The orderly winding up of the affairs of an insolvent debtor by either restructuring their assets or liquidating the same is both an economic and political imperative in modern capitalist economies. As companies and individuals trade beyond individual State boundaries it has become imperative that an orderly international system be developed to allow for the orderly realisation and distribution of an insolvent debtor's assets.

As Justice Perram of the Federal Court of Australia has previously pointed out this is not an area for the faint-hearted. There is no real consistency internationally in relation to the laws of restructuring or liquidation and the conceptual basis for the same. This is best illustrated by comparing the position in the USA and the United Kingdom. In the USA, their bankruptcy jurisdiction is considered an *in rem* jurisdiction whilst in the UK it is considered an *in personam* jurisdiction. Historically, States have also sought to protect their citizens from the effect of foreign laws.

The international recession in the early 1990's and the Global Financial Crisis (GFC) in 2007 highlighted a need for an international system to deal the collapse of multinational corporations as was highlighted by the Lehman Brothers collapse and the Maxwell group collapse. The recognition of insolvency related judgments form part of these measures.

Since the GFC there has also been a move internationally away from a predisposition for liquidations towards predisposition for restructuring proceedings, which has been driven by the World Bank and the European Commission.

**Background**

Internationally the recognition of judgments dealing with matters regarding insolvency have been seen as falling into a different category for three main reasons:

(a) **Public Policy,**

This argument is based upon the need to protect certain essential industries or sectors especially where there are State legislated compensation schemes applicable. In addition, it argued that officers of a company should be subject to the local law and if any offences are committed they should be reported to local authorities and prosecuted according to that State's law. It is argued that should a foreign company be wound up pursuant to a foreign law that the foreign insolvency representative may not be familiar with their local obligations and that

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breaches may be not disclosed depending upon the jurisdiction in which the insolvency proceeding takes place.

In relation to insolvency judgments it is suggested that transactions which occur within a particular State should be solely governed by the laws of that State and not some other States insolvency law as this would breach that country’s sovereignty. It is further argued that it is not just for a local person to be bound by the insolvency laws of a foreign state with which they have no familiarity in relation to a transaction that wholly occurs in their local jurisdiction. It is further argued that it may not be possible for local person to be able to identify the Centre of Main Interest (COMI) of person with whom they are dealing as they do not have access to information regarding the internal workings or business structures or personal life of a person with whom they are dealing.

(b) The underlying principles of law differ
The laws including the types of insolvency proceedings applicable the rules for recovery of antecedent transactions and whether insolvency proceedings are actions in rem or in personam. By way of example, in the USA they are considered actions in rem whilst in England they have been determined to be actions in personam. 4

(c) Insolvency is a specialist area of law
This argument suggests that given the nature, customs and complexity of insolvency law that is best dealt with by specific international arrangements.

Internationally this has led to such judgments being excluded form a number of conventions including the 1971 Hague Convention on the Recognition and enforcement of Foreign Judgments in Civil and Commercial Matters5 and the 2005 Hague Convention on Choice of Courts Agreements6. Similarly in Australia, even some New Zealand insolvency judgments are not recognised under the Trans-Tasman Proceeding Act 2010 (Cth).7

Recognition

In Australia there are generally four possible ways a foreign judgment can be recognised:-

(a) Under the Foreign Judgments Act 1991 (Cth);
(b) Under the common law, including the principle of comity;
(c) Pursuant to section 581 of the Corporations Act 2001 (Cth) or section 29(2) of the Bankruptcy Act 1966 (Cth);
(d) Under the provisions of the Cross Border Insolvency Act 2008 (Cth).

4 See Re British American Insurance Co Ltd, 488 BR 205 (Bankr, SD Fla, 2013); Re Octaviar Administration Pty Ltd, 511 BR 361 (Bankr, SD NY, 2014)
7 Trans-Tasman Proceedings Act 2010 (Cth) s66(2); Trans-Tasman Proceedings Regulations 2010 (Cth) reg16
Judgments from New Zealand can also be recognised under the provisions of the Trans-Tasman Proceedings Act 2010 (Cth) which are not dealt with in this paper.

**Foreign Judgments Act 1991**

The Foreign Judgments Act only applies to judgments given by the nominated courts in proclaimed states as a set out in the Foreign Judgments Regulations 1992 (Cth). No courts in the United States of America, India or China and a number of courts in a number of provinces of Canada been not proclaimed. This severally restricts the usefulness of this legislation in insolvency proceedings, given the US Bankruptcy Court is internationally one of the main courts dealing with insolvency matters and these countries are some of our major trading partners.

Section 7 of the Act also set out a number of grounds upon which a judgments debtor can apply to have the judgment overturned even if it is given by a proclaimed court. These grounds are those which are familiar to common law systems.

**Common Law and Comity**

There have been a number of exceptions to the above public policy objections commencing in the eighteenth and nineteenth centuries with the British Commonwealth countries developing the common law principle of ‘comity’.

This was a principle whereby a court in one member of the British Empire or common law world would recognise a court in another member of the British Empire and assist it in the enforcement of its judgments to the extent permitted by the latter court's laws and give assistance to the foreign court by allowing nominated persons to obtain the assistance of the foreign court. This included assisting liquidators appointed by those courts by either allowing them to sell assets or examining witnesses within the second court’s jurisdiction or appointing local liquidators to assist.8 This principle was not universally recognised by countries outside the Commonwealth because of issues of sovereignty.

The United States adopted a similar principle which was explained by the US Supreme Court as follows:

"Comity", in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.9

The Australian common law also gives a court a discretion to allow a foreign judgment to be enforced where:-

(a) The foreign court exercised jurisdiction in the international sense being where:

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a. The party against whom judgment was obtained was present or resident in that foreign jurisdiction; or

b. The party against whom judgment was obtained voluntarily submitted to that jurisdiction;

(b) The judgment is final and conclusive;

(c) The parties are identifiable;

(d) If the judgment is in personam it is for a fixed or readily calculable sum obtained within the limitation period.10

These common law principles require a court to exercise a discretion and are usually based upon receipt of a letter of request from a court of a foreign jurisdiction which sets out the assistance requested. The judgment debtor has a right to be heard at the hearing of the application and to submit evidence which can delay recognition as well as creating commercial uncertainty and added expense in obtaining recognition.

Corporations Act and Bankruptcy Act

In the late nineteenth and early twentieth century's several States introduced legislation to allow their courts to assist foreign courts to deal with insolvency matters.11 In common law countries this legislation extended the existing principles of comity in relation to the nominated States referred to the legislation. In Australia this is still reflected in section 581 of the Corporations Act 2001 (Cth) or section 29(2) of the Bankruptcy Act 1966 (Cth). These provisions provide that courts must act in aid of prescribed countries and may act in act of the courts of other countries in relation to insolvency matters.

The prescribed countries as set out in the relevant Act and in Regulation 5.6.74 of the Corporations Regulations 2001 (Cth) and Regulation 3.01 of the Bankruptcy Regulations 1996 (Cth). There is no uniformity between these countries, although the United States is listed under both regulations. Some of Australia's major trading partners including China, Japan, India and Korea are not included. In order for those countries judgments to be recognised the court must exercise a discretion and there is no commercial certainty that they will be recognised.

The assistance that can be granted pursuant to theses sections is restricted to that which is specified in the letter of request from the foreign court.

Cross Border Insolvency Act 2008


11 For example see Montevideo Treaty on Commercial International Law Argentina, Bolivia, Columbia, Paraguay, Peru and Uruguay (entered into force 1889) arts 35-48; 11 USC §304(2012); Insolvency Act 1986 c 45 s 426; Corporations Act 2001 (Cth) ss 580, 581; Bankruptcy Act 1966 (Cth) s 29; Bankruptcy and Insolvency Act, RSC 1985, c B-3 s271. The Bankruptcy Act 1869 32 & 33 Vict c 71 (Eng) required Her Majesty’s Courts to act in aid of each other. Its subsequent incorporation into many of the Commonwealth Colonies’ laws had the effect of British colonial courts recognising and acting in aid of each other. However, each colony’s court was restricted to dealing with the property within its own respective jurisdiction. See Mason, Rosalind, ‘Cross-border insolvency: Adoption of CLERP 8 as an evolution of Australian insolvency law’ (2003) 11 Insolvency Law Journal 62, 68-7.
Following the recession in the early 1990’s it was recognised that ‘the practical problems caused by the disharmony among national laws governing cross-border insolvencies warranted further study of legal issues in cross-border insolvencies and possible internationally acceptable solutions’. In 1995 this led to UNCITRAL referring the issue to its reconstituted Working Group V who in 1997 produced the UNCITRAL Model Law on Cross-Border Insolvency which was adopted by the United Nations General Assembly in January 1998. This Model Law has been adopted to varying degrees in 43 States including Australia, Canada, Korea, New Zealand, Singapore, United Kingdom and the United States of America. China has indicated that it will adopt it but has not to date. In Australia it has been adopted through the provisions of the Cross Border Insolvency Act 2008 (Cth).

This model law was based upon the principles of modified Universalism and provided a mechanism for the recognition and granting of assistance to representatives in foreign insolvency proceedings where they are appointed in the jurisdiction of the debtor’s centre of main interest or where the debtor has an establishment.

Article 21 of the Model Law gives the court a wide discretion in relation to the relief it can grant following recognition to include any relief that would be available to a local representative of a debtor. Article 21 provides examples of the sought of additional relief a court may grant upon recognition of a foreign main or non main proceeding:-

(a) Staying the commencement or continuation of individual actions or individual proceedings concerning the debtor’s assets, rights, obligations or liabilities, to the extent they have not been stayed under paragraph 1 (a) of article 20;

(b) Staying execution against the debtor’s assets to the extent it has not been stayed under paragraph 1 (b) of article 20;

(c) Suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor to the extent this right has not been suspended under paragraph 1 (c) of article 20;

(d) Providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor’s assets, affairs, rights, obligations or liabilities;

(e) Entrusting the administration or realization of all or part of the debtor’s assets located in this State to the foreign representative or another person designated by the court;

(f) Extending relief granted under paragraph 1 of article 19;

(g) Granting any additional relief that may be available to [insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State] under the laws of this State.

Article 21(g) provides the court with a wide discretion and the person to whom they are referring in that paragraph is a registered liquidator or trustee in bankruptcy in Australia.\(^{13}\) As a voluntary administrator must be a registered liquidator it is deemed to include their functions as acting as an administrator.\(^{14}\) Article 25 obliges a court to cooperate to the maximum extent possible with foreign court and foreign representatives. Article 27 lists some of the forms of cooperation envisaged. This Model Law is premised upon a foreign representative upon being recognised, using Australia's domestic law to assist them.

In Australia the courts have not considered whether the powers contained in Articles 21 or 25 of the \textit{UNCITRAL Model Law on Cross Border Insolvency} are wide enough following the granting of recognition of a foreign insolvency proceeding to allow recognition of a foreign insolvency judgment. The relief under both those articles is discretionary and therefore does not provide any commercial certainty that should proceedings occur in a foreign jurisdiction that they could be recognised in Australia.

\textbf{International Developments}

In 2013 the United Kingdom Supreme Court in \textit{Rubin v Eurofinance SA} was asked to consider whether in two cases whether it should recognise foreign judgments given in insolvency recovery proceedings. One case involved an Australian judgment given in the case of New Cap Reinsurance. The court recognised that judgment based upon the provisions contained in section 426 of the UK Insolvency Act which obliged English Courts to give assistance to Australian courts. The other case involved a judgment of the US Bankruptcy Court from the Southern District of New York where default judgments were obtained by receivers of an English trust fund. Application was made under both the Model Law on Cross Border Insolvency and under the principles of comity. The Court found that judgments in foreign insolvency proceedings for the recovery of moneys are \textit{in personam} proceedings and that no special rules exist.\(^{15}\) Further the Court found that even where the application is under the Model Law that such proceedings are bound by the general rules in relation to the recognition of such proceedings namely ‘where (among other cases) the judgment debtor was present in the foreign country when the proceedings were instituted, or submitted to the jurisdiction of the foreign court by voluntarily appearing in the proceedings’.\(^{16}\) The court found that as Articles 21 and 25 of the Model Law say nothing about enforcement of foreign judgments and that it could not be implied that the Model Law was as a basis for a court to allow enforcement of a foreign judgment. The court rejected the approach adopted by the Privy Council in \textit{Cambridge Gas} which had previously recognised a foreign judgment.\(^{17}\) Lord Collins in the leading judgment went on to state that the relevant rule applicable to recognition of foreign insolvency judgments was ‘Dicey Rule’ 43\(^{18}\) which states:

\(^{13}\) \textit{Cross-Border Insolvency Act 2008 (Cth)} s11
\(^{14}\) Explanatory Memorandum, \textit{Cross-Border Insolvency Bill 2008 (Cth)} 9 [18]-[19]
\(^{15}\) \textit{Rubin v Eurofinance SA} [2013] 1 AC 236, 272 [105], 274 [119]-[117].
\(^{16}\) \textit{Rubin v Eurofinance SA} [2013] 1 AC 236, 250 [6].
\(^{17}\) \textit{Rubin v Eurofinance SA} [2013] 1 AC 236, 276-8 [128],132 confirmed in \textit{Singularis Holdings Ltd v PricewaterhouseCoopers} [2015] AC 1675, 1692-3 [18].
\(^{18}\) \textit{Rubin v Eurofinance SA} [2013] 1 AC 236, 250 [7]. The courts leading judgment was written by Lord Collins who is the editor of the text.
[A] court of a foreign country outside the United Kingdom has jurisdiction to give a judgment in personam capable of enforcement or recognition as against the person against whom it was given in the following cases:

First Case? If the person against whom the judgment was given was, at the time the proceedings were instituted, present in the foreign country.

Second Case? If the person against whom the judgment was given was claimant, or counterclaimed, in the proceedings in the foreign court.

Third Case? If the person against whom the judgment was given, submitted to the jurisdiction of that court by voluntarily appearing in the proceedings.

Fourth Case? If the person against whom the judgment was given, had before the commencement of the proceedings agreed, in respect of the subject matter of the proceedings, to submit to the jurisdiction of that court or of the courts of that country.19

The court stated that any change to this common law position should be made by the legislature.

The Privy Council in Singularis Holdings Ltd v PricewaterhouseCoopers was subsequently asked to consider whether at common law the court could assist a foreign court by ordering a third party in their jurisdiction to produce documents in aid the administration of a foreign winding up. Lords Sumption and Clarke found that such a power existed at common law however indicated that such common law power should only be exercised:-

(a) in relation to court ordered winding up but not voluntary winding up;
(b) when such power existed in the place of incorporation;20
(c) should only be available to allow when it is necessary for the performance of the officeholders functions;
(d) the exercise of the power should be consistent with the substantive law and public policy of the assisting court.21

Lord Collins found that the type of assistance that had previously given under the common law had to be consistent with remedies available under English law.22

The English courts have also been reluctant to recognise foreign restructuring proceedings that discharge debts in England unless those debts are discharged pursuant to the law of the contract or the creditor has submitted to the jurisdiction of the foreign insolvency proceeding.23

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20 Singularis Holdings Ltd v PricewaterhouseCoopers [2015] AC 1675, 1697 [25], 1716 [113], 1724 [134].
21 Singularis Holdings Ltd v PricewaterhouseCoopers [2015] AC 1675, 1697 [25], 1716 [113].
22 Singularis Holdings Ltd v PricewaterhouseCoopers [2015] AC 1675, 1705 [58].
23 Antony Gibbs & Sons v La Société Industrielle et Commerciale des Métaux (1890) 25 QBD 399, 405-6; Re OJSC International Bank of Azerbaijan [2018] EWHC 59 (Ch)
Similarly in Korea the Supreme Court has determined that the Model Law on Cross-Border Insolvency offers mainly procedural measure to support a foreign insolvency proceedings and that relief is not available to recognise substantive law matters such as a discharge of debts. The court found that in order for a debt to be discharges application must be made pursuant to their Civil Procedure Code.\(^{24}\)

The bankruptcy courts in the United States of America, on the other hand, are more likely more likely to recognise foreign judgments that discharge debts under Article 21 of the Model Law on Cross-Border Insolvency, given its jurisdiction in relation to reorganisation proceedings under their bankruptcy jurisdiction is an \textit{in rem} jurisdiction.\(^{25}\) The Bankruptcy Courts consider whether they have jurisdiction under section 109(a) of the Bankruptcy Code and whether the terms of the reorganisation otherwise comply with the terms of the Model Law on Cross-Border Insolvency as enacted into Chapter 15 of their Bankruptcy Code. This includes ensuring that their local creditors interests have been protected in any such reorganisation. The Bankruptcy Court is not concerned with the choice of law that governs the contract and will recognise and enforce proceedings that compromise debts or change the rights of US creditors.\(^ {26}\) Similarly in Canada orders are regularly made for the recognition and enforcement of US restructuring proceedings.\(^ {27}\)

The effect of the decisions in \textit{Rubin} and \textit{Singularis} and the English common law position in relation to recognition of judgments that extinguish debts is that courts in the United Kingdom and those jurisdictions who have a right of appeal to the Privy Council may not recognise foreign reorganisation judgments relating to entities that have no relevant relationship or are not incorporated in that foreign jurisdiction or which seek to compromise debts which arise out of contracts in which the proper law is not that of the jurisdiction in which such reorganisation is occurring. This would affect the viability of a number of reorganisation proceedings especially those using the USA Chapter 11 and equivalent procedures, involving multinational corporations.

If the current position in the United Kingdom is maintained and followed in other jurisdictions where the law of the contract is not the jurisdiction in which the reorganisation proceedings occurred, this would require a separate proceedings and hearing in each State in which recognition was sought as to the appropriateness of the reorganisation under their local law which would require the court of each jurisdiction to consistently approve the movement of assets and shareholdings and compromise of its debts. In such an application each court could take account of the interests of their local creditors. This gives rise to commercial concerns regarding the reorganisation due to the risk of inconsistent decisions and the time delay to obtain the necessary approvals.

\(^{24}\) Supreme Court of South Korea Case No 2009Ma 1600, <http://library.scourt.go.kr/SCLIB_data/decision/8.Supreme%20Court%20Order%202009Ma1600%20Decided%20March%2025.html>

\(^{25}\) 11 USC § 109(a). So long as the entity has property in the USA they can the restructure using the US Bankruptcy Code. An asset has been held to include undrawn money held on account with their lawyers in the USA see \textit{Re Octaviar Administration. Pty Ltd}, 511 BR 361, 372 (Bankr SD NY, 2014).

\(^{26}\) See eg \textit{Re Energy Coal SPA} 2018 WL 276139 (Bankr, D Del, 2018); \textit{Re Rede Engeria SA}, 2014 WL 4248121 (Bankr, SD NY, 2014); \textit{Re Metcalfe & Mansfield Alternative Investments}, 421 BR 685 (Bankr, SD NY, 2010); \textit{Re Avanti Communications Group PLC}, 582 BR 693 (Bankr, SD NY, 2018).

\(^{27}\) See eg \textit{Re Massachusetts Elephant & Castle Group Inc} (2011) ONSC 4201; \textit{Re Xerium Technologies Inc} (2010) ONSC 3974
Recent Developments

In 2014 UNCITRAL Working Group V was given a mandate to look at the issue of enforcement of insolvency judgments as a result of the above decisions and the 'uncertainty concerning the ability of courts, in the context of recognition proceedings under the MLCBI [UNCITRAL Model Law on Cross-Border Insolvency] to recognise and enforce judgments given in the course of foreign insolvency proceedings, such as judgments issued in avoidance proceeding, on the basis that neither article 7 nor 21 of the MLCBI explicitly provided the necessary authority'. In 2014 UNCITRAL Working Group V commenced work on drafting a model law to specifically cover this issue. It is not necessary for a State to adopt the Model Law on Cross Border Insolvency in order to adopt this proposed Model Law.

The draft Model Law has now been circulated to governments for comments which were discussed at Working Group V meeting in early May 2018. The Model Law has now been referred for adoption by both the United Nations Committee on International Trade Law (UNCITRAL) and the General Assembly of the United Nations. A Guide to Enactment had a number of amendments made at the May 2018 working group meeting and has been referred to the next meeting of the working group in December 2018.

Draft Model Law

The draft Model Law on the Recognition and Enforcement of Insolvency-related Judgments only introduces one new term being "insolvency-related foreign judgment" from the terms contained in the Model Law on Cross Border Insolvency. It has been drafted as a standalone model law so it can be adopted in states that have not adopted the Model Law on Cross Border Insolvency. Like the Model Law on Cross Border Insolvency it also contains in Article 7 a public policy exception which it is expected will be rarely used. In drafting the Model Law several different options have been presented so as to more closely align the text with domestic drafting. Being a Model Law, States are at liberty to alter the text, however for the sake of uniformity and utility of purpose any variation is suggested to be minimal.

A judgment is defined in Article 2 as “any decision, whatever it may be called, issued by a court or administrative authority, provided an administrative decision has the same effect as a court decision. For the purposes of this definition, a decision includes a decree or order, and a determination of costs and expenses. An interim measure of protection is not to be considered a judgment for the purposes of this Law;

Article 2 defines an Insolvency-related foreign judgment:

(i) Means a judgment that:

30 United Nations Commission on International Trade Law, Recognition and enforcement of insolvency-related judgments: draft guide to enactment of the model law: Note by the Secretariat, 52nd session, UN Doc A/CN.9/WG.V/ WP.151 (20 September 2017) 5 [16]
(a) Arises as a consequence of or is materially associated with an insolvency proceeding, whether or not that insolvency proceeding has closed; and;
(b) Was issued on or after the commencement of the insolvency proceedings to which it is related; and
(c) Does not include a judgment commencing an insolvency proceeding.

The definition of insolvency proceeding is basically the same as under the Model Law on Cross Border Insolvency and means a collective judicial or administrative proceeding pursuant to which the assets of a debtors are subject to the control of a court for the purposes of reorganisation or liquidation. The model Law also covers proceedings by an “other competent authority”. It covers both personal and corporate insolvency and a court is defined as including an administrative body. The definition of an administrative body in the Australian context covers both ASIC and AFSA and an insolvency proceeding covers includes creditors voluntary liquidation, voluntary administration, debtors petitions and personal insolvency agreements, none of which require an Australian court involvement to commence.

A foreign proceeding is required to be a collective proceeding in which the debtor's assets are realised for the benefit of all creditors. A secured creditor appointed receiver does not come within that definition.

As to whether a foreign proceeding fits within the definition of an insolvency proceeding should be determined according to the law of the State in which the proceeding is issued.

The draft Model Law in Article 10(1) envisages that it will also cover proceedings issued by creditors with the approval of a court where the insolvency representative has decided not to pursue them and by a party to whom a cause of action has been assigned by the insolvency representative.

Article 10 (2) sets out the documents required to be produced to seek recognition (subject to any additional documents required by an individual court) are:-

(a) A certified copy of the Insolvency-related foreign judgment. This should be determined by reference to the law of the State in which it is issued.
(b) Any documents necessary to establish that the insolvency-related foreign judgment has effect and is enforceable in the originating State, including information on any pending review of the judgment; or
(c) In the absence of evidence referred to in subparagraphs (a) and (b), any other evidence on those matters acceptable to the court.

Article 10(5) provides that any party against whom recognition and enforcement is sought has a right to be heard on the application.

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34 See, eg Rubin v Eurofinance SA [2010] 1 All ER (Comm) 81, 94 [46]; Re Betcorp Ltd 400 BR 266, 280 (Bankr, D Nev, 2009).
35 United Nations Commission on International Trade Law, Recognition and enforcement of insolvency-related judgments: draft guide to enactment of the model law: Note by the Secretariat, 52nd session, UN Doc A/CN.9/WG.V/WP.151 (20 September 2017) 7 [27]. In Australia this includes actions assigned pursuant to sections 100-5 of Schedule 2 to both the Corporations Act 2001 (Cth) and the Bankruptcy Act 1966 (Cth).
36 United Nations Commission on International Trade Law, Recognition and enforcement of insolvency-related judgments: draft guide to enactment of the model law: Note by the Secretariat, 52nd session, UN Doc A/CN.9/WG.V/WP.151 (20 September 2017) 19 [80].
Article 12 provides that an insolvency-related foreign judgment shall be recognised and enforced provided:

(a) The requirements of article 9, with respect to effectiveness and enforceability are met;
(b) The person seeking recognition and enforcement of the insolvency-related foreign judgment is an insolvency representative within the meaning of article 2, subparagraph (b) or another person entitled to seek recognition and enforcement of the judgment under article 10, paragraph 1;
(c) The application meets the requirements of article 10, paragraph 2 which deal with notice; and
(d) Recognition and enforcement is sought from a court referred to in article 4, or the question of recognition arises by way of defence or as an incidental question before such a court.

Article 13 sets out specific grounds upon which a court may refuse recognition or enforcement namely:

(a) The party against whom the proceeding giving rise to the judgment was instituted:

   (i) Was not notified of the institution of that proceeding in sufficient time and in such a manner as to enable a defence to be arranged, unless the party entered an appearance and presented their case without contesting notification in the originating court, provided that the law of the originating State permitted notification to be contested; or
   
   (ii) Was notified of the institution of that proceeding in a manner that is incompatible with fundamental principles of this State concerning service of documents;

(b) The judgment was obtained by fraud;

(c) The judgment is inconsistent with a judgment issued in this State in a dispute involving the same parties;

(d) The judgment is inconsistent with an earlier judgment issued in another State in a dispute between the same parties on the same subject matter, provided the earlier judgment fulfils the conditions necessary for its recognition and enforcement in this State;

(e) Recognition and enforcement would interfere with the administration of the debtor's insolvency proceedings or would conflict with a stay or other order issued in insolvency proceedings relating to the same debtor commenced in this State or another State;

(f) The judgment:

   (i) Materially affects the rights of creditors generally, such as determining whether a plan of reorganization or liquidation should be confirmed, a discharge of the debtor or of debts should be granted or a voluntary or out-of-court restructuring agreement should be approved; and
   
   (ii) The interests of creditors and other interested persons, including the debtor, were not adequately protected in the proceeding in which the judgment was issued;

(g) The originating court did not satisfy one of the following conditions:

   (i) The court exercised jurisdiction on the basis of the explicit consent of the party against whom the judgment was issued;
   
   (ii) The court exercised jurisdiction on the basis of the submission of the party against whom the judgment was issued, namely that the defendant argued on the merits before the court without
objecting to jurisdiction or to the exercise of jurisdiction within the time frame provided in the law of the originating State, unless it was evident that an objection to jurisdiction would not have succeeded under that law;

(iii) The court exercised jurisdiction on a basis on which a court in this State could have exercised jurisdiction; or

(d) The court exercised jurisdiction on a basis that was not [inconsistent] [incompatible] with the law of this State;

States that have enacted legislation based on the Model Law on Cross-Border Insolvency might wish to enact subparagraph (h)

(h) The judgment originates from a State whose proceeding is not recognizable under [insert a reference to the law of the enacting State giving effect to the UNCITRAL Model Law on Cross-Border Insolvency], unless:

(i) The insolvency representative of a proceeding that is or could have been recognized under [insert a reference to the law of the enacting State giving effect to the UNCITRAL Model Law on Cross-Border Insolvency] participated in the originating proceeding to the extent of engaging in the substantive merits of the claim to which that proceeding related; and

(ii) The judgment relates solely to assets that were located in the originating State at the time that proceeding commenced.

Where States have enacted the Model Law on Cross Border Insolvency paragraph (h) allows them to refuse to recognise a judgment that originates from a jurisdiction that is not the debtors centre of main interest or where they have an establishment being the determining factor as to whether the insolvency proceeding could be recognised as either the foreign main proceeding or foreign non-main proceeding under that Model Law.37 This is to ensure consistency should a later application be made under that Model Law for recognition of the insolvency proceedings and where there are multiple proceeding in different States as to which proceeding should take precedence.

Article 15 provides that a receiving court should not refuse recognition and enforcement of one part of a judgment upon the basis that another part is not recognisable. The severable part of the judgment should be recognised.

Whilst an application is pending the court also has power to grant provisional relief this includes granting freezing orders or other orders to preserve the assets pursuant to Article 11.

In framing any orders either provisionally or for recognition or enforcement those order have the same effect as it they were made in the receiving State.38 Further the court, to the extent possible, must frame orders that are equivalent but do not exceed the orders granted in the originating State.39

37 United Nations Commission on International Trade Law, Recognition and enforcement of insolvency-related judgments: draft guide to enactment of the model law: Note by the Secretariat, 52nd session, UN Doc A/CN.9/WG.V/WP.151 (20 September 2017) [32], [111]-[114]
38 Art 14(1)
39 Art 14(2)
It is also proposed to add an additional article to the *Model Law on Cross Border Insolvency* which will clarify that the relief that can be sought under that Model Law includes the recognition and enforcement of a judgment in an attempt to circumvent some of the issues raised by the decisions in *Rubin* and *Singularis*.

**Conclusion**

The proposed Model Law on the Recognition of Insolvency Judgments has been designed to complement and not replace the existing avenues available to seek recognition of an insolvency related judgment. The uncertainties created by the present regimes for recognition mean that where a debtor trades beyond the boundaries of a single country that there is the risk of the need to duplicate legal proceedings in order to ensure their enforcement. This in turn means that there is a risk of inconsistent decisions as well as increasing the costs to an insolvency administrations and thereby reducing the funds available for creditors.

In States that have enacted the Model Law on Cross Border Insolvency, this proposed Model Law is also designed to complement the existing proceedings and to ensure that the principles of Universalism espoused in that Model Law are achieved.

It is a political decision as to whether Australia will adopt the proposed Model Law and if so with any amendments. Its adoption, however can only enhance Australia's international standing to assist other jurisdictions with the orderly liquidation or restructuring of the property of debtors who trade beyond the boundaries of a single State and avoid the present uncertainties in relation to the courts jurisdiction to do so. This Model Law will also allow courts to foreign representatives from a larger range of countries that is presently available under our statutory regimes.