

Report on Bachelor / Master Thesis

Institute of Economic Studies, Faculty of Social Sciences, Charles University in Prague

Student:	Pavel Martinik
Advisor:	Tomas Richter
Title of the thesis:	Czech Cross-Border Insolvency Rules in Comparison with the UNCITRAL Model Law

OVERALL ASSESSMENT (provided in English, Czech, or Slovak):

The thesis consist of several major sections : (a) a review of the main theories of cross-border insolvency – part III, (b) an introduction of the relatively new Czech rules on cross-border insolvency applicable outside the scope of the European Insolvency Regulation 1346/2000 (the "EIR") contained in the Czech Act of Private Insolvency Law 91/2012 (the "Act") – part IV.1, (c) an introduction to the UNCITRAL Model Law on Cross-Border Insolvency (the "Model Law") – part IV.2, (d) an attempt at comparison of the rules of the Act with those of the Model Law – part IV.3, (e) a quantitative study of the volume of Czech foreign trade with jurisdictions that have adopted the Model Law – part IV.4, and (f) a conclusion – part V.

Section (a) is a little too cursory but given that this is a bachelor-level thesis and given its overall size, the simplifications are probably within the bounds of the acceptable.

Section (b) is, unfortunately, not adequate given its importance to the thesis. The text barely manages to state the law correctly – in fact, on several occassions (such as on p. 25 with respect to the rules in S. 111 (3) and (5) of the Act) those statements are incomplete or incorrect. Although describing Section 111(2) of the Act as "specifically important", the section does not really discuss what type of jurisdiction it grants to Czech courts in comparison with/in addition to, their jurisdiction to open territorial or secondary proceedings pursuant to the EIR, which S. 111(1) of the Act expressly refers to and which, by general consensus going back to early EIR case law by English courts (*in Re BRAC Rent-A-Car*) applies irrespective of whether the debtor's jurisdiction of incorporation lies within or outside the EU. The section also gives an inadequate treatment to rules on inter-court communication (p. 25 in the bottom) although the rule in S. 102 of the Act presents a particular challenge in the cross-border insolvency context. Moreover, and more importantly, the section does not apply the theoretical findings presented in section (a) to the Act's rules described. This is left to a cursory statement in section (f) – a questionable methodological choice, in my opinion, because the sections in between section (b) and section (f) would have benefitted from a solid conceptual analysis of the effects of the rules described in section (b).

Section (c) is a little too superficial as well. In particular, it does not properly discuss the meaning of UNCITRAL Model Law's concept of "relief" as a key to the understanding of the nature of its (US-inspired) system of international co-operation, and its differences to the Czech reader's likely intuitions as to the meaning of "recognition" of a foreign judgment.

Section (d) uses local creditors' incentives as the methodological tool of comparing the Act to the Model Law. Once again, this seems to me a questionable choice, in particular given the fact that the section speculates about the creditors' incentives without taking into account, or at least stating expressly, the factual assumptions as to the debtor's estate which would need to be in place in order to allow the tactical choices under discussion in the first place (see p. 29 and 30). The claims as to the Model Law's impacts on parties' incentives made on p. 30 and 31 once again depend on the meaning, and the workings of, the concept of "relief" pursuant to the Model Law which has not been discussed properly. One useful realisation in section (d) is that, at least on its face, Section 111(3) of the Act is phrased as an option given to the Czech courts to apply the EIR's conflict of laws rules appropriately, not an order to do so (p. 31 ff.). Applied literally, the rule in Section 111(3) indeed achieves no certainty as to the governing law, as the thesis vividly shows.

Section (e) is useful alone due to the fact that, so far as I know, the quantitative research it presents had not been conducted in the past. On the other hand, the finding that the Czech Republic's trade exchange with Model Law countries amounts only to approx. 6 % of the country's foreign trade makes

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the case for the adoption of the Model Law by the country questionable at best (an alternative metric, that of direct foreign investment, has not been presented but intuitively, it is not very likely to be much different from the trade figures, given the general dominance of EU member states in the country's foreign economic relations). If the quantitative findings are correct, the case for the adoption of the Model Law would seem to lie more in a template assuring some minimum quality of national legislation, rather than in foreign relations strategy choices.

Section (f) concludes that the Act's rules are based on "territorial principles" (p. 39). This finding is questionable since, at least as regards the outward operation of the rules, S. 111(1) of the Act states a clearly universalist ambition, although moderated by the obvious limits set by the sovereignty of the receiving states. On the inward operation of the rules, it ought to be no surprise if the Act's rules resemble the system laid down in the EIR – after all, it was obviously the main (probably the only) point of reference for the Act's draftsmen.

I have no dispute with section (f)'s claim that the Act's rules appear to be poorly designed and insufficiently thought-through. Unfortunately, the thesis does not deserve a much better evaluation. Although the candidate took a substantial period between applying for the thesis and submitting the finished manuscript, he clearly did not allow sufficient time to mastering the topic. The successive drafts which I have received towards the end of that period were too incomplete to allow many meaningful comments, including the penultimate draft. The outcome comes as a disappointment to me as advisor given how attractive the topic is and what potential it had offered. On the other hand, the candidate deserves to earn points for writing the thesis in English, rather than in his native language.

SUMMARY OF POINTS AWARDED (for details, see below):

CATEGORY	POINTS
<i>Literature</i> (max. 20 points)	15
<i>Methods</i> (max. 30 points)	10
<i>Contribution</i> (max. 30 points)	10
<i>Manuscript Form</i> (max. 20 points)	10
TOTAL POINTS (max. 100 points)	45
GRADE (1 – 2 – 3 – 4)	3

NAME OF THE REFEREE: T. Richter

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Referee Signature