Do Words Matter?

A COMPARATIVE ANALYSIS OF THE UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY IN AUSTRALIA, CANADA, NEW ZEALAND, UNITED KINGDOM AND THE UNITED STATES OF AMERICA

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School of Law

2015
Statement of Candidate Contribution

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Abstract

The UNCITRAL Model Law on Cross-Border Insolvency was designed to be enacted as a domestic law in the States in which it was enacted. There has been no consistency in the way Australia, Canada, New Zealand, the UK and the USA have incorporated the Model Law into their domestic law.

This thesis looks at four central questions in relation to the Model Law by comparing the situation in each of the five States examined:

1. Does the inconsistent wording adopted in the enactment of the Model Law affect it is interpretation?

2. Would an insolvent debtor with assets in each of the States examined or their foreign representative be treated consistently between those jurisdictions?

3. Do the inconsistencies prevent the principles of modified universalism from being achieved?

4. Has the Model Law achieved its stated objectives as set out in its preamble?

This thesis establishes that (a) the inconsistent wording adopted in the enactment of the Model Law has created inconsistency in its interpretation; (b) an insolvent debtor with assets in each of the States examined or a foreign representative may be treated inconsistently between those States due in part to the inconsistencies in the enactment of the Model Law between those jurisdictions; (c) the Model Law in each of the jurisdictions is generally consistent with the principles of modified universalism; and (d) the Model Law does not at present fully achieve its all of its objectives as set out in its preamble.

This thesis proposes a convention as a possible solution to the identified problems. A draft is provided in Appendix 4.
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supporting me in this endeavour and allowing me the time to complete this
dissertation.
List of Abbreviations

Bankruptcy Code: 11 USC.

BIA: Bankruptcy and Insolvency Act, RSC 1985, c B-3.

CCAA: Companies Creditors Arrangement Act, RSC 1985, c C-36.

COMI: centre of main interest.


IBA: International Bar Association.

INSOL: INSOL International, International Association of Restructuring, Insolvency and Bankruptcy Professionals.


UK: United Kingdom of Great Britain and Northern Ireland.

UK Insolvency Act: Insolvency Act 1986 c 45 (UK)
**US**: United States

**USA**: United States of America
Chapter 1
Introduction

Overview
This chapter introduces the reader to the central issues addressed by this thesis and aims to:-

• explain the theoretical basis for international cross-border insolvency laws and summarise the principle of comity;

• summarise the comparative analysis as applied in this thesis;

• summarise the importance of the research and the contribution its makes to the general knowledge in relation to the Model Law;

• introduce the reasons identified for the present inconsistencies in the Model Laws adoption and interpretation;

• summarise the conclusions reached, having conducted the comparative analysis; and

• suggest a possible solution to the identified problems.

1.1 Theoretical Basis for International Cross-border Insolvency Laws

Insolvency law plays a vital part in a modern free enterprise economy as it provides for an equitable distribution of an insolvent debtor's assets to its creditors. The effect and reach of a State's insolvency laws has become more important as the world's economies have become more consolidated and interdependent. As a result, laws relating to cross-border insolvency have acquired a high profile and greater importance since the mid-twentieth century. Such laws deal with the situation where an insolvent debtor trades, or has assets or creditors, in more than one jurisdiction.

During the twentieth century, and in particular following the world recession in the early 1990s, a number of practical deficiencies with the existing systems of recognition were identified, especially when more than one jurisdiction was involved. As a result, academics began to examine the theoretical basis underpinning both national and
international insolvency laws. Leading these discussions were Professors Westbook, LoPucki and Janger in the USA, Professor Fletcher, Lord Justice Hoffman and Professor Goode in the UK, Professor Wessels in the Netherlands, Professor Sarra in Canada and Professor Mason in Australia.

The main theoretical questions in cross-border insolvency concern the number of proceedings that should operate and which States' laws should govern the assets and claims in respect of the debtor. The answer to these two issues is not always the same as a number of States have existing rules in relation to the choice of the applicable law in different insolvency circumstances. Such rules are not universal.

A number of theories were advanced as set out below in relation to the correct underpinning of international insolvency laws and how such laws should be developed including the applicable choice of law principles:¹

(a) Universalism;

(b) Modified Universalism;

(c) Territorialism;

(d) Cooperative Territorialism; and

(e) Universal Proceduralism.

The universal model is based upon the debtor's estate including the totality of their worldwide assets. Furthermore, all their worldwide creditors have their claims dealt with in that one insolvency proceeding. The insolvency proceeding is governed by the laws of the place most closely connected with the debtor, being what under other models is called the place of the main proceeding.² No State to date has adopted this model.

Modified Universalism advocates the acceptance of a centralised administration of the debts and assets, but allows local jurisdictions to have separate proceedings and to assess the fairness of the main proceedings including the creditor priority regime, and determine whether they breach of that local jurisdiction’s public policy. Priority regarding choice of law rule is given to the jurisdiction of the main proceeding, subject to a contrary ruling by the local courts. The role of the courts in non main proceedings is generally to cooperate with the courts controlling the main proceedings. This is the type of model that is advocated by insolvency and banking industries bodies.

Modified Universalism has been described by Lord Hoffman as the ‘golden thread’ of cross-border insolvency. His Honour has applied this principle in dealing with an application to remit assets held in England and Australia. His Honour, in applying this principle, stated that ‘the existence of foreign preferential creditors who would have no preference in an English distribution has never inhibited the courts from ordering remittal.’ His Honour went on to state:

It follows that in my opinion the court had jurisdiction at common law, under its established practice of giving directions to ancillary liquidators, to direct remittal of the English assets, notwithstanding any differences between the English and foreign systems of distribution.

The Territorialism model is premised upon each jurisdiction dealing with the assets and creditors of the debtor within that jurisdiction. The insolvency proceedings do not have any extraterritorial effect and each State applies its own choice of law provisions. This is the traditional model that existed in the majority of States until the early twentieth century. This model sees separate insolvency proceedings being issued in each State.


5 McGrath v Riddell [2008] 3 All ER 869 [44].

6 Ibid.

which deal only with the assets and creditors within their respective jurisdiction. This can lead to an inequitable return to creditors between different States. This is not a viable ongoing model given the extent of multinational corporations and the problems experienced.

Cooperative Territorialism was advanced by LoPucki and advocates that each jurisdiction deal with the assets within that jurisdiction, but allows foreign creditors to claim in the local administration although some local creditors may have their claims prioritised over the claims of foreign creditors. In addition, the different administrations in each State work cooperatively with each other, whilst still applying their own choice of law provisions.\(^8\) This is the model that existed in a large number of developed States until the late twentieth century and until the enactment of the Model Law and other legislation.

Universal Proceduralism is advocated by Janger who suggests that the administration of the debtor’s estate be centralised. The choice of law applicable is to be determined in accordance with local law. The domestic laws of individual States apply when determining the assets that are to be administered by the debtor’s representative, including the ability to seek recovery of antecedent transactions. This model envisages that the debtor’s assets and claims will be administered centrally, using the ordinary non-bankruptcy principles of law in each jurisdiction to identify the claims against the assets of the debtor the subject to the insolvency administration and to determine the distribution priorities to be accorded to creditors.\(^9\) This model has not been adopted by any State.

In practice, during the last 20 years, major trading States have taken the ‘sharp edges’ off these theories and have introduced modified or mixed models involving an element of Universalism.\(^10\)


As discussed in Chapter 2, UNCITRAL’s Model Law was introduced in response to a perceived need to have a more consistent approach to cross-border insolvency issues, especially after the recession of the early 1990s.

This thesis examines the Model Law as it was introduced in Australia, Canada, New Zealand, UK and the USA. The Model Law is based upon the principles of Modified Universalism and by its enactment creates domestic laws that apply to a foreign debtor’s insolvency proceedings being recognised in that State. The Model Law seeks to establish the main proceeding whilst allowing separate proceedings to be issued in individual States if it is thought appropriate. It also allows courts to permit a foreign representative to deal with the debtor’s assets within their jurisdiction.

This thesis examines how the Model Law has been introduced and interpreted in the five States being considered.

1.2 Main Issues Examined

This thesis looks at four central questions in relation to the Model Law:

(a) Does the inconsistent wording adopted in the enactment of the Model Law in the States reviewed affect its interpretation?

(b) Given these inconsistencies how would an insolvent debtor with assets in Australia, Canada, New Zealand, UK and the USA and its foreign representative be treated in each of those jurisdictions?

(c) Do the identified inconsistencies prevent the principles of modified universalism being achieved?

(d) Does the Model Law achieve its stated objectives as set out in its preamble?

In the thesis I have only sought to highlight where the principles of modified universalism have not been achieved, given the limited circumstances where this has occurred.

The courts of a number of States have already acknowledged that the difference in the wording of their version of the Model Law may create inconsistencies. For example, the English High Court has noted in relation to the Model Law's adoption in the USA that changes 'in language of the enactment, . . .may well explain why the jurisprudence of the American courts has diverged from that of the ECJ.\textsuperscript{12}

In Chapter 2 the historical development of the Model Law is discussed. In Chapter 3, the manner of introduction of the Model Law into each State’s domestic law is reviewed. In Chapter 4, the question of how the Model Law affects the existing law in relation to foreign proceedings is examined. The variations between the domestic law enacted and the Model Law and its interpretation on an article-by-article basis are discussed in Chapter 5 to 9. In Chapter 10, the issue of how the existing principles of conflict of laws interact with the Model Law and potential problems that may arise is considered. Chapter 11 deals with the interpretation of two essential concepts namely COMI and \textit{establishment}. How the principles of private international law in respect of choice of forum and choice of laws may affect recognition of foreign proceedings, is examined in Chapter 12. In Chapter 13, the interrelationship between the Model Law and the EC Regulation is considered. This chapter also considers the desirability of common underlying concepts contained in both the Model Law and the EC Regulation such as COMI and \textit{establishment} having common meanings. The current UNCITRAL proposals that may affect the Model Law are discussed in Chapter 14. Recent amendments to the UNCITRAL Guide and proposed amendments to the EC Regulation are discussed in both Chapters 11 and 14. In Chapter 15, the findings and conclusions of this thesis are discussed. The extent to which the States apply the principle of Universalism when interpreting the Model Law provisions is examined throughout this thesis.

Chapter 14 has been inserted to highlight to the reader the current work of UNCITRAL Working Group V which may affect the operation of the Model Law. Particular reference is made to the issues discussed in relation to enterprise groups, which during

recent discussions at UNCITRAL Working Group V, it has been suggested that any agreed proposal be an addendum to the Model Law.\textsuperscript{13}

The analysis conducted is premised upon the following: (1) the Model Law, in order to achieve its objectives, requires that its provisions be interpreted consistently by the States that have adopted it. (2) It is desirable that the provisions of the Model Law and the EC Regulation be interpreted consistently. (3) The courts have accurately identified a difference in the interpretation of essential concepts such as COMI contained in the Model Law; moreover, those differences are not due to an incorrect interpretation by the relevant courts of their domestic enactment of the Model Law.

This thesis does not address the issues related to: (1) the effect of State’s minor definitional changes to the Model Law; (2) the laws of the individual States or Provinces in the countries examined; (3) an examination of the theoretical basis for cross border-insolvency as it is impacted by the Model Law; and (4) providing a definitive list of factors that a court should consider in interpreting a provision of the Model Law.

This thesis is important as it highlights the different positions adopted by States in respect of the Model Law. The States chosen represent a broad spectrum in relation to the manner of adoption and interpretation of the Model Law and include the two main States in which problems of inconsistencies have arisen, namely the UK and the USA. The States chosen are also drawn from different regions of the world. This thesis addresses issues beyond that dealt with in a large amount of the academic literature. In particular it reviews the introduction and interpretation of the Model Law in the five States on an article by article basis as well as examining the present inconsistencies between the European position and that of the USA in relation to COMI and other essential terms. Furthermore, the situation in an economically smaller State such as New Zealand is also taken into consideration.

Whilst leading academics have written on the utility of the Model Law, the analysis contained in this thesis namely, variations of the Model Law on an article-by-article basis as enacted by the five chosen jurisdictions, has not been carried out to date. This analysis is important as it addresses the four central questions posed by this thesis and highlights the many inconsistencies that exist in the adoption and interpretation of the Model Law.

The order in which the States are reviewed is alphabetical rather than based upon the size of their respective economies. This has been done in order to prevent the reader from focusing on the present disputes in the interpretation of the Model Law that exist between the USA and the UK as identified above by the English High Court. This thesis allows the reader to consider the position taken by the other States examined before considering those disputes. In a number of cases, this position is the middle ground between that in the UK and the USA.

1.3 Conclusions and Proposed Solution

This thesis concludes that words do matter. The inconsistent enactments and the interpretation of the provisions of the Model Law have given rise to a number of inconsistent results between jurisdictions. It identifies that some of these differences in interpretation may in part be due to cultural variations and predispositions in the insolvency laws that exist between the North American States and Europe. Europe has a history of debtors’ prisons and traditionally had a predisposition towards liquidation, blame and punishment of debtors or their officers. The USA and Canada have, since the mid to late-twentieth century, adopted a predisposition towards restructuring with their laws encouraging and facilitating a debtor to consider restructuring before liquidation. Europe has recently announced its intention to adopt a restructuring predisposition but this requires legislative change by its member States.\(^{14}\)

The thesis also concludes that the introduction and interpretation of the Model Law in the States reviewed is generally consistent with the theory of modified universalism. However, the application of the Model Law in the USA has been limited to debtors recognised under Chapter 1 of their Bankruptcy Code. It also concludes that the Model Law is not fulfilling its objectives as set out in its preamble. It identifies a number of factors that prevent it fulfilling its objectives; these are: (1) the manner of the introduction of the Model Law into the domestic legislation of each State; (2) amendments and deletions made to the Model Law in the domestic legislation enacting it; (3) the incorporation of different domestic insolvency principles into the interpretation of the Model Law by its enacting legislation; (4) the different approaches the States have to insolvency law; (5) different prerequisites for States invoking jurisdiction over

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an insolvent debtor or a debtor requiring restructuring; (6) some States attempting to impose their jurisdiction worldwide once they have jurisdiction under their domestic law; (7) different rules relating to conflicts of law; (8) different rules relating to choice of law; and (9) other treaties or agreements to which the States are bound, which affect their predisposition in relation to the interpretation of the Model Law.

It is argued that the desirability for consistency enhances cooperation between States and creates certainty of outcome which is desired by business. The breakdown in international cooperation in cross-border insolvency cases threatens the progress of international trade and economic development and result in job losses, erosion of enterprise value, misallocation of assets and costly cross-border litigation. It also leads to unnecessary duplication of costly insolvency administrations and internal disputes between those administrations as to their right to assets and the division of those assets between creditors and other interested parties. These issues also make the possible restructuring of an insolvent entity more difficult and costly and therefore less likely. This in turn has negative economic effects especially on labour and investment more generally especially were large multinational corporations are involved as was seen with the recent global economic crisis.

This thesis also argues that amendments made to the UNCITRAL Guide might be ineffectual in the majority of the States examined, given the principles of legislative sovereignty. This means that UNCITRAL cannot resolve the current difficulties in the interpretation of the Model law by amending the UNCITRAL Guide.

This thesis further argues that, given the interrelationship between the Model Law and the EC Regulation, it is desirable for the common underlying concepts such as COMI and ‘establishment’ to have common meanings. This is the current position that exists in the United Kingdom. This thesis also identifies that recent amendments to the UNCITRAL Guide and the proposed amendments to the EC Regulation pertaining to COMI are not consistent as they require different issues to be taken into account; this may lead to further inconsistencies and give rise to further divergences in the interpretation of those commonly-used terms. A summary of the findings of this thesis and the issues identified are presented in section 15.2.

15 United Nations Commission on International Trade Law Background information on topics comprising the current mandate of Working Group V and topics for possible future work UN Doc A/CN.9/WG.V/WP.117 (8 October 2013) 6 [10]
In Chapter 16 a possible solution is proposed to the issues identified. It recommends the introduction of a convention which will be largely based upon the Model Law. A draft of this proposed convention is set out in Appendix 4. Whilst this recommendation has until recently been theoretical, UNCITRAL Working Group V in December 2013 expressed support for looking at the goal of drafting a convention, although expressed reservations as to its feasibility.\textsuperscript{16} UNCITRAL has formed an ad hoc group to study the feasibility of a convention.\textsuperscript{17}


Chapter 2
Development of the Model Law

Overview

This Chapter examines:

- The history of the development and introduction of the Model Law.
- Historical background to the creation of laws dealing with cross-border insolvencies.
- The need identified following the recession in the 1980s for a better system of recognising cross-border insolvencies as a result of a number of high profile insolvencies of individuals and corporate entities who had assets and creditors in multiple States.

2.1 Background

The free enterprise economic system is premised upon people being willing to take a risk in establishing businesses by contributing their capital with the anticipation that the risk associated with running a business will attract a return. In any business, the recognition and presence of an element of risk means that a proportion of people who commence a business must fail. Legal systems have for a long time developed rules to deal with the consequences of these businesses failures including an orderly and equitable distribution of the assets which are left to the creditors of the failed business.\(^\text{18}\)

When the assets of a business have been spread across more than one State, it is difficult to conduct an orderly and equitable distribution of the assets due to differences in laws, legal systems, political interests and self-interest that characterise each State.\(^\text{18}\)

\(^{18}\) See, eg, Philip R Wood, *Principles of International Insolvency* (Sweet & Maxwell, 2nd ed, 2007), 891 [29-074] referring to Treaty between Verona and Trent in 1204 regarding transfer of debtors’ assets and to a Treaty between Verona and Venice in 1306 in respect of extradition of fugitive debtors; Kurt H Nadelmann *Conflict of Laws: International and Interstate* (Martinus Nijhoff, 1972) 302 n15, 303 referring to a treaty between Verona and Trent of 1204 providing for the transfer of assets to the place where the insolvency had occurred and the insolvency convention between Holland and Utrecht in 1679.
In the Middle Ages, non-secular intervention was sometimes sought to achieve equitable outcomes, an example of which was the Pope’s intervention in the affairs of the Ammanati Bank of Pistoia following its collapse in 1302. The Pope arranged for the safe conduct of the owners back to Rome and directed the clergy in a number of European countries to collect the debts on behalf of the Bank and transmit the funds to Rome for distribution among all the Bank’s creditors.

Over time, a number of bilateral and multilateral treaties have been adopted between different States. They have largely been concluded between States that are not only geographical neighbours, but also have close legal traditions and consistent cultural, linguistic and political affiliations.

The wide use of corporations in the nineteenth century complicated this issue further as corporations commenced trading in multiple States. When a corporation became insolvent, it had to liquidate/bankrupt its assets in each State in which they were held. In order to facilitate this, it was necessary for the liquidator/trustee to be recognised by the local laws of that State or for a separate liquidator/trustee to be appointed in each State in which assets were held. This led to a number of different representatives being appointed to the one legal entity, each of whom dealt with the assets in their respective jurisdictions in accordance with their local laws. In some cases, the representatives attempted to coordinate their efforts, but not always.

During the eighteenth and nineteenth centuries when the British Empire was the most dominant in the world and Britain was the foremost trading nation, the British Commonwealth countries developed a principle of ‘comity’. Comity was a principle whereby a court in one member of the British Empire would recognise a court in

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19 In this thesis, the word ‘State’ has the same meaning as that used in the Model Law on Cross-Border Insolvency issued by UNCITRAL. Cross-border insolvency issues may arise not only between different countries but also between different States in which the country has adopted a federal system.
22 For example, in the case of National Employers Mutual General Insurance Association Limited, a company incorporated in England, and recognised as a foreign corporation in three other States: Australia, Canada and South Africa. The writer acted for the Australian liquidators in this liquidation.
another member of the British Empire and assist it in the enforcement of its judgements to the extent permitted by the latter court's laws. 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.\(^\text{24}\) This principle was not universally recognised by countries outside the Commonwealth because of issues of sovereignty.

The United States however 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.\(^\text{25}\)

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.\(^\text{26}\) Problems arose regarding the laws that should apply (especially with the advent of multinational corporations); how the members of such groups should be treated; and, how creditors should be dealt with by the different jurisdictions in order to ensure equality.

In 1995, the European Community proposed the introduction of the European Convention on Insolvency Proceedings which faltered due to the UK failing to agree to it in protest against the European Commission's refusal to lift the embargo on British beef and cattle imposed during the mad cow disease threat.\(^\text{27}\)

\(^{24}\) See, eg, Schmitt v Deichmann [2012] 2 All ER 1217, 1232-1233 [62]-[65].

\(^{25}\) Hilton v Guyot (1895) 159 US 113, 163-4.

\(^{26}\) 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 Rosalind Mason, ‘Cross-border insolvency: Adoption of CLERP 8 as an evolution of Australian insolvency law’ (2003) 11 Insolvency Law Journal 62, 68-7.

In 1996, Virgos & Schmidt\(^{28}\) prepared a Report on the *European Convention on Insolvency Proceedings* which has been considered the leading text on the same, even though that convention was not enacted. The report has been extensively cited in the interpretation of the meaning of COMI,\(^{29}\) and the assumptions contained in it which both the later EC Regulation and the UNCITRAL Guide refer to. This is discussed below in sections 7.2, 7.3, 11 and 13.

On 29 May 2000, the European Council adopted the *Regulation on Insolvency Proceedings* (`EC Regulation`).\(^{30}\) This followed ‘almost forty years’ efforts to establish a framework within which insolvency proceedings taking place in any Member State of the [European Union (EU)] could be recognised and enforced throughout the rest of the Union.\(^{31}\)

In 2003 in North America, the American Law Institute published *Transnational Insolvency: Cooperation Among the NAFTA Countries, Principles of Cooperation Among The NAFA Countries* in an attempt to develop principles and procedures for managing cross-border insolvency within NAFTA countries.\(^{32}\) This report, amongst other things, recommended that both the United States and Canada adopt the UNCITRAL Model Law.\(^{33}\) An amended version of these principles has recently been adopted by the International Insolvency Institute and the American Law Institute with a view to them being used more widely.\(^{34}\) These principles have been developed to encourage discussion on a wider acceptance of these principles to be used in conjunction with the Model Law, as it is the case in Australia.\(^{35}\)


\(^{29}\) See Omar, above n 27, 218, 232.


\(^{32}\) The American Law Institute, *Transnational Insolvency: Cooperation Among the NAFTA Countries, Principles of Cooperation Among The NAFA Countries* (Jirus Publishing, 2003)

\(^{33}\) Ibid Sec V Recommendation 1.

\(^{34}\) See American Law Institute and International Insolvency Institute, ‘Global Principles for Cooperation in International Insolvency Cases and Global Guidelines for Court to Court Communications in International Insolvency Cases’ (10 January 2012) <http://iiiglobal.org/component/jdownloads/viewdownload/36/5897.html>; Ian F Fletcher and Bob Wessel, ‘Global Principles for Cooperation in International Insolvency Cases (1 January 2013)’<www.bobwessels.nl/wordpress>.

\(^{35}\) Federal Court of Australia, *Practice Note Corp 2 Cross-Border Insolvency Cooperation with Foreign Courts or Foreign Representatives* (22 November 2013)
2.2 Model Law

On 30 May 1997, UNCITRAL adopted the Model Law which was subsequently adopted by the General Assembly of the United Nations in January 1998. In 1997, UNCITRAL also adopted the *Guide to Enactment of The UNCITRAL Model Law on Cross-Border Insolvency* (UNCITRAL Guide) which has been varied over time. The Model Law has adopted several concepts such as COMI and ‘establishment’ similar to those contained in the EC Regulation and it was envisaged that a similar interpretation would apply to such a concept and that the Model Law would complement the EC Regulation.

The Model Law was established as a result of work done and pressure exerted by a number of groups including the IBA and the INSOL. During its development, the working group took into account other international regulations, conventions and proposals from various non-government bodies including the Model International Insolvency Act and the Cross-Border Insolvency Concordat which had been developed by Committee J of the IBA.

The Model Law was created out of the necessity to have some uniformity in the way multinational companies were dealt with when they experience insolvency or require restructuring and to avoid having multiple insolvency administrations over different States as had been experienced during the recessions of the early 1990s. The Model Law was established as a result of work done and pressure exerted by a number of groups including the IBA and the INSOL. During its development, the working group took into account other international regulations, conventions and proposals from various non-government bodies including the Model International Insolvency Act and the Cross-Border Insolvency Concordat which had been developed by Committee J of the IBA.

Law does not attempt to substantively unify the insolvency laws of States.\textsuperscript{41} UNCITRAL recognised that national laws have generally not kept pace with the trend of cross-border insolvency; nor have they been able to deal with cross-border cases adequately, which in part has arisen out of insolvent debtors concealing assets in foreign jurisdictions.\textsuperscript{42} The Model Law is not a treaty and does not contain any requirement of reciprocity, although some countries have incorporated this requirement into their domestic enactment of the same.\textsuperscript{43} The Model Law is premised on four primary concepts: access, recognition, relief and cooperation.\textsuperscript{44}

The Model Law in general has three key elements:

(a) It provides for expedited control of the debtors’ local assets and their protection from unilateral actions by creditors.

(b) It then gives the local court considerable discretion to grant all sorts of relief to an administrator from a foreign main proceeding.

(c) The discretion is accompanied by a statutory mandate to cooperate subject to ensuring that the debtor and its creditors are adequately protected.\textsuperscript{45}

The UNCITRAL Guide states that the purpose of the Model Law is to assist States ‘to equip their insolvency laws with a modern, harmonized and fair framework to address more effectively instances of cross-border insolvency’.\textsuperscript{46} It reflects practices in cross-border insolvency matters that are characteristic of ‘modern, efficient insolvency systems’.\textsuperscript{47} The UNCITRAL Guide also acknowledges that fraud by insolvent debtors is an increasing problem and indicates that the cross-border co-operation mechanisms established by the Model Law are ‘designed to confront such international fraud’.\textsuperscript{48}

\begin{footnotes}
\item[42] Ibid [5].
\item[43] Eg, \textit{Cross Border Insolvency Act 2000} (South Africa) s 2.
\item[44] Ian F Fletcher, ‘\textit{Insolvency in Private International Law, National and International Approaches}’ (Oxford University Press, 2nd ed, 2005), 453, [8.17].
\item[47] Ibid [2].
\item[48] Ibid [6].
\end{footnotes}
UNCITRAL Guide provides that the Model Law may exist as an integral part of a State’s legislation when dealing with cross-border insolvency issues. It was not designed to replace all of a State’s existing legislation dealing with cross-border insolvency.

The UNCITRAL Guide has been described as ‘less specific’ and ‘less binding’ than the Model Law. The purpose of the UNCITRAL Guide is to provide background and explanatory information about the Model Law and while the information would primarily be used by legislators and government; it may provide insights to judges, practitioners and academics. It is argued that the UNCITRAL Guide pursuant to Article 8 may be consulted as extrinsic material when interpreting a section within the Model Law which is not clear.

The UNCITRAL Guide recognises that the Model Law is only a recommendation rather than a convention. It also recognises ‘that the degree of and certainty about, harmonization achieved through a model law is likely to be lower than in the case of a convention’. Therefore, in order to achieve a satisfactory degree of harmonisation and consistency between States, States must make as few changes as possible.

The UNCITRAL Guide accepts that the Model Law was drafted to into account that the EC Regulation on Insolvency was to come into effect to ‘establish a cross-border insolvency regime within the European Union for cases where the debtor has the centre of its main interests in a State member of the Union’. The guide goes onto note that it ‘offers to States members of the European Union a complementary regime of considerable practical value that addresses the many cases of cross-border cooperation not covered by the EC Regulation.’

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50 See generally, Re HIH Casualty & General Insurance Ltd [2007] 1 All ER 177.
53 Ibid [20].
54 Ibid.
55 Ibid 188 [19].
In 2005, UNCITRAL adopted its Legislative Guide which was designed to foster and encourage the adoption of effective national insolvency regimes. The text of the Legislative Guide represented a five-year effort to derive a best practice guide to the enactment of a modern insolvency law and as an aid to countries engaged in that task.\textsuperscript{56} In the Legislative Guide, UNCITRAL makes several comments about the Model Law and how it should be interpreted and its interrelationship with the EC Regulation,\textsuperscript{57} whilst acknowledging that the Model Law is used for a purpose different from that of the Legislative Guide.\textsuperscript{58}

On 1 July 2009, UNCITRAL adopted a \textit{Practice Guide on Cross-Border Insolvency Cooperation}\textsuperscript{59} which was designed to provide information for practitioners and judges on the practical aspects of cooperation and communication as was envisaged in Article 27 of the Model Law.\textsuperscript{60}

Subsequently on 1 July 2010, UNCITRAL adopted the \textit{Legislative Guide on Insolvency Law – Part Three} which dealt with the treatment of enterprise groups in insolvency. This guide was developed as an aid to States looking to legislate in respect of enterprise groups. As the Model Law requires debtor company’s to be dealt with individually and not as a group, the legislative guide does not deal with enterprise groups’ interrelationship with the Model Law.\textsuperscript{61}

In December 2011, the UN General Assembly adopted the UNCITRAL publication relating to a judicial prospective on the Model Law.\textsuperscript{62} This paper discusses the Model from a judge’s perspective and offers to judges a guide to its interpretation.\textsuperscript{63}

The Model Law is designed to provide a system of procedural recognition in part under the principles of comity and court intervention to assist any recognised foreign

\begin{itemize}
\item \textsuperscript{56} Clark & Goldstein, above n 8, 541.
\item \textsuperscript{57} See, eg, Legislative Guide, 41 [13].
\item \textsuperscript{58} Ibid 1 [2].
\item \textsuperscript{59} United Nations Commission on International Trade Law, UNGOAR, 64th sess, 890th mtg, Supp No 17, UN Doc A/64/17 (1 July 2009), [24].
\item \textsuperscript{60} See United Nations Commission on Trade Law, \textit{UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation}, GA Res 64/112, (16 December 2009) UN Publication Sales No E.10.V.6 (June 2010), [1]-[3].
\item \textsuperscript{63} Ibid 1.
\end{itemize}
insolvency proceeding with a view to achieving a more efficient disposition of cases and distribution of the assets of an insolvent debtor. \(^{64}\)

In July 2013, following recognition by UNCITRAL’s Working Group V of difficulties experience in the interpretation of several key concepts under the Model Law, UNCITRAL adopted a number of amendments to the UNCITRAL Guide with a view to further clarifying some those central concepts within the Model Law. Most importantly, the amendments sought to address the meaning and interpretation of the phrase ‘centre of main interest’ and the applicability of the rebuttable presumption contained in Article 16. On 16 December 2013 these amendments were adopted by the UN General Assembly. \(^{65}\) This issue is commented upon further in Chapter 11.1

The Model Law does not provide its own rules of private international law and its interpretation will be the subject of each States existing rules of Private International Law as discussed in Chapters 10 and 12. However regard must be had to the Model Laws own interpretative provisions in Article 8 which requires an international prospective to the brought to the interpretation of words contained with the Model Law.

Despite the recommendations made in the UNCITRAL Guide to minimise the changes to the wording of the Model Law and because of several variations allowed under the Model Law itself, the law has not been uniformly enacted into the domestic law of the five States. This has led to States interpreting differently the provisions of the Model Law because of the differences in their domestic legislation. This issue is addressed in more detail in Chapter 7 to Chapter 9 and section 12.2.

### 2.3 Summary

The Model Law was created as a result of difficulties arising from the recessions in the early 1990s. This experience showed the need for some uniformity or harmonisation in

\(^{64}\) Whilst the Model Law is designed to be enacted into the domestic law of each country, it is not a convention that is adopted by countries and as such there may be variations.

the way multinational companies are dealt with when they experience some form of insolvency, with a view to avoiding multiple insolvency administrations and allowing creditors in one State access to the assets of the insolvent entity in another.

The Model Law is designed to provide a system of procedural recognition in part under the principles of comity and court intervention to assist any recognised foreign insolvency proceeding to achieve a more efficient disposition of cases and distribution of the insolvent debtor’s assets whilst protecting the interests of all creditors and other parties including the debtor. The Model Law is also designed to assist in the maximisation of the debtor’s assets and to create greater legal certainty for trade and investment.66

It was envisaged that essential concepts such as COMI and ‘establishment’ would be interpreted consistently since similar terms were contained in the EC Regulation, although as a domestic enactment it must also be interpreted in accordance with each States own rules of interpretation and rules of private international law.

Chapter 3
Manner of Introduction of the Model Law

Overview

Australia, Canada, New Zealand, UK and the USA have each adopted a different method for introducing the Model Law into its domestic law. This chapter analyses:

• how the manner of enactment in the States under consideration affects the terms and meaning of the Model Law;

• how the insertion of the Model Law by Canada and the USA into their existing domestic legislation has required those States to make it consistent with their domestic insolvency provisions. This is reflected in the inconsistent way that the Model Law has been enacted in those States; and

• whether in States where the substance of the legislation does not vary from the Model Law; the differences in the legislation can be overcome by the courts relying upon the interpretative provisions in Article 8 of the Model Law.

3.1 Australia

Australia enacted the Model Law per se by annexing the Model Law as Schedule 1 to the Cross-Border Insolvency Act 2008 (Cth) (the Act). Where options or insertions are provided for in the Model Law, these have been set out in the Act to which the Model Law is annexed.

The Act deals solely with the issue of the Model Law and applies it to both corporate and personal insolvency. It does not attempt to amend or otherwise insert itself into the domestic law relating to insolvency, although it does draw upon that law to set out the powers a foreign representative may have and the mechanism for using those powers. See, eg, art 21 of the Model Law allows a foreign representative to conduct examinations; however sections 596A – 596F of the Corporations Act 2001(Cth) and the Supreme Courts and Federal Court Corporations Rules made under that Act set out the procedural aspects of how to summon a person and the procedures for conducting an examination.
adopted different methods in the Model Law’s interpretation including using the Vienna Convention in its interpretation. This issue is discussed further in section 10.3.9 and 12.3.2.

3.2 Canada

Canada has based its legislation on the Model Law by incorporating the spirit and purpose of the Model Law in their domestic legislation. The Model Law was enacted by An Act to Amend the Bankruptcy and Insolvency Act, the Companies’ Creditors Arrangement Act, the Wage Earner Protection Program Act and Chapter 47 of the Statutes of Canada 2005, which inserted the same into Part IV of the CCAA in respect of large corporate insolvency, and restructuring and by inserting it into Part XIII of the BIA in respect of other insolvencies.

As both pieces of legislation in which the provisions of the Model Law have been inserted were pre-existing, the language of the Model Law has been adapted so as to make it consistent with the terminology and definitions contained in that legislation. These definitions are not always consistent between the two pieces of legislation.

The Model Law has been dealt with in 20 sections in their domestic legislation. Not all provisions of the Model Law have been incorporated into the Canadian domestic law. Furthermore, they have inserted provisions that are not contained in the Model

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70 An Act to Amend the Bankruptcy and Insolvency Act, the Companies’ Creditors Arrangement Act, the Wage Earner Protection Program Act and Chapter 47 of the Statutes of Canada, SC, 2005, c C-47.
71 Companies Creditors Arrangement Act, RSC 1985, c C-36.
72 Bankruptcy and Insolvency Act, RSC 1985, c B-3.
74 Companies Creditors Arrangement Act, RSC 1985, c C-36 ss 44-61; Bankruptcy and Insolvency Act, RSC 1985, c B-3 ss 267-284.
Law, and amended definitions which have the effect of changing the remedies available under the Model Law. In addition, they have not included the interpretative provisions contained in Article 8. No explanation or reasons have been given for these exclusions by the Canadian parliament or government and there is no reference to it in the parliamentary debate.

More generally, the provisions of the CCAA, deals primarily with the restructuring of larger corporations and have been described as being skeletal in nature and as a ‘sketch, an outline, a supporting framework for the resolution of corporate insolvencies in the public interest’. The Act has been designed ‘to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets’. It has been stated that this promotes flexibility and is particularly useful in complex insolvency cases. If this is the stated purpose of that enactment, it may explain the deletion, from the Model Law, of several articles as they left those matters to the discretion of the court.

Girgis has argued that since the public interest test in the CCAA can be defined to include the continuance of value in the economy in any form, then that legislation can also be used to achieve a liquidation of a company’s assets as long as the value to be obtained is more than the sum of the parts achieved by a formal liquidation. Hence, it...
should not be confined to formal restructuring proceedings at the end of which a business or entity continues.\textsuperscript{81}

The interrelationship between the CCAA and the BIA is that the BIA has been described as serving:

the same remedial purpose, though this is achieved through a rules-based mechanism that offers less flexibility. Where reorganization is impossible, the BIA may be employed to provide an orderly mechanism for the distribution of a debtor’s assets to satisfy creditor claims according to predetermined priority rules.\textsuperscript{82}

In enacting the Model Law, Canada has changed the definition of a non-main proceeding by not requiring such a proceeding to have an ‘establishment’ in the State where the foreign representative was appointed.

Ziegel has questioned why a number of the provisions in the Model Law have not been incorporated into the Canadian domestic law as there appears to be no reason for their deletion.\textsuperscript{83} Arguably such changes and, most importantly, the discretion allocated to courts, allow the Canadian courts to recognise a larger group of insolvency administrations. Once such insolvency administrations are recognised, the courts can grant the stays and other types of orders envisaged under the Model Law. It is arguable that this has allowed Canada to recognise the majority of insolvency proceedings issued in the USA. This issue is elaborated in sections 7.8 and 8.1.

3.3 New Zealand

New Zealand enacted the Model Law with minor variations as Schedule 1 to the \textit{Insolvency (Cross-border) Act 2006}. This Act attempts to not only enact the Model Law but also deal with cross-border insolvency generally by making specific provisions in relation to the High Court of New Zealand acting in aid of overseas courts.\textsuperscript{84} Whilst


\textsuperscript{82} \textit{Century Services Inc v Canada} [2010] 3 SCR 379, 394 [15].


\textsuperscript{84} \textit{Insolvency (Cross-border) Act 2006} ss 3, 8.
provision was made for the Model Law application to be restricted by regulation, this has not occurred to date.\textsuperscript{85}

All amendments to the Model Law are contained within the law as it appears in the Schedule and there is no need to refer to that Act to determine what options have been chosen or amendments made, although a number of definitions are contained in the Act. Throughout the Model Law, where there is a reference to a domestic court, the New Zealand law refers to the High Court of New Zealand.

Unlike other States’ in their interpretation of the Model Law, the High Court of New Zealand has been given power to refer to:

\begin{quote}
any document that relates to the Model Law on Cross-Border Insolvency that originates from the United Nations Commission on International Trade Law, or its working group for the preparation of the Model Law on Cross-Border Insolvency.\textsuperscript{86}
\end{quote}

It is argued that this does not restrict the court to making reference only to the versions of those documents that existed at the date of enactment of the Model Law in New Zealand, but to also take account of updates to those documents, including the UNCITRAL Guide. This would appear to accord with the principles behind Article 8.

\textbf{3.4 United Kingdom}

The \textit{Insolvency Act 2000} authorised the introduction of the Model Law with or without modification by regulation.\textsuperscript{87} The Secretary of State enacted an amended form of the Model Law in \textit{The Cross-Border Insolvency Regulations 2006}.\textsuperscript{88} The regulation does not deal exclusively with the issue of cross-border insolvency.

The \textit{Insolvency Act 1986} also deals with the issue of cross-border insolvency and allows a court to take action to assist a foreign court in a designated country.\textsuperscript{89} The regulation requires the courts when interpreting the Model Law to refer to the Model Law, any documents of UNCITRAL relating to the preparation of the Model Law, and the UNCITRAL Guide.\textsuperscript{90} However, unlike New Zealand, the regulation prescribes that

\begin{itemize}
\item \textsuperscript{85} Ibid s 10.
\item \textsuperscript{86} Ibid s 5(1)(b).
\item \textsuperscript{87} \textit{Insolvency Act 2000} c39 s 14(1).
\item \textsuperscript{88} \textit{Cross-Border Insolvency Regulations 2006} SR 2006/1030.
\item \textsuperscript{89} \textit{Insolvency Act 1986} c45 s 426.
\item \textsuperscript{90} \textit{Cross-Border Insolvency Regulations 2006} reg 2(2).
\end{itemize}
reference can be made to any documents of UNCITRAL 'and its working group relating to the preparation of the UNCITRAL Model Law' and the UNCITRAL Guide including reference to UNCITRAL Guide's document number and date made in May 1997. It is argued this may prevent the UK Courts from taking into account the updates to that Guide.\textsuperscript{91}

An amendment to Article 3 of the Model Law as enacted in the UK makes it clear that the provisions of the European Insolvency Regulation prevail over the provisions of the Model Law. Hence, any application for recognition of a foreign representative from a European Union State will be considered under the EC Regulation and not the Model Law, which is in keeping with its obligations under the EC Regulation, and the Treaty on the Functioning of the European Union.\textsuperscript{92}

### 3.5 USA

The USA enacted the Model Law by the \textit{Bankruptcy Abuse Prevention and Consumer Protection Act}\textsuperscript{93} which replaced section 304 of the Bankruptcy Code\textsuperscript{94} with Chapter 15 of that Code. Chapter 15 alters some of the language of the Model Law to make it consistent with the existing provisions of the Bankruptcy Code and does not contain its own exhaustive definition section, but cross-references its definition with other chapters within the Code. Chapter 15 also picks up a number of exclusions contained in other Chapters which are not present in the Model Law; these are discussed in section 5.2. A knowledge of the concepts contained in the other chapters of the Code is necessary in order to understand the meanings of terms contained in Chapter 15.

Section 103 stipulates that the general provisions in Chapter 1 of the Bankruptcy Code apply to Chapter 15 cases. In addition, the following sections apply to these cases:

(a) Section 307 granting standing to the US Trustee to act in Chapter 15 cases;

(b) Section 362(n) excepting from the automatic stay cases involving certain small business debtors;

\textsuperscript{91} See generally \textit{Fibria Celulose S/A v Pan Ocean Co Ltd} [2014] EWHC 2124 (Ch) (30 June 2014) [88]


\textsuperscript{93} Pub Law No 109-8, 119 Stat 23 (2005).

\textsuperscript{94} 11 USC § 304.
As a result of Chapter 1 of the Bankruptcy Code applying to Chapter 15 of the Bankruptcy Code, the US Court of Appeals has found that Chapter 15 applies only to debtors which fit within the definition of section 109 of the Bankruptcy Code. A debtor must reside, have a domicile, a place of business, or property in the United States. This would appear to contradict the underlying principles of Universality underpinning the Model Law. However this issue may be overcome practically in the majority of cases as the requirement to have an asset in the jurisdiction is simply achieved.

Chapter 15 also includes additional provisions which are territorialist in nature in order to protect local interests. It addresses concerns that USA creditors may be prejudiced in foreign proceedings. This is evidenced by a requirement that the court, pursuant to section 1522, can only make interim orders or other orders following recognition that the interests of creditors are sufficiently protected. This is discussed further in section 7.8.

Despite the variations to the Model Law provisions the US Congress has recommended the UNCITRAL Guide ‘for guidance as to the meaning and purpose of the Model Law's provisions’. The issue remains as to whether amendments to the UNCITRAL Guide since the enactment of Chapter 15 can be taken into account by US courts. This issue is discussed further in section 14.1.

95 Daniel M Glosband et al, ‘The American Bankruptcy Institute Guide to Cross-Border Insolvency in the United States’ (American Bankruptcy Institute, 2008), 89. They comment that the inclusion of section 362(n) was a legislative error as the exception was intended to cover provisions excepting financial contracts from the automatic stay.
96 Re Barnet, 737 F 3d 238 (2nd Cir, 2013); 11 USC § 109 (a).
97 See Re Octaviar Administration Pty Ltd, 511 BR 361 (Bankr, SD NY, 2014).
3.6 Summary

As identified above, there has been no uniformity in the manner in which the Model Law has been adopted into the domestic law of each of the States reviewed.

In Canada and the USA where the Model Law has been inserted into pre-existing legislation, arguably this may result in the courts of those States imposing preconceptions associated with the other parts of the legislation upon the domestic provisions of the Model Law. The UK and the USA have also altered some of the definitions of essential concepts contained within the Model Law, presumably to satisfy their domestic requirements.

The domestic legislation of both New Zealand and the UK allow reference to be made to the relevant UNCITRAL documents including the UNCITRAL Guide. In the case of New Zealand, this may include the UNCITRAL Guide as amended from time to time. In the UK it is restricted to a specific version of the UNCITRAL Guide. In relation to other States examined, it will depend upon their domestic rules of interpretation as to whether their courts take such material into account in their interpretation of the Model Law as enacted domestically. It is argued that the above issues will lead to inconsistencies in the interpretation of the Model Law.

It is also argued that States which amend the terms in the Model Law when adopting it domestically are not taking a truly Universalist approach as they are imposing domestic concepts or priorities on a proposed international harmonised law. As stated above, some of these amendments are clearly designed to protect domestic creditors. The same can also be said of Canada which has not enacted all of the provisions of the Model Law.

As discussed below in Chapter 5 to 9, this lack of consistency has led to some provisions of the Model Law being interpreted differently by the various States.
Chapter 4
How does the Model Law affect existing principles of recognition?

Overview
This chapter introduces the notion that the Model Law has attempted to provide an internationally uniform approach to the recognition of foreign insolvency proceedings based upon the concepts of ‘foreign main proceedings’ and ‘foreign non-main proceedings’. In particular, the following points will be discussed:

- how each of the States reviewed has dealt differently with its pre-Model Law systems for recognition;

- how each of the States has inserted the Model Law into its existing system of recognition of foreign proceedings and whether there concurrently exists the ability to bring applications for assistance using principles such as comity; and

- the relevance of the Model Law in relation to bringing applications in respect of these types of entities that exclude its operation;

The issue of excluded entities is discussed further in sections 5.2 and 10.3.2.

4.1 Australia

The Model Law does not seek to amend the existing statutory provisions allowing the courts to assist foreign courts, nor to change the common law in relation to the recognition and assistance to be granted to foreign proceedings.\(^\text{100}\) These provisions also continue to apply in respect of foreign proceedings that do not fit or invoke the local provisions of the Model Law or which do not satisfy the tests for recognition under the Model Law.\(^\text{101}\)

\(^{100}\) Corporations Act 2001 (Cth) s 581; Bankruptcy Act 1966 (Cth) s 29.

\(^{101}\) Mason, Cross-border insolvency: Adoption of CLERP 8 as an evolution of Australian insolvency law’ above n 26, 89; see generally Ackers v Deputy Commissioner of Taxation [2014] FCAFC 57 (14 May 2014) [99]-[106].
4.1.1 Statutory Provisions

The existing provisions require the Courts to assist the courts of prescribed countries \(^{102}\) whilst giving the court discretion as to whether to assist the court of other non-prescribed States. \(^{103}\) As a condition of any order made, the court has power to obtain undertakings as part of any orders granted. \(^{104}\) These provisions continue to apply except to the extent to which they are inconsistent with the provisions of the Model Law, in which case the provisions of the Model Law prevail. \(^{105}\) These provisions will continue to be used in respect of those classes of debtors who are specifically excluded from the provisions of the Model Law. \(^{106}\)

The Full Federal Court has held that, were an application for assistance comes from a prescribed country under the statutory provisions in respect of personal bankruptcy, recognition must be granted and the court does not have discretion in this regard, as the section uses the word ‘shall’. \(^{107}\) The court has power to order a foreign representative to take control of the debtor’s assets, both movable and immovable, and to distribute the same. Furthermore, the court held that the mandatory statutory provisions excluded the operation of the public policy exception against the enforcement of foreign revenue debts, so far as prescribed countries were concerned. Hence, recognition is given to a foreign representative who does not seek to enforce a revenue claim, but rather collects the debtor’s property and then distributes it according to law. \(^{108}\) The Federal Court has also indicated that it is not necessary for an application for recognition to be made under the Model Law where an application for assistance can be made under the provisions of the Bankruptcy Act 1966 (Cth) (Bankruptcy Act), and that there is no inconsistency between the provisions of the Model Law and section 29 of the Bankruptcy Act which allows the court to extend

\(^{102}\) Corporations Regulations 2001 (Cth) reg 5.6.74; Bankruptcy Regulations 1996 (Cth) reg 3.01.

\(^{103}\) See, eg Mason, ‘Local Proceedings in a Multi-State Liquidation: Issues of Jurisdiction’ above n 2, for a summary of the pre-existing provisions and the basis of the same.


\(^{105}\) Cross-Border Insolvency Act 2008 (Cth) s 22.

\(^{106}\) Cross-Border Insolvency Act 2008 (Cth) s 9; Cross-Border Insolvency Regulations 2008 (Cth) sch 1.

\(^{107}\) Re Ayres; Ex parte Evans (1981) 56 FLR 235, 240; Radich v Bank of New Zealand (1993) 45 FCR 101, 105 referring to Bankruptcy Act 1966 (Cth) s 29(2)(a); The Corporations Act 2001(Cth) s 581(2) uses the word ‘must’.

\(^{108}\) Re Ayres; Ex parte Evans (1981) 56 FLR 235, 238.
assistance to other foreign courts in nominated countries exercising bankruptcy jurisdiction.

After examining the interrelationship between the statutory provisions and the Model Law, the New South Wales Supreme Court indicated that the duty to cooperate under Article 25 exists concurrently with a separate duty under s 581(2)(a) of the Corporations Act and that it ‘is therefore possible for this court to perform the s581(2)(a) duty without thereby potentially failing to perform an art 25 duty or otherwise acting inconsistently with art 25’. The court held that if the country from which the request was made was a prescribed country, then the requirement to give cooperation was mandatory, unlike Article 25 which gives the court discretion.

Foreign corporations can be wound up under the provisions of the Corporations Act, either voluntarily or by the courts where such corporations are registered or recognised under the Corporations Act, including those that are registered as foreign corporations. The courts also have the power to wind up other body corporates that have a principal place of business in Australia. The courts’ power to wind up such body corporates is discretionary. The New South Wales Supreme Court has held that the antecedent transactions provisions of the Corporations Act apply to such liquidations. Once a registrable body that is a foreign corporation becomes registered under Division 2 of Part 5B.2 of the Corporations Act or carries on business in Australia, it becomes a Part 5.7 body and a court in Australia has the power to wind it up regardless of whether it subsequently becomes deregistered or ceases carrying on business in Australia. The Australian courts have held that once it has become a Part 5.7 body, it has effectively submitted to the Australian jurisdiction and its laws, including the laws for winding up.

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111 Ibid 322-3 [28]-[30].
112 Corporations Act 2001 (Cth) s 57A for definition of ‘corporation’ and ss 459A, 461 and 491.
113 Corporations Act 2001 (Cth) Part 5.7. ‘Principal place of business is defined in s 583(a) as being the place of its registered office.
114 Titchfield Management Ltd v Vaccinoma Inc (2008) 68 ACSR 448, 450-1 [7].
115 Ibid [32].
The Act provides that to the extent that the provisions of the existing law are inconsistent with the Model Law, the provisions of the Model Law prevail.\footnote{Cross-Border Insolvency Act 2008 (Cth) ss 29-30.}

**4.1.2 Common Law**

Where a body corporate owns assets in Australia but does not carry on business or have a principal place of business in Australia, it will fall outside the provisions of Part 5.7 of the Corporations Act. This may occur where the company merely holds assets such as real estate in Australia. Australian courts can wind up foreign corporations that are not Part 5.7 bodies if Australia is an ‘appropriate forum’. They will decline such jurisdiction only if it is an appropriate forum when the exercising of jurisdiction is ‘clearly inappropriate’.\footnote{Martin Davies, Andrew Bell and Justice Paul Le Gay Brereton, *Nygh’s Conflict of Laws in Australia*, (Lexis Nexis, 8th ed, 2010), 167 [8.13]; MGR Gronow and Rosalind Mason *‘McPherson’s Law of Liquidation’* (Thomson Lawbook Co 5th ed 2006), 17-3052 [17.300]; see Voth v Manildra Flour Mills Pty Ltd (1990) 171 CLR 538, 559-60.} Such a situation would be rare but possible.\footnote{For example a type of semi incorporated body that is has no equivalent in Australia.}

The common law developed various principles with a view to promoting consistency and co-operation in cross-border insolvency matters. These principles were somewhat *ad hoc* and not always consistent.\footnote{Davies, Bell and Brereton, above n 118 725 and see generally *Akers v Deputy Commissioner of Taxation* [2014] FCAFC 57 (14 May 2014) [99]-[105].} In Australia, the position in respect of an individual’s bankruptcy is slightly different from the position of a corporation. In a corporation, that is being wound up the assets remain the property of the corporation unless a vesting order is made to vest them in the liquidator.\footnote{See Corporations Act 2001 (Cth) s 474(2).} The traditional rule in personal bankruptcy that was confirmed by the High Court of Australia in relation to the operation of foreign bankruptcy laws was that the assignment of the divisible bankruptcy assets to the foreign representative affected by a foreign States bankruptcy laws in which the debtor was domiciled operated only as an assignment of the debtor’s movable assets wherever located within the world and as an assignment of the immovable assets owned by the bankrupt within that foreign State. However, once the debtor ceases to be domiciled in that State, the bankruptcy order ceases to have application to moveables acquired thereafter and situated outside that jurisdiction.\footnote{Hall v Woolf (1908) 7 CLR 207, 211.} The Full Federal Court more recently brought into question the extent to which the traditional approach applied in the modern world. The court stated movable property in
Australia belonging to a bankrupt in New Zealand vested in his trustee in New Zealand as did the ability to avoid antecedent transactions. The court went on to state:

While the principle of Hall v Woolf raises difficulties, the actual result seems to be unjust. … Of course, with today’s federal legislation involving prescribed countries and automatic discharge, it is highly unlikely that the fact situation in Hall v Woolf will be repeated. Furthermore, in general circumstances, there seems no significant injustice in allowing after-acquired property to vest in a foreign trustee, even where there are domestic creditors, and there appear to be good reasons of comity for the courts to allow this result.

The Court confined the reasoning in Hall v Woolf to denying to a foreign trustee recognition of title to the bankrupt’s moveables under foreign bankruptcy laws after the bankrupt ceased being domicile in a foreign country. The court further pointed out that insofar as immovable assets are concerned, the court has regularly recognised foreign trustees’ right to such assets by granting assistance under section 29.

The common law principles of comity also apply in Australia which means that foreign representatives can be recognised using this common law principle. Comity will allow a court, when requested by a foreign court to recognise a foreign representatives to whom the Model Law does not apply or who cannot avail themselves of the statutory rights of recognition. This includes the case of corporate debtors that operate as banks or insurance companies in Australia. In such cases, greater Australian court involvement and supervision may be warranted in order to protect the interests of Australian creditors.

It is uncertain whether an Australian Court in the absence of a treaty would enforce a foreign judgment in relation to recovery of assets or antecedent proceedings where the defendant did not participate in the proceedings. Australian courts, are not bound by the United Kingdom’s Supreme Court decision in Rubin v Eurofinance SA (Rubin), but may find it persuasive subject to appropriate facts existing. On the other hand, it is argued that the High Court of Australia may not necessarily follow the decision in

124 Ibid 110 (Einfield J); Drummond J stated that he shared Einfields J’s dissatisfaction that was an acceptable statement of the modern law - Ibid 116.
125 Ibid 118-9.
126 Ibid 119.
127 See, eg, Gainsford v Tannenbaum (2012) 293 ALR 699.
129 See, eg, Ackers v Deputy Commissioner of Taxation [2014] FCAFC 57 (14 May 2014) [150]
Rubin but rather find that insolvency law has its own rules for recognition and are not bound by the general rules that exist for recognition of foreign judgments. As discussed in Chapters 10 and 12 it is argued that this is desirable.

### 4.2 Canada

Section 48(4) of the CCAA makes it clear that seeking an order for recognition under the provisions of their enactment of the Model Law does not prevent proceedings being commenced under the BIA or the *Winding-up and Restructuring Act*.\(^{130}\) Section 61 of the CCAA and section 284 of the BIA provide that nothing in those Acts prevents a court from applying legal or equitable rules governing recognition of foreign insolvency orders.

Section 284 of the BIA provides that nothing in that Act prevents a court, on the application of any foreign representative or other interested party, from applying under the legal and equitable rules governing recognition of foreign insolvency orders and to provide assistance to foreign representatives which are not inconsistent with the Act.

In *Beals v Saldanha* the Supreme Court of Canada confirmed that in order to apply the principles of international comity and recognise a foreign judgement, there must be a real and substantial connection with Canada.\(^{131}\) The Court also determined that the presence of more traditional indicia of jurisdiction such as residence, presence in the foreign jurisdiction and attornment will serve to strengthen the real and substantial connection to the action or parties.\(^{132}\) In *Morguard Investments Ltd v De Savoye*, the Supreme Court of Canada set out considerations to be employed in establishing the ‘real and substantial connection’.\(^{133}\) In *Re Lear Canada*, the Ontario Superior Court stated that the jurisdiction to which the debtor is most closely connected should exercise primary control of the insolvency process and be afforded comity in order to avoid multiple proceedings.\(^{134}\)

Where the debtor is not connected to the jurisdiction whose representatives are seeking comity the court may not grant comity. The Queen’s Bench in Alberta has

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\(^{131}\) [2003] 3 SCR 416, 437 [29].

\(^{132}\) Ibid, 440-1, [37].


refused to recognise under comity Chapter 11 proceedings in the USA of a Canadian company where the company was neither carrying on business nor had any assets in the USA.\textsuperscript{135}

Justice Morawetz has described Canada’s insolvency statues as, although ‘based upon English common law, many of the significant amendments over the past 20 years have been made in order to adopt and follow US practices’.\textsuperscript{136} This historical tie is evidenced by Canada having also applied the English common law principle of hotchpot in relation to the distribution of dividends to foreign creditors.\textsuperscript{137}

### 4.3 New Zealand

Section 8 of the \textit{Insolvency (Cross-border) Act 2006} provides that if a court of another country in an insolvency proceeding makes an order requesting the aid of the High Court in respect of a person to whom Article 1 of the Model Law applies, the High Court may, if it thinks fit, act in aid of and be auxiliary to that court in insolvency proceedings. The High Court can act as if the proceedings had been originated as its own.

The \textit{Companies Act 1993} allows an application to be made to the High Court for the liquidation of a foreign company.\textsuperscript{138} Such applications are not contingent upon the debtor having assets in New Zealand.\textsuperscript{139}

The New Zealand Law Reform Commission recognised that in common law jurisdictions such as New Zealand, the doctrine of comity will apply to assist insolvency administrators appointed in one jurisdiction to gain recognition in other jurisdictions.\textsuperscript{140} The Commission further stated that:

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The justification for granting comity to foreign insolvency proceedings is the need to ensure that a debtor's property is realised as quickly as possible for the benefit of all
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\textsuperscript{135} \textit{Re Singer Sewing Machine Company of Canada Limited} (2000) 259 ABR 364 [8], [26].


\textsuperscript{137} Sarra, above n 77, 24-7.

\textsuperscript{138} \textit{Companies Act 1993} s 342.

\textsuperscript{139} Ibid.

creditors entitled to participate in the distribution of assets …to ensuring maximum returns to creditors on a pari passu basis.\textsuperscript{141}

Gollin has summarised the New Zealand position as follows:

- A New Zealand liquidation of the assets of an overseas company should, in the event of a primary liquidation proceeding elsewhere, be ancillary to the foreign proceeding.
- In principle, the liquidators in the primary overseas proceeding should be recognised as having the right to administer the assets of the debtor in New Zealand, and the New Zealand courts should actively assist the foreign liquidators in carrying out their duties in that respect.
- New Zealand assets should be made available for distribution to creditors universally on a pari passu basis, subject to the retention for New Zealand creditors of any preferential status recognised by New Zealand law.
- Although an overseas liquidator could apply to be a liquidator in a New Zealand liquidation, it was generally preferable to appoint a New Zealand liquidator to act in an ancillary capacity (unless the New Zealand court could be satisfied that an overseas liquidator could give undertakings to protect all creditors entitled to protection under New Zealand law).\textsuperscript{142}

This position, it is argued, has not changed as a result of the introduction of the Model Law. This was confirmed by the New Zealand High Court in \textit{Williams v Simpson}, wherein Mr. Simpson was a psychiatrist who had originally practised in London but had moved to New Zealand many years earlier and commenced practice in New Zealand. He had children who were born, lived and were being educated in New Zealand. Mr. Simpson would also spend several months of each year in England. Mr. Simpson held both UK and New Zealand passports. Mr. Simpson, as part of his investments, became a name in a Lloyds syndicate and when a call was made, he did not pay the same. By reason of being a Lloyds’ name, he was deemed under English law to be carrying on business in that jurisdiction and was made bankrupt. The English Trustee applied for recognition under both the Model Law and for assistance under section 8 of the \textit{Insolvency (Cross-border) Act 2006} based upon a letter of request. The court determined that as Mr. Simpson’s habitual place of residence was New Zealand, and he did not have an establishment in the UK, the English trustee was not recognised.


\textsuperscript{142} Sean Gollin, ‘New Zealand’ in Ho above n 77, 332-3.
under the Model Law. The court did, however, recognise and act in aid of the trustee pursuant to its statutory obligations under section 8. The court adopted the reasoning of Lord Hoffman in the *Cambridge Gas Transport Corporation Limited v Official Committee of Unsecured Creditors (of Navigator Holdings PLC & Ors) (Isle of Man (Cambridge Gas)* in holding that a Universalist approach to international insolvency should be adopted.

### 4.4 United Kingdom

The English courts have traditionally indicated that in order to exercise jurisdiction to wind up a foreign entity, it was ‘necessary to establish that a foreign company has a ‘sufficient connection’ with England’. The English courts have also traditionally considered that their winding-up orders to have worldwide effect even though they may not be recognised under other States’ rules of private international law. Further, where a company is simultaneously being wound up in the country of its incorporation and in England, the English courts will naturally seek to avoid unnecessary conflict, and as far as possible will ensure that the English winding up is conducted as ancillary to the principal liquidation. The default position is that the principle liquidation would be deemed to be the place of incorporation of the company. The English courts have traditionally been able to wind up companies that have been dissolved in their place of incorporation or in another jurisdiction, save where the effect of its dissolution in its place of incorporation is such that it is deemed to have never existed.

It is argued that under the English common law, the courts have the power to assist foreign courts to help a foreign representative pursuant to the principles of comity by doing whatever it can pursuant to domestic English law.

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143 Williams v Simpson [2011] 2 NZLR 380, 393-5.
146 *Re International Tin Council* [1987] Ch 419, 446; *Bilta (UK) Ltd (In Liq) v Nazir* [2013] 1 All ER 375, 391-2 [42]-[43].
148 Sheldon, above n 147, 127 [3.87].
149 Ibid 238 [6.24].
150 *Schmitt v Deichmann* [2012] 2 All ER 1217, 1232-3 [62]-[65]; Sheldon, above n 147 11 [1.30].
In Agbaje v Akinnoye-Agbaje, the United Kingdom Supreme Court described ‘comity’ as a having elastic content and being relevant in three respects:

52. First, comity is sometimes used not simply in the sense of courtesy to foreign states and their courts, but also in the sense of rules of public international law which establish the proper limits of national legislative jurisdiction in cases involving a foreign element. In that sense it will be contrary to comity for United Kingdom legislation to apply in a situation involving a foreign country when the United Kingdom has no reasonable relationship with the situation. ........

53. The second relevant sense in which comity is used is that a court in one country should not lightly characterise the law or judicial decisions of another country as unjust.

54. The third sense in which comity may be relevant is that it is said to be the basis for the enforcement and recognition of foreign judgments.151

In Swiss Air, the English High Court commented that there was nothing that prevented an English Court from ordering remittal of assets to a foreign liquidator if the local law of that liquidator provided for a pari passu distribution to creditors.152 The Court went on to confirm that there are a number of alternate and supplementary ways by which foreign representatives can seek its assistance in the UK.153 In AWB Geneva, the English High Court confirmed that there were various ways in which the Court could assist by recognising a Canadian foreign insolvency proceeding. This was an admiralty case involving two Swiss companies (AWB and Pioneer) suing a Canadian company (NASL) which was subject to restructuring proceedings. The court stated the following in relation to the English common law position:

Not only will the English Court recognise the existence of NASL's bankruptcy and the restructuring proceedings under the CCAA since these are occurring in NASL's place of incorporation, but also it will regard itself as under a duty to give such aid and assistance to the foreign court as it is able to give. This duty is a matter of common law.154

The Insolvency Act 1986 (UK Insolvency Act) provides that a court having insolvency jurisdiction shall assist the court of another relevant jurisdiction as prescribed.155 This power has been said to be limited to requests made by foreign court where there is an

151 [2010] 1 AC 628, 650-1 [51]-[54].
153 Ibid [12].
155 Insolvency Act 1986 c45 ss 426 (4),(11).
insolvency proceeding on foot in that State.\textsuperscript{156} Recognition can occur as a result of an application under the Model Law or by way of a letter of request from a foreign court.\textsuperscript{157} It common law allows the court to apply either the UK domestic law or the law of the relevant State and apply the rules of private international law.\textsuperscript{158} Nothing in these provisions restricts the UK courts’ power to request assistance from a foreign court which is derived from the common law.\textsuperscript{159}

Fletcher comments that section 426 of the UK Insolvency Act was more than a re-enactment of the previous section 122 of the Bankruptcy Act 1914 and that it was ‘so drafted as to make its provisions applicable to corporate as well as to individual insolvency. The hope was also expressed that the remodelled provisions would apply for reciprocal enlargement of the power to give international assistance, particularly within the Commonwealth’.\textsuperscript{160}

The situation in relation to the recognition of foreign judgments arising out of insolvency proceedings is slightly different. Whilst the English Court of Appeal in \textit{New Cap Reinsurance Corporation v Grant} (New Cap Reinsurance) found that a request under section 426 of the UK Insolvency Act can be used for enforcement of a foreign judgement and allowed it to be used to enforce an Australian judgement in respect of an antecedent transaction,\textsuperscript{161} the United Kingdom Supreme Court found that section 426 does not apply to the enforcement of foreign judgments.\textsuperscript{162} The United Kingdom Supreme Court in \textit{Rubin} found that judgements in foreign insolvency proceedings for the recovery of moneys are \textit{in personam} proceedings and that no special rules exist.\textsuperscript{163} Further the Court found that as Model Law 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’.\textsuperscript{164} The court found that as Articles 21 and 25 of the Model Law say nothing about enforcement of foreign judgements and that it

\textsuperscript{156} HSBC Bank v Tambrook Jersey Ltd [2013] 2 WLR 1249, 1252-3 [10]-[13].  
\textsuperscript{157} See, eg, McGrath v Riddell [2008] 3 All ER 869; Fourie v Le Roux [2006] 2 BCLC 531 upheld on appeal [2007] 1 All ER 1087.  
\textsuperscript{158} Insolvency Act 1986 c45 s 426 (5).  
\textsuperscript{159} Sheldon, above n 147, 142 [4.3]; Lord Collins et al (eds), Dicey, Morris and Collins on The Conflict of Laws (Sweet & Maxwell, 15th ed, 2012), 1703 [30-371].  
\textsuperscript{160} Fletcher, ‘Insolvency in Private International Law, National and International Approaches’ above n 44, 227 [4.04].  
\textsuperscript{161} New Cap Reinsurance Corporation v Grant [2012] 1 All ER 755, 769, 776-7, [58], [84]-[85].  
\textsuperscript{162} Rubin v Eurofinance SA [2013] 1 AC 236, 281 [152].  
\textsuperscript{163} Ibid 272 [105], 274 [115]-[117].  
\textsuperscript{164} Ibid 250 [6].
could not be implied that the Model Law was as a basis for a court to allow enforcement of a foreign judgement. The court adopted ‘Dicey Rule’ 43 which states:

[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.166

The court when comparing the decision in New Cap Reinsurance found that as the creditor had participated in the liquidation by lodging proofs of debt, attending creditors’ meetings and voting on resolutions, the creditor had participated in the liquidation which amounted to a ‘step which is only necessary or only useful if’ an objection to jurisdiction ‘has been actually waived, or if the objection has never been entertained at all’.167 The court found that by taking such steps, in particular lodging a proof of debt, the creditor had submitted to the Australian court’s jurisdiction and the judgement was therefore registrable in England under the basic common law principles.168

The decision in Rubin, it is argued, is a move by the UK Supreme Court away from a modified Universalist approach that was adopted by Lord Hoffman in McGrath v Riddell (HIH)169 and Cambridge Gas and a step back towards a more Territorialist approach. This decision has also been criticised for not taking into account the ability to recognise

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165 Ibid 250 [7].The courts judgement was written by Lord Cross who is the editor of the text.  
166 Collins, et al, above n 159, 689-90 [14R-054].  
169 McGrath v Riddell [2008] 3 All ER 869.
a foreign judgement pursuant to the principles in comity. It is questionable the extent
to which Lord Collins was simply adopting the position he set out as editor in Dicey, 
Morris and Collins and not seeking to address the underlying principles associated 
with cross-border insolvency.

In cases involving the reorganisation of insolvency companies, the courts in England
have not automatically recognised the USA Chapter 11 arrangements and the world 
wide stays granted thereunder generally require a proceeding in their jurisdiction to be 
commenced and in that proceeding make an assessment of the reasonableness of the 
proposed reorganisation in light of their domestic regime.

4.5 USA

Prior to enacting Chapter 15 of the Bankruptcy Code the ‘United States followed a 
modified Universalist approach both on pre- Bankruptcy Code case law and as 
embodied in former Bankruptcy Code §304 which provided for comity and in the case 
law interpreting it’. The United States Supreme Court stated, in applying comity, that US bondholders were bound by a Canadian reorganisation proceeding as:

. . . every person who deals with a foreign corporation impliedly subjects himself to such 
laws of the foreign government, affecting the powers and obligations of the corporation 
with which he voluntarily contracts, as the known and established policy of that 
government authorize.

The common law position of comity has been recognised by the courts in the USA as 
early as 1883 and continues to apply. The USA had one rarely-invoked exception to 
sure that it ‘does not prejudice the rights of United States citizens or violate domestic 
public policy’. The Restatement (second) of the Conflict of Laws expresses the 
position on comity as follows:

170 Jodie Kirshner ‘The (false) conflict between due process rights and universalism in cross-
171 Lord Collins et al above n 159.
172 Re T&N Ltd [2005] 2 BCLC 488 [121]-[123].
173 Glosband et al, above n 95, 39.
175 Canadian Southern Railway Co v Gebhard, 109 US 527 (1883).
176 Vitrix SS Co v Salen Dry Cargo AB, 825 F 2d 709, 713.
A valid judgement rendered in a foreign nation after a fair trial in a contested proceeding will be recognized in the United States so far as the immediate parties and the underlying cause of action are concerned.\textsuperscript{177}

In a number of cases in relation to companies that have operated in both Canada and the United States, due to the commercial imperatives, the courts of those States have required proceedings to be issued in both jurisdictions. This is easily achieved due to the similarity that exists between the procedures for reorganisation under both Chapter 11 of the US Bankruptcy Code and the provisions of the Canadian CCAA.\textsuperscript{178} The courts in both States have been willing to enter into insolvency agreements/protocols to coordinate their activities and recognise each other’s decisions in the insolvency proceedings.\textsuperscript{179}

In cases involving the reorganisation of insolvent companies, the US courts have not automatically recognised English Company Voluntary Arrangements and would generally require proceedings in their jurisdiction to be commenced and in those proceedings an assessment to be made of the reasonableness of the proposed reorganisation in light of their domestic regime.\textsuperscript{180}

Chapter 15 of the Bankruptcy Code recognise\s that the granting of recognition, and any assistance given following recognition of a foreign proceeding, must be consistent with the principles of comity.\textsuperscript{181} The Bankruptcy Appeal Panel has held that 'Chapter 15 is fundamentally procedural in nature and does not constitute a change in the basic approach of United States law, which, as we have explained, has long been one of honouring principles of comity'.\textsuperscript{182} This concept has also been expressed that a 'central tenet of Chapter 15 is comity in cross border proceedings'\textsuperscript{183} This implies that principles of comity continue to exist post Chapter 15, and arguably, the provisions in relation to recognition and the types of orders that can be made must not only take into account the provisions of Chapter 15, but may also take into account the USA common law on comity. To put the argument another way, Chapter 15 provides a means by

\textsuperscript{177} American Law Institute, Reinstatement (Second) of Conflict of Laws (1971) § 98.
\textsuperscript{178} Re MuscleTech Research and Development Inc (2006) 19 CBR (5th) 54 [4] Farley J stated that ‘the courts of Canada and of the US have long enjoyed a firm and ongoing relationship based upon comity’.
\textsuperscript{179} See Ziegel, above n 83; See e.g., Re Ephedra Products Liability Litigation, 349 BR 333 (Dist, SD NY, 2006).
\textsuperscript{180} Re T&N Ltd [2005] 2 BCLC 488 [2004] EWHC 2361 (Ch) [121]-[123].
\textsuperscript{181} 11 USC §§ 1507, 1509 (2012).
\textsuperscript{182} Re Iida, 377 BR 243, 256 (BAP, 9th Cir, 2007).
\textsuperscript{183} Re Vitro SAB De CV, 701 F 3d 1031, 1043 (5th Cir, 2012); Re Rede Engeria SA, 2014 WL 4248121 (Bankr, SD NY, 2014).
which comity can be granted. If however, recognition is refused under the Model Law, then the bankruptcy court is authorised to take any action necessary to prevent the US courts from granting comity or cooperation to the foreign representatives. This power of the court is, however, discretionary.

Given the above, it is argued that in the USA, the principles of recognition are not only governed by the Model Law, but also by the principles of comity. Further, in respect of insolvency and reorganisation proceedings in Canada or Mexico, the American Law Institute published Transnational Insolvency: Cooperation Among the NAFTA Countries, Principles of Cooperation Among The NAFA Countries, the principles of which have been adopted, applied or approved by a number of courts.

The US Bankruptcy Court has stated that granting comity is appropriate so long as US parties are ‘provided the same procedural protections that litigants in the United States would receive.’ The court went onto to state:

Chapter 15 does not attempt to unify insolvency law of various countries. It does not address issues such as choice of law, conflict of laws, attachment, set-off, recoupment, or similar property rights. Instead, it leaves such decisions to the discretion of courts. In determining whether comity should be extended, a bankruptcy court’s authority to grant ‘any appropriate relief’ under § 1521 is ‘exceedingly broad’.

This position is not universally supported by the US Bankruptcy Court which has commented that, as the Bankruptcy Code

... does not expressly deal with a proceeding from a foreign country that satisfies neither of these requirements, i.e., a proceeding that is not or was not the debtor’s "center of main interests" or a place where the debtor has or had an ‘establishment.’ Id. BCP draws the implication that in such circumstances the foreign representative is completely shut out of the U.S. judicial system and can obtain no substantive relief whatsoever.

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184 See Re British American Insurance Co Ltd 488 BR 205 (Bankr, SD Fla, 2013) 239;.
185 See, eg, 11 USC § 1509(d) (2012); Re Bear Stearns High-Grade Structured Credit 389 B.R 325,332 (Dist, SD NY, 2008).
186 The American Law Institute, above n 32.
187 Re Sivec SRL, 476 BR 310, 323 (Bankr, ED Okla, 2012).
188 Ibid. 
189 Re Millennium Global Emerging Credit Master Fund Limited, 458 BR 63, 70 (Bankr, SD NY, 2011).
However, it is argued that this comment must be taken in context, wherein the US Bankruptcy Court is a statutory court with limited jurisdiction confined to the jurisdiction granted to the Court under the Bankruptcy Code. The court has indicated that it does not have a general equitable jurisdiction.190 This position has been confirmed by the US Supreme Court which has determined that the Bankruptcy Court only has original jurisdiction in relation to 'core' matters under the Bankruptcy Code and that whilst it can hear 'non core' matters these matters are subject to a de novo review by the US District Court which must enter judgement with respect to non-core matters.191

The issue remains as to whether by using the word 'comity' in Chapter 15, it remains a core matter under the Bankruptcy Code and if so whether the US Bankruptcy Court can also continue to apply the common law principle of comity in addition to the Model Law provisions in Chapter 15. If the enactment of Chapter 15 in the Bankruptcy Code has excluded the ability of the Bankruptcy Court to grant recognition solely under the common law principles of comity, then it follows that no recognition can be granted in relation to those debtors who are excluded from the operation of Chapter 15 under sections 561 and 1501 by that court. It is argued that application under common law principles would have to be made to the District Court in respect of those types of entities, pursuant to its bankruptcy jurisdiction. Additional issues arising from the structure of the US legal system are discussed in section 0.

4.6 Summary

In Australia, New Zealand and the UK, there still exists an alternative statutory regime to the Model Law pursuant to which recognition and assistance can be given to a foreign proceeding and its foreign representative.

In all States examined, the principles of comity continue to apply. Although the common law principles of comity and the tests applicable may differ between some of the States examined, such differences are minor. Each of the States examined would appear to have retained the common law principles of comity and their courts’ ability to

190 See, e.g., Re Loy 380 BR 154, 168 (Bankr, ED Va, 2007). It is suggested this is because the Bankruptcy Court is an Article I and not an Article III court under the US Constitution and is vested with limited jurisdiction. See generally Executive Benefits Insurance Agency v Arkison 134 S Ct 2165 (2014). The US District Court may withdraw cases from the Bankruptcy Court under 28 U.S.C. § 157(d); Re British American Insurance Co Ltd, 2013 WL 765373 (Bankr, SD Fla, 2013).

191 Executive Benefits Insurance Agency v Arkison 134 S Ct 2165 (2014).
recognise foreign proceedings and provide assistance when requested by foreign courts. The test promoted by Canada of a ‘real and substantial connection’ has not been accepted by other jurisdictions.

In the USA, they have sought to link recognition under the Model Law to granting comity, thereby arguably seeking to incorporate their common law principles with those of Chapter 15. The extent of that link is not universally accepted by its courts exercising bankruptcy jurisdiction. In the USA, there is also a question as to whether the Bankruptcy Court has general power to grant common law comity outside the provisions of Chapter 15. If not it may be necessary to make such application in the US District Court. This issue requires further investigation and perhaps legislative change.
Chapter 5
Comparative Analysis of the Enactment and Interpretation of the Preamble and Chapter I of the Model Law on Cross-Border Insolvency - General Provisions

Overview
Chapters 5 to 9 identify where there is a significant variation in the domestic enactment of a provision of the Model Law or where that provision has not been enacted. They further examine how those provisions have been interpreted by the courts of those States.

The UNCITRAL Guide has been referenced by a number of courts when interpreting their domestic version of the Model Law. Chapters Chapter 5 to 9 examine whether it is the basis upon which some uniformity has been achieved in the interpretation of the Model Law, despite the differences in the manner in which the Model Law has been enacted in those States.

This chapter examines how the provisions of the Preamble and Chapter I of the Model Law are enacted by the five nominated States. The preamble sets out the purposes of the Model Law. One of the issues examined in this thesis is whether it is achieving those purposes. Not all States have adopted those purposes in their domestic enactment of the Model Law. Chapter I also sets out the definitional and interpretative provisions of the Model Law, including the types of debtors and representatives to which the Model Law applies, and shows how it interacts with other treaties.

Canada introduced the Model Law by inserting the same into Part IV of the CCAA in respect of large corporate insolvency and restructuring and by inserting it into Part XIII of the BIA in respect of other insolvencies. As their provisions are not identical; the provisions of both acts have been dealt with separately in Chapters 5 to 9.

5.1 Preamble
The purposes of the Model Law are set out and discussed in section 15.2. All of the States examined, other than the UK, have chosen to include the preamble in their version of the Model Law. No explanation has been given as to why it is not included in the UK version of the Model Law. The Canadian version of the Preamble amends the
same to make it consistent with the definitions contained in their existing domestic legislation.

In the USA they substitute for ‘other competent authorities’ in paragraph (a) the ‘United States trustees, trustees, examiners, debtors and debtors in possession’. On one reading this makes the purpose wider than that envisaged by the Model Law. In the USA, the Bankruptcy Court has also highlighted the added flexibility given to the court by the provisions of the Model Law.\textsuperscript{192}

5.2 Article 1

Article 1 sets out the scope of the Model Law which is designed to be an inclusive approach so as to catch all types of foreign proceedings other than those excluded.\textsuperscript{193} The Model Law envisages the inclusion of a number of local exclusions in its operation in different States.\textsuperscript{194} There appears to be no consistency between the five identified States as to the type of debtors that are to be excluded from their domestic versions of the Model Law.

In Australia, the following types of insolvencies are excluded:

(a) Parts 5.2 of the \textit{Corporations Act} which relates to Receivers and Controllers;\textsuperscript{195}

(b) Part 5.4A of the \textit{Corporations Act} which relates to the winding up on grounds other than insolvency;\textsuperscript{196}

(c) Section 601CL of the \textit{Corporations Act} which relates to the winding up of Foreign Companies;\textsuperscript{197} Mason has commented that this section reflects an anomaly as it deals with the appointment of a local liquidator where a foreign

\textsuperscript{192} \textit{Re Sphinx Ltd}, 351 BR 103, 112-4 (Bankr, SD NY, 2006).
\textsuperscript{194} Art 1(2).
\textsuperscript{195} \textit{Cross-Border Insolvency Act 2008} (Cth) s 8.
\textsuperscript{196} Ibid.
\textsuperscript{197} Ibid.
company registered under Part 5B.2 is being wound up in its place of incorporation.\(^{198}\).

(d) Australian Deposit Taking Institutions (ADIs) as defined under the *Banking Act 1959* (Cth)\(^ {199}\).

(e) General Insurers as defined under the *Insurance Act 1953* (Cth)\(^ {200}\) and

(f) Life Insurance companies as defined under the *Life Insurance Act 1995* (Cth)\(^ {201}\).

The exclusion in Australia of receivers and controllers appears to be largely unnecessary as these types of administrations would not generally fit within the definition of a foreign proceeding as they are not usually collective proceedings as they tend to be private appointments by a secured creditor seeking to enforce their security. It can only be speculated that the draftsperson inserted a reference to receivers and controllers so as to give some indication to both domestic representatives and foreign courts that representatives in these types of positions should not be able to avail themselves of the corresponding provisions in other States.

In the case of court-appointed receivers in Australia, whilst such proceedings can be collective in nature, such administrations are unusual for corporations and are generally only an interim measure whilst a determination is made of the entities’ solvency and future, and as such may not be seen as proceedings relating to insolvency.

Court-appointed receivers of trust assets under the Trustee Acts of the relevant Australian States or of managed investment schemes under the *Corporations Act* are not excluded and may fit within the definition of a foreign proceeding depending upon the relevant domestic law of the State in which recognition is being sought.

Canada has no equivalent to paragraph 1 of this article in either of their enactments. However, there is a provision for the existing law to continue to apply.\(^ {202}\) New Zealand excludes registered banks whilst the UK and USA versions, in addition to entities

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\(^{198}\) Mason, above n 40, 217. Section 601CL is in Chapter 5B of the *Corporations Act 2001* (Cth).  
\(^{199}\) Cross-Border Insolvency Regulations 2008 (Cth) reg 4.  
\(^{200}\) Ibid.  
\(^{201}\) Ibid.  
\(^{202}\) *Companies Creditors Arrangement Act*, RSC 1985, c C-36 s 61.
involved in the finance and insurance industries, exclude debtors involved in railroads and other public infrastructure within their jurisdictions.

Furthermore, the UK excludes *European Economic Area* credit institutions and third country credit institutions that have permission to operate in the UK. However, these exclusions do not appear to extend to debtors who operate in those industries in other States outside Europe. The courts’ powers to grant relief are further restricted by the provisions of a number of other domestic enactments. Both Lastra and Ho have commented that the exclusion of UK credit institutions and insurers may be defensible in light of the special resolution regime under the *Banking Act 2009* and given the special rules applying to insolvency of those types of institutions and the compensation scheme available. However, they see the exclusion of European Economic Area (EEA) credit institutions, third country credit institutions, EEA Insurers and third party insurers as creating unnecessary inconsistencies, since the English courts have previously recognised some foreign banks. Lastra has commented that the exclusion of credit institutions was not driven by well-reasoned principles but rather by legislative agenda and the government’s intention to extend it to credit institutions although it has not done so to date.

The USA also excludes stockbrokers and debtors who are individuals and citizens or residents of the USA with a small amount of income. It would therefore appear that it would not be possible to seek recognition in respect of an individual debtor who has no property in the United States and who is not a citizen or permanent resident of the United States. No other State examined has this exclusion and it should be seen as being territorialist as this provision will limit the ability of the trustees of individuals to collect assets for their administration based upon the provisions of the Model Law. Melnik has commented that residents of other countries, other than the USA, are not affected by this exclusion and thus their proceedings can be recognised.

In the USA, in addition to the type of debtors set out in s1501, Chapter 15 of the Bankruptcy Code does not apply to enforcement of:

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204 See Banking Act 2009 c 1, Parts 2, 3 and 4.
206 Lastra, above n 45, 217 [9.41]; Ho, above n 77, 144-5.
208 Lastra, above n 77, 218 [9.44].
210 Selinda A Melnik, 'United States' in Ho, above n 77, 477-8.
(a) security contracts;
(b) commodity contracts;
(c) forward contracts;
(d) repurchase agreements;
(e) swap agreements; and
(f) master netting agreements.\(^{211}\)

These provisions therefore require a foreign representative to review the purpose for which they are seeking recognition and restrict a foreign representative’s right to recover some contractual assets in the USA. The USA version of this article also creates larger purposes for the legislation than is set out in the Model Law and must be read with that part of the section that incorporates the Model Law’s preamble.

The reasonableness and effect of these exclusions are discussed further in Chapter 10.3.2. UNCITRAL is also looking at dealing with Financial Institutions separately because of the special domestic regimes that exist in States to protect consumers. Their discussion paper is analysed in section 14.5.

### 5.3 Article 2

The definitions contained in Article 2 have not been adopted by all States. This has and will lead to different meanings being given to equivalent phrases in different States. In Australia, there is no alteration to the Model Law definitions.

In Canada a ‘company’ is defined as including any incorporated body or income trust.\(^ {212}\) An income trust is defined as one that is listed on a prescribed stock exchange or the majority of which units are held by another trust listed on a prescribed stock exchange.\(^ {213}\)

In New Zealand, definitions have been added in relation to ‘insolvency administrator’ and ‘New Zealand insolvency proceeding’. An insolvency proceeding includes

\(^{211}\) 11 USC § 561(d) (2012).
\(^{212}\) Companies Creditors Arrangement Act, RSC 1985, c C-36 s 2(1).
\(^{213}\) Ibid.
bankruptcy, liquidation, receivership, judicial management, statutory management, voluntary administration or reorganisation. In New Zealand, it is also noteworthy that a private insolvency representative appointed by a corporate body is not required to be licensed and any independent individual can be appointed.\textsuperscript{214}

In the UK, a number of definitions have been added including those relating to ‘British insolvency law’, ‘British insolvency officeholder’, ‘secured creditor’ and ‘security’. The definition of the law of Britain that is included in the definition of ‘British insolvency law’ specifically includes a reference to the British rules of private international law. This article also requires the British courts to look at the Model Law, UNCITRAL Guide and any other documents from the UNCITRAL working groups created in the preparation of the Model Law when interpreting the Model Law.\textsuperscript{215} The issue as to how the Model Law should be interpreted is discussed in sections 10.3, 12.3 and 13.1.

In the UK, the definition of ‘establishment’ has also been changed by substituting the word ‘assets’ for ‘goods’ thereby covering land and intangible property.\textsuperscript{216}

In the USA, a number of the definitions are contained in the general definitions section of the Bankruptcy Code.\textsuperscript{217} A limited definition of ‘debtor’ is included for the purposes of Chapter 15 which defines it as ‘an entity that is the subject of a foreign proceeding’.\textsuperscript{218} An entity is defined as including a person, estate, trust, government unit and the United States trustee.\textsuperscript{219}

It is argued that a substance over form analysis should be conducted in order to determine which type of debtors that fit within the definitions contained in the Model Law. The laws of the State of origin of the foreign proceeding must be taken into account when making that analysis. In addition individual States should not be bound by their own domestic rules of interpretation, rather, given the international origin of the Model Law, a more international approach is intended to apply regardless of the system of law that operates within a State domestically.\textsuperscript{220} Furthermore, Article 8 compels a court interpreting its definitions and other provisions to construe it without

\textsuperscript{214} Companies Act 1993 ss 239F, 280.
\textsuperscript{215} The Cross-Border Insolvency Regulations 2006 SI 2006/1030, reg 2(b).
\textsuperscript{216} Roy Goode Principles of Corporate Insolvency Law (Sweet & Maxwell, 4th ed, 2011), 801 [16-27].
\textsuperscript{217} 11 USC § 101 (2012).
\textsuperscript{218} Ibid § 1502(1).
\textsuperscript{219} Ibid § 101(15).
any assumptions arising from the domestic legal system. This analysis is also consistent with the modified Universalist approach which is the principle behind the Model Law.

In relation to the specific definitions and phrases contained in the Model Law, a comparative analysis is set out below:

5.3.1 Foreign Proceedings

A foreign proceeding is required to be a collective proceeding in which the debtor’s assets are realised for the benefit of all creditors.\(^{221}\)

Australia, New Zealand and the UK have not changed this definition. The Canadian definition of foreign proceedings appears to require the same elements as the Model Law but is worded differently.

In the USA, the purpose of a foreign proceeding is extended to include not only insolvency but also ‘adjustment of debt’. The House Report indicates that this amendment was designed to make it consistent with the US law.\(^{222}\) It is argued that it does more than this as it anticipates debtors seeking recognition when the purpose of the appointment of the foreign representative is to restructure the debt of the debtor which may otherwise be solvent.

The US Bankruptcy Court, has also determined that the word ‘proceeding’ requires a broader definition than that used in American domestic law, ‘in order to achieve the statutory directive of interpretation consistent with the understandings and usages of international law and the UNCITRAL Model Law’.\(^{223}\)

Consistent with the above argument in respect of the interpretation of the Model Law requiring a court to look at the international origin, the English High Court and the US Bankruptcy Court have both stated that foreign proceedings should be determined according to the law of the State in which the proceedings are issued.\(^{224}\) This has led


\(^{223}\) Re Betcorp Ltd, 400 BR 266, 280 (Bankr, D.Nev, 2009).

\(^{224}\) 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).
to the recognition under the Model Law of legal structures of debtors, the subject of foreign proceedings that are not recognised under a State’s domestic laws.\textsuperscript{225}

It is argued that the definition of ‘Foreign Proceeding’ envisages a separate proceeding in respect of each debtor by reason of the use of the word ‘the’ before the word ‘debtor’ in the definition and throughout the Model Law. This necessarily means that it is not intended to deal with corporate groups as part of a single application for recognition.\textsuperscript{226}

In the USA, it is not uncommon for more than one debtor within a corporate group to apply for restructuring under Chapter 11.\textsuperscript{227} This appears to require separate applications for recognition to be made in respect of each of the debtors, which may give rise to issues of uncertainty where those entities may possibly have different centre’s of main interest. The issue of corporate groups is discussed further in section 14.3.

5.3.2 Centre of Main Interest (COMI)

COMI is not defined in the Model Law, but is referred to in the EC Regulation as corresponding ‘to the place where the debtor conducts the administration of his interests on a regular basis and there is therefore ascertainable by third parties.’\textsuperscript{228} Virgos and Schmidt have stated that in respect of the EC Regulation, in the case of professionals, it will be the place of their professional domicile and for natural persons their habitual residence.\textsuperscript{229}

The EC Regulation also contains a registered office rebuttable presumption.\textsuperscript{230} In the EC Regulation COMI is used to determine which member States’ courts have power to open a proceeding. Another member State is able to open an insolvency proceeding

\textsuperscript{225} Eg in Rubin \textit{v} Eurofinance SA ibid, the High Court recognised a US trust which was the subject of Chapter 11 proceedings. Trusts are not separate legal entities under English law and therefore could not be the subject of restructuring proceedings through an administration proceeding.

\textsuperscript{226} See UNCITRAL has dealt differently with the issue of corporate groups and has issued the United Nations Commission on International Trade Law, \textit{Legislative Guide on Insolvency Law, Part three: Treatment of enterprise groups in insolvency} UN Publication Sales No E.12.V.16.

\textsuperscript{227} See \textit{Re Lehman Brothers Holdings Inc}, 422 BR 407 (Bankr, SD NY, 2010).


\textsuperscript{229} Virgos & Schmidt, above n 28, [75] It is argued that the professional domicile would be the jurisdiction in which the person had their principal place of business when providing their services

only if the debtor has assets within that member State. There is a controversy regarding the interpretation of this phrase which is dealt with under Article 17 below.

Justice Lewison at first instance in Re Stanford International Bank Ltd commented that it is a reasonable inference that COMI under the Model Law would have the same meaning as in the EC Regulation as the Model Law was designed to provide a ‘complementary regime’ to the EC Regulation. His Honour considered that he did not need to decide if he was strictly bound to follow Re Eurofood IFSC Ltd (Eurofood) and therefore did not consider the effect of Article 2 which in the English version of the Model Law required him to apply the EC Regulation in the case of an inconsistency between the Model Law and the EC Regulation. The Court of Appeal in Re Stanford International Bank Ltd (Stanford International Bank) commented that as both the Model Law and EC Regulation apply in England and Wales, it was essential that the phrase be interpreted ‘in a manner consistent with each other’. This view has been subsequently supported in both Australia and New Zealand.

Despite the provisions of Article 8 requiring that the Model Law’s international origin be taken into account, and to promote uniformity in its application, the issue that must be examined in looking at the UK decision in Stanford International Bank is the extent to which the court considered or relied upon the UK amendment to Article 3 and Regulation 2(d). Those provisions required the court to give preference to the interpretation offered in Eurofood rather than looking to independently determine the meaning of COMI for the purposes of the Model Law. No mention is made in either the judgement at first instance of Justice Lewison or the decision of the Court of Appeal of the amended version of Article 3 as it appears in the UK regulation, which provides that to the extent that the Model Law conflicts with the EC regulation, the provisions of the EC Regulation prevail.

The courts in the USA have adopted a different position in relation to the interpretation of the meaning of COMI and the rebuttable presumption contained in Article 16. The

231 Ibid art 3.2.
233 Re Eurofood IFSC Ltd, [2006] Ch 508.
236 See comments under art 17.
237 Cross-Border Insolvency Regulations 2006 SR 2006/1030.
interpretation of COMI and the interrelationship of its meaning in the EC Regulation are discussed further in sections 7.2, 7.3, 11, 12 and 13.

5.3.3 Collective Proceedings

The term ‘collective proceedings’ is not defined in the Model Law but is in the EC Regulation which defines it by reference to a list of types of insolvency proceedings which is set out in an annexure to the regulation.\(^{238}\) No such list is contained in the Model Law and it is therefore up to the courts to determine whether foreign insolvency proceedings fit within the definition. It is arguable that the courts can rely upon Article 8 to refer to decisions in other States that consider the meaning of this term.

UNCITRAL Guide has been amended to give further guidance on the term ‘collective proceeding’ so as to ensure that the name or type of proceeding is not determinative.\(^{239}\) This followed UNCITRAL Working Group V’s recommendation that it was necessary to look at the substance of the same, in particular the following four factors:

(a) ‘Whether substantially all of the assets and liabilities of the debtor are dealt with in the proceeding, subject to local priorities and statutory exceptions, and to local exclusions relating to the rights of secured creditors;

(b) Whether creditors that are adversely affected by the proceeding have a right (though not necessarily the obligation) to submit claims for determination, and to receive an equitable distribution or satisfaction of their claims;

(c) Whether such creditors have a right to meaningful participation in the proceeding;

(d) Whether there are procedures in place for notice to such creditors so that they can meaningfully participate in the proceedings’.\(^{240}\)

In amendments to the UNCITRAL Guide, it is states that the Model Law is not intended to be used merely as a collection device for a particular creditor or group of creditors.


who might have initiated a collection proceeding in another State.\textsuperscript{241} It further states that a ‘proceeding should not be considered to fail the test of collectivity purely because a class of creditors is unaffected by it’.\textsuperscript{242} It offers the example of secured creditors not being bound by the collective proceedings. In Australia, for the reasons expressed above, court-appointed receivers and receivers of trusts may fit within the definition of a collective proceeding.

The situation in Canada is not as clear. The Ontario Superior Court of Justice recognised the appointment of a US court-appointed receiver as the first stage of a process which would lead to liquidation as assets were recovered and distributed to investors in a Ponzi scheme. The investors did not comprise the total group of creditors as there were other unsecured creditors who would not benefit from the receiver’s recoveries. The receiver had been appointed only for the purpose of recovering assets for the investors in the Ponzi scheme. The Court found that it should give a ‘purposive interpretation to the definition of ‘foreign proceeding’ and in part based its reason upon the fact that recognition of the receivership as a foreign proceeding obviates the need for the Canadian courts to appoint parallel receivership proceedings.\textsuperscript{243} It is argued that this decision appears to ignore the necessity for an insolvency administration to be a collective proceeding in order to be a foreign proceeding under the Model Law, which is a necessary element according to the definition contained in Article 2. It is noted that under the Canadian legislation, it is only necessary for the proceedings to deal ‘with creditors’ collective interests generally’. There is no need for the proceeding itself to be collective in nature. It is argued that unless a substance over form analysis is conducted in Canada and this decision is followed, it will have the effect of greatly widening the type of insolvency administrations to be recognised and create a potential for inconsistent recognition.

In New Zealand and the UK, the Model Law provides that it applies to receivers where they are acting for the benefit of all creditors or appointed by the court.\textsuperscript{244} The New Zealand High Court considered the term \textit{collective} as distinguishing ‘a formal regime (under which the debtors assets are realised for the benefit of all creditors) from private

\textsuperscript{242} Ibid [70].
\textsuperscript{243} \textit{Zayed v Cook} (2009) 62 CBR (5th) 114 (ONSC).
\textsuperscript{244} In the United Kingdom, privately appointed administrative receivers are practically no longer appointed as their appointment is terminated by the appointment of an administrator: \textit{Enterprise Act 2002} c40 sch 16 [41], [43].
proceedings against a debtor, in which a single creditor seeks judgement for its own benefit'. In *Stanford International Bank*, the English Court of Appeal determined that as the application for recognition was by a receiver appointed by a regulator under a law that was to protect investors, it was not a law relating to insolvency; nor was it a collective proceeding as it was for the benefit of the investors and not the wider class of creditors.\(^{246}\)

In *Re ABC Learning Centres Ltd*, Judge Gross of the US Bankruptcy Court stated that a proceeding ‘is collective if it considers the rights and obligations of all creditors’.\(^{247}\) In *Betcorp*, Judge Markell found that it ‘is one that considers the rights and obligations of all creditors. This is in contrast to a receivership remedy instigated at the request and for the benefit of a single secured creditor’.\(^{248}\) The US Bankruptcy Court has also held that a collective proceeding:

> ... contemplates both the consideration and eventual treatment of claims of various types of creditors, as well as the possibility that creditors may take part in the foreign action. ... In determining whether a particular foreign action is collective ... it is appropriate to consider both the law governing the foreign action and the parameters of the particular proceeding as defined in, for example, orders of a foreign tribunal overseeing the action.\(^{249}\)

and

Other characteristics of a collective proceeding include: adequate notice to creditors under applicable foreign law, provisions for the distribution of assets according to statutory priorities, and a statutory mechanism for creditors to seek court review of the proceeding. However, the standard for notice is not a demanding one.\(^{250}\)

The US District Court has held that when considering whether a proceeding is collective, the court is concerned with ‘not just what statutory mechanisms exist but also how involved creditors are in practice’.\(^{251}\)

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\(^{245}\) *Williams v Simpson* [2011] 2 NZLR 380, 383.

\(^{246}\) [2011] Ch 33, [27].

\(^{247}\) *Re ABC Learning Centres Ltd*, 445 BR 318, 328 (Bankr, D Del, 2010) affirmed *Re ABC Learning Centres Ltd* 728 F 3d 301 (3rd Cir, 2013).

\(^{248}\) *Re Betcorp Ltd* 400 BR 266, 281 (Bankr, D Nev, 2009).

\(^{249}\) *Re British American Insurance Co Ltd*, 425 BR 884, 902 (Bankr, SD Fla, 2010).

\(^{250}\) *Re Ashapura MineChem Ltd*, 480 BR 129, 137 (Dist, SD NY, 2012).

\(^{251}\) Ibid 141.
As indicated above, courts in New Zealand, the UK and the USA have recognised collective proceedings as a formal regime which takes into account the interests, and is for the benefit, of all creditors as opposed to a representative appointed to look after the interests of one or more creditors.

Ho has commented that US case law has confirmed that equity receiverships in the USA perform the same function as bankruptcy proceedings and may avoid the need for bankruptcy proceedings.\textsuperscript{252} He postulates that these types of administrations may be recognised. If he is correct, then by applying the proper analysis referred to above, such proceedings may be recognised.

5.3.4 Foreign Main Proceeding

All States examined have essentially adopted the definition of a foreign main proceeding as set out in the Model Law. This definition requires that the proceeding take place in the State where the debtor has its COMI. The meaning of this phase is considered further in section 7.2 and Appendix 1.

5.3.5 Foreign Non-Main Proceeding

In all States examined other than Canada, in order for there to be foreign non-main proceeding, the debtor must have an establishment in the State of that proceeding.

In Canada, there is no need for there to be an ‘establishment’. There is no definition or mention of the word ‘establishment’ or any similar word in their legislation. If there is a foreign proceeding and it is not a foreign main proceeding, then it can be recognised as a foreign non-main proceeding. It is argued that one explanation for this difference in the Canadian legislation may be the American Law Institute’s Report which recommended a procedure be adopted such that once a main proceeding for reorganisation is recognised in a NAFTA country, other NAFTA States should adopt the plan by opening non-main proceedings.\textsuperscript{253} Hence, a debtor is not required to have an establishment within Canada in order to be able to recognise such non-main proceedings. This has meant that the Canadian courts have tended to recognise proceedings, where such proceedings are based upon a debt being incurred in the foreign jurisdiction or where a business has been conducted within the jurisdiction of


\textsuperscript{253} The American Law Institute, above n 32, Rec 5.
the foreign proceedings.\textsuperscript{254} The Canadian courts have been able to recognise all US-based foreign proceedings, with the real issue being what remedies or orders should be granted as a matter of discretion if the foreign proceeding is not a foreign main proceeding.\textsuperscript{255}

The Canadian position, to all appearances, adopts a more Universalist approach by allowing recognition of a wider range of insolvency administrations. However it is argued that it also defeats the Model Law’s attempt to achieve a degree of uniformity, harmonisation and certainty in the recognition of foreign insolvency and reconstruction proceedings between States as it will inevitably lead to inconsistency in relation to proceedings that are recognised and may lead to forum shopping.

\subsection*{5.3.6 Foreign Representative}

The States examined, other than Canada, have essentially adopted the definition of ‘foreign representative’ contained in the Model Law.

Canada’s definition of foreign representative is different in that it only requires a representative to monitor rather than administer a reorganisation. It is argued that this may give rise to a broader category of person being recognised and will allow examiners with appropriate powers under Chapter 11 proceedings and holders of other statutory appointments issued in the USA to be recognised. Debtors in possession in respect of companies subject to Chapter 11 proceedings in the USA have been recognised as foreign representatives even though they are generally officers of a corporate debtor.\textsuperscript{256}

\subsection*{5.3.7 Foreign Court}

The definition of ‘foreign court’ includes both judicial and other authorities which are competent to control or supervise a foreign proceeding. Such authorities can be administrative. In \textit{Re Betcorp}, the US Bankruptcy Court expressed the view that the phrase ‘foreign court’ ‘should be given a broad meaning and include a person or body

\textsuperscript{254}See, eg, \textit{Re Magna Entertainment Corp} (2009) 51 CBR (5th) 82.
\textsuperscript{255}See \textit{Re Probe Resources Ltd} [2011] BCSC 552 [31]-[32].
empowered by national law to open insolvency proceedings.’ 257 The court was satisfied that an Australian voluntary liquidator was supervised by both the Australian courts and the Australian Securities and Investments Commission which was an administrative body.

In *Re Tradex Swiss AG*, the US Bankruptcy Court recognised a Swiss investigator appointed by the Swiss Federal Banking Commission over the company’s assets as a foreign representative as it was an administrative proceeding and the administration as a foreign main proceeding since the Swiss Federal Banking Commission fitted within the definition of foreign court being an administrative authority that supervised a foreign proceeding.258

5.3.8 Establishment

The definition of ‘establishment’ and the time it is to be determined is discussed in sections 11.2 and 11.3.

5.3.9 Other Definitions

In all States examined other than Australia, additional definitions have been inserted into the Model Law. Not all of these additional definitions are examined in this thesis.

Questions have been raised as to what is meant by an ‘interim appointment’ and whether it includes someone who has been appointed but whose appointment has not yet commenced (e.g. stay of order making appointment). This is currently being looked at by UNCITRAL.259

In New Zealand, definitions have been added in relation to ‘insolvency administrator’ which is defined as including a statutory manager, the Official Assignee, a receiver, liquidator or administrator.260 The definition of ‘receiver’ is not confined to court-appointed receivers.261

In the UK, the definition of ‘British insolvency officeholder’ has been added and refers to an official receiver (appointed by the Court), liquidator, provisional liquidator, trustee,

257 *Re Betcorp Ltd*, 400 BR 266, 277 (Bankr, D Nev, 2009).
258 384 BR 34 (Bankr, D Mass, 2008).
260 Art 2(h).
261 Receiverships Act 1993 s 2(1).
interim receiver or nominee or supervisor of a voluntary arrangement, the Accountant in Bankruptcy in Scotland and a person acting as an insolvency practitioner except as an administrative receiver.\textsuperscript{262}

Although there is a reference to private international law in the definition of ‘\textit{British insolvency law}’ in the UK version of the Model Law, it is argued that the non-inclusion of a reference to the rules of private international law in the other States’ definitions does not mean that those rules otherwise apply to proceedings for which recognition has been sought.\textsuperscript{263} This issue is discussed further in Chapter 13.

In Canada, in the CCAA the terms ‘\textit{debtor}’ and ‘\textit{company}’ also include an income trust which is a unit trust that is listed or a unit trust the majority of whose units are held by a listed trust.\textsuperscript{264} A similar provision is not contained in the BIA.\textsuperscript{265}

The definition of ‘\textit{debtor}’ in the USA Chapter 15 refers to an ‘entity’ which is defined as including an estate and a trust which are not under general common law principles separate legal entities.

In the USA, a definition of ‘\textit{trustee}’ has been added which includes a trustee under another chapter, debtor and a debtor in possession.\textsuperscript{266} Section 1501 states that one of the purposes of Chapter 15 is to encourage cooperation between foreign authorities and debtors in possession. A debtor in possession therefore has the ability to make applications under section 1505 to act in a foreign country on behalf of the estate and has the right to communicate with and cooperate with a foreign representative under section 1526. This is inconsistent with other provisions in the Model Law, as a debtor in possession may not fit within the definition of a foreign representative as it is a debtor which is subject to proceedings under the Bankruptcy Code that still remains in the control of its management rather than an independent person or trustee.\textsuperscript{267} However, in order to allow all Chapter 11 reorganisation proceedings to fit within the Model Law, it has been necessary to expand this definition.

\begin{footnotesize}
\begin{enumerate}
\item Art 2(b).
\item See, eg, Mason, ‘Cross-border insolvency: Adoption of CLERP 8 as an evolution of Australian insolvency law’, above n 40, 218.
\item Companies Creditors Arrangement Act, RSC 1985, c C-36 s 2(1).
\item Bankruptcy and Insolvency Act, RSC 1985, c B-3.
\item 11 USC § 1101 (2012).
\item Ibid.
\end{enumerate}
\end{footnotesize}
The phrase ‘a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject’ was considered in Australia by the Supreme Court of New South Wales in _Re Chow Cho Poon_, where the court after referring to the English decision in _Stanford International Bank_[^268] and the USA decisions in _Betcorp_[^269] and _ABC Learning Centres_[^270] stated that the test does not involve whether the debtor’s insolvency resulted in the foreign representatives appointment but rather that the foreign representatives appointment was under law relating to insolvency.[^271]

In _Stanford International Bank_, the English Court of Appeal also looked at the meaning of a ‘law relating to insolvency’ and agreed that this law did not have to be statutory or relate exclusively to insolvency.[^272]

Ho and Sheldon have suggested that the Model Law is not intended to apply to members’ voluntary liquidations in the UK and possibly Australia as they are not based upon a resolution or finding of insolvency.[^273] By extension it is argued that this could also be said of just and equitable windings up where insolvency is not an issue. It is argued that this gives too narrow an interpretation of this phrase and ignores that such proceedings may relate to reorganisation.[^274]

In _Betcorp_[^275], the US Bankruptcy Court after determining that the word ‘proceeding’ requires a broader definition than that used in American domestic law adopted what is said in

Paragraph 10 of the introductory recitals of the EU Regulation states:

> Insolvency proceedings do not necessarily involve the intervention of a judicial authority; the expression “court” in this Regulation should be given a broad meaning and include a person or body empowered by national law to open insolvency proceedings. In order for the Regulation to apply, proceedings (comprising formalities set down in law) should not only have to comply with the

[^269]: _Re Betcorp Ltd_, 400 BR 266 (Bankr, D Nev, 2009).
[^270]: _Re ABC Learning Centres Ltd_, 445 BR 318 (Bankr, D Del, 2010).
[^273]: Ho, above n 77, 166,168; Sheldon, above n 147, 111-2 [3.35].
[^275]: _Re Betcorp Ltd_, 400 BR 266 (Bankr, D Nev, 2009), adopted in _Re ABC Learning Centres Ltd_ 728 F 3d 301 (3rd Cir, 2013).
provisions of this Regulation, but they should also be officially recognised and legally effective in the Member State in which the insolvency proceedings are opened.\textsuperscript{276}

Judge Markell further stated that a proceeding is constituted by:

acts and formalities set down in law so that courts, merchants and creditors can know them in advance, and apply them evenly in practice. In the context of corporate insolvencies, the hallmark of a “proceeding” is a statutory framework that constrains a company’s actions and that regulates the final distribution of a company’s assets.\textsuperscript{277}

The court recognised an Australian creditor’s voluntary liquidation as a foreign proceeding even though no court had been involved in the appointment of the liquidators, but rather they had been appointed initially as administrators by the company’s directors. The court further found that the liquidators were supervised by the Australian Securities and Investments Commission that was an administrative body that supervised foreign proceedings as well as the courts of Australia.

In \textit{JSC BTA Bank}, the US Bankruptcy Court held that the term ‘\textit{debtor}’ upon recognition of a foreign proceeding was restricted to a debtor within the jurisdiction of the USA and to foreign debtors in respect of property located within the USA.\textsuperscript{278}

\subsection*{5.3.10 Practical Implications of the Definitional Section}

It is argued that differences in the interpretation of the Model Law arise in part because not all States that have adopted the Model Law are necessarily required to give the same weight to the UNCITRAL Guide as they must be interpreted in accordance with the provisions of the domestic enactment in which they are incorporated. It is questionable whether the interpretation of similar phrases by the European Courts in respect of the EC Regulation can be classed as admissible extrinsic material. However, there is an argument that in places where the EC Regulations and the Model Law track each other, such decisions should carry persuasive value.

Article 8 obliges courts to take into account the international origin of the Model Law and the need to promote uniformity in its application and the ‘observance of good faith’. However, it is arguable whether this applies in circumstances where a State that has

\textsuperscript{276} Ibid, 277-8 (Bankr, D Nev, 2009).
\textsuperscript{277} Ibid 278.
\textsuperscript{278} \textit{Re JSC BTA Bank}, 434 BR 334, 343 (Bankr, SD NY, 2010).
adopted the Model Law has not enacted it by adopting the Model Law per se but rather, as Canada has done, has sought to incorporate the spirit of the law into its domestic legislation. The same can be said about those States that have intentionally amended definitions within their domestic version of the Model Law as has occurred in the UK and the USA.

It is arguable whether in all States examined other than Canada, the provision of Article 8 would allow those States to obtain guidance for the UNCITRAL Guide in their interpretation in their domestic version of the Model Law. Canada does not incorporate in its domestic legislation the provisions of Article 8. This may in the future give rise to tension between courts of different States on how phrases within the Model Law are to be interpreted. This issue is discussed further in sections 10.3.9 and 11.6.

There is also a difference in judicial interpretation as to the date upon which the COMI and establishment is to be determined. This issue is dealt with further in section 11.3.

Despite the UNCITRAL Guide referring to the EC Regulation as the origin of certain concepts within the Model Law, it is questionable that States would be obliged to follow the previous European interpretations of similar provisions if they believe them wrong merely because of the provisions of Article 8. This aspect is discussed further in section 13.1.

5.4 Article 3

As the Model Law is designed to be a domestic law, this Article gives the enacting States the opportunity to comply with their international obligations by providing that to the extent that the Model Law is inconsistent with an obligation of a State under a treaty or other agreement, the provisions of the treaty and the agreement prevail.

Canada has no equivalent of this Article which may cause some issues in the future as there is no certainty as to whether the domestic provisions of the Model Law will prevail over other treaties or international agreements. This will depend upon Canada’s domestic conflict of law provisions.

The alteration to the UK version makes it clear that the provisions of the EC Regulation prevail over the provisions of the Model Law. This necessarily means that where a debtor conducts business and has an establishment outside the European Union, there is the possibility of inconsistent findings regarding the location of the debtor’s main centre of interest and whether recognition should be granted. A question exists as to
the extent (if any) to which the UK courts have sought to interpret the provisions of the Model Law consistently with the provisions of the EC Regulation to avoid such inconsistencies. The Court of Appeal in *Stanford International Bank* stated that this was its main reason for determining that the meaning of COMI should follow the pre-existing decision in respect of the EC Regulation.\footnote{Re Stanford International Bank Ltd [2011] Ch 33, 60, [53]-[54], 93,[150].} The Court also referred to the fact that the UNCITRAL Guide refers to the EC Regulation which shows that it should have a similar meaning.\footnote{Ibid 60 [53].} The UNCITRAL Guide also refers to the EC Regulation in respect of a number of provisions. However, the Court did acknowledge that this may still not lead to consistent decisions if different facts are presented to different courts.\footnote{Ibid 93 [150].}

Further, in relation to a number of provisions of the Model Law, the UNCITRAL Guide specifically refers to terms in the EC Regulation as having a similar meaning to those in the Model Law.\footnote{See, eg, United Nations Commission on International Trade Law, *Guide to Enactment of The UNCITRAL Model Law on Cross-Border Insolvency*, UN Doc A/CN.9/442 (19 December 1997) as approved by GA Res A/RES/52/158 (1997) (30 January 1998) and amended by GA Res A/RES/68/107 (2013) (16 December 2013) [10], [11], [81],[82], [83], [87], [88], [141].} It is arguable that this is evidence of the intention to interpret those provisions consistently as suggested by the Court of Appeal in *Stanford*.

As this Article has been modelled on similar provisions in other model laws prepared by UNCITRAL, there is no explanation as to what is to occur if there is an inconsistency with the provisions of another model law that has a similar provision.\footnote{See, ibid [77].} In such circumstances, it is argued that it would be necessary to revert to Article 8 and its equivalent provision in the other Model Law and to look at international materials with a view to establishing what it was intended should occur in such an eventuality.

UNCITRAL has not sought to address the issue of the interrelationship between its model laws and any inconsistencies which may exist.\footnote{See, eg, Neil Hannan, ‘International Commercial Arbitration and Cross Border Insolvency’ (2014) XVII *International Trade and Business Law Review* 447.} It is argued that this is in part due to its expert working groups who draft its model laws and conventions being largely industry-based and there being no overriding forum where these issues can be identified and solutions discussed. Another possible issue that prevents such forums from being conducted is the limited funding available to bodies such as UNCITRAL. This issue is discussed further in section 16.1.
5.5 Article 4

Article 4 is a procedural article which specifies the courts with jurisdiction under the Model Law.

In Australia, the Federal Court of Australia has jurisdiction in relation to matters involving individuals, and the Federal Court of Australia and the Supreme Courts of each of the States and Territories has jurisdiction to make orders in relation to corporations.\(^{285}\) If the debtor is a partnership which includes individuals, then any order sought in respect of those individuals would generally be dealt with in Australia by the Federal Court of Australia as the State Supreme Courts do not have jurisdiction in respect of individuals’ bankruptcy.\(^{286}\) It is speculated that where recognition is sought in relation to trusts or other types of entities that do not exist under Australian domestic law, that jurisdiction will vest in the same courts that has the corporate jurisdiction.

In Canada, there is no equivalent section in either of their enactments. Both Canadian Acts vest jurisdiction in the relevant Supreme or Superior Court of each Province or Territory.\(^{287}\) There is no trial jurisdiction vested in a federal court. In the case of larger companies which operate in more than one province, the court’s jurisdiction is based upon the location of the company’s head office or chief place of business.\(^{288}\)

In New Zealand, the High Court of New Zealand is nominated as the Court to exercise jurisdiction under their version of the Model Law.

In the UK, the High Court (Chancery Division) in respect of England and Wales and the Court of Session Scotland are nominated as the appropriate courts. Their version also provides that jurisdiction within the UK shall be determined by a debtor’s place of business or in the case of an individual, their place of residence or where the debtor’s assets are situated.\(^{289}\)

As discussed in section 4.5, in the USA, jurisdiction under the Bankruptcy Code is given exclusively to the US District Court of which the US Bankruptcy Court is a unit.\(^{290}\)

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\(^{285}\) Cross-Border Insolvency Act 2008 (Cth) s 10.

\(^{286}\) Bankruptcy Act 1966 (Cth) s 27.

\(^{287}\) Bankruptcy and Insolvency Act, RSC 1985, c B-3 s 183; Companies Creditor Arrangement Act RSC 1985, c C-36 s 2(1) under definition of “court”.

\(^{288}\) Companies Creditor Arrangement Act, RSC 1985, c C-36 s 9(1).

\(^{289}\) Art 4(2).

\(^{290}\) 28 USC §§ 151, 157, 1334 (2012).
They also make it clear that procedurally a petition under Chapter 15 starts the process for recognition.\textsuperscript{291} Such petitions are usually issued out of the US Bankruptcy Court if such court exists in that district.\textsuperscript{292}

Both Canada and the USA, by incorporating the Model Law into pre-existing legislation, have avoided the need to specifically grant jurisdiction to courts in separate legislation.

The issue of jurisdiction is also discussed in Chapter 13 as some conflicts that arise require the court to have either a general common law jurisdiction or a specialist jurisdiction and knowledge (e.g. when dealing with matters involving admiralty law).

### 5.6 Article 5

This Article authorises domestic representatives of debtors to act in a foreign State where they have been appointed under nominated provisions of their domestic legislation, including making application for recognition in foreign States as permitted by the applicable State laws.

The definition or designation of the domestic representative for the purposes of this article is not determinative of whether they can seek recognition in a foreign State as that application will be determined in accordance with the domestic law (including their version of the Model Law) of the State in which recognition is sought. Such courts may, however, take into account the laws of the State in which the foreign representative was appointed. However, if necessary, this article does give the domestic representative power to act in a foreign jurisdiction if that is required because they do not otherwise have that power under their domestic law.

At most, it is argued that this provision can provide some guidance to a foreign court only in regards to whether the foreign representative's home jurisdiction believes they are an appropriate class of representative to seek recognition and seek to apply Article 8 in order to promote uniformity. It should be noted that Canada does not have an equivalent to Article 8.

In Australia, trustees in bankruptcy and registered liquidators are nominated as the domestic representatives to whom this article applies.\textsuperscript{293} By Australia listing registered

\textsuperscript{291} 11 USC § 1504 (2012).
\textsuperscript{292} See 11 USC appendix rr 9001-02.
liquidators as authorised persons for the purposes of this Article, it is intended that the Model Law apply to voluntary administrators who must be registered liquidators.\textsuperscript{294}

In Canada, the court may authorise any person to act as a representative for the purpose of seeking recognition in a foreign jurisdiction.\textsuperscript{295}

In New Zealand, an insolvency administrator is defined as the type of representative to which this article applies. This term is defined in Article 2 and includes privately appointed receivers. This Article may allow privately appointed receivers to seek recognition in jurisdictions such as Canada even though they are not collective proceedings.

In the UK, a British insolvency officeholder is a person authorised to act under this Article. This term is defined in Article 2.

In the USA, the court may authorise a trustee or other person to act in a foreign country on behalf of the estate of the debtor.\textsuperscript{296}

In both the Canadian and USA versions of this article, it would appear that a representative has an obligation to seek authorisation from the court prior to seeking recognition in a foreign State. Such an authorisation would not necessarily ensure that the representative would obtain recognition as they would have to otherwise fit within the definition of a foreign representative in the jurisdiction in which they are seeking recognition.

\section*{5.7 Article 6}

Article 6 allows a court to refuse recognition of a foreign proceeding if it appears to be manifestly against the public policy of the respective State. All States examined in this thesis have enacted a version of this article. Public policy is always a difficult area as each State has its own international and political agenda which affects it and changes

\begin{flushleft}
\textsuperscript{293} Cross-Border Insolvency Act 2008 (Cth) s 8.
\textsuperscript{294} See, eg, Mason, ‘Cross-border insolvency: Adoption of CLERP 8 as an evolution of Australian insolvency law’, above n 40, 221; Explanatory Memorandum, Cross-Border Insolvency Bill 2008 (Cth) 9 [18]-[19].
\textsuperscript{295} Companies Creditors Arrangement Act, RSC 1985, c C-36 s 56; Bankruptcy and Insolvency Act, RSC 1985, c B-3 s 279.
\textsuperscript{296} 11 USC § 1505 (2012).
\end{flushleft}
over time. Politics is often governed by public opinion which is influenced by high profile incidents and press reporting.\textsuperscript{297}

The UNCITRAL Guide indicates that the term ‘public policy’ should be given a broad meaning but is clarified by the word ‘manifestly’ and should be restricted to fundamental principles of law. Further, it states that it should be restricted to fundamental points of law, in particular constitutional guarantees.\textsuperscript{298} The UNCITRAL Guide also suggests that this exception to the Model Law should be interpreted so as to limit its application to what is recognised internationally as being a breach of public policy.\textsuperscript{299} If this interpretation is to be accepted, then the decision in \textit{Gold & Honey}\textsuperscript{300} mentioned below has to be questioned, given the Israeli Court’s decision to proceed in the knowledge of the US proceedings.

In Australia, the explanatory memorandum states that the ‘public policy exceptions should be interpreted restrictively and that Article 6 is only intended to be invoked under exceptional circumstances concerning matters of fundamental importance for the enacting State’.\textsuperscript{301}

The Canadian version of this Article does not require the proposed action to be ‘manifestly’ in breach of public policy. This is a lower standard than that applied under the Model Law. However, the courts of that country in interpreting the domestic version of this article have referred to the UNCITRAL Guide and indicated that it should be interpreted restrictively and in accordance with the provisions of the UNCITRAL Guide, this Article should be interpreted restrictively.\textsuperscript{302}

In the USA, there have been a number of decisions that have considered their version of this article and whose interpretation of this article has not been consistent. Some decisions have applied this exception in circumstances where ordinarily in other States would not be seen as being manifestly against public policy. The majority position has been that this article should only be invoked only in exceptional circumstances

\begin{itemize}
\item Eg in Australia, at present the arrival of boat people and the government attempts to stop it and secure Australia’s borders may be argued to be issues of public policy.
\item Ibid [88]-[89].
\item \textit{Re Gold & Honey Ltd}, 410 BR 357 (Bankr, ED NY, 2009).
\item Explanatory Memorandum, Cross-Border Insolvency Bill 2008 (Cth) 21 [21]; \textit{Ackers v Deputy Commissioner of Taxation} [2014] FCAFC 57 (14 May 2014) [40]-[41].
\item Ibid.
\end{itemize}
concerning matters of fundamental importance for the United States.  

It has been said that it should only be applied narrowly and only invoked ‘when the most fundamental policies of the United States are at risk’. Further it has been held that there is a prerequisite to applying this article, namely ‘that there exist a conflict between foreign and U.S. law - however ‘that fact alone is not dispositive’. It has further been held that the mere identification of a contrary statute to the US public policy is insufficient as it must be manifestly contrary to US public policy. On the other hand it has been stated that ‘deference should be withheld where appropriate to avoid the violation of the laws, public policies, or rights of the citizens of the United States.’ Further Chapter 15 cases under the Model Law the exception should only apply ‘where the procedural fairness of the foreign proceeding is in doubt or cannot be cured by the adoption of additional protections’. The US Bankruptcy Court has also held in response to a submission put to it that the fact that an application for recognition is unnecessary does not make it against public policy.

The exception under this article has been argued in the following fact scenarios:

(a) In Re Toft, the US Bankruptcy Court refused to allow recognition of a German insolvency administrator of Dr Toft, who sought it for the purposes of obtaining access to his email accounts with a US internet service provider because to do so without there being a criminal investigation afoot as the purpose for such recognition would have been to breach of US statute law and therefore the public policy of the USA, even though the orders sought were permissible in the administrators home jurisdiction.

(b) In Re Gold & Honey Ltd (Gold & Honey) the US Bankruptcy Court dealt in part with a situation of a secured creditor continuing with an Israeli receivership proceeding relating to Gold & Honey Ltd a company incorporated under the laws of Israel and a partner in Gold & Honey LP, a limited partnership under

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303 Re Ran, 607 F 3d 1017, 1021 (5th Cir, 2010) affirmed in Re Fairfield Sentry Ltd 714 F 3d 127 (2nd Cir 2013).
304 Re Ernst & Young Inc, as Receiver of Klytie’s Developments Inc, 383 BR 773, 781 (Bankr, D Colo, 2008); Re Rede Engeria SA, 2014 WL 4248121 (Bankr, SD NY, 2014).
305 Re Ashapura MineChem Ltd 480 BR 129, 139 (Dist, SD NY, 2012).
306 Re ABC Learning Centres Ltd 728 F 3d 301, 309 (3rd Cir, 2013); Re Irish Bank Resolution Corporation Ltd 2014 WL 1884916 (Bankr, D Del, 2014).
308 Re ABC Learning Centres Ltd 728 F 3d 301, 309 (3rd Cir, 2013).
309 Re Gerova Financial Group Ltd, 482 BR 86 (Bankr, SD NY, 2012).
310 Re Toft, 453 BR 186 (Bankr, SD NY, 2011).
New York law. After Gold & Honey Ltd and Gold & Honey LP filed a Chapter 11 application under the US Bankruptcy Code, the First International Bank of Israel (FIBI) filed receivership proceedings out of a District Court in Israel in purported breach of the world-wide stay granted by the issue of Chapter 11 proceedings. The Israeli court had been advised of the US Bankruptcy Court’s orders in relation to the stays but refused to recognise the same, in part for procedural reasons and because of a presumed illegitimacy of the Chapter 11 cases, as the COMI of both the company and limited partnership were in Israel. In an application to recognise the receivership proceedings as foreign main proceedings, the Bankruptcy Court refused the application in part upon the grounds that the pursuit of a receivership application in light of the Chapter 11 stay and subsequent stay order, was a breach of public policy of the United States even though the Israeli court had refused to recognise the same.311

(c) In Re Fairfield Sentry, the US Court of Appeals found that the ‘confidentiality of BVI bankruptcy proceedings does not offend U.S. public policy.’312

(d) In Re Qimonda, (Qimonda) the US District Court stated prior to remittal and the above decision of the Bankruptcy Court that three principles can be elicited from the cases under this article:

a. The mere fact of conflict between foreign law and U.S. law, absent other considerations, is insufficient to support the invocation of the public policy exception;

b. Deference to a foreign proceeding should not be afforded in a Chapter 15 proceeding where the procedural fairness of the foreign proceeding is in doubt or cannot be cured by the adoption of additional protections;

c. An action should not be taken in a Chapter 15 proceeding where taking such action would frustrate a U.S. court's ability to administer the Chapter 15 proceeding and/or would impinge severely a U.S. constitutional or statutory right, particularly if a party continues to enjoy the benefits of the Chapter 15 proceeding.313

311 Re Gold & Honey Ltd, 410 BR 357, 368-9 (Bankr, ED NY, 2009).
312 Re Fairfield Sentry Ltd 714 F 3d 127 (2nd Cir 2013) 140.
313 Re Qimonda AG, 433 BR 547, 570 (Dist, ED Va, 2010) affirmed Re ABC Learning Centres Ltd 728 F 3d 301 (3rd Cir, 2013); Jaffe v Samsung Electronics Company Ltd, 737 F 3d 14 (4th Cir, 2013).
d) In *Re Qimonda*, following remission from the District Court, it was held that industrial and competitive concerns are fundamental public policy issues and that failure to apply them would ‘undermine a fundamental U.S. public policy promoting technological innovation’.  

The later decision by the Bankruptcy Court in *Qimonda*, would appear to be inconsistent with the interpretation of this provision by different circuits of the Court of Appeal. It is argued that this decision may be due more to domestic economic considerations and the more political nature of judges in the USA. This decision, it is argued, is not a true interpretation of this provision.

### USA Legal System

As indicated above, the majority of courts in the USA are of the view that this public policy exception should be interpreted narrowly and was intended to be invoked only in ‘exceptional circumstances concerning matters of fundamental importance to the enacting State’.

In reviewing the above US decisions, in particular the most recent decision by the Bankruptcy Court in *Qimonda*, we must be mindful of issues that arise from their federal judicial system which comprises a number of Courts of Appeal which are appointed to a circuit. Each circuit has a number of district and specialist courts from which appeals are heard. There is only one Court of Appeal that has a national jurisdiction, namely the Federal Circuit which has a limited jurisdiction that does not include bankruptcy. The lower courts of one circuit are not bound to follow the decisions of a Court of Appeal in a different circuit. Each circuit is treated as a different court with its own chief judge and procedures; hence, decisions may not be consistent.

Different circuits of the Court of Appeal have made a number of inconsistent decisions and there is no mechanism for resolving these differences without an appeal to the US Supreme Court. The Supreme Court takes on appeal a very small percentage of the overall decisions of the Courts of Appeal and therefore these differences persist.

The Bankruptcy Courts are a division of the District Court with appeals being to either a judge of the relevant District Court or to a Bankruptcy Appeal Panel (BAP) appointed by that circuit, which is comprised of three Bankruptcy Court judges. An appeal then

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314 *Re Qimonda AG* 462 BR 165, 185 (Bankr ED Va, 2011) affirmed *Jaffe v Samsung Electronics Company Ltd*, 737 F 3d 14 (4th Cir, 2013) indicating that it was appropriate to consider it under the balancing exercise of factors required under section 1522.

315 *Re Ephedra Products Liability Litigation*, 349 BR 333, 336 (Dist, SD NY, 2006); *Re Iida*, 377 BR 243, 259 (BAP, 9th Cir, 2007).
goes from the District Court or a BAP to the relevant Court of Appeal for that circuit. As discussed in section 4.5 the Bankruptcy Courts also only have a limited jurisdiction.

Moreover, judges in the USA are more 'politically and socially orientated' than their counterparts in the English-based common law systems such as those examined in this thesis.\(^{316}\) Further, because the US judges are paid less than those in the other States examined, the position does not necessarily attract leaders from the legal profession, and the political and social landscape means that people from a wider range of ethnic and educational backgrounds are appointed.\(^{317}\)

There is also no national law in respect of such areas as private international law which is still an individual State-based law and is applied in a federal setting. This system has the effect of protecting the parochial interests of the smaller States within the USA. Whilst these issues arise for historical reasons, it is argued that in order to achieve uniformity and international certainty without the need to change their judicial system of appeal in respect of Chapter 15, cases should go to the Court of Appeal for the Federal Circuit.

Practical Issues As was highlighted in *Gold & Honey*, the issue of the supposed automatic worldwide stay granted by the issue of Chapter 11 proceedings under the US Bankruptcy Code, is likely to be a source of real tension between States on public policy grounds, especially when such proceedings are not foreign proceedings or foreign main proceedings within the definition of the Model Law.\(^{318}\) In that case, the Israeli Court questioned the enforceability of the extra-territorial effect of the stay without recognition of the same by foreign courts.\(^{319}\) This is a stance that may well be taken by other courts based upon public policy and their inherent sovereignty. This is further complicated where such recognition would be against the law or public policy of another State. This issue is discussed further in section 10.3.6.

In the UK, it is foreseeable that in some circumstances where alternate proceedings are afoot in another European State, the EC Regulation may oblige the UK courts to give the other European proceedings precedence pursuant to Article 3 and thereby not

\(^{316}\) Peter de Cruz, *Comparative Law in a Changing World* (Routledge-Cavendish, 3rd ed, 2007), 118.
\(^{317}\) Ibid.
\(^{318}\) Re *Gold & Honey Ltd*, 410 BR 357 (Bankr, ED NY, 2009).
\(^{319}\) Ibid 364.
enforce the stay.\textsuperscript{320} It has further been suggested that the courts may be unwilling to remit local assets to a foreign representative without appropriate safeguards being given to local creditors in respect of the \textit{pari passu} rule of distribution after taking account of rights of set-off.\textsuperscript{321}

To the extent that the word \textit{manifestly} is included in the local version of the Model Law, it is argued that this exception should be applied in extreme cases and not be used to achieve politically acceptable outcomes. Any attempt to enforce worldwide stay, should be subject to recognition being obtained in the States in which enforcement is sought.

Cyaganowski and Green have suggested that the way the US courts are interpreting this exception will result in ‘foreign policies or practices that are at odds with express provisions of USA law or established case law will be subject to greater scrutiny.’ They further suggest that national interests may signal a greater willingness for US courts to use this exception in granting orders under Chapter 15.\textsuperscript{322} It is argued that this attitude in the USA may also be due in part to the extra provisions contained in section 1507(b) which do not appear in the Model Law and which place additional obligations upon the courts in the USA to protect the interests of local creditors. Further research in relation to the attitudes of the courts in the USA is required as this issue lies outside the scope of this thesis.

5.8 Article 7

Article 7 confirms that the court or domestic representative can give assistance to a foreign representative under another law without seeking recognition. This provision has been adopted by Australia, New Zealand and the UK. There is no equivalent provision in Canada. However, Section 61(1) of the CCAA has been described as being conceptually similar to this article.\textsuperscript{323}

\begin{flushleft}
\textsuperscript{320} For example, a European subsidiary of a US based corporate group files Chapter 11 proceedings in respect of the group. The subsidiary whilst having assets in the USA does not have an establishment there and has its main business premises in Italy. The subsidiaries registered office is in the UK.
\textsuperscript{321} Sheldon, above n 147, 121 [3.70].
\textsuperscript{322} Melanie L Cyganowski and Lloyd M Green 'The Evolving Application of the Public Policy Exception in Cross-Border Insolvencies' (2013) 1 \textit{INSOL International} 12, 13.
\textsuperscript{323} Steven Golick and Marc Wasserman, 'Canada' in Ho above n 77, 81. A similar comment could also be made with respect of the \textit{Bankruptcy and Insolvency Act}, RSC 1985, c B-3 s 284.
\end{flushleft}
In the USA, in providing assistance, the court must ensure that it is consistent with the principles of comity and take into account:

1. just treatment of all holders of claims against or interests in the debtor’s property;
2. protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceeding;
3. prevention of preferential or fraudulent dispositions of property of the debtor;
4. distribution of proceeds of the debtor's property substantially in accordance with the order prescribed by this title; and
5. if appropriate, the provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns.\(^\text{324}\)

Just treatment has been held not to exist where the proceeding “fails to provide creditors `access to information and an opportunity to be heard in a meaningful manner,’ which are `[f]undamental requisites of due process,’” or where the proceeding “would not recognize a creditor as a claimholder.”\(^\text{325}\)

It is argued that this provision would allow a US court to refuse assistance if the laws of the State in which the foreign proceedings are issued are not similar to those of the USA. This, appears to be an attempt to impose the moral and social norms of the USA upon foreign proceedings, instead of the Universalist approach upon which the Model Law is based. These amendments to the Model Law’s provisions imply that the US Congress is seeking to ensure that creditors in the USA have their claims assessed in the same way as they would in the USA. If this is correct, it illustrates that the US Congress was seeking to reserve for its courts the ability to act in a more Territorialist manner, which of itself may defeat the principles of modified Universalism upon which the Model Law is based. Thankfully, however, it appears that this has not been borne out given the way in which US Courts have interpreted the Model Law and their willingness to allow US assets to be administered by foreign representatives.\(^\text{326}\)

The amendments further appear to prevent assistance being given to a debtor’s appointed representative, without domestic proceedings being issued. This is

\(^{324}\) 11 USC § 1507(b) (2012).
\(^{325}\) Re Board of Directors of Telecom Argentina, 528 F 3d 162,170 (2\textsuperscript{nd} Cir, 2008); Re Rede Energia SA, 2014 WL 4248121 (Bankr, SD NY, 2014).
\(^{326}\) Eg Re Lee 472 BR 156, 183 (Bankr, D Mass, 2012).
consistent with the House of Representatives’ Report.\textsuperscript{327} However, a foreign representative can seek to recover the debtor’s property in the USA that existed at the time of the representative’s appointment without having made an application for recognition.\textsuperscript{328} It is argued that this may be due to the US’ bankruptcy system, especially their laws in relation to restructuring which are largely judge-controlled proceedings. However, on face value, it once again appears to confirm the USA Congress giving its courts the ability to act in a more Territorialist way where this is in the USA’s self-interest for political or other reasons.

The USA version further makes it clear that any additional assistance granted must be consistent with the principles of comity. It is not necessary that the result achieved in the foreign bankruptcy proceeding be identical to that which would be had in the USA. It is sufficient for the result to be ‘comparable’.\textsuperscript{329} The US Court of Appeals has found that a non-debtor’s discharge of liabilities is a relief that the court can order under this section as part of restructuring proceedings. In Re Atlas Shipping A/S, the US Bankruptcy Court confirmed that the discretionary orders that can be made under Article 21 are subject to the factors set out in their domestic enactment of this article.\textsuperscript{330}

In Australia, the New South Wales Supreme Court has affirmed that the letter of request procedure could still coexist with the provision of the Model Law.\textsuperscript{331}

The UK Supreme Court has confirmed that Article 7 supplements the common law and does not supersede it.\textsuperscript{332} The English High Court has also determined that where neither the Model Law nor the EC Regulation is relied upon, the Court has the common law power under the principles of international comity to recognise a foreign representative and as a matter of discretion to give to them the power to issue proceedings relying upon the UK insolvency statute law.\textsuperscript{333}

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{328} 11 USC § 1509(f) (2012); \textit{Re Iida} 337 BR 243 (BAP, 9th Cir, 2007).
\item\textsuperscript{329} \textit{Re Vitro SAB de CV}, 701 F.3d 1031 (5th Cir, 2012).
\item\textsuperscript{330} \textit{Re Atlas Shipping A/S}, 404 BR 726, 740 (Bankr, SD NY, 2009).
\item\textsuperscript{331} McGrath as Liquidators of HIH Insurance Ltd[2008] NSWSC 881(26 August 2008), [17].
\item\textsuperscript{332} \textit{Rubin v Eurofinance SA} [2013] 1 AC 236, 255 [27].
\item\textsuperscript{333} \textit{Schmitt v Deichmann} [2012] 2 All ER 1217, 1232-3 [62]-[65].
\end{enumerate}
\end{footnotesize}
5.9 **Article 8**

Article 8 obliges courts, when interpreting the Model Law, to take into consideration ‘its international origin and to the need to promote uniformity in its application and the observance of good faith’. Similar provisions are contained in other conventions and model laws.\(^\text{334}\) It is suggested that this provision will allow a court to look to case law in other jurisdictions that have adopted the Model Law.\(^\text{335}\)

It has been suggested that in providing an interpretation that takes into consideration the Model Law’s ‘international origin’, a court should be reluctant to follow existing domestic rules of interpretation and follow a domestic interpretation of a word or phrase used in the Model Law and give priority to its procedural text. Further, the limited scope of the Model Law should be taken into account in its interpretation.\(^\text{336}\)

Australia, New Zealand and the UK have adopted the provision as drafted. Canada has not included an equivalent provision.

In Australia, the explanatory memorandum that accompanied the bill enacting the Model Law provides that it ‘is expected that Australian courts will make use of international precedents in interpreting the provisions of the Model Law.’\(^\text{337}\)

In the USA, the provision has been clarified by providing that ‘the court shall consider its international origin, and the need to promote an application of this chapter that is consistent with the application of similar statutes adopted by foreign jurisdictions’.\(^\text{338}\)

The reference to chapter refers to Chapter 15 of the Bankruptcy Code.

Therefore, it can be suggested that the interpretative mandate extends to include the EC Regulation in circumstances where it is clear that the local legislature has not intended to change the local provision from that provided for in the Model Law.\(^\text{\ldots}\)

The High Court of Australia, when considering a similar provision in the UNCITRAL Model Law on International Commercial Arbitration, indicated the:

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\(^{335}\) Sheldon, above n 147, 107 [3.22].

\(^{336}\) Wessels, Markell and Kilborn, above n 20, 208.

\(^{337}\) Explanatory Memorandum, Cross-Border Insolvency Bill 2008 (Cth) 21.

\(^{338}\) 11 USC § 1508 (2012).
‘considerations of international origin and international application make imperative that
the Model Law be construed without any assumptions that it embodies common law
concepts or that it will apply only to arbitral awards or arbitration agreements that are
governed by common law principles.’\textsuperscript{339}

It is argued that the same must apply to other UNCITRAL Model Laws.

The Federal Court of Australia has indicated that the Model Law should be interpreted
in accordance with the principles in the \textit{Vienna Convention on the Law of Treaties 1969}.\textsuperscript{340} The question arises whether it is necessary to consider this convention in
order to take the international origin of the Model Law into account, or whether that
convention should be used only to interpret Article 8 itself. This issue is discussed
further in section 12.3.2.

The English Court of Appeal has confirmed that the Model Law should not be
construed by reference to any particular national system of law.\textsuperscript{341} The English Court of Appeal in \textit{Eurofinance} has relied upon this provision in recognising a judgement of
the US Bankruptcy Court seeking to overturn antecedent transactions.\textsuperscript{342} This decision
was, however, overturned by the United Kingdom Supreme Court.\textsuperscript{343}

In the USA in \textit{Re Loy}, the Bankruptcy Court stated in relation to section 1508:

\begin{quote}
As each section of Chapter 15 is based on a corresponding article in the Model Law, if a
textual provision of Chapter 15 is unclear or ambiguous, the Court may then consider
the Model Law and foreign interpretations of it as part of its `interpretive task.’\textsuperscript{344}
\end{quote}

In \textit{Re International Banking Corp}, the US Bankruptcy Court in dealing with the
interpretation of the Model Law, stated:

\begin{quote}
When interpreting Chapter 15, the Court should also consult the GUIDE TO
ENACTMENT OF THE UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY
\end{quote}

\textsuperscript{341} \textit{Re Stanford International Bank Ltd} [2011] Ch 33, 57, [23].
\textsuperscript{342} \textit{Rubin v Eurofinance SA} [2011] Ch 133, 160-1 [63].
\textsuperscript{343} \textit{Rubin v Eurofinance SA} [2013] 1 AC 236.
\textsuperscript{344} \textit{Re Loy}, 432 BR 551, 561, (Bankr, ED Va, 2010).
(the “GUIDE”) promulgated by UNCITRAL . . . In addition, the Court should read Chapter 15 consistently with prior law under section 304.

In such cases, deference to the foreign court is appropriate so long as the foreign proceedings are procedurally fair and (consistent with the principles of Lord Mansfield's holding) do not contravene the laws or public policy of the United States.345

The Court clarified the above position stating that ‘Section 1508 provides the Court guidance in matters of statutory interpretation only, it does not grant the Court authority to adopt a provision in a foreign statute that is contrary to the text of Chapter 15’. 346

It is argued that the above decisions correctly interpret the meaning of Article 8 although the use of the word ‘comity’ must be taken in the context of the US legislation which uses this phrase. In British Commonwealth common law countries, ‘comity’ may have a slightly different meaning as it is based upon different common law principles. This issue has been discussed in Chapter 4.

5.10 Summary

This chapter has dealt with the interpretative provisions of the Model Law. Not one of the States reviewed has been consistent in terms of its exclusions to the operation of the Model Law.

As was highlighted under the headings in respect of Articles 3 and 6, the enactment of these provisions has not been consistent in the States examined. In the UK and the USA, some of the provisions have been changed, whereas Canada does not have an equivalent to Article 6.

These differences are further highlighted in the definitions set out in Article 2. Using one example, Canada does not have the concept of an establishment and therefore has not defined the term; whilst in the UK, the word ‘goods’ has been replaced with ‘assets’ in the definition. These amendments were intentional and therefore have to be taken into account by their domestic courts when interpreting their domestic version of the Model Law.

345 Ibid 624-5.
346 Re Loy, 432 BR 551, 560 (Bankr, ED Va, 2010).
The interpretation of the term ‘centre of main interest’, although not defined in the Model Law, differs between the States in part due to amendments made to the Model Law in both the UK and the USA. In the UK, there appears to be a deliberate intention to apply to the Model Law the meaning of that phrase under the EC Regulation in order to create consistency of meaning. In the USA, they do not have the same intent.

Application of a substance over form interpretation of the provisions cannot get round the issue of intentional amendments being made by a State’s legislature. The amendments made by the USA to Article 7 is further evidence of its territorialist intent as are some of the interpretations made by the courts of that State in respect of the public policy exception in Article 6.

It is argued that Article 8 requires courts to look at how the provisions of the Model Law have been interpreted in other States and to examine the international intent of the Model Law and not apply their domestic rules of interpretation to its provisions.
Chapter 6
Comparative Analysis of the Enactment and Interpretation of the Chapter II of the Model Law on Cross-Border Insolvency - Access of Foreign Representatives and Creditors to Courts in this State

Overview

Chapter 6 examines how the provisions of Chapter II of the Model Law have been enacted by the five nominated States. In particular, the following points are made:

- Chapter II grants foreign representatives the right to approach the domestic courts in each of the States, without conceding jurisdiction to those courts, as well as to issue domestic insolvency proceedings and to participate in domestic insolvency proceedings.

- Articles 13 and 14 provide for foreign creditors to have equality with domestic creditors in relation to their rights before the domestic courts.

6.1 Article 9

Article 9 allows foreign representatives to apply directly to the courts of the relevant State. Australia, New Zealand and the UK have adopted this article as drafted. Both Canada and the USA have incorporated an amended version of this article.

It has been suggested that there is no requirement that the foreign proceedings be recognised before the foreign representative can exercise this right of access to the UK courts.\(^\text{347}\) If this is correct, it is argued that the issue as to which creditors have rights in rem and over which other assets a local court can exercise control is to be determined in accordance with the domestic law of the State in which the debtor holds the asset. This may lead to a number of conflicts between the courts of different jurisdictions. This is especially the case if the local court wishes to exercise control over assets in another jurisdiction in which a foreign representative has been appointed. Such conflicts may lead to inconsistent decisions between courts in respect of the assets of the same debtors. For this reason, if the power suggested does exist, it is submitted

\(^\text{347}\) See, eg, Fletcher, *Insolvency in Private International Law, National and International Approaches* above n 44, 473 [8.49].
that it should be used only in exceptional circumstances. Further, it is argued that this jurisdiction should only be exercised consistently with the provisions of Article 28.

In Australia, the Family Court has determined that until an application is made for recognition, the court is free to deal with the assets in Australia of an insolvent entity.348 This case does not, however, deal with whether proceedings can be issued in the name of the insolvent debtor by the foreign representative.

The Canadian legislation allows a foreign representative to apply to a court for recognition, but does not otherwise deal with a foreign representative's power to issue proceedings in the courts of Canada without seeking such recognition.349

In the USA, a foreign representative must apply for recognition before being able to issue proceedings within the USA or seek relief from a court in the USA or be sued in the USA.350 A foreign representative can, however, issue proceedings to recover a claim that was the property of the debtor prior to the debtor's insolvency without seeking recognition if such proceedings do not require comity or cooperation by courts.351 A claim is defined as a 'right to payment or a right to an equitable remedy for breach of performance if such breach gives rise to a right to payment'.352

In Re Iida, the US Bankruptcy Appellate Panel determined that section 1509(f) permitted a foreign representative to sue in order to collect or recover a claim that was the property of the debtor without obtaining prior permission or recognition from a Bankruptcy Court.353 The US Bankruptcy Court has determined that section 1509 is intended to function identically to the manner in which 28 USC §959 affects domestic trustees.354 This gives foreign representatives the right to be sued without leave of the court appointing them and the obligation to manage and operate the property in their possession in the same manner as the owner or possessor of it.355 The section does

348 Winter & Winter [2010] FamCA 933 (15 October 2010) [210].
349 Companies Creditors Arrangement Act, RSC 1985, c C-36, s 46(1); Bankruptcy and Insolvency Act, RSC 1985, c B-3 s 269(1).
350 11 USC § 1509 (b) (2012); Re Loy 380 BR 154, 165 (Bankr, ED Va, 2007).
351 11 USC § 1509(f) (2012); Re Iida, 377 BR 243, 257-8 (BAP, 9th Cir, 2007).
353 337 BR 243, 258 (BAP, 9th Cir, 2007).
354 Re Loy, 380 BR 154, 165 n.2 (Bankr, ED Va, 2007).
not mandate the type of orders to be made; the foreign representative must still make a case that the relief it seeks is warranted.\textsuperscript{356}

In \textit{Cozumel Caribe}, the US Bankruptcy Court also commented that:

Other than providing access to courts in the United States, section 1509 is not a self-executing relief section of Chapter 15. Relief to a foreign representative must be based on sections 1507, 1519, 1520 and 1521, subject to limitations that may be imposed under section 1522.\textsuperscript{357}

The USA version of this article associates recognition with the principles of comity. If the court does not grant recognition, the court can issue an order preventing other courts in the United States from granting comity or cooperation to the foreign representative. The US Bankruptcy Court has stated that once a foreign proceeding has been recognised, it is mandatory that US courts grant comity to the foreign representatives upon request unless such request is in breach of the public policy of the USA.\textsuperscript{358} The US Court of Appeals has indicated that by the provision, using the word ‘comity’ it connotes recognition of another judicial proceeding whilst the word ‘cooperation’ suggests a much broader meaning.\textsuperscript{359} This issue has been discussed previously in Chapter 4.

\textbf{6.2 Article 10}

Article 10 is a safe conduct provision ‘aimed at ensuring that the court in the enacting State would not assume jurisdiction over all the assets of the debtor on the sole ground of the foreign representative having made an application for recognition of a foreign proceeding’.\textsuperscript{360}

Australia, New Zealand and the UK have adopted this article in its original form.

\textsuperscript{356} \textit{CT Investment Management Co. LLC v Cozumel Caribe S.A de C}. 482 BR 96 (Bankr, SD NY, 2012).
\textsuperscript{357} Ibid.
\textsuperscript{358} \textit{CT Investment Management Co., LLC v Carbonell}, 2012 WL 92359 (Dist, SD NY, 11 January 2012) 4.
\textsuperscript{359} \textit{Re Vitro SAB de CV}, 701 F.3d 1031 (5th Cir, 2012).
This provision is not contained in the Canadian version of the legislation. No explanation is given for this and it allows the Canadian courts to assert jurisdiction over the foreign assets of the foreign administration if they concede jurisdiction to a Canadian court by making application for recognition. As Article 8 has also not been incorporated in the Canadian legislation, this article cannot be relied upon to prevent a court taking jurisdiction over the foreign assets and affairs of the debtor unlike in other jurisdictions.

The USA has adopted this article with amended wording which has the same practical effect.

### 6.3 Article 11

Article 11 is a procedural provision which ensures that a foreign representative can apply for recognition and issue domestic insolvency proceedings against the debtor.\(^{361}\) Such application can be made prior to recognition being granted where there is an urgent need to do so in order to preserve the debtor’s assets.\(^{362}\) It has been suggested that one of the purposes of this article is to allow a foreign representative to block sales by local creditors who are seeking to enforce court judgements or orders pertaining to the assets of the debtor.\(^{363}\) This is a desirable effect of this article, should domestic insolvency proceedings provide for a stay of enforcement proceedings. An alternative approach to protect assets would be for a foreign representative to seek orders under Article 19.

The provision has been adopted in Australia, New Zealand and the UK as drafted.

There is no equivalent provision to this article in the Canadian version of the Model Law. Given the differences in the Canadian version, it has been speculated that a foreign representative may still have this power if so granted by the Canadian courts pursuant to its inherent powers.\(^{364}\)

In the USA, a foreign representative can only issue domestic proceedings following recognition.\(^{365}\) Further, a voluntary proceeding can be issued only if the proceeding

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\(^{361}\) Ibid [98]-[99].
\(^{362}\) Ibid.
\(^{363}\) Wood, above n 18, 957 [31-031].
\(^{364}\) See, eg, Golick and Wasserman, ‘Canada’ in Ho, above n 77, 82.
\(^{365}\) 11 USC § 1511(a) (2012).
recognised is a foreign main proceeding. There is also a procedural obligation to file the order granting recognition with the domestic petition.

In *AWAL Bank*, the US Bankruptcy Court considered the situation of a Foreign Main Representative issuing Chapter 11 proceedings in an endeavour to bring avoidance proceedings under Chapter 5 of the Bankruptcy Code in respect of payments that had been made into bank accounts in the USA. The Foreign Representative sought orders to allow him not to disclose a detailed listing of all creditors including set-off claims as part of the Chapter 11 proceedings. The Court confirmed that the antecedent transaction proceedings could not be authorised under Chapter 15 proceedings and that it was appropriate for Chapter 11 proceedings to be issued. The Court went on to say that, notwithstanding the Chapter 11 proceedings, ‘the principles of cooperation and coordination embedded in Chapter 15 are still applicable’. Applying those principles the court made the orders in relation to the disclosure of a listing of creditors claim, given the disclosure had previously been made in the Bahrain proceedings even though under Bahrain law such information was confidential.

The lack of consistency in the enactment of this article domestically, and especially the amendments made by the USA, appears to indicate that the US Congress seeks, as much as possible, to make their domestic law or similar laws apply to foreign proceedings. Thankfully, US courts have not strictly enforced these provisions and have sought to cooperate with foreign representatives and foreign courts as is highlighted below. However, it is feared that if there is a change in public sentiment in the USA, this position could change.

### 6.4 Article 12

Article 12 grants a foreign representative, following recognition, the right to participate in local insolvency proceedings in their respective State. This right extends to proceedings issued pursuant to their domestic insolvency legislation such as those seeking recovery of antecedent transactions or those relating to the protection,

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366 Ibid.
367 11 USC § 1511(b) (2012).
368 *Re AWAL Bank, BSC*, 455 BR 73, 80 (Bankr, SD NY, 2011).
369 Ibid 77.
370 Ibid 81.
371 Ibid.
realisation or distribution of assets of the debtor or cooperation with the foreign proceeding.\textsuperscript{372}

The legislation in Australia, New Zealand, and the UK adopts this article. There is no equivalent provision in the Canadian legislation although they are given standing as if they are a creditor of the debtor.\textsuperscript{373}

The USA adopts the principles of this article, subject to the foreign representative having been recognised.

Fletcher has indicated that this article does not appear to have been intended to allow a foreign representative to lodge a proof of debt in the local proceedings.\textsuperscript{374} This appears logical as debtors cannot be creditors of themselves. Whether or not assets in a local proceeding should be handed over to a foreign representative is a different issue.

\section*{6.5 Article 13}

Article 13 gives to foreign creditors the same rights as domestic creditors regarding the commencement of and participation in insolvency proceedings. Paragraph 2 of the article excludes creditors, in relation to nominated types of claims, from the provisions of this article. An alternate wording in paragraph 2 allows the exclusion of foreign tax and social security claims.

The position in Australia and New Zealand is similar to the old common law position in relation to the recognition of judgments in respect of foreign tax and social security obligations.\textsuperscript{375} In Australia, the alternate wording is adopted with it, providing that ‘the claims of foreign creditors, other than those concerning tax and social security obligations, must not be ranked lower than the unsecured claims of other creditors solely because the creditor concerned is a foreign creditor’.\textsuperscript{376} New Zealand excludes

\begin{flushleft}
\textsuperscript{373} \textit{Bankruptcy and Insolvency Act}, RSC 1985, c B-3, s274; \textit{Companies Creditors Arrangement Act}, RSC 1985, c C-36, s 51. \\
\textsuperscript{374} Fletcher, above n 44, 476 [8.54]. \\
\textsuperscript{375} See \textit{Raulin v Fischer} [1911] KB 93. \\
\textsuperscript{376} \textit{Cross-Border Insolvency Act} 2008 (Cth) s 12.
\end{flushleft}
foreign tax and social security obligations from proving their debts pari passu with local creditors in local insolvency proceedings.

There is no equivalent provision in the Canadian legislation. Foreign creditors have, however, always been granted the same rights as domestic creditors.⁴⁷⁷

The UK allows claims in relation to foreign tax and social security obligations and excludes claims in relation to penalties and other types of debts not provable under their domestic law.

The USA allows only foreign tax, social security and public law obligations which are allowable under its domestic law based upon tax treaties.⁴⁷⁸ Melnik comments that the USA version of this article extends not only to cases commenced under Chapter 15, but also to other cases commenced under the Bankruptcy Code.⁴⁷⁹ Vattamala, on the other hand, argues that foreign tax and social security obligations should be provable and accepted as debts within the Chapter 15 insolvency administrations.⁴⁸⁰

It has been stated that this article does not require foreign employees and other creditors with a priority in another State to be given an equivalent priority in the State in which recognition is being sought. Rather, such creditors have only the right to a priority equivalent to that of ordinary unsecured creditors.⁴⁸¹

It is argued that this lack of uniformity is allowed under the Model Law and therefore cannot be criticised as it complies with the provisions of the Model Law. It is a different issue whether the Model Law should allow this lack of uniformity. Given domestic priorities and the existing rules of conflicts of law in relation to collection of foreign taxes, it would be difficult to ever achieve uniformity in relation to a uniform list of priorities as domestic politics would play a large role in establishing priorities in some States.

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⁴⁷⁷ Steven Golick and Marc Wasserman, ‘Canada’ in Ho, above n 77, 82.
⁴⁷⁹ Selinda A Melnik, ‘United States’ in Ho, above n 77, 486.
⁴⁸¹ Wood, above n 18, 958 [31-033].
6.6 Article 14

Article 14 mandates that when a notice is required to be given to creditors under their domestic law, that it is given to all creditors including foreign creditors individually, unless a court orders otherwise. It allows a reasonable period for foreign creditors after being notified to file their claims. It further provides that no formality is required before giving notice in a foreign jurisdiction.

This article is designed to ensure that all creditors are treated equally and receive all relevant notifications, and that a court can control the process for the notification of creditors. The variation that exists between the legislation in each State that has adopted the article appears to be largely procedural in nature and does not appear to alter the substance of the provision and none require excessive legal formality.

This article has been adopted in Australia and New Zealand as drafted. There is no equivalent provision in Canada, although notice must be given to all known creditors about the commencement of any proceedings within five days of the initial order and advising them that they will be placed on the service list upon request.\(^\text{382}\) If they are placed on the service list, they must be served with all future documents filed in the proceeding subject to any order of the court.\(^\text{383}\) The UK version allows notice to be given by advertisement in appropriate foreign newspapers, where notification of creditors in Great Britain is by advertising in newspapers. The USA version provides that notice is to be given to the known foreign creditors individually or as the court determines. Further, if notification is given to foreign creditors of the commencement of proceedings, they must also be notified of the time by which and manner in which to submit their claims.\(^\text{384}\)

Where there is a conflict between the domestic law and paragraph 2 of this article in respect of the manner in which such notice is to be given, Article 3 requires compliance with the foreign law.\(^\text{385}\)

\(^{382}\) Golick and Wasserman, ‘Canada’ in Ho, above n 77, 83.
\(^{383}\) Ibid.
\(^{384}\) 11 USC § 1514 (2012).
6.7 Summary

The Model Law confers upon foreign representatives the right to be heard in the domestic court of that State once recognition has been obtained. However, any application for recognition does not mean that the foreign representative is conceding to the jurisdiction of the courts of that State, thereby protecting those foreign representatives whose applications are unsuccessful.

Consistent with the Universalist approach, all creditors of a debtor in a foreign proceeding that has been recognised can approach the courts of a State in which recognition has been granted and have an entitlement to receive all notices etc. regarding any applications to be made. Thus, foreign creditors will not be disadvantaged in respect of applications made in a foreign jurisdiction.

Article 13 grants to foreign creditors the same rights as domestic creditors, including the issuing of domestic insolvency proceedings without being contingent upon recognition.
Chapter 7
Comparative Analysis of the Enactment and Interpretation of
Chapter III of the Model Law on Cross-Border Insolvency –
Recognition of Foreign Proceeding and Relief

Overview

Chapter 7 examines how the provisions of Chapter III of the Model Law which deals
with the procedural requirements for recognition of a foreign proceeding and the types
of orders that a court can take on either an interim basis or following recognition:

- Articles 16 and 17 address the central issues regarding recognition of foreign
proceeding and examine in particular the concepts of COMI and
‘establishment’. These issues are also examined further in Chapter 11.

- Articles 19 to 21 deal with the types of orders that a court can make depending
upon whether a proceeding has been recognised as a ‘foreign main proceeding’
or a ‘foreign non main proceeding’.

- Article 20 confirms that upon recognition of a ‘foreign main proceeding’, an
automatic stay operates in relation to any proceedings against the debtor.

This chapter does not address the issues that arise in relation to the recognition of
COMI or establishment, or the problems that emerge due to inconsistent decisions
arising from their interrelationship with the EC Regulation, which are dealt with in
Chapter 11 and Chapter 13.

7.1 Article 15

Article 15 lists the procedural requirements in relation to the documents required to be
submitted to a court when a foreign representative is seeking recognition. All States
examined require the documents listed to be put before the court and to be translated
into English.
Australia also requires the submission of a listing of all domestic proceedings relating to the debtor.\textsuperscript{386} These additional documents inform the court whether there are any domestic proceedings afoot in relation to the debtor, thereby ensuring that orders can be made for the service of the domestic representative and potential creditors.\textsuperscript{387}

In the UK, in addition, the same types of documents must be submitted as are required in relation to applications for assistance under section 426 following a letter of request from a foreign court.

\section*{7.2 Article 16}

Paragraph 1 of Article 16 entitles a court to make presumptions regarding the efficacy of the documents submitted to them in accordance with Article 15.

The entitlement given by paragraph 2 to presume that documents submitted in support of the application for recognition are authentic, whether or not they have been legalised, is discretionary.\textsuperscript{388} Ultimately it is up to the court from which recognition is sought to determine whether it requires the documents to be legalised through the process of authentication, or in those countries that are party to the Hague convention, the attachment of an apostille is required.\textsuperscript{389}

As the definition of ‘court’ includes non-judicial bodies, and foreign proceedings are conducted under the supervision of those administrative bodies,\textsuperscript{390} it may be possible to use in some countries documents certified by Notary Publics to establish the necessary facts required to conduct a foreign proceeding as such certifications will generally be accepted as stating the truth. This will help a foreign representative to establish in appropriate cases the legislative regime pursuant to which they are appointed by producing evidence of the foreign administrative proceeding. Alternatively, they could seek declarations or other orders from their domestic courts.

\textsuperscript{386} Cross-Border Insolvency Act 2008 (Cth) s 13.
\textsuperscript{387} See generally, Federal Court (Corporations) Rules 2000 (Cth) r 15A.3 and corresponding provisions in the rules of each States and Territories Supreme Court Rules.
\textsuperscript{390} For example, creditor voluntary liquidations and voluntary administrations in Australia are primarily supervised by the Australian Securities & Investments Commission, although a Court on application has the power to supervise and give directions.
recognising the proceeding, before seeking to obtain recognition in a foreign jurisdiction.

Paragraph 3 of this article sets out a presumption that:

In the absence of proof to the contrary, the debtor's registered office, or habitual residence in the case of an individual, is presumed to be the centre of the debtor's main interests.

This presumption is contained in the versions of the Model Law as enacted by Australia, New Zealand and the UK. In Canada, the presumption is worded slightly differently in that it substitutes ‘ordinary place of residence’ for ‘habitual residence’. 391 This would appear to lower the standard required.

In the USA, a slightly different wording again was used as it substitutes ‘evidence’ for ‘proof’. 392 The US Congress has stated that it intentionally changed the presumption in paragraph 3 as referred to in the House report that accompanied the Bankruptcy Abuse and Consumer Protection Act which provides:

The ultimate burden as to each element is on the foreign representative, although the court is entitled to shift the burden to the extent indicated in section 1516. The word “proof” in subsection (3) has been changed to “evidence” to make it clearer using United States terminology that the ultimate burden is on foreign representative. “Registered office” is the term used in the Model Law to refer to the place of incorporation or the equivalent for an entity that is not a natural person. The presumption that the place of the registered office is also the center of the debtor’s main interest is included for speed and convenience of proof where there is no serious controversy. 393

The effect of this change has been noted by the US courts in Tri –Continental and Bear Stearns decisions and recognised in England in the Stanford International Bank decision which is discussed further in section 7.2

391 Companies Creditors Arrangement Act, RSC 1985, c C-36 s 459(2) and Bankruptcy and Insolvency Act, RSC 1985, c B-3 s 268(2).
7.2.1 Rebuttable Presumptions

There are two rebuttable presumptions contained in Article 16, one relating to corporations based upon their registered office, and the other pertaining to individuals regarding their habitual place of residence. The ability to rely upon the rebuttable presumption has given rise to a number of contradictory decisions between the English Court and the USA courts which are discussed below and in section 11.1. Fletcher maintains that the purpose of the presumptions is to authorise ‘the court to proceed on the basis of prima facie evidence, but does not oblige it to do so’. 394

7.2.1.1 Registered Office

In Ackers v Saad Investments Company Ltd (in liq) (Ackers), Justice Rares of the Federal Court of Australia stated that the purpose of the presumption was ‘to provide a ready means of dispensing with formal proof but to leave the way open for the Court to find that, on the evidence, the contrary is the case.’ The court went on to state that they preferred to follow the English approach adopted in Eurofood to the approach adopted in the USA. 395 The court summarised the relevant test as:

‘If, after reviewing all the evidence before the court, the proper conclusion is adverse to the presumption, then proof to the contrary will have been established. On the other hand, where the position is left uncertain, the Model Law authorises the court to proceed upon the deemed position, even if a more mature and thorough investigation eventually could determine it to be an erroneous, or indeed, fictitious, position. Of course, the court can revisit matters in the event provided in Art 17(4).’ 396

In Gainsford v Tannenbaum, Justice Jagot of the Federal Court expressed the test slightly differently from that expressed in Eurofood when he stated:

Thus the Model Law proceeds on the basis that, in the absence of proof to the contrary, in the case of corporate debtors their COMI will be their registered office and in the case of individual debtors, their place of habitual residence will be presumed to be their COMI. 397

394 Fletcher, Insolvency in Private International Law, National and International Approaches above n 44, 460 [8.27].
396 Ibid [53].
397 Gainsford v Tannenbaum (2012) 293 ALR 699, 707 [35].
His Honour went on to state that 'the inquiry as to COMI must remain a broad, factual one'. 398 His Honour subsequently confirmed that factors which are both objective and ascertainable by third parties must establish that the COMI is in a different location to the registered office. 399

The test in Australia has been described thus: ‘if after an analysis of objectively ascertainable factors the centre of main interest remains unclear, then the court will apply the presumption to determine the location of the debtor’s registered office.’ 400 It is argued that this test is similar to that which is being promoted by the European Court of Justice in Re Interedil Srl (Interedil) 401 with respect to its interpretation of the same phrase under the EC Regulation. 402

In Canada, the Superior Court of Ontario in Re Lightsquared LP considered the factors that must be taken into account in determining a debtor’s COMI, where it is necessary to go beyond the registered office presumption by reason of it being questioned, as being: (a) the location that is readily ascertainable by creditors; (b) the location is one in which the debtor’s principle assets or operations are found; and (c) the location where the management of the debtor takes place. 403 The court indicated that it may have to give greater or lesser weight to each factor depending on the circumstances. The court further stated that it ‘corresponds to where the debtor’s true seat or principal place of business is, consistent with the expectations of those who dealt with the enterprise, prior to commencement of the proceedings’. 404

The Canadian courts appear to have taken a position closer to that of the USA than that adopted by the UK and Australia in relation to the practical effect of the presumption, by requiring only the presumption in respect of COMI to be questioned before opening the issue for determination. This may be due to the Canadian courts’

398 Ibid 712 [46].
399 Young v Buccaneer Energy Ltd [2014] FCA 711 (2 July 2014) [34].
400 Scott Atkins and Rosalind Mason, ‘Australia’ in Ho, above n 77, 32.
401 Re Interedil Srl [2012] Bus LR 1582.
404 Ibid [26].
general attitude in relation to restructuring cases in order to adopt a flexible interpretation. 405

In the UK, in Stanford International Bank, the English Court of Appeal held that the presumption is rebuttable but the onus of proof lies with the person seeking to rebut it to produce objective and facts ascertainable to third parties of an alternate COMI. 406 The English Court of Appeal in Shierson summarised their position in determining a debtor’s COMI under the EC Regulation as follows:

(1) A debtor’s centre of main interests is to be determined at the time that the court is required to decide whether to open insolvency proceedings . . . (2) The centre of main interests is to be determined in the light of the facts as they are at the relevant time for determination. . . (3) In making its determination the court must have regard to the need for the centre of main interests to be ascertainable by third parties; in particular, creditors and potential creditors. It is important, therefore, to have regard not only to what the debtor is doing but also to what he would be perceived to be doing by an objective observer. And it is important, also, to have regard to the need for . . . an element of permanence. The court should be slow to accept that an established centre of main interests has been changed by activities which may turn out to be temporary or transitory. (4) There is no principle of immutability. A debtor must be free to choose where he carries on those activities which fall within the concept of “administration of his interests”. He must be free to relocate his home and his business. . . the court must recognise and give effect to that. (5) It is a necessary incident of the debtor’s freedom to choose where he carries on those activities which fall within the concept of “administration of his interests”, that he may choose to do so for a self-serving purpose. In particular, he may choose to do so at time when insolvency threatens. 407

The Court of Appeal went on to state that if there are grounds for suspecting that a debtor has deliberately changed their COMI after they suspected insolvency, the court will need to be satisfied of that fact and that it was intended to have permanence.

The above decision in Shierson was handed down before the European Court of Justice decision in Interedil which interpreted COMI in relation to the EC Regulation. The decision in Interedil, appears to have taken the middle ground between the above position and that adopted in Canada and the USA in interpreting the same phrase

406 [2011] Ch 33, 69 [57].
407 Shierson v Vlieland-Boddy [2005] 1 WLR 3966, 3985-6 [55].
under the EC Regulation. This decision may result in the Court of Appeal having to review this decision and is commented on below in section 11.1

The above position, may also alter if the proposed changes to the EC Regulation are accepted. One of those changes is to insert a definition of COMI which presumes a debtor’s company’s COMI to be the debtor’s registered office, which is capable of rebuttal when the company’s central administration is in a different State from its registered office. This issue is discussed further in sections 11.1 and 13.1.6.

In the USA, the burden of proof is on the foreign representative seeking recognition. The debtor’s registered office is probative and only one of the factors is taken into account by the court when determining the location of the debtor’s COMI.

In *Re Tri-Continental Exchange Ltd*, the reason for the difference in the wording of the presumption was explained by Judge Klein as:

Thus, if the foreign proceeding is not in the country of the registered office, then the foreign representative has the burden of proof on the question of ‘center of main interest’. . .

Correlatively, if the foreign proceeding is in the country of the registered office, and if there is evidence that the center of main interests might be elsewhere, then the foreign representative must prove that the center of main interests is in the same country as the registered office.

It follows that the burden of proof as to the “center of main interest” is never on the party opposing “main” status and that such an opponent has only a burden of going forward to adduce some evidence inconsistent with the registered office warranting a conclusion of “main” status.

In *Re Bear Stearns*, Judge Lifland (who was involved with the drafting of the Model Law), at first instance noted that the US Bankruptcy Code does not state the type of evidence required to rebut the presumption in respect of COMI, and indicated that it may include: the location of the debtor’s headquarters; the location of those who actually manage the debtor; the location of the debtor’s primary assets; the location of the majority of the debtor’s creditors or of a majority of the creditors who would be

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409 *Re Tri-Continental Exchange Ltd*, 349 BR 627, 635 (Bankr, ED Cal, 2006).
affected by the case; and/or the jurisdiction whose law would apply to most disputes.\(^{410}\) The District Court, in hearing the appeal, recognised that the US Congress changed the relevant language of the Model Law by substituting rebuttal by ‘evidence to the contrary’ for the Model Law’s ‘proof to the contrary’ in order to clarify this very issue, and referred to the House report. That accompanied the bill introducing Chapter 15 into the Bankruptcy Code.\(^ {411}\)

In *Re Basis Yield Alphs Fund*, the court considered the relevant test in relation to the presumption in a slightly different way by stating:

> Article 16 establishes presumptions that allow the court to expedite the evidentiary process; at the same time they do not prevent, in accordance with the applicable procedural law, calling for or assessing other evidence if the conclusion suggested by the presumption is called into question by the court or an interested party it states, explicitly, that the conclusion suggested by the presumption may likewise be “called into question by the court”.\(^ {412}\)

As illustrated above, the wording adopted by the different States examined in their enactment of the Model Laws provisions has given rise to different interpretations with respect to the effect of the presumption and the requirements to rebut it. The main differences are between the USA and Canada on one hand, and those States that advocate consistency with the interpretation of COMI under the EC Regulation, namely the UK, Australia and New Zealand on the other. Sarra explains that the difference in approach when assessing COMI differs between that adopted in Europe, with respect to the EC Regulation which sets a high threshold to rebut the presumptions contained in Article 16(3), from that adopted in Canada and the USA which is a ‘command and control’ test.\(^ {413}\) Professor Westbrook, a member of the committee that drafted the Model Law, has explained that the purpose of the presumption is ‘for speed and convenience of proof where there is no serious controversy.’\(^ {414}\) In the USA the extent of the evidence required to rebut the presumption would also appear to be a feature of a change to their wording of Article 16 by only requiring evidence and not proof to rebut it.

\(^{410}\) *Re Bear Stearns High Grade Structured Credit Strategies Master Fund Ltd*, 374 BR 122, 128 (Bankr, SD NY, 2007).

\(^{411}\) *Re Bear Stearns High-Grade Structured Credit* 389 B.R 325, 334 (Dist SD NY, 2008).

\(^{412}\) *Re Basis Yield Alphs Fund*, 381 BR 37, 51 (Bankr, SD NY, 2008).


Professor Wade has commented in relation to the registered office presumption that it should not be a strong presumption because:

(a) Such an approach would enable havens serving as centres of main interest (i.e. tax havens, bank secrecy laws havens) to draft laws favourable to certain interests (i.e. director's manager's liability) in insolvency.

(b) The place of incorporation or registered office is too easily altered by vested interests, e.g. to secure protection for directors/managers.

(c) The drafter of the Model Law and the EC Regulation would have resisted locating the COMI in the States of a mailbox registration.415

Moss explains the reason for the presumption in relation to the registered office being a debtor's COMI as being based upon the different approaches by the law taken in the UK and Europe. In the UK, if there were to be proceedings in more than one country, then the common law would assume the main proceedings were taking place in the State of registration and other proceedings would be deemed to be ancillary. In Europe, the approach focuses on the 'seat' of the company which 'is most likely the idea behind the 'centre of main interest' concept'.416

Ultimately, the difference in interpretation may boil down to who has the onus of proof with respect to COMI not being the registered office, and that it will not affect the substance of the outcome of the majority applications for recognition. However, in more difficult cases, where there is a lack of evidence or there is contradictory evidence as to where the COMI is, the presumption will play a more important role particularly in Australia, New Zealand and the UK.

As discussed in section 11.1 UNCITRAL has approved a change to the UNCITRAL Guide to better clarify the interpretation of this phrase. Further, should the changes proposed for the EC Regulation as set out in section 13.1.6 be accepted, the extent of this difference may be reduced but there is still a difference in respect of the weight to be given to the rebuttable presumption.

7.2.1.2 Habitual Residence

There are fewer cases dealing with this rebuttable presumption as it applies only to the cases of individual debtors. Canada uses the phase ‘ordinary residence’ and is distinguishable given the judicial comments set out below.

In Australia in *Gainsford v Tannenbaum*, the Federal Court determined that the term should be interpreted in a manner consistent with the way that the term is used in the Abduction Convention. The court went on to state:

> The Model Law does not, in terms, make criteria readily ascertainable by third parties determinative in the objective test for the identification of COMI which it posits. . . . Axiomatically, ascertainment “habitual residence” may entail the reception of facts which, though relevant, are not readily ascertainable by third parties.

The court considered various factors, including the fact that the bankrupt had permanent residency in Australia, although he remained a South African citizen, and determined that his habitual place of residence was in Australia as he had left South Africa several years earlier and established himself and his family in Australia and transferred his funds to Australia. However, the court noted that a different test from that used in the case of corporate debtors was applicable when determining an individual’s COMI.

In *Williams v Simpson*, the New Zealand High Court referred to the term ‘habitual residence’ as being well-known in international law. The court went on to state:

> . . . the inquiry into “habitual residence “was a “broad factual one, taking into account such factors as settled purpose, the actual and intended length of stay in a state, the purpose of the stay, the strength of ties to the State and to any other state (both in the past and currently), the degree of assimilation into the State (including living and schooling arrangements), and cultural, social and economic integration.”

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417 *Gainsford v Tannenbaum* (2012) 293 ALR 699, 710 [41].
418 Ibid 712 [46].
419 *Williams v Simpson* [2011] 2 NZLR 380, 391 [41].
420 Ibid 391 [42].
In *Re Ran*, the US Court of Appeals considered the term ‘habitual residence ‘as being identical to the term ‘domicile’, which ‘is established by the physical presence in a location coupled with intent to remain there indefinitely’.

The court found that the time for determining a person’s or entity’s COMI was the time at which the petition for recognition was filed.

In *Re Kemsley*, the US Bankruptcy stated:

Habitual residence is a concept implying more than just the place where an individual happens to be living at a particular time and has aspects of an ongoing intention to stay in the same location for the foreseeable future unless and until something might occur to prompt or compel a change (loss of employment, family needs, illness, job opportunities, retirement, other significant life events or perhaps a spontaneous desire to relocate born of a spirit of adventure).

The term habitual residence includes an element of permanence and stability and is comparable to domicile.

The US Bankruptcy Court has also indicated that the factors to rebut the presumption are different from those with respect to a corporate debtor. The court has also indicated that each person ‘has a unique set of connections to our place of residence, some personal and others institutional, and there are multiple ways for an individual to manifest the intent to remain indefinitely in that place of residence’.

In *Re Loy*, the US Bankruptcy Court held that as Mr. Loy had only a temporary residence visa and had to return to England in several months’ time to renew his visa, his habitual place of residence had not changed to the USA.

The meaning of *habitual place of residence* appears to equate to the place of a person’s residence where they intend to stay in the long term. This test is slightly less strict than the old common law test of domicile with the court being required to look at all the surrounding factors to determine whether the debtor has demonstrated the intent to remain there indefinitely and assimilate into the State. This lack of difference in the interpretation of this term, it is argued, is due in part to the fact that all of the

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421 607 F.3d 1017, 1022. (5th Cir, 2010).
422 607 F.3d 1017, 1025 (5th Cir, 2010).
423 *Re Kemsley* 489 BR 346, 353 (Bankr, SD NY, 2013).
424 *Re Chiang*, 437 BR 397, 404 (Bankr, CD Cal 2010).
426 *Re Loy* 380 BR 154, 163 (Bankr, ED Va, 2007).
States examined other than Canada have not sought to change the wording used in the Model Law. Canada by using ordinary residence it is argued does not require the degree and intention of permanency required in the other States.

7.3 Article 17

Article 17 sets out the requirements for recognition as a foreign proceeding and provides that it will be recognised as a foreign main proceeding if the foreign representative from the State of the debtor’s COMI. It further provides that it shall be recognised as a foreign non-main proceeding if it is being made by a foreign representative from the State in which the debtor has an establishment. Paragraph 3 of this Article requires a court to hear any application for recognition as early as possible, whilst paragraph 4 allows a court to modify or terminate any order granting recognition in the future should circumstances change.

The power to modify or terminate a recognition order may be used in circumstances where:

(a) a change of circumstances after the decision granting recognition (e.g. the recognised proceeding has been terminated or changed from a restructuring proceeding to a liquidation);

(b) new facts have arisen that require or justify a change;

(c) the requirements for recognition were not fully observed in the decision-making process especially where, on appeal, the merits of the decision can be reviewed.  

Each of the States examined, other than Canada, has made minor insubstantial procedural amendments which affect the operation of this article, but will not affect the ultimate outcome of an application for recognition. Canada has no requirement for the debtor to have an establishment in the State of the foreign representative in order to

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recognise it as a foreign non-main proceeding. Furthermore, there is no requirement for the application to be dealt with at the earliest possible time.

UNCITRAL Working Group V confirmed that the ‘Model Law is not intended to accord recognition to all foreign proceedings’. The Model Law anticipates non-recognition where the foreign proceedings are issued outside a State which is not the debtor’s COMI or where the debtor does not have an establishment. This includes those foreign proceedings based upon the cessation of payments, abandonment of premises or departure from the jurisdiction.

In Canada, the legislation does not require the debtor to have an establishment in order to be recognised as a foreign non-main proceeding, giving possible rise to the recognition of a foreign proceeding which will not be recognised in other States.

The issues identified under Article 16 with respect to the test applicable for recognition of the COMI also apply under this Article. Different courts have listed different factors to be taken into account when determining a debtor’s COMI although it is clear that these lists are not exhaustive.

This article has been the subject of much judicial commentary, especially in relation to the various meanings of COMI, which are not consistent and raise questions as to whether the provisions have been interpreted after taking into account the interpretative provisions of Article 8. This issue is further complicated where it is clear that the local legislature intended to change the local provision from that provided for in the Model Law. The judicial decisions of the different States take different positions in relation to the level of the evidence required to rebut the presumption contained in Article 16. In Australia and the UK, it must be shown on readily ascertaintable evidence that the COMI is in another State. In the USA and Canada, the court requires evidence to be put before it as to COMI and if any of that evidence is inconsistent with the rebuttable presumption, then the court must make its own determination on the evidence.

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429 Companies Creditors Arrangement Act, RSC 1985, c C-36 s 47; Bankruptcy and Insolvency Act, RSC 1985, c B-3 s 270.
430 United National Commission on International Trade Law ‘Interpretation and application of selected concepts of the UNCITRAL Model Law on Cross- Border Insolvency relating to centre of main interests (COMI)’ 41 session, UN Doc A/CN.9/WG.V/WP.103 (28 February 2012) 8 [37A].
431 Ibid 9 [37C]-[37D].
432 Bankruptcy Act 1966 (Cth) s 40; Bankruptcy & Insolvency Act, 1985, c B-3 s 2 in the definition of ‘insolvent person’.
presented. The difference is highlighted in the decisions set out in Appendix 1. The issue of recognition of COMI is discussed further in Chapter 11.

This article is subject to the public policy exception contained in Article 6. As highlighted under Article 6, there has been a recent tendency for some courts in the USA to use this exception to refuse recognition so as to protect the industrial and competitive concerns of USA businesses.433

The types of entities that are recognised may also differ between States and it is not certain that the English position in relation to the recognition and enforcement of foreign judgements as set out in Rubin will be followed in other States.434

These issues are commented on further in sections 10.3.2 and 12.3.

7.4 Article 18

Article 18 places an obligation upon a foreign representative, following recognition, to inform the court promptly about any substantial change to the foreign proceedings or the foreign representative’s appointment, and of any other foreign proceedings regarding the same debtor that comes to the foreign representative’s knowledge.

In Australia, additional obligations are placed upon the foreign representative to inform the court of any local proceedings issued in respect of the debtor, including the appointment of a receiver or controller of the debtor’s assets.435

In Canada, foreign representatives are obliged to:

> publish, without delay after the order is made, once a week for two consecutive weeks, or as otherwise directed by the court, in one or more newspapers in Canada specified by the court, a notice containing the prescribed information.436

The amendments made to the Model Law provisions in Australia and Canada are largely procedural and designed to keep the court informed of developments so that the court can determine whether it is necessary to amend its orders under Article 22 or

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433 *Re Ephedra Products Liability Litigation*, 349 BR 333, 336 (Dist, SD NY, 2006); *Re Iida*, 377 BR 243, 259 (BAP, 9th Cir, 2007).
434 [2009] EWHC 2129 (Ch) (31 July 2009) [48].
435 *Cross-Border Insolvency Act 2008* (Cth) s 14.
436 *Companies Creditors Arrangement Act*, RSC 1985, c C-36 s 53; *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 s 276.
its inherent powers. No amendments of substance have been made to this article in New Zealand, UK or the USA.

### 7.5 Article 19

Article 19 grants the courts power to grant provisional or interim relief once proceedings seeking recognition have been filed. Such relief can be granted to protect the debtor’s assets or interests of creditors including staying the execution of proceedings, and entrusting the administration and/or realisation of the debtor’s assets to the foreign representative. The court may refuse to give such interim relief if it is likely to interfere with the foreign main proceedings.

No amendments of substance have been made to this article in Australia, New Zealand, or the UK. However, New Zealand imposes an obligation upon the foreign representative to notify the debtor in a prescribed form as soon as practical after an interim relief has been granted.\(^{437}\)

There is no corresponding provision in the Canadian legislation; however, the court can apply legal and equitable rules regarding recognition of foreign insolvency proceedings.\(^{438}\) In practice, it appears that this has not caused any difficulties in Canada.

The USA also provides that such interim relief cannot be granted if it might enjoin a police, regulatory or government unit. Further, the grant of relief is subject to ‘the standards procedures and limitations applicable to injunctions’.\(^{439}\) However, the US Bankruptcy Court has held that the standards for obtaining a preliminary injunction under section 1519(e) are not the same as those for obtaining an injunction in adversary proceedings and that the court has the power to grant stays under section 362 of the Bankruptcy Code.\(^{440}\)

It has been opined that the reason for allowing a foreign representative to obtain provisional relief is to overcome the potential ‘race of the swiftest’ to take advantage of

\(^{437}\) Art 19(2).

\(^{438}\) *Companies Creditors Arrangement Act*, RSC 1985, c C-36 s 61; *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 s 274.

\(^{439}\) 11 USC §1519 (e).

\(^{440}\) *In re Pro-Fit Holdings Ltd* 391 BR 850 (Bankr, CD Cal, 2008); *Contra, Re Worldwide Education Services Inc* 494 BR 494, 497-8 (Bankr, C D Cal, 2013).
local assets and to address the issue of forum shopping.\textsuperscript{441} The courts have on several occasions granted interim relief under this article as summarised below.

### 7.5.1 Australia

The Federal Court of Australia in \textit{Tucker} granted interim provisional relief preventing the commencement or continuation of proceedings concerning the debtor’s assets, rights, obligations or liabilities and staying the execution against the debtor’s assets. The court further injunctioned the debtor’s right to transfer, encumber or dispose of assets.\textsuperscript{442}

In \textit{Ackers}, the Federal Court of Australia gave interim relief by entrusting the administration of all of the company’s assets in Australia (excluding the external Territories) to the foreign representative together with an Australian-based registered liquidator. The court also issued orders preventing proceedings being conducted against the assets of the debtor.\textsuperscript{443}

In \textit{Asafuji}, the Federal Court found that there were threats from creditors of the debtor to arrest or take possession of the debtor’s ships. The court gave interim relief that prevented any enforcement being undertaken or continued with against the debtor’s property, and prevented any legal proceedings being issued against the debtor without leave of the court.\textsuperscript{444}

### 7.5.2 New Zealand

The High Court of New Zealand granted interim relief to an English trustee in bankruptcy against a debtor resident in New Zealand by issuing a search warrant allowing the New Zealand Official Assignee to search the debtor’s premises and ordering the debtor to attend for examination.\textsuperscript{445}

Whether to grant an order that would not be available to the foreign representative in their home jurisdiction has also been raised as a reason for refusing to grant such an order.\textsuperscript{446}

\textsuperscript{441} Mason, ‘Cross-border insolvency: Adoption of CLERP 8 as an evolution of Australian insolvency law’, above n 26, 84.
\textsuperscript{442} Tucker, \textit{re Aero Inventory (UK) Ltd v Aero Inventory (UK) Ltd [No 2] (2009) 181 FCR 374.}
\textsuperscript{443} In \textit{Ackers v Saad Investments Company Ltd (in liq), (2010) 190 FCR 285, 291 [25].}
\textsuperscript{445} Williams v Simpson [2010] NZHC 1631.
\textsuperscript{446} ANZ National Bank Ltd v Sheahan [2013] 1 NZLR 674 [112].
7.5.3 USA

In *Bear Sterns*, the US Bankruptcy Court granted interim relief restraining persons from commencing or continuing any litigation or enforcement proceedings including judicial, quasi-judicial administrative or regulatory action, proceeding or process against the foreign representative of the debtor or the debtor’s property in the USA, by way of an interim injunction. On the other hand, the US Bankruptcy Court has refused to grant an injunction to protect subsidiary non-debtor guarantors because it was against the basic bankruptcy law and such orders could not be granted in the State of the foreign proceeding. The difficulty that emerges from these cases is that they are seeking to apply domestic bankruptcy principles to the Model Law which is based upon universal principles. Whilst the outcomes of the cases referred to above are not criticised, they highlight the underlying difficulty of attempting to incorporate a model law into pre-existing, domestic legislation.

7.6 Article 20

Article 20 provides that upon recognition of a foreign main proceeding, an automatic stay is granted in respect of any proceedings in relation to the debtor’s assets, rights, obligations or liabilities. A stay operates against the execution of the debtor’s assets and a debtor’s right to transfer, encumber or dispose of assets is suspended.

An exception is provided in paragraph 3 where proceedings are being issued to preserve a claim against the debtor. Fletcher indicates that this paragraph is designed to prevent a creditor’s claim from becoming statute barred under the laws of the enacting State or some other State. He points out that the effect of Article 20 is that the automatic stay in the enacting State may be more extensive than those imposed by the laws of the State of the foreign main proceeding.

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447 *Re Bear Stearns High-Grade Structured Credit Strategies Master Fund Ltd* (in prov liq) 389 BR 325,329-30 (Dist, SD NY, 2008).
448 *Re Vitro S.A.B de C.V* 455 BR 571 (Bankr, ND Tex, 2011).
449 Fletcher, *Insolvency in Private International Law, National and International Approaches* above n 44, 465 [8.33].
450 Ibid [8.34].
The Model Law does not provide any relief or punishment for breach of its provisions. Any breach of the stay under this article is to be punished in accordance with the domestic law of the enacting State.\footnote{Ibid 466, [8.36].}

As noted in section 10.3.5, there is no consistency in the States examined regarding the extent of the stay. This article as enacted in Australia, the UK and the USA equate the stay or suspension that can be given under this article to the orders that can be made by the court in relation to domestic insolvency administrations. However, the USA courts will not apply the world-wide stay that operates under their Chapter 11 restructuring proceedings.\footnote{See \textit{Re JSC BTA Bank}, 434 BR 334 (Bankr, SD NY, 2010).} In New Zealand the court can limit the stay or suspend the stay on any conditions it thinks fit.\footnote{Insolvency (Cross-border ) Act 2006 , Schedule 1 art 20(2); see also \textit{Downey v Holland} [2014] NZHC 1546 (3 July 2014), [14]-[15].}

It is argued that the stay intended to be granted under the Model Law is clear from the terms of the Model Law, and for uniformity and international certainty, should not be equated to the domestic stay, but rather should apply as drafted, as is the case in New Zealand. This would overcome the issue of the stay being different depending upon the type of insolvency or restructuring proceeding that is recognised, as is the case in Australia.

\textbf{7.6.1 Exceptions to Stay}

The factors to be considered by a court under section 1520(1)(c) of the Bankruptcy Code in relation to giving permission to the transfer or disposal of the debtor’s assets, has been considered by the US Bankruptcy Court. The court in respect of an application to approve the sale of assets in the USA by a foreign representative outside the ordinary course of business, determined that the standards applicable to granting permission is the same as those under section 363(b) of the US Bankruptcy Code and stated that:

\begin{quote}
A debtor may sell assets outside the ordinary course of business when it has demonstrated that the sale of such assets represents the sound exercise of business judgment. In determining whether a sale satisfies this standard, the courts in this Circuit require that a sale satisfy four requirements (1) a sound business purpose exists for the
\end{quote}
sale; (2) the sale price is fair; (3) the debtor has provided adequate and reasonable notice; and (4) the purchaser has acted in good faith.\textsuperscript{454}

This issue has not been considered by the courts of any other States examined. It is argued that the courts in those other States would allow sales of the debtor’s assets to proceed after considering all the circumstances, including those identified above, when determining whether to grant leave to sell such assets in accordance with the principles applicable to the corresponding stay granted under their domestic law.

Given the lack of consistency in the extent of the domestic stays and the exceptions applicable to insolvency entities as discussed in section 10.3.5, it is clear that no uniform approach to this issue has been taken by the States examined. It is argued that Territorial considerations have in this regard defeated the Universalist aim of the Model Law which is to achieve some consistency between States in respect of the recognition of foreign proceedings between States.

### 7.7 Article 21

Article 21 gives the courts discretion to determine the powers to grant to a foreign representative including the power to entrust to a foreign representative the distribution of the debtor’s assets within a court’s jurisdiction. It sets out examples of the types of relief that a court may grant which include:

- (a) Staying the commencement or continuation of individual proceedings concerning the debtor’s assets, rights, obligations or liabilities;
- (b) Staying execution against the debtor’s assets;
- (c) Suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor;
- (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 to the foreign representative or another person designated by the court;

\textsuperscript{454} Re Elpida Memory Inc, 2012 WL 5828748 (Bankr, D Del 2012).
(f) Entrusting the distribution of all or part of the debtor’s assets to the foreign representative or another person designated by the court, provided that the court is satisfied that the interests of creditors are adequately protected.

Paragraph 3 provides that relief granted to a foreign non-main proceeding should be limited to assets that are to be administered in that non-main proceeding and that, if the foreign representative seeks information concerning the debtor’s assets or affairs, the relief must concern information required in that proceeding. The type of relief that has been granted by courts has varied and is largely dependent upon the circumstances such as whether there are any secured creditors or creditors holding liens, whether any enforcement or legal proceedings are threatened, and the underlying cause of the debtor’s insolvency or need to restructure.

### 7.7.1 Australia

The Federal Court of Australia has granted foreign representatives the following powers:

(a) entrusting English Special Administrators appointed by the English High Court with the administration, realisation and distribution of Australian assets to the Administrators. The court further extended the automatic stay on legal proceedings to ‘any individual action or legal proceedings including without limitation any arbitration, mediation or any quasi-judicial administrative action, proceeding or process whatsoever’.  

(b) entrusting the realisation and administration of the debtor’s assets to the debtor’s New Zealand liquidator. The court granted the New Zealand liquidators the powers of a liquidator appointed under the *Corporations Act*.

(c) granting stays against commencement of proceedings or enforcement of judgements and appointed a local representative of the foreign representative who was a local liquidator to administer and finalise a sale of the property and business.

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455 *Pink v MF Global UK Ltd (in Special Admin)* [2012] FCA 260 (23 March 2012) [20].


457 Ibid order 3.5.

458 *Appleyard re Crawford Farms Ltd v Crawford Farms Ltd* [2012] FCA 1373 (8 November 2012).
(d) giving the distribution of real property to a Japanese foreign representative after recognition of a foreign main proceeding.\(^{459}\)

(e) granting a British Virgin Island liquidator the power to conduct an examination of an Australia resident in accordance with the provisions of the \textit{Corporations Act}.\(^{460}\)

The Federal Court has held that the payment of tax liabilities and employees fell within Article 21(1)(e) if an order was made in those terms. The court further held that in order for an order to be made under Article 21(1)(g), the powers given must be in addition to those set out in paragraphs (a) to (f) in order to constitute ‘additional relief’.\(^{461}\)

On the other hand the Federal Court of Australia, has refused to grant a foreign representative from Iceland all the powers of the domestic liquidator under the \textit{Corporations Act}, on the basis that such a request was too wide and went beyond what was envisaged by the Model Law.\(^{462}\) However the court, indicated that it may be willing to grant the representative more limited powers should the representative prove a requirement of the same.

The above decisions highlight that the Australian courts are more willing to grant New Zealand liquidators powers akin to those of Australian liquidators, presumably as a result of the similarity of their positions and the law under which they operate. Liquidators and administrators in New Zealand are not required to be licensed and therefore cannot seek recognition as Australian liquidators under the mutual recognition which would otherwise entitle them to practice and be registered in Australia.\(^{463}\)

\textbf{7.7.2 Canada}

In Canada, it has been argued that the Canadian enactments provide the courts with flexibility to make orders authorising foreign representatives to act as monitors of the debtors business and affairs.\(^{464}\) The provisions of the CCAA are a broad outline and

\(^{461}\) Ibid [28].
\(^{462}\) \textit{Backman v Landsbanki Islands hf} [2012] FCA 260 (7 December 2011) [21].
\(^{463}\) See, eg, \textit{Companies Act 1993} ss 239F, 280; Mutual Recognition Act 1992 (Cth) s19.
\(^{464}\) Golick and Wasserman, in Ho (ed), above n 77, 93.
give the Canadian courts wide discretion in terms of what they can approve. The
Alberta Queens Bench has, in commenting upon the CCAA, indicated that:

The legislation is intended to have wide scope and allow a judge to make orders which
will effectively maintain the status quo for a period while the insolvent company
attempts to gain the approval of its creditors for a proposed arrangement which will
enable the company to remain in operation for what is, hopefully, the future benefit of

The provisions of the CCAA have been described as being skeletal in nature and as a
’sketch, an outline, a supporting framework for the resolution of corporate insolvencies
in the public interest.’\footnote{ATB Financial v Metcalfe & Mansfield Alternative Investments II Corp (2008) 45 C.B.R (5th) 163 [44], [61].} This is said to provide flexibility and is particularly useful in
complex insolvency cases.\footnote{Re Nortel Networks Corporation (2009) CanLii 39492 (ONSC) (23 July 2009) [28].} This has been confirmed by the Superior Court of
Quebec which stated that the function of the court in proceedings under the CCAA ‘is
to facilitate an orderly restructuring process and to promote a negotiated settlement of
any disputes which may arise’.\footnote{Re White Birch Paper Holding Company (2011) 209 ACWS (3d) 26; (2011) QCCS 5223(7 October 2011) [21].} It has also been stated that a court should give the
Act ‘a broad and liberal interpretation so as to encourage and facilitate successful
restructurings whenever possible’.\footnote{Re Cinram International Inc (2012) 91 CBR (5th) 46,[58].} The Canadian Courts are able to recognise
diverse restructuring arrangements and to approve such arrangements in relation to a
Canadian entity without that entity having any place of business in Canada or in the
jurisdiction from which the foreign representative is seeking recognition. Canadian
courts have recognised foreign proceedings, where such proceedings were based
upon a debt being incurred in their jurisdiction, a business being conducted, or an asset
being located in the jurisdiction of the foreign proceedings. In practice, this has meant
that the Canadian courts have been able to recognise the majority of US-based foreign
proceedings, with the real issue being the remedies or orders that should be granted as
a matter of discretion if the foreign proceeding is not a foreign main proceeding.\footnote{Re Probe Resources Ltd (2011) 79 CBR (5th) 148 [31]-[32]; Re Cinram International Inc
(2012) 91 CBR (5th) 46, [58]-[60].}
7.7.3 New Zealand

In New Zealand, the High Court has commented that as a matter of discretion the court should not make an order under this article if the remedy sought is not available to the foreign representative in the State of their appointment.\(^{471}\)

The New Zealand High Court has issued summons for the examination of officers of an Australian company and ordered that the examinations be held in chambers and that there be restricted communication to examinees of the questions and answers of other examinees.\(^{472}\) The New Zealand court has also appointed Australian liquidators as liquidators of related companies in New Zealand under their domestic laws.\(^{473}\)

7.7.4 United Kingdom

In the UK, the court can give the same relief as they give to a British insolvency officeholder. No stay granted under this article can affect a regulatory authority’s intention to commence or continue proceedings. The English High Court has stated that:

Article 21(1) (d) was intended to set a common minimum standard. A foreign representative is to be able to seek relief under Article 21(1) (d) regardless of whether an officeholder would be entitled to such relief under the local law. If the local law in fact provides for “additional” relief, a foreign representative can seek that under Article 21(1) (g).\(^{474}\)

The English High Court has also indicated that it must weigh up the competing factors when determining whether to grant an order under this article and that an order is, in the words of Article 21(1), ‘necessary to protect the assets of the debtor or the interests of the creditors’.\(^{475}\) Lastra has commented that this article does not authorise a court to grant any relief that prejudices the protection afforded to financial collateral arrangements and closes out netting provisions within the Financial Collateral Arrangements (No 2) Regulations 2003 and certain financial market transactions.\(^{476}\)

Both Fletcher and Sheldon have commented that any relief is restricted to that which is

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\(^{471}\) ANZ National Bank Ltd v Sheahan [2013] 1 NZLR 674 [112]; Sheahan v ANZ Bank NZ Ltd [2013] NZHC 888 (26 April 2013) [4].
\(^{473}\) See, eg, ANZ National Bank Ltd v Sheahan [2013] 1 NZLR 674.
\(^{475}\) Ibid [17].
\(^{476}\) Lastra (ed), above n 45, 221 [9.58].
available under their domestic law.\textsuperscript{477} This position has been confirmed by the High Court.\textsuperscript{478}

The English High Court has granted conditional interim relief staying the enforcement of a lien in England pending the determination of an appeal over the quantity of the creditor’s provable debt in Korea, the place of the main proceeding, upon an undertaking being given that the fact that the creditor appeared in the Korean proceeding would not create an estoppel in England to them enforcing their lien.\textsuperscript{479} The court relied upon Articles 21(3) and 22(2) of the Model Law when imposing these conditions.

The English High Court has used Article 21(1) (d) to issue a subpoena to compel a Bank resident in England to hand over documents to a foreign representative, including several internal documents of the bank to allow the foreign representative to assess its claims against the Bank.\textsuperscript{480}

In \textit{Pichard v FIM Advisers LLP}, the English High Court stated:

\begin{quote}
It is apparent that Article 21(1)(d) has both a jurisdictional and a discretionary component. The court must be satisfied that the information sought concerns the debtor’s assets, affairs, rights, obligations or liabilities. If it is so satisfied then it has discretion to order the delivery of that information. In exercising that discretion it must have regard to all relevant circumstances and ensure that the interests of the person against whom the order is sought are adequately protected.\textsuperscript{481}
\end{quote}

In \textit{Swissair}, the English High Court stated:

\begin{quote}
While express provision is made for the remittal of assets to a foreign representative, there are two qualifications relevant to the present application, in addition to the discretionary nature of the power under article 21.2. First, under article 21.2 itself, the court must be satisfied that the interests of creditors in Great Britain are adequately protected. . . . Secondly, because Swissair was already in liquidation in England when the Swiss liquidator applied for recognition of the Swiss liquidation, article 29(a)(i) requires that an order for remittal must be consistent with the liquidation in England. .
\end{quote}

\textsuperscript{477} Fletcher, above n 44 [8.38]; Sheldon, above n 147, 128-32.
\textsuperscript{478} Fibria Celulose S/A v Pan Ocean Co Ltd [2014] EWHC 2124 (Ch) (30 June 2014) [108].
\textsuperscript{479} Norden v Samsun Logix Corporation [2009] BPIR 1367.
\textsuperscript{480} Ackers v Deutsche Bank AG [2012] BCC 786.
\textsuperscript{481} Pichard v FIM Advisers LLP [2011] 1 BCLC 129; [2010] EWHC 1299 (Ch) (27 May 2010) [23].
In the context of the submissions made in the present case, it is worth noting article 21.3 which provides that in granting relief under article 21, including remittal of assets under article 21.2, to a representative of a foreign non-main proceeding "the court must be satisfied that the relief relates to assets that, under the law of Great Britain, should be administered in the foreign non-main proceeding". There is no equivalent restriction as regards remittal to a main proceeding. The implication is clear, that remittal to a main proceeding is contemplated by English law.  

The Court held that recognition of a foreign main proceeding does not prejudice the rights of set-off that exist under an English winding-up.

The issue of the nature of the protection that is required for a court to entrust the distribution of assets to a foreign representative was considered in a different context by the Privy Council in *Cambridge Gas* in which case it was equated to fairness, with fairness requiring the bankruptcy proceedings to have universal application to which all creditors are entitled and required to prove. However the United Kingdom Supreme Court has since indicated that this case was wrongly decided.

The House of Lords in *McGrath*, in deciding to entrust the distribution of assets to a foreign representative, found that the assets did not have to be distributed according to English law.

### 7.7.5 USA

Paragraph (a) of this article is understood to include 'intangible property deemed under applicable non bankruptcy law to be located within that territory'. The court also cannot enjoin an act of a police or regulatory or government agency. Melnik comments that this article was drafted to protect the primacy of the law of the State of the foreign main proceedings and that it will allow a US court to grant a worldwide stay to assist such proceedings. It is argued that such stays are against the spirit of the Model

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483 Ibid.
485 *Cambridge Gas Transport Corporation Limited v Official Committee of Unsecured Creditors (of Navigator Holdings PLC & Ors ) (Isle of Man)* [2007] 1 AC 508, 517 [16].
486 *Rubin v Eurofinance SA* [2013] 1 AC 236, 276-8 [128]-[132].
487 *McGrath v Riddell* [2008] 3 All ER 869, 879 [20] (Lord Hoffman).
488 11 USC § 1502(8).
489 Selinda A Melnik, in *Ho*, above n 77, 493.
Law that requires recognition in order for an insolvency proceeding to have effect in a foreign jurisdiction. This issue is commented upon further in section 10.3.5.

A US court, when exercising the power under this provision, must take into account the provisions of sections 1507 and 1522 which list a number of factors a court must take into account when determining what assistance to grant. In addition, it cannot grant relief under sections 522, 547, 548, 500 or 724(a). These provisions are not contained in the Model Law suggesting once again that the USA places its domestic interests ahead of international consistency and the principles of modified Universalism upon which the Model Law is based.

The granting of relief is subject to the ‘standards procedures and limitations applicable to an injunction’. The section prevents the court from granting to a foreign representative the power to bring a number of antecedent transaction proceedings under the Bankruptcy Code. The Court of Appeal has, however, heard that the restriction goes no further than the sections listed and does not extend to the court applying foreign law in respect of antecedent proceedings. This case is discussed further in sections 7.7.5, 7.9.5 and 10.3.7.

The US Court of Appeals has indicated that any relief granted does not have to be identical to that which would have been granted if the proceedings commenced in the USA but is only ‘comparable’. It is argued that this is the correct analysis and recognises the international character of the Model Law and that any relief granted should take account of the provisions of Article 8.

There is a dispute among the different circuits of the US Court of Appeals as to the appropriateness of granting non-debtor discharges of liabilities as a part of restructuring proceedings. As previously discussed, this is a function of the US judicial system and its lack of structures to resolve differences in reasoning between the different US Courts of Appeal.

The US Bankruptcy Court in *Re International Banking Corporation* applied section 1521(1) (b) in refusing to transfer property in the US to a recognised foreign proceeding

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490 11 USC § 1521(7)
491 *Re Condor Insurance Ltd*, 601 F.3d 319 (5th Cir, 2010).
492 *Re Vitro SAB de CV*, 701 F.3d 1031 (5th Cir, 2012).
493 Ibid.
in Bahrain until the foreign representative provided additional evidence that the US creditors would be protected.\(^\text{494}\)

In *Re Atlas Shipping*, the court granted a Danish Foreign Main Representative the power to administer the assets of a Danish shipping company located in the USA and to vacate attachments by the debtor’s creditors against US bank accounts. Judge Glenn described the discretion under section 1521 as 'exceedingly broad' since the court may grant any appropriate relief that would provide further relief in accord with the purposes of Chapter 15.\(^\text{495}\) The court went on to state that:

> Section 1521(b) cautions that this relief only be granted if the interests of local creditors are "sufficiently protected." Id. One court has described "sufficient protection" as embodying three basic principles: "the just treatment of all holders of claims against the bankruptcy estate, the protection of U.S. claimants against prejudice and inconvenience in the processing of claims in the [foreign] proceeding, and the distribution of proceeds of the [foreign] estate substantially in accordance with the order prescribed by U.S. law." . . . , but noting that the analysis would be "essentially the same" under § 1521(b)).\(^\text{496}\)

The US Court of Appeals has indicated that, in assessing which relief to grant, courts must use the following framework when analysing such requests:

> First, because § 1521 lists specific forms of relief, a court should initially consider whether the relief requested falls under one of these explicit provisions. . . Second, if § 1521(a)(1)-(7) and (b) does not list the requested relief, a court should decide whether it can be considered "appropriate relief" under § 1521(a). . . Third, only if the requested relief appears to go beyond the relief previously available under § 304 or currently provided for under United States law . . . should a court consider § 1507.\(^\text{497}\)

The US Court of Appeals in *Re Condor Insurance* described the powers the court may not confer upon a foreign representative as follows:

> The sections explicitly excepted from [1521] (a)(7) are often referred to as "avoidance powers"—a trustee's powers to avoid the transfer of debtor property that would deplete the debtor's estate at the expense of creditors. Such powers, generally described,

\(^{494}\) 439 BR 627, 637-9 (Bankr, SD NY 2010).  
\(^{495}\) 404 B.R 726, 739 (Bankr, SD NY, 2009).  
\(^{496}\) Ibid 740.  
\(^{497}\) *Re Vitro SAB de CV*, 701 F.3d 1031 (5th Cir, 2012).
include those addressing exempt property (§ 522), the "strong arm" power, which permits the trustee to act as a judicial lien creditor (§ 544), the power to avoid statutory liens (§ 545), the power to avoid transactions as "preferences" (§ 547), the power to avoid fraudulent transfers (§ 548), and the power to avoid liens that secure claims for compensatory fine, penalty, or forfeiture, or punitive damages (§ 724(a)). Section 550 contains the rules that govern the mechanics of avoidance actions.498

In Lee, the US Bankruptcy Court determined that when a foreign representative is seeking a turnover order for the assets of the debtor in the USA to be turned over to them, the burden of proof is with the applicant representative to prove that their administration is entitled to the assets upon a preponderance of evidence.499 The Bankruptcy Court has also used the equivalent of this article to allow a foreign representative to seek orders under sections 542 and 543 for turnover orders providing that an application is made on motion and the adverse parties are given an opportunity to be heard.500 Likewise, orders for discovery can be made provided that they are sought on notice, with the parties against whom they are sought being given an opportunity to be heard.501

Finally the US Bankruptcy Court has also used this article to exempt from the automatic stay under article 20 a foreign main proceeding where there were domestic proceedings on foot in relation to the entitlement of the debtor to money that had been paid into the custody of the court.502

7.7.6 Generally

Mason, has indicated that where a debtor is the subject of foreign proceedings in multiple jurisdictions, and foreign representatives of more than one jurisdiction seek recognition or relief, a local court must seek to promote cooperation and coordination with all of the foreign representatives, with any relief to be granted to be consistent with the foreign main proceeding.503 Fletcher has suggested that Article 21(3) requires the court to:

decide which of two or more foreign proceedings has the better claim to assets located within its jurisdiction where each of the foreign laws purports to affect the debtors

498 Re Condor Insurance Ltd, 601 F.3d 319, 323 (5th Cir, 2010).
500 Re AJW Offshore Ltd, 488 BR 551 (Bankr, ED NY, 2013).
501 Ibid.
503 Mason, above n 1, 88.
property ‘wherever situate’. It will normally be the case that the claim on behalf of a main proceeding will prevail over that of a non-main. Where both foreign proceeding are non-main, however, the matter is apt to be less clear cut, although it may be possible to establish that the local assets or some of them, are more closely associated with the operations of a particular foreign establishment of the debtor.  

Mason and Fletcher do not appear to have taken into account the situation of what is to occur when there are inconsistent findings of the State the foreign main proceeding occurs. This is especially the case where the inconsistency in part occurs due to amendments made in those jurisdictions to the wording of the Model Law adopted in those States.

7.8 Article 22

Article 22 confirms that a court has broad discretion regarding the type of order it can make to assist a foreign representative, including rescinding or varying a previous order. The court must consider and weigh up the competing interests of creditors, other interested parties and the debtor. It has been suggested that in ‘order to allow the court to tailor the relief, the court is authorised to subject the relief to conditions (paragraph 2) and to modify or terminate the relief granted (paragraph 3)’.  

The effect of this article is to allow the court to tailor the relief granted so as to take into account any changing circumstances. It has been suggested that the court can use this article to limit the stay granted under Article 20.

7.8.1 Australia

This article has been used to prevent assets being remitted to the jurisdiction of the foreign main proceedings until a sum equivalent to the dividend that would be payable

504 Fletcher, above n 44, 470, [8.42].
506 Explanatory Memorandum, Cross-Border Insolvency Bill 2008 (Cth) 31 [65].
508 Wood, above n 18, 964 [31-049].
to the Australian Taxation authorities had been paid to them, where that debt was not otherwise admissible under the local law of the place of the main proceedings.  

7.8.2 Canada

In the Canadian version of this article, there is no provision for the adequate protection of creditors and interested persons. Section 187(5) of the Canadian BIA allows a court to review, rescind or vary any order made under its bankruptcy jurisdiction. The Quebec Superior Court has held that this section permits a judge to deal with continuing matters on an insolvency file and not be bound by an earlier decision where circumstances have changed or fresh evidence is brought forward.

Sarra has suggested that the omission of this Article is due to Canadian insolvency law not currently enshrining a notion of adequate protection such as exists in the USA and other jurisdictions.

7.8.3 New Zealand

In New Zealand, this article has been altered to oblige the court to terminate any relief granted should the debtor be a registered bank.

7.8.4 United Kingdom

This article has been enacted as a draft.

7.8.5 USA

In the USA this article allows a court to grant relief under Articles 19 or 21 'only if the interests of creditors and other interested parties, including the debtor are sufficiently protected'. It can also grant such relief on condition that security is provided. This Article has been the subject of judicial comment in the USA summarised as follows:

The court stated in Tri-Continental Exchange that:

509 Ackers v Saad Investment Company Ltd (in liq) (2013) 31 ACLC 493 affirmed but for slightly different reasons in Ackers v Deputy Commissioner of Taxation [2014] FCAFC 57 (14 May 2014). It will be interesting to see if this Article is also used to collect foreign taxes given Australia's recent adoption of the Convention on Mutual Administrative Assistance in Tax Matters [2012] ATS 38 (entered into force 11 December 2011).
510 See, eg, Golick and Wasserman in Ho, above n 77, 93.
511 Marciano (Sequestre de) [2011] QCCS 7086 (8 December 2011) [41].
512 Sarra, above n 77, 48-9.
513 Article 22(4).
514 11 USC § 1522 (a) (2012).
515 11 USC § 1522 (b) (2012).
Standards that inform the analysis of § 1522 protective measures in connection with discretionary relief emphasize the need to tailor relief and conditions so as to balance the relief granted to the foreign representative and the interests of those affected by such relief, without unduly favoring one group of creditors over another.\textsuperscript{516}

In \textit{Re Atlas Shipping}, the US Bankruptcy court stated that ‘[t]he exercise of discretion is, however, circumscribed by the Bankruptcy Code. Section 1522(a) provides that the court may only grant discretionary relief under § 1521 if the interests of creditors are sufficiently protected’.\textsuperscript{517}

The US District Court on the other hand, has used this article to approve a stay granted upon the recognition of a foreign proceeding extending to non-debtor entities in order to maintain the integrity of the administration of the debtor’s bankruptcy case.\textsuperscript{518}

It is argued that, in determining whether to impose terms upon any relief, a court must examine all the circumstances including the interests of the debtor and creditors. The court must craft conditions after taking account of the principles of equity. Any order should not impose any substantial burden upon the debtor, in addition to that which would be imposed under that State’s domestic law, but does not have to be identical.

\subsection*{7.9 Article 23}

Article 23 grants a foreign representative standing to bring proceedings to overturn antecedent transactions under the domestic law of the State in which recognition is granted. This article does not equate foreign representatives with individual creditors who have similar rights under different laws.\textsuperscript{519}

\subsubsection*{7.9.1 Australia}

In Australia, the types of actions which a foreign representative can issue as if they were appointed under the relevant domestic legislation are nominated as being:

- section 120, 121, 121A, 122, 128B or 128C or Division 4A of Part VI of the Bankruptcy Act 1966; or

\textsuperscript{516} 349 BR 627, 637 (Bankr, ED Cal, 2006).
\textsuperscript{517} 404 BR 726, 739 (Bankr, SD NY, 2009).
\textsuperscript{518} \textit{CT Investment Management Co.,LLC v Carbonell}, 2012 WL 92359 (Dist, SD NY, 11 January 2012) 5-6.
\textsuperscript{519} Wessels, Markell and Kilborn, above n 20, 210.
7.9.2 Canada

The situation in Canada, is slightly different as their different enactments allow a foreign representative to bring or continue proceedings as if it were the debtor or a creditor of the debtor.\textsuperscript{521} It is arguable that the court can grant the foreign representative of a foreign main proceedings leave to bring general avoidance proceedings.\textsuperscript{522}

7.9.3 New Zealand

A foreign representative can take any action that ‘an insolvency administrator may take in respect of a New Zealand insolvency proceeding that relates to a transaction (including any gifts or improvement of property or otherwise), security, or charge that is voidable or may be set aside or altered.’ The relevant applicable provisions are sections 292 to 299 of the 	extit{Companies Act 1993} and sections 192 to 216 of the 	extit{Insolvency Act 2006}. The Model Law does not specify how the relevant provisions are to be adapted to foreign proceedings.\textsuperscript{523}

7.9.4 United Kingdom

A foreign representative has power to issue proceedings under ‘sections 238, 239, 242, 243, 244, 245, 339, 340, 342A, 343, and 423 of the UK Insolvency Act and sections 34, 35, 36, 36A and 61 of the Bankruptcy (Scotland) Act 1985’ whether or not the debtor who is an individual has been adjudged bankrupt or the debtor company liquidated or placed into administration in the UK.\textsuperscript{524} The majority of these proceedings relate to antecedent transactions.

Leave of the court must be granted to the foreign representative by an appropriate court before issuing any proceedings where there is a concurrent British insolvency proceeding afoot with respect to the same debtor.\textsuperscript{525} Such leave may be granted

\textsuperscript{520}Cross-Border Insolvency Act 2008 (Cth) s 17.
\textsuperscript{521}Companies Creditors Arrangement Act, RSC 1985, c C-36 ss 36, 51; Bankruptcy and Insolvency Act, RSC 1985, c B-3 ss 38, 95-101 274.
\textsuperscript{522}Golick and Wasserman in Ho, above n 77, 96.
\textsuperscript{523}See, eg, Sean Gollin, in Ho, above n 77, 340.
\textsuperscript{524}Art 23 (1)-(3).
\textsuperscript{525}Art 23(6).
subject to conditions. This article has been amended to provide a number of procedural definitions to enable proceedings to be conducted under those sections.

Ho suggests that English courts should first apply the principles of private international law rules to determine whether the applicable law is under the *Insolvency Act 1986*. He argues that it is not be appropriate for an English court to apply avoidance provisions if this impinges on the insolvency policies of the *lex concursus* of the foreign main proceeding.

### 7.9.5 USA

In the USA, the foreign representative, once recognised, is granted power to bring proceedings under sections 522, 544, 545, 548, 550, 553 and 724(a) in another proceeding issued under another chapter of the Bankruptcy Code which is pending.

The USA version of this article has been the subject of considerable judicial comment including the following:

(a) In *AWAL Banking*, the court recognised that in relation to a creditor who had within 90 days prior to the filing of the recognition petition set-off amounts owing by it to the debtor, that this section ‘provides that a foreign administrator, after recognition, does have standing to initiate certain enumerated actions including those under § 553(b)” and that ‘based on the foregoing, relief pursuant to § 553(b) is not prohibited by § 521(a)(7).’

(b) In *Re Condor Insurance Ltd*, the US Court of Appeals described section 1523 as follows:

The Model Law is not clear about whether it would grant standing in a recognized foreign proceeding if no full case were pending . . .

This limited grant of standing in section 1523 does not create or establish any legal right of avoidance nor does it create or imply any legal rules with respect to the choice of applicable law as to the avoidance of any transfer of obligation. The courts will

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526 Art 23(7).
527 Ho, above n 77, 238.
528 See Glosband, et al, above n 95, 135-6.
529 155 BR 73, 87 (Bankr, SD NY, 2011).
530 Ibid 88.
The court went on to allow proceedings in respect recovery of antecedent proceedings to be issued under the laws of the state of the main proceedings.

7.9.6 Generally

The cases above highlight some of the issues that arise as a result of amendments made to the text of the Model Law by States that have adopted it, particularly in relation to the USA. If a foreign representative brings proceedings under this article, it is argued that the private international law issues must already have been determined, as it is the domestic law of that State that applies, as proceedings must be issued in that State’s domestic courts which will apply its domestic procedural rules.\(^{532}\)

The Model Law does not deal with the issue of whether a local court should also apply the law of the foreign main proceedings or recognise judgments of the courts of the country of the foreign main proceedings against creditors or recipients of those transactions within its State. The US Court of Appeals has indicated that it is willing to allow a foreign representative to apply foreign law in relation to antecedent transactions in appropriate circumstances.\(^{533}\) This issue is discussed further in section 12.2.

The USA does not allowing a foreign representative to issue domestic proceeding seeking to overturn antecedent transactions under their domestic law without issuing domestic proceeding under another chapter of the Bankruptcy Code. This concept is unique to the USA and, is against the spirit of the Model Law. Further, this provision can be seen as an attempt by the US legislature to impose US law on foreign administrations. The US courts have circumvented this provision by allowing foreign representatives to issue proceedings to recover antecedent transactions under foreign law. Whilst this solution promotes Universalism, it may lead to arguments in respect of lack of certainty from domestic creditors as they would not be familiar with foreign insolvency laws. This is an issue that should be reconsidered by the US Congress.

\(^{531}\) \textit{Re Condor Insurance Ltd}, 601 F.3d 319, 325-6 (5th Cir, 2010).
\(^{532}\) See Chapter 11 below.
\(^{533}\) \textit{Re Condor Insurance Ltd}, 601 F.3d 319, 329 (5th Cir, 2010).
7.10 Article 24

Article 24 is a procedural provision that grants certainty in relation to a foreign representative’s standing to intervene in proceedings to which the debtor is a party. This provision has been enacted without variation in Australia, New Zealand and the UK. In Canada, there is no direct equivalent provision and therefore leave is required.  

In the USA, this article has been clarified by a confirmation that such intervention can be in relation to proceedings before either a Federal or State court. In *Re Iida*, the US Bankruptcy Appellant Panel determined that by reason of section 1509(f), a foreign representative was permitted to sue in order to collect or recover a claim that was the property of the debtor without obtaining prior permission or recognition from a Bankruptcy Court. This decision appears to recognise the constitutional position in the USA whereby the State’s laws allow a foreign representative to sue in that State’s courts in respect of causes of action that arose prior to recognition. However, this exception does not apply to causes of action that arise by reason of the bankruptcy. Once a foreign proceeding has been recognised, jurisdiction is vested in the Bankruptcy Court.

It is argued that in the case of corporate debtors, where the cause of action vests in the body corporate, a similar situation exists in the four other States examined and that recognition is not required prior to issuing such proceedings. The common law provides other protections to the parties against whom such proceedings are issued such as the ability to seek security for costs.

7.11 Summary

The Model Law promotes the granting of recognition to foreign proceedings without formalities and vests in the courts a wide discretion as to the type of order that can be made upon recognition or on an interim basis. Upon recognition of a foreign main proceeding, a stay operates; however, the extent of that stay differs between States.

As indicated above, no uniformity has been achieved in the States in relation to recognition of foreign proceedings and the relief that can be granted by courts following

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534 Golick and Wasserman, in Ho, above n 77, 94.
535 *Re Iida* 337 BR 243, 258 (BAP, 9th Cir, 2007).
recognition. This is in part due to the way the presumption contained in Article 16 has been enacted, with the US legislature having intentionally changed the circumstances in which the registered office presumption can be applied. This lack of uniformity is also due in part to some States, such as Canada, not enacting the Model Law completely or amending their domestic version of the same as in the UK and the USA.

Despite the lack of uniformity, the courts in States with close economic ties such as those between the USA and Canada and between Australia and New Zealand, have attempted to interpret the Model Law consistently in relation to applications involving their close neighbours. Unfortunately, this has given rise to different interpretations between the North American States on one hand and Europe on the other, with Australia and New Zealand slightly favouring the European position.

In relation to the powers conferred upon a foreign representative following recognition, only the USA requires domestic proceedings to be issued in order for antecedent transactions proceedings to be issued under their domestic laws. All other States allow a foreign representative to issue such proceedings under the equivalent of their domestic laws. The USA, however, allows a foreign representative to issue proceedings under their domestic courts in respect of antecedent transactions applying a foreign law.
Chapter 8
Comparative Analysis of the Enactment and Interpretation of Chapter IV of the Model Law on Cross-Border Insolvency – Cooperation with Foreign Courts and Foreign Representatives

Overview
Chapter 8 examines how the provisions of Chapter IV of the Model Law have been enacted by the five nominated States. This chapter argues that:

- The Model Law encourages communication between domestic and foreign courts and local and foreign representatives and for local representatives to communicate with foreign courts.

- These provisions are based upon the premise that the more communication there is between jurisdictions, the less likely it will be for assets to be dissipated.536

- The use of protocols between courts and different representatives of insolvent entities is important. Examples of the types of communication that have occurred or are referred to in the UNCITRAL Practice Guide are set out in Appendix 2.

8.1 Article 25

Article 25 promotes and advances the principles of uniformity and the observance of good faith set out in Article 8. It encourages cooperation and communication between courts and between courts and foreign representatives through communication between courts. Paragraph 2 of this article entitles a court to communicate directly with, or to request information or assistance from, a foreign court or foreign representative.

Article 25 is designed to address two problems: firstly, there are no rules in several States’ (especially in civil law countries), that allow their courts to cooperate and

communicate with foreign courts. Secondly, in some jurisdictions, do not clearly indicate the extent of a court's power to cooperate with foreign courts and foreign representatives. The communication envisaged by this article usually occurs through either letters (including letters of request) or protocols. Communication with foreign representatives will generally occur in accordance with the court's procedural rules.

In the UK they have substituted in paragraph 1 the word ‘may’ for ‘shall’ thereby making the obligation to cooperate discretionary.

It has been suggested that this article allows a court in the USA that is overseeing a Chapter 11 case, in which the debtor is a Debtor in Possession (DIP), to appoint a person to deal with cross-border issues in countries that are accustomed to the appointment of a receiver or supervisor for the debtor that may be suspicious of the authority of the Debtor in Possession.

The courts in North America have a greater amount of experience in creating protocols for dealing with issues that may arise during the course of a cross-border insolvency. Justice Morawetz of the Ontario Superior Court stated that it is “common” to have court-to-court communication protocols and to have joint hearings via closed circuit television. This experience may be more due to the provisions of the American Law Institute’s Transnational Insolvency: Cooperation Among the NAFTA Countries, Principles of Cooperation Among The NAFA Countries being adopted by the North American courts than to the provisions of the Model Law. This requires further investigation and is beyond the scope of this thesis. However, it is noted that several courts within Australia have referred to these principles as factors which they believe should be considered.

537 Wessels, Markell and Kilborn, above n 20, 223.
538 See, eg, Glosband et al, above n 95, 139.
539 Morawetz, above n 136, 11.
540 The American Law Institute, above n 32.
Notably a revised set of principles has recently been released which aims to encourage interaction and cooperation between courts and representatives. More recently, the European Communication and Cooperation Guidelines for Cross-Border Insolvency have been proposed by the International Association of Restructuring, Insolvency and Bankruptcy Professionals of Europe in an endeavour to assist European Courts with transnational cases involving more than one main proceeding.

A summary of the types of communications and protocols that have been established by courts is set out in Appendix 2.

8.1.1 Australia

In Australia, some of the courts having jurisdiction under the Model Law have issued Practice Directions which address the issue of cooperation with foreign courts and foreign representatives. The New South Wales Supreme Court has also found that paragraph 1 of this article imposes a mandatory obligation on the court to cooperate with courts and representatives of foreign jurisdictions.

8.1.2 Canada

In Canada, the equivalent provision obliges a court to cooperate to the maximum extent possible with a foreign representative or foreign court. It is arguable that in order for this to work, the court must take into account the same matters as required under Article 8 in order to achieve maximum cooperation and harmonisation of outcomes.

8.1.3 USA

In the USA, the provisions of this article are ‘subject to the rights of a party in interest to notice and participation’.


Sexton, above n 10, 821.


Companies Creditors Arrangement Act, RSC 1985, c C-36 s 52(1); Bankruptcy and Insolvency Act, RSC 1985, c B-3 s 275(1).

11 USC § 1525(b) (2012).
The types of protocols and communications that have occurred under this Article and the protocol issues identified by UNCITRAL are set out in Appendix 2. That Appendix shows that Appendix 2 the issues that have been addressed in the past by insolvency agreements /protocols cover the vast majority of the duties of a representative of an insolvent entity. In Canada, the UK and the USA, such agreements have generally been approved by the Court as a means of protecting the representatives from any allegation of breach of duty and to ensure that the agreements are binding on the insolvency practitioner representatives. It is suggested that this would also be appropriate in both Australia and New Zealand.

8.2 Article 26

Article 26 encourages communications and cooperation between foreign representatives and between local representatives and foreign courts and foreign representatives, subject to the supervision of the court. Communication between representatives of insolvent entities generally occurs in a non-formal manner. Communication between representatives and a court will generally occur in accordance with the court’s procedural rules and customs. Given the expanded definition of the term ‘court’, this article also places an obligation on foreign representatives to communicate and cooperate with local administrative authorities.

In Canada, Article 26 (2) has not been adopted. All other States examined have adopted the Model Law provisions. Despite Canada not adopting this article, the Canadian court representatives have a history of communication with foreign representatives and courts, and in particular have a history of cooperation in the case of corporate restructuring where dual proceedings are issued under both Chapter 11 in the USA and under the CCAA in Canada. See the decisions referred to in Annexure 2

Silverman and Seamon have commented that at the Judicial Colloquia in 1995, the ‘general consensus was that courts can and should be permitted to communicate directly on procedural or administrative matters, but not on substantive matters without participation of parties in interest in some appropriate forum. Appropriate forums would include advance consent or actual participation, but not through an ex parte communication, made without notice imported to all of the parties’. It is argued that

in common law States, such as those considered in this thesis, it is not appropriate for judicial officers to communicate between themselves in the absence of the parties or their input. This is because the court is not aware of all of the circumstances of an individual insolvency administration and any flow-on effects that may occur. The court of a English common law tradition cannot be aware of all of the circumstances of a foreign proceeding under the rules of evidence. Even if communications are in writing, and only relate to procedural matters, all parties should have an input. It is argued that this issue cannot be addressed by an amendment to the Model Law.

8.3 Article 27

This provision is designed as a signpost for courts to give them some idea of the breadth of orders they can make for the purpose of cooperating with foreign courts and foreign representatives under Articles 25 and 26. It is argued that the word ‘including’ implies that the forms of cooperation listed in this article are not intended to be exhaustive. All States examined have adopted this article.

The types of cooperation specified by this article include:

(a) Appointment of a person or body to act at the direction of the court;
(b) Communication of information by any means considered appropriate by the court;
(c) Coordination of the administration and supervision of the debtor’s assets and affairs;
(d) Approval or implementation by courts of agreements concerning the coordination of proceedings;
(e) Coordination of concurrent proceedings regarding the same debtor.

UNCITRAL in its Practice Guide has specified further types of cooperation that could exist between courts including:

(a) Those relating to questions of jurisdiction and allocation of disputes among cooperating courts for resolution; and

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548 Eg, the legal advice a foreign representative has received; the state of ongoing settlement discussions or what has been said by different parties at a mediation.
(b) Coordination of the filing, determination and priority of claims.\textsuperscript{549}

It is argued that any further cooperation that is given must be consistent with the purposes of the Model Law in providing assistance to a foreign representative after taking into account the interests of the debtor, creditors and other interested parties in accordance with Article 22.

### 8.4 Summary

The Model Law encourages communication between courts, between local and foreign representatives, and between courts and foreign representatives. The courts are given a wide discretion as to how to cooperate with foreign courts and foreign representatives. The list specifying the forms that such cooperation can take is not exhaustive. However these rules should not be used in circumstances where it may give rise to an appearance of lack of impartiality or not applying the rules of natural justice. Courts must ensure that all parties to a proceeding are aware of and have input into any communication between one court and a court in another State or a foreign representative.

Chapter 9
Comparative Analysis of the Enactment and Interpretation of Chapter V of the Model Law on Cross-Border Insolvency - Concurrent Proceedings

Overview

Chapter 9 examines how the provisions Chapter IV of the Model Law have been enacted by the five nominated States:

- Articles 28 to 30 describe what is to occur where there are multiple insolvency proceedings on foot, and the rules applicable to overcome any conflicts.

- Article 31 makes a presumption that a debtor is deemed to be insolvent if they are a debtor in a recognised foreign main proceeding. This is designed to assist with the issuing of domestic proceedings in the State in which recognition is granted, including those relating to antecedent transactions. Antecedent transactions are discussed further in section 10.3.4.2.

- Article 32 ensures that where there are multiple proceedings, creditors to the greatest extent possible receive a *pari passu* distribution after considering all the proceedings as a whole by applying the English principle of hotchpot, which provides for the equalisation of distributions between creditors of the same class in different States.

9.1 Article 28

Article 28 is premised upon another State being recognised as the State in which there is the COMI such that the foreign main proceeding is within that other State’s jurisdiction. This article restricts the court’s power to appoint a domestic representative in circumstances where the debtor has assets within that State. It further restricts the powers of any subsequently appointed domestic representative to deal with the assets within the jurisdiction and those which the court believes should be administered in the jurisdiction in light of the obligations of cooperation and coordination under Articles 25,
It has been stated that both restrictions contained within the article must be taken into account.\(^{551}\)

Fletcher postulates that other assets of the debtor (including those outside the local jurisdiction) may be brought into the local proceedings pursuant to this Article, providing that the local laws regard them as being properly within the scope of an administration conducted within its jurisdiction.\(^{552}\) It has been suggested that the type of foreign assets that may be covered include assets of a local business being sold as a going concern which are located overseas, or assets that have been fraudulently transferred overseas.\(^{553}\) There is, however, no restriction placed upon the types of assets over which a court can assert control. A number of jurisdictions assert a right over all the assets of the debtor wherever located.\(^{554}\) This issue is discussed further in section 10.3.6.

The UK version of this article does not restrict representatives to dealing only with the local assets within Great Britain once a foreign main proceeding is recognised. Ho suggests that this is based upon the previous English position that assets being within the jurisdiction were not a prerequisite to English courts initiating foreign proceedings. Ho further suggests that the English courts would also extend their insolvency jurisdiction to other assets of the debtor that the court determines should be administered in that proceeding.\(^{555}\)

In the USA, this article restricts the subsequently appointed domestic representative to dealing only with the assets which are within the territorial jurisdiction of the USA and not subject to the control of the foreign proceeding.\(^{556}\) In *AWAL Banking*, the US Bankruptcy Court recognised that, when a domestic case is opened in the USA following the recognition of a foreign main proceeding, ‘to the extent possible, the administration of a debtor’s affairs should be centralized in the foreign main proceeding

\(^{550}\) See, eg, *Re Awal Bank BSC*, 455 BR 73, 81 (Bankr, SD NY, 2011).
\(^{551}\) Explanatory Memorandum, Cross-Border Insolvency Bill 2008 (Cth) 33 [73].
\(^{552}\) Fletcher, *Insolvency in Private International Law, National and International Approaches* above n 44, 482 [8.66].
\(^{553}\) Sheldon, above n 147, 138 [3.122].
\(^{554}\) E.g. under the bankruptcy laws in Australia, New Zealand and the United Kingdom and Chapter 11 proceedings in the United States of America.
\(^{555}\) Ho, above n 77, 242.
\(^{556}\) 11 USC § 1528 (2012).
and other cases should be coordinated with the main case'.  

The court further held that:

Section 1528 further provides that when a domestic plenary case is opened subsequent to recognition of a foreign main proceeding, the effects of the U.S. case are restricted to the assets of the debtor that are within the territorial jurisdiction of the United States and, to the extent necessary to implement cooperation and coordination under sections 1525, 1526, and 1527, to other assets of the debtor that are within the jurisdiction of the court under sections 541(a) of this title, and 1334(e) of title 28, to the extent that such other assets are not subject to the jurisdiction and control of a foreign proceeding that has been recognized under this chapter.

9.2 Article 29

If a domestic insolvency proceeding is on foot at the time an application is made for recognition of a foreign representative in respect of the same debtor, then any order made and the automatic stay must be consistent with the domestic proceedings and not bring about a stay of those domestic proceedings. If the domestic proceedings are issued after the application for recognition of the foreign proceedings has been filed, then any order for recognition must be reviewed such that it is not inconsistent with the domestic proceedings. Further, the court should grant orders only in relation to foreign non-main proceedings in respect of assets that are to be administered within the foreign non-main proceedings.

In the UK, where domestic proceedings are issued after recognition of a foreign proceeding, the court must review any leave granted to the foreign representative under Article 23 to issue proceedings for recovery of antecedent transactions.

The principle embodied in this Article is that the commencement of a local proceeding does not prevent or terminate the recognition of a foreign proceeding. This article must be read in conjunction with Article 20(3) which allows domestic proceedings to be issued after recognition of a foreign main proceeding. However this article gives precedence to the domestic proceedings over a foreign main proceeding by requiring that any orders made following recognition of the foreign proceedings be consistent with the domestic proceedings. This is understandable if the assets are perishable,

557 455 BR 73, 82 (Bankr, SD NY 2011).
558 Ibid 81.
559 Explanatory Memorandum, Cross-Border Insolvency Bill 2008 (Cth) 33 [78].
large or immovable or have local legislative registration requirements or involve local legal proceedings with which a foreign representative may not be familiar. The effect of this article as a whole is to give an advantage to domestic creditors in the State with a large number of assets as the domestic insolvency laws (including those with respect to antecedent transactions) will determine that the assets available to be paid to them. This is a result of the local proceedings not being subordinated to the foreign proceedings.  

9.3 Article 30

Article 30 is designed to ensure that where there are multiple recognised foreign proceedings, any orders made are consistent between those other proceedings. Further, where both a foreign main proceeding and a foreign non-main proceeding have been recognised, any order made must be consistent with the foreign main proceeding. This Article is designed to ‘promote cooperation, coordination and consistency of relief granted to different proceedings’. This article also places an obligation upon the court to review its previous orders when recognising a foreign proceeding after another proceeding has already been recognised.

All States examined, other than Canada, have enacted this provision. Canada does not deal with the situation where a foreign main proceeding is filed before a foreign non-main proceeding in its legislation. Sarra has suggested that Canadian courts are likely to align their orders with those made by foreign courts given the courts’ willingness to grant comity.

In all States examined except Canada, where two foreign non-main proceedings are recognised, the court is required to modify its relief in the first proceeding to facilitate coordination between the two proceedings. The Canadian legislation does not deal with this possibility. The court in Canada does, however, have wide discretion. Golick

560 See comments below in Chapter 10.3.7.
562 Explanatory Memorandum, Cross-Border Insolvency Bill 2008 (Cth) 34 [78].
563 Sarra, above n 77, 53-4.
564 Companies Creditors Arrangement Act, RSC 1985, c C-36, ss 54-55; Bankruptcy and Insolvency Act, RSC 1985, c B-3 ss 277-278.
and Wasserman comment that where a second non-main proceeding is recognised, the court will review the orders made in the first non-main proceeding.\textsuperscript{565}

\section*{9.4 Article 31}

Article 31 provides that in the absence of proof to the contrary, recognition of a foreign main proceeding deems the debtor to be insolvent. The presumption does not apply if the foreign proceeding is a non-main proceeding. As this article imposes a presumption, it can be rebutted by appropriate evidence.

This a procedural provision such that upon recognition of a foreign main proceeding, the debtor is deemed insolvent.\textsuperscript{566} Allowing domestic insolvency proceedings to be issued quickly.\textsuperscript{567} The drafters have also stated that the purpose of this article is to avoid the need for repeated proof of financial failure which reduces the likelihood that a debtor may delay the commencement of proceedings long enough to conceal or remove assets.\textsuperscript{568}

In Australia, Canada, New Zealand and the UK, insolvency is not the test for personal bankruptcy; rather, an act of bankruptcy must have been committed or failure to comply with a statutory notice or other specified acts have been committed.\textsuperscript{569} In the USA, a foreign representative can commence a proceeding under chapter 3 of the Bankruptcy Code without otherwise fulfilling the domestic requirements for an involuntary case.\textsuperscript{570}

Insolvency is not defined in the Model Law, however in the States examined is generally understood as referring to the debtor’s inability to pay its debts as and when they fall due. This inability is a ground for winding up an incorporated debtor in all of

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{565} Golick and Wasserman, in Ho, above n 77, 97.
  \item \textsuperscript{567} See Corporations Act 2001 (Cth) ss 459B, 464; Winding-up and Restructuring Act, RSC 1985, c W-11 s 10; Companies Act 1993 s 241(4) (NZ); Insolvency Act 1986 c45 s 122; In the USA the necessary perquisites for involuntary proceedings are set out in 11 USC § 303 (2012) and relate to a debtor having at least $10,000 being owed.
  \item \textsuperscript{569} Bankruptcy Act 1966 (Cth) s 43; Bankruptcy and Insolvency Act , RSC 1985, c B-3 s 42, Insolvency Act 2006 ss 16-28 (NZ) ; Insolvency Act 1986 c45 ss 267-268.
  \item \textsuperscript{570} 11 USC § 1511 (2012).
\end{itemize}
\end{footnotesize}
the States examined. In all of the States examined, this presumption can be used in
the recovery of antecedent transactions.

Ho indicates that the UK version of the Model Law is not restricted to proceedings in
relation to a debtor that is technically insolvent; otherwise, this article would be
meaningless. In the USA, this article can be used to support an application for
domestic proceedings to be issued under another chapter in order to issue domestic
antecedent transaction proceedings under 11 USC § 1523.

9.5 Article 32

Article 32 simply incorporates the English equitable principle of hotchpot. This
principle equalises a creditor’s distribution between different proceedings in respect of
the same debtor, subject to the rights of secured creditors and other holders of rights in
rem. ‘Article 32 does not affect the ranking of claims as established by the law of the
enacting State and is solely intended to establish the equal treatment of creditors of the
same class’.

Distributions, even though made by recognised foreign representatives, may be
different given the domestic priority laws that exist in each State. The priority regime
that applies to each payment is that of the State from which the payments are made.
The ability to apply hotchpot is contingent upon there being sufficient assets available
for distribution in the State that will allow such equalisation to occur. This is not always
the case.

It is argued that hotch pot appears to be a sensible political compromise to address the
issue of equalisation of distributions in circumstances where it would be unlikely that,
politically, States would allow all assets in their jurisdiction to be administered by the
representative appointed in the State where the debtor has its COMI. This is especially
so where the debtor is subject to a local licensing regime or there is a statutory
compensation regime applicable to the debtors in that State. This issue is further

571 Corporations Act 2001 (Cth) s 459A; Winding-up and Restructuring Act, RSC 1985 c W-11 s
10(c) Companies Act 1993 (NZ) s 241(4); Insolvency Act 1986 c45 s 122(f) ; 11 USC § 303.
572 Ho, above n 77, 165.
573 For an explanation of English principle of hotchpot see generally McGrath v Riddell [2008] 3
All ER 869, 886 [50]; Fletcher, Insolvency in Private International Law, National and
International Approaches above n 44, 485 [8.70]; Sheldon, above n 147, 483-8 [14.6]-
[14.18].
574 Explanatory Memorandum, Cross-Border Insolvency Bill 2008 (Cth) 35 [82].
complicated where a debtor’s COMI may change over time as discussed in section 10.3.3.3.

9.6 Summary

Courts are granted a wide discretion to review the orders they have made where there are multiple proceedings issued in respect of the same debtor. They have power to review its previous orders under Articles 17(4) and 22(3) at any time. It is argued that such reviews must be conducted carefully to ensure that a court changes its findings only in relation to a debtor’s centre of interest where it is clear that, on the evidence subsequently presented, their earlier decision was incorrect. Courts should not condone debtors organising their affairs so as to change their COMI or create an establishment within the jurisdiction so as to take advantage of and benefit from the insolvency regime present within that jurisdiction.

Canada has not adopted all the articles contained in this chapter. It would appear that the courts of that State have been granted a very wide discretion and in exercising that discretion, can implement the policy behind the articles which it has not adopted should they so choose.

It is further argued that the presumptions contained in Article 31 should not apply to restructuring proceedings as such proceedings need the versatility to distinguish between creditors, and some of the entities which are the subject of those proceedings may not be insolvent. The issue of enterprise groups is discussed in section 14.3.
Chapter 10
Conflict of Laws

Overview

This chapter addresses the question of how the existing principles of conflict of laws have a bearing upon the interpretation of the Model Law and how they fit within the existing domestic law of a State. It highlights and suggests that:

- inconsistent rules is one of the factors contributing to the present inconsistencies in the interpretation of the Model Law

- a number of situations where conflicts exist in the domestic rules applicable in insolvency matters

10.1 Introduction

The Model Law does not harmonise the conflict of law rules of States adopting it, the issue is left to the established rules and practices of each State. Whilst insolvency proceedings are typically governed by the laws of the State in which they are issued (lex fori concursus), many States have adopted exceptions to that rule.575

The international character of the Model Law implies that its interpretation should be determined by reference to its objectives and its internal interpretative provisions contained in Article 8, with a view to its interpretation being consistent between States. Where inconsistencies exist in the interpretation of a provision after applying these principles, then it is argued that the courts should look to the domestic rules relating to conflict of laws to resolve these inconsistencies.

This chapter does not deal with the conflict of law issues that relate to the interpretation and recognition of COMI and establishment, which issues are dealt with in Chapter 11; nor does it deal with any conflict that arises as a result of its decisions conflicting with the EC Regulation which may give rise to inconsistent decisions which is dealt with in Chapter 13.

The other principles of private international law issues, namely choice of forum and choice of law, are dealt with separately in Chapter 12.

### 10.2 Common Law

The English common law which has been followed in Australia, Canada and New Zealand views bankrupt individuals and the liquidation or bankruptcy of corporations differently due to the effect of the different types of insolvency. In the case of an individual the divisible assets of the bankrupt are vested in the debtor’s trustee. In a corporate liquidation, the assets generally remain vested in the corporation.

#### 10.2.1 Australia

Nygh describes the common law position in relation to the resolution of conflict of laws in individual bankruptcy matters as follows:

1. The assignment affected by the foreign bankruptcy must comply with any requirement imposed by the *lex situs* in order to complete the title of the trustee;

2. In the case of conflicting claims, their respective priorities must be determined according to *lex situs*;

3. The foreign trustee takes the assignment subject to such rights, encumbrances and other equities as exist in relation to the property under *lex situs* and have priority over the trustee’s claim under that law.

Australian courts will give effect to a foreign individual’s bankruptcy only so far as it operates as an assignment of property. Similarly, a release or discharge from a liability under a foreign law will not be recognised in Australia unless that discharge or release is given under the law of the country which is the law of the contract.

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576 See, eg, *Bankruptcy Act 1966* (Cth), s 58.
577 See, eg, *Corporations Act 2001* (Cth) s 474(2).
578 Davies, Bell and Brereton, above n 118, 727-8, [36.7].
579 Ibid 728 [36.8]; *Global Distressed Alpha Fund 1 Limited Partnership v PT Bakrie Investindo* [2011] 1 WLR 2038,2042 [13].
The position in relation to the liquidation of corporations is different as the assets remain with the corporation and its management changes. There is no assignment or vesting of the assets unless the court so orders. The common law will recognise, upon application, the appointment of the liquidators or foreign representatives, upon which recognition they are entitled to deal with the company's assets including immovable assets, subject to any conditions the court may impose.

In summary, the position in Australia is that the foreign proceedings will be governed by the laws of Australia; however, the identity of the assets available in the insolvency administration will be determined in accordance with the law of the State in which the property is located (lex situs) or the law that is the applicable law of the contract giving rise to the asset.

### 10.2.2 Canada

In Canada, there are no clear rules in relation to conflict of laws. The Supreme Court of Canada has adopted a test of real and substantial connection in determining whether Canadian law should apply. The Supreme Court of Canada recently confirmed the lack of a clear rule when it stated:

> But in the common law, the nature of the conflict rules that would accord with the constitutional imperative has remained largely undeveloped in this Court's jurisprudence. Although the real and substantial connection test has been consistently applied both as a constitutional test and as a principle of private international law since Hunt, the Court has generally declined to articulate the content of the private international law rules that would satisfy the test's constitutional requirements or to develop a framework for them.

Castel, however, has previously sought to identify a number of principles applicable in bankruptcy scenarios and concluded the proper law for determining provability of debts in a Canadian bankruptcy, the validity of security interests and any property caught by a Canadian bankruptcy is *lex situs*. He also comments that a foreign discharge of a

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580 *Cambridge Gas Transport Corporation v The Official Committee of Unsecured Creditors (of Navigator Holdings PLC & Ors)* [2007] 1 AC 508, 517-8 [20].

581 See, e.g., Corporations Act 2001 (Cth) s 474(2); *Blacktown Concrete Pty Ltd v Ultra Refurbishing and Construction Pty Ltd* (1988) 43 NSWLR 484, 500-1.

582 *Cambridge Gas Transport Corporation v The Official Committee of Unsecured Creditors (of Navigator Holdings PLC & Ors)* [2007] 1 AC 508, 517-8, [20].

583 See, e.g., *Morguard Investments Ltd v De Savoyne* [1990] 3 SCR 1077.

584 *Club Resorts Ltd v Van Breda* [2012] 1 SCR 572, 592 [29].

debt will be recognised in Canada if it is recognised as a discharge under the law of the State of the contract.\textsuperscript{586}

10.2.3 New Zealand

New Zealand has a position similar to that in Australia and the United Kingdom (without the imposition of the EC Regulation).

10.2.4 United Kingdom

Dicey, Morris and Collins summarise the common law position in England in respect of liquidations and bankruptcy in rules 176 to 178 and rules 216 to 219. In relation to corporate insolvency, the UK courts assume jurisdiction in respect of those entities registered in the UK or whose central management is in the UK. The courts will wind up such entities according to the law of the UK, including the EC Regulation. The UK court will also recognise a winding-up order made by the courts of the State in which a corporate entity is incorporated.

In relation to personal insolvency, the UK courts say that the foreign bankruptcy of an individual amounts to an assignment of their movable assets in the UK but does not assign their immovable assets in the UK. It may however assign the right to receive rents from such immovable assets. A release from liabilities only operates in the UK so long as the law of the contract is the law of the State of the bankruptcy. Otherwise it is necessary to determine whether the law of the contract will otherwise recognise the release.

Goode has explained the UK common law position slightly differently by indicating that it still applies where the insolvency is not covered by either the EC Regulation or section 426 of the Insolvency Act 1986, and indicates that there is a hierarchical order that applies:

1. The Insolvency Regulation;
2. The Model Law and related provisions of the Cross-Border Insolvency Regulations, supplemented by s426 of the Insolvency Act;
3. Other UK statutes governing the insolvency of companies; and
4. The common law conflict rules relating to the recognition of foreign judgement in insolvency proceedings and to the provision of assistance so far as not displaced by s426.\textsuperscript{587}

\textsuperscript{586} Ibid 501.
It is argued that the corporate rules above may require some refinement given the 2008 Global Financial Crisis which commenced when *Lehman Brothers* filed Chapter 11 proceedings under the US Bankruptcy Code in New York at the insistence of the US Federal Reserve Bank. As Lehman Brothers was incorporated in the USA and all its assets in the UK were movable being credit contracts, this had the effect of immediately placing those contracts under the control of the US Bankruptcy Proceedings. This also resulted in the UK offices of Lehman Brothers losing their UK licence to operate and shutting down its business in the UK. This led to a lack of confidence in the European markets. The separate *Lehman Brothers* subsidiaries in the UK and Europe continued to trade for a small period until separate proceedings were issued under the laws of their place of incorporation or in accordance with the EC Regulation. It is argued that this situation should not be allowed to exist in the future and that financial institutions should be excluded from these rules as they are from the Model Law’s provisions and that special rules apply in relation to them. Fletcher has also commented that the English conflict of laws rules in relation to insolvency need further development and modernisation.  

The issue of financial institutions is discussed further in section 14.4.

### 10.2.5 USA

In the USA, the rules relating to conflict of laws are governed by the laws of the individual USA States. The American Law Institute has enunciated some general principles comprising factors which must be considered when determining the relevant laws which are applicable if there is a conflict. Those relevant rules are as follows:

1. A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.
2. When there is no such directive, the factors relevant to the choice of the applicable rule of law include:
   a. the needs of the interstate and international systems,
   b. the relevant policies of the forum,
   c. the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
   d. the protection of justified expectations,
   e. the basic policies underlying the particular field of law,

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587 Goode, above n 216, 792-3 [16-15].
588 Ian F Fletcher *The Law of Insolvency* (Sweet & Maxwell, 2002) 739 [28-012].
(f) certainty, predictability and uniformity of result, and
(g) ease in the determination and application of the law to be applied.\textsuperscript{589}

This approach requires a court to weigh up a number of factors to determine the appropriate law that is applicable. This can lead to results different from those obtained by using the laws that are applicable in England and Australia. There are a number of more specific laws set out in the reinstatement that do not appear to apply specifically to bankruptcy or its elements, although there is a chapter on receivership which is no longer applicable in the USA. The principles set out in the Second Reinstatement have been criticised as being too subjective and allowing judges in individual States to protect those individual States' interests.\textsuperscript{590} It is also acknowledged that this is an area of law in the USA which has no uniformity across all its States.\textsuperscript{591}

10.3 Model Law

The Model Law does not attempt to harmonise local insolvency law. The main issues addressed by the Model Law include the recognition of foreign proceedings, the rights and duties of foreign representatives, the power of courts, and the duty of cooperation between jurisdictions.\textsuperscript{592} The Model Law does not otherwise attempt to change the domestic law of a State. As a result there are an infinite number of potential conflicts of law issues that arise by reason of the enactment of the Model Law in the domestic law of States. In an endeavour to highlight a number of those potential conflicts the following issues are each separately addressed:

(a) Concurrent Insolvency Administrations;

(b) Entities excluded by various States from the operation of the Model;

\textsuperscript{589} American Law Institute, above n 177 § 6.
\textsuperscript{591} See, eg, Simon C. Symonds ‘Choice of Laws in the American Courts in 2010: Twenty-Fourth Annual Survey’ (2011) 59 \textit{American Journal of Comparative Law} 303; Simon C. Symonds ‘Choice of Laws in the American Courts in 2011: Twenty-Fifth Annual Survey’ (2012) 60 \textit{American Journal of Comparative Law} 291. It is not the purpose of this thesis to examine in detail the various common law rules that exist in each of the fifty States in the USA in respect of the issue of conflict of laws.
(c) The different definitions of exempt property that exist under the various States insolvency legislation;

(d) The different rules relating to conflict of laws that exist between States;

(e) The nature of the stay granted under article 20;

(f) The purported worldwide effect of some States insolvency regimes;

(g) Priority of Domestic Laws and Administrations;

(h) The effect of discharge given to creditors under domestic law and whether it applies internationally;

(i) Inconsistency between provisions of the Model Law and with Other International Laws and Conventions; and

(j) Protection of local creditors’ interests.

In the world of global commerce where secured creditors, who are also generally some of the debtors largest creditors, ‘place a premium on certainty’, these creditors wish to avoid these potential conflicts. They also wish to exert maximum control the process for resolving them commercially. To this end, it is argued that the rules of conflict of laws in insolvency situations should as much as possible be universally known and largely uniform, thereby ensuring that a consistent approach is taken between States.

10.3.1 Concurrent Administrations

The jurisdiction of the courts of a State were traditionally not excluded by the fact that the debtor had been made bankrupt or insolvent by a foreign court from exercising jurisdiction in relation to proceedings involving the debtor as any stays imposed by that foreign jurisdiction were not recognised. The Model Law, however, anticipates that there may be concurrent proceedings by distinguishing between foreign main proceedings and foreign non-main proceedings and allowing proceedings to be issued, even following recognition, in a State in which the debtor has assets. Further, the Model Law allows for the administration or realisation of the debtor’s assets by a

594 Wade, above n 415, 144.
595 Davies, Bell and Brereton above n 118, 733, [36.23].
person appointed by the court who does not necessarily need to be a foreign representative. The Model Law recognises that where a foreign main proceeding is recognised prior to the appointment of a local representative, care must be taken to ensure that the powers of both are not inconsistent so as to avoid them acting inconsistently.

If the common law position in relation to movable assets in a bankruptcy still applies post Model Law, Nygh questions how an Australian court can appoint a local representative to deal with those assets if they are already vested in the foreign representative. The answer may lie with the power of a court, in recognising foreign representatives, to limit their powers or deny them jurisdiction to collect local assets, especially in circumstances where they are not aware of the local provisions relating to exempt property or the manner in which assets are to be collected or administered.

This occurred in Levy v Reddy where the Federal Court of Australia appointed a local receiver to assist an English Trustee to collect the debtor’s assets including an immovable asset in the form of land.

Dicey, Morris and Collins, in respect of bankruptcy proceedings against individuals, described the rule applicable in England as follows:

Rule 218 - . . ., where a debtor has been made bankrupt in more countries than one, and, under the bankruptcy law of each such countries, there has been an assignment of the bankrupt's property, which might, under any of the foregoing Rules operate as an assignment of his property in England, effect will be given in England to that assignment which is earliest in date.

10.3.2 Excluded Entities

As identified in section 5.2, most States exclude entities in the financial, insurance and banking sectors from automatic recognition under their domestic version of the Model Law. This is also consistent with the EC Regulation. The option to exclude these entities has been given because States may have special regimes that exist in relation

See art 21(1)(e).

Davies, Bell and Brereton, above n 118, 735, [36.32].

Ibid 736 [36.34].


Collins et al, above n 159, 1758 [31R-086].

See Chapters 5.2 and 5.3.

to these types of entities.\textsuperscript{603} UNCITRAL has also recently developed a paper dealing with financial institutions,\textsuperscript{604} which is discussed further in section 14.4.

Foreign representatives of these types of companies can be recognised under the common law principles of comity or other concurrent statutory regimes as discussed in Chapter 4. Alternatively, it is arguable that given the differences in the domestic law that relate to these types of companies,\textsuperscript{605} it is probable that the courts will require a local representative or authority to be appointed to ensure compliance with the domestic laws. Such appointments may result in inequitable distributions between the creditors of different States by giving priority in the distribution of dividends to local creditors, which Article 32 of the Model Law has attempted to overcome.

As can be seen from the manner of enactment of Preamble and Article 1 of the Model Law by the different States, individual States have sought to exclude other types of entities and individuals from the operation of the Model Law. It is arguable on public policy grounds that such exclusion is necessary due to either separate domestic compensation schemes existing at a domestic level or other international regulations applying in the case of the UK. However, this will still give rise to conflicts regarding the manner in which the assets of those foreign entities are to be treated in different States, as arguably, there may be inconsistencies between States in the recognition of foreign representatives.\textsuperscript{606} This conflict will also make it difficult for foreign representatives to determine whether the provisions of the Model Law apply to their


\textsuperscript{605} See, e.g., \textit{Insurance Act 1973} (Cth) s 116(3) which requires Australian assets to be applied first in the discharge of Australian liabilities and \textit{Corporations Act 2001} (Cth) s 562A which allows for the flow through of reinsurance proceeds to the insured. This difference was commented on by the House of Lords in \textit{McGrath v Riddell} [2008] 3 All ER 869, 877, 882, [2], [32]. A similar priority for domestic creditors is conferred by the \textit{Insurers (Reorganisation and Winding Up) Regulations 2004} (SI 2004/353), giving effect to the \textit{European Parliament and Council Directive 2001/17/EC} on the reorganisation and winding up of insurance companies.

\textsuperscript{606} For example, an Australian railroad and tourism company goes into voluntary administration in Australia. It has assets in Canada, USA, New Zealand and the United Kingdom where it operates a small protected railway. It has establishments in all states other than Canada. It is recognised in Canada as there is no requirement for the company to have an establishment. It is also recognised in New Zealand as it has an establishment in that state. The company cannot be recognised in the USA or United Kingdom as railroad companies are excluded.
proceedings in different States and whether it is more appropriate to seek assistance relying upon the principles of common law comity.

As discussed in Chapter 3.5, the USA further restricts the application of the Model Law to entities that are recognised under Chapter 1 of the Bankruptcy Code. This effectively means that the Model Law cannot be used to examine directors of an entity subject to a foreign proceeding where that entity does not have any property or a place of business within the USA or otherwise fits within the definition of a debtor set out in section 109 of the Bankruptcy Code. However it acknowledged that there is a low threshold required to satisfy these requirements as it has been held that both a cause of action or an undrawn retainer in the trust account of the foreign representatives lawyer who were making the application for recognition were both property located in the USA and therefore satisfied that perquisite. However a number of States prevent a representative of an insolvent debtor from depositing money with their foreign lawyers without court approval and requires it to be placed into a bank account within their jurisdiction.

10.3.3 Exempt Property

A potential conflict arises due to the different definitions of ‘exempt property’ in the various countries’ domestic laws, although not all jurisdictions have considered this issue.

10.3.3.1 United Kingdom

In the UK, the House of Lords has considered this issue in the context of the HIH Insurance liquidation wherein the Australian liquidators sought to have the UK assets remitted to Australia. A liquidator had already been appointed in England and had collected the English assets which were reinsurance proceeds. The application was opposed because it was claimed that the English creditors would not be treated equally to the Australian creditors as a result of the difference in the laws between Australia and England in respect of the flow through of reinsurance proceeds to the individual claimant creditors. The Australian liquidators of HIH had made application for assistance, not under the Model Law, but rather based upon a letter of request from the New South Wales Supreme Court under section 426(4) of the UK Insolvency Act. Australia was a designated country under that section which obliged the English courts

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607 See Re Barnet, 737 F 3d 238 (2nd Cir, 2013).
608 Re Octaviar Administration Pty Ltd, 511 BR 361 (Bankr, SD NY, 2014)
609 McGrath v Riddell [2008] 3 All ER 869.
to give assistance to the courts of Australia if requested. It is arguable that the Australian liquidators were unable to use the Model Law to effect the transfer of the assets as insurance companies are excluded from the provisions of the Australian version of the Model Law. ⁶¹⁰ Although such exclusions would not technically bind the English courts exercising jurisdiction, there may have been an issue as to whether it was proper in the circumstances for the liquidators to make such an application.

There appears to have been no unanimity in the court's decision, with some judges basing their decision solely upon the power conferred on the court under s426 of the UK Insolvency Act, whilst others sought to exercise a wider power in the court based upon Universalist principles being applicable in international insolvency. Lord Hoffman, with whom Lord Walker of Gestingthorpe agreed, adopted a Universalist approach by considering the insolvency proceeding on a worldwide basis, stating that:

… creditors cannot be deprived of their statutory rights under the English scheme of liquidation. The whole doctrine of ancillary winding up is based upon the premise that in such cases the English court may ‘disapply’ parts of the statutory scheme by authorising the English liquidator to allow actions which he is obliged by statute to perform according to English law to be performed instead by the foreign liquidator according to the foreign law (including its rules of the conflict of laws.) These may or may not be the same as English law. Thus the ancillary liquidator is invariably authorised to leave the collection and distribution of foreign assets to the principal liquidator, notwithstanding that the statute requires him to perform these functions. ⁶¹¹

Almost all countries have their own lists of preferential creditors. These lists reflect legislative decisions for the protection of local interests, which is why the usual English practice is, when remittal to a foreign liquidator is ordered, to make provision for the retention of funds to pay English preferential creditors. But the existence of foreign preferential creditors who would have no preference in an English distribution has never inhibited the courts from ordering remittal. ⁶¹²

Lord Scott of Foscote and Lord Neuberger of Abbotsbury adopted a more territorialist approach by considering how the remittal of assets would affect local creditors. They took the view that the domestic rules should apply to domestic ancillary liquidations and that, generally, a domestic court should not give up control of a liquidation in its

⁶¹⁰ Cross-Border Insolvency Regulations 2008 (Cth) Sch 1.
⁶¹¹ McGrath v Riddell [2008] 3 All ER 869, 879 [19].
⁶¹² Ibid [21].
jurisdiction. However, they agreed to the transfer of the English assets to Australia solely because Australia was a designated country under section 426 of the Insolvency Act which obliged the English Court to assist the New South Wales Supreme Court pursuant to its letter of request. They indicated that without such a provision, they would not have approved the turnover of the assets as the English creditors would have been receiving less than if the English liquidator had distributed the assets in accordance with English law. They differed in their view as to whether English law allowed the remission of assets without a statutory authority. The fifth judge, Lord Phillips of Worth Matravers, confined his judgement to exercising discretion under section 426.

The above speeches by the House of Lords appear to make the position in the UK uncertain as to whether, in relation to countries that are not declared countries for the purposes of section 426 of the Insolvency Act, the English Courts would allow remission of assets to a foreign jurisdiction in circumstances where the distribution rights of English creditors are different. However, more recently, courts in the UK have appeared to favour the releasing of assets in part based upon the practices that have developed under the EC Regulations and the Model Law, provided that the interests of the English creditors, including the right of set-off, are protected.613

10.3.3.2 USA

In the USA, the issue becomes more complicated because of section 522(b) of the Bankruptcy Code which provides that ‘a debtor can choose to exempt from property of the bankruptcy estate that property which is exempt under the applicable state or federal law.’ Section 522(o) also provides a limited exemption.614 Various States in the USA, by virtue of their constitutions or legislation, exempt an individual person’s home or value in their home up to a prescribed limit from being subject to judgments enforced against it (homestead provisions). The homestead provisions vary widely from being non-existent in two States to being unlimited in seven States.615 The effect of these provisions is to allow an individual bankrupt to keep the value of the equity in their

614 Such that the value of the property exempted ‘shall be reduced to the extent that such value is attributable to any portion of any property that the debtor disposed of within the 10-year period ending on the date of the filing of the petition with the intent to hinder, delay, or defraud a creditor and that the debtor could not exempt’.
home up to the prescribed limit for that State, no matter what the home’s true value is or how it was purchased. The extent of the exemption and the ability to recover payment made toward the home depend upon the laws in each State.

To highlight the issues that arise, reference is made to the situation in two US States. In Florida, where the homestead provision is contained in that State’s Constitution, the US District Court determined that even where the payment into the house mortgage was done for the sole purpose of ‘hindering and avoiding their creditors and defeating their claims’, the exemption applied. In Minnesota, where the homestead provision is a State law, the US Court of Appeals found that the value of a payment made for the purpose of ‘hindering and avoiding their creditors and defeating their claims’ was divisible property of the bankrupt estate and recoverable.

10.3.3.3 Generally

Article 21 of the Model Law provides that a Court has power to remit assets to the custody of a foreign representative for distribution, which should take account of in accordance with the principles of Article 32. Article 32 basically enacts the English principle of hotchpot. This principle is not otherwise generally part of the domestic law of Australia, Canada, New Zealand or the USA, although it has been used in Canada in the past. As the Model Law is enacted as a domestic law, the assets and income that can be remitted must be only those which are divisible under that State’s domestic law. As discussed in section 10.2 this may include foreign assets, The foreign State (or part thereof) in which the assets are held will clearly have a bearing upon the assets that are recoverable by the foreign representative.

Article 32 of the Model Law it is argued does not deal with the situation highlighted by McGrath v Riddell namely, whether a court will exercise its discretion to remit the

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616 Art X, § 4(a)(1).
617 Bank Leumi Trust Co. v Lang, 898 F Supp 883,885 (SD Fla, 1995).
618 Re Addison, 540 F 3d 805, (8th Cir, 2008).
619 Which principle is explained in McGrath v Riddell [2008] 3 All ER 869, 887 [50].
620 Sarra, above n 77, 24-7. Hotchpot has been used in Australian relation to cases involving trust funds and managed investment schemes were some creditors have already received a return on their money invested and other haven’t and all creditors are making claims against a common fund and is based upon equitable principles see, Re French Caledonia Travel Services Pty Ltd (in liq) (2003) 59 NSWLR 361; Australian Securities and Investments Commission (ASIC) v Idyllic Solutions Ltd (2009) 76 ACSR 129; Australian Securities and Investments Commission v Letten (No 20) [2012] FCA 1283 (19 November 2012). It is uncertain as to whether this equitable principle applies to managed investments schemes because its property is held on trust: Corporations Act 2001 (Cth) s 601AC (2) or whether it applies more generally.
assets that if certain assets under a State’s domestic law are exempt from distribution or are distributable only to a certain class of creditors in priority. This has the effect of disadvantaging the creditors in that State in which the assets are located when compared with a distribution of the assets under their domestic regime.

Given the legislative effect of Article 32, it has not been determined whether this article in the Model Law will override the domestic laws in respect of distributions to creditors, and if it does, whether the principles of Article 32 will apply only to those assets remitted from a foreign jurisdiction or to the assets held by a foreign representative generally.  

It is argued that ordinarily the laws applicable to the exemption of property will be determined *lex fori concursus*.

### 10.3.4 Conflict of Laws Provision in Different States

Professor Fletcher has commented:

> In the past, a notorious feature of the subject of conflict of laws was that states sought to develop their own individual solutions to the problems caused by the material diversity between the domestic laws of the various sovereign states, thereby giving rise to the paradoxical situation where there were effectively just as many systems of conflict of laws as there were national laws.

Westbrook has argued that we should adopt a Universalist approach to distributions to creditors in insolvency proceedings involving more than one State and has advocated that the laws of the foreign main proceeding should (subject to three significant exceptions) solely govern such distributions regardless of the priorities that exist in the States in which the debtors’ assets are held, providing that creditors are treated on a *pari passu* basis. Westbrook lists the three exceptions as being wages, secured creditors and taxes. It should be noted that this is effectively the situation that exists under the EC Regulation.

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621 It was accepted in *McGrath v Riddell* that the priority awarded to domestic creditors under s116(3) of the *Insurance Act 1973* only applied to assets that existed as at the date of liquidation: *New Cap Reinsurance Corp v Faraday Underwriting* (2003) 117 FLR 52; *HIH Casualty and General Insurance Ltd* (2005) 215 ALR 562.
622 Fletcher, above n 3, 494.
624 Arts 3 and 4.
Janger, on the other hand, advocates that if we apply Westbrook's suggestion, this will only lead to greater problems as it will encourage forum shopping by companies that want to have a COMI in a favourable jurisdiction for taxation purposes or other reasons by artificial means. This may make coordinated governance more difficult.625

The assets that are available for distribution include the assets that are remitted into that jurisdiction. The question arises regarding the extent to which they should be remitted to the jurisdiction of the foreign main proceeding. In McGrath v Riddell, Lord Hoffman stated:

The power to remit assets to the principal liquidation is exercised when the English court decides that there is a foreign jurisdiction more appropriate than England for the purpose of dealing with all outstanding questions in the winding up. It is not a decision on the choice of the law to be applied to those questions. That will be a matter for the court of the principal jurisdiction to decide. Ordinarily one would expect it to apply its own insolvency laws but in some cases its rules of the conflict of laws may point in a different direction.626

This issue of remittal of assets may be affected by whether any local creditor holds security over them and whether a court is confident that a foreign representative can deal with them properly. This will in part depend upon the nature of the assets and whether they are perishable or created solely pursuant to some local law (e.g. forestry rights over land).

Fletcher has noted that the American Legal Institute has prepared ‘Global Principles for Cooperation in International Insolvency Cases’627 pursuant to which the courts of the State in which there is an establishment can deal only with the assets within that State; otherwise, the courts in the State of the COMI have control of the overall insolvency proceedings.628 Unfortunately, the Model Law gives no guidance on the law applicable to any insolvency proceedings. Article 28 allows separate proceedings to be issued in different States which would allow assets to be distributed pursuant to their domestic laws. Conversely, Article 21 of the Model Law allows a court to authorise the

626 McGrath v Riddell, [2008] 3 All ER 869, 881 [28].
627 American Law Institute and International Insolvency Institute, n 34.
628 See, eg Ian Fletcher, a, 508-12; Global Principles for Cooperation in International Insolvency Cases and Global Guidelines for Court to Court Communications in International Insolvency Cases, presented to the 89th Annual Meeting of the American Law Institute on 23 May 2012 and unanimously approved by the International Insolvency Institute membership at its 12th Annual Conference, Court de Cassation, Paris, 22 June 2012, <http://iiiglobal.org/component/jdownloads/viewdownload/36/5897.html>, principle 13.
administration, realisation and distribution of assets to a foreign administrator provided that the interests of the local creditors are protected. This will allow the movable assets to be distributed in accordance with the laws of the State to which the assets are entrusted (lex situs). The extent to which the domestic creditors of a State must be protected is based upon political and public policy considerations, which may differ between States. Article 21 can also be used to allow the sale of immovable assets to be controlled by a foreign representative and the proceeds remitted to the jurisdiction of that foreign representative.

The practical difficulties and theoretical issues that result from the principles of private international law that may apply is highlighted by issues relating to the availability of set-off, the recovery of antecedent transactions, and priority creditor claims. The law that is applicable to each of these issues in any given administration may differ depending upon the relevant principles of private international law that are applicable under their respective conflict of law provisions. This issue is dealt with further in Chapter 12.

10.3.4.1 Set-off

Each State other than Canada has a set-off law based upon the English common law which allows creditors to set off amounts which they owe the debtors against amounts that the debtor owes them which arise out of mutuality of dealing.

In Canada, the law of set-off is confined to statutory, legal, contractual and equitable rights. The legal right of set-off requires a degree of mutuality in that the debts must be owed between the same parties. Equitable set-off does not require mutuality but rather a close connection or interconnectedness of cross claims.  

In both England and the US set-off is a right that must be allowed by the foreign jurisdiction in order for the domestic creditor’s interests to be adequately protected. In particular, the US Bankruptcy Court in *Tri-Continental* explained that the substitution of ‘sufficiently protected’ in lieu of the Models Law’s ‘adequately protected’ was made in order to avoid confusion with the Bankruptcy Code’s defined term of ‘adequate


630 See *McGrath v Riddell* [2008] 3 All ER 869, 878 [16]-[17]; *Re Tri-Continental Exchange Ltd* 349 BR 627 (Bankr, ED Cal, 2006).
The court held that a secured creditor objecting to a Chapter 15 order would have no greater rights than a secured creditor under the Bankruptcy Code.\textsuperscript{632} The USA does not allow set-off in respect of transactions occurring within 90 days prior to the commencement of the insolvency proceedings whether or not the other party to the transaction knew the debtor was insolvent.\textsuperscript{633} In Australia, New Zealand and the UK, set-off is not allowed where the creditor received notice of the insolvency of the debtor.\textsuperscript{634} In the UK, multilateral contractual set-off must have been taken place before the commencement of the liquidation.\textsuperscript{635}

These different rules of set-off can give rise to substantially different amounts being recoverable by the representative of the insolvency entity where a set-off is allowed in similar circumstances between the jurisdictions examined.\textsuperscript{636} It is argued that the right of set-off should also be determined under either \textit{lex situs} or \textit{lex contractus} where it arises from a transaction involving property as this recognises the commercial reality of the transaction and potential commercial impetus in entering into the transaction.\textsuperscript{637}

\textbf{10.3.4.2 Antecedent transactions}

Article 23 authorises a foreign representative of a recognised foreign main proceeding to issue proceedings seeking recovery of antecedent transactions. It also authorises a foreign representative of a foreign non-main proceeding with leave of the court to issue such proceedings. In the UK, the foreign representative is required to seek the leave of the court prior to issuing such proceedings. In the USA, such proceedings can be issued only in domestic proceedings under another chapter of the US Bankruptcy Code.

\textsuperscript{631} Re Tri-Continental Exchange Ltd, 349 BR 627, 636 (Bankr, ED Cal, 2006).
\textsuperscript{632} Ibid 636.
\textsuperscript{633} 11 USC § 553 (a) (2012).
\textsuperscript{634} See Corporations Act 2001 (Cth) s 533C(2); Bankruptcy Act 1966 (Cth) s 86(2); Insolvency Act 2006 s 254(2); Insolvency Act 1986 c45 s 323(3).
\textsuperscript{635} Ho, above n 77, 214.
\textsuperscript{637} See United Nations Commission on International Trade Law, General Assembly, \textit{Legislative Guide on Insolvency Law} UN Publication Sales No E.05.V.10 (United Nations, 2005), 70 [85].
Code. Chapter 15 does not allow such proceedings to be issued under the relevant provisions of the Bankruptcy Code without associated domestic proceedings.  

Each State examined has different provisions in relation to the recovery of antecedent transactions, which provisions provide for a different time before their appointment in which a representative can look to overturn a transaction and recover the debtor’s property. This thesis does not explore these differences, but rather notes that they will give rise to different States treating creditors differently, and the amount available for distribution to creditors depends upon which State’s laws apply to such recoveries. Recognising these differences Ho has advocated that priority should be given to the laws of the jurisdiction where the main proceedings are opened in respect of antecedent transactions.

The United Kingdom Supreme Court in *Rubin* held that the ordinary rules for enforcing foreign judgements *in personam* or *in rem* apply to bankruptcy proceedings such that it was necessary for the defendant to have conceded to the jurisdiction of the foreign court in order for its judgment in respect of recovery of an antecedent transaction to be recognised. The court also refused an application by Rubin who had the benefit of judgments from the US Bankruptcy Court in respect of claims to overturn antecedent transactions where the defendants had refused to participate in the proceedings. The Supreme Court found that such judgments could not be enforced in the UK under the common law and found that as Articles 21 and 25 of the Model Law say nothing about enforcement of foreign judgements and that it could not be implied that the Model Law was as a basis for a court to allow enforcement of a foreign judgement.

This decision has been criticised for not taking into account the ability to recognise a foreign judgement pursuant to the principles in comity. It has also been suggested that the decision may in part be due to the alteration made in the UK to paragraph 1 of Article 25 so as to make the obligation to cooperate discretionary rather than

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638 The court has power under 11 USC §§ 1521 (2012) to grant a foreign representative power to bring proceedings except under §§ 522, 544, 545, 547, 548, 550 and 724(a).


640 Ho, above n 592, 371.


642 *Rubin* ibid 279 – 280.

643 Jodie Kirshner above n 170, 30.
mandatory and the court reluctance to use discretionary powers to expand the types of orders it can make. It is questionable the extent to which Lord Collins was simply adopting the position he set out as editor in Dicey, Morris and Collins.

On the other hand, in order to circumvent the statutory provisions the US Court of Appeals and the US Bankruptcy Court have allowed recovery of antecedent transactions in the USA according to the law of the State of the main proceedings, basing this decision upon the principles of comity and Article 21 of the Model Law. The US Bankruptcy Court has also applied the law of the State in which the provable debt arose in order to determine the validity of that provable debt.

Given the difference in the above court decisions, it is difficult to extract any common rules for determining the principles of private international law applicable to antecedent transactions. It is clear that there is a difference between the UK and the USA in relation to the courts’ ability to recognise a foreign judgment regarding antecedent transactions where the creditor who received the benefit has not conceded to the jurisdiction of the foreign court. These differences have been recognised by UNCITRAL which has been unable to properly reconcile the same.

If a rule can be extracted from the different court decisions highlighted above, it is argued that it should be that subject to a court order to the contrary, the applicable laws for antecedent recoveries should be *lex fori concursus*.

### 10.3.4.3 Priorities

Judge Gropper of the US Bankruptcy Court has accepted that the treatment of priority claims to creditors will be largely dependent upon the State’s laws that are applicable to the payment of such claims. His Honour points out that insolvency regimes differ not only in the identity of creditors granted priority status, but also in the size and scope

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645 Lord Collins et al above n 159. Lord Collins was the general editor of the *Dicey, Morris and Collins on The Conflict of Laws* 15th ed.
646 Re Fairfield Sentry Ltd, 452 B.R 64, 78-80 (Bankr, SD NY, 2011); Re Condor Insurance Ltd, 601 F.3d 319, 329 (5th Cir, 2010).
647 Re Nortel Networks Inc, 469 BR 478, 498-9 (Bankr, D Del, 2012).
of priorities particularly in the area of employee priorities.\textsuperscript{650} Pottow, on the other hand, has speculated that a priority conflict among creditors in multinational jurisdictions will result in secondary proceedings being opened in order to protect local creditors’ priority interests.\textsuperscript{651} Judge Clark of the US Bankruptcy Court, after considering the position of secured creditors, concluded that it is possible via an insolvency regime to restrict, partially or fully, a secured creditor’s rights to their collateral and enforcement of the same as part of a restructuring without their consent, providing their underlying legal or equitable interest in the property does not change.\textsuperscript{652}

The position of priority creditors is even more pronounced in the USA than in other States examined by reason of the insertion of section 1521(b) which requires a US court to ensure that the position of US resident creditors is protected prior to allowing the transfer of assets to a foreign representative.\textsuperscript{653} Given the broad discretion that courts are given under the Model Law, it is difficult to see how a Universalist approach will be achieved unless all States agree to a convention that contains common wording.

Given the public policy and political considerations behind priorities, it is not realistic to expect the courts of one State to release their assets into the care of a foreign representative when their domestic creditors may lose a priority or otherwise be adversely affected.\textsuperscript{654} It is further argued that the decision of the House of Lords in McGrath v Riddell does not provide any certainty that, in the absence of section 426 applying, the UK courts will allow assets in the UK to be remitted to a foreign representative for distribution where the UK creditors’ interests may be adversely affected.

Further given the differences that exist with the manner of introduction of the Model Law in the States examined, it is unlikely that this or any consistency in the principles of private international law rules or the rules relating to conflict of laws could be achieved via another Model Law or an amendment to the present Model Law. It is argued that the priority laws regarding creditors who have security over assets should be \textit{lex situs}.\textsuperscript{655} In relation to other creditors, there are competing arguments as to whether the

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\textsuperscript{650} Ibid 562.
\textsuperscript{652} Clark & Goldstein, above n 8, 556.
\textsuperscript{653} Gropper, above n 649, 568.
\textsuperscript{654} See, eg Re Collins &Aikman Europe SA \textsuperscript{[2006] EWHC (Ch) (9 June 2006).}
applicable laws should be determined *lex situs* or *lex fori concursus*. The issues involving the different rules of private international law are dealt with further in Chapter 12.

### 10.3.5 Nature of Stay under Article 20

As highlighted in Chapter 7, the nature of the automatic stay granted under Article 20 differs between each of the States examined because some of the States equate it to one or more of the stays granted under their domestic insolvency legislation. The UNCITRAL Guide indicates that it is meant to extend to "actions before an arbitral tribunal". It further states that it is meant to extend to "enforcement measures initiated by creditors outside the court system".

#### 10.3.5.1 Australia

In Australia, the stay granted under the Model Law is equated to the stays provided for under the *Bankruptcy Act 1966* (Cth) and Chapter 5 of the *Corporations Act*. The court may have to determine the type of Australian insolvency proceeding that is the closest to the foreign proceeding in order to determine the nature of the stay that is applicable. This stay does not affect the rights of secured creditors to otherwise realise or deal with their security over the assets that are the subject of their security. The Federal Court of Australia has held that an action *in rem* to enforce a maritime lien is not affected by the stay. In respect of a debtor subject to Voluntary Administration proceedings, the stay applies only to ‘proceedings in a court’. Because of the definition of ‘court’ contained in section 58AA, it does not apply to arbitration proceedings. Similarly, in the case of a court-ordered winding up, the automatic stay operates only in relation to ‘proceedings in a court’ or ‘enforcement against the property

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68.[82] where it describes the applicable law as *lex rei sitae* which has the same meaning as *lex situs*.


657 Ibid [146].

658 *Cross-Border Insolvency Act 2008* (Cth) s 16.

659 In the case of restructuring proceedings, if concurrent voluntary administration proceedings are commenced in Australia, a secured creditor with security over the whole or substantially the whole of the assets of the company can only seek to enforce its security during the decision period see *Corporations Act 2001* (Cth) s 441A; in respect of liquidations see s 471C.

660 *Yu v STX Pan Ocean Co Ltd (South Korea)* (2013) 223 FCR 189, 202-3 [41].

661 *Corporations Act 2001* (Cth) s 440D.

of the company’ without leave of the court. Application can also be made between the time of filing the application to wind up the company and the making of the winding up order to stay ‘any action or other civil proceedings’ on such terms as the court thinks fit. In the case of a voluntary liquidation, the stay operates in respect of ‘any action or other civil proceedings’. This phrase is purported to capture arbitral proceedings.

The Federal Court, in equating the stay to that granted under the Corporations Act, has in respect of Japanese reconstruction proceedings granted a stay which excluded criminal and prescribed proceedings so as to equate it to section 440D(2) of the Corporations Act and liens or pledges that are exempt under section 440JA of the Corporations Act. Those sections apply to voluntary administrations in Australia. The stay granted under the liquidation provisions of the Corporations Act is different. The court, therefore, has to determine the type of Australian insolvency proceeding that is closest to the foreign proceeding in order to determine the nature of the stay that is applicable.

10.3.5.2 Canada

In Canada, the BIA imposes an automatic stay upon a bankruptcy or liquidation, subject to a court order to the contrary. There is no automatic stay under the CCAA, however, the court is granted power to order similar stays. The stay imposed relates to all proceedings taken or that might be taken against the debtor for such time as the court thinks appropriate. The stays can prevent secured creditors from seeking to enforce against their security, especially in the case of restructuring proceedings. Any stay granted in Canada is subject to three conditions First, the order must be consistent with any order that may be made under the legislation. Second, the stay provisions do not apply if any other proceedings under the CCAA, BIA have been issued. Third, nothing prevents a debtor from commencing other proceedings under

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663 Corporations Act 2001 (Cth) s 471B.
664 Ibid s 468(4).
665 Ibid s 467.
666 Ibid s 500(2).
667 Re Vassal Pty Ltd [1983] 2 Qd R 769.
668 Asafuji v The Sanko Steamship Co. Ltd (No 2) [2012] FCA 1314 (23 November 2012) [16].
669 Corporations Act 2001 (Cth) ss 471B, 500.
670 Bankruptcy and Insolvency Act, RSC 1985, c B-3 s271; Companies Creditors Arrangement Act, RSC 1985, c C-36 s 48.
either of those Acts or the Winding-Up and Restructuring Act. The latter enactment is restricted in its application to both domestic and foreign banks, trust companies, insurance companies, loan companies with borrowing powers, building societies and trading companies doing business in Canada, whether domestic or foreign, and corporations incorporated under federal or provincial laws.

In *Re Massachusetts Elephant & Castle Group Inc.*, the Ontario Superior Court acknowledged that, having recognised a foreign main proceeding, the relief set out in section 48(1) was mandatory.\(^{671}\)

10.3.5.3 **New Zealand**

In New Zealand, there is no reference in the legislation to equating the stay granted under Article 20 to any stay granted under their domestic legislation. The stay that operates is in the form contained in the Model Law, namely ‘the commencement or continuation of individual actions or individual proceedings concerning the debtor’s assets rights obligations or liabilities’. The court is given the power to limit or remove the stay.\(^{672}\)

There is also an additional provision that allows the court on the application of a creditor or interested party to exclude a stay against a particular action or proceeding, execution, or disposal of assets.\(^{673}\)

10.3.5.4 **United Kingdom**

In the UK, the stay under this article is equated to the stay granted under the UK Insolvency Act in relation to a court-ordered winding up and subject to the same powers of the court and the same prohibitions, limitations, exceptions and conditions as would apply under the law of Great Britain.

In a court-ordered winding up, ‘no action or proceedings shall be proceeded with or commenced against the company’ without leave of the court.\(^{674}\) The stay does not affect a party’s right to claim set-off.\(^{675}\) If concurrent administration proceedings are

\(^{671}\) (2011) 81 CBR (5th) 102 [33].
\(^{672}\) Art 20(2).
\(^{673}\) Art 20(2).
\(^{675}\) *Larsen and Ziegler v Navios International Inc* [2012] 1 BCLC 151 [16]; *Langley Construction v Wells* [1969] 2 All ER 46.
commenced in the UK, secured creditors are generally unable to appoint an administrative receiver to enforce against their secured assets; however, the holder of a floating charge can appoint an administrator.\textsuperscript{676} The stay granted is subject to the court's power to grant leave to issue proceedings. The stay granted also does not affect the rights of secured creditors to enforce their security, or an owner's right to repossess the debtor's goods under a hire purchase agreement.\textsuperscript{677} Creditors' rights of set-off are also reserved.\textsuperscript{678} The stay does not affect a creditor's right to issue proceedings to the extent necessary to preserve a claim. The stay also does not affect a regulatory authority's right to commence or continue proceedings against the debtor.

In \textit{Amanda Shipping}, the English High Court stated:

Paragraph 2 of article 20, which is expressed to prevail over paragraphs 1 and 3, clearly identifies the British insolvency code as the primary source of an understanding as to the effect of recognition of a foreign main proceeding both in terms of its immediate effect, and in terms of the court's powers in relation to the automatic stay prescribed by paragraph 1. . . . . Thus, the domestic regime for the imposition and management of a stay incorporated by paragraph 2 of article 20 is that prescribed by section 130(2) of the Insolvency Act 1986. . . .

The only provision of the Model Law framed in a way which might be thought to override article 20.2 is article 22.1, requiring the court to be satisfied that the interests of creditors, including secured creditors, and other interested persons, including if appropriate the debtor, are adequately protected.\textsuperscript{679}

The court decided that arbitration proceedings could be pursued against a company whose foreign proceedings had been recognised as the main proceeding in England as the court determined that the stay granted by Article 20 was akin to the stay granted under England's domestic law upon the commencement of winding-up proceedings under section 130 of the \textit{Insolvency Act}. Therefore, the Court had the power to remove the stay (in whole or part) and grant leave to issue proceeding despite the stay. The court, however, granted a stay in the enforcement of any award until after the award

\textsuperscript{676} \textit{Insolvency Act 1986} c45 ss, 72A- 72H, Sch B1 s 41.
\textsuperscript{677} Such rights must be read as being subject to the provisions contained in \textit{Insolvency Act 1986} c45 ss 72A – 72H.
\textsuperscript{678} \textit{Cross-Border Insolvency Regulations 2006} SR 2006/1030 sch 1 Art 20(3).
became final and the company which was the subject of the foreign proceedings had a chance to restore the matter to the Court.\textsuperscript{680}

\textbf{10.3.5.5 USA}

In the USA, a stay is applied which operates in other bankruptcy proceedings under sections 361 and 362 upon recognition of a main proceeding. The USA enactment confers upon a recognised foreign representative the power to:

(a) use, sell or lease the property of the estate in accordance with the provisions of section 363;

(b) avoid a transfer of property after the date of commencement of a petition for recognition pursuant to section 549; and

(c) avoid security interests created prior to their appointment pursuant to section 552.

The grant of such power is not contingent upon a court order granting them the same but may be removed from them by the court. The stay granted in the USA extends only to the assets within the territorial jurisdiction of the USA.\textsuperscript{681} This issue is to be determined in accordance with the applicable USA States' laws using individual State's conflict of law rules. These sections also prevent the commencement or continuation of judicial, administrative or other actions and the enforcement of any award or judgement. Pursuant to these sections, the courts can also prevent secured creditors from seeking to enforce against the assets the subject of their security with or without terms. In \textit{Atlas Shipping}, the court described the stay under Chapter 15 as follows:

The statute refers to "property of the debtor" to distinguish it from the "property of the estate" that is created under § 541(a). In a chapter 15 case, there is no "estate"; nevertheless, § 1520(a) imposes an automatic stay on any action with respect to the debtor's property located in the United States.\textsuperscript{682}

\textbf{10.3.5.6 Stay Generally}

\textsuperscript{680} Ibid 496 [64].
\textsuperscript{681} \textit{Re JSC BTA Bank}, 434 BR 334, 342 (Bankr, SD NY, 2010).
\textsuperscript{682} \textit{Re Atlas Shipping A/S}, 404 B.R 729, 739 (Bankr, SD NY, 2009); \textit{Re Spansion Inc}, 418 BR 84, 90 (Bankr D Del, 2009); \textit{Contra Re Worldwide Education Services Inc} 494 BR 494, 497-9 (Bankr, C D Cal, 2013).
In those jurisdictions in which the granting of recognition does not prevent a secured creditor from seeking to enforce its security without a corresponding domestic appointment or at all, a foreign representative can seek to prevent such enforcement by seeking additional relief under Article 21. This is of benefit in States, such as Australia, where the stay under Article 20 is restricted to proceedings before a court and does not apply to proceedings before tribunals or arbitral proceedings.\textsuperscript{683}

Although there may be good reasons for States to equate the stay to the stay under their domestic insolvency legislation, these differences in large multijurisdictional proceedings will give rise to administrative difficulties for the foreign representative and may lead to forum shopping by creditors seeking to litigate their disputes. To avoid these issues, it is argued that a common form of stay should be granted under this article.

\subsection*{10.3.6 Worldwide effect of some States’ Insolvency Regimes}

In the UK, the common law position assumes that its wind-up orders have worldwide effect.\textsuperscript{684} Similarly in Australia, New Zealand and the UK, the common law assumes that when a debtor is made bankrupt in their place of domicile, their movable assets are assigned to their insolvency trustee or representative wherever located within the world.\textsuperscript{685} The effect of these assumptions was not always recognised in the States in which the debtors held assets, which is one of the reasons that led to the creation of the Model Law which allows such recognition to be obtained.

The Model Law does not deal with the way in which courts in other States have recognised the purported worldwide stay of proceedings following the filing of Chapter 11 proceedings in the USA and other jurisdictions.\textsuperscript{686} The stay is automatic and applies worldwide irrespective of whether or not it is consistent with a foreign State’s domestic law. This stay also applies to secured creditors. This jurisdiction over all of the debtor’s assets asserted by US courts is said to arise from their \textit{in rem} jurisdiction over those assets resulting from the bankruptcy. In Chapter 11 proceedings the US Bankruptcy

\begin{footnotes}

\item[684] Re International Tin Council [1987] Ch 419, 446; Bilta (UK) Ltd (In Liquidation) v Nazir [2013] 1 All ER 375, 391-2 [42]-[43].

\item[685] See Hall v Woof (1908) 7 CLR 207, 211.

\item[686] 11 USC §§ 362(a), 1110(2) (2012).
\end{footnotes}
Court, imposes a low threshold regarding the entities in respect of which such proceedings can be issued in the USA. All that is required is that the entity has an asset, place of business or domicile in the USA. Entities can arrange to have property transferred to the US in order to secure the court’s jurisdiction. This may result in entities attempting to manipulate their circumstances so as to obtain the benefit of an insolvency regime to which they are otherwise not entitled, and deny creditors in other jurisdictions what should be their legitimate enforcement rights. These competing public policy issues do not appear to have been dealt with by the US courts in the context of whether such proceedings would be recognised in other States under the Model Law and the enforceability of any stay under those provisions.

As indicated above, although the United States courts have asserted that the stay under Chapter 11 operates automatically and they have jurisdiction over assets located in other States, courts in other States have been reluctant to accept this. This is highlighted by the decision in Re Gold & Honey Ltd wherein the US Bankruptcy Court dealt an application of a secured creditor continuing with an Israeli receivership proceeding relating to Gold & Honey Ltd, a company incorporated under the laws of Israel and a partner in Gold & Honey LP a limited partnership under New York law. After Gold & Honey Ltd and Gold & Honey LP filed a Chapter 11 application under the US Bankruptcy Code, the First International Bank of Israel (FIBI) filed a receivership proceeding out of a District Court in Israel in purported breach of the world-wide stay granted by the issue of Chapter 11 proceedings. FIBI then sought recognition of the receivership proceeding under Chapter 15. The Israeli court had been advised of the US Bankruptcy Court’s orders in relation to the stays but refused to recognise the same, in part for procedural reasons and the presumed illegitimacy of Chapter 11 insofar as it affected Gold & Honey Ltd partly because the stay had not been filed with the Israeli Court and partly on principles of comity. The Israeli Court also noted that:

\[\text{in spite of the broad, worldwide grant of jurisdiction given to United States federal courts over a debtor’s assets wherever located, a United States court cannot control the} \]

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687 Andrew DeNatale and Jonathon D Canfield 'Minimum Jurisdictional Threshold for U.S. Bankruptcy Courts in Cross-border Insolvency Cases' (2013) 2 Insol World 30;
688 11 USC § 109(a).
689 Effectively creditors which fall within the Bankruptcy Court’s jurisdiction because they have an office or assets within the USA could be found to be in contempt if they seek to act inconsistently with the stay.
690 Re Gold & Honey Ltd, 410 BR 357 (Bankr, ED NY, 2009). See also Re Soundview Elite Ltd, 503 BR 571 (Bankr, SDNY, 2014).
actions of a foreign court, nor can it exercise control over assets in a foreign country without the assistance of the foreign court.\footnote{Ibid 369.}

When FIBI appeared before the US Bankruptcy Court, that court warned them that they may be in contempt by continuing with the receivership proceedings. The situation may have been different if FIBI had not appeared in the US proceedings since, by doing so, they had conceded the jurisdiction of the US Courts. The situation may have also been different if FIBI had sought recognition of the Israeli proceedings only; then they could have relied upon Article 10 to allege that they had not accepted the US court jurisdiction.

The position taken by the Israeli court is not uncommon and has resulted in separate proceedings being issued in each State in which the entity or business,\footnote{Chapter 11 allows business trusts to file for protection under Chapter 11: \textit{Rubin v Eurofinance SA} [2010] 1 All ER (Comm) 81, 85 [10].} the subject of Chapter 11, trades.\footnote{See, eg, \textit{Re Massachusetts Elephant & Castle Group Inc} (2011) 81 CBR (5th) 102; \textit{Re Graceway Canada Company} (2011) 209 ACWS (3d) 555; [2011] ONSC 6292 (4 October 2011); \textit{Re Hartford Computer Hardware Inc} (2012) 94 CBR (5th) 20; \textit{Re T&N Ltd} [2004] EWHC 2361 (Ch) (21 October 2004).} Until the US courts provide that the stay under Chapter 11 does not operate in foreign jurisdictions, and until the Chapter 11 proceedings are recognised as foreign proceedings and orders are made in those jurisdictions, this issue will not be addressed. The decision by the foreign court, where Article 20 of the Model Law does not apply, to grant or recognise the stay under Chapter 11, is discretionary and may be affected by domestic considerations and principles of territoriality in not wanting to been seen as necessarily automatically enforcing the law of the USA in that State.

Given the principles of judicial sovereignty, any reorganisation plan that deals with or uses assets in another State should also generally be approved by the Courts of that State, often following a protocol agreed to by the US court and the foreign court.\footnote{See, eg, \textit{Re T&N Ltd} [2005] 2 BCLC 488; [2004] EWHC 2361 (Ch) (21 October 2004).}

Pottow has speculated that if Chapter 11 proceedings are issued at a time when there are other foreign main proceedings afoot, then section 1528 will limit the automatic stay...
of proceedings under section 541 to assets in the United States.\footnote{See, eg John A.E Pottow, “The Myth (and Realities) of Forum Shopping in Transnational Insolvency” (2006) 32 Brooklyn Journal of International Law 785, 808.} This comment has been confirmed by the US Bankruptcy Court.\footnote{Re Awal Bank BSC 455 BR 73, 81 (Bankr, SD NY, 2011).}

Another issue that arises is the ability to bring into Chapter 11 proceedings any related entity of the debtor with a connection to the USA on whose behalf the proceedings are issued, even though those other entities have no connection to the USA.\footnote{Nick Segal, The Effect of Reorganisation Proceedings on Security Interests: The Position under English and U.S. Law (2007) 32 Brooklyn Journal of International Law 927.} The US Court of Appeals has held that a reorganisation can include third party releases where they directly impact on the debtor's reorganisation or they provide for payment of the creditors' claims in full.\footnote{Re Speciality Equipment Companies Inc, 3 F.3d 1043 (7th Cir, 1993); Re Metromedia Fiber Network Inc, 416 F. 3d 136 (2nd Cir, 2005); Contra Re Vitro SAB de CV, 701 F.3d 1031 (5th Cir, 2012).} Releases can otherwise be given only to third parties in unique or unusual circumstances when it is an integral part of the plan.\footnote{Re Continental Airlines, 203 F. 3d 203 (3rd Cir, 2000); Re Metromedia Fiber Network Inc 416 F. 3d 136 (2nd Cir, 2005).} Whilst the US Court of Appeals has confirmed the power to grant such stays, it has questioned the appropriateness of granting such orders and the disagreement between different circuits of that court as to its power to grant such orders in domestic proceedings.\footnote{Re Vitro SAB de CV, 701 F.3d 1031 (5th Cir, 2012).} A similar issue may exist in relation to stay and releases included in plans approved in Canada under the CCAA. It has been held that such releases and stays against non-debtor third parties can have worldwide effect provided that they were properly approved and are integral to bringing the plan into effect.\footnote{Re Metcalfe & Mansfield Alternative Investments ll Corp (2008) 45 CBR (5th) 163 and accepted by the US Bankruptcy Court Re Metcalfe & Mansfield Alternative Investments, 421 BR 685, 692-693 (Bankr, SD NY, 2010).} However, the US courts have held that they are required to make an independent determination about the propriety of individual acts of a foreign court.\footnote{Re Metcalfe & Mansfield Alternative Investments, 421 BR 685, 697-700 (Bankr, SD NY, 2010).} This issue is especially relevant in corporate group and as discussed in section 14.3 is being considered by UNCITRAL’s Working Group V.

The effect of stays and other orders which are to have effect in foreign jurisdictions is further illustrated by a recent decision of the US Bankruptcy Court which has identified a limited circumstance in which it may seek to exercise extra territorial jurisdiction when recognition has been granted under Chapter 15:

where the Court has recognized a foreign main proceeding, the foreign representative has filed a plenary bankruptcy case for the debtor here, and the foreign representative does not have the benefit of another foreign proceeding for the debtor recognized by this Court having jurisdiction over the asset, then this Court may exercise its extra-territorial in rem jurisdiction under section 1334(e).\(^{703}\)

Whilst the exercise of such jurisdiction is based upon the court’s jurisdiction over the ancillary domestic proceedings which may be issued under Article 28, it will face the same difficulties with the enforceability of those orders as all other extra-territorial orders face when made without recognition of the US ancillary proceeding as a non-main proceeding in the foreign jurisdiction. Such orders would generally be enforceable only where the parties concerned are otherwise subject to the jurisdiction of US courts. It is further argued that in such circumstances, it is not in accordance with the principles of Universalism for a US court to assert a jurisdiction over the foreign assets when the representative of the foreign main proceeding has not sought recognition or comity in that foreign jurisdiction in which the assets are located.

The worldwide effect of an insolvency regime is further complicated by the issue of non-suit injunctions seeking to enforce stays granted under the law of the State of the main proceeding being recognised in foreign jurisdictions. The New Zealand High Court has refused to grant an anti-suit injunction in respect of proceedings in Nevada against a company in liquidation in New Zealand. The court held, after considering the effect of the Model Law and the fact that the USA had incorporated Chapter 15 into its domestic law, that:

> the statutory prohibition to commence or continue proceedings against a company in liquidation is not applicable to foreign proceedings, and there is therefore no jurisdiction to make the order sought. I conclude that in terms of New Zealand law, no consent of this Court is required for the Nevada proceedings to continue.\(^{704}\)

The Model Law appears to assume that any stay granted under the domestic law of the State of the foreign proceedings does not necessarily apply in foreign jurisdictions; otherwise, it would be unnecessary for such a stay to come into effect upon recognition of such proceeding as a main proceeding pursuant to Article 20 or orders being granted under Articles 19 or 21. If this is the case, it is arguable that anti-suit

\(^{703}\) Re British American Insurance Co Ltd, 488 BR 205 (Bankr, SD Fla, 2013).

\(^{704}\) Commissioner of Inland Revenue v Compudigm International Limited (in liq) [2010] NZCCLR 6 [44].
injunctions may have a place under the Model Law until such time as recognition is granted. However, such injunctions may cause conflict if they extend beyond the time of recognition in the case of non-main proceedings where a court has refused to grant a stay following recognition of the foreign non-main proceeding. 705

10.3.7 Priority of Domestic Laws in Administrations

Article 29 of the Model Law provides that if local insolvency proceedings have already been commenced at the time proceedings are issued for recognition under the Model Law, no mandatory assistance is available on recognition as provided by Article 20; any discretionary relief must be consistent with the existence of the local proceedings. Where both foreign main and non-main proceedings are recognised, priority is accorded to the foreign main proceedings and any assistance granted to a foreign non-main proceeding must be consistent with that provided to the foreign main proceeding. Therefore, where courts cannot agree on the identity of the State of the foreign main proceedings, inconsistencies may arise. This may result in assets shifting after an entity has insolvency proceedings issued in one State. The purpose would be to attempt to shop for the forum where the laws provide the most convenient outcome for the directors or management and which may prejudice the interests of creditors.

Similar issues arise where there is a difference between the laws of a State in which a debtor carries on business or under whose laws contracts are entered into and the laws of the State of the foreign main proceeding. This situation was exemplified in the Lehman Brothers administrations where the English Courts had interpreted a complicated series of financial instruments which contained a flip clause. The clause deprived the Lehman's entity of an indemnity and gave that indemnity to the investor note-holders should any of the Lehman entities commit any default including an insolvency event. 706 Whilst the proceedings were settled prior to the final appeals being heard, the English Courts had interpreted the contract under English law, being the law that governed the contract which found the flip clause to be valid. 707 The US Bankruptcy Court, on the other hand, held that the flip clause was invalid under

705 See, eg Re Kemsley, 489 BR 346 (Bankr, SD NY, 2013); Kemsley v Barclays Bank PLC [2013] BPIR 839; [2013] EWHC 1274 (Ch) (15 May 2013).
706 Belmont Park Investments Pty Ltd v BNY Corporate Trustee Services Ltd [2012] 1 AC 383, 404, [35].
sections 365(e) (1) and 541(c) (1) (B) and void against the Lehman entities. In relation to this inconsistency, Judge Peck stated:

The English Courts authoritatively have interpreted the Transaction Documents in accordance with applicable English law. The Court, while respecting that determination as valid and binding between the parties, is not obliged to recognize a judgment rendered by a foreign court, but instead may choose to give res judicata effect on the basis of comity. . . . In deciding whether to recognize the decision of the English Courts in relation to the determination that Perpetual is entitled to a distribution based on Noteholder Priority, this Court will evaluate whether the English Courts, in rendering their respective decisions, sufficiently considered the applicability and impact of section 365 of the Bankruptcy Code. It appears that the English Courts did not take into account principles of United States bankruptcy law and understood, as did the parties themselves, that the outcome of the dispute might well be different in this Court. . .

As a general matter, ‘courts will not extend comity to foreign proceedings when doing so would be contrary to the policies or prejudicial to the interests of the United States.’

The US Court of Appeals has also found that whilst some avoidance laws under the Bankruptcy Code are expressly excluded from being able to be granted to foreign representatives, ‘it does not necessarily follow that Congress intended to deny the foreign representative powers of avoidance supplied by applicable foreign law.’ On the other hand, the US Court of Appeals has also determined that even though English administrators can bring recovery proceedings in the USA in respect of transactions in England, the English preference laws apply to the recovery, and not the USA laws.

It is difficult to determine when the courts will apply domestic or foreign laws in insolvency proceedings as it is a matter of discretion. This creates uncertainty in the minds of foreign representatives and creditors regarding their potential liabilities, and is an issue that needs to be further investigated. This issue will persist until States can agree to a convention that will legislate consistently the rules applicable to choice of law rules and principles of private international law issues in insolvency administrations.

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708 Re Lehman Brothers Holdings Inc, 422 BR 407 (Bankr, SD NY, 2010).  
710 Re Condor Insurance Ltd (in liq), 601 F.3d 319, 324 (5th Cir, 2010).  
711 Maxwell Communications Corporation v Societe Generale, 93 F.3d 1036 (2nd Cir,1996).
An easier issue to deal with relates to the position of domestic secured creditors who have not registered their security in the jurisdiction of the foreign main proceeding. This has been dealt with in the past by orders requiring all claims of the secured creditor to be satisfied in full from the assets before transmission of the balance to the foreign main proceeding.\textsuperscript{712} It is argued that given the provisions of Article 22 under the Model Law, this situation will continue as the validity of the title to the assets and the security should be determined by the \textit{lex situs}.

It is argued that the priority laws in relation to creditors which have security over particular assets should be \textit{lex situs}. In relation to other creditors, there are competing arguments as to whether the applicable laws should be determined \textit{lex situs} or \textit{lex fori concursus}, depending upon the circumstances. As the Model Law allows separate insolvency proceedings to be issued in a State in which the debtors held an asset after recognition of a foreign main proceeding, equity and harmonisation between administrations would demand that \textit{lex situs} apply but with hotchpot as is envisaged by Article 32. This is different from the old common law position in relation to trustees that required the administration of the assets to be carried out \textit{lex fori concursus} of the country in which representation has been granted.\textsuperscript{713} This change, it is argued, has been brought about by the Model Law.

10.3.8 Effect of Discharge under Domestic Law

The Model Law, unlike the EC Regulation, applies the domestic rules to the discharge of debts in jurisdictions where foreign proceedings are recognised. Recognition itself does not automatically give a discharge.\textsuperscript{714}

In Australia, section 153(1) of the \textit{Bankruptcy Act 1966} (Cth) operates to release the bankrupt individual from all debts provable in the bankruptcy. Since all creditors, both foreign and domestic can prove their debts, whether governed by Australian or foreign laws, then according to that section, all debts both foreign or domestic that fit within the definition of a provable debt, are discharged. Similar provisions are contained in the legislation of the other States examined.\textsuperscript{715}

\begin{flushleft}
\textsuperscript{712} \textit{Re Northland Services Pty Ltd} (1978) 18 ALR 684.
\textsuperscript{713} \textit{Permanent Trustee Company (Canberra) Ltd v Finlayson} (1968) 122 CLR 338, 342-43.
\textsuperscript{714} \textit{Kumkang Valve Manufacturing Co Ltd v Enterprise Products Operating LLC}
\end{flushleft}
In the case of releases given in an Australian deed of company arrangement executed under the provisions of Part 5.3A of the *Corporations Act*, the company’s debts are released to the extent provided for in the Deed of Company Arrangement.\(^{716}\) A Deed of Company arrangement can bind all unsecured creditors, both domestic and foreign, if so expressed.\(^{717}\) Similar provisions are contained in the reorganisation legislation in the other States examined.\(^{718}\) The question of whether these discharges and releases will be recognised in foreign jurisdictions will depend upon their domestic laws and whether recognition will be required of the Australian proceeding as a foreign proceeding.

For some time, Canadian Courts have been willing to recognise United States bankruptcy proceedings including the stay of proceedings and discharge of debts.\(^{719}\) However, there does not appear to be any other definitive rule about the discharges that will be recognised. The New Zealand position would appear to be similar to that in Australia given their adoption of similar legislation. The traditional position in England was stated by the Privy Council over a hundred years ago where it found that a discharge of a debt of an English company by a scheme of arrangement under English law did not prevent a debt from being pursued in Australia under Victorian law where Victorian law was the law of the contract, as the enactment under which the scheme of arrangement was effected did not extend to Victoria.\(^{720}\) It has been stated that a foreign discharge in accordance with the proper law of the obligation will be effective in England.\(^{721}\) It is arguable that this position has been altered by the Model Law in that, should the above fact scenario occur again and recognition of the English scheme of arrangement be sought in Australia, it would have the effect of bringing the Australian debts into the English restructuring.

The entering of an appearance by a creditor in a foreign insolvency process will not itself prevent a creditor from subsequently bringing an action in England to enforce their debt. However, the situation is different where the debt has been discharged.

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\(^{716}\) *Corporations Act 2001 (Cth)* s 444H.

\(^{717}\) *Corporations Act 2001 (Cth)* s 444D.

\(^{718}\) Companies Creditors Arrangement Act 1985, RSC 1985, c C-36 s 36; Companies Act 1993 ss 239ACS, 239ACT; Insolvency Act 1986 c45 ss 37, 260; 11 USC § 1141.


\(^{720}\) New Zealand Loan and Mercantile Agency v Morrison (1898) AC 349, 357-8.

\(^{721}\) Sheldon, above n 147, 467 [13.5].
under the foreign proceeding and the creditor has sought to prove in the administration of that foreign proceeding with a view to receiving a dividend.\textsuperscript{722}

Westbrook has suggested by analogy that the US courts:

might well assert that the person’s conduct is subject to stay anywhere in the world once we have jurisdiction over that person, even if the jurisdiction arises form a “generally doing business” contact unrelated to the bankruptcy as such. On that basis, it is reasonably probable that the United States courts will impose sanctions on creditors who attempt to collect outside the United States debts discharged in a main proceeding in our country.\textsuperscript{723}

Despite the above, it is argued that the effect of a discharge can be confined only to the jurisdictions in which the insolvency proceeding commenced or has been recognised or where the \textit{lex contractus} is one of those jurisdictions.

\begin{itemize}
\item[10.3.9] Inconsistency with Other International Laws, Treaties and Conventions
\end{itemize}

Whilst the US Constitution gives treaties and federal statutes equal status,\textsuperscript{724} the same is not the case in Australia, Canada, New Zealand or the UK where treaties are required to be enacted domestically.\textsuperscript{725}

Further, despite the indication given in paragraph 92 of the UNCITRAL Guide, Australia and New Zealand have made the decision to leave Article 3 in their domestic version of the Model Law. This means that a decision under the Model Law must be interpreted in light of existing treaties, agreements and conventions to which those States are parties. This would include future treaties, agreements and conventions to which those States may become a party. In the USA, this may give rise to potential difficulties with the interpretation of the Model Law as a result of the provision of a domestic version of Article 3,\textsuperscript{726} as it may be difficult to determine at any point in time the treaties that may apply to any given fact scenario and where they do apply, this may produce a different result from that anticipated under the Model Law. The United States and Canada are both parties to the \textit{North America Free Trade Agreement} and have endorsed The

\begin{itemize}
\item[722] Ibid 476 [13.22].
\item[724] \textit{United States of America Constitution}, art VI § 2.
\item[725] See, \textit{Dietrich v R} (1992) 177 CLR 292, 305.
\item[726] 11 USC § 1503 (2012).
\end{itemize}
American Law Institute guidelines for cooperation\textsuperscript{727} which include guidelines for communications between courts.\textsuperscript{728} As different States are subject to different treaties, this clause may result in different States interpreting terms contained in the Model Law differently despite the provisions of Article 8 where such treaty requires the Model Law or insolvency legislation generally to be interpreted in a certain way.

Different conventions and model laws agreed to by different States have different meanings for similar phrases. This may give rise to potential clashes and inconsistencies where courts rely upon decisions that have interpreted a similar phrase in another convention to determine the meaning of that phrase in the Model Law, especially where that phrase is not clarified. It is argued that rather than using the meaning of a phrase from another convention or model law, Article 8 requires the courts to look at the UNCITRAL Guide and other documentation as well as foreign decisions under the Model Law. For example, the debtor’s COMI has a different meaning in the Cape Town convention that provides that it is ‘the place of the debtors statutory seat, or if there is none, the place where the debtor is incorporated or formed unless proved otherwise’.\textsuperscript{729} In another UNDROIT convention, a similar meaning is given to the phrase ‘primary Insolvency jurisdiction’.\textsuperscript{730} Further, the use of the concept of COMI is different in the EC Regulation, as once insolvency proceedings are issued in the State where the debtor has its COMI, further insolvency proceedings cannot be issued against the debtor in a member State if the debtor has no establishment in that State.\textsuperscript{731}

Justice Rares of the Federal Court of Australia has pointed out a number of potential inconsistencies between the Model Law and the international admiralty law. This is highlighted by the fact that courts are granted \textit{in rem} jurisdiction simply based upon a ship being present in their jurisdiction without their owner or operator having any other association with that jurisdiction. Courts can arrest a ship even though its owner or operator/charterer may be the subject of foreign insolvency proceedings. His Honour applauds the decision in \textit{Atlas Shipping} wherein the US Bankruptcy Court set aside a

\textsuperscript{727} The American Law Institute above n 32.
\textsuperscript{728} Ibid Annexure B.
\textsuperscript{729} International Institute for the Unification of Private Law, ‘\textit{Protocol to the Convention on International Interests in Mobile Equipment on Matter Specific to Aircraft Equipment}’ Cape Town (16 November 2001), art 1 (2)(n).
garnishee notice issued by the US District Court exercising its admiralty jurisdiction based upon the fact that foreign insolvency proceedings had been issued at the time of issue of the garnishee proceedings, even though there was no application afoot for recognition of those proceedings in the USA at the time.\textsuperscript{732} His Honour stated that admiralty proceedings fall outside the Model Law’s provisions for the orderly distribution of a debtor’s assets.\textsuperscript{733} His Honour further stated that admiralty proceedings are \textit{in rem} proceedings and, as such, a plaintiff is treated as a secured creditor entitled to enforce by arresting the ship but not against the insolvent debtor’s property generally.\textsuperscript{734} The judge further argued:

What happens if a ship is sold by a liquidator or under an order of a court exercising insolvency jurisdiction such as under the Model Law? Such a sale does not operate in the same way as a sale by order of the Admiralty Court. The two jurisdictions deal with changes in status. But, because of the reach and operation of Admiralty law principles, or the general law of the sea, most jurisdictions recognise the authority of a sale by an Admiralty Court as passing a clear title. Such a title will be free from maritime liens attached to the ship or other res.\textsuperscript{735}

His Honour expressed the opinion that the Model Law could not override the existing principles of admiralty law.\textsuperscript{736} The above statements highlight a number of potential inconsistencies and difficulties that may arise when a court exercising insolvency jurisdiction ventures into the admiralty jurisdiction, especially if that court otherwise does not have the power to exercise admiralty jurisdiction. Whilst the courts in Australia, Canada, New Zealand and the UK which are granted jurisdiction under their domestic version of the Model Law can also exercise admiralty jurisdiction, this is not necessarily the case in other States. In the USA that jurisdiction is vested in the District Court. It may therefore be necessary to ensure that any orders made under the Model Law, where the debtor has admiralty issues, are made by a court which has both jurisdictions in order to ensure that they are issued with the recognition of the court’s order by other admiralty courts.

The Federal Court of Australia has also held that an admiralty action \textit{in rem} to enforce a maritime lien is not affected by the stay under Article 20 as their position is akin to

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\textsuperscript{733} Ibid [31].
\textsuperscript{734} Ibid [49], citing \textit{Re Aro Ltd} [1980] Ch 196, 204, 229.
\textsuperscript{735} Ibid [53].
\textsuperscript{736} Ibid [63].
\end{flushright}
that of a secured creditor.\textsuperscript{737} This decision is in part due to the definition of secured creditor which includes a person who holds a pledge or lien.\textsuperscript{738} 

The unique position of admiralty claims has been confirmed in England in \textit{The Matter of Amanda Shipping SA} where the court granted leave for arbitration proceedings to continue against a company whose foreign proceedings had been recognised as a main proceeding in England as the court determined that the stay granted by Article 20 was akin to the stay granted under England’s domestic law upon the commencement of winding-up proceedings under section 130 of the \textit{Insolvency Act}, and as such, the Court had the power to remove the stay.\textsuperscript{739}

The European Union and the USA are both signatories to the Hague Conference Convention on Choice of Courts Agreements.\textsuperscript{740} This agreement requires a contractual provision containing choice-of-court provisions to be honoured and enforced in signature States.\textsuperscript{741} This may cause issues in respect of the enforcement of standard form agreements and terms of trade with those States. The convention does not apply to insolvency, composition and analogous matters and where the enforcement of the choice-of-court clause amounts to a breach of public policy.\textsuperscript{742} The extent of the insolvency and public policy exemptions is uncertain as it will depend upon the domestic laws of the relevant State. Subject to the exemptions, the Convention may still have to be taken into account by representatives in relation to enforcement of agreements entered into prior to a debtor’s insolvency.\textsuperscript{743} However, it should not affect the principles of private international law applicable to the insolvency proceeding.

The Model Laws interrelationship with the \textit{European Convention of Human Rights} arose in relation to the deceased estate of Australian personality Rene Rivkin. The English High Court on an application of Mr. Rivkin’s Trustee in Bankruptcy to enable him to trace where Mr. Rivkin’s assets had gone, issued an application under Article 21 for the production of documents by third parties. That application was opposed by

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\textsuperscript{737} Yu v STX Pan Ocean Co Ltd (South Korea) (2013) 223 FCR 189, 202-3 [41].  
\textsuperscript{738} Bankruptcy Act 1966 (Cth) s5; Corporations Act 2001 (Cth) ss 51A, 51F.  
\textsuperscript{739} Re Amanda Shipping SA [2011] 2 All ER (Comm) 481.  
\textsuperscript{741} The signature States are the European Union, Mexico and the United States of America, <http://www.hcch.net/index_en.php?act=conventions.status&cid=98>.  
\textsuperscript{742} Art 2(2)(e); art 6(c).  
\end{flushright}
some of the third parties as it brought into issue third parties’ rights to privacy under Article 8 of the *European Convention of Human Rights* insofar as they related to the third party individuals and their business affairs. The court refused to allow the trustee to inspect the documents.\(^{744}\)

It is argued that the interaction of the Model Law with other model laws and conventions must be determined according to the provisions of the Model Law itself, in particular Article 3 that provides that to the extent that there are any inconsistencies, the terms of the other treaties prevail over the Model Law. The law to be used to determine whether there are any inconsistencies should be the applicable law for interpreting that treaty or convention.

### 10.3.10 Protection of Creditors Interests

Articles 21(2) and 22(1) oblige the court to be satisfied that the interests of creditors are protected before making orders under those articles and Article 19. These Articles must be read subject to Article 13 which excludes certain creditors from the operation of the Model Law.

The English High Court in *Samsun Logix*, in attempting to address the interests of local creditors, granted conditional relief staying the enforcement of a lien in England pending the determination of an appeal over the quantity of the creditors’ provable debt in Korea, being the place of the main proceeding, upon an undertaking being given that the fact the creditors appeared in the Korean proceeding would not create an estoppel in England to them enforcing their lien.\(^{745}\) The English courts have also raised the issue of distribution to creditors being on a *pari passu* basis as a necessity for recognition and for assets to be handed over to a foreign representative for distribution.\(^{746}\)

In both England and the USA, the courts maintain that the right of set-off is a fundamental right that must be adequately protected and recognised by the foreign jurisdiction before the court is willing to make orders under those articles.\(^{747}\) In the USA, section 1507 in addition requires the court, before granting assistance under Chapter 15, to be reasonably assured that there is a just treatment of all claims against

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\(^{744}\) *Re Rivkin* [2009] BusLR 500; [2008] EWHC 2609 (29 October 2008) [18].


\(^{746}\) *McGrath v Riddell* [2008] 3 All ER 869, 896-7,[79]-[81].

\(^{747}\) *Re Swissair Schweizerische Luftverkehr-Aktiengesellschaft* [2010] BCC 667, 672 [14]-[15]; *SNP Boat Service S.A. V Hotel Le St James* 483 BR 776 (Dist, SD Fla, 2012).
the debtor and protection of claims holders in the USA against prejudice and
inconvenience of processing claims in a foreign jurisdiction. This provision has been
interpreted differently by the US Courts in different circuits. The US District Court has
described its obligations as follows:

Thus, according to the Model Law, a bankruptcy court must be satisfied that local
creditors' interests are "sufficiently protected" before allowing a foreign representative to
distribute property in a foreign proceeding, and though not an express requirement, is
not precluded from satisfying itself that foreign creditors’ interests are "sufficiently
protected" before allowing a foreign representative to distribute property in a foreign
proceeding.\footnote{748}{SNP Boat Service S.A. V Hotel Le St James, 483 BR 776 (Dist, SD Fla, 2012).}

In \textit{Tri-Continental Exchange}, the US Bankruptcy Court stated that section 1522
required a court 'to tailor relief and conditions so as to balance the relief granted to the
foreign representative and the interests of those affected by such relief, without unduly
favoring one group of creditors over another'.\footnote{749}{349 BR 627, 637 (Bankr, ED Cal, 2006).}

\textit{In re Board of Directors of Telecom Argentina}, the US Court of Appeals held that the
principles of comity require a just treatment of creditors and that the foreign law
‘provides for a comprehensive procedure for the orderly and equitable distribution of
[the debtor]'s assets among all of its creditors.’\footnote{750}{Re Board of Directors of Telecom Argentina, 528 F. 3d 162, 170 (2nd Cir, 2008).} This does not require them to give
creditors the same protections as under US Bankruptcy Law.\footnote{751}{Ibid 173.}

In \textit{Re International Banking Corporation}, the US Bankruptcy Court refused to transfer
property in the US to the foreign representative of recognised proceedings in Bahrain
until the foreign representative provided additional evidence that the US creditors
would be protected.\footnote{752}{Re International Banking Corporation B.S.C 439 BR 614, 627-9 (Bankr, SD NY 2010).} The court further held that Article 22 is not limited to local
creditors and that it must protect the interests of both secured and unsecured
creditors.\footnote{753}{Ibid 627.}
Westbrook has argued that in the interest of creditors, they should be treated on a pari passu basis with the exception of wages, secured creditors and taxes.\textsuperscript{754} However, this ignores any local priorities as observed above in section 10.3.4.3.

The additional requirement imposed by section 1507 in the USA may create inconsistency in the requirements between States to protect the interests of creditors. This may lead to resentment by creditors in other jurisdictions whose interests may not be as well protected as those in the USA. This protection may also lead to preference being given to USA creditors over other foreign creditors.

As each State examined has a different priority regime for creditors and different laws in relation to when set-off is applicable, if foreign courts believe that their regime should apply to assets in their State, conflicts will arise regarding the way in which creditors’ interests are to be protected. This is not the case in the States examined in this thesis, but may be an issue with other States. It is argued that the stance taken by the House of Lords in \textit{McGrath v Riddell} is the more appropriate stance, namely that a difference in a priority regime, subject to basic, generally accepted priorities for employees and secured creditors being protected, should not influence a court issuing turnover or other orders under these articles.\textsuperscript{755} The validity of any secured interests must be assessed \textit{lex situs} as that is the law that will govern the transfer of such property including the formalities required to affect such transfer.

As stated above, it is further argued that the right of set-off should also be determined under either \textit{lex situs} or \textit{lex contractus} where it arises from a transaction involving property as this recognises the commercial reality of the transaction and potential commercial impetus in entering into the transaction.

\section*{10.4 Summary}

The Model Law does not harmonise the conflict of law rules for each State adopting it. This leaves this issue to the established conflict of law practices of each State. Whilst a number of obvious areas where conflicts will arise have been examined in this chapter, there are an infinite number of possibilities in terms of where conflicts are likely to arise in cross-border insolvency matters.

\textsuperscript{754} Westbrook, ‘Breaking Away: Local Priorities and Global Assets’ above n 2, 603 -15.
\textsuperscript{755} See \textit{McGrath v Riddell} [2008] 3 All ER 869.
The interpretation of the Model Law, it is argued, should be determined in accordance with the provision of Articles 3 and 8. Article 3 provides that, to the extent that the Model Law is inconsistent with any other treaty, the provisions of the treaty prevail. Article 8 requires the court to take into account the Model Law’s international origins and to promote uniformity. It is argued that this requires courts to consider foreign judgments when interpreting the provisions of the Model Law.

As was evidenced in *McGrath v Riddell*, the courts are grappling with the notion of addressing cross-border insolvency matters by taking a Universalist approach being advanced by Lord Hoffmann, whilst other judges are adopting a more conservative traditionalist approach advocating the protection of local creditors’ interests. Westbrook advocates that the Universalist approach would apply the law of the State of the main proceeding to the administration and its recovery proceedings.

In appropriate cases, the courts appear willing to allow foreign law to be used in domestic insolvencies to recover antecedent transactions which would normally be governed by domestic legislation. However, no steadfast rules have been developed to determine when this will occur. It is argued that in order to achieve a commercial and equitable result, the courts must take into account the relevant laws which the parties believed would apply to their transactions and any potential insolvency.

In the USA, it is argued, Chapter 15 relates recognition to comity, and therefore by implication bringing in their earlier judicial interpretations of that principle. In the other States examined, no such linkage is given, with the Model Law creating a separate right to recognition. Whilst all of the States examined have similar conflict of law rules due to their English common law heritage, the same cannot be said for all States that have adopted the Model Law. This may ultimately give rise to further conflicts which will continue to exist until a common set of conflict rules applies in relation to cross-border insolvencies.

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756 See 11 USC §§ 1507,1509 (2012).
757 See comments above in Chapter 8 in respect of linkages between comity and the Model Law.
Chapter 11
Centre of Main Interest and Establishment

Overview

This Chapter 11 identifies issues that have arisen in the interpretation and recognition of the central concepts of recognition of the foreign proceedings, namely a debtor’s COMI and establishment in the States examined. It argues that:

- The determination of this issue has a direct effect upon which proceeding is identified as the foreign main proceeding. Therefore, it will also have a bearing on conflict of law issues.

- On a number of issues, such as the timing for recognition, there appears to be no uniformity even within an individual State, let alone internationally which can lead to inconsistencies.

11.1 Factors Determining COMI

The concept of COMI was taken from Article 3 of the EC Regulation.\textsuperscript{758} It has been suggested that this has the advantage of promoting a consistent approach to international recognition.\textsuperscript{759} The EC Regulation provides that in respect of incorporated debtors that it ‘should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties’.\textsuperscript{760}

As no definition of COMI is contained in the Model Law, UNCITRAL in its Legislative Guide recommends that the appropriate meaning is that contained in the EC Regulation.\textsuperscript{761} This definition differs between corporate and personal debtors.

The definition of this phrase under the EC Regulation was considered in Eurofood wherein the European Court of Justice indicated that in referring to recital 13 of the EC

\textsuperscript{758} United Nations Commission on International Trade Law Guide to Enactment of The UNCITRAL Model Law on Cross-Border Insolvency UN Doc A/CN.9/442 [31] [72].

\textsuperscript{759} See Fletcher, above n 44, 458 [8.23].

\textsuperscript{760} Recital 13.

\textsuperscript{761} United Nations Commission on International Trade Law, General Assembly, Legislative Guide on Insolvency Law, UN Publications Sales No E.05.V.10 (United Nations, 2005), 41 [13].
Regulation, it should correspond to the place where the debtor conducts the
administration of its interests and is ascertainable by third parties.\(^{762}\) The court went on
to state that the relevant jurisdiction for determining rights and remedies of creditors
should be clear to investors at the time they make their investment.\(^{763}\) If a party wishes
to rebut the presumption, it must demonstrate elements relied upon that are
transparent and ascertainable.\(^{764}\) The European Court of Justice also requires an
enquiry to be made if the place in which a company’s central administration is located
is not the same as that of its registered office, and in such circumstances that a party
cannot simply rely upon the presumption.\(^{765}\) This concept is also picked up in the
proposed amendments to the EC Regulation.\(^{766}\) These proposed amendments are
discussed in section 13.1.6.

Article 16 of the Model Law deems ‘in the absence of proof to the contrary’ for the
debtor’s registered office or habitual residence in the case of an individual, to be the
debtor’s COMI.\(^{767}\) As is highlighted by the cases referred to in Appendix 1, there is a
difference in the manner in which the USA and Canada have given effect to the
rebuttable presumption as opposed to Australia, New Zealand and the UK. This
difference in approach is due in part to the different wording adopted in their respective
enactments of Article 16 as opposed to that contained in the Model Law. Australia,
New Zealand and the UK have adopted an interpretation consistent with that taken by
the European Court of Justice.\(^{768}\)

A number of courts in different States have specified the factors that should be
considered when determining a debtor’s COMI. These factors vary according to
whether the debtor is an individual or company.\(^{769}\) Dicey, Morris and Collins on the
other hand argue that the enquiry should be looked at from the perspective of both the

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\(^{762}\) Re Eurofood IFSC Ltd [2006] Ch 508, 528 [107].
\(^{763}\) Ibid 530 [118].
\(^{764}\) Ibid 531 [122].
\(^{765}\) Re Interedil Srl [2012] Bus LR 1582, 1592 [51]-[53].
\(^{766}\) European Commission, ‘Proposal for a Regulation of the European Parliament and of the
2012/0360 (COD) Recital 13a.
\(^{767}\) Art 16(3).
\(^{768}\) See Ackers v Saad Investment Company Ltd (in liq) (2010) 190 FCR 285; Williams v
Simpson [2011] 2 NZLR 380; Re Stanford International Bank Ltd [2011] Ch 33 in which the
courts followed the European Court of Justices decision Re Eurofood IFSC Ltd, [2006] Ch.
508.
\(^{769}\) See Williams v Simpson [2011] 2 NZLR 380,395; Re Angiotech Pharmaceuticals Ltd (2011)
76 CBR (5th) 317 [7]; Re Massachusetts Elephant & Castle Group Inc (2011) 81 CBR (5th)
102 [30]; Re Sphinx Ltd, 351 BR 103, 117 (Bankr, SD NY, 2006.); Re Ran, 607 F. 3d 1017,
1022-1023 (5th Cir 2010).
debtor and an objective observer. Professor Wade, after examining the different interpretations from the USA and the UK, and comparing those relating to the interpretation of COMI under the EC Regulation, has stated that a court must make an independent fact-based determination using objectively ascertainable factors. Ho has criticised the stance taken by the English Court of Appeal in Stanford International Bank as following the interpretation of COMI under the EC Regulation which looks at the head office function, whereas the interpretation adopted by the courts in the USA has concentrated on the ‘principle place of business’.

Professor Westbrook has argued that the international interpretation of COMI under the Model Law should consider the quality of the substantive law of the State of the main proceedings as, otherwise, public policy may prevent courts from recognising some jurisdictions which are recognised havens. Havens are generally described as jurisdictions which will protect the interests of directors and management rather than creditors, and their local laws usually have secrecy provisions. He suggests that a COMI rule should not be adopted that ‘is likely to permit havens to serve often as the COMI of a corporation whose headquarters and operations are elsewhere’. Westbrook further argues that the proper interpretation of the Model Law and Chapter 15 of the US Bankruptcy Code should give only limited weight to the presumption of the jurisdiction of incorporation as the COMI. This may be seen as contrary to the European Court of Justice’s decisions on Eurofood and Interedil which can be read as creating a presumption in favour of the State of incorporation which can be rebutted should it be shown that their place of central administration is in another State. It is proposed that the Eurofood and Interedil test be included in the EC Regulation, which if adopted will require a comprehensive understanding of all relevant factors to determine the place of the actual management and supervision and management of the debtor’s interests that is ascertainable by third parties. No list has been specified of other relevant factors which has the potential of creating inconsistency.

770 Collins et al, above n 159, 1766 [31-108].
771 Wade, ‘Where is a corporation’s “centre of main interests” in international insolvency’ above n 415,144.
772 Ho, above n 77, 194-200.
774 Ibid 1032.
775 Ibid 1033-4.
The UNCITRAL Guide has been amended to suggest that where on an application for recognition there appears to be a separation between the debtor’s registered office and its COMI, then the party alleging that the registered office is not the COMI will need to satisfy the court of the debtor’s COMI. This test is different from that proposed for inclusion in the EC Regulation which provides that the registered office presumption can be rebutted should it be shown that the debtor’s central administration is in the State of its registered office, upon proof of which a comprehensive investigation has to be conducted to determine the location of the actual centre of management and supervision and the management of its interest.

The amendments to the UNCITRAL Guide changes the factors to be considered as a whole to indicate a debtor’s COMI to be:

(a) Where the central administration of the debtor takes place; and

(b) The location which is readily ascertainable by creditors.

Where these factors do not yield a ready answer, a further 15 factors should be considered after giving a relevant weight to each. These amendments require a court to look at more factors than the proposed amendments to the EC Regulation discussed below in section 13.1.6. This may of itself lead to further inconsistent

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decisions. In an attempt to link the concept of COMI as it appears in both the Model Law and the EC Regulation, the UNCITRAL Guide has been amended to provide that, notwithstanding the different purpose for which COMI is used, that the EC Regulation jurisprudence may be relevant to the interpretation of the Model Law.

However, it is argued that there is an issue regarding the extent to which the courts of States which have enacted the Model Law can take into account the amendments to the UNCITRAL Guide after their domestic enactment of the Model Law. This would involve issues of the domestic rules of interpretation and may be seen as a breach of the principles of legislative sovereignty. It is argued that where major amendments have been made to the UNCITRAL Guide since the date of enactment of the domestic provisions of the Model Law, a court may refuse to consider such amendments. This is especially the case in the UK wherein the domestic legislation enacting the Model Law specially allows the courts to refer to the UNCITRAL Guide by document number, thereby giving rise to a possible inference that the amendments to the UNCITRAL Guide cannot be referred to. This is in contrast to the position in New Zealand where the courts can refer to any document relating to the Model Law that originates from UNCITRAL. The adoption of the amendments in the USA may be difficult as their legislature intentionally amended their version of the Model Law in relation to this issue.

To date, the courts’ approaches to assessing COMI differ: the approach taken in Europe is consistent with the EC Regulation, which sets a high threshold to rebut the presumptions contained in Article 16(3), while that adopted in Canada and the USA is a ‘command and control’ test.

Given these different views, it is not clear what factors should be considered when determining a debtor’s COMI. However, it is clear that the class of factors that are to

783 Cross-Border Insolvency Regulations 2006 SR 2006/1030 reg 2(2)(c); see generally, Fibria Celulose S/A v Pan Ocean Co Ltd [2014] EWHC 2124 (Ch) (30 June 2014) [88].
784 Insolvency (Cross-border) Act 2006 s 5.
785 Sarra, above n 413, 558.
be looked at is not closed and may depend upon the jurisdiction in which the application for recognition is being heard. It is argued that, considering the weighting that different courts give to these factors, inconsistent findings may be made.

It is, however, suggested that should a definition of COMI be inserted into the EC Regulation as proposed, then it is desirable for the definitions contained in the EC Regulation and the Model Law to be consistent. This will avoid difficulties in interpretation for those States, such as the UK, which have both the EC Regulation and the Model Law as part of their domestic law. This can easily be done by inserting the list of relevant factors from the UNCITRAL Guide into the EC Regulation. The weight to be given to the presumption should also be consistent.

It is argued that uniformity between the European position and that in North America will be achieved only when a consistent decision is arrived at in a case in which the debtor company has a registered office and there is no evidence regarding its place of central management. It appears that this would not be achieved in all circumstances by the changes proposed to both the EC Regulation and the recent amendments to the UNCITRAL Guide which will provide different threshold tests for rebutting the registered office presumption in respect of corporate debtors. The proposed test in the EC Regulation for rebutting the presumption appears to require a higher standard than do the amendments to the UNCITRAL Guide.

11.2 Factors Considered when Determining Establishment

The definition of the term ‘establishment’ in the Model Law was inspired by the same term contained in Article 2 of the EC Regulation, except that the EC Regulation does not include the words ‘or services’.

Virgos and Schmidt state that the mere presence of assets is not sufficient to amount to an establishment. The definition contained in the Model Law requires a place of operations which Virgos and Schmidt describe as ‘a place from which economic activities are exercised on the market (i.e. externally), whether the said activities are commercial industrial or professional’. They further state that:

786 Virgos & Schmidt, above n 28 [71].
The emphasis on an economic activity having to be carried out using human resources shows the need for a minimum level of organization. A purely occasional place or operations cannot be classified as an “establishment”. A certain stability is required. The negative formula (non-transitory”) aims to avoid minimum time requirements. The decisive factor is how the activity appears externally, and not the intention of the debtor.\footnote{Ibid.}

11.2.1 Australia

The Federal Court of Australia after referring the authorities from New Zealand, UK and USA has equated establishment to a place of operations.\footnote{Gainsford v Tannenbaum (2012) 293 ALR 699 [51]}

11.2.2 Canada

The Canadian version of the Model Law does not contain a definition of or a reference to an establishment; nor does it state that it is a necessary element of a non-main proceeding that the debtor has an establishment in the State.

11.2.3 New Zealand

The New Zealand High Court has considered this term and noted that it has the same definition in the EC Regulation. The court referred to the Virgos–Schmidt Report which ‘describes a ‘place of operations’ as one from which ‘economic activities are exercised on the market (that is externally), whether the said activities are commercial industrial or professional. The court noted that the authors’ emphasis on economic activity using human resources demonstrated a need for ‘a minimum level of organisation’. The Court also noted that a ‘certain stability is required for there to be an establishment’.\footnote{Williams v Simpson [2011] 2 NZLR 380 at 393 quoting paragraph [71] of the Virgos-Schmidt Report.}

11.2.4 United Kingdom

In the UK, the word ‘assets’ has been substituted for ‘goods’ in the definition of establishment, thereby covering both land and intangible property. The effect of this difference has not to date been investigated by the courts of any State examined. This amendment to the Model Law would appear, however, to allow the UK courts to recognise a larger number of foreign proceedings than Australia, New Zealand or the United States, including those where the establishment was a real estate owning and leasing business and those that provide finance. The English Court of Appeal in \begin{em} Shierson v Vlieland-Boddy \end{em} considered the definition of an establishment under the EC
Regulation. The court found that, as the bankrupt held a beneficial interest in a property that was leased out as a multi-let business premises, the debtor was a landlord. Further, as a landlord, the debtor would need to manage the property (even if done through an agent) and was therefore carrying out a non-transitory economic activity with human needs and goods and as such this was an establishment. It is argued that this decision is not consistent with the definition of establishment as contained in the EC Regulation or what is stated by Virgos and Schmidt, and should be not be followed in other States in respect of the definition of that term under the Model Law other than in the UK where the definition of that term has been changed.

It is argued that Shierson should be confined to its facts as the court spent considerable time explaining the steps taken by the bankrupt to hide this asset and was seeking to find a way to assist the foreign representative to obtain control of the assets. It is also argued that it is not the purpose of the definition of establishment contained in the Model Law to recognise as an establishment one based upon only equitable interests as this would lead to the absurd result of investors who own units in a listed units property trust carrying out a non-transitory economic activity in each jurisdiction in which the trust owns property.

More recently, the Court of Appeal has relied upon the Virgos and Schmidt report in stating that it depends on 'whether it has in that other country a "place of operations" where non-transitory "economic activity" is carried on "with human means and goods", i.e. with human and physical resources'. The court further stated that more is required than simply having a branch office or place where the debtor is located.

The English High Court has also stated in cases involving the EC Regulation, that the date for determining the existence of an establishment is the date of presentation of the petition. Justice Mann went on to state that the concept of establishment involves:

. . . 3 ingredients for these purposes – (i) a place where things happen, and (ii) sufficient things (iii) of sufficient quality happening there. The concept of non-transitoriness goes to the third of them. In my view the converse of something being transitory is not confined merely to things which are "fleeting" (to use one English synonym) but is also intended to encapsulate such things as the frequency of the activity; whether it is
planned or accidental or uncertain in its occurrence; the nature of the activity; and the length of time of the activity itself.\textsuperscript{790}

The court held that the term 'goods' in the definition should correctly be interpreted as 'assets'. This amendment has been incorporated into the definition contained in their domestic version of the Model Law. The Court also determined that if all that is left by the debtor is assets in the jurisdiction, then it is not enough to found an establishment. This would appear to be inconsistent with the UK definition contained in the Model Law although it is consistent with a Universalist approach to the term.

In \textit{Olympic Airways SA}, the Court of Appeal noted that the concept of an 'establishment' was the same under the Model Law and stated that in order for there to be an establishment what should be looked for is a location where there is still, at the critical date, a business operation such as will justify secondary proceedings in a state outside the state of the centre of main interests. . .\textsuperscript{791} The court went on to state:

The question is whether at that point it has an establishment in a country other than the country of its "main interests", and that depends on whether it has in that other country a "place of operations" where non-transitory "economic activity" is carried on "with human means and goods", i.e. with human and physical resources.\textsuperscript{792}

The difficulty in establishing the factors that should be considered when determining whether a debtor had an establishment in the jurisdiction of the representative who is seeking recognition, has been appreciated in both New Zealand and the USA. There is no defined list of factors that a court should consider; moreover, the courts state that they are not attempting to define the scope of possible activities that would suffice to demonstrate the existence of an individual debtor's establishment.

As in the case of the corporate COMI, it is arguable that the list of factors to be taken into account by a court when determining whether an establishment exists, is not closed.

Dicey, Morris and Collins when commenting upon the term establishment' in the EC Regulation, state that the term 'non-transitory' indicates that an occasional or temporal place of operations does not qualify. The reference to human means would 'appear to

\textsuperscript{790} \textit{Re Office Metro Limited} [2012] BCC 829, 839 [33].
\textsuperscript{791} \textit{The Trustees of the Olympic Airlines SA Pension & Life Insurance Scheme v Olympic Airlines SA} [2013] 2 BCLC 171; [2013] EWCA Civ 643 (6 June 2013) [31].
\textsuperscript{792} Ibid [32].
connote operations conducted through personnel including employees and some forms of agent which in effect give the debtor a degree of stability" in that State.\footnote{793} Furthermore, they speculate that the term ‘goods’ is more problematic because in the French version of the text this is referred to as \textit{biens} which means property or assets of any kind. They also indicate that the term ‘goods’ does not include services, although if they are provided by human means, it would fit within the definition of \textit{biens}.

It is argued that the intention of obtaining consistency between the provision of the EC Regulation and the Model Law in the UK may be a reason for the change in the definition of establishment in the Model Law provisions in the UK. If this is the case, it is evidence of a territorialist European stance as it will not achieve uniformity with States outside Europe.

\textbf{11.2.5 USA}

The definition contained in the US Bankruptcy Code does not include the words ‘with human means and goods or services’. The US House of Representatives report states that the change to the definition ‘has been necessary to comport with United States terminology’.\footnote{794} The US Bankruptcy Court has found that an establishment should constitute a ‘seat for local business activity’ for the debtor. The terms ‘operations’ and ‘economic activity’ require showing of a local effect on the marketplace, more than mere incorporation and record-keeping and more than just the maintenance of property.\footnote{795}

In \textit{Ran}, the US Court of Appeals after referring to the above passages, stated:

recognition based on the existence of the bankruptcy proceeding and debts alone poses problems. First, a bankruptcy proceeding is by definition a transitory action, but recognition as a nonmain proceeding requires that the debtor carry out nontransitory activity in a location. . . . To permit a transitory action, i.e., the existence of the Israeli bankruptcy proceeding and corresponding debts alone to constitute the basis for finding nontransitory economic activity, would be inappropriate because it would go against the plain meaning of the statute. Second, if Ran's bankruptcy proceeding and associated

debts, alone, could suffice to demonstrate an establishment, this would render the framework of Chapter 15 meaningless.\textsuperscript{796}

The US Court of Appeals found that as Mr. Ran had moved from Israel to the USA more than eight years previously, and was not involved in any business in Israel, he did not have an establishment in Israel. At the time of issue of the petition seeking recognition, Mr. Ran’s only connection with Israel was the debts he had there. The court rejected a submission that his trustee was his agent and in that capacity carried out an economic activity in Israel.

In \textit{Lavie v Ran}, the US District Court commented that the US Congress had lowered the threshold to demonstrate the existence of an establishment by deleting the phrase ‘with human means and goods and services’. The Court further found that the date for determining whether an establishment existed was the date when the foreign representative filed a petition seeking recognition.

\textbf{11.2.6 Establishment Generally}

As can be seen from the above, there is no uniformity in the positions taken by the UK and the USA courts. Both States have also altered the wording of that definition. The courts in the USA seemingly indicate that a lower standard is required in the USA because of the different wording in their legislation. If this is correct, then it is argued that both the UK and the USA may have put their domestic interests above the desire to achieve a degree of uniformity and certainty in the recognition of foreign insolvency and reconstruction proceedings between States. In so doing, they are working against the Universalist principles they espouse and upon which the Model Law is based.

\textbf{11.3 Time of Recognition of COMI and Establishment}

In order for recognition to occur, the debtor must have either their COMI or an establishment in the State from which the foreign representative is seeking recognition. There is no unanimity in the position of courts in relation to the time at which this is assessed. There are different dates proposed even by the same court.

In Australia and the USA, the date of hearing of the application for recognition has been proposed as the relevant date.\textsuperscript{797} In Australia the court has however stated that

\textsuperscript{796} \textit{Re Ran}, 607 F 3d 1017, 1028 (5\textsuperscript{th} Cir, 2010).
they can look at historical facts that have led to the position as it is at the time for
determination.\textsuperscript{798}

In Australia, the Federal Court in recognising that different decisions exist in terms of
the time for determining a habitual residence, stated:

\begin{quote}
I have focussed upon the position as at the time when the application to this Court, was
filed, rather than some anterior time, first and foremost because Art 16, para 3 of the
Model Law uses the present tense. It also coincides with the focal point adopted by
Heath J in Williams v Simpson for determining habitual residence. That is not to exclude
reference to an individual debtor’s historical position. Indeed, reference to that may be
critical in determining whether the present residential position is “habitual”. The scope
for factual inquiry is broad and, though a debtor’s subjective intention is not irrelevant,
the conclusion as to habitual residence must be reached after an objective examination
of the whole of the evidence.\textsuperscript{799}
\end{quote}

In New Zealand, the UK and the USA, courts have also held that the time for
determining the COMI and establishment is the date on which the respective
application or petition is issued in the jurisdiction in which recognition is being
sought.\textsuperscript{800} The US Court of Appeals has recently extended this by stating that:

\begin{quote}
COMI should be determined based on its activities at or around the time the Chapter 15
petition is filed, as the statutory text suggests. But given the EU Regulation and other
international interpretations, which focus on the regularity and ascertainability of a
debtor’s COMI, a court may consider the period between the commencement of the
foreign insolvency proceeding and the filing of the Chapter 15 petition to ensure that a
debtor has not manipulated its COMI in bad faith.\textsuperscript{801}
\end{quote}

The US Bankruptcy Court has advocated the date of hearing of the petition on the
following basis:

\begin{quote}
\End{quote}

\textsuperscript{797} Moore v Australian Equity Investors (2012) 30 ACLC 629, 633) [18]; Young v Buccaneer
Energy Ltd [2014] FCA 711 (2 July 2014) [5]; Re British American Insurance Co Ltd 425 BR
884, 910 (Bankr, SD Fla, 2010).

\textsuperscript{798} Young v Buccaneer Energy Ltd [2014] FCA 711 (2 July 2014) [5].

\textsuperscript{799} Gainsford v Tannenbaum (2012) 293 ALR 699, 711 [44].

\textsuperscript{800} Williams v Simpson [2011] 2 NZLR 380, 396 [65]; Re Office Metro Limited [2012] BCC 829,
838[27]; Re British American Isle of Venice (BVI) Ltd 441 BR 713, 720-21 (Bankr SD Fla,
2010); Re Ran, 607 F. 3d 1017,1025 (5th Cir 2010), Re Betcorp Ltd, 400 BR 266, 290-2
(Bankr, D Nev, 2009); The Trustees of the Olympic Airlines SA Pension & Life Insurance
Scheme v Olympic Airlines SA [2013] 2 BCLC 171; [2013] EWCA Civ 643 (6 June 2013)
[35].

\textsuperscript{801} Re Fairfield Sentry Ltd 714 F 3d 127 (2nd Cir 2013) 137.
Section 1517(d) authorizes the court to modify or terminate recognition based on changed circumstances. These provisions exhibit a policy that the recognition process remain flexible, taking into account the actual facts relevant to the court’s decision rather than setting an arbitrary determination point. In light of these provisions, if the location of a debtor’s COMI changes between the date a chapter 15 petition is filed and the date a court makes a determination on recognition, the court may look to the facts on the latter date for purposes of COMI.

Selecting the latest possible date for the COMI analysis is consistent with the aim of international uniformity stressed in Ran and Betcorp. Over time, the circumstances affecting recognition may change.\(^{802}\)

This issue was also addressed by the US Bankruptcy Court in relation to determining the date for recognition of establishment. The court held that as a result of the use of the present tense, it is determined as being the date of filing the petition for recognition.\(^{803}\)

In the UK, an alternate date has been stated by the Chancellor as being applicable, namely the time at which the proceeding for which recognition is sought were issued.\(^{804}\) This would appear to be similar to an alternate date put forward in the USA, namely the date on which the foreign proceedings commenced for which recognition is sought.\(^{805}\)

UNCITRAL Guide has been amended to provide that the relevant date should be the date of commencement of the foreign proceeding.\(^{806}\) It is noted that under domestic laws of the foreign State, this date may be backdated in which case it should be that earlier date.\(^{807}\) It is argued that this test may not prevent the shifting of assets where a
non-main proceeding is commenced first and ultimately leads to the commencement of
the main proceedings. Further States may not take into account these amendments
due to legislative sovereignty.\textsuperscript{808}

\subsection*{11.3.1 Difficulties with Present Proposed Dates}

If the date for determining COMI is the date of issuing the application for recognition,
and this position is adopted in other States, different factors could lead to different
results as assets and business units are shifted between jurisdictions by the foreign
representatives or the officers of the debtor in the case where there is a debtor in
possession.

If the date of the issue of the foreign proceedings for which recognition is sought is
adopted, it is arguable that this may also cause problems where a non-main
proceeding was issued before the proceeding in which recognition is being sought, or
where recognition is sought of foreign proceedings which were not the first proceedings
issued in respect of that debtor.

If the date of hearing the application is adopted, this will lead to different decisions
being made in different jurisdictions, especially if some asset shifting has occurred
since the appointment of the foreign representatives as occurred in \textit{Bear Stearns}.\textsuperscript{809} It
may lead to a competition between representatives to secure the assets and bring
them within their home jurisdictions. This competition will not lead to cooperation
between States.

History has shown us examples of assets and business back offices being moved at
very short notice prior to insolvency proceedings being issued.\textsuperscript{810} In the case of
bankruptcies of individuals, this could be further complicated by the bankrupts
themselves moving jurisdiction post-bankruptcy as occurred in Australia with Mr.

\begin{flushright}
8-26 July 2013) UN Doc A/68/17; United Nations Commission on International Trade Law, \textit{Interpretation and application of selected concepts of the UNCITRAL Model Law on Cross-
Border Insolvency relating to centre of main interests (COMI)} forty third session, UN Doc
A/CN.9/WG.V/WP.112 (11 February 2013) 25; \textit{Revision of the Guide to Enactment of the
Model Law on Cross-Border Insolvency} GS Res 68/107 UN GOAR 68\textsuperscript{th} sess, UN Doc
808 See discussion in Chapter 11.1.
809 See \textit{Re Bear Stearns High Grade Structured Credit Strategies Master Fund Ltd}, 374 BR 122
(Bankr, SD NY, 2007); \textit{Re Bear Stearns High-Grade Structured Credit}, 389 B.R 325 (Dist SD
NY, 2008).
810 See Pottow, above n 695, 797-802, 805-6; \textit{Hoffman v Bullmore (Re National Warranty
Insurance Risk Retention Group)} 306 BR 614 (BAP, 8th Cir, 2004) affirmed 384 F.3d 959
(8th Cir, 2004).
\end{flushright}
Christopher Charles Skase who moved to Spain, reportedly after loading assets onto a boat from a beach in Northern Queensland and in England with Mr. Martin Vlieland-Boddy.\textsuperscript{811} Similar issues are highlighted by Mr. Tannenbaum’s actions in moving from South Africa to Australia before being made bankrupt in South Africa.\textsuperscript{812}

By way of comparison, the European Court of Justice when considering this issue, determined that the appropriate time for determining the issue under the EC Regulation is the date on which the request to open insolvency proceeding is lodged.\textsuperscript{813} This was based upon the Court not wanting to have the purpose of the EC Insolvency regulation frustrated by a debtor moving its COMI between the date of issue of the proceedings and the making of any insolvency order.\textsuperscript{814}

Wade notes that there is a difference between the test under the Model Law and the EC Regulation namely that under the Model Law, the COMI is determined at the time recognition is granted; under the EC Regulation, it is determined at the time the request to open insolvency proceedings is filed and not when the opening decision is made.\textsuperscript{815}

\textbf{11.3.2 Suggested Reform}

It is argued that the time at which the debtors COMI or establishment is to be determined requires clarification and that a consistent date for recognition exist between the Model Law and the EC Regulation. Further it is suggested that the correct date for determining both COMI and establishment should be the earlier of:

\begin{itemize}
  \item [(a)] The date the foreign main proceeding was commenced;
  \item [(b)] The date of commencement of a foreign non-main proceeding that is still on foot as at the date of issue of the proceedings seeking recognition in the Contracting State in which recognition is sought.
\end{itemize}

It is argued that the above formulation takes account of the issues identified above and will avoid forum shopping as the time for recognition would be determined at the time


\textsuperscript{812} \textit{Gainsford v Tannenbaum} (2012) 293 ALR 699, 700-2.

\textsuperscript{813} \textit{Re Interedil Srl} [2012] Bus LR 1582, 1592-3 [55]; \textit{Re Staubitz-Schreiber} [2006] BCC 639.

\textsuperscript{814} \textit{Re Staubitz-Schreiber} [2006] BCC 639, 644 [24].

\textsuperscript{815} Wade, “Where is a corporation’s “centre of main interests” in international insolvency” above n 415, 136.
the debtor is still trading. This proposed test takes into account the circumstance where a non-main proceeding prompts the issuing of the main proceeding.

11.4 The Obligation of Courts to Review Decisions in Relation to COMI and Establishment

Article 17(3) of the Model Law requires an application for recognition of a foreign proceeding to be decided at the earliest possible time. The UNCITRAL Guide explains that this is in order to protect the debtor’s assets from dissipation or concealment.\(^{816}\)

Article 17(4) provides that nothing in Articles 15 to 18 prevents the modification or termination of recognition if it is shown that the grounds for granting such recognition were fully or partially lacking or have ceased to exist.

In *Akers*, the Federal Court of Australia appears to advocate that once an initial finding of the State in which the debtor’s COMI exists is made, that pursuant to Article 17(4) of the Model Law, this finding can be reviewed should new evidence come to light.\(^{817}\) This view is supported by the US Bankruptcy Court in *British American Insurance* although in a different context.\(^{818}\) The Federal Court has also stated that the ‘Court should be slow to accept that an established COMI has been changed by activities that may turn out to be temporary or transitory. There is no principle of immutability.’\(^{819}\) This comment is supported by Dicey, Morris and Collins.\(^{820}\) It is unknown whether the courts of other States will follow the positions set out above and if so, on what basis.

It is argued that Article 17(4) of the Model Law may be used by the courts to overcome inconsistencies in the recognition of the State in which the debtor has its COMI or an establishment.

A possible solution to the problem of a change in the finding of the State of the COMI is that proposed in principle 13 of the *Global Principles for Cooperation in International Insolvency Cases* which prevents a previous finding being displaced unless either:

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\(^{818}\) *Re British American Insurance Co Ltd*, 425 BR 884, 910 (Bankr, SD Fla, 2010).

\(^{819}\) *Moore v Australian Equity Investors* (2012) 30 ACLC 629, 634 [20].

\(^{820}\) Collins et al, above n 159, 1766 [31-108].
(i) ‘at the time of the alleged relocation of the centre of main interests, the debtor
was able to pay all debts and liabilities incurred prior to that time; or

(ii) the debtor has fully paid or concluded a composition or compromise in respect
of its obligations incurred before the relocation of its centre of a main interests . . . or alternatively

(iii) ‘there is no undue prejudice to creditors whose claim arose from dealings with
the debtor during the time when the debtor’s centre of main interest was in the
Prior State’. 821

Article 17 provides the court with the power to review its previous orders including
recognition should circumstances change. Arguably this provision should not be used
frequently to review a recognition order based upon a subsequent change in
circumstances.

11.5 Inappropriate Recognition of Centre of Main Interest (COMI)

UNCITRAL’s Working Group V has expressed concern that examples are emerging of
a practice of originating courts making decisions on COMI in situations where they
were not required to do so under their national laws, but where there was an intention
to influence or an attempt to influence the receiving court’s decision on the issue of
COMI. Amendments to the UNCITRAL Guide, make it clear that a court receiving an
application for recognition is required to independently satisfy itself that the
requirements for recognition are met.822

If this situation is correct and courts, especially those of larger nations and economies,
are trying to intimidate other courts of smaller States to follow their decision in light of
Article 30 of the Model Law, it may affect States’ future adoption of the Model Law.

821 ‘Global Principles for Cooperation in International Insolvency Cases and Global Guidelines
for Court to Court Communications in International Insolvency Cases’, presented to the 89th
Annual Meeting of the American Law Institute on 23 May 2012 and unanimously approved
by the International Insolvency Institute membership at its 12th Annual Conference, Court de
822 United Nations Commission on International Trade Law, Guide to Enactment of The
UNCITRAL Model Law on Cross-Border Insolvency, UN Doc A/CN.9/442 (19 December
This would defeat the purpose for which the Model Law was created and discourage the principles of Universalism and encourage States to maintain or revert to principles of Territorialism. This, in turn, would not be good for international commerce.

11.6 Inconsistency of Court Decisions

There is a possibility that given the different interpretation of COMI and the extent of the evidence required to rebut the registered office presumption, different courts in the USA and Canada on the one hand, and Australia, New Zealand and the UK on the other, may have different findings regarding the State in which the debtors have their COMI. This situation may also arise where the debtor’s COMI changes over time, especially in the case of individual debtors who move between States.\footnote{See Gainsford v Tannenbaum (2012) 293 ALR 699; Williams v Simpson [2011] 2 NZLR 380; Re Loy 380 BR 154, 168 (Bankr, ED Va, 2007).}

Fletcher and Wessels have commented that the finding of a debtor’s COMI may differ between the EC Regulation and the Model Law due to the manner in which that term must be interpreted. The EC Regulation must be interpreted in an autonomous way with a purposive interpretation (related to the goals of the EC Regulation, including the proper functioning to the European market, the avoidance of forum shopping, the protection of creditors and the aim of improving the efficiency and effectiveness of cross-border insolvency proceedings). The Model Law is to be interpreted with regard to the obligations under Article 8 concerning its international origin and the need to promote uniformity and the observance of good faith.\footnote{American Law Institute and International Insolvency Institute, above n 34, 122.} As the Model Law is enacted as a domestic law of each State, there is no provision for an appeal or adjudication to occur before an international court to resolve this issue. The issue will have to be resolved by the domestic courts themselves, in part relying upon the provisions of Article 8.

The courts have not been required to consider the issue of the effect of inconsistent decisions made under the Model Law, although it is likely that they will have to do so in an endeavour to overcome a number of practical difficulties that may arise in large insolvency administrations, especially those using tax havens as places of incorporation. The courts are presently grappling with this problem in the \textit{Lehman Brothers} administrations where there are inconsistent decisions between the US and
English courts. This issue also has arisen in relation to Stanford International Bank wherein the English Court of Appeal recognised the liquidation taking place in Antigua as the foreign main proceeding whilst the Quebec Court of Appeal recognised the US receivership as the foreign main proceeding. These problems will be further highlighted as other European countries recognise the same foreign main proceeding as the UK due to its interpreting the provisions of the Model Law consistently with their interpretation of the EC Regulation.

It is probable that any appeal courts in attempting to sort out any inconsistencies in the place of a debtor’s COMI will take into account the provision of Article 8 which requires the need to promote uniformity and observance of good faith. In such circumstances an insolvency agreement/protocol may be entered into between the relevant foreign representatives with a view to protecting the assets and interests of creditors whilst the issue is determined, if no practical solution presents itself (e.g. the majority of assets are in one State and it adopts the dominant role).

In Ackers, the Federal Court of Australia and in British American Insurance, the US Bankruptcy Court advocate that once an initial finding of the State in which the debtor’s COMI exists is made pursuant to Article 17(4), this finding must be reviewed should new evidence come to light. If this interpretation is correct, it may give rise to multiple applications to review the findings and create uncertainty in the administration of the debtor’s assets as a result of the debtor, its officers or creditors seeking to change the debtor’s COMI by moving assets or its head office functions or habitual residence so as to create a new COMI. Given that there is no consensus regarding the time at which COMI is to be determined, such manipulation could lead to a court changing its finding on this issue. It could also lead to creditors and other interested parties seeking to manipulate evidence and circumstances of the debtors so that a court changes its finding from a State in which the debtor had its COMI to one which is more favourable to their respective position. This will only further complicate the issue concerning the State in which the debtor had or has its COMI. This is especially the

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825 See Re Lehman Brothers Holdings Inc 422 BR 404 (Bankr, SD NY, 2010); Perpetual Trustee Company Limited v BNY Corporate Trustee Services Limited [2010] 2 BCLC 237; Perpetual Trustee Company Limited v BNY Corporate Trustee Services Limited [2010] Ch 347, Belmont Park Investments Pty Ltd v BNY Corporate Trustee Services Ltd [2012] 1 AC 383.
828 See above under subheading Time of Recognition of COMI and Establishment.
case as the court is able to review its determination pursuant to Article 17(4) if the grounds for granting recognition have ‘ceased to exist’.

Article 17(4) may also be used by the courts in an attempt to overcome inconsistencies in the recognition of the State in which the debtor has its COMI or an establishment. Different evidence may be presented to different courts as a result of each court being provided with the most up-to-date evidence as at the time the application for recognition in that State. Such evidence would include which State has been recognised by other courts as being the State in which the debtor has its COMI. It is arguable that, given the provisions of Article 8, a court should act consistently with courts in foreign jurisdictions which decide this issue. As the real dispute in the interpretation of the rebuttable presumption in the recognition of COMI, such evidence, may be sufficient to allow a court to review all the evidence and determine whether the proper conclusion is adverse to the presumption.\(^{829}\)

### 11.7 Summary

As a result of the manner in which the Model Law was enacted in the different States examined, no uniformity of approach has been adopted when interpreting the terms COMI and ‘establishment’. In addition the time at which the assessment of whether the debtor had either COMI or an establishment in the foreign representative’s jurisdiction is to occur has not been finally established. Further, it has been suggested that as facts change, a State’s recognition of a foreign proceeding could also change as it is reviewable under Article 17(3).

It is argued that attempts by UNCITRAL to resolve some of these issues by amending the UNCITRAL Guide will be unsuccessful in resolving these differences, and only highlights the different stances taken by States and their courts until such time as the factors to be considered when determining COMI and the standard of proof required to rebut the registered office presumption, are made uniform. Any change may require legislative change in some States which, politically, may not be feasible.

Some States appear to be trying to influence the courts’ findings in other States by making unnecessary rulings. This has led to UNCITRAL confirming that each State should make its own determinations.

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\(^{829}\) See, eg, Ackers v Saad Investment Company Ltd (in liq) (2010) 190 FCR 285, 296 [52].
These issues will lead to further differences and inconsistencies existing between States in court decisions given under the Model Law, which has the potential to create further international difficulties.
Chapter 12
Applicability of Rules of Private International Law

Overview

This chapter explores how the rules of private international law in respect of choice of law and choice of forum affect the recognition of foreign insolvency proceedings and the interpretation of the Model Law. The following points are made:

• An individual State’s own choices of law and choice of forum rules have the potential to affect the interpretation of the Model Law as the Model Law itself does not deal with this issue.

• Recommendations are made in relation to a proposed uniform set of choice of law rules in relation to insolvency and reconstruction matters which are set out in Appendix 3.

12.1 Private International Law

Private International Law adopts a comprehensive theoretical approach to multi-jurisdictional issues. Professor Mason states that the fundamental issues that must be determined are:

(a) choice of forum;

(b) the recognition and effect accorded foreign insolvency proceedings; and

(c) choice of law.\textsuperscript{830}

12.1.1 Choice of Forum

Professor Fletcher has commented that, despite the world’s legal systems being able to be categorised into a small number of ‘legal families’, they nevertheless differ from one another in numerous details, with the consequence that the actual venue to a proceeding cannot infrequently assume a critical significance in relation to the interests

of the various parties concerned. The issue of choice of forum pertains not only to substantive and procedural issues, but also to choice of the insolvency law that will be implied which affects such issues as who the priority creditors are, and the laws that are applicable in respect of recovery of antecedent transactions, as well as the extent to which stays on proceedings may be imposed. In the past, this has led to forum shopping by debtors.

The Model Law does not address the issue of debtors who change the State of their COMI shortly prior to the commencement of the insolvency or restructuring proceedings. As indicated in section 11.3, the courts are grappling with this issue at present.

### 12.1.2 Recognition and Choice of Law

In a domestic setting, insolvency laws have been described as being neither *in rem* nor *in personam* proceedings. The purpose of insolvency laws “is not to determine or establish the existence of rights but to provide a mechanism of collective execution against the property of the debtor by creditors whose rights are admitted or established”. The United Kingdom Supreme Court however, has determined that proceedings in respect of the recovery of antecedent transactions issued pursuant to such insolvency laws are proceedings *in personam* and subject to the ordinary principles of private international law with respect to recognition of judgments. By way of contrast in the USA, bankruptcy proceedings are considered to be *in rem* proceedings.

Nygh has commented that the first objective of the rules of private international law should be to meet the parties’ reasonable expectations. Thus, parties will expect their contractual relations to be governed by the law they have chosen or by the law of the State with the closest connection to the transaction, if they have not chosen one. This is the rule that is most frequently used although its application can vary between States. It is arguable that similar expectations arise in relation to the law applicable to

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831 Ian F Fletcher *The Law of Insolvency* (Sweet & Maxwell, 2002) 737 [28-008].
834 *Rubin v Eurofinance SA* [2013] 1 AC 236.
835 Ho, above n 592, 577-8.
836 Davies, Bell and Brereton, above n 118, 263 [12.19].
insolvency such that the laws of the State with the closest connection with the insolvent
debtor or the transaction sought to be overturned should apply. This has not always
been the case, especially where foreign laws in relation to antecedent transactions are
sought to be applied to overturn a transaction after it has been completed.

Fletcher has commented that:

In the past, a notorious feature of the subject of conflict of laws was that states sought
to develop their own individual solutions to the problems caused by the material
diversity between the domestic laws of the various sovereign states, thereby giving rise
to the paradoxical situation where there were effectively just as many systems of
conflict of laws as there were national laws.837

It has been suggested that the different rules of private international law that have been
developed in different States have paradoxically led to further diversity in the national
systems of private international law.838 In the past, this diversity has led to informal
measures being adopted to resolve international disputes which have included
insolvency agreement/ protocols between courts and between representatives.839 The
diversity of the laws and procedures, and their predictability in outcome as applicable to
insolvency administrations, has also led to forum shopping in transnational
corporations.840 In particular, this has occurred as a result of the lack of universal
acceptance of the provisions of the Model Law, and its numerous variations as is
evidenced by the way it has been adopted in the States examined. It is still the case
that the majority of States in the world have not adopted the Model Law. It is not the
purpose of this thesis to provide a detailed examination of the rules applicable in each
State; however, the issues addressed below relate to the interaction between private
international law and the Model Law

In common law jurisdictions such as those considered in this thesis, these issues
generally emerge only if one of the parties raises them. Although a court has the
power to raise issues should a judge be concerned, this does not occur on a regular
basis.

837 Fletcher, above n 3, 494.
838 Angus Francis, ‘Cross-border Insolvency in East Asia: Formal and Informal Mechanisms and
UNCITRAL’s Model Law’ in Roman Tomasic (ed), Insolvency Law in East Asia (Ashgate
839 United Nations Commission on Trade Law, UNCITRAL Practice Guide on Cross-Border
Insolvency Cooperation, GA Res 61/112 (16 December 2009).
840 John A.E. Pottow, ‘The Myth (and Realities) of Forum Shopping in Transnational Insolvency’
12.2 Model Law

The Model Law does not seek to deal with issues governed by private international law including which State’s law should govern insolvency proceedings and any individual court applications within it. These issues are left to the individual State’s rules of private international law. In addition the laws of the individual States in which the debtor’s assets are located are relevant in order to ensure that any court decision is recognised and is enforceable.

Although the drafters of the Model Law were unable to agree on any model law provisions regarding the rules of private international Law, the Legislative Guide contains four recommendations addressing applicable law in insolvency proceedings generally including provisions in respect of which State laws should govern the insolvency administration. These recommendations apply lex concursus in granting an automatic stay once a foreign main proceeding has been recognised. As indicated above in sections 7.6 and 10.3.5, this stay has been equated in some jurisdictions to the stay granted once local proceedings have been recognised.

Fletcher suggests that the Model Law deliberately refrains from including choice of law rules and leaves it to the States adopting the Model Law to deal with this issue in accordance with their existing rules.

The UK version of the Model Law specifically refers to the law that applies to the Model Law as including Great Britain’s ‘rules of private international law’. The English Supreme Court has held that the Model Law was not ‘intended to replace the rules of private international law in any enacting State’. Dicey, Morris and Collins indicate that the EC Regulation and the UK Insolvency Act have altered the choice of law rules.

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841 Rubin v Eurofinance SA [2011] Ch 133,146 [31].
842 See cases referred in Chapter 5 under Art 20.
844 Block-Lieb and Halliday, above n 51, 896.
845 Fletcher, Insolvency in Private International Law, National and International Approaches above n 44, 455 [8.19].
846 Art 2(q).
847 Rubin v Eurofinance SA [2011] Ch 133, 146 [31]. This issue was not commented on in the appeal see Rubin v Eurofinance SA [2013] 1 AC 236.
as applicable to insolvency proceedings. They have generally summarised the English choice of law position in relation to corporate insolvencies involving the EC Regulation (subject to a number of specific exceptions) as follows:

Rule 183- (1) Subject to Rules 184-194, the law applicable to insolvency proceedings and their effects is that of the Regulation State within the territory of which such proceedings are opened, herein after referred to as the ‘State of the opening of proceedings’.

(2) The law of the State of the opening of proceedings determines the conditions for the opening of those proceedings, their conduct and their closure. . .

(3) . . . the law applicable to secondary proceedings shall be that of the Regulation State within the territory of which the secondary proceedings are opened. 848

It is argued that similar rules would apply under the Model Law. Ho argues that it is still undecided whether English courts can apply foreign law with respect to antecedent transactions as the courts in the USA have done in Re Condor Insurance Ltd. 849 The English High Court has questioned whether they have the power to apply foreign law when such relief would not be available under their domestic law and has refused to follow that US decision. 850 It has also been suggested that English courts would be unlikely to follow the US decision as it was designed to circumvent a problem created by the US enactment of the Model Law requiring foreign representatives to go to the inconvenience and expense of issuing Chapter 7 or 11 proceedings in order to be able to issue avoidance of antecedent transaction proceedings under the provisions of the US Bankruptcy Code. 851 Issuing US bankruptcy proceedings under Chapter 7 or 11 may also give rise to different periods in which antecedent transactions are reviewable.

Lastra and Ho on the other hand opine that UK courts can apply foreign insolvency law. 852 They have further argued that the three main areas where foreign law will have the most application are bankruptcy discharge, executory contracts and avoidance of

848 Collins et al, above n159, 1645 [30R-203].
850 Fibria Celulose S/A v Pan Ocean Co Ltd [2014] EWHC 2124 (Ch) (30 June 2014) [106] – [108]
851 Sheldon, above n 147, 128-31.
852 Lastra, above n 45, 227 [9.81]; Ho, above n 77, 218-23.
antecedent transactions.\textsuperscript{853} Previously, the Privy Council had stated that ‘it is doubtful whether assistance could take the form of applying provisions of the foreign insolvency law which form no part of the domestic system’.\textsuperscript{854}

The English Court of Appeal has indicated that, after considering Article 8 of the Model Law and the equivalent provisions in the UK and USA domestic versions of the Model Law which it found to be similar, it justified a ‘harmonised interpretation’ of those provisions.\textsuperscript{855} However, on appeal, the United Kingdom Supreme Court held that it did not extend the operation of the Model Law such that a court could recognise a foreign judgment in respect of antecedent transactions where the person who received the benefit did not concede to the foreign court jurisdiction in respect of that foreign proceeding.\textsuperscript{856}

In the UK, it is questionable whether the court will follow the US Court of Appeals in applying foreign law as the Privy Council has stated:

\begin{quote}
At common law, their Lordships think it is doubtful whether assistance could take the form of applying provisions of the foreign insolvency law which form no part of the domestic system. . . .The purpose of recognition is to enable the foreign office holder or the creditors to avoid having to start parallel insolvency proceedings and to give them the remedies to which they would have been entitled if the equivalent proceedings had taken place in the domestic forum.\textsuperscript{857}
\end{quote}

However, in the same decision, the Privy Council issued orders which had the effect of recognising and enforcing a stay of proceedings granted under Chapter 11 of the US Bankruptcy Code. The efficacy of some of those orders has been questioned recently by the United Kingdom Supreme Court.\textsuperscript{858}

The House Report that accompanied the introduction of Chapter 15 in the USA, implies that the US Congress was happy to leave the issue of choice of law to the courts to decide. The report states:

\begin{quote}
\end{quote}

\textsuperscript{853} Lastra, above n 45, 227 [9.82]; Ho, above n 77, 223-231.
\textsuperscript{854} Cambridge Gas Transport Corporation Limited v Official Committee of Unsecured Creditors of Navigator Holdings PLC [2007] 1 AC 508, 518 [22].
\textsuperscript{855} Rubin v Eurofinance SA [2011] Ch 133, 159 [60].
\textsuperscript{856} Rubin v Eurofinance SA [2013] 1 AC 236, 274 [115]-[117], 278 [132].
\textsuperscript{857} Ibid.
\textsuperscript{858} Rubin v Eurofinance SA [2013] 1 AC 236, 278 [132].
The Model Law is not clear about whether it would grant standing in a recognised foreign proceeding if no full case were pending. This limitation reflects concerns raised by the United States delegation during the UNCITRAL debates that a simple grant of standing to bring avoidance actions neglects to address very difficult choice of law and forum issues. This limited grant of standing in section 1523 does not create or establish any legal right of avoidance nor does it create or imply any legal rules with respect to the choice of applicable law as to the avoidance of any transfer of obligation. The courts will determine the nature and extent of any action and what national law may be applicable to such action.\footnote{859}

The US Court of Appeals has stated in respect of the Model Law that:

The statutory intent to conform American law with international law is explicit in the text of Section 1501(a), and also is expressed in Section 1508, which states that 'in interpreting this chapter, the court shall consider its international origin, and the need to promote an application of this chapter that is consistent with the application of similar statutes.'\footnote{860}

Wessels has advocated that the Model Law has made a clear choice to adopt as its choice of law \textit{lex \textit{forum} concursus}.\footnote{861} It is argued that this is not strictly correct as the Model Law contains no choice of law provision.

A proposal with respect to a uniform set of choice of law rules is set out below in Appendix 3.

\section*{12.3 Private International Law in interpretation of Model Law}

Professor Westbrook has commented that the choice of principal forum will have important implications for the choice of the bankruptcy rules (and procedures) to be applied in an insolvency administration and therefore will substantially affect the outcome for stakeholders.\footnote{862}

\footnotesize
\begin{itemize}
  \item \footnote{860} \textit{Re Ran}, 607 F.3d 1017, 1020 (5th Cir, 2010).
  \item \footnote{861} Bob Wessels ‘Will Uncitral Bring Changes to Insolvency Proceedings Outside the USA and Great Britain? It Certainly Will!’ (2006) 3 \textit{International Corporate Rescue} 200, 205 citing recommendation 31 in the UNCITRAL Guide.
  \item \footnote{862} Westbrook, ‘Locating the Eye of the Financial Storm’ above n 414, 1020.
\end{itemize}
The Model Law contains in Article 8 its own provision in relation to the Model Law’s interpretation which requires it to be interpreted by ‘having regard to its international origin and the need to promote uniformity in its application and the observance of good faith’. This article would appear to require courts to consider the decisions of courts of other States interpreting the same provisions and promote uniformity in their interpretation of similar provisions.

Difficulties arise with the implementation of Article 8. As has been identified above in section 5.9, the words used in each of the domestic versions of the Model Law differ such that the provisions are not identical in each of the States examined. As the Model Law is still a domestic law of each State, the courts have not been able to promote uniformity where it is clear that their respective domestic legislature has not intended it, by adopting alternate wording to that contained in the Model Law. In such circumstances, it is arguable that Article 8 cannot be relied upon to overcome the domestic legislature’s intention to change the provisions of the Model Law.

As aforementioned, this issue has been identified by both the US District Court in *Bear Stearns*863 and the English High Court in *Stanford International Bank*864 as being an issue regarding the interpretation of the rebuttable presumption in respect of the interpretation of the COMI contained in Article 16. Other clear instances also exist where this intent is clear, such as Canada not requiring a foreign proceeding to have an establishment in order to recognise it as a foreign non-main proceeding. This issue cannot be overcome using the present Model Law regime.

Ho has criticised the English Court of Appeal for the way it interpreted the Model Law in *Stanford International Bank*,865 and for not using Article 8 to examine and follow previous international interpretations of its provisions, but rather to find that it should be interpreted consistently with the EC Regulation.866 The UNCITRAL Guide refers to the concept of the COMI as corresponding to the formulation in Article 3 of the EC Regulation, thereby building on the emerging harmonisation of the notion of a main proceeding.867 However, Article 8 obliges a court to look at the Model Law’s international origins and consider the need to promote uniformity. Article 3 of the UK’s

863 *Re Bear Stearns High-Grade Structured Credit*, 389 B.R 325, 335-6 (Dist SD NY, 2008).
866 Ho, above n 77, 194-200.
867 Guide to Enactment of The UNCITRAL Model Law on Cross-Border Insolvency UN Doc A/CN.9/442 [31].
enactment of the Model Law provides that if there is any inconsistency between the provisions of the Model Law and the EC Regulation, the provisions of the EC Regulation prevail. In light of these circumstances, it is arguable that the English Court of Appeal decision cannot be criticised as suggested by Ho, as otherwise they would have created a tension between the provisions of Articles 3 and 8. The provisions contained in Article 3 impose an obligation upon the English Courts to more readily accept the interpretations of similar phrases consistent with those in the EC Regulation. No other State examined has this obligation.

Zeller has argued that the statutory interpretation of model laws should not be governed by domestic methods if they contain an interpretative article. He argues that if, as is provided in Article 8, the Model Law is to be interpreted having regard to its international origin and the need to promote uniformity, then this necessarily means that recourse to foreign and domestic judgements are mandatory. He argues that the use of extrinsic material which considers the same or similar provisions is permissible under the mandate of ‘international origin’. This is similar to a position taken by the High Court of Australia in relation to the interpretation of the Model Law on International Commercial Arbitration.

12.3.1 Extrinsic Material

In Australia, the Federal Court has indicated that it is entitled to take extrinsic materials into account in construing the Model Law, relying upon s 15AB of the Acts Interpretation Act 1901 (Cth). It is argued that both sections 15AA and 15AB of the Acts Interpretation Act 1901 (Cth) would allow reference to the Model Law and UNCITRAL Guide as drafted as at the date of the passing of Cross-Border Insolvency Act 2008 (Cth) as well as the Corporate Law Economic Reform Program's Proposals for Reform: Paper No 8, which preceded the introduction of the Australian legislation adopting the Model Law in order to interpret the Australian legislation so as to best achieve its purpose. The word ‘including’ in section 15AB(2) suggests that the list of matters set out in the section that a court may take into account is not intended to be

872 Ibid 377-8 [21]-[22].
exclusive. The court could look widely to see what matters it can refer to providing these assist to determine the matters referred to in subsection (1). There are no equivalent provisions to sections 15AA and 15AB in the other States examined.\[873\]

In Australia, it is argued that the purpose of the *Cross-Border Insolvency Act 2008* (Cth) is for the Model Law to have effect in Australia, subject to the modifications made.\[874\] Further, the explanatory memorandum that accompanies the bill refers to Australian courts making use of international precedents in the interpretation of the Model Law provisions.\[875\] In relation to the interpretation of the UNCITRAL Model Law on International Commercial Arbitration, the High Court of Australia has stated that ‘[t]hose considerations of international origin and international application make imperative that the Model Law be construed without any assumptions that it embodies common law concepts’.\[876\] It is argued that this statement should also apply to the Model Law.

It is argued that although Article 8 allows reference to international material including the UNCITRAL Guide in the interpretation of the Model Law, it may not extend to domestic documentation created for the domestic enactment of its provisions. These later documents would be able to be referenced pursuant to the domestic rules of statutory interpretation such as sections 15AA and 15AB of the *Acts Interpretation Act 1901* (Cth). It may therefore be necessary to rely upon both provisions, to see if the legislature intended to amend the relevant provisions of the Model Law and the interpretation of Article 8 itself. Otherwise, Article 8, being the Model Law’s own interpretative provision, would be used to reference foreign material to determine the meaning of the provisions of the Model Law.

### 12.3.2 Vienna Convention

The Federal Court of Australia has, in interpreting the Model Law and acknowledging Article 8, chosen to ignore this provision and instead sought to rely upon the Vienna Convention to interpret the Model Law.\[877\] The court has indicated that the Model Law

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873 See *Interpretation Act*, RSC 1985, c l-21; *Interpretation Act 1999*; *Interpretation Act 1978* c30; 1 USC.
874 *Cross-Border Insolvency Act 2008* (Cth) s 6.
875 Explanatory Memorandum, *Cross-Border Insolvency Bill 2008* (Cth) 21 [23]-[24].
876 *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* (2013) 295 ALR 596, 599 [8].
must be interpreted in accordance with Australian principles of statutory interpretation which principles, using the Vienna Convention, allow it to have regard to the preparatory material prepared by UNCITRAL in respect of the Model Law. The court did not determine whether it could rely upon the provisions of Article 8 to look at extraneous material when interpreting the Model Law.

The Vienna Convention is designed to assist with the interpretation of treaties.\(^\text{878}\) Treaties are defined in the Vienna Convention as ‘an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation’.\(^\text{879}\) It is argued that the Model Law does not constitute an agreement within the meaning of the Vienna Convention as it is adopted by States incorporating it into their domestic Law. Further, as highlighted in Chapter 5 to Chapter 9, the Model Law has not been adopted by the States examined using a common wording, and therefore cannot constitute an agreement comprised of two or more agreements as envisaged by the above definition.

As the Model Law is a domestic law in each of the States examined, it is argued that it is inappropriate to refer to the Vienna Convention for its interpretation. If reliance can be placed on the Vienna Convention, it is submitted that it cannot be used to interpret more than the provisions of Article 8 of the Model Law.\(^\text{880}\)

It is arguable that both Article 8 of the Model Law and Articles 31 and 32 of the Vienna Convention would require a court to look at the Model Law in its international context and to take account of other court decisions in other States when interpreting its provisions. Further, it is arguable that pursuant to the requirement in the Model Law ‘to promote uniformity in its application and the observance of good faith’, a court must consider the preparatory work and subsequent material in the UNCITRAL Guide and other UNCITRAL publications that existed at the time of its enactment in the interpretation of the Model Law.\(^\text{881}\) Such documents could also be relied upon pursuant to Articles 31 and 32 of the Vienna Convention.

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\(^{879}\) Ibid art 1(a).

\(^{880}\) See Zeller, above n 868.

The High Court of Australia has indicated that a Model Law should be construed ‘without any assumptions that it embodies common law concepts or that it will apply only to arbitral awards or arbitration agreements that are governed by common law principles’.

Given the above, it is arguable that it was unnecessary for the Federal Court to refer to the Vienna Convention and that the same result can be achieved by simply relying upon the interpretation provisions contained in Article 8 of the Model Law and the provisions of the Acts Interpretation Act 1901 (Cth).

12.3.3 Model Law Provisions

As highlighted above, there is still an interaction between the Model Law provisions and each State’s respective principles of private international law, especially those provisions which may not achieve the same outcome depending upon the States involved and the nature of the relevant dealings and transactions. Given the manner in which the Model Law was introduced and the differences that exist with its incorporation into the domestic laws of the States considered, it is unlikely that this or any consistency in the principles of private international law rules could be achieved via an amendment to the Model Law or a separate model law that will deal with its interpretation including agreement to a convention applying to its interpretation.

Given the broad discretion that courts are given under the Model Law, it is difficult to see how a Universalist approach will be achieved without a convention being agreed upon by the States. Such a convention would provide a common wording and overcome the present difficulties which have been created by States not adopting the Model Law’s wording. It would also have to be given appropriate domestic legislative effect.

Wade has gone a step further and argued that, given the increased lack of ability to associate assets and liabilities with only one State and the increase in electronic commerce, one set of laws should apply to such international insolvencies. She has suggested that it is time to create international rules of law in relation to international insolvency that are not dependent upon any individual State’s laws for its

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interpretation. It is argued that the international convention proposed by this thesis could be the basis for such a law.

12.4 Proposed Choice of Law Rules

Given the issues identified above, the writer submits that a universal specialist set of choice of law rules should be established in relation to insolvency and restructuring proceedings and proposes the following rules set out in Appendix 3.

It is argued that the proposed rules provide a fair balance between sovereignty issues and the rights of other parties to transactions so as to provide a degree of commercial certainty to parties to a transaction.

12.5 ALI and IIL Guidelines

As there is no uniformity in the rules of private international laws between States, the American Law Institute and the International Insolvency Institute in their recently published guidelines have sought to promote Global rules of Laws in International Insolvency Cases. These rules provide a useful benchmark for courts to consider when dealing with difficult principles of private international law issues. To date, these rules have not been generally accepted by any State.

12.6 Summary

The Model Law does not specify the rules of private international law that apply. In the majority of cases, the domestic rules will apply. Although the States considered have similar choice of law rules due to their English common law heritage, the same cannot be said for all States that have adopted the Model Law; this may ultimately give rise to further conflicts which will persist until a common set of conflict rules applies in relation to cross-border insolvencies.

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884 Ibid 185, 192-3.
The Model Law contains interpretative provisions in Article 8 which, it is argued, must be respected. There is still a necessary interaction between the Model Law provisions and each State’s respective principles of private international law, especially those provisions which may not achieve the same outcome depending upon the States involved and the nature of the dealings and transactions involved.

It is argued that Article 8 cannot be relied upon to overcome the domestic legislature’s intention to change to provisions of the Model Law as has occurred in a number of the States examined. In such circumstances, the domestic rules of interpretation apply, including those of choice of law. A proposal for a uniform set of choice of law rules is set out in Appendix 3.
Chapter 13
Interrelationship between the Model Law and the EC Regulation

Overview

The EC Regulation relates only to the recognition of insolvency proceedings between States within the European Union (except Denmark which opted out pursuant to the provisions of the Treaty of Amsterdam).\textsuperscript{886} However, the UNCITRAL Guide refers to a number of essential concepts as having taken into account or having similar meanings to those contained in the EC Regulation. This chapter:

- examines the interrelationship between the Model Law and the EC Regulation and the extent to which decisions under the EC Regulation should be relied upon in the interpretation of the Model Law;

- discusses proposed amendments to both the EC Regulation and the UNCITRAL Guide are discussed which may widen the present differences in the interpretation of essential common concepts such as COMI.

13.1 Interrelationship

In European States, when recognition is sought by a foreign representative from outside Europe or when recognition is sought in States outside Europe, the issue arises to what extent decisions under the EC Regulation in relation to equivalent issues, such as a finding of COMI, should be followed in order to achieve harmonisation between findings under the EC Regulation and those under the Model Law. Article 8 of the Model Law does not strictly apply as the decisions are not made in relation to the Model Law. This issue is further complicated where the wording of an individual article varies even slightly between individual States’ enactment of the Model Law and the EC Regulation.

The UNCITRAL Guide states that the Model Law took into account the provisions of the EC Regulation at the time it was drafted.\textsuperscript{887} Further, it provides that the Model Law

\textsuperscript{886} Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts [1997] OJ C 340/01.

\textsuperscript{887} Guide to Enactment of The UNCITRAL Model Law on Cross-Border Insolvency UN Doc A/CN.9/442 [18].
offers a complementary regime to the EC Regulation.\footnote{Ibid [19].} The UNCITRAL Guide also notes that the definition of COMI corresponds with that under the EC Regulation,\footnote{Ibid [31].} and that the definition of ‘foreign court’ has a similar meaning.\footnote{Ibid [74].} It states that the term ‘establishment’ was ‘inspired’ by the EC Regulation.\footnote{Ibid [75].} This interrelationship between the Model Law and the EC Regulation is further supported by the Legislative Guide which provides that the appropriate test to be applied for determining COMI is that referred to in Recital B of the EC Regulation.\footnote{United Nations Commission on International Trade Law, General Assembly, \textit{Legislative Guide on Insolvency Law}, UN Publications Sales No E.05.V.10 (United Nations, 2005), 13 [13], 41 [13].} The Legislative Guide notes that the EC Regulation provides a similar definition with respect to ‘establishment’, although the definition in the EC Regulation does not include services.\footnote{Ibid 42 [15].}

Given the above, it is arguable that it was intended that the Model Law should be interpreted consistently with the EC Regulation. The English Court of Appeal in \textit{Stanford International Bank} referred to the above provisions in the UNCITRAL Guide and found that they saw nothing in the respective contexts of the Model Law and the EC Regulation ‘to require different meanings to be given to the phrase COMI’.\footnote{Re Stanford International Bank \textit{Ltd} [2011] Ch 33, 67 [53]-[54].} The court found that the EC Regulation and the Model Law should be interpreted consistently. The court further stated that it ‘should apply the \textit{Eurofood} test’.\footnote{Ibid 67 [54].} It is argued that the Court, in reaching this decision, must have been aware of the provisions of the UK Article 3 of Model Law which provided that should there be conflicts between the Model Law and an obligation under the EC Regulation, then the EC Regulation would prevail. This finding of the Court of Appeal makes practical sense in European States as it avoids the possibility of inconsistent decisions being reached in respect of the place of the main proceedings where a debtor does business both within and outside Europe. The same cannot necessarily be said about States outside Europe to whom the EC Regulation does not apply. The substituted wording in Article 3 in the UK enactment of the Model Law which gives precedence to the EC Regulation is clearly of no relevance to the other four States.

\section*{13.1.1 COMI}

In the USA the US Bankruptcy Court has stated:

\begin{quote}
\end{quote}
The interrelationship between the EC Regulation and the Model Law in relation to the interpretation of 'centre of main interest' has been accepted by the US Bankruptcy Court which referred to the UNCITRAL Guide as referring to the concept of COMI being modelled on that concept under the EC Regulation. The court further stated that:

In the regulation adopting the EU Convention, the COMI concept is elaborated upon as "the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties." . . .This generally equates with the concept of a "principal place of business" in United States law . . .

As noted by the European Court of Justice, the COMI presumption may be overcome "particularly in the case of a `letterbox' company not carrying out any business in the territory of the Member State in which its registered office is situated." 896

Similar comments have been made in respect of the interpretation of the term 'establishment'. 897

The European Court of Justice has indicated in respect of the definition of COMI that a greater importance must be placed on the company’s central administration, as may be established by objective factors which are ascertainable by third parties. The court went on to state:

- where a company’s central administration is not in the same place as its registered office, the presence of company assets and the existence of contracts for the financial exploitation of those assets in a Member State other than that in which the registered office is situated cannot be regarded as sufficient factors to rebut the presumption unless a comprehensive assessment of all the relevant factors makes it possible to establish, in a manner that is ascertainable by third parties, that the company’s actual centre of management and supervision and of the management of its interests is located in that other Member State;

- where a debtor company’s registered office is transferred before a request to open insolvency proceedings is lodged, the company’s centre of main activities is presumed to be the place of its new registered office. 898

In relation to rebutting the presumption, the court stated that it requires an enquiry to be made where the place in which a company’s central administration is located is not the

896 Re Bear Stearns High Grade Structured Credit Strategies Master Fund Ltd, 374 BR 122, 129 (Bankr, SD NY, 2007).
897 Re Ran, 607 F.3d 1017, 1020 (5th Cir, 2010); Re Millennium Global Emerging Credit Master Fund Limited, 458 BR 63, n 49 (Bankr, SD NY, 2011).
898 Re Interedil Srl [2012] Bus LR 1582, 1593 [59].
same as that of its registered office., This test appears to be more consistent with the approach adopted by the US and Canada with respect to the ability to rebut the presumption than that adopted in Australia, New Zealand and the UK. As observed in section 7.2.1, this decision may also lead to the position in relation to the rebuttal of the presumption set out by the English Court of Appeal in Shierson, being re-examined. If the approach adopted by the European Court of Justice is followed in Australia, New Zealand and the UK, and that court continues down the path of this line of reasoning, it is arguable that it may lead to a convergence of the positions in respect of the presumption in Article 16.

The question arises whether the European proposals for reform should be amended so as to align themselves with the amendments proposed to the UNCITRAL Guide with a view to creating uniformity. This, however, may require legislative change in Australia, UK and the USA, in order to overcome any uncertainty created by the principles of legislative sovereignty, which politically might not be achievable.

13.1.2 Establishment

In relation to the definition of ‘establishment’, the European Court of Justice stated:

The fact that that definition links the pursuit of an economic activity to the presence of human resources shows that a minimum level of organisation and a degree of stability are required. It follows that, conversely, the presence alone of goods in isolation or bank accounts does not, in principle, satisfy the requirements for classification as an ‘establishment’.

The above statement appears at odds with the definition of ‘establishment’ in both the UK and the US which has been altered from that contained in the Model Law. This may give rise to a further divergence between the EC Regulation and the interpretation of the Model Law in those States.

The above concepts enunciated by the European Court of Justice in Interedil have been incorporated into the proposed amendments to the EC Regulation. If these amendments are accepted, it will be necessary for UNCITRAL to consider whether the

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899 Ibid 1592 [51]-[52].
900 Shierson v Vlieoland-Boddy [2005] 1 WLR 3966, 3985-6 [55].
901 Re Interedil Srl [2012] Bus LR 1582, 1594 [62].
13.1.3 Date of recognition of COMI

As indicated in section 11.3, the European Court of Justice has determined that the appropriate time is the date when the request to open insolvency proceedings is lodged.\(^{903}\) This differs from the dates which have been determined by courts in Australia, New Zealand and the USA, although may correspond to the recent amendments to the UNCITRAL Guide. This may give rise to inconsistent decisions between the EC Regulation and the Model Law. This is especially the case where recognition is sought both within and outside the European Union.

It must be borne in mind that the concept of COMI in the Model Law and EC Regulation is used for different purposes as was pointed out by the New Zealand High Court which stated:

> In considering the authorities it is necessary to bear in mind that the Model Law and the EC Regulation use the term "centre of main interests" for different purposes. The EC Regulation uses the term to provide jurisdiction for the opening of a main insolvency proceeding in a Member State. Such proceedings have universal scope and encompass all the debtor's assets within the European Union. On the other hand, the expression is used in the Model Law purely for recognition purposes.\(^{904}\)

13.1.4 EC Regulation

The EC Regulation emanates from a political community, the European Union, whose member states have agreed to pool sovereignty and work towards a closer union. The EC Regulation contained mandatory uniform rules on jurisdiction and choice of law, whereas the Model Law does not purport to say which law should govern insolvency proceedings which are opened in a particular State.\(^{905}\)

Under the EC Regulation, a proceeding issued in one State is entitled to automatic recognition in another EU member State. The Model Law, on the other hand, requires

\(^{903}\) Re Interedil Srl [2012] Bus LR 1582, 1592-3 [55].
\(^{904}\) Williams v Simpson [No 5] [2010] NZHC 1786 (12 October 2010) [32].
an application to be made to the courts of each State in which recognition is sought, which recognition is not automatic.\textsuperscript{906}

The European Court of Justice has determined that the EC Regulation allowed a court of the State of the centre of main interest which is within the European Union, to set aside a prior transaction between the debtor and a defendant domiciled in a third country as it conformed with the objective of the Regulation to promote the proper functioning of the internal market. Such application would be made under the laws of the State in which the debtor had its centre of main interest.\textsuperscript{907} This is similar to the situation that exists under the Model Law, but highlights the need for consistency between the EC Regulation and the Model Law so that inconsistent decisions are not possible.

The European Court of Justice has found that it is for the national law of the Member State in which insolvency proceedings have been opened to determine at which moment the closure of those proceedings occurs.\textsuperscript{908} The EC Regulation permits the opening of secondary insolvency proceedings in the Member State in which the debtor has an establishment, where the main proceedings have a protective purpose.\textsuperscript{909} The court before which an application to have secondary insolvency proceedings opened has been made, cannot examine the insolvency of a debtor against which main proceedings have been opened in another Member State, even where the latter proceedings have a protective purpose.\textsuperscript{910}

The same situation may not exist under the Model Law as there is no choice of law provision in the Model Law like that contained in Article 4 of the EC Regulation. It is possible under the Model Law for proceedings in different States to be recognised as the foreign main proceedings as discussed in Chapter 7 and 11

In non-European States, Article 8 of the Model Law is the only interpretive provision that binds their courts. It is argued that they are therefore free to look at all decisions made under the Model Law and to use \textit{lex fori concursus} to determine which competing line of authority to follow or to reach their own independent conclusions.

\textsuperscript{906} See Goode, above n 216, 807-11 [16-32]-[16-36].
\textsuperscript{907} \textit{Schmid v Hertal} [2013] EUECJ C-328/12.
\textsuperscript{908} \textit{Bank Handlowy w Warszawie SA v Christianapol sp z oo} [2012] WLR (D) 340 [46].
\textsuperscript{909} Ibid [55].
\textsuperscript{910} Ibid [63].
13.1.5 Predilection of Insolvency Laws

The divergence of opinion in relation to the interpretation of the Model Law has been said by one commentator to highlight the differences in their insolvency regimes. ‘Whereas European systems are generally considered more solicitous (which implies the bent toward corporate liquidation instead of rehabilitation), US bankruptcy laws are more debtor-centric’. This predilection, if it exists, obviously affects the way in which the courts interpret concepts common to both the EC Regulation and the Model Law, and may not be something that can be overcome by legislation as it is attitudinal. Given these different predispositions, it is arguable that a different test for the two regimes may be appropriate. Alternatively, if it is desirable to have uniformity as was suggested in Stanford International Bank, more detailed and consistent interpretative provisions are needed to achieve this.

13.1.6 Proposed Changes to EC Regulation

The European Commission has issued a proposed reform for the EC Regulation which has been passed by the European Parliament but is still awaiting approval of the European Commission. These amendments affect the interrelationship between the Model Law and the EC Regulation by imposing a number of factors that must be looked at when determining COMI. This proposal will require a court to look at a smaller number of factors than those required under the recent amendments to the UNCITRAL Guide as referred to in section 11.1.

The amendments involve the deletion of the present recital 13 and insertion of a recital 13a and 13b in the recital. Recital 13a will state that whilst it is assumed that a corporate entity’s COMI is its registered office, this presumption can be rebutted if its central administration is located in another member State and a comprehensive assessment of all the relevant factors establishes, in a manner that is ascertainable by third parties, that the company’s actual centre of management and supervision and of the management of its interests is located in that other Member State. By contrast, it should not be possible to rebut the presumption where the bodies responsible for the management and supervision of a company are in the same place.

as its registered office and the management decisions are taken there in a manner ascertainable by third parties.\textsuperscript{912}

The proposed recital 13b relates to the jurisdiction of European courts and does not affect the Model Law’s interpretation.

In March 2014, the European Commission issued a number of common principles which it has recommended that its member States adopt as national insolvency principles that encourage a shift toward restructuring. In particular it notes that a number of member States including UK have laws that require amendment. The European Commission recommends that these principles be adopted within 12 months.\textsuperscript{913} Only time will tell if the recommendations are adopted by its member States and whether it changes this predilection. These recommendations, if adopted, will necessarily result in changes to the EC Regulation as well as changes to the way that the European Courts view insolvency law generally and their predilection to it. This may also lead to a change in their interpretation of the Model Law.

13.1.7 Other Comments

Professor Westbrook has argued that we should not necessarily apply the same COMI standard under the Model Law and the EC Regulation.\textsuperscript{914} It is argued that this would appear to be inconsistent with the provisions of the UNCITRAL Guide and would give rise to further inconsistencies in respect of the treatment of foreign proceedings between Europe and the rest of the world.

Ho has suggested that where a debtor’s business was a fraud, the approaches adopted under the EC Regulation and the Model Law may produce different results. Under the EC Regulation, a public perception that its business is run from its registered office will be almost determinative of the COMI location, even if it is all smoke and mirrors. However, he argues that, if applying the US approach to COMI under the Model Law,\textsuperscript{915} a court should not feel bound by the smoke and mirrors and should be

\textsuperscript{913} European Commission ‘Insolvency: Commission recommends new approach to rescue businesses and give honest entrepreneurs a second chance’ (Press Release, IP/14/254, 12 March 2014).
\textsuperscript{914} Jay Lawrence Westbrook, 'Locating the Eye of the Financial Storm' above n414, 1021.
\textsuperscript{915} Applying the reasons in cases such as Re Ernst & Young Inc as Receiver of Klytie’s Developments Inc, 383 BR 773 (Bankr, D Col, 2008).
free to determine the true location of the debtor’s COMI. On the other hand, it is arguable that should an intention to defraud be proven, a court would look for the real ‘seat of power’ in order to give justice to the parties. Public policy may also come into play to prevent the registered office being recognised.

A further difference may exist in respect of the rules of private international law. The EC Regulation contains its own choice of law rule by providing that the uniform law applicable to proceedings is that of the Member State in which such proceedings are commenced (lex concursus). This has led to the European Court of Justice determining that the EC Regulation must be interpreted as meaning that the courts of the Member State within the territory of which insolvency proceedings have been opened have jurisdiction to hear and determine an action to set a transaction aside by virtue of insolvency that is brought against a person whose place of residence is not within the territory of a Member State. As highlighted in section 12.3, this may not be the case under the Model Law as the domestic rules of private international law apply in each State.

The list of current inconsistencies may lengthen if, as Veder speculates, courts within the European Union apply the provisions of the EC Regulation wherever they are inconsistent with the provisions of the Model Law. These inconsistencies may arise because of the issues discussed above.

It is argued that these differences will continue, even though the current proposed amendments to the EC Regulation are adopted, and UNCITRAL amendments to the UNCITRAL Guide are accepted in countries that have adopted the Model Law, as the legislative definition differ and required different factors to be taken into account.

### 13.2 Reconciliation - ALI and LLI Guidelines

The American Law Institute and the International Insolvency Institute in their recently published guidelines have sought to promote uniformity in the recognition of both the

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917 Art 4.


EC Regulation and the Model Law and to encourage cooperation between representatives of insolvent debtors. The aim of the principles enunciated in the report was to provide ‘a standard statement of principles suitable for application on a global basis in international insolvency cases. As in the ALI NAFTA Principles, a ‘principle’ is a statement of value serving as guidance for behaviour in cross-border insolvency cases.

Whilst these principles have no legislative effect, they do provide a benchmark for comparing good conduct and useful suggestions for overcoming the difficulties in the different interpretations of the EC Regulation and the Model Law. The principles seek to harmonise the practical interpretation rules by restating the provisions that appear in both the Model Law and EC Regulation in a way that has a different emphasis, but without changing the substance of those provisions. The principles also seek to clarify issues such as when COMI and establishment are to be determined.

13.3 Summary

It is argued that, although some of the concepts used in the Model Law including centre of main interest and establishment are similar to or derived from the EC Regulation, the purpose for which they are used is different. This different purpose may be the justification for similar terms being given different meanings.

Whilst it may be desirable for commercial reasons to achieve uniformity in outcomes under the Model Law and the EC Regulation, this might not be achievable until phrases such as ‘centre of main interest’ and ‘establishment’ have a uniform unequivocal meaning. It is argued that even with further explanation, this will not overcome deliberate drafting changes made by some States to their domestic version of the Model Law which may result in courts having to ignore such further definitions and explanations if they are not consistent with their domestic version. As the Model Law is a domestic law, it will be virtually impossible for each State that has adopted the Model Law to amend its local version in order to clarify definitions. Although the proposed American Law Institute and International Insolvency Institute global principles seek to

921 See Fletcher and Wessels above n34.
923 See, eg, principle 13 in relation to recognition of foreign proceedings and definition of centre of main interest and establishment.
924 Principle 13.4.
advance this matter, they have no legislative effect and therefore it will be difficult for
courts to rely upon them when interpreting the domestic version of the Model Law.
Chapter 14
Current Proposals which may affect the Model Law

Overview
This chapter examines current proposals by UNCITRAL and other bodies that may affect the future interpretation or implementation of the Model Law. The following points are discussed:

- UNCITRAL is investigating the creation of a consistent set of director’s duties that are to apply when a corporate entity is nearing insolvency. This is an issue that relates possible causes of action that may exist against such director even though they are not resident in the place of the foreign main proceeding.

- UNCITRAL is currently also exploring either separate model laws or conventions or special provisions that should relate to both enterprise group and financial institutions.

- At present, the Model Law applies only to individual entities and not enterprise groups. The COMI of each member of that group must be determined separately. Where this examination gives rise to different results it may affect the ability of enterprise groups to properly restructure.

- All of the States examined exclude financial institutions from the provisions of the Model Law, in part because they have separate domestic regimes in place in respect of such institutions in order to protect both their voter-consumers and domestic economies.

14.1 Model Law Concepts
UNCITRAL is currently working on three issues which may affect the Model Law, namely ‘Interpretation and Application of selected concepts of the Model Law on Cross-Border Insolvency relating to centre of main interest’\(^\text{925}\) and Directors’ obligations in the

period approaching insolvency; ‘Insolvency of Large and Complex Financial Institutions’ and mechanisms suitable for the insolvency of micro, small and medium sized enterprises.

As observed in section 11.1, the UNCITRAL Guide has been amended to suggest that where on an application for recognition there appears to be a separation between the debtor’s registered office and its COMI, the party alleging that the registered office is not the COMI will need to satisfy the court of the debtor’s COMI. The court hearing the application for recognition will need to consider independently the debtor’s COMI. As discussed in section 11.1, this new test does not appear to be consistent with the proposed amendment to the EC Regulation which is to provide a statutory definition of COMI. This inconsistency may lead to a further division between the European States and those in North America in relation to the interpretation of this phrase.

It is argued that whilst Practice Guides and interpretative statements and amendments to the UNCITRAL Guide are issued by UNCITRAL, and others may represent a statement of what was intended or should be intended by the provisions of the Model Law ipso facto, such documents may not be admissible before a court. This is because such extrinsic materials did not exist at the time the domestic legislation was enacted and therefore could not have been considered by their legislature. Courts therefore cannot assume, except to the extent that it is otherwise authorised by statute, that the legislature intended for such documents has been referred to. Such an

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926 Border Insolvency relating to centre of main interests (COMI) 43rd session, UN Doc A/CN.9/WG.V/WP.112 (11 February 2013).
assumption would breach the principles of legislative sovereignty.\textsuperscript{931} Given the extent of the variations made to the text of the Model Law by different States, the UNCITRAL Guide may not be relevant to the interpretation of the domestic versions of the same in a number of States. It is arguable that Article 8 may allow reference to foreign or international extrinsic material that did not exist at the time of enactment but only in so far as it relates to the domestic wording adopted.

It would appear that UNCITRAL’s Working Group V have appreciated the above difficulties at their meeting in December 2013 and have expressed support for the goal of drafting a convention, although it expressed reservations as to its feasibility.\textsuperscript{932}

\subsection*{14.2 Directors’ Obligations}

UNCITRAL’s Working Group V has produced a series of draft recommendations in relation to a director’s obligations in the period approaching insolvency including directors in enterprise groups.\textsuperscript{933} These duties include a duty to look after the interests of creditors. The working group has agreed to adopt part of those recommendations and the draft commentary which included reference to the cross-border insolvency implications of their research.\textsuperscript{934}

\subsection*{14.3 Enterprise Groups}

In 2010, UNCITRAL issued the legislative guide in relation to the next stage of cross-border insolvency development, namely the treatment of enterprise groups in insolvency.\textsuperscript{935} It has been observed that, to date, substantive consolidation in relation to multi-jurisdictional insolvent enterprise groups has been difficult to achieve but that

procedural consolidation of the insolvency proceedings has been achieved, depending upon the jurisdictions involved.936

The concept of an enterprise group COMI has previously been rejected by UNCITRAL’s Working Group V. It was identified that a key issue in this decision was the extent to which such a definition would be accepted by different States and adopted and enforced by the courts of those States.937 The working group has, however, recently agreed to look at this issue again following finalisation of its current deliberations regarding amendments to the UNCITRAL Guide.938

Lastra has commented that the issues involving corporate groups are more intractable as the Model Law problems are largely solved at a national level, so the only difficulties that had to be addressed were those that re-emerged at a multinational level. The issues regarding multinational corporate groups are largely unresolved at a national level and therefore it is more difficult to resolve them internationally.939 This has clearly been evidenced by what has occurred with the Lehman Brothers administrations.940

Given the diverse nature of enterprise groups and the degree of control that is centralised, it is argued that it not possible to create a uniform set of rules for dealing with them. The extent of the variance within groups ranges from those wherein all substantial decisions are taken by the board of directors of the controlling entity and where there is a centralised treasury vehicle which sweeps money each day from group members’ bank accounts and pays it back so that bills can be paid,941 to those that are more like a conglomerate in which each business line operates as a separate business and pays dividends once or twice yearly to its controlling entity. It is recognised that even where there is no centralisation of power within the head office, it may still be desirable to coordinate insolvency proceedings of all such entities within a group for the purposes of restructuring.

939 Lastra, above n 45, 192 [8.20].
Further, given the diverse nature of enterprise groups, it is difficult to see how a ‘one size fits all’ approach can be taken in this area. The extent of control exerted by the centralised management may have a bearing upon the willingness of States to concede jurisdiction to another State in any insolvency proceeding or restructuring. It is difficult to see why in the case of say, conglomerates with totally different business lines which may exist in different States, any State would be willing to concede jurisdiction to another State which has no relationship with that business.

Enterprise groups also present a unique problem in that, while it may be desirable to include them in insolvency proceedings for the purposes of a restructuring of an enterprise group, including them may relieve officers of subsidiaries being properly reviewed and held accountable for their actions. Each subsidiary would have its own directors who would have responsibilities under the domestic law of the States in which the corporate entity is incorporated and operates. It is argued that States, for public policy reasons, may be unwilling to relieve officers within their jurisdiction of their personal liabilities through such restructuring activities.

The public policy of the State in which the subsidiaries are incorporated or regulated may wish to ensure that those officers are held responsible for their actions including any liability which they may have for insolvent trading or breach of duties. Further, there is an issue as to whether domestic creditors should be bound by a foreign insolvency or restructuring regime, where such entity traded only within one State and creditors had a reasonable expectation that the laws of the State would be applicable to them in their trading with that entity. In addition, it is questionable whether solvent members of an enterprise group should be included within restructuring proceedings and if so, whether the provisions of any convention should apply to those entities. There are clearly reasons both for and against the inclusion of such entities. However, to date, no consensus has been reached in relation to this issue.

It is arguable that where there is a centralised management function within an enterprise group, one test that could be easily implemented to identify those insolvency proceedings to be covered by any special provisions relating to enterprise groups would be to look at the entities’ centre of main interest and the presumptions contained in Article 16(2) to determine if its vests in the head office. It is recognised that this test would not deal with the situation identified above in respect of the desirability of having all entities within the group coordinated for the purpose of restructuring.

It is hoped that an acceptable framework will emerge for the recognition of international enterprise groups which could form part of, or be an add-on to, any proposed
convention. In this context, enterprise groups may comprise more than corporate entities and could also include trusts, partnerships and other former business structures as authorised by different States’ domestic legislation.

Any law seeking to deal with enterprise groups should be supported by common rules of accounting which would assist in the identification of assets and liabilities between States, as well as standardised laws in respect of some procedural matters such as priority payments in an attempt to overcome an individual State’s political priorities.

14.4 Micro, Small and Medium Enterprises

Working Group V has just commenced its deliberations on this issue which involves trying to achieve cost effective mechanisms for smaller business to either restructure or be wound up without the business owners being in debt the rest of their lives. The results will be incorporated into its Legislative Guide.

14.5 Financial Institutions

Following the commencement of the global financial crisis, there has been a renewed effort, to examine for the purposes of reaching some agreements between States, the framework applicable for the supervisory, legal and financial issues that arise by virtue of the insolvency of a financial institution. These issues are exemplified by with the case of the *Lehman Brothers* Group. A number of bodies including the Financial Stability Forum, Basel Committee on Banking Supervision of the Bank for International Settlement and the International Monetary Fund, have published recommendations in respect of this issue; however, to date no consensus has been reached other than a special form of coordinated regulation being required.

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942 See *Re Lehman Brothers Holdings Inc* 422 BR 404 (Bankr, SD NY, 2010); *Perpetual Trustee Company Limited v BNY Corporate Trustee Services Limited* [2010] 2 BCLC 237; *Perpetual Trustee Company Limited v BNY Corporate Trustee Services Limited* [2010] Ch 347, *Belmont Park Investments Pty Ltd v BNY Corporate Trustee Services Ltd* [2012] 1 AC 383.


UNCITRAL has recently developed a paper dealing with financial institutions.\(^{946}\) In this paper, they have suggested that until a coordinated approach can be agreed to between States, the Model Law may provide the best mechanism at present by which such coordination can be achieved.\(^{947}\) However it is argued that this suggestion, ignores that a number of States have excluded such financial institutions from the operation of their domestic version of the Model Law where the same debtor’s financial institution also operates in their State.\(^{948}\) Further, the EC Regulation and the UK Insolvency Act exclude several financial institutions which are governed by separate European Union Directives.\(^{949}\) Different consumer compensation schemes may also operate in each State. It is argued that this would make it politically difficult for States to act uniformly without some pre-existing convention or treaty.

UNCITRAL’s Working Group V has recently agreed to continue to monitor and assist the Financial Stability Board who has established a legal panel to review this issue.\(^{950}\)

14.6 Conclusion

Until such time as there is some international agreement in relation to how the issue of enterprise groups is to be dealt with, in particular whether the state of the head office function should govern the state with overall control of the debtor group’s proceedings, it is argued that this issue should be left in abeyance and not be included in any convention on cross-border insolvency. This issue can be addressed by either a separate convention or an amendment to any future convention, once a degree of unanimity has been arrived at.

The issue of directors’ duties may affect a States willingness to reach agreements in relation to enterprise groups and financial institutions if one effect of a restructuring is to alleviate or limit the directors’ liability which may lead to forum shopping. The


\(^{947}\) Ibid [62].

\(^{948}\) See, eg, comments under preamble and art 1 above.


different predispositions States have to their insolvency laws will also affect the way they view the issue of directors duties and the level of obligation imposed upon directors.

Similarly, financial institutions should be dealt with separately as is evidenced in the States examined they are generally subject to domestic compensation regimes and special regulation which would make a uniformity of approach practically impossible without some uniformity in those domestic schemes and regulation.
Chapter 15
Findings and Conclusions

Overview

In this chapter, the present issues that exist with the Model Law are summarised and conclusions drawn in relation to the central issues examined by this thesis, namely:

(a) Do words matter?

(b) Has the Model Law achieved its aim of modified universalism?

(c) Does the Model Law achieve its purposes as set out in its preamble?

(d) How would an insolvent debtor with assets in each of Australia, Canada, New Zealand, the UK and the USA and its foreign representative be treated in each of those jurisdictions?

A summary of the findings of this thesis regarding the causes of the current inconsistencies in the interpretation of the Model Law is presented and discussed.

15.1 Present Status of Model Law

The Model Law has been a large step forward in the recognition of international insolvency administrations between States. As the manner in which the Model Law should be enacted is not dictated, it can be inferred that it was envisaged that there would be variations in its domestic enactment. This is evidenced by what has occurred in both Canada and the USA where its provisions have been incorporated into the existing legislation. In the USA, restrictions have also been placed on its operation by restricting the operation of Chapter 15 to debtors that fit within Chapter 1 of the Bankruptcy Code.\textsuperscript{951} It would however appear that there is a low threshold to satisfy the requirements to have property in the USA as it includes having a cause of action in that jurisdiction or money in a trust account.\textsuperscript{952}

\textsuperscript{951} 11 USC §§ 103(a),109(a) \textit{Re Barnet}, 737 F 3d 238 (2nd Cir, 2013).
\textsuperscript{952} \textit{Re Octaviar Administration Pty Ltd}, 511 BR 361 (Bankr, SD NY, 2014).
In all States examined, as is highlighted in Chapter 4, the Model Law complements the existing statutory and common law systems including comity in order to assist foreign courts when dealing with cross-border issues. These systems continue to apply in relation to those debtors who are excluded domestically from the operation of the Model Law’s provisions.

This thesis shows that in all of the States examined (except Canada) their domestic enactment of the Model Law has retained its core principles and those of modified universalism. Canada has, on the other hand, worked within those core principles even though they are not part of their domestic legislation. In practice, this has resulted in a workable cross-border insolvency system although there has been a lack of consistency in the interpretation of some of the key concepts, especially the registered office presumption in relation to COMI.953

Further differences are also evident in relation to the interpretation of the public policy exception identified in section 5.9, particularly as that exception is being interpreted in the USA and includes commercial considerations.

This thesis shows that some of the differences in the enactment and interpretation of the Model Law arise from a difference in attitude or predisposition in relation to the operation of insolvency and restructuring laws. These differences arise from a conceptual difference among the jurisdictions concerning the balance of rights of the parties in insolvency. These differences have been summarised as ‘[w]hereas European systems are generally considered more solicitous which implies the bent toward corporate liquidation instead of rehabilitation; US bankruptcy laws are more debtor-centric’.954 This issue is further complicated by the US courts being required by their enactment to protect the interests of their domestic creditors.955 This thesis argues that this predilection may not be something that can be overcome by amending the domestic legislation enacting the Model Law as there may not be the political will to do so due to cultural differences which may present obstacles. Further, whilst the Model Law is incorporated into existing legislation, the predilection of that legislation will continue to influence the interpretation of the Model Law.

954 Bernardo, above n 911, 827.
955 11 USC § 1507(b).
Despite the provisions of Article 8, the domestic courts of individual States cannot ignore the words used in their domestic legislation or the intention expressed by their legislature when enacting their domestic version of the Model Law. Further, it is argued that principles of legislative sovereignty may prevent courts looking to any amendments to the UNCITRAL Guide made after the date of the enactment of their domestic law when interpreting the provisions of the Model Law.

An inherent difficulty with a model law is that, in order for there to be consistency in its interpretation, the Model Law should be enacted by adopting States with as little variation as possible. This thesis shows that in the States reviewed, this has not occurred and Article 8 cannot be used to achieve consistency. Each State has sought to incorporate the Model Law into its domestic law by different means which has resulted in different predispositions to interpretation of its provisions. In addition, this thesis shows that in the UK, a preference has been expressed for the interpretation to be consistent with the EC Regulation. In Canada, they have chosen to delete a number of the provisions. Whilst in the United States their Congress has intentionally amended the wording, particularly in respect of the rebuttable presumption contained in Article 16. In addition, in order for the Model Law to apply in the USA, the debtor must be a debtor within the meaning of Chapter 1 of their Bankruptcy Code. The lack of consistency and predictability of decisions may be a reason why only 20 countries and one territory have adopted the Model Law.956

For the reasons set out in Chapter 13, it is desirable that there be consistency in the interpretation of the Model Law and the EC Regulation in relation to common key concepts including 'centre of main interest' and the rebuttable presumption associated with it and the term 'establishment'.

This thesis further shows that the courts should seek to develop a uniform set of choice of law and conflict of laws rules in relation to insolvency matters.

15.2 Analysis of Questions posed

This thesis shows that the question posed in the title of this paper ‘Do Words Matter?’ should be answered in the affirmative, namely that words do matter.

The above chapters highlight a number of instances where there have been inconsistent enactments or interpretations of the Model Law, and other issues that have arisen from the inconsistent enactment of the provisions of the Model Law. As the Model Law has been enacted as domestic law and the local legislature has chosen to amend its text, the provisions of Article 8 cannot be used to overcome these inconsistencies.

As highlighted in Chapters 11 and 13, the differences in interpretation may also be in part due to cultural differences and predispositions in the insolvency laws between the North American States and Europe. Whilst it was intended to allow States to modify the provisions of the Model Law, the lack of consistency in the enactment and interpretation has led to a lack of consistency in courts’ decisions between States which is creating commercial uncertainty for business, for whose benefit the Model Law was drafted.

On the other hand, despite a large degree of consistency having been achieved in the interpretation of some provisions of the Model Law, and what has been described by Lord Hoffman as the ‘golden thread’ of cross-border insolvency,\textsuperscript{957} it is argued that the Model Law has generally achieved its stated aim of modified Universalism. This thesis shows that a large degree of consistency has been achieved in the interpretation of a majority of the provisions of the Model Law. The courts in the USA have interpreted the provisions of Chapter 15 so as to get around some of the issues created by their legislature, such as allowing foreign law to be used in respect of antecedent transactions. However, there remain areas in the interpretation where inconsistent court decisions have affected the interpretation of an essential concept such as COMI. In addition, there are inconsistent decisions in relation to choice of law, such as applying foreign laws to set aside antecedent transactions as highlighted in section 10.3.4.2. Further, in the USA, they have limited the application of the Model Law to debtors who reside or are domiciled in the USA or have property or a place of business in the USA.\textsuperscript{958} This has limited the class of debtors to which it applies. It is acknowledged however that a fairly low threshold has been established in order to satisfy these requirements.\textsuperscript{959}

\textsuperscript{958} 11 USC §§ 103(a),109(a); Re Barnet, 737 F 3d 238 (2nd Cir, 2013).
\textsuperscript{959} See Re Octaviar Administration Pty Ltd, 511 BR 361 (Bankr, SD NY, 2014).
On the other hand, this thesis shows that the Model Law has not achieved all of its stated objectives as set out in its Preamble. Summarised below is each of those objectives and a number of reasons why those objectives are not being achieved in the jurisdictions examined:

(a) *Cooperation between the courts and other competent authorities of the State in which it is enacted and foreign States involved in cases of cross border insolvency*

Cooperation under the Model Law is contingent upon recognition of a foreign proceeding and especially a foreign main proceeding. As highlighted in Chapters 7 and 11 the differences in the interpretation of the concepts of COMI and establishment, especially between England and the Americas has meant that this objective is not being meet.

There has certainly been a great deal of cooperation between neighbouring countries (eg Canada and the USA and Australia and New Zealand) which it is argued in past is due to commercial necessity and a large amount of interaction between the respective courts. However in circumstances where the courts in the common law countries examined cannot agree upon how the rebuttable presumption in relation to COMI is to be dealt with as discussed in Chapter 11 it is difficult to see how full cooperation can be achieved.

(b) *Greater legal certainty for trade and investment*

In Canada, a large number of the articles contained in the Model Law have not been included in their domestic enactment of the Model Law including Article 8. It can be argued that in such a circumstance, the legislation should be interpreted by relying solely upon the domestic rules of interpretation as the legislature has intentionally not included the interpretative provision within the Model Law that obliges it to be interpreted with regard to its international origins and to promote uniformity. The effect of this is that Canadian decisions cannot be relied upon when interpreting the provisions of the Model Law.
In the UK, the word ‘assets’ has been substituted for the word ‘goods’ in the definition of ‘establishment’.\textsuperscript{960} This amendment has clearly been intentional, but is not explained as it is inconsistent with the definition contained in the EC Regulation although it may be consistent with the intended meaning as discussed above in section 11.2. The effect of this is that some UK decisions cannot be relied upon when interpreting the provisions of the Model Law, further it may create inconsistent results when compared to applications for recognition made in other States.

The position of the USA regarding the application of the foreign law to antecedent transactions has made the legal position less certain for creditors within that country which may discourage them from foreign trade for fear of being bound by foreign laws that they do not know or understand.

Further, there is the present inconsistent interpretation of the concept of ‘centre of main interest’ between the States examined as highlighted in Chapter 11, and the different interpretation of this concept between the EC Regulation and the Model Law as highlighted in Chapter 13. This uncertainty is further evidenced by the different choice of law and conflict of law rules in each of the jurisdictions examined. These rules are further complicated by the relevant States’ treaty requirements, with Canada and the USA bound by the protocols and rules established pursuant to the North American Free Trade Agreement, whilst the UK is a member of the EU and bound by its legislation and procedures.

The International Bar Association in a submission to Working Group V has noted that breakdown in international cooperation in cross-border insolvency cases threaten the progress of international trade and economic development and result in job losses, erosion of enterprise value, misallocation of assets and costly cross-border litigation.\textsuperscript{961}

\begin{flushleft}(c) Fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested persons including the debtor
\end{flushleft}

\textsuperscript{960} Collins et al, above n 159,1634 [30-186].
\textsuperscript{961} United Nations Commission on International Trade Law \textit{Background information on topics comprising the current mandate of Working Group V and topics for possible future work UN Doc A/CN.9/WG.V/WP.117 (8 October 2013) 6 [10]
The provisions in the USA version of Article 6 of the Model law including that which requires their courts to take account of the protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in foreign proceeding, means that the US courts are to give priority to their domestic creditors. 962

On the other hand the ability to apply foreign law in respect of antecedent transactions in the USA means that their domestic creditors may be bound by laws which they are not aware of.

The inconsistency in the choice of law and conflict of law rules between the States examined as discussed in Chapters 10 and 12 can also affect creditors rights especially where different priority regimes exist between the State from where the assets may be remitted to those of the State that governs the division of the debtors assets as occurred with ,

(d) Protection and maximisation of the value of the debtor's assets

The Model Law has reduced costs of foreign representatives as compare to the requirements under the previous systems identified in Chapter 4 by providing a simplified system of recognition and the ability to assist foreign representatives and allow them to administer assets within that State.

On the other hand the requirement in the USA that Chapter 1 of the Bankruptcy Code applies to the Model Law provisions under Chapter 15 of the Bankruptcy Code, has resulted in the Court of Appeal finding that Chapter 15 only applies to debtors to which section 109 of the Bankruptcy Code applies. A debtor must reside, be domicile, have a place of business, or property in the United States. 963 This provision unduly limits the ability of foreign representatives to seek recognition pursuant to the Model Law. Despite the low thresholds imposed by the US courts, these provisions may restrict proper investigation being conducted of officers of a foreign debtor resident in the USA by foreign representatives which may result in this objective not being achieved, especially in relation to debtor administrations with limited funds.

962 11 USC § 1507(b) (2012).
963 11 USC §§ 103(a),109(a); Re Barnet, 737 F 3d 238 (2nd Cir, 2013).
The inconsistency between jurisdictions in relation to the State of a debtors COMI as in the case of Stanford Bank and Lehman Brothers has led to a number of legal proceedings to determine these issues and restricted the ability of the debtors to restructure thereby lowering the return to creditors as occurred in the HIH case.\textsuperscript{964}

In addition the legal uncertainty of a court’s ability to refer to amendments to the UNCITRAL Guide following their enactment of their domestic legislation due to the principles of legislative sovereignty, as discussed in section 15.1, and the UK legislating the version of the UNCITRAL Guide that can be referred to, as discussed in section 3.4, means that the present inconsistencies may continue.

It is argued that inconsistency will increase costs to insolvency administrations due to the necessity to abstain multiple sets of advices for each jurisdiction in which proceedings are issued and ongoing disputes as to which assets are collectable and creditor claims provable as occurred with Lehman Brothers as discussed in section 10.2.4

(e) \textit{Facilitation of the rescue of finally troubled businesses, thereby protecting investment and preserving employment.}

The predisposition for liquidation in the Australia and New Zealand and the fact that their administration regimes cannot bind secured creditors and stop them enforcing their securities means that they cannot achieve this objective. In the UK a floating charge holder cannot appoint a receiver.\textsuperscript{965} Chapter 11 proceedings in the USA and the provisions of the Canadian CCAA provide the maximum protection for investments and preserving employment by having procedures that prevent secured creditors enforcing their securities. In addition the US Chapter 11 proceedings has the principle of cram down which allows the court to impose a restructuring upon secured creditors who have rejected it so long as another class of creditors have voted in favour of the restructuring and it is in the interests of the company and creditors as a whole. Until all States offer restructuring proceedings which bind all creditors and grant a wide

\textsuperscript{964} McGrath v Riddell [2008] 3 All ER 869
\textsuperscript{965} Insolvency Act 1986 (UK) c 45 s72A
uniform stay of proceedings upon recognition, this objective cannot be achieved.

This thesis argues that the amendments to the UNCITRAL Guide and the proposed amendments to the EC Regulation will not achieve the desired uniformity as they continue to apply different tests to the key concept of centre of main interest. Further, as highlighted in Chapter 11, there is the question of whether the principles of legislative sovereignty will prevent such amendments being used by the courts in a number of the States examined.

Until consistency of wording and manner of interpretation is achieved, it is argued that the inconsistencies will continue to exist regarding the interpretation and implementation of the Model Law in respect of the States examined.

In addressing how an insolvent debtor with assets in each of Australia, Canada, New Zealand, the UK and the USA and its foreign representative would be treated in each of those jurisdictions, account must be taken of the different wording used by each of the States examined in their domestic version of the Model Law. The outcome of any application for recognition may be different in the courts of each State. Hence, in more difficult cases where there is a difference between the place of the debtor’s centre of main interest and its registered office or place of habitual residence, the individual State’s rules in relation to private international law should be examined. However, it is anticipated that this would apply to only a small number of cases. In the majority of cases, consistent decisions will be arrived at under the Model Law’s provisions, thereby achieving its stated aim of promoting modified Universalism. However, where such differences do arise, especially where recognition is sought under both the Model Law and EC Regulation, this will lead to commercial uncertainty and the possibility of inconsistent decisions as is highlighted by both the Stanford Bank and Lehman Brothers insolvency proceedings.

15.3 Factors giving rise to Inconsistencies

In summary, this thesis shows that a number of factors have given rise to the present inconsistencies in the interpretation and operation of the Model Law in the States examined. These factors include:

(a) the manner of the introduction of the Model Law into the domestic legislation of each State;
(b) amendments and deletions made to the Model Law in the domestic legislation enacting it;

(c) the incorporation of different domestic insolvency principles into the interpretation of the Model Law by its enacting legislation;

(d) the different predispositions the States have in relation to insolvency law;

(e) different prerequisite for States invoking jurisdiction over an insolvent debtor or a debtor requiring restructuring;

(f) some States seeking to state that they can impose their jurisdiction worldwide once they are ceased of jurisdiction under their domestic law;

(g) different rules relating to conflicts of law;

(h) different rules relating to choice of law; and

(i) other treaties or agreements to which the States are bound, which affect their predisposition in relation to the interpretation of the Model Law.

These factors show that the Model Law is not fulfilling all its stated objectives as set out in its preamble. Further amendments made to the UNCITRAL Guide may be of no effect in all the States discussed except New Zealand given the principles of legislative sovereignty.
Chapter 16
Proposed Solution

Overview

In this chapter, a convention is proposed and discussed as a possible solution to the problems identified. A draft of this proposed convention is set out in Appendix 4.

The convention provides for UNCITRAL to issue rules of interpretation of the Model Law to allow for changing circumstances. It is also proposed that the convention allow a number of protocols to be added to it, which will affect the manner of its interpretation so as to take account of agreements being reached by States at a later point in time in relation to such things as conflict of law and choice of law rules that will apply in the case of cross-border insolvency or restructuring proceedings.

In order to promote consistency, a system has been included in the convention for UNCITRAL or its nominee to be advised of any appeal concerning the interpretation of the convention. UNCITRAL or its nominee is able to make non-binding submissions (both written and/or oral) in relation to the correct interpretation of those provisions before a court of appeal.

16.1 The Next Stage in Evolution of the Model Law

If, as Block-Lieb and Halliday imply, the Model Law, like other model laws previously developed by UNCITRAL, is just an incremental step towards an international convention on the subject of cross-border insolvency, then the present problems that are being experienced as a result of the different manner in which the Model Law has been enacted in the different States examined, will be eventually eliminated to a large degree should all States adopt a uniform convention.966 This thesis has shown that these differences will persist until there is uniformity in the choice of law and conflict of law rules that apply in those States in respect of insolvency matters, and any predispositions that courts may have, are eliminated.

As highlighted above, the present inconsistencies in the interpretation of the Model Law appear to have arisen in part from the changes made to the legislative text enacted by

966 Block-Lieb and Halliday, above n 51.
different States. The reason for these differences, it is argued, may also have a
bearing on the way in which the courts in those respective States interpret the Model
Law’s provisions including taking into account their respective predisposition to
interpreting insolvency and restructuring laws. Ideally, a uniform position would be
taken internationally regarding a predisposition towards restructuring or liquidation. A
number of possible solutions have been suggested to resolve some or all of the above
issues including all States adopting the Model Law in a common format which will
include an expanded set of definitions, or the European Union adopting the Model Law
or at least its definitions in place of the EC Regulation.\textsuperscript{967}

Melnik has reported that a not-for-profit group has been formed in New York to develop
an international tribunal that courts may look to \textit{amicus curiae} to consider issuing in
cross-border insolvency and provide briefs/opinions.\textsuperscript{968} It is argued that this is unlikely
to be successful as the tribunal would not be based upon any formal international
agreement or understanding, and therefore any opinion or brief issued would carry little
weight. It is unlikely that legislatures of the different States would enact legislation
allowing courts to take such opinions into consideration. No details have been provided
regarding the composition of members of the tribunal which, if dominated by
representatives from the USA, will affect its credibility.

At most, it is suggested that these will be only short-term solutions as the more
fundamental issue arises out of the different ways in which States have enacted the
Model Law to date, with several States having made intentional amendments to the
same. It is difficult to see why those States at present would agree to amend their
domestic version of the Model Law where such amendments have been made to make
their domestic legislation conform to their legal or political predispositions towards
restructuring or liquidation.

The present political agendas, which gave rise to States changing the text of the model
which they incorporated into their domestic law, have not changed over time. It is
therefore unlikely that all States would be willing to amend the Model Law in the way
suggested. For the same reason, it is suggested that States would not be willing to
amend their legislation to allow reference to all amendments to the UNCITRAL Guide
and overcome issues arising by reason of legislative sovereignty.

\textsuperscript{967} Jeanette Weideman, \textit{European and American perspectives on the choice of law regarding
cross-border insolvencies of multinational corporations}, (Mini -dissertation, North West
University, 2011).

\textsuperscript{968} Selinda A Melnik, in Ho, above n 77, 475.
Even if a common text could be established in all States, it would not overcome the present difficulties experienced with the interrelationship between the Model Law and the EC Regulation. The EC Regulation in part serves a different function from that of the Model Law as it regulates the State in which insolvency proceedings can be commenced and managed, with automatic recognition being given to the proceeding in the State in which the debtor has its centre of main interest. This additional purpose is not compatible with the Model Law which, if adopted as the domestic legislation of the European Union, may result in a duplication of proceedings being issued in respect of one debtor in different member States, which is one of the issues the EC Regulation was designed to overcome.

Given the above, it is argued that there are no real short-term solutions to the present issues pertaining to the implementation and interpretation of the Model Law. In finding a solution to the present issue, it is argued that the Model Law has to be seen in its historical context as a stage in which the major economies of the world start adopting a more Universalist approach to issues involving cross-border insolvency.

Whilst the Model Law has been a useful experiment in attempting to achieve some international consistency in relation cross-border insolvency, and identifying issues of difference and practice between different States, there still appears to be a political divide based in part upon a State’s culture and whether it tends to protect the interests of debtors or creditors and whether restructuring is the preferred option in respect of their insolvency laws. The Model Law has certainly helped to identify these issues, and possible solutions are now being studied, with some agreement being reached on interpretative provisions.69

It is clear that the global economic crisis that commenced in 2008 has caused and is still causing a number of States to look at their insolvency laws and how they deal with cross-border issues. The overall direction of any future solvency laws is commencing to be determined, with Europe expressing a change toward restructuring.70 It is argued that, in order to achieve any uniformity in cross-border insolvency, a uniform set of laws


70 European Commission ‘Insolvency: Commission recommends new approach to rescue businesses and give honest entrepreneurs a second chance’ (Press Release, IP/14/254, 12 March 2014).
must be introduced that allows recognition between nations which have terms consistent with those in the EC Regulation. The best way to achieve this is by States repealing their respective versions of the Model Law and adopting a convention. Until recently, this solution could be advocated only at an academic level; however, Working Group V of UNCITRAL has recently expressed support for investigating the possibility of drafting a convention, although it expressed reservations as to its feasibility.  

In order for there to be uniformity in its interpretation, as highlighted in Chapters 10 Conflict of Laws and 12, there must also be uniformity in the States’ choice of law and conflict of law rules in relation to insolvency matters. This would require an international acknowledgement that insolvency is a specialist area of law that requires special rules, unlike the finding by the UK Supreme Court in *Rubin*.

It is recognised that this proposal for a convention may require more than minor adjustments to the present Model Law, as the scope of such a convention may possibly expand into the areas of choice of law and conflict of law rules about which there has been no previous international discussion or consensus. Such discussion must necessarily accommodate different legal traditions in relation to these issues. It is argued however, that in order for there to be any real consistency between States recognising and granting rights to representatives of foreign proceedings, these issues must be tackled in order to give confidence and security to international business and trade.

A possible impediment to UNCITRAL creating a convention is that it may not have the funding or manpower to manage the necessary consultation required for States to agree to a convention, especially where there is no resources for the same and therefore the project may not be successful. The success of a project is a benchmark put forward by Gabriel regarding the current discussions in relation to the UNCITRAL Convention on Contracts for the International Sales of Goods and the drafting of a global contract law convention. Similar considerations may be taken into account by UNCITRAL before considering a convention to replace the Model Law. Further

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972 *Rubin v Eurofinance SA* [2013] 1 AC 236.


974 See Gabriel, ibid, 663, 668, 673; Renaud Sorieul, Emma Hatcher and Cyril Emery 'Possible Future Work by UNCITRAL in the Field of Contract Law: Preliminary Thoughts from the Secretariat' (2013) 58 Villanova Law Review 491, 498.
difficulties may arise because of cultural differences and the possible inconsistency between the local law and that proposed in any convention which to date have been circumvented by amendments being made to the domestic enactment of the Model Law. Regional differences will also apply based upon commercial custom and the willingness of courts to give the jurisdiction over assets to foreign representative’s ad courts of a States with which they are not familiar. Possible solutions to these issues are discussed below.

16.2 Form and Terms of Convention

It is argued that the convention should be in a form that can be cross-referenced by the European Parliament and other States in their domestic legislation so as to achieve uniformity in the meaning and interpretation of common phrases, thereby avoiding inconsistent interpretations of similar terms between the convention and the EC Regulation. Ideally, the EC Regulation would simply incorporate the Convention’s definitions into its regulation by cross-referencing in order to avoid any inconsistent interpretations. Similarly any interpretative guide would list the same factors to be considered under both the convention and the EC Regulation and cross reference the same. Alternatively, the proposed amendments to the EC Regulation could be further amended to align them with the changes adopted by UNCITRAL to the UNCITRAL Guide, especially in relation to the definitions of COMI and ‘establishment’.

Any convention should be based upon an expanded version of the present Model Law which would encompass and include the current UNCITRAL Legislative Guide including the amendments to the Guide and to the Model Law. In addition, it may consider the comments made in the Practice Guide on Cross-Border Insolvency and the American Law Institute and International Insolvency Institute Global Principles for Cooperation in International Insolvency Cases. It should also include an expanded section of definitions which would include definitions of the concepts of ‘the centre of main interest’ and ‘non-transitory economic activity’, ‘with human means’ and ‘goods or

978 American Law Institute and International Insolvency Institute, above n 34.
services’, which phrases are used to determine whether a foreign proceeding is a main or non-main proceeding. Such definitions could be specified by way of a guide to the UNCITRAL cross-border principles and include the factors proposed by UNCITRAL in its recently proposed amendments to the UNCITRAL Guide referred to in Chapter 14.

The Convention should expand upon the provisions in Article 8 and make it clear that courts must consider the decisions of other States in interpreting its provisions, and the United Nations CLOUT system should be notified and sent a copy of any decision that interprets a provision of the Convention. The Vienna Convention could also apply to the interpretation of the interpretative clause within the Convention by reference, in an endeavour to obtain uniformity of interpretation by States including those that have not formally adopted the Vienna Convention. The adoption of the Vienna Convention will ensure that there are consistent rules relating to the interpretation of that clause of the Convention, and therefore to the Convention generally, including reference to relevant external material. It is argued that this would be consistent with and implement the provisions of Article 8.

It is argued that the nature of the stays granted under Article 20 should be uniform and certain, and not contingent upon the nature of the stays granted by domestic insolvency legislation. This is especially the case where the extent of the stays imposed differs between the types of domestic insolvency administration, as is the case in Australia.

Furthermore, it is argued that the proposed convention should also provide a practical guide to its interpretation including provisions in relation to principles of private international laws and what is to occur where there is a conflict of law. It is acknowledged that such a proposal is unique. This practice guide could deal with issues such as what is required before an order granting recognition can be reviewed due to a change of circumstance and other procedural issues raised above. The practice guide could be changed from time to time by UNCITRAL or a body appointed by it. It is noted that the UNCITRAL Working Group V has recommended changes to the UNCITRAL Guide for a similar purpose and, it is argued, it could continue to fulfill this role or delegate it to another international body or international industry association such as INSOL. However, it would be essential that this body be properly funded and

have a diverse cross section of representation from different States, including those which had not signed the convention. The diverse nature of the body’s representation would give smaller States confidence and encourage them to enter into the convention, as it should not be dominated by the USA and Europe.

The convention could provide that the practice guide as amended from time to time may be referred to by courts when interpreting the convention. This would allow courts to have knowledge of and take into account the future direction which the parties and the international community wish to take in interpreting the convention. This is similar to the situation in New Zealand with respect to the UNCITRAL Guide.

The convention could also advocate that the appeal courts of all States hearing appeals in relation to controversial or inconsistent interpretations of the convention adopt an *amicus curiae* procedure, which with the leave of the court, would allow all the parties interested in the interpretation of the convention including UNCITRAL or a body appointed by it, to make submissions before the appeal court in an endeavour to create internationally consistent interpretations of the convention. Minimum notice provisions should be contained in the convention setting out to whom this notice of any such appeal should be given, the time by which applications should be made for leave to be created to appear *amicus curiae*, or to submit written submissions in relation to the interpretation of the convention. It is envisaged that should UNCITRAL nominate a body to provide this service, it would be the same body that updates the cross-border insolvency principles.

In order to overcome inconsistency in decisions between States, not resolved by the above *amicus curiae* procedure, an international court or panel, such as the International Court of Justice, should be given the power to interpret the provisions of the convention, where there are two or more inconsistent decisions of different States courts of ultimate appeal, in States which have adopted the convention. The decision of this court or panel would be binding on all States that had adopted the convention. If a State does not like a decision, it can choose to withdraw from the convention after a giving a certain period of notice (e.g. six months). If the option of an international panel is adopted, it could be comprised of expert lawyers nominated by UNCITRAL or the States comprising UNCITRAL. However, it is appreciated that, politically, States may

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not be willing to give up their sovereignty to such an international body. This will be particularly difficult in States where there is no separation effectively between the administrative and judicial arms of government. Europe may have particular issues with this proposal, as the European Court of Justice at present is the ultimate court of appeal. This Court would effectively lose such power or be subservient to the proposed court or panel, which it is not at present, especially if common terms are being interpreted. However, the same issue will arise in relation to all ultimate court appeals in different States. Without such ultimate interpretive authority, different lines of authority may exist concurrently in relation to the interpretation of the convention, which will only be self-perpetuating and lead to an increased divergence in interpretation of the convention rather than creating a universal system to address cross-border insolvency. Consistent with the provisions of Article 6, there could also be an exception to the binding effect of any decision of the court or the panel where its decision or opinion is against the public policy of that State.

Alternatively, a less desirable but more politically acceptable alternative may be to create a panel whose opinions are not binding upon the courts of States which have adopted the convention, but whose decisions or opinions may be taken into account by those courts when reaching decisions. The courts of appeal of individual States could either have the right to refer interpretations of the convention’s provisions to the panel during the course of the appeal process or receive submissions from the panel. If the latter option is adopted, this panel could prepare amicus curiae submissions. It is not proposed that the panel act like arbitrators but rather that they provide an opinion to the court referring the matter which is not binding upon that court. The advantage of allowing lower courts of appeal to refer a matter to a panel is that the panel’s input can be received earlier than was suggested in the first proposal, thereby potentially avoiding successive appeals. In order for this option to be attractive, panels would have to be convened at relatively short notice so as to not unduly affect the appeal processes within the individual State’s courts. This may present an obstacle to this option in terms of practicality. Also, this option will not bind the courts of different States to follow any opinion issued by the panel, so inconsistent decisions may still be made.

In order to overcome cultural differences, the convention could allow additional procedural matters to be required by individual States, but otherwise not allow any amendments to its text.

Even if a convention is adopted, there is still the question of whether States would interpret it consistently. As has been seen with the Convention on Contracts for the
International Sales of Goods, the courts in some States including Australia have continued to apply traditional interpretative methods to this international convention and have failed to refer to international decisions in its interpretation. However, as insolvency matters are usually heard by specialist judges within the relevant courts, this is less likely as those judges develop specialist experience and knowledge of the Model Law and the interaction between them. This specialisation is to be encouraged as it will lead to greater interaction between the courts which in turn will lead to greater efficiency as a result of the courts of different States having a greater trust in, knowledge of, and willingness to consider decisions from foreign States. A courts willingness to look to foreign decisions and norms has been encouraged by INSOL and UNCITRAL at the Multinational Judicial Colloquium. Unfortunately this has not always been evident as has been seen in Australia and the USA.

As mentioned above, a possible difficulty in UNCITRAL preparing and submitting a convention is that UNCITRAL may not have the funding or manpower to manage the necessary consultation required to secure the States’ agreement to a convention, especially when there is no perceived demand for the same and therefore the project may not be successful. It is argued that UNCITRAL should look to the international insolvency industry for funding. There are a number of such bodies including INSOL and the IBA that have an interest in ensuring that a widely accepted and consistent cross-border insolvency system is put in place.

16.3 Proposed Convention

In general, businesses look to structure themselves in such a way that their owners’ returns are maximised. In part, this means that they adopt structures that help them achieve this. These structures change in order to gain the maximum benefit as laws change, especially tax laws. In order to have an effective insolvency system, the insolvency laws of individual States must be flexible in order to adapt to changing

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984 See, eg, Gainsford v Tannenbaum (2012) 293 ALR 699; Re Qimonda AG 462 BR 165, 185 (Bankr ED Va, 2011).
business structures and systems. The nature of insolvency laws means that they are necessarily changed regularly to take account of these changes in structures. It is often the case that it is only when a new structure is placed into insolvency that the efficacy of these structures is put under the microscope and examined, with the courts then attempting to apply the current law to dealings and structures which may have been designed to, in part, avoid those laws. This situation is further complicated where those structures or dealings extend over more than one State. This need for flexibility and change should be reflected in any convention so as to ensure that it does not become outdated quickly.

A draft of the proposed convention which offers a proposal for such flexibility is set out in Appendix 4. The convention provides a procedure for its amendment by UNCITRAL proposing, and the United Nations General Assembly by resolution, approving an amendment to the same following the implementation of the steps set out in Article 39 of the proposed convention which requires two-thirds of the contracting States to first approve of the amendment. Any amendment does not take effect for six months after the General Assembly resolution. In the meantime, any State that does not agree to the amendment can denounce the convention and be no longer bound by it by giving five months’ notice. It is assumed, given the steps required by Article 39 that at least by the time of the UN resolution, a State would have reached a decision whether to support the same and if not whether it will denounce the convention.

The convention requires that Courts of contracting States take account of principles of interpretation published by UNCITRAL which can be varied by UNCITRAL. These principles can be changed relatively quickly if UNCITRAL is willing to delegate the function of creating the same to an international industry or expert body, which is a possibility envisaged by the draft convention. If an expert body is chosen, it could be appointed by UNCITRAL similar to those used by UNIDROIT to draft some of its conventions. The delegation of the creation of the principles of interpretation may relieve UNCITRAL of the related financial burden, especially if the function is taken on by an industry body willing to fund the same. The courts are not obliged to follow those principles but only to have regard to them. These principles would replace the present UNCITRAL Guide and expand upon a number of the matters contained therein.

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The draft convention also provides for a mechanism for other areas of law to be incorporated into it in the future using a separate protocol which must be approved by UNCITRAL. It is suggested that these areas law could include choice of law and conflict of law rules, should a sufficient number of States agree upon a uniform international set rules in relation to cross-border insolvency and reconstruction proceedings. The requirement for the approval of UNCITRAL is to prevent bilateral agreements or multilateral agreements such as those between States within an economic block seeking to distort the interpretation of the Convention and to encourage more States to adopt the protocol. The protocol would only bind those States that had adopted it. If, however, the major economic powers adopted the protocol, it could reasonably be expected that there would be pressure from the financial sector for other States to adopt it as has occurred with respect to the Aircraft Protocol under the Cape Town Convention.986

The provision for a protocol to be created in relation to choice of law rules in relation to insolvency matters is driven in part out to address the issues raised by the UK Supreme Court decision in Rubin987 wherein the court determined that there were no special choice of law rules for insolvency matters and applied the English common law. As argued in Chapters 10, 12 and 15 one of the reasons for the different and inconsistent interpretations of the Model Law is the different rules of private international law between countries. This issue is further complicated in countries such as the USA where the rules of international private law vary between its individual States. In order for there be ultimately been consistency in the interpretation of any Model Law or convention there must be some unanimity in the rules of private international law.

The proposal for a protocol to the convention is to help ensure that any country that adopted the convention could sign onto the protocol which would create special rules of private international law with respect to insolvency matters alone and be consistent with the wording used in the proposed convention. Not all members of the United Nations are members of the Hague Conference and therefore it was proposed that the protocol would be driven by UNCITRAL, rather than the Hague Conference. It is acknowledged that when Working Group V has been discussing the possibility of a

987 Rubin v Eurofinance SA [2013] 1 AC 236
convention that it has been suggested that work on some of these issues could be
done jointly with the Hague Conference.\textsuperscript{988}

The reason for the delay between the convention and any proposed protocol in relation
to the rules of private international law is as a result of the acceptance of the practical
difficulties of having sufficient States from different legal cultures and norms agree to
the same. This should however stop a convention such as the one proposed being
adopted in the meantime.

Article 2 of the proposed convention includes a section of expanded definitions which
contains a definition of centre of main interest and a definition of establishment that
diffs from that of the Model Law by referring to movable property rather than assets
or goods and services. This is a compromise in relation to the positions taken by
Canada and the UK and that taken by the remainder of the States examined. As it is a
convention, the Vienna Convention on the Laws of Treaties is stated to apply to it in
respect of the interpretation clause only. This is designed to ensure that even those
States that have not adopted the Vienna Convention must consider it when interpreting
Article 3 of the proposed convention. This is designed to ensure that the Convention’s
own interpretation clause is interpreted consistently.

In an endeavour to promote uniformity in the interpretation of the Convention, Article 3
requires a State to put into place procedures such that at least two months’ notice is
given to UNCITRAL (or the body nominated by it to the States that have adopted this
Convention) of any appeal proceedings where an issue in the appeal involves the
interpretation of this Convention. It further ensures that UNCITRAL or a body
 nominated by it has a right to make submissions and appear at any appeal before its
courts dealing with the interpretation of the provisions of the Convention.

Article 20 defines the extent to which the stay in proceedings applies and is designed
to be independent of the domestic stay that exists under the local laws that applies in
each State. This means that the stay may differ from that which operates in respect of
domestic insolvencies.

Article 32 allows States to declare that they will recognise the decisions of other courts
or other designated contracting States; this is an area in which there is a possible

\textsuperscript{988} United Nations Commission on International Trade Law \textit{Background information on topics
comprising the current mandate of Working Group V and topics for possible future work UN
Doc A/CN.9/WG.V/WP.117 (8 October 2013) 8 [16]}
difference of judicial opinion between the USA and the UK as to whether this can be done under the Model Law.\textsuperscript{989} By allowing a State to designate, it allows it some flexibility as to which States' judgments it will recognise.

It is arguable that standardisation could be avoided if it is not compatible with existing social, commercial and even political norms in particular jurisdictions. This is especially if States do not give a wide interpretation to the equivalent of the Model Laws Article 8 requiring courts to give consideration to the international origin of the proposed convention and the need to promote consistency. For this reason as suggested in section 16.2 the draft convention proposes that UNCITRAL or a body nominated by it have the right to make submission in any appeal involving the interpretation of the proposed convention. This right was inserted so as to avoid courts interpreting it not having submissions made as to its correct interpretation (including the effect of Article 8) despite any commercial or political norm. The right to make submission does not disturb the judicial sovereignty of any State as the court is not bound to follow the submission made by UNCITRAL. The right is restricted only to appeals for practical reasons such that UNCITRAL would only need to make submission where the legal interpretation of a provision is a real issue in dispute and to prevent UNCITRAL having administrative issues arising out of it being notified of every application under the convention at first instance just in case the interpretation was to become an issue. As indicated above, in draft convention there is an expanded definition and interpretation section in Articles 2 and 3 to try and limit any arguments as to the proper meaning of the defined terms.

\section*{16.4 Conclusion}

The only way to achieve greater uniformity and harmonisation in the introduction and interpretation of the provisions of laws relating to cross-border insolvency is by introducing and adopting an international convention which would be in a form that allows the European Union to enact consistent legislation domestically so as to deal with cross-border insolvency issues which exist within the European Union. Ideally, uniform rules relating to choice of law and conflict of laws in respect of insolvency and restructuring matters would also be adopted. The convention would have the option of

expanding its purpose so as to deal with those issues by way of a protocol. It could also have the option of a protocol dealing with preventing multiple states opening insolvency proceedings once such proceedings have been opened in the debtor’s centre of main interest.

Taking a pragmatic view, the major impediments to the implementation of the aforementioned recommendations are the political consequences of States adopting such a convention in the absence of a wide agreement in relation to the controversial issues that exist under the Model Law including those that relate to the reasons behind States intentionally changing the Model Law’s provisions so that they correspond with their domestic policy and attitudes toward insolvency laws.

States may take issue with their sovereignty being conceded by granting jurisdiction to an International Court to act as the ultimate court of appeal in the interpretation of the convention. Political pressure may be applied by international industry and the finance sector to overcome this issue. Political pragmatism may mean that States choose to adopt a panel to issue opinions with non-binding authority although this will not ensure that inconsistent decisions continue to exist between States. If such panel has a right to make submissions before the domestic courts of the States that have adopted the convention, then it could be argued that the risk of inconsistency could be minimised by those courts applying the equivalent of article 8 under the Model Law so as to look to overseas precedents including the opinions of the panel.

This proposal for a convention is further complicated by the scope of such a convention possibly expanding into the areas of choice of law and conflict of law rules about which there has been no previous international discussion or consensus. Such discussion must accommodate different legal traditions. It is recognised that this may take some time and may be difficult to achieve given the UNCITRAL structure.

It is argued that a convention will provide the most certainty for business if the proposals set out in this chapter and the annexure are contained within it. The answer to any potential UNCITRAL funding problem in relation to the drafting of a convention and its promotion may lie with the international insolvency industry bodies funding this endeavour. Until recently, any proposal for a convention could only be advocated at an academic level. However, Working Group V of UNCITRAL has agreed to look at the feasibility of a convention and suggested that legally binding instruments may be

990 Gabriel, above n 973, 670-1.
needed in order to provide greater assurance and legal certainty, although it expressed reservations as to its feasibility.\textsuperscript{991}

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Appendix 1

Judicial Comment upon Granting Recognition under Article 17

A1.1 Australia

In Ackers, Justice Rares of the Federal Court of Australia, noted that COMI is not defined in the Model Law of the Cross Border Insolvency Act and that this was a deliberate choice. Further, the Australian Court should have regard to foreign decisions when deciding whether to grant recognition.992

In the same decision, when referring to Bear Stearns, both before the US Bankruptcy Court and on appeal before the US District Court, Justice Rares went on to state:

Both Judges Lifland and Sweet considered that the concept of the centre of main interests derived from the European Union Convention on Insolvency Proceedings (done at Brussels, November 23, 1995) that had been in the process of adoption when the Model Law was being drafted. The regulation adopting the European Convention explained that the centre of main interests meant “... the place where the debtor conducts the administration of his interests on a regular basis and is, therefore, ascertainable by third parties”: see Bear Stearns 389 BR at 336. His Honor referred to the decision of the European Court of Justice in Re Eurofood IFSC Limited [2006] Ch 508, particularly at 542 [34]-[35] describing it as “more or less amount[ing] to another non-barking dog”. District Judge Sweet noted that the European Court of Justice had held that the fact that a company’s economic choices are or could be controlled by a parent company in another state was not enough to rebut the COMI presumption.993

The court further determined that the relevant test to determine the centre of main interest should be the approach adopted in Eurofood and Stanford International Bank.994

In Buccaneer Energy Ltd the Federal Court accepted that an Australian listed company had its centre of main interest in the USA. The court indicated that

993 Ibid 293 [36].
994 Ibid 295-296 [49].
in determining the centre of the main interests of a debtor company, the simple presumption laid down by the Community legislature in favour of the registered office of that company can be rebutted only if factors which are both objective and ascertainable by third parties enable it to be established that an actual situation exists which is different from that which locating it at that registered office is deemed to reflect.  

A1.2 Canada

In Canada, the courts have not reached a consistent position in relation to the meaning and factors to be taken into account in relation to COMI and when recognition should be granted.

In Straumar-Buraras Investment Bank, the Ontario Superior Court of Justice recognised a special trustee appointed under special Icelandic legislation following the collapse of their banking sector. The Bank had no office or creditors in Canada, but had assets in the form of shares in a Canadian company and money due from three Canadian borrowers. Clearly, the bank’s centre of main interest was Iceland. The court commented that the CCAA was intended to give flexibility in peculiar and unusual circumstances.  

In Re Stanford International Bank Ltd, the Quebec Court of Appeal determined the court has discretion under the BIA whether or not to recognise a foreign representative. Further, the court can refuse recognition where it is not in the interests of Canadian creditors. The court affirmed the decision of the court at first instance which had refused recognition of the liquidators appointed by the Antiguan court, citing the fact that prior to seeking recognition, they had imaged the data contained on computers in Canada and then deleted the data on the Canadian computers without the consent of the USA receivers. The court further referred to the order appointing the liquidators preventing disclosure of information to third parties without a further order of the court. The court held that the liquidators’ actions in destroying the data were illegal and not in the interests of Canadian creditors, and therefore refused recognition. It is uncertain but arguable whether the court, in reaching its conclusions either at first instance or on 

995 Young v Buccaneer Energy Ltd [2014] FCA 711 (2 July 2014) [34]
996 Re Straumar-Buraras Investment Bank hf (2009) 57 CBR (5th) 256 [24].
appeal, was seeking to apply the public policy exception under Article 6. This decision has otherwise been criticised as not dealing with the issue of whether the US receivership of the entity whose purpose was to protect US creditors alone was a collective proceeding.  

In *Tucker v Aero Inventory (UK) Ltd*, the Court was satisfied that a Canadian company with a registered office in Canada, but which had business interests globally and its head office in the UK from where it was managed and administered and where its holding company was listed, was sufficient to find that its centre of main interest was in the UK.  

In *Re Probe Resources Ltd*, the British Columbia Supreme Court equated the centre of main interest to where the legitimate expectations of third parties dealing with a company as to which law would govern it.  

In *Angiotech Pharmaceuticals Ltd*, the Supreme Court of British Columbia set out a number of relevant factors to consider when determining the centre of main interest; these are:

(a) the location where corporate decisions are made;  
(b) the location of employee administrations, including human resource functions;  
(c) the location of the company's marketing and communication functions;  
(d) whether the enterprise is managed on a consolidated basis;  
(e) the extent of integration of an enterprise’s international operations;  
(f) the centre of an enterprise's corporate, banking, strategic and management functions;  
(g) the existence of shared management within entities and in an organization;  

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1001 (2011) 79 CBR (5th) 148 [28].
(h) the location where cash management and accounting functions are oversee;

(i) the location where pricing decisions and new business development initiatives are created; and

(j) the seat of an enterprise's treasury management functions, including management of accounts receivable and accounts payable.\footnote{1002}

In \textit{Re Massachusetts Elephant \& Castle Group Inc.}, the court was faced with an application by the company which had issued Chapter 11 proceedings in the USA in respect of itself and a number of related entities including three entities incorporated in Canada with registered offices in Canada to be recognised as the foreign main proceedings. The Ontario Superior Court stated that Canadian courts had consistently recognised Chapter 11 proceedings as foreign proceedings and that, as the applicant was the lead debtor, it should be recognised as the foreign representative.\footnote{1003} In relation to the Canadian companies, the court was required to determine whether the presumption in relation to the registered office being the company’s centre of main interest (COMI) had been rebutted. The court found that ‘the factors listed in \textit{Re Angiotech}, the intention is not to provide multiple criteria, but rather to provide guidance on how the single criteria, i.e. the centre of main interest, is to be interpreted’.\footnote{1004} The court went on to list a number of factors that it considered significant in relation to COMI being (a) the location of the debtor’s headquarters or head office functions or nerve centre; (b) the location of the debtor’s management; and (c) the location which significant creditors recognize as being the centre of the company’s operations.\footnote{1005}

\section*{A1.3 New Zealand}

In New Zealand, the courts have only had to consider in detail the position of an individual debtor. In \textit{Williams v Simpson}, the High Court of New Zealand dealt with an application for recognition by an English trustee of a New Zealand citizen and resident who had been made bankrupt in England upon a petition of Lloyds for non-payment of calls made against the debtor who was a ‘name’ in a Lloyds syndicate. The English Court had accepted jurisdiction to make the sequestration order as the debtor, Dr Simpson, was deemed to have been carrying on business in England by being a

\footnotesize{\begin{itemize}
  \item \footnote{1002} (2011) 76 CBR (5th) 317 [7] (BCSC).
  \item \footnote{1003} (2011) 81 CBR (5th) 102 [13] (ONSC).
  \item \footnote{1004} Ibid [27].
  \item \footnote{1005} Ibid [30].
\end{itemize}}
Lloyds name. The New Zealand High Court refused recognition under the Model Law as a foreign main proceeding as Dr Simpson’s centre of main interest was clearly in New Zealand where he had a family and home and a child at school. Relying on Article 16 (3), the court held that the centre of main interest was presumed to be his place of habitual residence and this presumption had not been rebutted. The court also refused to recognise the English bankruptcy as a non-main proceeding as it found Dr Simpson had no establishment (as defined in Article 2) in England. The Court did, however, agree to grant assistance to the English trustee based upon a request from the English High Court in accordance with the principles of comity.\textsuperscript{1006}

A1.4 United Kingdom

In the UK, the courts on several occasions have had to consider the meaning of COMI and when recognition should be granted.

\textit{In the Matter of Stanford International Bank Ltd}, the English High Court dealt with an application by the liquidators of Stanford who had been appointed by the High Court of Antigua and Barbuda for recognition. Stanford had been incorporated in Antigua and Barbuda and had a registered office in that country. Stanford had been the subject of a ponzi scheme and was being investigated by the US Securities Exchange Commission which had obtained the appointment of a receiver from the US District Court. The US receiver also applied for recognition in cross-referenced proceedings. At first instance, Lewison J granted recognition to the liquidators as the foreign main proceedings, but not the USA receivers because the USA receivership was not a collective proceeding or made under a law relating to insolvency as their purpose was to prevent dissipation and waste, not to liquidate or reorganise.\textsuperscript{1007} The Court of Appeal confirmed the decision at first instance.\textsuperscript{1008} In considering the issue of centre of main interest, the court affirmed that it should follow the European Court of Justice decision in \textit{Eurofood}\textsuperscript{1009} and that the test for centre of main interest is ‘the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties.’\textsuperscript{1010}

As indicated under Article 2, the issue that must be questioned when examining the decision in \textit{Stanford International Bank} is the extent to which the court accorded with or

\textsuperscript{1006} [2011] 2 NZLR 380.
\textsuperscript{1007} [2011] Ch 33.
\textsuperscript{1008} [2011] Ch 33, 58 [29].
\textsuperscript{1009} \textit{Re Eurofood IFSC Ltd} [2006] Ch 508.
relied upon the UK amendment to Article 3 and Regulation 2(d). Those provisions required the court to give preference to the interpretation offered in *Eurofood* rather than look to independently determine the meaning of ‘centre of main interest’ for the purposes of the Model Law. It is argued that the decision in *Eurofood* has been further clarified by the decision in *Re Interedil Srl*.1012

The English High Court in *Rubin* was faced with the situation of a trust being recognised as a debtor and separate legal entity under US Chapter 11 proceedings, but not being recognised as a separate legal entity under UK general law.1013 The court found that if the structure was recognised as a separate debtor under the foreign law giving rise to the foreign main proceeding, then the court should do likewise.1014 The court also found that when interpreting these provisions in the Model Law, ‘a purposive construction should be given to these provisions. Their object is to facilitate co-operation between different jurisdictions in relation to bankruptcy proceedings’.1015

The court went on to find that the Model Law cannot be used for the purposes of obtaining recognition and enforcement of judgements relating to the foreign proceedings unless it complies otherwise with English private international law which requires ‘that the judgment of a foreign court is not enforceable unless the defendant was present within the jurisdiction, or in some way submitted himself to the jurisdiction, of the foreign court’.1016 This conclusion was affirmed by the UK Supreme Court.1017

In *Pillar Securitisation S.a.r.l*, the English High Court summarised the *Re Eurofood* principles as follows:

(i) There is a presumption that the body’s COMI is in the state where its registered office is located.

(ii) The presumption can be rebutted only by factors which are both objective and ascertainable by third parties. Thus the court is to have regard to factors already in the public domain, or which would be apparent to a typical third party doing business with the body, excluding such matters as might only be ascertained on inquiry.

1011 Cross-Border Insolvency Regulations 2006 SR 2006/1030.
1012 *Re Interedil Srl* [2012] Bus LR 1582.
1014 Ibid [46].
1015 Ibid [48].
1016 Ibid [72].
1017 *Rubin v Eurofinance SA* [2013] 1 AC 236, 274 [115].
(iii) Accordingly, the place where the body’s head office functions are carried out is only relevant if so ascertainable by third parties.
(iv) Each body or individual has its own COMI; there is no COMI constituted by an aggregation of bodies or individuals. 1018

The court determined that the company’s centre of main interest was where it was managed and business was conducted on its behalf as this was the address that clients and creditors dealt with and, as such, the presumption was rebutted. 1019

A1.5 USA

In the USA, the court has considered the meaning of COMI in light of the amendments made to the Model Law provisions by Chapter 15 of the Bankruptcy Code. This has led to different considerations being taken into account in relation to recognition.

In Re Sphinx Ltd, the joint liquidators appointed by the Grand Court of the Cayman Islands of a group of companies operating under the Sphinx Ltd group applied for recognition as the Foreign Main Proceedings. The liquidator’s evidence established that, whilst the companies’ registered office was in the Cayman Islands, each of the companies operated as hedge funds and was incorporated as either a limited liability company or as a segregated portfolio company. The companies operated to attract both US and non-US investors; however, they had no employees or business addresses in the Cayman Island with only their statutory records being kept in the Cayman Islands. The companies’ business and trading activities were in fact conducted under a management agreement by a company in New York City with 90% of its assets being located in the United States of America. The court determined that the presumption in section 1516(c) can be rebutted and that the ultimate burden of element of recognition is on the foreign representative although the court is entitled to shift the burden to the extent indicated in section 1516. 1020 The court also found that ‘there is nothing in chapter 15 provides that there cannot be a ‘non-main’ proceeding unless there is a ‘main’ proceeding’. 1021 As there was no opposition to the recognition, the court granted recognition as a main proceeding based upon its registered office

1019 Ibid 344 [27].
1020 Re Sphinx Ltd, 351 BR 103, 117 (Bankr, SD NY, 2006).
1021 Ibid 122.
being in the Cayman Islands. This recognition has been criticised in more recent
decisions.\textsuperscript{1022}

The Court also stated that ‘in cases where the court is asked under chapter 15 to
reconcile conflicting claims to primacy between or among proceedings . . . including the
matter presently before the Court, the interests of the debtor’s estate, creditors and
other parties, absent evidence that they support a ‘primary’ proceeding for an improper
purpose, should generally be a significant and perhaps deciding factor.’\textsuperscript{1023}

The Court set out a number of factors which it believed were relevant in determining
the location of the debtor’s headquarters, namely ‘(1) the location of those who actually
manage the debtor (which, conceivably could be the headquarters of a holding
company); (2) the location of the debtor’s primary assets; (3) the location of the majority
of the debtor’s creditors or of a majority of the creditors who would be affected by the
case; and (4) the jurisdiction whose law would apply to most disputes.’\textsuperscript{1024}

In \textit{Bear Stearns High Grade Structured Credit Strategies Master Fund Ltd}, the US
District Court on appeal from the US Bankruptcy Court examined a Cayman Island
winding up proceedings of two Cayman Islands open-ended investment companies
that were incorporated in the Cayman Islands as exempt companies.\textsuperscript{1025} The
Bankruptcy Court had ruled that the winding up was neither a foreign non-main
proceedings, nor foreign main proceedings. The companies operated hedge funds that
were managed and administered in the USA. The investment registries were in Ireland
and the accounts receivable registries were located in a number of countries in Europe.
The registered office of the company was that of its professional advisers in the
Cayman Islands and the only thing that occurred in the Cayman Islands was the
maintenance of statutory records and auditing. The Bankruptcy Court determined that it
was not a foreign non-main proceeding as the company did not have a business
establishment in the Cayman Islands; nor did it conduct any transactions in the
Cayman Islands. After the issue of the Chapter 15 application, the company had a
large amount of funds remitted from the United States to the Cayman Islands. The US
District Court determined that the time for determining whether a debtor had an

\textsuperscript{1022} See, eg, \textit{Re Bear Stearns High Grade Structured Credit Strategies Master Fund Ltd}, 374
BR 122, 130 (Bankr, SD NY, 2007); \textit{Re Bear Stearns High-Grade Structured Credit} 389 B.R
325, 334 (Dist SD NY, 2008); \textit{In re Basis Yield Alphas Fund (Master)}, 381 BR 37,52-53
(Bankr, SD NY, 2008).

\textsuperscript{1023} \textit{Re Sphinx Ltd} 351 BR 103, 114 (Bankr, SD NY, 2006).

\textsuperscript{1024} Ibid 117 adopted in \textit{Re Fairfield Sentry Ltd}, 714 F 3d 127 (2nd Cir 2013).

\textsuperscript{1025} \textit{Re Bear Stearns High Grade Structured Credit Strategies Master Fund Ltd}, 374 BR 122
(Bankr, SD NY, 2007).
establishment was as at the date of presentation of the petition.  

The US District Court referred to the House of Representatives Report and stated:

The drafters of the Model Law understood that only a main proceeding or a non main proceeding meeting the standards of section 1502 (that is, one brought where the debtor has an establishment) were entitled to recognition under this section. The Model Law has been slightly modified to make this point clear by referring to the section 1502 definition of main and non main proceedings, as well as to the general definition of a foreign proceeding in section 101(23). A petition under section 1515 must show that the proceeding is a main or a qualifying non main proceeding in order to obtain recognition under this section.  

The Court went on to say:

If the debtor does not have its center of main interests or at least an establishment in the country of the foreign proceedings, the bankruptcy court should not grant recognition and is not authorized to use its power to effectuate the purposes of the foreign proceeding. 

The court held that ‘Auditing activities and preparation of incorporation papers performed by a third party do not in plain language terms constitute ‘operations’ or ‘economic activity’. 

The court referred to the European Court of Appeals decision of Eurofood and stated that their reasoning was consistent with this decision and determined that the presumption had been rebutted and the liquidators had failed and reaffirmed the Bankruptcy Court’s decision. 

In Re Ran, the US Court of Appeals considered an appeal involving an application by an Israeli bankruptcy receiver of the affairs of Mr. Ran. Mr. Ran had been a high profile business man in Israel whose business interests had become insolvent. Mr. Ran had

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1026 Ibid 339  
1027 Ibid 331.  
1028 Ibid 334.  
1029 Ibid 339.  
1030 Ibid 337.  
1031 Ibid.
moved to Texas in the United States before he was bankrupted in Israel and had obtained residency. His children were US citizens. The petition for recognition was issued eight years after Mr. Ran was declared bankrupt. The Court confirmed that an application for recognition is not a ‘rubber stamp’ and, in the absence of an objection, the court must undertake its own jurisdictional analysis to grant or deny recognition. The burden of proof of the requirements for recognition as either a foreign main proceeding or a foreign non-main proceeding is on the foreign representative. The court determined that Mr. Ran’s habitual place of residence as at the date of the petition was the USA, and as such, the Israeli proceedings could not be foreign main proceedings. Furthermore, as Mr. Ran did not have any businesses in Israel, he could not have an establishment there. Even if he had a place of operations in Israel, because he carried out no economic activity there, the test for an establishment was not met. 1032

The US Bankruptcy Court has refused to terminate a recognition order where a foreign representative had taken conflicting positions on material issues the Bankruptcy Court and in the foreign main proceedings. The court indicated that it was not a ground upon which to terminate recognition, but that the court would reconsider the position when the foreign representative was seeking recognition of any ultimate scheme of reorganisation at which time the court would decide whether to grant comity to the order or judgment. 1033

1032 Re Ran (2010) 607 F.3d 1017, 1027-28 (5th Cir, 2010).
1033 Re Cozumel Caribe SA de CV (2014) WL 1569238 (Bankr, SD NY, 2014).
Appendix 2

Types of Protocols and Communications

A2.1 Australia

In *Parbery; in the matter of Lehman Brothers Australian Limited (in liq)* the Federal Court of Australia accepted that inter-court communication was to be encouraged in cross-border insolvencies.¹⁰³⁴ The court declined a request by the liquidators of the Australian company to send a letter of request in the form submitted to the Judge Peck of the US Bankruptcy Court dealing with the US companies in an attempt to seek to resolve the inconsistencies that existed between court decisions in England and the USA. Justice Jacobsen indicated that he was not willing to send the proposed letter because:

1. It breached the principles of comity by pre-empting the decision of the US Bankruptcy Court as comity is based upon ‘common courtesy and mutual respect’.¹⁰³⁵

2. It was inappropriate to enter into discussions with another court on matters of controversy.¹⁰³⁶

3. The application was made ex parte.¹⁰³⁷

4. Cooperation between the courts and other courts should occur within a framework or protocol that has been approved by the court with the input of parties and the relevant court’s practice notes and guidelines.¹⁰³⁸

5. The communication was to be in respect of proceedings before the court which was not the case here.¹⁰³⁹

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¹⁰³⁴ (2011) 285 ALR 476, 484 [71].
¹⁰³⁵ Ibid 482 [53].
¹⁰³⁶ Ibid 482 [54].
¹⁰³⁷ Ibid 482 [55].
¹⁰³⁸ Ibid 483 [59].
¹⁰³⁹ Ibid 483 [66].
The court did, however, agree to send a letter attached to the judgement to the US Bankruptcy Court advising that court of the application and the judge’s refusal to grant the request, and seeking to establish a protocol for future communication.

A2.2  Canada and USA

In Canada, numerous cases have involved protocols associated with the USA courts following the introduction of the American Law Institute’s *Guidelines Applicable to Court to Court Communications on Cross-Border Cases* including:

(a) In *Re Matlack*, the court approved and set out a protocol for communication between it and the US Bankruptcy Court based upon The American Law Institute’s *Guidelines Applicable to Court to Court Communications on Cross-Border Cases*.  

(b) In *Re Graceway Canada Company*, after appointing a Canadian Receiver, the court approved a communication protocol for the purposes of communicating with the US Bankruptcy Court in anticipation of Chapter 11 proceedings being issued.

(c) In *Calpine Canada*, Madame Justice Romaine commented that a protocol cannot be drafted in a vacuum and must address the particular circumstances of the case at hand. Her Honour stressed that a protocol cannot be pulled off the shelf and should be a matter of discussion and negotiation and cooperation among interested parties before a form of protocol is presented to the courts for review and approval.

(d) In *Eddie Bauer of Canada Inc.*, the court recognised that in a case where Canadian entities were fully integrated with associated entities in the USA which were the subject of Chapter 11 proceedings, the adoption of a Cross-Border Protocol which incorporates the American Law Institute’s *Guidelines Applicable to Court to Court Communication on Cross-Borders Cases* was appropriate.

The Supreme Courts of provinces of Canada and the US Bankruptcy Court have created the following protocols:

1043 *Re Eddie Bauer of Canada Inc* (2009) 55 CBR (5th) 33 [26].
(a) Joint directions hearings where the judges confer before handing down joint directions;\(^{1044}\)

(b) Requiring a common submission to be filed in both Courts with each Court to then consider the issue of the States’ laws applicable to the dispute;\(^{1045}\)

(c) Establishing procedures for submitting claims where two insolvency/reconstruction administrations exist or where there are interrelated administrations;\(^{1046}\)

(d) Establishing a joint plan for reorganisation from a company and approving the same;\(^{1047}\)

(e) Waiving the requirement to file a separate plan under the CCAA where Chapter 11 proceedings have been filed in the United States;\(^{1048}\)

(f) Recognising proceedings in the other jurisdictions so as to allow a group of companies who reside in different jurisdictions to be dealt with under a joint plan for reorganisation;\(^{1049}\)

(g) A standing protocol between the Superior Court of Quebec and the US Bankruptcy Court for dealing with cross-border insolvencies.\(^{1050}\)

A2.3 United Kingdom

In *Perpetual Trustee Co Ltd v BNY Corporate Trustee Services Ltd* the English High Court was dealing with an application involving a member of the Lehman Brothers group and it was proposed to communicate with the US Bankruptcy Court in an attempt to avoid conflicting decisions between the two countries. The English High Court made it clear that although it would accept submissions in respect of any letter to be sent, the ultimate decision is for the court alone as to whether to send a letter and the form of the letter that it was proposing to send to the US Bankruptcy Court.


\(^{1045}\) Ibid.

\(^{1046}\) *Re Abitibibowater Inc* [2010] QCCS 1064 (18 January 2010).

\(^{1047}\) *Re Masonite International Ltd* [2009] ONSC 40563 (28 July 2009).


\(^{1049}\) *Re Abitibibowater Inc* [2010] QCCS 1064 (18 January 2010).

\(^{1050}\) *Re Montreal, Maine & Atlantic Canada Co* [2013] QCCS 5194 (9 October 2013) [32].
A2.4 UNCITRAL

The UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation provides information for insolvency practitioners and judges on the practical aspects of cooperation and communication in cross-border insolvency cases. The information is based upon a description of collected experience and practice, focusing on the use and negotiation of cross-border agreements. It provides an analysis of more than 39 agreements, ranging from written agreements approved by courts to oral arrangements between parties to the proceedings that have been entered into over the last decade or so.1051

The UNCITRAL Practice Guide has also summarised circumstances in which it is appropriate for cross-border insolvency agreement or protocols to be entered; these include:

(a) Cross-border insolvency proceedings with a considerable number of international elements;
(b) Complex debtor structures;
(c) Different types of insolvency procedures in the States involved;
(d) Sufficient assets to cover the costs of drafting an agreement;
(e) The availability of time to negotiate an agreement;
(f) Similarity of insolvency laws;
(g) Legal uncertainty regarding the resolution of principles of private international law or choice of forum questions;
(h) The ordering of contradictory stays in the different proceedings;
(i) The existence of a cash management system providing for the deposit of cash into a centralised account and the sharing of cash among member of international group of companies;

The appointment of insolvency representatives from the same firm.\textsuperscript{1052}

The Practice Guide sets out the type of clauses that have been used in the past with such agreements. These agreements have been reached both between courts and between insolvency representatives and cover issues including:

(a) Recital setting out the purpose of the agreements;
(b) Circumstances supporting use of a cross-border insolvency agreement;
(c) Capacity to enter into a cross-border insolvency agreement;
(d) Conditions precedents to make agreement binding (e.g. court approval);
(e) Whether agreements are intended to be legally binding;
(f) Comity and independence of courts;
(g) Allocation of responsibilities between courts;
(h) Allocation of responsibility for the investigation and commencement of avoidance proceedings;
(i) Approval of compensation for insolvency representatives;
(j) Resolution of disputes between different administrations of the same debtor and between the representatives of the debtor and third parties;
(k) Where it is necessary to appear in the courts of a State that has not adopted the Model Law, ensuring there is a right to make submissions (rather than appearing and thereby potentially subjecting them to the jurisdiction of that court);
(l) Whether the insolvency agreement extends to future proceedings issued in other States with respect to the same debtor;
(m) The law that governs the insolvency agreement/protocol;
(n) General obligations and means of cooperation;

\textsuperscript{1052} Ibid, 25-26, [10].
(o) Coordination of reorganisation plans;

(p) Discovery and treatment of assets in different States;

(q) Supervision of representatives in each State;

(r) Allocation of responsibility to commence further insolvency proceedings;

(s) Calling for and treatment of creditor claims;

(t) Payment of distributions including how priority creditors are to be dealt with;

(u) How communication is to occur between the courts of different States;

(v) Information-sharing between representatives;

(w) Sharing information with third parties (e.g. creditors);

(x) Specifying steps that require notice to be given between parties before being taken;

(y) The manner of notice to be given;

(z) Amendment revision or termination of insolvency agreement;

(aa) Costs and fees of complying with insolvency agreement;

(bb) Safeguards such that complying with agreement does not breach any domestic law or to breaching the rights or obligations to third parties;

(cc) Limitation of personal liability to representatives and professionals in their employ form complying with insolvency agreement, subject to any domestic law;

(dd) Warranties as to power to enter into agreement.\textsuperscript{1053}
Appendix 3

Proposed Uniform Choice of Law Rules for Insolvency Matters

1. Claims in respect of immovables and interests in real property - the law of the State in which the property is held (*lex situs*).

2. Subject to paragraph (c) claims in respect of other immovable property (*lex situs*).

3. In relation to proceedings, to overturn antecedent transactions and other action under Article 23 of the Model Law (which do not involve immovable property or interests in real property):

   3.1. In respect of contracts between the debtor and a person in another State depending upon which test provides the closest connection to the transaction as a whole being either:

      3.1.1. The law of the contract (*lex contractus*) or if none is nominated;

      3.1.2. The law of the State where the contract was made (*lex loci contractus*);

   3.2. In relation to all other transactions – the law of the State in which the property is held (*lex situs*).

4. The validity of a debt that is claimable in the insolvency proceeding is to be determined according to the law of the State in which the debt is held (*lex situs*). If the debt is unenforceable in the State in which it is held, it should not be claimable in a foreign proceeding.

5. The validity of any security interests over the property of the company is to be determined in accordance with the laws of the State in which the property is located (*lex situs*).

6. In relation to all other claims, the law applicable should be the law of the State of the insolvency proceedings (*lex forum*), unless a court determines that another State’s law is more closely connected with the subject matter of the claim (e.g. where the claim involves rights under a licence granted by a another State, the laws of that other State may be more applicable).

7. Rules of procedure including rights of set-off and priority creditors shall be determined *lex forum*. 
Appendix 4

DRAFT UNITED NATIONS CONVENTION ON CROSS-BORDER INSOLVENCY

The States Parties to this Convention,

Reaffirming their belief that international trade on the basis of equality and mutual benefit is an important element in promoting friendly relations among States;

Convinced that the progressive harmonization and unification of international trade law, in reducing or removing legal obstacles to the flow of international trade, significantly contributes to universal economic cooperation among all States on a basis of equality, equity and common interest, and to the well-being of all peoples;

Recognising the significant contribution of the UNCITRAL Model Convention on Cross-Border Insolvency adopted on 30 May 1977 as been to the harmonization of the Convention governing the cross-border insolvency;

Recognising further that the full text of the UNCITRAL Model Convention on Cross-Border Insolvency has not been adopted by all States’;

Believing that the adoption of uniform rules to assist States to equip their insolvency Conventions with a modern legal framework to more effectively address cross-border insolvency proceedings concerning debtors experiencing severe financial distress or insolvency improves the efficiency of international carriage of goods and facilitate new access opportunities for previously remote parties and markets, thus playing a fundamental role in promoting trade and economic development, both domestically and internationally;

Recognising the desirability of a Convention to provide effective mechanisms for dealing with cases of cross-border insolvency so as to promote the objectives of:

(a) Cooperation between the competent courts and other competent authorities of a Contracting State and foreign States involved in cases of cross border insolvency;
(b) Greater legal certainty for trade and investment;

(c) Fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested persons, including the debtor;

(d) Protection and maximization of the value of the debtor’s assets;

(e) Facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment.

Have agreed as follows:

CHAPTER I. GENERAL PROVISIONS

Article 1

Scope of application

1. This Convention applies where:

(a) Assistance is sought in a Contracting State by a foreign court or a foreign representative in connection with a foreign proceeding; or

(b) Assistance is sought in a foreign State in connection with a proceeding under a domestic insolvency law; or

(c) A foreign proceeding and a proceeding under a domestic insolvency law in respect of the same debtor are taking place concurrently; or

(d) Creditors or other interested persons in a foreign State have an interest in requesting the commencement of, or participation in, a proceeding under a domestic insolvency law.

2. This Convention does not apply:

(a) to a proceeding concerning debtors whose businesses are in the banking, finance or insurance industries in the Contracting State;

(b) to a proceeding concerning debtors of the type declared by the Contracting State at the time of adoption of this Convention;
(c) to territories or protectorates of the Contracting State declared by the Contracting State at the time of adoption of this Convention.

3. The provisions of this Convention are designed to supplement and not replace Contracting States’ existing law in respect of recognition and granting assistance to foreign proceedings.

**Article 2**

**Definitions**

For the purposes of this Convention:

(a) ‘administrative proceeding’ means legal formal regime that is supervised by a non-judicial State body or authority;

(b) ‘centre of main interest’ means the place where the debtor conducts its centre of management and the administration and supervision of its interests on a regular basis, to be determined on the basis of objective factors which are known to or are readily ascertainable by third parties. Unless there is evidence to the contrary, it shall be deemed to be an incorporated debtors registered office or individual debtors place of habitual residence. A debtor’s centre of main interest shall be determined in accordance with the factors set out in the UNCITRAL Cross-Border Insolvency Principles (if any);

(c) ‘collective proceeding’ means a formal regime under which the debtor’s assets are realised for the benefit of all creditors or all unsecured creditors of the debtor;

(d) ‘competent court’ means a court or other judicial body in a Contracting State that, according to the rules on the internal allocation of jurisdiction among the courts of that State, may exercise jurisdiction or has been granted jurisdiction over matters arising out of this Convention;

(e) ‘Contracting State’ means a State that is a party to this convention;

(f) ‘debtor’ means a person, entity or other business structure recognised in the State of the foreign proceeding and that it is subject to the foreign proceeding;

(g) ‘domestic insolvency law’ means the law of a Contracting State relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation;

(h) ‘domestic insolvency practitioner’ means a person or body (including the debtor), who is authorised by the domestic insolvency law to administer the
reorganisation or the liquidation of the debtor’s assets or affairs or to act as a representative of the debtor, including one appointed on an interim basis;

(i) ‘domestic insolvency proceeding’ means a collective judicial proceeding or administrative proceeding in a Contracting State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation;

(j) ‘establishment’ means any place of operations where the debtor carries out a non-transitory economic activity with human means and movable assets or services, to be determined on the basis of objective factors which are known to or are readily ascertainable by third parties. An establishment shall be determined in accordance with the factors set out in the UNCITRAL Cross-Border Insolvency Principles (if any);

(k) ‘foreign court’ means a judicial or other authority competent to control or supervise a foreign proceeding in accordance with the laws of the Contracting State;

(l) ‘foreign proceeding’ means a collective judicial proceeding or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation;

(m) ‘foreign main proceeding’ means a foreign proceeding taking place in the State where the debtor has the centre of its main interests;

(n) ‘foreign non-main proceeding’ means a foreign proceeding, other than a foreign main proceeding, taking place in a State where the debtor has an establishment;

(o) ‘foreign representative’ means a person or body (including the debtor), authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor’s assets or affairs or to act as a representative of the foreign proceeding, including one appointed on an interim basis.

(p) ‘goods’ means all assets and property of the debtor (including intellectual property) but does not include immovable property or interests in immovable property.

(q) ‘habitual residence’ means the State of the debtor’s residence and where they intend to stay in the long term.

(r) ‘interim proceeding’ means a collective judicial proceeding or administrative proceeding in a foreign State pursuant to a law relating to insolvency or restructuring in which proceeding the assets and affairs of the debtor are
subject to control or supervision by a foreign court, and which are on foot whilst a foreign court considers whether to create a foreign proceeding.

\( s \) ‘judicial proceeding’ means a legal formal regime that is supervised by a judicial body or court of the State.

\( t \) ‘law relating to insolvency’ means a law of a foreign State whose relevant part relates to the insolvency or restructuring of the affairs of a debtor.

\( u \) ‘non transitory economic activity’ means the production, manufacture or provision of goods or services for more than a short or temporary period of time.

\( v \) ‘ordinary unsecured creditors’ means creditors of debtor who do not hold any security over the assets of the debtor and who are not entitled to a priority in the distribution of the debtor’s assets under the domestic insolvency laws of the Contracting State

\( w \) ‘Protocol’ means a protocol adopted by a Contracting State relating to foreign proceedings the subject of this Convention and approved by UNCITRAL or the body nominated by them.

\( x \) ‘registered office’ means the place provided for by the laws of the State in which the foreign proceedings are issued or the service of documents upon the debtor.

\( y \) ‘services’ means the provision of a benefit by the debtor to another person or entity as a result in part of the debtors labour or person exertion or that of their servants or agents.

\( z \) ‘this convention’ means this convention as approved by the General Assembly of the United Nations as amended from time to time pursuant to article 39.


\( bb \) ‘UNCITRAL Cross-Border Insolvency Principles’ means the principles approved and published by UNCITRAL or the body nominated by them relating the interpretation and implementation of this Convention.


\( dd \) ‘with human means’ requires some human involvement by individual persons at the place of operations that is the establishment.
**Article 3**  
*Interpretation*

1. In the interpretation of this Convention, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.

2. In the interpretation of this Convention, regard is to be had to any Protocols.

3. In interpreting this Convention the competent courts in a Contracting State shall have regard to the decisions of the competent courts of other Contracting States.

4. This article must be interpreted in accordance with the principles set out in the Vienna Convention on the Laws of Treaties.

5. This convention must be interpreted in accordance with the UNCITRAL Cross-Border Insolvency Principles as amended from time to time by UNCITRAL.

6. Where an appeal is pending from a decision of a competent court which involves an issue of a difference in the interpretation of a provision of this Convention by the competent courts of different Contracting States, UNCITRAL (or a body nominated by it to the Contracting States) shall have the right to make submission to (either orally or in writing or both) and to appear before that court of appeal.

7. Contracting States shall ensure that procedures are put in place to ensure that at least two months’ notice is given to UNCITRAL (or the body nominated by it to the States that have adopted this Convention) of any appeal proceedings where an issue in the appeal involves the interpretation of this Convention.

8. All courts of a Contracting State hearing an appeal from the decision of a competent court involving the interpretation of this Convention shall grant UNCITRAL (or a body nominated by it to the Contracting States) the right to make submissions to (either orally or in writing or both) and to appear before that court of appeal.

9. Where there is an issue of a difference in the interpretation of a provision of this Convention by the competent courts of different Contracting States those
Contracting States may by agreement between them petition the International Court of Justice for an interpretation of that provision of this convention.

10. The application of this convention in a Contracting State is not contingent upon the foreign proceedings being issued out of another Contracting State, unless a Contracting State declares it to be so contingent.

11. Subject to articles 4 and 7, if a provision of this Convention is inconsistent with the laws of a Contracting State the provisions of this convention shall prevail in that Contracting State to the extent of any inconsistency.

12. The rights and obligation created pursuant to the terms of this convention are neither in rem nor in personam.

**Article 4**

*International obligations of a Contracting State*

1. To the extent that this Convention conflicts with an obligation of a Contracting State arising under any treaty or other international agreement, the requirements of that treaty or agreement shall prevail over the terms of this Convention.

2. The provisions of paragraph 1 shall not apply where it has been declared by a Contracting State, in accordance with the provisions of article 36, that the provisions of this Convention shall prevail over an obligation of a Contracting State under any other declared treaty or other international agreement which the Contracting State has entered into.

**Article 5**

*Competent court or authority*

The functions referred to in this Convention relating to recognition of foreign proceedings and cooperation with foreign courts shall be performed by the competent courts in each State.
Article 6

Authorization of a domestic insolvency practitioner to act in a foreign State

A domestic insolvency practitioner is authorized to act in a Contracting State on behalf of a proceeding under a domestic insolvency law as permitted by this Convention and the applicable law of that Contracting State.

Article 7

Public policy exception

Nothing in this Convention prevents a competent court from refusing to take an action governed by this Convention if the action would be manifestly contrary to the public policy of that Contracting State.

Article 8

Additional assistance under other laws

1. Nothing in this Convention limits the power of a competent court or a domestic insolvency practitioner to provide additional assistance to a foreign representative under other laws of a Contracting State.

2. The provisions of this Convention are intended to supplement and not replace Contracting States' existing law in respect of recognition and granting assistance to foreign proceedings.

CHAPTER II. ACCESS OF FOREIGN REPRESENTATIVES AND CREDITORS TO COURTS IN A CONTRACTING STATE

Article 9

Right of direct access

A foreign representative is entitled to apply directly to a competent court in a Contracting State.
Article 10

Limited jurisdiction

The sole fact that an application pursuant to this Convention is made to a competent court in a Contracting State by a foreign representative does not subject the foreign representative of the foreign assets and affairs of the debtor to the jurisdiction of the courts of a Contracting State for any purpose other than the application.

Article 11

Application by a foreign representative to commence a proceeding under domestic insolvency laws

A foreign representative is entitled to apply to commence a domestic insolvency proceeding under a domestic insolvency law in a Contracting State if the conditions for commencing such a proceeding are otherwise met.

Article 12

Participation of a foreign representative in a proceeding under the Contracting States domestic insolvency law

Upon recognition of a foreign proceeding, the foreign representative is entitled to participate in a proceeding regarding the debtor under a Contracting States domestic insolvency law.

Article 13

Access of foreign creditors to a proceeding under domestic insolvency law

1. Subject to paragraph 2 of the present article, foreign creditors have the same rights regarding the commencement of, and participation in, a proceeding under a domestic insolvency law as creditors in a Contracting State.

2. Paragraph 1 of the present article does not affect the ranking of claims in a proceeding under a domestic insolvency law, except that the claims of foreign creditors shall not be ranked lower than ordinary unsecured creditors.
Article 14
Notification to foreign creditors of a proceeding under domestic insolvency laws

1. Whenever under a domestic insolvency law notification is to be given to creditors in a Contracting State, such notification shall also be given to the known creditors that do not have addresses in that State. A competent court may order that appropriate steps be taken with a view to notifying any creditor whose address is not yet known.

2. Such notification shall be made to the foreign creditors individually, unless the competent court considers that, under the circumstances, some other form of notification would be more appropriate. No rogatory letters or other similar formality is required.

3. When a notification of commencement of a proceeding is to be given to foreign creditors, the notification shall:

   (a) Indicate a reasonable time period for filing claims and specify the place for their filing;

   (b) Indicate whether secured creditors need to file their secured claims;

   (c) Contain any other information required to be included in such a notification to creditors pursuant to the laws of that State and the orders of the competent court.

CHAPTER III. RECOGNITION OF A FOREIGN PROCEEDING AND RELIEF

Article 15
Application for recognition of a foreign proceeding

1. A foreign representative may apply to a competent court for recognition of the foreign proceeding in which the foreign representative has been appointed.

2. An application for recognition shall be accompanied by:
(a) A certified copy of the decision commencing the foreign proceeding and appointing the foreign representative; or

(b) A certificate from the foreign court affirming the existence of the foreign proceeding and of the appointment of the foreign representative; or

(c) In the absence of evidence referred to in subparagraphs (a) and (b), any other evidence acceptable to the competent court of the existence of the foreign proceeding and of the appointment of the foreign representative.

3. An application for recognition shall also be accompanied by a statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative.

4. A competent court may require a translation of documents supplied in support of the application for recognition into an official language of the Contracting State.

5. The competent courts in Contracting States may make procedural rules in relation to applications to made under this Convention.

*Article 16*

*Presumptions concerning recognition*

1. If the decision or certificate referred to in paragraph 2 of article 15 indicates that the proceeding is a foreign proceeding within the meaning of article 2 and that the foreign representative is a person or body within the meaning of article 2, the competent court is entitled to so presume.

2. The competent court is entitled to presume that documents submitted in support of the application for recognition are authentic, whether or not they have been legalized.

3. Subject to the provision of the documents referred to in paragraph 15, that the foreign proceedings have been validly issued in their Contracting State of origin.
**Article 17**

*Decision to recognize a foreign proceeding*

1. Subject to article 6, a foreign proceeding shall be recognized if:

   (a) The proceeding is a foreign proceeding within the meaning of subparagraph (a) of article 2;

   (b) The foreign representative applying for recognition is a person or body within the meaning of subparagraph (d) of article 2;

   (c) The application meets the requirements of paragraph 2 of article 15;

   (d) The application has been submitted to a competent court

2. The foreign proceeding shall be recognized:

   (a) As a foreign main proceeding if it is taking place in the State where the debtor has its centre of its main interests; or

   (b) As a foreign non main proceeding if the debtor has an establishment in the foreign Contracting State.

3. An application for recognition of a foreign proceeding shall be decided upon at the earliest possible time.

4. The provisions of articles 15, 16, 17 and 18 do not prevent modification or termination of recognition if it is shown that the grounds for granting it were fully or partially lacking at the time of granting recognition.

5. For the purposes of paragraph 2 the time at which it is determined whether the foreign proceedings is taking place in a State in which the debtor has its centre of main interest or an establishment is at the earlier of:

   (a) the date of commencement of the foreign main proceeding; or

   (b) the date of commencement of a foreign non-main proceeding that is still on foot as at the date of issue of the proceedings seeking recognition in the Contracting State in which recognition is sought.
Article 18
Subsequent information

From the time of filing the application for recognition of the foreign proceeding, the foreign representative shall inform the competent court promptly of:

(a) Any substantial change in the status of the recognized foreign proceeding or the status of the foreign representative’s appointment;

(b) Any other foreign proceeding regarding the same debtor that becomes known to the foreign representative.

Article 19
Relief that may be granted upon application for recognition of a foreign proceeding

1. From the time of filing an application for recognition until the application is decided upon, a competent court may, at the request of the foreign representative, where relief is urgently needed to protect the assets of the debtor or the interests of the creditors, grant relief of a provisional nature, including:

(a) Staying execution against the debtor’s assets;

(b) Entrusting the administration or realization of all or part of the debtor’s assets located in a Contracting State to the foreign representative or another person designated by a competent court, in order to protect and preserve the value of assets that, by their nature or because of other circumstances, are perishable, susceptible to devaluation or otherwise in jeopardy;

(c) Any relief mentioned in paragraph 1 (c), (d) and (g) of article 21 below.

2. Unless extended under paragraph 1 (f) of article 21, the relief granted under the present article terminates when the application for recognition is decided upon.

3. The competent court may refuse to grant relief under the present article if such relief would interfere with the administration of a foreign main proceeding.
Article 20

Effects of recognition of a foreign main proceeding

1. Upon recognition of a foreign proceeding that is a foreign main proceeding, except with the approval of the Competent Court granting recognition:

   (a) Commencement or continuation of individual proceedings concerning the debtor’s assets, rights, obligations or liabilities is stayed;

   (b) Execution against the debtor’s assets is stayed;

   (c) The right to transfer, encumber or otherwise dispose of any assets of the debtor is suspended.

2. The scope, and the modification or termination, of the stay and suspension referred to in paragraph 1 of the present article shall not be inconsistent with that granted under the domestic insolvency law of the Contracting State.

3. Paragraph 1 (a) of the present article does not affect the right to commence individual actions or proceedings to the extent necessary to preserve a claim against the debtor.

4. Paragraph 1 of the present article does not affect the right to request a Competent Court’s permission to commencement of a proceeding under the domestic insolvency law of the Contracting State or the right to file claims in such a proceeding.

5. For the purposes of paragraph 1 an individual proceedings means any demand, complaint, action, process or proceeding (including mediation, conciliation, arbitration, adjudication or any other quasi-judicial administrative action) taken against the debtor that may result in a legally enforceable judgement, order or determination being made against the debtor.

6. For the purposes of paragraph 1 a Competent Court in considering an application for approval must take into consideration the effect of granting such approval will have upon the foreign proceedings as a whole and not confined to its effect upon the jurisdiction of the Competent Court.
Article 21

Relief that may be granted upon recognition of a foreign proceeding

1. Upon recognition of a foreign proceeding, whether main or non main, where necessary to protect the assets of the debtor or the interests of the creditors, a competent court may, at the request of the foreign representative, grant any appropriate relief, including:

(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 a Contracting 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 relief that may be available to a domestic insolvency practitioner under the laws of the Contracting State;

(h) Granting any power to the foreign representative that may be available to a domestic insolvency practitioner under the laws of the Contracting State.

2. Upon recognition of a foreign proceeding, whether main or non main, the competent court may, at the request of the foreign representative, entrust the distribution of all or part of the debtor’s assets located in a Contracting State to
the foreign representative or another person designated by the court, provided that the court is satisfied that the interests of creditors in that State are adequately protected.

3. In granting relief under the present article to a representative of a foreign non main proceeding, the competent court must be satisfied that the relief relates to assets that, under the laws of that State, should be administered in the foreign non main proceeding or concerns information required in that proceeding.

**Article 22**

*Protection of creditors and other interested persons*

1. In granting or denying relief under article 19 or 21, or in modifying or terminating relief under paragraph 3 of the present article, the competent court must be satisfied that the interests of the creditors and other interested persons, including the debtor, are adequately protected.

2. The competent court may subject relief granted under article 19 or 21 to any conditions it considers appropriate.

3. The competent court may, at the request of the foreign representative or a person affected by relief granted under article 19 or 21, or at its own motion, modify or terminate any relief granted by it.

**Article 23**

*Actions to avoid acts detrimental to creditors*

1. Upon recognition of a foreign proceeding, subject to any order of a competent court to the contrary, the foreign representative has standing to initiate proceedings under the Contracting States domestic insolvency laws to avoid or otherwise render ineffective:

   (a) the acts or transactions of the debtor; or

   (b) security granted by the debtor

which may be detrimental to creditors.
2. When the foreign proceeding is a foreign non main proceeding, the competent court must be satisfied that the action relates to assets that, under the laws of the Contracting State, should be administered in the foreign non main proceeding.

**Article 24**

*Intervention by a foreign representative in proceedings in a Contracting State*

Upon recognition of a foreign proceeding, the foreign representative may, provided the requirements of the laws of that State are met, intervene in any proceedings in which the debtor is a party.

**CHAPTER IV. COOPERATION WITH FOREIGN COURTS AND FOREIGN REPRESENTATIVES**

**Article 25**

*Cooperation and direct communication between a court of a Contracting State and foreign courts or foreign representatives*

1. In matters referred to in article 1, a competent court of a Contracting State shall cooperate to the maximum extent possible with foreign courts or foreign representatives, either directly or through a domestic insolvency practitioner.

2. A competent court is entitled to communicate directly with, or to request information or assistance directly from, foreign courts or foreign representatives.

**Article 26**

*Cooperation and direct communication between the domestic insolvency practitioner and foreign courts or foreign representatives*

1. In matters referred to in article 1, a domestic insolvency practitioner shall, in the exercise of its functions and subject to the supervision of the court, cooperate to the maximum extent possible with foreign courts or foreign representatives.
2. The domestic insolvency practitioner is entitled, in the exercise of its functions and subject to the supervision of the court, to communicate directly with foreign courts or foreign representatives.

**Article 27**

*Forms of cooperation*

Cooperation referred to in articles 25 and 26 may be implemented by any appropriate means, including:

(a) Appointment of a person or body, of whatever designation the competent court consider appropriate, to act at the direction of the competent court;

(b) Communication of information by any means considered appropriate by the competent court;

(c) Coordination of the administration and supervision of the debtor’s assets and affairs;

(d) Approval or implementation by competent courts of agreements concerning the coordination of proceedings;

(e) Coordination of concurrent proceedings regarding the same debtor;

(f) Recognition and enforcement of a judgement of a foreign competent court relating to or arising out of the foreign proceedings.

**CHAPTER V. CONCURRENT PROCEEDINGS**

**Article 28**

*Commencement of a proceeding under domestic insolvency laws after recognition of a foreign main proceeding*

After recognition of a foreign main proceeding, a proceeding under the domestic insolvency laws of the Contracting State may be commenced only if the debtor has assets in the Contracting State; the effects of that proceeding shall be restricted to the assets of the debtor that are located in the Contracting State and, to the extent necessary to implement cooperation and coordination under articles 25, 26 and 27, to
other assets of the debtor that, under the laws of the Contracting State, should be administered in that proceeding.

Article 29
Cooperation of a proceeding under domestic insolvency laws and a foreign proceeding

Where a foreign proceeding and a proceeding under the domestic insolvency laws of the Contracting State are taking place concurrently regarding the same debtor, a competent court shall seek cooperation and coordination under articles 25, 26 and 27, and the following shall apply:

(a) When the proceeding in the Contracting State are taking place at the time the application for recognition of the foreign proceeding is filed,
   
   (i) Any relief granted under article 19 or 21 must be consistent with the proceeding in the Contracting State;
   
   (ii) If the foreign proceeding is recognized in the Contracting State as a foreign main proceeding, article 20 does not apply;

(b) When the proceeding in the Contracting State commences after recognition, or after the filing of the application for recognition, of the foreign proceeding,

   (i) Any relief in effect under article 19 or 21 shall be reviewed by the competent court and shall be modified or terminated if inconsistent with the proceeding in the Contracting State;

   (ii) If the foreign proceeding is a foreign main proceeding, the stay and suspension referred to in paragraph 1 of article 20 shall be modified or terminated pursuant to paragraph 2 of article 20 if inconsistent with the proceeding in the Contracting State;

(c) In granting, extending or modifying relief granted to a representative of a foreign non main proceeding, the competent court must be satisfied that the relief relates to assets that, under the laws of the Contracting State, should be administered in the foreign non main proceeding or concerns information required in that proceeding.
Article 30

Coordination of more than one foreign proceeding

Where in respect of the same debtor there is more than one foreign proceeding, a competent court shall seek cooperation and coordination under articles 25, 26 and 27, and the following shall apply:

(a) Any relief granted under article 19 or 21 to a representative of a foreign non main proceeding after recognition of a foreign main proceeding must be consistent with the foreign main proceeding;

(b) If a foreign main proceeding is recognized after recognition, or after the filing of an application for recognition, of a foreign non main proceeding, any relief in effect under article 19 or 21 shall be reviewed by the competent court and shall be modified or terminated if inconsistent with the foreign main proceeding;

(c) If, after recognition of a foreign non main proceeding, another foreign non main proceeding is recognized, the competent court shall grant, modify or terminate relief for the purpose of facilitating coordination of the proceedings.

Article 31

Presumption of insolvency based on recognition of a foreign main proceeding

In the absence of evidence to the contrary, recognition of a foreign main proceeding is, for the purpose of commencing a proceeding the domestic insolvency laws, proof that the debtor is insolvent.

Article 32

Recognition and enforcement

1. A decision made by a competent court in one Contracting State in which the debtor is recognised as having its centre of main interest shall be recognized and enforced in another Contracting State in accordance with the law of that latter Contracting State when both States have made a declaration in accordance paragraph 3.
2. A competent court may refuse recognition and enforcement based on the grounds for the refusal of recognition and enforcement available pursuant to the law of that Contracting State.

3. The provisions of this article shall bind only Contracting States that declare that they will be bound by them.

Article 33

Rule of payment in concurrent proceedings

Without prejudice to secured claims or rights *in rem*, a creditor who has received part payment in respect of its claim in a proceeding pursuant to a Convention relating to insolvency in a foreign State may not receive a payment for the same claim in a proceeding under the domestic insolvency laws regarding the same debtor, so long as the payment to the other creditors of the same class is proportionately less than the payment the creditor has already received.

CHAPTER VI. ADMINISTRATIVE PROVISIONS

Article 34

Depositary

The Secretary-General of the United Nations is hereby designated as the depositary of this Convention.

Article 35

Signature, ratification, acceptance, approval or accession

1. This Convention is open for signature by all States at the Headquarters of the United Nations in New York.

2. This Convention is subject to ratification, acceptance or approval by the signatory States.

3. This Convention is open for accession by all States that are not signatory States as from the date it is open for signature.
4. Instruments of ratification, acceptance, approval and accession are to be deposited with the Secretary-General of the United Nations

**Article 36**  
**Procedure and effect of declarations**

1. The declarations permitted by article 3 paragraphs 6 and 7, article 4 and article 32 paragraph 3 may be made at any time. The initial declarations permitted by article 1, paragraphs 2(b) and 2(c), article 3 paragraph 9 and article 35 shall be made at the time of signature, ratification, acceptance, approval or accession. No other declaration is permitted under this Convention.

2. Declarations made at the time of signature are subject to confirmation upon ratification, acceptance or approval.

3. Declarations and their confirmations are to be in writing and to be formally notified to the depositary.

4. A declaration takes effect simultaneously with the entry into force of this Convention in respect of the State concerned. However, a declaration of which the depositary receives formal notification after such entry into force takes effect on the first day of the month following the expiration of six months after the date of its receipt by the depositary.

5. Any Contracting State that makes a declaration under this Convention may withdraw it at any time by a formal notification in writing addressed to the depositary. The withdrawal of a declaration or its modification where permitted by this convention, takes effect on the first day of the month following the expiration of twelve months after the date of the receipt of the notification by the depositary.

6. Nothing in this article precludes a Contracting State when signing, ratifying or acceding to this Convention from making declarations or statements however phrased or named with a view, inter alia, to harmonization of its laws and regulations with the provisions of this Convention, provided that such declarations or statements do not purport to exclude or modify the legal effect of the provisions of this Convention in their application to that Contracting State.
**Article 37**

*Effect in domestic territorial units*

1. If a Contracting State has two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention is to extend to all its territorial units or only to one or more of them, and may amend its declaration by submitting another declaration at any time.

2. These declarations are to be notified to the depositary and are to state expressly the territorial units to which the Convention extends.

3. When a Contracting State has declared pursuant to this article that this Convention extends to one or more but not all of its territorial units, a place located in a territorial unit to which this Convention does not extend is not considered to be in a Contracting State for the purposes of this Convention.

4. If a Contracting State makes no declaration pursuant to paragraph 1 of this article, the Convention is to extend to all territorial units of that State.

**Article 38**

*Complimentary Rules*

6. Two or more Contracting States which have the same or closely related legal rules on matters governed by this Convention may at any time declare that the Convention is not to apply to foreign proceedings in those States. Such declarations may be made jointly or by reciprocal unilateral declarations.

7. A Contracting State which has the same or closely related legal rules on matters governed by this Convention as one or more non-Contracting States may at any time declare that the Convention is not to foreign proceedings in those States.

8. If a State which is the object of a declaration under the preceding paragraph subsequently becomes a Contracting State, the declaration made will, as from the date on which the Convention enters into force in respect of the new Contracting State, have the effect of a declaration made under paragraph (1),
provided that the new Contracting State joins in such declaration or makes a reciprocal unilateral declaration.

**Article 39**
**Entry into force**

1. This Convention enters into force on the first day of the month following the expiration of six months after the date of deposit of the tenth instrument of ratification, acceptance, approval or accession.

2. For each State that becomes a Contracting State to this Convention after the date of the deposit of the tenth instrument of ratification, acceptance, approval or accession, this Convention enters into force on the first day of the month following the expiration of one year after the deposit of the appropriate instrument on behalf of that State.

3. Each Contracting State shall apply this Convention to the issue of recognition of and granting assistance to foreign proceedings.

**Article 40**
**Revision and amendment**

1. At the request of not less than one third of the Contracting States to this Convention, the Secretary-General of the United Nations shall convene a conference of the Contracting States and UNCITRAL for revising or amending it.

2. Any amendment adopted by the two thirds of the Contracting States at the conference convened pursuant to paragraph 1 of this article shall be submitted to the General Assembly for approval.

3. An amendment adopted in accordance with paragraphs 1 and 2 of this article and approved by the General Assembly shall enter into force on the first day of the month following the expiration of six months after it has been approved by the General Assembly.

4. Any instrument of ratification, acceptance, approval or accession deposited after the entry into force of an amendment to this Convention is deemed to apply to the Convention as amended.
Article 41

Denunciation of this Convention

1. A Contracting State may denounce this Convention at any time by means of a notification in writing addressed to the depositary.

2. The denunciation takes effect on the first day of the month following the expiration of one year after the notification is received by the depositary. If a longer period is specified in the notification, the denunciation takes effect upon the expiration of such longer period after the notification is received by the depositary.

3. Upon receipt of a denunciation UNCITRAL shall provide a copy of such notice to each Contracting State and post a copy on its website.

DONE at, this # day of # two thousand #, in a single original, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic.

IN WITNESS WHEREOF the undersigned plenipotentiaries, being duly Authorised by their respective Governments, have signed this Convention.