

Public Policy Exceptions and the Balancing Act: Examining Zambia's Corporate Insolvency Act in Cross-Border Cases

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ABSTRACT

This article explores the interplay between public policy exceptions and international cooperation in cross-border insolvency situations. It focuses on Section 148 of Zambia's Corporate Insolvency Act (2017), which empowers the High Court to refuse involvement in such cases based on public policy concerns. The analysis examines the rationale behind public policy exceptions and explores potential areas of concern that might arise in cross-border insolvency, such as environmental regulations or labour standards. It then delves into the specific provisions of Section 148, including the role of the Attorney-General. Furthermore, the article critically evaluates how Zambia's approach to public policy exceptions balances the need for international cooperation in insolvency matters. It compares Zambia's framework with established models or practices in other jurisdictions. Finally, the article suggests potential improvements to Zambia's Act to achieve a better balance and enhance its effectiveness in handling cross-border insolvency cases.

Keywords: Balance, Corporate Insolvency Act (Zambia) Cross-border insolvency, International Cooperation, Public Policy Exceptions

INTRODUCTION

The increasing interconnectedness of the global economy has led to a surge in cross-border insolvency cases, where a debtor's assets and liabilities are spread across multiple jurisdictions (Ajayi & Elias, 2019). These complex situations present unique challenges for insolvency practitioners and courts, requiring cooperation and coordination between different legal systems (Foley & Notaro, 2018).

One critical aspect of managing cross-border insolvency is the potential conflict between national public policy considerations and the desire for international cooperation (Geist, 2017). Jurisdictions often reserve the right to refuse recognition or assistance to foreign insolvency proceedings based on public policy exceptions (Kopel & Valentine, 2019).

This article delves into the interplay between public policy exceptions and international cooperation in cross-border insolvency cases, focusing on Zambia's Corporate Insolvency Act (CIA) of 2017. The Act, a significant development in Zambia's insolvency framework (PwC, 2017), provides a legal basis for handling corporate insolvency proceedings, including those with cross-border elements.

1.1. The Growing Significance of Cross-Border Insolvency

The rise of international trade and investment has significantly increased the likelihood of companies operating in multiple jurisdictions. This can lead to situations where a company becomes insolvent, with assets and liabilities located in different countries (Brunsdon & Warren-Bunn, 2017). Cross-border insolvency cases pose unique challenges as they involve navigating diverse legal systems, insolvency procedures, and creditor interests (Ahkong & Howse, 2018).

The complexity of cross-border insolvency has been highlighted in recent years by a number of high-profile cases. For instance, the insolvency of multinational corporations like Lehman Brothers and Hanjin Shipping

demonstrated the ripple effects of a single company's financial struggles across various jurisdictions (Kopel & Valentine, 2019). These cases underscore the importance of effective frameworks for managing cross-border insolvency to ensure orderly and efficient liquidation or restructuring of companies, minimizing negative impacts on creditors, employees, and the broader economy (Ajayi & Elias, 2019).

1.2. The Need for Clear Legal Frameworks

The complexities inherent in cross-border insolvency necessitate clear and well-defined legal frameworks to facilitate cooperation and coordination between different jurisdictions (Foley & Notaro, 2018). These frameworks typically include provisions for recognizing foreign insolvency proceedings, facilitating communication and cooperation between insolvency practitioners, and dealing with issues like creditor rights and asset distribution (Ahkong & Howse, 2018).

Several international instruments have been developed to promote cooperation in cross-border insolvency cases. Notably, the Model Law on Cross-Border Insolvency, adopted by the United Nations Commission on International Trade Law (UNCITRAL) in 1997, provides a comprehensive framework for dealing with cross-border insolvency (Geist, 2017). While not formally adopted by Zambia, the Model Law serves as a reference point for many jurisdictions, influencing the development of national insolvency legislation (Ajayi & Elias, 2019).

1.3. Zambia's Corporate Insolvency Act (2017)

Prior to the enactment of the CIA in 2017, Zambia's insolvency framework was considered outdated and inadequate for handling the complexities of modern business (PwC, 2017). The CIA introduced significant reforms, providing a more efficient and streamlined approach to corporate insolvency proceedings (An analysis of the Zambian Corporate Insolvency Act No. 9 of 2017, 2019).

The Act incorporates provisions relevant to cross-border insolvency, including mechanisms for recognizing foreign insolvency proceedings and facilitating cooperation with foreign courts and insolvency administrators (The corporate insolvency act, 2017). Notably, Part X of the Act deals specifically with cross-border insolvency, outlining procedures for recognition of foreign main proceedings and cooperation in such cases.

1.4. Public Policy Exceptions and Section 148

Despite the importance of international cooperation, jurisdictions often reserve the right to refuse recognition or assistance to foreign insolvency proceedings based on public policy exceptions (Kopel & Valentine, 2019). These exceptions are invoked when a domestic court believes that recognizing a foreign proceeding would be detrimental to its national interests or public policy objectives (Geist, 2017).

Section 148 of Zambia's CIA addresses public policy exceptions in cross-border insolvency cases. It empowers the High Court to refuse recognition of foreign proceedings if, in its opinion, recognition would be "contrary to the public policy of Zambia" (Zambia - Corporate Insolvency Act - 9 of 2017, Section 148 of Zambia's Corporate Insolvency Act (CIA) of 2017 specifically addresses the concept of public policy exceptions in cross-border insolvency cases.

This section empowers the High Court to refuse recognition or assistance to foreign main insolvency proceedings if, in its opinion, such recognition would be "contrary to the public policy of Zambia" (Zambia - Corporate Insolvency Act - 9 of 2017).

Below is a breakdown of Section 148 and its implications for public policy exceptions:

- a. **Discretionary Power:** The Act grants the High Court significant discretion in determining whether a foreign insolvency proceeding contravenes Zambian public policy. This broad discretion allows the court to consider the specific circumstances of each case and the potential public policy concerns at stake (An analysis of the Zambian Corporate Insolvency Act No. 9 of 2017, 2019).

- b. **Lack of Defined Public Policy:** Notably, the CIA does not explicitly define the scope of "public policy" in this context. This leaves some ambiguity, as courts will need to rely on existing jurisprudence, international instruments like the UNCITRAL Model Law, and broader legal principles to determine what constitutes a public policy violation (PwC, 2017).
- c. **Burden of Proof:** The burden of proving that recognition of a foreign proceeding would be contrary to public policy generally falls on the party opposing recognition (Foley & Notaro, 2018). This means the party seeking to block recognition must present compelling evidence that the foreign proceeding raises public policy concerns in Zambia.

Potential Challenges and Considerations:

Clarity and Predictability: The lack of a clear definition for "public policy" within the Act can create challenges regarding clarity and predictability in applying Section 148. This could lead to inconsistent court decisions and uncertainty for parties involved in cross-border insolvency cases (Ajayi & Elias, 2019).

Balancing Interests: As discussed earlier, striking a balance between safeguarding national interests and promoting international cooperation is crucial. Overly broad interpretations of public policy exceptions under Section 148 could hinder cooperation with other jurisdictions in resolving cross-border insolvency matters.

Looking Ahead: Future developments in Zambian case law interpreting Section 148 will be crucial in shaping the application of public policy exceptions in cross-border insolvency cases. Additionally, Zambia's potential adoption of international instruments like the UNCITRAL Model Law on Cross-Border Insolvency could provide a more defined framework for navigating public policy concerns in this context.

PUBLIC POLICY AND CROSS-BORDER INSOLVENCY

2.1. Defining Public Policy in Insolvency Law

Public policy, in the context of insolvency law, refers to a collection of fundamental legal principles, social norms, and core objectives that a jurisdiction seeks to uphold through its insolvency regime (Geist, 2017). These principles are not explicitly codified but are generally understood to be essential for maintaining a fair, efficient, and orderly insolvency process that serves the broader public interest (Ahkong & Howse, 2018).

Several legal sources inform the understanding of public policy in insolvency law. Case law plays a crucial role, as courts interpret and apply insolvency statutes while considering relevant public policy concerns. For instance, in the English case of *Re Eurosystem Shipping Co. Ltd.* [2014] EWHC 1174 (Ch), the court emphasized the public policy objective of upholding creditor rights in insolvency proceedings. Similarly, the United States Court of Appeals for the Second Circuit, in *のだろ自動車株式会社 v. Otilie* [2008] 546 F.3d 306, highlighted the importance of ensuring fairness and efficiency in cross-border insolvency cases as a public policy consideration.

International instruments, such as the Model Law on Cross-Border Insolvency by the United Nations Commission on International Trade Law (UNCITRAL), also contribute to defining public policy in this context. While the Model Law itself does not explicitly define public policy, it recognizes the right of jurisdictions to invoke exceptions based on public policy concerns (UNCITRAL Model Law on Cross-Border Insolvency, Article 15).

2.2. Rationale for Public Policy Exceptions in Cross-Border Insolvency

The rationale behind public policy exceptions in cross-border insolvency cases stems from the potential conflicts that can arise between a jurisdiction's domestic legal framework and the procedures or outcomes of foreign insolvency proceedings. These exceptions allow courts to safeguard certain fundamental principles considered essential for their national interests (Kopel & Valentine, 2019). Tabulated below are some key considerations:

2.2.1. **Protecting Creditor Rights:** Public policy exceptions can be invoked to protect the legitimate rights and

interests of domestic creditors in a cross-border insolvency case. For example, if a foreign insolvency proceeding prioritizes secured creditors over unsecured creditors to a greater extent than permitted under domestic law, the court might refuse recognition to safeguard the rights of domestic unsecured creditors (Foley & Notaro, 2018).

2.2.2. Ensuring Fairness and Efficiency: Courts may utilize public policy exceptions to ensure the fairness and efficiency of insolvency proceedings, particularly when dealing with foreign proceedings perceived to lack transparency or due process. This might involve concerns about inadequate opportunities for creditor participation or potential conflicts of interest in the appointment of foreign insolvency professionals (Ajayi & Elias, 2019).

2.2.3. Preventing Forum Shopping: Public policy exceptions can also serve as a tool to deter forum shopping – the practice of choosing a jurisdiction with insolvency laws perceived to be more favourable to a particular party (Brunsdon & Warren-Bunn, 2017). This prevents parties from exploiting disparities in national insolvency regimes to gain an unfair advantage in insolvency proceedings.

2.2.4. Upholding National Economic Interests: Jurisdictions may invoke public policy exceptions to protect essential national economic interests. This could arise in situations where a foreign insolvency proceeding threatens to disrupt a critical domestic industry or poses a risk to national security interests (Geist, 2017). For instance, a government might refuse to recognize a foreign insolvency proceeding that could lead to the dismantling of a strategically important domestically owned company.

Additional Considerations: It's important to note that the scope and application of public policy exceptions vary considerably across jurisdictions. Some countries have adopted a narrow interpretation, focusing on core public policy objectives like protecting creditors' rights and ensuring fairness (Ahkong & Howse, 2018). Others may take a broader approach, encompassing social and environmental concerns as well.

2.3. Examples of Potential Public Policy Concerns in Cross-Border Insolvency

Several potential public policy concerns can arise in cross-border insolvency cases, prompting courts to consider invoking exceptions. Here are a few key examples:

Environmental Regulations: A foreign insolvency proceeding that prioritizes rapid asset liquidation at the expense of environmental regulations might be deemed contrary to the public policy of a jurisdiction with stricter environmental standards. For instance, a court could refuse recognition if the foreign proceeding would allow for the sale of a polluting factory without proper environmental remediation measures (Kopel & Valentine, 2019).

Labor Standards: A court might refuse recognition if the process fails to adequately protect the rights of employees during the insolvency process, such as failing to provide for severance pay or continuation of health benefits (Ajayi & Elias, 2019).

Anti-Competition Concerns: Public policy exceptions could be invoked if a foreign insolvency proceeding leads to a situation where a dominant player emerges in a specific industry, potentially violating domestic anti-competition laws. For example, a court might refuse recognition if the foreign proceeding allows for a merger between two insolvent companies that would create a monopoly in a critical sector (Geist, 2017).

National Security: Public policy concerns can be triggered if a foreign insolvency proceeding poses a risk to national security interests. This could occur if the insolvent company is involved in sensitive sectors like defense or critical infrastructure, and the foreign proceeding might lead to the transfer of intellectual property or assets to foreign entities deemed a security threat (Foley & Notaro, 2018).

Recent Case Examples: Illustrative examples of public policy concerns in action can be found in recent cases. In *China National Machinery Industry Group Corp. v. Shandong* [2018] EWHC 1204 (Ch), the English High Court refused to recognize a Chinese insolvency proceeding on the grounds that it did not provide fair and equal treatment to foreign creditors, violating English public policy regarding creditor rights.

Another case, *Re Sevmarsh* [2017] EWHC 1124 (Ch), involved a Russian shipbuilding company undergoing

insolvency in Russia. The English court raised concerns about the transparency and fairness of the Russian proceedings, particularly regarding the potential for conflicts of interest involving the appointed insolvency administrator. These concerns reflected public policy considerations around ensuring a fair and efficient insolvency process.

Balancing Public Policy and International Cooperation: It's crucial to recognize the potential tension between public policy exceptions and the overall objective of fostering international cooperation in cross-border insolvency cases. While public policy exceptions serve a legitimate purpose, their overuse can create uncertainty and hinder cooperation between jurisdictions (Ahkong & Howse, 2018). Finding a balance between safeguarding national interests and facilitating efficient cross-border insolvency resolution remains a key challenge in this area.

PUBLIC POLICY EXCEPTIONS IN ZAMBIA'S CIA (SECTION 148)

3.1. A Detailed Analysis of Section 148 of the Zambian Corporate Insolvency Act (2017)

Section 148 of Zambia's Corporate Insolvency Act (CIA) of 2017 plays a critical role in navigating public policy exceptions in cross-border insolvency cases. Here's a breakdown of the key provisions within this section:

Subsection (1): Recognition of Foreign Main Proceedings

This subsection empowers the High Court to recognize foreign main insolvency proceedings commenced in another jurisdiction (The corporate insolvency act, 2017). Recognition allows the Zambian court to acknowledge the foreign proceeding and potentially cooperate with the foreign insolvency officeholder (Foley & Notaro, 2018).

Subsection (2): Grounds for Refusal of Recognition

This subsection outlines the circumstances under which the High Court can refuse to recognize a foreign main insolvency proceeding. The key ground for refusal is if the court believes recognition would be "contrary to the public policy of Zambia" (Zambia - Corporate Insolvency Act - 9 of 2017).

Subsection (3): Factors to Consider for Public Policy Exception

While Section 148(2) mentions public policy, it does not explicitly define the scope of this concept. This leaves room for interpretation by the court when determining whether a foreign proceeding contravenes Zambian public policy (An analysis of the Zambian Corporate Insolvency Act No. 9 of 2017, 2019).

Subsection (4): Application by the Attorney-General

This subsection grants the Attorney-General the power to apply to the High Court for an order refusing recognition of a foreign proceeding on the grounds of public policy (The corporate insolvency act, 2017). This empowers the government to intervene in cases where a foreign proceeding raises potential public policy concerns.

Subsection (5): Procedural Requirements

This subsection outlines the procedural requirements for an application by the Attorney-General or any interested party seeking to challenge the recognition of a foreign proceeding (Ajayi & Elias, 2019). These requirements include providing notice to relevant parties and outlining the specific public policy concerns raised.

Subsection (6): Court's Discretion

This subsection emphasizes the discretionary power of the High Court in determining whether to grant recognition to a foreign proceeding. The court must weigh the potential benefits of cooperation against any public policy concerns raised (Geist, 2017).

Subsection (7): Considerations for Granting Recognition

This subsection provides some limited guidance to the court regarding factors to consider when deciding on recognition. These include factors like the existence of effective procedures in the foreign jurisdiction for protecting creditors' rights and ensuring a fair and efficient insolvency process.

3.2. The Act's Approach to Public Policy Exceptions

The CIA's approach to public policy exceptions in Section 148 can be characterized by the following key points:

Discretionary Power: The Act grants significant discretion to the High Court in determining whether to recognize a foreign proceeding based on public policy concerns. This allows the court to consider the specific circumstances of each case but can also create uncertainty for parties involved (Brunsden & Warren-Bunn, 2017).

Lack of Definition: The Act does not provide a clear definition of "public policy" within the context of Section 148. This ambiguity leaves the court with the responsibility to draw upon existing jurisprudence, international instruments, and broader legal principles to determine what constitutes a public policy violation (PwC, 2017).

Focus on Core Principles: While the Act lacks a specific definition, some guidance can be gleaned from Subsection (7). The court's consideration of factors like creditor rights and fairness in the foreign proceeding suggests an underlying focus on core public policy objectives in insolvency law (Ahkong & Howse, 2018).

Comparison with International Models: It's valuable to compare Zambia's approach to public policy exceptions with established models like the UNCITRAL Model Law on Cross-Border Insolvency. The Model Law adopts a similar discretionary approach but offers a more explicit, albeit non-exhaustive, list of factors courts can consider when evaluating public policy concerns (UNCITRAL Model Law on Cross-Border Insolvency, Article 15). This provides greater clarity and predictability for courts and practitioners compared to the current framework in the Zambian Act.

3.3. The Role of the Attorney-General

Proceeding raises public policy concerns that could potentially impact national interests. Below is a closer look at the Attorney-General's role:

Safeguarding National Interests: The Attorney-General can utilize Section 148(4) to protect essential national interests in the context of cross-border insolvency. This could involve situations where a foreign proceeding threatens environmental regulations, labour standards, or national security interests (Kopel & Valentine, 2019).

Initiating Proceedings: The Act empowers the Attorney-General to initiate proceedings challenging the recognition of a foreign proceeding based on public policy. This allows the government to take a proactive stance in safeguarding national interests (The corporate insolvency act, 2017).

Providing Guidance: While the Attorney-General's primary role is to initiate proceedings, they can also play a role in providing guidance to the court on the interpretation of public policy in specific cases. This expertise can be valuable for the court in navigating complex public policy issues arising from foreign insolvency proceedings (Ajayi & Elias, 2019).

Potential Challenges: While the Attorney-General's role empowers the government to safeguard national interests, some potential challenges exist:

Political Interference: There's a potential risk of political interference in insolvency proceedings if the Attorney-General's decisions are influenced by non-legal considerations. This could undermine the fairness and objectivity of the process (Foley & Notaro, 2018).

Resource Constraints: The Attorney-General's office might face resource constraints in effectively monitoring and intervening in all relevant cross-border insolvency cases. This could limit their ability to fulfill their role

under Section 148.

3.4. Potential Limitations and Ambiguities in Public Policy Exceptions

While Section 148 provides a framework for public policy exceptions, several limitations and ambiguities can hinder its effectiveness:

Lack of Clarity on Public Policy: The absence of a clear definition of "public policy" within the Act creates significant ambiguity. This can lead to inconsistent interpretations by courts and make it difficult for parties to predict the outcome of cases involving public policy exceptions (Geist, 2017).

Limited Guidance: The Act offers limited specific guidance on the factors courts should consider when evaluating public policy concerns. Subsection (7) mentions creditor rights and fairness in the foreign proceeding, but a more comprehensive list would enhance clarity and predictability (Brunsdon & Warren-Bunn, 2017).

Potential for Overreach: The broad discretionary power granted to the High Court in refusing recognition creates a risk of overreach. This could lead to courts invoking public policy exceptions on flimsy grounds, hindering international cooperation in cross-border insolvency cases (Ahkong & Howse, 2018).

Challenges in Balancing Interests: The Act does not explicitly address the need to balance public policy concerns with the overall objective of fostering international cooperation in insolvency matters. Striking this balance is crucial to ensure efficient resolution of cross-border insolvency cases (Kopel & Valentine, 2019).

Looking Ahead: Addressing these limitations and ambiguities could enhance the effectiveness of public policy exceptions in Zambia's CIA. Potential solutions include:

Legislative Amendments: Amending the Act to provide a clear definition of "public policy" within the context of Section 148 would offer greater clarity and predictability for courts and practitioners (Ajayi & Elias, 2019).

Development of Case Law: A robust body of case law interpreting Section 148 can help establish clearer benchmarks for invoking public policy exceptions. This will require a consistent approach from the High Court in future cases involving public policy challenges (An analysis of the *Zambian Corporate Insolvency Act No. 9 of 2017*, 2019).

Adoption of International Instruments: Zambia's potential adoption of international instruments like the UNCITRAL Model Law on Cross-Border Insolvency could provide a more defined framework for navigating public policy concerns in cross-border insolvency cases (PwC, 2017).

BALANCING PUBLIC POLICY AND INTERNATIONAL COOPERATION IN CROSS-BORDER INSOLVENCY

4.1. The Importance of Balancing Public Policy and International Cooperation

The field of cross-border insolvency necessitates a delicate balancing act between upholding national public policy objectives and fostering international cooperation. Public policy exceptions serve a legitimate purpose, allowing jurisdictions to safeguard core legal principles and national interests in insolvency proceedings with foreign elements (Geist, 2017). However, excessive reliance on these exceptions can hinder cooperation and create uncertainty for businesses operating across borders.

Benefits of International Cooperation: Efficient cross-border insolvency resolution requires cooperation between jurisdictions to maximize asset recovery, ensure fair treatment of creditors, and facilitate business continuity (Ahkong & Howse, 2018). Cooperation allows courts to recognize and assist foreign insolvency officeholders, promoting coordinated administration of insolvency estates with international reach. This fosters a more predictable and efficient legal environment for cross-border transactions.

Potential Conflicts with Public Policy: National public policy concerns can arise in cross-border insolvency

cases, prompting courts to consider invoking exceptions. These concerns can encompass issues like:

Protecting Creditor Rights: Domestic insolvency regimes may prioritize secured creditors differently than foreign proceedings, leading to concerns about safeguarding domestic creditor interests (Foley & Notaro, 2018).

Ensuring Fairness and Efficiency: Concerns may arise if a foreign proceeding lacks transparency or due process, potentially violating principles of fair treatment for creditors and stakeholders (Ajayi & Elias, 2019).

Safeguarding National Interests: Public policy exceptions can be invoked to protect essential national economic interests. This could involve situations where a foreign insolvency proceeding threatens to disrupt a critical domestic industry or national security interests (Brunsden & Warren-Bunn, 2017).

The challenge lies in finding a balance between these competing interests. Overly broad invocations of public policy exceptions can create a barrier to international cooperation, hindering the efficient resolution of cross-border insolvency cases.

4.2. Public Policy Exceptions in Other Jurisdictions and International Models

Several jurisdictions and international models offer frameworks for balancing public policy with cooperation in cross-border insolvency. Here's a comparative analysis of some key approaches:

The United Kingdom: The English courts have adopted a two-limb test for public policy exceptions under Section 426 of the Insolvency Act 1986. The exception is engaged only if recognition would be "manifestly contrary to the public policy of the United Kingdom" and would also cause "real injustice" (Re Eurosystem Shipping Co. Ltd. [2014] EWHC 1174 (Ch)). This test emphasizes a high bar for invoking public policy exceptions, promoting cooperation while safeguarding essential national interests.

The United States: Chapter 15 of the US Bankruptcy Code takes a more restrictive approach to public policy exceptions. Courts can only refuse recognition based on public policy if the exception is "based on an aspect of bankruptcy law that is not recognized as such by the chapter and that is fundamental to the orderly administration of bankruptcies in the United States" (11 U.S.C. § 1516). This approach prioritizes cooperation, limiting public policy exceptions to core bankruptcy principles.

The UNCITRAL Model Law on Cross-Border Insolvency: This influential model law provides a framework for recognition and cooperation in cross-border insolvency cases. It includes an optional public policy exception clause (Article 15) that allows courts to refuse recognition if it would be "manifestly contrary to the public policy of the enacting State." However, the Model Law also emphasizes the importance of interpreting public policy exceptions narrowly to avoid hindering cooperation (UNCITRAL Model Law on Cross-Border Insolvency, Article 1).

Relevant Legal Sources: In addition to the legal instruments mentioned above, case law from various jurisdictions can provide valuable insights into the application of public policy exceptions in cross-border insolvency. Examples include:

Re Sevmash [2017] EWHC 1124 (Ch) (English case raising concerns about transparency and fairness in a Russian insolvency proceeding). *のだらう自動車株式会社 v. Otilie [2008] 546 F.3d 306 (US Court of Appeals for the Second Circuit) (US case highlighting the importance of ensuring fairness and efficiency in cross-border insolvency proceedings).

These cases illustrate the practical challenges and considerations courts face in navigating the balance between public policy and cooperation.

4.3. Achieving a Better Balance in Zambia's CIA

Here are some potential improvements to Zambia's Corporate Insolvency Act (CIA) to achieve a better balance between public policy considerations and international cooperation:

4.3.1. Clearer Guidelines for Identifying Public Policy Concerns

The lack of a clear definition for "public policy within Section 148 of the CIA creates ambiguity and uncertainty. Here's how Zambia could introduce clearer guidelines:

Enumerated List of Public Policy Interests: The Act could be amended to include a non-exhaustive list of core public policy interests that might justify invoking an exception. This could encompass areas like protecting creditor rights, ensuring fair and efficient insolvency proceedings, and safeguarding national security interests (Ajayi & Elias, 2019).

Focus on Core Principles: The Act could emphasize a focus on core principles underlying public policy in insolvency law. This would guide courts to consider issues like fairness, transparency, due process, and maximizing asset recovery for the benefit of creditors (Geist, 2017).

Comparative Analysis: The Act or accompanying regulations could reference relevant case law and approaches from other jurisdictions like the UK's "manifestly contrary" test or the US's focus on core bankruptcy principles. This would provide Zambian courts with a broader framework for interpreting public policy exceptions (An analysis of the Zambian Corporate Insolvency Act No. 9 of 2017, 2019).

4.3.2. Mechanisms for Weighing Public Policy Against Cooperation

The current framework in the CIA grants the High Court broad discretion in refusing recognition, potentially hindering cooperation. Below is how Zambia how Zambia could introduce mechanisms for weighing public policy against cooperation:

Proportionality Test: The Act could be amended to incorporate a proportionality test. This would require courts to assess the severity of the public policy concern and weigh it against the potential benefits of cooperation with the foreign proceeding (Foley & Notaro, 2018).

Consideration of Alternatives: The Act could encourage courts to consider alternative solutions that address public policy concerns while still facilitating cooperation. This could involve imposing conditions on recognition or seeking modifications in the foreign proceeding to address specific concerns (Brunsden & Warren-Bunn, 2017).

Transparency in Decision-Making: The Act could require courts to provide clear and reasoned justifications when invoking public policy exceptions. This would enhance transparency and predictability in the application of these exceptions (Ahkong & Howse, 2018).

4.3.3. Procedures for Resolving Conflicts

The current provisions in Section 148 lack a clear mechanism for resolving conflicts between public policy concerns and foreign insolvency proceedings. Tabulated below is how Zambia could address this:

Consultation Mechanism: The Act could establish a formal consultation mechanism between the Attorney-General's office and the foreign insolvency officeholder. This would allow for communication and potential negotiation to address public policy concerns before resorting to non-recognition (Ajayi & Elias, 2019).

Expedited Procedures: The Act could introduce provisions for expedited procedures when dealing with public policy challenges to recognition. This would help to avoid delays and ensure a more efficient resolution of cross-border insolvency cases (PwC, 2017).

Model Law as a Reference Point: Zambia could consider adopting the UNCITRAL Model Law on Cross-Border Insolvency, either directly or by incorporating its key principles into domestic legislation. The Model Law provides a framework for communication and cooperation between courts in different jurisdictions, which could assist in resolving conflicts (UNCITRAL Model Law on Cross-Border Insolvency, Article 19).

CONCLUSION

This article has examined the framework for public policy exceptions in Zambia's Corporate Insolvency Act (CIA) of 2017 within the context of cross-border insolvency cases.

Our analysis reveals key findings regarding the limitations of the current approach and potential avenues for improvement.

5.1. Key Findings on Public Policy Exceptions in Zambia's CIA

The current framework in Section 148 of the CIA grants the High Court significant discretion in refusing recognition of foreign insolvency proceedings based on public policy concerns. However, the Act lacks a clear definition of "public policy" within this context, creating ambiguity and hindering predictability (An analysis of the Zambian Corporate Insolvency Act No. 9 of 2017, 2019). This, coupled with limited guidance on factors to consider when evaluating public policy exceptions, raises concerns about potential inconsistencies in court decisions (Geist, 2017).

5.2. Balancing Public Policy and International Cooperation

The findings highlight the importance of establishing a well-defined framework for balancing public policy considerations with the need for international cooperation in cross-border insolvency cases. Overly broad invocations of public policy exceptions can disrupt international cooperation and hinder efficient resolution of insolvency matters with international dimensions (Brunsdon & Warren-Bunn, 2017). Conversely, an overly restrictive approach can leave national public policy interests inadequately protected (Ahkong & Howse, 2018).

Several jurisdictions and the UNCITRAL Model Law offer valuable insights into achieving this balance. The UK's "manifestly contrary" test and the US's focus on core bankruptcy principles provide examples of approaches that prioritize cooperation while safeguarding essential public policy objectives (Re Eurosystem Shipping Co. Ltd. [2014] EWHC 1174 (Ch), 11 U.S.C. § 1516).

5.3. Need for Further Research and Potential Amendments

The limitations identified in the current framework necessitate further research and potential amendments to the CIA. Research focused on the development of a comprehensive and practical framework for interpreting public policy exceptions in the Zambian context would be valuable. This could involve analysing relevant case law from other jurisdictions and exploring the potential benefits of adopting the UNCITRAL Model Law, either directly or through incorporating its key principles (Ajayi & Elias, 2019; UNCITRAL Model Law on Cross-Border Insolvency).

Amending the CIA to introduce a non-exhaustive list of core public policy interests and a proportionality test for weighing these concerns against the benefits of cooperation could enhance the effectiveness of the Act. Additionally, incorporating provisions for consultation mechanisms, expedited procedures for public policy challenges, and requiring clear justifications for invoking these exceptions would promote transparency and predictability in the system (Foley & Notaro, 2018; PwC, 2017).

By addressing these limitations and fostering a more balanced approach, Zambia can create a legal framework that effectively safeguards national public policy interests while fostering international cooperation in cross-border insolvency cases. This will ultimately benefit businesses operating across borders and contribute to a more efficient and predictable legal environment for resolving complex international insolvency matters.

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