International Insolvency Law in the New Hungarian PIL Code - A Window of Opportunity to Enact the UNCITRAL Model Law on Cross-Border Insolvency?

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1. Introduction

The aim of this paper is threefold. *First*, it is demonstrated that private international law ("**PIL**") in Hungary, in its current state, is unsuitable to adequately address cross-border insolvency situations. *Second*, it is analysed whether the reform proposal on the new PIL legislation improves the adequacy of the legal framework. *Third*, the argument is made that the enactment of the UNCITRAL Model Law[1] (the "**Model Law**") would beneficially contribute to establishing a functional international insolvency law in Hungary.

In *Section 2*, the question is examined whether international insolvency falls within the *material scope* of the existing PIL framework of Hungary. In *Section 3*, the *adequacy* of those rules is addressed. *Section 4* focuses on the insolvency aspects of the *legislative proposal* on the new Hungarian private international law. Finally, in *Section 5*, it is argued that the enactment of *Model Law* would adequately fill the regulatory gap that appears to be left open by the legislative proposal.

The analysis focuses on corporate insolvency and disregards those classes of debtors which are subject to industry-specific legal regimes.[2]

2. The material scope of the current Hungarian private international law

2.1 The PIL Code 1979

The Law-Decree No. 13 of 1979 on International Private Law (the "**PIL Code 1979**") focuses on the "classical" questions of the PIL, namely jurisdiction, applicable law, recognition and enforcement of foreign judgements. Insolvency proceedings are explicitly referred to by the statute in the context of the jurisdiction of Hungarian courts.[3] Therefore, it is assumed that international insolvency is not excluded from the material scope of the statute.

On the other hand, the question of recognition and enforcement of foreign insolvency proceedings is only indirectly and incompletely tackled by the statute[4] and no provision of the PIL Code 1979 addresses applicable law in the context of international insolvency at all.[5] Beyond the concise provisions on jurisdiction, no other insolvency-specific rules are to be found in the PIL Code 1979. Furthermore, no case law appears to have been published where Hungarian courts applied the PIL Code 1979 concerning international insolvency cases.

2.2 Bilateral agreements

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[1] United Nations Commission on International Trade Law (UNCITRAL) Model Law on Cross-Border Insolvency. The Model Law is accompanied by a Guide to Enactment and Interpretation. Both documents are accessible at <http://www.uncitral.org/pdf/english/texts/insolven/1997-Model-Law-Insol-2013-Guide-Enactment-e.pdf>.

[2] Insurance undertakings, credit institutions, investment firms etc. cf Model Law, art 1(2).

[3] Subsection '*3.2 International jurisdiction'.*

[4] Subsection'*3.4 Recognition and enforcement'.*

[5] Subsection'*3.3 Applicable law'.*

Hungary is no party to multilateral or regional conventions applicable to international insolvency.[6] By contrast, Hungary has entered into a number of bilateral treaties on legal assistance in civil or commercial matters.[7] Those treaties which in the meantime have not been replaced by the Insolvency Regulation,[8] i.e. those concluded with non-member states, are still in force. However, the applicability of these treaties to cross-border insolvency situations is more than dubious.

The better part of these conventions was concluded *before* the fall of the communism with states belonging to the Soviet bloc. In relation to those treaties it is less likely that their material scope could reasonably cover international insolvency situations,[9] because no insolvency law in the modern sense existed in the period of the planned economy.[10] Regarding the conventions of the *post-communism period* the scope could more naturally extend to the field of international insolvency. This interpretation may be underpinned by one example[11] where the parties found it necessary to exclude the recognition of insolvency judgements and composition agreements from the scope of the treaty. On the other hand, a significant number of the treaties encompass "civil" matters[12] while others

[6] Andrea Csőke, *A határon átnyúló fizetésképtelenségi eljárások [Cross-Border Insolvency Proceedings]* (2nd edn, HvgOrac 2016) 33.

[7] The Convention between the Polish People's Republic and the Hungarian People's Republic on Legal Assistance in Civil, Family and Criminal Matters, signed at Budapest on 6 March 1959; the Convention between Hungary and Greece on Legal Assistance in Civil and Criminal Matters, signed at Budapest on 8 October 1979; the Convention between Hungary and France on Legal Assistance in Civil and Family Law, on the Recognition and Enforcement of Decisions and on Legal Assistance in Criminal Matters and on Extradition, signed at Budapest on 31 July 1980; the Convention between the Republic of Cyprus and the Hungarian People's Republic on Legal Assistance in Civil and Criminal Matters, signed at Nicosia on 30 November 1981; the Treaty between the Czechoslovak Socialist Republic and the Hungarian People's Republic on Legal Aid and Settlement of Legal Relations in Civil, Family and Criminal Matters, signed at Bratislava on 28 March 1989; the Treaty between the People's Republic of Romania and the People's Republic of Hungary on Legal Assistance in Civil, Family and Criminal Matters, signed at Bucharest on 7 October 1958; the Agreement between the People's Republic of Bulgaria and the Hungarian People's Republic on Legal Assistance in Civil, Family and Criminal Matters, signed at Sofia on 16 May 1966; the Agreement between the Socialist Federative Republic of Yugoslavia and the People's Republic of Hungary on Mutual Legal Assistance, signed at Belgrade on 7 March 1968; the Treaty between the People's Republic of Hungary and the Syrian Arab Republic on Legal Assistance in Civil and Criminal Matters, signed at Damascus on 1 May 1986; the Convention between the People's Republic of Hungary and the Tunisian Republic on Legal Assistance in Civil and Criminal Matters, on the Recognition and Enforcement of Decisions and on Extradition, signed at Tunis on 6 December 1982; the Convention between the Hungarian People's Republic and the People's Republic of Albania on Legal Assistance in Civil, Family and Criminal Matters, signed at Budapest on 12 January 1960; the Treaty between the Republic of Hungary and the Arab Republic of Egypt on Legal Assistance in Civil and Commercial Matters, signed at Cairo on 26 March 1996; the Convention between the Hungarian People's Republic and the Republic of Cuba on Legal Assistance in Civil, Family and Criminal Matters, signed at Havana on 27 November 1982; the Convention between the Hungarian People's Republic and the Union of Soviet Socialist Republics on Legal Assistance in Civil, Family and Criminal Matters, signed at Moscow on 15 July 1958; the Convention between the Republic of Hungary and the People's Republic of China on Legal Assistance in Civil and Commercial Matters, signed at Beijing on 9 October 1995; the Convention between the Hungarian People's Republic and the People's Democratic Republic of Algeria on Legal Assistance in Civil, Family and Criminal Matters, signed at Algiers on 7 February 1976; the Convention between the Hungarian People's Republic and the Republic of Iraq on Legal Assistance, signed at Budapest on 4 March 1977; the Convention between the Hungarian People's Republic and the Mongolian People's Republic on Legal Assistance in Civil, Family and Criminal Matters, signed at Ulan Bator on 22 November 1968; the Convention between the Hungarian People's Republic and the Democratic People's Republic of Korea on Legal Assistance in Civil, Family and Criminal Matters, signed at Pyongyang on 5 October 1970; the Convention between the Hungarian People's Republic and the Socialist Republic of Vietnam on Legal Assistance in Civil, Family and Criminal Matters, signed at Hanoi on 18 January 1985; the Convention between the Republic of Hungary and Ukraine on Legal Assistance in Civil Matters, signed at Budapest on 2 August 2001.

[8] Council Regulation (EC) on insolvency proceedings [2000] OJ L160/1 (the **"Insolvency Regulation"**), art 44. Regarding insolvency proceedings opened after 26 June 2017 the Regulation (EU) on insolvency proceedings (recast) [2015] OJ L141/19 (the **"recast Insolvency Regulation"**) applies. When referring to both regulations alternatively, the term **"(recast) Insolvency Regulation"** is used.

[9] Note, however, that the convention concluded with Yugoslavia (n 7), art 56(1)(a) explicitly excluded the recognition "bankruptcy" judgements and composition agreements from its scope. Thus, one could argue *a contrario* that those conventions which do not contain such exclusion should apply for insolvency cases.

[10] László Juhász, *A Magyar fizetésképtelenségi jog kézikönyve [Textbook on the Hungarian insolvency law]* (5th ed, Novotni Kiadó 2014) [electronic edition] 35 ff.

[11] The treaty concluded with Egypt (n 7), art 22(3).

[12] The treaties concluded with the Soviet Union, North Korea, Vietnam, Mongolia, Cuba, Czechoslovakia, Albania, Bulgaria, Algeria, Poland, Romania and Ukraine (n 7).

explicitly refer to "commercial" matters.[13] It is rather dubious whether "civil" matters (in contrast to the term "commercial") can embrace insolvency law in the Hungarian legal terminology.

Be that as it may, none of the bilateral treaties consists of insolvency-specific rules and no provisions dealing with *jurisdiction* or *applicable law* in insolvency context appear in the documents. What could be of some importance, however, is that a significant number of the treaties extend *recognition* and *enforcement* to settlement agreements sanctioned by courts,[14] however, it is unsure whether this latter category covers composition agreements binding dissenting creditors.

What we can say, therefore, is that international insolvency situations do not appear to be *per se* excluded from the scope of the vast majority of the bilateral treaties. However, the practical relevance of the treaties on the terrain of cross-border insolvency is very limited. *First*, the Insolvency Regulation, which entered into force in relation to Hungary in 2004, "absorbed" those treaties of Hungary concluded with (then: future) member states of the EU. *Second*, the majority of the remaining treaties are applicable to "civil" matters only making it questionable whether their scope covers insolvency matters.[15] *Third*, no case law is available where courts applied treaties in relation to international insolvency cases.

3. The existing PIL legislation in Hungary in the context of insolvency

3.1 The inadequacy of "general" PIL in the context of insolvency

As we have seen in the previous section, while the applicability of the bilateral agreements in the terrain of international insolvency is rather questionable, basically no such doubts emerge regarding the PIL Code 1979: the scope of the latter statute does cover international insolvency law. The next question is whether the PIL Code 1979 *adequately* addresses the relevant questions of the cross-border insolvency. In order to find an answer, we should shortly recall those special features of the international insolvency law which makes it different from the "general" PIL.

International insolvency law, as the term is used in this paper, is a particular branch of PIL dealing with cross-border issues concerning insolvency. While "general" PIL regulates the cross-border aspects of the civil or commercial proceedings, international insolvency law does the same with domestic insolvency regimes. Accordingly, the differences between "general" PIL and international insolvency law are to be found in the underlying substantive laws, namely in the particularities of insolvency law.

With a few exceptions, proceedings in the terrain of civil/commercial law are *individual* proceedings. The party seeks remedy from the court for violation of his rights, enforcing their claims, protection of his interests, sanctioning their settlement agreements etc. The proceedings normally result in court decisions determining the rights and obligations of the parties. Even judgements *in rem* with *erga omnes* effect in the context of commercial law lack collective nature.[16] The judgement may be recognised and enforced in other states as long as the PIL rules of the "host" state concerned allows. By contrast, insolvency proceedings are *collective* proceedings. The principle of collective proceedings is the very backbone of the insolvency law. The particular features of the insolvency law arise from that principle: the prohibition of the individual enforcement actions, facilitation of the reorganisation of the debtor, composition agreements binding also dissenting creditors, appointment of insolvency office holders administering the debtor's matters and representing the interests of the

[13] The treaties concluded with Tunisia, Syria, Cyprus, Iraq, Greece and France (n 7). It is not clear whether the convention with China (n 7) covers the recognition of commercial judgements.
[14] Those referred to above (n 12, 13), except the treaty with Algeria (n 7).
[15] n 12.
[16] cf Jacob van de Velden et al, 'The Effect in the European Community of Judgments in Civil and Commercial Matters: Recognition, Res Judicata and Abuse of Process (JLS/2006/FPC/21)' <http://www.biicl.org/files/4608_comparative_report_-_jls_2006_fpc_21_-_final.pdf> accessed 6 December 2016, 13-14.

creditors, distribution of the assets according to the ranking order etc. In cross-border context, when the creditors, the business or the assets of the insolvent debtor are located in different states, these special features and functions of the insolvency law are not necessarily reflected by the traditional PIL rules designed for dealing with individual proceedings.[17]

3.2 International jurisdiction

As long as the centre of the main interest (COMI)[18] of the debtor is situated within the territory of the EU,[19] the jurisdiction to open, main or territorial, insolvency proceedings is determined by the (recast) Insolvency Regulation.[20] The scope of the national legislation regarding jurisdiction is limited, therefore, to debtors whose COMI is located in third states.

The PIL Code 1979 addresses jurisdiction rather laconically. Hungarian courts have *exclusive* jurisdiction in proceedings concerning insolvency of corporations whose registered office is in Hungary.[21] By contrast, the jurisdiction of Hungarian courts is *excluded* in proceedings concerning insolvency of companies the registered office of which is outside Hungary.[22] As to the so-called insolvency-related judgements,[23] the PIL Code 1979 contains no specific provisions. Therefore, arguably, the general rules on jurisdictional apply.[24] Alternatively, the argument can be made that the category of "insolvency-related proceedings fall within the scope of the "proceedings concerning insolvency". In that case, the jurisdiction would be determined by the insolvency-specific provisions.[25]

Whether this black and white approach is the best way to address cross-border insolvency situations, may be subject to discussion. Apparently, this approach may discourage courts to open insolvency proceedings in Hungary against off-shore registered companies even if their COMI is located in Hungary.[26] Also, assets or establishments of foreign companies situated in Hungary cannot be subject to Hungarian insolvency proceedings even if the interests of the local creditors would justify the opening of insolvency proceedings in that country.

What cannot be disputed, however, that the principle behind the law is clear: only Hungarian courts may conduct insolvency proceedings against companies registered in Hungary while no Hungarian courts have jurisdiction in insolvency matters of foreign companies. The rules on recognition, to be discussed in details below, mirror this approach.[27]

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[17] For more on this question, see below Subsection '*3.4 Recognition and enforcement'.*
[18] See Insolvency Regulation, Recital (13); recast Insolvency Regulation, art 3(1).
[19] Denmark is not bound by the (recast) Insolvency Regulation; see Insolvency Regulation, Recital (33) and recast Insolvency Regulation, Recital (88). Therefore, Denmark is to be considered as if it were a non-member state; see Miguel Virgós and Francisco Garcimartín, *The European Insolvency Regulation: Law and Practice* (Kluwer Law International 2004) para 2.
[20] Insolvency Regulation, Recital (14) and art 3; recast Insolvency Regulation, Recital (25) and art 3.
[21] PIL Code 1979, s 62/A(g). Note that the Act CXXXII of 1997 on Hungarian Branch Offices and Commercial Representative Offices of Foreign-Registered Companies ("**Brach Office Act**"), in limited scope, allocates jurisdiction to Hungarian courts to open liquidation proceedings against Hungarian branch offices of foreign-registered companies, see Branch Office Act, § 19-20. The branch office of a foreign company, with some simplification, can be regarded as an establishment vested with financial autonomy and registered in the Hungarian company registration records; see Branch Office Act, § 2(b). For the definition of establishment, see Insolvency Regulation, art 2(h); recast Insolvency Regulation, art 2(10); Model Law, art 2(f).
[22] PIL Code 1979, s 62/C(g).
[23] In the context of the (recast) Insolvency Regulation, those judgements are insolvency-related which derive directly from the insolvency proceedings and are closely linked with them, see Insolvency Regulation, Recital (6), art 25; recast Insolvency Regulation, Recitals (6), (35), art 6, 32. cf the definition given by the recent version of the Draft Model Law on the Recognition and Enforcement of Insolvency-Related Judgments, art 2(e). See UNCITRAL Working Group V, *Recognition and enforcement of insolvency-related judgments: draft model law* (A/CN.9/WG.V/WP.143) <https://documents-dds-ny.un.org/doc/UNDOC/LTD/V16/086/50/PDF/V1608650.pdf?OpenElement> accessed 5 December 2016.
[24] The general jurisdiction rule is based on the place of the registered office of the defendant. Regarding the general, special and other grounds for jurisdiction see PIL Code 1979, § 54-62/H.
[25] n 21, 22.
[26] ÍH 2013.81 (Fővárosi Ítélőtábla 12. Fpkf. 44.199/2012/3.); see Csőke (n 6) 34.
[27] Subsection *'3.4 Recognition and enforcement'*.

Therefore, while the solution chosen by the Hungarian legislator regarding the determination of *international jurisdiction* in international insolvency matters may not be the most sophisticated one, still, it constitutes a legal framework *relevant and functional* in the context of international insolvency.

3.3 Applicable law

Should the COMI of the debtor located in the territory of the EU, the (recast) Insolvency Regulation determines not only jurisdiction to open insolvency proceedings but, indirectly, also the law applicable to insolvency proceedings and their effects.[28] This is the insolvency law of the Member State the courts of which opened the main[29] insolvency proceedings (*lex concursus*). Thus, again, the scope of the Hungarian domestic provisions on conflict of laws is limited to cases where the COMI of the debtor is situated outside the territory of the Union.

Therefore, the application of the provisions of the PIL Code 1979 on conflict of laws comes into play only if two cumulative preconditions are met. *First*, the debtor's COMI must be located in a third state. *Second*, the Hungarian courts must have jurisdiction to open insolvency proceedings against the debtor on the basis of the domestic PIL rules; namely, without the jurisdiction of Hungarian courts, there is no forum which would apply the Hungarian rules on conflict of laws. As we have seen, Hungarian courts have (exclusive) jurisdiction in insolvency cases if the registered office of the debtor is in Hungary. Thus, if we disregard the particular cases regarding the branch offices of foreign companies,[30] the only cases when domestic Hungarian rules on conflict of laws determine the applicable law are those where the COMI of the debtor is situated outside the EU but its registered office is located in Hungary.

The *first question* is whether the law applicable for insolvency proceedings opened before Hungarian courts can be clearly determined on the basis of the PIL Code 1979. As to the *procedural aspects*, the situation is simple: Hungarian *fora* apply their own procedural law.[31] By contrast, the PIL Code 1979 does not answer the question which *substantive* law applies to the insolvency of companies registered in Hungary but having their COMI outside the EU. The statute states only that the legal capacity, economic capacity and the personality rights of a legal entity as well as the legal relationships between the shareholders thereof shall be adjudged, principally, according to the law of the state in the territory of which the legal entity was registered.[32]Insolvency is not on the list ; thus, it is far from certain whether the latter is covered by this provision.[33] Neither the Insolvency Act 1991[34] clears the fog because the wording of the statute[35] is rather ambiguous in this regard. On the one hand, it may be interpreted as if statute applied only to those entities having their COMI within the territory of the EU.[36] On the other hand, it can also be represented that the reference to the COMI merely extends the scope of the Insolvency Act 1991 to companies with COMI in the Union *beyond* the original scope of the statute which was limited to *Hungarian-registered* entities. Therefore, on the basis of the existing legislation the law applicable for insolvency proceedings opened by Hungarian courts *vis-à-vis* Hungarian-registered companies whose COMI is outside the EU cannot be clearly determined.

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[28] Insolvency Regulation, art 4; recast Insolvency Regulation, art 7.
[29] Insolvency Regulation, art 4; recast Insolvency Regulation, art 7 concerns both main and territorial insolvency proceedings but only the law of the State of the opening of *main* insolvency proceedings shall, principally, have universal effects within the EU, see Insolvency Regulation, art 17 and recast Insolvency Regulation, art 20.
[30] n 21.
[31] PIL Code 1979, § 63.
[32] PIL Code 1979, § 18(1)-(2).
[33] cf Tamás Szabados, 'Challenges of the Codification of the Law Applicable to Legal Persons from the Perspective of Recodifying Hungarian Private International Law' (2015) ELTE Law Journal 81, 94.
[34] Act XLIX of 1991 on Reorganisation Proceedings and Liquidation Proceedings.
[35] Insolvency Act 1991, § 3(1)(a).
[36] cf János Bóka, 'Fizetésképtelenségi eljárások az új magyar nemzetközi magánjogi kódexben [Insolvency Proceedings in the New Hungarian PIL Code]' in Barna Berke and Zoltán Nemessányi (eds), *Az új nemzetközi magánjogi törvény alapjai [Foundations of the new PIL Act]* (HvgOrac 2016) 253.

The *second question* is whether Hungarian insolvency law – assuming it is the applicable *lex concursus* – can adequately address the issues emerging in connection to insolvency proceedings opened against companies whose COMI is located in thirds states. This is more than dubious. The domestic insolvency regime of Hungary has been modelled to address purely domestic situations. There are no exceptions to the application of the Insolvency Act 1991: Hungarian insolvency law would apply in its entirety, to all aspects of the insolvency opened against the debtor, notwithstanding the fact that, having its COMI outside the EU, the debtor and its business may have, beyond the registered office, only limited or no connection to Hungary. Having a look at the list of exceptions to the application of the *lex concursus* in the (recast) Insolvency Regulation[37] gives us a broad idea about the situations where the application of the *lex concursus* would either be in conflict with the legitimate expectation of the parties[38] or result in too much complexity of cross-border insolvency proceedings.[39] By contrast, the Insolvency Act 1991 consists of no such corrections: this weakness of the law may confront both courts and parties with practically irresolvable challenges. For instance, Hungarian insolvency provisions should determine how third-state creditors, whose claim is subject to foreign law and secured by rights *in rem* in respect of collaterals granted by the debtor, located outside Hungary and created under foreign law (*lex rei situs*), can satisfy their claims from the encumbered assets.[40] Also, Hungarian insolvency law would govern the effects of insolvency on employment contracts or contracts regarding immoveable properties, even if all the relevant aspects of those contracts are connected to a third state.

3.4 Recognition and enforcement

3.4.1 The existing system

The scope of the Hungarian domestic legislation in terms of recognition and enforcement of foreign insolvency proceedings is restricted to cross-border situations in relation to third countries.

In intra-EU context, the (recast) Insolvency Regulation lays down a system of the universal effects of the insolvency proceedings the theoretical basis of which is modified universalism.[41] To put it simply, this system has two main pillars. On the one hand, there is the (intra-EU) universal effects of the main insolvency proceedings and those of the *lex concursus*. On the other hand, the universality is mitigated in two aspects. First, a number of exceptions have been created to the application of the *lex concursus*.[42] Second, territorial proceedings may be opened in member states where the debtor has establishment;[43] in this case the insolvency law of the relevant member state (as *lex concursus territorialis)* applies and the secondary proceedings encompass the assets situated in the territory of the member state concerned. The automatic universal effects of the main insolvency proceedings as determined by the (recast) Insolvency Regulation go far beyond what we mean by recognition in the traditional PIL. If, as typical, the *lex concursus* provides for staying individual enforcement actions *vis-à-vis* the debtor's assets by force of law, or orders to suspend the right of the debtor to transfer or encumber its assets, then, principally, these provisions are binding throughout the EU and the courts and other authorities of the member states shall enforce these provisions notwithstanding that they are part of a foreign *lex concursus*.

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[37] Insolvency Regulation, arts 5-15; recast Insolvency Regulation, arts 8-18.
[38] cf Insolvency Regulation, Recital (24); recast Insolvency Regulation, Recital (67).
[39] cf Virgós and Garcimartín (n 19) para 135.
[40] cf 'Az új magánjogi törvény koncepciója – részletes előterjesztés [Principles of the new PIL Code – Comprehensive Proposal]' para 190 <http://www.kormany.hu/download/c/cf/c0000/NMJ TV KONCEPCIÓ.pdf> accessed 19 October 2016. The Comprehensive Proposal refers to the relationship between the *in rem* securities and the insolvency proceedings but no details are provided.
[41] Virgós and Garcimartín (n 19) paras 17 ff.
[42] n 37.
[43] Insolvency Regulation, art 3(2); recast Insolvency Regulation, art 3(2).

The PIL Code 1979, in contrast, does not consist of explicit provisions on the recognition and enforcement of foreign insolvency judgements. Having said that, the rules applicable can be extrapolated from the explicit provisions on jurisdiction. The decision of a foreign court or another foreign authority shall be, principally, recognized by Hungary if it pertains to a matter in which the jurisdiction of Hungarian courts is excluded.[44] As discussed above,[45] the jurisdiction of Hungarian courts is *excluded* in proceedings concerning insolvency of corporations the registered office of which is outside Hungary.[46] Therefore, the general rule is that Hungary will recognise foreign insolvency decisions regarding companies whose registered office (and, of course, their COMI[47]) is in third states.[48] Thus, Hungarian PIL legislation appears to open the door quite wide to foreign insolvency judgements. One may conclude that on the basis of this seemingly generous recognition regime the effects of foreign insolvencies (opened even in the most exotic jurisdictions) are admitted in Hungary without any material examination by Hungarian courts. However, this is not really the case. *First*, the PIL Code 1979 mentions foreign *decisions* rather than the *effects* of the foreign proceedings. For the purposes of this paper it is assumed that the provisions of the PIL Code 1979 on recognition of foreign judgements may not be so widely interpreted that they embrace all the diverse effects of foreign insolvency proceedings.[49] But even if they may, the present legal framework would be unsuitable to adequately address the question of the legal effects of foreign insolvency proceedings in practice: the moratorium on individual enforcement actions, the prohibition of transferring or encumbering of assets, the powers of the foreign insolvency office holder[50] etc. *Second*, it is far from certain that the concept of "decision" in the text of the PIL Code 1979 encompasses composition agreements binding

[44] Note, however, that recognition is to be refused if (i) it violated the public policy of Hungary or (ii) the party against whom the decision was made could not attend the proceeding because he had not been properly notified or (iii) the foreign procedure seriously violated the basic principles of Hungarian procedural law; see PIL Code 1979, § 71, 72(2)(a)-(c).

[45] Subsection *'3.2 International jurisdiction'*.

[46] PIL Code 1979, § 62/C(g)

[47] Insolvency proceedings against companies whose COMI is within the EU fall within the scope of the (recast) Insolvency Regulation; n 20.

[48] The "inverse" of this situation is when the registered office of the company is located in Hungary. In that case the jurisdiction of the Hungarian courts to open insolvency proceedings is exclusive, see PIL Code 1979, § 62/A(g). The recognition of foreign judgements on matters belonging to the exclusive jurisdiction of the Hungarian courts is excluded, see PIL Code 1979, § 70(1). Thus, Hungary categorically denies to recognise foreign insolvency judgements even if the COMI of the debtor is located in third states and no further factors beyond the registered office attaches the company to Hungary.

[49] In the system of the "Brussels regime" dealing with recognition and enforcement of civil and commercial matters a foreign judgement must in principle have the same effects in the state in which enforcement is sought as it does in the state in which judgment was given, see Case 145/86 Hoffmann v Krieg [1988] ECR 645, para 11. This is referred to as the "extension model", see Pietro Franzina, Xandra Kramer and Jonathan Fitchen, 'The Recognition and Enforcement of Member States Judgements' in Andrew Dickinson and Eva Lein (eds), *The Brussels I Regulation (Recast)* (OUP 2015) 378 ff; Velden (n 16) 53 ff; see further Subsection '*3.4.2 The deficiency of the existing law'*. However, this should not be construed as if the simple recognition of the judgement opening the insolvency proceeding let in all the effects of the foreign insolvency proceedings into the Hungarian law. *First*, it is far from certain that the extension model is followed by the PIL Code 1979. *Second*, this model of recognition is designed for commercial proceedings; regarding the – more complex and collective – insolvency proceedings the extension of the effects of the *lex concursus* does not operate without a proper legal framework enabling the universal effects of the *lex concursus*. *Third*, this is why insolvency proceedings are excluded from the scope of the Brussels regime, see Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) [2015] OJ 2012 L351/1 (the "Brussels Ibis Regulation"), art 1(2)(b). The fact that the PIL Code 1979 does not contain such exclusion is not decisive: that statute was drafted in a period when insolvency law virtually did not exist in Hungary. *Forth*, the recognition of "normal" (i.e. non-insolvency) commercial judgements require, generally, reciprocity in the system of the PIL Code 1979, see PIL Code 1979, § 72(1)(c). By contrast, the recognition of judgements opening foreign insolvency proceedings does not presuppose reciprocity, see PIL Code 1979, § 62/C(g), 71. It would be inconsistent to set a lower threshold for insolvency judgements importing all the effects of a foreign *lex concursus* than for commercial judgements the scope of which is typically more limited. Of course, it may be open to discussion whether, by reason of the foreign insolvency proceedings, in a particular case there are remedies available enabling foreign office holders to exercise some powers in Hungary or to protect local assets from individual enforcement actions or from dissipation. This should be analysed on a case-by-case basis. What can be asserted with some certainty, however, is that even if some individual remedies turned out to be successful in particular cases, there is no established legal framework in Hungary which could efficiently protect the stakeholders and the principle of collective proceedings in relation to foreign insolvency proceedings.

[50] Regarding the powers of the foreign office holder in Hungary in the context of the present legal framework, see Csőke (n 6) 33.

dissenting creditors and sanctioned by court. The fact that a significant number of the bilateral treaties[51] explicitly refer court-sanctioned settlement agreements to the category of "decisions" may suggest that the scope of the PIL Code 1979, which consist of no such referral to court-sanctioned agreements, does not extend to the latter category. *Third*, no published case law is available where foreign insolvency judgements have been recognised in Hungary on the basis of the PIL Code 1979 or the bilateral treaties.

As for the recognition of the *insolvency-related judgements*[52] no special provisions are available. Therefore, the general rules on recognition appear to apply.[53] The cornerstone of these general rules is reciprocity.[54] Beyond, the recognition requires the foreign decision to be final, and that the jurisdiction of the foreign court has been based on a ground recognised by the Hungarian stature and there are no grounds for refusal.[55] The bilateral agreements, with some variations, follow the same pattern although in those cases no reciprocity is required.[56] An apparent weakness of this system is that it is not harmonised with the rules on jurisdiction. Therefore, the recognition of foreign insolvency-related judgement can fail if the ground on which the foreign court has based its jurisdiction does not correspond with the Hungarian jurisdictional rules or the foreign judgement concerns a matter falling within the exclusive jurisdiction[57] of the Hungarian courts. But again, alternatively, it can be argued that the category of the insolvency-related proceedings fall within the scope of the "proceedings concerning insolvency".[58] In that case, the (implied) insolvency-specific rules on recognition would apply.

As for the *enforcement* of the foreign decisions neither the PIL Code 1979 nor the possibly applicable treaties consist of insolvency-specific provisions. The PIL Code 1979 notes only that foreign decisions, assuming they are to be recognised in Hungary, shall be executed in accordance with the relevant Hungarian statute.[59] The wording suggests that this provision concerns only individual enforcement actions falling within the scope of the Act on Judicial Enforcement 1994.[60]

To sum up, an ambivalent approach can be detected regarding in the Hungarian PIL provisions regarding the recognition and enforcement of foreign judgements on the field of insolvency. On the one hand, the legislation appears to open the door for the recognition and enforcement of foreign insolvency judgements as long as the registered office (and the COMI) of the debtor is in third countries. On the other hand, the rules are designed for individual decisions and do not constitute a functioning legal regime that is able to consistently deal with the effects of foreign insolvency proceedings in Hungary.

3.4.2 The deficiency of the existing law

Opening insolvency proceedings drastically modify the "status quo". The imperative provisions of domestic insolvency laws overwrite existing rights: the debtor loses its power to dispose of its assets, the creditors lose their right to enforce their claims, insolvency office holders are appointed to manage administer the very diverging aspects of insolvency of the debtor etc. The very core of virtually each modern insolvency law is the protection of the assets from the individual enforcement actions and the

[51] n 14.
[52] n 23.
[53] PIL Code 1979, § 72.
[54] PIL Code 1979, § 72(1)(c). In relation the Germany and Italy the reciprocity has been established, see Igazságügyminiszteri viszonossági nyilatkozat az NSZK vonatkozásában [Declaration of the Minister of Justice about Reciprocity in relation to the German Federal Republic] Igazságügyi Közlöny 1992/4. and 8001/2003 (IK 3.) IM tájékoztató viszonossági nyilatkozatról [Communication of the Ministry of Justice about Reciprocity].
[55] PIL Code 1979, § 72(2).
[56] Subsection *'2.2 Bilateral agreements'*.
[57] PIL Code 1979, § 62/A.
[58] Subsection '*3.2 International jurisdiction'*.
[59] PIL Code 1979, § 74/A.
[60] Act LIII of 1994 on Judicial Enforcement.

distribution of the assets in an organised manner.[61] Many of these provisions apply by force of law. Generally, no court decisions opening insolvency proceedings elaborate the rather far-reaching consequences of insolvency: those stem from the statutory insolvency law. This is the reason why PIL in general, so the Hungarian statute, designed for "piecemeal" recognition and enforcement of judgements are unfit to constitute a functional international insolvency law.

There are two basic models dealing with the determination of the effects of foreign (insolvency) proceedings. "[T]he *extension model* is based on the idea of accepting the foreign decision as it is, on its own terms and with its own effects [emphasis in the original]."[62] In this model, the foreign-opened insolvency proceedings are *"let in"* into the domestic arena together with their effects. This is more than a simple recognition. It is about the application of the *lex concursus*. Of course, the scope of the application does not necessarily entails every aspect of the foreign insolvency law (e.g. powers of the liquidator acting in a foreign state may be limited[63]). This is the model which is primarily followed by the (recast) Insolvency Regulation.[64] By contrast, "the *assimilation model* responds to the idea of »equating« foreign decisions with national one; i.e. it entails granting a foreign decision the same effects as an equivalent national decision [emphasis in the original]."[65] In other words, the host state recognises the foreign insolvency proceedings but *replaces* the effects of the foreign insolvency as imposed by the foreign *lex concursus* with the effects of its own, as allocated by the domestic legislation. The Model Law may be interpreted as a subspecies of the assimilation model by attaching *sui generis* effects to the recognition of foreign insolvency proceedings.[66]

The underlying problem with the Hungarian international insolvency law is that it does not really follow any of the models described above; therefore, it does not tackle the question of the domestic legal effects of the foreign proceedings.

4. Reform proposal

4.1 Background

The Hungarian Government adopted the Principles of the new PIL Code in November 2016 (the "**Principles**").[67] As a novelty, the Principles declare that the new PIL Code should address the questions of jurisdiction, applicable law, recognition and enforcement regarding insolvency proceedings, as far as they do not fall within the scope of the European legislation.[68] The insolvency aspects of the Principles are further explained in a number of studies[69] written by a member of the Working Group[70] (these works together are referred to as the "**Proposal**" in this paper). At the end of February 2017, the Government submitted the draft law **("Draft PIL Code 2017")** to the Hungarian Parliament.[71] When relevant, short referrals to the new draft law will be made in the notes.[72]

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[61] cf Philip R Wood, 'Principles of International Insolvency (Part I)' (1995) 4 International Insolvency Review 94, 95.
[62] Virgós and Garcimartín (n 19) para 353; cf n 49.
[63] cf Insolvency Regulation, art 18; recast Insolvency Regulation, art 21.
[64] Insolvency Regulation, art 17(1); recast Insolvency Regulation, art 20(1). See Miguel Virgós and Etienne Schmit, 'Report on the Convention of Insolvency Proceedings', paras 153-154.
[65] Virgós and Garcimartín (n 19) para 353. An example is the effects of insolvency proceedings on lawsuits pending in the system of the (recast) Insolvency Regulation which shall be governed solely by the *lex processus*; see Insolvency Regulation, art 15, recast Insolvency Regulation, art 18.
[66] Subsection *'5.2 The Model Law in general'*.
[67] 1673/2016. (XI. 29.) Korm. határozat az új nemzetközi magánjogi törvény koncepciójáról [Government Resolution 1673/2016. (XI. 29.) on the Principles of the New Code on Private International Law].
[68] ibid, para 34.
[69] Bóka (n 36); János Bóka, 'Fizetésképtelenségi eljárások az új nemzetközi magánjogi törvényben [Insolvency Proceedings in the new Act on Private International Law]' [2016] Gazdaság és Jog (7-8) 11.
[70] Comprehensive Proposal (n 40) para 4.
[71] Regarding the status of the Draft PIL Code 2017 see <http://www.parlament.hu/iromanyok-egyszerusitett-lekerdezese?p_auth=ND62zwHo&p_p_id=pairproxy_WAR_pairproxyportlet_INSTANCE_9xd2Wc9jP4z8&p_p_lifecycle=1&p_p_state=normal&p_p_mode=view&p_p_col_id=column-1&p_p_col_count=1&_pairproxy_WAR_pairproxyportlet_INSTANCE_9xd2Wc9jP4z8_pairAction=%2Finternet%2Fcplsql

4.2 Jurisdiction

The Proposal envisages a number of changes regarding the current regime on jurisdiction.

First, as *general rule*, Hungarian courts would have *non-exclusive* jurisdiction to conduct insolvency proceedings if the registered office of the (legal person) debtor is located in Hungary.[73] Note, that the existing law provides for *exclusive* jurisdiction in such cases;[74] therefore, insolvency proceedings opened in a third state are currently prevented from being recognised as far as the registered office of the debtor is located in Hungary[75] even if the company has strong economic ties with the third state concerned. Abolishing the exclusive jurisdiction would have the effect that such proceedings, at least in theory,[76] could be recognised in Hungary.

Second, Hungarian courts would have jurisdiction to conduct insolvency proceedings *vis-à-vis* debtors whose establishment[77] is situated in Hungary.[78] This ground of jurisdiction would absorb the current provisions on jurisdictions regarding branch offices of foreign companies.[79] It is not completely clear whether the effects of the insolvency proceedings opened on the basis of the Hungarian registered office or establishment are supposed to be universal or territorial.[80]

Third, Hungarian courts having jurisdiction to conduct insolvency proceedings would also have the power to entertain actions which derive directly from the insolvency proceedings and are closely linked with them (insolvency-related actions[81]).[82]

Fourth, in lack of registered office or establishment in Hungary, the mere presence of assets does not constitute a jurisdictional ground. It is opined that in this case "it is a satisfactory solution either to recognise the effects of the foreign proceedings regarding the assets located here or to initiate particular enforcement actions".[83] The problem with the first variation is that the Proposal does not seem to properly address the effects of the foreign proceedings in Hungary.[84] The second variation, namely allowing singular enforcement actions against the assets of the insolvent debtor, is plainly contrary to the very core principles of the (international) insolvency.

Fifth, the jurisdiction of the Hungarian courts would be explicitly excluded if none of the above jurisdictional grounds (registered office, establishment or insolvency-related actions)[85] are present.[86] One may wonder if this goes too far because this approach would prevent Hungarian courts to open

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%2Fogy_irom.irom_adat%3Fp_ckl%3D40%26p_izon%3D14237>. The text of the Draft PIL Code 2017 with the explanatory memorandum is available at <http://www.parlament.hu/irom40/14237/14237.pdf> both accessed 8 March 2017.

[72] Note that the Draft PIL Code 2017 is subject to the normal legislative process meaning that some changes may be expected.

[73] Principles, para 34; Bóka (n 36) 254; Draft PIL Code 2017, § 100(1).

[74] Subsection *'3.2 International jurisdiction"*.

[75] n 48.

[76] However, see Subsection *'4.4 Recognition and enforcement'*.

[77] Place of operation where a debtor carries out a non-transitory economic activity, see Principles, para 34, Draft PIL Code 2017, § 100(1). cf Insolvency Regulation, art 2(h); recast Insolvency Regulation, art 2(10); Model Law, art 2(f).

[78] Principles, para 34; Draft PIL Code 2017, § 100(1).

[79] Bóka (n 36) 254.

[80] cf Bóka (n 36) 255 and Bóka (n 69) 15. Similarly, the Draft PIL Code 2017 does not clarify the question of the territorial scope of the insolvency proceedings opened by Hungarian courts having jurisdiction on the basis of the Draft PIL Code 2017, either.

[81] n 23.

[82] Principles, para 34; Draft PIL Code 2017, § 100(2). In this regard, also the case law of the ECJ regarding the delineation of the insolvency-related actions from those other commercial actions which fall outside the scope of the insolvency proceedings thus are subject to the Brussels Ibis Regulation should be "adopted", see Bóka (n 36) 255.

[83] Bóka (n 36) 255.

[84] Subsection *'4.4 Recognition and enforcement'*.

[85] Of course, the jurisdictional grounds established by the (recast) Insolvency Regulation remain intact.

[86] cf Principles para 70 on "*forum necessitatis*"; it is not clear how that special ground for jurisdiction relates to the exclusion of the jurisdiction of Hungarian courts in the context of insolvency. The Draft PIL Code 2017, § 100 and 89(e) appear to suggest that no other jurisdictional grounds than those explicitly referred to by the Draft PIL Code 2017 or the (recast) Insolvency Regulation apply.

insolvency proceedings even if the debtor company had significant ties to Hungary and the local creditors or employees would benefit from the opening of insolvency proceedings in Hungary.[87]

Overall, the rules of jurisdiction as suggested by the proposal seem to improve the current system by streamlining the provisions on international jurisdiction regarding insolvency cases and setting up a clear system of grounds for jurisdiction.

4.3 Applicable law

Domestic laws are free to regulate those aspects of the cross-border insolvency which are not covered by the (recast) Insolvency Regulation. This is the case if the COMI of the debtor is situated in a third country[88] or the rules on conflict of laws of the (recast) Insolvency Regulation[89] refer to the law of a non-member state.[90]

The Proposal suggest maintaining the principle that Hungarian *forum* applies its own procedural law.[91] As a novelty,[92] the Principles explicitly declare that Hungarian (substantive) law applies to the legal effects of the insolvency proceedings opened by Hungarian courts but some exceptions are justified. These exceptions concern the law of the state where the immoveable property is located and that of the state under the authority of which a public register is kept.[93] It is not completely clear whether any further exceptions[94] would apply.[95]

The application of the *lex concursus* is practical because *forum* and *ius* coincide.[96] This is a solution which is the most predictable by the stakeholders and the most manageable by the courts. There are some question marks, however, regarding the range of the exceptions to the general application of the Hungarian law as *lex concursus*. There appears to be no explanation as to the rather limited scope of the exceptions to the *lex concursus*.[97] Beyond, it is unclear how the Proposal intends to overcome the predictable difficulties regarding the recognition of Hungarian insolvency judgements affecting e.g. foreign rights *in rem* or employment contracts. .

4.4 Recognition and enforcement

The Principles addresses the question of recognition and enforcement in a rather concise manner.

The Principles state that "[d]ecisions in insolvency matters may be recognised in Hungary on the basis of reciprocity."[98] It appears that the material scope of the envisaged recognition is rather wide: a judgement opening foreign main insolvency proceedings would have the same legal effects in Hungary as it has according to the *lex concursus*, unless secondary proceedings in Hungary have been opened.[99] Moreover, it is suggested that reciprocity is required exactly because it is about extending

[87] cf the jurisdiction of English courts regarding unregistered companies in *Real Estate Development Co* [1991] BCLC 210 and *Stocznia Gdanska SA v Latreefers Inc (No 2)* [2001] 2 BCLC 116.
[88] Insolvency Regulation, Recital (14); recast Insolvency Regulation, Recital (25).
[89] Insolvency Regulation, arts 5-15; recast Regulation, arts 8-18.
[90] Virgós and Garcimartín (n 19) paras 27, 137; to the contrary, cf Richard Snowden, 'Article 9 – Set-off' in Reinhard Bork and Kristin van Zwieten (eds), *Commentary on the European Insolvency Regulation* (OUP 2016) 257.
[91] Bóka (n 36) 256; Draft PIL Code 2017, § 66.
[92] cf Subsection *'3.3 Applicable law'.*
[93] Principles para 34. In principle, the Draft PIL Code 2017, § 67 follows the same pattern but it specifies some further exceptions, namely the rights of the debtor in immoveable property, ships, aircrafts or securities subject to registration in a public register.
[94] cf Insolvency Regulation, arts 5-15; recast Insolvency Regulation, arts 8-18.
[95] At one place Bóka opines that the best solution would be to implement the conflict of laws provisions of the (recast) Regulation, see Bóka (n 36) 252, 259. Elsewhere, the same author seems to suggest that a more narrow circle of exceptions would be allowed, see Bóka (n 69) 18.
[96] Virgós and Garcimartín (n 19) para 118.
[97] n 94.
[98] Principles para 34; Draft PIL Code 2017, § 114(1).
[99] Bóka (n 69) 18; Bóka (n 36) 258, 259; Draft PIL Code 2017, § 114(3).

the effects of the foreign insolvency to Hungary.[100] In other words, the Proposal follows the extension model.[101]

Thus, the legislator seems to appreciate that on the field of cross-border insolvency recognition has a meaning different from the recognition in the general PIL. While in the former case the emphasis is on the effects of the foreign insolvency proceedings (automatic stay, protection of assets, collective distribution etc.), traditional PIL provisions are designed for a "piecemeal" recognition of single judgements. But extending all the legal effects of insolvency proceedings opened in third states – sometimes in countries whose legal system is fundamentally different – without giving any material power to Hungarian courts to verify the compatibility of those effects with the Hungarian law is difficult to imagine.[102] This is why the Hungarian legislator imposes the requirement of reciprocity on the basis of which those states can be determined which are "trustworthy" enough that their insolvency judgements can be recognised in Hungary. Paradoxically, however, no reciprocity in respect of insolvency proceedings is in place between Hungary and other countries.[103] Therefore, in practical terms, the new law would not enable Hungarian courts to recognise foreign insolvency proceedings.[104] Beyond, the Principles promise that "[t]he statute addresses by specific provisions also the effects of the foreign main insolvency proceedings".[105] Unfortunately, the Principles do not provide further explanation what those specific provisions would be. It appears that this is nothing more than a simple reference to a possible separate piece of legislation regarding the recognition of some effects of foreign insolvency proceedings.[106] However, it is also apparent that the creation of such separate piece of legislation is considered to be *out of the scope* of the new PIL Code. Therefore, in effect, the only contribution of the new PIL Code to the recognition of the effects of the foreign insolvency proceedings would be a mere (and strictly speaking unnecessary) "authorisation" to create a separate piece of legislation which should properly address this critical question sometime in the future.

The Proposal does not mention the question of the insolvency-related proceedings[107] in the context of the recognition. However, the fact that the Proposal seems to bring closer the insolvency-related proceedings to the insolvency proceedings by granting jurisdiction to the Hungarian insolvency forum to entertain insolvency-related actions[108] appears to suggest that the proposed rules on recognition of insolvency proceedings would apply.

As discussed above,[109] the current PIL framework in Hungary regarding recognition and enforcement of foreign insolvency decisions, designed for "piecemeal" recognition and enforcement of foreign judgements, is unfit to adequately address the complex issues of the international insolvency.

The reform proposal, although rather vaguely, appears to appreciate that recognition in cross-border insolvency cannot be properly treated within the framework of the traditional PIL: it is not about the recognition and enforcement of foreign decisions but about the legal effects of a foreign insolvency in

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[100] Bóka (n 69) 17; Explanatory memorandum (n 71) to § 114 of the Draft PIL Code 2017.
[101] See Subsection *'3.4.2 The deficiency of the existing law'.*
[102] It is doubtful that the public policy exception would be sufficient in relation to third countries.
[103] Csőke (n 6) 33; Bóka (n 69) 17.
[104] Note that the Draft PIL Code 2017, § 111 appears to go further by limiting the role of the requirement of reciprocity in some respect: the rather vague text may be interpreted as saying that the reciprocity is presumed to exist in relation to those states which have a bilateral treaty with Hungary even if the foreign decision may not be recognised on the basis of the treaty; see Subsection *'2.2 Bilateral agreements'*. The loosening of the requirement of reciprocity *vis-à-vis* third countries in relation to which treaty on legal assistance is in force may have the effect that Hungary would *in fact* import the legal effects of insolvency proceedings from several countries. For the further preconditions of the recognition (the jurisdiction of the foreign court has been based on a ground respected by the Hungarian statute; the foreign decision is final, and there are no grounds for refusal) see Draft PIL Code 2017, § 109. The adequacy of those further preconditions for recognition are rather questionable in the context of the insolvency proceedings.
[105] Principles, para 34.
[106] Bóka (n 69) 17, 18. The Draft PIL Code 2017, § 114(4) confirms this interpretation.
[107] n 23.
[108] Subsection *'4.2 Jurisdiction'.*
[109] Subsection *'3.4 Recognition and enforcement'.*

Hungary. However, the chosen approach is not consistent. On the one hand, the Proposal seems to follow the radical *extension model* of the recognition rather than the *assimilation model*.[110] On the other hand, the extension model appears to function only on paper: in fact, the requirement of reciprocity makes the system improbable to operate in the foreseeable future.[111]

Therefore, the proposal is ambivalent regarding recognition of foreign insolvency proceedings. On the one hand, it makes clear that the new PIL regime will not facilitate recognition: without reciprocity no effects of foreign insolvency will be recognised in Hungary. One could consider this as a step backward from the current regime because the latter, even if only in theory, enables the recognition and enforcement of foreign insolvency proceedings in a wide range.[112] On the other hand, by explicitly declaring this deficiency of the new PIL regime, the Proposal manages to clear the fog: now it is evident that a new piece of legislation is needed in order to efficiently address the recognition of foreign insolvency proceedings in Hungary. This may open a window of opportunity for the Model Law.

5. A window of opportunity for the Model Law?

5.1 The gap in the new PIL Code

In contrast to the jurisdiction and applicable law, the question of the recognition of foreign insolvency proceedings would be addressed by the new PIL Code only ostensibly: because of the requirement of reciprocity, no foreign proceedings would actually meet the criteria of the "full" recognition (extension of the effects of the foreign proceedings).[113] However, the Proposal leaves open the possibility to create a separate piece of legislation regarding the recognition of some effects of foreign insolvency proceedings. And this is where the Model Law may come into play.

5.2 The Model Law in general

The Model Law, adopted by UNCITRAL in 1997, is designed to provide a harmonised approach to the treatment of cross-border insolvency proceedings in national legal systems and to facilitate co-operation between courts and office holders in different jurisdictions and provide for the recognition of insolvency proceedings and direct access of foreign representatives (office holders) to the courts of the enacting state.[114] The Model Law is purely procedural: it contains no rules on substantive law. The material scope of the Model Law is narrower than the traditional PIL: it does not concern the question of jurisdiction[115] and conflict of laws. On the other hand, the questions which are dealt by the Model Law are designed specifically for international insolvency. The main pillars of the Model Law are: access of foreign representatives and creditors to the national proceedings of the enacting state, recognition of foreign proceedings, relief granted in the enacting state, co-operation between courts and office holders and coordination of concurrent proceedings.

The effects of the implementation of the Model Law in Hungary would require a complex analysis[116] that goes far beyond the scope of this paper. What is the objective of this study is to demonstrate that the regulatory gap which appears to be left open regarding the recognition of foreign insolvency proceedings[117] could be adequately filled by the enactment of the Model Law.[118]

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[110] See Subsection '*3.4.2 The deficiency of the existing law'.*
[111] See, however, the possible dilution of the requirement of the reciprocity in Draft PIL Code 2017, § 111; n 104.
[112] Subsection *'3.4.1 The existing system'.*
[113] But see n 104.
[114] Roy Goode, Principles of Corporate Insolvency Law (4th edn, Sweet & Maxwell 2011) 793.
[115] But see Model Law, art 28.
[116] Some features of the Model Law, first of all the wide discretion vested in the courts of the enacting state (see e.g. Model Law, art 22) would be challenging to adapt to the Hungarian legal environment.
[117] Subsection '*5.1 The gap in the new PIL Code'.*

5.3 Recognition

As it has been pointed out, the Principles appear to allow a full-scale recognition (extension of the effects) of foreign insolvency proceedings, if the requirement of reciprocity is met.[119] In other cases, the Proposal intentionally does not address the recognition of foreign insolvency proceedings leaving a gap to the potential implementation of the Model Law.

At the first glance, the rules on recognition envisaged by the Model Law are too wide and would make the strict requirement of reciprocity meaningless by offering a much smoother way for recognition. The fundamental approach of the Model Law is that, as far as the formal requirements[120] are met, foreign insolvency proceedings shall be recognised.[121] The only actual ground for refusal is the public policy exception.[122] The reason why these widely drafted provisions on recognition do *not* actually contradict the "full recognition" suggested as the general rule by the Proposal is that the *effects* of these two variants of recognition are different. This is what we are going to see in the next paragraph.

5.4 Relief

The effects of the recognition of foreign main proceedings, as specified by the Model Law, are intended to be automatic. Automatic relief includes (i) staying commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities, (ii) staying execution against the debtor's assets and (iii) suspension of right to transfer, encumber or otherwise dispose of any assets of the debtor.[123] By contrast, some sorts of relief *may be* granted either upon application for recognition of foreign proceedings (interim relief) or upon recognition of foreign proceedings.[124] Exercising its discretionary powers, the court may, among others, (i) entrust the administration, realization or distribution of the debtor's assets located in the enacting state to the foreign representative or another person designated by the court, (ii) provide for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's matters, or (iii) grant any additional relief that may be available in the enacting state.[125] As it can be seen, the relief of collective nature provided by the Model Law are designed for the protection of the assets of the debtor and that of the interests of the general body of creditors.[126] The types of relief listed in the Model Law are typical of the relief most frequently granted in insolvency proceedings.[127] However, the list is not exhaustive and the court has the power to grant any type of relief that is available under the law of the enacting State and needed in the circumstances of the case.[128]

What is of utmost importance for our purposes is that the Model Law, as enacted by the host state, attaches its own effects to the foreign insolvency rather than accepting the effects the foreign insolvency proceedings as stipulated by the *lex concursus*.[129] In other words, the Model Law follows

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[118] Regarding the recognition of the insolvency-related judgements the Model Law does not appear to apply, see *Rubin v Eurofinance SA* [2012] UKSC 46 [133]- [144]. Regarding the Draft Model Law on the Recognition and Enforcement of Insolvency-Related Judgments, see n 23.

[119] Subsection *'4.4 Recognition and enforcement'.*

[120] The proceedings fall within the scope of the Model Law, the foreign representative has been properly appointed, the application is accompanied with the necessary documents and is submitted with the designated court, see Model Law, art 17(1).

[121] Guide to Enactment (n 1) para 150.

[122] Model Law, art 6.

[123] Model Law, art 20.

[124] Model Law, arts 19, 21.

[125] ibid.

[126] cf Guide to Enactment (n 1) para 171-172.

[127] ibid para 189.

[128] ibid.

[129] Note, however, that the choice of law rules of the enacting state may, in theory, lead to the application of the foreign *lex concursus*, see Look Chan Ho, 'England' in Look Chan Ho (ed), *Cross-Border Insolvency – A Commentary on the UNCITRAL Model Law* (3rd edn, Globe Law & Business 2012) 218 ff; Look Chan Ho, 'Applying Foreign Law Under the

the assimilation model rather than the extension model.[130] As the Guide to Enactment[131] states, a basic principle underlying the Model Law is that "[…] recognition of foreign proceedings by the court of the enacting State produces effects that are considered necessary for an orderly and fair conduct of a cross-border insolvency. *Recognition, therefore, has its own effects rather than importing the consequences of the foreign law into the insolvency system of the enacting State* [emphasis added]." Similarly, it is explained that "[…] recognition of a foreign proceeding *does not mean extending the effects* of the foreign proceeding as they may be prescribed by the law of the foreign State. Instead, recognition of a foreign proceeding entails *attaching to the foreign proceeding consequences envisaged by the law of the enacting State* [emphasis added]".[132]

Therefore, the solution offered by the Model Law, that is attaching *sui generis* effects to the foreign insolvency proceedings (including those types of relief which are available in the domestic law of the host state), appears to fill the regulatory gap intentionally left open by the Principles of the new Hungarian PIL Code. Where, in lack of reciprocity (or international convention) no "full-scale" recognition – i.e. extending the effects of the foreign insolvency – is allowed, the Hungarian law, if enacting the Model Law, would attach legal consequences to the foreign insolvency proceedings which are of its own. The adopted version of the Model Law should not refer to reciprocity,[133] in order to avoid the same *de facto* inapplicability which characterises the proposed provisions on "full-scale" recognition. Whether or not the remedies enlisted in the Model Law should be implemented in their entirety or some adjustments are needed is a question open to debate. Also, it has to be analysed which types of domestic relief should be available in the context of the recognition of foreign insolvency proceedings and whether Hungarian courts should be allowed to apply foreign law when granting discretionary relief.[134] What is decisive from the point of view of this paper is that the model offered by the Model Law enables the Hungarian legislator to control the infiltration of the foreign insolvency proceedings from states in relation to the legal system of which it has no unlimited confidence (i.e. no reciprocity or convention) while maintaining the idea of collective insolvency proceedings by protecting the assets of the foreign debtor located in Hungary and preventing individual actions. In other words, the Model Law represents a flexible approach looking for a balance between, on the one hand, the universal effects of the insolvency as provided for by the *lex concursus*, which may be in real or ostensible contrast to the interests of the host state and, on the other hand, the rigid territorial principle which would frustrate the protection of the local assets of the foreign debtor, the interests of the creditors, i.e. the principle of collective proceedings.

5.5 Powers of the foreign representative

The recognition of foreign insolvency proceedings appears to consist of the extension of the powers of foreign insolvency office holders, as conferred on him by the foreign *lex concursus*, to Hungary.

By contrast, the Model Law gives a number of specific powers to the foreign representative. The foreign representative is entitled to apply directly to a court in the enacting state,[135] he has procedural standing to commence domestic insolvency proceeding in the enacting State;[136] he may apply to the

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UNCITRAL Model Law on Cross-Border Insolvency' (2009) 24 Butterworths J. of Int'l Banking & Fin. Law 655; Jenny Clift, 'The UNCITRAL Model Law on Cross-Border Insolvency - A Legislative Framework to Facilitate Coordination and Cooperation in Cross-Border Insolvency' (2004) 12 Tul. J. Int'l & Comp. L. 307, 339-340; but see *Pan Ocean Co Ltd, Re* [2014] EWHC 2124 (Ch) [107]-[108]; Gerard McCormack, 'Foreign Law and Public Policy in the UNCITRAL Model Law on Cross- Border Insolvency: A Transatlantic Perspective' (2010) 3(26) NIBLeJ <https://www4.ntu.ac.uk/nls/document_uploads/184258.pdf> accessed 20 December 2016.

[130] Subsection *'3.4.2 The deficiency of the existing law'.*

[131] Guide to Enactment (n 1) para 178.

[132] ibid para 194.

[133] Keith D Yamauchi, 'Should Reciprocity Be a Part of the UNCITRAL Model Cross-Border Insolvency Law?' (2007) 16(3) International Insolvency Review 145; cf Rachel Kelly and Claire van Zuylen, 'South Africa' in Ho (n 129) 401-403.

[134] cf n 129.

[135] Model Law, art 9.

[136] ibid art 11.

court for recognition of the foreign proceeding in which he has been appointed;[137] he may initiate actions to avoid acts detrimental to creditors;[138] he may request for discretionary relief;[139] he may participate in an insolvency proceeding in the enacting State,[140] and may also intervene in proceedings in which the debtor is a party.[141] Beyond, the foreign representative may be entrusted by the court with the administration, realization or distribution of the debtor's assets located in the enacting state.[142]

As with the effects of the recognition, the Model Law replaces the powers of the foreign representatives as determined by the *lex concursus* with *sui generis* powers defined by the Model Law as enacted by the host state. The scope and types of these powers may be adjusted by the enacting state but the principle remain: instead of importing foreign effects, the effects of the foreign proceedings, including the powers of the foreign representative, are "transformed" into the legal system of the enacting state.

5.6 Coordination of proceedings

According to the Proposal, Hungarian courts would have jurisdiction to open domestic (main or non-main) insolvency proceedings if the registered office or establishment of the debtor is situated in Hungary.[143] This is in compliance with the Model Law.[144] In the event of opening such "full" domestic insolvency proceedings in Hungary (as opposed to the "ancillary" proceedings limited to the recognition of the foreign proceedings on the basis of the Model Law[145]) the reconciliation of the legal effects of the foreign and Hungarian proceedings is necessary but is not addressed by the Principles. The Model Law addresses this problem by laying down provisions aimed at the coordination of the effects of the different proceedings taking into consideration the capacity of the proceedings (main or non-main) and the question whether the recognition precedes or follows the commencement of the insolvency proceedings in the enacting state.[146]

6. Conclusion

The present Hungarian PIL framework is unfit to adequately address the relevant questions of the international insolvency law. Therefore, in cross-border situations, the existing regime does not functionate properly and this may result in legal uncertainty, improper protection of the foreign debtor's assets located in Hungary and neglect of the principle of collective proceedings. The Proposal of the new Hungarian PIL Code appears to make some progress regarding the jurisdiction of Hungarian courts and the law applicable for insolvency proceedings. However, the recognition of the effects of foreign insolvency proceedings – the extension of the effects of the *lex concursus* – would be conditional upon reciprocity meaning that the system would be functional *vis-à-vis* a very few, if any, foreign states.[147] In most cases, no foreign insolvency proceedings would be recognised in Hungary. This may cause that the foreign debtor's assets located in Hungary would be exposed to individual enforcement actions meaning the violation of the principle of the collective proceedings.

[137] ibid art 15.
[138] ibid art 23.
[139] ibid arts 19, 21.
[140] ibid art 12.
[141] ibid art 24.
[142] ibid art 21(1), (2).
[143] Subsection *'4.2 Jurisdiction'.*
[144] The Model Law principally does not address jurisdiction and requires only that after recognition of a foreign main proceeding a proceeding in the enacting state may be commenced only if the debtor has assets in the latter state; the effects of that proceeding shall be restricted to the assets of the debtor that are located in this state, see Model Law, art 28.
[145] In this paper the expression of "ancillary proceedings" refers to the proceedings aimed at the recognition of "full" foreign insolvency proceedings by the courts of the host state pursuant to the Model Law (as enacted by the host state). Note that the "ancillary proceedings" may have different meanings, cf Ángel Espiniella Menéndez, 'The Ancillary Insolvency Proceeding' (2010) 19 International Insolvency Review 99.
[146] Model Law, arts 29-30.
[147] However, see n 104.

This paper argues that the enactment of the Model Law by Hungary would adequately fill the regulatory gap left open by the Proposal. Rather than extending the legal effects of foreign insolvency proceedings to Hungary, the Model Law attaches limited *sui generis* legal consequences to the foreign insolvency proceedings. The Model Law would allow Hungary to keep under control the infiltration of the effects of foreign insolvency proceedings from states in relation to which it has no full confidence while maintaining the idea of collective insolvency proceedings by protecting the assets of the foreign debtor located in Hungary and preventing individual actions. In other words, the Model Law represents a balanced approach between the universal effects of the insolvency as provided for by the *lex concursus* on the one hand and the protection of the local interests on the other.