Thai Cross Border Insolvency Law

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บทคัดย่อ

บทความนี้มีวัตถุประสงค์เพื่อศึกษาถึงแนวทางในการร่างกฎหมายล้มละลายข้ามพรมแดนของประเทศไทย เพราะในปัจจุบันการดำเนินธุรกิจได้เป็นไปในระดับสากล รวมถึงการดำเนินคดีล้มละลายด้วยเช่นกัน ประเทศต่าง ๆ ได้บัญญัติกฎหมายล้มละลายขึ้นเพื่อสร้างความเชื่อมั่นทางด้านการค้าและการลงทุน ซึ่งความเป็นจริงเกี่ยวกับตลาดการค้าเสรีจะต้องมีประเด็นปัญหาในเรื่องของการล้มละลายเข้ามาเกี่ยวข้อง กฎเกณฑ์ของกฎหมายล้มละลายที่มีความแตกต่างกันไปในแต่ละประเทศได้นำไปสู่ความต้องการในการทำความเข้าใจที่ชัดเจนขึ้นเกี่ยวกับกฎหมายที่จะนำมาปรับใช้ในเรื่องของการล้มละลายในระหว่างประเทศต่าง ๆ ความแน่นอนอีกทั้งความเป็นอันหนึ่งอันเดียวกันและสามารถคาดเดาได้เกี่ยวกับปัญหาในเรื่องการล้มละลายข้ามพรมแดนเป็นสิ่งสำคัญที่จะช่วยอำนวยความสะดวกในเรื่องการค้าและการลงทุนระหว่างประเทศ ดังนั้น ประเทศไทยควรที่จะพยายามหาบทบัญญัติที่เหมาะสมเกี่ยวกับการล้มละลายข้ามพรมแดนเพื่อเป็นการส่งเสริมการค้าและการลงทุนจากต่างประเทศ

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*บทความนี้เรียบเรียงจากดุษฎีนิพนธ์เรื่องกฎหมายล้มละลายข้ามพรมแดนของไทย ซึ่งได้สอบป้องกันดุษฎีนิพนธ์แล้ว โดยมีคณาจารย์ที่ปรึกษา 3 ท่าน คือผู้ช่วยศาสตราจารย์ ดร.วิณัฏฐา แสงสุข รองศาสตราจารย์ ดร. ภูมิ โชคเหมาะ และผู้ช่วยศาสตราจารย์ ดร. ภูมิ มูลศิลป์.

**นักศึกษาในหลักสูตรนิติศาสตรดุษฎีบัณฑิต สถาบันการศึกษานานาชาติ มหาวิทยาลัยรามคำแหง.

Abstract

The objective of this article is to establish suitable provisions for a Thai Cross-Border Insolvency Law. Nowadays, the business world has become global, and it is moving toward a universal approach to bankruptcy proceedings. Countries must enact Bankruptcy Codes that will promote the creation of greater certainty and thus facilitate trade and investment. It is a truism in free trade markets that there will be insolvencies. The significant differences in insolvency regulation and procedure among countries, combined with the increased globalization of business activities, has led to a need for a clearer understanding of the applicable laws between countries. A stable, uniform and predictable approach to cross-border insolvency issues is very important to facilitate the flow of investment and capital. In this regard, Thailand should try to clearly establish suitable provisions for any law regarding cross-border insolvencies in order to promote more foreign investment from around the world.

คำสำคัญ : การล้มละลายข้ามพรมแดน, กฎหมายล้มละลาย, กฎหมายไทย
Keywords : Cross border insolvency, Bankruptcy law, Thai law

1. Introduction

The notion of cross border insolvency starts more important than ever when there are the communications among individuals or corporations in doing the international business. The advance of nowadays technology makes the world smaller. People can more easily communicate and do the investment. The situation has changed so as to the Bankruptcy Law. This fact affected the notion of cross border insolvency to be updated for the changes of the way people doing their business. Nowadays, many countries pay more attention on free trade market by launching the international organizations to support the economic expansion. The law has to concern the relationship of these international investment especially transnational corporations. Cross border insolvency is a term used to describe circumstances in which an insolvent debtor has assets and/or creditors in more than one country. Cross border insolvency is the important key to solve problems of international investment.

However, against a background of increasing international trade, the absence of international coordination in respect of insolvency matters can often lead to an inability by administrative authorities in dealing with assets effectively, resulting in the concealing or removal of assets and a reduced return to creditors or, as the case maybe, a reduced chance of rescuing a failing business. The inability to effectively progress matters relating to cross border insolvency may be due to the need to follow complicated and unfamiliar procedural and judicial systems, or may be as a result of an absence of any legal framework allowing cooperation in the country in which an insolvent has an interest. This situation will be an obstacle of the innovation and economic growth; therefore, a well-designed and precise legal and regulatory framework with respect to insolvency is an important factor to promote more investment from around the world.

2. Principles and Theories of Criss Border Insolvency

International law accords nation-states broad grants of competence in making and applying law to particular events through these principles.

2.1 The Principle of Territoriality

Under the principle of territoriality, States are authorized to make law and apply law to all events occurring within their borders, regardless of whether such events involve nationals or non-nationals. It reflects the overriding importance of territoriality in the present day State system. Under this principle, the authority of the State extends to the limits of its territory. The State's competence to make law to regulate actors and activities within its territorial domain and to apply law to events, persons, and assets within its borders are both manifestations of such authority.[1]

This principle is based on State Sovereignty. State's sovereignty could make bankruptcy decisions issued by foreign authorities neither effective nor enforceable within the State. The decisions issued by the State's authorities are neither effective nor enforceable abroad. The insolvency proceedings are strictly limited to assets of the debtor situated within one jurisdiction. Territorialism is the default system for all cross-border insolvency systems, because it relies on actual in rem control over assets. Under the territorial approach, a separate and independent plenary case is pursued in each forum in which the debtor's assets are located.[2]

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[1]Ian Brownlie, **Principles of Public International Law**, 7th ed. (New York: Oxford University Press, 2008), p. 289.

[2]Anderson Kent, "The Cross Border Insolvency Paradigm: A Defense on the Modified Universal Approach Considering the Japanese Experience," **Cornell Rev**. 696 (1999): 66-68.

2.2 The Principle of Universality

Universalism, also known as pure universalism, unity, and ubiquity, is a system in which all aspects of a debtor's insolvency are conducted in only one central procedure under one Insolvency Law. Universalism implies that there should be a single set of bankruptcy proceedings that collects, administers and then distributes all the debtor's assets wherever these assets may be situated throughout the world. All creditors should be entitled to submit proofs of their claims in these proceedings and be paid accordingly. The former signifies a single set of proceedings and the latter the collection and distribution of assets on a worldwide basis.[3]

2.3 The Principle of Reciprocity

From an objective point of view, reciprocity may be defined as the relationship between two or more States according to each other identical or equivalent treatment. Most attempts at definition add the element of a subjective interrelation of action and counteraction according to which the action of one party, whether consummated or expected, provides the motivation for that of the other. The designation of reciprocity as a principle of international law should only be applied to conclusions derived from the analysis of the latter—above all to the maxim that a State basing a claim on a particular norm of international law must accept that rule as also binding upon itself.[4]

3. The Uncitral Model Law on Cross Border Insolvency

The Model Law on Cross Border Insolvency (Model Law) is designed to assist States to equip their national insolvency laws with a harmonized and fair framework that effectively addresses cross border insolvency cases. The Model Law is not a law in its own right and has no binding force; rather it provides a legal text for

[3]Anderson Kent, ibid., pp. 75-77.

[4]Thomas M. Franck, **Fairness in International Law and Institutions**, 2nd ed. (New York: Oxford University Press, 2002), p. 128.

incorporation into national law. States may, if they wish, modify or leave out some provisions in order to adapt the Model Law to particular national circumstances. The rationale of the Model Law lies in the continuing global expansion of trade and investment leading to an increasing incidence of cross border insolvencies. The Model Law respects the differences among National Insolvency (procedural) Laws and therefore does not attempt a substantive harmonization of Insolvency Law. However, in order to achieve a satisfactory degree of harmonization and certainty, it is recommended that as few changes as possible be made when adopt the Model Law.[5]

The issues addressed by the UNCITRAL Model Law include the access of foreign representatives and creditors to courts in the adopting State. In this regard, it states that a foreign administrator can have access to the courts of the enacting State and allows the courts in the enacting State to determine the relief that may be available. Moreover, a transparent regime is set up with regard to the right of foreign creditors to commence or participate in insolvency proceedings in the enacting State.[6]Moreover, the Model Law provides guidelines concerning the recognition of foreign proceedings and the consequences of such recognition.[7]Rules on cooperation with foreign courts and representatives are set out, authorizing courts and competent authorities in the enacting State to seek assistance abroad.[8]Rules regarding coordination when insolvency proceedings in the enacting State are taking place concurrently with proceedings in another State are also given. In this Section, rules are laid down in order to coordinate relief granted in the enacting State in favor of two or more insolvency proceedings that take place in foreign States regarding the same debtor.[9]

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[5]Julian Male, "Cross-Border Insolvency Harmonizing Treaties Becoming Important," Asia-Pacific Housing Journal, pp. 11-13.

[6]Articles 9-14 of the Model Law.

[7]Articles 15-24 of the Model Law.

[8]Articles 25-27 of the Model Law.

[9]Articles 28-32 of the Model Law.

4. Rules and Regulations Relating to Cross Border Insolvency

Insolvency Law reform is a progress being made in many countries such as the United Kingdom, the United States of America, and Japan.

4.1 The EC Regulation

The EC Regulation has direct force throughout the European Union (except Denmark) without the need for implementation in Member States. It was adopted by the European Union Council on Regulation (EC) No. 1346/2000 on Insolvency Proceedings on 29 May 2000 which came into force on 31 May 2002. The Regulation contains rules on jurisdiction, recognition and applicable law and provides for the coordination of insolvency proceedings opened in several Member States. The Regulation applies when the debtor has an establishment or creditors in another Member State than his own and does not solve issues related to non-EU Member States.[10]

The provisions of the EC Regulations are similar to the Model Law in that a company's Center of Main Interests, for purposes of determining which court has jurisdiction to hear the "main proceeding", is where its registered office is, absent evidence to the contrary.[11]The recitals further clarify that the Center of Main Interests should be "the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties."[12] econdary proceedings may be opened in other Member States where the debtor company has an establishment.[13]The cornerstone of the Regulation is the recognition of insolvency judgment. Article 16 states that any judgment opening insolvency proceedings handed down by a court of a Member State which has jurisdiction under the Regulation shall be recognized in all the other Member States

[10]Vanessa Finch, **The Roots of Corporate Insolvency Law**, 2nd ed. (Cambridge: Cambridge University Press, 2009), p. 1.

[11]EC Regulations, Article 3(1).

[12]EC Regulations, Recital 13.

[13]EC Regulations, Article 3(2).

from the time it becomes effective in the State of opening of the proceedings.[14] Chapter I of the EC Regulation provides for jurisdiction to open main insolvency proceedings and secondary insolvency proceedings. Chapter II of the EC Regulation provides recognition of main insolvency proceeding, the effect of recognition, the powers of officials to act on behalf of the estate in the proceeding, and the formalities required for such officials to act abroad. Under the Regulation, a court order opening insolvency proceeding must be automatically recognized in all other Member States.[15]Chapter III regulates secondary insolvency proceedings in European Union countries apart from the country where the main insolvency proceeding is pending. Chapter IV of the EC Regulation provides for the provision of information to creditors and their entitlement to lodge claims in the proceedings. Any EU creditor will have the right to lodge a claim. Office holder will be entitled to be treated as creditors in proceedings against the debtor in another State.[16]

4.2 The US Chapter 15

Chapter 15 is based on the Model Law on Cross Border Insolvency which had been prepared by the United Nations Commission on International Trade Law (UNCITRAL), with significant input from insolvency practitioners all over the world. A Chapter 15 case is commenced by the filing of a petition seeking recognition of a "foreign proceeding" by a "foreign representative."[17]Chapter 15 establishes more detailed procedures and expands the rights of the foreign representative. A Chapter 15 petition can be described as a request for "recognition" which is defined as "the entry of an order granting recognition of a foreign main proceeding or foreign non-main proceeding."[18]Nevertheless, a court may grant provisional relief upon the filing

[14]EC Regulations, Article 16.

[15]EC Regulations, Articles 16 and 25.

[16]Fiona M. Tolmie, **Corporate and Personal Insolvency Law**, 2nd ed. (London: Cavendish Publishing., 2003), p. 203.

[17]11 U.S.C. §1504.

[18]11 U.S.C. §1502.

of Chapter 15 petition and before recognition if it is urgently needed to protect the assets of the debtor or the interests of creditors.[19] Moreover, Chapter 15 follows the UNCITRAL Model Law by expressly encouraging cooperation and communication between courts handling cross border cases.[20]While most courts in the US and other countries have effectively utilized cross border protocols and cooperation agreements, some have been reluctant to do so without express statutory authority. Chapter 15 further establishes procedures and recommendations for communication and cooperation between US case trustees and examiners, their foreign counterparts and the foreign court.[21]Chapter 15 also gives foreign creditors the right to participate in US bankruptcy cases and it prohibits discrimination against foreign creditors (except certain foreign government and tax claims, which may be governed by treaty).[22]It also requires to foreign creditors concerning to US bankruptcy case, including notice of the right to file claims.[23]Finally, Chapter 15 also contained various provisions dealing with concurrent proceedings in the US and abroad. Once a foreign main proceeding has been recognized, a plenary case on behalf of the same debtor may be commenced in the US if the debtor has assets in the US.[24]

4.3 The Law on Recognition of and Assistance in Foreign Insolvency Proceedings (LRAF)

A foreign representative is entitled to file a petition with the Tokyo District Court for recognition of the relevant foreign insolvency proceedings. A foreign representative may file a petition for recognition of the foreign insolvency proceeding and for a court order for assistance even before a decision is made with regard to the foreign insolvency proceedings.[25]Until clear precedents are established

[19]11 U.S.C. §1519.

[20]11 U.S.C. §1525.

[21]11 U.S.C. §§1526 and 1527.

[22]11 U.S.C. §1513.

[23]11 U.S.C. §1514.

[24]11 U.S.C. §1528.

[25]Articles 4 and 17 of the LRAF.

on this issue, in such cases it will be necessary to seek the instruction of the Japanese courts at an early stage as to whether the foreign proceedings can be recognized in Japan under this Article. The court shall issue an order of recognition of foreign insolvency proceedings if it is convinced that the foreign insolvency proceeding is qualified for assistance within Japan. The court order shall be effective from the time it is made.[26] The distribution of assets under the foreign insolvency proceedings may not always be made in accordance with the same priority as the Japanese insolvency proceedings. The court may require the debtor to obtain the permission of the court in order to dispose of his or her assets in Japan or take it out of Japan.[27]

5. Enforcement of Cross Border Insolvency-Derived Judgment

It was observed that some of the judgments would be enforceable in some jurisdictions under the existing provisions of the Model Law, while in others they would not. For judgments that were a part of insolvency proceedings, the Model Law structure, based on main and non-main proceeding, could be followed. For judgments that might be part of insolvency proceedings but involved third parties, a different concept of jurisdiction, such as domicile, might be required in order to ensure judgments emanating from proceedings that were neither main nor non-main could be recognized. Various concerns were expressed with respect to the ability to recognize judgments from jurisdictions other than the location of main or non-main proceedings. One solution would be to require a connection with the main insolvency proceedings so that the judgment would be enforceable in that jurisdiction.[28]

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[26] Article 22 of the LRAF.

[27] Article 31 of the LRAF.

[28] Auen Kunkaew, **Cross Border Insolvency** [Online], available URL: http://www.iad.coj.go.th/userfiles/file/announcement/IU4.doc, 2014 (August, 15).

6. The analysis of the UNCITRAL key elements compared among the UNCITRAL Model Law, cross border insolvency of the United Kingdom, the United States of America, and Japan to find out the suitable provisions for Thai Cross Border Insolvency Law.

The important issues on cross border insolvency to be analyzed are as follow:

6.1 The Definitions of Cross Border Insolvency

The precise and clear definitions will make the terms comprehensible to all interested parties and promote the international investment. All of these terms are quite important to be defined precisely.

6.1.1 Debtor

The determination of which entities are eligible to be subjected as debtors to a country's general Insolvency Law is an important issue and has important implications for a country's economy. If the law excludes certain entities, these entities will be neither subject to the discipline imposed by an effective insolvency regime nor able to take advantage of the protection does it afford. At the same time, important policy considerations may lead countries to establish special insolvency procedures for natural persons or for certain regulated entities. Laws differ on the specific standard that must be satisfied before insolvency proceedings can commence. Therefore, the term "debtor" should be defined as "an entity that is the subject of a foreign proceeding and under Thai Bankruptcy and Reorganization Law."

6.1.2 Trustee

Insolvency Laws refer to the person responsible for administering the insolvency proceedings by a number of different titles; including administrators, trustees, liquidators, supervisors, receivers, curators, official, or judicial managers. The term "insolvency representative" is used to refer to the person fulfilling the range of functions that may be performed in a broad sense without distinguishing

between those different functions in different types of proceeding. However appointed, the insolvency representative plays a central role in the effective and efficient implementation of an insolvency law, with certain powers over debtors and their assets and a duty to protect those assets and their value, as well as the interests of creditors and to ensure that the law is applied effectively and impartially. Therefore, the word “trustee” is used in Thai Bankruptcy Act and should be defined as “a person, other than the debtor, who has a right to administer and dispose of a debtor’s assets, and also include the plan preparer, the plan administrator of the reorganization plan.”

6.1.3 Recognition

One of the key objectives of the Model Law is to establish simplified procedures for recognition of qualifying foreign proceedings in order to avoid time-consuming legalization or other processes that often apply and to provide certainty with respect to the decision to recognize. These core provisions accord recognition to orders issued by foreign courts commencing qualifying foreign proceedings and appointing the foreign representative of those proceedings. Provided it satisfies specified requirements, a qualifying foreign proceeding should be recognized as either a main proceeding, taking place where the debtor had its center of main interests at the date of commencement of the foreign proceeding or a non-main proceeding, taking place where the debtor has an establishment. Recognition of foreign proceedings under the Model Law has several effects principal among them is the relief accorded to assist the foreign proceeding. Therefore, the word “recognition” should be defined as “the entry of an order granting recognition of a foreign main proceeding or foreign non main proceeding under this law.”

6.1.4 Secured Creditor

Creditors have duties and functions in the insolvency proceeding. The insolvency law should give a clear definition of the word “creditor” to make the understanding of who should be qualify as a creditor in the insolvency proceeding to have a right to proceed in the cross border insolvency case.

Therefore, the word “secured creditor” should be defined as “a creditor of the debtor in the meaning of Thai Bankruptcy and Reorganization Law and in the meaning of other related law”

6.1.5 Assets of the Debtor

Fundamental to insolvency proceedings is the need to identify, collect, preserve and dispose of the debtor’s assets. Many insolvency systems place these assets under a special regime sometimes referred to as the insolvency estate, over which the insolvency representative will have specified powers, subject to certain exceptions. There are some important differences in the way in which the concept of the insolvency estate is understood in various jurisdictions. In some States, the insolvency law provides that legal title over the assets is transferred to the designated official. In others, the debtor continues to be the legal owner of the assets, but its powers to administer and dispose of those assets are limited. Identification of assets and their treatment will determine the scope and conduct of the proceedings and, in particular in reorganization, will have a significant bearing on the likely success of those proceedings. Therefore, the word “assets of the debtor” should be defined as “asset, rights and interests of the debtor, including rights and interests in asset, whether or not in the possession of the debtor, tangible or intangible, movable or immovable, including the debtor’s interests in encumbered assets or in third party-owned assets.”

6.1.6 Center of Main Interests (COMI)

One of the most important new developments in cross border insolvency is the introduction of the concept of Center of its Main Interests (COMI). The operation of most of the Model Law provisions depends on whether one is concerned with a foreign main proceeding or a foreign non-main proceeding. A foreign main proceeding is a foreign proceeding taking place in the State where the debtor has its Center of Main Interests. A foreign non-main proceeding is a foreign proceeding, other than a foreign main proceeding, taking place in a State where the debtor has an establishment, which is, any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services. These concepts have been enacted in all the jurisdictions with some local

variations, furthermore, an important point is that the test applies on the date of filing an application for insolvency and not at the time the business was conducted. Thai law should give its meaning as “the place where the debtor conducts the administration of its interests on a regular basis and that is ascertainable by third parties” to avoid misunderstanding of which proceeding should be the main proceeding or non-main proceeding.

6.1.7 Claim

Claims by creditors operate at two levels in insolvency proceedings: firstly, for purposes of determining which creditors may vote in the proceedings and how they may vote (according to the class into which they fall and the value of their claim, where that is a relevant factor) and, secondly, for purposes of distribution. The procedure for submission of claims and their admission is therefore a key part of the insolvency proceedings. Consideration should be given to determining which creditors should be required to submit claims and the types of claim that should be submitted. Consideration should also be given to the procedures applicable to the submission, verification and admission of claims, the consequences of failure to submit a claim and review of decisions concerning the admission of claims. Therefore, the word “claim” should be defined as “a right to payment from the estate of the debtor, whether arising from a debt, a contract or other type of legal obligation, whether liquidated or unliquidated, matured or unmatured, disputed or undisputed, secured or unsecured, fixed or contingent.”

6.1.8 Party in Interest

Many insolvency laws provide creditors, as the primary beneficiaries of the estate, and other parties in interest with some ability to scrutinize both the administration of the estate and the conduct of the insolvency representative in performing its duties. Most insolvency laws require a party in interest to raise its requests for relief or objections through the court. Other parties in interest may have legal standing to raise an objection or request relief when their rights, interests in assets or duties under the insolvency law are affected. The right to be heard must be balanced with the need for efficient administration of the insolvency

proceedings. The definition of the word “party in interest” should be “any party whose rights, obligations or interests are affected by insolvency proceedings or particular matters in the insolvency proceedings, including the debtor, the insolvency representative, a creditor, a creditor committee, a government authority or any other person so affected.”

6.1.9 Stay of Proceedings

To ensure transparency and predictability, it is highly desirable that an insolvency law clearly identify the actions that are to be included within and specifically excepted from the scope of the stay, irrespective of who may commence those actions, whether unsecured creditors (including priority creditors such as employees, legislative lien holders or Governments), third parties (such as a lessor or owner of assets in the possession or use of the debtor or occupied by the debtor), secured creditors or others. Exceptions might include set-off rights and netting of financial contracts; actions to protect public policy interests, such as to restrain environmental damage or activities detrimental to public health and safety; actions to prevent abuse, such as the use of insolvency proceedings as a shield for illegal activities; actions commenced in order to preserve a claim against the debtor; and actions against the debtor for personal injury or family law claims. The word “stay of proceedings” should be defined as “a measure that prevents the commencement, or suspects the continuation, of judicial or other individual actions concerning the debtor’s assets, rights, obligations or liabilities, including actions to make security interests effective against third parties or to enforce a security interest; and prevents execution against the assets of the insolvency estate, and the transfer, encumbrance or other disposition of any assets or rights of the insolvency estate.”

6.2 Adopting the UNCITRAL Model Law on Cross Border Insolvency leading to the Effect of State Sovereignty

Cross border insolvency proceedings can be inefficient, prolonged and costly. This is because insolvency rules in different languages, in different countries, under different legal systems and traditions are not always uniform or consistent.

Where insolvency proceedings are governed by the laws of several jurisdictions, various conflicts of laws issues are bound to arise especially as regards the recognition of court decisions and regulations of foreign jurisdictions, judicial recognition and enforcement of foreign judicial proceedings, recognition of the claims of foreign creditors and the differences in the applicable laws in the disposable of assets. Insolvency orders are mostly a method of enforcing monetary court judgments and it is unrealistic to expect courts not to be particular about the enforcement of insolvency orders from many countries with different laws and legal systems. Then there is the problem of different insolvency administrators requiring assistance of national courts and authorities to principally bring about benefits to foreign creditors. Territoriality or the upholding of domestic laws over the laws of other States is a sensitive issue as it is so much part of the concept of State Sovereignty.

At the international level, there are different theoretical approaches advanced to construct an international bankruptcy regime. At present there are two conflicting approaches followed in cross-border insolvency cases. One is the traditional “territorialism” approach and the other is the “universalism” approach.

Traditionally, the way that the adopting States resolved the international issues inherent in these cases was by partitioning insolvency along national borders. This approach known as territorialism is consistent with the concepts of sovereignty and jurisdiction and permits local courts to control local assets pursuant to local laws. Universalism, on the other hand embraces the principle of “one law, one court” which implies that the courts of the debtor’s home country would have international jurisdiction to conduct international bankruptcy proceeding using the home country’s laws, and the home country administers the assets worldwide; having been surrendered to it and follows one plan of distribution to creditors.

The major impediment to the conclusion of the UNCITRAL Model Law concerns State sovereignty. The benefits of cross border insolvency laws can only be attained by implementing a formalized system that is attentive to the distinct interests of the effective administration of foreign-located assets and the

maintenance of State sovereignty that competes in cross border insolvencies. The adaptation of the provisions of a Model Law into the domestic laws of States has profound implications for international law, but it involves the co-existence of State sovereignty and international policy.

The economic underpinning of insolvency has resulted in State sovereignty and strong resistance in order to prevent their sovereignty from being undermined. Traditional views of sovereignty have given way to a growing consensus on the need for reciprocity. However, adopting countries can maintain State sovereignty through the public policy exception either. The public policy exception permits a court that is asked to recognize and enforce a foreign judgment to reject doing so if that court determines that the recognition and enforcement would contradict to a fundamental public policy of the enforcing country.

6.3 The Enforcement of Foreign Judgment

The growth in the number of cross border insolvencies in recent years has heightened interest in the question of recognition and enforcement of cross border insolvency judgments. As is obvious, absent recognition and enforcement, there is no effective remedy, and decisions are confined to territorial limits. Approaches based purely on the doctrine of reciprocity or on exequatur do not provide the same degree of predictability and reliability. General legislation on reciprocal recognition of judgments, including exequatur, might be confined to enforcement of specific money judgments or injunctive orders in two-party disputes, thus excluding decisions opening collective insolvency proceedings.

Despite this recognition early on in the drafting process, the Model Law does not specifically deal with the enforcement of judgments, and there has been significant controversy in recent years on this topic. Moreover, although international efforts at harmonizing the law on recognition and enforcement in general have been scant. Even when treaties have been signed to recognize and enforce specific types of judgments, insolvency judgments have typically been excluded.

One approach might be to focus on judgments issued by courts of the jurisdiction in which the debtor has its COMI or an establishment. Those two

concepts are already used in the cross border context. Such an approach could lead to the exclusion of judgments from courts with no jurisdictional claim over main or non-main insolvency proceedings concerning the debtor, including judgments entered by a court with jurisdiction over insolvency proceedings concerning the debtor, but commenced on the basis of presence of assets or the place of the debtor's registration. Since judgments from those courts might also be relevant to the goal of any instrument to be developed, a wider formulation might be required using some of the more general criteria such as jurisdiction over the debtor.

In 2014, UNCITRAL gave Working Group V the mandate to commence work on a Model Law or provisions on the enforcement of foreign insolvency derived judgments. Clearly, despite its enormous financial importance and academic complexity, cross border insolvency law remains in a state of confusion.

The substantial literature about cross border insolvency has examined the benefits and detriments of the competing ideas of universalism and territoriality. Under universalism, the liquidation of an insolvent debtor with assets in multiple countries is carried out in the country where the debtor has its center of main interests (COMI). The court in the COMI would have global reach to cover the debtor's assets worldwide. The law that would apply would also be the law of that country. Conversely, under territoriality, creditors in each country where the debtor's assets are located commence proceedings within their own jurisdiction using their own laws. This is often called the "grab rule" because local creditors race to grab the assets that are situated in the local jurisdiction before international liquidation proceedings can reach the far-flung assets. Under territoriality, not only is it likely that creditors as a whole receive less in the winding up than under a Universalist structure, but the inconsistent application of multiple laws across the world arguably also results in excessive costs and impinges on the willingness of creditors to extend credit to those companies exposed to potential cross border insolvency. This has the flow-on effect of limiting investment and restructuring international trade to the detriment of global welfare.

To be sure, the diversity in national insolvency laws evidences the fact that each State has designed laws to suit State's unique circumstances and policy preferences. There might be a commonality in the design of insolvency laws around the world sufficient to be able to derive a more general theory and to underpin an argument for cooperation. Certainly, each country's insolvency law seeks to maximize the return to interested parties from the assets of insolvent debtors. To meet these legislated requirements of the insolvency process, there needs to be a system that aggregates the greatest pool of assets from which to distribute. If that pool is reduced, then each interested party will receive less on a distribution.

Specifically, Article 21 of the Model Law states that following recognition of a foreign proceeding, the court may "grant any appropriate relief" as long as it is "necessary to protect the assets of the debtor or the interests of the creditors." The Model Law conditions this relief in Article 22 by requiring that the court be "satisfied that the interests of the creditor and other interested persons, including the debtor, are adequately protected." In this regard, we propose that the national courts of States enacting the Model Law read the "grant any appropriate relief" language broadly to enforce foreign insolvency judgments in appropriate circumstances. To be sure, the due process rights of affected parties have to be protected, and there has to be some check on expansive interpretations of jurisdiction by foreign courts.

6.4 The Cooperation among Courts and Administrative Authorities

Court cooperation and coordination are core elements of the Model Law. Cooperation is the only realistic way to prevent dissipation of assets, to maximize the value of assets, or to find the best solutions for the reorganization of the enterprise. It is also the only way in which proceedings concerning different members of the same enterprise group taking place in different States can be coordinated. Cooperation and communication lead to better coordination of the various insolvency proceedings, streamlining them with the object of achieving greater benefits for creditors.

Communications by judges directly with judges or administrators in a foreign country raises issues of credibility and proper procedures. The context alone is likely to create concern in litigants unless the process is transparent and clearly fair. Thus, communication among courts in cross border cases is both more important and more sensitive than in domestic cases.

To the extent that there is a lack of communication and coordination among courts and administrators from concerned jurisdictions, it is more likely that assets would be dissipated, fraudulently concealed, or possibly liquidated without reference to other more advantageous solutions. As a result, not only is the ability of creditors to receive payment diminished, but also is the possibility of rescuing financially viable businesses and saving jobs.

Probably all jurisdictions provide for some methods of judicial cooperation; however, they are often slow and complicated in that diplomatic channels have to be included, or even used. If judicial cooperation is considered to take place, some substantive issues are to be observed such as public policy consideration, burden of proof, avoidance rules, protection of the domestic creditors, or any other rights granted to a party by the Constitution or a Human Rights Convention.

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However, the success of cross border insolvencies within the European Community depends primarily on how effectively harmonization between the different proceedings is conducted and on how thoroughly cooperation between the respective liquidators and courts can be achieved. While the various terms promote the cooperation and communication amongst local and foreign jurisdictions, Section 1525 of the US Code also demands cooperation and communication between the local courts and the foreign jurisdiction. Not only is

this duty imposed on the court to affirmatively and directly communicate with a foreign court or representative, but a trustee is also required to "cooperate to the maximum extent possible with a foreign court or representative. However, due to a specific governmental measure implemented, Japanese insolvency proceedings had extraterritorial effect and foreign procedures could be recognized in only a limited way. The law does not create cross border communication provisions between courts, but only between Japanese and foreign representatives and Japanese law excludes the coordination provisions with regard to concurrent proceedings. The idea is that when an application for recognition of a foreign proceeding is filed when a local proceeding has already commenced, the Japanese court must either dismiss the application or suspend the local proceeding.

It is clear that courts in different countries are capable of cooperating with each other and coordinating their administrations in the case of a cross border or multinational reorganization or liquidation. Commerce among nations would clearly be enhanced and facilitated by an international understanding that particular principles or guidelines would be available in the event of a business failure or reorganization.

7. Conclusion

Cross border insolvency is one inevitable consequence of international business. Regulating multinational insolvency cases could be very complicated since there are creditors from different countries while more than one jurisdiction is involved. The UNCITRAL Model Law on cross border insolvency is one of the main international regimes in regulating cross border insolvency. This system is trying to encourage the cooperation among involved insolvency courts in order to achieve greater efficiency. However, it will fail to reach its full potential until universal acceptance of this model is accomplished.

The Thai system for credit protection and insolvency serves an important role within the Thai economy and it conforms in most respects with international standards. Some aspects of the regime are not completely consistent with the

international standards. However, there are encouraging developments in the insolvency law regime of Thailand. Such a new law will be very useful for Thailand as the current law on insolvency has not been updated and lacks of effective and efficient remedies for creditors across border. The Bankruptcy Court also with the Bank in Thailand is now responding to the insolvency law developments. They start to do the conference on cross border insolvency to cope with the international insolvency issues which will arise after being fully join the ASEAN Economic Community. The best way to solve the international problems is to adopt the UNCITRAL Model Law on cross border insolvency to promote the harmonization and cooperation among courts of the member countries. Furthermore, Thailand will implement a plan called the ASEAN Economic Community (AEC) to promote the investment from around the world. Therefore, in order to provide the best preparation, Thailand should learn about cross border insolvency provisions of the UNCITRAL Model Law.

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