UNCITRAL

Established: 1966 as the core legal body of United Nations system in international trade law

Mandate: the progressive harmonization & modernization of international trade law – development of uniform legal texts addressing aspects of (private) international trade law, including insolvency

Why harmonization?

Divergence of the laws of different States in the area of international trade has been identified as an obstacle to the development of trade, by

- Creating uncertainty and dispute
- Adding to transaction, information, negotiation costs
- Increasing the need for coordination and cooperation

UNCITRAL: 60 State members elected for 6 year terms, representing 5 regional groupings

Africa 14 (currently Algeria, Benin, Botswana, Cameroon, Egypt, Gabon, Kenya, Mauritius, Morocco, Namibia, Nigeria, Senegal, South Africa, Uganda), Asia Pacific 14, Latin America-Caribbean 10, Eastern Europe 8, WEOG 14

How are texts developed?

- The substantive preparatory work on topics on UNCITRAL’s work programme is usually assigned to working groups, which generally hold one or two sessions per year and report on the progress of their work to the Commission.
- The membership of the working groups currently includes all member States of UNCITRAL, non-member States and invited NGOs and IGOs

Once completed by WGs, texts are referred to the Commission for finalisation and adoption.

Types of text - soft law

- A model law is an appropriate vehicle for modernization and harmonization of national laws when it is expected that States will wish or need to make adjustments to the text of the model to accommodate local requirements that vary from system to system, or where strict uniformity is not necessary or desirable.
- It is precisely this flexibility that makes a model law potentially easier to negotiate than a text containing obligations that cannot be altered, and promotes greater acceptance of a model law than of a convention dealing with the same subject matter.
- Notwithstanding this flexibility, in order to increase the likelihood of achieving a satisfactory degree of unification and to provide certainty about the extent of unification, States are encouraged to make as few changes as possible when incorporating a model law into their legal systems.

For a number of reasons, it is not always possible to draft specific provisions in a suitable or discrete form, such as a convention or a model law, for incorporation into national legal systems:
• National legal systems often use widely disparate legislative techniques and approaches for solving a given issue,
• States may not yet be ready to agree on a single approach or common rule,
• There may not be consensus on the need to find a uniform solution to a particular issue, or
• There may be different levels of consensus on the key issues of a particular subject and how they should be addressed.

In such cases, it may be appropriate not to attempt to develop a uniform text, but to limit the work to a set of principles or legislative recommendations.

In order to advance the objective of harmonization, and offer a legislative model, the principles or recommendations would need to do more than simply state general objectives.

• The text would provide a set of possible legislative solutions to certain issues, but not necessarily a single set of model solutions for those issues.
• In some cases, it may be appropriate to include variants, depending upon applicable policy considerations.
• By discussing the advantages and disadvantages of different policy choices, the text would assist the reader to evaluate different approaches and to choose the one most suitable in a particular national context.
• It could also be used to provide a standard against which Governments and legislative bodies could review the adequacy of existing laws, regulations, decrees and similar legislative texts in a particular field and update those laws or develop new laws.

Identification of topics

1968: international sale of goods; international commercial arbitration; transportation; insurance; international payments; intellectual property; agency; and legalization of documents

New topics come from proposals by governments; consultation with international organizations; special colloquiums and seminars; topics related to subjects already under discussion; implementation of existing texts may indicate a need for revision

Relevant factors to be considered: global significance; special interest to developing countries; developments in technology; changing trends in business practice; international trends and developments; economic and financial crises; other forces affecting and shaping international trade and commerce

Legislative Guide

How negotiated?

• Work developed through seven one-week meetings between December 2000 and late March 2004
• A total of 87 States, 14 inter-governmental organizations and 13 non-governmental organizations participated in the elaboration of the text
• Adopted by consensus on 25 June 2004; endorsed by UNGA by resolution 59/40 of 2 December 2004
• Builds upon the work in the late 1990s of the other international organizations – ADB, EBRD, IMF, World Bank

A key element of the negotiation process is the continued interaction and cooperation between countries, inter-governmental and non-governmental organizations and the Secretariat, which enables a consensus to be reached on the substance and content of the
text being negotiated - that consensus balances the concerns of civil and common law, different cultural and political traditions and different language groups.

The Legislative Guide recognizes that solutions to the key economic, legal and legislative issues raised by insolvency that are negotiated internationally through a process involving a broad range of constituents will be useful both to States that do not have an effective and efficient insolvency regime and to States that are undertaking a process of review and modernization of their insolvency regimes.

The importance of social policy issues to the design of an insolvency regime is not forgotten - the various interests of relevant stakeholders in an insolvent debtor are noted and discussed at each phase of the process.

**Purpose**

- Intended to assist with development of efficient and effective insolvency laws
- Identifies core issues to be addressed in an insolvency law & offers range of solutions
- Limited to debtors engaged in economic activity – consumers, specially regulated entities, enterprise groups not specifically addressed

**How used?**

- A key reference tool for law reform - Chile, Colombia (part three), China, France, Georgia, Germany, India, Indonesia, Macedonia, Montenegro, Netherlands, ROK, Serbia, South Africa, Spain
- Part of the methodology for the FSB Reports on Observance of Standards and Codes (ROSC)
- Key resource in the World Bank Group Investment Climate Insolvency Technical Assistance Program
- Referenced (especially part three) in work by FSB, IMF, BCBS, EU on bank and financial institution resolution

**Content**

The first section of each chapter of the Guide contains a commentary identifying the key issues for consideration in formulating an insolvency law and discussing and analyzing the various approaches that are adopted by insolvency laws and that represent best practice.

The second part of each chapter contains a set of legislative recommendations dealing more specifically with the manner in which those key issues should be addressed in an insolvency law. It is not intended that these recommendations be enacted directly into national law. Rather, they outline the core issues that it would be desirable to address in that law, and in some cases provide specific guidance on how legislative provisions might be drafted.

**Recommendations:**

- Adopt different levels of specificity, depending upon the issue in question
- A number employ legislative language to detail the manner in which a particular issue should be addressed in an insolvency law, reflecting a high degree of consensus as to the particular approach to be adopted
- Others identify key points to be addressed by an insolvency law with respect to a particular topic and offer possible alternative approaches, indicating the existence of different policy and procedural concerns that might need to be considered
To a significant extent they reflect the level of agreement in the Working Group balancing the desirability of a unified approach with existing approaches and procedures under national laws.

The user is advised to read the legislative recommendations together with the commentary, which provides detailed background information to enhance understanding of the legislative recommendations, as well as a discussion of issues not specifically included as recommendations.

Model Law (on Cross-Border Insolvency)

What is it?

The framework provided is unilateral – a model law is recommended to States for incorporation into their national law and relies for its effect on enactment by individual States.

Although providing a degree of flexibility that allows States to modify or omit provisions in order to tailor the text to suit local conditions, a satisfactory degree of harmonization and certainty can only be achieved if States make few changes when enacting the model law into their domestic legal systems.

NB. While some States that have adopted the Model Law have followed the text quite closely, others have not. In either case, the enacting legislation needs to be examined, as the changes in each jurisdiction may have an impact upon your particular issue, however minor the change may appear on first examination.

Enactment by a State generally signals that it will accept applications for recognition from all other States, irrespective of whether those other States have adopted it. The only exception is where it has been enacted on the basis of reciprocity and provides, for example, that applications for recognition will only be accepted from other enacting States.

Purpose

Provides a framework for cooperation and coordination between national regimes that are generally diverse and often conflicting when cross-border issues arise

How negotiated?

Between 1995 and 1997; 72 States, 7 inter-governmental organizations and 10 non-governmental organizations participated.

Organizations included the European Insolvency Practitioners Association (EIPA), Hague Conference on Private International Law, Instituto Iberoamericano de Derecho Internacional Económico, International Association of Insolvency Practitioners (INSOL), International Bar Association (IBA), and the International Chamber of Commerce.

Who has adopted/enacted?


*Not yet in force

Countries considering adoption: India, Russia, OHADA,
The Spanish Insolvency Act 22/2003, which came into force in 2004, includes international insolvency provisions inspired by the Model Law as well as provisions based on the ECR; Philippines also has legislation inspired by the ML

**How used**

Have been number of cases involving numerous countries
400+ in USA - coming from Japan, Korea, Australia, Canada, UK, various locations in the Caribbean;
Cases in Australia from Korea, Japan, NZ, UK
Cases in GB from Caribbean, USA,
Cases in Korea from Netherlands

**Benefits of adoption**

- Reduction of costs through clear, predictable regime
- Minimizes disputes
- Avoids having to use procedures that are likely to be lengthy and costly
- Establishes simple straightforward requirements
- Quick and predictable outcome
- Recognizes need for speed - provision for interim relief
- Most applications are routine
- Similarity of laws (e.g. OHADA, EU) – discussion in recent crisis of desirability of similar regimes for bank resolution and how that would facilitate dealing with cross-border entities
- Ease of proof of law, especially in cross-border cases; greater predictability and potentially certainty
- Assistance with interpretation and application from growing jurisprudence - resource

The **UNCITRAL Model Law on Cross-Border Insolvency: the judicial perspective** provides information for judges on the issues likely to arise in the context of a cross-border application for recognition and relief under the Model Law. This text is only available online in the 6 UN languages (English is available at http://www.uncitral.org/pdf/english/texts/insolven/V1188129-Judicial_Perspective_ebook-E.pdf) and will be updated regularly to reflect the latest jurisprudence interpreting the Model Law.

**Concerns and apprehensions**

Despite the commercial advantages of adopting the Model Law to facilitate the conduct of cross-border insolvency cases, a number of concerns appear to stand in the way of adoption.

These include:

(i) **Adoption of the Model Law as part of domestic insolvency law will import the insolvency law of the foreign country upon recognition of a foreign insolvency order;**

(ii) **Protection of local creditors and the participation of local creditors in foreign proceedings are not ensured;**

(iii) **Foreign insolvency practitioners will be allowed to administer local proceedings;**

(iv) **Recognition of foreign court decisions and orders on insolvency detracts from a country’s sovereignty and independence;**

(v) **The Model Law cannot be adopted without adding a requirement for reciprocity;**
(vi) A number of practical issues make implementation difficult – mechanics of how to cooperate, judicial experience.

The provisions of the Model Law provide answers to some of these issues; others are not (or cannot be) directly addressed by the terms of the Model Law, as they are of a more general application than insolvency, or they relate to the implementation of insolvency law, raising questions of judicial and institutional capacity.

(i) The implications of recognition of foreign insolvency proceedings in terms of the applicable effects of foreign law in the recognizing State were discussed during the development of the Model Law. Some delegates to the Working Group took the view that upon recognition of foreign insolvency proceedings the effects of the foreign law should apply, while others took the view that only the local effects of the commencement of insolvency proceedings should apply. The Model Law specifically rejects both of these approaches and adopts a neutral middle ground that specifies the effects, in terms of relief, that should automatically apply on recognition. At the same time, it defers to local law, providing that the scope, modification, or termination of the relief applicable upon recognition are subject to provisions of the law of the enacting State that applies to such exceptions, limitations, modifications, or terminations. In addition, the Model Law provides that in granting relief the court may subject that relief to such conditions as it considers appropriate, and that at the request of the foreign representative or any person affected by the relief granted or at its own motion, the court may modify or terminate that relief. In terms of coordination of concurrent proceedings, the Model Law again defers to the local law by providing that relief must be coordinated and consistent with that granted in the local proceeding, whether it commenced before or after the foreign proceeding.

(ii) With respect to the interests of creditors, particularly local creditors, there will always be an issue as to whether recognizing foreign insolvency proceedings in a particular case will be to their advantage or disadvantage. The answer may depend upon the case in question and whether quarantining local assets for the benefit of local creditors will ensure a greater return to them than pooling those assets to increase the global assets available to creditors generally. In some cases, quarantining will lead to a greater return, and in others pooling will bring more. The answer may also depend upon whether the foreign proceedings are for liquidation or reorganization. While it may be relatively straightforward in the case of liquidation, the answer in reorganization may depend as much upon the particular interests of a creditor as upon the relative amounts that may be received through quarantining or pooling. Employees, for example, may have a greater interest in ongoing employment than in a distribution, while trade creditors may derive more benefit from a continuing marketplace for goods and services. As one commentator notes, there is no answer to the dilemma of whether or not local creditors will be better off if countries apply cross-border recognition law. He continues that "[i]t might be best addressed by accepting the observation that, in a system of inter-country cooperation, any loss to local interests in one case will be roughly balanced by a gain in another case."

The Model Law does not (and cannot) address this issue. Nor, as a unilateral instrument, can it address the treatment of local creditors in foreign proceedings. It does, however, seek to ensure the equality of treatment of foreign and local creditors and to ensure that their interests are protected as far as possible. When granting or denying relief, whether in an interim or discretionary nature, the court is required to ensure that the interests of creditors and other interested parties, whether foreign or local, and the debtor, adequately are protected. Foreign creditors are to have the same rights as local creditors with respect to commencement of, and participation in, insolvency proceedings. The rule in article 32 prevents double dipping, particularly by foreign creditors, as noted above.

More generally, the form of the Model Law itself provides an element of flexibility that allows enacting States to vary the provisions to suit local conditions, as reflected in the enacting legislation discussed above. As already noted, article 6 provides an overriding protection that allows the court to refuse to take any action governed by the Model Law if it would be manifestly contrary to the public policy of the enacting State.
(iii) With respect to the suggestion that a foreign insolvency practitioner might be able to administer local proceedings, it should be noted that although certain provisions of the Model Law may permit that result, it is not an automatic effect, and it would require an order of the local court. The foreign representative has certain entitlements with regard to local proceedings that affect the debtor. For example, the foreign representative may apply to commence local insolvency proceedings and, following recognition of foreign proceedings, to participate in local proceedings regarding the same debtor, or intervene in local proceedings in which the debtor is a party. Applying for commencement and intervening in proceedings are both subject to the requirements of local law being met. As an interim measure, or as discretionary relief available after recognition, the court may entrust the foreign representative with administration or realization of all or part of the debtor’s assets located in the enacting State in order to protect and preserve value. However, it is not obliged to appoint the foreign representative to perform that task, and it may designate another person, such as a local practitioner.

(iv) The concern with respect to sovereignty is not one that is limited in its application to cross-border insolvency and adoption of the Model Law, but rather may apply broadly to all situations where recognition of foreign judgments and arbitral awards, as well as exposure to other decisions and processes of foreign courts, can impact upon the local legal system. The focus of the concern is the disadvantages likely to accrue from exposing one country to the legal processes and decisions of another, with the potential for subordination of national interests and institutions to foreign influence and the consequent loss of ability to regulate one’s own affairs. A second aspect relates to exercise of judicial power as part of royal prerogative and the potential for inconsistency between that prerogative and the autonomy of the jurisdiction if foreign judgements were to be recognized.

(v) A widely discussed issue that is closely related to the concern about sovereignty is that of reciprocity. As noted above, a suggestion to include a reciprocity requirement in the Model Law was ultimately not accepted, and it consequently functions unilaterally on a global basis. Concern that this approach might lead to recognition of inbound requests but not outbound requests has led some countries to include a reciprocity provision in legislation enacting the Model Law. An issue of concern with that approach, however, is the implementation of the reciprocity requirement. To facilitate cross-border insolvency, a clear and quick determination is required as to whether another State’s legislation is sufficiently similar to qualify as being reciprocal. That might be achieved by designating in the law those countries whose laws are regarded as satisfying the requirement. Different approaches, such as a legislative formulation that defines reciprocal treatment by reference to whether or not another country has enacted a law “based on the Model Law,” or a consideration of foreign law by the courts on a case-by-case basis, are unlikely to achieve a quick and certain result. In the first instance, the flexibility allowed by the Model Law and the likelihood of local variations in enactment will require close scrutiny of enacting legislation to ensure the required level of compliance with the requirement. The second approach is likely to involve delay while the court conducts the necessary investigations, which may include, in order to give a true picture of the foreign law, consideration of difficult questions of implementation of that law.

The question of how to implement the reciprocity requirement is cited as one of the reasons for the delay in entry into force of the South African legislation, which requires a determination to be made as to which countries will offer effectively reciprocal treatment and a designation of those countries under the legislation. It is not clear how other countries such as Mexico and Romania, which specify the need for reciprocal treatment but not for the designation of countries that satisfy that requirement, will approach the issue. One commentator on the Japanese law observed that the principle of reciprocity was much criticized in Japan, not only because reciprocity has proven, historically, not to be a useful means of achieving harmonization of law, but also because creditors and other actors in insolvency proceedings who have limited capacity to influence the legislative policy of their governments should not be penalized because of that policy.
Solutions for sovereignty and reciprocity concerns: One proposal to address concerns of sovereignty and reciprocity that have arisen in one region has been to explore cooperation on a regional basis in the form of a **regional agreement or arrangement** such as a treaty, where parties would have the same mutual (presumably binding) obligations. The success of such an arrangement, where it involves commitment to obligations, can be measured only by the number of States adhering to it and States are likely to do so only when there is a coincidence of interests and general confidence with respect to the judicial, legislative and administrative procedures of other potential participant States. An arrangement that only contemplates agreement to a selection of principles is likely to be more widely acceptable, but less useful in practice. Issues that would have to be resolved in negotiating such arrangements would include the definition of the “region” for the purposes of the arrangement (and how that definition coincides with regional flows of trade and investment); the content of the arrangement (eg. will it follow the Model Law to a greater or lesser extent or be a statement of principles and will it include binding obligations); the interaction between States that are party to the arrangement and those that are not, both within the region and outside the region and including interaction with other regional arrangements that may cover similar issues (eg. the EU) (again in the context of flows of trade and investment).

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