CHARLES UNIVERSITY IN PRAGUE

FACULTY OF SOCIAL SCIENCES

Institute of Economic Studies

Pavel Martiník

Czech Cross-Border Insolvency Rules in Comparison with the UNCITRAL Model Law

Bachelor thesis

Prague 2016

Author: Pavel Martinik

Supervisor: JUDr. Mgr. Tomáš Richter, LL.M., Ph.D.

Academic Year: 2015/2016

Závazně prohlašuji, že jsem práci vypracoval samostatně, všechny použité prameny a literatura byly řádně citovány a práce nebyla použita k získání jiného titulu.

V Praze dne 9. května 2016

_____

Pavel Martiník

Děkuji vedoucímu bakalářské práce JUDr. Mgr. Tomáši Richterovi, LL.M., Ph.D za cenné podněty a rady při psaní této bakalářské práce.

Abstract in English

The Thesis compares UNCITRAL Model Rules on Cross-Border Insolvencies with current Czech legislation. In the first part, it briefly depicts main cross-border insolvency systems, as they were developed by leading scholars. Furthermore, the protocols, as a unique solution to a multinational default are discussed. In the second part, it applies principles of economic approach to law and discusses the pros and cons of the Czech system in comparison to the Model Rules using specific examples. The outcome of the Thesis is analysis of several features the Model Rules and Czech legislation differs.

Abstract in Czech

Bakalářská práce srovnává Modelová pravidla UNCITRAL pro přeshraniční insolvence se současnou českou právní úpravou v této oblasti. V první části popisuje současné hlavní systémy mezinárodních insolvencí, jak byly vyvinuty akademií. Kromě těchto systému jsou popsány i protokoly jako specifické způsoby řešení mezinárodních úpadků. Ve druhé části této práce jsou aplikovány zásady ekonomického přístupu k právu a jsou rozebrány výhody a nevýhody českého systému ve srovnání s modelovou úpravou UNCITRAL za použití konkrétních příkladů. Výstupem práce je analýza několika specifik, ve kterých se modelová pravidla a česká právní úprava liší.

Key Words

Insolvency, Cross-Border Insolvency, UNCITRAL, Economic Approach to Law, International Private Law.

Klíčová slova

Insolvence, Mezinárodní insolvence, UNCITRAL, ekonomický přístup k právu, mezinárodní právo soukromé.

Bachelor Thesis Proposal

The thesis will focus on the new Czech cross-border insolvency rules that are a part of the new International Private Law Act (91/2012 Sb.), which was adopted in 2012. Specifically, it will provide a comparison of the UNCITRAL Model Law and the current Czech legislation regarding general cross-border insolvencies (par 111, 91/2012 Sb. Act). On the contrary, the thesis will inquire neither into specific rules on international insolvencies of special regulated financial bankrupts (paras 112 – 114, 91/2012 Sb. Act), nor into the EU cross-border insolvency rules.
The aim of the work is to evaluate the development of Czech cross-border insolvency rules with regard to the development of international standards in this area, and to identify the impact of the Czech legislation on the domestic economy.

Table of Contents

An Israeli entrepreneur has run his branch in Pensacola, FL for many years. Now, the business is struggling to meet its liabilities and the entrepreneur doesn't know what to do. He goes to his Rabbi to seek advice, tells the Rabbi about his business problems and asks what he should do.

The Rabbi replies "Take a Bible, drive down to the ocean and go to the water's edge. Sit there and open the Bible up. The wind will riffle the pages for a while and eventually the Bible will stay open on a particular page. Read the first words your eyes fall on and they will tell you what to do." The man does as he is told.

Three months later, the man comes back to see the Rabbi. The man is wearing a very expensive Italian suit, a $1500 watch and hands the Rabbi a thick envelope full of money telling him that he wants to donate this money to the synagogue to thank the Rabbi for his advice. The Rabbi is delighted. He recognizes the man and asks him what words in the Bible brought this good fortune to him.

The man replies: "Chapter 11".

I. Introduction

This thesis will deal with the same issue as outlined in the anecdote above but on a larger scale. It will briefly introduce the current theoretical discussion on cross-border insolvency as developed by leading scholars in the field and compare the theory with the UNCITRAL model rules on cross-border insolvency, as well as the current system in the Czech Republic, examining the pros and cons of the latter with respect to the Czech economy.

I will investigate and discuss only the Czech national law. Therefore, the European Union legislation that is in force in the Czech Republic will not be examined in this Thesis.

In particular, the thesis will demonstrate that some systems are legally preferable to debtors, others to creditors, while others determine the governing law and bankruptcy

courts more or less randomly (at least in certain circumstances) and will show how this affects the decision-making process of all entities in the relevant markets.

Finally, the outcomes of the general inquiry will be applied to the situation in the Czech Republic and will provide, what I believe is, a comprehensive review of the current domestic legal framework for cross-border insolvencies.

II. Introduction to Insolvencies

First of all, it is necessary to define what insolvency is, what the aims of insolvency proceedings are, and what it means for an insolvency to be cross-border. An explanation of the terms above will be provided in this short chapter.

There are currently two primary tests to determine whether a company[1] is insolvent or not in legal systems around the globe: The first is a balance sheet test while the other is a cash flow test. Whereas the principle of a balance sheet test is the comparison of assets to liabilities and if the latter exceeds the former, then the company is declared insolvent, the principle of the cash flow test is based around looking into the debtor`s ability to meet their liabilities on time. If they do not, it will result in an insolvency order[2].

The aim of insolvency proceedings, at least from the macro-economic point of view, is to provide an option for unsuccessful market players to leave the market so the markets can continue to operate efficiently[3]. The exit does not necessarily mean the entity ceases to exist but it can force the business entity to adjust its structure in order to secure the position of its creditors[4].

As insolvency proceedings are special processes, dissimilar to all other legal procedures, it has unique principles that most jurisdictions have in common: First of all, once the procedure has commenced, liabilities cannot be met outside the

[1] Although a non-business individual can be declared insolvent as well, for the purpose of the work I will focus only on proceedings that take place to deal with insolvencies of businesses.

[2] RICHTER, Tomáš. Insolvenční právo. Vyd. 1. Praha: ASPI, 2008. ISBN 978-80-7357-329-4, p. 125

[3] RICHTER, Tomáš. Insolvenční právo. Vyd. 1. Praha: ASPI, 2008. ISBN 978-80-7357-329-4, p. 128

[4] For example, see paras 316 – 364 Act no. 182/2006 Sb. (Insolvency Act) that governs reorganization.

insolvency proceedings. Second, creditors belonging to one class[5] have equal opportunities for their liabilities to be met in the proceedings.

Although the core principles are the same, the preferred outcomes differ. While some legal systems in some jurisdictions are aimed on meeting as many liabilities as possible[6], others aim for reorganization and for the employees of the business entity to have secured their positions[7].

For the purpose of this work, I would define Cross-Border Insolvency as an insolvency where the debtor has his or her assets in more than one country[8]. Moreover, the Cross-Border Insolvency proceedings would be defined as proceedings influencing rights and duties in more than one jurisdiction.

III. General Systems of Cross-Border Insolvencies

There is one feature that all systems should have in common: they should all aim to find the most effective solution to a situation where there is an entity about to undergo insolvency proceedings and this entity has its assets spread across two or more jurisdictions or another jurisdiction is involved for different reasons. In general, this area is covered by Private International Law[9], but for the scope of this work I would

---

[5] E.g. unsecured creditors.

[6] See par 5a) Insolvency Act.

[7] See French Commercial Code Article L-640-1 that allows liquidation if, and only if the reorganization is *"manifestly impossible*".

[8] See FLETCHER, Ian F. Insolvency in private international law: national and international approaches. 2nd ed. New York: Oxford University Press, 2005. ISBN 01-992-6250-0.

[9] International Private Law is *"the part of the national law of a country that establishes rules for dealing with cases involving a foreign element (i.e. contract with some system of foreign law)"*. LAW, Jonathan a E MARTIN. A dictionary of law. Seventh edition reissued with new covers and updates. Oxford, United Kingdom: Oxford University Press, 2013. ISBN 01-996-6986-4, p. 424

narrow the range to outlining a proper model for the (international) insolvency proceedings of an entity as described above leaving other issues aside.

Having said that, I would like to present how this chapter will describe the current major systems of cross-border insolvencies, as developed in the theory of cross-border insolvency, and emphasize their advantages and disadvantages as were argued in past years in various papers. This section is structured to depict the solutions that are considered to be the most global[10] first, while leaving those based on local laws last. Therefore, the first system I am going to describe is Universalism, the next will be Corporate-Charter Contractualism, followed by Modified Universalism and then Secondary Bankruptcy. Finally, I will describe Cooperative Territoriality which will include a few words on Territoriality as well. I will also discuss the International Protocol as a tool to help solve individual multinational defaults. Moreover, I would like to state that the first two proposed systems, Universalism and Contractualism, have not been adopted in any jurisdiction so far and thus they remain to be academic concepts rather than viable solutions.

III.1. Universalism

The key principle of universalism is simple. When a cross-border insolvency occurs, the global proceedings are governed by one bankruptcy court and thus only one jurisdiction is responsible for all legal relationships connected with the insolvency proceedings in each and every involved country[11].

The main advantage is obvious and is stressed by professor Westbrook: *"A single court would maximize asset values, even in liquidation, by providing a unified approach to*

[10] As for the process of insolvency proceedings. All of the following schemes except for territorialism require cooperation between countries at least in the form of an international treaty for the system to work.

[11] WESTBROOK, Jay Lawrence. A Global Solution to Multinational Default. Michigan Law Review. 1999, 1999-2000(98), 2276-2328, p. 2277

assembly and sale assets as a whole. […] A single court would improve dramatically the possibility of reorganization."[12]

On the other hand, there are also serious drawbacks. Although it is true that choice of forum and choice of law can be separated[13], meaning the governing legal system could be adjusted; the nature of multi-national cross-border insolvencies implies that even in this case, foreign laws would be imported to a sovereign country as the proceedings are being administrated[14].

Through that, an important issue arises. Each legal system mirrors, amongst other things, the economic reality of the given country. By such importing of laws, rules that do not meet the domestic eligible expectations could appear. Let me introduce an example: As the seat of a company is considered one of the most inherent criterion for the choice of law, it is very likely, in my opinion, that the fears of L. M. LoPucki regarding the situation of employees in a company gone bankrupt would become true: *"Workers who performed the same jobs in the same industry in the same city would be paid varying amounts depending on the nationality of the firm for which they worked."*[15]

Moreover, the system needs to be truly universal as all of the solutions below attempt to demonstrate.

III.2. Corporate Charter Contractualism

In contrast to other systems, the debtor is not dependent on Private International Law to determine under which legal system it would undergo insolvency proceedings in this

[12] WESTBROOK, Jay Lawrence. A Global Solution to Multinational Default. Michigan Law Review. 1999, 1999-2000(98), 2276-2328, p. 2293

[13] WESTBROOK, Jay Lawrence. Theory and Pragmatism in Global Insolvencies: Choice of Law and Choice of Forum. American Bankruptcy Legal Journal. 1991, 1991(65), 457-490, p. 461

[14] For example, in the case of prioritization of liabilities.

[15] LOPUCKI, Lynn M. Cooperation in International Bankruptcy: A Post-Universalist Approach. Cornell Law Review. 1998, 1998-1999(84), 696-762, p 711

case. If the state legislation approves this system, every entity can find governing law on its own.

There are many variations of the system. While some authors argue that the debtor should decide what jurisdiction should be applied when entering into a contract with a creditor[16] the other option is that the decision should be made upon incorporation of the company.

The main advantage of this system, whether it is on a contractual or incorporated basis, is that the debtors know in advance precisely what system will be used in the case of default. As LoPucki puts it, the main disadvantage is purely of an economic nature: *"Each lender would have to (1) obtain the debtor`s corporate charter from the public record, (2) analyze the possibly complex provisions of the charter governing bankruptcy, (3) determine the priority of the creditor`s claim under the law of the forum country or countries specified, and (4) evaluate the 'efficiency' of the country`s bankruptcy system as it actually operates."*[17] To put it in other words, transaction costs for creditors would be too high.

III.3. Modified Universalism

In contrast to the two systems described above, this system is the first to be actually in force in some countries[18]. As its name suggests, it is derived from Universalism but it mitigates some of its key features and involves the local courts much more in decision making, or more precisely, involves them.

---

[16] SCHWARTZ, Allan. A Contract Theory Approach to Business Bankruptcy. The Yale Law Journal. 1998, 1997-1998(107), 1807-185, p 1822

[17] LOPUCKI, Lynn M. Cooperation in International Bankruptcy: A Post-Universalist Approach. Cornell Law Review. 1998, 1998-1999(84), 696-762, p 739

[18] Elements of Modified Universalism are present for example in the Canadian system. LOPUCKI, Lynn M. Cooperation in International Bankruptcy: A Post-Universalist Approach. Cornell Law Review. 1998, 1998-1999(84), 696-762, p 726

In Modified Universalism the bankruptcy court in the forum country[19] commences proceedings and if foreign assets are present, it appoints a representative who should take control over them. But, unlike general Universalism, if there are obstacles the representatives need to seek the support of the local courts not just for the execution of orders of the forum court, but the local court also holds ancillary proceedings[20].

The only thing that comes out of the outcome of the ancillary proceedings is the decision regarding whether the foreign representative would be allowed to administrate the proceedings in the local jurisdiction. Therefore, it does not deal with the questions regarding how the default ought to be controlled or with other questions of facts or law[21].

The United States has been considered a great proponent of such a system. Although there was a change to the legislation in 2005[22], the system didn't see significant modifications. Professor Westbrook emphasizes the complexity of the new solution stressing new features occur but the principles remained unaffected: "*Section 304 did not provide for recognition of a foreign bankruptcy proceeding as such. It simply gave the United States courts the authority to open an ancillary proceeding and grant various forms of relief to the representative of a foreign main proceeding if the*

[19] The jurisdiction is determined by the home country of the debtor. LOPUCKI, Lynn M. Cooperation in International Bankruptcy: A Post-Universalist Approach. Cornell Law Review. 1998, 1998-1999(84), 696-762, p 727 -728.

[20] LOPUCKI, Lynn M. Cooperation in International Bankruptcy: A Post-Universalist Approach. Cornell Law Review. 1998, 1998-1999(84), 696-762, p 726

[21] LOPUCKI, Lynn M. Cooperation in International Bankruptcy: A Post-Universalist Approach. Cornell Law Review. 1998, 1998-1999(84), 696-762, p 728

[22] The former § 304 of the U.S. Code that dealt with auxiliary proceedings was replaced by Chapter 15 of the bankruptcy code.

statutory criteria were satisfied. By contrast, the Model Law specifically provides for a petition for recognition to open an ancillary case under Chapter 15."[23]

The main advantage in comparison to pure Universalism system is that the local court can protect domestic creditors through ancillary proceedings which can have (and usually have) different interests from the creditors abroad. In case the petition is rejected in ancillary proceedings, standard bankruptcy proceedings commence according to national law[24].

The main downsides are directly mirrored when compared with the positives in this case. As the solution clearly aims for the protection of domestic creditors, the most efficient global solution for insolvency can easily be overridden by local interests.

Moreover, it is hard to predict which substantive law would be applied, as there is never certainty whether the local court would recognize the foreign protection of creditors to a sufficient degree. This, of course, influences amongst other things, the interest rates for which are creditors willing to invest in the debtor's business: "*[P]arties entering into these international transactions should expect and understand that they were not lending money to the corner grocer, so to speak. Thus, their reasonable expectations should include the possibility that the laws of the issuer's home*

[23] WESTBROOK, Jay Lawrence. Chapter 15 at Last. American Bankruptcy Law Journal. 2005, **2005**(13), 713-728, p. 721

[24] It was not so in the past under US law Before the adoption of Chapter 15, there were actually three options – the recognition of foreign proceedings and commencing of standard proceedings as described above were accompanied by the surrender of assets to the foreign representative after assurances were made. This is now covered in Section 1522(b) of the Code as a condition for granting relief. See comment on then legislation in LOPUCKI, Lynn M. Cooperation in International Bankruptcy: A Post-Universalist Approach. Cornell Law Review. 1998, 1998-1999(84), 696-762, p 727

country might affect their legal rights."[25] As one can probably take from the citation, the problem is whether it can be determined how likely the possibility of application of foreign law is.

III.4. Secondary Bankruptcy

While some authors do not distinguish between Secondary Bankruptcy and Modified Universalism[26], stating only they both contain non-main proceedings, there are substantial differences in my opinion. Whereas in ancillary proceedings, the court decides merely whether or not foreign proceedings would be recognized, in the secondary proceedings system, there are still leading proceedings in the debtor`s home country and the court makes decisions regarding the subject matter in the secondary proceedings according to the local law: *"In a secondary bankruptcy case, the court reorganizes or liquidates the debtor`s local assets and make distributions necessary to protect creditors entitled to priority under local law. […] The secondary courts then would surrender any remaining assets to the U.S. court [where the main proceedings were held before in this case]."*[27]

The main advantage can be directly observed – the domestic debtors` interests are even more protected than in the case of Modified Universalism as the local law is always used: *"If, by some chance, the liquidation of assets in the secondary proceedings results in the full satisfaction of all claims allowable under those proceedings, any surplus assets remaining are to be transferred to the liquidator in the main proceedings.*

---

[25] Canada Southern Ry. Co v Gebhard 109 U.S. 527 (1883) cited from WESTBROOK, Jay Lawrence. Chapter 15 and Discharge. American Bankruptcy Institute Law Review. 2005, 13(2), 503-519, p. 508

[26] WESSELS, B, Bruce A MARKELL a Jason J KILBORN. International cooperation in bankruptcy and insolvency matters. New York: Oxford University Press, c2009. ISBN 01-953-4017-5, p 68.

[27] LOPUCKI, Lynn M. Cooperation in International Bankruptcy: A Post-Universalist Approach. Cornell Law Review. 1998, 1998-1999(84), 696-762, p 733

[quotation avoided]"[28] Furthermore, there is also no dispute over the governing law as in the former system.

On the other hand, this certitude is countered by the dispersion of the proceedings. It is almost impossible for the court holding the main proceedings to control the final outcome of the proceedings altogether as it only administrates the assets that remain in the secondary proceedings. Therefore, it is probable that it would be ineffective on a global scale. The other disadvantage is the speed of the proceedings – the court governing the main proceedings has to wait until all other courts involved have delivered decisions in the secondary proceedings before rendering a final ruling.

The European Union structure for cross-border insolvencies[29] that is governed by European Union secondary legislative acts belongs to this doctrinal system. This fact can be observed from Article 3 and Chapter III of Regulation EC 1346/2000. Article 3(1) and introduces main proceedings that can be held only in the jurisdiction where the debtor has their center of main interests. If the debtor's center of main interests is in the European Union, insolvency proceedings in other states are always secondary[30] and their effects are limited to the state's jurisdiction[31].

Furthermore, the Chapter III Regulation EC 1346/2000 deals with specifics of secondary proceedings. It stipulates, amongst other things, the court's discretion in measures involving secondary insolvency proceedings[32] or in granting preservation measures

---

[28] FLETCHER, Ian F. THE EUROPEAN UNION CONVENTION ON INSOLVENCY PROCEEDINGS: AN OVERVIEW AND COMMENT, WITH U.S. INTEREST IN MIND. Brooklyn Journal on International Law. 1991, 23(1), 25-56, p. 44

[29] Although the European Union system is not the topic of this Thesis, I believe it would be useful to briefly discuss it here with respect to Subsection 3 Section 111 International Private Law Act (see bellow).

[30] Article 3(3) Regulation EC 1346/2000.

[31] Article 3(2) Regulation EC 1346/2000

[32] Article 34 Regulation EC 1346/2000

before the secondary insolvency proceedings commence[33]. Moreover, the fact that the court is not just the executor of the will of the court holding the main proceedings stems from the fact that secondary proceedings may commence before the main one[34].

III.5. Cooperative Territoriality

The key principle of Cooperative Territoriality which was invented by professor LoPucki[35] is that there are concurrent proceedings in each country where the debtor`s assets are located, but unlike in the previous systems, no proceeding is considered to be the main one. Therefore, the proceedings are independent of each other.

The cooperation is therefore always bilateral and resides in (1) unified contact point[36], (2) preventing creditors from receiving more than the full amount of their receivables by sharing the current status of proceedings (3) the joint sale of assets in case this would render greater value, (4) the cross-border transfers of properties in connection to reorganization efforts, and (5) return of assets that were transferred avoidably[37].

The main advantage is, in comparison to all previous systems, that during the insolvency proceedings, foreign laws are not applied. Moreover, it is the system with the shortest length in terms of proceedings insofar as only domestic courts are involved and there is no proceeding to follow up.

---

[33] Article 38 Regulation EC 1346/2000

[34] Article 3(4) Regulation EC 1346/2000

[35] LOPUCKI, Lynn M. Cooperation in International Bankruptcy: A Post-Universalist Approach. Cornell Law Review. 1998, 1998-1999(84), 696-762, p 742-743

[36] Meaning that there would be a system for claims to be automatically shared amongst all relevant jurisdictions after being filed in one of the countries where proceedings are administered.

[37] LOPUCKI, Lynn M. Cooperation in International Bankruptcy: A Post-Universalist Approach. Cornell Law Review. 1998, 1998-1999(84), 696-762, p 750

The disadvantage is that problems with the choice of avoidance law might occur. As the proceedings are not globalized and the concurrent proceedings are not dependent on each other, fraudulent conveyance[38] of assets or preferential transactions[39] might take place and, in the case where some of them are international, a problem appears: *"If home-country law would avoid a transaction not avoidable under local law, avoidance would not promote the home-country policies served by its avoidance rule, because the proceeds of avoidance would not be distributed according to the home-country priority system."*[40] Professor LoPucki admits this might be a problem and states it has to be addressed by *"the seizure and return of assets that have been subject of avoidable transfers"*[41], he does not state how, though.

But this is a deadlock: either the court in the country the assets are transferred to applies foreign rules[42] in order to determine whether the transfer is to be considered avoided, or it applies only local laws and the creditors in the home country are obviously, according to the principles of Cooperative Territoriality, subject to unfair

---

[38] *"A transfer of land [or other assets] made without valuable consideration and with the intent of defrauding […]."* LAW, Jonathan a E MARTIN. A dictionary of law. Seventh edition reissued with new covers and updates. Oxford, United Kingdom: Oxford University Press, 2013. ISBN 01-996-6986-4, p. 240

[39] "The favouring by an insolvent debtor of a particular creditor […] The court can order that the position be restored to what it would have been had the creditor not been given preference." LAW, Jonathan a E MARTIN. A dictionary of law. Seventh edition reissued with new covers and updates. Oxford, United Kingdom: Oxford University Press, 2013. ISBN 01-996-6986-4, p. 417

[40] WESTBROOK, Jay Lawrance. Choice of Avoidance Law in Global Insolvencies. Brooklyn Journal of International Law. 1991, 1991(17), 499-538, p. 526

[41] LOPUCKI, Lynn M. Cooperation in International Bankruptcy: A Post-Universalist Approach. Cornell Law Review. 1998, 1998-1999(84), 696-762, p 750

[42] Which is something the system strives to avoid, as the application of foreign law is always an element that undermines the legal certainty of creditors.

treatment as the local law, mirroring local preferences, would not allow such a transfer.

III.6. Territoriality

The key principle of territoriality in the case of insolvency proceedings is to only govern property that is within the jurisdiction the proceedings take place in and vice versa, no foreign court may administrate insolvency proceedings in that country[43].

The advantages and disadvantages are opposite to those I have discussed in the case of Universalism described above. Most importantly, forum shopping might occur[44]. Although it may also appear in the Universalism system, in this case it would be done by different means. An entity that is about to seek insolvency protection would transfer all their property to one jurisdiction that has laws based on the principle of territoriality. That would mean creditors in the other jurisdiction would have to undergo proceedings in a foreign country if they want to access the transferred assets[45].

The other disadvantage is that the most efficient outcome would be reached if and only if the ideal solution would be piecemeal liquidation. Other types of discharges[46] from bankruptcy would not be possible.

The advantage is the speed of the proceedings. As they would only take domestic assets and processes into account, the proceedings would be the fastest solution of all

---

[43] MIYAKE, Shozo. Japanese International Insolvency: The Problem of Territoriality. International Business Lawyer. 1996, 24(5), 238-240, p. 238

[44] *"The practice of choosing a country in which to bring a legal case through the courts on the basis of which country`s laws are the most favourable [to debtors]. In some instances, there is a choice of jurisdiction."* LAW, Jonathan a E MARTIN. A dictionary of law. Seventh edition reissued with new covers and updates. Oxford, United Kingdom: Oxford University Press, 2013. ISBN 01-996-6986-4, p. 239.

[45] Even if their domestic jurisdictions were based on other models described above.

[46] E.g. reorganization or bulk liquidation.

solutions described in this part of the thesis. Moreover, if no forum shopping occurs, Territoriality is also protective of domestic creditors as only national laws are applicable.

III.7. Protocols

Although Protocols are not usually considered to be a specific model solution to cross-border insolvency proceedings, I would like to mention them here because they are not covered by any of the systems discussed above and they represent ad-hoc solutions to issues that arise in the choice of law before and during insolvency proceedings.

The protocols emerged in 1991 during the Maxwell Case[47] where the proceedings where held before the UK and US courts while the debtor`s main assets were located in those two countries as well as Canada. The US court holding the insolvency proceedings instructed the examiner *"to act harmonize for the benefit of all creditors […] to maximize prospects for rehabilitation and reorganization"*[48]. Thus, the protocols occurred with the subsequent agreement between the US examiner and UK insolvency administrator. The outcome of the case was part reorganization and part liquidation

[47] The case dealt with the multinational insolvency of a media group having its seat in London while most of the assets were dispersed throughout the United States. The difficulty in this case was that there were two concurrent proceedings both in the United Kingdom and the United States where the petitions for bankruptcy were filed in. Moreover, after funds were transferred to the United Kingdom, some transfers were made that would be considered avoidable under the US law but not under the UK law. See WESTBROOK, Jay Lawrence. The Lessons of Maxwell Communications. Fordham Law Review. 1996, 64(6), 2531-2542, pp 2234-2235

[48] United States Court of Appeals, Second Circuit. 93 F 3d 1036, paras 1, 11. Available online on https://law.resource.org/pub/us/case/reporter/F3/093/93.F3d.1036.95-5084.95-5086.95-5082.95-5078.95-5076.html

of the debtor`s company assets which would not have been possible if not for the mutual international cooperation.

In general, protocols are used when *"there are concurrent plenary proceedings in multiple jurisdictions and where there is a plenary main proceeding in one or more jurisdictions accompanied by ancillary proceedings in one or more additional jurisdictions"*[49]. There are bilateral or multilateral agreements between the courts or between other entities administrating insolvency in order to have more efficient outcome of the proceedings. Furthermore, it is considered to be a tailored solution to a given debtor`s situation that deals with the question of jurisdiction and allows for the determination of the most efficient solution.

The cons are obvious – it is an even more unpredictable solution than the ones described above as it is never guaranteed that protocols would be used, and even if they were, what they contain is always unknown[50].

IV. Comparison of Czech Legislation and UNCITRAL Model Rules

IV.1. Czech Rules for Cross-Border Insolvencies

Cross-border insolvencies are not governed by a special statue but by the universal International Private Law Act[51] that provides general rules and rules on specific situations where conflict of laws can occur[52], insolvency proceedings included. I would like to stress that this Thesis aims to focus on Czech national laws and does not

[49] ZUMBRO, Paul H. Cross-border Insolvencies and International Protocols - an Imperfect but Effective Tool. Business Law International Review. 2010, 11(2), 157-170, p 158

[50] But on the other hand, this can be perceived as an advantage: It means forum shopping is almost impossible as it would never be clear what jurisdiction would be selected for substantive and procedural laws in every single case. Therefore, the debtor would not waste time or money to secure a better position for themselves or for favoured creditors.

[51] Act no 91/2012 Sb.

[52] The scope of the statute ranges from family law to securities.

investigate the specifics of European Union legislation. Although this is not the first legal regulation in the area of possible conflict of laws of insolvencies in Czech law[53] as some sources suggest (the first one was in Act no 328/1991, par 69), this regulation is much more complex.

Leaving aside the specific case of insolvency proceedings in the case of financial or insurance companies, there are only four sections in the International Private Law Act that regulates general international insolvencies[54]. Subsection 1 deals with the question of jurisdiction over a debtor's property located in a foreign country (even outside the European Union) when there is a Czech court authorized by European Union legislation to administrate insolvency proceedings. It stipulates that in such a case, the Czech court is authorized to administrate the property located in the foreign country within the boundaries of that country's laws.

Subsection 2 of Section 111 is of specific importance as it states the jurisdictional rule, i.e. that Czech courts can commence and hold insolvency proceedings if:

a) the debtor has an establishment[55] in the Czech Republic,
b) a creditor who has habitual residence in the Czech Republic requests so, or

[53] It was stated that neither the then International Private Law Act (Act no 97/1963 Sb.) nor the Insolvency Act has governed this area, see Zákon o mezinárodním právu soukromém: komentář. Vyd. 1. V Praze: C.H. Beck, 2014. Beckova edice komentované zákony. ISBN 978-80-7400-528-2., p. 621.

[54] Section 111 Act 91/2012 Sb.

[55] As the systematic interpretation requires all the legal expression to have the same meaning (at least in one area of law), the terms "establishment" and "centre of main interests" (as well as other terms) have to have the same meaning as they do in the relevant European Union legislative acts (in this case EC Regulation 1346/2000). This stems not only from the interpretation dogma, but also from the fact secondary legislation of the European Union is superior to Czech national laws.

c) [the requesting] creditor's receivable has arisen in the course of business of the debtor's establishment in the Czech Republic.

In all those cases, in contrast to the proceedings held according to Subsection 1 Section 111 Act 91/2012 Sb, all of the subsequent effects based on the proceedings are limited to the Czech Republic.

Subsection 3 states that even in cases where the European Union legislation is not applicable, its provisions may be employed by a court appropriately. As Subsection 4 deals only with the specifics of insolvencies in the case of payment institutions, I will not discuss it in this Thesis.

Finally, in subsection 5, the rules on recognition of foreign decisions are stated. Decisions issued in foreign insolvency proceedings can be recognized

a) under the condition of reciprocity,
b) if the debtor's main interests are located in the country in which the decision had been issued[56],
c) the debtor`s property is not subject to a pending proceeding in the Czech Republic commenced pursuant to subsection 2.

Moreover, the debtor's assets are to be conveyed to the foreign insolvency court only after all rights to exclude assets from the debtor`s estate have been performed.

Other issues that might arise during, before, or after insolvency proceedings related to the debtor's insolvency are governed by general provisions in other parts of the Act. Besides that, the general provisions also contain issues such as international cooperation of courts.

[56] This is called the "main interests test" – see below.

IV.2. UNCITRAL and its Model Rules on Cross-Border Insolvencies

The UNCITRAL Model Law on Cross-Border Insolvencies is one of the outcomes of the UNCITRAL Working Group V (Insolvency Law)[57]. It was adopted in 1997 followed by many supplementary instruments, the database of court decisions CLOUT included[58].

The Model Law is a ready-to-be-adopted bill that provides solutions for insolvency proceedings involving international insolvencies. It is divided into the preamble and the main text which is further divided into five chapters and thirty-two articles. The preamble states purpose and aims of the model law, most of which are economic ones: protecting the interests of all participants of the insolvency proceedings, maximization of value of the debtor's assets and the protection of investment and preserving employment.

The first chapter contains general provisions. Besides definitions, public policy exceptions[59] and international obligations, it focuses on the scope of application, i.e. in what particular cases the law can be used[60]. The first case is when assistance to the

---

[57] There are also other Working Group's outcomes aimed at international insolvencies e.g. Legislatives Guides that cannot be analyzed due to the anticipated scope.

[58] 1997 Model Rules on Insolvencies have currently 100 cases in CLOUT (http://www.uncitral.org/clout/search.jspx?f=en%23cloutDocument.textTypes.textType_s1%3aModel%5c+Law%5c+on%5c+Cross%5c-Border%5c+Insolvency%5c+%5c(1997%5c), see above) the vast majority of them are from Anglo-American Legal Family courts. This might have two causations. The first is that countries whose jurisdiction is based on a different legal system did not update their laws governing international private law on insolvencies and retained their old legislature (that could have complied by the model law), the other reason could be the database does not take into account the decisions of courts that are not binding (Continental or Roman Law based legal systems).

[59] Public policy exception is the key principle of International Private Law (nejakou citaci) that states that the state is not obligated to take action under an International Private Law legal norm if it is contrary to its public policy.

[60] Article 1 UNCITRAL Model Law on Cross-Border Insolvency

domestic court is demanded by a foreign court and vice versa. Moreover, it would be applied in the case of domestic and foreign insolvency proceedings taking place concurrently. The last case is when a foreigners are interested in the insolvency proceedings in the form of commencement or participation.

The most important Article in this Chapter that is not (as will be revealed in the next part of this thesis) implemented in Czech Law, is the Interpretation Rule[61] that states that the Act based on the Model Law would be interpreted in all countries unanimously.

The other provisions stipulate the competent court to be international insolvency proceedings held before[62] a body or person authorized to act in a foreign state on behalf of the pending domestic insolvency proceedings[63] and a provision enabling the courts or other bodies to cooperate with the body or person that acts on behalf of foreign proceedings[64].

Chapter II provides anti-discrimination provisions in order to secure equal treatment for foreign and domestic creditors[65] in the insolvency proceedings.

The next Chapter is focused on recognitions of foreign proceedings and relief. The foreign proceedings can be recognized either as main or non-main while the main

[61] Article 8 UNCITRAL Model Law on Cross-Border Insolvency

[62] Article 4 UNCITRAL Model Law on Cross-Border Insolvency

[63] Article 5 UNCITRAL Model Law on Cross-Border Insolvency

[64] Article 7 UNCITRAL Model Law on Cross-Border Insolvency

[65] As this is guaranteed by the Czech national law in the Convention of Basic Human Rights and Freedoms, Article 36 Section 1, I would not elaborate this Section of the model law.

proceeding is only the proceedings in the jurisdiction where the debtor's main activities are located. This is called the "center of main interests test"[66].

Relief is the institution that is closest to the effect of commencement of proceedings in Czech law: it halts executions against the debtor's property entrusting the administration to a person different to the debtor[67], furthermore it suspends the rights of the owner to his or her property and starts the proceedings itself by the commencement of examination of witnesses and taking evidence[68].

Chapter IV deals with the problems regarding the cooperation of foreign and domestic courts during the proceedings. Article 25 states that courts are eligible to communicate directly, with no intermediary. The following two articles specify the particular forms of cooperation.

Finally, the last chapter deals with concurrent proceedings. There is not any requirement of reciprocity in the text of the Model Law. This means that the national law based on the Model Rules would be applied regardless of if the foreign country adopted the Model Rules as well.

IV.3. Comparison

First of all, is is clear from the description above that the Czech Republic has not implemented the Model Rules. Therefore, in this section, I would discuss the differences between Czech laws and the 1997 UNCITRAL Model Rules on Cross-Border Insolvencies with regards to the general systems described in the second section of this thesis. Moreover, I will examine what states the Czech Republic has the largest

---

[66] ARSENAULT, Steven J. Westernization of Chinese Bankruptcy: An Examination of China's New Corporate Bankruptcy Law through the Lens of the UNCITRAL Legislative Guide to Insolvency Law. Penn State International Law Review. 2008, 27(1), 45-88. p. 81

[67] In this case, the person the property is handed over to for administration is the person that was authorized by a foreign court to administer the property in the foreign proceedings.

[68] Article 19 Section 1 (a), (b) and Article 21 Section 1 (c), (d) and (e) UNCITRAL Model Law on Insolvencies

portion of international trade with, if they accepted the Model Rules and what are consequences in those cases.

In my description I will focus on the key issues from my point of view, such as the predictability of the choice of law, cooperation with or subordination to courts in foreign jurisdictions during, before and after the proceedings, and

IV.3.1. Activity of Creditors

The Czech Insolvency Act motivates creditors who prefer the domestic system[69] over foreign insolvency proceedings to play an active role and file for the debtor`s insolvency themselves instead of passively waiting for the debtor to do it. The incentive is hidden in Subsection 2 and 5 in Section 111 of the International Private Law Act described above.

If the creditor doesn't file for insolvency and waits, there is the danger for him or her that

a) a foreign court renders a insolvency order that would be recognized with respect to Subsection 5, and
b) the debtor`s assets would be subject either to liquidation, reorganization or other measures that foreign law permits with respect to the same Section.

It is clear that there are substantial differences in outputs in cases where the creditor is proactive versus when they are not. If they do not file for bankruptcy, the Czech system for cross-border insolvencies would be subsumed under Modified Universalism as the court would only deliberate upon recognition[70] of the foreign proceedings, or more precisely, of the result of foreign proceedings while it does not inquire into the

[69] There can be variety of reasons why: They can simply know it better, their receivables might be privileged.

[70] The deliberation is formal as the court, according to Subsection 5, takes into account only whether there is pending proceeding in the Czech Republic, reciprocity between the two jurisdictions and if there are any assets in the country that is administrating the proceedings.

subject matter. This means all cases where the decision was issued in the same jurisdiction would have the same result – either recognized, or not.

In case the creditors (or debtor) managed to file for an insolvency order, the situation changes. Not only would the court not recognize the foreign proceedings, it would not take it into consideration either[71]. This would result in concurrent proceedings that, if not taken into account by the Czech court`s counterpart(s), would be administrated completely separately. Therefore, it can be defined as pure Territorialism from the point of view of the Czech legal system.

On the other hand, the 1997 UNCITRAL Model Rules provide in their Article 15 a clear algorithm to be followed for the recognition of foreign proceedings in home jurisdictions. It states that the foreign representative[72] can file for recognition and the home court has to recognize the representative if they meet formal criteria[73].

Moreover, the court decides whether the foreign proceedings shall be recognized as foreign main or non-main. This depends solely on the center of debtor`s interests. If the center is located in the country where recognized foreign proceedings are taking place, they are recognized as foreign main proceedings, otherwise they are recognized

[71] If the court does not decide to apply European Union law with respect do Subsection 3 Section 111 International Private Law Act.

[72] A foreign representative is a person or body managing or administrating the reorganization or liquidation of the debtor in foreign proceedings or was appointed to represent either the debtor or creditors in the foreign proceedings. See BERENDS, Andre J. The UNCITRAL Model Law on Cross-Border Insolvency: A Comprehensive Overview. Tulane Journal of International and Comparative Law. 1998, 6(1), 309-400, p. 331

[73] The foreign representative needs to represent a foreign proceeding, the application is accompanied by stated addendums and it is submitted to the correct court. See Article 17(1) and Article 15(2) 1997 UNCITRAL Model Rules on Cross Border Insolvencies.

as non-main[74]. There is also the option outlined for the court in case in the future *"the grounds for granting ... were fully or partially lacking or ceased to exist"*[75].

The Model Rules, in comparison to the Czech laws, do not motivate the creditors to be proactive and try to commence the insolvency proceedings before they would be started in the case of it not being a multi-national default, as the conditions for a foreign proceeding to be recognized as main are clear and independent from the date of commencement of insolvency proceedings in the home jurisdiction. This has some practical consequences: As in the Czech Republic, the Insolvency Register is public[76] and contains information of all pending insolvency proceedings, including those that have not been decided and would be dismissed in the future[77], the debtor would be stigmatized and the result could be that they have to leave the market even if they would not have to had to do so if not for the proactive approach of creditors.

IV.3.2. Predictability of the Choice of Law

The next issue I will focus on in this chapter is Predictability. Although it is true that the outcome of every single court hearing cannot be exactly predicted and is influenced by many external factors[78], the choice of jurisdiction enables a person to start deliberating their chances of winning. This issue is especially important in insolvency proceedings where there are some claims considered privileged, which means they are prioritized before others.

The Choice of aw of cross-border insolvency proceedings of a debtor having assets located in the Czech Republic can be effectively evaluated by up to three different kinds of legislative acts in case the proceedings are not governed by Council Regulation (EC) No 1346/2000. The first one is the Czech Private International Law Act, the second is

[74] Article 17(2)

[75] Article 17(4)

[76] Subsection 3 Section 419 Insolvency Act

[77] Subsection 1 Section 97 and Subsection 4 Section 420 Insolvency Act

[78] Some of them are legitimate while some of them are not. For more on this topic see

the Choice of Law rules contained in the foreign legislation that would be recognized based on Section 111(5) Private International Law Act and the third one is, quite surprisingly, Council Regulation (EC) No 1346/2000 itself[79]. In some cases, all three might occur[80].

In case the Czech court decides to pursue the Czech national rules covered in Section 111(2) of the Private International Law Act and starts the proceedings restricted to the establishment in the Czech Republic and there is pending insolvency proceedings abroad, it would be a clear example of secondary proceedings and therefore of the Secondary Bankruptcy system if there was legislation governing its relation to the main proceeding that is being administrated abroad. As there is no such rule in force now, aside from Subsection 3 Section 111 Private International Law Act, that may or may not be applied, this seems to be rather an example of territorialism since the local business premises would be subject to purely local proceeding with no attachments to the foreign one.

The Czech scheme would be (if the courts were to apply only this rule) regarded as Professor Anderson puts it: *"The system is simple and predictable, but results in duplicative administrative costs and potentially disparate treatment of similar creditors who happen to be in different countries."*[81] But as there are the other two options

[79] For the last case, see Subsection 3 Section 111 International Private Law Act.

[80] An example could be a debtor having their main activities in the United States – it would be only the court`s decision whether it would use the rules contained in the Council Regulation (EC) No 1346/2000 or in Subsection 2 Section 111 Private International Law Act, or if it would wait, with respect to the latter, to recognize foreign proceedings based on Subsection 5 Section 111 Private International Law Act.

[81] ANDERSON, Kent. The Cross-Border Insolvency Paradigm: A Defense of the Modified Universal Approach Considering the Japanese Experience. University of Pennsylvania Journal of International Economic Law. 2000, 21(4), 679-780, p. 681

(described below), the system is neither simple nor predicable and only the disadvantages of territorialism remain.

If the decision in the insolvency proceedings is recognized, the choice of law taken into account can vary as the decision could be adopted by authorities administrating proceedings in any jurisdiction.

Finally, if Council Regulation (EC) No 1346/2000 Choice of Law rules are to be applied, then Article 3 states that there is only one main proceeding in the state where the debtor has their main activities and the others are only local (secondary). There are some exceptional cases[82] in which local proceeding can commence before the main one but nevertheless, the scheme of the proceedings is clear – one main proceeding with the possibility of as many local ones as needed. Therefore, in general, it is clear that following the Council Regulation, the system would be Secondary Bankruptcy with one main proceeding and many local ones (this is more thoroughly discussed above).

The 1997 UNCITRAL Model Rules on Cross-Border Insolvencies, on the other hand, does not have rules on the Choice of Law, only on the Choice of Forum. But, as was discussed above, the UNCITRAL system is based on Modified Universalism and thus the foreign proceedings are recognized if they meet certain formal criteria (see above). After recognition, the assets are handed over to the foreign representative who can redistribute them provided the interests of domestic creditors are protected[83].

---

[82] There are two exceptions: the law in the country where the debtor has its main assets prohibits the commencement of the proceedings and if the local proceeding is commenced upon request of a creditor having its seat or residence in the country where the debtor has their business premises and where the debt originated. See Article 3(4) Council Regulation (EC) No 1346/2000.

[83] Article 21(2) Model Rules. This *de facto* means the Choice of Law rules are inherently hidden in the system of modified universalism - only the substantive rules of the forum country would be applied.

Therefore, the choice of law is based on the location of main proceedings taking into account domestic interests[84].

IV.3.3. Proceedings Abroad

The system for multi-national insolvencies that is the relationship between domestic courts and other bodies and their foreign counterparts is another topic I would like to discuss. Interactions in the systems that are described above range from total subordination[85] to equality[86], it will be interesting to examine whether and under which conditions Czech bodies can find themselves administrating insolvency proceedings abroad.

As the possibility of the influencing of Czech courts by foreign bodies overseeing insolvency proceedings was depicted above, this section would aim to discuss under what circumstances Czech insolvency proceedings could influence foreign ones during a multinational default. The Czech law does not have any specific provision that would govern the activities of an Insolvency Administrator or Insolvency Court abroad in case the debtor undergoing insolvency is in possession of any assets stationed there. Although there is Subsection 1 Section 111 of the International Private Law Act, it covers only insolvencies where the European Union legislation is directly applicable[87]. Therefore, the general rules for administration apply.

It would mean that the Insolvency Administrator would try to follow general rules contained in the Insolvency Act. Specifically, he or she would try to administrate assets located abroad as if they were in the Czech Republic during the insolvency proceedings. The rest would depend on the system in the respective country: in case their system

---

[84] Furthermore, see e.g. Article 19(4) and Article 20 in connection with Article 15(1) and Article 24 Model Rules.

[85] Both procedural and in substantive law, in Universalism.

[86] Cooperative Territoriality.

[87] That does not cover cases where the court applies European Union insolvency acts based on Subsection 3 Section 111 International Private Law Act.

of cross-border insolvencies would follow the structure of Universalism[88], Modified Universalism or Secondary Bankruptcy the Administrator would or could be allowed to govern the assets, and in other cases, in general, would not be able to do so.

IV.3.4. Protocols

I will look into the possibility of issuing protocols as a means to administrate an international insolvency. Specifically, I will focus on the possibility of applying them in the Czech jurisdiction be it by a Czech or foreign court.

Protocols are specific measures taken to solve international insolvencies. First of all, it must be clarified that procedural law[89] is considered to be part of public law. As such, and in opposition to private law, only what is explicitly stated in statues and other sources of law is permitted. In the Czech system for cross-border insolvencies, it is not an issue for a Czech court or other body or person to promote this solution. But, this does not mean that assets located in the Czech Republic cannot be part of such a solution. As was described above, foreign solutions to default can be recognized in the Czech Republic even if the Czech Republic has not adopted this kind of solution in its legislation.

On the other hand, 1997 UNCITRAL Model Rules for Cross-Border Insolvencies accounted for the option to adopt protocols: *"In essence, the Working Group recommendations amount to provisions that have proven successful in Protocols involving court-to-court communication in large-scale enterprise groups."*[90] Moreover, this area is addressed in the Article 25 Model Rules which enable the court to cooperate and communicate directly with foreign courts and representatives. This

---

[88] This system is currently not in force in any country.

[89] Law governing international and national insolvencies included.

[90] SEXTON, Anthony V. Current Problems and Trends in the Administration of Transnational Insolvencies involving Enterprise Groups: The Mixed Record of Protocols, the UNCITRAL Model Insolvency Law, and EU Insolvency Regulation, Chicago Journal of International Law, 2011 – 2012, pp. 811 – 840, 830-831

means the Model Rules empower the courts to seek unique solutions for each and every case that would stem from communication between the courts, protocols included.

But does this mean that protocols could be applied within the boundaries of Czech jurisdiction? In my opinion yes. Although it is definitely true, as was discussed above, the Czech courts could avoid taking part in negotiating or creating protocols because it has no statutory authority for such an action, it can recognize protocols adopted between other courts in multinational default using Section 111 Private International Law Act.

Furthermore, the new EU Regulation 2015/848 recast enables concluding protocols and, therefore, the Czech courts (and other subjects of insolvency proceedings) will be entitled to participate in the negotiation of protocols and entrance into them[91].

The outcomes for Czech creditors and debtors are unfortunately not optimal. As, now, Czech authorities cannot take part in shaping the protocols, domestic laws will not be taken into account in protocols that, in the form of a foreign decision, the Czech court would be obligated to recognize under certain circumstances. On the other hand, the situation will soon change as the new EU rules on protocols will be applicable in all insolvency proceedings when the Regulation comes into force.

IV.4. Impact on International Trade of the Czech Republic

In this section, I will show that inquiring into the UNCITRAL Model Rules on Cross-Border Insolvencies is important as the number of states adopting laws based on them is growing. Moreover, I will present the total volume of trade done between the Czech Republic and countries that have implemented the Model Rules.

I believe the volume of trade, in other words, turnover, between the Czech Republic and countries having implemented the Model Rules is a fine criterion to show how the relationships in the Czech economy can be influenced by this ready-to-adopt bill.

[91] Section 52 EU Regulation 2015/848

IV.4.1. Explanatory remarks

I obtained the data on foreign trade both from the Czech Ministry of Commerce and Industry[92] and from the Czech Statistical Office[93]. I decided to choose turnover as the most relevant indicator – in case a foreign business is undergoing insolvency proceedings it is irrelevant for its Czech counterpart whether it is a supplier or purchaser, monetary consideration can be due and overdue at both times[94].

Moreover, as Table 1 in the Annexes shows, I used a table[95] depicting the current status of worldwide implementation of 1997 UNCITRAL Model Rules on Cross Border Insolvencies and found the values of foreign trade between the Czech Republic and countries that have adopted the Model Rules starting in January the year after their enactment in the respective country in order to be certain that the Model Rules have been implemented if not in force.

The value I am interested in can be described as the ratio of turnover with countries that have adopted the Model Rules to total turnover of countries that can adopt them and have no special treatment with respect to international insolvencies between them and the Czech Republic. This means that, from the denominator, I have to subtract turnover coming from trade with all European Union countries (EU28) with the exception of Denmark (EU27) as those countries have to, along with the Czech Republic, apply Council Regulation (EC) No 1346/2000 in the case of any cross-border insolvencies occurring between their and the Czech jurisdictions. Therefore, in my opinion, it is better to sort them out as (1) it is not a regulation adopted on a national

---

[92] The data from the Ministry were used to find the volume of trade between the Czech Republic and EU28 - http://www.mpo.cz/cz/zahranicni-obchod/statistika-zahr-obchod/

[93] The rest of data was manually obtained from https://apl.czso.cz/pll/stazo/STAZO.STAZO

[94] It is clear in the case of the purchaser – it is usually the price for goods or services, on the part of supplier it can be advances, commissions, compensations or contractual fines.

[95] Source:
http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html

basis[96] and it deals with a very specific situation of the Internal Market, (2) each of EU27 has two sets of rules for cross-border insolvencies – one for EU27 countries and the another for the rest of the world and either of them can be applied in particular insolvency proceedings where Czech jurisdiction is involved[97], and (3) inquiring into particulars of Council Regulation (EC) No 1346/2000 is not within the scope of this work.

I believe arguments can be found to keep EU27 countries in the computation so I provided another table and graph which includes the Internal Market effects.

IV.4.2. Outcomes

I used data from the years 2009 – 2015 and from the first two months of 2016. The segment from 2016 can (and probably does) suffer from seasonality as 18 new countries were added to the list and the ratio declined to 21% at the same time[98]. If we take into account all foreign trade (i.e. if the trade within the European Union is added), the ratio would oscillate around 6 per cent in the given time period.

The volume of foreign trade also plummeted between 2013 and 2014 when it declined by 8%. This was not caused by a downswing in foreign trade with countries that implemented Model Rules because the volume of trade with those countries actually increased. The reason is that trade with countries that had not adopted legislation based on model rules grew faster.

---

[96] Neither as national legislation nor as an international treaty that has sovereign countries as contracting parties. Moreover, according to

[97] E.g. a U.S. insolvency administrator seeks recognition of one insolvency proceeding that resulted in reorganization in both Spain and the Czech Republic – in this case, two EU27 jurisdiction are involved but, nevertheless, the general rules on cross-border insolvencies instead of Council Regulation (EC) No 1346/2000 would be applied. On the contrary, if only Czech and Spanish jurisdictions are involved in an insolvency proceeding, the regulation would be used.

[98] See Graph 1 in Annexes.

I believe those numbers show that it is meaningful to inquire into the 1997 UNCITRAL Model Rules as they govern insolvencies in countries that have a significant share in foreign trade with the Czech Republic.

V. Conclusion

I believe I have provided a comparison of the UNCITRAL Model Rules on Cross-Border Insolvencies and the Czech legislation in this Thesis. In the first, descriptive, chapter after introducing insolvencies, I dealt with the main systems for International insolvency proceedings, drawing inspiration from world renowned scholars such as Professors LoPucki or Westbrook.

In the main part of my work, I focused on the contrasts between the Czech national legislation and the Model Rules in specific cases and provided their impact on the economy. Moreover, I applied the findings from the first part to particular situations that might occur in cross-border insolvency proceedings by application of the national legislation or Model Rules. Finally, I looked into the volume of trade between the Czech Republic and countries that have adopted the Model Rules.

It is clear from the research I have conducted above, that the Czech legislation, leaving aside Council Regulation (EC) No 1346/2000, is based on territorial principles while the Model Rules try to pursue more universalistic approach. Moreover, the Czech system for cross-border insolvencies cannot be subsumed under any of the general systems depicted above for it includes many of their features. Furthermore, the question

remains whether Section 111 of the International Private Law Act was carefully balanced to achieve one of Pareto Optima solutions[99] or was it created by chance[100].

In my opinion, the Czech cross-border insolvency scheme resembles the Secondary Bankruptcy doctrinal system the most: European Union rules, which are representative of the Secondary Bankruptcy system themselves, could be applicable in the case that the Czech court commences insolvency proceedings restricted to the Czech Republic according to Subsection 2 Section 111 of the International Private Law Act, making the insolvency proceedings administrated in the area of the Czech Republic secondary within the meaning of Regulation EC 1346/2000. In the case that the Czech court would decide not to apply European Union rules[101], the Czech system would fall into the category of territorialism as no rules for international cooperation would be available.

Regarding the second question, i.e. whether the provisions of International Private Law Act were balanced, I must say I am, with respect to the legislative procedure, skeptical. I believe that if the legislation was considered important, there would be much more discussion in the Parliament[102] and the Explanatory Memorandum should be much more comprehensive.

---

[99] As is discussed in FRANKEN, Sefa M. Cross-Border Insolvency Law: A Comparative Institutional Analysis, Oxford Journal of Legal Studies, 2014, pp. 97 – 131, p. 104.

[100] The Explanatory Memorandum and the legislative process of the International Private Law Act (see http://www.psp.cz/sqw/historie.sqw?o=6&t=364) suggests it is more likely the latter option.

[101] Or those rules are not applied with respect to the Subsection 1 Section 111 91/2012 Sb. Act

[102] In the first reading, only two MPs spoke in the debate during 1st reading: Minister of Justice and Parliamentary Bill Reporter. Both contributions are mandatory and both were very vague (see the minutes – Point 36 http://www.psp.cz/eknih/2010ps/stenprot/019schuz/19-2.html#140). After discussion in the Legislation Committee that suggested several amendatory proposals (see http://www.psp.cz/sqw/text/tiskt.sqw?o=6&ct=364&ct1=1), the

Therefore, it may be concluded that the legislation on cross-border insolvencies should get more attention in the Czech Republic and while the concept drafted in the International Private Law Act is generally fine, it should be followed all the way through and ambiguities should be clarified.

discussion continued In the second hearing with the same persons making their speech while the Bill Reporter claimed the bill and amendatory proposals are „of pure technical nature“ and suggests their sanction with no further discussion. So it happened (see http://www.psp.cz/eknih/2010ps/stenprot/025schuz/s025024.htm#r2, point 5a). It is no surprise that in the final reading only the Minister and Reporter shortly contributed before the bill passed (http://www.psp.cz/eknih/2010ps/stenprot/030schuz/s030061.htm#r2, point 6).

VI. Annexes

Table 1

	Imp.	2009	2010	2011	2012	2013	2014	2015	Jan and Feb 2016
Japan	2000	70460809	68807667	65248730	69862886	69041578	74097068	77604825	13010141
Mexico	2000	7574486	10935195	13276255	17650547	18873288	24106640	29471728	4956202
South Africa	2000	8248630	12985852	16742549	15233311	15350473	16909851	16869907	2899800
Montenegro	2002	323197	376201	462161	499355	913338	1242916	1200794	232005
Romania	2002	European Union	European Union	European Union	European Union	European Union	European Union	European Union	European Union
Poland	2003	European Union	European Union	European Union	European Union	European Union	European Union	European Union	European Union
British Virgin Islands	2003	156079	164837	128451	207676	227022	101677	96510	5916
Serbia	2004	7989975	9794822	14362230	14088360	17636764	18593368	18962038	3195372
Canada	2005	6623259	6214473	8020390	8210537	9342142	9025130	10444149	1683067
United States of America	2005	76187496	98269560	108274580	129432858	130205951	158634121	174044582	28183162
Colombia	2006	846804	1031441	1344493	1462822	1470852	2041242	2140487	264506
New Zealand	2006	889911	1063062	1232211	1578060	1917441	2213621	2850548	573985
Republic of Korea	2006	31651263	45628747	55730714	71554787	70090499	77054798	95572194	14830735
Great Britain	2006	European Union	European Union	European Union	European Union	European Union	European Union	European Union	European Union
Slovenia	2007	European Union	European Union	European Union	European Union	European Union	European Union	European Union	European Union
Australia	2008	5489604	7807019	10010762	13573654	16704413	15889796	18756151	2084054
Mauritius	2009	----	468323	274904	503644	718121	765388	646203	82847
Greece	2010	European Union	European Union	European Union	European Union	European Union	European Union	European Union	European Union
Philippines	2010	----	----	5503886	6166957	7923510	8326498	8748177	1338614
Uganda	2011	----	----	----	198530	187154	258080	338327	54350
Chile	2013	----	----	----	----	----	2016794	2970192	275035
Seychelles	2013	----	----	----	----	----	52063	48893	6647
Vanuatu	2013	----	----	----	----	----	59	3851	797
Gibraltar	2014	----	----	----	----	----	9695	10521	1553
Benin	2015	----	----	----	----	----	----	----	2154
Burkina Faso	2015	----	----	----	----	----	----	----	11991
Cameroon	2015	----	----	----	----	----	----	----	63100
Central African Republic	2015	----	----	----	----	----	----	----	33691
Chad	2015	----	----	----	----	----	----	----	5391
Comoros	2015	----	----	----	----	----	----	----	387
Congo	2015	----	----	----	----	----	----	----	15307
Côte d'Ivoire	2015	----	----	----	----	----	----	----	190320

Democratic Republic of the Congo	2015	----	----	----	----	----	----	----	5561
Equatorial Guinea	2015	----	----	----	----	----	----	----	2323
Gabon	2015	----	----	----	----	----	----	----	16056
Guinea	2015	----	----	----	----	----	----	----	2323
Guinea-Bissau	2015	----	----	----	----	----	----	----	4977
Kenya	2015	----	----	----	----	----	----	----	87907
Malawi	2015	----	----	----	----	----	----	----	17881
Mali	2015	----	----	----	----	----	----	----	42252
Niger	2015	----	----	----	----	----	----	----	22415
Senegal	2015	----	----	----	----	----	----	----	19659
Togo	2015	----	----	----	----	----	----	----	6303

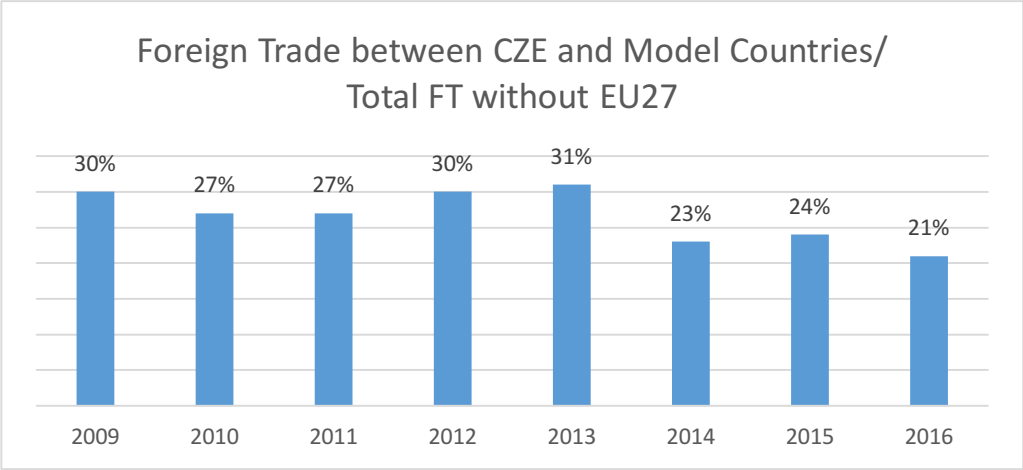
Trade turnover in CZK thousands

Table 2

Sum of trade turnover with UNCITRAL countries:	216441513	263547199	300612316	350223984	360602546	411338805	460780077	74228786
Total trade:	4127659116	4944353581	5566254212	5839486075	5998189089	6790442000	7377865463	1209289537
Total trade EU28-CZ:	3444081000	4017483000	4507260000	4714346000	4864761000	5074500000	5492563000	859 817 000
Total trade without EU28-CZ:	683 578 116	926 870 581	1 058 994 212	1 125 140 075	1 133 428 089	1 715 942 000	1 885 302 463	349 472 537
Denmark:	29222831	35020228	37821604	38733860	42914400	61602546	58718238	10309005
Total trade without EU28 and with Denmark:	712 800 947	961 890 809	1 096 815 816	1 163 873 935	1 176 342 489	1 777 544 546	1 944 020 701	359 781 542
Ratio Sum/Total:	***5%***	***5%***	***5%***	***6%***	***6%***	***8%***	***6%***	***6%***
Ratio Sum/Without EU28	32%	28%	28%	31%	32%	24%	24%	21%
Ration Sum/Without EU28 with Denmark	**30%**	**27%**	**27%**	**30%**	**31%**	**23%**	**24%**	**21%**
	2009	2010	2011	2012	2013	2014	2015	Jan and Feb 2016

Per Cents or CZK thousands

Graph 1


Foreign Trade between CZE and Model Countries/
Total FT without EU27
30%
27%
27%
30%
31%
23%
24%
21%
2009
2010
2011
2012
2013
2014
2015
2016

VII. Sources

Bibliography

ANDERSON, Kent. The Cross-Border Insolvency Paradigm: A Defense of the Modified Universal Approach Considering the Japanese Experience. University of Pennsylvania Journal of International Economic Law. 2000, 21(4), 679-780.

ARSENAULT, Steven J. Westernization of Chinese Bankruptcy: An Examination of China's New Corporate Bankruptcy Law through the Lens of the UNCITRAL Legislative Guide to Insolvency Law. Penn State International Law Review. 2008, 27(1), 45-88.

BERENDS, Andre J. The UNCITRAL Model Law on Cross-Border Insolvency: A Comprehensive Overview. Tulane Journal of International and Comparative Law. 1998, 6(1), 309-400.

FLETCHER, Ian F. THE EUROPEAN UNION CONVENTION ON INSOLVENCY PROCEEDINGS: AN OVERVIEW AND COMMENT, WITH U.S. INTEREST IN MIND. Brooklyn Journal on International Law. 1991, 23(1), 25-56, p. 44

FRANKEN, Sefa M. Cross-Border Insolvency Law: A Comparative Institutional Analysis, Oxford Journal of Legal Studies, 2014, pp. 97 – 131.

KISLINGEROVÁ, Eva, Tomáš RICHTER a Luboš SMRČKA. Insolvenční praxe v České republice: v období 2008–2013. Vyd. 1. V Praze: C.H. Beck, 2013, xv, 143 s. Beckova edice ekonomie. ISBN 978-807-4004-971.

LAW, Jonathan a E MARTIN. *A dictionary of law*. Seventh edition reissued with new covers and updates. Oxford, United Kingdom: Oxford University Press, 2013. ISBN 01-996-6986-4.

LOPUCKI, Lynn M. Cooperation in International Bankcruptcy: A Post-Universalist Approach. *Cornell Law Review*. 1998, **1998-1999**(84), 696-762.

MAJUMDAR, Arjya B. The UNCITRAL Model Law on Cross-Border Insolvency, India Law Journal, 2009, pp 1 – 19.

OMAR, Paul (ed.). *International insolvency law: reforms and challenges*. Farnham: Ashgate, 2013. Markets and the law. ISBN 978-0-7546-7482-5.

RICHTER, Tomáš. Insolvenční právo. Vyd. 1. Praha: ASPI, 2008, 471 s. ISBN 978-807-3573-294.

SEXTON, Anthony V. Current Problems and Trends in the Administration of Transnational Insolvencies involving Enterprise Groups: The Mixed Record of Protocols, the UNCITRAL Model Insolvency Law, and EU Insolvency Regulation, Chicago Journal of International Law, 2011 – 2012, pp. 811 – 840.

SCHWARTZ, Allan. A Contract Theory Approach to Business Bankruptcy. The Yale Law Journal. 1998, 1997-1998(107), 1807-185, p 1822

SMRCKA, Lubos, Marketa ARTLOVA, Jaroslav SCHONFELD a Lee LOUDA. The reciprocal relationship of insolvency proceeding results and economic performance ascertained

by the regression analysis method. *International Journal of Economics and Statistics*. 2015, **2015**(4), 65-76. ISSN 2309-0685.

WESSELS, B, Bruce A MARKELL a Jason J KILBORN. *International cooperation in bankruptcy and insolvency matters*. New York: Oxford University Press, c2009. ISBN 01-953-4017-5.

WESTBROOK, Jay Lawrance. Choice of Avoidance Law in Global Insolvencies. *Brooklyn Journal of International Law*. 1991, **1991**(17), 499-538.

WESTBROOK, Jay Lawrence. Chapter 15 and Discharge. American Bankruptcy Institute Law Review. 2005, 13(2), 503-519.

WESTBROOK, Jay Lawrence. Chapter 15 at Last. *American Bankruptcy Institute Law Review*. 2005, **2005**(13), 713-728.

WESTBROOK, Jay Lawrence. *A global view of business insolvency systems*. Boston, Mass.: Martinus Nijhoff, c2010. Law, justice, and development. ISBN 9789004180253.

WESTBROOK, Jay Lawrence. A Global Solution to Multinational Default. *Michigan Law Review*. 1999, **1999-2000**(98), 2276-2328.

Zákon o mezinárodním právu soukromém: komentář. Vyd. 1. V Praze: C.H. Beck, 2014. Beckova edice komentované zákony. ISBN 978-80-7400-528-2.

ZUMBRO, Paul H. Cross-border Insolvencies and International Protocols - an Imperfect but Effective Tool. *Business Law International Review*. 2010, **11**(2), 157-170.

Courts` decision

United States Court of Appeals, Second Circuit. 93 F 3d 1036

Canada Southern Ry. Co v Gebhard 109 U.S. 527 (1883)

Legislation, UNCITRAL Materials and Other Materials

Act no. 328/1991 Sb.

Act no. 182/2006 Sb.

Act no. 91/2012 Sb. with Explanatory Memorandum

UNCITRAL Model Law on Cross Border Insolvency, 1997

UNCITRAL Model Law on Cross Border Insolvency, 2011

UNCITRAL Model Law on Cross Border Insolvency, Guide on Enactment and Interpretation, 2013

http://www.mpo.cz/cz/zahranicni-obchod/statistika-zahr-obchod/