CROSS BORDER INSOLVENCY

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- **Introduction**

Cross-border insolvency controls the care of financially distressed debtors where such debtors have properties or creditors in more than one country. In general, cross-border insolvency is more concerned with the insolvency of businesses operating in more than one country than with the bankruptcy of individuals. Like traditional conflict of law rules, cross-border insolvency focuses on three areas: choice of law, jurisdiction and enforcement of judgment rules. However, in the case of insolvency, the main focus tends to be the recognition of foreign insolvency officials and their powers.

- **Theories of Cross Border Insolvency**

Universalist:

Universalism seeks to establish a common forum applying a common legal framework to handle the assets and liabilities of the debtor on a global basis. The principle of universalism means that all the assets or properties of the debtor are disposed of internationally by the courts of the debtors' home jurisdiction and, after a court of law, the allocation of the proceeds of the debtor's property or assets is in line with the distribution scheme in accordance with the law of the debtor's home jurisdiction.

Territorialism

Territorialism, on the other hand, is based on the idea of state sovereignty, where each country uses its own insolvency law to administer the debtor’s assets locally in accordance with the procedures and priorities of the law of that country. There is no acceptance of international proceedings in such a scheme, as it states that insolvency proceedings within a jurisdiction shall have effect only within that jurisdiction. In other words, local assets are intended for local creditors, regardless of what happens globally elsewhere.

Modified Universalism

Modified universalism retains the concept of universalism, but recognizes that a country may only freely regulate its own territories and laws and enforce private international rules and regulations and form them to suit global insolvency in line with Universalist theory to provide a

global collective method. Under the Modified Universal Regime, a country does not try to coordinate its legislation with another country, but rather creates a system that is open to cooperation while seeking the widest possible impact on its own laws. It stipulates that the courts, in so far as they are compatible with justice, public policy and specific domestic factors, will actively assist and comply with the courts of the principal liquidation nation. This incorporates the theories of universality and territoriality where in one context there is a primary insolvency action which is complemented by ancillary or secondary process by other jurisdictions.

- **UNCITRAL Model Law On Cross Border Insolvency**

The Model Law on Cross-Border Insolvency was implemented in 1997 and is intended to assist States in enforcing their debt laws with a cutting-edge, well-organized and rational mechanism to resolve the most common incidents of cross-border procedures involving lenders suffering severe money-related pain or bankruptcy. Cases involve cases where the indebted person has capital in more than one country / state or where a majority of the creditors of the account holder is not from the State where the bankruptcy occurs. At the fundamental level, the procedure laid down in the focal point of primary interests of the account holder must have a head office to deal with the bankruptcy of the indebted person paying little attention to the number of States in which the borrower has capital and the loan managers, subject to sufficient planning strategies to meet the needs of the community.

The Model Law represents cross-border insolvency activities that are typical of modern, effective insolvency systems. As a result, the Model Legislation States will introduce important reforms and improvements to national insolvency legislation designed to tackle problems arising in cross-border insolvency cases. By adopting legislation based on the Model Law, States agree that such insolvency laws may or may have had to be amended in order to comply with generally accepted standards.

The Model Law recognizes the discrepancies between national procedural laws and does not seek a fundamental reform of insolvency law. Rather, it provides a basis for collaboration between jurisdictions, offers solutions that support in a variety of small but important ways, and encourages and supports a common approach to cross-border insolvency. Such strategies shall include the following:

a) providing the individual conducting the international insolvency proceedings ('foreign representative') with access to the courts of the enacting State1, thereby enabling the international representative to request a temporary 'breathing space' and enabling the courts of the enacting State to decide whether coordination between jurisdictions or other relief is needed for an effective disposition of the insolvency proceedings.

b) Determining where "recognition" will be given to a foreign insolvency proceeding and what the implications of recognition can be;

c) providing for a clear framework for the right of international creditors to initiate or engage in insolvency proceedings in the issuing State;

d) allowing the courts of the enacting State to cooperate more effectively with foreign courts and foreign representatives involved in insolvency proceedings;
e) allowing courts in the enacting State and individuals administering insolvency proceedings in the enacting State to seek assistance abroad;

f) provide for jurisdiction of the court and lay down rules for cooperation where insolvency proceedings in the enacting State take place at the same time as insolvency proceedings in a foreign country;

g) Creating guidelines for the arrangement of relief provided in the enacting State in order to assist two or more insolvency proceedings which may take place in foreign States in respect of the same debtor.

- **Case Laws**

A. *SOLOMONS V ROSS* (1764) 1 H BL 131N.

A firm in Amsterdam was declared bankrupt and assignees were appointed. An English creditor brought garnishee proceedings in London to attach and pound; 1200 owing to the Dutch firm.

Held

The court decreed that the bankruptcy had vested all the firm's moveable assets, including debts owed by English debtors, in the Dutch assignees. The English creditor had to surrender the fruits of the garnishee proceedings and prove in the Dutch bankruptcy. The Dutch curator was entitled to recover the English debt in priority to an English creditor of the merchants who had attached the debt after the bankruptcy.

B. CAMBRIDGE GAS TRANSPORT CORP V OFFICIAL COMMITTEE OF UNSECURED CREDITORS (OF NAVIGATOR HOLDINGS PLC AND OTHERS): PC 16 MAY 2006

A scheme of arrangement was proposed for a company with involvement in several jurisdictions. An order in New York sought assistance in the vesting of shares and assets in the Isle of Man in the creditors committee. Cambridge was a majority shareholder in the Isle of Man Company, but had no involvement in the New York proceedings and resisted the vesting order.

Held:

The appeal failed. If the New York order was in rem, then it could not affect title to shares in the Isle of Man. If in personam, the court had wide common law discretion, but the action had been brought against the wrong party. However the order was neither: 'The purpose of bankruptcy proceedings. . is not to determine or establish the existence of rights, but to provide a mechanism of collective execution against the property of the debtor by creditors whose rights are admitted or established. That mechanism may vary in its details.'

The Manx court had jurisdiction to assist the committee of creditors, as appointed representatives under the Chapter 11 order, to give effect to the plan. As there was no suggestion of prejudice to any creditor in the Isle of Man or local law which might be infringed, there was no discretionary reason for withholding such assistance.

C. RUBIN AND ANOTHER V EUROFINANCE SA AND OTHERS: SC 24 OCT 2012

The Court was asked 'whether, and if so, in what circumstances, an order or judgment of a foreign court .in proceedings to adjust or set aside prior transactions, eg preferences or transactions at an undervalue, will be recognised and enforced in England.

The appeals also raise the question whether enforcement may be effected through the international assistance provisions of the UNCITRAL Model Law (implemented by the Cross-Border Insolvency Regulations 2006 . . which applies generally, or the assistance provisions of section 426 of the Insolvency Act 1986, which applies to a limited number of countries, including Australia.'

Held

In Rubin, the appeal succeeded (Lord Clarke dissenting); there should not be special rules for avoidance judgments. The appeal in New Cap failed, since the Syndicate had submitted to the Australian jurisdiction.

A court in one jurisdiction may give a judgment in personam which is a proper basis for recognition and enforcement where the defendant

(i) was present in the foreign court when the proceedings were instituted; or

(ii) was a claimant, or had counterclaimed, in the foreign proceedings; or

(iii) submitted to the jurisdiction of that foreign court by voluntarily appearing in the proceedings; or

(iv) Had agreed to submit to the jurisdiction of the foreign court before the proceedings began.

However the interests of universality of insolvency were not sufficient to give them more liberal enforcement than in other matters, since this would inevitably lead to further complications. Any change would require parliamentary action.