United Nations Commission on International Trade Law (UNCITRAL)
Working Group V (Insolvency)
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To the Secretariat of UNCITRAL Working Group V

1. Introduction

The UNCITRAL Model Law on Cross-Border Insolvency ("MLCBI") turned 26 years in 2023. During this period, it has been adopted in more than 60 jurisdictions around the world and it has significantly contributed to successful management of insolvency proceedings with a cross-border element. Therefore, the MLCBI is an achievement that the international insolvency community needs to celebrate.

The MLCBI is built on the idea of "modified universalism". Therefore, it envisions the commencement of a main procedure in a *single* jurisdiction even if non-main proceedings can also be opened and the laws of other jurisdictions can still be relevant for certain aspects of the procedure. Once the procedures are opened, the MLCBI establishes a set of rules to facilitate cooperation and assistance for the successful management of the procedures.

In our view, the adoption of modified universalism as a regulatory model to deal with cross-border insolvency is a sensible one. Indeed, against those favoring the adoption of a more fragmented (or "territorialist") approach, we believe that the existence of a centralized procedure is a superior option.[1] We also believe that the type of cooperation and assistance facilitated by the MLCBI significantly improves the efficiency and effectiveness of insolvency proceedings in cases where the debtor has assets, creditors and operations in various jurisdictions. Therefore, any future reforms and developments in the area of cross-border insolvency promoted by UNCITRAL should keep moving in that direction.

2. Harmful economic effects generated by the concept of COMI

Despite our positive views about the content and impact of the MLCBI, we believe that the MLCBI errs in the policy option chosen to determine the initiation of the foreign

[1] This policy option has been generally supported in the literature. See, for example, Lucian A Bebchuk and Andrew T Guzman, 'An Economic Analysis of Transnational Bankruptcies' (1999) 42 *Journal of Law and Economics* 775; Jay L Westbrook, 'Global Insolvency Proceedings for a Global Market: The Universalist System and the Choice of a Central Court' (2018) 96 *Texas Law Review* 1473. Expressing their skepticism about universalist models, however, see Lynn M LoPucki, 'Cooperation in International Bankruptcy: A Post-Universalist Approach' (1999) 84(3) *Cornell Law Review* 696; Frederic Tung, 'Is International Bankruptcy Possible?' (2001) 23 *Michigan Journal of International Law* 31.

main proceeding. Under the MLCBI, a procedure qualifies as a foreign *main* procedure if it takes place in the jurisdiction where the debtor has its centre of main interests ("COMI"), which is generally the place of the debtor's registered office unless it is shown that the central administration of the debtor is in a different location which is ascertainable by creditors.[2] In our view, this policy option presents various flaws that can undermine the ability of insolvency law to facilitate the maximization of the returns to creditors, the effective reorganization of viable but financially distressed businesses, and the promotion of entrepreneurship, access to finance and economic growth.[3]

First, the MLCBI encourages debtors to initiate insolvency proceedings in the place where they have their COMI. Otherwise, even if a jurisdiction eventually allows foreign debtors to initiate insolvency proceedings, as it is indeed permitted in various countries,[4] the debtor faces the risk that the procedure or some aspects triggered by the procedure - such as a moratorium or a discharge or modification of the terms of a debt - might not be recognized overseas.[5] As a result, this aspect may encourage debtors to initiate insolvency proceedings in the place of their COMI, even if their local jurisdictions have an inefficient insolvency system or other jurisdictions simply provide a more attractive legal, market or institutional environment to deal with financial distress. Therefore, the initiation of an insolvency proceeding in a less efficient insolvency forum not only may hamper the maximization of the returns to creditors and the effective reorganization of viable but financially distressed businesses but it can

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[2] See art 16(3) of the Model Law on Cross-Border Insolvency. See also UNCITRAL, 'Model Law on Cross-Border Insolvency: Guide to Enactment and Interpretation' (2013) <https://www.uncitral.org/pdf/english/texts/insolven/1997-Model-Law-Insol-2013-Guide-Enactment-e.pdf> accessed 24 January 2023, 70–71. For a summary of the case law interpreting the concept of COMI, see UNCITRAL, *Digest of Case Law on the UNCITRAL Model Law on Cross-Border Insolvency*, pp. 39-42. <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/20-06293_uncitral_mlcbi_digest_e.pdf>.

[3] For a pioneering work criticizing the concept of COMI, see Robert K Rasmussen, 'A New Approach to Transnational Insolvencies' (1997) 19 *Michigan Journal of International Law* 1. Emphasizing the harmful economic effects generated by the existence of the concept of COMI, see Aurelio Gurrea-Martinez, REINVENTING INSOLVENCY LAW IN EMERGING ECONOMIES (Cambridge University Press, Forthcoming, 2024), Chapter 8.

[4] These jurisdictions include the United States, the United Kingdom and Singapore, provided that the debtor shows some forms of "connection" with the country. In the United States, this connection is generally shown if the debtor has property in the United States. See Section 109(a) of the US Bankruptcy Code. To that end, the concept of property has been interpreted very broadly. See *In re Global Ocean Carriers Ltd* 251 B.R. (Bankr. D. Del. 2000). In the United Kingdom, foreign companies can initiate insolvency proceedings if they show a "sufficient connection" that can be found if, for example, the debtor has assets or creditors in the country or debt contracts subject to English law. See *Van Gansewinkel Groep B.V.* [2015] EWHC 2151. In Singapore, foreign companies can initiate insolvency proceedings if they show a "substantial connection" that may include situations in which the debtor: (i) has its centre of main interest in Singapore; (ii) is carrying on business in Singapore or has a place of business in Singapore; (iii) has substantial assets in Singapore; (iv) has chosen Singapore law as the law governing a loan or other transactions; or (iv) has submitted to the jurisdiction of the Singapore Courts in the resolution of one or more disputes relating to a loan or other transactions. See Section 63(3), 246(1)(d) and 246(3) of the Insolvency, Restructuring and Dissolution Act 2018. Other factors, such as the listing of securities in Singapore, can also show the substantial connection. See *In Re PT MNC Investama TBK* [2020] SGHC 149.

[5] This aspect, along with other weaknesses of the concept of COMI, is highlighted in Aurelio Gurrea-Martinez, INSOLVENCY LAW IN EMERGING ECONOMIES (Cambridge University Press, Forthcoming, 2024), Chapter 8.

also lead to an *ex ante* increase in the cost of credit that will reduce firms' access to finance and the promotion of economic growth. Furthermore, given that countries with inefficient insolvency frameworks often include emerging economies, the preservation of the concept of COMI will be particularly harmful in countries where the adoption of active policies to reduce poverty and foster growth are more urgently needed.[6]

Second, the concept of COMI is far from clear, especially in a world that has become increasingly global, internationally connected and technology driven. Indeed, many companies nowadays have assets, creditors, subsidiaries, offices, employees and clients in many jurisdictions. In this context, determining the debtor's COMI is not an easy task. Additionally, due to the nature of certain businesses, such as cryptoexchanges and decentralized finance applications, the concept of COMI becomes even less clear.[7] In such a world, a market participant can never be entirely sure about the place of debtor's COMI. As a response, lenders will rationally price their loans assuming the worse scenario – that is, the place with the most inefficient insolvency forum where the debtor could potentially initiate an insolvency proceeding– leading to an undesirable increase in the cost of credit. Additionally, many market participants might also be discouraged from doing business with a company if they do not know where a potential insolvency proceeding will be initiated. Thus, the current concept of COMI may discourage transactions that could potentially create jobs, wealth and growth. As a result, the uncertainty created by the concept of COMI can also be detrimental for society from an *ex ante* perspective, that is, before a situation of insolvency arises. Put differently, the current concept of COMI hampers economic growth even if a company never becomes insolvent.

Third, due to the controversies surrounding the concept of COMI, different stakeholders may have different views about the place of the debtor' COMI. Under the current system, these controversies will need to be handled in court, and very often with the involvement of different courts. As a result, the current concept of COMI will inevitably result in litigation costs that will destroy value at the expense of debtors, creditors and society as a whole.

Finally, the concept of COMI can lead to opportunistic behaviour by debtors. Indeed, given that the concept of COMI can be moved without obtaining prior consent from the creditors, debtors can opportunistically change their COMI once they have obtained credit. Therefore, this risk of opportunistic behavior can be priced by lenders in the form of higher interest rates, requiring more collateral, or not extending credit at all. Thus, the concept of COMI ultimately reduces firms' access to finance and the promotion of economic growth.

3. Alternative approaches to determine the insolvency forum

As a result of the factors mentioned in Section 2, we respectfully urge UNCITRAL to reconsider the concept of COMI. In our view, the concept of COMI should be abolished

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[6] *Ibid.*

[7] Recent cases such as the collapse of FTX shows the difficulties associated with determining the debtor's COMI in the context of cryptoexchanges.

and replaced by the approach suggested in Section 3.1. Alternatively, UNCITRAL should consider the adoption of the second-best solution suggested in Section 3.2.

3.1. Preferred approach: the *ex ante* choice of the insolvency forum in the company's constitution[8]

As one of us suggested in the 1990s, an alternative approach to determine the place where an insolvency proceeding will be initiated (should the need arise) may consist of allowing debtors to choose the insolvency forum in the company's constitution.[9] This approach presents several advantages. First, it provides more predictability about the place where an insolvency proceeding will take place. Indeed, as the debtor's insolvency forum would be mentioned in the company's constitution, every market participant would have the ability to know where a future insolvency proceeding will be initiated. Second, this solution would also reduce litigation costs once a debtor initiates an insolvency proceeding. Finally, the choice of insolvency forum in the company's constitution would allow debtors and creditors to have access to more attractive insolvency frameworks. Therefore, this approach would encourage lenders to extend credit at a lower cost, facilitating firms' access to finance and the promotion of economic growth. By allowing debtors to choose more efficient insolvency systems, this solution would also contribute to the maximization of the returns to creditors and the effective reorganization of viable but financially distressed businesses.

It can be argued that this solution can lead to opportunistic behaviour by debtors. For example, a potential concern is that debtors may want to opportunistically choose a forum that can be attractive to them but detrimental to the creditors. It can also be argued that this system may allow debtors to opportunistically change the insolvency forum once they have obtained credit. Thus, by choosing a more debtor-friendly and less creditor-friendly regime, they can benefit themselves at the expense of the creditors. Finally, another potential criticism of the proposed approach is that it may hamper the change of insolvency forum even if debtors and creditors realize that a jurisdiction not initially chosen by the debtor can serve as a more attractive insolvency forum. However, these arguments are not persuasive if, as we urge UNCITRAL, our proposed approach is adopted with the safeguards and conditions suggested below.

First, it is important to start our analysis by highlighting that debtors should not have incentives to choose an insolvency forum that is not attractive for *sophisticated* lenders. Otherwise, they will be exposed to an increase in the cost of debt or, in certain scenarios, they may even restrict themselves from having access to credit. Therefore, the real risk of opportunistic behavior when initially choosing the insolvency forum only exists in the context of *vulnerable* creditors such as tort claimants and employees, that do not have the ability, information or bargaining power to adjust the conditions of their claims.

[8] For the purpose of this note, the terms "company's constitution", "corporate charter" or "articles of association" are used interchangeably. The terms "bankruptcy procedure" and "insolvency proceedings" are also used as synonyms.
[9] See Robert K Rasmussen, 'A New Approach to Transnational Insolvencies' (1997) 19 *Michigan Journal of International Law* 1.

Second, the risk of having debtors choosing an insolvency forum that can be detrimental for vulnerable creditors, however, is a concern that can be addressed through several mechanisms. For example, if countries seriously want to protect these creditors, a defined group of vulnerable creditors such as tort claimants and employees can be given a preferential treatment in the ranking of claims,[10] and the lack of respect of this priority may serve as a cause for denying recognition, even on the basis of "public policy", of any insolvency proceeding initiated by the debtor in a foreign jurisdiction.[11] Alternatively, countries can just impose that those vulnerable creditors should not be worse off, in terms of expected returns, compared to what they would receive if the procedure would have been initiated in the debtor's local jurisdiction.[12]

Third, as mentioned above, another risk associated with our proposal –if adopted without any safeguards– is that, given that the company's constitution can be changed by the shareholders and not by the creditors, the debtor may opportunistically change the insolvency forum once it has obtained credit. To address this problem, UNCITRAL may adopt different solutions. For instance, it can require debtors to provide notice to all the pre-existing creditors, except for those vulnerable creditors identified by the insolvency legislation.[13] Then, if no creditor objects within a reasonable period of time (e.g., 3-4 weeks), the change of the insolvency forum approved by the company would be deemed to be blessed by the creditors.[14] By adopting this approach, none of the company's pre-existing creditors would be required to accept an insolvency forum that was not accepted at the moment of extending credit. Therefore, this approach can be considered the most protective one.[15]

A more flexible approach may consist of requiring approval of a majority or super-majority of the creditors.[16] While this approach may avoid some holdout problems eventually existing in the previous approach, it can create certain costs. On the one hand, obtaining consent from the majority or super-majority of creditors can be costly, especially in the context of companies with dispersed debt structures. On the other hand, since certain creditors might be required to accept an insolvency forum that was

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[10] Employees generally have this preferential treatment in most jurisdictions. Tort claimants, however, only enjoy a preferential treatment in the ranking of claims in some jurisdictions (e.g., Spain).

[11] See Aurelio Gurrea-Martinez, Reinventing Insolvency Law in Emerging Economies (Cambridge University Press, Forthcoming, 2024), Chapter 8.

[12] *Ibid.*

[13] Given that vulnerable creditors would always get priority, their involvement in the change of forum would not be needed.

[14] Robert K Rasmussen, 'A New Approach to Transnational Insolvencies' (1997) 19 *Michigan Journal of International Law* 1.

[15] We believe that requiring the debtor to provide notice to the creditors and allowing the change of insolvency forum if no creditor objects would be equally protective than requiring individual consent from all the pre-existing creditors, as some authors have suggested. See Robert K Rasmussen, 'A New Approach to Transnational Insolvencies' (1997) 19 *Michigan Journal of International Law* 1; Aurelio Gurrea-Martinez, 'Insolvency Law in Emerging Markets' (2020) Ibero-American Institute for Law and Finance, Working Paper 3/2020 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3606395>. However, our proposed approach would provide more flexibility if the debtor wants to change the insolvency forum in order to choose a more value-enhancing insolvency regime.

[16] Suggesting this approach, see Randall Thomas and Robert K. Rasmussen, 'Timing Matters: Promoting Forum Shopping by Insolvent Corporations' (2000) 94 *Northwestern University Law Review* 1357.

not foreseen at the moment of extending credit, it can encourage lenders to assume the worst scenario when drafting their debt contracts. Therefore, this approach can lead to an increase in the cost of credit.

A third approach eventually adopted by UNCITRAL may consist of subjecting the change of the insolvency forum to any conditions eventually imposed in the company's constitution.[17] Sophisticated lenders will price their loans taking into account the approach adopted by the debtor. Therefore, debtors seeking to obtain credit at a lower cost will have incentives to choose a system that can be attractive to creditors. And vulnerable creditors will be fully protected given that they would always get priority.

3.2. The second-best approach: *ex post* choice of insolvency forum

If UNCITRAL decides to keep the concept of COMI, debtors should be allowed to initiate an insolvency proceeding in any jurisdiction that permits the initiation of insolvency proceedings by foreign companies.[18] Additionally, and more importantly, the MLCBI should establish that the place where the insolvency proceeding is initiated will be considered functionally equivalent to the debtor's COMI for the purpose of the MLCBI. Put differently, initiating an insolvency proceeding in the place of debtor's COMI or in any other forum chosen by the debtor would trigger similar effects under the MLCBI. To grant these functionally equivalent effects, however, the debtor needs to show that the place of filing is beneficial for the creditors as a whole. In the absence of clear evidence showing the beneficial effects of choosing a different insolvency forum, the debtor would still be allowed to initiate an insolvency proceeding if it is permitted by the laws of that jurisdiction (as it happens nowadays) but it would be subject to the legal risks currently associated with initiating an insolvency proceeding in a place that it is not the debtor's COMI.

This second-best solution improves the current regulatory framework for cross-border insolvency in several ways. First, it allows debtors and creditors to benefit from the choice of a more efficient insolvency forum.[19] And while this practice is already observed in the market,[20] the adoption of the proposed solution in the MLCBI would provide more certainty. Second, if the debtor shows that the place of filing can be

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[17] Anthony J. Casey and Joshua C. Macey, 'Bankruptcy Shopping: Domestic Venue Races and Global Forum Wars' (2021) 37 *Emory Bankruptcy Developments Law Journal* 436.

[18] This solution is generally admitted nowadays. However, it entails some of the risks and practical challenges mentioned in Section 2.

[19] The choice of a value-enhancing insolvency forum has been largely supported in the literature. See, for example, Randall Thomas and Robert K. Rasmussen, 'Timing Matters: Promoting Forum Shopping by Insolvent Corporations' (2000) 94 *Northwestern University Law Review* 1357; Horst Eidenmüller, 'Free Choice in International Company Insolvency Law in Europe' (2005) 6(3) *European Business Organization Law Review* 423; Wolf-Georg Ringe, 'Forum Shopping Under the EU Insolvency Regulation' (2008) 9(4) *European Business Organization Law Review* 579; Kannan Ramesh, 'Party Autonomy and the Search for Nodal Jurisdictions in Cross-Border Insolvency' (Texas, 6 February 2021) <https://static1.squarespace.com/static/571cb81f86db43188990d82a/t/602cebf8688a4a6f750ac18b/1613556730419/Justice+Kannan+Ramesh_Party+Autonomy+and+the+Search+for+Nodal+Jurisdictions+TILJ.pdf>; Anthony J. Casey and Joshua C. Macey, 'Bankruptcy Shopping: Domestic Venue Races and Global Forum Wars' (2021) 37 *Emory Bankruptcy Developments Law Journal* 436.

[20] This practice is particularly popular among companies from countries that do not have efficient insolvency frameworks as it typically occurs in emerging economies. Recent examples include Avianca, LATAM and Philippines Airlines. Even though these companies are primarily based in Colombia, Chile and the Philippines, respectively, they filed for bankruptcy in the United States.

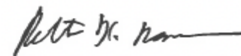
beneficial for the creditors as a whole, this solution may avoid many of the legal risks associated with choosing an insolvency forum that is not the debtor's COMI.

Yet, it should be noted that this solution is inferior to the preferred approach suggested in Section 3.1. On the one hand, this solution can lead to litigation costs if, for example, there are some disagreements about the ability of the place of filing to benefit the creditors as a whole. On the other hand, even if the new place chosen by the debtor has functionally equivalent effects to the debtor's COMI provided that it can be beneficial for the creditors, nothing would prevent the debtor from initiating the procedure in the place of the debtor's COMI *even if* this solution is not the most desirable one for the creditors. Thus, from an *ex ante* perspective, this scenario will be priced by sophisticated lenders, leading to an undesirable increase in the cost of credit. Hence, while this second-best solution can still improve the current regulatory framework for cross-border insolvency, it would provide a less desirable solution than the preferred approach suggested in Section 3.1.

4. Conclusion

The MLCBI has played a major role in the improvement and efficient management of cross-border insolvency cases. In our view, the principle of modified universalism and the cooperation and assistance promoted by the MLCBI have contributed to the success of this instrument enacted by UNCITRAL. Therefore, any future reforms and developments in the space of cross-border insolvency should keep embracing these principles. Nonetheless, we believe that the MLCBI presents a major flaw: the adoption of the concept of COMI as the policy option to determine the place where a main foreign proceeding should take place. We believe that embracing the concept of COMI can undermine the ability of insolvency law to promote the maximization of the returns to creditors, the effective reorganization of viable but financially distressed businesses and the promotion of entrepreneurship, access to finance and economic growth. Therefore, we respectfully urge UNCITRAL to reconsider the concept of COMI and adopt one of the approaches suggested in this article. To support our views, Annex 1 includes a list of prominent scholars and leading practitioners that endorse our proposal.

We will be honored and delighted to discuss the details and possible implementation of this proposal and provide any assistance eventually needed by the Secretariat of UNCITRAL Working Group V.



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