The Model Law and asset recovery in Europe

Joseph A. Speakman & Daniel J. Saval revisit some of the key provisions and benefits of the Model Law in particular with the case of Fairfield Sentry Limited, the largest of the Madoff "feeder funds"

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It is often cited that the absence of international cooperation in respect of insolvency matters can lead to the frustration of office holder objectives to deal with assets effectively, resulting in the concealing or removal of assets and a reduced return to creditors or, as the case may be, a reduced chance of rescuing a failing business.

To address this predicament, in 1997 the United Nations Commission on International Trade Law ("UNCITRAL") adopted the Model Law on Cross-Border Insolvency ("Model Law") with the goal of assisting States "*to equip their insolvency laws with a modern, harmonised and fair framework to address more effectively instances of cross-border insolvency*"[1].

This article revisits some of the key provisions and benefits of the Model Law and, as a case study example, considers whether a wider adoption of the Model Law across Europe (where the Model Law remains largely unincorporated) would have simplified the asset recovery efforts of the liquidators of *Fairfield Sentry Limited*, the largest of the Madoff "feeder funds" in liquidation in the British Virgin Islands.

The Model Law

The Model Law is built around four key elements: (a) access to local courts for representatives of foreign insolvency proceedings; (b) recognition of orders issued by foreign courts; (c) relief to assist foreign proceedings; and (d) cooperation and coordination among courts involved in cross-border insolvency cases.[2] Importantly, the Model Law does not attempt to harmonise or unify the substantive insolvency laws applicable in each jurisdiction.

Under Article 17 of the Model Law, if the requisite information and documents are provided to the local court, the court is obliged to recognise the foreign proceedings so long as the proceedings qualify as a "*foreign main proceedings*" or a "*foreign non-main proceedings*".[3] By making recognition automatic upon compliance with the streamlined and minimal requirements of Article 17 (subject to the public policy exception), the Model Law "*ensures fair, quick and predictable access to the enacting State's laws*"[4].

Where the recognised proceedings are a foreign main proceedings the automatic effects (under Article 20) are that:

- Commencement or continuation of individual proceedings concerning the debtor's assets, rights, obligations or liabilities is stayed;
- Execution against the debtor's assets is stayed; and
- The right to transfer, encumber or otherwise dispose of any assets of the debtor is suspended.

Under Article 21, a foreign representative is also entitled to apply for various forms of discretionary relief upon recognition.

Fairfield Sentry v Sitching Shell – would the Model Law have simplified asset recovery efforts in Europe?

Fairfield Sentry Limited ('Fairfield') was a British Virgin Islands ("BVI") incorporated investment fund and is now in liquidation under the BVI Insolvency Act 2003. Prior to its winding up it had invested approximately 95% of its assets in Bernard L Madoff Investment Securities LLC ("BLMIS"), it was in fact the largest feeder fund into BLMIS. Sitching Shell Pensioenfonds ("Shell") is a

Netherlands-based pension fund which had subscribed for shares in Sentry to the tune of US $63 million.

The day after Mr Madoff's arrest in December 2008, Shell successfully applied to the Amsterdam District Court for permission to obtain pre-judgment garnishment or conservatory attachment orders over Fairfield's assets, these assets included a large cash balance held in the Dublin branch of Citco Bank Nederland (the "Attachment Order"). In July 2009, Fairfield was ordered to be wound up by the High Court of the BVI (the "BVI Court") and liquidators (the "Liquidators") were appointed.

In July 2010, the Liquidators commenced proceedings in Ireland seeking recognition of the BVI liquidation proceedings under common law principles and declarations that the Liquidators were entitled to possession of the funds in the Citco account and that the Attachment Order should not be recognised in Ireland. The Irish court issued a decision in February 2012 that did not grant effective relief, as it essentially recognised both the BVI liquidation proceedings and the Attachment Order and gave rise to the unhelpful situation whereby multiple courts and jurisdictions were exhibiting influence over the same winding up and the same assets.

In March 2011, the Liquidators applied to the BVI Court for an anti-suit injunction restraining Shell from progressing proceedings in the Netherlands and requiring Shell to take all necessary steps to procure the release of the Attachment Order.

The Liquidators were unsuccessful at first instance, but successful on appeal, and a further appeal by Shell brought the matter before the Privy Council. The key issue was whether, in circumstances where a company was being wound up in the jurisdiction in which it is incorporated, an anti-suit injunction should be capable of preventing a creditor or a member from pursuing proceedings in a different jurisdiction which might give him priority over other creditors.

The Privy Council determined that it could make an order granting the injunctive relief sought by the Liquidators (thereby achieving the Liquidators' desired result of preventing the Irish Injunction from leading to execution of the cash balance). The basis of this jurisdiction was found from two sources:

(a) A rejection of territorial ring fencing in international insolvency; and
(b) An equitable jurisdiction to enforce the statutory scheme of distribution in an insolvency.

The Privy Council held there was no principle which prevented the anti-suit injunction from being enforced against Shell, a foreign litigant. Further, it found there was an underlying public interest in enabling a single court, in the place of incorporation of a company, to conduct an orderly winding up of its affairs on a worldwide basis.

Whilst the decision of the Privy Council reflected (as the Privy Council put it) "*the ordinary principle of private international law that only the jurisdiction of a person's domicile can effect a universal succession to its assets*" the decision required the involvement of three local courts, besides the Privy Council, and spanned over three years.

Had the Model Law been enacted in both the Netherlands and Ireland, the Liquidators would have been able to swiftly and efficiently obtain recognition of the BVI liquidation proceedings in both jurisdictions, pursuant to Article 17 (note that the Liquidators successfully obtained recognition of the BVI liquidation proceedings as a foreign main proceedings in the United States, under Chapter 15 of the US Bankruptcy Code). In the Netherlands, the foreign main proceedings' recognition would have immediately stayed the litigation against Fairfield Sentry in that jurisdiction, pursuant to Article 20 of the Model Law.

In Ireland, recognition under the Model Law would have afforded the Liquidators the right to (i) obtain the funds subject to the Attachment Order under Article 21(1)(e), which allows for the "*entrust[ment] [of] the administration or realisation of all or part of the debtor's assets located in [the enacting] State to the foreign representative or another person designated by the court*" and (ii) repatriate those assets to the BVI for administration in the BVI liquidation proceedings pursuant to Article 21(2), which authorises the court to "*entrust the distribution of all or part of the debtor's assets located in [the enacting] State to the foreign representative or another person designation by the court, provided that the court is satisfied that the interests of creditors in [the] State are adequately protected.*"

Applying the four key elements of the Model Law – access, recognition, relief (assistance) and cooperation – to the *Fairfield Sentry* factual matrix would have resulted in:

i) cooperation among the various State courts;
ii) coordination of the concurrent proceedings concerning *Fairfield Sentry* and, following recognition;
iii) a clear and simple path to the relief sought by the Liquidators.

Fairfield Sentry is thus a quintessential example of how the Model Law could provide much needed assistance to insolvency office holders in pursuing the recovery of assets in Europe. ■

Footnotes:

1 *Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency*, at www.uncitral.org/pdf/english/texts/insolven/1997-Model-Law-Insol-2013-Guide-Enactment-e.pdf, viewed 12 August 2015.
2 *Id.*
3 Consideration of "foreign representatives", "foreign main proceeding" and "foreign non-main proceeding" are covered extensively elsewhere and are outside of the scope of this article.
4 Matthew T. Cronin, *UNCITRAL Model Law on Cross-Border Insolvency: Procedural Approach to a Substantive Problem*, 24 J. Corp. L. 709 (1999), *supra*, note 12, p. 713

> **THE MODEL LAW DOES NOT ATTEMPT TO HARMONISE OR UNIFY THE SUBSTANTIVE INSOLVENCY LAWS APPLICABLE IN EACH JURISDICTION**

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