device that operates in each case to protect and adjudicate the interests of many stakeholders, even though there are disputes about the identity of the stakeholders.'[8]

Thus, insolvency is a legal device to protect stakeholders. How are stakeholders best served in a situation of cross-border insolvency? What is the most effective way of fulfilling the aforementioned purpose? In literature, two ways of handling cross-border insolvency are mentioned: territorialism and universalism.[9] Territorialism is the system in which each country seizes the local assets of an insolvent debtor and uses them for the benefit of local creditors, according to local policies (e.g. priorities in distribution, security rights and statutory priority rights). A local court is competent in a local insolvency procedure for assets located in that country. The substantive law will be the law of the court where the proceedings are opened.[10] This theory is based on the idea of national sovereignty.[11] One of the major drawbacks of territorialism is the 'grab rule'. Since assets that are located beyond the borders of the State where the insolvency procedure is opened do not fall under the jurisdiction of that procedure, a debtor can still dispose of those assets. At the same time creditors will try to secure their interests and grab as many assets as they can get a hold of.[12]

The theory of universalism states that one court leads a procedure on a worldwide basis. All the assets of the debtor, wherever located, fall under the insolvency proceeding of that court. In this theory, the court that leads that procedure receives information and cooperation from supporting proceedings in each involved country.[13] Also a 'choice of law' is made in the universal approach: usually the 'choice of forum' includes a choice for that country's law.[14] Both theories do not occur in their pure forms, they should be seen as the ends of a spectrum of diverse policies.[15]

The literature agrees on the theoretical superiority of universalism, but also admits that territorialism has a lot of practical advantages.[16] Universalism provides the opportunity to have a legal system that is symmetrical with the market and will reduce obstructions for international investments.[17] However, as said before, States are afraid that their citizens will lose protection if they approach the matter of cross-border insolvency according to the universal approach.[18] Other problems of universalism are the large differences between the national substantive law of States and the fear that debtors will 'forum shop'.[19]

So what makes handling cross-border insolvencies effective? A system that best serves the interests of stakeholders, wherever these interests are located. This system can be based on universalism or territorialism. Hereafter we will compare the Regulation with the Model Law on the issues of scope, efficiency and

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8 J.L. Westbrook, note 2, p. 4.

9 Furthermore, a difference is made between ancillary and parallel proceedings. The purpose of an ancillary proceeding is to be of assistance to a main proceeding that has been established in another country. Therefore, a cooperative attitude is needed, with as purpose to achieve a fair result for local creditors in a foreign main proceeding. The parallel proceeding does not have an assistant function. Two courts in a parallel proceeding will try to cooperate and coordinate in the settlement of the insolvency, but each of them handles the insolvency full domestic, see J.L. Westbrook, note 2, p. 5.

10 R. Mason, 'Cross-border insolvency law: where private international law and insolvency law meet', in Paul J. Omar (ed.), *International Insolvency Law: Themes and Perspectives* (Ashgate, Aldershot, 2008), p. 42.

11 R. Mason, note 10, p. 43.

12 B. Wessels, *International Insolvency Law*, (Kluwer, Deventer, 2006), p. 9.

13 R. Mason, note 10, p. 45.

14 S.M. Franken, note 7, p. 234.

15 S. Khumalo, 'International Response to the UNCITRAL Model Law on cross-border insolvency' (2004) Research paper Vrije University Amsterdam, the Netherlands, p. 7 (<www.iiiglobal.org> e-library>insolvency topics>UNCITRAL Model Law on Cross-Border Insolvency), 6 January 2009 and J.L. Westbrook, note 2, pp. 8-9 for the notions: 'modified territorialism', 'cooperative territorialism' and 'modified universalism'.

16 J.L. Westbrook, note 2, p. 8 and S.M. Franken, note 7, p. 246.

17 J.L. Westbrook, note 2, p. 3 and S. Khumalo, note 15, pp. 4-6.

18 T.M. Bos, note 5, p. 52. Personally, we think that the objective of insolvency law should be creditor protection on one hand, and debtor relief on the other hand. Their rights are best protected if their rights are recognised in as many countries as possible. Therefore, insolvency law is the most effective if their rights are recognised in as many countries as possible. States have to decide if they should hold on to the certainty that they can protect their citizens rights in the cases that an insolvent debtor has (sufficient) local assets to do so, or if they should give up this certainty and trust on an international insolvency settlement which purpose it is to have a fairer outcome in every case. To illustrate that States are frightened to adopt universalism we repeat that in 1995 the European Convention on Insolvency Proceedings almost came in to effect, but the United Kingdom refused to sign it, because of political reasons, see T.M. Bos, note 5, p. 32.

19 S.M. Franken, note 7, p 235 and S. Khumalo, note 15, p. 7. An interesting point of view by Franken is that local professionals who are afraid that universalism will result in a loss of business (because most of the main proceedings will be held in important financial centers), try to prevent their States from adopting universalism, see S.M. Franken, note 7, p. 246.

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on level of unification. All of these issues contribute to effective handling of cross-border insolvency. They are helpful in determining whether a more universal or a more territorial approach is applied.

3. The effectiveness of the European Insolvency Regulation

3.1. Scope

For applicability of the Regulation, several requirements should be met. For example, it is obvious that insolvency proceedings should be opened in an EU Member State. Article 1 paragraph 1 dictates that the Regulation 'shall only apply to collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator'. It follows from article 2 that collective insolvency proceedings are proceedings as set out in annex A of the Regulation. In this annex, insolvency proceedings that fall under the scope of the Regulation are listed by Member State.

Furthermore, the Regulation only applies if the centre of the debtor's main interests (COMI) is located in the EU, excluding Denmark.[20] This rule is the most important limitation of the Regulation's scope. The term COMI is considered to be a vague term, as it is not defined in the Regulation. Therefore, sometimes a court of an EU Member State will assume that the COMI lies in its own country, even though he would not have assumed that if the term COMI would have been more concrete. Because the Regulation has effect if the COMI of an insolvent debtor lies within the EU, the scope of the Regulation can be enlarged by the vagueness of that term. Article 3 paragraph 1 states that the place of the registered office is presumed to be the COMI of companies and legal persons. This is a presumption that can be rebutted. Goode criticises this presumption, because the place where companies are registered has, most of the time, nothing to do with the place where they actually conduct business.[21] For natural persons, recital 13 of the Regulation gives an indication of what the COMI is. It states: 'The "centre of main interests" should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties'. Regardless of presumptions and recitals, COMI remains a multi-interpretable term.

If the COMI falls outside of the EU, the Member States will fall back on their own private international laws concerning insolvency. Some authors see this as a major shortcoming.[22] Others believe that the Regulation, despite its limited territorial scope, will motivate Member States to treat non-EU members more universally than before, or even according to the Regulation.[23]

Insolvency proceedings concerning credit institutions and insurance companies are excluded from the scope of the Regulation. This is done because of the special position that financial entities have in an economy.[24] Because of Directives 2001/17 and 2001/24, which cover this issue, there is an arrangement for this subject within the EU. Therefore, we see this as a matter of *lex specialis*, an integral part of the legal system of the EU.[25]

Whatever the result of introduction of the Regulation may be, we must conclude that the legal consequences that are implied in the Regulation itself are limited to its territorial scope.

3.2. Efficiency

If the COMI of an insolvent debtor lies within the territorial scope of the Regulation, a main proceeding can be opened.[26] The qualification as main proceeding has great influence on the issue of recognition. If a court declares that it has jurisdiction in the case, this jurisdiction is automatically recognised in other Member States.[27] The Regulation is the first and, until now, only legal system regarding insolvency procedures that provides automatic effects and recognition on a regional scale, and is seen as a great achievement by the literature.[28] This recognition means that the effect of the moratorium that is a result of the main proceeding also gets universal applicability within the territorial scope

Notes

20 Article 3 Regulation. Denmark had a separate Protocol added to the Treaty of Amsterdam. That protocol did not supply in an opt-in clause regarding judicial cooperation on the subject of insolvency law, see T.M. Bos, note 5, p. 49.

21 R. Goode, note 6, p. 588

22 B. Wessels, note 4, pp. 2-9 and J.L. Westbrook, note 2, p. 22.

23 J.L. Westbrook, 'Chapter 15 at Last' (2005) 79 *American Bankruptcy Law Journal* p. 721. Westbrook expresses this opinion, without giving the impression that he agrees on the subject. Personal, we doubt if the Regulation can have that influence on countries such as the Netherlands and Sweden, who have a tradition of territorialism concerning cross-border insolvency.

24 Article 1 para. 2 Regulation.

25 The territorial scope of the directions is even wider then that of the Resolution, because it includes al twenty-five Member States (therefore, also Denmark), article 33 Directive 2001/17 and 36 Directive 2001/24.

26 Article 3 para. 1 Regulation

27 Article 16, 17 and 25 Regulation

28 J.L. Westbrook, note 2, p. 22.

29 J.L. Westbrook, note 2, p. 22.

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of the Resolution.[29] An exception to the automatic recognition is given in article 26, if recognition would be contrary to the public policy of a Member State.

The Regulation also provides the possibility for commencing territorial proceedings.[30] These can be either 'independent' proceedings or secondary proceedings. Independent proceedings are opened in a Member State prior to the opening of the main proceeding. These independent proceedings become secondary proceedings when a main proceeding is opened.[31] A secondary proceeding can be opened in every country where the insolvent debtor has an 'establishment'.[32] The term establishment is defined in article 2 sub h Regulation as 'any place of operations where the debtor carries out a non-transitory economic activity with human means and goods'. If a secondary proceeding is started, the legal effects of the main proceeding are no longer in force within the territory of that Member State.[33] The secondary proceeding can only seize the assets within the territory of that Member State.[34] This is a less efficient part of the Regulation. The large scope of a main proceeding can easily be narrowed by opening territorial proceedings in other Member States.[35] With regard to the communication between courts, the Regulation lacks regulation, but it contains directions for liquidators in the form of an obligation to cooperate and communicate relevant information.[36]

3.3. Level of unification

Contrary to most EU regulations, the European Insolvency Regulation mainly contains rules for private international law in the meaning of conflict of laws settlement. Its purpose is not to provide a uniform law regarding (cross-border) insolvencies throughout the EU.[37] The Regulation is concentrated on the unification of conflict of laws settlement; in the literature we have encountered three matters that will have positive effect on that goal.[38] First, the Regulation cannot be accepted with any exceptions. To a certain level, that is a guarantee for a uniform conception among the Member States. Secondly, the Regulation is a part of the legal system that is established by the EU. Therefore it will be maintained by the institutions of the EU. In our opinion, the European Court of Justice in particular contributes to unification among the Member States, because of its explaining role and its accepted authority.[39] Thirdly, the introduction of main proceedings in the way it is done by the Regulation. The automatic recognition that the Regulation prescribes is a unique form of universalism on the subject of cross-border insolvency and a contribution to the unification of the Member States in each case. One can also see the obligation of liquidators to communicate as a reinforcing matter on the topic of a uniform treatment of the Regulation.

On the other hand the vagueness of the term 'COMI', and to a lesser degree of the term 'establishment', can be seen as a threat to the unification of the Member States.[40] This is because they play such a relevant role in the acceptance of jurisdiction by the courts of the Member States.[41]

3.4. Effectiveness of the European Insolvency Regulation

So how effective is the Regulation in serving the interests of the stakeholders? That depends on where the insolvent debtor is located, since the Regulation has a limited territorial scope. If a court decides that the centre of main interests is located within an EU Member State, the insolvency proceeding will be much more efficient. This is largely due to the principle of automatic recognition in other EU Member States. The term COMI is not defined and remains vague. It is the task of the European Court of Justice to provide unification in the explanation of the term.

If an insolvent debtor merely has an establishment in an EU Member State a secondary proceeding can be opened. This is not a very effective procedure since in this kind of procedure the court has jurisdiction limited to assets located in that particular country. In a way, that part of the insolvency is not cross-border.

Notes

30 Article 3 para. 2 Regulation.
31 R. Goode, note 6, p. 573.
32 Article 3 para. 2 and 3 Regulation.
33 Article 27 Regulation.
34 Article 3 para. 2 Regulation.
35 For a similar opinion see J.L. Westbrook as cited in R. Goode, note 6, p. 577.
36 Article 31 Regulation.
37 T.M. Bos, note 5, pp. 32-33 and see Recital 13 to the Regulation.
38 T.M. Bos, note 5, p. 40.
39 Since article 65 and 67 of the EU treaty are the legal basis of the Regulation, the Court of Justice can only judge if a case has reached the highest national court.
40 See the judgment *Eurofood IFSC Limited* in which both the Irish High Court as the Parma Court in Italy assumed that the 'COMI' of the insolvent debtor Eurofood was located in their country. For a review on the case and on the term 'COMI', see J. Berends, 'The Eurofood Case: One Company, Two Main Insolvency Proceedings: Which One Is The Real One?' (2006) *NILR* LIII, pp. 331-361.
41 Article 16 Regulation: according to the Regulation the court that first opened the proceeding automatically has jurisdiction.

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So, as long as the COMI of the insolvent debtor lies within an EU Member State and all the assets of the debtor are located within an EU Member State, the Regulation is highly effective.

4. The effectiveness of the UNCITRAL Model Law on Cross-Border Insolvency

4.1. Scope

The legal status of the Model Law is in a certain way an unusual one. It is not a treaty or convention, it is not legally binding and no one can claim support from the Model Law at a foreign court. Of course, when properly incorporated in national law, the Model Law has legal force.

The Model Law is applicable in cases of cross-border insolvencies that take place in either an enacting State or a foreign State.[42] Article 1 paragraph 2 provides an opportunity to exclude financial entities from the scope of the Model Law. By enacting State is meant: a State that has incorporated the Model Law into its national laws. That makes the territorial scope of the Model Law dependent on the number of countries that convert the Model Law into national law. If in a case of cross-border insolvency only one of the involved countries has incorporated the Model Law, it will still have a regulating function, but especially on the subjects of communication and cooperation the Model Law needs two countries to have full effect.

At the moment, versions of the Model Law have been adopted by several countries. A version of the Model Law has been adopted by the US in Chapter 15 of the United States Bankruptcy Code that replaces paragraph 304 of that Code.[43] And, although with different density, Japan, Mexico, Poland, Romania and South Africa, among other countries, have enacted legislation that adopts the Model Law.[44] The United Kingdom has plans in this direction. According to Westbrook, disappointments have been Germany and Spain for not having adopted the Model Law, despite the fact that in both countries new legislation regarding cross-border insolvency came into force recently.[45]

A reasonable number of countries have adopted the Model Law. The fact that the USA and Japan have enacted the Model Law is especially interesting from an EU point of view. For this article it is important to note that the dependency of the scope of the Model Law on the number of enacting States is a weakness. It also gives the Model Law the potential of worldwide scope, simply because every State can incorporate its own regulations.

The sphere of application is determined in article 1 of the Model Law. The Model Law is applicable in the following situations: a court or representative from a foreign State seeks assistance in the enacting State, a court or representative of the enacting State seeks assistance in a foreign State, two proceedings take place at the same time or stakeholders want to open or participate in an insolvency proceeding in an enacting State. Articles 3 and 6 limit the sphere of application. Article 3 determines that obligations from treaties prevail over the Model Law and article 6 states that the Model Law has no effect when its provisions are manifestly contrary to the public policy of an enacting State.

So, the Model Law can, in theory, have worldwide scope, but has to rely on countries to adopt the Model Law and trust that these countries do not change the Model Law too rigorously.

4.2. Efficiency

Under the Model Law, a foreign representative can seek recognition of a foreign proceeding. This requires the handing over of certain documents, such as a certificate from the foreign court that affirms the existence of the foreign proceeding.[46] The Model Law does not give universal effect to an insolvency proceeding; in each involved country a foreign representative has to seek recognition of the foreign proceeding.[47] It does try to make such recognition as fast and inexpensive as possible.[48] A foreign representative has a right to direct access to a court in an enacting State.[49] He does not need formal authorisation by the authorities of an enacting State. It is also possible for a foreign representative to commence an insolvency proceeding in an enacting State.[50] Of course the requirements to commence such a proceeding should be met. Furthermore, article 13 paragraph 1 states that foreign creditors have the same rights as local creditors with respect to the commencing

Notes

42 Article 1 Model Law.
43 Chapter 15 of the United States Bankruptcy Code excludes the insolvencies of natural persons that fall under Chapter 13 of the Bankruptcy Code, which is different from what the Model Law intended, see J.L. Westbrook, note 23, pp. 718 *et seq*.
44 J.L. Westbrook, note 23, pp. 720-721.
45 J.L. Westbrook, note 23, p. 721.
46 Article 15 Model Law.
47 R. Goode, note 6, p. 651. For the definition of 'foreign representative' see article 2 sub d Model Law.
48 See J.L. Westbrook, note 23, pp. 721-723 for the American application of these regulations.
49 Article 9 Model Law.
50 Article 11 Model Law.

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of and participation in insolvency proceedings. This provision is meant to prevent discrimination against foreign creditors. Local liquidators as well as local courts and representatives are stimulated to cooperate and communicate relevant information.[51]

The Model Law provides a regulation for foreign proceedings.[52] Foreign proceedings are collective proceedings in a foreign State that relate to insolvency law and that see about reorganisation or liquidation.[53] The Model Law also defines foreign main proceedings and foreign non-main proceedings. The former is a procedure taking place in a State where the debtor has its COMI and the latter is a procedure in a foreign State where the debtor has an establishment. It can be argued that a foreign proceeding can be main nor non-main, since the definition of 'foreign proceeding' is not limited to these two notions.[54] There can be a foreign proceeding in a State where a debtor does not have its COMI or an establishment, but does have assets. There are multiple provisions of the Model Law which use the term 'foreign proceeding' and could be applicable in such a way. It is defended by some that article 17 paragraph 2 limits recognition to main and non-main proceedings.[55] This conclusion seems correct, but the matter remains uncertain.

Further uncertainty is provided by the fact that no definition of the term COMI is given. In contrast to the Regulation not even a presumption for legal persons and companies is given. The Guide to Enactment states that the amount of new legal terminology is limited, but the courts of enacting States shall have to explain the term independently.[56] The European courts can seek connection with the explanation of the term as used in the Regulation, but uncertainty remains as courts worldwide can explain the term differently.

In some aspects the Model Law is efficient. Examples are the direct access of foreign representatives and the possibility for the foreign representative to commence a proceeding in an enacting State. In other aspects the Model Law is less efficient, especially with regard to the term 'foreign proceeding' and the term 'COMI'. This matter could have been solved by clear formulation when the Model Law was drawn up.

4.3. Level of unification

The level of unification of the Model Law is heavily influenced by the fact that it concerns 'model law' and not a treaty or convention. It gives States the possibility to incorporate their own version of the Model Law and as a result, to change its legal consequences.[57] UNCITRAL tries to expedite the level of unification of the enacting States by the declaration of a Guide to Enactment, but that and recommending uniform enactment is all UNCITRAL and the United Nations can do.[58] On the other hand, the obligation to communicate and cooperate for liquidators, courts and representatives will have a positive effect on the uniformity of the use of the Model Law. The Model Law lacks a 'UN Court of Justice' for uniform explanation of the used terms.

4.4. Effectiveness of the Model Law

The question remains how effective the Model Law is in serving the interests of the stakeholders. The answer to that question is mainly decided by the States that are involved in the proceedings. Since the Model Law is soft law, it is up to the States to decide if they want to adopt it. If all States have adopted the Model Law it can be very useful. If only one or none of the involved States have adopted it, the effectiveness is largely diminished. Another limitation to its effectiveness is the fact that recognition of the foreign proceeding has to be sought in every country.

The rights given by the Model Law are quite effective and make cross-border insolvencies more manageable. A major drawback is the uncertainty about terms used in the Model Law. This particularly applies to the terms 'foreign proceeding' and 'COMI'. That uncertainty expresses itself in the application of the Model Law. Since

Notes

51 Chapter IV Model Law.
52 Article 17 Model Law.
53 Article 2 sub a Model Law.
54 R. Goode, note 6, pp. 647-649.
55 R. Goode, note 6, p. 649.
56 Guide to Enactment, p. 23. Available at <www.uncitral.org> (6 January 2009).
57 Interesting is what seems to be a disagreement between the author Westbrook (J.L. Westbrook, note 2, p. 24) and the Japanese author Yamamoto (K. Yamamoto, 'New Japanese Legislation on Cross-border Insolvency As Compared with the UNCITRAL Model Law', (2002) *International Insolvency Review* p. 95). They quote respectively: 'Japan's version of the Model Law is the least uniform of those adopted so far.' In contrast with: 'Of course, there are several differences between our law and the model law, but these points are almost technical ones' and 'we can assert that our State has given favorable consideration to the model law, as the General Assembly Resolution 52/158 of 15 Dec. 1997 recommended'.
58 Khumalo recognises the difficulties concerning unification faced by the Model Law and proposes several measures, such as only applying the Model Law if the foreign country does also has incorporated it (indicated with the term reciprocity) or incentives for correct adoption of the Model Law, see S. Khumalo, note 15, pp. 27-28. Personally, we think that the effect of the measure of reciprocity mainly will be a reduction of the scope of the Model Law.

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there is no unifying institution, terms will be differently explained. The obligation to cooperate and communicate will help, but will not solve this issue. The Model Law is reasonably effective, but would have had a much stronger impact if it were a binding treaty.

5. Comparison and relevance[59]

On the issue of scope we must conclude that, compared to the Model Law, the Regulation has a restricted territorial scope. Of course, it is a result of its origins, but the territorial scope of the Resolution does not reach beyond the borders of the EU Member States. On the other hand, the scope of the Model Law might potentially be worldwide; at this moment however, it certainly is not.

We consider the Regulation to be more efficient than the Model Law, because of the automatic effects and recognition it gives to main proceedings. Regarding the subject of communication between local courts, the Regulation does not contain regulations, though we doubt that that will have a large influence on the practical implementation of the Regulation. The efficiency of the Model Law is also diminished by uncertainty surrounding the term 'foreign proceeding'. It is not clear if there can be a proceeding when it is neither main nor non-main.

We think that because of the difference in identity of both legislations, the Regulation will be treated with a higher level of unification than the Model Law. The Model Law is 'model law', that means that its legal consequences can be incorporated differently in each country. Another disadvantage is that it lacks a unifying court as the Regulation has in the European Court of Justice. Both the Regulation and the Model Law are confronted with the vagueness of the term COMI. The difference is that in the EU, the European Court of Justice will develop jurisprudence on the subject.

In our opinion the relevance of this comparison is the following: we see that both the Regulation and the Model Law have their imperfections. We think that for EU Member States, the Model Law provides an opportunity to complete the scope of the Regulation in cases in which the COMI falls outside of the EU.[60] For non-EU members, the Model Law is an improvement on the issue of cross-border insolvencies.[61]

6. Conclusion

The statement: 'In the goal of handling cross-border insolvency the UNCITRAL Model Law is more effective than the European Insolvency Regulation' needs nuance. Both the Model Law and the Regulation have their qualities and their imperfections. In our opinion, the automatic effects and recognition of a main proceeding under the Regulation is a great achievement and contributes a lot towards the objective of effective handling of cross-border insolvencies. On the other hand, its territorial scope can be seen as a weakness. The Model Law potentially has a worldwide scope, but we think that that potential is not likely to be realised within a short period of time. If it is, however, we value the worldwide scope more than the efficiency and level of unification provided by the Regulation. But until that day, we think the Regulation is more effective in serving the interests of the stakeholders.

For us, the most important conclusion of this article is the determination of the additional function regarding Member States that the Model Law can have on the Regulation.

Notes

59 On this subject it is interesting to note that Westbrook assumes that without the influence and expertise of the Regulation, the Model Law could never have been accomplished within the period it did, see J.L. Westbrook, note 2, p. 3.

60 Westbrook is of opinion that enacting the Model Law by the EU Member States would be considered as a friendly gesture in other States and therefore also gives a diplomatic function to enacting the Model Law; see J.L. Westbrook, note 2, p 22. According to Westbrook the best solution would be adoption of the Model Law on EU level. In our conception the EU is not competent to enact the Model Law as a community, this because of the requirement of subsidiarity, which contents an impediment for the EU to arrange matters that can better be arranged by the Member States self. A requirement that especially sees at matters of foreign politics.

61 This opinion is shared by Wessels. See: B. Wessels, 'The European Union Insolvency Regulation: An Overview With Trans-Atlantic Elaborations' (2003) *Norton Annual Survey of Bankruptcy Law*, p. 506: 'It seems that the solutions the Model Law presents are the best options under the present circumstances.'

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International Corporate Rescue

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